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No. 97681-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN JACKSON, SR.,
Petitioner.

BRIEF OF AMICI CURIAE
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICI CURIAE..... 1

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

 I. An Individualized Hearing Prior to Restraining a Criminal Defendant Is Necessary at Any Stage of the Criminal Process to Preserve the Defendant’s Right to Appear and Defend in Person. 3

 a. Courts Have Uniformly Recognized That Defendants Are Prejudiced When They Appear Shackled Before a Jury 4

 b. Empirical Literature Suggests That Judges Are Susceptible to the Same Biases as Juries 6

 c. Appearing Shackled Before a Judge May Result in Unfair Process and Unintended Consequences..... 10

 II. This Court Should Clarify That When a Defendant Has Been Shackled Absent an Individualized Determination, the State Must Prove Beyond a Reasonable Doubt that the Error Was Harmless 14

 III. Videoconferencing Is Not an Adequate Alternative in All Cases Because It Creates Barriers to a Fair Process. 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Constitutional Provisions

Washington
Const. art I, § 32
Const. art I, § 22.....2, 4
Federal
U.S. Const. amend. VI4, 18

Washington Cases

In re Pers. Restraint of Davis,
152 Wn.2d 647, 101 P.3d 1 (2004)8
State v. Clark,
143 Wn.2d 731, 24 P.3d 1006 (2001).....16
State v. Damon,
144 Wn.2d 686, 25 P.3d 418 (2001) *as amended* (July 6, 2001),
as modified on denial of reh'g, 33 P.3d 735 (2001)4, 16
State v. Elmore,
139 Wn.2d 250, 985 P.2d 289 (1999).....16
State v. Finch,
137 Wn.2d 792, 975 P.2d 967 (1999) (plurality opinion).....5, 14, 16
State v. Gregory,
192 Wn.2d 1, 427 P.3d 621 (2018)6
State v. Hartzog,
96 Wn.2d 383, 635 P.2d 694 (1981)2, 3, 5
State v. Hutchinson,
135 Wn.2d 863, 959 P.2d 1061 (1998)16, 17
State v. Jackson,
10 Wn. App. 2d 136, 447 P.3d 633 (2019).....14, 16, 17, 18

<i>State v. Lundstrom</i> 6 Wn. App. 2d 388, 429 P.3d 1116 (2018).....	3, 4
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013)	6
<i>In re Smith</i> , 117 Wn. App. 846, 73 P.3d 386 (2003), <i>abrogated by</i> <i>In re Domingo</i> , 155 Wn.2d 356, 119 P.3d 816 (2005).....	15
<i>State v. Sweidan</i> , __ Wn. App. 2d __, __ P.3d ____, 2020 WL 1921551 (April 21, 2020) (published in part).....	19
<i>State v. Williams</i> , 18 Wash. 47, 50 P. 580 (1897).....	2, 3, 5

Federal Cases

<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)	15
<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	14, 15
<i>Deck v. Missouri</i> , 544 U.S. 622, 633, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005)	15, 16
<i>Rhoden v. Rowland</i> , 10 F.3d 1457 (9th Cir. 1993).....	16
<i>United States v. Bethea</i> , 888 F.3d 864 (7th Cir. 2018).....	19

Other State Cases

<i>People v. Best</i> , 19 N.Y. 3d 739, 955 N.Y.S.2d 860, 979 N.E. 2d 1187 (2012)	5, 13
<i>People v. Fierro</i> , 1 Cal. 4th 173, 3 Cal. Rptr. 2d 426, 821 P.2d 1302 (1991).....	13

Washington Court Rules

CrR 3.2.....	11
CrR 3.4.....	18

Other Authorities

Roy F. Baumeister et al., <i>Bad Is Stronger Than Good</i> , 5 Rev. Gen. Psychol. 323 (2001).....	10
Eric Bellone, <i>Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom</i> , 8 J. Int. Com. L. & Tech. 24 (2013).....	19
Thomas Cohen & Brian Reaves, U.S. Department of Justice, Bureau of Justice Statistics, <i>Pretrial Release of Felony Defendants in State Courts</i> (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf	12
Shai Danziger et al., <i>Extraneous Factors in Judicial Decisions</i> , 108 Proc. Nat'l Acad. Sci. U.S. 6889 (2011).....	6
Stephanie H. Didwania, <i>The Immediate Consequences of Federal Pretrial Detention</i> , 22 Am. L. & Econ. Rev. (forthcoming 2020) ...	12, 13
Ingrid V. Eagly, <i>Remote Adjudication in Immigration</i> , 109 Nw. U. L. Rev. 933 (2015).....	19
Chris Guthrie et al., <i>Inside the Judicial Mind</i> , 86 Cornell L. Rev. 777 (2001).....	7
Cynthia E. Jones, “Give us Free”: <i>Addressing Racial Disparities in Bail Determinations</i> , 16 N.Y.U. J. of Legis. & Pub. Pol’y. 919 (2013)	11
King County Department of Adult and Juvenile Detention, <i>Detention and Alternatives Scorecard</i> (2019), https://kingcounty.gov/ ~/media/courts/detention/documents/2019-12_-_KC_DAR_ Scorecard.ashx?la=en	11, 12
Fatma E. Marouf, <i>The Unconstitutional Use of Restraints in Removal Proceedings</i> , 67 Baylor L. Rev. 214 (2015).....	7, 8

Alexandra Natapoff, <i>Speechless: The Silencing of Criminal Defendants</i> , 80 N.Y.U. L. Rev. 1449 (2005).....	19
Research Working Group, Task Force on Race and the Criminal Justice System, <i>Preliminary Report on Race and Washington's Criminal Justice System</i> , 35 Seattle U. L. Rev. 623 (2012).....	13
Safety and Justice Challenge, Spokane County 2016 Safety and Justice Challenge Fact Sheet (2016), http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/04/Spokane-County-Safety-Justice-Challenge-Fact-Sheet.pdf	12
Shari Seidman Diamond et al., <i>Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions</i> , 100 J. Crim. L. & Criminology 869 (2010).....	19
Ram Subramanian, et al., Vera Institute of Justice, <i>Incarceration's Front Door: The Misuse of Jails in America</i> (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf	11, 12
Amrisha Vaish, et al., <i>Not All Emotions Are Created Equal: The Negativity Bias in Social-Emotional Development</i> , 134 Psychol. Bull. 383 (2002)	9
Jacqueline Van Wormer, <i>Creating and Effecting Local Criminal Justice Reform</i> , presentation to Washington State Supreme Court for Minority and Justice Commission Symposium: Pre-Trial Justice: Reducing the Rate of Incarceration, 1:45:00-1:54:40 (May 25, 2016), https://www.tvw.org/watch/?eventID=2016051095	13
Andrew J. Wistrich, et al., <i>Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding</i> , 153 U. Pa. L. Rev. 1251 (2005).....	8
Andrew J. Wistrich, et al., <i>Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?</i> , 93 Tex. L. Rev 855 (2015)	9
Andrew J. Wistrich & Jeffrey J. Rachlinski, <i>Implicit Bias in Judicial Decision Making</i> , in <i>Enhancing Justice: Reducing Bias</i> (Sarah E. Redfield ed., 2017).....	7, 8, 9

Yakima County Pretrial Policy Team, Yakima County Pretrial System
Implementation Plan (November 2015), [http://www.
whatcomcounty.us/DocumentCenter/View/17896](http://www.whatcomcounty.us/DocumentCenter/View/17896).....11

IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici curiae are set forth in the motion for leave to file brief of amicus curiae, filed contemporaneously with this brief.

INTRODUCTION

This Court has recognized that implicit bias may jeopardize the fair administration of justice and has made pathbreaking changes with regard to the death penalty and discrimination in jury selection. Amici urge this Court to recognize that the danger of bias exists when an individual appears in shackles before a judge, and that this bias might distort outcomes in very consequential ways.

Judges are human. And that is a good thing. They are tasked with the awesome responsibility of passing judgment on the people before them. The humanity that judges bring to this task is vital and irreplaceable.

Judges, though, are fallible as human beings. Empirical research teaches us that judges are not immune from implicit biases. Yet the failure to require an individualized hearing before a defendant appears shackled in front of a judge presumes that judges are somehow able to escape the impact of the visual marker, and presumes that it does not affect outcomes.

Both presumptions are incorrect.

SUMMARY OF THE ARGUMENT

Shackling, while occasionally necessary for safety purposes, must be used sparingly because of the myriad constitutional rights at stake, not least of which are an individual's right "to appear and defend in person" under article I, section 22 and the right to due process under article I, section 3. The individualized hearing required before a defendant may be restrained before a jury balances these rights against the State's interests.¹ Improper restraint in front of a jury violates a defendant's right to an impartial jury under article I, section 22, as shackles are presumed to prejudice the factfinders.²

However, this Court has yet to decide whether an individualized hearing is required when a defendant appears restrained before a judge. Constitutional concerns arise, though, when defendants routinely appear shackled before judges for both pretrial and sentencing proceedings, where many of the zealously guarded rights under article I, section 22 and article I, section 3 are at issue. This Court should require an individualized hearing prior to restraining a defendant at *any* phase of the proceedings to avoid the unacceptable risk of prejudice against the defendant.

Washington courts need clear guidance as to the appropriate standard of review once improper shackling has been established. This

¹ *State v. Hartzog*, 96 Wn.2d 383, 400-01, 635 P.2d 694 (1981).

² *Id.* at 397-98; *see also State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897).

Court should clarify that the constitutional harmless error test applies on direct appeal when a criminal defendant is erroneously shackled, whether before the judge or the jury. The presumption of harm exists, unless the State can prove otherwise beyond a reasonable doubt. Improper shackling diminishes the dignity of the court that permits the gratuitous demeaning of participants, and results in a loss of confidence in the justice system.

Finally, this Court should note that videoconferencing is not an adequate alternative to blanket shackling policies because it creates its own barriers to a fair process and should be implemented with caution.³

ARGUMENT

I. An Individualized Hearing Prior to Restraining a Criminal Defendant Is Necessary at Any Stage of the Criminal Process to Preserve the Defendant’s Right to Appear and Defend in Person.

Since 1897, this Court has recognized the right of a criminal defendant to be brought before the jury unrestrained. *See Williams*, 18 Wash. at 51. To protect this right, an individualized hearing is required before a criminal defendant may be made to appear before the jury in restraints. *Hartzog*, 96 Wn.2d at 400–01. However, this Court has yet to explicitly require that this individualized hearing be conducted before a defendant appears in restraints before a judge. *But see State v. Lundstrom*,

³ Amici recognize that videoconferencing has enabled the judiciary to continue to function during the COVID-19 pandemic. The fact that it is deemed necessary during this crisis should not be taken to mean that it is equivalent to in-person in all instances.

6 Wn. App. 2d 388, 394–95, 429 P.3d 1116 (2018) (holding trial court committed constitutional error by failing to conduct individualized inquiry prior to allowing defendant to appear restrained at pretrial hearing). Mr. Jackson’s case gives this Court the opportunity to guard against prejudice by any decision-maker—be it juror or jurist—caused by seeing a defendant in shackles. An individualized hearing is required prior to restraining a defendant at any stage because of the prejudice and bias associated with shackling, from which judges are not immune.

a. Courts Have Uniformly Recognized That Defendants Are Prejudiced When They Appear Shackled Before a Jury.

Under the Washington Constitution “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, [and] to have a speedy public trial by an impartial jury.” Const. art. I, § 22. This includes the right “to be brought into the presence of the court free from restraints.” *State v. Damon*, 144 Wn.2d 686, 690, 25 P.3d 418 (2001), *as amended* (July 6, 2001), *as modified on denial of reh’g*, 33 P.3d 735 (2001). *Cf.* U.S. Const. amend. VI (guaranteeing criminal defendants “the right to a speedy and public trial, by an impartial jury”).⁴ Restraints interfere with a criminal defendant’s constitutional rights, including the

⁴ It is noteworthy that art I, section 22 may be more protective than the Sixth Amendment because of textual differences—our state constitution guarantees an active, rather than passive, right to appear and defend, in addition to the right to an impartial jury, compared with the federal constitution’s guarantee of a passive right to be tried by an impartial jury.

presumption of innocence, the right to testify on one's own behalf, and the right to counsel. *Hartzog*, 96 Wn.2d at 398.

Shackling a defendant in the presence of a jury is strongly discouraged, as doing so prejudices the jury against the defendant by creating the perception that the defendant is dangerous or guilty, thereby threatening his constitutional right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (1999) (plurality opinion) (“Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” (internal citations omitted)); *Williams*, 18 Wash. at 51 (when a defendant is brought before the jury in restraints, the “jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers”).

While concerns about prejudicing the jury are well-recognized, similar concerns have rarely been acknowledged when the defendant appears before a judge. However, as the New York Court of Appeals recently and correctly observed, “[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.” *People v. Best*, 19 N.Y. 3d 739, 744, 955 N.Y.S.2d 860, 979 N.E. 2d 1187 (2012). When judges don the black robe, they do not become immune to human processes.

b. Empirical Literature Suggests That Judges Are Susceptible to the Same Biases As Juries.

Individuals—judges included—are influenced by unconscious biases in a myriad of ways. Simply put, judges are humans too.⁵ This Court has acknowledged and accepted that implicit bias impacts the administration of justice. *See State v. Gregory*, 192 Wn.2d 1, 22–23, 427 P.3d 621 (2018) (acknowledging implicit and overt racial bias against Black capital defendants in Washington state); *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (plurality opinion) (racism lives “beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus”). This Court is well-equipped to consider the empirical literature showing that judges are not immune from implicit bias, and the implausibility that judges would be unaffected by seeing a defendant restrained.

Empirical studies show that judges are generally subject to the same implicit biases as jurors. Although judges can sometimes avoid common errors that intuition can produce, judges also “rely on misleading intuitive reactions, even when doing so leads to erroneous or otherwise

⁵ A study sought to test whether judges were affected by “what the judge ate for breakfast” by recording Israeli judges’ parole decisions in relation to food breaks. Favorable decisions dropped from approximately 65% to nearly zero between breaks and returned to approximately 65% after a break, leading the researchers to conclude that judges are swayed by extraneous variables. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 Proc. Nat’l Acad. Sci. U.S. 6889 (2011).

indefensible judgments.” Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making*, in *Enhancing Justice: Reducing Bias* 92 (Sarah E. Redfield ed., 2017); *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777 (2001) (reporting on five empirical studies of judges’ biases and finding that judges are affected by the same biases and cognitive illusions as lay people).

While sufficient research has not been conducted into whether or to what extent judges are biased by the sight of a shackled defendant, *see* Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 *Baylor L. Rev.* 214, 277 (2015), amici discuss empirical research in three related areas, all of which demonstrate the likelihood that implicit bias operates in this context as well: first, judicial decision-making is affected by inadmissible evidence; second, judicial decision-making is affected by parties perceived as sympathetic, and third, negativity bias has an effect on cognitive processes.

The presence of shackles should not serve as the basis for a legitimate judicial decision, whether conscious or unconscious. While judges are accustomed to the concept of setting aside prejudicial information, in a study testing whether judges are able to ignore inadmissible evidence, researchers found that they struggle to ignore

inadmissible information when making factual determinations.⁶ Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1324 (2005); *see also* Marouf, *supra*, at 273-75 (reviewing studies indicating that judges are susceptible to implicit consideration of irrelevant facts and inadmissible evidence when making decisions). Just as judges have difficulty disregarding the existence of inadmissible evidence, they may also be unable to disregard the shackles worn by a defendant, which may unconsciously impact a judge's ruling. In light of the research confirming that judges are largely unable to exclude extraneous facts and circumstances when making decisions, *Implicit Bias in Judicial Decision Making*, *supra*, at 96, it is unreasonable to presume that a judge will be able to render decisions unaffected by seeing a defendant in restraints.

While the law recognizes that the sight of a criminal defendant in restraints invokes an emotional response from jurors, it also presumes that judges do not have such emotional responses. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) (declaring that there is a presumption that trial judges execute their official duties without explicit

⁶ The inadmissible evidence judges had more difficulty ignoring included settlement demands, attorney-client privileged information, sexual history, criminal record, and information that the prosecutor agreed not to use. *Can Judges Ignore Inadmissible Information?*, *supra*, at 1283, 1324. This study found that judges were better able to ignore inadmissible information in situations that required them to make legal determinations, which are much more likely to be scrutinized on appeal. *Id.* at 1324.

bias or prejudice).⁷ In testing whether judges favor emotionally sympathetic parties, researchers concluded that, while the judicial head wins out most of the time, “when the law is unclear, the facts are disputed, or judges possess wide discretion in their decisions, judges can be influenced by their feelings about litigants.” Andrew J. Wistrich et al., *Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex. L. Rev 855, 911 (2015). Research has largely concluded that “judges are good decision makers, but like most adults, they tend to rely too heavily on their intuition.” *Implicit Bias in Judicial Decision Making*, *supra*, at 104. Emotions and feelings about the defendant can and do impact how a judge applies the law. The sight of a restrained defendant can rouse a judge’s emotions and feelings about the party and consequently impact decisions in the case.

Further, there is no reason that studies examining negativity bias⁸ would not also apply to judges seeing a defendant in shackles. A meta-analysis of negativity bias studies supports that the initial negative image of the shackled defendant may remain with the judge and impact the

⁷ It should be noted that the holding in *Davis* only addresses explicit bias or prejudice and did not consider implicit or unconscious bias.

⁸ Negativity bias is the theory that “[a]dults spend more time looking at negative than at positive stimuli, perceive negative stimuli to be more complex than positive ones, and form more complex cognitive representations of negative than of positive stimuli.” Amrisha Vaish et al., *Not All Emotions Are Created Equal: The Negativity Bias in Social-Emotional Development*, 134 Psychol. Bull. 383, 383 (2002).

judge's decisions. *See* Roy F. Baumeister et al., *Bad Is Stronger Than Good*, 5 *Rev. Gen. Psychol.* 323, 345 (2001). This meta-analysis found that nearly twenty studies confirmed that negative information about another person is retained longer and has a greater impact on overall impressions than positive information. *Id.* Because human brains retain negative information about others longer and this information impacts cognition, *id.* at 325, the implications of negativity bias likely weigh heavily on judges who perceive criminal defendants in shackles during pretrial hearings or sentencing. When a defendant appears in restraints before a judge, this negative image may attach and impact the judge's view of the criminal defendant, even if the defendant later appears unrestrained before the jury.

c. **Appearing Shackled Before a Judge May Result in Unfair Process and Unintended Consequences.**

The potential prejudicial effect of judges seeing a defendant shackled may directly impact the fairness of the criminal process beyond the right to a fair trial. For instance, because of the associated negative bias, defendants who are shackled at bail hearings may be less likely to be released before trial and more likely to have bail set at an inaccessible amount. Further, pretrial detention has a significant impact on case outcomes— national data reflect a notable disparity in the conviction rate

between those held on bail and those released pending trial.

Assumptions based on seeing a defendant shackled may unconsciously and incorrectly lead a judge to determine that an accused person is more likely to fail to appear in court or pose a danger to the community, and thus lead to decisions that keep shackled defendants disproportionately incarcerated before trial. *See* Section II. a. & b, *supra*. While court rules presume criminal defendants will be released pending trial, judges have significant discretion in deciding whether to detain a defendant. *See* CrR 3.2. Because the decision of whether to impose bail and the amount to impose relies on a determination of a defendant's likelihood of flight or community safety risk if released, a defendant who is shackled may be more likely to be perceived as a risk. *See* Cynthia E. Jones, "Give us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. of Legis. & Pub. Pol'y 919, 921 (2013). Despite the presumption of release imbedded in CrR 3.2, in Washington counties where data is available, approximately 65 to 75 percent of county jails' populations were comprised of people who had not yet been sentenced.⁹ *See* King County Department of Adult and Juvenile Detention,

⁹ In Washington, bail is routinely set at amounts out of reach for the majority of the population. *See e.g.*, Yakima County Pretrial Policy Team, Yakima County Pretrial System Implementation Plan, 33 (November 2015), <http://www.whatcomcounty.us/DocumentCenter/View/17896> (bail amounts in Yakima County averaged between \$5,000 and \$50,000 in 2014); *cf.* Ram Subramanian et al.,

Detention and Alternatives Scorecard (2019);¹⁰ Safety and Justice Challenge, Spokane County 2016 Safety and Justice Challenge Fact Sheet (2016).¹¹ Because the majority of defendants lack the resources to post bail and therefore lack any meaningful alternative to pretrial detention, the impacts of the negative stigma and perceived dangerousness associated with shackling result in serious consequences.

Shackling increases the likelihood of pretrial detention, and pretrial detention leads to a higher likelihood of conviction. The Bureau of Justice Statistics found that 78 percent of defendants held on bail while awaiting trial were convicted, but just 60 percent of defendants who were released pending trial were convicted. Thomas Cohen & Brian Reaves, U.S. Department of Justice, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts*, 7 (2007).¹² This is not surprising. Released defendants are better able to participate in their defense, partake in activities that build a strong mitigation case at sentencing, and benefit from assumptions that released defendants may be less dangerous and less likely to recidivate. *See* Stephanie H. Didwania, *The Immediate*

Incarceration's Front Door: The Misuse of Jails in America, Vera Institute of Justice, 29 (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf (43 percent increase in the amount of bail imposed between 1992 and 2009 in felony cases in 75 largest counties in U.S., including King County).

¹⁰ <https://kingcounty.gov/~media/courts/detention/documents/2019-12 - KC DAR Scorecard.ashx?la=en>.

¹¹ <http://safetyandjusticechallenge.org/wp-content/uploads/2016/04/Spokane-County-Safety-Justice-Challenge-Fact-Sheet.pdf>.

¹² <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

Consequences of Federal Pretrial Detention, 22 Am. L. & Econ. Rev. (forthcoming 2020).¹³

The harm of shackling and its impacts on pretrial detention may be disproportionately enhanced for defendants of color. Racial and ethnic disparities are prevalent in pretrial determinations in Washington State, including in higher rates of pretrial detention. *See* Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 636, 650-51 (2012); Jacqueline Van Wormer, *Creating and Effecting Local Criminal Justice Reform*, presentation to Washington State Supreme Court for Minority and Justice Commission Symposium: Pre-Trial Justice: Reducing the Rate of Incarceration, 1:45:00-1:54:40 (May 25, 2016).¹⁴

To mitigate the significant fair process concerns created by the use of shackles, this Court should require trial courts to conduct individualized hearings before a criminal defendant can appear restrained at any stage of the criminal process.¹⁵

¹³ <https://ssrn.com/abstract=2809818>.

¹⁴ <https://www.tvw.org/watch/?eventID=2016051095>.

¹⁵ Other jurisdictions require individualized hearings before a criminal defendant appears restrained before a judge. *E.g.*, *People v. Fierro*, 1 Cal. 4th 173, 220, 3 Cal. Rptr. 2d 426, 821 P.2d 1302 (1991) (“as at trial, shackling should not be employed at a preliminary hearing absent some showing of necessity for their use”); *Best*, 19 N.Y.3d at 742–43 (rule governing visible restraints in jury trials, which requires a particularized reason for using restraints on the record, applies to nonjury trials).

II. This Court Should Clarify that When a Defendant Has Been Shackled Absent an Individualized Determination, the State Must Prove Beyond a Reasonable Doubt that the Error Was Harmless.

As argued by Mr. Jackson, the Court of Appeals incorrectly applied the “substantial and injurious effect” test rather than the constitutional harmless error test to determine whether this case should be reversed and remanded for a new trial. *State v. Jackson*, 10 Wn. App. 2d 136, 148, 447 P.3d 633 (2019). This Court should take this opportunity to clarify that the constitutional harmless error test, requiring the State to prove beyond a reasonable doubt that the error did not impact the outcome of the case, is the correct standard of review on direct appeal of an erroneous shackling decision.

Constitutional errors reviewed on direct appeal are presumed to be prejudicial and the burden is on the State to show that the error was harmless beyond a reasonable doubt. *See Finch*, 137 Wn.2d at 859. Stated another way, “the error is harmless if the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.”¹⁶ *Id.* The constitutional harmless error standard was established in *Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and has been applied by the United States Supreme Court in

¹⁶ Because this articulation of the standard references the evidence presented to establish a finding of guilt, it is less useful to examine prejudice in the pretrial context.

the context of direct appeals of erroneous decisions to shackle criminal defendants in violation of their due process rights. *See Deck v. Missouri*, 544 U.S. 622, 633, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) (“[W]here 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.’” (quoting *Chapman*, 386 U.S. at 24)).

After *Chapman*, the Court established a different test for reviewing constitutional errors in post-conviction cases in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Under this test, when reviewing constitutional errors brought in habeas corpus actions, whether related to shackling or otherwise, the defendant must demonstrate that the claimed error resulted in a “substantial and injurious effect or influence in determining the jury’s verdict.”¹⁷ *Id.* at 637.

Unfortunately, Washington courts have incorrectly applied the “substantial and injurious effect” test in some shackling cases on direct

¹⁷ This test is comparable to the “substantial and actual prejudice” test applied in personal restraint petitions. *See In re Smith*, 117 Wn. App. 846, 859-60, 73 P.3d 386 (2003), *abrogated by In re Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005) (state and federal standards “same”). This test does not apply where an error is deemed a structural error, is presumed prejudicial, and remanded without the requirement to demonstrate prejudice. *See Brecht*, 507 U.S. at 629-30 (discussing standards for trial and structural errors).

appeal. *See, e.g., State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). In initially employing this standard, Washington courts cited to federal habeas cases deciding the prejudicial effect of unconstitutional decisions to shackle defendants. *See id.* (when reciting error standard to be applied, citing to *Rhoden v. Rowland*, 10 F.3d 1457, 1459–60 (9th Cir. 1993), which reviewed propriety of shackling in the habeas context). However, federal courts finding constitutional violations related to shackling of criminal defendants on direct appeal apply the constitutional harmless error standard. *See Deck*, 544 U.S. at 633.

The application of these inconsistent standards in shackling cases on direct appeal has been prevalent at all levels of appellate courts in Washington. Even this Court has not applied a consistent standard. *Compare Damon*, 144 Wn.2d at 692 (applying constitutional harmless error standard), *State v. Clark*, 143 Wn.2d 731, 775–76, 24 P.3d 1006 (2001) (same), *Finch*, 137 Wn.2d at 859 (same), *with State v. Elmore*, 139 Wn.2d 250, 274, 985 P.2d 289 (1999) (applying substantial and injurious effect standard), *Hutchinson*, 135 Wn.2d at 888 (same). This inconsistency in the case law has resulted in confusion, and, more problematically, in erroneous shackling being found to be overwhelmingly harmless. *See Jackson*, 10 Wn. App. 2d at 152-53 (Melnick, J., concurring) (discussing survey of the 14 shackling cases decided since 2015 in which shackling

error was determined to be harmless, 13 of which were on direct appeal and either cited to or applied the incorrect standard from *Hutchinson*).

While the Court of Appeals in Mr. Jackson's case found the shackling errors to be "harmless beyond a reasonable doubt," the court also recited the improper "substantial or injurious effect" test, *id.* at 148, and practically speaking did not hold the State to its burden to prove the error was harmless. *See id.* at 149-50 (discussing defendant's arguments and what the record demonstrated with regard to prejudice but failing to discuss evidence or arguments put forth by the state). At the Court of Appeals, Mr. Jackson was required to prove something that was never investigated and may be unknowable—whether the jury knew about his leg brace, and how it impacted its decision making. Absent direct inquiry, which did not occur in this case, jurors and judges are unlikely to offer *sua sponte* that their decision was impacted by seeing the defendant restrained. Even if asked directly, given what is known about the operation of implicit bias, judges and jurors are not likely to consciously recognize the role that seeing a person shackled played in their decision-making.

Once the decision-maker, whether judge or juror, sees the defendant restrained, the implicit bias is established and becomes pervasive. That bias then impacts the decision-maker's view of the evidence for the duration of the case. Because of this, only a presumption

of prejudice and application of the constitutional harmless error standard can address the error. Here, there was not overwhelming evidence of guilt against Mr. Jackson, *see* Pet'r Supp. Br. at 19-20, so the State could not likely meet its burden. Application of the proper standard would have changed the outcome of Mr. Jackson's appeal at the Court of Appeals.

Guidance from this Court is necessary because application of the improper substantial and injurious effect standard leaves significant constitutional violations unremedied and has excused the State from its burden to demonstrate beyond a reasonable doubt that convictions are free from impermissible bias. *See Jackson*, 10 Wn. App. 2d at 152-53.

III. Videoconferencing Is Not an Adequate Alternative in All Cases Because It Creates Barriers to a Fair Process.

The trial court in this case indicated that it would continue to shackle criminal defendants until it was able to implement a system for appearance by videoconference. CP 66. Although videoconferencing can serve an important function for the court,¹⁸ courts should exercise caution in replacing in-person hearings because appearances by videoconference have the potential to negatively impact defendants' Sixth Amendment

¹⁸ Though CrR 3.4 allows for videoconferencing, which may be appropriate in certain circumstances such as during the current COVID-19 pandemic, courts should take seriously requests by defendants to appear in-person because of the substantial due process concerns associated with appearing by video. CrR 3.4 gives any party the option to request an in-person hearing, which the trial court judge may grant or deny. CrR 3.4(a), (d)(1), (d)(3).

right to counsel by interfering with their ability to communicate freely with counsel and to interact with the court. Shari Seidman Diamond, et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 879 (2010); Eric Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. of Int. Com. Law & Tech. 24, 31 (2013) (physical exclusion from the courtroom decreases the quality of exchanges between attorney and client and infringes on their ability to confer freely and effectively).¹⁹

When a key participant is absent from the courtroom, the form and substantive quality of the hearing is altered. *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018). An in-person proceeding allows a judge to experience impressions that are essential to assessing credibility and evaluating the “true moral fiber of another.” *Id.* (holding a hearing by video conference can have a tangible impact on outcomes for defendants); see Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933, 966 (2015) (detained videoconferenced removal cases more

¹⁹ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1452, 1469 (2005) (Anything that disrupts the free flow of private communications between attorney and client effectively silences the defendant); see also *State v. Sweidan*, __ Wn. App. 2d __, ¶¶ 2, 31, __ P.3d __, 2020 WL 1921551 (April 21, 2020) (published in part) (finding error in allowing witness to appear by videoconference without hearing to determine necessity, noting that it is not the same as in-person testimony and that “technological changes in the courtroom cannot come at the expense of the basic individual rights and freedoms secured by our constitutions”).

likely to result in deportation than detained in-person removal cases).

Although videoconferencing has been proposed as a solution to shackling, videoconferencing has significant differences compared to in-person proceedings and is therefore not appropriate as a wholesale substitution for in-person appearances.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand for a resentencing.

DATED this 24th day of April, 2020.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 24, 2020, the forgoing document was electronically filed with the Washington State Appellate Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, this 24th day of April, 2020.

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