H

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE THE MATTER OF JAIME MEJIA JASSO, On Habeas Corpus.	)) NO. _____) (Filed in Conjunction) with appeal in) H028593)) (Monterey Co.) Superior Court) No. SS021615 B))

PETITION FOR WRIT OF HABEAS CORPUS
AND BRIEF IN SUPPORT THEREOF

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Under the S11.ixth District Appellate
Program Assisted Case System

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	) Superior Court
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PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE CONRAD RUSHING, PRESIDING JUSTICE OF THE COURT OF APPEAL, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Petitioner, Jaime Mejia Jasso, by and through his attorney, Ruth McVeigh, respectfully petitions this court for a writ of habeas corpus, and by this verified petition sets forth the following facts and causes for the issuance of said writ:

I.

Petitioner is presently unlawfully confined by the Director of Corrections at the California State Prison in Delano, California. On March 16, 2005, in case number SS021615 B, the Monterey County Superior Court unlawfully imposed upon petitioner a sentence of 26 years to run consecutively to a life term petitioner was then serving.

II.

This petition is being filed in this court pursuant to its original habeas corpus jurisdiction. (Calif. Const., Art. VI, sect. 10.)

III.

At present, petitioner's direct appeal is pending before this court in H028593. Since this petition presents collateral evidence that is outside the record on appeal, it is necessary to proceed with the instant petition in conjunction with the direct appeal. Other than his pending direct appeal, this is the sole legal proceeding in which petitioner is challenging his conviction.

IV.

In order to avoid unnecessary duplication, petitioner will rely on the record on appeal, which has been filed in his attendant appeal. Accordingly, petitioner respectfully requests that this court take judicial notice of the transcripts, files, briefs, motions, and records in H028593. (Evid. Code sects. 452, subd. (d)(1), 453, & 459.)

V.

On October 3, 2002, the district attorney of Monterey County filed an amended information charging petitioner with the following offenses: Counts I, III, and V alleged that on or about June 2001, June-July 2001, and June-August 2001, respectively, petitioner conspired to commit in violation of Penal Code section 182, subdivision (a) the crimes of transportation for sale of controlled substances from one county to a noncontiguous county in violation of Health & Safety Code section 11352, subdivision (b), and bringing drugs into a state prison in violation of Penal Code section 4573; Counts II and IV alleged that on July 15, 2001 and August 18, 2001, respectively, petitioner transported for sale a controlled substance to a noncontiguous county in violation of Health & Safety Code section 11352, subdivision (b). The amended information further alleged that petitioner had suffered one prior "strike" conviction within the meaning of Penal Code section 1170.12, subd. (c)(1). (Clerk's Transcript [hereinafter "CT"] 18-29.[1])

On March 10, 2005, after a bifurcated four day trial, a jury convicted petitioner of all the substantive charges. (CT 67-74.) On March 16, 2005, the trial court found true the prior strike conviction allegation. (CT 75; Reporter's Transcript [hereinafter "RT"], Vol. V, 1004-1005.)

On March 16, 2005, the trial court sentenced petitioner as follows: as to Count II, the

[1] The Clerk's Transcript consists of only one volume.

trial court imposed the upper term of nine years, which it doubled to eighteen years pursuant to Penal Code section 1170.12, subdivision (c)(1); as to Count I, one third the middle term of six years, i.e., two years, which it doubled to four years pursuant to Penal Code section 1170.12, subdivision (c)(1) to be served consecutively to Count II; as to Count IV, one third the middle term of six years, i.e., two years, which it doubled to four years pursuant to Penal Code section 1170.12, subdivision (c)(1), to be served consecutively to Count I; and, as to Counts III and V, the terms were stayed pursuant to Penal Code section 654. Thus, the trial court imposed a total fixed term of 26 years, and ordered petitioner to serve the term consecutively to the life term he was presently serving. (CT 75-77; 79-80; RT, Vol. V, 1004-1009.)

On March 16, 2005, petitioner filed a timely notice of appeal. (CT 78.)

VI.

At the trial in this case, petitioner was deprived of due process of law, a fair trial, and the effective assistance of counsel guaranteed to him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, sections 7 and 15 of the California Constitution. Petitioner was deprived of due process of law and a fair trial by the trial court's unjustified and unsupported forcing of petitioner to appear throughout his jury trial in a white Department of Corrections jumpsuit, as well as in visible hand and feet shackles. The ineffective performance of defense counsel was committed by: (1) his failure

to request that petitioner's hands and feet be unshackled during his jury trial or that petitioner's hands be unshackled to permit him to take notes during his jury trial or that efforts be made to minimize the jury's perception of petitioner's shackles; (2) his failure to request that petitioner be dressed in civilian clothes, rather than a prison jumpsuit, during his jury trial; and (3) his failure to make a Penal Code section 1118.1 motion for judgment of acquittal as to two of the three conspiracy allegations or to request the trial court instruct the jury that it was a question of fact for the jury to determine petitioner's guilt or innocence as to whether he committed one overall conspiracy or the alleged multiple separate conspiracies.

VII.

With respect to petitioner's claim that he was denied due process of law, the facts supporting this allegation are as follows:

1). The trial court forced petitioner to be restrained throughout his jury trial: petitioner's hands were handcuffed and locked onto a metal "belly chain" around the waist of his white Department of Corrections jumpsuit; his ankles were locked to metal cuffs that were linked together by a metal chain approximately fourteen inches long. (Exhibits "A" & "B.")

2.) The shackles made noise when petitioner moved. The jury could both see and hear petitioner's shackles throughout his jury trial. (Exhibits "A" & "B.")

3.) There is no reference in the record on appeal to petitioner wearing a prison jumpsuit and only one reference to petitioner's shackling. During the reading of jury instructions, the trial court instructed the jury as follows: "Now, I can tell you that as the Department of Correction's policy, everyone who is transported to court is transported in restraints. That applies to everybody and it has absolutely nothing to do with whether the defendant is guilty or not guilty, and it should not be considered at all on that question." (CT 86; RT 580.) The trial court made no findings of fact specific to petitioner nor provided any further explanations to justify its imposition of shackles upon petitioner throughout his jury trial.

4.) At the time of the trial of this case, it was a matter of routine court policy in the Monterey County Superior Court to shackle California Department of Corrections inmates who appeared in court, whether for routine court appearances or for jury trial. (Exhibit "B.")

5.) Petitioner was not involved in any violent incidents, nor made any threats of violence, prior to his jury trial that would have justified the imposition of hand and feet restraints upon him. Petitioner made no attempts to escape before or during his jury trial. Petitioner was not disruptive during any of his pretrial court appearances or during his jury trial. (Exhibits "A" & "B.")

6.) The feet shackles made it difficult for petitioner to walk and were noisy. Petitioner was escorted into the courtroom through its front doors and had to walk past the jurors as

they assembled outside the courtroom's doors in the hallway. Petitioner also used the public restroom in this hallway. He was escorted into the restroom wearing the shackles while some jurors from his trial were present in the restroom. Petitioner found it very embarrassing to be seen and heard wearing shackles in front of the jury. (Exhibit "A.")

7.) Petitioner was shackled for so long each day, and forced to walk in the shackles from the prisoner holding area through the courthouse parking lot to the courtroom and back, that his ankles became injured by the shackles, which injuries bled. While in Monterey County for his jury trial, petitioner was housed at the Salinas Valley State Prison. He was treated in the prison infirmary for the injuries to his ankles caused by the metal cuffs. (Exhibit "A.")

8.) Petitioner did not know that he could ask to take notes during his jury trial and therefore did not ask his trial counsel or the trial court to have his hands unshackled so he could participate in his defense in that way. (Exhibits "A" & "B.")

9.) Petitioner was worried throughout his jury trial because he was facing very serious felony charges and thought "what chance did I have with the jury when I was wearing all those shackles and a prison jumpsuit." (Exhibit "A.")

VIII.

With respect to allegation (1) regarding trial counsel's ineffectiveness, petitioner did not want to be restrained at his jury trial and asked his trial counsel if he could be unshackled during the trial. Based upon petitioner's proper behavior during previous court appearances, trial counsel was unaware of any reason specific to petitioner that would have justified the trial court forcing petitioner to wear shackles at his jury trial. Nevertheless, trial counsel told petitioner it was "routine" in prison cases that all prisoners be shackled during their trials "for security reasons." Trial counsel also told petitioner that even if he were to ask the judge to unshackle him, the judge would not do it. Petitioner did not discuss removal of the shackles with any other person because, from what his trial counsel told him, he believed he was required to wear shackles to all court proceedings. (Exhibits "A" & "B.")

Trial counsel has declared that he had no tactical reasons for failing to request petitioner be unshackled at his jury trial. (Exhibit "B.")

X.

With further respect to allegation (1) regarding trial counsel's ineffectiveness, trial counsel did not ask petitioner if he wanted to take notes during his jury trial, nor did petitioner know it was possible for an accused to take notes during his trial. As a result, petitioner did not request to have his hands unshackled for this purpose, nor did trial counsel request the trial court to order petitioner's hands – or even one hand – be unshackled for this

purpose. Had petitioner known of the possibility of taking notes during his felony jury trial, he would have asked his trial counsel to make the request on his behalf. (Exhibits "A" & "B.")

The imposition of the hand shackles adversely impacted petitioner's ability to communicate with his trial counsel and to participate in his own defense. As petitioner stated in his declaration, "It's difficult to remember everything all the witnesses say and I would have liked to take notes so I could remember things I wanted to ask my lawyer about." (Exhibit "A.")

Trial counsel has declared that he had no tactical reasons for failing to request that petitioner have his hands unshackled to permit him to take notes at his jury trial. (Exhibit "B".)

X.

With further respect to allegation (1) regarding trial counsel's ineffectiveness, the jury could see petitioner's shackles, and could hear them when petitioner moved. Trial counsel did not request the trial court make any efforts to minimize the jury's perception of petitioner's shackles. (Exhibits "A" & "B.")

Trial counsel has declared that he had no tactical reasons for failing to request the trial court make efforts to minimize the juror's perception of petitioner's shackles. (Exhibit "B".)

XI.

With respect to allegation (2) regarding trial counsel's ineffectiveness, petitioner was required to wear a white prison jumpsuit throughout his jury trial. The jumpsuit had lettering on it identifying petitioner as a prisoner in the California Department of Corrections. Petitioner did not want to wear a prison jumpsuit at his jury trial and asked his trial counsel if he could wear civilian clothes. His trial counsel told him there was no point in wearing civilian clothes because the jury would know by the charges against him that he was a prison inmate. (Exhibits "A" & "B.")

Trial counsel has declared that he had no tactical reasons for failing to request that petitioner be permitted to wear civilian clothes at his jury trial. (Exhibit "B".)

XII.

With respect to allegation (3) regarding trial counsel's ineffectiveness, the prosecution alleged three separate conspiracy charges against petitioner, accusing him of conspiring to smuggle controlled substances into the state prison where he was incarcerated. The jury convicted petitioner of all three conspiracy allegations. At sentencing, trial counsel argued that the evidence showed only one overall conspiracy, rather than three separate ones, and requested therefore that the trial court not use the fact of the multiple conspiracy convictions to impose consecutive sentences. The trial court denied trial counsel's request and found the multiple conspiracy convictions were factors in aggravation warranting

consecutive sentences, which it then imposed. (Vol. V, RT 1004-1009.)

At trial, trial counsel failed to make a Penal Code section 1118.1 motion for judgment of acquittal on two of the three conspiracy allegations. Thereafter, trial counsel failed to request the trial court instruct the jury that it was a question of fact for the jury to determine whether petitioner was guilty or not guilty of a single overall conspiracy or of multiple separate conspiracies.

Trial counsel has declared that he had no tactical reasons for failing to make the motion for judgment for acquittal and for not requesting the special jury instruction. (Exhibit "B.")

XIII.

The record on appeal is not adequate to present these claims because it contains no direct information explaining why petitioner appeared at his jury trial in shackles and a prison uniform, or trial counsel's direct admissions that he had no tactical reasons for his failures to make various requests. As a result of the lack of any further evidence in the appellate record on these issues, an appeal does not provide petitioner with a plain, adequate, or speedy remedy, and a petition for a writ of habeas corpus is necessary in order to present facts not of record in the related appeal.

XIV.

Petitioner has no plain, speedy, or adequate remedy other than by this petition.

WHEREFORE, petitioner respectfully requests that this Court:

(1) Issue an order consolidating this petition with the related appeal in H028593;

(2) take judicial notice of the transcripts, files, briefs, motions, and records in H028593;

(3) issue an order to show cause to the Director of Corrections to inquire into the legality of petitioner's confinement;

(4) issue an order for the taking of such evidence as may be necessary for the proper consideration of the petition;

(5) issue the writ and vacate petitioner's judgment of conviction; and

(6) grant petitioner whatever alternative or further relief as may be appropriate in the interests of justice.

Dated:

Respectfully submitted,

RUTH MCVEIGH
Attorney for Petitioner,
JAIME MEJIA JASSO

VERIFICATION

I, Ruth McVeigh, declare:

I am an attorney admitted to practice before the courts of the State of California. I am the attorney for petitioner and am authorized to file this petition. Petitioner is unable to make the verification because he is incarcerated in Kern County, and for that reason I make this verification on petitioner's behalf. All facts alleged in the above petition or elsewhere in this document, not otherwise supported by citations to the record on appeal or the exhibits submitted to this court, are true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California and was executed on January 12, 2006**.**

Respectfully submitted,

RUTH MCVEIGH

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

STATEMENT OF FACTS

This petition arises from petitioner's reconvictions[2] of three counts of conspiring to smuggle heroin, cocaine, and marijuana into a prison during the summer of 2001 and two counts of transporting those controlled substances across county lines. During that time period, petitioner was incarcerated at Soledad State Prison [hereinafter "CTF"]. The evidence showed that CTF prison guards monitored inmate telephone calls during which petitioner and other inmates made arrangements with persons outside the prison to have three women smuggle drugs into the prison while visiting their husband-inmates. These women were named Mary Ramirez, Sarah Baucom, and Martha Silva.

Officer David Doglietto, a correctional officer assigned to the Narcotics and Crime Scene Investigative Unit at CTF, testified that prison guards monitored petitioner and inmates Danny Ramirez, Francisco "Pancho" Villa, and Storm Baucom as they made collect calls from a bank of telephones in exercise yards at the prison. (Vol. I, RT 19.) A computer maintained recordings of all the telephone calls. (Vol. I, RT 23.)

During the summer of 2001, Officer Doglietto tracked telephone calls petitioner and

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[2] This appeal arises from the retrial and reconviction of appellant on the same charges as reversed by this Court on July 16, 2004 in Case No. H025464.

Danny Ramirez made to a particular telephone number: (805) 487-8969. (Vol. II, RT 265-266.) The officer determined that the number belonged to Ruben Ambriz [hereinafter "Ruben"], who lived in Oxnard in Ventura County. (Vol. II, RT 258; 265.) In Officer Doglietto's opinion, petitioner and Ruben had an "agreement" to have "an ongoing business for them" of smuggling drugs into Soledad State Prison. (Vol. II, RT 295.) The procedure they would follow is that petitioner would telephone Ruben – the contact person outside the prison – to give him the names and telephone numbers of other inmates' wives; Ruben would follow petitioner's orders to supply the wives with specified amounts of packaged controlled substances; the wives would then smuggle the drugs into the prison while visiting their husbands. (Vol. II, RT 294-297; 348.) To keep the "business" running smoothly, petitioner would have inmates' orders for drug purchases set up ahead of the drug deliveries to the prison. (Vol. II, RT 294-295) Post office boxes were also established outside the prison for prisoners to send their checks to in payment of the drugs. (Vol. II, RT 262-263.)

Petitioner's first recorded telephone call to Ruben was on June 5, 2001. (Vol. II, RT 348.) During this call, petitioner instructed Ruben to call "Sara" at (805) 968-3335. (Vol. II, RT 269.) Officer Doglietto confirmed the phone number belonged to Sara Baucom, and that she was married to and authorized to visit inmate Storm Baucom. (Vol. II, RT 280.)

In Officer Doglietto's opinion, petitioner told Ruben to acquire drugs, deliver them to Sara in Goleta, and that Sara would then bring the drugs into the prison during a visit to

her husband, Storm Baucom. (Vol. II, RT 279-280.) Petitioner said, "[T]ell her that you're going to take something for Storm." (Vol. II, RT 270.)

Officer Doglietto testified that petitioner also said to Ruben during this call: "Okay. This is the first – because the first time is a little hard because we're going here and there, but from now on, you know, everything will be better … If this thing goes well, we'll know that we can count on you." (Vol. II, RT 275; 278.) When the prosecution asked the officer what, in his opinion, petitioner was referring to, the officer answered, "It means that they're very – very new to this, and with, brackets, 'They'll get much better.'" (Vol. II, RT 275.) Petitioner then told Ruben, "Okay, and tomorrow I'll tell you where the others are going to." (Vol. II, RT 275.)

The next day, June 6, 2001, petitioner telephoned Ruben. He told Ruben, "Look, I'm going to give you some more names." (Vol. II, RT 343-344.) He then provided Ruben with the names of Mary Ramirez and Theresa (also known as Martha Silva), and their telephone numbers. (Vol. II, RT 344-345.) These women were the wives of Soledad Prison inmates Danny Ramirez and Francisco Villa. (Vol. II, RT 344.) Petitioner instructed Ruben to supply Mary and Theresa with drugs. (Vol. II, RT 345.) Referring to Mary Ramirez, petitioner told Ruben, "[Y]ou tell her you have a package for Danny." (Vol. II, RT 345.) (Danny Ramirez was petitioner's cellmate before petitioner was transferred to the Administrative Segregation Unit. (RT 356.)) Referring to "Theresa," petitioner told Ruben she was to be supplied with

drugs "[i]n regards to Pancho [Francisco Villa]." (Vol. II, RT 345; 347.)

In this same June 6, 2001 telephone call, petitioner gave Ruben detailed instructions on how to divide up the drugs, what amounts to give to Mary and what amounts to Theresa, and how to package the drugs for concealment. (Vol. II, RT 346-348.) After petitioner gave Ruben these instructions, he told him, "That's what I want, because like that everything is fine. That way for the next time, I just tell you, you know what, the same way as the last time, address and all that save time." (Vol. II, RT 348.)

On June 27, 2001, petitioner called Ruben and told him that Sara "is waiting for the kids."(Vol. II, RT 289-290.) Ruben said he was going to "to drop off the kids, the toys for the kids." (Vol. II, RT 297.) Petitioner replied that Ruben should "take them to her wrapped up." (Vol. II, RT 297.) Officer Doglietto said they were not talking about children, but rather about controlled substances and wrapping them in latex or rubber for concealment. (Vol. II, RT 291; 297.)

In regard to this same telephone conversation, Officer Doglietto further testified, "[Petitioner then said to Ruben,] 'This is something that doesn't stop, right?' And Ruben says, 'No, you know that.' And [petitioner] says, 'There you go, buddy. That's what I want, because you know what I told you: I have a lot of guys here and they tell me when, when I tell them calm down,' and he laughs. 'I told them, I think this and I think that, and it's really good that you gave me that news, buddy.'"

District Attorney: "Which news?"

Officer Doglietto: "He's happy that Ruben is in agreement, they're going to keep doing this; it's going to be an ongoing business for them." (Vol. II, RT 295-296.)

Based upon these and other monitored telephone conversations, Officer Doglietto prepared a search warrant for Sara. (Vol. II, RT 327.) On July 15, 2001, Sara appeared at the prison and signed in to visit Storm. (Vol. II, RT 328.) During a strip search, Sara was uncooperative. (Vol. II, RT 335-337.) Prison authorities took her to a hospital where a doctor retrieved a package of bindles from her vaginal canal. (Vol. II, RT 337-341.) The parties stipulated that the various bindles contained 7.47 grams of marijuana, 49.97 grams of black tar heroin, and .92 grams of cocaine. (Vol. II, RT 342.)

On this same day, prison officials transferred petitioner to the "Administrative Segregation Unit" to isolate him from the general prison population. (Vol. II, RT 331.) This area is like "a prison within a prison" because it is much more restrictive than other housing areas at the prison: an inmate's movements are curtailed, he has no access to telephones, he may only receive visitors when separated by a glass partition, and rarely is permitted to interact with the general prison population. (Vol. II, RT 332.)

After petitioner's transfer, his former roommate, Danny Ramirez – who identified himself to Ruben as "Morelia" – took over making the telephone calls to Ruben for petitioner. (Vol. II, RT 364.) Officer Doglietto agreed with the prosecution when she asked

him, "So if somebody in that facility wants to continue an ongoing business, would they need to have someone else with access to phones do that for them?" He replied, "Yes, that is correct." (Vol. II, RT 357.)

On July 20, 2001, "Morelia" telephoned Ruben on petitioner's behalf to reassure him he was not being held responsible for petitioner's segregation. "Morelia" told Ruben, referring to petitioner, "He told me tell Ruben not to be on the lookout, that little car that he has is running fine." (Vol. II, RT 368.) Officer Doglietto testified that based upon his training and experience, "What they're telling Ruben is 'that everything is fine, you're not under suspicion, don't worry, you're going to be okay.' The little car is running fine … This is inmate Ramirez confirming that everything is going to be fine, Ruben is not a suspect, there is nothing to fear. He's saying he ["Morelia"] was – he was groomed to take over as soon as – if something ever happened; he's been receiving messages from [petitioner] and relaying them to – to Ruben that they will continue what they were doing before, that everything will be fine." (Vol. II, RT 368; 370-371.)

Based upon his investigation, Officer Doglietto prepared a search warrant for Mary. (Vol. II, RT 350.) She came to the prison on June 23, 2001 and signed in to visit Danny. (Vol. II, RT 350.) During a strip search, officers found a bindle concealed in Mary's brassiere. (Vol. II, RT 351.) The parties stipulated the bindle contained 24.57 grams of black tar heroin. (Vol. II, RT 352.)

On August 9, 2001, "Morelia" called Ruben. (Vol. II, RT 371.) "Morelia" said, "So, yes, home boy, I'll tell you, the guys are concerned and are waiting for Theresa." Ruben replied, "I'll speak with her and [see] if she's coming." (Vol. II, RT 377.) Officer Doglietto stated, "[T]hey're making sure that Ruben is in contact with Theresa, who is Martha Silva." (Vol. II, RT 377.)

Officer Doglietto monitored several more telephone calls between "Morelia" and Ruben, and based upon those calls prepared a search warrant for Martha Silva. (Vol. II, RT 384-385; 387-388; 391.) On August 18, 2001, Martha arrived at the prison. (Vol. II, RT 391.) She signed in to meet her husband, Francisco Villa. (Vol. II, RT 392.) During a strip search, Martha was uncooperative. (Vol. III, RT 538-539.) Prison authorities took her to a hospital where a doctor retrieved a package of bindles from her vaginal canal. (Vol. III, RT 539-541.) The parties stipulated that the various bindles contained 8 grams of marijuana and 45 grams of black tar heroin. (Vol. III, RT 542.)

ARGUMENT

INTRODUCTION

Throughout his jury trial, petitioner was forced to have his hands handcuffed and secured to a metal "belly chain" wrapped around the waist of his white California Department of Corrections jumpsuit, and to have his ankles shackled to a metal chain about fourteen inches long between his feet. The jury could see petitioner's shackles and could

hear the noise they made when petitioner moved. The trial court made no efforts – and trial counsel made no requests – to lessen the jurors' perception of the shackles. The sole reference in the record to petitioner being shackled is a concluding instruction the trial court gave to the jury: "Now, I can tell you that as the Department of Correction's policy, everyone who is transported to court is transported in restraints. That applies to everybody and it has absolutely nothing to do with whether the defendant is guilty or not guilty, and it should not be considered at all on that question." (CT 86; RT 580.)

In *Deck v. Missouri* (2005) __ U.S __, 125 S.Ct. 2007, the United States Supreme Court made it emphatically clear that the practice of visibly shackling a criminally accused at his jury trial without justification violates the accused's constitutional right to due process of law: "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Id.,* 125 S.Ct. at p. 2012.) "Shackling," the court stated, "is 'inherently prejudicial' … Thus, 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. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained. (*Chapman v. California*, 386 U.S. 18, 24 (1967).)" (*Id.,* 125 S.Ct. at p. 2015.)

Other than the trial court's instruction to the jury regarding the Department of Corrections's policy of transporting prison inmates in restraints, the record in this case is silent in regard to petitioner's shackling: the prosecution presented no evidence on the issue nor requested that petitioner be shackled; the trial court made no findings of fact specific to petitioner in support of its decision to shackle him, such as past violent or threatening behavior or attempts to escape, or any disruptive or inappropriate behavior by petitioner during trial; and, finally, trial counsel made no *in limine* motions to request that petitioner be permitted to dress in civilian clothes, that petitioner's feet and hands be unshackled or that one or both of his hands be unshackled so that he could take notes during his trial or that efforts be made to minimize the jury's perception of his shackles.

In the analysis below, petitioner will establish that he was denied due process of law, a fair trial, and the effective assistance of counsel by the trial court's abdication of its duty to preserve "the dignity and decorum … necessary for the conduct of judicial proceedings that determine issues of liberty and life" (*United States v. Howard* (2005) 429 F.3d 843, 851) and because "trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (*Strickland v. Washington* (1984) 466 U.S. 668, 686). Petitioner now hastens to demonstrate his entitlement to a remedy.

I.

THE FILING OF THIS PETITION ALONG WITH A REQUEST THAT IT BE CONSOLIDATED WITH PETITIONER'S PENDING DIRECT APPEAL IS THE APPROPRIATE PROCEDURE.

Petitioner is filing this petition in the first instance in this court because his direct appeal, H028593, is pending before this court. In employing this procedure, petitioner has sought to comply with the principles enunciated by the California Supreme Court.

First, in regard to petitioner's due process claim, he did not raise the claim in his direct appeal because the present record on appeal is incomplete on this issue. However, the trial court's unjustifiable forcing of petitioner to appear throughout his jury trial in visible shackles denied him a fair and impartial trial amounting to a denial of due process of law. (*Deck v. Missouri* (2005) __ U.S. __, 125 S.Ct. 2007.) The "defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice." (*In re Winchester* (1960) 53 Cal.2d 528, 531-532.) Thus, habeas corpus is the proper remedy to collaterally attack petitioner's judgment of conviction obtained in violation of his fundamental constitutional right to due process of law. (*In re Harris* (1993) 5 Cal.4th 813, 826.)

Second, in *People v. Pope* (1979) 23 Cal.3d 412, the court discussed the appropriate legal mechanism for raising an issue of ineffective assistance of counsel. In relevant part, the court held that judicial economy is best served if a petition for habeas corpus is joined

with a direct appeal. (*Id*., at pp. 426-427, fn. 17; accord *People v. Tello* (1997) 15 Cal.4th 264, 266-267.)

Petitioner respectfully requests this court to exercise its original habeas corpus jurisdiction pursuant to Article VI, section 10 of the California Constitution. In this way, judicial economy will be served by the simultaneous resolution of both this petition and the related appeal. (*People v. Pope, supra*, 23 Cal.3d 412, 426-427, fn. 17; *In re Harris* (1993) 5 Cal.4th 813, 826.)

II.

THE TRIAL COURT'S UNWARRANTED IMPOSITION OF VISIBLE HAND AND FEET SHACKLES UPON PETITIONER THROUGHOUT HIS JURY TRIAL DENIED PETITIONER HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In the recent decision of *Deck v. Missouri* (2005) __ U.S. __, 125 S.Ct. 2007, the United States Supreme Court held that the Constitution forbids the use of visible shackles during a capital trial's penalty phase unless that use is "justified by an essential state interest" – such as courtroom security – specific to the defendant on trial. In *Deck, supra*, defendant had been convicted of capital murder and sentenced to death. The Missouri Supreme Court set aside the death sentence. At his new sentencing trial, over his objections, defendant was shackled with leg irons, handcuffs, and a belly chain. In regard to its reasons for imposing restraints on defendant, the trial court stated only that defendant's "being

shackled takes any fear out of [the juror's] minds." (*Id.*, at p. 2015.)

In reaching its holding, the court first considered whether, in general, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. It stated, "The answer is clear: the law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." (*Id.*, at p. 2010.)

The court reviewed prior holdings that recognized, in the context of criminal trials, that "certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" (*Holbrook v. Flynn* (1986) 475 U.S. 560, 568.) In *Estelle v. Williams* (1976) 425 U.S. 501, for example, the court condemned the practice of forcing an accused to go to trial in prison clothing "because of the possible impairment of the presumption so basic to the adversary system." (*Estelle v. Williams, supra,* 425 U.S. at p. 504.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the court considered the practice of removing a disruptive or violent defendant from his jury trial. The court observed that an alternative to removing such a "contumacious" defendant from the courtroom, in order to preserve his Sixth Amendment right of confrontation, would be to bind and gag him. In regard to the "binding and gagging" option, however, the court left no doubt of its repugnance of the practice:

> "Trying a defendant for a crime while he sits bound and gagged before the judge and jury would, to an extent, comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint." (*Id.,* at p. 344.)

In *Deck, supra*, after reviewing the historical "judicial hostility to shackling," the court emphasized the importance of giving effect to three fundamental principles.

First, the American judicial system presumes an accused is innocent until proven guilty. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" (*Deck v. Missouri, supra,* 125 S.Ct. at p. 2013.)

Second, shackling can impinge upon an accused's Sixth Amendment right to the effective representation of counsel. "Shackles can interfere with the accused's 'ability to communicate' with his lawyer." Quoting from the California Supreme Court's one hundred thirty-five year old opinion of *People v. Harrington* (1871) 42 Cal. 165, 168, the court acknowledged that "shackles 'impos[e] physical burdens, pains, and restraints …, ten[d] to

confuse and embarrass' defendants' 'mental faculties,' and thereby tend 'to materially abridge and prejudicially affect his constitutional rights.'" (*Deck v. Missouri, supra,* 125 S.Ct. at p. 2013.)

Third is the concern that the practice of shackling an accused undermines the "dignity and decorum of judicial proceedings … The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives." (*Ibid.)*

California law has long been in accord with these principles. In *People v. Duran* (1976) 16 Cal.3d 282, defendant was a California Department of Corrections inmate, having been previously convicted of robbery, and was presently being prosecuted for assault with a deadly weapon by a life-term prisoner (Pen. Code, § 4500) and possession of a dirk or dagger while confined in state prison (Pen. Code, § 4502). Defense counsel made a motion prior to trial that defendant and his inmate witnesses be allowed to appear before the jury in civilian clothes and without feet and hand shackles. The motion was summarily denied.

Counsel then asked if defendant could have one hand freed in order to take notes during the trial. This request was granted but the court stated that defendant's wrists and ankles would be shackled when he testified.

In its analysis, the court reviewed common law pronouncements against unjustified shackling of a criminally accused, as well as Penal Code section 688, which reads, "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." The court reaffirmed its holding in *People v. Harrington, supra*, stating,

> "We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the *Harrington* rule … that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran, supra,* 16 Cal.3d at pp. 290-291.)

The court held that the trial court abused its discretion in ordering defendant to be visibly shackled without any showing that defendant threatened to escape or to behave violently, either before coming to court or during his jury trial. "The fact that defendant was a state prison inmate who had been convicted of robbery and was charged with a violent crime did not, without more, justify the use of physical restraints." (*Id.,* at p. 293.) The court condemned the trial court's adoption of "a general policy of imposing such restraints upon

prison inmates charged with new offenses unless there is a showing of necessity on the record. The court's summary denial of the motion to release defendant from his shackles was not based upon such a showing of record and implies a general policy of shackling all inmate defendants accused of violent crimes." (*Ibid.*)

The instant case is on all fours with *People v. Duran, supra*. It is irrefutable that here the trial court made no findings specific to petitioner that would have justified its decision to visibly shackle him throughout his jury trial. The fact that petitioner was a prison inmate was not a sufficient reason to shackle him. (See *People v. Seaton* (2001) 26 Cal.4th 598, 652.) The record is void of any mention of acts or threats of violence by petitioner or threats to escape; indeed, petitioner's counsel has declared that petitioner behaved properly at all his court appearances. (Exhibit "B".)

As trial counsel's declaration makes clear, at the time of petitioner's jury trial it was simply a matter of policy of the Monterey County Superior Courts to visibly shackle all California Department of Corrections inmates at all court appearances, including jury trials. (Exhibit "B".) The trial court's instruction to the jury to disregard petitioner's shackles reveals that the Monterey County Superior Courts simply expanded the Department of Corrections's policy of transporting inmates in restraints to include keeping those inmates restrained throughout their jury trials.

In the recent case of *United States v. Howard* (9th Cir. 2005**)** 429 F.3d 843, the Ninth

Circuit considered a magistrate court's general practice of requiring pretrial detainees to appear at their arraignments wearing leg shackles. The court noted that fear of prejudice was not at issue because the defendants were appearing at a pretrial hearing before a magistrate, not at trial before a jury, but nevertheless observed that "[s]hackling a defendant in any judicial proceeding can have negative effects," including that "shackling may confuse and embarrass the defendant, thereby impairing his mental faculties ... Shackling may also cause the defendant physical and emotional pain." (*Id.*, at p. 851.)

The record showed that the United States Marshall Service for the Central District of California consulted with the magistrate judges and then enacted a policy of requiring defendants to be shackled at initial court appearances. (Historically, defendants were not routinely shackled for such appearances.) The record was essentially silent as to whether the policy was based on any legitimate penological justifications.

The court noted that substantive due process violations alleged by pretrial detainees typically involved challenges to prison polices, to which "[c]ourts ordinarily defer to the expert judgments and professional expertise of corrections officials." (*Ibid*.) As far as requiring the defendants to appear in restraints *in court,* however, the ninth circuit found "[r]estrictions on defendants during judicial proceedings … are not within the realm of correctional officials. The conduct of the judicial proceedings is the domain of the courts." (*Ibid*.) The court ordered the existing shackling policy rescinded, absent a showing of

adequate justification. (*Id.*, at p. 852.)

In the instant case, the trial court's unaccountable adoption of a policy to routinely and visibly shackle Department of Corrections inmates at their jury trials without individualized justification denied petitioner his fundamental rights to due process of law and a fair trial. Petitioner was paraded before assembling jurors, who could hear his metal chains rattle as he shuffled past them and entered the courtroom doors. Therein, petitioner sat next to his trial counsel in a white prison jumpsuit, unable to take notes as the evidence came in against him because his handcuffed hands were locked onto a metal "belly chain" the jury could plainly see. In addition to not being able to take notes, petitioner's embarrassment and physical pain no doubt further reduced his ability to communicate with his counsel. No jury sitting in judgment of such an accused who sits before them in obvious prison garb and chained like an animal can accord that accused what the American criminal justice system claims to give him: the presumption of innocence. (See *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637; *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 747-748, citing *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 720-721.)

In this case, the trial court abdicated its duty "to maintain a judicial process that is a dignified process … [one] which includes the respectful treatment of defendants, [and] reflects the importance of the matter at issue, guilt or innocence …" (*Deck v. Missouri, supra,* 125 S.Ct. at p. 2013.) By failing to articulate any reasons, let alone a "manifest need,"

for its decision to visibly shackle petitioner at his jury trial, the trial court plainly abused its discretion. (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) Under these facts, petitioner "need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained." (*Deck v. Missouri, supra,* 25 S.Ct. at p. 2009; *Chapman v. California* (1967) 386 U.S. 18, 24.) On this basis alone, this court should issue a writ of habeas corpus and reverse petitioner's convictions. (U.S. Const., 5th, 6th, & 14th Amends; Calif. Const., Art. I, sects. 7 & 15.)

III.

DEFENSE COUNSEL ABDICATED HIS DUTY TO EFFECTIVELY REPRESENT PETITIONER BY FAILING IN ANY WAY TO CHALLENGE THE TRIAL COURT'S FORCING OF PETITIONER TO WEAR SHACKLES THROUGHOUT HIS JURY TRIAL, BY FAILING TO REQUEST THAT PETITIONER BE PERMITTED TO APPEAR AT HIS TRIAL IN CIVILIAN CLOTHES RATHER IN THAN A PRISON JUMPSUIT, BY FAILING TO MAKE A MOTION FOR JUDGMENT OF ACQUITTAL ON TWO OF THE THREE ALLEGED CONSPIRACY CHARGES OR TO REQUEST THE TRIAL COURT INSTRUCT THE JURY THAT IT WAS A QUESTION OF FACT FOR THE JURY TO DETERMINE WHETHER PETITIONER WAS GUILTY OR NOT GUILTY OF A SINGLE OVERALL CONSPIRACY OR MULTIPLE SEPARATE CONSPIRACIES. TRIAL COUNSEL'S FAILURE TO ACT AS A REASONABLY COMPETENT DEFENSE LAWYER DENIED PETITIONER HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL, AS WELL AS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

This court should issue a writ of habeas corpus on the separate and distinct ground that petitioner was denied his right to the effective assistance of counsel by trial counsel's failure to protect petitioner's fundamental constitutional rights to due process of law, a fair trial, and the effective assistance of counsel. (U.S. Const., 5th, 6th, & 14th Amends; Calif. Const., Art. I, sects. 7 & 15.)

As is well settled, a meritorious claim of ineffective assistance of counsel requires a two part showing: (1) that counsel's performance was below the objective standard of prevailing professional norms; and (2) that defendant was prejudiced by counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 688-695; *People v. Ledesma* (1987) 43

Cal.3d 171, 216-218; *People v. Pope* (1979) 23 Cal.3d 412, 424-425.) With respect to the requisite showing of prejudice, a defendant is entitled to relief if he can show "a significant but something-less-than-50 percent likelihood of a more favorable" result absent counsel's errors. (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.)

However, as petitioner has argued *supra*, the trial court's practice of routinely and visibly shackling California Department of Corrections inmates brought to jury trial on new charges is, as the United States Supreme Court has recently reaffirmed, a practice so "inherently prejudicial" ... that it

> "… 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. Thus, were 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. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." (*Deck v. Missouri* (2005) __ U.S. __, 125 S.Ct. 2007, 2015**;** *Chapman v. California* (1967) 386 U.S. 18, 24.)

As to the issue of whether "counsel's performance was below the objective standard of prevailing professional norms," the United States Supreme Court has made clear that "the right to counsel is the right to the effective assistance of counsel." (*Strickland v. Washington, supra,* 466 U.S. at p. 686; see also *People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218; *People v. Fosselman* (1983) 33 Cal.3d 572, 581-584; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

> "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (*Id.,* at p. 685.)

In his declaration, trial counsel has admitted he had no tactical reasons for failing to request the trial court unshackle petitioner, for failing to request the trial court unshackle petitioner's hands to enable him to take notes during his trial, for failing to request the trial court make efforts to minimize the jury's perception of petitioner's shackles, for failing to request that petitioner be allowed to dress for his jury trial in civilian clothes, for failing to make a Penal Code section 1118.1 motion for judgment of acquittal on two of the three alleged conspiracy charges, or for failing to request the trial court to instruct the jury that it was a question of fact for the jury to determine whether petitioner was guilty or not guilty of one overall conspiracy or multiple separate conspiracies. The court should view trial counsel's candid admissions as tantamount to admissions he was ineffective.

Given the virtually unanimous judicial recognition of the dangers inherent in requiring a criminally accused to appear at jury trial in visible restraints without a showing of "manifest need," it cannot logically be claimed that trial counsel here "play[ed] the role necessary to ensure that the trial [was] fair." (*Ibid*.) It is simply beyond dispute that trial counsel failed to act in a manner to be expected of a reasonably competent attorney acting

as a diligent conscientious advocate when he failed to take any action whatsoever to protect petitioner from having to have his hands and feet visibly shackled throughout his jury trial. (*Id.,* at pp. 423-425; *People v. Ledesma, supra,* 43 Cal.3d at pp. 215-216.)

With regard to his failure to make a Penal Code section 1118.1 motion for judgment of acquittal and for failing to request the trial court instruct the jury it was a question of fact for it to determine whether petitioner was guilty or not guilty of a single overall conspiracy or multiple separate conspiracies, trial counsel again failed to act in a reasonably competent manner. As petitioner has briefed fully in his related appeal, the evidence in this case pointed overwhelmingly to a single conspiracy rather than to three separate conspiracies. The information alleged that the three conspiracies occurred in June 2001, in June-July 2001, and June-August 2001. (CT 18-29.) However, the evidence showed that petitioner telephoned Ruben Ambriz on June 5 and 6, 2001, and had already agreed with Ruben to conduct a single on-going drug smuggling "business" by the time of those calls.

In that regard, in a telephone conversation on June 5, petitioner gave Ruben the name of Sara, a fellow inmate's wife. During this call petitioner said, "Okay, and tomorrow I'll tell you where the others are going to." (RT 275.) On June 6, in a follow-up telephone conversation, petitioner gave Ruben the names of Mary and Theresa, two other fellow inmates' wives. In these conversations, petitioner told Ruben to acquire certain amounts of assorted drugs, to divide them and package them for concealment, and to provide them to

the named inmates' wives for them to smuggle into the prison while visiting their husbands. (RT 268-270; 275; 345; 347.) In the June 5th call, petitioner told Ruben: "Okay. This is the first – because the first time is a little hard because we're going here and there, but from now on, you know, everything will be better … If this thing goes well, we'll know that we can count on you." (RT 275; 278.)

When the prosecution asked the officer what, in his opinion, appellant was referring to, the officer answered, "It means that they're very – very new to this, and with, brackets, 'They'll get much better.'" (RT 275.) Obviously what petitioner was saying that the smuggling operation "will be better" as time goes on and, that if the smuggling operation proceeds smoothly, "we'll know that we can count on [Ruben]" to carry out his end of the operation.

The prosecution's own expert witness, Officer Doglietto, testified to a single overall conspiracy to smuggle drugs into the prison, not separate unconnected conspiracies. In regard to another recorded telephone conversation between petitioner and Ruben on June 27, 2001, the officer testified as follows:

Officer Doglietto: "[Petitioner then said to Ruben,] 'This is something that doesn't stop, right?' And Ruben says, 'No, you know that.' And [petitioner] says, 'There you go, buddy. That's what I want, because you know what I told you: I have a lot of guys here and they tell me when, when I tell them calm down,' and he laughs. 'I told them, I think this and

I think that, and it's really good that you gave me that news, buddy.'"

District Attorney: "Which news?"

Officer Doglietto: *"He's happy that Ruben is in agreement, they're going to keep doing this; it's going to be an ongoing business for them."* (RT 295-296.)

The "gist of the crime of conspiracy" is "the agreement or confederation of the conspirators to commit one or more unlawful acts where 'one or more of such parties do any act to effect the object of the conspiracy.'" (*Braverman v. United States* (1942) 317 U.S. 49, 53.)

As the United State Supreme Court stated further in *Braverman*:

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the *agreement* which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is, in either case, that *agreement* which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements, and hence several conspiracies, because it envisages the violation of several statutes, rather than one. The single agreement is the prohibited conspiracy, and, however diverse its objects, it violates but a single statute." (*Id.*, at pp. 54-55.)

The People's position that the evidence in this case showed multiple separate conspiracies occurring at different times and involving different persons is plainly wrong. Petitioner and Ruben agreed to start a drug smuggling business with petitioner working on the inside of the prison and Ruben working on the outside. The overt act of petitioner

supplying Ruben with Sara's name and telephone number on June 5, 2001, and telling Ruben at the same time that he would call the next day with other women's names and telephones numbers established the conspiracy was underway. Petitioner did not, as the People would have it, commit a separate conspiracy involving Sara during the June 5th telephone call, and then commit two further separate conspiracies involving Mary and Theresa during the June 6th telephone call. Such a contention is without foundation in logic, law, or, indeed, common sense.

The evidence need only support *alternative findings* on this issue in order to give rise to the trial court's *sua sponte* duty to instruct that it is a question of fact for the jury to determine whether a single or multiple conspiracies exist. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 554.) In the instant case, the evidence not only supports the alternative finding of a single conspiracy rather than multiple conspiracies; it compels it. As the court stated in *People v. Morocco, supra*, 191 Cal.App.3d at p. 1453:

> "Where two or more persons agree to commit a number of criminal acts, the test of whether a single conspiracy has been formed is whether the acts 'were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result.' (*Blumenthal v. United States* (1947) 332 U.S. 539, 558; see also *People v. Skelton* (1980) 109 Cal.App.3d 691, 717-718; *People v. Elliot* (1978) 77 Cal.App.3d 673, 685.) We believe a similar test is applicable in determining whether multiple solicitations have occurred. It is well-settled law that 'the question whether one or multiple conspiracies are present is a question of fact, to be resolved by a properly instructed jury' (*United States v. Orozco-Pravda* (2d Cir. 1984) 732 F.2d 1076, 1086), just as the court in *People v. Cook* [(1984) 151 Cal.App.3d 1142] concluded that the question whether one or multiple solicitations took place is a question of fact. (151 Cal.App.3d at p. 1146.) In making this determination, the jury should be instructed to consider whether the multiple crimes requested by the defendant were part of a 'larger, all-inclusive' plan with a single objective and/or motive. (Cf. *Blumenthal, supra*, 332 U.S. at p. 558; see also *People v. Miley, supra,* 158 Cal.App.3d at p. 31, fn. 4.)

In the instant case, it cannot reasonably or logically be argued that the evidence did not at least support – let alone establish – the alternative finding that only one conspiracy was committed. When it was apparent the trial court was not going to fulfill its *sua sponte* duty to instruct on this question of fact, trial counsel should have requested the jury instruction. Under the same analysis, trial counsel likewise should have made a Penal Code section 1118.1 motion for judgment of acquittal on two of the three alleged conspiracies at the close of the prosecution's case. Trial counsel was obviously aware the evidence showed only one overall conspiracy, as is demonstrated by his last minute argument at sentencing that the trial court should not find the case was aggravated by petitioner's multiple

conspiracy convictions. (Vol. V, RT 1004.) Trial counsel admits in his declaration that he had no tactical purpose for failing to make the Penal Code section 1118.1 motion or for failing to request the special jury instruction. (Exhibit "B".) His failure to make the motion for judgment of acquittal meant the jury would consider three charges rather than one; his failure to request the special jury instruction resulted in the denial to petitioner of his Sixth Amendment right to a jury determination of his guilt or innocence on one versus multiple conspiracy charges. Trial counsel's performance with respect to the conspiracy charges, as well as to the issues of the visible shackles and prison garb, was clearly below the standard expected of reasonably competent attorneys acting as diligent conscientious advocates. (*People v. Pope, supra,* 23 Cal.3d at pp. 423-425.) The trial court's imposition of consecutive sentences based upon the aggravated factor of multiple conspiracy convictions establishes the prejudice these errors caused petitioner.

Petitioner was denied the effective assistance of counsel by trial counsel's combined egregious errors, which errors denied him due process of law and a fair trial. (U.S. Const., 5th, 6th, & 14th Amends.; Calif. Const., Art. I, sects. 15 & 16.) Accordingly, this court must grant petitioner's writ of habeas corpus and reverse petitioner's convictions. (U.S. Const., 5th, 6th, & 14th Amends; Calif. Const., Art. I, sects. 7 & 15.)

CONCLUSION

In *Holbrook v. Flynn* (1986) 475 U.S. 560, 567-568, the United States Supreme Court

said, "When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained."

In this case, there was not even a pretence of fairness. For the reasons expressed above, this court should issue a writ of habeas corpus and reverse petitioner's conviction.

Dated: January ___, 2006

Respectfully submitted,

_____
RUTH MCVEIGH
Attorney for Petitioner,
JAIME MEJIA JASSO

EXHIBIT A: PETITIONER'S DECLARATION

I, Jaime Jasso, hereby declare:

1) I am the petitioner in this matter;

2) Before my jury trial, I asked my lawyer, Mr. Clarence Darrow, if I could wear civilian clothes during my jury trial, rather than prison clothes. Mr. Darrow told me that there was no reason for me to wear civilian clothes because the jury would know that I was a prisoner, since the case was a prison case;

3) During the entire trial, I had to wear a white prison jumpsuit that had something written across the back of it like "CDC Prisoner." The letters were black and were about three inches high and the words were about ten inches across. The jury could easily read the words written on the prison jumpsuit;

4) I asked Mr. Darrow if I could be unshackled during the trial. He told me that it was routine in prison cases that all prisoners are shackled during their trials "for security reasons." He said even if he asked the judge to unshackle me, the judge would not do it. Mr. Darrow never asked anyone to have me unshackled. I did not discuss the shackles with any other person because, from what Mr. Darrow told me, I believed that I was required to wear the shackles to all court proceedings;

5) I was not involved in any violent incidents with anyone and I did not make any attempts or threats to escape during my trial. I was not going to do anything stupid like that when I had my jury trial. The judge did not state there was any reason for

having me shackled during the trial;

6) I did not know that I could take notes during the trial, so I did not ask Mr. Darrow to have my hands unshackled. I would have done so if I had known. It's difficult to remember everything all the witnesses say and I would have liked to take notes so I could remember things I wanted to ask my lawyer about;

7) I had to have a belly chain around my waste and my hands were handcuffed to the belly chain. The belly chain was on the outside of the white jumpsuit and fully visible to the jury. I never had my hands freed at any time during my jury trial;

8) My feet were shackled to a chain that was about fourteen inches long. It was difficult to walk. When I walked, I had to shuffle my feet along the ground and the chains made a lot of noise. I am certain the jury heard my feet shackles and chain when I had to walk back and forth in front of them many times. I never had my feet freed at any time during my jury trial;

9) When I had to go to the bathroom during my jury trial, I would use either a bathroom in the back that was not open to the public or a bathroom in the hallway in front of the courtroom that was open to the public. I had a guard escort me into that bathroom when there were jurors from my case in the same bathroom;

10) The shackles on my feet started to hurt me. I got very tired walking from the courthouse parking lot all the way to the courtroom because of the shackles on my

feet. Once I was in the courtroom, I still could not take the shackles off. At one point, the shackles had caused blisters on the backs of my ankles. The constant rubbing caused the blisters to break. Then my feet started bleeding. I had white prison socks on and they had to be thrown away.

11) I was housed at the Salinas Valley prison while I was having my jury trial. I asked a Black female nurse at the infirmary in building D-9 where I was housed to treat my hurt feet;

12) I was taken into and out of the courtroom every time through the front door of the courtroom. I was escorted to the courtroom before the jury entered. However, I had to walk past all the jurors as they waited outside the courtroom door in the hallway. No one made any attempt at all to hide my shackles from the jury;

13) I found it very embarrassing to be wearing shackles and chains that the jury could see during my jury trial. I was facing charges that carried a lot of time and I felt like what chance did I have with the jury when I was wearing all those shackles and a prison jumpsuit.

I declare under penalty of perjury that the foregoing is true and correct. Dated this __ day of _____, 2005.

EXHIBIT B : TRIAL COUNSEL'S DECLARATION

DECLARATION

I, Clarence Darrow, hereby declare the following to be true and accurate based on information and belief;

1. I am attorney licensed to practice law in the State of California, state bar number 45332. I was appointed to represent the petitioner in this action, Jaime Mejia Jasso in Monterey County Superior Court case number SS021615.

2.Petitioner was shackled during his jury trial. The shackles consisted petitioner's hands being restrained in handcuffs attached to a metal chain around his waist and his feet were restrained by ankle cuffs connected by a metal chain. His was wearing a white prison jumpsuit.

3. It is possible the jury was able to see and hear the sound of the shackles as the defendant moved.

4. It is matter of routine court procedure in Monterey County Superior Courts that Department of Corrections inmates appearing in court for routine pretrial matters or for jury trial remain shackled at all times. Based upon petitioner's proper behavior during previous court appearances I was unaware of any of any reason, other than his being a prison inmate, which would have justified the shackling of petitioner during his jury trial. The prosecution did not request the trial court to order petitioner shackled during trial.

5. I do not recall advising the petitioner he could take notes during his jury trial.

6. I did not challenge the trial court's policy of shackling prison inmates by moving to have the petitioner unshackled during trial or requesting his hands unshackled to allow him to take notes during the trial, or by requesting the court to make any efforts to minimize the jury's view of the shackles.

7.I had no tactical reason for failing to make these request.

8. In regard to petitioner's wearing a prison uniform during trial, the evidence against petitioner made it clear he was an inmate in state prison at the time the charges arose. Therefore, I did not determine it necessary to have petitioner dressed out in civilian clothes. I had no particular tactical reason for having petitioner wearing his white prison jumpsuit in

front of the jury.

9. The prosecution alleged three separate conspiracies against petitioner involving smuggling drugs in Soledad State Prison. The jury convicted petitioner of all three allegations. At petitioner's sentencing hearing I argued the evidence showed only one overall conspiracy, rather than three separate conspiracies and, therefore, the trial court should not use the multiple conspiracy convictions to justify the imposition of consecutive sentences. I did not move for a judgment of acquittal pursuant to Penal Code section1118.1 on two of the three conspiracy allegations, nor did I request the trial court to instruct the jury that it was a question of fact for the jury's determination whether only one, or multiple conspiracies were committed. I had no tactical reasons for failing to make the motion for acquittal or for not requesting a special jury instruction.

I declare under penalty of perjury that the foregoing is true and correction based upon information and belief.

Dated this 9th day of January 2006.

_____
Clarence Darrow

DECLARATION OF WORD COUNT

I, the undersigned, declare:

I am appellate counsel in *In re Jaime Jasso* and I have prepared this Petition for Writ of Habeas Corpus. The word count of the computer program used to prepare this brief is 12,226.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California and was executed on January 24, 2007.

RUTH MCVEIGH
Attorney for Petitioner,
JAIME MEJIA JASSO

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 3675 Lily Street, Oakland, California, 94619; I have caused to be served a copy of the within Petition for Writ of Habeas Corpus on each of the persons named below by placing in the United States mail a true copy thereof.

Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

Office of the State Attorney General, representing respondent, the People
455 Golden Gate Avenue, Room 11,000
San Francisco, CA 94105

Monterey County Municipal & Superior Courts
P.O. Box 1819
Salinas, CA 93902

Monterey County District Attorney
240 Church Street
Salinas, CA 93901

Jaime Mejia Jasso D-58719
A-8 #107
Kern Valley State Prison
P.O. Box 5101
Delano, CA 93216

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct. Executed on January **XX**, 2006

JUDITH SILVERMAN