

FILED
Court of Appeals
Division II
State of Washington
5/7/2018 4:31 PM

No. 97681-3

No. 51177-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN JACKSON, SR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

BRIDGET GROTZ
Licensed Legal Intern

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.. 2

D. STATEMENT OF THE CASE 4

E. ARGUMENT 10

1. The trial court violated Mr. Jackson’s constitutional rights when it required him to remain shackled and restrained while in court.. 10

a. Physical restraints threaten an individual’s constitutional rights to a fair trial and they may be ordered only in extraordinary circumstances 11

b. Automatic shackling is prohibited because it interferes with fundamental rights and affects the appearance of fair, dignified court proceedings 13

c. It is constitutional error and presumptively prejudicial for a trial court to require physical restraints without a hearing and without a record containing sufficient justification for the restriction 16

d. Before imposing physical restraints, the trial court must consider less restrictive alternatives that minimally impede one’s constitutional rights and the court cannot defer solely to the correctional officers’ judgments 20

 e. The court shackled Mr. Jackson for no individualized reason and without considering less restrictive alternatives, even while he testified. 22

<i>f. The unconstitutional shackling error prejudiced Mr. Jackson</i>	25
2. The court improperly imposed LFOs despite Mr. Jackson’s indigence	29
<i>a. The court may not impose LFOs upon a person who is indigent</i>	30
<i>b. The legislature amended the LFO statutes so courts may not impose fees on an indigent person.....</i>	33
<i>c. The changes in the law governing LFOs apply to Mr. Jackson</i>	35
F. CONCLUSION.....	40

TABLE OF AUTHORITIES

Washington Supreme Court

<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993).....	12
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	30
<i>State v. Caldwell</i> , 94 Wn.2d 614, 618 P.2d 508 (1980).	26
<i>State v. Clark</i> , 143 Wn.2d 731, 24 P.3d 1006 (2001)	11, 18, 22
<i>State v. Damon</i> , 144 Wn.2d 686, 25 P.3d 418 (2001).....	15, 17, 21
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999)	11, 12, 14, 15, 17, 18, 20, 21, 26, 27
<i>State v. Hanson</i> , 151 Wn.2d 783, 790, 91 P.3d 888 (2004)	40
<i>State v. Hartzog</i> , 96 Wn.2d 383, 635 P.2d 694 (1981)...	10, 12, 13, 16, 17, 20, 21
<i>State v. Heath</i> , 85 Wn.2d 196, 532 P.2d 621 (1975).....	35, 37
<i>State v. Humphrey</i> , 139 Wn.2d 53, 62, 983 P.2d 1118 (1999) ...	37
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	13
<i>State v. Slert</i> , 186 Wn.2d 869, 383 P.3d 466 (2016).....	13
<i>State v. Williams</i> , 18 Wash. 47, 50 P. 580 (1897)	12, 14
<i>State v. Zornes</i> , 78 Wn.2d 9, 475 P.2d 109 (1970).....	36

Washington Court of Appeals

*Marine Power & Equip. Co. v. Wash. State Human Rights
Comm’n Hearing Tribunal*, 39 Wn. App. 609, 694 P.2d 697
(1985) 36

State v. Bennett, 168 Wn. App. 197, 275 P.3d 1224 (2012)..... 24

State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009)..... 39

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 39

State v. Mathers, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016)39

State v. Rose, 191 Wn. App. 858, 365 P.3d 756 (2015)..... 36, 37

State v. Walker, 185 Wn. App. 790, 344 P.3d 227 (2015)..... 18, 21

United States Supreme Court

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed.
2d 302 (1991)..... 24

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d
705 (1967)..... 24

Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d
953 (2005)..... 11, 13, 15, 16

Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d
126 (1976)..... 14

Gray v. Mississippi, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d
622 (1987)..... 24

Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353
(1970)..... 11

<i>Press-Enter. Co. v. Superior Court</i> , 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).....	24
<i>Rose v. Clark</i> , 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	24

Federal Decisions

<i>United States v. Sanchez-Gomez</i> , 859 F.3d 649 (9th Cir.), <i>cert. granted in part</i> , 138 S. Ct. 543 (2017).....	19
--	----

United States Constitution

Fifth Amendment	19
Fourteenth Amendment.....	12
Sixth Amendment	2, 12

Washington Constitution

Article I, section 3.....	2, 12
Article I, section 22.....	12

Statutes

RCW 10.01.160	30, 33, 34, 37, 38, 40
RCW 10.73.150	31
RCW 10.101.010	32, 33
RCW 10.101.020	34
RCW 36.18.020	34, 38, 39

RCW 43.43.754 34
RCW 43.43.7541 34, 39
RCW 74.09.035 33

Other Authorities

People v. Best, 979 N.E.2d 1187 (N.Y. 2012) 16
People v. Harrington, 42 Cal. 165, 168 (1871)..... 15

A. INTRODUCTION.

Although the court never found John Jackson, Sr. presented any security risk, he was brought to court in physical restraints for every hearing. Over his objection, the court summarily approved a blanket policy requiring every detained person wear shackles during pretrial court appearances. Even when Mr. Jackson testified before the jury and despite being told the jurors would notice the leg restraint he wore, the court approved this physical “security” device without further inquiry.

The court never engaged in the mandatory individualized analysis to assess if restraints were necessary. It did not consider available alternatives. It did not find compelling circumstances required in-court shackling. The court’s rulings requiring Mr. Jackson to remain shackled during court hearings and trial rendered the proceedings fundamentally unfair and violated Mr. Jackson’s right to appear free from unnecessary restraints, requiring a new trial.

B. ASSIGNMENTS OF ERROR.

1. The court impermissibly ordered Mr. Jackson to be physically restrained during court hearings, violating due

process, detracting from his right to counsel, impairing his right to be present, and undermining the fundamental fairness and appearance of fairness required in the administration of justice. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

2. The court erroneously imposed legal financial obligations as part of Mr. Jackson's sentence despite his indigence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Physically restraining a person accused of a crime is impermissible absent compelling circumstances and requires a court to individually assess the risk a person poses that necessitates restraints in court. Here, the court adopted a blanket policy authorizing the jail to bring all detained people to court for any pretrial hearing while wearing readily observable physical restraints. Did the court's refusal to conduct an individualized inquiry into the need to physically restrain Mr. Jackson violate his rights to appear in court free from unwarranted shackles and undermine the fairness of the proceedings?

2. Does the court's refusal to employ an individual analysis for any detained person constitute a systemic constitutional violation that undermines the appearance of fairness essential to the administration of justice?

3. Constitutionally impermissible shackling of an accused person during court proceedings requires reversal unless proven harmless beyond a reasonable doubt. Mr. Jackson was physically restrained during his jury trial without any showing he posed any risk to courtroom security and even when his restraint was likely visible to the jury as he testified. Was Mr. Jackson prejudiced by the restraints he was forced to wear throughout his jury trial?

4. A court may not impose legal financial obligations on an indigent person at sentencing without evidence the person is able to pay. The court questioned Mr. Jackson's ability to pay discretionary LFOs, determined he lacked reliable income and was indigent, but imposed numerous LFOs with accumulating interest. Did the court lack authority to impose discretionary LFOs when Mr. Jackson does not have the ability to pay them?

5. The legislature recently amended the statutory scheme governing LFOs to make abundantly clear that the court may not impose LFOs on indigent people. Do the amendments to the LFO statutes demonstrate the court's LFO order must be stricken?

D. STATEMENT OF THE CASE.

At John Jackson Sr.'s first court appearance after his arrest, he was brought to court shackled in full chains that bound his hands, belly, and feet. RP 6.¹ His attorney objected and filed a written motion. *Id.* Defense counsel reminded the court he distributed this same motion to all judges the prior week, and advised the court and prosecution it intended to object to routine shackling in court. RP 7.

The judge said, "I'm not in a position to rule on this" and wanted to give the state time to respond. RP 6. Without asking about the reason for shackling Mr. Jackson, the court set a hearing on the issue one month later. RP 8.

¹ The verbatim report of proceedings from first appearance, trial, and sentencing is contained in a single volume, referred to a "RP." A second volume containing other pre-trial hearings is referred to as "SuppRP."

The court also denied Mr. Jackson's request to be released on his own recognizance and set \$35,000 bail. RP 11-12, 14. Mr. Jackson returned to court several times and asked to reduce his bail, but the court refused. SuppRP 4-5, 9, 16, 18. Pursuant to the jail's shackling policy, each time he came to court he would be in either full "5 point" restraints or have chains on his waist and handcuffs. CP 75.

The court issued a written decision more than six weeks after Mr. Jackson objected to being shackled in court. CP 61. The court agreed less restrictive methods would serve the needs of courtroom security and also eliminate the humiliation and distraction defendants feel when restrained. CP 65. It ruled that video conferencing would be a satisfactory less restrictive approach. CP 65-66.

But the court noted that video conferencing was unavailable and depended upon future implementation. *Id.* The court set January 1, 2018, as a "target date" to using video conferencing. *Id.* Until then, the court would continue under its

January 20, 2017 decision, where it adopted the jail's shackling policy for any pretrial hearings. CP 66; Gallauher Opinion, p. 6.²

Mr. Jackson was brought to court for his jury trial wearing a physical restraint device on his leg that "hobbled" him by locking his leg straight if he moved. RP 74-75. The brace was under his clothes so it would not be immediately visible, but it restricted his movement. RP 75. Defense counsel immediately objected to Mr. Jackson wearing this leg brace during the jury trial. RP 74-75.

Defense counsel told the court it had not "made any rulings" about the need for such a device. RP 74-75. The court responded, "I don't think there's anything inappropriate in having that limited additional security measure employed." RP 75. It did not ask the State whether it had any security concerns with Mr. Jackson and no one voiced any need to keep Mr. Jackson restrained. RP 74-75.

The court noted the device would make it difficult for Mr. Jackson to walk in front of the jury. RP 75. It offered to put him

² This Court granted Mr. Jackson's motion to supplement the record with a ruling issued on January 20, 2017, in *State v. Gallauher*, which the court referenced in its written decision. CP 66.

“into the witness box without the jury being present” if he testified. *Id.*

Mr. Jackson was charged with second degree assault based on an incident with his fiancé, Darci Black. CP 76.

Before trial, defense counsel objected to the prosecution’s use of text messages from Ms. Black’s phone because Ms. Black admitted this exchange omitted many messages she deleted. CP 55. On the eve of trial, defense counsel learned Mr. Jackson’s cell phone had the unedited version of text messages but because Mr. Jackson was in jail, his brother had his phone. CP 55. His brother could not travel to Clallam County before the trial. CP 55. The defense asked for a continuance so it could obtain this evidence. CP 56; RP 98-100. The prosecution objected to the “eleventh hour” nature of the defense’s request. RP 112.

As jury selection was about to begin, Mr. Jackson’s uncle arrived and handed Mr. Jackson’s cell phone to defense counsel. RP 116. Defense counsel had little time to review the messages or look for other relevant materials and struggled with the technology to make copies for the prosecution. RP 117-18, 193. The prosecution repeatedly objected because the defense had not

provided copies of text from Mr. Jackson's phone earlier. RP 118, 297-98, 300.

During trial, Ms. Black testified that following an afternoon sexual encounter with her fiancé Mr. Jackson, he became jealous and accused her of cheating. RP 314. She claimed he said he would harm her if she cheated and ripped her engagement ring off her finger. RP 316-17. She said he put his hands on her neck and strangled her several times. RP 316-19. Then she said he apologized and cried, saying he wanted to kill himself. RP 320. He drove her home and repeated his desire to kill himself. RP 322. She told him to buy her some coffee and cigarettes to calm down, which he did. RP 323. Then he hugged her and walked away. *Id.*

The State elicited text messages Ms. Black exchanged with Mr. Jackson immediately after the incident. RP 330-57. The text messages were at times kind and at other times hostile. *See, e.g.*, RP 347 (Ms. Black asking Mr. Jackson to bring her coffee and Red Bull); RP 352 (Ms. Black telling Mr. Jackson, "how about you go kill yourself"). Ms. Black had deleted her harsh responses to Mr. Jackson.

Mr. Jackson also testified and explained he acted in self-defense. Ms. Black was angry and irritable on the day of the incident because she did not take medication she needed. RP 451. She yelled at him, accusing him of cheating. RP 454. She punched him in the face several times, demanding he tell her who he had been sleeping with. RP 456. Her sister told her to let him go and he left. RP 458. The court instructed the jury on the law of self-defense. CP 41-43.

Before Mr. Jackson testified, defense counsel asked permission for Mr. Jackson to get on the witness stand before the jury entered. RP 447. Mr. Jackson told the court it was difficult for him to stand and asked the court if he needed to rise for the jury. RP 448. The court told him to stay seated. *Id.* The court asked Mr. Jackson if the jury would be able to see the restraint device and Mr. Jackson responded, "They can actually see it." *Id.* Mr. Jackson said, "it's gonna be noticeable for them." *Id.* The court told him to stay seated. *Id.*

Mr. Jackson was convicted of the charged offense and the court imposed a standard range sentence including 20 months in prison. CP 13, 25-26. At sentencing, the court asked Mr. Jackson

about his income and debts. RP 565-67. Mr. Jackson said he owed child support and relied on income from fishing, but his income varied depending on the fish he could catch and he could not put any number on his potential income. RP 566. The court imposed \$1300 in legal financial obligations, ordered that interest would accrue immediately, and directed Mr. Jackson to pay \$40 per month once released. CP 16-19. The court also imposed 18 months of community custody and ordered Mr. Jackson pay the costs of supervision. CP 16.

E. ARGUMENT.

1. The trial court violated Mr. Jackson's constitutional rights when it required him to remain shackled and restrained while in court.

The court violated Mr. Jackson's constitutional rights to a fair trial by ordering physical restraints any time he came to court, before trial and during trial.

A trial court may not permit physical restraints without first conducting an individualized assessment of the need for shackling and then, may only order them based on compelling circumstances. *State v. Hartzog*, 96 Wn.2d 383, 401, 635 P.2d 694 (1981). Without this fact specific assessment, shackling is

constitutional error and inherently prejudicial. *State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001). Mr. Jackson wore a physical restraint devices even when testifying in front of the jury and even though the jury was in a position to see it. Because these unnecessary physical restraints denied Mr. Jackson the presumption of innocence, implied he was a dangerous and untrustworthy person, and undermined the dignity with which an accused person must be treated, this court should find the trial court's error was not harmless and his conviction should be reversed.

a. Physical restraints threaten an individual's constitutional rights to a fair trial and they may be ordered only in extraordinary circumstances.

“It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances.” *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999); *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *Deck v. Missouri*, 544 U.S. 622, 626, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

A defendant has a right to stand before the court “with the appearance, dignity, and self-respect of a free and innocent

man.” *Finch*, 137 Wn.2d at 844; U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Article I, section 22 declares that “In criminal prosecutions the accused shall have the right to appear and defend in person.” This constitutional right entitles an accused person “to appear with the use of not only his mental but his physical faculties unfettered,” unless “impelling necessity demands” restraint. *State v. Williams*, 18 Wash. 47, 50-51, 50 P. 580 (1897).

The law prohibits physical restraints except in extraordinary circumstances because “they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one’s own behalf, and right to consult with counsel during trial.” *Hartzog*, 96 Wn.2d at 398.

A trial court’s factual decision to shackle a defendant is reviewed for an abuse of discretion. *Id.* at 401. A court abuses its discretion if its decision “is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is based on “untenable grounds” if the trial court

applied the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

It is legal error for courts to implement a broad general policy ordering physical restraints, and it constitutes an impermissible “failure to exercise discretion.” *Hartzog*, 96 Wn.2d at 400. Whether a trial court violated an accused’s right to be present under the fair trial and due process provisions is a question of law that is reviewed de novo. *State v. Slert*, 186 Wn.2d 869, 874, 383 P.3d 466 (2016).

This Court should apply a de novo standard of review, because the trial court’s decision was not based on factual findings and because this is a constitutional violation. Even if reviewed for abuse of discretion, the trial court necessarily abused its discretion by applying the wrong legal standard and refusing to conduct the mandatory individualized assessment.

b. Automatic shackling is prohibited because it interferes with fundamental rights and affects the appearance of fair, dignified court proceedings.

In *Deck*, the Supreme Court focused on three fundamental legal principles for the right to be free from shackles: (1) the presumption of innocence; (2) the Sixth Amendment right to

counsel and participation in one's own defense, and (3) the dignity and decorum of the courts. *Deck*, 544 U.S. at 630-31. The Court held that the Constitution forbids visible shackles during the guilt or penalty phase unless an essential state interest justifies it. *Id.* at 633.

First, shackling can undermine the presumption of innocence. *Id.* at 630. The presumption of innocence "is a basic component of a fair trial under our system of criminal justice." *Finch*, 137 Wn.2d at 844 (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)). When the jury sees or infers a defendant is wearing shackles they "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." *Williams*, 18 Wash. at 51.

Physical restraints automatically stigmatize the accused as violent and lacking dignity. Historically, shackles have marked persons as enslaved, taking away their right to be treated respectfully as individuals. *See Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) ("shackling and prison clothes are unmistakable indications of

the need to separate a defendant from the community at large.”);

State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010)

(“Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.”).

Second, restraints can undermine a person’s Sixth Amendment rights. They interfere with a person’s right to consult with counsel by limiting their ability to communicate. *Deck*, 544 U.S. at 631; *Finch*, 137 Wn.2d at 845 (shackling or handcuffing affects an accused’s ability to assist his counsel); *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001) (restraints may affect the right to confer with counsel during trial).

Physical restraints can also diminish a defendant’s right to participate in his own defense because they may “impos[e] physical burdens, pains and restraints” and may embarrass the accused. *Deck*, 544 U.S. at 631 (quoting *People v. Harrington*, 42 Cal. 165, 168 (1871)).

Even when judges believe they can ignore the symbolic dangerousness of shackle, there remains a “psychological

impact” on judges by seeing a defendant continually restrained. *People v. Best*, 979 N.E.2d 1187, 1189 (N.Y. 2012).

Third, judiciaries recognize the “routine use of shackles” undermine a judge’s ability to “maintain a judicial process that is a dignified process.” *Deck*, 544 U.S. at 631. Physical restraints, without an individualized determination of necessity, threaten the dignity and decorum of the courtroom.

c. It is constitutional error and presumptively prejudicial for a trial court to require physical restraints without a hearing and without a record containing sufficient justification for the restriction.

Courts are prohibited from imposing a blanket shackling policy on all defendants without making a fact specific determination. *Hartzog*, 96 Wn.2d at 400-01. In *Hartzog*, the Supreme Court pointedly rejected a policy adopted by superior court judges in Walla Walla County of shackling prison inmates who were brought to court on new charges. *Id.* at 400. A trial judge “must” individually assess needed security measures on a case-by-case basis and may not assume an inmate is “potentially dangerous” and therefore merits physical restraints in court. *Id.*

Hartzog set out several factors the trial court may consider when determining whether physical restraints are necessary, including:

the 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 to harm 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 mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Id. Even if one or more of these factors exist, this does not justify the use of physical restraints. *Finch*, 137 Wn.2d at 850. Instead, the courts must also find a "compelling circumstance" that restraints are necessary for courtroom security. *Id.*

Before allowing the use of restraints, the court must first "conduct[] a hearing and enter[] findings into the record that are sufficient to justify the use of the restraints." *Damon*, 144 Wn.2d at 692; *Hartzog*, 96 Wn.2d at 401. In *Damon*, the trial court abused its discretion by requiring the accused to be restrained throughout trial without conducting a hearing and

instead relying on security concerns raised by a jail officer.

Damon, 144 Wn.2d at 692.

When a trial court orders a defendant to be physically restrained without balancing or analyzing the need for restraints, the trial court commits constitutional error. *Clark*, 143 Wn.2d at 775. Additionally, unconstitutional shackling is “inherently prejudicial” and this prejudice is “particularly apparent where the defendant is accused of a violent crime.” *Finch*, 137 Wn.2d at 845. Close judicial scrutiny is required to ensure that inherently prejudicial shackling is necessary. *Id.* at 846.

Even at sentencing, a judge may not defer to the jail’s decision to shackle a person. *State v. Walker*, 185 Wn. App. 790, 344 P.3d 227 (2015). The court must still individually determine the necessity of restraints and should enter findings so the record shows what facts the court deemed sufficient to justify their use on a particular defendant.” *Id.* at 800.

Walker also explained the court may not defer to the jail’s decision to physically restrain someone. *Id.* at 796-97. A judge

has different concerns that it must protect, including treating people who appear in the courtroom with dignity. *Id.* at 796.

Similarly, in *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir.), *cert. granted in part*, 138 S. Ct. 543 (2017),⁴ pre-trial detainees challenged the constitutionality of a district-wide blanket policy of routinely shackling all pretrial detainees in the courtroom.

The Ninth Circuit recognized an accused person’s “right to be free from unwarranted restraints,” is a fundamental constitutional entitlement under the Due Process Clause. *Id.* at 660; U.S. Const. amend. V. This right extends to any hearing, “pretrial, trial or sentencing, with a jury or without.” *Id.* at 661. To permit physical restraints, a court must have “evidence of disruptive *courtroom* behavior, attempts to escape from custody, assaults . . . while in custody, or a *pattern* of defiant behavior” toward jail or courtroom staff. *Id.* (emphasis in original, internal citation omitted).

⁴ The grant of review involves a procedural challenge, not the substance of the holding denouncing blanket shackling. *United States v. Sanchez-Gomez*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/united-states-v-sanchez-gomez/>; argument preview (last visited Apr. 30, 2018).

Consequently, courts cannot “institute routine shackling policies reflecting a presumption that shackles are necessary in every case.” *Id.* The court may not “delegate this constitutional question” to security officers. *Id.* Instead, it “must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom.” *Id.*

Here, the trial court conducted no such hearing and entered no individualized justifications. The court did not identify any facts suggesting the need to shackle Mr. Jackson. Instead, just as the court in *Hartzog*, it deferred to a blanket policy of shackling. Mr. Jackson is entitled to a new trial.

d. Before imposing physical restraints, the trial court must consider less restrictive alternatives that minimally impede one’s constitutional rights and the court cannot defer solely to the correctional officers’ judgments.

Washington courts have long held that physical restraints should only be used as a “last resort,” and courts must also consider less restrictive alternatives before ordering the use of physical restraints. *Finch*, 137 Wn.2d at 850. Other alternatives the courts may consider include: additional security personnel,

metal detectors, and security devices. *Hartzog*, 96 Wn.2d at 401; *see e.g., State v. Lomax*, 199 Wn. App. 1027, 2017 WL 2560098, *4 (2017), *rev. denied*, 169 Wn.2d 1036, 407 P.3d 1150 (2018) (unpublished opinion cited pursuant to GR 14.1(a)) (holding the trial court abused its discretion by requiring restraints without finding that additional guards or other less invasive security measures would have sufficed); *State v. Boatright*, 1 Wn. App. 2d 1029, 2017 WL 5593790, *5 (2017) (unpublished opinion cited pursuant to GR 14.1(a)) (stating one alternative to a leg brace is to call in another deputy to monitor the defendant).

Although a trial court may exercise discretion in determining whether to order restraints, it is reversible error for the trial court to rely solely on the correctional officer's judgment that physical restraints were necessary. *State v. Finch*, 137 Wn.2d at 853; *see also Damon*, 144 Wn.2d at 692 (concluding that the trial court abused its discretion by relying "solely on the security concerns raised by the officer and fail[ing] to conduct a hearing."); *see also Walker*, 185 Wn. App. at 796-97 (criticizing court for relying on jail's claim it wants shackles).

Here, the trial court did not consider less restrictive alternatives. It hoped to start video conferences for future first appearances but since that was not available, it simply maintained a status quo policy of shackling any person in custody. CP 66. Because no one articulated any concern that Mr. Jackson posed a risk to anyone, no shackling could be permitted. The restraints used were not tailored to any actual risk presented.

e. The court shackled Mr. Jackson without any individual inquiry or efforts to employ less restrictive alternatives.

Unnecessary shackling is constitutional error and presumptively prejudicial. *Clark*, 143 Wn.2d at 731. Defense counsel accurately warned the court established law mandates an individualized inquiry and specific showing of necessity before the court may order physical restraints during court hearings. RP 26-27. But, pursuant to the court's blanket policy, Mr. Jackson was brought to court in restraints. CP 66, 75.

On the day his jury trial started, Mr. Jackson appeared in court wearing a mechanical leg restraint device that locked when he straightened his leg. RP 74-75. His attorney objected

because the court had not made any rulings regarding the restraint. RP 74. The court did not ask security staff or prosecution for any explanation. It conducted no individual assessment of the need for Mr. Jackson's restraint. It gave no reason to think Mr. Jackson present a risk or needed to be restrained. Instead, it summarily stated, "I don't think there's anything inappropriate in having that limited security measure employed." RP 75.

It was constitutional error and prejudicial for the trial court to require Mr. Jackson to attend his jury trial wearing physical restraints without any justification. The court did not conduct an individualized determination that shackles were necessary and did not consider other alternatives. It erroneously deferred to the sheriff office's policies on blanket shackling. The record did not show Mr. Jackson was disruptive, dangerous, or posed a high flight risk.

The Supreme Court has held that some constitutional rights, like the right to an impartial jury, are fundamental to a fair trial and a violation of these rights can never be harmless error. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S. Ct. 2045, 95

L. Ed. 2d 622 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The harm from structural error prevents a criminal trial from “serv[ing] its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)).

A judge’s role includes both ensuring the fairness of a criminal trial and ensuring “the appearance of fairness so essential to public confidence in the system” of justice. *State v. Bennett*, 168 Wn. App. 197, 203, 275 P.3d 1224 (2012) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

The trial court’s systemic refusal to adhere to the law prohibiting physical restraints on people accused of crimes requires this Court’s intervention. The trial court’s policy undermines the fairness and the appearance of fairness of public trial proceedings. Defense counsel properly objected and gave the court the opportunity to assess whether compelling

circumstances required Mr. Jackson to wear restraints. But the trial court refused to conduct an assessment and instead issued blanket rulings upholding a policy of presuming people accused of crimes must appear in court with shackles if they are unable to post bail. CP 65-66.

These cases generally evade review due to the prevalence of guilty pleas where no appeal follows, thus permitting the court to shackle people without reason to do so. For example, the trial court's order affirming the blanket shackling policy involved six consolidated cases, but no appeals were filed in those other cases.⁶ In order to prevent this inherently prejudicial violation from recurring, and because this error renders the trial fundamentally unfair, this court should reverse Mr. Jackson's conviction based on structural error.

f. The unconstitutional shackling error prejudiced Mr. Jackson.

Alternatively, if this Court does not find a structural error, the State bears the burden of proving the error is

⁶ Counsel checked ACORDS for the other defendants in the court's August 2017 opinion and did not find any appeals listed. CP 61-62.

harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859; *State v. Caldwell*, 94 Wn.2d 614, 618, 618 P.2d 508 (1980).

This error was not harmless. The court required Mr. Jackson to appear in full chains when the court was deciding what bail to set. RP 6, 11-14. Shackles make a person appear dangerous and unmanageable, which prejudices the court's assessment of whether to release Mr. Jackson and what bail amount he must post. *See Finch*, 137 Wn.2d at 863 (noting impact of shackling on determination of future dangerousness).

Because Mr. Jackson could not afford the bail set and remained in custody awaiting trial, he could not get his cell phone and show his attorney the conversations he had with Ms. Black near the time of the incident, which frustrated his attorney's preparation and ability to effectively cross-examine the complainant.

Throughout his jury trial, he wore a device that left him unable to move his leg without triggering a noticeable restraint. Near the end of jury selection, the court asked defense counsel, "assuming we finish voir dire and we start putting folks in the box, how do you want to deal with Mr. Jackson getting back to

the other side of the table with his brace?” RP 272. Defense counsel said, “I don’t have any good suggestions” and Mr. Jackson told the court “It’s hard, but.” RP 272-273. The court determined that voir dire was over and moved Mr. Jackson around before the jury returned to the courtroom. RP 274. This exchange demonstrates the effect the restraints had on Mr. Jackson’s movements and the fear throughout trial that the jury would see that he was restrained.

In *Finch*, the court ruled that the restraints were not overtly visible to the jury but “it was clearly possible that the jury could have known the Defendant was restrained” due to his restricted movements. *Finch*, 137 Wn.2d at 857. Simply being able to infer Finch was restrained made it likely the jury saw him as a dangerous person. *Id.* at 865. This inference undermined the fairness of the sentencing phase of a death penalty case despite overwhelming evidence of his guilt. *Id.* at 865-66.

Likewise, Mr. Jackson struggled to stand and sit before the jury because the leg brace locked every time he straightened his leg. RP 75, 448. Inevitably, the jury would notice his

movements were restricted during the trial. Additionally, when Mr. Jackson took the stand to testify, he said the jury could “actually see it” and the brace was on the same side as the jurors. RP 448. The court ordered him to sit but took no further measures to hide his restraint from the jurors and did not remove it for his testimony.

Mr. Jackson’s testimony about a version of the incident was markedly different from the complainant’s rendition; their testimony differed on where the assault occurred, who accused whom of cheating on the other, and who was the aggressor. Mr. Jackson’s credibility was central to the jury’s assessment of whether the prosecution disproved he acted in self-defense.

Not only did the restraints directly affect his ability to move, it likely affected the jury’s assessment of his credibility. If jurors could tell he was physically restrained, they would be more likely to see him as a dangerous person and less likely to credit his self-defense explanation. Even if they simply thought his impaired freedom of movement was suspicious, they would be less likely to credit his version of the incident.

At the least, Mr. Jackson would stand out as the one witness who did not pay the jury the respect others showed by standing when they entered. He was the only witness whose movements were impaired. The unnecessary physical restraints effected Mr. Jackson's behavior during trial and consequently affected the jury's assessment of his defense.

A new trial is required due to the court's disregard of the legal requirements for restraining an accused person when attending court hearings and during a jury trial, prejudicing Mr. Jackson. This deprivation of his constitutional right to appear in court free from unwarranted restraints denied him a fair trial.

2. The court improperly imposed LFOs despite Mr. Jackson's indigence.

The court ordered Mr. Jackson to pay \$1300 in LFOs for various costs, including the discretionary imposition of \$200 clerk's filing fee, \$500 fee for court-appointed counsel, \$100 fee for collecting a DNA sample, and \$100 fee for a domestic violence offense. CP 17. It ordered that he pay the costs of supervision and interest bearing from the date of judgment. CP 16, 19. It imposed these financial penalties despite Mr.

Jackson's indigence and over Mr. Jackson's objection. These LFOs are not authorized by statute and should be stricken.

a. The court may not impose LFOs upon a person who is indigent.

It is improper to order an indigent person pay discretionary LFOs. "[A] trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015) ; RCW 10.01.160(3). The court must take into account a defendant's financial resources and the nature of the burden imposed by payment, on the record. *Id.* at 838. A court "should seriously question" a person's ability to pay LFOs if he qualifies for court-appointed counsel by virtue of an income that falls below 125 percent of the federal poverty line. *Id.* at 839.

At sentencing, Mr. Jackson informed the court he lacked financial resources and asked the court not to impose discretionary LFOs. RP 563. The court questioned Mr. Jackson about his financial situation, learned he had no assets, owed

child support, and did not have reliable or steady income, but imposed discretionary LFOs anyway. RP 565-67.

At the time of sentencing, Mr. Jackson had no income and had remained in jail since his arrest. RP 14, 563; SuppRP 9, 18. The court asked Mr. Jackson to describe the money he made when working as a fisherman but Mr. Jackson did not know how to estimate it because it “depends on how fishing’s going.” RP 566. Whatever he made he had to share with the person he fished for. RP 566. He said he “used to work at the resort in LaPush” but never said when that was or what income he received. *Id.* Mr. Jackson was represented by court-appointed counsel from the inception of the case and the court authorized the appointment of counsel for appeal, based on Mr. Jackson’s indigence at the time of sentencing. RP 5; CP 7; RCW 10.73.150.

The court erred by imposing discretionary costs without receiving evidence of Mr. Jackson’s ability to pay them. The court unreasonably concluded Mr. Jackson’s inability to guess about his ability earn money and his lack of other resources meant he is able to pay. This determination is particularly unreasonable when Mr. Jackson’s lack of reliable income is

considered along with the court's imposition of a prison term and his indigent status as demonstrated by meeting the poverty standards for court-appointed counsel.

Furthermore, the statutory amendments to the LFO scheme precludes the imposition of attorney's fees or the filing fee on an individual who, at the time of sentencing, is indigent under RCW 10.101.010(3) (a) through (c). Mr. Jackson is indigent.

The amended statute directs the court to consider a person's ability to pay LFOs from a point in time: at sentencing. It prohibits a court from speculating about a long-ago job or future employment potentially available after a lengthy prison term. Mr. Joseph was indigent under the definition provided in RCW 10.101.010(3)(c) and discretionary LFOs may not be imposed upon him. Laws of 2018, ch. 269, § 6; Laws of 2018, ch. 269, § 17; CP 83. This Court should strike these discretionary LFOs from Mr. Jackson's judgment and sentence.

b. The legislature amended the LFO statutes so courts may not impose fees on an indigent person.

The legislature recently amended the statutory scheme governing imposition of LFOs upon an indigent person. As before, courts must consider whether a person “is or will be able to pay” LFOs before imposing them. RCW 10.01.160(3). But the new law clarifies what being “able to pay” means.

Under the revised statute, the court “shall not order a defendant to pay costs” if “the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).”⁷ Laws of 2018, ch. 269, § 6. If a person is indigent, the court does not further examine the person’s financial resources or the nature of the burden payment of costs would impose. *Id.*

⁷ RCW 10.101.010(3)(a)-(c) provides:

(3) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

The amendments further clarify the non-mandatory nature of several LFOs when a person is indigent. The \$200 clerk’s filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.020(3)(a) through (c).” RCW 36.18.020(2)(h).

The \$100 DNA fee must be included “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” RCW 43.43.7541. This fee is not mandatory for a person like Mr. Jackson, who has other state felony convictions because RCW 43.43.754 mandates DNA samples from all adults or juveniles conviction of felonies and certain misdemeanors. Mr. Jackson has two prior convictions for which DNA collection was mandatory at the time of his sentencing. *See* RCW 43.43.754.

Attorney’s fees are not permissible when a person is indigent under RCW 10.01.160(3). The prior version of RCW 10.010160(3) permitted this discretionary costs only upon a person who is able to pay, and the amended statute clarifies that

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level

an indigent person lacks the necessary “ability to pay.” *See State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (finding attorney’s fees subject to the analysis under 10.01.160(3)) (review granted in *Clark*, 187 Wn.2d at 1009, but only for purpose of requiring the trial court to engage in an adequate inquiry).

c. The changes in the law governing LFOs apply to Mr. Jackson.

Amendments to a statute that are remedial may be applied to pending cases. *State v. Heath*, 85 Wn.2d 196, 197-98, 532 P.2d 621 (1975). In *Heath*, the trial court retroactively applied an amendment to the habitual traffic offenders act that allowed judges to stay license revocations when a person is engaged in treatment. *Id.* The Supreme Court agreed the amendment applied retroactively as a remedial change to the statute. The purpose of the amendment was to allow alcoholics to receive treatment rather than lose their driving privileges. *Id.* at 198. Because the amendment was remedial the court held, “the presumption of retroactivity therefore applies.” *Id.*

Heath also explained that the effect of the amendment “reduced the penalty for a crime.” *Id.* “When this is so, the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one.” *Id.*

Under the common law, pending cases are decided according to the law in effect at the time of the decision. *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015). This rule applies when a case is pending on appeal. If “a controlling law changes” during the pendency of the case, “the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application.” *Marine Power & Equip. Co. v. Wash. State Human Rights Comm’n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985).

To determine the legislature’s intent to apply a law to pending cases, the legislature is not required to use explicit language. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970). Instead, the question is whether the law “fairly convey[s]” the intent to apply to pending litigation. *Id.*

When a statute reduces the penalty for a crime, “the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one.” *Heath*, 85 Wn.2d at 198. Even though statutes generally apply prospectively, this presumption does not control changes in the law enacted to reduce punishment or ease the harshness of criminal prosecutions. *Heath*, 139 Wn.2d at 198; *Rose*, 191 Wn. App. at 868.

The legislature is also aware that statutory changes operate retroactively when they are remedial in nature or intended to clarify an ambiguity. *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999). An amendment is remedial when it “applies to practice, procedure, or remedies and does not affect a substantive or vested right.” *Id.* Here the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) are remedial and should be applied retroactively.

In *Humphrey*, the Court addressed whether an amendment increasing the victim penalty assessment from \$100 to \$500 applied to people who were charged before the increase but convicted after it. 139 Wn.2d at 55. The Court found the

amendments were not remedial, and therefore could not be applied retroactively because they increased the financial penalty imposed on people convicted of crimes. *Id.* at 63.

The changes to the LFO statutory scheme are remedial and should be applied retroactively because they provide guidance on how to apply existing liabilities. The language of RCW 10.01.160(3) previously directed the court should not order an individual to pay costs unless he “is or will be able to pay them.” *See* Laws of 2018, ch. 269, § 6. The amendments eliminated this imprecise language and instruct no costs shall be ordered against any individuals found indigent pursuant to RCW 10.101.010(3) (a) through (c).

Unlike in *Humphrey*, the amendments to RCW 10.01.160(3) created no new liability. The changes to RCW 10.01.160(3) simply provide more concrete guidelines for the legislature’s previous directive that individuals not be burdened with costs they cannot pay.

Similarly, the legislature’s directive not to recoup the \$200 filing fee from indigent individuals under RCW 36.18.020(2)(h) is also remedial. In fact, although the Court of

Appeals has said the \$200 filing fee is in mandatory in some cases the changes to RCW 36.18.020(2)(h) reflect the practice of some trial courts, which regularly waive the \$200 filing fee for indigent individuals. *See, e.g., State v. Mathers*, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016) (finding the DNA fee and Victim Penalty Assessment fee mandatory but noting the trial court “waived all other LFOs” because the individual was indigent); *but see State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (construing criminal filing fee as mandatory). The changes to this provision should be applied retroactively.

Likewise, prohibiting a court from imposing multiple DNA collection fees where the state has the person’s DNA sample is remedial. It remedies the punitive imposition of a fee when that fee was intended for a purely administrative purpose. *See State v. Brewster*, 152 Wn. App. 856, 860-61, 218 P.3d 249 (2009) (noting DNA collection fee serves administrative purposes and “is not punitive”). The change to RCW 43.43.7541 removes the unreasonable imposition of a fee when the purpose of the fee has already been satisfied.

Finally, this Court should apply the general rule that “a new rule applies prospectively to all cases pending on direct review or not yet final.” *State v. Hanson*, 151 Wn.2d 783, 790, 91 P.3d 888 (2004). Because Mr. Jackson’s case remains pending on direct review, this Court may apply the amendments to RCW 10.01.160(3) prospectively here.

As a result, the discretionary LFOs, including the clerk’s fee and DNA collection fee, as well as attorney’s fees and non-mandatory interest and supervision fees, should be stricken.

F. CONCLUSION.

John Jackson, Sr.’s conviction should be reversed and a new trial ordered due to the improper shackling that occurred throughout the proceedings. Alternatively, his indigence mandates the striking of all non-mandatory LFOs.

DATED this 7th day of May 2018.

Respectfully submitted,



NANCY P. COLLINS (28806)
BRIDGET GROTZ (Rule 9 Intern)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 51177-1-II
)	
JOHN JACKSON, SR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF MAY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JESSE ESPINOZA, DPA [jespinoza@co.clallam.wa.us] CLALLAM COUNTY PROSECUTOR'S OFFICE 223 E 4 TH ST., STE 11 PORT ANGELES, WA 98362	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] JOHN JACKSON, SR. 359163 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF MAY, 2018.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

May 07, 2018 - 4:31 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51177-1
Appellate Court Case Title: State of Washington, Respondent v. John W. Jackson, Sr., Appellant
Superior Court Case Number: 17-1-00218-5

The following documents have been uploaded:

- 511771_Briefs_20180507163004D2676530_7782.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.050718-07.pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180507163004D2676530