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NO. 97681-3

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

JOHN JACKSON,

Petitioner/Cross-Respondent.

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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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STATE OF WASHINGTON'S ANSWER TO BRIEF OF AMICI  
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## I. INTRODUCTION

Amici Fred T. Korematsu Center for Law and Equality and Washington Assoc. of Criminal Defense Lawyers suggests that Washington Courts have erroneously applied a standard of review derived from Habeas Corpus Petitions to restraint violation cases on direct appeal. Amici assert that this standard is erroneous because it requires the defendant to establish that the erroneous use of restraints had a substantial or injurious effect or influence on the jury's verdict.

Amici, with a broad stroke, argue that the *Chapman* harmless error test is the correct test to be applied in all restraint violation cases as demonstrated by *Deck v. Missouri*. See 544 U.S. 622, 623, 125 S.Ct. 2007, 2009, 161 L.Ed.2d 953 (2005) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)) (“The State must prove “beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained.”). Amici also argue that a hearing must be held justifying the use of restraints in *all pretrial hearings*.

It is well established that a court must conduct a hearing on the record justifying the use of restraints prior to trial or sentencing. Failure to conduct such a hearing is an abuse of discretion and where the restraints are of a type that are *inherently prejudicial*, prejudice to a defendant’s right to a fair trial is presumed. Thus, the *Chapman* harmless error test applies when a defendant is brought to trial or sentencing in *visible* restraints without adequate justification. Accordingly, characterizing the *Deck* Court’s application of the *Chapman* test as a one-size-fits-all standard ignores the Court’s clear limitation of the heightened *Chapman* test to cases involving *visible* restraints.

Before and after *Chapman*, courts have consistently required a defendant to establish prejudice where restraints were only visible to jurors momentarily or inadvertently or not visible at all. Post *Deck* cases have followed suit pointing out that the *Deck* Court limited its holding to cases where restraints are visible.

Additionally, Washington Courts have been consistent with other numerous jurisdictions in requiring a defendant to prove prejudice from the use of restraints at trial where they were either not visible or were visible momentarily or inadvertently. Washington Courts have also correctly placed the burden on the State to prove harmless error when restraints or security measures were visible to a jury and used without adequate justification.

This Court should decline to apply the *Chapman* harmless error test in cases where the use of restraints is not presumptively prejudicial such as when they are not visible to a jury. Further, the use of restraints at pretrial hearings is not presumptively prejudicial to the right to a fair trial and therefore a hearing to justify restraints before every pretrial hearing is not constitutionally required.

## II. ARGUMENT

### A. BEFORE AND AFTER *CHAPMAN*, APPELLATE COURTS HAVE CONSISTENTLY REQUIRED AN APPELLANT TO SHOW PREJUDICE FROM THE USE OF RESTRAINTS THAT WERE EITHER NOT VISIBLE TO A JURY OR WERE ONLY VISIBLE MOMENTARILY OR INADVERTANTLY.

Prior to *Chapman* (1967), numerous jurisdictions have required an appellant to establish prejudice before a new trial could be granted in cases where restraints were not seen by a jury during trial or were seen only momentarily or inadvertently.

For instance, in *Gregory v. United States*, two jurors hearing the case saw the defendant in handcuffs as he was being transported from the jail to the courtroom. 365 F.2d 203, 205 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029, 87 S.Ct. 759, 17 L.Ed.2d 676 (1967). The *Gregory* Court, on appeal, cited to a long line of pre-*Chapman* cases from various jurisdictions that required the defendant to show prejudice before a new trial would be granted. *Id.* (citing *Blaine v. United States*, 136 F.2d 284 (D.C. Cir. 1943) (on direct appeal); *Odell v. Hudspeth*, 189 F.2d 300, 302 (10th Cir. 1951) (appeal from denial of Habeas Corpus Petition); *Cwach v. United States*, 212 F.2d 520, 527–528 (8th Cir. 1954) (on direct appeal); *McDonald v. United States*, 89 F.2d 128, 136 (8th Cir. 1937); *Hardin v. United States*, 324 F.2d 553, 554 (5th Cir. 1963) (on direct appeal); *Guffey v. United States*, 310 F.2d 753, 754 (10th Cir. 1962) (on direct appeal); *Glass v. United States*, 351 F.2d 678, 681 (10th Cir. 1965) (on direct appeal)).

As in *Gregory*, each of these cases involved restraints that were either not visible during trial or were seen only momentarily or inadvertently. For instance, in *Blaine v. United States*, on the second day of trial, in the presence of the jury, the defendant was brought into court manacled to the marshal. 136 F.2d 284, 285 (D.C. Cir. 1943). The restraints were removed immediately at the suggestion of the court clerk. *Id.* On appeal, the *Blaine* Court did not find the incident prejudicial and held that in order for a new trial to be granted, the error must have “seriously affected the fairness of the judicial proceeding.” *Id.*

In *Cwach v. United States*, the defendants were brought into the courtroom at the beginning of each session of trial in handcuffs which were removed in the

presence of the jury. 212 F.2d 520, 527–28 (8th Cir. 1954). On appeal, the *Cwach* Court applied the rule from *McDonald v. United States*, that “[a]bsent incontrovertible evidence of hurt, the trial court should be permitted to use such means, to secure the named ends, as the nature of the case, the known criminal record, character, associates in crime, and reputation of the accused shall reasonably call for, and such is the rule enunciated in the few cases existing which deal with the question, even when raised by one who had been himself handcuffed on his trial (citing cases).” *Id.* (quoting 89 F.2d 128, 136 (8th Cir. 1937)). The *Cwach* Court did not find prejudice and held the court’s decision was reasonable under the circumstances. *Cwach*, at 528.

In *Hardin v. United States*, the defendant moved for a mistrial on the basis that the defendant was seen in handcuffs by jurors in the elevator while being taken to and from the courtroom. 324 F.2d 553, 554 (5th Cir. 1963). The trial court took testimony on the issue and found that Hardin did not appear in court in handcuffs before the jury in the courtroom. The *Hardin* Court held: “There was no showing of prejudice and we do not think that it was error for the trial judge to deny the motion.” *Id.* (citing *Way v. United States*, 285 F.2d 253 (10 Cir. 1960); *Cwach v. United States*, 212 F.2d 520; *McDonald v. United States*, 89 F.2d 128, 136 (8th Cir. 1937); and *Blaine v. United States*, 136 F.2d 284 (D.C. Cir. 1943)).

In *Way v. United States*, the defendant moved to dismiss the jury panel because the defendant was brought into court handcuffed. 285 F.2d 253, 254 (10th Cir. 1960). On direct appeal, the *Way* Court found that the record

demonstrated that the handcuffs were removed promptly after the appellant entered the court. *Id.*

The *Way* Court held “[ ] that here is no indication that the occurrence was prejudicial. And in the absence of an indication of prejudicial consequences, such an occurrence does not warrant the granting of a new trial.” *Id.* (citing *Blaine v. United States*, 136 F.2d 284 (D.C. Cir. 1943)); *see also Glass v. United States*, 351 F.2d 678, 681 (10th Cir. 1965) (citing *Way* 285 F.2d 253).

#### Post *Chapman* Cases

After *Chapman* (1967) appellate courts have continued to follow the precedents established above when restraints were seen inadvertently or momentarily in and out of the courtroom by jurors. *See, e.g., United States v. Archie*, 656 F.2d 1253, 1258 (8th Cir. 1981) (citing *Gregory v. United States*, 365 F.2d 203 (8th Cir.), *cert. denied*, 385 U.S. 1029, 87 S.Ct. 759, 17 L.Ed.2d 676 (1967) (Defendant moved for mistrial after jurors saw defendant enter the courtroom through the door leading from U.S. Marshal lock-up accompanied by two marshals. Court held that defendant was not in handcuffs and the burden was on the appellant to show prejudice); *United States v. Leach*, 429 F.2d 956, 962–63 (8th Cir. 1970) (citing *Gregory v. United States*, 365 F.2d 203, 205 (8th Cir. 1966); *Hardin v. United States*, 324 F.2d 553, 554 (5th Cir. 1963) (In a case where defendants were seen in handcuffs by jurors outside the courtroom in hallway and moved for a mistrial, the *Leach* Court held: “No prejudice was shown and the court did not err in refusing to grant a mistrial.”); *United States v. Coppola*, 526 F.2d 764, 773 (10th Cir. 1975) (citing *Gregory v. United States*,

365 F.2d 203 (8th Cir. 1966); *Glass v. United States*, 351 F.2d 678 (10th Cir. 1965); *Way v. United States*, 285 F.2d 253 (10th Cir. 1960)) (On appeal, the *Coppola* Court held there was no showing of prejudice from jurors seeing defendant in hallway in manacles escorted by marshals).

In *State v. Medlock*, the defendant moved for a mistrial because he was handcuffed before the jury in order to leave the courtroom to attend to personal needs. 297 So.2d 190, 195 (La. 1974). On appeal, the Supreme Court of Louisiana held that the trial court's denial of a mistrial was not error absent a showing of prejudice. *Id.* (citing *State v. Tennant*, 262 La. 941, 265 So.2d 230 (1972) (citing *Gregory v. United States*, 365 F.2d 203 (8th Cir. 1966); *Hardin v. United States*, 324 F.2d 553 (5th Cir. 1963); *State v. Spencer*, 257 La. 672, 243 So.2d 793 (1971), *overruled on other grounds in State v. Holmes*, 347 So.2d 221, 223 (La. 1977))).

In *United States v. Diamond*, the defendant moved for a mistrial after a juror inadvertently saw the defendant in handcuffs during the course of the trial. 561 F.2d 557, 559 (4th Cir. 1977). The *Diamond* Court held, "we do not think that the district court was required to declare a mistrial because a juror inadvertently saw defendant Diamond in handcuffs during the course of the trial, since neither defendant has shown actual prejudice." *Id.* (citing *Wright v. State of Texas*, 533 F.2d 185, 187 (5 Cir. 1976); *United States v. Leach*, 429 F.2d 956, 962-63 (8 Cir. 1970), *cert. denied*, 402 U.S. 986, 91 S.Ct. 1675, 29 L.Ed.2d 151 (1971); *Gregory v. United States*, 365 F.2d 203, 205 (8 Cir. 1966), *cert. denied*, 385 U.S. 1029, 87 S.Ct. 759, 17 L.Ed.2d 676 (1967); *Way v. United States*, 285 F.2d 253, 254 (10

Cir. 1960); *See also Corley v. Cardwell*, 544 F.2d 349, 352 (9 Cir. 1977), *cert. denied* 429 U.S. 1048, 97 S.Ct. 757, 50 L.Ed.2d 763(1977)).

In *United States v. Chrzanowski*, the defendant moved for a mistrial on the basis that a juror may have briefly glimpsed the defendant being brought into the courtroom in handcuffs by a U.S. marshal. 502 F.2d 573, 576 (3rd Cir. 1974). On appeal, the *Chrzanowski* Court held: “The fact that jurors may briefly see a defendant in handcuffs is not so inherently prejudicial as to require a mistrial.” *Id.* (citing *United States v. Rickus*, 351 F.Supp. 1386 (E.D.Pa.1972), *aff’d*, 480 F.2d 919 (3d Cir. 1973); *United States v. Figueroa-Espinoza*, 454 F.2d 590 (9th Cir. 1972); *United States v. Hamilton*, 444 F.2d 81 (5th Cir. 1971); *United States v. Leach*, 429 F.2d 956 (8th Cir. 1970), *cert. denied*, 402 U.S. 986, 91 S.Ct. 1675, 29 L.Ed.2d 151 (1971)).

In *United States v. Williams*, the United States Court of Appeals, First Circuit, reviewed a case on appeal where the defendants moved for a mistrial on the basis that multiple jurors inadvertently saw them outside the courtroom during trial as the defendants exited the courtroom in custody of marshals that were in the process of handcuffing them. 809 F.2d 75, 83 (1st Cir. 1986). The *Williams* Court held as follows: “Appellant Blandin has not made the requisite showing of prejudice to justify our granting a new trial. . . . Our position is consistent with that taken by all circuit courts that have considered the question, and we decline to abandon it.” *Id.* at 83–84 (citations omitted).

Finally, in *United States v. Halliburton*, the Ninth Circuit Court of Appeals found that the appellant must prove actual prejudice where the use of

restraints was not inherently prejudicial. 870 F.2d 557, 560 (9th Cir. 1989). After examining case law from a number of circuit courts, the *Halliburton* Court held that the defendant failed to prove prejudice. *Id.* at 562.

**B. THE UNITED STATES SUPREME COURT IN *DECK* v. *MISSOURI* LIMITED APPLICATION OF THE *CHAPMAN* HARMLESS ERROR TEST TO CASES INVOLVING VISIBLE RESTRAINTS.**

In *Deck v. Missouri*, Carman Deck was charged for robbing and murdering an elderly couple. 544 U.S. 622, 624, 125 S.Ct. 2007, 2009, 161 L.Ed.2d 953 (2005). Deck was brought to trial and required to wear leg braces that were apparently not visible. *Id.* at 625. Deck was convicted and sentenced to death. *Id.* The sentence was reversed but not the conviction. *Id.* At re-sentencing, Deck was forced to wear leg irons, handcuffs, and a belly chain from the very first day and throughout the new penalty phase proceedings. *Id.* Deck was again sentenced to death. *Id.*

On appeal, Deck argued that the trial court abused its discretion by overruling his motion to appear free from restraint at his trial during the penalty phase. *State v. Deck*, 136 S.W.3d 481, 485 (Mo. 2004), *rev'd*, 544 U.S. 622 (2005). The Missouri State Supreme Court held that the trial court did not abuse its discretion. Further, the Court held that the error was harmless because, “Even assuming, *arguendo*, that the trial court did abuse its discretion in this instance, Appellant has not demonstrated that the outcome of his trial was prejudiced.” *Id.*

On review, the United States Supreme Court considered whether “as a general matter, the Constitution permits a State to use *visible* shackles routinely in

the guilt phase of a criminal trial.” *Id.* at 626 (emphasis added).<sup>1</sup> The *Deck* Court stated, “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.” *Id.* at 626 (emphasis added). The *Deck* Court concluded “that courts cannot routinely place defendants in shackles or other physical restraints *visible* to the jury during the penalty phase of a capital proceeding.” *Id.* at 633 (emphasis added).

Ultimately, the *Deck* Court held: “Thus, 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.” *Id.* at 635 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)) (emphasis added).

Therefore, the *Deck* Court made it very clear that it was not appropriate to require a defendant to establish prejudice from appearing in *visible* restraints without adequate justification. Under those circumstances, the *Chapman* test applies and shifts the burden to the State to prove the error was harmless.

**C. APPELLATE COURTS HAVE CONSISTENTLY RECOGNIZED THAT THE HOLDING OF *DECK v. MISSOURI* AND THE APPLICATION OF THE HARMLESS ERROR TEST IS LIMITED TO CASES WHERE RESTRAINTS WERE VISIBLE TO A JURY.**

In *Mendoza v. Berghuis*, the United States Court of Appeals, Sixth Circuit, pointed out precisely where the line was drawn in *Deck v. Missouri* in terms of

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<sup>1</sup> The fact that *Deck* was required to wear the leg brace at trial during the guilt phase was not at issue.

when the *Chapman* harmless error test should be applied. 544 F.3d 650, 654 (6th Cir. 2008).

“*Deck's* facts and holding . . . concerned only visible restraints at trial.” *Id.* (citing *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005)).

The Supreme Court was careful to repeat this limitation throughout its opinion. *See id.* at 630, 125 S.Ct. 2007 (“[v]isible shackling undermines the presumption of innocence”) (emphasis added); *id.* at 632, 125 S.Ct. 2007 (“[d]ue process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case”) (emphasis added); *id.* at 633, 125 S.Ct. 2007 (“courts cannot routinely place defendants in shackles or other physical restraints *visible to the jury* during the penalty phase of a capital proceeding”); *id.* at 635, 125 S.Ct. 2007 (“[w]here 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”) (emphasis added).

*Mendoza*, 544 F.3d at 654; *see also Earhart v. Konteh*, 589 F.3d 337, 348–49 (6th Cir. 2009) (quoting *Mendoza*, 544 F.3d at 654) (“Because the Supreme Court had stressed ‘at least six times’ the limitation of its holding to visible restraints, we held that *Deck* ‘concerned only *visible* restraints at trial.’”).

Considering the limitation of *Deck*, the *Mendoza* Court affirmed the denial of *Mendoza's* petition and found that the Michigan State courts were not objectively unreasonable by not applying *Deck* because the restraints used in *Mendoza's* case were not visible during his jury trial. *Mendoza* 544 F.3d at 654–55 (“Second, the facts here are not materially identical to those in *Deck*. Carson *Deck's* restraints were visible to the jury, whereas *Mendoza's* were not. That is a material difference.”).

In *Williams v. United States*, the Court of Appeals for the District of Columbia also highlighted the limitation of *Deck* in holding that the trial court did

not violate Williams' constitutional right to due process by failing to hold a hearing on the use of restraints prior to trial because the restraints were not visible. 52 A.3d 25, 33–35 (D.C. 2012).

In *Williams*, Myrone Williams appealed his convictions for threatening to injure a person and second-degree murder of his wife while armed and other firearm related crimes. *Id.* at 28. At trial, Williams' attorney objected to the use of leg restraints suggesting that the apron around the table, though hiding the shackles, would arouse the jury's suspicion. *Id.* at 32. The trial court noted that the apron was on the prosecutor's table as well, they matched the fabric on the seats in the courtroom and jury box, and were present so the restraints would not be visible to the jury. *Id.* at 32–33. The restraints were removed for the last day of the four day trial. *Id.* at 33.

Williams argued on appeal that “the trial court violated his constitutional right to due process by refusing to grant his request for removal of his leg shackles without a reasoned factual finding for doing so.” *Id.* at 32. Accordingly, the District of Columbia Court of Appeals considered whether the trial court violated Williams' constitutional right to due process. *Id.* at 33.

The *Williams* Court addressed the limitation of *Deck* pointing out that the Court held that “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.” *Id.* at 33 (quoting *Deck* at 629).

Considering that the restraints were not visible to the jury, the *Williams* Court held that Williams' claim failed. *Id.* at 34–35. “[E]ven if counsel's trial objection was sufficient to embrace all rationales that have informed the Supreme Court's ruling in *Deck*, and even if we ignore the substantial number of cases ruling that invisible restraints at trial are not limited by *Deck*, we cannot find harmful constitutional error.” *Id.* at 34 (citing *United States v. Wardell*, 591 F.3d 1279, 1294, 1297–98 (10th Cir. 2009); *Mendoza* 544 F.3d at 654; *United States v. Baker*, 432 F.3d 1189, 1245–46 (11th Cir.2005), *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)); *State v. Johnson*, 148 N.M. 50, 229 P.3d 523, 533 (2010)).

As mentioned in *Williams*, numerous jurisdictions have come to the same conclusion that *Deck*'s holding is limited to situations involving visible restraints. These jurisdictions include the Supreme Courts of Louisiana, Illinois, Connecticut, New Mexico, Colorado, California, Texas Court of Appeals, Missouri Court of Appeals, and the Federal Courts of Appeals for the 10th, 11th, and 6th Circuits as mentioned *supra*. See, e.g., *State v. Sparks*, 68 So.3d 435, 480 (La. 2011) (“It is clear from *Deck* the shackles must be visible to the jury in order for a Due Process concern to arise; the Court refers to “visible” restraints “seen” by the jury no less than four times in its opinion.”); *People v. Allen*, 856 N.E.2d 349, 352, 305 Ill.Dec. 544, 547, 222 Ill.2d 340, 346 (2006) (“Accordingly, *Deck* does not support the argument of amicus, as it does not even address concealed restraints.”); *State v. Brawley*, 137 A.3d 757, 763 n.3, 321 Conn. 583 (Conn. 2016) (“*Deck* makes clear that a heightened burden falls on the state when the

unwarranted restraints *are visible* to the jury, and not when, as in *Banegas*, the record is silent on the matter. Accordingly, we disagree with the conclusion that the court reached in *Banegas*. We further note that our understanding of the United States Supreme Court's holding in *Deck* is consistent with that of other federal and state courts that have examined the issue.” (disagreeing with *United States v. Banegas*, 600 F.3d 342 (5th Cir.2010)) (citations omitted); *State v. Johnson*, 148 N.M. 50, 59–60, 229 P.3d 523 (2010) (stating that, “In contrast [to *Deck*], where a defendant is restrained in a manner not visible to the jury, prejudice is not presumed”) (citing *United States v. Wardell*, 591 F.3d 1279, 1294 (10th Cir.2009)); *Hoang v. People*, 323 P.3d 780, 786, 2014 CO 27 (Colo. 2014) (“We agree with the majority of courts that *Deck's* heightened constitutional standard is applicable only when there is evidence that jurors observed the restraints or that they were plainly visible.”) (disagreeing with *United States v. Banegas*, 600 F.3d 342 (5th Cir.2010)); *People v. Letner*, 50 Cal.4th 99, 155, 235 P.3d 62, 112 Cal.Rptr.3d 746 (2010), *cert. denied*, 563 U.S. 939 (2011), and *cert. denied sub nom. Tobin v. California*, 563 U.S. 939 (2011) (*Deck* heightened standard applied where restraints were visible and did not require State to prove restraints were not visible beyond a reasonable doubt); *Bell v. State*, 356 S.W.3d 528, 537 (Tex. App. Texarkana, 2011) (concluding that “*Deck* is distinguishable from this case due to the fact that there is no evidence, in this case, that the restraints were perceived by the jury”); *State v. Snowden*, 285 S.W.3d 810, 814 (Mo. App. 2009) (quoting *Deck* at 629) (“*Deck*, however, states only that ‘the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to*

*the jury* absent a trial determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.”); *United States v. Wardell*, 591 F.3d 1279, 1294, 1297–98 (10th Cir. 2009) (citing *Deck*, 544 U.S. at 635) (“The standard for determining whether a district court abused its discretion—and, in the process, violated a defendant's constitutional rights—hinges on the nature and effect of the restraint. For instance, the Supreme Court has deemed *visible* shackling to be an inherently prejudicial practice) (emphasis in the original); *United States v. Baker*, 432 F.3d 1189, 1245–46 (11th Cir.2005), *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)) (citing *Deck*, 544 U.S. at 635) (“Unlike *Deck*, the shackles used here were not visible to the jury, and thus did not undermine the presumption of innocence in the jurors' minds such that they were ‘inherently prejudicial.’”); *Mendoza* 544 F.3d at 654 (cited *supra*); *But see United States v. Banegas*, 600 F.3d 342 (5th Cir.2010) (placing the burden on the State to prove beyond a reasonable doubt that restraints could not be seen by the jury when there is a question whether the restraints were visible) (disagreed with in *State v. Brawley* and *Hoang v. People*, cited *supra*).

The holding of *Deck* and application of the *Chapman* test is limited to visible restraint cases or where security measures were found to be inherently prejudicial as demonstrated by well-established law. Courts have thus consistently required a defendant to show prejudice from non-visible restraints before relief could be granted. Therefore, Amici’s suggestion that *Deck* requires that the *Chapman* test should apply to *all* restraint violations regardless of their nature

ignores the repeated limitation in *Deck* and contravenes the entire landscape of cases throughout the United States recognizing that *Deck*'s heightened standard applies only to cases where restraints are *visible*.

**D. WASHINGTON COURTS HAVE CORRECTLY APPLIED THE HARMLESS ERROR TEST TO VISIBLE RESTRAINT VIOLATIONS AND HAVE CONSISTENTLY REQUIRED AN APPELLANT TO SHOW PREJUDICE WHERE RESTRAINTS WERE EITHER NOT VISIBLE OR VISIBLE ONLY INADVERTANTLY OR MOMENTARILY.**

In *State v. Hutchinson*, the defendant was required at trial to wear a leg brace under his clothing and the defendant's other leg was chained to the floor under counsel's table which was skirted and no hand restraints were used. *State v. Hutchinson*, 135 Wn.2d 863, 869–70, 959 P.2d 1061 (1998). The court viewed the defendant from the jury box to make sure restraints were not visible and the State indicated that the restraints could not be seen. *Id.* at 870. The defendant was convicted of two counts of aggravated murder. *Id.* at 875.

The defendant sought reversal on the basis that his Sixth and Fourteenth Amendment rights to a fair trial were violated by the use of the restraints. *Id.* at 887. The *Hutchinson* Court found that the trial court did not adequately consider the need for restraints. *See Id.* at 888. However, noting that the record showed the restraints were not visible and the trial court insured that the restraints were not visible to the jury, the Court stated as follows: "In order to succeed on his claim, the Defendant must show the shackling had a substantial or injurious effect or influence on the jury's verdict. Because the jury never saw the Defendant in shackles, he cannot show prejudice." *Id.* (citing *Rhoden v. Rowland*, 10 F.3d 1457, 1459–60 (9th Cir.1993)). Ultimately, the *Hutchinson* Court held that the

error was harmless. *Id.* (citing *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir.), *cert. denied*, 522 U.S. 870, 118 S.Ct. 183, 139 L.Ed.2d 123 (1997) (holding on appeal that defendant failed to demonstrate prejudice where shackling was not visible to the jury).

The *Hutchinson* Court's holding is consistent with the many cases requiring to defendant to establish prejudice where restraints were not visible or were viewed inadvertently or momentarily.

For example, in *State v. Elmore*, the defendant appeared in restraints on the first day of the two week jury selection and never appeared in restraints again throughout his trial on the penalty phase. 139 Wn.2d 250, 274, 985 P.2d 289 (1999). The Court held that Elmore could not succeed on his claim because he failed to establish prejudice. *Id.* (citing *Hutchinson*, 135 Wn.2d at 887–88).

This is consistent with the many cases requiring the defendant to establish prejudice where restraints were viewed inadvertently or momentarily. *See supra*, sec. B. However, the converse is true as well. Where restraints were visible, the State must prove harmless error beyond a reasonable doubt as demonstrated by *State v. Finch*, 137 Wn.2d 792, 850–51, 975 P.2d 967 (1999).

In *State v. Finch*, “the Defendant was shackled during the entire course of his trial and special sentencing proceeding. He was further restrained during . . . testimony by having his right hand handcuffed to his chair and his shackles handcuffed to the table leg.” 137 Wn.2d at 850–51. The Court found that the trial court abused its discretion by requiring Finch to be restrained during the trial because there was no justifiable basis in the record. *Id.* at 852–53. The Court

found evidence in the record that the jury was aware of the leg restraints although it wasn't clear how visible they were. *Id.* at 857–58. The Court also found it revealing that the trial court record explicitly stated that “jury may well be able to see that there's some restraining going on ... I don't think there's any way of avoiding that.” *Id.* at 858. The Court also noted that “the trial court made no effort to conceal the handcuff and specifically noted that he was ‘concerned with arm restraints because it's tough to make them not visible.’” *Id.* at 859.

The *Finch* Court applied the harmless error test and did not require the defendant to prove prejudice. *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985)). The Court held that the error was harmless only because there was overwhelming evidence of guilt. *Id.*

In *State v. Jaquez*, the defendant was required to wear restraints during trial. 105 Wn. App. 699, 707–08, 20 P.3d 1035 (2001). The *Jaquez* Court assumed that the restraints were visible to the jury based upon defense counsel's reluctance to try to hide them so as to not look as if he was deceiving the jury and the State did not dispute the issue. *Id.* at n.6. The *Jaquez* Court found the trial court abused its discretion in deciding to have the defendant appear in restraints because it simply deferred to a general jail policy without making any findings specific to the defendant. *Jaquez*, 105 Wn. App. at 709–10 (citing *Finch*, 137 Wn.2d at 853).

The *Jaquez* Court, applied the harmless error test and reversed the conviction on the basis that the facts of the case did not present overwhelming evidence of guilt and therefore the error was not harmless. *Id.* at 712.

Finally, the Court in *State v. Damon* also applied the harmless error test placing the burden on the State to prove the error was harmless beyond a reasonable doubt. *State v. Damon*, 144 Wn.2d 686, 693, 25 P.3d 418 (2001) (citing *Finch*, 137 Wn.2d at 862; *State v. Guloy*, 104 Wn.2d at 425). In *Damon*, the Court found that the trial court abused its discretion in requiring the defendant to be seated in a restraint chair during trial relying solely on the concerns of a security officer and that the jury was aware of the restraints. *Id.* at 692–93. The Court held that the error was not harmless because the State failed to prove that there was overwhelming evidence of guilt as a jury was faced with competing credibility determinations of the State and defense witnesses and the defense presented a credible diminished capacity defense. *Id.* at 695.

The cases above demonstrate that the Court has been consistent in requiring the defendant to show prejudice from the use of restraints where their use is not inherently prejudicial because they only visible to a jury momentarily or inadvertently or were not visible at all. Additionally, where the use of restraints was inherently prejudicial because they were visible, the Court has found prejudice to be presumed and required the State to prove the error was harmless.

**E. HEARINGS WITH PARTICULARIZED FINDINGS TO JUSTIFY THE USE OF RESTRAINTS ARE NOT REQUIRED FOR ALL PRETRIAL HEARINGS WHERE THERE IS NO INHERENT PREJUDICE TO THE RIGHT TO A FAIR TRIAL.**

It is well established that a hearing with a record of the court's particularized findings justifying the use of security measures during trial is required when those security measures are *inherently prejudicial*. See *Finch*, 137 Wn.2d at 846 (citing *Estelle v. Williams*, 425 U.S. 501, 504, 96 S.Ct. 1691, 48

L.Ed.2d 126 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 1346, 89 L.Ed.2d 525 (1986)) (“[C]lose judicial scrutiny” is required to ensure that inherently prejudicial measures are necessary to further an essential state interest.”); *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.”); *State v. Hartzog*, 96 Wn.2d 383, 399, 401, 635 P.2d 694 (1981) (citing *United States v. Roustio*, 455 F.2d 366, 371 (7th Cir. 1972); and *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353 (1976)) (recognizing trial court is required to put its explanation for decision regarding shackles on the record and then adopting standards set forth in *Tolley* for the court to consider on the record when determining whether to employ restraints).

Accordingly, a trial court abuses its discretion and prejudice is presumed when it employs inherently prejudicial measures without adequate justification.

On the other hand, prejudice is not presumed when a security measure is not inherently prejudicial. *See, e.g., Wardell*, 591 F.3d at 1294 (Tenth Circuit refused to presume prejudice when a defendant was required to wear a stun belt that was not visible to the jury); *Baker*, 432 F.3d at 1246; *Johnson*, 148 N.M. at 59–60; *Halliburton*, 870 F.2d at 560; *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S.Ct. 1340, 1346, 89 L.Ed.2d 525 (1986).

As demonstrated throughout this brief, the use of restraints is not inherently prejudicial when they are not visible to a jury or only visible

momentarily or inadvertently. By extension, use of restraints during pretrial hearings, completely outside the trial atmosphere, are not inherently prejudicial to the right to a fair trial. Therefore, restraint hearings with particularized findings are not required prior to the use of restraints in every pretrial hearing.

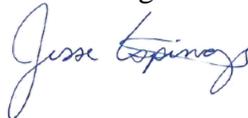
### III. CONCLUSION

Amici's argument that the harmless error test applies to all restraint violation cases ignores *Deck's* limitation of the test to cases where restraints are visible, i.e., where prejudice is inherent. This disregard for the nature of the restraint or other security measure fails to take into account the wealth of case law which distinguishes between measures that are inherently prejudicial and those that are not.

This distinction is also a key to recognizing when a court is required to conduct a hearing and make particularized findings justifying security measures. Momentary or inadvertent viewing of restraints in a *trial atmosphere* is not inherently prejudicial to a defendant's right to a fair trial. Therefore, the use of some form of restraint at routine pretrial hearings is generally not inherently prejudicial where the presumption of innocence is not at risk.

Respectfully Submitted May 22, 2020.

Respectfully submitted,  
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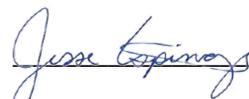
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ANSWER TO BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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