

SUPREME COURT, STATE OF COLORADO
101 W. Colfax Avenue, Suite 800
Denver, CO 80202

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SUPREME COURT

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OF THE STATE OF COLORADO
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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

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RESPONDENT:
PEOPLE OF THE STATE OF COLORADO

Attorney: Kimberly K. Caster, #31606
Contract Attorney for the
Office of Alternate Defense Counsel

Case Number:
2012SC219

Address: 1950 W Littleton Blvd., Suite 117
Littleton, CO 80120

Phone Number: (303) 303-870-7885

Fax Number: (303) 683-2342

REPLY 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 5,405 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 AUTHORITIES

Cases

<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	14
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	45
<i>Coe v. Thurman</i> , 922 F.2d 528 (9 th Cir. 1990).....	13
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005)	passim
<i>DeLancy v. Caldwell</i> , 741 F.2d 1246 (10 th Cir. 1984).....	13
<i>Eaddy v. People</i> , 174 P.2d 717 (Colo. 1946).....	40
<i>Gonzalez v. Pliler</i> , 341 F.3d 897 (9th Cir. 2003).....	42
<i>Harris v. Champion</i> , 15 F.3d 1538 (10 th Cir. 1994)	12, 14, 21, 22
<i>Holbrook v. Flynn</i> , 475 U.S. 560 (2005)	39
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970)	40
<i>Liggett v. People</i> , 135 P.3d 725 (Colo. 2006).....	35
<i>Masters v. People</i> , 58 P.3d 979 (Colo. 2002).....	35
<i>Medina v. People</i> , 114 P.3d 845 (Colo. 2005).....	35
<i>Peltz v. People</i> , 728 P.2d 1271 (Colo.1986).....	23, 24, 28
<i>People v. Backus</i> , 952 P.2d 846 (Colo. App. 1998).....	24, 29
<i>People v. Backus</i> , 952 P.2d 846 (Colo.App. 1998).....	25
<i>People v. Barela</i> , 689 P.2d 689 (Colo. App. 1984)	23
<i>People v. Cohn</i> , 160 P.3d 336 (Colo. App. 2007)	40
<i>People v. Darlington</i> , 105 P.3d 230 (Colo. 2005)	35
<i>People v. Dillon</i> , 655 P.2d 841 (Colo.1982).....	39
<i>People v. Hernandez</i> , 829 P.2d 392 (Colo. App. 1991)	24, 25, 29
<i>People v. Johnson</i> , 30 P.3d 718 (Colo. App. 2000).....	22
<i>People v. Knight</i> , 167 P.3d 147 (Colo. Ct. App. 2007)	39, 42, 44
<i>People v. Lesney</i> , 855 P.2d 1364 (Colo.1993).....	23, 24, 28
<i>People v. McGlotten</i> , 166 P.3d 182 (Colo.App. Div. 3 2007).....	13, 14, 15, 17
<i>People v. Montoya</i> , 942 P.2d 1287 (Colo. App. 1996).....	22, 23, 26
<i>People v. Quintana</i> , 665 P.2d 605 (Colo. 1983).....	35
<i>People v. Reynolds</i> , 159 P.3d 684 (Colo.App. Div. 1 2006)	25
<i>People v. Rios</i> , 43 P.2d 726 (Colo.App. 2001).....	13, 14, 15, 21
<i>People v. Summitt</i> , 132 P.3d 320 (Colo. 2006).....	35, 40
<i>People v. Welsh</i> , 80 P.3d 296 (Colo. 2003)	35
<i>People v. Whittiker</i> , 181 P.3d 264 (Colo.App. Div. 3 2006)	14, 17, 18
<i>Rheuark v. Shaw</i> , 628 F.2d 297 (5 th Cir. 1980)	13
<i>Riggins v. Nevada</i> , 504 U.S. 127 (1992).....	41
<i>Simmons v. Reynolds</i> , 898 F.2d 865 (2d Cir. 1990).....	15
<i>United States v. Durham</i> , 287 F.3d 1297 (11th Cir. 2002).....	42
<i>United States v. Johnson</i> , 732 F.2d 379 (4th Cir. 1984).....	15
<i>United States v. Lasker</i> , 481 F.2d 229 (2nd Cir. 1973)	25
<i>United States v. Smith</i> , 94 F.3d 204 (6th Cir. 1996).....	15
<i>United States v. Wardell</i> , 581 F.3d 1272 (10th Cir. 2009)	42, 43, 44

Statutes

C.R.S. § 18-1-405	24
-------------------------	----

C.R.S. § 16-7-101 23
People v. Gonzales, 601 P.2d 1366 (Colo. 1979) 23

Rules

Rule of Criminal Procedure 14 23

Constitutional Provisions

Colo. Const., art. II, §25 12, 38
U.S. Const. amend XIV 38
U.S. Const. Amend. V 12, 38

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 were 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

Mr. Hoang stands on his Statement of the case as set forth in his Opening Brief. Any additional or relevant facts will be discussed in the argument below.

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 an important 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*

The standard of review is not in dispute between the Petitioner and Respondent. The proper standard of review is de novo, with all doubts resolved in favor of preserving the appellate right of the Petitioner. *Wend v. People*, 235 P.3d 1090, 1094 (Colo. 2010); *People v. Glaser*, 250 P.3d 632, 636 (Colo.App.Div. 3 2010); *People v. Whittiker*, 181 P.3d 264, 270-71 (Colo.App. Div. 3 2006) (quoting *Peterson v. People*, 113 P.3d 706, 708 (Colo. 2005)); *United States v. Dirden*, 38 F.3d 1131, 1135 (10th Cir. 1994).

b) *Issue Preserved for Appeal*

Issue preservation is established by an appellant timely filing the notice of appeal and pursuing the appeal. *People v. Whittiker*, 181 P.3d 264, 270-71 (Colo.App. Div. 3 2006). There is no dispute in this case that Mr. Hoang properly filed the notice of appeal and timely pursued the appeal.

In their Answer Brief, the People attempt to muddy this matter by stating that a review of the record in the present case failed to show that Mr. Hoang asserted that the appellate delay violated his right to due process and a speedy appeal. (Answer Brief at 13). The case law does not support any additional requirements for assertion of the right to a speedy appeal beyond the filing of a Notice of Appeal.

To require an appellant to assert a violation of his speedy appeal right in the trial court record results in a non sequitur. Specifically, the People's requirement would demand that an appellant would predict the future delay on appeal and state such in the trial court or the appellate court before it has occurred. The claim would never be ripe before the trial court to rule upon nor is there a legal mechanism for the appellate court to consider a delay on appeal before it occurs. Therefore, the People's allusion to some required additional record support for an assertion of his right to a speedy appeal is a mere distraction and an attempt to cast doubt upon the legitimacy of Mr.

Hoang's claim and should be disregarded by this Court.

c) *Legal Analysis*

The central dispute on this issue hinges upon how this Court should evaluate prejudice when an appellant asserts that his right to a speedy appeal has been violated under *Barker v. Wingo*, 407 U.S. 514 (1972). The court of appeals' opinion in this case was particularly aberrant and disregarded the methods established by the federal courts and prior court of appeals panels for evaluating the due process violation caused by an excessive delay on appeal. While the court referred to 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 due process of law. *Slip op.* 5-7.

Colorado case law and federal case law employ different standards. See *Opening Brief* at 14-23 for a comparison of state and federal law: *Doggett v. United States*, 505 U.S. 647, 655-57 (1992); *Barker v. Wingo*, 407 U.S. 514 (1972); *Harris v. Champion*, 15 F.3d 1538, 1557 (10th Cir. 1994); *DeLancy v. Caldwell*, 741 F.2d 1246, 1247 (10th Cir. 1984); *People v. Rios*, 43 P.2d 726, 732 (Colo.App. 2001); *People v. Whittiker*, 181 P.3d 264 (Colo.App. Div. 3 2006); *People v. McGlotten*, 166 P.3d 182 (Colo.App. Div. 3 2007); *People v. Brewster*, 240 P.3d 291 (Colo. App. 2009).

Because the state constitutional right to a speedy appeal asserted in this case is founded upon federal constitutional rights, the federal standard should be adopted and applied in this case.

The four *Barker* factors established by the United States Supreme Court include: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion or non-assertion of his right, and (4) prejudice to the defendant.

Our Tenth Circuit Court of Appeals adopted a clear and comprehensive standard by which the delay in the state courts would be judged to determine a violation of the federal constitutional right to a speedy appeal. *See Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994). In *Harris*, the court used a traditional analysis of the first three *Barker* factors and adopted a modification of the fourth factor. Importantly, the court stated that no single *Barker* factor is determinative. *Harris*, at 1562.

Our state court of appeals has eroded the balancing test set out in *Barker v. Wingo* and has inconsistently weighed factors against petitioners in a manner that does not comport with the jurisprudence of our federal circuit and the United States Supreme Court. Therefore, clarifying the balancing

nature of the *Barker* factors as applied to a violation of a right to a speedy appeal is a ripe determination for this honorable Court.

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 there was more than sufficient delay in completing the record on appeal to trigger further analysis under *Barker*. Therefore, the Court of Appeals was required to engage in a full analysis of the remaining *Barker* factors.

For purposes of clarification, the People are mistaken in their Answer Brief when they claim it was only 3 years and 4 months of a delay in completing the record. The notice of appeal was filed on July 26, 2006. (See COA Register of Actions). The record was first filed in the court of appeals on July 21, 2008 after two years of extensions of time were requested by the court reporter. (See COA Register of Actions and affidavits of court reporter). Following an extensive review of the record, Mr. Hoang and the co-defendant filed a motion to remand the case to correct the record on January 15, 2009. The court of appeals was slow to rule on the motion and Mr. Hoang had to file a motion for expedited ruling on the motion for remand on February 17, 2009. The motion for remand was not

granted until March 3, 2009. The trial court was extremely slow to set a hearing date and did not set one until November 13, 2009 which was continued to January 15, 2010. On February 2, 2010, Mr. Hoang filed a motion to supplement the record with the corrected record. The supplemental record was not filed by the trial court reporter in the court of appeals until February 23, 2010. Mr. Hoang asked for additional time to review the extensive record up to June 1, 2010. During this time, counsel was notified by the district attorney that he discovered additional missing portions of the record requiring counsel to file an additional motion to supplement the record. The motion was granted on June 21, 2010, but it is unclear if the supplement was ever officially filed and certified in the court of appeals until an order was issued certifying the record on April 18, 2011. Therefore, the accurate amount of delay in completing the record for review was actually 4 years and 4 months, well beyond the excessive and inordinate standard under *Barker*.

The People also allude to the court's willingness "to entertain a remand to correct the record on May 30, 2008." (Answer Brief at 16). However, that allusion was taken out of the context in which the court meant. The court made this comment after at least 10 different affidavits were filed by court reporters seeking additional time to complete their

transcriptions. Specifically, the court stated that “if further extensions of time to file the record are required, this Court would entertain a motion to remand to the district court to settle the record.” (See Order dated May 30, 2008). This suggestion by the court was only for the purpose of completing the transcripts in the possession of the court reporter, not to correct the record for errors and omissions which was the subject matter of the January 15, 2009 motion for remand filed by the defendant and co-defendant. Shortly after the court issued this order (which also contained a second sanction against the court reporters), the record was filed in the district court on July 21, 2008. Therefore, any attempt by the People to place blame upon the appellant for this lapse in time is gravely misplaced and should not be attributed to Mr. Hoang.

There was subsequent excessive delay in the court of appeals caused by the government in filing the Answer Brief. The Answer Brief was originally due on December 20, 2010, but it was not filed until July 29, 2011, a delay of over 8 months. (See COA Register of Actions). Here, in the Supreme Court, the Answer Brief was due February 8, 2013 but was filed April 30, 2013 over Mr. Hoang’s objection to the 3 month delay requested by the People.

Consequently, based upon the over 4 year delay in merely completing the record for review under *Doggett v. United States*, *Barker v. Wingo* and *Harris v. Champion*, a violation of due process is presumed in this case and Mr. Hoang made the requisite showing to trigger an analysis of the remaining *Barker* factors. *Doggett v. United States*, 505 U.S. at 656; *Barker v. Wingo*, 407 U.S. at 531; *Harris v. Champion*, 15 F.3d at 1562. The People have a burden to show that the reason for delay the inordinate and prejudicial delay was based upon a compelling state interest to overcome the presumption of prejudice.

2. Reason for 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 strict scrutiny constitutional analysis. Once inordinate delay was determined, the court of appeals was required to consider the reason for delay and the People had the burden to establish the compelling state interest for the delay. *See 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”).

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). Government action in prosecuting an appeal can be measured on a spectrum from diligent prosecution to official negligence to bad-faith delay. *Doggett* at 656-57. *Barker* made it clear that different weights should be assigned to different reasons for delay. *Ibid.* Although deliberate intent to harm the accused's defense weighs much heavier than official negligence, it still tips the scales of prejudice to the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal appeal once it has begun. (See *Doggett* at 657 for its discussion in the context of a speedy appeal). The prejudice presumed from official negligence also weighs heavier because it compounds over time as the presumption of evidentiary prejudice grows. *Id.* Therefore, the longer the delay, the greater is its threat to the fairness of the petitioner's appeal.

Delays in the preparation of transcripts and exhibits are attributable to the government. When the government's official negligence or even bad-

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

The first error occurred when the court of appeals simply refused to consider this prong of *Barker*. The court 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”).

The second error occurred when the People failed to assert during this appeal any compelling state interest. (See both Answer Briefs filed in this case). The record does not support, nor can the People demonstrate, a

compelling state interest for causing the unconscionable violation of Mr. Hoang's right to a speedy appeal. The record from the court of appeals is completely devoid of any evaluation of the indolent reasons offered by the court reporter for the reason for the delay.

During the time the court reporters were completing the transcripts, the court reporters filed at least ten different affidavits requesting time to complete the transcripts. Never once did the reporters or the People assert a significant reason for the delay, rather the reporters only offered obscure allusions to a heavy workload and some potential technical difficulty. The court of appeals issued an order stating that the requests for time were made without good cause and reduced payment of the transcripts to 90% of the regular fee. (See Order dated February 14, 2008). This penalty did not change the behavior of the court reporters nor could the reporters offer any additional or significant reason for the delay and continued to request more time to complete transcripts. Following the final request for time, the court issued an order finding no good cause shown and reduced payment again to 50% of the regular transcript fee as a sanction for failure to timely file the transcripts. (See Order dated May 30, 2008 and Order dated December 18, 2008). Because sanctions were imposed and the court made a finding that no good cause was shown for the delay, the delay rose from official

negligence to bad-faith delay and no possible compelling state interest can be demonstrated for the violation of Mr. Hoang's right to a speedy appeal.

Therefore, because delays in the preparation of transcripts were attributable to the bad-faith of People and the People did not rebut the presumption of prejudice by demonstrating a compelling state interest for the delay, this factor weighs in Mr. Hoang's favor. *See McGlotten*, 166 P.3d 182 at 185-86; *People v. Whittiker*, 181 P.3d 264 (Colo.App. Div. 3 2006). Consequently, he is entitled to relief.

3. Assertion of the Right

It is undisputed that Mr. Hoang's filing of the notice of appeal properly asserted his right to a speedy appeal. Thus, this third factor weighs heavily in Mr. Hoang's favor. *See People v. Whittiker*, 181 P.3d 264 (Colo.App. Div. 3 2006).

In their Answer Brief, the People incorrectly assert that Mr. Hoang was required to expressly invoke his right to a speedy appeal and incorrectly claim that Mr. Hoang "did not complain about the delay in the appeal until November of 2010, when he filed his Opening Brief in the court of appeals." (Answer Brief at 16).

First, case law simply does not support the notion that defendants are required to expressly invoke their right to a speedy appeal beyond the filing of the notice of appeal. The People did not offer any legal basis for this assertion in their Answer Brief nor could counsel discover any such support for their premise. Therefore, this Court should refuse to adopt any such standard.

Second, the People are incorrect in their assertion and evaluation of the appellate record. Mr. Hoang actually asserted his right to a speedy appeal when he filed a motion for contempt against the delinquent reporters. (See Motion For Extension Of Time And Motion For Contempt Citation, dated May 13, 2008). Mr. Hoang made a record of the excessive amount of time that had passed in preparing the record and demanded sanctions against the reporters in an effort to assert his right to a speedy appeal. The People gravely misstate the record here in an effort to discredit Mr. Hoang's claim and should be entirely disregarded by this Court. Therefore, this factor weighs in Mr. Hoang's favor and he is entitled to relief.

4. Prejudice

In evaluating the prejudice to a defendant under the speedy trial analysis, the United States Supreme Court stated that 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) (applying *Barker* to a speedy trial violation); *People v. Glaser*, 250 P.3d 632, 635 (Colo.App.Div. 3 2010) (applying *Doggett* to a speedy trial violation). The same analysis must be employed when evaluating a speedy appeal violation for the policy reason that the same government that convicted the defendant now engages in wanton delay in appellate proceedings, thereby violating the defendant's fundamental constitutional right to a speedy appeal. As a result, the government must be held accountable for the delay by meeting a higher threshold showing of a compelling government interest for causing the delay.

In their Answer Brief, the People argue heavily for a requirement of particularized proof of prejudice from the defendant in a claim for a speedy trial violation. (Answer Brief at 17). The People misstate Mr. Hoang's argument as to the appropriate measure of prejudice. The People color Mr. Hoang's argument as not ever requiring a showing of particularized prejudice. (Answer Brief at 17). However, the People only quote a portion of the sentence from the Opening Brief. Rather, Mr. Hoang argues that proof of "particularized prejudice" is measured differently in each case,

particularly those in which a rebuttable presumption of prejudice exists. (See Opening Brief at 31 citing *Doggett v. United States*, 505 U.S. 647, 657 (1992)). The standard that should be adopted by this Court should be one that weighs all *Barker* factors and moves away from the court of appeals' trend to demand that a particularized prejudice be the ultimate determining factor. The People argue that a balancing approach that provides for a presumption of prejudice would allow any delay in an appeal to result in a new trial. (Answer Brief at 18). This is simply not the case and is an imagined result not noted in any case law.

There are two distinct avenues to reach the requisite prejudice requirement. The first is described in *Doggett v. United States*, 505 U.S. 647 (1992) as a rebuttable presumption of prejudice when the delay is caused by the government. Here, the particularized prejudice is found in the action of the government causing an inordinate delay without a compelling reason for the delay. The government may rebut the presumption by demonstrating a compelling reason for the delay that goes beyond poor management or underfunding of administrative personnel.

The second avenue to meet the prejudice requirement is found in cases where the rebuttable presumption does not arise or is rebutted as

described by our Tenth Circuit Court of Appeals in *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994). When there is no rebuttable presumption of prejudice, the petition may show several forms of prejudice, but the “most serious form of prejudice [is] impairment of the grounds for appeal or the grounds for defense in the event of a retrial.” *Harris*, at 1563-64. This form of prejudice is also the most difficult to prove because “time’s erosion of exculpatory evidence and testimony can rarely be shown.” *Id.* at 1564 quoting *Doggett*. Therefore, when proving this form of prejudice, the petitioner also must assert a colorable state or federal claim that would warrant reversal of his or her conviction. *Id.*

The petitioner may also demonstrate prejudice as constitutionally cognizable anxiety awaiting resolution of the appeal. *Id.* The anxiety must relate to the period of time that the appeal was excessively delayed. Because the court does not look to the anxiety related to the time to adjudicate a meritless appeal, a petitioner must once again assert a colorable state or federal claim that would warrant reversal of the petitioner's conviction or reduction of sentence to an amount of time less than that taken to adjudicate the appeal. *Id.* at 1565.

The final form of prejudice a petitioner may suffer is oppressive incarceration pending appeal. *Id.* The petitioner must make a particularized showing that the incarceration is oppressive beyond that experienced by others awaiting the outcome of their appeals. That is, the petitioner must show some oppressiveness unique to his or her situation that is directly attributable to the excessive delay in adjudicating the petitioner's appeal. *Id.*

In all three forms of prejudice under the second avenue of proof, the petitioner need make only a colorable and particularized showing of prejudice and it must arise during the period of appellate delay that the court finds to be excessive if it is to factor into the *Barker* balancing test. *Id.*

To require no demonstration of prejudice would render the fourth prong of *Barker* meaningless. Therefore, under certain circumstances, such as the present case, a rebuttable presumption of prejudice may arise to satisfy the petitioner's burden to show particular prejudice.

In the present case, as demonstrated under the time for delay prong and the reason for delay prong, the 4 year delay in completing a record for appellate review created a rebuttable presumption that Mr. Hoang suffered constitutional prejudice and his right to a speedy appeal has been violated. The prejudice suffered during the inordinate delay was far longer than if the

appeal proceeded in a timely manner. The People have not offered any argument to rebut this presumption and have disregarded the record support for the unconstitutional delay. (Answer Brief at 23-24). Rather, as discussed above, orders from the court of appeals sanctioned the court reporters for their negligence and belligerence in completing the transcripts and the government delay rose to the level of bad-faith action demanding a reversal of Mr. Hoang's conviction.

Additional prejudice was also demonstrated under the second avenue for proving prejudice. The lack of reliability of the transcripts actually presented difficulty in presenting an appeal on Mr. Hoang's claim for unconstitutional shackling during trial. The record contained an unusual number of unrecorded conferences that occurred in the courtroom during the trial. In their Answer Brief, the People claim that this was intentional. However, the People are unable to point to any specific place in the record where either the defendant agreed to this practice or was aware of this practice and acquiesced. (Answer Brief at 19). Neither can the People demonstrate that the court announced that they would be off the record during these periods. Rather, the transcripts merely contain the bare phrase "discussion held off the record" throughout the entire trial.

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 People rely heavily upon the court's fickle memory of these events and cannot support their claim that shackling the defendants was never discussed off the record, for the obvious reason that it was off the record and unreviewable by either party or the courts. (Answer Brief at 20). Further, the People rely on the court's alleged "copious notes" to establish reliability of the reconstruction. (Answer Brief at 20). However, the judge herself admitted she did not take notes of the discussions held off the record and merely relied upon her common practice and deference to the court reporter's discretion rather than what actually occurred in the courtroom during this case. (Tr. Nov. 13, 2009 at 43). The accuracy of the reconstruction of over 50 unrecorded conversations is gravely disputed where the principle parties to the reconstruction are only the judge's and the prosecutor's faded memories, while original defense trial counsel were not present.

Additionally, a prompt resolution of Mr. Hoang's claims would have reduced his anxiety and unfair incarceration. The reconstruction hearing occurred on November 13, 2009, three years after the trial occurred, the

record was not certified as complete and briefing did not begin until over 5 years after the trial occurred. Normal timely appeals proceed to briefing within one year. Therefore, Mr. Hoang suffered that treacherous anxiety associated with an enormous delay in the appellate process that other defendants appealing similar issues would not have faced. Therefore, under these circumstances, this case demands an evaluation of the *Harris* and *Rios* factors, contrary to the *Whittaker* decision. (See Opening Brief 32-35).

Therefore, the analysis of the four *Barker* 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 rendered Mr. Hoang’s direct criminal appeal a “meaningless ritual” under the constitution and his 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 were 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

The People and the Mr. Hoang agree that the standard of review is for

abuse of discretion. (Answer Brief at 29-30). As demonstrated in this case, the court's "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 at 99, Vol. XI at 4-7; 44-49, Vol. XII at 330).

In their Answer Brief, the People argue that this issue was not properly preserved. This argument is without merit and should be disregarded. Further, the People are incorrect that the standard to be applied should be plain error. This issue was raised and ruled upon in the trial court and ruled upon in the court of appeals. There was no dispute as to the issue preservation in the court of appeals. The People waived this argument by not preserving it in the court of appeals. The People try to further discredit Mr. Hoang by stating that record cites were not provided in the Opening Brief. (Answer Brief at 32). However, the People's assertion merely demonstrates that counsel for the government did read the following two

pages where specific cites and quotes were provided. (Opening Brief at 37-39). Therefore, the issue was properly preserved and is ripe for review in this Honorable Court.

C. Legal Analysis

A. Inherent prejudice.

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. If the jury views Mr. Hoang as a criminal, the presumption of innocence is disregarded and the burden of proof shifts to the defendant to prove his innocence. 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)).

Therefore, reliance on statements in the transcript alone may not be

sufficient to protect the defendant's constitutional rights.

The court in the instant case took no steps to reduce the inherent 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. The People are simply incorrect that this issue was not preserved and interpret the scant record only to their benefit. Therefore, their argument fails.

B. No articulable threat.

The shackling of Mr. Hoang is reversible error because the trial court did not articulate any specific reasons that would constitutionally justify the shackles. The court failed to balance any state interest against the inherent prejudice, and the court merely deferred to the bailiff without conducting any independent determination. The People assert that "the trial court, in exercising its discretion, determined the shackles were necessary and thus did not abuse its discretion." (Answer Brief at 33-34). However, the only


support for this contention is an out of court discussion with the deputies. (Answer Brief at 33, citing 4/3/05, p.5). The court did not enter independent findings on the record that there was some articulable and essential state interest the court was trying to protect, such as physical security, escape, or courtroom decorum. Because the People do not adequately address this grave error in their Answer Brief, Mr. Hoang stands on his argument as set forth in his Opening Brief and requests that his conviction be reversed.

CONCLUSION

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

DATED June 11, 2013.

Respectfully submitted,



Kimberly K. Caster, #31606
1950 W Littleton Blvd, Ste 117
Littleton, CO 80120
(303) 730-1963
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that on June 11, 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

