

FILED
SUPREME COURT
STATE OF WASHINGTON
2/14/2020 4:23 PM
BY SUSAN L. CARLSON
CLERK

NO. 97681-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN JACKSON, SR.,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

NANCY P. COLLINS
Attorney for Petitioner/Cross-Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 4

1. The court’s blanket order and unquestioning deference to the jail’s shackling policy was contrary to settled law and denied Mr. Jackson his right to fundamentally fair proceedings 4

a. This Court has long enforced an accused person’s right to appear in court without physical restraints 4

b. The court may not adopt a blanket policy requiring shackles in the courtroom..... 7

c. The court may not defer to the jail’s policy to physically restrain everyone held in custody during a court hearing 9

d. Before imposing physical restraints, the trial court must consider less restrictive alternatives that minimally impede one’s constitutional rights 11

e. Here the court followed a blanket policy set by the jail dictating the physical restraint of all people unable to post bail for all court hearings 12

2. The prejudicial effect of unnecessary shackles during court proceedings detrimentally affected the fairness of these proceedings and entitles Mr. Jackson to a new trial..... 13

a. Unjustified shackling is presumptively and inherently prejudicial 13

b. The Court of Appeals misapplied this test by failing to presume unjustified shackling orders were prejudicial 16

i. The Court of Appeals presumed no harmful effect could occur in all non-jury proceedings.....	16
ii. The Court of Appeals used the wrong standard to assess the constitutional error of unjustified restraints at the jury trial	18
E. CONCLUSION	20

TABLE OF AUTHORITIES

Washington Supreme Court

In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004)..... 16

State v. Damon, 144 Wn.2d 686, 25 P.3d 418 (2001) 10, 11

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)..... 5, 10, 11, 14, 15

State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981)..... 7, 10, 12

State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998)..... 18, 19

State v. Williams, 18 Wash. 47, 50 P. 580 (1897)..... 5, 9

Washington Court of Appeals

State v. Boatright, 1 Wn. App. 2d 1029, 2017 WL 5593790 (2017)..... 12

State v. Flieger, 91 Wn. App. 236, 955 P.2d 872 (1998) 11, 15

State v. Jackson, 10 Wn. App. 2d 136, 147, 447 P.3d 633 (2019), *rev. granted*, 455 P.3d 122 (2020) 4, 8, 11, 18

State v. Jaquez, 105 Wn. App. 699, 709, 20 P.3d 1035 (2001) 9, 10, 14, 15

State v. Lomax, 199 Wn. App. 1027, 2017 WL 2560098 (2017), *rev. denied*, 169 Wn.2d 1036 (2018) 12

State v. Lundstrom, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018), *rev. denied*, 193 Wn.2d 1007 (2019) 8, 9, 10

State v. Walker, 185 Wn. App. 790, 344 P.3d 227 (2015)..... 8, 9, 10

United States Supreme Court

Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)..... 18

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

Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2007) 5, 6, 8, 14

Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed.2d 525 (1986) 14

Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) 6, 11

Lafler v. Cooper, 566 U.S. 156, 32 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) 17

Federal Decisions

United States v. Sanchez-Gomez, 859 F.3d 649 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 1532 (2018) 8, 9

United States Constitution

Fourteenth Amendment 5

Sixth Amendment 5

Washington Constitution

Article I, § 22 5

Court Rules

JuCrR 1.6 17

Other Authorities

4 Blackstone *Commentaries on the Laws of England* 8

Blair v. Commonwealth, 171 Ky. 319 (App. 1916) 9

People v. Best, 19 N.Y.3d 739 (2012) 6, 16, 17

People v. Harrington, 42 Cal. 165 (1871) 6

Solomon v. Superior Court of Los Angeles County, 122 Cal.App.3d 532
(1981)..... 9

A. INTRODUCTION

Every time John Jackson Sr. came to court, he was forced to appear in shackles even though no one claimed he posed a risk to people in the courtroom, would try to escape, or behaved disorderly. He was physically restrained only because the court followed a blanket policy mandating these security measures for every accused person who was unable to post bail. This Court should condemn this unconstitutional shackling order and reverse Mr. Jackson's conviction due to the unnecessary and prejudicial effect of manacling him during court proceedings.

B. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. A judge may only order an accused person shackled if it explicitly finds the person poses an imminent risk while in court. Did the judge improperly order Mr. Jackson to wear restraints based on the jail's policy of physically restraining anyone in custody during court hearings?

2. Shackling an accused person in court without finding a compelling individual need is a presumptively prejudicial constitutional error. The Court of Appeals presumed the judge was unaffected by viewing Mr. Jackson shackled with chains and ruled Mr. Jackson had not proven the physical restraints affected his jury trial. Did the Court of Appeals misunderstand the test governing prejudicial constitutional errors

and should this Court find Mr. Jackson's unjustified shackling undermined his right to fundamentally fair proceedings?

C. STATEMENT OF THE CASE.

John Jackson Sr. is a 5'7" tall Native American man. CP 24. When he was brought before the judge for his bail hearing wearing irons on his legs and chains attached to his hands and belly, his attorney objected. RP 6. Despite receiving advance notice defense counsel intended to object to this shackling, the court set a hearing one month later to decide whether these chains were permissible. RP 6-8. In the meantime, the court set \$35,000 bail, an amount Mr. Jackson was unable to post. RP 11-12, 14.

After a later hearing, the court agreed it is humiliating and distracting for the accused person to be shackled in court. CP 65. It agreed less restrictive methods would serve the needs of courtroom security. *Id.* A videoconferencing system would be available in the future so jailed people could avoid appearing in court. CP 66. Despite the prejudicial effect of shackling people, the court concluded it would continue following the jail's shackling policy. *Id.*

The jail's policy the court adopted is summarized as:

First appearance	“waist chain, cuffs, and leg irons”
All superior court hearings, other than trials	“full restraints (waist chain, cuffs, and leg irons)” if “maximum classification” or “waist chain and cuffs” if “minimum or medium custody” And all inmates wear “jail uniform”
Trials	“Officer will secure either right or left leg brace on the inmate” Wear jail uniform
“Jury trial only”	Leg brace; May wear personal clothing rather than jail uniform

See Resp. Brief, App. C at 2-4 (policy attached to State's brief).

Mr. Jackson attended pretrial hearings shackled in chains pursuant to this policy. RP 6; CP 75. He usually wore a “regular jail uniform,” not his own clothes. Resp. Brief, App. C at 4. Each time he asked the court to lower his bail, the court refused. Supplemental RP 7, 16.

Before his jury trial, Mr. Jackson's attorney objected to the leg brace he came to court wearing, explaining no one ever ruled this device was needed. RP 74-75. The judge said, “I don't think there's anything inappropriate” about using this security measure, and did not ask if there was any need to restrain Mr. Jackson. *Id.*

The restraint on Mr. Jackson's leg “hobbled” him so he could not move or stand during trial. *Id.* When he testified, Mr. Jackson said the jury

would see his leg brace from the witness chair. RP 447-48. The court had him sit on the witness stand before the jury entered, unlike other witnesses, and told him not to stand in the presence of the jury. *Id.* Mr. Jackson was accused of second degree assault against his former fiancé. CP 76. The incident occurred when the two were alone in a parked car. RP 314-20, 455-56, 461. In his testimony, he presented a starkly different description of what occurred than the complainant. RP 314-20, 476.

The Court of Appeals ruled “the trial court clearly committed constitutional error” by ordering Mr. Jackson shackled during pretrial and trial proceedings without addressing the necessity of these restraints. *State v. Jackson*, 10 Wn. App. 2d 136, 147, 447 P.3d 633 (2019), *rev. granted*, 455 P.3d 122 (2020). But it deemed the error harmless. *Id.* at 149-50.

D. ARGUMENT.

1. The court’s blanket order and unquestioning deference to the jail’s shackling policy was contrary to settled law and denied Mr. Jackson his right to fundamentally fair proceedings.

a. This Court has long enforced an accused person’s right to appear in court without physical restraints.

In 1897, this Court recited “the ancient rule at common law” that a person charged with a crime is “entitled to appear free of all manner of shackles or bonds” when in court. *State v. Williams*, 18 Wash. 47, 49, 50

P. 580 (1897). The “ancient right . . . to appear in court unfettered,” has long prohibited physical restraints when an accused person “was arraigned or appeared at the bar of the court to plead.” *Id.* at 49-50. Only evidence of “impelling necessity” to secure the safety of others or “evident danger” of escape forfeits the right be appear unshackled. *Id.* at 49, 51.

This established rule is part of the constitutional guarantee that “in criminal prosecutions, the accused shall have the right to appear and defend in person.” *Id.* at 51; Const. art. I, § 22. This right requires a person’s “mental” and “physical faculties [are] unfettered” in court unless there is a specific necessity. *Williams*, 18 Wash. at 51.

The United States Supreme Court identified three fundamental legal principles underlying “[j]udicial hostility to shackling.” *Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2007); U.S. Const. amends. VI, XIV. First, physical restraints undermine the presumption of innocence and affect the “fairness of the factfinding process” that are the foundation of criminal law. *Id.* The presumption of innocence includes “the physical indicia of innocence,” and entitles the defendant to appear with the “dignity and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

Second, physical restraints can interfere with the bedrock rights to counsel and to present a meaningful defense. *Deck*, 544 U.S. at 631. They will affect a person’s decision about whether to testify and may limit the ability to communicate with counsel. *Id.* at 631. Restraint devices “tend to confuse and embarrass” the defendant, impacting their “mental faculties” in a way that impairs their ability to participate at trial. *Id.*, quoting *People v. Harrington*, 42 Cal. 165, 168 (1871).

Third, they undermine the dignity of the judicial process. By treating accused people respectfully, courts convey “the importance of the matter at issue,” and “the gravity” with which criminal prosecutions should be accorded. *Id.* at 631. The use of shackles in the courtroom is an “affront” to the “dignity and decorum of judicial proceedings that the judge is seeking to uphold.” *Id.*, quoting *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Shackling affects the public perception of the accused person and of criminal proceedings generally. *People v. Best*, 19 N.Y.3d 739, 744 (2012).

Consequently, the routine use of shackles is unconstitutional. *State v. Hartzog*, 96 Wn.2d 383, 399, 635 P2d 694 (1981). They inevitably have an adverse effect on the factfinder. *Deck*, 544 U.S. at 633. Physical restraints are only permitted after an individualized determination the

accused person poses an imminent risk of escape or presents a threat to the safety of the people in the courtroom.

b. The court may not adopt a blanket policy requiring shackles in the courtroom.

A court may not adopt a blanket policy requiring all people accused of crimes wear physical restraints in court. *State v. Hartzog*, 96 Wn.2d 383, 399, 635 P.2d 694 (1981). In *Hartzog*, a Walla Walla judge was concerned about prisoners at the state penitentiary who appeared in court. Due to incidents of misbehavior by some inmates, the judge adopted a policy requiring all inmates shackled while in court.

This Court rejected the judge's "blanket order shackling procedure." *Id.* at 399. It explained the historical prohibition on restraints applies in all cases and is only overcome by extreme, individual circumstances. *Id.* at 398. The fact a person is incarcerated and serving a prison sentence does not justify courtroom restraints. *Id.* at 399. A court may not adopt "a broad general policy of imposing physical restraints." *Id.*

In Mr. Jackson's case, the State's petition for review insists the right to appear in court free of unjustified shackles only applies at a jury trial. State's Petition at 9. But restraints are "disfavored" at all proceedings because "they may interfere with important constitutional rights." *Jackson*, 10 Wn. App. 2d at 144. Use of "shackles or other restraints" violate

constitutional guarantees unless carefully and individually imposed “regardless of the nature of the court proceeding or whether a jury is present.” *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (2015). During pretrial hearings, the court may not summarily order any person held in restraints. *State v. Lundstrom*, 6 Wn. App. 2d 388, 395, 429 P.3d 1116 (2018), *rev. denied*, 193 Wn.2d 1007 (2019).

The prosecution misconstrues dicta in *Deck* to claim there is no historical right to be free from shackles during any non-jury trial proceeding. *Deck* cited Blackstone for the proposition that the rule barring visible shackles does not apply to arraignment or like proceedings before a judge. 544 U.S. at 626. However, this dicta misrepresents Blackstone and the historical roots prohibiting restraints. *See United States v. Sanchez-Gomez*, 859 F.3d 649, 663-65 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 1532 (2018).

As Blackstone said, during a criminal case a person “must be brought to the bar without irons, or any manner of shackles or bond; unless there be evident danger of an escape.” 4 Blackstone *Commentaries on the Laws of England* 317. Shackles were historically permitted only in the rare case where the government proved a necessity for it, including at

arraignment. *Id.*; *Sanchez-Gomez*, 859 F.3d at 663-65 (discussing historical roots of pretrial bar on shackling).

This Court cited a similar understanding of the ancient rule barring shackling in *Williams*, 18 Wash. at 49. Such restraints are improper “whether or not a jury is present” because they preserve “[r]espect for the dignity of the individual and the court” at all hearings. *Walker*, 185 Wn. App. at 799, quoting *Solomon v. Superior Court of Los Angeles County*, 122 Cal.App.3d 532, 536 (1981); *see also Blair v. Commonwealth*, 171 Ky. 319, 393 (1916) (explaining long ago the “common-law rule” that “shackling defendant[s] during arraignment, . . . or at any time during the trial . . . was reversible error” absent the extreme danger of escape or imminent attack by the defendant in court).

A court may not adopt a routine policy demanding every person will appear with the feet and hands shackled at all court hearings, as occurred in Mr. Jackson’s case.

c. The court may not defer to the jail’s policy to physically restrain everyone held in custody during a court hearing

Trial courts may not defer to the jail on the issue of whether a person should be restrained during a court hearing. *Lundstrom*, 6 Wn. App. 2d at 394-95; *Walker*, 185 Wn. App. at 796-97; *State v. Jaquez*, 105 Wn. App. 699, 709, 20 P.3d 1035 (2001); *see also State v. Damon*, 144

Wn.2d 686, 692, 25 P.3d 418 (2001) (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.”).

The prosecution posits the jail decides security measures for jailed defendants and directs courtroom security. State’s Petition at 10-11, 13.

However, it is “the province of the trial court to determine whether and in what manner, shackles or other restraints should be used.” *Walker*, 185 Wn. App. at 797. The court’s interests are “readily distinguishable” from the concerns of jail security. *Id.* The court must balance the presumption of innocence, the defendant’s ability to assist counsel, and the dignity of the judicial process. *Id.* Jail officials may explain their security concerns but they are “in no position” to weigh and balance the unique interests that guide the court’s decision. *Id.*

The mere fact a person is charged with a crime is not a basis for imposing physical restraints. *Hartzog*, 96 Wn.2d at 400; *Lundstrom*, 6 Wn. App. 2d at 394. A general concern that a person is “potentially dangerous” does not justify the imposition of physical restraints. *Finch*, 137 Wn.2d at 846, quoting *Hartzog*, 96 Wn.2d at 400.

There must be a “factual basis justifying restraints specific” to the individual charged. *Jaquez*, 105 Wn. App. at 709. The record must

explicitly set forth this factual basis. *Id.* The factual predicate requires “compelling circumstances” of the need for restraints predicated on an imminent risk of escape, the accused’s present intent to injure someone in the courtroom, or the inability to behave in an orderly manner while in the courtroom. *Finch*, 137 Wn.2d at 850.

As the Court of Appeals ruled, the failure to conduct any inquiry into the need to restrain Mr. Jackson, and the broad adoption of jail policy for all criminal defendants in pretrial proceedings, clearly violated well-established constitutional law. *Jackson*, 10 Wn. App. 2d at 147.

d. Before imposing physical restraints, the trial court must consider less restrictive alternatives that minimally impede one’s constitutional rights.

Physical restraints are measures of “last resort.” *Allen*, 397 U.S. at 344. “Thus, the court must consider less restrictive alternatives before imposing physical restraints.” *Finch*, 137 Wn.2d at 850. The court must adopt measures that ensure “the least interference with a defendant’s rights.” *State v. Flieger*, 91 Wn. App. 236, 241, 955 P.2d 872 (1998).

If a court allows restraints, it must do so “only after conducting a hearing and entering findings into the record that are sufficient to justify the use of restraint.” *Damon*, 144 Wn.2d at 691-92.

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 (2018) (unpublished, cited pursuant to GR 14.1(a)) (holding court abused its discretion by requiring restraints without considering use of additional guards or other less invasive security measures); *State v. Boatright*, 1 Wn. App. 2d 1029, 2017 WL 5593790, *5 (2017) (unpublished, cited pursuant to GR 14.1(a)) (stating alternative to leg brace is using another deputy to monitor the defendant).

e. Here the court followed a blanket policy set by the jail dictating the physical restraint of all people unable to post bail for all court hearings.

No one ever alleged Mr. Jackson was a risk of escape, intended to injure someone while in the courtroom, or was unable to behave in an orderly manner. No less restrictive measures were discussed. No record was made that Mr. Jackson posed any threat in the courtroom.

Pursuant to the court's general policy, Mr. Jackson's legs were in irons and his hands and belly chained when the court set a bail of \$35,000, which was more money than Mr. Jackson could post. Mr. Jackson was brought to each subsequent hearing in shackles, under the court's shackling policy. At trial, he was forced to wear a device on his leg

restricting his movement. When he objected, the court only said there was nothing “inappropriate” about using a “security measure.” RP 75.

The leg brace Mr. Jackson wore during his jury trial was hidden by his clothes but visible to people near him. RP 448. He had difficulty standing for the jury as the other people did in the courtroom. RP 123, 210, 448-49. He had to take the witness chair when the jury was not present, unlike the other witnesses. RP 447-48. He could not stand and swear his promise to speak the truth as the prosecution’s witnesses and jurors did when taking their oath. RP 125, 285, 342, 448, 477.

The court abdicated its authority to determine whether any accused person should wear shackles in court and instead adopted a policy of wholesale deference to the jail. It did not assess any individual need for restraints at any time in Mr. Jackson’s case, even though Mr. Jackson objected. The court impermissibly deprived Mr. Jackson of his right to appear and defend unfettered.

2. The prejudicial effect of unnecessary shackles during court proceedings detrimentally affected the fairness of these proceedings and entitles Mr. Jackson to a new trial.

a. Unjustified shackling is presumptively and inherently prejudicial.

Physically restraining a person during trial or substantive court hearings “without first enumerating the reasons for this extraordinary

measure is ‘*inherently prejudicial*’ error.” *Jaquez*, 105 Wn. App. at 710 (emphasis in original, citing *Finch*, 137 Wn.2d at 845). The prosecution must affirmatively prove the error harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859.

When a practice is “inherently prejudicial,” courts place “little stock” in the factfinder’s claim it did not affect them. *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L. Ed.2d 525 (1986). A factfinder may not be “fully conscious of the effect” it has on their attitude toward the accused. *Id.* Thus, jurors need not “actually articulate” their awareness of a prejudicial effect. *Id.*; Instead, the court asks whether “an unacceptable risk is presented of impermissible factors coming into play.” *Id.* (internal citation omitted).

The harm from impermissibly shackling an accused person may be unquantifiable and elusive. *Deck*, 544 U.S. at 630, 633. It inevitably creates an adverse perception about the accused person’s dangerousness as well as his character. *Id.* It erodes the dignity and decorum of the criminal proceedings. *Id.* It impairs the defendant’s psychological state, stilts his movements, and affects the ability to freely communicate with counsel or testify in court. *Finch*, 137 Wn.2d at 862-63. For these reasons, the

prosecution bears a high burden to prove beyond a reasonable doubt it did not affect the verdict obtained.

In *Finch*, the defendant's restraints were not overtly visible to the jury but "it was certainly possible for the jury to notice" his restricted movements, allowing them to speculate he was restrained. *Id.* at 857. The restraint device shortened his stride and made him unable to stand up when the court was brought into session. *Id.* at 859. Because jurors could infer Finch was restrained, it was more likely jurors saw him as dangerous. *Id.* at 865. This inference undermined the fairness of a death penalty case despite overwhelming evidence of guilt. *Id.* at 865-66.

In *Jaquez*, the record was silent on whether the jurors actually saw the leg restraints shackling the defendant but the court agreed it was reasonable to infer the jurors noticed. 105 Wn. App. at 708. The Court of Appeals refused to deem the unjustified shackling harmless because the case involved contradictory testimony, including exculpatory testimony offered by the defense. *Id.* at 710; *see also Flieger*, 91 Wn. App. at 243 (reversing where some evidence jurors aware defendant wore hidden shock box at trial and court "cannot determine beyond a reasonable doubt that the State's use of the shock box had no effect on the jury's impression of Mr. Flieger's guilt.").

b. The Court of Appeals misapplied this test by failing to presume unjustified shackling orders were prejudicial.

The Court of Appeals agreed this constitutional error results in a presumption of prejudice requiring reversal. But it applied a different test.

i. The Court of Appeals presumed no harmful effect could occur in all non-jury proceedings.

For the pretrial hearings where Mr. Jackson was visibly shackled in irons and chains, the Court of Appeals stated “there is a presumption the trial court properly discharged its official duties without bias or prejudice.” 10 Wn. App. 2d at 149, quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). But *Davis* does not apply here.

In *Davis*, the defendant claimed the judge was actually biased against him. 152 Wn.2d at 692. A defendant alleging actual bias by a judge must prove “specific facts establishing bias,” because a judge is presumed to generally act without personal bias. *Id.* A different test applies when a court orders all persons appear in shackles.

Shackling is presumptively prejudicial because it erodes the presumption of innocence as well as the dignity and respect of the court proceedings. These concerns apply equally at hearings before a judge or jury. While a judge may be less surprised by seeing a person wearing irons, this does not mean a judge is unaffected by it. *Best*, 19 N.Y.3d at

744. “[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.” *Id.*

Recognizing judges are adversely affected by shackling, JuCrR 1.6(a) prohibits a court from ordering routine shackling of juveniles. This rule applies even though no jury trials occur in juvenile court.

Physical restraints psychologically impact the accused, who has been ordered restrained by the person making substantive rulings in the case. *Best*, 19 N.Y.3d at 744. The image of a shackled defendant affects the public’s perception of the accused and the proceedings generally. *Id.*

Criminal cases are “for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170, 32 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). Imposing coercive or humiliating conditions such as shackling on pretrial detainees disrupts their ability to freely and fairly assess whether to enter a guilty plea. It is only people who are too poor to afford bail who face these restraints, exacerbating concerns of the unequal treatment of some people by the criminal justice system.

Here, Mr. Jackson wore irons and chains when the judge set a bail too high for him to ever post. The prosecution did not show the judge would have reached the same bail decision if Mr. Jackson had not worn leg irons and chains. The Court of Appeals merely found the “record

suggests” the court had reasons for setting this bail other than concerns of dangerousness. 10 Wn. App. 2d at 149. But holding a Native American man in full restraints raises an unacceptable risk that impermissible factors affected the court, which undermines the fairness of those proceedings.

ii. The Court of Appeals used the wrong standard to assess the constitutional error of unjustified restraints at the jury trial.

When reviewing the harmful effect of Mr. Jackson’s leg restraints during his jury trial, the Court of Appeals also misstated the controlling legal test. It insisted Mr. Jackson was required to show the restraint “had a substantial or injurious effect on the jury’s verdict.” Slip op. at 12; citing *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). But the test recited in *Hutchinson* applies to habeas review; it is not used to assess a constitutional error on direct appeal. *Brecht v. Abrahamson*, 507 U.S. 619, 634-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); *Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967). On direct appeal, the prosecution bears the burden of proving the error is harmless beyond a reasonable doubt under *Chapman*.

In a concurrence, Judge Melnick noted a pattern where trial courts did not follow the “well-settled and clearly articulated principles of law” prohibiting shackling without an individualized inquiry. 10 Wn. App. 2d at

152 (Melnick, J., concurring). He found “no fewer than 14 cases since February 2015” where the defendant’s right to be free from shackles was violated, yet it was deemed harmless error on appeal. *Id.* He suggested using a different harmless error test. *Id.* at 155.

The cases Judge Melnick listed used the harmless error test from *Hutchinson*, requiring the defendant prove the restraints had “a substantial or injurious effect or influence on the jury’s verdict.” *See* Appendix A (collecting cases). This reliance on an incorrect harmless error test has allowed courts to avoid the consequences of unjustified restraints

Here, defense counsel promptly objected and asked the court to assess whether compelling circumstances required Mr. Jackson to wear restraints in court. But the judge refused to analyze Mr. Jackson’s circumstances and issued blanket rulings requiring shackles as long as he was in jail. CP 65-66. Treating unjustified shacking as structural error would curb the frequency of unnecessary shackling.

Under a proper application of the constitutional harmless error analysis, the prosecution has not proved the error harmless. Mr. Jackson was forced to appear at his jury trial hobbled by a leg restraint. The case against him rested on the jurors’ assessment of his credibility. He and his former fiancé gave very different explanations of an alleged assault where

they were the only two witnesses to what occurred. Seeing Mr. Jackson physically restrained, unable to rise for the jury or take his oath while standing as all others did, undercut his credibility. Jurors would view him as less truthful or respectful and more dangerous than other witnesses. The effect of this unjustified treatment of Mr. Jackson, at a trial where assessing his credibility was paramount, is not harmless beyond a reasonable doubt.

E. CONCLUSION.

Mr. Jackson respectfully requests this Court hold that the violation of his right to appear and defend in person free from unnecessary shackles undermined the fairness of the pretrial and trial proceedings and requires reversal of his conviction.

DATED this 14th day of February 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner/Cross-Respondent

APPENDIX A

List of cases surveyed in concurring opinion,
Jackson, 10 Wn. App. 2d at 152-53 (Melnick, J. concurring).¹

State v. Lundstrom, 6 Wn. App. 2d 388, at 385 n.2, 429 P.3d 1116 (2018), *rev. denied*, 193 Wn.2d 1007 (2019) (citing *Hutchinson* for harmless error test, although defendant did not seek relief from the violation of his due process rights);

State v. Zain, 191 Wn. App. 1033, 2015 WL 7737874, *4 (2015) (unpublished) (citing *Hutchinson*, *inter alia*, for proposition that shackling “error does not require reversal unless it is shown that the use of restraints substantially affected the trial court’s fact finding.”);

State v. Smith, 189 Wn. App. 1029, 2015 WL 4755642, *4 (2015) (unpublished) (citing *Hutchinson*, 135 Wn.2d at 888 for requirement “the defendant was required to ‘show the shackling had a substantial or injurious effect or influence on the jury’s verdict’”);

State v. Montenguisse, 188 Wn. App. 1045, 2015 WL 4094316, *3 (2015) (unpublished) (stating “Washington courts have routinely found that, in situations where the shackles were not visible to the jury, the error was harmless. *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)”);

State v. Calhoon, 3 Wn. App. 2d 1015, 2018 WL 1725219, *5 (2018) (unpublished) (“To demonstrate reversible error, the defendant is required to ‘show the shackling had a substantial or injurious effect or influence on the jury’s verdict.’ *Hutchinson*, 135 Wn.2d at 888.”);

State v. Boatright, 1 Wn. App. 2d 1029, 2017 WL 5593790, *6 (2017) (unpublished) (“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.” citing *Hutchinson*, 135 Wn.2d at 888);

State v. Bruce, 1 Wn. App. 2d 1021, 2017 WL 5462514, at *7 (2017) (unpublished) (“Our Supreme Court has held that the “defendant must show that the shackling ‘had substantial or injurious effect or influence on the jury’s verdict.’ ” citing *inter alia*, *Hutchinson*, 135 Wn.2d at 888);

¹ Unpublished decisions are cited here as illustrative, not as authority. GR 14.1; *Jackson*, 10 Wn. App. 2d at 152 n.5 (Melnick, J. concurring).

State v. Huynh, 2 Wn. App. 2d 1065, 2018 WL 1393836, *5 (2018) (unpublished) (“In order to succeed on his claim, the [appellant] must show the shackling had a substantial or injurious effect or influence on the jury's verdict.” citing *Hutchinson*, 135 Wn.2d at 888);

State v. Flores, 1 Wn. App. 2d 1014, 2017 WL 5152762, *3 (2017) (unpublished) (citing *Hutchinson*, 135 Wn.2d at 388, and finding error harmless);

In re Welfare of A.N.B., 186 Wn. App. 1002, 2015 WL 782975, *10 (2015) (unpublished) (citing *Hutchinson* and requiring the defendant “must show the shackling had a substantial or injurious effect or influence on the jury's verdict.”);

State v. Lomax, 199 Wn. App. 1027, 2017 WL 2560098, *5 (2017) (unpublished) (explaining “Prejudice is shown if the defendant demonstrates that the shackling “had substantial or injurious effect or influence on the jury's verdict,”” quoting *inter alia Hutchinson*, 135 Wn.2d at 888);

State v. Bakke, 192 Wn. App. 1037, 206 WL 562755, *6 (2016) (unpublished) (citing *Hutchinson* and explaining harmless error test as requiring proof restraints “substantially affected the trial court’s fact finding”);

State v. Mendez, 3 Wn. App.2d 1062, 2018 WL 2324388, *6 (2018) (unpublished) (stating harmless error test as “whether the restraints ‘had a substantial or injurious effect or influence’ on the verdict. *Hutchinson*, 135 Wn.2d at 888.”);

In re Pers. Restraint of Pender, 185 Wn. App. 1049, 2015 WL 562694, *4 (2015) (unpublished) (after reference hearing in collateral attack finding insufficient of evidence stun belt actually prejudiced defendant, without citation to *Hutchinson*).

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) NO. 97681-3
)
 JOHN JACKSON, SR.,)
)
 Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF FEBRUARY, 2020, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

JESSE ESPINOZA, DPA () U.S. MAIL
 [jespinoza@co.clallam.wa.us] () HAND DELIVERY
 CLALLAM COUNTY PROSECUTOR'S OFFICE (X) E-SERVICE VIA PORTAL
 223 E 4TH ST., STE 11
 PORT ANGELES, WA 98362

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF FEBRUARY, 2020.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

February 14, 2020 - 4:23 PM

Transmittal Information

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

The following documents have been uploaded:

- 976813_Briefs_20200214162323SC360344_6571.pdf
This File Contains:
Briefs - Petitioners Supplemental
The Original File Name was washapp.021420-01.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 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200214162323SC360344