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State v. Cheng Yang Appellant's Brief Dckt. 46828

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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46828-2019**
Plaintiff-Respondent,	)	
	)	**MINIDOKA COUNTY**
v.	)	**NO. CR-2017-1784**
	)	
CHENG YANG,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

HONORABLE JONATHAN BRODY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Cheng Yang challenges his conviction for conspiracy to traffic in marijuana. He asserts that he was denied due process because the jury instructions created a fatal variance with the information. Further, he challenges the sentence imposed and the denial of his Rule 35 motion. This Court should vacate Mr. Yang' judgment of conviction and remand this case to the district court for a new trial. Alternatively, this Court should reduce Mr. Yang's sentence.

Statement of the Facts and Course of Proceedings

On June 4, 2017, the Mini Cassia Drug Task Force took possession of approximately 100 pounds of marijuana as part of an undercover operation. (PSI, p.2.)[1] Previously, while working undercover, Detective Corporal Matt Love made arrangements with Kevin Ellsworth to purchase 100 pounds of marijuana and deliver the marijuana from out of state to Rupert, Idaho. (PSI, pp.2-3.) Two vehicles arrived at the scheduled meeting place. (PSI, p.3.) One vehicle was driven by Mr. Yang and the other by his co-defendants: Sou Cha and Doua Chang. (PSI, p.3.) The marijuana was located in the trunk of a vehicle driven by Mr. Yang. (PSI, p.3.) Mr. Yang and his co-defendants were arrested. (PSI, pp.3-4.)

The State charged Mr. Yang with conspiracy to traffic in marijuana (25 pounds or more). (R., pp.63-65.) In August of 2017, Mr. Yang entered a not guilty plea. (R., p.70.) In June of 2018, the State filed the Second Amended Information charging Mr. Yang with conspiracy. "willfully and knowingly combine, conspire, confederate, and agree with Sou Cha, Doua Chang

[1] For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as "PSI" and referenced pages will correspond with the electronic page numbers contained in this file.

and Kevin Ellsworth to deliver twenty-five (25) pounds or more, of a controlled substance, to-wit: marijuana, a Schedule I controlled substance, in violation of Idaho Code Sections 37-2732B(a)(1)(C), and 18-1701." (R., pp.331-33.) This information specifically asserted eight overt acts. (R., pp.331-33.)

The State called four witnesses at Mr. Yang's jury trial—Detective Matt Love; arresting officer, Lieutenant Rob Cobbley; assisting officer, Deputy Shane Murphy; and forensic scientist Anna Christina Mattox. (Trial Tr., p.169, L.14 – p.352, L.24.)[2] Mr. Yang; his wife, Ayeng Her; and Detective Love were called by the defense. (Trial Tr., p.386, L.19 – p.631, L.9.) Detective Love was then recalled as rebuttal witness. (Trial Tr., p.631, L.18 – p.638, L.1.)

Evidence was closed and the jury retired to the jury room for the parties to conduct a final jury instruction conference around 6:00 p.m. on Friday, November 17, 2018. (Trial Tr., p.638, L.22 – p.640, L.2.) During this conference, defense counsel noted that Jury Instruction Number 18, the conspiracy elements instruction, stated that "3. the defendant Cheng Yang, and Sou Cha, Doua Chang, *and/or* Kevin Ellsworth agreed . . ." in contrast to the charging document's language of "agree with Sou Cha, Doua Chang *and* Kevin Ellsworth." (Trial Tr., p.644, Ls.9-13; R., pp.331-33, 458(emphasis added).) The district court took a recess to research the potential issue and went back on the record at 8:23 p.m. to explain that it would be leaving the instruction as written. (Trial Tr., p.647, L.17 – p.657, L.10.) The jury returned a guilty verdict and the trial concluded at 12:51 a.m. on Saturday, November 18th.

The court later sentenced Mr. Yang to a unified sentence of fifteen years, with ten years fixed. (R., pp.470-472.) Mr. Yang timely appealed from his judgment of conviction. (R.,

[2] For ease of reference, the transcript of the trial will be cited as "Trial Tr." and use the corresponding page numbers rather than the cumulative transcript pagination. All other transcript will be cited with as "[Date] Tr." and will also use the corresponding page numbers.

pp.495-96.) He also filed a timely Rule 35 motion. (R., p.478.) The motion was denied. (Augmentation: Order Denying Motion for Reconsideration of Sentence I.C.R. Rule 35.)

ISSUES

1. Did the District Court's Conspiracy Elements Instruction, Jury Instruction 18, create a fatal variance with the information and violate Mr. Yang's right to due process?

2. Did the district court abuse its discretion when it imposed, upon Mr. Yang, a unified sentence of fifteen years, with ten years fixed, following his conviction for conspiracy to traffic in marijuana?

3. Did the district court abuse its discretion when it denied Mr. Yang's Motion for a Reduction of Sentence?

ARGUMENT

I.

The District Court's Conspiracy Elements Instruction, Jury Instruction 18, Created A Fatal Variance With The Information

In criminal proceedings in the State of Idaho, "[t]he indictment or information filed by the prosecution is the jurisdictional instrument upon which a defendant stands trial." *State v. Jones*, 140 Idaho 755, 757 (2004) (citations omitted). A criminal defendant is entitled to an information that that informs him both of the name of the charged offense and, in general terms, of the manner in which it is alleged to have been committed. *State v. Brazil*, 136 Idaho 327, 331(Ct. App. 2001) (citing I.C. §§ 19-1303, -1409, -1411; *State v. McMahan*, 57 Idaho 240, 246-247 (1937)). "Although the rules for amending an Information in this state are liberal, *see* I.C. § 19-1420, any amendment which charges the accused with a crime of greater degree or a different nature than that for which the accused was bound over for trial by the committing magistrate is barred by the Idaho Constitution." *State v. Colwell*, 124 Idaho 560, 566 (1993) (citing IDAHO CONST. art.I, § 8; *State v. O'Neill,* 118 Idaho 244, 249, 796 P.2d 121 (1990); *State v. McKeehan,* 91 Idaho 808, 430 P.2d 886 (1967); I.C. § 19-1420). Conviction of a crime different from that charged is a denial of due process. *Brazil*, 136 Idaho at 331; *State v. Cariaga,* 95 Idaho 900, 902 (1974); *McMahan,* 57 Idaho at 250; *State v. Gilman,* 105 Idaho 891, 893 (Ct.App.1983).

"A trial court has the duty to properly instruct the jury on the law applicable to the case before it." *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 313 (2010). "The instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged." *State v. Folk*, 151 Idaho 327, 342 (2011) (citing *State v. Hooper*, 145 Idaho 139, 147 (2007)). If they do not, "there can

be a fatal variance between the jury instructions and the charging document." *Folk*, 151 Idaho at 342; *see also State v. Day*, 154 Idaho 476, 479 (Ct. App. 2013).

The existence of an impermissible variance between a charging instrument and the jury instructions is a question of law which this Court reviews de novo. *State v. Alvarez*, 138 Idaho 747, 750 (Ct. App. 2003). An appellate court reviewing a variance claim must engage in a two-fold inquiry. *Brazil*, 136 Idaho at 329–30. First, is there a variance between the information used to charge the defendant and the instructions presented to the jury? Second, if a variance exists, does it rise to the level of prejudicial error requiring a reversal of the conviction? *Id.* A variance is fatal, thus violating due process and requiring reversal, if it deprives the defendant of his right to fair notice of the charge against which he must defend. *Id.*; *State v. Windsor*, 110 Idaho 410, 417–18 (1985). The notice element asks "whether the record suggests the possibility that the defendant was misled or embarrassed in the preparation or presentation of his or her defense." *Windsor*, 110 Idaho at 418.

The district court's jury instruction on conspiracy created a fatal variance with the information. That variance deprived Mr. Yang of notice and thus due process. This Court should therefore vacate Mr. Yang's conviction for conspiracy to traffic in marijuana.

A. A Variance Exists Between The Information And The Instructions Presented To The Jury

Mr. Yang was charged by Information. (R., pp.63-65.) The Second Amended Information specified:

> On or about the 4th day of June, 2017, in the County of Minidoka, State of Idaho, the defendant, CHENG YANG, did willfully and knowingly combine, conspire, confederate, and agree with Sou Cha, Doua Chang and Kevin Ellsworth to deliver twenty-five (25) pounds or more, of a controlled substance, to-wit: marijuana, a Schedule I controlled substance, in violation of Idaho Code Sections 37-2732B(a)(1)(C), and 18-1701.

OVERT ACTS

That in furtherance of and in order to effect the object of the combination or conspiracy the following overt acts were completed:

1. An undercover officer (UC) made phone calls and contact with a male by the name of Kevin Ellsworth. Kevin Ellsworth agreed to sell the UC 100 pounds of marijuana for $130,000.00[.]

2. On June 4, 2017, Kevin Ellsworth called the UC and stated he would not be able to make it but he would still have it delivered.

3. Kevin Ellsworth gave the UC a phone number for Kevin's driver and told the UC to get in contact with him with a phone number and told the UC it was a male of Laotian descent.

4. On June 4, 2017, UC made contact with a male later identified as Sou Cha (Sou) and told him where to meet. Sou said he was coming with two other guys and he would arrive in a grey Nissan.

5. One June 4, 2017, at Ridley's Parking Lot, Rupert, Minidoka County, Idaho, Sou drove into the parking lot with another male in the passenger side of the vehicle later identified as Doua Chang (Doua). Sou was driving a grey Nissan Sentra with an Oregon License Plate. Another vehicle arrived in the lot and parked to the south of where Sou parked. The vehicle was a black Nissan bearing Oregon plates, and the driver was later identified as Cheng Yang (Cheng).

6. The UC asked Sou to see the marijuana before the UC took Sou, Doua, and Cheng to the meet location. Sou then told Doua to call Chang. Cheng then pulled up in the black Nissan and Sou told Chang to open the truck [sic] of the vehicle. The UC observed green plant like material in vacuum sealed bags in the trunk of the vehicle.

7. UC then told Sou, Doua, and Cheng to follow him to the meet location at 71 N. 100 E., Minidoka County, Idaho, at a spud cellar. All three, Sou, Doua, and Cheng were detained by law enforcement.

8. Located in the trunk of the black Nissan driven by Cheng was approximately 102 pounds of marijuana and was in 99 sealed clear plastic bags. The green plant material tested presumptive positive for marijuana using NIK Test E.

(R., pp.331-33.)

However, Jury Instruction 18 contained decidedly different language:

In order for the defendant to be guilty of Conspiracy, the state must prove each of the following:

1. On or about June 4, 2017

2. in the state of Idaho

3. the defendant Cheng Yang, and Sou Cha, Doua Chang, and/or[3] Kevin Ellsworth agreed[4]

4. to commit the crime of Trafficking in Marijuana to deliver twenty-five (25) pounds or more of marijuana

5. the defendant intended that the crime would be committed;

6. one of the parties to the agreement preformed at least one of the following acts: [5]

    a. There was an agreement to deliver twenty-five (25) pounds or more of marijuana, to-wit: 100 pounds for the amount of the $130,000; and/or[6]

---

[3] The District Court's elements jury instruction varies from the pattern instruction I.C.J.I. 1101. The pattern instruction includes on the conjunctive "and" and does not provide for the use of the disjunctive "or." *See* I.C.J.I 1101. The Idaho Criminal Jury Instructions are presumed correct. *State v. Hopper*, 142 Idaho 512, 514 (Ct. App. 2005). Mr. Yang asserts that deviating from the pattern jury instruction was erroneous.

[4] The jury instruction lists only "agreed" as the means for conspiring. (R., p.458.) However, the information charged Mr. Yang with "willfully and knowingly combine, conspire, confederate, and agree." (R., pp.331-33.)

[5] Mr. Yang asserts that it was error for the district court to condense the eight overt acts into three less specific acts. However, he acknowledges that his trial counsel "strongly opposed" an instruction listing each of the overt acts and requested that the district court provide the instruction given. Mr. Yang reserves the right to address this error through an ineffective assistance of counsel claim in a post-conviction should such a filing be necessary.

[6] The listed overt act "a" is not actually an "overt act" but the agreement itself. It is well settled that the essential elements of conspiracy are: (1) the existence of an agreement to accomplish an illegal objective, (2) coupled with one or more overt acts in furtherance of the illegal purpose, and (3) the requisite intent necessary to commit the underlying substantive offense. *State v. Gamble*, 146 Idaho 331, 337 (Ct. App. 2008); *State v. Munhall,* 118 Idaho 602, 606 (Ct. App. 1990). As such, the first listed "overt act" satisfies only the existence of an agreement prong and is legally insufficient to be an overt act in furtherance of the agreement or conspiracy. This erroneous elements instruction invited the jury to convict Mr. Yang by relying on an insufficient or inappropriate overt act. *See State v. Draper*, 151 Idaho 576, 589-92 (2011); *State v. Medina*, 165 Idaho 501, ___, 447 P.3d 949, 957 (2019). However, as noted previously, counsel explicitly agreed to this portion of the Jury Instruction 18 and, as a result, Mr. Yang is barred from raising

b. arrangements were made to transport twenty-five (25) pounds or more of marijuana into Minidoka County, Idaho; and/or,

c. that there was actual transportation and/or delivery of twenty—five (25) pounds or more of marijuana

7. and such act/s was done for the purpose of carrying out the agreement. [sic]

(R., p.458.)

Despite defense counsel's objection to the addition of the "or" in the jury instructions, the district court determined the proposed instruction was proper,[7] and Instruction 18 was provided to the jury. (Trial Tr., p.644, Ls.9-13, p.647, L.17 – p.657, L.10; R., p.458.) There is a clear variance between the charging document—"agree with Sou Cha, Doua Chang *and* Kevin Ellsworth"—and the jury instruction—"3. the defendant Cheng Yang, and Sou Cha, Doua Chang, *and/or* Kevin Ellsworth agreed . . ." (R., pp.331-33, 458 (emphasis added).)

B. The Variance Deprived Mr. Yang Of His Right To Due Process

Mr. Yang was deprived of his right to fair notice because the variance between the information and the jury instructions prejudiced him in the presentation of his defense. The charging document put Mr. Yang on notice that he needed to defend against a conspiracy in which he conspired with Sou Cha, Doua Chang, *and* Kevin Ellsworth. (R., pp.331-33.) However, the jury was allowed to convict him an entirely different conspiracy—a conspiracy with Sou Cha or Doua Chang or Kevin Ellsworth.

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this as an issue on appeal. Mr. Yang reserves the right to address this error through an ineffective assistance of counsel claim in a post-conviction should such a filing be necessary.

[7] Despite the district court's recognition of Idaho case law on variances, the court relied primarily on cases, from other jurisdictions, focusing on instructing in the disjunctive when a crime was charged in the conjunctive. (Trial Tr., p.647, L.17 – p.657, L.10.) Mr. Yang asserts that these cases do not provide relevant authority as they do not address the jury instruction or variance issue based upon Idaho's constitutionally mandated notice requirement.

Counsel repeatedly noted that his defense was centered around the "and" in the charging document. During argument on the Rule 29 motion, counsel noted:

> Section 32 – 2732B(a)(1)(c) speaks in terms of – and 18-1701 speaks in terms of willfully and knowingly combine, conspire, and confederate and agree with Sou Cha, Doua Chang, and Kevin Ellsworth, that my client has somehow done that, Your Honor. But there has been no evidence that my client did any of those things in connection with Kevin Ellsworth. There has been no evidence that my client did anything in concert with Sou Cha.

(Trial Tr., p.373, L.22 – p.374, L.6.) Additionally, during the discussion after Mr. Yang's objection to Jury Instruction 18, defense counsel again reiterated that "I had prepared around the notion of the 'and' without an 'or' . . ." (Trial Tr., p.648, Ls.9-11.) Therefore, it clear that Mr. Yang was misled or embarrassed in the preparation or presentation of his defense. *See Windsor*, 110 Idaho at 418.

In Idaho, the charging instrument provides a person with the constitutionally required notice of what charge he will have to defend against. *See* IDAHO CONST. art. I, §8. Jury Instruction 18 deprived Mr. Yang of his right to due process by allowing the jury convict him for a crime for which he had not been charged and for which he was not prepared to defend against. Thus, the variance was fatal and his conviction must be vacated.

II.

The District Court Abused Its Discretion When It Imposed, Upon Mr. Yang, A Unified Sentence Of Fifteen Years, With Ten Years Fixed, Following His Conviction For Conspiracy To Traffic In Marijuana

Mr. Yang asserts that, given any view of the facts, his unified sentence of fifteen years, with ten years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the

record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Yang does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Yang must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo,* 136 Idaho 138 (2001)).

Appellate courts use a four-part test for determining whether a district court abused its discretion: Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018). Mr. Yang asserts that the district court failed to give proper weight and consideration to the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Specifically, he asserts that the district court failed to give proper consideration to his status as first time offender. "The courts have long recognized that the first offender should be

accorded more lenient treatment than the habitual criminal. In addition to considerations of humanity, justice and mercy, the object is to encourage and foster the rehabilitation of one who has for the first time fallen into error, and whose character for crime has not become fixed." *State v. Owen*, 73 Idaho 394, 402 (1953) (*overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971)); *see also State v. Nice*, 103 Idaho 89, 91 (1982) (reducing sentence where present conviction was the defendant's first felony). The instant case is Mr. Yang's first criminal conviction. (PSI, p.5.) In fact, Mr. Yang has no criminal history and, prior to his involvement in this case, he has never been arrested. (PSI, p.5.)

Furthermore, in *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. Mr. Yang supplied the district court with over a dozen letters of support. Mr. Yang's father, Her Yang, wrote that his son is a person who is easy to get along with, does not drink or use drugs, contributes to his community, is a "phenomenal husband and father," and is family oriented. (PSI, pp.28-29.) His wife, A Yeng Her, noted that she has been married to Mr. Yang for seventeen years, he is "a wonderful husband, friend and most importantly, a great father to our three children," he is selfless, puts his family first, and made great sacrifices for his wife to graduate with honors with a certified medical assistant degree. (PSI, pp.30-31.) Yeng Her also wrote that her three children, ages ten, five, and four, desperately miss their father and want to see him return home as soon as possible. (PSI, pp.30-31.) Mr. Yang's sister, Jennifer Yang, wrote that her brother is determined, loving, humorous, caring, supportive, giving, and a great brother, son, husband, and father. (PSI, p.36.) His uncle, Satiya Vang, described Mr. Yang as a family-oriented, respectable man and noted that his family stands behind him 100%. (PSI, pp.37, 41.) His brother, Leng Yang, wrote that Mr. Yang is

"responsible, helpful, generous, . . . courteous" and a loving and caring father. (PSI, p.38.) His brother-in-law Danny Hang, noted that Mr. Yang has a "great heart," he brings such joy to his children in the way he plays with and cares for them, he is "a great man," and Mr. Hang would "lay down [his] life for [Mr. Yang]" and cares for him like "brother by blood." (PSI, p.39.) Another brother-in-law, Vatsana Lor, wrote that Mr. Yang is cheerful, down to earth, and has "the kindest heart." (PSI, p.40.) Jackson Lor, another brother-in-law discussed how Mr. Yang is both humorous and family oriented. (PSI, p.43.) He also wrote that "[t]o me, my brother-in-law Cheng is not the perfect man, but is one of the most caring, generous, selfless, and loving people in my life." (PSI, p.43.) Yet another brother-in-law, Wanlee Lor, noted that Mr. Yang always makes people smile, loves his family, and has been "a motivator, a coach, and a father figure" to Mr. Lor. (PSI, p.44.) He also supplied very complimentarily letters from other family members including his father-in-law, Tom Her and cousin-in-law, Lou Lee. (PSI, p.45, 46.) Friends, Vang Lo, Nengge Vang, Solo Herr, and Timothe Hang wrote that Mr. Yang is kind-hearted, generous, honest, caring, supporting, responsible, considerate, kind, dependable, contributes to his community, has strong family values, and is a role model to many in the Hmong community. (PSI, p.32-35, 47.)

Based upon the above mitigating factors, Mr. Yang asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his status as a first time offender and friend and family support, it would have crafted a less severe sentence.

III.

The District Court Abused Its Discretion When It Denied Mr. Yang's Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447 (Ct. App. 1984)). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* (citing *Lopez*, 106 Idaho at 450). "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citing *State v. Hernandez*, 121 Idaho 114 (Ct. App. 1991)). "When presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203 (2007).

Appellate courts use a four-part test for determining whether a district court abused its discretion: Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg*, 163 Idaho at 863. Mr. Yang asserts that the district court failed to give proper weight and consideration to new or additional information provided in support of his Rule 35 motion and the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Mr. Yang maintained his innocence at trial and testified that he did not know there was any marijuana in the trunk of his rental car. (Trial Tr., p.416, L.3 – p.621, L.9.) In the presentence investigation report and at the sentencing hearing Mr. Yang expressed his remorse and took responsibility for his role in the conspiracy. (PSI, pp.4, 12; 1/28/19 Tr., p.25, Ls.17-24.) As a result, the district court expressed serious concern over what was believed to be perjury committed during the trial. (1/28/19 Tr., p.27, L.24 – p.30, L.24, p.36, L.25 – p.37, L.3, p.41, L.24 – p.42, L.7.)

This alleged perjury was the focus of the Rule 35 motion, supporting affidavits, and hearing. (R., pp.478, 482-83, 486-87, 490; 8/12/19 Tr., p.7, L.1 – p.35, L.8.) Mr. Yang's affidavit informed the district court that he was innocent of the charges and testified truthfully during his trial. (R., pp.486-87.) He asserted that his attorney advised him that he must take responsibility and contradict his trial testimony to receive a lesser sentence. (R., pp.486-87.) He yielded to his attorney's advice and his later statements were false.[8] (R., pp.486-87.) In further support of his assertion that he did not commit perjury during his trial, Mr. Yang supplied the district court with an affidavit from Sou Cha which stated that Mr. Cha made the arrangements to sell marijuana in Idaho; he needed a driver to transport the marijuana to Idaho; he asked Mr. Yang to drive to Idaho for him, but did not tell him why; he was able to place the marijuana in the trunk of Mr. Yang's vehicle without him present; and Mr. Yang did not know the marijuana was in the vehicle. (Augmentation: Affidavit of Sou Cha.) Based upon this evidence, Mr. Yang asserts that the district court should have reconsidered and reduced his sentence.

[8] On appeal, Mr. Yang is not asserting that he received ineffective assistance of counsel due to counsel's advice regarding taking responsibility for the offense. However, he reserves the right to assert this claim in a post-conviction proceeding should such a filing be necessary.

Additionally, Mr. Yang also asserted that his sentence was excessive in light of the sentences received by his co-defendants. (R., pp.478, 493-94.) Specifically, he articulated that:

> 1. The sentences of co-defendant's Doua Chang, Case No. CR17-1623 and Sou Cha, Case No. CR17-1624 were substantially less than the sentence handed down to Chang Yang. Doua Chang was sentenced to two years fixed and three years indeterminate and Sou Cha was sentenced to three years fixed and zero years indeterminate based upon binding plea agreements and reduction of the charges to a possession with intent to deliver for Doua Chang, and three years mandatory minimum trafficking charge, for Sou Cha.
>
> 2. Both the court and the state determined that their sentences were appropriate based on the very same set of facts upon which the jury convicted Mr. Yang, except that Sou Cha was the grower and the seller of the marijuana who masterminded the sale to the undercover officer and Cheng Yang exercised his constitutional right to a jury trial.
>
> 3. Defendant notes also for the record that both Doua Chang and Sou Cha had prior criminal records and Cheng Yang did not have any prior criminal record.

(R., pp.493-94.)

Mr. Yang asserts that in light of the above new and additional information and the mitigating factors mentioned in section II, which need not be repeated, but are incorporated by reference, the district court abused its discretion in denying his Rule 35 motion.

CONCLUSION

Mr. Yang respectfully requests that this Court vacate his judgment of conviction and remand for a new trial. Alternatively, he requests that this Court reduce his sentence as it deems appropriate or that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 22nd day of November, 2019.

/s/Elizabeth Ann Allred
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

CHENG YANG
INMATE #131098
JEFFERSON COUNTY
200 COURTHOUSE WAY
RIGBY ID 83442

JONATHAN BRODY
DISTRICT COURT JUDGE
Delivered via e-mail: jonathan.brody@co.minidoka.id.us

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

EAA/eas