SUPREME COURT, STATE OF COLORADO **2 E. 14th Ave** **Denver, CO 80202** Court of Appeals No. 06 CA 1518 Appeal from Jefferson County District Court Honorable Enquist, Judge District Court Case Number 05 CR 1008	
PETITIONER: RICKY HOANG **RESPONDENT:** PEOPLE OF THE STATE OF COLORADO	ΔCOURT USE ONLYΔ
Attorney: Kimberly K. Caster, #31606 Contract Attorney for the Office of Alternate Defense Counsel Address: 1950 W Littleton Blvd., Suite 117 Littleton, CO 80120 Phone Number: (303) 303-870-7885 Fax Number: (303) 683-2342	Case Number: 2012SC219
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:

1. The brief complies with C.A.R. 28(g). It contains 9,382 words.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE ISSUES

I. **Mr. Hoang's due process rights to a speedy and meaningful appeal have been violated due to the unreasonable delay in the preparation of transcripts and the significant omissions of trial exhibits.**

II. **Mr. Hoang's conviction must be reversed where he was forced to stand trial in shackles in the presence of the jury, where the shackles where visible and audible, where the trial court made no findings of fact and exercised no discretion, and where there had been no previous conduct in court that would lead a reasonable person to believe he posed a safety or escape risk.**

STATEMENT OF THE CASE

On April 13, 2005, Mr. Hoang was charged in a 34 count complaint based on alleged events that occurred on March 15, 2005. (R. at 1-10).

On June 20, 2005, Mr. Hoang entered a not guilty plea to all charges. (Trans. Vol. II at 2). On April 3, 2006, Mr. Hoang was tried with Mr. Lam.

Immediately prior to trial, the People raised the issue of whether the defendants would be shackled during trial and in the presence of the jury. (Tr. Vol. X at 99). The court made no findings of fact on the issue, but merely deferred to the sheriffs. (Tr. Vol. XI at 4-7, 5, l. 13-15). Without any indication that either defendant posed any security threats and without any other reasonable accommodation, the defendants were tried before the jury wearing shackles. (Tr. Vol. XII at 330). The record does not make clear what kind of shackles were actually worn during the trial, only that there

was a concern that the jury could see and hear the shackles as defendants moved.

Mr. Hoang was found guilty on all counts on April 20, 2006. On June 16, 2006, Mr. Hoang was sentenced to 160 years in the department of corrections.

On July 26, 2006, Mr. Hoang timely filed his notice of appeal. (R. at 242). The record on appeal was originally due to the Court of Appeals on October 24, 2006. (R. at 267). However, the record was not completed, filed and certified with the court of appeals until February 18, 2010. After additional supplemental exhibits were discovered by the district attorney, the record was not fully completed until July 2010. During the course of the four years it took to complete the record, it was discovered that the court reporter had made substantial errors and omissions in transcribing critical trial testimony and that the district attorney failed to transmit nearly sixty critical trial exhibits to the court of appeals. Therefore, the case was remanded to the district court for reconstruction of the record on March 3, 2009. The hearing to reconstruct the record took place in January 2010. But the district attorney, court reporter and court clerk were unable to fully comply with court orders to complete the record until July 2010.

On February 16, 2012, the Court of Appeals issued its opinion

rejecting Mr. Hoang's claim of prejudice for the unduly long delay in litigating the appeal. *Slip Opinion* at 11-12. The court further rejected Mr. Hoang's analysis of the delay in this unique set of circumstances. *Slip Opinion* at 7-10 and fn 2.

Additionally, the court of appeals rejected Mr. Hoang's assertion that the district court abused its discretion by forcing Mr. Hoang and his co-defendant to be tried wearing ankle and wrist shackles. *Slip Opinion* at 31. The court based its opinion on the lack of evidence in the record indicating that the jury heard or saw the shackles and avoided the analysis required by the district court judge to make a preliminary finding as to the necessity of the shackles prior to the commencement of trial. *Slip Opinion* at 35. The court affirmed the convictions and remanded the case for a correction to the mittimus.

This Court granted certiorari to review the issues concerning the undue delay in the appellate process and the issue concerning the shackling of the defendants at trial. This Court declined to consider Mr. Hoang's assignment of error concerning severance of the defendants and will not be a part of this argument.

SUMMARY OF THE ARGUMENT

Mr. Hoang is constitutionally entitled to a speedy appeal in the same

way he was entitled to a speedy trial. The excessive delay between conviction and the filing of the certification of the record to the appellate court in this case violated that fundamental constitutional right and caused him unfair prejudice. This excessive delay is not an anomaly and is indicative of a judicial system in Colorado that disregards the constitutional rights of the accused once they are placed into the Department of Corrections.

Further, Mr. Hoang is constitutionally entitled to the presumption of innocence during his trial to not be tried wearing ankle or wrist shackles. Because this is a fundamental constitutional right, the court must find a compelling state interest that would override Mr. Hoang's constitutional right. In this case, the district court refused to make any findings of fact that justified the suspension of Mr. Hoang's constitutional right during his trial.

As a result of these errors in the district court and the court of appeals, Mr. Hoang's conviction must be reversed.

ARGUMENT

I. Mr. Hoang's constitutional due process rights to a speedy and meaningful appeal have been violated due to the unreasonable delay in the preparation of transcripts and the significant omissions of trial exhibits.

a) *Standard of Review*

"Every person convicted of an offense under the statutes of this state

has the right of appeal to review the proceedings resulting in conviction." C.R.S. § 16-12-101 (2009). This right to appeal is fundamental to our system, so the court construes the rules liberally and disfavors interpretations that work a forfeiture of that right. *Wend v. People*, ___ P.3d ___ 09SC478 (Colo. June 28, 2010) (quoting *Peterson v. People,* 113 P.3d 706, 708 (Colo. 2005)). Therefore, this court must conduct a *de novo* review of this question of law, with all doubts resolved in favor of preserving the appellate right. *Id.* (citations omitted).

b) *Issue Preserved for Appeal*

Mr. Hoang timely filed his notice of appeal on July 26, 2006. (R. at 242). On August 21, 2006, following an order from the court, defense counsel filed an amended notice of appeal and designation of record. (R. at 254-65). The appeal was deemed timely filed and the record was due from the district court on October 24, 2006. (R. at 266). Therefore, Mr. Hoang properly preserved his right to a timely appeal.

c) *Legal Analysis*

Introduction

The constitutional touchstone of the due process clause in this case is that the appellate procedure must furnish the components necessary for meaningful review. U.S. Const. Amend. V, Amend XIV; Colo. Const., art.

II,§25; See, e.g., *Douglas v. California*, 372 U.S. 353, 358 (1963) (right to counsel on direct appeal); *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (right to transcript on direct appeal). Due process guarantees an appeal that is both "adequate and effective." *Evitts v. Lucey*, 469 U.S. 387, 392-94 (1985); *Simmons v. Beyer*, 44 F.3d 1160 (3rd Cir. 1995) (finding that the 13 year delay on direct appeal met the prongs of *Barker*). "[T]he fundamental requirement of due process is the opportunity to be heard '*at a meaningful time* and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (emphasis added)).

A review of federal and state case law demonstrates the need for clear jurisprudence from this Court regarding the indigent incarcerated defendant's right to a speedy appeal.

Federal Case Law

In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court introduced a four-part balancing test to be used by courts when determining possible violations of a criminal defendant's speedy trial rights. The factors included: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id.*

Federal and state courts across the country have adopted and modified this analysis to apply to the right to a speedy appeal when the state courts provide for an appeal of right. Therefore, the *Barker* analysis is still the appropriate measure to weigh the rights of a defendant-appellant.[1]

In *Rheuark v. Shaw*, 628 F.2d 297, 302-304 (5th Cir. 1980), the Fifth Circuit stated that

> Criminal appellants often languish in prison or jail, 'vegetating' while they await the outcome of their appeals. Moreover, if an appeal is not frivolous, a person convicted of a crime may be receiving punishment the effects of which can never be completely reversed or living under the opprobrium of guilt when he or she has not been properly proven guilty and may indeed be innocent under the law. In our judgment, such results cannot be tolerated. The cancerous malady of delay, which haunts our judicial system by postponing the rectification of wrong and the vindication of those unjustly convicted, must be excised from the judicial process at every stage.

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[1] *United States v. Smith,* 94 F.3d 204, 207 (6th Cir. 1996), *cert. denied,* 519 U.S. 1133 (1997); *United States v. Hawkins,* 78 F.3d 348, 350-51 (8th Cir.), *cert. denied,* 519 U.S. 844 (1996); *Simmons v. Reynolds,* 898 F.2d 865, 868 (2d Cir. 1990); *United States v. Antoine,* 906 F.2d 1379, 1382 (9th Cir.), *cert. denied,* 498 U.S. 963 (1990); *Burkett v. Cunningham,* 826 F.2d 1208, 1222 (3d Cir. 1987); *United States v. Johnson,* 732 F.2d 379, 381-82 (4th Cir.), *cert. denied,* 469 U.S. 1033 (1984); *DeLancy v. Caldwell,* 741 F.2d 1246, 1247-48 (10th Cir. 1984); *Rheuark v. Shaw,* 628 F.2d 297, 303 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981); *Gaines v. Manson,* 481 A.2d 1084, 1092 (Conn. 1984); *People v. Sistrunk,* 630 N.E.2d 1213, 1223, *appeal denied,* 642 N.E.2d 1298 (Ill. 1994); *Allen v. State,* 686 N.E.2d 760, 783 (Ind. 1997), *cert. denied,* 525 U.S. 1073 (1999); *State v. Harper,* 675 A.2d 495, 498 n.5 (Me. 1996); *Daniel v. State,* 78 P.3d 205, 218-19 (Wyo. 2003), *cert. denied,* 540 U.S. 1205, (2004).

"The cancerous malady of delay" has also been litigated in the Tenth Circuit. In *DeLancy v. Caldwell*, 741 F.2d 1246, 1247 (10th Cir. 1984), the Tenth Circuit found that "[a]n excessive delay in furnishing a pretrial or trial transcript to be used on appeal or for post-conviction relief can amount to a deprivation of due process."

"Purposeful delay weighs heavily against the government." *United States v. Yehling*, 456 F.3d at 1244 (citing *Barker v. Wingo*, 407 U.S. at 531). Delays in the preparation of transcripts and exhibits are attributable to the government. If the defendant bears no responsibility for the delay, a rebuttable presumption is required to counteract the prejudice which has become difficult to prove due to the passage of time. *Doggett v. United States*, 505 U.S. 647, 655-57 (1992).

Similarly, an inordinate delay in adjudicating a defendant's direct criminal appeal can give rise to an independent due process violation, as recognized by the Tenth Circuit in *Harris v. Champion*, 15 F.3d 1538, 1557 (10th Cir. 1994). The Tenth Circuit stated that "an appeal that is inordinately delayed is as much a 'meaningless ritual' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Id.* at 1558 (citation omitted).

Finally, the Ninth Circuit found that delays caused by court reporters

are attributed to the government for the purpose of determining whether a plaintiff has been deprived of due process on appeal from his conviction. *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990).

Colorado Case Law

While the Tenth Circuit, and several other federal circuits, have determined that due process can be denied by an excessive delay in the furnishing of a transcription of testimony necessary for completion of an appellate record, Colorado has yet to clearly settle this matter and adopt a clear analysis. While the various panels of the court of appeals have adopted the modified *Barker* analysis, the panels have created further distinctions that confuse whether a defendant is entitled to due process protection and what the remedy should be. For example, there is a distinction between a claim in a collateral action versus a direct appeal, as well as, a distinction between the denial of a meaningful appeal versus the denial of a speedy appeal. These distinctions are not uniformly applied.

Therefore, it is ripe for this Court to determine the appropriate analysis when a defendant both asserts the denial of a speedy appeal as a result of the court reporter's failure to produce a transcript in a timely manner and that when the transcript was finally furnished it contained errors and omissions that further contributed to the denial of due process.

a. Meaningful Appeal

A meaningful appeal is often denied when a portion of the transcript on appeal is missing critical portions or is inaccurate to the extent that the reviewing court cannot review the substantive claims for error. This claim can be asserted independently of a claim for a denial of a speedy appeal and does not apply *Barker v. Wingo*.

In proving this claim, a defendant is required to make a specific showing of prejudice, pointing to the portions of the record that prevented him from making his claim on appeal or prevent the court from reviewing his substantive claim. In *People v. Killpack*, 93 P.2d 642 (Colo. App. 1990), the Colorado Court of Appeals found that when the defendant demanded a new trial based upon the incompleteness of the reporter's transcript, and when that testimony and precise language were critical to the dispute, reconstruction is not the appropriate remedy. The court concluded that while loss of a portion of the record does not automatically require reversal, when a defendant can show that the incomplete record visits a hardship upon the appellant and prejudices his appeal, reversal is proper. *Id.* at 643. However, the court did not describe what kind of hardship the defendant must demonstrate or what extent of prejudice must be shown in order to be granted a reversal. The court merely stated that it could not make a decision

from the record before it. *Id.*

In *People v. Anderson*, 837 P.2d 293, 299-300 (Colo. App. 1992), the Colorado Court of Appeals again ruled that the loss of a portion of the record does not require automatic reversal. The court offered a mildly different standard stating that when the defendant is represented by the same attorney on appeal as at trial, the defendant must make a specific showing that the errors in the record visited a hardship upon him and prejudiced his appeal. The court stated that although there were some words and phrases that were not transcribed or incomprehensible, the defendant did not assert any particular ruling which he was prevented from challenging and the record still allowed the appellate court to fairly review the defendant's contentions. *Id.* at 300.

In *People v. Rodriguez*, 914 P.2d 230, 3001-301 (Colo. 1996), a defendant claimed that the incomplete record violated his right to due process and required reversal of his conviction. The Colorado Supreme Court recognized a criminal defendant is entitled to a record on appeal which includes a complete transcript of the proceeding at trial. However, the Court rejected a long line of federal cases, including *United States v. Selva*, in which those courts set a lower threshold showing of prejudice when the defendant is represented by different counsel on appeal. *See United*

States v. Selva, 559 F.2d 1303 (5th Cir. 1977); *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1212 (11th Cir. 1993); *United States v. Valdez*, 861 F.2d 427, 431 (5th Cir. 1988); *United States v. Renton*, 700 F.2d 154, 157 (5th Cir. 1983); *United States v. Workcuff*, 422 F.2d 700, 702 (D.C.Cir.1970) (expressing concern that new appellate counsel may face particular hardship where portions of trial transcript missing). This Court refused a standard that turned on whether the defendant was represented by the same counsel on appeal as at trial in determining what kind of prejudice a defendant must demonstrate. However, the defendant only *tangentially* asserted a violation of his due process rights and relied only upon *bare assertions* that an incomplete record *automatically* created prejudice and required reversal. *Id.* at 300, 301.[2]

a. Speedy Appeal

The weighing of the *Barker* factors becomes relevant when there is an assertion by the defendant that he has been denied his right to a speedy appeal at the hands of the government.

In *People v. Rios*, 43 P.2d 726, 732 (Colo.App. 2001) the court of

[2] The Court relied upon a line of federal cases that interpreted a violation of the federal Court Reporter Act 28 U.S.C. § 753 where federal courts have required a demonstration of specific prejudice when defendants assert a violation of that act. Id. at 301. Additionally, the Court cited state cases that evaluated specificity of claims arising from incomplete records and whether the claim was properly preserved for appellate review.

appeals recognized an excessive delay in the resolution of an appeal can give rise to a cognizable claim of denial of due process and specifically utilized the *Barker* four-prong analysis. In evaluating the prejudice prong of *Barker*, the court stated that it is necessary to consider (1) preventing oppressive incarceration pending appeal, (2) minimizing anxiety and concern of a convicted person awaiting the outcome of an appeal, and (3) limiting the possibility that the grounds for appeal or defenses in case of reversal and retrial might be impaired. *Id.* at 732-33 (adopting the factors recognized in *Harris* and *Rheuark*). While the court correctly noted the elements to consider under *Barker*, it did not find that the defendant's claims rose to the level of a violation of due process and simply stated that the defendant failed to meet the elements of *Barker*, *Harris*, and *Rheuark*. *Id.* at 733-34.

In *People v. Whittiker,* 181 P.3d 264 (Colo.App. Div. 3 2006), the court of appeals again considered a whether a defendant was deprived of (1) a meaningful appeal due to inaccurate transcripts and (2) a speedy appeal due to a four year delay in the preparations of a transcript for appeal. While the court agreed that the transcript was inaccurate, there was no perceived prejudice and the transcripts were sufficiently complete and reliable to enable intelligent review of the defendant's substantive contentions. *Id.* at 269-70.

With respect to the speedy appeal claim, the court relied upon *Rios* and *Barker* factors. *Id.* at 270. First, the court found excessive delay in the nearly five year delay but also cited to cases where a two year delay was presumptively excessive and inordinate. *Id.* Second, the court found that delay in the preparation of the transcripts is generally attributable to the government for the reason for the delay and weighs in the defendant's favor. *Id.* Third, the court found that timely filing the notice of appeal and seeking relief on the grounds of delay is a proper assertion of the right to a claim of a violation of due process. *Id.* at 270-71. Finally, the court stated that prejudice must be demonstrated by the defendant and adopted a distinction between a collateral action and a direct appeal to evaluate the prejudice prong.

According to the *Whittiaker* court, on a direct appeal a reviewing court need only to consider whether the delay impaired the defendant's ability to present the appeal or the court's review of the appeal and should, therefore, disregard the other *Barker* prejudice factors. *Id.* at 271. *See also People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007). The court blurred the analysis of denial of a meaningful appeal and denial of a speedy appeal in creating this meaningless distinction. The court further inappropriately added to the mix the consideration of whether the defendant's direct appeal

had merit to disregard the consideration of other prejudicial factors such as oppressive incarceration. This analysis creates an impossible position for a defendant on appeal, as the success or merit of the appeal is not determined until the conclusion of the appeal, well after the defendant has suffered the psychological effects of oppressive incarceration, rendering the protections of due process and speedy appeal meaningless.

A more appropriate articulation of the prejudice standard should be whether the substantive claims are frivolous or potentially meritorious on appeal. And the rebuttable presumption of prejudice should arise when the reason for the delay has been the fault of the government. *See Doggett v. United States,* 505 U.S. 647, 655-57 (1992).

In *People v. McGlotten*, 166 P.3d 182 (Colo.App. Div. 3 2007) the court of appeals reaffirmed the application of the four-prong test as set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) and *People v. Rios*, to determine whether an appellate delay exceeds the limits of due process.

Particularly important was whether the delay prejudiced the defendant by (i) causing him to suffer oppressive incarceration pending appeal; *or* (ii) causing him to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his appeal; *or* (iii) impairing his grounds for appeal or his defenses in the event of a reversal and retrial. *McGlotten*, at 185;

Harris v. Champion, 15 F.3d at 1559; *Rios*, 43 P.3d at 732.

First, the *McGlotten* court affirmed the threshold showing of excessive delay includes two to five years to trigger the analysis of the remaining factors. *Id.* Second, the court affirmed that because the delay was inordinate, the court must look at the reason for the delay. (citing *United States v. Smith,* 94 F.3d 204, 209 (6th Cir. 1996) (three-year delay is sufficient to trigger further inquiry); *Simmons v. Reynolds,* 898 F.2d 865, 868 (2d Cir. 1990) (six-year delay is excessive); *United States v. Johnson,* 732 F.2d 379, 382 (4th Cir. 1984) (two-year delay "is in the range of magnitude" for triggering further inquiry)). Here, the delay was caused by the court reporter's inability to prepare the transcripts, which is attributable to the government and weighs in favor of the defendant. *Id.* at 185-86. Third, the court affirmed that the timely filing of the notice of appeal is an assertion of the right to a speedy appeal. *Id.*

Finally, the court analyzed whether the defendant suffered prejudice. The court required the defendant to show that the appellate delay impaired his ability to present his ***potentially meritorious*** arguments on appeal. *Id.* at 186 (emphasis added). As part of its analysis the court concluded that the issue was not settled as a result of a remand to correct the record, the trial court made no written findings, and the evidence was conflicting or

inconclusive. The court also stated that it could not determine if error occurred and whether it was harmless beyond a reasonable doubt. The court was unable to make its own factual determination of the issue without knowing what actually happened in the trial court. Because the remand proved to be ineffective and witnesses could not remember clearly the pertinent events, the passage of time placed the necessary information beyond the reach of the appellate court. *Id* at 187.

The court distinguished its decision from *Whittiaker* and *Carmichael* by stating that because the court could not evaluate the substantive contention, a potentially meritorious claim, the defendant was prejudiced by the appellate delay. *Id.* Therefore, the defendant was entitled to a new trial. This opinion of the court of appeals seems to come closest to including the relevant factors but fell short of including the *Doggett* presumption of prejudice, to which the government is required to respond. *See United States v. Smith,* 94 F.3d 204, 208-209 (6th Cir. 1996).

The prejudice element has been further discussed by the court of appeals. In *People v. Brewster*, 240 P.3d 291 (Colo. App. 2009), the court again reviewed a speedy appeal claim. While the court properly cited the applicable cases of *Barker, Rios, McGlotten,* and *Whittiaker*, the court was derailed from its full analysis of the factors and focused solely on the

prejudice factor. The court again failed to look at the entire claim and merely stated that the defendant could not claim that a prompt resolution would have yielded a different outcome nor did the defendant show specific prejudice. *Id.* at 297.

As result, the status of the law in Colorado is unclear as to how to properly evaluate a defendant's assertion of a violation of his constitutional right to a speedy appeal. The present case is a clear example of the need for direction from this court as to how these claims should be evaluated, what courts must weigh to determine a constitutional violation, and what the appropriate remedy should be for such violation.

The Court of Appeals Opinion Currently Under Review

In the present case, the Court of Appeals mixed up the already muddied methods established by prior panels for evaluating the due process violation caused by an excessive delay on appeal. While the court properly cited to relevant Colorado case law and the use of the *Barker* factors, the court's application of the factors in its analysis gravely missed the mark for evaluating the constitutional violation of Mr. Hoang's right to a speedy appeal and due process of law. *Slip op.* 5-7. Therefore, Mr. Hoang urges this court to adopt the analysis in *Harris v. Champion*, 15 F.3d 1538, 1547 (10th Cir. 1994) and *People v. McGlotten*, 166 P.3d 182 (Colo.App. Div. 3

2007) and apply it to the law in Colorado.

1. Length of Delay—The Triggering Factor

As to the first factor, the length of the delay is the triggering factor for analyzing all of the remaining *Barker* factors. It is uncontested that the four-year delay in preparation of the record was clearly excessive and inordinate under *Barker*. Both the Court of Appeals and the People conceded that the triggering prong of the test was met and the four year time delay was ***presumed*** to be a violation of due process. This is a consistent analysis across jurisdictions and not contested in this case. *See Harris v. Champion*, 15 F.3d 1538, 1547 (10th Cir. 1994). The longer delay the appellate process extends beyond two years, the less showing a petitioner must make on the other parts of the balancing test, including prejudice resulting from the delay. *Id.*

2. Reason for Delay

The Court of Appeals incorrectly diverted its analysis when it stated "that the defendant has not made the requisite showing of prejudice, and therefore we do not consider the reason for the delay." *Slip op.* at 7. Circumventing a particular *Barker* factor because the court believes the

defendant did not demonstrate prejudice is not supported by case law. Rather, all factors and surrounding circumstances must be considered and weighed once the length of delay factor has been met. *United States v. Yehling*, 456 F.3d at 1243; *United States v. Toombs*, 574 F.3d 1262, 1274 (10th Cir. 2009); *People v. McGlotten*, 166 P.3d 182, 185-86 (Colo. App. 2007) (stating "because the delay is inordinate, we must inquire into the reason for the delay").

This prong of the *Barker* analysis is of particular importance because it involves the constitutional balance of government action to infringe upon a fundamental constitutional right. The reason for delay involving action by the government requires a classic strict scrutiny constitutional analysis. "It is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). The Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 147-148 (1968). "Substantive due process" holds that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721

(1997); *Reno v. Flores,* 507 U.S. 292, 303 (1993); *United States v. Salerno,* 481 U.S. 739, 751, (1987).

Because the right to a speedy appeal is considered a fundamental constitutional right in Colorado, when government action infringes upon that fundamental right, the state must demonstrate a compelling state interest. In the context of appellate delay at the hands of the government, the compelling state interest must overcome a rebuttable presumption of prejudice. *See Doggett v. United States,* 505 U.S. 647, 655-57 (1992); *United States v. Smith,* 94 F.3d 204, 209 (6th Cir. 1996) (recognizing that the appellate delay caused by the government was a good reason for the three year delay considering the unusual flux in the case law on point). While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. *Barker*, 407 U.S. at 531.

The court of appeals' refusal to consider this factor was the most damaging to the analysis of Mr. Hoang's due process violation and circumvented the government's obligation to demonstrate a compelling reason for allowing a four year delay in completing the record on appeal.

When the government's negligence causes delay sixteen times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice is neither extenuated as by the defendant's acquiescence nor persuasively rebutted, the defendant is entitled to relief. *Doggett*, at 658 (footnotes and citations omitted).

The court of appeals and other Colorado decisions incorrectly place the burden on defendant to prove the reason for delay and the prejudice resulting therefrom. Rather, the government was required to demonstrate that the reason for the delay met a compelling state interest. The record in this case cannot support any state interest.

Issues with the present record began as soon as it was requested. The court reporter, Patricia Messinger, took over two years to finish compiling her transcriptions and put together the incomplete record. (See Notice of Filing Record on Appeal dated July 21, 2008). This two year delay in preparing the transcripts without any asserted reason for the delay is presumptively inordinate and excessive. The court of appeals even sanctioned her for the inordinate delay by issuing an order for a page rate reduction. (See Court of Appeals Order, dated December 18, 2008). The

government failed to produce any good reason for this delay and, therefore, the reason for the delay weighs heavy in Mr. Hoang's favor.

Additional delay occurred when innumerable errors and omissions were discovered throughout the voluminous record. Numerous times throughout the trial, the court reporter failed to transcribe what was going on in the courtroom, most of which should have been on the record and likely contained essential information that would potentially form the basis for the substantive claims on appeal. (Tr. Nov. 13, 2009 at 4-5).

At the reconstruction hearing on November 13, 2009, the trial court found that nothing substantial was omitted, even though most of the omissions were labeled "bench conference held off the record." Rather, the court relied upon its own recollection to correct over 50 gaps in the record. (Tr. Nov. 13, 2009 at 19-24). It is hard to imagine that a reconstruction could accurately reflect what was occurring during each session where the principle parties to the reconstruction are only the judge and the prosecutor, while original defense trial counsel and the original court reporter were not present to testify.

Not only did the reporter fail to transcribe most of the so called "bench conferences," she omitted a great deal of the trial itself from the day

of April 17, 2006. (Tr. Vol. 18, p. 193-195; Tr. Nov. 13, 2009 at 4-5). The testimony of at least one witness was broken and out of order and required reconstruction based upon time stamps of the original transcript not provided to counsel. (Tr. Vol. 18, p. 196, Vol. 19 (Scott Pratt's testimony; Tr. Nov. 13, 2009 at 10-13; 15-17). Additionally, the entire direct examination of the lead investigator on the case, Detective Greaser, was entirely absent from the record. (Tr. Nov. 13, 2009 at 28).

Further, following the November 13, 2009 reconstruction hearing, it was clear that the government had previously failed to produce over sixty pieces of evidence as part of the record on appeal. These were finally produced during the November hearing, and no member of the district attorney's office offered a good reason for the delay in producing these exhibits. (CD 11/13/09 at pp. 4-9, 32; Answer Brief at 16).

The government presented nothing to rebut this presumption of prejudice in the court of appeals. Rather, the government attempted to place blame upon the defendant for the excessive delay in the preparation of the transcript. Answer Brief at 10. Not only did the government misstate the facts, but it ignored the presumption that failure to produce a transcript in a timely manner is the fault of the government. The government entirely

failed to produce a compelling reason for the delay in the preparation of this appeal and the court of appeals failed to require the government to carry its burden on this issue. As a result, the court of appeals' opinion is contrary to well established constitutional analysis and must be reversed.

3. Assertion of the Right

It is generally appropriate to view the defendant's filing of a notice of appeal as an assertion of the right to a speedy appeal. Thus, this third factor will generally weigh in the defendant's favor unless the state shows that the defendant affirmatively sought or caused delay. *See People v. Whittiker,* 181 P.3d 264 (Colo.App. Div. 3 2006). This factor is not contested and, therefore, this factor weighs in Mr. Hoang's favor.

4. Prejudice

As noted earlier, this is the most litigated *Barker* prong and most often misapplied.

Previous decisions rely upon whether the defendant has demonstrated that the appellate delay on direct appeal impaired his appeal. *People v. Whittiker,* 181 P.3d at 271. The defendant has to show that the delay impaired his ability to present, or the appellate court's ability to review, any

specific substantive contention or that a prompt resolution of his appeal would have yielded a different outcome. *Id.*

However, this is a nebulous standard for a defendant to meet and often impossible when the prejudice suffered cannot be measured until the defendant may be remanded to the trial court for a new trial. Therefore, courts should not require affirmative proof of particularized prejudice in every speedy trial claim and, therefore, is not the ultimate determining factor in every speedy appeal claim. *See Doggett*, at 657.

Rather, the appropriate measure of prejudice in a speedy appeal claim stems from the rebuttable presumption established in the reason for delay prong of *Barker*. This presumption of prejudice must be rebutted by the government and not merely by pointing to the lack of evidence of actual prejudice. This flimsy requirement is the exact problem the Supreme Court of the United States identified in *Doggett*: It is difficult for a defendant to demonstrate prejudice because a delay that results in the fogging of memories may benefit either side. This is even more apparent in the appellate realm. If a defendant is entitled to a new trial, the more likely prejudice will result in the clouding of witnesses' memories along with the

deterioration of evidence, the longer the delay is. *See State v. Berryman*, 624 S.E.2d 350, 363-64 (N.C. 2006).

Therefore, in this case there is already a presumption of prejudice by the government's failure to show a compelling reason for the excessive delay under *Harris*.

However, even should this court continue to follow the *Whittiaker* analysis, the record clearly demonstrates additional prejudice necessary for a reversal.

The lack of reliability of the totality of the transcripts actually presents difficulty in presenting an appeal. In the present case, the prejudice can be measured similar to the *McGlotten* case. Because there were so many bench conferences that were never transcribed, it is impossible to know if there were evidentiary, procedural, or "housekeeping" matters that were discussed and ruled upon that require review from this court. These unrecorded discussions are extremely relevant to the substantive claims raised in this case.

Specifically, the record completely lacks a record of precisely what kind of shackles were worn by Mr. Hoang, how the defendants were

transported in and out of the courtroom, discussions about how defendants would be seated with respect to the observation of the jury and housekeeping matters such as how the defendants were to take notes, drink water, and confer with counsel without the jury seeing or hearing the presence of the defendants' shackles.

During the November 13, 2009 reconstruction hearing, the court readily admitted that she simply did not recall what issues were raised and ruled upon during many of the bench conferences. For example, see (Tr. Nov. 13, 2009 at 37, 38, 43-46, 49-55, 56-63, 64-69.)

The court also defended the reporter's practice of not transcribing everything that went on in the court room and left it to the reporter's discretion as to what should have been transcribed. (Tr. Nov. 13, 2009 at 43). As a result, dozens of "discussions off the record" were noted and could not be deciphered by the court or the prosecution. Therefore, the transcripts as a whole are unreliable and prevent Mr. Hoang from presenting his substantive claim and this Court is prevented from an accurate and full appellate review of Mr. Hoang's substantive claim.

Additionally, a prompt resolution of Mr. Hoang's claims would have yielded a different outcome. The reconstruction hearing occurred on

November 13, 2009, three years after the trial occurred and memories failed. Had the appeal proceeded at a reasonable rate, reconstruction may have been more fruitful and a clear record of the trial may have been better preserved for this Court to review. However, as it stands, not only is the record unreliable, countless issues were never preserved, denying Mr. Hoang a fair appeal.

Finally, Mr. Hoang was incarcerated for well over five years before his appeal was briefed. His substantive issues included severance of the defendants for trial, including a speedy trial violation. Because there was already a speedy trial violation alleged, the excessive delay in his speedy appeal compounds his anxiety during the pending proceeding and the violation of his fundamental constitutional rights to a fair and prompt resolution of his case.

Although this court altered its perspective in *Whittiaker* on what factors should be considered to establish prejudice, the failure to promptly resolve his appeal has compounded the trial errors and unfairly imprisoned him for an excessive period of time. Therefore, the original factors set out in *Harris* and *Rios* are still instructive under these circumstances: (i) causing him to suffer oppressive incarceration pending appeal; *or* (ii) causing him to suffer

constitutionally cognizable anxiety and concern awaiting the outcome of his appeal; *or* (iii) impairing his grounds for appeal or his defenses in the event of a reversal and retrial. *Harris v. Champion*, 15 F.3d at 1559; *Rios*, 43 P.3d at 732. Undoubtedly, all of these factors are met in Mr. Hoang's circumstances when viewed as a whole and in light of the substantive claims raised.

Therefore, the analysis of these four factors constitutes an "inordinate delay in adjudicating [Mr. Hoang's] direct criminal appeal give[ing] rise to an independent due process violation." *Harris,* 15 F.3d 1538, 1557. The four year delay in preparing and correcting transcripts has rendered Mr. Hoang's direct criminal appeal a "meaningless ritual" under the constitution. Mr. Hoang urges this court to adopt a reasonable application of *Barker, Doggett, Harris, Rheuark, Rios* and their progeny so as not to subvert the constitutional rights of the accused to a speedy appeal when incarcerated for an inordinate delay at the mercy of the government and when that government cannot produce a compelling reason for the delay. Consequently, Mr. Hoang's conviction must be reversed.

II. Mr. Hoang's conviction must be reversed where he was forced to stand trial in shackles in the presence of the jury, where the shackles where visible and audible, where the trial court made no findings of fact and exercised no discretion, and where there had

been no previous conduct in court that would lead a reasonable person to believe he posed a safety or escape risk.

A. Standard of Review

Whether a defendant is required to stand trial before a jury in shackles is a matter left to the trial court's discretion. Therefore, this Court should review the district court's shackling determination for abuse of discretion. *United States v. Wardell*, 591 F.3d 1279, 1294 (10th Cir. 2009); *United States v. Portillo-Quezada*, 469 F.3d 1345, 1350 (10th Cir. 2006). Thus, the Court "must affirm unless [it] find[s] that the district court has made a clear error of judgment, or ***has applied the wrong legal standard.***" *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir.2004) (emphasis added).

In the present case, the district court did not exercise any discretion when it deferred its independent determination of whether to require the defendant to be shackled to the sheriff's deputies without making any findings of fact or conclusions of law. Therefore, "failure to exercise discretion is itself an abuse of discretion." *People v. Darlington,* 105 P.3d 230, 232 (Colo. 2005).

B. Issue raised and ruled upon in the lower court.

When Ricky Hoang was brought to trial in front of the jury he was shackled. (Tr. Vol. XI at 5). Defense counsel and the prosecution made objections to the shackling of the defendant on the day before the trial, at jury selection and the day the substantive trial began. All of the objections were denied by the court. (Tr. Vol. X, Vol. XI, Vol. XII).

At the pretrial hearing on March 28, 2006, the likelihood of prejudice Mr. Hoang would suffer and the possible due process violation resulting from the shackles were so obvious that the issue was originally raised by the prosecutor. The prosecutor 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.

(Tr. Vol. X at 99). The court immediately began to suggest that it was not going to make any determination regarding the shackles and defer to the deputies when it stated "[w]ell, I guess the deputies can take steps to make sure the courtroom's secure." (Id.)

Again on April 3, 2006, the shackles posed a major problem because the jury would be prejudiced when they observed Mr. Hoang wearing them or if they were able to hear them click together when Mr. Hoang moved or

shifted positions, such as when he stood for the entrance and exit of the judge. (Tr. Vol. XI at 4-7; 44-49.) Although, the court acknowledged that it might be possible for the jury to hear the shackles when Mr. Hoang moved or rose for the judge's entrance, it 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. (Tr. Vol. XI at 4-7.)

The court made conclusory statements while failing to issue any findings of fact or law as to why it felt it was necessary to require Mr. Hoang to appear in front of the jury under the restraint of the shackles, nor did it explain what, if any, safety concerns it had. The court simply stated "Well, I've spoken with the deputies. They feel that it's necessary, and I'm going to defer to them." (Tr. Vol. XI at 5, l. 13-15). On April 4, 2006, the court made its last ruling without making any independent findings of fact that Mr. Hoang posed a threat and stated that the defendants would remain shackled throughout the entire trial. (Tr. Vol. XII at 330.)

Specifically missing from the record is a description of the kind of shackles Mr. Hoang was forced to wear. While there was a brief indication that leg shackles were present, there is no indication whether Mr. Hoang was or was not required to wear wrist shackles as well. The court simply deferred to the judgment of the deputies. This omission from the record

could very likely be the result of the failure of the court reporter to record numerous discussions and proceedings, as discussed previously. As a result, there is no clear record of what Mr. Hoang was specifically shackled with and whether it was visible to the jury for this Court to review. The record only reflects the grave concerns of the prosecution and defense counsel before and during trial that Mr. Hong would likely be prejudiced by the shackles.

There had been no previous court room issues with Mr. Hoang that would lead anyone to believe Mr. Hoang would pose a safety risk if the shackles were taken off. The court even acknowledged that it had no real factual basis for its decision and that it had no access to or any specific information about why the deputies felt the shackles were required. (R. at vol. XI, p. 5, 9-10.)

Additionally, three years later during the reconstruction hearing on November 13, 2009, the court also underscored her lack of concern about the defendants being in custody when she stated that she was completely oblivious to the defendants being in custody and the need to coordinate how the sheriffs would escort the defendants out of the courtroom. (Tr. Nov. 13, 2009 at 48). Throughout the trial the court exhibited a blatant disregard for Mr. Hoang's right to due process and fair trial.

C. Legal Analysis

Both the United States and Colorado Constitutions protect the accused's right to due process of law, one such right being the ability to appear in normal attire and unshackled, absent 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 in order to protect against 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 the jury in visible restraints or prison clothes. *Eaddy v. People,* 174 P.2d 717 (Colo. 1946); *Montoya v. People*, 345 P.2d 1062 (Colo. 1959); *People v. Dillon*, 655 P.2d 841, 846 (Colo.1982). Actual prejudice is not always required when making a due process allegation. *People ex rel. N.A.T.*, 134 P.3d 535 (Colo.App. 2006) (citing *Deck v. Missouri*, 544 U.S. 622 (2005)(a defendant need not demonstrate actual prejudice to allege a due process violation when the court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury)).

A. Strict Scrutiny Required

The fundamental nature of the right to the presumption of innocence

and to appear before a jury in normal attire and unshackled requires the constitutional strict scrutiny analysis. Thus, the court may deny a defendant's request to appear unrestrained and in street clothes ***only when necessary*** for physical security, prevention of escape, or courtroom decorum. *Deck v. Missouri,* 544 U.S. 622, 628-29, (1982); *People v. Dillon,* 655 P.2d 841, 846 (Colo.1982); *People v. Knight*, 167 P.3d 147, 153 (Colo. Ct. App. 2007). Specifically, the government must demonstrate a compelling reason to infringe the defendant's right. *See generally Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores,* 507 U.S. 292, 303 (1993); *United States v. Salerno,* 481 U.S. 739, 751, (1987). The court may find a compelling interest when it (1) makes a defendant-specific determination of necessity resulting from security concerns; and (2) minimizes the risk of prejudice. *United States v. Wardell*, 591 F.3d 1279, 1294 (10th Cir. 2009); *United States v. Portillo-Quezada*, 469 F.3d 1345, 1350 (10th Cir. 2006) (quoting *Deck* for the proposition that the Constitution prohibits any courtroom procedure that "undermines the presumption of innocence and the related fairness of the fact finding process.")

B. Fundamental Right Infringed.

Mr. Hoang was not afforded a fair trial because the court painted him in the image of a criminal by requiring him to appear shackled in the

presence of the jury. "[R]equiring [the accused] to wear shackles or a prison uniform" has the effect of providing "a subconscious instruction to the jury that a defendant is dangerous and should be treated like a criminal." *Deck*, 544 U.S. at 630-31. "Dressing a defendant as a dangerous criminal instead of as an individual afforded the presumption of innocence, may interfere with the jury's determination as to the guilt or innocence of the defendant." *Id.* (Citing *Holbrook v. Flynn*, 475 U.S. 560, 569 (2005) (holding that appearing in shackles or prison garb "suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'"; *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("The sight of shackles and gags might have a significant effect on the jury's feelings about the defendant"); *People v. Cohn*, 160 P.3d 336, 341 (Colo. App. 2007) ("[P]otential forms of dealing with disorderly defendants, such as binding and gagging them, or employing the contempt power, may be unduly prejudicial"); *People v. Summitt*, 132 P.3d 320, 328 (Colo. 2006) (Martinez, J., dissenting). *Eaddy v. People*, 174 P.2d 717, 718 (Colo. 1946) ("[T]he presumption of innocence requires the garb of innocence . . .").

Forcing Mr. Hoang to appear in restraints sent a message to the jury that he was a dangerous criminal; a message that, as many courts have noted, has great potential to interfere with their ability to operate as a neutral entity

and create undue prejudice toward Mr. Hoang. Therefore, the shackles undermined the fundamental fairness of his trial and created actual prejudice against Mr. Hoang. Even though the negative effect has enormous constitutional implications, it is not immediately apparent on review of the trial transcript alone.

> The statement that shackling is inherently prejudicial "is rooted in our belief that the practice will often have negative effects, but – like the consequences of compelling a defendant to wear prison clothing or of forcing him to stand trial while medicated – those effects cannot be shown from a trial transcript."

Deck, 544 U.S. at 636 (Citing *Riggins v. Nevada,* 504 U.S. 127, 137 (1992)).

Because of the sensitive nature of this fundamental right, reliance on statements in the transcript alone may not be sufficient to protect the defendant against unwarranted governmental infringement. The court must first make a finding of a compelling interest to shackle the defendant during the trial. Once the court has made such a finding, it may take precautionary measures to insure the defendant's right is not unduly encumbered during trial. *United States v. Wardell*, 591 F.3d 1279, 1294 (10th Cir. 2009) For example, a court may be able to reduce the prejudicial inference by admonishing the jury or implementing a strategy to block the view of the jurors and carefully escort the defendant outside the viewing of the jury.

In the present case, the court entirely failed to make the constitutional

finding of a compelling governmental reason for shackling the defendants and took no steps to reduce the prejudice. The court failed to issue any instructions or take any precautions to protect Mr. Hoang. Rather, the record clearly reflects efforts by the prosecutor, defense counsel and the bailiff to notify the court of the concern and the fact that the shackles could be heard. Therefore, Mr. Hoang suffered the inherent prejudice that accompanies the appearance in prison garb or shackles; that of placing the idea that he is already a criminal in the jurors' minds.

As an aside, the case law relied upon by the court of appeals simply is inapplicable to the present case. These decisions are all factually distinguishable, do not support what the court claims they support or do not apply the same analysis. *Slip Op.* at 34. These cases simply do not stand for the clear proposition that there must be evidence that a juror actually saw a defendant in the restraints.

a. No Compelling Governmental Interest.

The shackling of Mr. Hoang is reversible error because the trial court did not articulate any specific reasons that would justify the shackles. The court failed to balance any governmental interest against the inherent prejudice, and the court merely deferred to the bailiff without conducting

any independent determination.

Multiple circuits, including the Ninth, Tenth, and Eleventh, make it clear that the judge is not permitted to merely rely on the recommendations of the bailiff or other outside authority without conducting its own evaluation and balancing of state interest against potential prejudice to the accused. *See United States v. Wardell*, 581 F.3d 1272 (10th Cir. 2009); *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)

"Trial courts may not shackle defendants routinely, but only if there is a particular reason do so." *Deck*, 544 U.S. at 627. *Deck* has made clear that the district court must identify particular security concerns, related to the defendants on trial, that justify shackling. *Id.* at 2014-15. Unless compelling necessity demands restraint, shackling or other bonds violates a defendant's right to a fair and impartial trial as protected by the Sixth and Fourteenth Amendments of the United States Constitution. 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.* The district court should also consider " the [defendant's] record, the crime charged, his physical condition, and other available security measures. "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 instant case, the district court made no specific findings and entered no articulable reasons for the restraints on the record. Thus, the lack of finding a compelling interest on the record alone is sufficient to require a reversal. Moreover, the court failed to exercise its own judicial discretion and instead relied solely upon the bailiff's discretion. The court, while ordering the shackles to remain on Mr. Hoang, stated "[w]ell, I've spoken with the deputies. They feel that it's necessary, and I'm going to defer to them." (Tr. Vol. X, p. 5, ln. 13-15). The court further stated that it did not know the reasons for shackling Mr. Hoang and stated that it did not have access to that information. (Tr. Vol. X, p. 7, l. 4-8).

The Tenth Circuit held that a trial court properly applied a "shock belt" to a defendant when it "clearly articulated its reasons." *United States v. Wardell*, 581 F.3d 1272 (10th Cir. 2009). It further stated that the use of restraints will not pose a constitutional problem when "(1) the court makes a defendant-specific determination of necessity resulting from security concerns; and (2) it minimizes the risk of prejudice . . . ." *Id.* The trial court in the present case failed to take either step.

Colorado courts have also addressed and settled this issue. In *People v. Knight*, 167 P.3d 147 (Colo.App. Div. 1 2006) the defendant wished to have defense witnesses appear in street clothes and without visible shackles. *Knight*, 167 P.3d at 154. The court of appeals found that the trial court abused its discretion when "the court denied [the request] without *expressly* considering whether [there would be a threat that would] jeopardize security, try to escape, or otherwise disrupt the trial" and "[b]ecause the court did not recognize the potential prejudice to [the defendant] or justify its decision by reference to *specific risks* posed." *Knight*, 167 P.3d at 154-55 (emphasis added).

b. Actual harm.

Mr. Hoang need not point to exactly what prejudice he suffered due to

the shackles, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 636. Thus, Mr. Hoang does not need to prove exactly what prejudice he suffered, it is sufficient that he was ordered to wear the shackles without adequate justification.

Therefore, because the constitution prohibits 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 defendant 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. Hoang is a violation of his right to due process and his conviction should be reversed. *Deck*, 544 U.S. at 629.

CONCLUSION

For the reasons set forth above, supported by facts, case law and statute, Mr. Hoang requests that his conviction be reversed.

DATED January 4, 2013.

Respectfully submitted,

Kimberly K. Caster, #31606
1950 W Littleton Blvd, Ste 117
Littleton, CO 80120
(303) 870-7885

Attorney for the Petitioner

CERTIFICATE OF MAILING

I certify that on January 4, 2013, a true copy of the foregoing was mailed, postage prepaid, to the following:

Office of the Attorney General
1525 Sherman St Fl 5
Denver, CO 80203