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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JAIME MEJIA JASSO, on Habeas Corpus.	H029756 (Monterey County Super. Ct. No. SS021615)

STATEMENT OF THE CASE

A jury convicted defendant Jaime Mejia Jasso of three counts of conspiracy to transport drugs into prison and two counts of transporting drugs. (Pen. Code, §§ 182, subd. (a)(1); Health & Saf. Code, § 11352, subd. (b).) On appeal from the judgment, he claimed the court erred in failing to instruct the jury that it must decide whether there was one overall conspiracy or multiple conspiracies and in imposing the upper term on one count of transporting a controlled substance into prison. He further claimed that defense counsel rendered ineffective assistance in failing to request a single-or-multiple conspiracy instruction. (*People v. Jasso* (Sept. 12, 2006, H028593) ___ Cal.App.4th ___.)[1]

Defendant also filed the instant petition for a writ of habeas corpus. He alleges that being shackled and required to wear a prison jumpsuit during trial violated his constitutional rights. He also alleges that defense counsel rendered ineffective assistance in failing to (1) request an appropriate conspiracy instruction, (2) move for acquittal on

[1] At defendant's request, we take judicial notice of the judicial records in H028593. (Evid. Code, §§ 452, subd. (d)(1), 453, 459.)

two counts of conspiracy, and (3) object to his shackles and the prison jumpsuit. We ordered that the petition be considered with the appeal.

In a separate opinion filed today, we conclude that the court erred in failing to give the single-or-multiple conspiracy instruction, and therefore the conspiracy convictions cannot stand. We reverse the judgment.

In this proceeding, we issue an order to show cause why defendant is not entitled to relief.[2]

FACTS

During the summer of 2001, defendant was incarcerated at Soledad State Prison (Soledad), where he was serving a life term. At Soledad, correctional officers monitor telephone calls made from a bank of phones in the exercise yard. The officers are trained to listen for code words used for drug-related activity. Officer Pete Garcia testified that he monitored numerous calls by defendant, his cellmate Danny Ramirez, and other inmates Francisco Villa and Storm Baucom. He explained that from his post in a watch tower overlooking the exercise yard, he could see the bank of 18 numbered telephones and listen to the conversations on them. He stated that when he heard suspicious conversation, he wrote down the date, time, and phone being used on a scrap of paper; and, when he did not know who the inmate caller was, he would call for a yard officer to go get the particular inmate's identification number. Sometime after each call, Officer Garcia passed along the information to Officer Doglietto for further investigation. Later, he compiled informal logs containing all of the information on the scraps of paper for his

[2] Given our reversal of defendant's conspiracy convictions, we need not address defendant's claims concerning counsel's failure to request a conspiracy instruction and move for acquittal on two conspiracy convictions. We focus solely on defendant's shackling claims and the evidence supporting the remaining convictions for transportation.

own personal records.[3] Officer Garcia noted that defendant and Ramirez made many calls to the same number, which belonged to a person named Ruben Ambriz, who had visited defendant several times between 1997 and 2001.

Officer Abel Ricardo Munoz testified that he was regularly posted in the yard and was often asked to identify inmates who were using the phones. On May 31, 2001, Officer Garcia called and asked him to identify an inmate using a particular phone. Every phone was being used. He waited for the inmate to finish the call and then obtained his identification number. The caller was defendant.

Officer Doglietto, who was assigned to the Narcotics and Crime Scene Investigative Unit at Soledad, testified generally about how drugs are smuggled into prisons and by whom. He listened to numerous calls that Officer Garcia attributed to defendant, Ramirez, Baucom, and Villa and interpreted their code language.[4]

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[3] Officer Garcia testified that although he was trained to pass along information about suspicious calls for further investigation, he did not receive systematic training on how to do it. He was simply told to do "whatever you needed to do to keep it . . . ." Nor was he instructed to maintain logs of the information or trained in how to collect and memorialize the information. In this regard, Officer Garcia explained that there were no official forms for keeping the information about suspicious calls so he used scraps of paper and later constructed personal logs. Officer Garcia could not recall when he constructed the logs and conceded that it could have been one or two months after the calls were made. He did not give his logs to Officer Doglietto.

Officer Doglietto testified that computers at the facility maintain recordings of telephone calls and also store information such as the date and time of a call and which phone is being used, the number dialed, and the duration of the call. Officer Garcia did not testify that he consulted or used the computer records in constructing his logs, and the computer records were not offered at trial.

Officer Garcia's logs were used and admitted into evidence at trial.

[4] Officer Doglietto testified that he was able to recognize the same voice on the tapes. However, he did not testify that before listening to them, he could identify defendant's voice. Nor did he testify that he had independent personal knowledge concerning the identify of the callers on the tapes. Rather, Officer Doglietto relied on Officer Garcia's identification. Although Officer Garcia attributed numerous calls to defendant, Officer Munoz testified that he personally verified only the one call on May

Officer Doglietto stated that on June 5, 2001, defendant called Ruben and told him to call a woman named "Sara," who lived in Goleta. He gave Ruben two phone numbers. He told Ruben to tell her "that you're going to take something for Storm . . . ." Defendant said, "This is where the kids need to be before 12 o'clock on Saturday." The numbers defendant gave to Ruben belonged to Baucom's wife Sara, who was authorized to visit him. Officer Doglietto opined, among other things, that this call reflected defendant's effort to smuggle drugs into the prison.

On June 6, 2001, defendant called Ruben again. He told Ruben, "Look, I'm going to give you some more names." He gave Ruben the number of a woman named "Mary" and told him to tell her that he (Ruben) had "a package for Danny." Mary was Ramirez's wife, and she was authorized to visit him and had made calls to Ruben. Defendant also gave Ruben the name of a woman named "Theresa." He told Ruben to tell Theresa that Villa would try to call her the next day. Officers later determined that Villa's wife's real name was Martha Bello Silva, and that she and "Theresa" were the same person. Officer Doglietto opined that this call also reflected a smuggling effort.

On June 23, 2001, Mary visited Ramirez. Upon her arrival, she was searched, and police found 24.57 grams of black tar heroin in her brassiere.

On June 27, 2001, defendant called Ruben again and told him that Sara was "waiting for the kids." Ruben said he would "drop off the kids, the toys for the kids. Defendant told him to "take them to her wrapped up." Officer Doglietto opined that the conversation was about wrapping drugs in latex or rubber for concealment.

On June 29, 2001, Baucom called Sara and told her that several inmates had been "busted" for drugs. Sara told him she would visit him on July 15, 2001. On June 30, 2001, defendant called Ruben. When Ruben said he had gotten the drugs,

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31, 2001. Officer Doglietto confirmed Officer Munoz's testimony that there was only one call for which the caller was visually identified.

defendant told him to "put them in double pants, double wrapped." Officer Doglietto opined that they were talking about wrapping the drugs in latex or rubber so they could be hidden inside the body without breaking down.

On July 1, 2001, defendant called Ruben, who said he had seen Sara. Defendant was pleased that "it's done." On July 2, 2001, Baucom called Sara, who said she was visiting the next weekend. However, on July 7, defendant called Ruben and told him that Sara would need another week.

On July 15, 2001, Sara came to visit Baucom. Upon her arrival, she was taken to the hospital for a body cavity search, and police found bindles of marijuana, black tar heroin, and cocaine.[5]

Shortly after this, defendant was transferred to a segregated unit and lost telephone privileges. Ramirez then began calling Ruben on defendant's behalf. On July 20, 2001, Ramirez called Ruben and said, "[defendant] told me to tell Ruben not to be on the lookout, that little car that he has is running fine." Officer Doglietto opined that point of the message was to tell Ruben not to worry because he was not under suspicion.

On August 9, 2001, Ramirez called Ruben and told him that "the guys are concerned and waiting for Theresa [a.k.a., Martha]." Ruben said, "I'll speak with her and [see] if she's coming." On August 14, 2001, Ramirez called Ruben and spoke to an unidentified woman. He told her, "If you get in touch with [Ruben], please tell him to get in touch with me through lady Theresa." The woman replied, "As she said, she already has the children . . . . It's just a matter of bringing them." Officer Doglietto opined that the conversations indicated that Ramirez and defendant were making sure that Ruben was in touch with Theresa about bringing the drugs.

[5] The drugs found on Sara formed the basis for one of defendant's convictions for transportation (count 2).

On August 15, 2001, Villa called his wife Martha (a.k.a. Theresa) and asked if she had spoken to Ruben. She said, "I was thinking of calling him today, so they could have it ready." On August 16, 2001, Ramirez called Ruben and again spoke to an unidentified woman. She told him that "[Ruben] had to hurry up today because that lady Theresa said she wanted it for today because she's leaving today." Ramirez replied, "Yes, she's stopping by; she's got to go there for the children, and afterwards she's coming over here." According to Officer Doglietto, the conversation was about ensuring that the drugs were ready for Martha to pick up before coming to Soledad.

On August 17, 2001, Villa called Martha and asked if she had spoken to Ruben. She said, "Yes, but right now I'm having problems for getting good weed." Later that day, Ramirez called Ruben, who said that Martha had just left. Ramirez said that she would visit the next day.

On August 18, 2001, Martha came to visit. Upon her arrival, she was taken to the hospital for a body cavity search, and police found bindles of marijuana and black tar heroin.[6]

THE PETITION

In his supporting declaration, defendant states that during trial, he had to wear a white prison jumpsuit that had bold writing on the back identifying him as a prisoner. Defendant says that he is not a violent person and did nothing to suggest that he might have tried to escape. Nevertheless, his hands were handcuffed and attached to a belly chain around his waist. His feet were shackled together with a 14-inch chain, making it difficult and noisy to walk. The foot shackles hurt his ankles and caused them to bleed on the white sox that he had to wear. He found it embarrassing to be visibly shackled and felt that he had no chance with the jury looking the way he did. He also wished he could

[6] The drugs found on Martha formed the basis for defendant's other conviction for transportation (count 4).

have taken notes because it was difficult to remember everything the witnesses said. However, his shackles prevented him from doing so.

Defendant further states that he asked his attorney if he could be unshackled and wear civilian clothes at trial, but counsel said shackling was routine in prison cases, and there was no reason to wear civilian clothing because the jury would learn that he was a prisoner.

In another declaration, defense counsel states that defendant was shackled and wore his prison jumpsuit during trial, and both were noticeable to the jury. He declined to object to the jumpsuit because jurors would inevitably learn that he was a prisoner. However, he said he had no tactical reason for not objecting to the shackles or requesting that they not be visible to the jury. He noted that defendant had behaved properly at previous hearings, and the prosecutor had not requested shackling. Thus, counsel opined that there was no need for shackling and no reason for doing so except his status as a prison inmate. In that regard, counsel averred, "It is [a] matter of routine court procedure in Monterey County Superior Courts that Department of Corrections inmates appearing in court for routine matters or for jury trial remain shackled at all times."

Shackling and Prison Garb: Applicable Principles

In *Deck v. Missouri* (2005) 544 U.S. 622 (*Deck*), a majority of the United States Supreme Court held that the use of physical restraints on a criminal defendant 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, such as courtroom security and the risk of escape, violates a defendant's rights under the Fifth and Fourteenth Amendments. (*Id*. at p. 629.) Writing for the majority, Justice Breyer explained that "the criminal process presumes that the defendant is innocent until proved guilty. [Citations.] Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. [Citations.]" (*Id*. at pp. 630.) He further noted that unjustified shackling can interfere the defendant's right to counsel and a meaningful defense. (*Id*. at

p. 631.) Last, he asserted that the routine use of shackles in front of a jury undermines the dignity of the courtroom and the ability of the judicial system to maintain public confidence in its ability and authority to provide justice. (*Id*. at pp. 626, 630.)

Given the constitutional rights at stake, the majority held that the erroneous and unjustified shackling visible to the jury compels reversal even without a showing of prejudice unless the state can prove beyond a reasonable doubt that the shackling did not contribute to the verdict. (*Deck, supra*, 544 U.S., at p. 635.)

California has long followed similar principles. In *People v. Harrington* (1871) 42 Cal. 165 (*Harrington*), the California Supreme Court stated that that "any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf." (*Id*. at p. 168; accord, *People v. Ross* (1967) 67 Cal.2d 64, 72 [absent danger of escape, defendant entitled to appear without shackles]; *People v. Burnett* (1967) 251 Cal.App.2d 651, [unnecessary show of restraint of an accused in the presence of the jurors is prejudicial].)[7]

In *People v. Duran* (1976) 16 Cal.3d 282 (*Duran*), the court, citing *Harrington*, reaffirmed "the 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. [Citation.]" (*Id*. at pp. 290-291, fn. omitted.) Manifest need exists "only upon a showing of unruliness, an announced intention to escape, or

[7] The California Legislature also limited the amount of restraint that may be used against those charged with offenses. Section 688 provides, "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." (See former § 13, stats. 1872.)

'[e]vidence of any nonconforming conduct or planned nonconforming conduct, which disrupts or would disrupt the judicial process if unrestrained . . . .' " (*People v. Cox* (1991) 53 Cal.3d 618, 651.) Thus, the mere fact that the defendant is a prison inmate, standing alone, does not justify the use of physical restraints. "[T]he trial judge must make the decision to use physical restraints on a case-by-case basis. The court cannot adopt a general policy of imposing such restraints upon prison inmates charged with new offenses unless there is a showing of necessity on the record." (*Duran, supra,* 16 Cal.3d at p. 293)

The *Duran* court further ruled that because the imposition of restraints is a "judicial function," the trial court has a sua sponte duty "to initiate whatever procedures [it] deems sufficient in order that it might make a due process determination of record that restraints are necessary." (*Duran, supra,* 16 Cal.3d at p. 293, fn. 12.) If the defendant is to be restrained, the court must make a record concerning the justification, and if the restraints are visible to the jury, the trial court must instruct the jury sua sponte that the restraints should have no bearing on the determination of the defendant's guilt.[8] (*Id*. at pp. 291-292; see *People v. Mar* (2002) 28 Cal.4th 1201 [reaffirming principles outlined in *Duran*].) The *Duran* court also reaffirmed the rule that a defendant waives

[8] CALJIC No. 1.04 provides, "The fact that physical restraints have been placed on defendant [_____] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely."

Here, the court gave that instruction and further stated, "Now I can tell you that as a 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."

appellate claims concerning shackles and prison garb unless he or she objected below.[9] (*Duran*, *supra*, 16 Cal.3d at p. 289, citing *People v.Chacon* (1968) 69 Cal.2d 765, 778; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 192, fn. 7; *People v. Stankewitz* (1990) 51 Cal.3d 72, 95; *People v. Walker* (1988) 47 Cal.3d 605, 629.)

In *Estelle v. Williams*, *supra*, 425 U.S. at page 512, the court held that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes." (*Id*. at p. 512.) "Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. Jurors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior criminal record; a significant danger is thus created of corruption of the factfinding process through mere suspicion. The prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system in which every person is presumed innocent until proved guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk. Jurors required by the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well see in an accused garbed in prison attire an obviously guilty person to be recommitted by them to the place where his clothes clearly show he belongs. It is difficult to conceive of any other situation more fraught with risk to the presumption of innocence and the standard of reasonable doubt. [¶] Trial in identifiable prison garb also entails additional dangers to the accuracy and objectiveness of the fact-finding process. For example, an accused considering whether to testify in his

[9] The rule is also applied in federal courts. (E.g., *King v. Rowland* (9th Cir. 1992) 977 F.2d 1354, 1357; cf. *Estelle v. Williams* (1976) 425 U.S. 501, 512-513 [prior objection require to preserve claim concerning prison garb].

own defense must weigh in his decision how jurors will react to his being paraded before them in such attire. It is surely reasonable to be concerned whether jurors will be less likely to credit the testimony of an individual whose garb brands him a criminal." (*Id*. at pp. 518-519.)

In *People v. Taylor* (1982) 31 Cal.3d 488, the California Supreme Court acknowledge the rule against jail or prison garb and held that where the court erroneously compels a criminal defendant to be tried in prison or jail garb, the error compels reversal unless it can be deemed harmless beyond a reasonable doubt. (*Id*. at p. 499.) However, the court further stated that the failure to object at trial, waives the error on appeal. (*Id*. at pp. 495-496; *Estelle v. Williams, supra,* 425 U.S. at pp. 509-513.) In that regard, we note that courts need not sua sponte raise the issue of civilian clothing. (*People v. Williams* (1991) 228 Cal.App.3d 146, 151.) "Courts may not presume a defendant wants to wear civilian clothes, in the absence of an objection, because defense counsel may choose as a matter of trial tactics to have the defendant tried in prison clothing." (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1304; *People v. Taylor, supra,* 31 Cal.3d at p. 496 ["there may be instances where for tactical reasons the defendant may wish to be tried in jail garb"]; e.g., *People v. Scott* (1997) 15 Cal.4th 1188, 1214.)[10]

With these principles in mind, we turn to defendant's claims.

Direct Challenge to Shackling and Prison Jumpsuit

Defendant directly claims that being shackled and required to wear a prison jumpsuit at trial violated his constitutional rights. He is correct. However, the California Supreme Court requires an objection at trial to preserve such claims for appeal. (*Duran,*

[10] Both the United States Supreme Court and the California Supreme Court have recognized that the practice of requiring criminal defendants to wear prison or jail clothing also violates equal protection because it operates primarily against defendants who are too poor to post bail. (*Estelle v. Williams, supra,* 425 U.S. at pp. 505-506; *People v. Taylor, supra,* 31 Cal.3d at p. 495.)

supra, 16 Cal.3d at p. 289; *People v. Taylor, supra*, 31 Cal.3d at p. 495-496.) Moreover, because habeas corpus cannot serve as a substitute for issues that could have been raised on appeal (see *In re Dixon* (1953) 41 Cal.2d 756, 759), the failure to object precludes a direct challenge with a petition for a writ of habeas corpus. We are constrained to follow the Supreme Court's rule.[11] (See *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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[11] Although constrained to apply the prior-objection rule to defendant's shackling claim, we question whether doing so is appropriate. The primary reason for the rule is that an objection alerts the trial judge to a problem, which can be corrected before prejudice accrues. (See *People v. Taylor*, *supra*, 31 Cal.3d at p. 495-496.) However, since a judge knows when a defendant is wearing shackles, especially when, as here, the shackles are noisy, it seems unnecessary to make the defendant point out the obvious. Moreover, given the inherent prejudice from being tried in shackles, trial courts ought to simply assume that a shackled defendant wishes to be unshackled and then, as *Duran* requires, initiate a procedure to determine whether shackling is necessary. (*Duran, supra,* 16 Cal.3d at p. 293, fn. 12.) We further believe that requiring a prior objection can cause unintended negative consequences. Putting the burden on defendant to object can dull the trial courts' sensitivity to shackling and foster a wait-for-an-objection approach that undermines the court's sua sponte duty to deal with shackling in the first place. In our view, that duty, which is intended to protect a defendant's fundamental constitutional rights, should be treated the same as a court's sua sponte duty to instruct on applicable principles of law relevant to the case and supported by the evidence. (*People v. Birks* (1998) 19 Cal.4th 108, 118; *People v. Hood* (1969) 1 Cal.3d 444, 449.) The instructional duty is not subject to the prior objection rule. Thus, when a court purposefully or inadvertently fails to give an appropriate instruction, the defendant may raise the error on appeal without a prior request or objection. (*People v. Prettyman* (1996) 14 Cal.4th 248, 285.) Indeed, where the court erroneously performs its sua sponte duty by giving an incorrect instruction that affects the defendant's substantial rights, the defendant need not object to preserve the instructional claim for appeal. (§ 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.)

Last, the prior-objection rule in this context means, in effect, that a failure to object—i.e., the defendant's silence—waives the constitutional rights implicated by unjustified shackling and prison garb. However, it is settled that courts decline to infer a knowing and intelligent waiver of constitutional rights from a defendant's mere silence or apparent acquiescence. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444; *People v. Cortes* (1999) 71 Cal.App.4th 62, 69.)

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the defendant bears a two-pronged burden. First, the defendant must establish that " 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688.) Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.) A different—i.e., more favorable—result than a conviction includes not just an acquittal but also a deadlock or hung jury. (See *People v. Brown* (1988) 46 Cal.3d 432, 471, fn. 1 [conc. & diss. opn. of Broussard, J.].)

As noted, defense counsel saw no grounds for shackling defendant, but he had no tactical reason for failing to object. Although he alleged that the Monterey County Superior Court routinely shackles prison inmates for trial, he does not assert that policy as the reason he did not object. Concerning defendant's prison jumpsuit, counsel did not request civilian clothing because he knew that the jury inevitably would learn that defendant was a prisoner. However, counsel's decision was unreasonable. Prison garb is inherently prejudicial, and defendant had a constitutional right to wear civilian clothes. (*Estelle v. Williams, supra,* 425 U.S. at pp. 518-519; *People v. Taylor, supra,* 31 Cal.3d at pp. 494-496.) Thus, had counsel timely requested civilian clothing, the court, absent a compelling reason—and none appears in the record—would have granted the request. Counsel's reasoning reflects a harmless-error analysis rather than a sound tactical decision in his client's best interest. Moreover, counsel's analysis ignores the potential impact on the jury of seeing a defendant in a prison jumpsuit and shackles and hearing him be identified during trial as the person "wearing a white jumpsuit." (Cf. *People v.*

Taylor, supra, 31 Cal.3d at p. 500 [witnesses identifying the defendant as the person " ' "wearing blue county clothes" ' " and the one dressed in a " ' "blue jail suit" ' "].) As the court in *People v. Garcia* (1984) 160 Cal.App.3d 82, 91, observed, "regardless of the rules that may be laid down by the courts in this area, jurors will invariably study a nontestifying defendant's appearance and demeanor in hopes of discovering clues as to his guilt or innocence." Shackles and prison garb undoubtedly inform this inquiry.

Furthermore, because counsel failed to object to the shackles and the jumpsuit, he waived the issue and prevented defendant from raising it directly on appeal. Had counsel objected and the objection erroneously been denied, our review would have been governed by the stringent harmless-error standard for federal constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, and the state would have had to prove beyond a reasonable doubt that the shackling and jumpsuit did not contribute to the verdict. (*Deck, supra*, 544 U.S. at p. 635.) However, because counsel waived the issue, defendant can only indirectly raise it with a claim of ineffective assistance. In that context, we apply a less stringent standard of review, under which defendant has the burden to prove a reasonable probability that he would have obtained a more favorable result had he not been shackled and required to wear a jumpsuit. (See *Strickland v. Washington, supra,* 466 U.S. at p. 694.)

In short, the allegations in the petition unequivocally establish that counsel's performance " 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.]" (*People v. Ledesma, supra,* 43 Cal.3d at p. 216.)[12]

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[12] Defense counsel was not the only one in the courtroom whose performance was deficient. Trial courts not only have a general duty to control trial proceedings, maintain order and decorum, and safeguard the rights of the defendant and the interests of the state so that fairness and justice prevail (See *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365; *People v. Carlucci* (1979) 23 Cal.3d 249, 255; *People v. Mendez* (1924) 193 Cal. 39, 46, overruled on other grounds in People v. McCaughan (1957) 49 Cal.2d 409,420; *People v. Polite* (1965) 236 Cal.App.2d 85, 91-92; *Pedrow v. Federoff* (1926) 77 Cal.App.164,

We now address question of prejudice.

First, although the jury inevitably would learn that defendant was a prison inmate, that fact does not erase the visual, psychological, and emotional impact of seeing a defendant shackled, wearing a prison jumpsuit, day after day or negate the natural tendency to wonder and perhaps worry about why shackles are necessary and whether defendant is a violent and dangerous criminal.

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175) but also a specific duty to initiate a due process determination on the record establishing the necessity for shackles. (*Duran, supra,* 16 Cal.3d at p. 293, fn. 12.) We are disconcerted by the trial court's failure to do so and alarmed by defense counsel's suggestion that the omission may not have been inadvertent but consistent with a routine practice of shackling prison inmates during trial. The court's failure to determine whether shackles were necessary and its instructional explanation that it is CDC policy to transport inmates in restraints support defense counsel's assertion that shackling of inmates for trial is routine practice. Indeed, we see no reason for the court to mention CDC policy other than as a justification for the shackling as a reason for his failure to determine whether they were necessary. We emphasize, however, that *Duran* condemned routine shackling 30 years ago. (*Duran, supra,* 16 Cal.3d at p. 293.)

We are equally troubled that the court may have simply skipped a due process determination because it planned to instruct jurors to disregard defendant's shackles. We consider it unwise and inappropriate, if not improper, for a court to rely on an instructional palliative to cure an erroneous failure to follow procedures mandated by the California and United States Supreme Courts and determine whether shackles are necessary.

We are also bothered by the prosecutor's silence. A prosecutor is not simply an advocate, charged with the duty to convict regardless of the fairness of the proceedings. "Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) "[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' " (*United States v. Agurs* (1976) 427 U.S. 97, 110-111.)

With this in mind, we note that when defendant "clanked" into the courtroom for the first time, the prosecutor apparently stood silent and remained silent throughout the trial concerning the use of shackles. Notwithstanding the trial court's duty to make a due process determination, and defense counsel's duty to object to shackles and prison garb, the prosecutor's failure to ensure that the court made a proper record put any subsequent verdict for the prosecution at risk.

Second, although defendant did not allege that the shackles and prison garb affected his decision not to testify, he did allege that the shackles were embarrassing and impaired his ability to participate in his defense, in that he was unable to take notes when the prosecution witnesses were testifying. He also alleged that his shackles hurt him and made him question whether jurors could view him fairly. In this respect, we may reasonably assume that the shackles affected the defense by distracting defendant and making it more difficult to think clearly. (Cf. *People v. Mar, supra*, 28 Cal.4th at p. 1224 [affect of stun belt on defendant].)

Third, we acknowledge that the court instructed the jury to disregard defendant's shackles, and as a general rule, courts may presume that jury's follow such instructional admonitions. (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1210.) However, we point out that the court instructed the jury after all the witnesses had testified and counsel had given their closing arguments. Thus, the sight of defendant in shackles and a jumpsuit and the prejudicial associations from both tainted the jury's perception and evaluation of the evidence and closing argument. In our view, it is far more reasonable to presume that jurors can disregard the impact of seeing a shackled defendant before they have heard the evidence and formed opinions about the defendant and witnesses, than it is to presume they can do so after they have heard and formed opinions about all of the evidence.

Furthermore, if the presumption cures not only an erroneous determination that shackles are necessary but also the failure to make a determination in the first place, then, as noted, trial courts would have no incentive to perform their sua sponte duty and could simply shackle criminal defendants as a matter of routine and later instruct the jury to disregard the restraints. However, routine shackling without an individualized justification is flagrantly contrary to the procedures outlined by United States and California Supreme Courts.

Last, we do not believe that the presumption is, or ought to be mandatory, in every

case. On the contrary, as the evidence of guilt in a given case becomes less and less compelling, reliance on a general presumption to negate the inherent prejudice from shackles and prison garb becomes less and less reasonable and appropriate, especially when, as here, the instruction comes after the jury has heard the evidence and witnesses.

Turning to the evidence in this case, we note that although the evidence that Sara and Martha unlawfully transported drugs was overwhelming, the evidence connecting defendant to the two crimes was far less so. Indeed, there were substantial deficiencies in the prosecution's case on that determinative issue.

Officer Doglietto had no independent knowledge that defendant made any of the calls he interpreted. He relied on Officer Garcia to identify defendant. However, Officer Garcia did not testify that he personally saw and identified defendant making each of the calls attributed to him. Nor did he testify that he had independent knowledge of defendant's voice. He testified only that he had Officer Munoz personally identify the name of a caller on May 31, 2001, and later he started to recognize the voices on the various calls he monitored.

Officer Munoz confirmed that he visually identified defendant as the caller on only one call on May 31, 2001. Officer Doglietto agreed that of all the calls he listened to, there was positive visual identification for only that one call. Thus, although numerous calls were attributed to defendant, he was positively and visually identified as the caller on only one.

Even though there was some evidence that defendant made a call on May 31, 2001, the prosecution did not rely on it. Officer Doglietto did not testify about what was said or otherwise suggest that that during the call defendant used code words for drug-related activity. Rather, Officer Doglietto testified about the calls on and after

June 5, 2001.[13]

We further note that there was only one call attributed to defendant in which the name of Theresa, a.k.a. Martha, was mentioned. That call took place on June 6, 2001. All of the other calls related to Theresa or Martha, which Officer Doglietto interpreted to be arrangements for Martha to import drugs, were attributed to Ramirez and Villa. Thus, the evidence linking defendant to the unlawful transportation alleged in count 4 was especially weak.

Next, Officer Garcia received no formal training concerning how to collect and pass on information about calls he considered to be suspicious. Nor were there formal procedures or forms for him to use. He simply wrote down notes on scraps of paper and sometime later passed the information, but not the scraps of paper, to Officer Doglietto. At some unspecified time later, he compiled the information into informal logs for his own personal records. Apparently, Officer Garcia did not keep his original notes because they were not introduced as evidence at trial.

We observe that in cases where telephone company PIN registers are used to identify time, number, and other factual details, prosecutors still face considerable proof burdens in proving up the identity of a caller. The proof here is questionable. Although computers apparently record the calls and information related to the calls (see *ante,* fn. 3), those computer records were not admitted or even used at trial, and Officer Garcia did not use those records in compiling his personal logs, which were introduced at trial. However, there was little or no evidence adduced to establish the reliability of those after-the-fact logs. Although Officer Garcia's paper scrap notes would have been the basis for establishing admissibility of the logs as past recollection recorded (Evid. Code, § 1237), they were not available or introduced at trial. Thus, the reliability of the

[13] Officer Garcia testified that he had Officer Munoz identify defendant on May 31 because he heard "something that was suspicious to [him]." However, he did not testify about what made him suspicious.

information on the logs was never tested or properly established.[14]

Under the circumstances, we do not find that counsel's failure to object to defendant's shackles and prison jumpsuit was harmless. Rather, counsel's omission undermines our confidence in the verdict, and we find that but for that omission there is a reasonable probability defendant would have obtained a more favorable outcome. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

DISPOSITION

We issue an order to show cause returnable before the superior court directing the Attorney General to show cause why defendant's remaining convictions for transporting controlled substances should not be reversed due to ineffective assistance of counsel based on counsel's failure to object to the shackles and prison garb. (See § 1508, subd. (b).)

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

[14] Because Officer Garcia was not instructed to keep the logs, compiling them was not within the scope of his official duty. Indeed, he constructed them for his own personal records. Thus, the logs would not have been admissible as official records. (Evid. Code, § 1280.) Moreover, since Officer Garcia could not say when he constructed the logs and conceded that perhaps he did so months after the calls reflected in the logs, they would not have been admissible as business records. (Evid. Code, § 1271.)

Trial Court:	Monterey County Superior Court Court No.: SS021615
Trial Judge:	The Honorable Robert F. Moody Under appointment by the Court of Appeal for Appellant
Attorneys for Petitioner Jamie Mejia Jasso:	Ruth McVeigh