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Court of Appeals
Division II

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State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN W. JACKSON, SR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00218-5

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the issue of whether the court failed to make an independent determination regarding any need for Jackson to appear in court in restraints for non-jury proceedings is moot and should not be reviewed as it does not present a substantial public interest?
2. Whether the requirement that Jackson wear a leg brace under his clothing during jury trial was harmless beyond a reasonable doubt because the jury could not see the leg brace and the evidence of guilt was strong?
3. Whether the court properly imposed mandatory legal financial obligations under the statutes in effect at the time of the offense because they are subject to the savings clause?
4. Whether the court properly imposed discretionary costs because it inquired with Jackson about his assets and liabilities and ability to work and thus, his ability to pay prior to imposing the \$500 attorney recoupment fee?

II. STATEMENT OF THE CASE

The State charged Jackson with Assault in the Second Degree by Strangulation for allegedly strangling his fiancé on May 25, 2017. CP 76. The defendant was brought to court for his first appearance in restraints and the

defense objected:

THE COURT: All right, Mr. Johnson, what would be the state's recommendations as far as conditions of release?

MR. JOHNSON: Thank you, Your Honor. The state is requesting bail in the amount...

MR. GASNICK: Oh, Your Honor, before we do that, we may like to file this.

THE COURT: All right, this is Mr. Jackson's objection. Does Mr. Jackson know anything about this?

MR. GASNICK: No, he does not, Your Honor.

THE COURT: Does he want this objection to be made?

MR. GASNICK: I believe, Your Honor that Mr. Jackson is aware that he's in handcuffs and that he's wearing a belly chain and that he's in shackles. If he is not aware of those things, then I would question his competency.

THE COURT: Okay, well, Mr. Jackson, just so you know that a motion has been filed on your behalf objecting to the restraints, the shackles, and asking for the removal of those. So, since you're the moving party here, so, I'm not in a position to rule on this, as I've just been presented it and I think the state probably should get some opportunity to respond, unless you want to respond at this time, Mr. Johnson?

MR. JOHNSON: No, Your Honor.

RP 5-6 (defendant's first appearance).

The issue of restraints was litigated by the parties on July 12, 2017 and involved a lengthy discussion on the issues. (RP 15-67) On August 4, 2017, the trial court issued a memorandum opinion ordering the

implementation of a lesser restrictive alternative to use of restraints by means of video conferencing as permitted by CrR 3.4(d). CP 66. The court also ordered that it would adopt the restraint policy set forth in the court's January 20, 2017 order. App. at

Jury Trial

The matter proceeded to trial on August 21, 2017 and Jackson objected to the leg brace which he was required to wear. RP 74.

MR. STALKER: So, just for the record, Your Honor, it's my understanding that Mr. Jackson's been fitted with a leg brace and I encountered this many times before, previous trials, but I wanted to bring this to the attention to the court and object because I don't think the court has made any rulings about it and security is the province of the court, but he's fitted with a brace, it's not visible from outside his clothes, it's on his leg and it will lock into position when he moves his leg to the straight position and there's a little release by his knee that he can press to unlock it, so it's basically a hobble.

RP 74-75.

THE COURT: All right. At this juncture, I don't think there's anything inappropriate in having that limited security measure employed. To the extent that your client wishes to testify, we'll make sure that he gets into the witness box without the jury being present and seeing him perhaps have some difficulty walking. But, at this juncture, I think that it is appropriate to have some limited security and I think that the brace that is employed is certainly appropriate. Anything else?

MR. STALKER: No, I think nothing other than motions in limine.

RP 75.

Trial Testimony

The victim testified that on May 25, 2017, prior to the strangulation event, Jackson drove her to her medical appointment at Clallam Bay where she met with ARNP Donna West. RP 311. Donna West testified that nothing seemed to be wrong with the victim and there were no noticeable visible marks on the victim who appeared to be cheerful. RP 446. The victim testified that after the appointment, Jackson took the victim to the A road to make up with her and they had sexual relations in the back of the vehicle when Jackson became upset due to his suspicions the victim was cheating. RP 313--15.

The victim then testified with that Jackson said he was going to kill her on multiple occasions and that he strangled her on three occasions and on the last she gave up struggling and urinated on herself. RP 316--19. Then Jackson stopped and began crying and apologized for almost killing her. RP 320. Jackson began expressing his own desire to commit suicide for what he did. RP 320.

La Push Police Chief Lyon testified that when he tried to contact Jackson after the event was reported, Jackson sent text messages to him expressing his desire to commit suicide. RP 426, 439, 442. Jackson also claimed in his texts that he didn't touch the victim, that he only pushed her and scratched her with her ring and that the victim is a liar. RP 440.

The victim testified that Jackson took the victim home where she lived with her parents. RP 321. The victim told her sister, Dondi Huling, what had happened. RP 324–26. Huling then called the police. RP 326. Huling noticed that the victim was beyond upset and had visible marks on her face and hands and her neck was visibly swollen. RP 425–26.

After the strangulation event, the victim was examined by Dr. John Shima in the emergency room of the Forks Community Hospital. RP 375, 395. Dr. Shima testified at length about strangulation and his qualifications and that in his professional medical opinion the victim's observable injuries were consistent with the strangulation event. RP 397–98.

Deputy Sean Hoban also observed physical signs of injury on the victim's neck. RP 408. Jonais Merrill, Physician's Assistant, also observed swelling on the victim's neck and that the victim's voice was hoarse and the victim was tearful. RP 415. Finally, the victim's mother testified that the victim went to her medical appointment with the Jackson and came back with Jackson and was crying. RP 418.

Jackson's testimony

When it was time for Jackson to testify, Jackson's attorney raised the issue of the leg brace outside the presence of the jury. RP 447. The court agreed that Jackson would sit down on the witness stand before the jury was brought back out. RP 447–48. Jackson then inquired if he would have to

stand to take the oath in front of the jury. RP 448. Jackson expressed concern that the jury might be able to see that he was wearing a leg brace. RP 448. The court decided that Jackson would just remain seated when taking the oath so that he would not have to stand and possibility expose the presence of the leg brace under Jackson's clothing before the jury. RP 448. Then the jury was brought out.

Jackson testified that the victim was irritable on the day he took her to her medical appointment because she did not take her medications. RP 452–53. After the appointment, Jackson said they never stopped at the A Road. RP 453. Instead, he took the victim home and she was irritable. RP 453. The victim went into the house to get her PRN medication and came back to the vehicle Jackson was driving. RP 454–55. The victim then accused Jackson of cheating on her. RP 455. Jackson testified that the victim was angry and yelling and the arguing continued for about an hour. RP 456. Then before Jackson was about to leave the victim punched him four times. RP 456. Jackson tried to call down and leave and the victim chased after him still arguing. RP 457. Jackson said this continued until the victim's sister Dondi yelled at her to just let him go. RP 458. Jackson left and then the victim called him for him to bring cigarettes and red bull. RP 458. Jackson began crying and expressed that he wasn't going to if she was going to physically harm him. RP 458. Jackson went back to the victim and flinched when the

victim gave him a kiss because he thought she was going to physically harm him again. RP 459. Then Jackson left to get cigarettes and coffee. RP 460. The arguing continued when Jackson came back and then Jackson explained the text messages that ensued. RP 461–476.

III. ARGUMENT

A. THE USE OF RESTRAINTS IN NON-JURY PROCEEDINGS IS A MOOT ISSUE AND THE USE OF A LEG BRACE UNDER CLOTHING AT TRIAL WAS A LESSER RESTRICTIVE ALTERNATIVE AND NOT PREJUDICIAL TO JACKSON’S RIGHT TO A FAIR TRIAL.

1. **The Court should decline to review the use of restraints in pre-trial hearings in this case because the issue is moot and not of substantial public interest.**

“A case or an issue is moot when the court can no longer provide effective relief.” *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995) (citing *Washam v. Pierce Cy. Democratic Cent. Comm.*, 69 Wn. App. 453, 457, 849 P.2d 1229 (1993), *review denied*, 123 Wn.2d 1006 (1994)).

Jackson argues that this is an issue of continuing and substantial public interest and is likely to evade review. This Court may still reach the merits of a moot issue if it involves matters of a continuing and substantial public interest. *In re Det. of W.R.G.*, 110 Wn. App. 318, 322, 40 P.3d 1177 (2002).

First, Jackson’s claim fails to present an issue of continuing and substantial public interest because the use of *visible* restraints was limited to

pre-trial hearings rather than at trial and there has been no showing of prejudice due to use of restraints in the non-jury proceedings.

Although a court must be persuaded by compelling circumstances and must pursue lesser restrictive alternatives before requiring a defendant to appear before a jury in restraints, this rule historically does not apply to non-jury and non-guilt phase proceedings. *See Deck v. Missouri*, 544 U.S. 622, 626, 125 S.Ct. 2007, 2010–11 (2005) *abrogated on other grounds by Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (“In discussing the “deep roots” of this rule, however, the Court noted that ‘the rule did not apply at ‘the time of arraignment,’ or like proceedings before the judge.’”).

The cases that address shackling of defendants in the courtroom “turn in large part on fear that the jury will be prejudiced by seeing the defendant in shackles.” *See Deck*, 544 U.S. at 630, 125 S.Ct. 2007; *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995); *see also Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). A judge in a pretrial hearing presumably will not be prejudiced by seeing defendants in shackles. *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (“We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors.”)).

The issue was also addressed in the U.S. Court of Appeals, 2nd Circuit case of *U.S. v. Zuber*, which upheld the restraint policy at issue without an individualized determination by the court. *U.S. v. Zuber*, 118 F.3d

101, 103 (2d Cir. 1997). “In *Zuber*, the court held that ‘the rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury sentencing hearing.’” *Zuber*, at 102; *see also DeLeon v. Strack*, 234 F.3d 84, 87–88 (2d Cir. 2000).

The U.S. Court of Appeals, 11th Circuit, also concluded “the rule against shackling pertains only to a jury trial,” adding it “does not apply to a sentencing hearing before a district judge” in *U.S. v. LaFond*, 783 F.2d 1216, 1225 (11th Cir. 2015), *cert. denied*, 136 S. Ct.213 (2015).

Here, there was no jury present in any of the Jackson’s pre-trial proceedings and sentencing and there was no apparent prejudice.

Jackson cites to *United States v. Sanchez-Gomez*, 859 F.3d 649, 661 (9th Cir. 2017) *vacated by U.S. v. Sanchez-Gomez*, 138 S.Ct. 1532 (2018) (remanding case to the Court of Appeals with instructions to dismiss as moot). The U.S. Supreme Court held that the case was moot and that the capable of repetition yet evading review exception did not apply because the defendants in that case are presumed and required by law to refrain from future criminal conduct. *U.S. v. Sanchez-Gomez*, 138 S.Ct. 1532, 1542 (2018) (citing *Lane v. Williams*, 455 U.S. 624, 633, n. 13, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982)).

Moreover, *Sanchez-Gomez* was not binding on Washington trial

courts even before it was vacated. *See State v. Glasmann*, 183 Wn.2d 117, *cert.denied*, 136 S. Ct. 357, 193 L. Ed. 2d 289 (2015) (state court need not follow Ninth Circuit holding that a blank jury verdict form returned after jury got “unable to agree” instruction amounts to an acquittal such that double jeopardy prohibits retrial on the charge the jury failed to unanimously agree upon.).

It would undermine our role as an independent state court in our system of federalism if we overturned our precedent simply because it conflicted with a Ninth Circuit decision.

Glasmann, 183 Wn.2d at 127.

The issue of restraints in non-jury proceedings in this case is moot as the underlying criminal case has been resolved through jury trial and this Court cannot grant effective relief. Additionally, the facts of this case regarding the use of restraints do not present a substantial public interest as there has been no showing of prejudice from wearing restraints in non-jury proceedings and the trial court is presumed to not be prejudiced.

Therefore, this Court should decline to review this issue.

2. **The use of restraints in pre-trial non-jury hearings in the instant case is not a matter of continuing and substantial public interest because the court exercised its discretion when it adopted a blanket restraint policy for non-jury proceedings after careful consideration of safety issues in the courtroom.**

Washington law requires that the court exercise its discretion regarding the use of restraints in the court room rather than prison officials.

See State v. Walker, 185 Wn. App. 790, 344 P.3d 227 (2015); *State v. Hartzog*, 96 Wash.2d 383, 401, 635 P.2d 694 (1981) (citation omitted) (“[T]he standard for appellate review will be whether the trial court has abused its broad discretion to provide for order and security in the courtroom.”).

The *Walker* court pointed out that although prison officials were not permitted to make the determination in place of the court, prison officials were well positioned to aid the court in deciding matters of courtroom security. *Id.* at 796–97. However, no Washington Law prohibits the court from adopting a blanket restraint policy for non-jury proceedings in court.

In the instant case, the trial court exercised its discretion when it adopted the Clallam County Correction Facility’s (CCCF) restraint policy and ordered the implementation of a lesser restrictive alternative after considering the arguments of both the defense and the State, and considering the concerns of the CCCF Chief Correction’s Deputy, Ronald Sukert. App. B.

Chief Sukert was responsible for the development and implementation of safety and security policies related to inmate movement in the correctional facility and outside, including the courtroom. App. B. Sukert’s declaration includes his training and lengthy experience as a corrections deputy and Chief Deputy since 2006. App. B. Sukert outlined the safety measures and the concerns that they are designed to address. Sukert

also includes his experience of what has happened in the courtroom when restraints have been removed including flight and violent outbursts. App. B-3.

Full restraints are used under the CCCF Policy and Procedure 15.106.3(A)(1)–(4) for first appearances only as Sukert explains that inmates present a threat level which is unknown as there is no reliable predictability or track record of behavior. Sukert outlines that new inmates come to jail under the influence of controlled substances, excitement or stress of circumstances such as Domestic violence, or unstable mental health conditions. Sukert points out that there are too many varied examples to cite which can lead to volatile or violent situations in the courtroom. The policy is designed to prevent the need to speculate what risks an inmate may present in a courtroom at the potential expense of safety and security.

The jail employs a complex classification system taking many factors into consideration to assign a risk or classification level. After the first appearance, the jail uses this classification system with wrist bands to determine whether full or medium restraints are used. *Id.*

The jail policy has a different procedure for trials. 15.106.3(5)(C) which provides that handcuffs are removed before entering a courtroom. App. C3–4. A leg brace is employed in place of visible restraints with clothing loose enough to fit comfortably over the leg brace. 15.106.3(5)(C)(3)–

(6)(C)(3).

The trial court addressed Jackson's objection to restraints in its Aug. 4, 2017. The court determined that it would go to a lesser restrictive alternative once video conferencing was in place. CP 66. This was to take some time, so in its discretion, the court determined that it would proceed under the restraint policy as outlined above.

Thus, the court's application of the blanket restraint policy in the non-jury proceedings did not run afoul of Washington law. The court's determination was made with consideration of applicable case law and the safety concerns as outlined by Chief Ron Sukert. The trial court went further and actually ordered a lesser restrictive alternative in the form of video conferencing but in considering the logistics of implementation, the court in its discretion, determined that it would proceed under the restraint policy as outlined above until video conferencing was available. The court did not abuse its discretion and therefore not a matter of substantial public interest.

Jackson cites to *Hartzog* to suggest that *any* "broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be "potentially dangerous" is a failure to exercise discretion." *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). This reading of *Hartzog* is over generalized because the *Hartzog* Court was examining the application of the restraint policy at issue in the context of jury

trials. *State v. Hartzog*, 96 Wn.2d 383, 397, n.7, 635 P.2d 694 (1981).

The statement in *Hartzog* cited by Jackson was a direct and specific response to the trial court's reasoning:

Here, in addition to the policy incorporated in the security order, the trial judge relied upon the assumption that *the jury* was bound to learn petitioner and his witnesses were prison inmates. Thus, the court reasoned, if all inmates were brought into and remained in court in physical restraints, the *jury* would not be affected or prejudiced thereby. We cannot agree.

State v. Hartzog, 96 Wn.2d 383, 399–400, 635 P.2d 694 (1981) (emphasis added).

Thus, it is clear that the *Hartzog* Court was speaking within the context of prejudice from the use of physical restraints in front of and visible to a jury. Furthermore, *Hartzog* was examining already existing law regarding use of restraints during trial and determined that the same rules apply when the defendant and witnesses are inmates in State prison. *See Hartzog*, 96 Wn.2d 398–99.

Here, the restraint policy that the court adopted in the instant case was far more narrow and reasoned and only applied to non-jury proceedings. Therefore, the issue of whether application of a blanket restraint policy during non-jury pre-trial proceedings is moot because it is not of substantial public interest. The trial court followed the law and exercised its discretion as required.

3. **The requirement that Jackson wear a leg brace under his clothing was a lesser restrictive alternative and was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming and there was no evidence of prejudice.**

Generally, an error that violates a constitutional right of the accused is presumed to be prejudicial. *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999) (citing *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980)). “The appellate court determines whether the State has overcome the presumption from an examination of the record, from which it must affirmatively appear the error is harmless beyond a reasonable doubt.” *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999) (citing *State v. Belmarez*, 101 Wn.2d 212, 676 P.2d 492 (1984)).

“[A] claim of unconstitutional shackling is subject to a harmless error analysis.” *State v. Finch*, 137 Wash.2d 792, 861, 975 P.2d 967 (1999) (citing *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)).

“Shackling, except in extreme forms, is susceptible to harmless error analysis.” *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995) (citing *Castillo v. Stainer*, 997 F.2d 669, 669 (9th Cir. 1993) (“The remaining question is whether this error prejudiced the outcome of the sentencing hearing.”)).

The court’s requirement that Jackson wear a leg brace, without a more careful and individualized determination as to its necessity, was harmless

beyond a reasonable doubt considering the strength of the State's case and the facts that the leg brace was not visible, Jackson never moved in front of the jury, and Jackson was not wearing any hand or other restraints. Any reasonable juror would have come to the same conclusion. *See State v. Finch*, 137 Wn.2d 792, 862, 975 P.2d 967 (1999) (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (“[a] constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error”)).

Here, the testimony was strong as the victim provided highly detailed testimony regarding the repeated strangulation incidents and the surrounding events, all of which were corroborated by medical witnesses and family members. RP 309.

The victim testified that on May 25, 2017, prior to the strangulation event, Jackson drove her to her medical appointment at Clallam Bay where she met with ARNP Donna West. RP 311. West testified that nothing seemed to be wrong and there were no noticeable visible marks on the victim who appeared to be cheerful. RP 446. Then the testimony of the victim was that after the appointment Jackson took the victim to the A road to make up with her and they had sex relations when Jackson became upset due to his suspicions the victim was cheating. RP 313–15. The victim then testified with explicit detail that Jackson said he was going to kill her on multiple

occasions and strangled her on three occasions and on the last she gave up struggling and urinated. RP 316–19. Then Jackson stopped and began crying and apologizing for almost killing her. RP 320. Jackson began expressing his own desire to commit suicide for what he did. RP 320. Later La Push Police Chief Lyon testified that when he tried to contact Jackson, Jackson sent text messages to him expressing his desire to commit suicide. RP 426, 439, 442. These text messages corroborate the victim's story regarding Jackson's behavior and remorse although Jackson claimed in his texts that he didn't touch the victim, he only pushed her and scratched her with her ring and that the victim is a liar. RP 440.

The victim's testimony was also corroborated by witnesses that had contact with her after the incident. Jackson took the victim home where she lived with her parents. RP 321. Later, the victim told her sister, Dondi Huling, what had happened. RP 324–26. Huling then called the police. RP 326. Huling's testimony was consistent with this and she noticed that the victim was beyond upset and had visible marks on her face and hands and her neck was visibly swollen. RP 425–26.

The day of the strangulation event, May 25, 2017, the victim was examined by Dr. John Shima in the emergency room of the Forks Community Hospital. RP 375, 395. Dr. Shima testified at length about strangulation and his qualifications and that in his professional medical opinion the victim's

observable injuries were consistent with the strangulation event. RP 397–98. Deputy Sean Hoban also observed physical signs of injury on the victim’s neck (RP 408) and Jonais Merrill, Physician’s Assistant, also observed swelling on the victim’s neck and that the victim’s voice was hoarse and the victim was tearful. RP 415. Finally, the victim’s mother testified that the victim went to her medical appointment with the Jackson and came back with Jackson and was crying. RP 418.

The evidence against the defendant was very strong. Furthermore, there is no evidence in the record that any of the jurors could see the leg brace.

The brace was worn under loose clothing as required by the jail policy. Jackson’s attorney pointed out that it could not be seen and the locking position could be unlocked by Jackson himself with a push of a button. RP 74–75. Furthermore, the jury remained out of the courtroom when Jackson moved so the leg brace could not be seen by the jury. The only thing that may have occurred to the jury is that Jackson was seated instead of standing when he was sworn in on the witness stand. RP 448. Jackson’s hands were free of restraint. Thus the jury could not see the leg brace and did not see anything else to suggest he was wearing it. “In order to succeed on his claim, the Defendant must show the shackling had a substantial or injurious effect or influence on the jury’s verdict. Because the jury never saw the

Defendant in shackles, he cannot show prejudice.” *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998).

Jackson argues as follows:

[w]hen 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.

Appellant’s Br. at 35.

This argument rendition of the facts is not accurate because it suggests that the jury actually saw the leg brace when Jackson was on the stand.

Jackson claimed to the court in regards to the jury and the leg brace that “They can actually see it” when discussing whether to sit or stand during the oath, while the jury was still out of the courtroom. The court then ordered Jackson to just stay seated then and only then did he order the jury to come back out. RP 448. Therefore, the jury did not actually see that Jackson was wearing a leg brace.

Should the Court find the trial court abused its discretion in requiring the leg brace, the Court should also find that the error was harmless beyond a reasonable doubt because of the strength of the State’s case and because the jury could not see the leg brace or otherwise detect it by Jackson’s movements.

Therefore, this Court should affirm the conviction.

B. THE COURT PROPERLY ORDERED THE STATE TO IMPOSE MANDATORY LEGAL FINANCIAL OBLIGATIONS.

1. The trial court properly imposed mandatory legal financial obligations.

[F]or mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, No. 30548–1–III, 2013 WL 3498241 (Wash.Ct.App., July 11, 2013). And our courts have held that these mandatory obligations are constitutional so long as “there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.” *State v. Curry*, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

State v. Lundy, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013); *see also State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (“The trial court imposed a \$500 victim assessment fee, a \$200 criminal filing fee, and a \$100 DNA collection fee. RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 respectively mandate the fees regardless of the defendant's ability to pay. Trial courts must impose such fees regardless of a defendant's indigency. (citation omitted) *Blazina* addressed only discretionary legal financial obligations.”).

The \$200 criminal filing fee under RCW 38.18.020(2)(h) is mandatory. *State v. Gonzales*, 198 Wn. App. 151, 155, 392 P.3d 1158 (2017).

Here, the trial court lacked the statutory authority and discretion to waive the mandatory legal financial obligations including the DNA fee (CP

18) although it is no longer mandatory if “the state has previously collected the offender's DNA as a result of a prior conviction.” RCW 43.43.7541. The court was also not authorized to waive the \$200 court costs under RCW 38.18.020(2)(h) although it was amended:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c)..

The effective dates to the amendments for RCW 43.43.7541 and RCW 38.18.020(2)(h) was June 7, 2018 after the defendant had been sentenced. Under the savings statute, the defendant is not entitled to the benefit of these amendments.

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

Jackson cites to *State v. Heath* for the proposition that remedial statutes have retroactive application and apply to cases pending direct review.

State v. Heath, 85 Wn.2d 196, 197–98, 532 P.2d 621 (1975). The

amendments at issue are governed by the savings statute and are not subject to the analysis in *Heath*, which was dicta. See *State v. Kane*, 101 Wn. App. 607, 615–16, 5 P.3d 741 (2000). “When a new statute repeals or amends a new statute governed by the saving statute, it will be given prospective application even if it is patently remedial, unless it contains words that fairly convey a different intention.” *State v. Kane*, 101 Wn. App. 607, 615, 5 P.3d 741 (2000).

Therefore, this Court should uphold the imposition of mandatory legal financial obligations.

1. The trial court properly imposed discretionary legal financial obligations because it considered the defendant’s ability to pay.

The trial court considered Jackson’s ability to pay the \$500 attorney recoupment fee. CP 17. The court inquired of Jackson regarding his past employment in the fishing industry, whether he had full or part time work elsewhere, his liabilities from child support, whether Jackson owed the court money for other offenses or restitution. Jackson replied he didn’t know how much child support he owed, he did not have any disabilities that would prevent him from working, he had job skills and an employment history, and did not owe any money to the court. RP 565–67.

As argued above, the application of the savings clause means that Jackson is subject to the statutes as they were when the offense was

committed. Here, the offense was committed on May 25, 2017. CP 11. The amendments were not effective until June 7, 2018. Ch. 269, Laws of 2018.

Therefore, the court engaged in a thorough independent inquiry with Jackson about his ability to pay and did not abuse its discretion by applying the statutes in effect at the time of the offense. This court should uphold the imposition of the legal financial obligations.

2. The issue of whether the court erred in ordering payments is not ripe for review as there is no evidence the State has attempted to enforce payment.

There is no evidence of any effort by the State to collect legal financial obligations. Therefore, the issue is not ripe for review.

“[G]enerally challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them.” *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013).

Therefore this Court should uphold the trial court’s imposition of the mandatory legal financial obligations which include the \$500 victim assessment, \$200 court filing fee, and the \$100 DNA fee.

IV. CONCLUSION

The Court should decline to review the issue of whether the court failed to make an independent determination regarding any need for Jackson

to appear in court in restraints during non-jury proceedings because the issue is moot and does not present a substantial public interest.

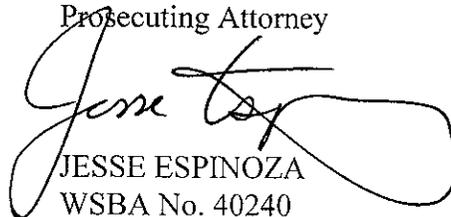
Should the Court find the trial court's determination for use of the leg brace during trial inadequate, the Court should still find that the error was harmless beyond a reasonable doubt because there is no evidence of prejudice and the case against Jackson was strong such that a reasonable juror would still have found Jackson guilty.

Furthermore, the court was required by statute to order the mandatory legal financial obligations without regard to ability to pay and the savings statute requires that the legal financial obligations statutes in effect of the time of the offense are applicable in Jackson's case.

Therefore, the State requests the Court to affirm the conviction and uphold the legal financial obligations imposed in the judgement and sentence.

Respectfully submitted this 20th day of July, 2018.

MARK B. NICHOLS
Prosecuting Attorney

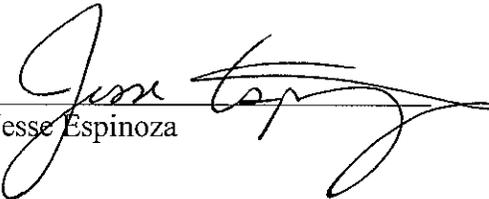


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Nancy Collins on July 20, 2018.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

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2016 NOV 21 P 1:21

BARBARA CHRISTENSEN

IN THE SUPERIOR COURT FOR CLALLAM COUNTY, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

BLAKE RYLEE GALLAUHER,

Defendant.

No. 16-1-00507-1

**STATE'S RESPONSE TO DEFENDANT'S
MOTION FOR REMOVAL OF
RESTRAINTS AND STATE'S MOTION
TO ADOPT A BLANKET RESTRAINT
POLICY FOR NON-JURY
PROCEEDINGS**

Comes Now the Plaintiff, State of Washington, by and through its attorney David Alvarez, Chief Civil Deputy Prosecuting Attorney, with this Response to Defendant's Motion for Removal of Shackles. This response is based upon the pleadings and papers on file and attached herein. The State also requests adoption of a blanket restraint policy for non-jury proceedings.

I. STATEMENT OF THE CASE

On Nov. 9, 2016, the State filed a criminal information charging the defendant with the crimes of Identity Theft in the Second Degree and Forgery. The defendant was brought before the court by the jail for his first appearance in 5 point restraints pursuant to the Clallam County Correctional Facility's (CCCF) restraint policy, chapter 15. (attached herein).

Counsel on behalf of his client objects to being shackled pursuant to a jail-created generalized policy for all "1st Appearance" arrestees.

//

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**STATE'S RESPONSE TO MOTION TO REMOVE
RESTRAINTS**

Page 1 of 4

PROSECUTING ATTORNEY
CLALLAM COUNTY COURTHOUSE
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PORT ANGELES, WA 98362
(360) 417-2368 FAX 417-2422

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1
2 **II. ISSUE PRESENTED**

- 3 1. Whether the Court may, using its own discretion, adopt a blanket restraint policy that
4 allows the county jail to bring arrestees and defendants before the court in restraints for
5 non-jury proceedings?
6

7 **III. ARGUMENT**

8 **A. THE COURT MAY ADOPT A BLANKET POLICY FOR THE USE OF**
9 **RESTRAINTS IN NON-JURY PROCEEDINGS WITHOUT HAVING TO**
10 **UNDERTAKE AN INDIVIDUAL DETERMINATION WITH RESPECT TO EACH**
11 **ARRESTEE OR DEFENDANT BECAUSE NO PREJUDICE ARISES**

12 The issue of whether an arrestee or defendant may be put in restraints in a courtroom in
13 non-jury proceedings pursuant to a blanket restraint policy without violating due process was
14 addressed in *U.S. v. Howard*, 480 F.3d 1005, 1012 (9th Cir. 2007).

15 Cases such as *U.S. v. Howard* that address whether shackling of defendants in the
16 courtroom is constitutional “turn in large part on fear that the jury will be prejudiced by seeing
17 the defendant in shackles.” *Id.* (citing *Deck*, 544 U.S. at 630, 125 S.Ct. 2007; *Duckett*, 67 F.3d at
18 748; see also *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). “[A]
19 judge in a pretrial hearing presumably will not be prejudiced by seeing defendants in shackles.”
20 *Id.* at 1012 (citing *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (“We traditionally
21 assume that judges, unlike juries, are not prejudiced by impermissible factors.”)).

22 Although a court must be persuaded by compelling circumstances and must pursue lesser
23 restrictive alternatives before requiring a defendant to appear before a jury in shackles, this rule
24 does not apply to non-jury proceedings. *Howard*, at 1012 (citing *Deck v. Missouri*, 125 S.Ct.
25 2007, 2010–11, 544 U.S. 622, 626 (2005) (“In discussing the “deep roots” of this rule, however,
the Court noted that ‘the rule did not apply at ‘the time of arraignment,’ or like proceedings
before the judge.”)).

1 The *Howard* case involved numerous defendants asserting the unconstitutionality of a
2 blanket policy requiring defendants to appear in leg shackles at their first appearance. They
3 alleged “due process requires that there be no restraint whatsoever without an individualized
4 determination.” *Id.* at 1013. Rejecting that assertion, the *Howard* Court upheld the blanket
5 restraint policy at issue and pointed out the “case does not involve the question of shackling in
6 the presence of a jury or during a trial.” *Id.* (emphasis added).

7
8 The *Howard* Court also cited to *U.S. v. Zuber*, 118 F.3d 101, 103 (2nd Cir. 1997) as a
9 basis for upholding the restraint policy at issue without an individualized determination by the
10 court. In *Zuber* the 2nd Circuit Court of Appeals declined to extend the need for an
11 individualized determination regarding the appropriateness of shackling a defendant to the
12 sentencing of a defendant solely before a Judge with no jury present. *Id.*, at 104. Again, the
13 rationale for declining to require an individualized determination for a sentencing hearing was
14 the confidence the 2nd Circuit had that Judges would not be prejudiced in their decision-making
15 by the presence of shackles. The State trusts the elected Judges of this County will not be
16 prejudiced against an arrestee or defendant appearing before them in a non-jury proceeding while
17 in 5 point restraint.

18
19 Therefore, the court may institute a blanket policy requiring all defendants held in-
20 custody to be brought before the court in restraints for non-jury proceedings in accordance with a
21 blanket restraint policy. However, in this state, pursuant to *State v. Walker*, 185 Wn. App. 790
22 (2015), the court, rather than the jail or prison officials, must make the determination..

23 **B. THE COURT MUST EXERCISE ITS DISCRETION REGARDING THE ADOPTION**
24 **OF A POLICY FOR THE USE OF RESTRAINTS ON DEFENDANTS IN NON-JURY**
25 **PROCEEDINGS.**

Citing to *State v. Walker*, the defendant objects to being shackled pursuant to a jail-
created generalized policy for all “1st Appearance” arrestees. *Walker* does not support the
defendant’s position because “a defendant’s right to appear in court free from restraints is not

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1 unlimited," meaning *Walker* would not prohibit a generalized restraint policy in non-jury
2 proceedings. *Id.*, at 800. *Walker* only requires that *the court* rather than the jail use its discretion
3 in deciding whether to use restraints. *Id.* at 797. *Walker* also pointed out that prison officials are
4 well positioned to aid the court in deciding matters of courtroom security. *Id.* at 796-97.

5 Therefore, *Walker* only requires the court, rather than the jail, to determine whether to
6 adopt a blanket policy regarding the use of restraints in the courtroom for non-jury proceedings.
7 Furthermore, this Court may rely on the aid of CCCF in making this determination.
8

9 IV. CONCLUSION

10 For all the foregoing reasons, the State moves the Court to decide whether to adopt a
11 blanket restraint policy for non-jury proceedings. For this purpose, the State requests the Court
12 to consider the attached affidavit of Chief Corrections Deputy Ron Sukert, CCCF, and to
13 memorialize its findings. Finally, the defendant's motion to remove shackles at non-jury
14 proceedings should be denied.

15 Respectfully submitted the 21st day of November, 2016.

16 MARK B. NICHOLS
17 Prosecuting Attorney
18 For Clallam County

19
20 BY:

David Alvarez #29194

21 DAVID ALVAREZ
22 Chief Civil Deputy Prosecuting
23 Attorney, WSBA #29194
24
25

DECLARATION OF

Chief Corrections Deputy Ronald D. Sukert, Clallam County Corrections Facility

I am the Chief Corrections Deputy for the Clallam County Sheriff's Office. I began my employment with the Sheriff's Office in July on 1980. During my nearly thirty seven year tenure, I have worked and or supervised all elements and assignments within the Corrections Facility including but not limited to; Deck Officer, Medical Officer, Work Release Officer, Court Officer; Chain Gang Officer; Control Room Operator/Technician, Transport Officer; Booking Officer as well as others.

I have promoted through the Ranks of Shift Supervisor, Lead Corrections Officer, Corporal, Sergeant, Work Release Sergeant and in 2006 was promoted to my current Rank of Chief Corrections Deputy.

During my career I have received specialized training in Jail Operations, Basic and Advanced Level Supervision, Management and Executive Level Training. I have participated in many Local and State Panels as a Subject Matter Expert, Washington Counties Risk Pool, Board of Directors Peninsula Behavioral Health, Hargrove (Mental Health Fund) Committee Member, Corrections Committee Member for Washington Association of Sheriffs and Police Chiefs, Washington State Criminal Justice Training Center Participant, President of Peninsula College Advisory Committee for Criminal Justice Curriculum.

As the Chief Corrections Officer I am responsible for the development, implementation and enforcement of safety and security polices related to inmate movements both inside and outside of the Jail. The safety of Corrections Deputies, Inmates, Members of the Public and the Court and it's Officers are of paramount concern when determining adequate and appropriate levels of restraints.

The Clallam County Jail Policies governing the use of physical restraints are anchored in sound judgment, experience and good reasoning. Our policies allow for varied levels of

restraints to be deployed dependent upon many factors surrounding inmates moving to and from the courts.

First appearance inmates present a threat level which is unknown as there is no reliable predictability or track record of behavior. It has been my experience that many fresh inmates come to the jail under the influence of controlled substances, the excitement or stress of the circumstances of their arrest such as Domestic Violence, or unstable mental health conditions. There are too many numerous and varied examples to cite here which can lead to volatile and or violent situations in the courtroom. The current CCCF restraint policies are in place to prevent the need to predict or speculate as to what risk level an inmate may present in a courtroom environment at the potential expense of safety and security.

First appearance inmates appear in full restraints as outlined in Policy and Procedure 15.106.3(A) 1-4. The Jail employs a fairly complex classification system which takes many factors into consideration at the time of booking so that each inmate can be assigned a risk or classification level. Some factors such as current charges, criminal history, offender sophistication, age and gender as well as current behavior within the jail and other security risk components are considered. Each inmate is provided with a colored wrist band which serves to assist Corrections Deputies to easily and readily identify various classifications of inmates and inmates are housed within like classifications.

All of this is done with the goal of providing adequate safety and security measures for staff and inmates within the confines of the Jail.

When moving inmates outside of the jail the risk factors most certainly increase exponentially. In addition to the potential threat for inmate on inmate contact or inmate on officer contact, the safety of the public and in this instance the courts become additional safety factors which enter into the equation. It has been my experience that when restraints are removed from inmates inside the courtrooms, an unnecessary flight risk is also introduced. This

concern is borne out by actual escapes having taken place from both the District and Superior Courts of this County.

In some instances the break in custody has been short while presenting minimal additional risk to the public, in another instance the custody break of a violent felon lasted for numerous hours and presented great unnecessary risk to the public and resulted in the expense of considerable local resources. This particular instance also resulted in the inmate attempting to disarm the Corrections Staff member who was assaulted and suffered severe injury while removing the restraints as directed by the court.

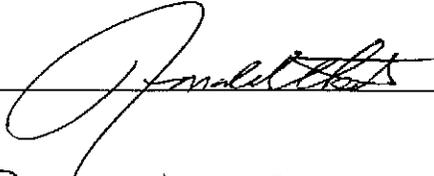
In addition to the added risk of flight, having unrestrained inmates in the courtroom presents a higher risk for potential violence. We have experienced violent outbursts by inmates throwing objects, flipping tables, knocking over chairs and being able to struggle at great length with security staff when not properly restrained.

The Clallam County Courts are open to the public and no locked physical barriers exist between unsecured or unrestrained inmates and free flow access to officers of the Court, members of the public or direct exit routes out of the courthouse. In fact, exit routes are clearly marked with signage for those who may not know the way out. Inmates sit in a chair at a table adjacent to defense counsel with security staff located approximately eight to ten feet away. An unrestrained inmate is much more capable of inflicting considerable harm or physical injury before security staff could react and intervene. This open access also allows for members of the public to move about freely while court is in session. Efforts by emotionally charged people seeking revenge upon or perhaps rescue of an inmate would be enhanced when proper levels of restraints are not employed.

It is my recommendation that the Court continue to allow for the use of physical restraints on inmates appearing in all of the various courtrooms located within the Clallam County Courthouse in accordance with current CCCF restraint policy chapter 15.016.

I CERTIFY under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED AND DATED this 18th day of Nov., 2016, at Port Angeles, Washington.


signature

RONALD D. SISKERT
CHIEF CORRECTIONS DEPUTY

4. No visitors or unauthorized persons will enter the jail facility.
5. Corrections personnel will assist the investigating officer when requested.
6. Notification of next-of-kin will be done in accordance with P&P 14.35.05.
7. The Corrections Sergeant will return the facility to normal operation when advised by the investigating officer.
8. The investigating officer shall conduct the death investigation in accordance with P&P 14.35.01.

15.106 COURT SECURITY.

1. To facilitate the safe transport of an inmate to and from court.
2. To maintain smooth, uninterrupted operations of the courts and the jail.
3. Outline procedures for daily court appearances and set in place a policy for high risk and dangerous "incident" situations.
4. To ensure the safety of people and property within the courthouse and grounds.
5. Maintain the integrity of the judicial process.

15.106.1 INMATE MOVEMENT TO COURT.

1. Risk Assessment.
 - A. Sources of information.
 - (1) Arresting Officer.
 - (2) Inmate file.
 - (a) First arrest.
 - (b) Age.
 - (c) Type of crime.
 - (d) Weapons used.
 - (3) AFIS information, ACCESS information.
 - (4) In-house computer.
 - (a) Previous & local criminal history.
 - (5) Officer knowledge of past contacts.
 - B. Advise court of special considerations.

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2. Retrieving inmate from holding cell.
 - A. Time to check current demeanor.
 - (1) Visual contact.
 - (2) Verbal - how he answers questions, etc.
 - B. Insure each inmate receives a pat search/frisk before applying restraints.
3. Applying restraints.
 - A. Use proper restraints.
 - (1) First appearances - full restraints (waist chain, cuffs and leg irons).
 - (2) Inmates classified as Minimum or Medium custody use waist chain and cuffs.
 - (3) Maximum classification use full restraints.
 - (4) Inmates without a wristband use full restraints regardless of classification.
 - B. All handcuffs and leg irons must be double-locked and applied according to Department policy and manufacturer's directions.
 - C. Assure that all equipment is fit onto the inmate in such a way that waist chains will not slip below hips and hands may not be pulled out of handcuffs.
 - D. Never close equipment onto an inmate so tightly that the equipment will cause injury to the inmate.
 - E. After leaving the security of the jail, you will not remove or readjust the equipment, unless ordered to do so by the court.
4. Inmate movement through elevator and secure hallway.
 - A. A maximum of 7 inmates in any one group shall be taken to court.
 - (1) Only inmates of the same sex will be in the elevator cage together. If inmates of opposite sex are transported at the same time the smaller group will be outside the cage with the officer.
 - B. Upon arrival at the secure hallway:
 - (1) All inmates proceed to south end of hallway and wait by wall opposite your armed side.
 - (2) The officer will retrieve their weapon from locker.
 - (3) The officer will do a radio check - officer to Control.
5. Security hall to courtroom.

A. District Court.

- (1) Open door with "weak" hand.
- (2) Step into hallway - check all clear.
- (3) Have inmates step through and proceed to District Court. They will wait just past the wooden door. You will secure the door to Superior Court hallway.
- (4) While in the hall, tell inmates what to expect to happen during court, give them instructions on where to sit and what their behavior should be.
- (5) The inmates may be seated on the bench area just inside the courtroom door or on special exceptions the inmates will be seated on the bench outside of DCI and the mirror will be positioned so that the officer can view the inmates from the courtroom.
- (6) Spectators will not have physical contact with, nor shall they give any items to the in-custody inmates.
- (7) Defendants may not communicate with spectators. If this occurs with permission from the judge, spectators may be told to leave the courtroom.
- (8) Attorney shall not visit client in the security hallway.
- (9) Check paperwork before leaving court; assure it is correct.

B. Superior Court.

- (1) Bring inmates (all same sex) to doorway at end of security hall.
- (2) Close all doors in hall: chambers, courtroom, administrators.
- (3) Follow inmates to holding cell area for appropriate court.
- (4) Close yourself and inmates into foyer.
- (5) Open cell.
- (6) Leave inmates, with restraint devices on, in cell until called for by the court. Only one defendant in court at a time, unless ordered by the judge. If risk is great, advise court and supervisor.
- (7) Inmates will be brought into the courtroom, one at a time, wearing restraint devices.
- (8) The defendant will sit at the table and chair nearest the cell.
- (9) The officer will stand (or sit during trial or lengthy hearing) near door to foyer, but in a position to be able to see court/hall door and view audience.
- (10) Spectators will not have physical contact with, nor shall they give any items to the in-custody inmates.
- (11) Inmates may not communicate with spectators. Spectators may be told to leave the courtroom.
- (12) Attorney shall not visit inmates in the holding cell.
- (13) When finished in court, secure all inmates in holding cell.
- (14) Secure hallway doors to judges' chambers, other courts, etc.
- (15) Lock holding cell doors before taking inmates into hall. Security cells will remain locked when not in use.
- (16) Escort inmates back to jail. Be sure they are well ahead of you when you secure your weapon.

C. Trials.

- (1) Officer will check inmates' personal clothes for contraband.
- (2) Officer will pat down inmate
- (3) Officer will secure either right or left leg brace on the inmate.
- (4) Handcuff inmate with hands behind his/her back in a manner consistent with Department policy and manufacturer's instruction.
- (5) Proceed to court as usual.
- (6) Remove handcuffs from inmate at the holding cell door.
- (7) The inmate will wait in the holding cell.
- (8) The inmate will enter and exit the courtroom while jury is not present.
- (9) The inmate's attorney shall not visit the inmate in the holding cell.
- (10) Only prospective jurors may sit in the first row of courtroom, and only during jury selection.

6. Inmate clothing during court appearances will be:

- A. Fresh arrest/first appearance inmates will wear street clothes, or some times jail attire.
- B. Post arraignment people will wear their regular jail uniform for all court appearances except jury trials.
- C. Jury trial only, defendant may wear personal clothing.
 - (1) These clothes need to be brought to the jail the week-end before the trial and added to their property record. The Court Officer will have the inmate fill out a kite to accept the trial clothes and will place the kite in the Control Room.
 - (2) Clothing arrangements must be made with the Shift Sergeant or appropriate Court Officer.
 - (3) The clothing must be loose enough to fit comfortably over a leg brace.
 - (4) Slacks for women.
 - (5) No boots.
 - (6) Trial clothing will be labeled and stored in the property room next to male search and shower.
 - (7) After the trial, the clothes will be placed in a property bag with the inmate's other clothing in the property room. The Court Officer will have the inmate fill out a kite to release the property to someone outside of the jail.

15.106.2 COURT OFFICER.

1. Court Officer will enter the facility via the secure hallway.
2. Court Officer will check the court rooms, Superior Court 1 and 2 holding cells, hallway and elevator for contraband on their way to the facility. Any contraband or security violations will be reported to the supervisor.
3. The officer will secure his/her weapon in the gun locker prior to entering the elevator.
4. Establish court list.

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**SUPERIOR COURT OF WASHINGTON
FOR CLALLAM COUNTY**

STATE OF WASHINGTON,
Plaintiff

Blaise vs. *Walker*
Defendant.

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2016 NOV -9 P 2:05

BARBARA CHRISTENSEN *00508-9*

NO. *16-1-00507-1* ✓
**DEFENDANT'S OBJECTIONS TO
RESTRAINTS/SHACKLES AND
MOTION FOR REMOVAL OF SAME**

MOTION

COMES NOW the defendant, *Blaise Walker* and pursuant to the 5th Amendment of the United States Constitution and Wash. Const. art. I, § 22, and the respective DUE PROCESS CLAUSES of both Constitutions, OBJECTS TO HIS/HER BEING SHACKLED PURSUANT TO A JAIL-CREATED GENERALIZED POLICY FOR ALL "1ST APPEARANCE" ARRESTEES. And MOVES FOR REMOVAL OF SAME.

MEMORANDUM AND ARGUMENT

Shackling defendants as applied to non-jury trial proceedings in a criminal case has recently been addressed in *State v. Walker*, 185 Wn. App. 790; 344 P.3d 227 (2015). That case re-affirms the basic principals that the Washington State Constitution's assurance of the right to appear in court in person, contemplates that such appearance be free from restraints absent evident necessity determined on an individualized basis by the court.

[A] trial court should allow the use of restraints only after conducting a hearing and entering findings into the record that are sufficient to justify their use on a particular defendant. A decision to restrain a defendant "must be founded upon a factual basis set forth in the record." *Walker*, at 800 (citations omitted)

Factors a trial court should consider in assessing whether a defendant

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OBJECTIONS TO RESTRAINTS

CLALLAM PUBLIC DEFENDER
516 EAST FRONT STREET
PORT ANGELES, WA 98362
(360) 452-3307
(360) 452-3329 FAX

App. D

1 should be restrained in the presence of a jury:

2
3 "[T]he seriousness of the present charge against the
4 defendant; defendant's temperament and character; his age
5 and physical attributes; his past record; past escapes or
6 attempted escapes, and evidence of a present plan to
7 escape; threats to harm others or cause a disturbance; self-
8 destructive tendencies; the risk of mob violence or of
9 attempted revenge by others; the possibility of rescue by
10 other offenders still at large; the size and mood of the
11 audience; the nature and physical security of the courtroom;
12 and the adequacy and availability of alternative remedies."
13 *Walker*, at 801, quoting *State v. Hartzog*, 96 Wn.2d 387,
14 635 P.2d 694 (1981)

15 The analysis in *Walker*, suggests these criteria, be applied but that a somewhat
16 lesser standard of proof be required for a court's analysis re: restraints in the pre-trial
17 setting. *Walker*, at 799

18 Under a federal law analysis, the 9th Circuit has stated that a generalized
19 shackling policy is only permissible when it is adopted with an adequate justification for
20 its necessity. *United States v. Howard*, 480 F.3d 1005, 1008 (9th Cir. 2007). In *Deck v.*
21 *Missouri*, 544 U.S. 622 630-631, 125 S. Ct. 2007, 161 L. Ed. 2d 953, (2005), the United
22 States Supreme Court's most recent shackling decision, the Court determined that three
23 fundamental legal principals are affected by the use of shackling. 544 U.S. 622, 630-31
24 (2005). The relevant principals for a non-jury proceeding are:

25 ... (2) the right to counsel, which shackles can hinder by interfering
26 with a defendant's ability to communicate with his lawyer and by
27 humiliating and distracting a defendant, potentially impairing his
28 ability to participate in his own defense; and (3) the need for a
29 dignified and decorous judicial process, which may be affronted by
30 the routine use of shackles.

31 Even under federal standards a general restraint policy is only permissible when
32 it can be justified by a commensurate need. *United States v. Sanchez-Gomez*, 798 F.3d
1204 (2015). In *Sanchez Gomez*, as a policy, defendants were placed into 5 point
restraints with only 15" on slack in the chains connecting their arms to their belly chains.

1 *Id.* At 1206. This is the same policy understood to be utilized by the Clallam County
2 Sheriff's Office (CCSO) as to all persons brought to court for "first appearances",
3 whether on new charges or a warrant. The Marshal's service sought to justify their
4 policy on the basis that there were more persons accused of crimes, more violence
5 among inmates, two instances of courtroom attacks and under-staffing for the Marshals
6 due to insufficient funding. *Id.* The policy was to apply to all non-jury proceedings other
7 than sentencing and guilty pleas. *Id.* The court found that under these circumstances,
8 there was no justification for the need to utilize 5 point restraints. *Id.* at 1208. Further
9 the court even held that a full restraint policy cannot rest on the "economic strain of the
10 jailer to provide adequate safeguards." *Id.* at 1209.

11
12 In *United States v. Howard*, the court found that the generalized use of restraints
13 was permissible, however, the restraints utilized in *Howard* were only leg restraints
14 rather than the 5 point restraints utilized in *Sanchez-Gomez* and all "first appearances" in
15 Clallam County or the minimum of handcuff with belly chain (3 pt restraints) in all other
16 Clallam County cases. *Howard*, at 1009. *Howard* is further distinguished in that in
17 addition to the security concerns referenced in *Sanchez-Gomez*, there was the added
18 concern of the design flaw associated with the courthouse itself which was not
19 designed as a standalone courthouse. *Sanchez-Gomez*, 10. Finally, the practices utilized
20 in *Howard* were judicially authorized only after multiple hearings after which the court
21 determined that due to the security concerns, including those associated with the
22 design flaws, the leg shackles were adequately justified. *Id.* at 1013.

23
24
25 Defense is unaware of any such design flaws concerns as being applicable to the
26 instant case, nor does there appear to have been any judicial individual or generalized
27 judicial input regarding the restraint practices utilized in the instant case or other
28 matters taking place in the courtrooms of the Clallam County Courthouse. Absent such
29 individual determination, Defendant's OBJECTION TO SHACKLING should be deemed

30
31 //

32 //

OBJECTIONS TO RESTRAINTS

CLALLAM PUBLIC DEFENDER
516 EAST FRONT STREET
PORT ANGELES, WA 98362
(360) 452-3307
(360) 452-3329 FAX

1 well taken and his/her MOTION TO BE FREE OF RESTRAINTS should be granted
2 immediately.

3 Dated this Friday, November 04, 2016

4
5 CLALLAM PUBLIC DEFENDER

6
7 

8
9 Harry Gasnick, No. 14929
10 Attorney for Defendant

11
12 **CERTIFIED STATEMENT OF HARRY GASNICK**

13 I, Harry Gasnick certify under penalty of perjury under the laws of the State of
14 Washington, that the foregoing is true and correct to the best of my knowledge:

- 15 1. I am the director of the director of the Clallam Public Defender, which agency
16 has been assigned as counsel to this defendant.
- 17 2. That as such, in October, 2015, I conducted a public disclosure inquiry of the
18 CCSO as to their shackling policies for persons brought to court in Clallam
19 County. As a result of that inquiry, I ascertained that the CCSO policies in that
20 regard included that all persons brought up for "1st appearance", whether for
21 new charges or warrant arrest, were to be brought to court in "5 point"
22 restraints ... handcuffs with a belly chain (believed to be approximately 15")
23 and leg shackles. Per CCSO policy 15.106.1 , INMATE MOVEMENT TO COURT.
24 Use proper restraints.
- 25 (1) First appearances - full restraints (waist chain, cuffs and leg irons).
26 (2) Inmates classified as Minimum or Medium custody use waist chain and cuffs.
27 (3) Maximum classification use full restraints.
28 (4) Inmates without a wristband use full restraints regardless of classification.

29
30
31 Other provisions provide that pregnant inmates may not be shackled or belly-
32

OBJECTIONS TO RESTRAINTS

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chained, but may be handcuffed under extraordinary circumstances.

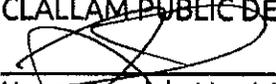
The policies received in response to my public disclosure request are attached.

3. I am unaware of there having been any judicial input in the formulation of the above policies.

Dated this Friday, November 04, 2016

EXECUTED at Port Angeles, WA.

CLALLAM PUBLIC DEFENDER



Harry Gasnick, No. 14929
Attorney for Defendant

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

July 20, 2018 - 4:56 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

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