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NO. 97681-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

JOHN JACKSON, SR.,

Petitioner/Cross-Respondent.

MR. JACKSON'S ANSWER TO AMICUS BRIEF
FILED BY WASHINGTON ASSOCIATION OF PROSECUTING
ATTORNEYS

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A. INTRODUCTION

The Washington Association of Prosecuting Attorneys (WAPA) asks this Court to hold that using chains, irons, or other devices to visibly restrain accused people during any non-jury proceeding without any individual justification is not only permissible, but should be encouraged to “enhance” safety. Its position rests on a misunderstanding of the law and requires judges turn a blind eye to the effects of shackling people during court hearings. The rule it seeks would exacerbate inequities and lead to a markedly unfair and mistrusted justice system.

B. ARGUMENT

1. Requiring an accused person to wear physical restraints during court hearings is antithetical to our system of justice and permissible only as a measure of last resort.

a. Shackling has never been deemed necessary or permissible as a matter of routine practice.

Shackling a person in court is allowed only “as a last resort.” *People v. Duran*, 16 Cal.3d 282, 290, 54 P.2d 1322 (Cal. 1976), quoting *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970). The reason it is a last resort is not solely because of its prejudicial effect on jurors, as WAPA contends, “but also because ‘the

use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.” *Duran*, 16 Cal.3d at 290. As one court explained when ruling physical restraints are forbidden at a preliminary hearing, “[r]espect for the dignity of the individual and the court are values to be preserved whether or not a jury is present.” *Solomon v. Superior Court*, 122 Cal. App. 3d 532, 536, 177 Cal. Rptr. 1, 3 (Ct. App. 1981).

Respecting individual dignity includes recognizing the harm caused by mandating a Native American man stand in court wearing chains that are symbols of slavery and chain gangs, even though no one claims he poses a threat in the courtroom. *See* Brief of Amici Curiae King County Department of Public Defense, *et al*, at 5-7 (detailing historic use of restraints in shackling slaves and oppressing Native Americans).

Shackles are demeaning, distracting, and may inflict pain as they restrict a person’s movements. Furthermore, using inflammatory, racially charged tools in a courtroom undermines the appearance of fairness that is a bedrock principle of the criminal justice system. *See State v. Walker*, 182 Wn.2d 463, 488, 491 n.4, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring) (finding imagery that implicitly

references racial stereotypes unacceptable in court); *State v. Monday*, 171 Wn.2d 667, 682, 257 P.3d 551 (2011) (Madsen, J., concurring) (calling prosecutor’s injection of race into case “so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint”).

“[J]udges, like laypersons, are similarly prone to implicit associations and implicit biases.” *State v. Jackson*, 10 Wn. App. 2d 136, 154, 447 P.3d 633 (2019), *rev. granted*, 194 Wn.2d 1016 (2020) (Melnick, J., concurring), citing Judge Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgments and What Judges Can Do About It, Enhancing Justice: Reducing Bias* 87 (Sarah E. Redfield ed., 2017). Implicit biases are subtle cognitive processes due to “implicit attitudes and implicit stereotypes [] that often operate at a level below conscious awareness and without intentional control.” *Walker*, 182 Wn.2d at 491 n.4 (Gordon McCloud, J., concurring), quoting Nat’l Ctr. for State Courts, *Helping Courts Address Implicit Bias: Frequently Asked Questions* (2015).

The blanket policy enforced against Mr. Jackson, requiring that all people held in custody must appear before the judge wearing chains on their hands, waist, and feet has overt and implicit repercussions for all participants in the criminal justice system. WAPA’s brief disregards this effect on the proceedings.

The rationales disfavoring shackles in court apply with more force today, as courts recognize the harmful effect of unconscious biases on decision-makers and the importance of ensuring the public perception of a fair justice system. *See State v. Berhe*, 193 Wn.2d 647, 663, 444 P.3d 1172 (2019). As this Court said in *Berhe*, “as our understanding and recognition of implicit bias evolves, our procedures for addressing it must evolve as well.” *Id.* Bringing people of color to court in chains without any individualized reason should be disallowed for many reasons, including the likelihood that it will trigger implicit racial bias influencing the fact-finder. *Id.*

b. WAPA’s arguments rest on a misapprehension of historical limits on shackling in court.

WAPA mistakenly contends that the common law shifted in 1722 to bar shackles only at trial, so that restraints have been routinely permitted at any other court hearing. WAPA Amicus at 3-4. The case it

cites, *State v. Temple*, 92 S.W. 869 (Mo. 1906), is inapposite. In *Temple*, the defendant was arraigned and tried in a single day. 92 S.W. at 870. The “shackling” occurred only in the afternoon, during the trial, when the defendant was transported to court in handcuffs. *Id.* These handcuffs were removed before the proceedings started, so the defendant was neither arraigned nor tried while in restraints. *Id.* at 871. Because the “shackles were removed from [Temple] as soon as he was brought within the bar of the court,” and the reason for these temporary restraints were the defendant’s two prior escapes while in custody, the court found no error. *Id.* at 871-72.

Contrary to WAPA’s portrayal of common law, the historical rule was that “at the time of arraignment,” the accused “ought not to be brought to the bar in a contumelious manner, as with his hands tied together . . . nor even with fetters on his feet” absent a specific danger. 2 William Hawkins, *PLEAS OF THE CROWN* 434 (8th ed. 1824). Physical restraints were a “mark of ignominy and reproach” at any court hearing. *Id.*

WAPA erroneously claims there has always been a bright line between trial and arraignment for purposes of shackling. *See United States v. Sanchez-Gomez*, 859 F.3d 649, 663 (9th Cir. 2017), *vacated on*

other grounds, 138 S. Ct. 1532 (2018). In fact, the rule was “the *opposite*: Shackles at arraignment and pretrial proceedings are acceptable only in situations of escape or danger.” *Id.* (emphasis in original), citing 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 371 (1769) (at an arraignment, the accused “must be brought to the bar without irons, or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons.”).

Common law recognized that restraints “skew perceptions of the defendant’s character.” Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L. Rev. 214, 224 (2015), citing Hawkins, *supra* at 434.

Absent an individualized necessity to employ chains, irons, or other physical restraints, including an on-the-record showing of no less restrictive alternative, such restraints unacceptably detract from the fairness of the proceedings.

c. WAPA also misrepresents shackling decisions from other jurisdictions.

WAPA’s brief claims it only found one case from another jurisdiction touching on pretrial shackling, and describes that court’s

opinion as holding no due process right is implicated by chaining a person in court. WAPA Amicus, at 6 n.1, citing *People v. Goldston*, 126 A.D.3d 1175 (N.Y. App. Div. 2015). However, in *Goldston*, the court actually ruled that “even if” the rules prohibiting shackling applied to a pretrial hearing, the trial court “did not blindly acquiesce” to the jail’s belief the defendant “was a ‘security risk’ but, rather, made its own independent assessment as to whether shackling defendant was required.” *Id.* at 1178.

Goldston also noted that the judge properly conducted an individualized assessment of the need for shackles, distinguishing another case about pretrial shacking, *People v. Ashline*, 124 A.D.3d 1258, 1259 (N.Y. App. Div. 2015). In *Ashline*, the court improperly restrained the defendant by refusing to remove handcuffs during a suppression hearing without finding “a particularized reason for restraining” the defendant “on the record.” 124 A.D.3d at 1259.

Contrary to WAPA’s depiction of case law in other jurisdictions, New York is one of several states that has clear rules prohibiting physical restraints at non-jury proceedings. *See People v. Best*, 19 N.Y.3d 739, 743-44, 979 N.E.2d 1187 (2012) (holding “routine and unexplained use of visible restraints . . . does violence” to legal

principles that are “essential pillars of a fair and civilized criminal justice system” that apply with or without a jury); *People v. Fierro*, 1 Cal. 4th 173, 821 P.2d 1302, 1321 (Cal. 1991) (holding “restrictions on the use of physical restraints at trial” also “apply at a preliminary hearing” and other proceedings); *People v. Allen*, 856 N.E.2d 349, 352-53 (Ill. 2006) (holding “reasons which prompt due process scrutiny in visible restraint cases—the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings” apply “with like force” when there is no jury or the device is under clothes).

The recent Court of Appeals decisions in *State v. Lundstrom*, 6 Wn. App. 2d 388, 395, 429 P.3d 1116 (2018), *rev. denied*, 193 Wn.2d 1007 (2019), *Jackson*, 10 Wn. App. 2d at 144-45, and *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (2015) accurately reflect long-standing views that shackling people in court may not be premised on a blanket rule or broad deference to a jail policy.

2. Unnecessarily shackling a person denies the fundamental fairness required by due process.

The “essentials of due process and fair treatment” apply throughout a criminal prosecution, not only at a jury trial. *Tiffany A. v. Superior Court*, 150 Cal. App. 4th 1344, 1361-62, 59 Cal. Rptr. 3d 363,

375 (Cal. App. Ct. 2007); *Kent v. United States*, 383 U.S. 541, 562, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) (explaining due process rights at hearing on court's jurisdiction).

An arraignment and other pretrial hearings are considered critical periods in a criminal case. *Powell v. Alabama*, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 2d 158 (1932). A critical stage of a criminal case is one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (internal citation omitted).

WAPA asserts that the presumption of innocence has no application in a pretrial hearing, quoting at length from *Bell v. Wolfish*, 441 U.S. 520, 533, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). WAPA Amicus at 9-10. Yet *Bell* was a class action suit complaining about jail conditions, and had nothing to do with courtroom conditions or pretrial hearings. Anytime the court deprives a person of liberty, the right to due process applies. *United States v. Salerno*, 481 U.S. 739, 746, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). For example, bail decisions implicate both substantive and procedural due process and require "a full-blown adversary hearing" with "a neutral decision-maker" and

adequate proof that “no conditions of release can reasonably assure the safety of the community.” *Id.*

While setting bail and other pretrial hearings do not dispose of the charges, they may shape the outcome of the case, impacting whether a person pleads guilty or the nature of the evidence the prosecution may present. *See, e.g.,* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 Ga. L. Rev. 235, 280 & n.15 (2018) (citing studies showing “pretrial detention places a high premium on quick plea bargains”). A trial is not the only occasion for which an accused person has the right to be judged fairly, without appearing unduly dangerous or untrustworthy as four-point restraints signal.

“Judicial susceptibility to implicitly considering irrelevant facts such as race has also been documented in a number of other contexts, such as bail determinations and sentencing.” Marouf, 67 Baylor L. Rev. at 274. Since considerations such as race or nationality affect bail decisions, it is reasonable to infer seeing a person of color wearing chains around the wrists, stomach, and feet further triggers implicit biases or stereotypes.

Many studies of judicial decision-making have found “implicit racial bias can influence legal decision-making at every single stage of

the criminal justice system,” and such biases influence a broad range of judicial decisions. Justin Levinson, et al, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63, 79, 113 (2017) (compiling studies).

WAPA’s contention that there are no due process rights at stake other than during a jury trial ignores the many critical stages of proceedings at which a judge’s decision will affect the outcome of the case. Consequently, during all court hearings the accused person should be treated fairly, with meaningful access to counsel and without fear of being deemed dangerous or untrustworthy due to the unnecessary imposition of braces, cuffs, or other physical restraints.

3. Courts ensure courtroom safety as well as fair proceedings by evaluating security needs on a case-by-case basis.

The parade of horrors WAPA concocts in its brief should be disregarded. If a court faces a security threat, it may address that threat on an individual basis. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P2d 694 (1981). But courts do not presume every accused person poses an immediate threat while in the courtroom, just as they do not presume every person who attends a court hearing is likely to be dangerous or disruptive. *Id.*

This rule is not new. *State v. Finch*, 137 Wn.2d 792, 873, 975 P.2d 967 (1999) (Talmadge, J., dissenting) (“trial courts should be well aware the *Hartzog* factors require an individualized assessment on the record of the necessity for restraint of a defendant in a courtroom proceeding”). Courts will not need to conduct a shackling hearing at every hearing for every person because there is no reason to chain and bind most people during their court hearings. Shackles are a measure of last resort and require the prosecution or jail to explain the specific reasons a person needs to be physically restrained while in court, as courts in this state have long required. *Id.*

Prohibiting the actual and symbolic harm inflicted by unnecessarily manacled an accused person during a court hearing serves the interest of justice, has long been the rule in this state, and should be properly enforced.

C. CONCLUSION

The Court of Appeals correctly construed the rules prohibiting blanket policies of shackling people accused of crimes solely because they are unable to post bail. This Court should reject WAPA's arguments seeking a broad rule endorsing the use of physical restraints pursuant to a general policy set by the jail. The particular harm of the court's shackling rules for Mr. Jackson, who posed no threat yet was bound and restrained at each court hearing, undermined the fairness of his trial and requires reversal.

DATED this 22nd day of May 2020.

Respectfully submitted,



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