

FILED
SUPREME COURT
STATE OF WASHINGTON
4/24/2020 4:02 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
5/4/2020
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 97681-3
(Court of Appeals No. 51177-1-II)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN JACKSON, SR.,
Petitioner.

BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF
PUBLIC DEFENSE, ACLU OF WASHINGTON FOUNDATION,
WASHINGTON DEFENDER ASSOCIATION, and DISABILITY
RIGHTS WASHINGTON

King County Department of Public Defense Anita Khandelwal, Director La Rond Baker WSBA No. 43610 David Montes WSBA No. 45205 710 Second Avenue, Suite 200 Seattle, WA 98104 Phone: (206) 263-6884 lbaker@kingcounty.gov david.montes@kingcounty.gov	The Washington Defender Association Alexandria Hohman WSBA No. 44104 110 Prefontaine Pl. S., Suite 610 Seattle, WA 98104 Phone: (206) 623-4321 ali@defensenet.org
--	--

Disability Rights Washington

Heather McKimmie
WSBA No. 36730
315 5th Avenue S, Suite 850
Seattle, WA 98104
Phone: (206) 324-1521
heatherm@dr-wa.org

ACLU of Washington Foundation

Nancy L. Talner
WSBA No. 11196
Antoinette M. Davis
WSBA No. 29821
Crystal Pardue
WSBA No. 54371
P.O. Box 2728
Seattle, WA 98111
Phone: (206) 624-2184
talner@aclu-wa.org
tdavis@aclu-wa.org
cpardue@aclu-wa.org

TABLE OF CONTENTS

I. STATEMENT OF INTEREST 1

II. INTRODUCTION 1

III. ARGUMENT 2

 A. America Has Long Used Shackling as a Form of Oppression, and
 this History Supports a Presumption of Prejudice Standard 2

 1. Shackling Was Used as a Tool of Control and Punishment
 Against Blacks 2

 a. *Chattel Slavery*..... 3

 b. *Chain Gangs* 4

 2. Shackling Was Used as a Tool of Control and Punishment
 Against Native Americans 5

 B. Vulnerable Individuals Are Often Subjected to Shackling and
 Restraints..... 6

 C. Despite Clear Directives from this Court, Washington Courts
 Routinely Neglect to Make Individualized Determinations
 Regarding Use of Restraints in the Courtroom, Necessitating a
 Strong Deterrent Remedy..... 10

 D. Washington Courts’ Shackling Practices Disproportionately
 Impact People of Color, Contributing to the Need for a
 Presumptive Prejudice Standard 13

 E. Washington Courts Must be Required to Perform Individualized
 Determinations Regarding Courtroom Shackling..... 15

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

<i>Duckett v. Godinez</i> , 67 F.3d 734 (9th Cir. 1995).....	16
<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).....	16
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	12, 15, 16
<i>State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018).....	13
<i>State v. Hartzog</i> , 96 Wn.2d 383, 635 P.2d 694 (1981).....	12, 15, 17
<i>State v. Jackson</i> , 10 Wn.App.2d 136, 447 P.3d 633 (2019)	17
<i>State v. Lundstrom</i> , 6 Wn. App. 388, 419 P.3d 1116, 1119-20 (2018).....	17
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	13
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015).....	13
<i>State v. Walker</i> , 185 Wn. App. 790, 344 P.3d 277 (2015).....	16, 17
<i>Turner v. Stime</i> , 153 Wn. App. 581, 222 P.3d 1243 (2009)	14
<i>Tyars v. Finner</i> , 709 F.2d 1274 (9th Cir. 1983).....	16

Statutes

RCW 72.09.651	9
---------------------	---

Other Authorities

American Civil Liberties Union of Washington, <i>Washington State Bans Shackling of Pregnant Inmates</i> , https://www.aclu.org/blog/smart-justice/mass-incarceration/washington-state-bans-shackling-pregnant-inmates	9
Bancroft, Hubert H., <i>History of California</i> , vol. 1, 588-596 (1886).....	5
<i>Court Ruling Puts Stress on Judicial System</i> , https://apnews.com/a9651fda3b324b0b83e8f757055fafd7	10

<i>Difficult Births: Laboring and Delivering in Shackles</i> , https://www.npr.org/templates/story/story.php?storyId=128563037	9
Fatma E. Marouf, <i>The Unconstitutional Use of Restraints in Removal Proceedings</i> , 27 <i>Baylor L. Rev.</i> 214 (2015)	17
Finkelman, Paul, <i>Exploring Southern Legal History</i> , 64 <i>N.C. L. Rev.</i> 77, 90 (1985)	4
Gary Lee, <i>A Personal Journey: Following the Trail of Tears</i> , Sept. 5, 1999, <i>Los Angeles Times</i> , https://www.latimes.com/archives/la-xpm-1999-sep-05-tr-6965-story.html	5
Gorman, Tessa M., <i>Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs</i> , 85 <i>Cal. L. Rev.</i> 441, 444 (1997)	4
Halnais, Sean, <i>Native Californians and the Mission Period</i> , <i>Cal. State. Mont. Bay Capstone Projects and Master's Theses</i> , 30 (2008)	5
Human Rights Watch, <i>Callous and Cruel</i> , available at https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and	7
Mays, Kimberly, <i>Shackled During Labor: My Experience</i> , https://www.nwhn.org/shackled-during-labor-my-experience/	9
Muhammad, Patricia M., <i>The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law</i> , 19 <i>Am. U. Int'l L. Rev.</i> 883, 892 (2004)	3
National Institute of Health, <i>Diseases of the Mind: Highlights of American Psychiatry through 1900</i> , available at https://www.nlm.nih.gov/hmd/diseases/early.html	7
Rawley, James A., <i>The Transatlantic Slave Trade</i> 298 (W.W. Norton & Co. 1981)	3
Richard Klugar, <i>The Bitter Waters of Medicine Creek: A Tragic Clash Between Whites and Native America</i> , 338, 405-406 (2011)	6
Rodrigues, Junius, 2 <i>The Historical Encyclopedia of World Slavery</i> 436 (1997)	3
Task Force, <i>Preliminary Report on Race and Washington's Criminal Justice System</i> , 35 <i>Seattle U. L. Rev.</i> 623 (2012)	14
The Sentencing Project, <i>State by State Data</i> , available at https://www.sentencingproject.org/the-facts/#map	14

Thomas, Hugh, <i>The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870</i> , at 147 (1997).....	3
Vera Institute of Justice, <i>Incarceration Trends in Washington</i> , https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-washington.pdf	14
Washington Association of Sheriffs and Police Chiefs, <i>Statewide Objective Jail Classification Procedure</i> , https://www.waspc.org/assets/docs/statewide%20objective%20jail%20classification%20procedure.pdf	11

Rules

GR 9	8
Wash. JuCR Rule 1.6.....	8

I. STATEMENT OF INTEREST

The King County Department of Public Defense, American Civil Liberties Union of Washington, Washington Defender Association, and Disability Rights Washington (collectively Amici) are social justice, racial justice, civil liberties, and disability rights advocacy organizations that seek to reform the criminal legal system and mitigate the harms that system imposes on individuals and impacted communities—especially communities of color. Amici’s advocacy manifests in multiple ways, including direct representation for those charged with crimes, policy advocacy, systemic litigation, and community education. Amici include public defense organizations familiar with the variety of shackling practices around the state, and many of our clients and constituents are regularly shackled in courtrooms across Washington without being afforded appropriate judicial protections meant to limit in court shackling to those instances where it is necessary.

II. INTRODUCTION

Shackling people in the courtroom pursuant to corrections policies and practices—without an individualized judicial determination of necessity—raises concerns of fairness, impartiality, economic disparities, and racial bias in the adjudication of criminal matters. This is because such

practices infringe on civil liberties and meaningful access to counsel. Further, courts have long been required to performed individualized assessments to ensure that any restraints or shackling that occurs in the courtroom is necessary and required for safety and the orderly administration of justice. However, Washington courts frequently defer to corrections policies and practices for the determination of who will be in restraints and shackles in the courtroom. This must end. Washington courts must be reminded to make individualized determinations regarding courtroom based restraints, and this Court should hold that failure to do so results in presumptive prejudice on an individual's ability to fully defend against criminal charges.

III. ARGUMENT

A. America Has Long Used Shackling as a Form of Oppression, and this History Supports a Presumption of Prejudice Standard

“One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles.” Baldwin, James, *An Open Letter to My Sister, Miss Angela Davis*, Nov. 19, 1970.

1. Shackling Was Used as a Tool of Control and Punishment Against Blacks

Shackling was used as a form of control, oppression, and punishment targeting Black Americans for centuries.

a. Chattel Slavery

The Trans-Atlantic slave trade was perpetrated through the process of capturing, stowing, torturing, and transporting the African slaves to North and South America. Muhammad, Patricia M., *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 Am. U. Int'l L. Rev. 883, 892 (2004). As the demand for slave labor increased, so did brutality toward the slaves. *Id.* (citing Thomas, Hugh, *The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870*, at 147 (1997)). Europeans packed Africans into the unsanitary, dangerous holds of ships meant for far fewer passengers. *Id.* The treatment of Africans taken from their homes on voyages to the United States “was invariably harsh and captors inflicted brutalities on slaves such as whipping, beating, shackling, dismemberment, and mutilation.” *Id.* (citing Rodrigues, Junius, 2 *The Historical Encyclopedia of World Slavery* 436 (1997)). During transport, Africans were subjected to physical restraints including iron shackles that restrained the African slaves’ ankles and wrists binding them “together in pairs, left leg to right leg, left wrist to right wrist.” *Id.* (citing Rawley, James A., *The Transatlantic Slave Trade* 298 (W.W. Norton & Co. 1981)). Some captors did not remove these chains even once during

the six to ten week journey. *Id.*; Gorman, Tessa M., *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 Cal. L. Rev. 441, 444 (1997). And, ultimately, the use of shackles, handcuffs, and whips to control Black slaves became prevalent and predominant in the United States during the entirety of chattel slavery. *Id.* at 445-447.

b. Chain Gangs

“Although slavery ended in 1865, the various mechanisms for race control, including statutes and court decisions, as well as the underlying rationales for the law of slavery, continued to influence Southern law: ‘[t]he slave codes of the ante-bellum period were the basis of the black codes of 1865-66 and later were resurrected as the segregation statutes of the period after 1877.’” Gorman, Tessa M., *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 Cal. L. Rev. at 447-448 (1997) (quoting Finkelman, Paul, *Exploring Southern Legal History*, 64 N.C. L. Rev. 77, 90 (1985)). “Even though slavery was officially over after the Civil War, mechanisms to control blacks remained. Blacks were either forced into labor contracts or compelled to enter the convict labor system”—often in the manifestation of the chain gang. *Id.* at 448. “Historically, American chain gangs were

instruments with which to terrorize, control, and humiliate African Americans.” *Id.* at 450. The practice continues to this day. *Id.* at 452-56

2. Shackling Was Used as a Tool of Control and Punishment Against Native Americans

The history of the use of shackling to oppress Native American communities is well documented. Native Americans were chain ganged during the “Trail of Tears”—the forced removal of around 60,000 Native Americans from the Southwestern United States to areas west of the Mississippi River. *See* Gary Lee, *A Personal Journey: Following the Trail of Tears*, Sept. 5, 1999, Los Angeles Times, <https://www.latimes.com/archives/la-xpm-1999-sep-05-tr-6965-story.html> (describing a July 1837 newspaper photo “featur[ing] several hundred Creek warriors shackled at the feet and chained hand to hand, being prodded by bayonet-wielding soldiers down a street in Montgomery.”) Similar accounts of shackling and chain-ganging exist from the time of early California territory’s mission building periods. *See* Halnais, Sean, *Native Californians and the Mission Period*, Cal. State. Mont. Bay Capstone Projects and Master’s Theses, 30 (2008); Bancroft, Hubert H., *History of California*, vol. 1, 588-596 (1886) (“Stocks, shackles and hobbles were also applied to [Native Americans] accused of neglect of work or religious duties, . . . thefts and quarreling.”)

Historical accounts of shackling targeting Native Americans are found even in the arrest, trial, and execution of Nisqually Tribal Chief Leschi—one of many to face this fate. Richard Klugar, *The Bitter Waters of Medicine Creek: A Tragic Clash Between Whites and Native America*, 338, 405-406 (2011).

In addition to the thousands of Native Americans shackled during the Trail of Tears, California's mission building era, and arrests, trials, and executions like Chief Leschi's, many Native Americans are subjected to shackling in our criminal legal system. The matter before the Court is one such case.

B. Vulnerable Individuals Are Often Subjected to Shackling and Restraints

Washington has long subjected vulnerable individuals involved in the criminal legal system to shackles and other restraints both in and out of its courthouses.

First, people in the midst of mental health crises are often subjected to shackles and restraints in psychiatric hospitals, detention facilities, and courtrooms. Indeed, the first psychiatric hospital in the United States

consisted of a basement with shackles attached to the wall.¹ National Institute of Health, *Diseases of the Mind: Highlights of American Psychiatry through 1900*, available at <https://www.nlm.nih.gov/hmd/diseases/early.html>.

The shackling of people in need of mental health treatment continues today. In a Colorado Department of Corrections facility for individuals with serious mental illness an inmate was found dead in shackles on the floor of his cell. Human Rights Watch, *Callous and Cruel*, available at <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and>. Unfortunately, similar examples are frequent. *Id.*

Washington is no exception as it also subjects those in mental health crises to shackling and restraints when they are involved in the criminal legal system. As public defenders practicing around the state, Amici have direct knowledge of these problematic shackling practices.

It is common to see individuals brought into the courtroom in shackles for hearings related to competency concerns—including evaluation or restoration orders. Often the decision to subject these

¹ The practice of using shackles in mental health institutions to control the mentally ill continued until after World War II. Mental Health America, *The Story of the Bell*, available at <http://mhah.org/who-we-are/story-of-the-bell/>.

individuals to shackles is not made on an individualized basis but rather pursuant to corrections policies that require individuals in psychiatric housing to be subjected to restraints when they are moved out of their living units—regardless of whether they themselves pose a threat. The result is that people with serious mental illness are routinely brought into Washington courtrooms in shackles pursuant to a corrections policy and not a judicial determination that such restraints are necessary.

Second, Washington has a long history of shackling children during court proceedings. It wasn't until 2014 that Washington barred the shackling of children who were brought to juvenile court, where there is no jury, absent an individualized finding that such restraints were necessary. The court rule demanded that “[j]uveniles shall not be brought before the court wearing any physical restraint devices except when ordered by the court during or prior to the hearing.” Wash. JuCR Rule 1.6. The rule barred the use of “handcuffs, ankle chains, waist chains, strait jackets, electric-shock producing devices, gags, spit masks and all other devices which restraint an individual’s freedom of movement[.]” *Id.* Prior to the implementation of this rule young people could be restrained when they appeared before the court without an individualized court finding that such restraint was necessary. *See* GR 9 Cover Sheet (affirming that “juvenile offenders and status offenders are routinely shackled in juvenile courtrooms

in a majority of the counties in the state, including Thurston, Pierce, and Snohomish Counties”), <http://www.njcn.org/uploads/Suggested-amendment-Juvenile-Court-Rules-Indiscriminate-shackling.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef>.

Similarly, Washington long allowed the use of restraints on incarcerated pregnant women and girls in court appearances and in labor. Mays, Kimberly, *Shackled During Labor: My Experience*, <https://www.nwhn.org/shackled-during-labor-my-experience/>. Washington continued this practice until 2010 when a woman successful sued because she was forced to birth her child while in restraints. *See Difficult Births: Laboring and Delivering in Shackles*, <https://www.npr.org/templates/story/story.php?storyId=128563037>. After the lawsuit settled, Washington lawmakers finally decided to stop the shackling pregnant women and girls. *See American Civil Liberties Union of Washington, Washington State Bans Shackling of Pregnant Inmates*, <https://www.aclu.org/blog/smart-justice/mass-incarceration/washington-state-bans-shackling-pregnant-inmates>. Lawmakers also took aim at the concerning practice of shackling pregnant women during “court proceedings during the third trimester” of pregnancy or “during postpartum recovery.” RCW 72.09.651(1). Further, the in court shackling of women in the third trimester if: (1) there are extraordinary circumstances requiring use

of restraints; (2) the restraints must be the least restrictive available; and (3) the restraints are the most reasonable under the circumstances. *Id.*

C. Despite Clear Directives from this Court, Washington Courts Routinely Neglect to Make Individualized Determinations Regarding Use of Restraints in the Courtroom, Necessitating a Strong Deterrent Remedy

As public defenders, civil liberties defenders, social and racial justice advocates, and disability rights advocates working around the state, Amici have direct knowledge of the problematic shackling practices used in Washington as we witness Washington courts routinely neglect to perform individualized assessments regarding the need for restraints in court—resulting in overutilization of shackling in the courtroom.

Like the matter before the Court, some Washington courts have implemented blanket policies—driven by policies of corrections departments—wherein all individuals transported from a detention facility to the courthouse are restrained while they are in court, with some exception and variation for jury trials. For example, like the policy at issue in this case, until recently Skagit County had a blanket policy of placing restraints on all individuals brought from the jail to the courthouse for a hearing. *See Court Ruling Puts Stress on Judicial System*, <https://apnews.com/a9651fda3b324b0b83e8f757055fafd7>. Similarly, until recently King County Superior Court had a blanket policy that required

anyone transported from a hospital to the courthouse for their hearing in Involuntary Treatment Act court to be shackled to a gurney for the duration of their stay in the ITA courthouse, which Amici successfully advocated to end.

However, most often, jail policy regarding courtroom use of restraints is often the determining factor is jail-based housing or classification status. This is because judges frequently defer to these policies. In some courts the practice of deferring to corrections policy regarding shackling is so prevalent and engrained that the judges refuse to hear motions for an individualized determination of regarding the appropriateness of restraints. In other counties, like Snohomish County, courts regularly leave inmates shackled unless there is a specific request to unshackle a particular individual.

This deference results in a jail's classification policies being substituted for individualized findings regarding the need to shackle a person while they are in a courtroom having their matter heard before a judge. These classifications decisions are rarely based on the likelihood of escape or danger in the courtroom. *See* Washington Association of Sheriffs and Police Chiefs, *Statewide Objective Jail Classification Procedure*, <https://www.waspc.org/assets/docs/statewide%20objective%20jail%20classification%20procedure.pdf> (noting that jail classification is predicated on

several factors including alcohol/drug use, age, prior behavior in jail, conviction history, and severity of current offense).

The jail's considerations differ significantly from the factors courts must consider before allowing shackling in court. *State v. Finch*, 137 Wn.2d 792, 848, 975 P.2d 967 (1999) (citing *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)) (noting that the factors the court must consider when making a determination regarding the use of restraints are: “[t]he seriousness of the present charge against the defendant; defendant’s temperament and character, his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats of harm to others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and the mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies).

Judicial deference to corrections policies result in the use of restraints in the courtroom on those who pose no threat and in instances where the evidence would not support such restraint. This is, in part, because some jails have a policy of using restraints on anyone in segregation. The result is that a person who is housed in segregation will be brought to court in shackles—even if that person is in segregation for

protective reasons. For example, a public defender recently represented a client at a first appearance. The client was brought into the courtroom in shackles—and was shackled throughout her hearing—because she was being held in segregation. The individual was in segregation because there were concerns for her safety if she was placed in general population as she was transgender and very petite—not because she posed any particular risk of violence or escape or disruption.

D. Washington Courts’ Shackling Practices Disproportionately Impact People of Color, Contributing to the Need for a Presumptive Prejudice Standard

Washington courts consistent negligence to perform individualized assessments of whether an individual should be shackled when they appear in court disproportionately impacts people of color. “This Court has taken judicial notice” that the criminal legal system is rife with “implicit and overt racial bias against black defendants.” *State v. Gregory*, 192 Wn.2d 1, 23, 427 P.3d 621 (2018). This Court has also acknowledged the long history of race discrimination in Washington’s legal system generally. *See, e.g., State v. Walker*, 182 Wn.2d 463, 488, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring) (describing prosecutor’s use of inflammatory, racially charged images highlighting the defendant’s race—his blackness); *State v. Monday*, 171 Wn.2d 667, 676-79, 257 P.3d 551 (2011) (reversing a case in which the prosecutor argued to the jury that “black folk don’t testify against black

folk” and referred to the police as “po-leese” in the examination of black witness); *Turner v. Stime*, 153 Wn. App. 581, 594, 222 P.3d 1243 (2009) (requiring new trial based on jurors’ racist remarks regarding Japanese-American attorney). In addition, the Research Working Group, Task Force on Race and the Criminal Justice System (Task Force) found that “the fact of racial and ethnic disproportionality” in the criminal legal system in Washington “is indisputable.” See Task Force, *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 Seattle U. L. Rev.623 (2012) (finding youth of color overrepresented in the criminal legal system, prosecutors charge people of color at higher rates than whites, and that “race shapes confinement sentence outcomes”).

In Washington, Blacks are represented in the incarcerated population five times the rate of whites. See The Sentencing Project, *State by State Data*, available at <https://www.sentencingproject.org/the-facts/#map>. Blacks comprise 11% of Washington’s jail population across the state—even though they are only 5% of Washington’s population. See Vera Institute of Justice, *Incarceration Trends in Washington*, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-washington.pdf>. Considering the history of racism in our legal system, it is no surprise that there are significant racial disparities in Washington’s

incarceration rates. Indeed, these racial disparities are the direct result of this longstanding racial bias in the criminal legal system.

The racial disparities in Washington’s criminal legal system and incarceration rates mean that when Washington courts adopt blanket policies or defer to corrections policies regarding shackling in the courthouses, Washington ends up shackling people of color in its courthouses at greater rates than white defendants. This is especially true in the instances where courts defer to jails’ classification determinations that rely so heavily on past interactions with law enforcement—including arrest history.

E. Washington Courts Must be Required to Perform Individualized Determinations Regarding Courtroom Shackling

It is well settled that a defendant in a criminal case is entitled to appear free from all bonds or shackles except in extraordinary circumstances. *Finch*, 137 Wn.2d at 842 (citing *Hartzog*, 96 Wn.2d at 398). The bar on in court restraints protects against multiple potential harms: (1) shackling violates a defendant’s presumption of innocence, *Hartzog*, 96 Wn.2d at 398; (2) shackling can lead to the “substantial danger of destruction . . . of the presumption of innocence” in the mind of the factfinder, *Finch*, 137 Wn.2d at 844; (3) the use of shackles are inherently prejudicial because they are “unmistakeable indications of the need to

separate a defendant from the community at large[.]” *id* at 845; (4) shackling impairs a defendant’s ability to confer with their counsel, *id.*; and “offends the dignity of the judicial process[.]”² *id.*

To protect the interest of a defendant from prejudicial biases of any factfinder—judge or jury—before a court may allow a defendant to be shackled in court, “[c]lose judicial scrutiny” is required. *Finch*, 137 Wn.2d at 846. This means the court must “conduct a hearing and enter findings into the record that are sufficient to justify their use on a particular defendant.” *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 277 (2015). This individualized inquiry “ensure[s] that inherently prejudicial measures are necessary to further an essential state interest” before a defendant is subjected to such prejudice. *Id.* (citing *Estelle v. Williams*, 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). Even in matters where no jury is present, shackling not predicated on a particularized finding of necessity cannot stand because judges—just as much as jurors—are subconsciously

² This is true even in courts presiding over civil commitment matters. *See Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) (noting that use of physical restraints during court hearings raises concerns beyond that of presumption of innocence including impeding an individual’s ability to communicate with counsel and impairing cognitive functioning due to pain and embarrassment); *Tyars v. Finner*, 709 F.2d 1274, 1284-85 (9th Cir. 1983).

influenced by seeing a person shackled.³ See *State v. Jackson*, 10 Wn.App.2d 136, 154, 447 P.3d 633 (2019) (Melnick, J. concurring). (“[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.”) This is especially concerning since judges don’t regularly inquire as to the reason for the restraints. They may incorrectly, and subconsciously, assume that restraints signify a safety issue when, the shackles simply reflect a jail based housing or classification determination.

As such, courts should allow for use of restraints only “when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.” *Id.* (citing *Hartzog*, 96 Wn.2d at 398). To effectuate this, Washington courts must make an individualized inquiry into whether restraints are necessary or appropriate for an individual in a particular hearing. See *Walker*, 185 Wn. App. at 797. Deferring to corrections officers or corrections policies is insufficient meet the court’s burden for individualized assessments. See *Id.*; *State v. Lundstrom*, 6 Wn. App. 388, 393, 419 P.3d 1116, 1119-20 (2018).

³ Often when someone is shackled in everyone can “hear the clinking of the chains whenever [defendants] move, especially when they are led into the courtroom and when they approach the counsel table for their hearings.” Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 27 Baylor L. Rev. 214 (2015).

While this Court has long required an individualized determination regarding the appropriateness of the use of restraints in the courtrooms throughout the state, courts consistently fail to do so. This consistent abdication has infringed upon defendants' rights and their ability to most meaningfully participate in their defense.

Due to the persistent nature of this issue—as evidenced by the plethora of case law on the issue—Washington courts need further direction, and defendants need greater protection, from this Court. To ensure that courts appropriately protect the rights of those brought before the judiciary, unjustified shackling should be presumed prejudicial to an individual and their defense against criminal charges.

IV. CONCLUSION

Being shackled during court proceedings damages an individual's dignity, humanity, presumption of innocence, and ability to defend against criminal charges. Thus far, Washington courts have neglected to protect individuals against these harms by failing to consistently perform individualized assessments regarding the appropriateness of in-court shackling. Due to the Court hold that where such a failure occurs there is a presumptions of prejudice on that individual's ability to appropriately and adequate defend against criminal charges.

DATED this 24th day of April, 2020.

Respectfully submitted,

ANITA KHANDELWAL
Director, King County Department of
Public Defense

s/La Rond Baker
La Rond Baker, WSBA No. 43610
King County Department of Public Defense
710 Second Avenue, Suite 200
Seattle, WA 98104
Phone: (206) 263-6884
Email: lbaker@kingcounty.gov

s/David Montes
David Montes, WSBA No. 45205
King County Department of Public Defense
710 Second Avenue, Suite 200
Seattle, WA 98104
Phone: (206) 477-9151
Email: david.montes@kingcounty.gov

The Washington Defender Association

s/Alexandria Hohman
Alexandria Hohman, WSBA No. 44104
The Washington Defender Association
Director of Legal Services
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
Phone: (206) 623-4321
ali@defensenet.org

Disability Rights Washington

s/Heather McKimmie
Heather McKimmie, WSBA No. 36730

315 5th Avenue S, Suite 850
Seattle, WA 98104
Phone: (206) 324-1521
heatherm@dr-wa.org

ACLU of Washington Foundation

s/Nancy L. Talner

Nancy L. Talner, WSBA No. 11196
ACLU of Washington Foundation
P.O. Box 2728
Seattle, WA 98111
Phone: (206) 624-2184
talner@aclu-wa.org

s/Antoinette M. Davis

Antoinette M. Davis, WSBA No. 29821
ACLU of Washington Foundation
P.O. Box 2728
Seattle, WA 98111
Phone: (206) 624-2184
tdavis@aclu-wa.org

s/Crystal Pardue

Crystal Pardue, WSBA No. 54371
ACLU of Washington Foundation
P.O. Box 2728
Seattle, WA 98111
Phone: (206) 624-2184
cpardue@aclu-wa.org

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, I served one copy of the foregoing document by email on the following:

Jesse Espinoza
Deputy Clallam County Prosecutor
Clallam County Prosecutor's Office
jespinoza@co.clallam.wa.us

Nancy Collins
Washington Appellate Project
nancy@washapp.org

s/La Rond Baker
La Rond Baker, WSBA No. 43610
King County Department of Public Defense
710 Second Avenue, Suite 200
Seattle, WA 98104
Phone: (206) 263-6884
Email: lbaker@kingcounty.gov

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

April 24, 2020 - 4:02 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97681-3
Appellate Court Case Title: State of Washington v. John W. Jackson Sr.
Superior Court Case Number: 17-1-00218-5

The following documents have been uploaded:

- 976813_Briefs_Plus_20200424155745SC253694_4703.pdf
This File Contains:
Briefs - Amicus Curiae
Certificate of Service
The Original File Name was 2020-04-24--FINAL Jackson Amicus Brief 330p.pdf
- 976813_Motion_20200424155745SC253694_1263.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 2020-4-24--FINAL Motion for Leave to File Amicus 330a with CA edits.pdf

A copy of the uploaded files will be sent to:

- ali@defensenet.org
- changro@seattleu.edu
- cpardue@aclu-wa.org
- david.montes@kingcounty.gov
- gverhoef@spokanecounty.org
- heatherm@dr-wa.org
- jespinoza@co.clallam.wa.us
- lbaker@kingcounty.gov
- leeme@seattleu.edu
- levinje@seattleu.edu
- nancy@washapp.org
- office@blacklawseattle.com
- scpaappeals@spokanecounty.org
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- tim@blacklawseattle.com
- wapofficemail@washapp.org

Comments:

Sender Name: Christina Alburas - Email: calburas@kingcounty.gov

Filing on Behalf of: La Rond Baker - Email: lbaker@kingcounty.gov (Alternate Email:)

Address:
710 Second Ave.
Suite 200
Seattle, WA, 98104

Phone: (206) 477-0303

Note: The Filing Id is 20200424155745SC253694