NO. 97681-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHN W. JACKSON, SR.,

Petitioner.

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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

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# ANSWER AND CROSS PETITION FOR REVIEW

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| **SERVICE** | Nancy P. Collins<br>Washington Appellate Project<br>1511 Third Avenue, Suite 610<br>Seattle, WA 98101<br>Email: nancy@washapp.org;<br>wapofficemail@washapp.org | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.<br>DATED October 21, 2019, Port Angeles, WA Jesse Espinoza<br>**Original e-filed at the Washington Supreme Court; Copy to counsel listed at left.** |

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## I. IDENTITY OF RESPONDENT AND CROSS-PETITIONER

The respondent is the State of Washington. The answer and cross-petition for review is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

## II. COURT OF APPEALS DECISION

The State seeks limited review of the Court of Appeals, Division II, published decision in *State v. Jackson*, No. 51177-1-II (Aug. 20, 2019) in which the Court 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 . . . restraints." [1]

Additionally, the State respectfully requests that this Court deny review of the issues raised by the Petitioner requesting this Court to examine the application of the harmless error test for restraint violations.

The Court of Appeals, in conformity with well-established principles held that the trial court's error in restraining Jackson in pretrial proceedings and during trial was harmless error beyond a reasonable doubt.[2]

[1] *State v. Jackson*, 447 P.3d 633, 635 (Wn. App. 2019).

[2] *Id.* at 640.

## II. COUNTER STATEMENT OF ISSUES

### A. ISSUE RELATING TO THE USE OF RESTRAINTS IN PRETRIAL PROCEEDINGS.

Whether criteria set forth in RAP 13.4(b) are met, and this Court should thus accept limited review of the decision of the Court of Appeal's holding that the trial court violated Jackson's due process rights by using restraints during pretrial proceedings without first holding a hearing and making an individualized determination and record, where:

1. The Court of Appeals decision conflicts with the decisions of this Court in *State v. Damon*,[3] *State v. Hartzog*,[4] *State v. Finch*,[5] and *State v. Turner*,[6] by applying the principles involving the use of restraints in jury or sentencing proceedings out of their proper context to pretrial proceedings thereby interfering with a court's

[3] *State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418 (2001) (holding the trial court abused its discretion by relying upon a correction officer's concerns without a hearing before ordering the defendant to be held in restraints throughout his jury trial).

[4] *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981) (in a case where the trial court ordered the use of restraints during jury trial, holding that "[a] 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" and relying upon cases where an individualized showing of need for restraints is required before their use in proceedings before a jury).

[5] *State v. Finch*, 137 Wn.2d 792, 842–43, 975 P.2d 967 (1999) (citing well established principles that prohibit the use of restraints without a showing of extraordinary circumstances in hearings before a jury or for sentencing).

[6] *State v. Turner*, 143 Wn.2d 715, 725, 23 P.3d 499 (2001) (quoting *Hartzog*, 96 Wn.2d at 396) ("It is fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public.").

"discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public"[7] where there is no risk of prejudice to a defendant's rights to a fair trial; and,

2. The Court of Appeals decision conflicts with the decision of the Court of Appeals, Division 1, in *State v. Walker*,[8] which held that the court may not delegate decisions regarding courtroom security, by requiring further that a court must hold a hearing, conduct an individualized inquiry, and make findings on the record before restraints may be utilized in *every* pretrial courtroom proceeding; and,

3. The petition involves a question of law under the U.S. Constitution because the Court of Appeals' holding extends the right to be free from restraint before the court in jury and sentencing proceedings to *all* pretrial proceedings although the U.S. Supreme Court in *Deck v. Missouri* made it clear that such right has never been held

[7] *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981).

[8] *State v. Walker*, 185 Wn. App. 790, 803, 344 P.3d 227 (2015) (holding "that it was within the trial court's sole discretion to determine whether Walker should be restrained during his sentencing hearing" and that "the record was sufficient to support the trial court's decision to maintain Walker's restraints during the hearing and does not show that Walker was prejudiced thereby.").

to apply at arraignments and "like proceedings;"[9] and,

4. The petition involves an issue of substantial public interest that should be determined by this Court because the decision affects the policies and practices of courtrooms and jail facilities across the State of Washington that for years had been operating under constitutional norms to promote safety and efficiency in their respective courtrooms during pretrial proceedings?

### B. THIS COURT NEED NOT REVIEW WHETHER THE *JACKSON* COURT CORRECTLY APPLIED THE HARMLESS ERROR TEST FOR RESTRAINT VIOLATIONS AND JACKSON DOES NOT ARGUE THAT THE TEST IS INCORRECT AND HARMFUL.

The Court of Appeals held that the trial court violated Jackson's due process rights by failing to hold an individualized inquiry and make a record prior to authorizing the use of a leg brace during jury trial. This decision was rendered in favor of Jackson and need not be reviewed. *State v. Jackson*, 447 P.3d 633, 639 (Wn. App. 2019).

Jackson also requests the Court to review the decision on the basis that the *Jackson* Court applied the harmless error test incorrectly by shifting the burden to Jackson to prove prejudice from the court's authorization of the leg brace under Jackson's clothing at trial.

[9] *Deck v. Missouri*, 544 U.S. 622, 626 , 125 S.Ct. 2007, 2010, 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 Court need not review this issue because the *Jackson* Court, citing to *State v. Clark*, correctly ruled that the *record* demonstrated that the jury could not see that Jackson was wearing a leg brace under his clothes and therefore the error was harmless beyond a reasonable doubt. *See Jackson*, 447 P.3d at 640 (citing *State v. Clark*, 143 Wn.2d 731, 777, 24 P.3d 1006 (2001)).

Jackson also suggests that this Court should review the propriety of the harmless error test itself suggesting the Court of Appeals is helpless to put an end to restraint violations. Br. of Petitioner at 16.

Whether or not the application of the harmless error test to restraint violations is appropriate need not be reviewed as Jackson has not attempted to demonstrate that the test is incorrect and harmful. *See State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (citing *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

## IV. 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 a 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").

In *Gallauher*, the defendant filed an objection to restraints and the State filed a response along with a motion for the court to exercise its discretion and adopt the Clallam County Correction Facility restraint policy for non-jury proceedings. *See* Br. of Respondent, App. A, D. The trial court was presented with the aforementioned restraint policy and a Declaration of Chief Corrections Deputy Ronald D. Sukert, Clallam County Corrections Facility. *See* Br. of Respondent, pp. B1–B4, C1–C4.

The trial court issued a written memorandum on Jan. 20, 2017 after considering the briefings and hearing arguments. *See Gallauher* Opinion.

The court ruled that it would be moving toward the increased use video monitoring as authorized by CrR 3.4(d) but would adopt the Clallam County Corrections Facility's restraint policy for hearings which include preliminary hearings, arraignments, bail hearings, and trial settings. *Gallauher* Opinion, at 6.

At trial on Aug. 21, 2017, the court authorized the use of a leg brace under Jackson's clothing. 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." *Jackson*, 447 P.3d at 635.

## V. ARGUMENT

### A. THIS COURT SHOULD ACCEPT LIMITED REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THE ISSUE PRESENTED BY THE RESPONDENT MEETS THE CRITERIA UNDER RAP 13.4(b).

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

**1. The decision of the Court of Appeals conflicts with the holdings in *State v. Damon, State v. Hartzog, State v. Finch,* and *State v. Turner* because it applies the constitutional principles underlying those cases beyond their traditional limits to all pretrial hearings where the risks of danger of prejudice to the defendant's due process rights do not outweigh the court's discretion to implement measures to promote courtroom safety.**

"'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).

On the other hand, "'[i]t is fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public.'" *Turner*, 143 Wn.2d at 725 (quoting *Hartzog*, 96 Wn.2d at 396); *see also Finch*, 137 Wn.2d at 873 (citing *State v. Breedlove*, 79 Wn. App. 101, 113–14, 900 P.2d 586

(1995)) ("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.").

Thus there is a tension between the defendant's right to be free from the prejudice of being seen in restraints by a jury at trial and the court's duty in ensuring public safety. The court's interests must be given greater weight where the defendant's interests are not implicated.

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 shackles, this rule historically does not apply to *non-jury* and *non-guilt* phase proceedings and American Courts have adhered closely to this doctrine. *See Deck v*, 544 U.S. at 626–27 ("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.'"); *see also State v. Walker*, 185 Wn. App. 790, 795, 344 P.3d 227 (2015) ("Many subsequent cases, in Washington and other jurisdictions, have addressed the right to appear in court free of physical restraint, but nearly all have addressed the right in the context of a jury trial." (citing *Finch*, 137 Wn.2d at 842–43, and cases cited within.)).

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; *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995); *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970). "We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors." *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997).

Here, the Court of Appeals applied the principle requiring an individualized showing of a compelling need for restraints during trials and sentencing proceedings to *all* other pretrial hearings. Thus, the holding in *Jackson* undercuts the trial court's interests in public safety and orderly conduct in the courtroom in hearings where there is no risk of prejudice to a defendant's right to a fair trial.

*Jackson* especially interferes with the court's interest in maintaining safety during first appearances where it is unknown how a defendant will act without restraints. *See* Br. of Respondent, App. B-2. Defendants are often arrested when still under the stress of a traumatizing event such as domestic violence, or when under the influence of controlled substances or alcohol, or during manic mental health episodes. Br. of Respondent, App. B-2. Requiring a hearing without any precautionary restraints in these appearances undercuts the court's discretion to maintain safety. Further, requiring a hearing and individualized inquiry for *every* single hearing for every defendant severely curtails courtroom efficiency.

The holding of *Jackson* conflicts with well-established law by extending the right to be free from restraint in jury trials and sentencings beyond traditionally recognized limits and unnecessarily interferes with a court's discretion to take safety precautionary measures in the courtroom. Therefore, the State requests the Court to accept review of this issue.

**2. The Court of Appeals, Division II, decision conflicts with the decision of the Court of Appeals, Division I, in *State v. Walker*, by expanding the *Walker* Court's holding by requiring the court to hold a hearing, make an individualized inquiry and findings on the record before using any restraints in all pretrial hearings.**

After recognizing that nearly all the cases in Washington and other jurisdictions have only addressed the right to be free from restraint in the context of a jury, the *Walker* Court pointed out that it was expressly invited to extend the right to *all pre-trial hearings* regardless of their nature. *Walker*, 185 Wn. App. at 795 ("Walker asks us to expressly extend the right to include appearances at all court proceedings, regardless of whether a jury is present.").

The *Walker* Court did not do so. Rather, the *Walker* Court, taking a far narrower approach, held that "regardless of the nature of the court proceeding or whether a jury is present, it is particularly within 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.

Thus, the *Walker* decision only reminds the court that although

"prison officials may be well positioned to assist the trial court in deciding matters of courtroom security," a trial court must exercise its discretion and may not delegate it to prison officials. *Id.* at 796–97. The *Walker* holding does not take away a court's discretion to consider and adopt a blanket restraint policy in non-jury or non-sentencing proceedings, or for first appearances for that matter.

The *Jackson* decision does not consider that the trial court, in Jan. 2017, had already exercised its discretion by adopting a blanket restraint policy for pretrial proceedings. *See Gallauher* Opinion.

The record demonstrates that the trial court held a consolidated hearing and considered the defense brief objecting to restraints and the State's response and motion to exercise discretion and adopt the jail policy for non-jury proceedings. Br. of Respondent, App. A, D. The State provided the trial court an affidavit by the jail superintendent explaining the rationale and development for the jail policy and the jail policy itself. Br. of Respondent, App. B. After hearing arguments and considering the above the trial court issued a memorandum opinion explaining its consideration and decision to adopt the jail policy until lesser restrictive measures could be put in place. *See Gallauher* Opinion. However, the *Jackson* Court's decision does not appear to consider the above to be an act of discretion by the trial court as required by *Walker*.

Rather, the *Jackson* Court cites to *Walker* and its more recent Division II decision in *Lundstrom* which also cites to *Walker*, to support its conclusion that the trial court abused its discretion because it did not hold a hearing, conduct an individualized inquiry, and make findings on the record in order to determine whether restraints would be justified in a first appearance. *See State v. Lundstrom*, 6 Wn. App.2d 388, 394, 429 P.3d 1116 (2018) (citing *Walker*, 185 Wn. App. at 800 (applying the rule requiring court discretion on the use of restraints in the context of a sentencing hearing)).

Courts do not all have the same resources to ensure courtroom security and they may have different layouts presenting unique security issues. *Jackson* has the effect of undercutting court discretion to adopt a blanket restraint policy in first appearances where precautions such as wrist restraints may be prudent. Courtroom safety is not guaranteed and defendants may still act out unpredictably despite an apparent lack of risk factors supporting the use of restraints.

Additionally, requiring a hearing, individualized inquiry, and findings for *every* appearance during the course of a defendant's case is similar to requiring a bail hearing at every appearance. This dramatically interferes with a court's ability to maintain efficient pre-trial dockets. *Jackson* also increases the burden on small jails with limited staff and

resources, which in itself, may further increase security risks.

The decision in *Jackson* conflicts with *State v. Walker* by extending *Walker* well beyond its more narrow holding which prohibits the court from delegating its discretion over courtroom security measures.

The State requests the Court to accept review of this issue.

**3. A significant question of law under the Constitution of the State of Washington and the United States is involved in the holding of *State v. Jackson*.**

"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." *Finch*, 137 Wn.2d at 842 (citations omitted) (emphasis added); *see also Deck*, 544 U.S. at 628, 629. "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 (citations omitted) (emphasis added).

As pointed out above, the right to be brought to trial or sentencing free from restraints without a showing of compelling circumstances has never been held to apply to pretrial hearings where prejudice to a fair trial is not at issue. This rule historically does not apply to non-jury and non-guilt phase proceedings and American courts have adhered closely to this doctrine. *See Deck*, 544 U.S. at 626–27 ("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 Court of Appeal's decision in *Jackson* relying upon its recent decision in *Lundstrom*, 6 Wn. App. 2d at 395, continues to extend the constitutional rights stated above to proceedings in which the risk of prejudice to the defendant's right to a fair trial are not at issue.

This is highlighted in part by Jackson's argument that the *Jackson* Court found the use of restraints in Jackson's first appearance was harmless error, not based upon the the harmless error test, but rather, based upon the proposition that "[t]here is a presumption that a trial judge properly discharged his/her official duties without bias or prejudice." *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

It is correct that this standard presumption is not the harmless error test. However, this underscores that the harmless error test has not been applied in the context of pretrial restraints because the right to appear in court free from restraint has not been applied to pretrial hearings. *See Walker*, 185 Wn. App. at 795 (citing Finch, 137 Wn.2d at 842–43 and cases cited therein); s*ee also Deck*, 544 U.S. at 626; *Duckett v. Godinez*, 67 F.3d 734 (9th Cir.1995); *Jones v. Meyer*, 899 F.2d 883 (9th Cir.1990); *Spain v. Rushen*, 883 F.2d 712 (9th Cir.1989).

The holding in *Jackson* involves a significant question of

constitutional law because the holding extends constitutional rights to a fair and impartial jury trial to all other pretrial hearings. Therefore, the State requests the Court to review this issue.

**4. The petition involves an issue of substantial public interest that should be determined by the Supreme Court.**

The holding in *Jackson* affects courtroom security practices across the State of Washington which, in unison with the policies and practices of jail facilities, were designed to promote safety and efficiency in accordance with constitutional norms. Each courtroom may have unique security issues generated by multiple factors including courtroom layout, location of exit routes, security and staffing resources, access routes to the jail or holding cells, the size of dockets, and the population that it serves.

Accordingly, a court should have discretion to adopt restraint policies and other security measures for non-jury proceedings in accordance with its own security needs as long as they are consistent with a defendant's constitutional rights to due process and a fair trial. Such policies are designed to protect all participants in the courtroom including the employees, practitioners, defendants, and the public at large.

The *Jackson* opinion does not allow a trial court to use its broad discretion in adopting a restraint policy for non-jury pretrial hearings. The State requests that this Court consider whether a court may exercise its

discretion and implement such security measures for non-jury pretrial hearings where prejudice to a defendant's constitutional rights are not at stake. Such a practice could prevent unnecessary risk to the public and courtroom employees or risk of flight. This would also allow the court to promote efficiency rather than requiring a hearing, individualized inquiry, and findings on the record at every pretrial court appearance.

This is an issue of substantial public interest that should be determined by the Supreme Court.

### B. THIS COURT SHOULD DENY REVIEW OF THE ISSUES PRESENTED BY THE PETITIONER.

#### 1. The *Jackson* Court properly applied the harmless error test and did not shift the burden to the defendant to prove prejudice.

Jackson argues that the *Jackson* Court did not apply the constitutional harmless error test correctly because it "insisted Mr. Jackson was required to show the restraint 'had a substantial or injurious effect on the jury's verdict.'" Br. of Petitioner at 12 (citing Slip Op. at 12).

The *Jackson* Court, rather than insisting that Jackson prove prejudice, stated "*the record must show* that the restraints 'had a substantial or injurious effect or influence on the jury's verdict.'" *Jackson*, 447 P.3d at 639–40 (citing *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)) (emphasis added).

"The test for harmless error is whether the state has overcome the

presumption of prejudice when a constitutional right of the defendant is violated when, *from an examination of the record*, it appears the error was harmless beyond a reasonable doubt, . . . ." *State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001) (citing *State v. Belmarez*, 101 Wn.2d 212, 216, 676 P.2d 492 (1984)) (emphasis added).

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

The *Jackson* Court properly applied the harmless error test utilized in cases where restraints are erroneously authorized at trial. Therefore this Court need not review this issue.

**2. This Court need not review whether restraint violations should be subject to the harmless error test because restraint violations are not per se prejudicial and Jackson has not shown otherwise that the test is incorrect and harmful.**

Jackson argues that this Court should revisit well established case law holding that restraint violations are subject to harmless error review. *See Hutchinson*, 135 Wn.2d at 888; *Clark*, 143 Wn.2d at 775 (citing *State v. Elmore*, 139 Wn.2d 250, 274, 985 P.2d 289 (1999) (citing *Finch*, 137 Wn.2d at 859–62)). Jackson suggests that structural error would be more appropriate.

"In order to effectuate the purposes of stare decisis, this court will

reject its prior holdings only upon 'a clear showing that an established rule is incorrect and harmful.'" *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

Jackson does not argue how the harmless error test is incorrect and harmful. Even cases cited in the concurring opinion show that although a court erred in authorizing restraints for various reasons, even after holding a hearing and exercising its discretion, the errors have not resulted in prejudice to the defendants' right to a fair trial or assistance of counsel. *See State v. Jackson*, 447 P.3d at 641–42 (Melnick, J., concurring).

"Shackling is not per se unconstitutionally prejudicial." *Rhoden*, 10 F.3d at 1459 (quoting *Illinois v. Allen*, 397 U.S. 337, 342–44, 90 S.Ct. 1057, 1060–61, 25 L.Ed.2d 353 (1970)). "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)).

Because prejudice does not automatically flow from wearing a restraint at trial, the harmless error test is not incorrect. Further, structural error would not be the appropriate remedy because it would severely chill a trial court's use of its broad discretion in determining security measures

in its courtrooms, and could thereby cause unnecessary risk of danger to court officials and the public and risk of flight during trial.

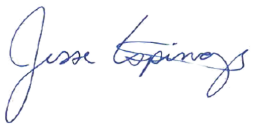
Therefore, this Court should decline to review whether unconstitutional restraint violations are subject to the harmless error test.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant limited review of the decision of the Court of Appeals to address whether due process prohibits the court, in its discretion, from adopting a blanket restraint policy in pretrial hearings and whether a hearing, individualized inquiry, and findings on the record are required before restraints may be used in all pretrial hearings.

Respectfully submitted this 21st day of October, 2019.

MARK B. NICHOLS
Prosecuting Attorney



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## CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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## Transmittal Information

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