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NO. 97681-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN W. JACKSON, SR.,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 51177-1-II
Clallam County Superior Court No. 17-1-00218-5

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

SERVICE

Nancy P. Collins
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Email: nancy@washapp.org;
wapofficemail@washapp.org

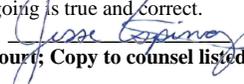
This brief was served *electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 14, 2020, Port Angeles, WA 
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I. ISSUES PRESENTED

1. Whether in this criminal prosecution the shackling of the defendant in pretrial proceedings and at trial without an individualized inquiry into the need for shackling may be deemed harmless error?
2. Whether in this criminal prosecution the trial court was constitutionally required to conduct an individualized inquiry into the need for shackling before permitting the defendant to be shackled during pretrial hearings?

II. STATEMENT OF THE CASE

The State charged Jackson with Assault in the Second Degree by Strangulation for strangling his fiancé on May 25, 2017. CP 76. The defendant was brought to court on June 19, 2017 for his first appearance in restraints. RP 4. Counsel was appointed for Jackson and the defense objected to Jackson's appearance in restraints. RP 4–6.

The trial court noted the State should have the opportunity to respond and when asked if ready the deputy prosecutor stated he was not ready to proceed. RP 6. The State filed a response (CP 67) and the issue of restraints was argued at hearing on July 12, 2017. RP 15–67. On Aug. 4, 2017, the trial court ordered the implementation of a lesser restrictive

alternative to restraints by means of video conferencing as permitted by CrR 3.4(d) with an implementation target date of Jan. 1, 2018. CP 66.

The court also ordered that until video conferencing could be implemented, it would adopt the restraint policy set forth in the court's previous January 20, 2017 order in *State v. Gallauher*. CP 66; Appellant's Motion to Supp. Record on Appeal (May 1, 2018) (*Gallauher* Opinion attached) (hereinafter "*Gallauher* Opinion").

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 approved the use of the leg brace:

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?

RP 75.

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 possibly expose the presence of the leg brace under Jackson’s clothing before the jury. RP 448. Then the jury was brought out.

Jackson was convicted by a jury and the issue of restraints was raised on appeal. The Court of Appeals ultimately held that “the trial court violated [Jackson’s] constitutional right to due process by failing to conduct an individual inquiry into the need for pretrial and trial restraints.” *State v. Jackson*, 10 Wn. App.2d 136, 139, 447 P.3d 633 (2019).

The *Jackson* Court also held that the error was harmless because it was clear from the record that the jury could not see the leg brace under Jackson’s clothing. *Id.* at 150.

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III. ARGUMENT

A. THE USE OF RESTRAINTS IN THIS CASE MAY BE DEEMED HARMLESS ERROR BECAUSE THE RESTRAINTS AT PRETRIAL HEARINGS AND THE LEG BRACE UNDER JACKSON'S PANTS AT TRIAL WERE NOT VISIBLE TO A JURY.

1. The right to appear before a jury free from restraint is not absolute and use of visible restraints at trial is not per se unconstitutionally prejudicial.

“It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances.” *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (citations omitted); *see also United States v. Bell*, 819 F.3d 310, 322 (7th Cir. 2016) (citing *Deck v. Missouri*, 544 U.S. 622, 626, 628, 629, 125 S.Ct. 2007, 2012, 161 L.Ed.2d 953 (2005), *abrogated on other grounds by Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007)).

“This is to ensure that the defendant receives a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution.” *Finch*, 137 Wn.2d at 843 (citing U.S. Const. amend. VI, U.S. Const. amend. XIV; and Const. art. I, § 22); *State v. Elmore*, 139 Wn.2d 250, 273, 985 P.2d 289 (1999) (citing *State v. Hutchinson*, 135 Wn.2d 863, 887–88, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999)) (“We are fully

aware shackling an accused imperils that person's constitutional right to a fair trial by reversing the presumption of innocence.”); *see also State v. Tolley*, 290 N.C. 349, 364–65, 226 S.E.2d 353, 366 (1976) (pointing out that general rule that a defendant in a criminal case is entitled to appear at trial free from all shackles except in extraordinary instances flows from the need to protect the presumption of innocence).

“The right to appear before a jury free of shackles, however, is not absolute.” *See Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) (citing *Wilson v. McCarthy*, 770 F.2d 1482, 1484–85 (9th Cir. 1985). “Shackling is inherently prejudicial, but it is not per se unconstitutional.” *Duckett*, 67 F.3d at 748 (citing *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir.1989)); *Rhoden v. Rowland*, 10 F.3d 1457, 1459 (9th Cir. 1993) (quoting *Illinois v. Allen*, 397 U.S. 337, 342–44, 90 S.Ct. 1057, 1060–61, 25 L.Ed.2d 353 (1970) (“Shackling is not per se unconstitutionally prejudicial.”)).

“[S]hackling a defendant, even in the courtroom in the jury's presence, has been upheld where it was necessary for security reasons.” *United States v. Smith*, 436 F.2d 787, 789 (5th Cir. 1971) (citing *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Loux v. United States*, 389 F.2d 911, 919–20 (9th Cir. 1968); *Gregory v. United States*, 365 F.2d 203, 205 (8th Cir. 1966); *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963); *Cwach v. United States*, 212 F.2d 520, 522–28 (8th

Cir. 1954); *DeWolf v. Waters*, 205 F.2d 234, 235 (10th Cir. 1953).

The right to appear free from restraint at trial is subject to a trial court's duty to provide for courtroom security for the benefit of all, public and defendant alike. *State v. Turner*, 143 Wn.2d 715, 725, 23 P.3d 499 (2001) (quoting *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981); *see also Hartzog*, 96 Wn.2d at 396 (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970) ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country.")); *Elmore*, 139 Wn.2d at 273 (citing *Hutchinson*, 135 Wn.2d at 887–88).

"A trial court has *broad discretion* to determine if a defendant's conduct is so dangerous or disruptive as to require restraints in the courtroom." *Finch*, 137 Wn.2d at 873 (citing *State v. Breedlove*, 79 Wn. App. 101, 113–14, 900 P.2d 586 (1995)) (emphasis added).

Thus, courts must balance competing interests and a trial court's authorization to use of restraints at trial without first conducting an individualized inquiry on the record could result in an unconstitutional denial of due process. *Elmore*, 139 Wn.2d at 273 (citing *Hartzog*, 96 Wn.2d at 400; *Duckett*, 67 F.3d 734); *see also Tolley*, 290 N.C. at 367 (quoting *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970)) ("The cases traditionally hold that accommodation between the conflicting interests of

the defendant and the State with regard to the use of shackles and other physical restraints lies within the discretion of the trial judge because ‘(i)t is he who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes.’); *see also Spain v. Rushen*, 883 F.2d 712, 722 (9th Cir. 1989) (citing *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970)) (“Despite this hazard, shackling sometimes may be appropriate because of the public's competing interest in courtroom security and the just administration of law.”).

In order to set forth standards to weigh the competing interests at stake, the Washington State Supreme Court, in *State v. Hartzog*, adopted standards which the Washington Court of Appeals, Division Three, set forth requiring that the trial court must state its reasons for restraints on the record. *State v. Hartzog*, 96 Wn.2d 383, 401, 635 P.2d 694 (1981) (citing *State v. Hartzog*, 26 Wn. App. 576, 588–89, 615 P.2d 480 (1980) (“The necessity for those measures must be made on a case-by-case basis after a hearing with a record evidencing the reasons for the action taken.”)). The Washington State Court of Appeals, Division Three, looked to *Tolley*, in adopting a list of factors that may be considered on the record before

allowing restraints. *Hartzog*, 26 Wn. App. at 588 (citing *Tolley*, 290 N.C. at 368).

Additionally, the Washington Supreme Court, in *Hartzog*, declared that “the standard for appellate review will be whether the trial court has abused its broad discretion to provide for order and security in the courtroom.” *Hartzog*, 96 Wn.2d at 401 (citing *People v. Duran*, 16 Cal.3d 282, 297, 545 P.2d 1322, 1332, 127 Cal.Rptr. 618, 628 (1976)).

The individualized inquiry is necessary for adequate review. *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970) (“Unless the district judge's discretion is to be absolute and beyond review, the reasons for its exercise so as to require special security measures, must be disclosed in order that a reviewing court may determine if there was an abuse of discretion.”); *see also People v. Duran*, 16 Cal.3d 282, 293, 545 P.2d 1322, 1329, 127 Cal.Rptr. 618, 625 (1976) (holding the trial court abused its discretion where it summarily denied the motion to release defendant from his shackles at trial without making a record for its reasons which thereby implied “a general policy of shackling all inmate defendants accused of violent crimes.”).

In *Deck v. Missouri*, the United States Supreme Court extensively considered the historical roots of the principle prohibiting restraints and the

various and often disagreed upon procedural steps lower courts have taken and concluded as follows:

Thus, the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

Deck v. Missouri, 544 U.S. 622, 629, 125 S.Ct. 2007, 2012, 161 L.Ed.2d 953 (2005), *abrogated on other grounds by Fry v. Plier*, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (emphasis added).

Thus, the law is clearly set forth that the right to appear before a jury free from restraint is not absolute and use of visible restraints at trial is not per se unconstitutionally prejudicial.

2. Washington courts and courts throughout the nation have applied harmless error in the context of restraint violations to determine whether the accused's right to a fair trial has been prejudiced.

The Washington Supreme Court held, "A claim of unconstitutional shackling is subject to harmless error analysis." *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998); *Elmore*, 139 Wn.2d at 274 (citing *Finch*, 137 Wn.2d at 975).

"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." *Hutchinson*, 135 Wn.2d at 888. Courts normally require a showing

of prejudice before a court's error is deemed reversible. *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir. 1997) (holding defendant failed to demonstrate his right to due process was prejudiced where the court adopted a means of restraint that was not visible to the jury and "there [was] no evidence the jury was aware that he was shackled or restrained.").

Numerous cases have even held that when a defendant is seen by a jury in shackles, especially when inadvertently or only momentarily, the burden is placed on defendant to prove prejudice. *See, e.g., Wilson v. McCarthy*, 770 F.2d 1482, 1485–86 (9th Cir. 1985) ("When the jury's view of a defendant or witness in shackles is brief, as in this case, or inadvertent, the defendant must make an affirmative showing of prejudice."); *Way v. United States*, 285 F.2d 253, 254 (10th Cir. 1960) (citing *Blaine v. United States*, 136 F.2d 284 (8th Cir. 1943) ("And in the absence of an indication of prejudicial consequences, such an occurrence does not warrant the granting of a new trial."); *Gregory v. United States*, 365 F.2d 203, 205 (8th Cir. 1966) (citing *Hardin v. United States*, 324 F.2d 553, 554 (5th Cir. 1963); *Guffey v. United States*, 310 F.2d 753, 754 (10th Cir. 1962); *Glass v. United States*, 351 F.2d 678, 681 (10th Cir. 1965)); *Kennedy v. Cardwell*, 487 F.2d 101, 111 (6th Cir. 1973) (citing *Odell v. Hudspeth*, 189 F.2d 300 (10th Cir. 1951). ("The burden of proof was upon the petitioner in this habeas corpus proceeding to establish that his constitutional rights were

violated by the manacling.”).

More recently, in *Deck v. Missouri*, the United States Supreme Court held that it “where a court, without adequate justification, orders the defendant to wear shackles *that will be seen by the jury*, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove ‘beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.’” *Deck*, 544 U.S. at 635 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)) (emphasis added).

Here, the record was clear that the leg restraint could not be seen. This is sufficient to show the error was harmless. *Hutchinson*, 135 Wn.2d at 888 (citing *Rhoden v. Rowland*, 10 F.3d 1457, 1459 (9th Cir. 1993)).

3. The facts of this case demonstrate that the use of a leg brace at trial and restraints in pretrial hearings were appropriately deemed harmless.

In the instant case, the use of restraints on the defendant in pretrial proceedings and at trial without an individualized inquiry into the need for such restraints may be deemed harmless error. This is because there was no reversal of the presumption of innocence in the pretrial hearings and at trial there was no evidence that the jury was able to see or was aware Jackson was wearing a lockable leg brace under his clothing. In fact, the record demonstrates that the leg brace was clearly not visible.

At trial, Jackson's defense counsel pointed out that the leg brace was not visible and that the locking position could also be unlocked by Jackson with the push of a button. *See* RP 74–75. Additionally, the court made sure the jury did not see Jackson move to or from the witness stand and that Jackson did not move to stand up while being sworn in to testify.

This case is similar to other cases where restraints were not visible to a jury and the violation was deemed harmless. *See, e.g., State v. Hutchinson*, 135 Wn.2d at 888 (citing *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir. 1997) (holding the alleged error harmless where “the Defendant does not argue persuasively that he was prejudiced in any way by the unseen restraints.”); *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir. 1997) (holding “Collins has failed to demonstrate that his right to due process was prejudiced because there is no evidence the jury was aware that he was shackled or restrained.”).

Here, it is purely speculative as to whether the jury became aware Jackson was wearing a leg brace because he was already sitting at the witness stand when the jury reentered the courtroom. It is also purely speculative as to whether the jury figured out Jackson was wearing a restraint when Jackson remained seated while taking the oath. Jackson did not try to stand up, was not asked to stand up, and did not express any discomfort suggesting the presence of a leg restraint.

The instant case is one which falls outside the concern of cases where shackles were were seen momentarily or inadvertently by a jury. This case is even further removed from *Deck* which was concerned about the risk of prejudice due to visible shackles.

Therefore, in this case the shackling of the defendant in pretrial proceedings and a leg brace under Jackson's clothing at trial without an individualized inquiry may be deemed harmless error.

B. AN INDIVIDUALIZED INQUIRY IS NOT CONSTITUTIONALLY REQUIRED BEFORE RESTRAINTS ARE PERMITTED IN NONJURY PRETRIAL HEARINGS WHERE THERE IS NO RISK TO THE PRESUMPTION OF INNOCENCE WHICH APPLIES DURING TRIAL.

- 1. The rule prohibiting restraints at trial in order to protect a defendant's presumption of innocence does not apply in pretrial hearings.**

The United States Supreme Court, in *Deck v. Missouri*, has made it clear that the rule prohibiting the use of restraints absent adequate justification applies at trial:

We first consider whether, as a general matter, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. The answer is clear: The law has long forbidden routine use of *visible* shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.

Deck, 544 U.S. at 626 (emphasis added).

“Blackstone and other English authorities recognized that the rule

did not apply at “the time of arraignment,” or like proceedings before the judge.” *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England, 317 (1769); Trial of Christopher Layer, 16 How. St. Tr. 94, 99 (K.B.1722)).

“It was meant to protect defendants appearing at trial before a jury.” *Id.* (citing *King v. Waite*, 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B.1743)); *but see State v. Williams*, 18 Wash. 47, 49–50, 50 P. 580 (1897) (“*prior to 1722*, when a prisoner was arraigned or appeared at the bar of the court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape.” (citations omitted) (emphasis added)).

The U.S. Supreme Court in *Deck* held that the rule also applies in the penalty proceedings in capital cases and “that courts cannot routinely place defendants in shackles or other physical restraints *visible to the jury* during the penalty phase of a capital proceeding.” *Deck*, 544 U.S. at 632, 633 (emphasis added).

Deck, Washington Cases, and cases cited *supra* make clear that the rule against the routine use of restraints without adequate justification offends the presumption of innocence. “[T]he criminal process presumes that the defendant is innocent until proved guilty.” *Deck*, 544 U.S. at 630 (citing *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) (presumption of innocence “lies at the foundation of the

administration of our criminal law”)); *see also Finch*, 137 Wn.2d at 844.

The presumption of innocence is a doctrine which applies only during trial. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 533, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

The United States Supreme Court has declined to apply the presumption of innocence in analyzing the constitutionality of various pretrial confinement rules and conditions:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.... *But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.*

State v. Archie, 148 Wn. App. 198, 203–04, 199 P.3d 1005 (2009) (quoting *Wolfish*, 441 U.S. at 533 (citations omitted) (emphasis added)).

The “presumption of innocence,” applies at trial and requires that the prosecution has the obligation to prove each element of the offense beyond a reasonable doubt and that the accused bears no burden of proof. This principle can be traced to many historical sources. *See generally Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Washington juries are fully informed of this principle and commanded to follow it. *See generally* WPIC 1.02 and 4.01.

The *Deck* Court also stated that the rule prohibiting restraints at trial

absent adequate justification is also there to protect a defendant's right to counsel and "to maintain a judicial process that is a dignified process." *Deck*, 544 U.S. at 630–31; *see also Finch*, 137 Wn.2d 845 ("Shackling or handcuffing a defendant has also been discouraged because it restricts the defendant's ability to assist his counsel during trial, it interferes with the right to testify in one's own behalf, and it offends the dignity of the judicial process."); *Hartzog*, 96 Wn.2d at 398 ("Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial.").

The dangers of prejudice to the presumption of innocence and the ability to assist counsel in one's own defense at trial are not present in pretrial hearings where there is no finder of fact. Therefore, a defendant's constitutional rights to a fair trial are not implicated by the use of restraints during non-jury pretrial hearings.

2. Requiring a hearing prior to the use of restraints at every pretrial hearing could have a harmful and wide ranging impact on courts.

A vast majority of criminal cases, around 90% to 95%, are resolved by plea bargain and not by jury or bench trials. *See generally* 13 Wash. Prac., Criminal Practice & Procedure § 3401 (3d ed.). Of those cases that go to trial, not all defendants are tried while held on bail or in custody for

other reasons. Thus, the use of restraints at trial is a relatively rare occurrence when considering the vastly larger number of criminal cases that are resolved without a trial.

Each criminal case will have multiple hearings before it is resolved whether by plea bargain or trial. There is the first appearance, arraignment, status or conference hearings, omnibus hearings, not to mention the host of other hearings regarding discovery motions, continuances, competency hearings, and others. Further, the more complex a case is, the greater the likelihood a case will require a greater number of hearings before it is resolved.

Therefore, requiring an individualized hearing to determine the need for restraints before *all pretrial hearings* would have the effect of exponentially increasing the burden on the resources of courts, corrections facilities, and throughout the criminal justice system when such hearings are not a constitutional necessity to begin with. Such a requirement will also necessarily result in increased litigation of the issue on appeal.

Case law on the issue reveals that although a court has broad discretion to determine the use of restraints, trial courts are often found to have abused its discretion despite holding a hearing. *See State v. Jackson*, 10 Wn. App.2d 136, 152–53, 447 P.3d 633 (2019) (Melnick J., concurring)

(survey of cases where trial courts held a hearing but on review the evidence did not support the use of restraints).

“But as to matters entrusted to a trial judge's discretion, it is often true that judges presented with the same record may reach different conclusions.” *United States v. Bell*, 819 F.3d 310, 322 (7th Cir. 2016) (citing *Bracey v. Grondin*, 712 F.3d 1012, 1020 (7th Cir.2013) (“discretion by its very nature permits different judges to reach different—but reasonable—conclusions on the same set of facts”); *United States v. Aljabari*, 626 F.3d 940, 952 (7th Cir.2010); *Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir.1986).

Increased litigation over the issue of the use of restraints in courtrooms during pretrial hearings is certain to create more confusion rather than clarity creating a real risk of chilling courts from exercising their broad discretion in good faith. This is not necessary considering that courts are already consistently using lesser restrictive alternatives even in pretrial hearings as the court in the instant case ordered appearances by video monitoring.

Considering the logistical and resource problems mentioned above, it may be more practical to require an individualized inquiry in pretrial hearings only when a defendant objects to restraints during a pretrial hearing. If it harmless error to be in a leg brace as the restraint is not visible

to a jury, and visible restraints have been upheld before a jury when justified, then minimal restraints could be appropriate without a hearing at pretrial hearings at least until objection. This would allow for court room safety especially for more unpredictable first appearances. This may also promote more efficient use of resources of all concerned as a hearing would not be required prior to each pretrial hearing to determine whether restraints may be used in court during each pretrial court proceeding. Allowing courts to function in this manner would also permit a defendant to decline to object to restraints in the event the defendant does not want his or her previously unknown jail history brought before the court with the risk of leaving an impression in the mind of a judge.

An individualized inquiry to determine whether the use of restraints is justified in every pretrial hearing is not required by the U.S. or Washington Constitutions.

VI. CONCLUSION

The weight of authority demonstrates that the use of restraints during pretrial hearings and a leg brace during trial without an adequate hearing in this case may be deemed harmless error because the restraints were not visible to the jury and there was no prejudice to Jackson's right to a fair trial.

Finally, the requirement of a hearing to justify the use of restraints

at non-jury pretrial hearings is not constitutionally required to protect an accused's right to a fair trial.

Respectfully submitted this 14th day of February 2020.

MARK B. NICHOLS
Prosecuting Attorney

A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive style with a large initial 'J' and a long, sweeping underline.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

February 14, 2020 - 2:41 PM

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