No. 56086-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent.

v.

PHILLIP JARVIS,

Appellant.

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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION, RONALD A. PETERSON LAW CLINIC, DISABILITY RIGHTS WASHINGTON, AND WASHINGTON DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI

The identity and interest of Amici are set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

II. INTRODUCTION

Imagine you are a Black man in a Pierce County courtroom facing life without parole under Washington's Persistent Offender Accountability Act and from the very first time you enter this courtroom, you do so confined in shackles—a present reminder of the historical and continued oppression of Black bodies in the United States. Your wrists are bound in handcuffs, attached to a leaden chain wrapped tightly around your waist and secured with a padlock, which connects to the ponderous leg irons locked around your ankles. Imagine that you are brought to court in this state five times before the Court determines these restraints are not necessary. Imagine again that even after this individualized determination has been made, you continue to appear in court in these same onerous restraints not

once, not twice, but nearly twenty different times in total. These shackles, similar to those forced upon Black slaves and Native Americans chain ganged during the Trail of Tears, restrain your body as you are sentenced to the harshest penalty existent in Washington State—life without the possibility of parole, a literal sentence to death in prison. When objected to and argued against, the Court tells you that although you should not have been restrained in such a way, from the moment of your arraignment through your sentencing, it is nothing more than harmless error.

This exercise demonstrates for readers, particularly those who do not identify as Black, the lived experience of Black people in Washington's criminal legal system. By placing the reader within that experience, identical to that which Mr. Jarvis underwent, one can begin to reckon with the inherent racial inequity present in our criminal legal system—a system that disproportionately affects Black, brown, and Indigenous communities in policing, prosecution, convictions, and sentencing.

The Washington Supreme Court has stated "unequivocally, that [our judiciary] owe[s] a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice."[1] "Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice." *Henderson v. Thompson*, No. 97672-4, 2022 WL 11469892, at *1 (Oct. 20, 2022).

Our Supreme Court "has taken judicial notice" that the criminal legal system is rife with "implicit and overt racial bias against [B]lack defendants," serving as a vehicle of "systemic control of persons of color," and has held that shackling inside the courtroom is a "means of control and oppression." *State v. Gregory*, 192 Wn.2d 1, 23, 427 P.3d 621 (2018); *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). Restraining

[1] Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty1(June4,2020); http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

individuals interferes with a criminal defendant's constitutional rights, including the presumption of innocence, the right to testify on one's own behalf, and the right to counsel. *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694, 701 (1981). As "the unknown risks of prejudice from implicit bias and how it may impair decision-making, coupled with the practical impossibility for a defendant to prove whether…the jury or judge was unconsciously prejudiced by the restraints at any point during the case," courts must conduct an individualized inquiry to ensure any shackling that occurs in the courtroom is necessary and required for safety and the orderly administration of justice. *Jackson*, 195 Wn.2d at 856, 467 P.3d at 104. In the face of this clear mandate, courts still—and often—defer to corrections policies and practices in determining who will be shackled in the courtroom, in direct contention with the individualized determination required under state law. When Washington courts leave the protection of an individual's constitutional right to face a tribunal and assist in their defense without shackles, the courts

must be admonished, in the strongest possible terms. That is because failure to follow this clear directive results in presumptive prejudice on an individual's ability to fully defend against criminal charges and violates the constitutional rights of individuals, like Mr. Jarvis.

III. STATEMENT OF THE CASE

Amicus adopts Petitioner Jarvis' statement of the case.

IV. ARGUMENT

A. Shackling Has Long Been a Form of Oppression in America, Used as a Tool of Control and Punishment Against Black Communities.

1. The Trans-Atlantic Slave Trade

The slave shackle was one of the fundamental tools of oppression, control, and punishment during the Trans-Atlantic slave trade, the largest enforced movement of humanity ever recorded, in which European enslavers kidnapped more than 12.5 million Black Africans from the continent of Africa, forcibly transported them to North and South America, and economically exploited them. Hugh Thomas, *The Slave Trade*: *The Story of the*

Atlantic Slave Trade: 1440-1870 (1997). The brutality experienced by Blacks, at the hands o" their captors, cannot be overstated. The economic incentives for enslavers to engage in the trade of Black people promoted an atmosphere of lawlessness and violence. *Id.*

From the moment of capture, enslaved Africans were subjected to horrific and inhumane experiences, chained in slave trains by iron shackles that restrained their ankles and wrists binding them "together in pairs, left leg to right leg, left wrist to right wrist," and forced to march to the coast, a journey that could be as many as 300 miles, where the slave ships waited to deracinate them. Patricia M. Muhammad, *The Trans-Atlantic Slave Trade*: *A Forgotten Crime Against Humanity as Defined by International Law*, 19 Am. U. Int'l L. Rev. 883, 892 (2004) (citing James A. Rawley, *The Transatlantic Slave Trade*, at 298 (1981)).

Driven by colonialism and greed, European slavers over-crowded slave ships in the interest of profit, as the more slaves on a ship allowed for more money to be made. Marcus Rediker, *The Slave Ship: A Human History* (2007). In doing so, the conditions that were created on these slave ships were horrific and inhumane, the history of which is well documented. *Id.* African slaves were typically chained together for the duration of the six-to-ten-week passage by "manacles and shackles, neck irons, [and] chains of various kinds," "the hardware of bondage." *Id.* at 72. The experiences of Africans forcibly removed from their homeland and transported to the Americas "was invariably harsh and captors inflicted brutalities on slaves such as whipping, beating, shackling, dismemberment, and mutilation." Junius Rodrigues, *The Historical Encyclopedia of World Slavery, Vol 1.*, at 99 (1997). Once this horrifying traumatic journey was completed and the enslaved Africans reached the United States, they were continually subjected to the use of shackles, whips, and handcuffs as tools of their continued enslavement. Tessa M.

Gorman, *Back on the Chain Gang*: *Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 Cal. L. Rev. 441, 444-447 (1997).

2. Chain Gangs

The spectacle of Black prisoners in chains, indelibly linked to images of slavery, serve as a powerful reminder of the heritage of racial oppression in America, bringing to mind slave auctions that were commonplace in the American South where Black families, chained by leg irons and iron collars, were sold and transported to plantations across the region. Once slavery was abolished following the Civil War, Jim Crow laws were passed in southern states to hinder migration and control freed Blacks.[2]

[2] "Jim Crow" is the colloquial term for forms of systematic discrimination employed by whites against African Americans from the second half of the nineteenth century through the first half of the twentieth. The expression insinuates the legal components of the color line (e.g., Jim Crow laws), but also encompasses the cultural and symbolic conventions of hierarchical race relations. *See* Michael J. Klarman, *From Jim*

"Even though slavery was officially over after the Civil War, mechanisms to control [B]lacks remained. Blacks [convicted of Jim Crow laws] were either forced into labor contracts or compelled to enter the convict labor system"- which included the prison farm and the road chain gang, the latter of which was vilified as "the last surviving vestige of the slave system." Gorman at 448; Mitchel P. Roth, *Prisons and Prison Systems: A Global Encyclopedia*, at 57 (2006). To a southern Black prisoner, there was little difference between their experience as a slave on the plantation and as a chained prison worker on the roads, having only been transformed from the plantation owner's chattel into a slave of the state. Dennis Childs, *Slaves of the State: Black Incarceration from the Chain Gang to the Penitentiary* (2015).

As the state now shifted to become the master responsible for the growing pool of forced Black labor, the chain gang had

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Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004).

much of the same characteristics as the legacy of slavery. Black prisoners were bound to one another, at all times, by iron chains fastened around their ankles and waists, the emblem of continued degradation and humiliation. The brutal atrocities suffered by Black people throughout the time of slavery remained as part of the corporal punishment doled out on chain gangs by white southerners. This torture included beatings and whippings with leather straps, staking treatments, which involved chaining inmates between stakes and pouring molasses over their bodies while bees, flies, and other insects attacked their flesh, sweat box treatments, during which prisoners would be locked, for days, in wooden boxes that were neither high enough to stand nor deep enough to sit, and the notorious Georgia rack, in which prisoners' bodies were stretched between two hooks, using a cable and turn crank. *Id.* The practice of chain gangs, embedded into the cultural history of oppression of Black people in the United States, remains to this day. Gorman at 452-56.

B. Shackling Has Long Been a Form of Oppression in America, Used as a Tool of Control and Punishment Against Indigenous Communities.

As explained above, the history of the use of shackling is inextricable from the history of enslavement. While the genocidal policies of European colonizers have been robustly documented, the enslavement of Native Americans in the United States is less widely known. Across the United States, the system of slavery relied on legal mechanisms to exact its violence. In states like California and New Mexico, laws existed that made it "legal" for white people to own Native Americans. ACLU of Northern California, *Gold Chains: The Hidden History of Slavery in California*, https://www.aclunc.org/sites/goldchains/resources.html ("Act for the Government and Protection of Indians"); *see also* John Burnett, *Descendants Of Native American Slaves In New Mexico Emerge From Obscurity*, NPR (Dec. 29, 2016), https://www.npr.org/2016/12/29/505271148/descendants-of-native-american-slaves-in-new-mexico-emerge-from-obscurity.

(discussing cultural celebrations in the modern *genizaros* community, descendants of formerly captive "Indian" slaves in New Mexico). One scholar has explained the enormity of these atrocities in concise, artless terms: "Between 1492 and 1880, between 2 and 5.5 million Native Americans were enslaved in the Americas in addition to 12.5 million African slaves." Brown University, *Colonial enslavement of Native Americans included those who surrendered too*, News from Brown (Feb. 15, 2017), https://www.brown.edu/news/2017-02-15/enslavement (describing a study conducted by Linford D. Fisher). As was common practice throughout the period of slavery, "stocks, shackles and hobbles were also applied to [Native Americans] accused of neglect of work or religious duties, . . . thefts and quarreling." Hubert H. Bancroft, *History of California*, Vol. 1, 588-596 (1886).

The use of shackles and chain gangs were also a staple during the time following the enactment of the Indian Removal Act, effected in 1830 by then-President Andrew Jackson. This

Act gave the federal government the power to exchange Native-held land in the cotton kingdom east of the Mississippi River for land to the west, in the "Indian colonization zone," located in present-day Oklahoma. David S. Heidler & Jeanne T. Heidler, *Indian Removal* (2007). As a direct result, from 1830 to 1840, the United States Army forcibly removed approximately 60,000 Native Americans from their ancestral homeland, bound in chains, incarcerated in stockades, and marched double file, forced to walk more than a thousand miles on what is now known as the Trail of Tears.[3] *Id.* These enslavement practices permanently disrupted the "lives, livelihoods and kinship networks of thousands of [Native Americans]." Brown University, *supra*.

[3] *See* Gary Lee, *A Personal Journey: Following the Trail of Tears*, Sept. 5, 1999, Los Angeles Times, https://www.latimes.com/archives/la-xpm-1999-sep-05-tr-6965-story.html (describing a July 1837 newspaper photo "featur[ing] several hundred Creek warriors shackled at the feet and chained hand to hand, being prodded by bayonet-wielding soldiers down a street in Montgomery").

Key to the system of oppression survived by Native Americans during and after colonization of the continent were the boarding schools erected to force Indigenous children to assimilate. Ann Piccard, *Death by Boarding School: The Last Acceptable Racism and the United States' Genocide of Native Americans*, 49 Gonz. L. Rev. 137, 151-3, 155-7 (2013); s*ee also* Craig Steven Wilder, *Ebony and Ivy: Race, Slavery, and the Troubled History of America's Universities* (2003). Native American leaders have described the violence of the assimilation schools in uncompromising terms: "Indian children were forcibly abducted by government agents, sent to schools hundreds of miles away, and beaten, starved, or otherwise abused when they spoke their native languages." The National Native American Boarding School Healing Coalition, *US Indian Boarding School History*, https://boardingschoolhealing.org/education/us-indian-boarding-school-history/ (providing historical context for the creation of boarding schools and describing the impact on

Indigenous people); s*ee also* The National Native American Boarding School Healing Coalition, *Healing Voices Volume 1: A Primer on American Indian and Alaska Native Boarding Schools in the U.S.*, Newsletter (June 2020) https://boardingschoolhealing.org/wp-content/uploads/2021/09/NABS-Newsletter-2020-7-1-spreads.pdf (a report that outlines a timeline for the history of boarding schools and includes an image of the handcuffs used to restrain Indigenous children in the schools).

Shackling and restraints were used against the abducted children at the boarding schools. In 2013, the Haskell Indian Institute, a former boarding school turned cultural museum, revealed a set of tiny handcuffs that had been used to shackle Native American children as they were transported to the government-run school. Mary Annette Pember, *Tiny Horrors: A Chilling Reminder of How Cruel Assimilation Was—and Is*, Indian Country Today (updated Sept. 13, 2018), https://indiancountrytoday.com/archive/tiny-horrors-a-chilling-

reminder-of-how-cruel-assimilation-wasand-is (recounting the story of the tiny handcuffs and what is known about their use); s*ee also* Rebecca Onion, *The Sad History of the Kid-Sized Handcuffs*, Slate (Jan. 11, 2013), https://slate.com/human-interest/2013/01/small-handcuffs-the-artifact-was-used-to-bring-native-american-children-to-boarding-school.html.

The legacy of the oppression of Native Americans through enslavement, forced assimilation, and ultimately genocide, remains with us today, and has shaped our reliance on the criminal legal system. Nicolas Runnels, *Native Americans and the New Jim Crow*, 15 Colum. Undergraduate L. Rev (2018).

C. The Use of Shackles in Criminal Proceedings Has Damaging Psychological Effects on Defendants of Color.

How the justice system treats defendants in the public setting of a courtroom matters, not only for public perception, but also for the defendant. *United States v. Sanchez-Gomez*, 859 F.3d 649, 665 (9th Cir. 2017) (Ikulta, J., dissenting), vacated on other grounds, 138 S. Ct. 1532 (2018). The "psychological

impact on the defendant of being continually restrained at the order of the individual who will ultimately determine his or her guilt should not be overlooked." *People v. Best*, 19 N.Y.3d 739, 744, 979 N.E.2d 1187, 1189, 955 N.Y.S.2d 860, 862 (2012). While public perception is critical to maintain faith in the criminal legal system, it is also crucial to recognize and appreciate the defendant's perception of the distinctively painful process in which they are involved. These damaging psychological effects may force Black, brown, and Indigenous defendants to relive traumatic practices endured by their ancestors or may increase their likelihood of reoffending.[4]

Given the racial disparities in the criminal legal system, the parallels between slavery and shackling are closely drawn and startling.[5] In 2017, throughout Washington State, Black

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[4] *See* Patricia Puritz, *Shackling Juvenile Offenders Can Do Permanent Damage to Our Kids*, Wash. Post (Nov. 13, 2014), https://perma.cc/CKG2-ANVA.

[5] *See generally* The Sentencing Project, *Report to The United Nations on Racial Disparities in The U.S. Criminal Justice System* (2018), https://perma.cc/KUR9-JFQ7.

people were incarcerated at 4.4 times the rate of white people, and Native American people were incarcerated at 3.6 times the rate of white people.[6] The detrimental effects of shackling practices are not limited to adult defendants either, with children who have been put in shackles for criminal proceedings reporting feeling "like a slave, an animal or a criminal."[7] As a result of the painful racialized history of this practice, defendants of color are arguably more impacted, psychologically and emotionally, by the effects of shackling than white defendants.

As our Supreme Court recently acknowledged, our judiciary's "commitment to substantial justice rings hollow if [it] fail[s] to recognize that racial bias often interferes with achieving justice in our courts." *Henderson*, No. 97672-4, 2022 WL

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[6] Vera Institute of Justice, *Incarceration Trends in Washington* (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-washington.pdf#:~:text=In%20Washington%2C%20Black%20people%20constituted%205%25%20of%20state,number%20of%20women%20in%20prison%20has%20increased%20810%25.

[7] Puritz, *supra* note 4.

11469892, at *5 (Oct. 20, 2022). Recognizing the large and disproportionate number of Black, brown, and Indigenous individuals navigating the criminal legal system, it is essential that courts are more acutely aware of the trauma that is inflicted upon these individuals by the use of shackles. Defendants having to face a single individual who will ultimately decide their legal outcome is already stressful and traumatic. Adding shackles to that experience can cause people to disassociate with the proceedings, ultimately limiting a defendant's ability to actively participate in his or her own trial.[8]

A plethora of recent decisions emphasize how shackles impede defendants' abilities to communicate with their attorneys and actively participate in their own defenses; no defendant can meaningfully participate when forced to mentally disassociate from his or her own trial because of the trauma shackling has

[8] Vicki Ortiz, *Youth Advocates Seek to Limit Use of Shackles for Juveniles in Court*, Chi. Trib. (Aug. 1, 2016) (quoting Era Laudermilk, deputy director for the Illinois Justice Project), https://perma.cc/3ATN-TYLN.

caused.[9] This trauma is only further compounded by the circumstances of the present case, in which Mr. Jarvis faced a third strike offense, one that could, and did, lead to an effective death sentence. Although much of the empirical research pertaining to the psychological effects of shackling pertain to children, it is clear that other vulnerable individuals from marginalized communities may be equally susceptible to this demeaning practice.

D. Judges Are as Susceptible to Implicit Bias as Jurors.

"[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder." *Best*, 19 N.Y.3d at 744, 979 N.E.2d at 1189. Our Supreme Court has previously acknowledged how implicit bias impacts the administration of justice. *See Gregory*, 192 Wn.2d at 22–23 (acknowledging implicit and overt racial bias against Black capital defendants in Washington State); *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326, 335 (2013)

[9] *Id.*

(plurality opinion) (racism lives "beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus"). Although there is no evidence in the record indicating Mr. Jarvis was shackled during his trial, he was shackled when appearing before the judge at his initial bail hearing, multiple subsequent pretrial hearings, and his sentencing hearing.

As empirical evidence has consistently demonstrated that judges are not immune from implicit bias, it is implausible that judges would be unaffected by seeing a defendant, specifically a Black male defendant, restrained in shackles. Pretending that judges are able to be perfectly impartial regardless of the defendant's appearance benefits no one and consistently injures defendants, particularly defendants of color.

Empirical evidence shows that judges are as susceptible to implicit bias as jurors. Judges are often unsuccessful when tasked with "ignoring information they have been told to disregard,"

and, in fact, judges often "make decisions based on factors other than those that they believe influence their decisions."[10] A study, testing whether judges were capable of ignoring inadmissible evidence, found that judges struggled to disregard inadmissible evidence when making factual determinations.[11]

Research further shows that "race, perceived attractiveness, affability," and a defendant's nervous behavior can affect outcomes such as conviction rates and sentencing lengths.[12] These subconscious judgments can be made in a

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[10] Brian H. Bornstein, Judges vs. Juries, Court Review: The Journal of the American Judges Assn., Vol. 43, Iss. 2, 43 Ct. Rev. 56, 58 (2006), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1214&context=ajacourtreview.

[11] Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1324 (2005). *See also* Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L. Rev. 214, 225–30, 273-75 (2015) (reviewing studies indicating that judges are susceptible to implicit consideration of irrelevant facts and inadmissible evidence when making decisions).

[12] Jill Suttie, *How Bias Warps Criminal Justice*, Greater Good Mag. (Sept. 22,2015), https://greatergood.berkeley.edu/article/item/how_bias_warps_criminal_justice [https://perma.cc/ W9SG-Z96H].

number of ways, one of which is the identification of an "out-group."[13] Out-groups are comprised of individuals who do not "share our particular qualities," and can be based on attributes such as race, birthplace, or age, but can also entail more arbitrary qualities such as the sports teams we support.[14] Quite similar to the difficulty judges have ignoring inadmissible information and evidence, there may also exist an inability to ignore the shackles worn by a defendant appearing before them, attributable to negativity bias, which may implicitly adversely affect the rulings made by that judge and directly impact the fairness of the criminal process.[15]

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[13] Gregory S. Parks & Andre M. Davis, *Confronting Implicit Bias: An Imperative for Judges in Capital Prosecutions*, 42 Hum. Rts. 22, 22–23 (2016).

[14] Susan Krauss Whitbourne, *In-groups, Out-groups, and the Psychology of Crowds*, Psychol. Today (Dec. 7, 2010), https://perma.cc/U5VP-WNPQ.

[15] Negativity bias is the theory that "[a]dults spend more time looking at negative than at positive stimuli, perceive negative stimuli to be more complex than positive ones, and form more complex cognitive representations of negative than of positive stimuli." Amrisha Vaish et al., *Not All Emotions Are Created Equal: The Negativity Bias in Social-Emotional Development*,

"Social scientific literature [shows] that [B]lacks . . . are implicitly perceived as a threat and hostile[.]"[16] Given that "75-90 percent of whites, 65 percent of Asian and Latino Americans, and 35-60 percent of [B]lacks harbor automatic, implicit negative judgments of [B]lacks and positive ones of whites[,]" it is not difficult to see how a white judge may automatically consider a Black defendant as a member of an out-group.[17] By placing a Black individual, someone who is already statistically more likely to be perceived as a member of an out-group in shackles, and inherently making them appear as a dangerous criminal, only stands to reaffirm that belief and undermines that person's constitutional right to a fair trial.

Regardless of the role played in a trial and courtroom setting, "we are all remarkably bad at understanding what

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Psychol. Bulletin, Vol. 134, 383-403 (2008), shorturl.at/bOVW3.

[16] Parks & Davis, *supra* note 13, at 23.

[17] *Id.*

influences us when we make decisions."[18] While jurors and judges are extraordinarily similar in terms of implicit bias, there is one major distinction worth noting: jurors are much more likely to recognize and correct each other's biases than a judge who is completely unaware of his or her own biases and errors.[19]

As the practice of shackling has been consistently determined to be prejudicial in jury trials, where jurors are more likely to call attention to each other's biases, imagine how much more damaging the practice of shackling becomes when a judge's implicit bias in the related proceedings, such as bail, pretrial, and sentencing hearings, remains unchecked. By allowing a judge's implicit bias to potentially affect the outcomes of defendants who appear before them, the constitutional

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[18] Leslie Ellis, *Are Juries Really Such a Wildcard with Judges?*, A.B.A. (July 16, 2015) (citing Amos Tversky et al., *Judgment under Certainty: Heuristics and Biases*, Science, Vol. 185, 1124-1131 (1974); Ruud Custers et al., *The Unconscious Will: How the Pursuit of Goals Operates Outside of Conscious Awareness*, Science, Vol. 329, 47-50 (2010)), https://perma.cc/2WTV-EY6K.

[19] *Id.*

guarantee of innocent until proven guilty is undoubtedly offended.

E. This Court Should Provide a Strong Deterrent Remedy When a Defendant Has Been Shackled Without an Individualized Determination.

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Washington State Constitution entitle a defendant to appear at trial and at pretrial proceedings without shackles or other restraints, absent extraordinary circumstances. *Jackson*, 195 Wn.2d at 852.

As early as 1897, the Washington Supreme Court has acknowledged that the Washington State Constitution gives a defendant "the right to appear and defend in person" and that this right includes "the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty." *State v. Williams*, 18 Wash. 47, 49, 50 P. 580, 582 (1897). Although restraints

implicate important constitutional rights, the right to be free from restraint is not absolute, and trial court judges are vested with the discretion to determine measures that implicate courtroom security, including whether to restrain a defendant in some capacity in order to prevent injury. *Hartzog*, 96 Wn.2d at 396, 400.

There are several factors that must be addressed in determining whether a defendant needs to be shackled, including: "[t]he seriousness of the present charge against the defendant; defendant's temperament and character; [their] age and physical attributes; [their] past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies." *State v. Hutchinson*, 135 Wn.2d 863, 887-

88, 959 P.2d 1061, 1073-1074 (1998) (quoting *Hartzog*, 96 Wn.2d at 400). In the present case, the trial court conducted such an individualized determination and Mr. Jarvis was found to not require shackles. However, Mr. Jarvis remained shackled throughout the pendency of his case, even though it was in direct conflict with the individualized determination.

A trial court abuses its discretion when its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Jackson*, 195 Wn.2d at 850 (quoting *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499, 504 (2001)). Analogous to the circumstances in *State v. Lundstrom*, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018), in which the defendant challenged the use of a Clallam County Sheriff Office's blanket shackling policy, the trial court in the present case relied upon the Pierce County Jail's blanket policy requiring the shackling of prisoners facing third-strike offenses at their court proceedings. This effective abdication of the trial court's obligation to protect the constitutional rights of defendants

before it because of a blanket shackling policy implemented by a corrections facility, in direct conflict with the law and the court's individualized determination requirement, should unequivocally constitute "an abuse of discretion and constitutional error under *Hartzog*'s prohibition of general policies of shackling defendants." *Jackson*, 195 Wn.2d at 854, (*citing Lundstrom* at 395, 429 P.3d 1116).

The trial court's failure to exercise discretion, a constitutional error, is subject to a harmless error analysis, the test for which 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, 1028 (2001) (citing *State v. Belmarez*, 101 Wn.2d 212, 216, 676 P.2d 492, 494 (1984)). The State cannot meet its burden in this regard. It cannot prove that Mr. Jarvis was not prejudiced by the shackles he was forced to wear throughout his case proceedings, in violation of

his constitutional rights. This Court is aware of "the unknown risks of prejudice from implicit bias and how it may impair decision-making." *Jackson*, 195 Wn.2d at 856. Once the decision-maker, juror or jurist, sees the defendant restrained in shackles, implicit bias is established. That pervasive bias subsequently affects how evidence is viewed and the decisions rendered. Due to this, the presumption of prejudice must be applied, and a strong deterrent remedy imposed to ensure the State carries its burden of demonstrating that convictions are free from impermissible bias beyond a reasonable doubt. Doing otherwise would leave significantly injurious constitutional violations unremedied.

V. CONCLUSION

As set out in *Deck*, the practice of shackling offends the three fundamental legal principles that are so critical to our criminal legal system.[20] First, the practice of shackling

[20] *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

defendants like dangerous animals chips away at the crucial foundation of our criminal legal system. Second, in addition to the physical barriers shackles present between a defendant and their legal representation, the psychological and emotional trauma shackles inflict upon a defendant may prevent adequate communication and participation in the trial. Lastly, shackling a defendant before a sole factfinder offends the concept of innocent until proven guilty by allowing an opportunity for unchecked judicial bias to influence a defendant's outcome.[21] To ensure that a defendant's constitutional rights are appropriately and adequately protected throughout the pendency of their case, this Court should adopt a strong deterrent remedy when those inalienable rights are violated. For the foregoing reasons, the Court should reverse and remand.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP

[21] *Best*, *supra*, at 743-744.

18.17(b), this brief contains 4,416 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 5,000 words for amicus briefs as required by RAP 18.17(c)(6).

DATED this 5th day of December, 2022.

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***** *The ACLU would like to acknowledge intern Sagiv Galai for his work and contribution to this motion and amicus brief.*

CERTIFICATE OF SERVICE

I certify that on the 5th day of December, 2022, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts Secure Portal.

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