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COURT OF APPEALS, STATE OF COLORADO Court Address: 2 East 14th Avenue, 3rd Floor Denver, CO 80203 Telephone: 303-837-3785	
Jefferson County District court Honorable Margie Enquist, Case No. 05CR977	
Plaintiff-Appellee: People of the State of Colorado **v.** **Defendant-Appellant:** Cong T. Lam	▲ **COURT USE ONLY** ▲ Case Number: 06CA1525
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It exceeds 30 pages but does not exceed 9,500 words (exclusive of the caption, table of authorities, table of contents, certificate of compliance and certificate of service). The Brief contains 9,211 words.

The brief complies with C.A.R. 28(k).

Each issue contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

Signature of Appellant's Attorney

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II. The Photo Array Used to Identify Mr. Lam was Impermissibly Suggestive and Created a Substantial Risk of Misidentification and Violated Mr. Lam's Due Process Right to a Fair Trial

III. The District Court committed reversible error when the Defendant was forced to stand trial in Shackles in the presence of the jury, the shackles were visible and/or audible, and the Defendant had not engaged in any previous conduct in Court that would lead a reasonable person to believe he posed a safety or escape risk.

STATEMENT OF THE CASE

The Defendant, Cong Thanh Lam, was charged with three counts of Second Degree Kidnapping (F2), seven counts of Aggravated Robbery (F3), two counts of First Degree Burglary (F3), one count of Robbery - at risk adult (F3), Second Degree Assault (F4), Theft (F4), five counts of Conspiracy and fourteen counts of Commission of a Violent Crime. Lam was convicted on April 20, 2006 of most of the counts, and was sentenced to 160 years DOC with 417 years of presentence confinement credit. This direct appeal followed.

STATEMENT OF THE PERTINENT FACTS

This case involves a detailed conspiracy to rob the owners of a Chinese restaurant (Cong Nguyen and Amy Ho) and their oldest daughter (Jennifer Nguyen). The robbery took place at the Nguyen residence in Littleton, on the

morning of March 15, 2005. Tens of thousands of dollars in cash and jewelry were allegedly stolen. The motivation appears to be a family dispute over money, between Cong Nguyen's Nephew, Tai Nguyen, and Tai Nguyen's ex wife, regarding how much money she obtained from the Nguyen family restaurant business in the divorce. Relatives of Tai Nguyen's ex wife recruited conspirators in the Oakland, California area to perform the robbery. The Defendant, Cong Lam, and his co-Defendants at trial, Ricky Hoang, Kin Fong and Charles Slater drove from Oakland to Denver to carry out the robbery on the morning of March 15, 2005. After the robbery, a little before 11:00 a.m. on March 15, 2005, Slater and Lam attempted to fly out of Denver International Airport ("DIA"), but were detained when TSA screeners discovered approximately $20,000 in cash in Lam's carry on bag after Lam was randomly selected for inspection. Lam and Slater were arrested and charged. Four other co-conspirators, Manhao Luong, Kin Fong, Tusheng Huang and Ricky Hoang were subsequently extradited and charged. Other coconspirators (including the ex-wife) were never charged, and are probably no longer in the United States. Only a portion of the allegedly stolen cash and jewelry were recovered.

Only Ricky Hong and the Defendant (Mr. Lam) were tried together. Slater, Kin Fong and Tusheng Huang pled guilty. Manhao Luong was not extradited in

time to be tried with Mr. Lam and Mr. Hoang. Therefore, Mr. Lam and Mr. Hoang have identical Records on appeal, and some of the exhibit envelopes were filed with Mr. Hoang's Record, and are shared between the two Records. (Mr. Hoang's appeal is case number 06CA1518.) The DA removed some of the exhibits used at the Lam/Hoang trial for the Luong trial, and there is at least one exhibit envelope that is filed in the Luong Record but is shared between all three appeals. (Mr. Luong's appeal is case number is 07CA1604.) All three cases are currently pending in the Court of Appeals.

The facts of this case are detailed and complex. However, the Defendant only raises three discrete evidentiary issues in this appeal, and a recitation of the entire factual history is unnecessary for the resolution of these three issues. Therefore, the facts needed for resolution of each of the three issues is contained in each argument section of this brief.

SUMMARY OF THE ARGUMENT

The Defendant is entitled to a new trial for three reasons: (1) The Defendant's detention at the airport was not a lawful administrative search or *Terry* stop and violated the Fourth Amendment; therefore the District Court erred by denying the Defendant's motion to suppress all evidence and statements obtained

as a result of this unconstitutional search and seizure. (2) The trial court erred in allowing evidence relating to the identification of the Defendant because the photo array was impermissibly suggestive and gave rise to a substantial risk of misidentification. The photo array contained only two individuals who visually appeared to be of Asian descent, and only one individual (the Defendant) had the distinctive triangular tussle of hair on his forehead as described by the victims. (3) When the district court forced Mr. Lam to stand trial in front of the jury wearing shackles indicative of a convict, it committed reversible error by infringing on his Constitutional right to due process and the presumption of innocence.

ARGUMENT

I. The Defendant's Detention at Denver International Airport was unreasonable and in violation of the Federal and State Constitutions.

A. Compliance with CAR Rule 28(k)

CAR 28(k)(1) In reviewing a district court's ruling on a motion to suppress evidence, a court should defer to the district court's findings of historical fact, but review applications of legal standards to those facts de novo. *People v. King*, 16 P.3d 807, 812 (Colo. 2001).

CAR 28(k)(2) The Defendant filed two motions to suppress any of the evidence seized as a result of his detainment at Denver International Airport. (R.

Vol I at 159-163[1]) There was also extensive argument on the Record (R. Vol VIII beginning at 209) after two days of evidentiary hearings. The District Court denied the motions at the conclusion of the hearing. (R. Vol. VIII. at 222 line 24- page 223 line 2)

B. Facts

Some time before 11:00 a.m. on March 15, 2005, Mr. Lam was randomly asked to proceed through the special "Selectee Lane" at the south screening area of DIA.[2] The "Selectee Lane" is a particularly in-depth search, which includes a Transportation Safety Administration ("TSA") employee physically searching through a passenger's luggage.[3] Officer Jennifer Rowe of the Denver Police Department, who is stationed at DIA, testified that once a passenger has entered the screening area, he or she is not permitted to leave and anyone who refuses consent to have their luggage searched will have "an issue with TSA.[4]"

A search of Mr. Lam's belongings revealed that he was carrying a large amount of cash rolled up and secured with rubber bands.[5] Upon finding the cash,

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[1] These pages from Volume I were separately scanned and included on the CD filed herewith.
[2] R. Vol. VIII. at 93 line 20- page 94 line 6
[3] R. Vol VIII at 94 lines 12-19.
[4] R. Vol. VIII. at 95 line 22- page 96 line 2
[5] R. Vol. VIII. at 98 lines 15-21.

Mr. Lam's identification was taken and not returned by TSA personnel.[6] Next, the TSA supervisor was notified, who then alerted Officer Rowe that a passenger had been detained with approximately $20,000 in cash.[7]" Thus, by the time Officer Rowe was notified at 11:00 a.m., Mr. Lam had already been through the Magnetometers, his bag had been physically searched, his identification had been confiscated, and the cash had been found by TSA personnel. Mr. Lam was taken to a cordoned off "containment area,[8]" and Officer Rowe briefly questioned Mr. Lam and asked him where he had gotten the money, to which he replied a gambling debt.[9] Officer Rowe never testified that anything other than the $20,000 in cash aroused her suspicion.[10] After this brief encounter with Mr. Lam, Officer Rowe made several phone calls to other law enforcement officials, including Drug Enforcement Agent ("DEA") Mark Lee who indicated that he wished to talk to Mr. Lam and that they should continue to detain him until he could arrive at DIA.[11]

Officer Rowe testified, that after approximately thirty minutes of detention, she realized Mr. Lam had an 11:35 a.m. flight, which he had no chance of making

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[6] R. Vol. VIII. at 108 line 23- page 109 line 2
[7] R. Vol. VIII at 93 lines 15-24 and page 104 lines 10-12.
[8] R. Vol. VIII. at 106 lines 9-23.
[9] R. Vol. VII at 100 lines 3-10.
[10] R. Vol. VIII. at 112 line 23- page 113 line 1
[11] R. Vol. VIII. at 102 lines 7-15.

and would surely miss.[12] However, she admitted on cross-examination that she made no effort to confirm whether this was in fact true, and she never checked to see whether Mr. Lam's flight was delayed for any reason.[13] Mr. Lam had explicitly requested to leave because he was afraid he would miss his flight if he was forced to remain at the security checkpoint any longer. Officer Rowe was well aware that Agent Lee was on his way to the airport and she claims that he arrived about ten-fifteen minutes later.[14] She further testified that she notified a United Airlines customer representative to re-book his flight, although it meant that Mr. Lam could not proceed to his gate until he received a new boarding pass because his current boarding pass had become invalid. Officer Rowe estimated that it took almost forty-five minutes for the re-booking, which means that Mr. Lam was finally permitted to proceed to his gate almost an hour and thirty minutes after he was initially detained. [15]

Therefore, Mr. Lam could not proceed to his gate without a boarding pass and he could not exit the airport because TSA regulations prohibited passengers from exiting back through the security checkpoint. Consequently, despite the fact

[12] R. Vol. VIII. at 101 lines 10-24 and page 102 lines 18-23.
[13] R. Vol. VIII. at 117 lines 16-22.
[14] R. Vol. VIII. at 107 line 21 - page 108 line 8.
[15] R. Vol. VIII. at 102 line 19- page 103 line 18.

that he never inquired whether he was free to leave, he was not in fact free to leave for that hour and thirty minutes.

Agent Lee from the DEA arrived at DIA and proceeded to question Mr. Lam at about 12:15 (during the time he was detained and not free to leave) regarding the large sum of cash found in his bag.[16] Agent Lee admitted on cross-examination that is it not illegal for an American citizen to be traveling domestically with an excess of $10,000 in cash.[17] Joseph Kautzman, a TSA supervisor on duty also testified that in his experience there was nothing wrong with a passenger carrying large amounts of cash.[18]

Agent Lee requested permission from Mr. Lam to search his person and his personal belongings, to which Mr. Lam agreed.[19] By the time Agent Lee approached Mr. Lam, his original flight had left, he had already been detained at the screening area for approximately an hour, and he was still waiting on a new boarding pass to be issued, which provided his sole means of exiting the screening area and proceeding toward his gate. The search of Mr. Lam's bag revealed a ski mask, gloves, currency and woman's jewelry, which according to Agent Lee

[16] R. Vol. VIII. at 195 lines 3-4.
[17] R. Vol. VIII. at 199 lines 15-16.
[18] R. Vol. VII. at 31 lines 22-25.
[19] R. Vol. VIII. at 174 lines 1-7.

alerted him to the possibility of a burglary or home invasion robbery.[20] Agent Lee confiscated the money from Mr. Lam and wrote him a DEA-12 receipt for the currency.[21] After confiscating the cash and alerting law enforcement of his findings, Agent Lee finally permitted Mr. Lam to proceed to his gate after a boarding pass for another flight was issued. However, this only occurred after Mr. Lam asked if he was free to leave, and after Agent Lee confiscated his cash, which he did not have probable cause to do.[22]

Mr. Lam was ultimately arrested at the gate after Agent Lee and other law enforcement agencies connected the jewelry and cash to a home-invasion burglary that had occurred in Jefferson County that morning.

C. Argument

The District Court predicated its ruling on "people in our airports, especially in this day and age, have a lesser expectation of privacy.[23]" However, the United States Constitution was not amended after September 11, 2001, and there is no "airport exception" to the United States Constitution. Airline passengers do not surrender their Fourth Amendment rights when they step foot into the terminal. The mere fact that airline passengers know that they must subject their personal

[20] R. Vol. VIII. at 175 lines 18-24 and page 183 lines 9-12.
[21] R. Vol. VIII. at 179 line 25 - page 180 line 7.
[22] R. Vol. VIII. at 182 lines 11-21.

effects to reasonable security searches does not mean that they are automatically consenting to ***un*** reasonable searches. *United States v. $557,993.89, More or Less, In U.S. Funds*, 287 F.3d 66, 82 (2nd Cir. 2002). The Fourth Amendment to the United States Constitution and Article II, section 7 of the Colorado Constitution protects citizens from unreasonable searches and seizures, even in the context of an airport. *See People v. Heimel*, 812 P.2d 1177, 1180 (Colo. 1991). However, any airport search must be "no more intrusive than necessary to achieve the objective of air safety." *Heimel*, 812 P.2d at 1182. *See also, United States v. Place*, 462 U.S. 696, 707 (1983) ("We have affirmed that a person possess a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment"). Although recognized exceptions to the Fourth Amendment have emerged, it still remains that passengers should be free from unreasonable searches and seizures at airports.

1. <u>The detention was unreasonable and does not fall into a Fourth Amendment exception</u>

An airport administrative search is a reasonable exception to the Fourth Amendment as long as the search is directed at finding weapons or explosives that pose a threat to passenger safety. *See, e.g.*, *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (administrative searches are constitutionally reasonable as long

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[23] R. Vol. VIII. at 215 lines 20-23.

as they are "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings). The administrative search exception cannot be used when the items uncovered implicate criminal activity and have little or no relationship to protecting passenger safety.

The administrative search exception the screening and searching of airline passengers and their luggage is reasonable so long as it is "***no more intrusive than necessary to achieve the objective of air safety***." *Heimel*, 812 P.2d at 1182 [emphasis added]. The United States Supreme Court has repeatedly warned against the use of administrative searches, like airport screenings, as a vehicle for law enforcement to circumvent the protections of the Fourth Amendment. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1972). *Accord, United States v. $124,570 U.S. Currency*, 873 F.2d 1249, 1244-5 (9th Cir. 1989) (the search of luggage by customs agents who were alerted by airport security agents that claimant was carrying a large amount of money could not be upheld as an administrative search).

When a potential passenger enters the x-ray screening areas and actually commences the screening process, "such person has consented to screening procedures directed to the discovery of a ***weapon, explosive, or other destructive device***." *United States v. $557,993.89, More or Less, In U.S. Funds*, 287 F.3d 66,

82 (2nd Cir. 2002) (emphasis added). The search "must be directed to determining whether the potential passenger is carrying an object that is potentially dangerous to air commerce." *Id.* at 1182. Probable cause, or reasonable, articulable suspicion, *may not be* based solely on a large amount of cash and a drug courier profile. *See, e.g., United States v. $53,082*, 985 F.2d 245, 250 (6th Cir. 1993) (holding that while a large amount of cash does raise the possibility of a drug courier, it is insufficient to support a finding of reasonable, articulable suspicion); *United States v. $121,000.00 in United States Currency*, 999 F.2d 1503, 1506 (11th Cir. 1993) (holding that a large amount of currency, standing alone, is insufficient to establish probable cause for forfeiture).

An administrative security search may be upheld under the "plain view" doctrine where the contraband's incriminating nature is immediately apparent. *See*, *e.g., $557,993.89, More or Less, In U.S. Funds*, 287 F.3d 66, 82 (2nd Cir. 2002). Under the "plain view" doctrine, law enforcement may only seize the contraband upon a showing of probable case. *Arizona v. Hicks*, 480 U.S. 321, 326-7 (1987). To satisfy probable cause under the "plain view" doctrine, a court must analyze (1) what information was readily apparent to airport security personnel during their search for weapons, and (2) did that information give rise to a "sufficient probability that the [evidence found] represented evidence of criminal

activity to justify their detention?" *$557,993.89*, *More or Less, In U.S. Funds,* 287 F.3d at 82.

In *$557,993.89 More or Less, In U.S. Funds*, the defendant was found with over five hundred thousand dollars in unmarked, blank money orders in small denominations. *Id.* 287 F.3d at 87 (all of the money orders were in amounts less than $1,000.00). The court emphasized the fact that having a very large amount of money in the form of blank, small denomination, money orders was far more indicative of criminality than ordinary cash:

> Currency – that is to say, cash – is of course accrued by all types of legitimate businesses, often in small denominations, and though for a business to choose to keep (and transport) over half a million dollars of its proceeds in cash form would be, to say the least, foolhardy, it would not necessarily be indicative of criminality – foolishness not yet being a crime.

$557,993.89 More or Less, In U.S. Funds, 287 F.3d at 88 (by comparison, money orders in such small denominations demonstrate an intent to evade currency transaction reporting requirements). Here, Mr. Lam was carrying pure U.S. currency and the amount was far less in value. While the court in *$557,993.89 More or Less, In U.S. Funds* found reasonable, articulable suspicion, its reasoning supports the opposite conclusion where a defendant is simply carrying cash. *Id*

Even if the item's incriminating character is not immediately apparent to support probable cause, TSA personnel and law enforcement may ***briefly detain*** a

passenger for a ***reasonable period of time*** to investigate their suspicions further. *$557,993.89, More or Less, In U.S. Funds*, 287 F.3d at 86-7 (emphasis added). When an officer's observations lead him to reasonably believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry v. Ohio* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. *United States v. Place*, 462 U.S. 696, 702 (1983). When an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. The United States Supreme Court identified three factors in determining the reasonableness of a *Terry*-type investigative stop: (1) the length of the detention, (2) the lack of diligence of the police in pursuing their investigation, and (3) the failure to accurately inform the defendant how long he might reasonably be detained or how long his luggage would confiscated. *See Place, supra,* 462 at 709-10.

Once the search the search of Mr. Lam was completed and security personnel were satisfied that he passenger die not pose a threat to air safety, law

enforcement was required to permit Mr. Lam to proceed on his way. No contraband was found in "plain view," because cash is not contraband. Therefore, an *additional* seizure occurred when TSA personnel detained the defendant after the screening search had ended and before law enforcement arrived. TSA did not have probable cause under the "plain view" doctrine to seize the defendant and his cash while they waited for law enforcement to arrive. Therefore, the reasonableness of Mr. Lam's detention hinges on what TSA and Officer Rowe knew when they first found out about the cash and whether their actions in detaining Mr. Lam were reasonable in light of the circumstances. The record indicates they lacked reasonable, articulable suspicion and their actions were not reasonable in light of the duration of Mr. Lam's detention and the methods that were employed.

By the time Officer Rowe was notified, Mr. Lam had virtually completed the final phases of the security screening, which revealed no evidence of weapons or any reason to believe he was a danger to airline safety. Once TSA personnel were satisfied that he was not a danger, he should have been allowed to proceed on his way no later than several minutes after 11:00 a.m. At that point, the detention of Mr. Lam began and TSA personnel were required to proffer a legitimate justification. TSA personnel and Officer Rowe's attempts to detain and stall Mr.

Lam were unreasonable and even deceptive. In fact, Officer Rowe admitted that she was trying to "fit" or match Mr. Lam's actions to a crime.[24] During the thirty minutes between when Mr. Lam was initially detained and when he missed his flight, TSA personnel and Officer Rowe were required to act diligently in investigating their suspicions regarding his money. *See $557,993.89*, *More or Less, In U.S. Funds,* 287 F.3d at 86. However, they detained Mr. Lam for another 90 minutes -- which is not reasonable.

The single most important fact in Mr. Lam's detention is that he missed his flight. Missing a flight is perhaps the greatest intrusion airport security or law enforcement can inflict on a passenger in an airport. Officer Rowe extended the duration of the detention when she forced Mr. Lam to remain in the security screening area while she called a United Airlines representative. There is no reason why Mr. Lam could not have been escorted out of the screening area and back into the terminal, where he could have rebooked his own ticket or decided for himself how he wanted to proceed -- except for the fact that he was clearly being detained. Officer Rowe never presented Mr. Lam with any options because she wanted to make sure that he remained in the screening area so that Agent Lee could investigate him. By the time Agent Lee arrived at 12:15 p.m., Mr. Lam had

[24] R. Vol VIII at 119 lines 19-21.

been detained for one hour and fifteen minutes. By the time Mr. Lam was finally permitted to leave, it was closer to 12:30 p.m. considering it would have taken Agent Lee several minutes to investigate once he arrived. Thus the detention was at the 90-minute mark that the United States Supreme Court in *Place* held was ***per se unreasonable***. *See Place, supra*, 462 U.S. at 709.

2. Mr. Lam did not consent to the encounter or detention

The government argued at the suppression hearing that the entire encounter was consensual. However, no reasonable person in Mr. Lam's situation would have felt that he could leave when he was asked to sit in a physically cordoned off area and his indentification was confiscated. The key question in determining whether a person is "seized" is whether, in "view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *People v. Ealum*, 211 P.3d 48, 51 (Colo. 2009).[25] The "reasonable person test presupposes an innocent person." *People v. Johnson*, 865 P.2d 836, 842 (Colo. 1994)[26].

The Colorado Supreme Court has enumerated a non-exhaustive list of ten factors to consider in determining whether "a reasonable innocent person would not feel free to decline the officers' requests or otherwise terminate the encounter."

[25] (quoting *United States v. Medenhall*, 446 U.S. 544, 554 (1980))

People v. Jackson, 39 P.3d 1174, 1184 (Colo. 2002). While many of the factors relate to a traditional police encounter on a public street, several factors should inform the decision whether Mr. Lam's detention amounted to a seizure.

Factor two instructs a court to consider the number of officers present. *Id.* Although TSA personnel may not constitute officers in the traditional sense of the word, they are very much in a position of authority as it relates to the passengers and most passengers believe that they are expected to obey their commands. Additionally, there were many TSA personnel present at the security screening areas, as well as their supervisors and other law enforcement officers such as Officer Rowe.

Factor eight instructs a court to consider "whether an officer's show of authority or exercise of control over an individual impedes that individual's ability to terminate the encounter." *Id.* Airport screening areas are designed to be intimidating for precisely the reason that passengers are expected to take the process seriously. Mr. Lam was also asked to be seated in an area that was physically cordoned off from the rest of the passengers, which further implied that he was not free to get up and leave. Even though she later allowed him to move from this area, she never told him he was free to leave, and testified that he would

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[26] (quoting *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

have a "problem," if he had tried to turn around and go back through the Magnetometers. The entire airport screening process is intended to be a show of authority designed to send the message that passengers must comply with TSA regulations.

Factors nine and ten should illustrate that Mr. Lam was never free to leave during this portion of the encounter. Factor nine instructs a court to consider "the duration of the encounter." *Jackson, supra*, 39 P.3d at 1184. In *People v. Johnson*, 865 P.2d 836, 842 (Colo. 1994), the Colorado Supreme Court noted that "prolonged questioning by the police after a citizen has provided proper identification and has answered questions in a manner giving rise to no additional suspicion militates in favor of a finding that the citizen was seized." 865 P.2d at 844. Factor ten instructs a court to consider "whether the officer retains the citizen's identification or travel documents." *Jackson*, 39 P.3d at 1184. The court in *Jackson* placed considerable weight on the tenth factor as critical in distinguishing a consensual encounter from an investigatory stop: "We, along with the United States Supreme Court, the federal appellate courts, and a number of other states, have recognized that whether an officer retains a defendant's identification is a critical factor in distinguishing, under the totality of the

circumstances, a consensual encounter from an investigatory stop." *Jackson, supra*, 39 P.3d at 1188.

3. All Evidence Obtained After Mr. Lam Was Initially Detained at the Airport Screening Area Must be Suppressed as a "Fruit of the Poisonous Tree."

Evidence obtained by police as a result of their improper or illegal conduct must be suppressed as a "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. Corpany*, 859 P.2d 865 (Colo. 1993). Had it not been for the illegal seizure of his person, which began at 11:00 a.m. and ended close to 12:30 p.m., he would have boarded his flight and traveled to Oakland. The police would not have had probable cause to arrest him at the gate or to seize his personal belongings. Therefore, all evidence that was illegally obtained after Mr. Lam's detention should be suppressed. This includes the ski masks, the jewelry, the identification of the Defendant by the victims, and the jail house phone calls made by the Defendant.

The fact that the Defendant consented when DEA Agent Lee asked for his consent to search does not erase the taint of the illegal detention until Agent Lee arrived and does not mean that the items found were admissible at trial. For purposes of the Fourth Amendment, the Court must consider whether Mr. Lam's consent was given in circumstances that render it an independent, lawful cause of Lee's discovery of the other items in his bag. In determining whether the taint is

purged from the evidence seized during the unlawful detention, the following factors must be analyzed: (1) the temporal proximity between the illegal search or seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-4 (1975).

In the case at bar, Mr. Lam had been illegally seized for approximately one hour, and had become increasingly upset over missing his flight, prior to Agent Lee extracting his "consent." During this time, Officer Rowe purposefully detained him, causing him to miss his flight, even though she had no probable cause or reasonable suspicion to do so. Therefore, Mr. Lam's "consent" did not erase the taint of the unlawful detention, and the other items in Mr. Lam's bag and Lam's jailhouse phone calls must be suppressed as fruit of the poisonous tree.

II. The Photo Array Used to Identify Mr. Lam was Impermissibly Suggestive and Created a Substantial Risk of Misidentification and Violated Mr. Lam's Due Process Right to a Fair Trial

A. Compliance with CAR Rule 28(k)

CAR 28(k)(1) The ultimate question as to the constitutionality of pretrial identification procedures is a mixed question of law and fact. *Bernal v. People*, 44 P.3d 184 (Colo. 2002). While the trial court's findings of fact are entitled to

deference, an appellate court may give different weight to those facts and may reach a different conclusion in light of the legal standard. *Id.*

CAR 28(k)(2) Mr. Lam filed a written Motion to Suppress Evidence regarding the photo array used to identify him, arguing that it was impermissibly suggestive and would result in the presentation of unreliable identification evidence at trial. R. Vol. I, pages 138-40[27] Hearings were held on the motion. (R. Vol. VII and VIII.) The District Court then ruled against the Defendant on both prongs of the *Bernal test.* R. Vol. VIII, p. 239 line 24 - page 240 line 2; p. 242, lines 12-14; p. 244, lines 2-6 and 22-24. At trial, the witnesses were permitted to testify about their out-of-court identifications of Mr. Lam, and were permitted to make in-court identifications of Mr. Lam. (R. Vol XII, p. 7-80; R. Vol XIII, p.3-207.) The Defendant appeals the District Court's ruling with respect to the two victims, Ms. Nguyen and Ms. Ho.

B. Facts

Mr. Lam's photograph was included in a photo array created by Jefferson County Police.[28] The photo array consisted of six color photographs depicting different males dressed in jail-issued, orange jumpsuits, and Mr. Lam's photograph

[27] These pages from Volume I were separately scanned and included on the CD filed herewith.

was in position number 4. At the first hearing on this issue, the court held the following:

> The Court would agree with [Defense Counsel for Mr. Lam] that these individuals do not all appear to be of Asian descent, and under the circumstances of this case, that is a concern to the Court. […] I don't think it's fair to say this ultimately is a two-person lineup, but I think there is some impermissible suggestibility in the selection of this array, so the Court is going to require proof of the second prong of the *Bernal* test.

R. Vol. VII, p. 126, Lines 12-23.

At the second hearing on Defendant's Motion to Suppress Evidence, Ms. Jennifer Nguyen testified that she had been sure when she saw the lineup that the photo of Mr. Lam was the person who had robbed her home and that she had recognized him right away.[29] Although she had testified that English is her primary language, she said she checked the "possible" box next to the picture of Mr. Lam because she "read it wrong" and that she "couldn't think.[30]" Ms. Nguyen also testified that when she was shown the lineup on the afternoon of the day following the robbery, she was still in a state of shock.[31] When asked by law enforcement officers to describe the robber, Ms. Nguyen gave a description that

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[28] People's Exhibit Number 1; Sealed Envelope VIII
[29] R. Vol VIII at p. 46, lines 1-11.
[30] R. Vol VIII at p. 45, line 1 to p. 46, line 23.
[31] R. Vol VIII p. 46, line 10.

the man was Asian, had a mustache, and had "pointy hair on his forehead.[32]" Ms. Nguyen denied remembering telling police officers that she could not distinguish the three Asian men from each other.[33] Ms. Nguyen testified that only one other person in the lineup, the man in position two, appeared to be of Asian descent and that only Mr. Lam had the distinct "pointy hair.[34]"

Similarly, Ms. Amy Ho described one of the robbers to police as Asian with a "tussle of hair sticking out in front.[35]" She was not able to provide any additional information about the robber's description. On the day following the robbery, Ms. Ho stated that she did not remember the alleged robber too well because she did not get a good look at him.[36] Despite that statement, Ms. Ho identified her robber as the person depicted in photo number four, Mr. Lam.[37] She indicated she was positive about her selection by marking the appropriate box next to the picture.[38] At the pretrial hearing, however, Ms. Ho testified that she did have an opportunity to see the robber's face at different times during the robbery while he pointed a gun at her, threatened her, pulled her hair, and dragged to different rooms in the

[32]R. Vol VIII at p. 55, lines 3-10.
[33]R. Vol VIII at p. 49, p. 22 to p. 50, line 1.
[34]R. Vol VIII at p. 57, lines 6-25, p. 58, lines 1-14.
[35]R. Vol VIII at p. 9, lines 21-22.
[36]R. Vol VIII at p. 109, lines 5-7.
[37]R. Vol VIII at p. 23, lines 14-15
[38]R. Vol VIII at p. 23, lines 10-13.

house.[39] Despite her prior statement to the contrary, her position at the hearing was now that "I tried to look at him the whole time.[40]" At the pretrial hearing, Ms. Ho testified that during her opportunity to view the robber, the robber was pointing a gun at her face, dragging her by her hair, and whipping her head with a pistol.[41] Ms. Ho further testified that the robber pointed a gun at her and specifically told her not to look at his face.[42] Ms. Ho admitted that after the robbery she had been unable to identify any other facial characteristics of the man including the nose, cheekbone structure, or mouth characteristics because she "was too fearful to get a really clear look.[43]" When asked to describe the color of the robber's eyes, Ms. Ho responded, "I was very afraid. I did not see very clearly. He wouldn't let me take a good look at him. He has a gun in his hand.[44]" Ms. Ho, just like Ms. Nguyen, testified that only photo number four depicted someone with the "tussle" of hair that she had previously described to police.[45]

[39]R. Vol VIII at p. 12, line 10 to p. 14, line 13.
[40]R. Vol. VIII at p. 21, lines 7-8.
[41]R. Vol VIII at p. 12, line 10 to p. 18, line 8.
[42]R. Vol VIII at p. 18, lines 9-17.
[43]R. Vol VIII at p. 29, lines 8-19.
[44]R. Vol VIII at p. 30, lines 17-19.
[45]R. Vol VIII at p. 28, lines 5-25, p. 29, lines 1-2.

During the hearing, Investigator Jamie Greaser identified the names of the individuals depicted in the photo lineup, over Defense objection.[46] The names read were: Hong Le, Pong Tong, An Nguyen, Cong Lam, Vakhom Xayamoungkhoun, and Kimo Yee.[47] Detective Greaser testified that when individuals are shown photo arrays, they are never given the names of the individuals depicted.[48] Therefore, even though the individuals were in fact Asian, the witnesses did not know this, and thought that most of them were Hispanic or not otherwise of Asian descent.

At the first hearing held on this issue, the court noted that four of the individuals in the lineup "do not appear to be of Asian descent, and under the circumstances of this case, that is a concern to the Court.[49]" The Court further noted that there were "probably two individuals in the lineup who appear to me more Hispanic, maybe African-American.[50]" However, at the conclusion of the second hearing, the court held that the lineup was "not *per se* unduly suggestive,[51]" and concluded that there "isn't suggestibility built into the lineup other than

[46]R. Vol VIII at p. 162, lines 2-19 and p. 163 lines 1-3.
[47]R. Vol VIII at p. 163, lines 4-15.
[48]R. Vol VIII at p. 165, line 1.
[49]R. Vol VII at p. 126, lines 13-15.
[50]R. Vol VII at p. 126, lines 17-19.)
[51]R. Vol VIII at p. 238, line 25.

possibly the race of these individuals.[52]" The court then considered the surnames of the individuals depicted, stating "the Court heard their names. It's possible that they are more Asian than we know and just don't look as Asian as the next person.[53]" The District Court then concluded that the state had met its burden of proving that there was not a substantial risk of misidentification with regard to Jennifer Nguyen and Amy Ho.[54]

C. Argument

A defendant is denied due process when an in-court identification is based upon an out-of-court identification which is so suggestive as to render the in-court identification unreliable. *People v. Mack,* 638 P.2d 257, 265 (Colo.1981). First, a court must consider whether the defendant has demonstrated that the array was impermissibly suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 114-119 (1977); *Bernal v. People,* 44 P.3d 184, 191 (Colo.2002). Second, if the defendant has met this burden, then the state must show that the identification was nevertheless reliable under the totality of the circumstances. *Id.* Thus, the defendant has the

[52]R. Vol VIII at p. 239, line 25 to p. 240, line 2.
[53]R. Vol VIII at p. 240, lines 1-9.
[54]The Defendant does not appeal the ruling with respect to Co-Defendant, Kin Fong.

burden of proving the first prong of the test, while the state has the burden of proving the second prong. *Id.*

The six photograph photo array in the case at bar was impermissibly suggestive because only two photographs depicted individuals of Asian descent, and only the photograph of Mr. Lam had the distinct tussle of hair described by the two victims. Courts have held that, as here, a lineup with as few as six pictures is not a per se due process violation, but the fewer the pictures, the closer the array must be scrutinized for impermissibly suggestive irregularities. *U.S. v. Sanchez,* 24 F.3d 1259, 1262 (10th Cir.1994). It is required that the "photos are matched by race, approximate age, facial hair, and a number of other characteristics. *Bernal, supra,* 44 P.3d at 191-192. However, an array that includes a photograph that contains a unique feature that directly relates to an important factor may be impermissibly suggestive. *Id.* The question whether a pretrial photographic identification procedure is impermissibly suggestive must be resolved in light of the totality of the circumstances. *Neil v. Biggers,* 409 U.S. 188, 194-200 (1972).

A color copy of the actual photo line up in the *Bernal* case (that the Colorado Supreme Court held was impermissibly suggestive) was introduced by the Defendant at the Hearing (and is Defendant's Exhibit B contained in Sealed

Envelope VIII of the Record).[55] The photo array used to identify Mr. Lam is also contained in Sealed Envelope VIII. When the *Bernal* photo array is compared with the photo array in the case at bar, it is clear that the photo array in the case at bar is even more suggestive than the photo array in the *Bernal* case. Mr. Lam is the only Asian looking male with the distinct tussle of hair on his forehead. Therefore, the District Court erred in reversing her original concerns, and holding that the Defendant did not meet his burden of proof that the photo array was impermissibly suggestive. Therefore, the government must meet its burden of proof that the identification of Mr. Lam by Ms. Nguyen and Ms. Ho was nevertheless reliable.

If a court finds that an array is impermissibly suggestive, then it must determine whether, under the totality of the circumstances, the state can demonstrate that the identification was nevertheless reliable. *People v. Borghesi,* 66 P.3d 93, 104 (Colo.2003). The factors to be considered in determining the reliability of a suggestive lineup are (1) the opportunity for the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time

[55] The Contents of Sealed Envelope VIII are scanned in color and contained on the CD filed herewith.

between the crime and the confrontation. *Manson*, 432 U.S. at 116 (Citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

Determining the extent of the suggestiveness is also important for the purposes of the second prong of the test because a court is required to "balance the suggestiveness of the procedures employed against indicia of reliability surrounding the identification." *Bernal, supra*, 44 P.3d at 192. In the case at bar, the trial court improperly considered the names of the individuals used in the array, evidently holding that the names reduced the suggestiveness of the race characteristic. The fact that the names "sounded Asian" should not have been considered for the purposes of this test because the witnesses are never given the names of the individuals depicted in the lineup, and therefore the sound of the individual's names is irrelevant when considering how the individuals look.

In *People v. Dotson*, 55 P.3d 175, 179 (Colo. App. 2002), the Court of appeals analyzed the second prong of the test and found that there was not a substantial risk of misidentification. *Id*. at 179. The court based its determination on the evidence which indicated that the victim observed the assailant for at least fifteen minutes and provided a detailed description, including approximate age, height, clothing and specific details about his teeth and shape of his head. *Id.* The court also noted that the victim quickly identified the defendant and was positive

about his identification. *Id.* In *People v. Whittiker*, 181 P.3d 264, 272 (Colo. App. 2005), the court held that the identification was nevertheless reliable under the second prong of the *Bernal* test. In making its determination, the trial court noted that the victim (1) had previously met defendant, (2) had an adequate opportunity to view defendant the night of the shooting, both in the movie theater and in the theater parking lot, (3) had paid close attention to defendant, and (4) had demonstrated a high level of certainty. *Id.* Based on these facts, the court found that there was not a substantial risk of misidentification and affirmed the decision of the trial court. *Id.*

In the case at bar, the facts require a different result than that of *Whittiker*. Ms. Ho was only able to describe her assailant as Asian with a "tussle of hair sticking out in front; she provided no additional detail about the robber's facial characteristics." While Ms. Ho did indicate that she was positive about her selection by checking the appropriate box, the notion that she actually was positive is in direct contradiction to what she had earlier told police (before viewing the suggestive photo array). On the day that she was shown the photo array, Ms. Ho told police that she did not remember the alleged robber too well because the robber did not let Ms. Ho "look at him too much." When asked to describe the color of the robber's eyes, Ms. Ho responded, "I was very afraid. I did not see very

clearly. He wouldn't let me take a good look at him. He has a gun in his hand." Ms. Ho also admitted that after the robbery she had been unable to identify any other facial characteristics of the man including the nose, cheekbone structure, or mouth characteristics because she was "to fearful to get a really clear look."

Soon after the robbery, Ms. Nguyen gave as similarly vague description of the robber, describing the man as Asian, with a mustache and "pointy hair on his forehead."[56] This description lacked more specific detail, despite Ms. Nguyen's assertion at the pretrial hearing that she had ample opportunity to observe the robber from various close distances and for lengthy amounts of time.[57] However, during the pretrial hearing, Ms. Nguyen denied remembering telling police officers that she could not distinguish the three Asian men from each other.[58] Although she had testified that English is her primary language,[59] Ms. Nguyen claimed she checked the "possible" box next to the picture of Lam because she "read it wrong" and that she "couldn't think.[60]" Even though more than 24 hours had passed since the robbery, Ms. Nguyen also attributed her mistake to her being in a state of shock

[56]R. Vol VIII at p. 55, lines 3-10.
[57]R. Vol VIII at p. 35-40.
[58]R. Vol VIII at p. 49, p. 22 to p. 50, line 1.
[59]R. Vol VIII at p. 45, lines 15-16
[60]R. Vol VIII at p. 46, lines 20-23

but claimed she was positive about her selection.[61] Investigator Gary Burger testified that when he presented Ms. Nguyen with the photo lineup, she stated only that the person in position number four looked "familiar.[62]" Despite the district court's assertion that a witness's checking "possible" goes to weight and not admissibility,[63] it does go to admissibility because it goes to the certainty of the witness which as the district court pointed out, the witness' degree of certainty is a factor that the court needs to consider. As with Ms. Ho, Ms. Nguyen only became certain of her identification after she was shown the suggestive photo array.

The fact that the identifying witnesses in this case are robbery victims greatly contributes to the added risk of misidentification. "The danger of misidentification is further increased in prosecutions where the victim is the witness, such as in a robbery, because there is a particular hazard that a victim's understandable outrage may excite a vengeful or spiteful motive." *United States v. Wade*, 388 U.S. 218, 229 (1967). Ms. Nguyen's and Ms. Ho's testimony is also less reliable because they originally selected Mr. Lam's photograph and naturally wanted to stick by their original selections. "[I]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go

[61]R. Vol VIII at p. 46, line 10.
[62]R. Vol VIII at p. 131, lines.24-25.
[63]R. Vol VIII at p. 240, line 24 to p. 241, line 2

back on his word later on." *Id*. (Citations Omitted). Because the witnesses gave vague descriptions, had a limited opportunity to view the robber, and indicated a low level of certainty, there was a substantial risk of misidentification.

Had the district court found the photo array so suggestive as to give rise to the substantial risk of misidentification, Ms. Ho and Ms. Nguyen would not have been allowed to testify about their out-of-court identification of Mr. Lam. Additionally, after making such a finding, the court would be required to determine whether the witnesses had an independent basis for making an in-court identification before they could be permitted to do so. *People v. Stevens*, 642 P.2d 39, 40 (Colo. App. 1981). For such an inquiry, the prosecution bears the burden in showing that an in-court identification is not the product of an unduly suggestive confrontation. *People v. Walker*, 666 P.2d 113, 119 (Colo. 1983). Because the district court improperly held that the array did not create a substantial risk of misidentification, it did not address the question of the witnesses' independent basis for the identification. This case must be remanded for an evidentiary hearing on this issue and a ruling whether Mr. Lam's right to due process was violated by the in court identifications.

III. The District Court committed reversible error when the Defendant was forced to stand trial in Shackles in the presence of the jury, the shackles were visible and/or audible, and the Defendant had not engaged in any previous

conduct in Court that would lead a reasonable person to believe he posed a safety or escape risk.

A. Compliance with CAR Rule 28(k)

CAR 28(k)(1) The district court did not make any findings of fact, and did not exercise any discretion when it deferred the decision, to the Sheriff Deputies, of whether or not to require the Defendant and his co-Defendant to be shackled. Therefore, the review is *de novo* and giving no deference to the trial court's decision. *People v. Butler*, 224 P.3d 380, 387 (Colo. App. 2009).

CAR 28(k)(2) This issue was first raised by the District Attorney at a pretrial hearing (R. Vol IX at 99 lines 10-19). Defendant's counsel joined in the objection. R. Vol IX at 101 lines 7-8. The District Court did mot make findings of fact or conclusions of law and instead stated that she was "going to defer to the [Sheriff's Deputies in the Courtroom.]" R. at. vol. X at 5 lines13-15 and page 330, lines 1-5. The Defendant and co-Defendant were shackled for the trial.

B. Facts

The Sheriff Deputies shackled Cong Lam during pretrial proceedings. During these pretrial proceedings, the DA first raised this issue because if shackles remained during the trial, the likelihood of prejudice and the possible due process issues were so obvious. The DA stated that shackling the defendants

> raises a lot of appellate issues if they're shackled in a way that the jury can see them. So I just want to clarify that I think the Court would have to hold a hearing as to whether they would be shackled in any way that the jury would be allowed to be aware of that, and I don't know that the Court's intending to have that done. I would ask that that not been done, that they not be shackled in a way that the jury would be able to see that.

R. Vol IX at 99 lines 10-19; Defendant's counsel joined in the objection.[64] The court refused to make any determination regarding the shackles and deferred to the Deputies: "[w]ell, I guess the deputies can take steps to make sure the courtroom's secure.[65]"

The shackles posed a major problem because the jury would be prejudiced when they observed Mr. Lam wearing them or if they were able to hear them click together when Mr. Lam moved or shifted positions, such as when he stood for the entrance and exit of the judge or jury. Although, the Court acknowledged that it might be possible for the jury to hear the shackles when Mr. Lam moved or rose for the judge's entrance, she ultimately concluded that it would not be an issue because she had not heard the chains during the course of the proceedings the day before.[66] The court never took any steps to ensure the shackles would be out of view or hearing from the jury. The Sheriff Deputies denied the shackles were

[64]R. Vol IX at 101 lines 7-8.
[65]R. Vol IX at 99 lines 20-21.

visible, but the Courtroom Clerk spoke up and said the shackles were visible.[67] However, the Clerk was ignored.

The Court declared that the need to restrain and shackle Mr. Lam in front of the jury had "nothing to do with the presumption of innocence." The Court started to say that it had to do with the Sheriff's determination, but then caught herself and stated that this Court has "some concerns about safety, especially when witnesses are on the stand.[68]" The Court never made any findings of fact or law as to why she felt it was necessary to require Mr. Lam to appear in front of the jury under the restraint of the shackles, nor did she explain her safety concerns. She simply stated: "Well, I've spoken with the deputies. They feel that it's necessary, and I'm going to defer to them.[69]" The only remark by the Court regarding the reason for the shackles was that "[t]here's something in the -- and I don't know anything -- the only thing I know, Ms. Sanders, is there's something in the comments in the jail, you know, the jail comments concerning your client, about statements that he may have made. I don't have access to those, so.[70]" There are several problems with this statement: (1) This statement was directed toward the co-Defendant, Mr.

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[66]R. Vol X at 6 lines 4-9
[67]R. Vol X at 45 line 21 - page 46 line 3.
[68]R. Vol XI at 330 lines 1-4.
[69]R. Vol X at 5 lines 13-15.
[70]R.Vol X at 7 lines 3-8..

Hoang's counsel and was about statements Mr. Hoang may have made in the jail, not any statements actually made by Mr. Lam; (2) There is nothing in the Record that Mr. Lam did or said anything in the jail, the courtroom or anywhere else that was evidence that Mr. Lam posed a security threat in the courtroom; (3) The Court never held a hearing regarding what exactly was said at the jail; and therefore, (4) This statement clearly evidences that the judge was completely deferring to the Sheriff Deputies and had no basis to conclude that Mr. Lam would pose any problem in the courtroom.

C. Argument

Both the United States and Colorado Constitutions protect a defendant's right to due process of law and the presumption of innocence, which includes the right to appear in normal attire and unshackled absent in extreme situations. *See* U.S. Const. amend V; U.S. Const. amend XIV; Colo. Const. Art. II, § 25. A trial court is not permitted to routinely shackle, gag, or dress defendants in prison garb when they appear before the jury. American "law has long forbidden routine use of visible shackles during the guilt phase [of the trial]," this protects defendants who appear before a jury from the prejudicial effect that appearing like a criminal has on the jury. *Deck v. Missouri*, 544 U.S. 622, 626 (2005). The presumption of innocence is "directly undermined when the defendant is required to appear before

a jury in visible restraints or prison clothes." *People v. Knight*, 167 P.3d 147, 153 (Colo.App. 2007); *Deck v. Missouri*, 544 U.S. 622, 634-5 (2005).

The shackling of Mr. Lam is reversible error because the trial court did not articulate any specific reasons that would justify the shackles, because the court failed to balance state interest against the potential prejudice, and because the court merely deferred to the bailiff without conducting any independent determination. "Trial courts may not shackle defendants routinely, but only if there is a particular reason do so." *Deck*, 544 U.S. at 627. The only time the right to appear without visible or audible restraints may be set aside by the court is when there is some articulable and essential state interest the court is trying to protect, such as physical security, escape, or courtroom decorum. *Id.* When evaluating whether or not to use shackles or other restraints, the court "should balance the need for courtroom security against the potential prejudice against the defendant." *Knight*, 167 P.3d at 154; *see also Deck*, 544 U.S. at 627. When performing this balancing of interests the court should consider the risk the defendant poses, whether he poses a threat of escape, or is otherwise likely to be disruptive. *Id.* "If the court denies the [request to appear without shackles or other visible restraints], its reasons *must be entered on the record* and *supported by specific findings*." *Knight*, 167 P.3d at 154 (emphasis added). In the case at bar, the District Court made no specific findings

and entered no articulable reasons for the restraints on the Record. Thus, the lack of findings on the Record alone are sufficient to require a reversal.

The District Court exercised no discretion and did not perform the required balancing of interests when requiring the shackles, instead she decided to merely defer to the Sheriff Deputies. A trial judge is not permitted to merely rely on the recommendations of the bailiff, Sheriff Deputy or other outside authority without conducting its own evaluation and balancing of state interest against potential prejudice to the accused. *Gonzalez v. Pliler*, 341 F.3d 897, 900 (9th Cir. 2003) (Stating that bailiff's decision to use restraint does not constitute undergoing judicial scrutiny); *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002) (Stating the court failed to articulate sufficient reasons for imposing the use of the stun belt).

Therefore, because "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination . . . that they are justified by a state interest specific to a particular trial[,]" and no such determination, that is supported by specific findings or clearly articulated reasons, can be found in the Record, the use of shackles on Mr. Lam is a violation of his right to due process and his conviction must be reversed. *Deck*, 544 U.S. at 629. Consequently, this case must be remanded for a new trial unless the government

can show the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Deck v. Missouri*, 544 U.S. 622, 634-5 (2005).

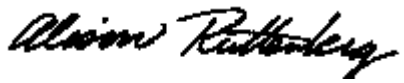
In *Knight,* the court ultimately deemed the error harmless, because the witnesses testimony was brief and unimportant. However in the case at bar, Mr. Lam was one of the central figures in the trial and present for the entire duration of the trial. The shackling of a defendant in front of the jury is "inherently prejudicial.[71]" *Holbrook v. Flynn*, 475 U.S. 560, 568-9 (1986); *see also.*, *Deck*, 544 U.S. at 636. The fact that there is no finding that the jury could see the shackles is irrelevant. In order for the government to meet its burden of proof that the error was harmless beyond a reasonable doubt, there must be a finding in the Record that the jury could *not* see the shackles. *E.g., Deck,* 544 U.S, at 634. Therefore, the government will not be able to "prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

CONCLUSION

For the reasons set forth above, Mr. Lam respectfully requests that this Court vacate the conviction and sentence and remand to the District Court for a new trial.

DATED this 24th day of November 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, I mailed a true and correct copy of the foregoing **OPENING BRIEF** addressed to the following:

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