

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

JAY E. McKAGUE,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Jay McKague filed a timely PRP raising several claims—some based on the trial record and others supported by new, extra-record evidence. In response, the State does not dispute McKague’s new evidence with its own. Instead, the State argues that none of McKague’s claims of error merit reversal.

The State is wrong.

McKague’s trial was rife with major constitutional errors. He was unjustly forced to wear a shock device. His jury was selected anonymously. Material evidence was suppressed. The prosecutor superimposed the word “guilty” over a piece of evidence during closing. McKague was excluded from critical portions of his trial for no legitimate reason. The evidence presented in McKague’s PRP shows that his trial was neither fair nor reliable. A new trial, or at least remand for an evidentiary hearing, is required.

B. ARGUMENT

1. MR. MCKAGUE WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL BY THE PROSECUTOR’S USE OF A POWERPOINT SLIDE WHICH SUPERIMPOSED THE WORD “GUILTY” OVER MCKAGUE’S FACE SIMILAR TO THE CONDEMNED SLIDE FROM *IN RE PRP OF GLASMANN*.
2. MR. MCKAGUE WAS DEPRIVED OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE POWERPOINT SLIDE.

The prosecutor's closing argument was accompanied by a PowerPoint slide show, which included a screen capture of McKague from the security video with the word "GUILTY" superimposed on McKague's face. The State does not dispute that the prosecutor used this slide to argue for McKague's conviction.

The prosecutor's final slide is virtually indistinguishable from the slides that the Washington Supreme Court recently condemned in *In re PRP of Glasmann*, 175 Wash.2d 696, 286 P.3d 673 (2012). Nevertheless, the State argues that reversal is not required because the word "guilty" was superimposed only once, not multiple times, and because the photo is a surveillance photo, not a booking photo. Whether the word "guilty" appeared one, two, or three times over a booking or surveillance photo makes no difference. Both arguments are equally improper and equally harmful. *Glasmann* controls and requires reversal.

Like in *Glasmann*, the State first attempts to argue that there was no error. However, in both cases the State manipulated evidence. The Court in *Glasmann* rejected a nearly identical argument and held: "While the State argues that it merely combined the booking photograph, admitted as exhibit 89, with the court's instructions and argument of the law and facts, the prosecutor's conduct went well beyond this. *Id.* at 706. Indeed, here the prosecutor's modification of photographs by adding captions was the

equivalent of unadmitted evidence. *Id.* “Yet this ‘evidence’ was made a part of the trial by the prosecutor during closing argument.” *Id.* According to *Glasmann*, a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations.

Just as a prosecutor could never shout in closing argument that “Glasmann is guilty, guilty, guilty!” and it would be highly prejudicial to do so, a prosecutor cannot shout McKague is “guilty.” Like in *Glasmann*, during the critical closing moments of trial, one of the last things the jury saw before it began its deliberations was the representative of the State of Washington impermissibly flashing the word “guilty” across an image of McKague. In both cases, the prosecutors’ actions predisposed the jury to return a harsh verdict.

Reading *Glasmann* and the State’s argument here makes it clear that the State’s argument is an attack on that decision, rather than an attempt to distinguish it.

In fact, there is a greater likelihood of prejudice in this case. The evidence against McKague is by comparison weaker than the evidence in *Glasmann*. The prejudice is just as great. This Court should reverse.

3. MR. MCKAGUE’S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A FAIR JURY TRIAL WERE VIOLATED BY THE COURT REQUIRING HIM TO WEAR A SHOCK DEVICE AT TRIAL.

4. MR. MCKAGUE'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO OBJECT TO THE SHOCK DEVICE WHERE NO SECURITY CONCERN JUSTIFIED REQUIRING MCKAGUE TO WEAR THE DEVICE.
5. MR. MCKAGUE'S RIGHT TO BE PRESENT AT TRIAL WAS VIOLATED BY REQUIRING MCKAGUE TO WEAR A SHOCK DEVICE AT TRIAL VIOLATING THE GUARANTEES OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.
6. MR. MCKAGUE'S RIGHT TO COUNSEL WAS VIOLATED BY REQUIRING MCKAGUE TO WEAR A SHOCK DEVICE AT TRIAL SUBSTANTIALLY INTERFERING WITH MCKAGUE'S ABILITY TO CONSULT WITH COUNSEL.

During his trial, Mr. McKague was forced to wear a shock device.

The State does not attempt to defend the decision by arguing that a valid security reason made the device the least restrictive means necessarily. Instead, the State simply argues that because the trial judge did not think the device was visible to jurors that McKague could not have been prejudiced by the constant threat of debilitating shock administered for a misperceived action or comment (or even accidentally). The State's argument is a radical departure from what the law requires.

First, this Court should reverse simply because McKague was forced to wear a shock device without conducting a hearing. In addition, this Court should reverse because a shock device necessarily interferes with a defendant's ability to communicate with counsel and his demeanor in the

courtroom. If this Court does not find that a shock device is inherently prejudicial, then it should remand for a hearing.

The federal circuit courts applying the Constitution have held that trial courts may authorize a stun belt or shock device only after a case-specific determination that an essential state interest requires it. *Miller*, 531 F.3d at 345 (before imposing a stun belt, “a formal hearing should be conducted, with sworn testimony”); *Wrinkles v. Buss*, 537 F.3d 804, 814 (7th Cir. 2008) (counsel's failure to object to stun belt was error because “particularized reasoning must support a decision to restrain a defendant”); *Gonzalez*, 341 F.3d at 901; *Durham*, 287 F.3d at 1306-7 (court must “make factual findings about the operation of the stun belt,” “assess whether an essential state interest is served,” and “consider less restrictive methods of restraint”).

The facts in *Gonzalez v. Pliler*, 341 F.3d 897 (9th Cir. 2003), parallel those in Mr. McKague’s case. In *Gonzalez*, the defendant was compelled to wear the belt for the majority of trial. *Id.* at 901-02. The initial decision to require the belt was made by the bailiff, not the court. *Id.* In this case, the decision was made by the jail officers. Like here, the trial court failed to hold a hearing or make factual findings demonstrating a compelling need for the shock device to maintain courtroom security. *Id.* And like here, “[t]he record [wa]s completely devoid of any action taken by the defendant in the courtroom that could be construed as a security problem.” *Id.* at 902.

The trial court's only basis for requiring the defendant to wear the belt was the bailiff's statements that the defendant had "three strikes" and, reportedly, "was being a little uncooperative, and he had a little attitude." *Id.* at 901-02. The trial court also stated that "the belt is not visible to anyone." *Id.* at 901.

The court concluded that "the record is completely devoid of any evidence concerning the effect the belt had on the defendant's ability to communicate with his lawyer, on his ability to assist in his own defense, or on his ability to testify on his own behalf." *Id.* Faced with an inconclusive record on the petitioner's credible allegations of prejudice, the Ninth Circuit remanded to the district court for an evidentiary hearing on the issue of prejudice. *Id.* It bears mention that the evidentiary hearing in *Gonzalez* was no empty exercise. At the hearing, documentary evidence and the defendant's testimony established that Gonzalez was told by the bailiff prior to trial that the stun belt could be remotely activated if he "communicat[ed] with persons in [his] immediate vicinity" and was not informed that he could consult with counsel. *Gonzalez v. Plier*, 395 Fed. Appx. 453, 456 (9th Cir. 2010). The evidence further showed that Gonzalez never initiated conversation with his attorney during the trial. *Id.* In light of this evidence, the district court held that Gonzalez was denied the assistance of counsel at a critical stage of a criminal proceeding and granted his habeas petition, and the Ninth Circuit affirmed. *Id.* at 456-57.

At a minimum, this Court should remand for a hearing.

United States v. Durham, 287 F.3d 1297, 1300 (11th Cir. 2002), is another stun belt case in which the court of appeals held that “the district court did not make findings on the record sufficient to justify the use of this extraordinary security measure.” In *Durham*, the Eleventh Circuit credited the same allegations about the prejudicial effects of stun belts as specifically claimed by McKague, here. Indeed, the Eleventh Circuit vacated the defendant's conviction outright, concluding that the use of the stun belt prejudiced Durham's right to be present at trial and participate in his own defense. *Id.* at 1308. Because the court held that the district court's error with respect to this right was prejudicial, the court did not rule on other possible burdens on the defendant's rights, including the effect on the jury and interference with communication with counsel. *See id.* at 1305-6, 1308 n.10. Though the burden in *Durham* lay with the government to demonstrate harmless error, the Eleventh Circuit went beyond merely holding that the government did not meet its burden. The court concluded, based on the known facts about stun belts, that “the defendant's ability to participate meaningfully throughout his trial was hampered by the use of the stun belt.” *Id.* at 1309. This was because: Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of

these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. *Id.* at 1306.

Again, these conclusions were not based on details from Durham's trial record, as “[t]here [wa]s no testimony in the record from a single sworn witness about the operation of the stun belt, nor [we]re there any findings of fact on the issue.” *Id.* at 1305. Rather, the court of appeals' conclusions were based on the defendant's “uncontested claims about certain of the stun belt's basic operational facts.” *Id.* These basic operational facts are the same facts cited in McKague’s PRP- that the stun belt administers a 50,000 volt shock for approximately eight seconds; that, if activated, the belt can cause temporary immobilization, urination and defecation; and that stun belts have both malfunctioned and been triggered accidentally. *Id.*; App. 40a-41a.

This Court should either reverse outright or should remand for an evidentiary hearing.

7. MR. MCKAGUE’S RIGHT TO BE PRESENT AT HIS OWN TRIAL WAS VIOLATED WHEN MANY ISSUES, INCLUDING THE EXCUSAL OF JURORS, WAS CONDUCTED IN HIS ABSENCE.

The State does not dispute that all of the “for cause” and peremptory challenges in this case were conducted in the absence of Mr. McKague.

However, the State argues that because McKague had a theoretical right to

discuss these matters with counsel prior to the excusals his right to presence was not violated. The same opportunity theoretically existed, but made no difference in *State v. Irby*, 170 Wash.2d 874, 246 P.3d 796 (2011).

In fact, the same argument made by the State in this case was rejected in *Irby*: “The State likens the ‘e-mail exchange’ between the trial judge and counsel for the parties to a sidebar or chambers conference, proceedings that our court and other courts have said that a defendant has no due process right to attend.” *Id.* at 882. The Court held that *Irby*’s absence from jury selection was a violation of the constitutional right to be present and the record needed to show either a waiver or that counsel had consulted with *Irby* about the hearing. In this case, the record does not reveal that counsel discussed the excusal of jurors with McKague prior to the hearing held without him. Further, the exercise of peremptory challenges is an evolving process, one that cannot be completely decided in advance.

Because the hearing was a critical stage of trial and because there is no showing that McKague’s right to be present was satisfied in some manner other than presence across the room, reversal is required.

8. MR. MCKAGUE’S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY WERE VIOLATED BECAUSE THE JURY WAS SELECTED ANONYMOUSLY—MCKAGUE WAS NOT PERMITTED TO KNOW THE NAMES OF JURORS AND JURORS KNEW THEIR IDENTITIES WERE PRIVATE.

The State misses the point on this claim of error. By using numbers instead of names and by telling jurors their privacy as jurors would be insured, the Court created the impression in the mind of jurors that McKague was dangerous. Why else would he be precluded from learning their names? If only one juror reached that conclusion, then McKague was prejudiced.

9. THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE ABOUT THE EXTENT OF THE VICTIM'S INJURY.
10. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT TESTIMONY ABOUT THE EXTENT OF THE VICTIM'S INJURY.

Because the State disputes whether certain records were disclosed to defense counsel before trial, this claim must be remanded for an evidentiary hearing. The determination of materiality, which is also disputed, can also best be determined at that hearing.

11. THE FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION OF ASSAULT IN THE FOURTH DEGREE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Like the previous claim of error, the facts on this claim of error are in dispute. Trial counsel's strategy changed during trial. Just as importantly, the decision to offer a lesser (or not) must include the defendant. As a result, this claim should be remanded for an evidentiary hearing.

12. MR. MCKAGUE IS ENTITLED TO A NEW TRIAL BASED ON THE CUMULATIVE PREJUDICE FROM MULTIPLE ERRORS.

If this Court concludes multiple errors occurred, it should measure the prejudice cumulatively.

B. CONCLUSION

This Court should reverse and remand for a new trial. Alternatively, this Court should remand for an evidentiary hearing.

DATED this 4th day of March, 2013.

Respectfully Submitted:

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