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Randall Hepp v. Danny Wilber

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 20-2614 & 20-2703

DANNY WILBER,
Petitioner-Appellee,
Cross-Appellant,
v.

RANDALL HEPP, Warden,
Respondent-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Wisconsin.
No. 1:10-cv-00179-WCG — **William C. Griesbach**, *Judge*.

ARGUED FEBRUARY 10, 2021 — DECIDED OCTOBER 29, 2021

Before MANION, KANNE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. A jury convicted Danny Wilber of murder in Wisconsin state court, and he was sentenced to a life term in prison. After unsuccessfully challenging his conviction in state court, Wilber sought relief in federal court pursuant to 28 U.S.C. § 2554, arguing among other things that he was deprived of his right to due process under the Fourteenth [1] Amendment when he was visibly shackled before the jury during closing arguments. The district court issued a writ of habeas corpus on that claim, concluding that the Wisconsin Court of Appeals decision sustaining the shackling order amounted to an unreasonable application of the United States Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007 (2005). Because neither the trial judge nor the state appellate court ever articulated a reason why Wilber had to be *visibly* restrained in the jury's presence, we agree with the district court that the shackling decision ran afoul of *Deck*. And because Wilber was visibly restrained at a key phase of the trial, when the State highlighted evidence that, in the moments leading up to the murder, Wilber's behavior was "wild," "crazy," "possessed," and "out of control," we also agree with the district court that Wilber was prejudiced by the shackling error. The restraints would have suggested to the jury that the court itself perceived Wilber to be incapable of self-control and to pose such a danger that he must be manacled in order to protect others in the courtroom, including the jurors. We therefore affirm the district court's decision to grant a writ of habeas corpus.

I.

Wilber was convicted for the murder of David Diaz in Milwaukee Circuit Court, Judge Mary M. Kuhnmuench presiding. Wilber attended an after-hours house party at Diaz's home in Milwaukee during the night of January 30-31, 2004. According to witness statements made to the police in the days after the incident, Wilber had been acting belligerently at the party; when his belligerence escalated into a physical confrontation with other guests, several men attempted to subdue him and persuade him to leave the party. At that [2] point, a shot rang out, Diaz fell dead to the floor, and partygoers fled the house. Jeranek Diaz (no relation to the victim) ("Jeranek") reported that he saw Wilber pointing a gun at Diaz just prior to the shooting. When Jeranek heard the gunshot, he turned in Wilber's direction and saw Diaz's body strike the floor and Wilber tucking the gun under his coat. He believed that Wilber fired the shot because the sound came from where Wilber was standing several feet away. A second witness, Richard Torres, told police that he saw Wilber with a gun in his hand immediately after the shooting. Both men also reported that in the aftermath of the shooting, they heard Antonia West, Wilber's sister, cry out, "[O]h my God. You shot him. Get out of here. You shot him." Having seen Wilber with a gun, Torres assumed that he was the shooter. When Torres heard West's exclamation, "[i]t convinced me more that he did." R. 61-24 at 282–83.

At trial, all of the witnesses called by the State denied seeing who shot the victim, including Jeranek,

who disclaimed the statement attributed to him by the police. But the trial testimony nonetheless did point the finger at Wilber as the likely shooter. Our summary of this testimony derives verbatim from the Wisconsin Appellate Court's decision resolving Wilber's post-conviction appeal.

* * *

Milwaukee Police Officer Thomas Casper testified that he created a diagram of the crime scene showing the locations of all the physical evidence. Diaz's body was facedown in the kitchen with his head facing north. Bullet fragments were found behind the stove in the northeast corner of the kitchen. During the investigation, the eyewitnesses from the kitchen explained to detectives where everyone had been standing by [3] placing "x's" with people's names or initials on diagrams of the kitchen.

Investigator William Kohl testified about the layout and dimensions of the kitchen. Kohl testified as to where the appliances were located, which portions of the kitchen were visible from different angles and from other parts of the house, and where Diaz's body was found in relation to the measurements of the kitchen. Wilber's sister, Antonia, testified that she, Wilber, and other family members went to the house party in the early morning hours of the shooting following a night out at a local bar. Antonia denied saying "[y]ou shot him. Get out of here" to Wilber, but told the jury that she had to tell Wilber to "calm down" multiple times because Wilber "got into it" with another party-goer, Oscar Niles. Antonia also testified that Wilber

grabbed and choked another man in the kitchen. Antonia said someone tried to grab Wilber from behind to stop the choking. Antonia was also in the kitchen at the time of the choking incident. She said the next thing she remembered was the sound of the gunshot coming from Wilber's direction.

Wilber's cousin, Donald Jennings, told the jury that he also attended the house party and was standing in the kitchen when Wilber got into an altercation with Niles. He testified that Wilber got aggressive with Niles and Jeranek intervened. Jennings said the parties "got to tussling and they grabbed each other. And that's when the shot was fired, hitting the man that was [found] laying on the ground." Jennings did not say that he saw Wilber shoot Diaz, but stated that he "yelled" at Antonia when they left the party because "she was saying, my brother, my brother, I can't believe this shit[.]" Jennings [4] interpreted Antonia's statement to mean that Antonia saw her brother shoot Diaz.

Two other witnesses, Lea Franceschetti and Jaimie Williams, also testified that they heard Antonia say "I can't believe he did that," and "I can't believe he shot him." Franceschetti stated that she interpreted Antonia's statement to mean that Antonia knew the shooter.

Torres testified that he was also in the kitchen at the time Diaz was shot. He stated that immediately after the shooting he saw Wilber with a gun. Torres stated that Wilber, while in the kitchen, was acting aggressively towards other guests. Diaz, who was also

in the kitchen, told Jeranek to ask Wilber to leave. Wilber "didn't want to hear that" and started choking Jeranek, who was standing next to Diaz. Torres intervened and got into his own altercation with Wilber. Wilber hit Torres, causing Torres to "black out a little bit" and "lean[ ] up against the ... sink." Torres said he then heard a gunshot from "the right side of my ... ear," where he said Wilber was standing. Torres said that he saw Wilber with a gun after the shooting "in a crouched position." Torres stated that he heard someone in the kitchen yell "you shot the guy," and then Wilber ran out. Torres stated that he tried to chase Wilber but lost him in the chaos.

Torres also testified that he saw a man named "Ricky" at the party with a gun, but that he did not see Ricky in the kitchen at the time of the shooting. Torres stated that there was no tension between Diaz and Ricky, but that the two exchanged "dirty looks" the week before. Torres stated that there did not appear to be tension between Diaz and Ricky at the party and that Torres was not concerned about Ricky's possession of a gun.

[5] Jill Neubecker testified that she lived in the upper portion of a duplex above Wilber's sister, Wanda Tatum. She testified that police came to the house looking for Wilber on February 1, 2004. She told them that the night before, she smelled something on fire and saw smoke coming from an old grill in the back yard. Detective Joseph Erwin found the soles of a pair of shoes burnt in the grill.

The police officers who had interviewed Antonia, Williams, Niles, and Jeranek testified about

statements they gave that were inconsistent with their trial testimony.

Mark Bernhagen, a shoe store manager, testified for the defense about shoe sizing. He testified that Wilber's feet were size fourteen and one-half. The soles of the burnt shoes found in the grill were size twelve, which were smaller than the shoes Wilber was wearing at trial.

Shortly after the defense rested, defense counsel asked for an adjournment, telling the trial court that during the break, an eyewitness approached counsel and said that he saw "another person shooting the shot that struck the head of David Diaz." Counsel told the court that neither he nor Wilber was aware of the potential witness until that moment. The trial court allowed defense counsel to make an offer of proof.

Defense counsel called two of Wilber's sisters, Tatum and Monique West. Tatum told the court that six days after the trial began, Monique told Tatum "if my brother was found guilty this person was supposed to give a confession saying he did it." She stated that this information came from Monique's boyfriend, Roberto Gonzalez, who told Monique that if Wilber was convicted, another person would come forward and confess to the shooting. According to Tatum, [6] Gonzalez told Monique that he and "Isaiah" were at the party the night of the shooting. Gonzalez told Monique that he heard Diaz tell his girlfriend to go get a gun, and in response, Isaiah pulled out a gun that went off and hit Diaz. Monique conveyed this information to Tatum. Tatum said she first learned

that Gonzalez claimed to be at the house "a while ago," but she did not tell defense counsel because she did not "know that that was relevant."

Monique also testified, telling the trial court that her boyfriend, Gonzalez, told her that he witnessed Isaiah shoot Diaz. Monique stated that she told Tatum about Gonzalez's observation on the fourth day of trial, but could not explain why she did not tell counsel or anyone else. When asked whether she heard of the plan for someone else to confess if Wilber was convicted, Monique said she heard it from Tatum. The State asked, "So the notion or the idea or the fact that Isaiah's going to confess to this came from Wanda to Monique, not from Monique to Wanda?" Monique answered, "Right."

The trial court denied defense counsel's request to investigate the matter, stating that the sisters' testimony was inconsistent, lacked corroborating evidence, and was an "attempt to manipulate proceedings."

State v. Wilber, 385 Wis.2d 513, 2018 WL 6788074, at *1–3 ¶¶ 3–16 (Wis. App. Dec. 26, 2018) (unpublished).

* * *

To the foregoing summary of the evidence from the state appellate court's decision we offer a few additional observations about the State's case against Wilber.

The physical evidence posed some difficulties for the State's theory. At the moment of the shooting,

Diaz evidently [7] had been standing in a doorway between the living room and the kitchen. The living room was in the middle of the house, with the kitchen to its north. Diaz was shot at close range in the back of the head, and the position of his body on the floor of the kitchen was consistent with the possibility that he had fallen forward (from south to north) into the kitchen. Bullet fragments were found on the north side of the kitchen, which was also consistent with the possibility that Diaz was shot from behind in a south-to-north direction. By all witness accounts, however Wilber had been standing in the kitchen—in front of where Diaz was standing, not behind him—at the time of the shooting. Also, according to witnesses, the gun that Wilber was seen holding was a semi-automatic, which would have ejected a casing; but no such casing was found, and a firearms examiner testified that Diaz was shot with a revolver. No forensic evidence was presented as to the likely trajectory of the bullet after it left Diaz's body or as to the existence of any indication of bullet ricochet, blood-spray patterns, or the like.

But the State was not wholly without answers to the questions posed by this evidence. Among other points, the State noted in closing arguments that the relatively small kitchen was crowded with people at the time of the shooting; the moments immediately before and after the shooting were chaotic; those in the kitchen bolted after the shooting, presenting the possibility that Diaz's body was jostled as or after it fell to the floor; the trajectory of the bullet through Diaz's head was in a downward direction, indicating that the gun was pointed in a downward direction when he was shot; Wilber, who was six feet, seven

inches tall, stood significantly taller than Diaz (five feet, eight inches) or anyone else in the kitchen and, assuming Diaz was standing upright at the time of the shooting, [8] was likely the only person who could have shot him in a downward direction; Jeranek had told the police that Diaz had turned away from Wilber just prior to the shooting, which would explain how Wilber could have shot him in the back of the head; and although bullet fragments had been found on the north side of the kitchen, as police testimony had indicated, bullets often strike other objects and ricochet before coming to rest in unexpected places.

One of Wilber's ankles was manacled and connected to an eye bolt on the courtroom floor throughout the trial, but until the final day of the trial, no restraints were visible to the jury—both counsel tables were draped so as to hide the restraints. This remained true even after the judge subsequently increased the number of deputies stationed inside and outside of the courtroom and ordered a stun belt added to Wilber's restraints. But on the last day of trial, just prior to final jury instructions and closing arguments, the judge ordered that the restraints be expanded to include wrist and shoulder restraints, both of which were visible to the jury. These visible restraints are what give rise to Wilber's due process claim.

To set the stage for our analysis of this claim, we think it important to set out in some detail the events that culminated in the trial court's decision to visibly shackle Wilber and the court's rationale for the escalating measures it took to restrain Wilber during the trial. With minor modifications, we incorporate

the following account from the district court's thorough opinion.

* * *

Beginning the first day of trial before jury selection had even begun, the trial judge cautioned Wilber that he would [9] not be allowed to make "facial gestures," "sounds," "act imprudently," or "be disrespectful" to the court. R. 61-17 at 4. The judge stated that she had noticed during the morning session that Wilber was reacting inappropriately to the arguments of the prosecutor: "[E]very time Mr. Griffin would make some comment that—in terms of how he was going to couch this—this evidence, and why he thought it was admissible, your head was straining at the bit at times looking back at him and—and maybe it was just a reflex on your part." *Id.* at 5. When "we're in front of the jury," the court warned, this would not be allowed:

> You can't do that. You have to face frontwards at all times. You're not allowed to look back into the gallery. You're not allowed to turn back and make faces or gestures at the State table. You're supposed to be sitting straight in front in your chair, eyes forward, confer with your lawyer, but always facing this direction.

Id. at 5. The court offered two reasons why such behavior would not be allowed:

> One, because it's disrespectful, and I'm going to have to take some steps to stop you if you don't do it, if you don't stop, and I don't want to have to do that. And the second thing is it's—it's bad for you and it looks bad in front of a jury. So I'm going to ask you to be careful about how you act and how you react to the different things that happen during a trial here.

Id. at 6. Wilber's attorney explained to the judge that his client meant no disrespect but had worked closely with counsel on [10] preparing his defense, was familiar with the legal arguments, and strongly disagreed with the court's ruling. *Id.* at 6. Disagreement was fine, the judge noted, but "[w]hat I'm trying to tell you is it's a disrespect to the court to show you disagree." *Id.* at 7. "You have to keep a poker face," she continued, noting that it was in his interest to do so because it "looks bad in front of the jury." *Id.* at 7.

On the second day of trial, the court also noted that it had taken all the necessary steps to make sure this is "a safe proceeding." R. 61-18 at 75. The court noted that Wilber was to remain shackled throughout the trial. A bracelet had been attached to one of Wilber's ankles and anchored to the floor beneath the defense table. The court also noted that steps had been taken to prevent jurors from becoming aware that Wilber was shackled and maintain the presumption of innocence to which he was entitled. Both the prosecution and the defense tables were skirted to prevent the shackles from being visible to the jury. *Id.* at 75–76. In addition, the court noted that

the defendant was allowed a change in the civilian clothes he was wearing "so all steps—reasonable steps are being made to continue to have the presumption of innocence for the defendant protected." *Id.* at 76.

At the same time, however, the court expressed its view "that even if jurors do see an individual defendant secured in some fashion that that sight or that observation in and of itself is not enough for a default of that particular juror or that they are somehow exempted." *Id.* at 76. "There has to be something about those observation[s]," the court continued, "that ha[s] affected them one way or the other that they articulate to the [11] parties and to the court—that would cause them to be an unsuitable juror." *Id.* at 76.[1]

After two days of jury selection and several lengthy discussions of legal issues, the attorneys gave their opening statements on the third day and began the presentation of evidence. When the jury was released for lunch, the court granted the prosecution's request over the objection of the defense that two of the State's witnesses be instructed to review their prior written statements to the police over the break so that their direct examinations could proceed more

[1] The court was referring to a prior incident which had given rise to concern that two jurors might have seen Wilber with his ankle restraint exposed. The court had questioned the jurors and was satisfied that neither had seen anything that might affect his or her ability to remain impartial. R. 61-18 at 4, 21-26, 73–74.

efficiently. In response to the court's ruling, Wilber stated, "It's not new." R. 61-20 at 116. The court instructed Wilber to "[s]top it," to which Wilber responded, "You are granting everything the D.A. is throwing at you." *Id.* at 116. As the court ordered the courtroom deputies to remove Wilber from the courtroom, the discussion continued:

> THE DEFENDANT: What haven't you denied, that's nothing new. Put that on the record. I'm speaking up on my behalf. This is my life.
>
> THE COURT: Mr. Chernin, please talk to your client.
>
> MR. CHERNIN: I will, Your Honor.
>
> THE COURT: Thank you. [12]
>
> THE DEFENDANT: You don't intimidate me with that shit, man.
>
> THE COURT: Mr.—Mr. Wilber.
>
> THE DEFENDANT: You gonna hold me in contempt? What, you gonna hold me in contempt. It's my life right here.
>
> THE COURT: Mr. Wilber, I'm going to if you don't –
>
> THE DEFENDANT: Do it.
>
> THE COURT: Settle down and behave.

> MR. CHERNIN: Danny, please relax.
>
> THE COURT: If you don't behave—
>
> THE DEFENDANT: It ain't doing me no good her overruling—sustaining everything he throw out whether it is bogus or not.
>
> THE COURT: Mr. Wilber, you are doing yourself no good.

Id. at 116–17.

After lunch, before the trial resumed, the trial court again cautioned Wilber that he had to stay in control when he was in front of the jury. R. 61-21 at 3. Wilber stated he understood and was "all right." *Id.* at 4. The court then stated that it wanted to make a record of the fact that it had added additional security in the courtroom. It added two additional deputies in the courtroom, bringing the total to four, and had also added a stun belt to Wilber's arm that one of the deputies would control as "a way of keeping you safe, everybody around you safe, the staff safe and the jury safe so that the trial [13] can continue without hopefully any additional incidences." *Id.* at 4–5. These steps were necessitated, the court explained, "because of some of the statements that you made to the court and to the deputies in—I'm hoping was a moment of anger, but when you make those kinds of statements and you indicate that you don't really have any respect for my authority or for the authority of the deputies, it becomes a—a real safety concern, an issue

for everyone involved in the trial, and it doesn't do anybody any good." *Id.* at 5.

On the fourth day of the trial, as the morning session was ending, the trial court advised the jury that they would be sequestered during the day over their breaks and when coming to and leaving the courtroom. R. 61-22 at 104–07. The sequestration was "to avoid even the appearance of somebody suggesting that the jury was somehow tainted, talking or overhearing conversations in the hallway, talking to people." *Id.* at 106. After the jury left the courtroom, the court set forth the reasons for the sequestration order and additional measures that were being implemented.

The court noted that specific issues had arisen over the course of the trial requiring that additional security measures be taken and that the jury be sequestered. *Id.* at 107. Referring back to Wilber's outburst at the court's ruling the previous day, the judge stated that Wilber had been highly agitated, not only with the court, but according to the deputies, also with anyone who was in the holding or "bullpen" area and even with his own attorney. The judge noted that the deputies had advised her that Wilber made certain statements to them, such as "[I am] not going down for this, you might as well use your gun and kill me now." *Id.* at 110–11. Wilber also asked detailed questions about the paths he would walk to the [14] courtroom each morning, what floors they would be on, and who would have access to that same path. These questions alarmed the deputies and suggested that Wilber might attempt to flee, potentially with the help of others. *Id.* at 111.

The court also expressed concern that three men had approached the trial court's clerk and made comments that were ill-advised at best, and a possible threat at worst. The three men had also watched the trial and were seen near witnesses who were under a sequestration order. Although Wilber denied any connection with the men (and the court did not find that there was a connection), the court noted their presence as an additional reason for its sequestration order and concern for security. *Id.* at 114–16, 120. The court added later that an individual had been caught by sheriff's deputies listening at a door that the judge used to access the courtroom; the deputies had to warn him away from the door multiple times. The court ultimately ordered him excluded from the courtroom along with another spectator who had been observed using his cell phone in the courtroom and loitering near trial witnesses. R. 61-23 at 155–58.

As a result, in consultation with the deputies, the court had decided that certain security measures would be added. First, two additional deputies would be added inside the courtroom and at least one outside. In addition, the court had agreed with the recommendation that a stun belt be placed on Wilber's arm under his shirt which would allow one of the deputies to administer a shock to him if he became disruptive. *Id.* at 110:03–16. The court explained that it wanted Wilber to continue to have the use of his hands, while continuing to be "fully restrained" with the ankle bracelet connected to the bolt on the floor. But the court also warned Wilber that, if any [15] further disruptions occurred, the court might order his hands secured and would instruct him to keep them out of sight below the defense table. And if that

proved insufficient, the court might order him removed from the courtroom for the duration of the trial and have him participate in the proceedings via video. At the same time, the court acknowledged that there had been no problems with Wilber since his outburst the previous day. *Id.* at 112–13.

At the beginning of the fifth day of trial, the court returned to a discussion of an issue that the prosecutor had raised earlier— whether Wilber could be directed to participate in a courtroom demonstration intended to show the State's theory of how Wilber, given his height (six feet, seven inches), could have fired a gun at an angle at which the bullet would have caused the entrance and exit wounds to Diaz's head. R. 61-24 at 4–13. Wilber's attorney strenuously objected to forcing his client to, in effect, reenact the crime he was accused of committing before the jury. *Id.* at 32–33; 42. The question arose as to whether doing so might expose the stun belt around his arm. *Id.* at 44–45. As the court engaged Wilber's counsel in a discussion on that point, the court apparently heard Wilber sigh, which the court interpreted as a sign of disrespect. The court directed his attorney to warn him:

> Mr. Chernin, please advise him about his conduct in this court, because as I said the other day, I'm not going to have you folks mistake my kindness for weakness. I have been doing this as restrained as I can outside the presence of the jury, and given his outburst the other day, he's lucky he hasn't been charged with threatening a judge, that he hasn't been

> charged with [16] disorderly conduct, that he hasn't been charged with contempt. And you know whereof I speak.

Id. at 46. As counsel attempted to explain that his client meant no disrespect, the court continued:

> And I am not going to continue to run my court with this gentleman, you know, being disrespectful to me from the minute he comes in the court till the minute he leaves. I'm not going to tolerate it and I don't have to, quite honestly. I don't have to. Tell me if I have to. I don't think I do. I don't think there's anything in the rules of judicial conduct that require a judge to be disrespected and do nothing about it. Tell me if I'm wrong. I'm not going to. Today's the end. You do it again, we are going to add additional restraints to you in front of the jury.

Id. at 46–47. The court directed Wilber's counsel to explain to Wilber the proper way of behaving in court and took a ten minute break to decide the issue before it and to allow counsel to converse with his client. *Id.* at 48–49.[2]

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[2] A similar exchange and admonition had taken place on the day before, when the court was discussing the misbehavior of witness Oscar Niles, who among other things had winked at the defendant during his testimony. When the court raised the issue with Niles and with counsel after the jury was excused, it made clear that it was not attributing any misconduct on the

The trial proceeded to its conclusion with no further comments on the record about Wilber's behavior. It was after the [17] evidence was closed and just before closing arguments were to begin when defense counsel moved to reopen the case and allow him to investigate a report by Wilber's sisters that there was an eyewitness who saw someone else shoot David Diaz. The jury was excused from the courtroom while the defense made its offer of proof and the trial court delivered its ruling denying the defense's motion to reopen the case and its follow-on motion for a mistrial.

At that point, before the jury was brought back into the courtroom for final instructions and closing arguments, the court announced that Wilber had been placed "in a secured wheelchair with—not only secured at his ankles but at his wrists." R. 61-28 at 100. His ankle remained attached to a bolt on the floor, but now his hands were chained together at the wrists and two-inch wide black straps secured him to the wheelchair at his right wrist and at both of his upper arms just below the shoulder. *Id.* at 197; R. 69–73. (See the appendix at the end of this opinion for a photograph of Wilber so shackled.) The court stated that "Mr. Wilber is responsible for his own predicament and for his own position, that is to be restrained and to have that obvious restraint being shown to the jury." R. 61-28 at 100. His behavior

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part of Niles to Wilber. But while the judge was airing the issue, the judge observed Wilber smiling or laughing at one point and chastised him for evidently finding the situation humorous. R. 61-23 at 70–73, 159–61.

throughout the trial, the court stated, "has been contemptible." *Id.* at 100.

The trial court went on to summarize Wilber's previous behavior and the measures taken to ensure the trial would proceed in an orderly and safe manner. Describing Wilber's previous behavior, the court stated:

> This defendant, through his gestures, through his facial gestures at the court, through his facial expressions, through his body language, through his tone, and most particularly through [18] his language, including the tirade that he had at the end of the second day or the end of the second morning of this trial, directed at this court, and challenging this court, quite honestly, to find him in contempt, thereby setting the stage for his defiance throughout the proceedings.

Id. at 101. The court then noted that in response to this behavior, additional deputies had been stationed in the courtroom and a stun belt had been placed on Wilber's right arm. This was in addition to the bracelet around his ankle that was anchored to the floor under the defense table where Wilber was seated.

The judge stated that she had thought these measures, along with her words of advice, would be enough "to get him to understand that such disrespect to the court to these proceedings was not going to be tolerated." *Id.* at 103. "Apparently," the judge

concluded, "it was not a sufficient amount of restraint[.]" *Id.* at 103. She then explained why:

> [O]n today's date the defendant used absolutely inappropriate, vulgar, profane language to the deputies who were in charge of security of this courtroom, and will not be tolerated or accepted. He also physically fought with the deputies, such that they had to decentralize him in the back hallway leading back to the bullpen.
>
> That conduct will not be rewarded, it will not be tolerated, and I will not be manipulated into [19] allowing a defendant, by his actions, to dictate how I run this court.

Id. at 103–04.[3]

The court noted that "we're at the stage where we charge the jury, we have closing arguments, where quite honestly the State is going to be making their closing argument that I'm sure is going to have parts of it that the defendant is going to simply find annoying, wrong, incorrect, lying, disrespectful of him, and if he was already demonstrating to me at the very beginning of these proceedings that he didn't agree with my rulings and was going to act out, God

[3] The record does not supply any further details concerning Wilber's behavior with the deputies apart from what the court itself reported.

only knows how he's going to react when the State starts making its closing argument and summing up what it believes the evidence is showing or not showing in this case." *Id.* at 104. Not wanting to risk any "further physical outburst of any kind by this defendant in the presence of the jury," *id.* at 105, the judge stated, "I will not be dissuaded from having him in any less secure form than he is right now." *Id.* at 105.

Wilber's attorney objected, noting that Wilber's appearance in the wheelchair was "disturbing because it looks absolutely horrible" and that there were constitutional problems with the restraints. *Id.* at 105. The trial court reminded counsel that Wilber had been admonished for his behavior and that the restraints had been progressive. *Id.* at 106–07. It explained that there was precedent for taking these extra measures and described an incident years earlier in which another defendant, who was not restrained, was shot and killed by law enforcement upon the reading of a verdict in that courtroom. *Id.* [20] at 107. The court determined that it was "taking the appropriate measures" in this case, "given this gentleman's behavior and his tone and tenor with the court." *Id.* at 108. Counsel requested that the court proceed without the visible restraints and instead limit the restraints to those he had worn prior to that day, noting that it was in his interest to avoid misconduct in front of the jury and reminding the court that Wilber had not engaged in any misconduct in front of the jury up to that point. *Id.* at 110, 111–12. The court denied the request, noting that Wilber was someone who "by his own language and conduct"

toward the court and court staff posed a security threat. *Id.* at 111. Shortly thereafter, the trial court instructed deputies to bring the jury into the courtroom. As they moved to do so, the prosecutor offered to see if his office had a sport coat or blazer that Wilber could wear, presumably to cover the visible restraints. *Id.* at 113. The trial court, without explanation, responded, "That's not necessary." *Id.* at 113. The jury thereupon entered the courtroom, and the closing arguments proceeded without incident. The court then directed the jury to begin deliberations. *Id.* at 197. *See Wilber v. Thurmer*, 476 F. Supp. 3d 785, 790–95 (E.D. Wis. 2020).

* * *

After the jury retired to deliberate, the defense moved for a mistrial based on the decision to place Wilber in restraints that were visible to the jury. Wilber's counsel argued that the decision violated his rights under the Fifth, Sixth, and Eighth **Amendments of the United States Constitution and Article I**, section 7 of the Wisconsin Constitution. R. 61-28 at 199. The court denied the motion. The court noted for the record that it had offered to give a cautionary instruction admonishing the jurors to make their decision based on the evidence rather [21] than the appearance of the defendant, but the defense had declined the court's offer. *Id.* at 200–01. Wilber's counsel acknowledged the offer, but added:

> I'm not certain if there's any instruction that could be fashioned, that would take away the impact of what Mr. Wilber was presenting to the jury as a result of the

> physical constraints placed upon him, and that's my concern. … I'm not certain what you can tell the jury that would take away the stain of what's visible.

Id. at 201.

The jury convicted Wilber on the sole charge submitted to it: first degree homicide with a dangerous weapon. The court ordered him to serve a life term in prison with the possibility of release on extended supervision after 40 years.

Wilber subsequently sought post-conviction relief, arguing, *inter alia*, that it was improper to order that he be visibly restrained during closing arguments. The trial court denied the petition without a hearing. R. 61-2.

Wilber then appealed his conviction, as relevant here renewing his contention that the trial court had abused its discretion in requiring him to appear before the jury in visible restraints and that he was denied a fair trial as a result of the court's decision.

The Wisconsin Court of Appeals affirmed his conviction. *State v. Wilber*, 314 Wis.2d 508, 2008 WL 4057798 (Wis. Ct. App. Sept. 3, 2008) (unpublished). With respect to Wilber's shackling claim, the court observed that the trial judge had engaged in a deliberate exercise of discretion and had been careful to explain her rationale each time she took additional [22] security measures, including imposing restraints on Wilber's person. The judge had reasonably

concluded that the restraints on Wilber's wrists and arms were warranted by his verbal and physical altercation with the sheriff's deputies on the final day of trial. The appellate court rejected Wilber's contention that the judge had given undue weight to the shooting incident that had taken place in the same courtroom several years earlier, noting that the shooting was but one of myriad factors that the judge cited for her decision to order the additional restraints. The court found that the judge's decision was amply supported by the record and did not amount to an abuse of discretion. Finally, it did not believe that Wilber was denied a fair trial as a result of the visible restraints on his wrists and arms. *Id.*, at *7–8. The Wisconsin Supreme Court subsequently declined to hear the case. R. 61-7.

Wilber then pursued postconviction relief pursuant to Wis. Stat. § 974.06. As relevant here, Wilber asserted that there was insufficient evidence to support his conviction and that defense counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. The circuit court denied his section 974.06 motion. Wilber again appealed.

The appellate court affirmed the denial of his request for postconviction relief. *State v. Wilber*, *supra*, 2018 WL 6788074. In addressing Wilber's claim that defense counsel was ineffective for failing to challenge on direct appeal, the sufficiency of the evidence underlying his conviction, the court found that the evidence was sufficient to support the conviction, such that it did not need to address this claim of attorney ineffectiveness. *Id.*, at *7. The

Wisconsin Supreme Court again denied review. R. 69-13. [23]

Wilber also sought relief pursuant to 18 U.S.C. § 2254 in the district court. He filed his original petition in March 2010, but at his request, proceedings in federal court were stayed while he continued to pursue remedies in state court for the various errors he alleged. Those remedies were fully exhausted in April 2019 with the Wisconsin Supreme Court's denial of his second petition for review. The habeas proceeding then moved forward in the district court. As relevant here, Wilber's amended habeas petition asserted the following two claims: (1) his right to due process was violated because there was insufficient evidence to support his conviction; and (2) the trial court violated his right to due process as set forth in *Deck v. Missouri* by ordering him visibly shackled to a wheelchair for closing arguments.[4]

Judge Griesbach granted the petition in part. *Wilber*, 476 F. Supp. 3d 785. He rejected, in the first instance, Wilber's claim that the Wisconsin Appellate Court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979), in finding the evidence sufficient to support the conviction. 476 F. Supp. 3d at 797–99. The state court had, consistently with *Jackson*, considered the record as a whole and found that a reasonable trier of fact could have found Wilber guilty beyond a reasonable doubt. Multiple witnesses had described Wilber's "aggressive[ ] and violent[ ]" behavior at the party just

[4] Wilber also asserted claims of attorney ineffectiveness that neither Judge Griesbach nor we find it necessary to reach.

before Diaz was shot; two witnesses (Jeranek and Torres) had seen a gun in Wilber's hand just before and just after the shooting, and although Jeranek and other witnesses denied their prior statements at trial, those statements were admitted both to impeach their trial testimony and as [24] substantive evidence. Although Wilber had a reasonable argument (which his counsel had made to the jury) that the problematic physical evidence was inconsistent with the State's theory that Wilber was the shooter, the State itself had put forward testimony and argument responding to that argument. "While Wilber's evidence on its own, may paint one picture, the court of appeals reviewed the record in its entirety and came to the reasonable conclusion that the evidence was sufficient to sustain the conviction. That is all that is required of it, and thus, Wilber is not entitled to relief on this claim." *Id.* at 799.

But Judge Griesbach went on to conclude that Wilber was entitled to relief on his claim that the decision to visibly shackle him during closing arguments constituted a violation of his Fourteenth Amendment right to due process. *Id.* at 800–04. He reasoned that the Wisconsin Court of Appeals' failure to explain why *visible* restraints were necessary rendered its decision affirming the shackling order not only inadequate but an unreasonable application of federal law to the undisputed facts of the case. *Id.* at 802–03. Although, as the appellate court had pointed out, the trial judge addressed Wilber's behavior and the need for security on some eight occasions during the trial and her comments in that regard were extensive, a careful review of the record revealed no misconduct that warranted visible

restraints. Only two instances of misconduct had taken place in the courtroom itself: Wilber's nonverbal reactions to the prosecutor's remarks on the first day of trial, and his argument with the judge on the third day of trial; both incidents had taken place outside of the jury's presence. There were no further incidents between the third and final days of trial. Although Wilber on the last day did engage in another altercation with the sheriff's deputies, that [25] incident, like his prior run-ins with them, had taken place outside of the courtroom. Even taking that incident into account, the judge gave no indication why the existing security measures—which by this time included the restraint on Wilber's ankle, which was anchored to the courtroom floor, the stun belt on his arm, four deputies in the courtroom, and one more stationed outside the courtroom door—were insufficient to address any safety threat to the judge, her staff, or the public. *Id.* at 800–01, 802. The district court expressed concern that some of the judge's comments justifying the new restraints suggested she was simply deferring to the wishes of the sheriff's deputies in that regard. *Id.* at 802–03. It was also troubled that other remarks suggested she viewed the additional, visible shackles as punishment for the disrespect Wilber had shown her over the course of the trial. *Id.* at 803. But even assuming the record supported the decision to order the additional restraints, the trial judge, like the state appeals court, had never explained why it was necessary for such restraints to be visible to the jury. *Id.* Supreme Court precedent on courtroom restraints made clear that visible restraints present a substantial risk of prejudice to the defendant and must be justified by case-specific reasons that justify visible restraints. *Id.*

at 799–800. And yet the state courts had never explained why, if additional restraints on Wilber were necessary, they could not be concealed from the jury's sight. *Id.* at 800, 803. This omission was inconsistent with the Supreme Court's decision in *Deck*.

Initially, the district court did not think it necessary to consider whether Wilber had demonstrated that he was prejudiced by the visible shackles he wore during closing argument and jury instruction. *Deck* itself observed that visible shackles are inherently prejudicial, such that when a court [26] imposes such shackles on the accused without adequate explanation, he need not make a showing of actual prejudice in order to prevail on a due process claim; instead, the burden falls to the State to demonstrate beyond a reasonable doubt that the error did not contribute to the guilty verdict. 544 U.S. at 635, 125 S. Ct. at 2015 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828(1967)). "Respondent cannot meet his burden. Given the inconsistent testimony of the eyewitnesses and the physical evidence suggesting Wilber could not have fired the fatal shot, the error may well have contributed to Wilber's conviction." *Wilber*, 476 F. Supp. 3d at 804.

The court therefore granted Wilber relief under section 2254 and ordered him released from custody unless the State decided, within 90 days of the court's decision, to retry him. The court subsequently stayed that decision pending the resolution of this appeal and denied Wilber's motion for release on bond.

In successfully seeking a stay from the district court, the State pointed out as to the matter of prejudice resulting from a shackling error that *Deck* was a direct-review case, whereas this is a section 2254 habeas proceeding in which harmless-error review applies in virtually all cases of trial error. *Brecht v. Abrahamson*, 507 U.S. 619, 637–38, 113 S. Ct. 1710, 1722 (1993). Thus, once a constitutional error has been established in a habeas proceeding, a court must consider whether the error "had substantial or injurious effect or influence in determining the jury's verdict." *Id.* at 637, 113 S. Ct. at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)); *see also Davis v. Ayala*, 576 U.S. 257, 267–68, 135 S. Ct. 2187, 2197–98 (2015); *Fry v. Pliler*, 551 U.S. 112, 121–22, 127 S. Ct. 2321, 2328 (2007). And it is the habeas petitioner who [27] bears the burden of demonstrating that the error had such an effect or influence. *Brecht*, 407 U.S. at 637, 113 S. Ct. at 1722.

> There must be more than a reasonable probability that the error was harmful. The *Brecht* standard reflects the view that a State is not to be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.

Ayala, 576 U.S. at 268, 135 S. Ct. at 2198 (cleaned up). Ultimately, a court may grant habeas relief only if it is in "grave doubt" as to whether the federal error had a substantial or injurious effect in determining

the jury's verdict. *Id.* at 267–68, 135 S. Ct. at 2197–98.

Acknowledging that the *Brecht* standard as to prejudice applies here, the district court concluded that Wilber had adequately established prejudice from the shackling error. The court noted the physical evidence at the scene of the murder did pose difficulties for the State's case against Wilber. R. 100 at 3–4. In addition, none of the State's witnesses testified before the jury that they saw Wilber shoot Diaz. In that regard, the State relied on the out-of-court statements of Torres and Jeranek. But Torres had told the police, as he did the jury, simply that he saw Wilber with a gun and apparently assumed that Wilber had shot Diaz. Jeranek had indicated to the police that Wilber was the shooter, but he never signed a [28] written statement to that effect[5] and in his subsequent testimony denied having told the detective any such thing. R. 100 at 4. Additionally, the witnesses who saw Wilber with a gun described it as a semiautomatic weapon rather than a revolver. R. 100 at 4. Although the court did not question the sufficiency of the evidence to support Wilber's conviction, the weaknesses in the State's case caused it to have grave doubt whether the decision to shackle Wilber during closing arguments—" the very point in the trial where the jury's attention was likely most focused closely upon him"—had a substantial and injurious effect on the jury's verdict. R. 100 at 4.

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[5] A written summary of Jeranek's oral statements to the police was prepared and orally approved by Jeranek, but he nonetheless refused to sign it.

II.

The parties have filed cross-appeals from the district court's decision. The State has appealed the finding that Wilber was deprived of due process by being made to appear before the jury in visible shackles. Wilber has cross-appealed, challenging the court's holding that the state court reasonably applied *Jackson* in deeming the evidence sufficient to support his conviction. The district court issued a certificate of appealability as to that claim. R. 94. Wilber also pursues on appeal a claim that his trial counsel was ineffective, which the district court did not reach.

As relevant here, the Antiterrorism and Effective Death Penalty Act authorizes relief under section 2254 only when the state court's decision on the merits of a claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of [29] the United States." § 2254(d)(1). A state court decision is "contrary to" Supreme Court precedent if it either did not apply the proper legal rule or did apply the correct rule but reached the opposite result from the Supreme Court on materially indistinguishable facts. *E.g.*, *Brown v. Finnan*, 598 F.3d 416, 421–22 (7th Cir. 2010). A state court decision amounts to an unreasonable application of Supreme Court precedent when it applies that precedent in a manner that is "objectively unreasonable, not merely wrong." *Woods v. Donald*, 575 U.S. 312, 316, 135 S. Ct. 1372, 1376 (2015) (per curiam); *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010). This is by design a difficult standard to meet. *Donald*, 575 U.S. at 316, 135 S. Ct.

at 1376. A state court's application of Supreme Court precedent is not objectively unreasonable simply because we might disagree with that application, but rather only when no reasonable jurist could agree with it. *Ayala*, 576 U.S. at 269–70, 135 S. Ct. at 2199; *Donald*, 575 U.S. at 316, 135 S. Ct. at 1376; *Lett*, 559 U.S. at 773, 130 S. Ct. at 1862; *Williams v. Taylor*, 529 U.S. 362, 409–11, 120 S. Ct. 1495, 1521–22 (2000).

We affirm the court's decision to issue a writ of habeas corpus. Although, like the district court, we find no fault with the Wisconsin appellate court's decision as to the sufficiency of the evidence, we agree with the district court that the state court unreasonably applied *Deck* in sustaining the decision to order Wilber visibly shackled during final jury instruction and closing arguments. Whatever risks Wilber may have posed to the security and dignity of the trial proceeding, neither the trial judge nor the appellate court ever cited a reason why the additional restraints ordered for the final phase of the trial had to be restraints that were visible to the jury, nor is such a reason otherwise apparent from the record. *Deck* and its antecedents make clear that visible restraints are so [30] prejudicial to the defendant that they may be required only as a last resort. As Judge Griesbach reasoned, the decision to compel Wilber to be visibly shackled at a time in the trial when the jurors' attention was most likely to be focused on the defendant, was necessarily prejudicial. As we explain below, the restraints would have lent the court's implicit endorsement to witness accounts—highlighted by the prosecutor in his closing

arguments—that Wilber was out of control at the time of the shooting. He is entitled to a new trial.

A. Sufficiency of the evidence

Although, as we discuss below, Wilber is entitled to relief on his due process claim, that relief takes the form of a new trial. His claim as to the sufficiency of the evidence, on the other hand, would if successful bring his prosecution to a definitive end now. As the district court recognized, 476 F. Supp. 3d at 796, a finding that the evidence was insufficient to support a defendant's conviction "is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal rather than submitting the case to the jury." *Lockhart v. Nelson*, 488 U.S. 33, 39, 109 S. Ct. 285, 290 (1988) (citing *Burks v. United States*, 437 U.S. 1, 16–17, 98 S. Ct. 2141, 2149–50 (1978)). As a result, when an appellate court finds on direct review of a conviction that the evidence leading to that conviction was insufficient, the double jeopardy clause of the Fifth Amendment precludes a retrial on the same charge. *Burks*, 437 U.S. 18, 98 S. Ct. at 2150–51. This same rule applies in habeas proceedings as well. *See McDaniel v. Brown*, 558 U.S. 120, 131, 130 S. Ct. 665, 672 (2010); *Piaskowski v. Bett*, 256 F.3d 687, 694–95 (7th Cir. 2001). For this reason, we are obligated to address the sufficiency challenge first. [31]

The rule of *Jackson v. Virginia* is a familiar one: A reviewing court must uphold a conviction so long as the trial evidence, viewed in the light most favorable to the prosecution, would permit a

reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. 443 U.S. at 319, 99 S. Ct. at 2789. It is difficult enough for a defendant to prevail on a challenge to the sufficiency of the evidence on direct review; it is even more so in a section 2254 proceeding, where the only question for a federal court is whether the state court's application of *Jackson* was objectively unreasonable. *Coleman v. Johnson*, 566 U.S. 650, 651, 132 S. Ct. 2060, 2062 (2012) (per curiam). Like Judge Griesbach, we find nothing objectively unreasonable about the Wisconsin Court of Appeals' decision finding the evidence sufficient to support Wilber's conviction.

To start, there can be no doubt that the Wisconsin Court of Appeals applied the correct standard. Although that court did not cite *Jackson* or a Wisconsin precedent that sets forth the same rule, a review of the appellate court's decision reveals that it conducted the appropriate inquiry. It canvassed the testimony given at Wilber's trial, considered the record as a whole in a light favorable to the State, and concluded that a reasonable factfinder could have found Wilber guilty beyond a reasonable doubt.[6] So

[6] As noted, the court considered the sufficiency of the evidence in the course of addressing a claim that Wilber made in his postconviction appeal, asserting that defense counsel was ineffective in failing to challenge the sufficiency of the evidence underlying Wilber's conviction on direct appeal. *See* 2018 WL 6788074, at *4 ¶ 23. The court made its finding in passing; but its conclusion as to the sufficiency of the evidence was unmistakable. *Id.*, at *7 ¶ 43 ("Because we have concluded that the evidence was sufficient and that defense counsel was not ineffective, we need not address this issue.").

the court's decision was not "contrary to" *Jackson*. [32]

The state court's decision also represents a reasonable application of *Jackson*. Viewed favorably to the State, there was ample evidence that would have permitted a reasonable trier of fact to find Wilber guilty beyond a reasonable doubt notwithstanding the oddities of the physical evidence. Jeranek told police that he had seen Wilber pointing a gun at Diaz, that he heard the gunshot coming from where Wilber was standing, and that he turned to see Wilber putting his gun underneath his coat. Immediately after the shooting, he heard West, Wilber's sister, exclaim, "Get out of here. You shot him." Although Jeranek, like other witnesses, disclaimed his prior statement to the police, an officer (under oath and subject to cross-examination) recounted the statement for the jury, and in accordance with the Wisconsin rules of evidence, the statement was admitted for its substance as well as its impeachment value. Wis. Stat. § 908.01(4)(a)(1); *Vogel v. State*, 291 N.W.2d 838, 844–45 (Wis. 1980). The jury reasonably could have credited Jeranek's out-of-court statement over his trial testimony. At the same time, Jeranek and Torres (among others) testified that Wilber was belligerent with other partygoers and that the belligerence escalated into violence. Torres testified that after Wilber struck him, he heard a shot ring out nearby, and turned to see Wilber with a gun. All of this evidence supports the jury's verdict.

To be sure, the physical evidence posed certain problems for the State's case as we noted earlier. The

position of Diaz's body on the kitchen floor, coupled with the discovery of bullet fragments at the north end of the kitchen, suggested that he was shot (and fell) in a south-to-north direction. But Wilber [33] as in the kitchen, to Diaz's north, not south at the time of the shooting. Ricky, on the other hand, who was also seen with a gun, had been seen in the living room of the house prior to the shooting.

But, as we have also discussed, the State's case was not entirely without answers to the questions posed by this evidence. Although Jeranek had told the police that he saw Wilber pointing a gun at Diaz, neither he nor any other witness admitted at trial that he saw the actual shooting, and thus there was no testimony in the trial record as to how Wilber and Diaz were positioned relative to one another at the precise moment of the shooting or as to how Diaz's body fell to the floor of the kitchen after he was struck by the bullet (whether his body may have spun around or instead fell straight downward, for example). As the State argued in closing, the kitchen was crowded with people and the moments just before and after the shooting were chaotic. Jeranek told the police that Diaz had turned away from and had his back to Wilber before the shooting, which would explain how Wilber could have shot him in the back of the head, if not how Diaz's body ended up facedown on the kitchen floor in a south-north direction. It is possible that Diaz's body was jostled while it was falling or after it fell to the floor. We also know from the testimony of multiple witnesses that Wilber's height relative to Diaz and the other individuals in the kitchen at the time made him a more likely candidate for having shot Diaz from above, in a

downward direction consistent with the trajectory of the bullet. And although the witnesses who saw Wilber with a gun described it as a semi-automatic weapon, which is inconsistent with the forensic evidence, witnesses frequently are mistaken as to such details. So the jury might [34] reasonably have surmised that it was not physically impossible for Wilber to have shot Diaz.

On this record, the Wisconsin Court of Appeals reasonably concluded, consistently with *Jackson*, that a rational factfinder could have found Wilber guilty beyond a reasonable doubt. At least one eyewitness had effectively identified Wilber as the shooter to the police, and a second had seen a gun in Wilber's hand immediately after the shooting, and although the trial testimony of these and other witnesses was not as directly inculpatory as their out-of-court statements were, it still pointed the finger at Wilber as the shooter. Moreover, multiple witnesses had described Wilber's belligerent behavior at the party, which escalated to physical violence with multiple individuals just prior to the time at which Diaz was shot. The evidence was sufficient to support the conviction.

B. Use of visible restraints

The due process clause of the Fourteenth Amendment secures a state criminal defendant's right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692 (1976); *see also Kentucky v. Whorton*, 441 U.S. 786, 790, 99 S. Ct. 2088, 2090 (1979) (Stewart, J., dissenting) ("a fair trial, after all, is what the Due Process Clause of the Fourteenth

Amendment above all else guarantees"). Central to this right "is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 1345 (1986) (quoting *Taylor v. Kennedy*, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934 (1978)). [35]

For over 50 years, the Supreme Court has recognized that the fairness of a trial is brought into question when a defendant is made to appear before a jury bearing the badges of restraint. This is the very sort of circumstance that can divert the jury's attention and lead it to convict the defendant based on something other than the evidence put forward against him at trial.

In *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057 (1970), the Court sustained a trial court's decision to remove a perpetually disruptive defendant from the courtroom against a Sixth Amendment confrontation clause challenge. The Court recognized that there are alternative means of dealing with an obstreperous defendant that do not involve removing him from the courtroom, including binding and gagging him. But the Court was quick to recognize the serious problems with this particular option:

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's

> purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but 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. [36] Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint. It is in part because of these inherent disadvantages and limitations in this method of dealing with disorderly defendants that we decline to hold with the Court of Appeals that a defendant cannot in any possible circumstances be deprived of his right to be present at trial. However, in some situations which we need not attempt to foresee, binding and gagging might pos[s]ibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here.

Id. at 344, 90 S. Ct. at 1061. *See also id.* at 345, 90 S. Ct. at 1062 (noting that option of imprisoning unruly

defendant for civil contempt "is consistent with the defendant's right to be present at trial, and yet it avoids the serious shortcomings of the use of shackles and gags"); *id.* at 350–51, 90 S. Ct. at 1064 (Brennan, J., concurring) (noting that dealing with a disorderly defendant by binding and gagging him "is surely the least acceptable" of the options available to a judge: "It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law.").

In *Estelle*, the Court concluded that compelling a defendant to appear before the jury in prison garb posed comparable difficulties. The court emphasized that the presumption of innocence is "a basic component of a fair trial," 425 U.S. at 503, 96 S. Ct. at 1692, and forcing a defendant to stand trial in jailhouse clothing tends to undermine that presumption: [37] "[T]he constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that … an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 504–05, 96 S. Ct. at 1693. The Court went on to add that "[u]nlike physical restraints, permitted under *Allen*, … compelling an accused to wear jail clothing furthers no essential state policy." *Id.* at 505, 96 S. Ct. at 1693.[7]

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[7] Because the defendant in *Estelle* had never voiced an objection to his prison attire, the Court concluded that he had not, in fact, been compelled to appear before the jury in such attire, and thus no constitutional violation had occurred. 425 U.S. at 512–13, 96 S. Ct. at 1697.

By way of contrast, the Court concluded in *Holbrook* that the presence of multiple uniformed state troopers in the front row of the spectator section of a courtroom did not jeopardize the presumption of innocence in the same way as visible shackling and prison attire:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against [38] disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public

> places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

475 U.S. at 569, 106 S. Ct. at 1346.

Not until its 2005 decision in *Deck v. Missouri* did the Court actually articulate a rule as to when visible restraints may be used. Although its prior decisions had recognized the prejudice that visible shackling poses to a fair trial, *Deck* was the first case in which the Court confronted head-on the question of whether and when the use of visible restraints during a criminal trial are consistent with the Constitution.

The defendant in *Deck* was compelled to appear in visible restraints—including leg irons, handcuffs, and a belly chain—during the penalty phase of his capital murder trial. During the guilt phase of the trial, the defendant had been restrained solely by leg braces that were not visible to the jury; but following his conviction, the additional restraints were added and no attempt was made to hide them. The defense objected to the visible restraints, but the trial court overruled the objection, with little explanation beyond the observation that the [39] defendant had already been convicted. The jury sentenced Deck to death. In affirming the sentence, the Missouri Supreme Court reasoned that the decision to require Deck to appear before the jury in restraints was justified by a security interest, in that the defendant was a repeat offender who may have murdered his two victims in an effort to avoid a return to custody.

The U.S. Supreme Court reversed, concluding that the shackling decision had deprived the defendant of a fair trial at the penalty phase. Although the Court acknowledged that visible shackling may be permissible in limited circumstances, the trial court had never identified a circumstance that warranted shackling Deck, let alone the need for *visible* shackling. 544 U.S. at 634–35, 125 S. Ct. at 2015.

The Court began its analysis by finding it "clear" that the Constitution did not authorize the use of visible shackles as a routine matter during a criminal trial: "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a defendant only in the presence of a special need." *Id.* at 626, 125 S. Ct. at 2010. The Court traced the "deep roots" of this rule to Blackstone, who wrote more than 250 years ago that a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." *Ibid.* (quoting 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnote omitted)). After surveying American precedents on the subject, including its own observations in *Allen*, *Williams*, and *Holbrook*, the Court summarized:

> [I]t is clear that this Court's prior statements gave voice to a principle deeply embedded in the law. We now conclude that those statements [40] identify a basic element of the "due process of law" protected by the Federal Constitution. Thus, the Fifth and

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

Id. at 629, 125 S. Ct. at 2012.

The Court went on to explain that the disfavor of visible shackling was animated by "three fundamental legal principles": the presumption that a defendant is innocent until proven guilty, a defendant's right to counsel to help him mount a meaningful defense, and a judge's obligation to "maintain a judicial process that is a dignified process." *Id.* at 630–31, 125 S. Ct. at 2013. With respect to the first of these principles, "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" *Id.* at 630, 125 S. Ct. at 2013 (quoting *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346). Second, restraints can interfere with the right to defend oneself against the charge by making it more difficult for a defendant to communicate with his counsel and imposing an additional cost on the decision to give testimony in his own behalf. *Id.* at 631, 125 S. Ct. at 2013. And third, with respect to judicial decorum, the use of shackles tends to undermine "[t]he courtroom's

formal dignity, which includes [41] the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." *Ibid.*

The Court allowed that there will be cases in which the dangers of shackling cannot be avoided: "We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations." *Id.* at 632, 125 S. Ct. at 2014.

However, the decision to compel a defendant to appear before a jury in shackles is one that must be tied to the specific circumstances of the case at hand, including any security risks that the individual defendant might pose. "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Ibid.*

The Court went on to apply this rule to the penalty phase of Deck's trial. Although of course the presumption of innocence was no longer at issue once Deck had been convicted, the deployment of visible shackles still presented perils to the fairness of the proceeding:

> The appearance of the offender during the penalty phase in shackles … almost inevitably implies to a jury, as a matter of common sense, that court authorities

> consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. It also almost [42] inevitably affects adversely the jury's perception of the character of the defendant. And it thereby undermines the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death. In these ways, the use of shackles can be a thumb on death's side of the scale.

Id. at 633, 125 S. Ct. at 2014 (citations and internal quotation marks omitted). Thus, at the penalty phase as well as the guilt phase of a trial, a judge may only require a defendant to appear in shackles if the circumstances warrant. "But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Id.*, 125 S. Ct. at 2015.

Having set out the rule that visible restraints at either phase of a criminal trial must be justified by case-specific circumstances, the Supreme Court rejected Missouri's assertion that the trial court had acted within its discretion in requiring Deck to be visibly shackled during the penalty phase of his trial. The Court observed in the first instance that there was no confirmation in the record that the trial judge

saw the matter as one calling for the exercise of discretion. *Id.* at 634, 125 S. Ct. at 2015. The Court pointed out that the trial judge had not cited a risk of escape or a threat to courtroom security as a reason for the shackles. Instead, the judge had justified the shackles on the ground that Deck had already been convicted. *Ibid.* The judge had additionally remarked that the shackles might take fear out of the jurors' minds but had not cited any particular reason for the jurors to be afraid. *Ibid.* "Nor did he [43] explain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see—apparently the arrangement used at [the guilt phase of the] trial." *Id.* at 634–35, 125 S. Ct. at 2015. "If there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one." *Id.* at 635, 125 S. Ct. at 2015.

The Court concluded its decision with a rejection of Missouri's contention that the decision to shackle Deck was harmless. Shackling is "inherently prejudicial," the Court emphasized, although typically its negative effects will not be evident from the trial transcript. *Ibid.* (quoting *Holbrook*, 475 U.S. at 568, 106 S. Ct. at 1345). "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.*, 125 S. Ct. at 2015–16 (quoting *Chapman v. California*, *supra*, 386 U.S. at 24, 87 S. Ct. at 828).

The Wisconsin Court of Appeals' decision affirming the shackling decision in this case cannot be reconciled with *Deck*. That court reasoned that, in view of Wilber's altercation with sheriff's deputies outside of the courtroom on the final day of trial, shackling Wilber was justified by his disruptive behavior and security concerns. But like the trial court, the appellate court never articulated why, to the extent the additional restraints were justified, they must be restraints that were visible to the jury.

To be clear, the state court's decision is not contrary to *Deck*. Although the appellate court did not cite *Deck* and [44] instead relied exclusively on state precedents, the court recognized that a criminal defendant has a right to a fair trial, that a defendant's freedom from physical restraints is an important component of a fair trial, that such restraints may nonetheless be appropriate when they are reasonably necessary to maintain order, and that the trial court, in the exercise of discretion, may require that a defendant be restrained so long as it puts its reasons for doing so on the record. *Wilber*, 2008 WL 4057798, at *7 ¶¶ 35–36. The framework that the Wisconsin Court of Appeals applied is faithful to *Deck*'s holding.

But the state court's analysis nonetheless represents an objectively unreasonable application of the rule set forth in *Deck*. As we discuss below, the state court lost sight of the inherent prejudice that visible shackles pose and wholly neglected to address why, in this case, the restraints imposed on Wilber had to be visible rather than concealed.

Deck makes clear that the Fourteenth Amendment prohibits a state court from compelling a defendant to appear in restraints that are visible to the jury unless, in the exercise of its discretion, the court concludes that visible restraints are justified by one or more state interests specific to the trial at hand. Such interests of course include security problems and the risk of escape.

Clearly the behavior of Wilber (and, of course, the other individuals present at the trial who engaged in suspicious behavior) posed potential threats to the security and orderliness of the courtroom that warranted the imposition of restraints. Wilber had engaged in multiple altercations with the sheriff's deputies who escorted him to and from court, at one point suggesting that he wanted them to kill him; his inquiries about the route the deputies would take in escorting him to [45] and from court suggested that he might be pondering an escape attempt; several individuals made odd remarks to the court clerk and one was caught listening at the door of the judge's private office, suggesting perhaps that these individuals might be in on such an attempt; and Wilber challenged the judge's authority and accused her of endeavoring to help the prosecution win its case. Even if most of this disruptive and threatening behavior took place outside of the courtroom—and none of it in the jury's presence—the trial court could reasonably conclude that restraints were warranted. At the same time, the court took care to ensure that such restraints were not visible to the jury: until the final phase of trial, Wilber was only shackled with an ankle restraint which was concealed behind a table

skirt and later a stun belt on his arm that was hidden underneath his shirt.

But for closing arguments, the court concluded that additional restraints—over and above the ankle restraint and stun belt—were warranted by a recent verbal and physical altercation between Wilber and the deputies (outside of the courtroom); and in a departure from the care the court had taken with respect to the restraints previously imposed, no effort was made to hide these wrist and arm restraints from the jury's sight. The photograph of Wilber shackled to a wheelchair we have attached to this opinion leaves no doubt that the wrist and arm restraints were readily visible to the jury. Indeed, the state appellate court so found. 2008 WL 4057798, at *7 ("At issue is the visible, physical restraint of Wilber during closing arguments."). The wheelchair itself, which had not been used previously and which immobilized Wilber to the extent that he could not even stand up, would only have highlighted Wilber's enhanced state of restraint. [46]

Although the trial court articulated a justification for its decision to impose still more restraints at the closing-argument stage of the trial, it offered no explanation—none—as to why these additional restraints had to be visible to the jury, even when Wilber's counsel objected repeatedly. By contrast, when the court had previously warned Wilber that it might order his wrists manacled if he engaged in any additional misbehavior, it suggested that his hands would be secured beneath the (skirted) defense table, out of the jury's sight. R. 61-22 at 112–13. And yet, when the prosecutor, in response to the

defense objections, offered to obtain a sport coat for Wilber, presumably to help conceal the new restraints (whether partially or in whole), the court said that would not be necessary. Wholly absent from the trial judge's rationale is any discussion of why it was required or unavoidable for the new restraints to be visible, particularly when it had previously acknowledged that additional restraints could be hidden from the jury's view. In this respect, the instant case is on all fours with *Deck*, where nothing the trial judge had said regarding the shackling decision explained why it was that *visible* restraints were a necessity.

The appellate court, for its part, sustained the trial court's decision as appropriate given the circumstances we have discussed, without ever addressing the distinction between visible and concealed restraints or identifying why the trial court legitimately might have concluded that visible restraints were necessary. Like the trial court, its analysis focused on the propriety of ordering additional restraints, with no mention of whether these restraints could have been kept out of sight or why it was not feasible to do so. [47]

Deck envisions there will be cases where visible restraints are necessary, 544 U.S. at 632, 125 S. Ct. at 2014; but at the same time, its discussion of the inherent prejudice posed by such restraints leaves no doubt that visible restraints may be required only as a last resort, *see id.* at 628, 125 S. Ct. at 2011 (quoting *Allen*, 397 U.S. at 344, 90 S. Ct. at 1061); *id.* at 635, 125 S. Ct. at 2015 (quoting *Holbrook*, 475 U.S. at 568, 106 S. Ct. at 1345). Visible restraints suggest to the

jury that the court itself views the defendant as someone who is dangerous and must be physically isolated from others in the courtroom, thereby undermining the presumption of innocence. *Id.* at 630, 125 S. Ct. at 2013. Visible manacles also detract from the formal decorum of the courtroom that promotes respect for the defendant and dispassionate decisionmaking. *Id.* at 631–32, 125 S. Ct. at 2013.

The State goes so far as to suggest that, apart from justifying why additional restraints were necessary at the closing argument stage, it was unnecessary for the court to explain why visible restraints, in particular, were necessary. But in two ways, *Deck* leaves no doubt that such an explanation is necessary. First, the entirety of the *Deck* decision hinges on the inherent prejudice posed by visible, as opposed to concealed, restraints. *See*, *e.g.*, 544 U.S. at 630, 125 S. Ct. at 2013 ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process."); *cf. Holbrook*, 475 U.S. at 568–69, 106 S. Ct. at 1345–46 (distinguishing the presence of uniformed troopers in courtroom, which support a benign inference, from shackling and prison clothes, which "are unmistakable indications of the need to separate a defendant from the community at large"). Second, lest there be any doubt on this point, the Court concluded that the Missouri trial judge's shackling decision could not be sustained as a [48] reasonable exercise of discretion in part because the judge had never explained why, if restraints were necessary, they must be visible. 544 U.S. at 634–35, 125 S. Ct. at 2015. Our own jurisprudence reflects an understanding that *Deck* requires a court to weigh the

interests in courtroom security and decorum against the prejudice to the defendant posed by visible shackles. *See Lopez v. Thurmer*, 573 F.3d 484, 493 (7th Cir. 2009) ("the analysis set forth by the Supreme Court's cases requires a balancing of the need for security and order during a trial *against any prejudice that the defendant might suffer in the eyes of the jury*") (original emphasis removed; new emphasis ours); *Stevens v. McBride*, 489 F.3d 883, 899 (7th Cir. 2007) ("a defendant's general right to be free of restraints in the courtroom is not absolute, but rather it is based on a balancing of the defendant's right *not to be viewed in a prejudicial light by the jury* against the court's need for security") (emphasis ours); *Stephenson v. Wilson*, 619 F.3d 664, 668–69 (7th Cir. 2010) ("Even when a visible restraint is warranted by the defendant's history of escape attempts or disruption of previous court proceedings, it must be the *least visible secure restraint*, such as, it is often suggested, leg shackles made invisible to the jury by a curtain at the defense table.") (citations omitted) (emphasis ours); *United States v. Jackson*, 419 F. App'x 666, 670 (7th Cir. 2011) (non-precedential decision) ("Because Jackson's leg restraints were not visible to the jury, we conclude on the record before us that his right to due process was not violated. In *Deck* the Supreme Court addressed only the question whether *visible* restraints offend the Constitution.") (emphasis in original). The balancing explicitly required by *Deck* is necessarily incomplete if the court does not consider whether the prejudice to the defendant can be minimized or avoided altogether by concealing the restraints. [49]

The district court cited two additional reasons for concern about the shackling decision in this case which we do not factor into our own decision. The court raised the possibility that the trial judge may have given too much deference to the deputy sheriffs in deciding that the additional restraints were necessary for the closing phase of the trial. 476 F. Supp. 3d at 802–03, citing *Lopez*, 573 F.3d at 493 n.4 ("[T]he actual due process decision must be made by the judicial officer. Law enforcement officials hardly can be said to be neutral in balancing the rights of the defendant against their own view of necessary security measures."), and *Woods v. Thieret*, 5 F.3d 244, 248 (7th Cir. 1993) ("While the trial court may rely 'heavily' on the marshals in evaluating the appropriate security measures to take with a given prisoner, the court bears the ultimate responsibility for that determination and may not delegate the decision to shackle an inmate to the marshals."); *see also United States v. Henderson*, 915 F.3d 1127, 1135 (7th Cir. 2019) (Hamilton, J., dissenting) ("One central theme of the law of courtroom restraints is that the trial judge is the person responsible for making the decisions. The judge cannot simply delegate that responsibility to the Marshals Service or other correctional or security staff."). We are inclined to agree with the State on this point that the record is best understood to reflect the trial judge's agreement, in the exercise of her independent discretion and oversight, with what deputies recommended as appropriate security measures.

The district court also expressed concern about the possibility that the trial judge may have ordered Wilber to be visibly shackled as punishment for what

she perceived to be his disrespect for her authority. That is one way to read the record. When the judge explained her decision to impose the additional restraints, she declared that "Wilber is responsible for [50] his own predicament and for his own position, that is to be restrained and to have that obvious restraint being shown to the jury." R. 61-28 at 100. She went on to remark upon the fact that Wilber, through his gestures, facial expressions, body language, tone, and spoken words, had "challeng[ed]" the court to find him in contempt and "set[ ] the stage for his defiance throughout the proceedings." *Id.* at 101. She added that she had thought the prior measures she had taken, including her admonitions to Wilber, would suffice to "get him to understand … that such disrespect to the court[,] to these proceedings[,] was not going to be tolerated[.]" *Id.* at 103. But these remarks can also be understood as reflecting the judge's frustration with what she perceived to be Wilber's inability to abide by her rulings and comport himself in a manner consistent with courtroom decorum and the orderly, secure administration of justice. Every judge has a right to expect that a defendant will respect her authority to manage the trial and to comport himself appropriately not only in her presence, inside of the courtroom, but with other court personnel, including security personnel, inside and outside of the courtroom. Indeed, the judge here went on at some length, after describing Wilber's latest altercation with the sheriff's deputies, to identify the concerns that this incident raised both for the security of the courtroom as well as the orderly conclusion of the trial. We have therefore abstained from ascribing any

punitive intent to the judge's decision to order additional restraints for Wilber.

As Judge Griesbach emphasized, the key point here is that neither the trial judge nor the state appellate court ever explained why they believed it necessary or unavoidable that such additional restraints be visible to the jury. One can readily accept the trial judge's determination, seconded by the [51] appellate court, that it was necessary to shackle Wilber's wrists and/or arms at the close of the trial, given his pattern of disruptive behavior, including most recently his physical altercation with the deputies outside of the courtroom. But what is noteworthy, given the care that the court had taken up to that point to ensure that all of the increasing degrees of restraint were hidden from the jury's view, is the court's sudden decision to order the imposition of multiple restraints on his wrists and arms that would be visible (along with the wheelchair) to the jury. The visible nature of the restraints is what defense counsel objected to expressly. It might have been a simple matter to hide those restraints, as the trial judge herself had envisioned previously when she warned Wilber that further outbursts might result in his hands being secured beneath the defense table. And the prosecutor evidently had the same thought when he suggested looking for a blazer for Wilber, presumably to help hide the restraints. Yet the court at that point seemed unwilling to consider any means of hiding the restraints, for reasons that were left unexplained. The appellate court, in sustaining the trial court's decision, noted that the restraints were visible, but never addressed *why* visible restraints were necessary or justified. Given

Deck's focus on the inherent prejudice posed by visible restraints, the appellate court's omission is significant.

Certainly there will be cases in which it may not be possible to hide physical restraints. If a defendant is representing himself and has a need to move around the courtroom, for example, there may be no practical way of keeping the restraints hidden. *E.g.*, *United States v. Van Sach*, 458 F.3d 694, 699–700 (7th Cir. 2006). And if a defendant is particularly disruptive and/or uncooperative with measures to cloak the restraints, a court may have no alternative than to allow the jury [52] to see them. But, so far as the record reveals, this was not such a case. As discussed, the record indicates that the trial judge herself believed it possible to conceal wrist manacles beneath the defense table should she order them imposed. To the extent that still additional restraints on Wilber's wrists were required, including straps of the variety that were placed on one of Wilber's wrists, it might have been possible to hide those restraints with something like a sweater folded in his lap. The shoulder restraints might have been more difficult to conceal, given their location, but as there was no discussion whatsoever of the necessity of visible restraints or the options for concealment, we cannot know.

The state courts' wholesale omission to address the necessity of visible restraints cannot be reconciled with *Deck*'s repeated recognition that it is the visibility of such restraints that is injurious to the presumption of a defendant's innocence and to the dignity of a judicial proceeding. Indeed, the Supreme

Court found visible restraints so inherently prejudicial to a defendant that it relieved the defendant of having to show (on direct review) that he was actually prejudiced by a shackling error and instead assigned the burden to the State to prove the harmlessness of the error. Although *Deck* acknowledges that visible restraints may be appropriate when the specific circumstances of a case warrant them, it leaves no doubt that a court's balancing of the need for restraints against the resulting prejudice to the defendant must include consideration of whether the restraints can be concealed from the jury's view: thus the Court's express observation that the Missouri court had never explained why, to the extent restraints were necessary, they must be visible. Confronted with a record that is utterly silent as to the necessity of visible restraints, *Deck* compels a finding that error [53] occurred. The Wisconsin Court of Appeals' decision to the contrary necessarily amounts to an objectively unreasonable application of *Deck*.

This leaves us with the question of prejudice. The State has argued that the district court erroneously placed the burden on the State to show that the shackling error was harmless beyond a reasonable doubt under *Chapman* rather than placing the burden on Wilber to show that the error had a substantial and injurious effect on the verdict under *Brecht*. But the district court obviated any issue in this regard when it addressed the State's motion to stay its order granting the writ and ordering Wilber's release absent a decision to retry him within 90 days. The court expressly found that Wilber had met the *Brecht* test by raising a "grave

doubt" as to whether visibly shackling him at the closing of the trial had a substantial and injurious impact on the jury's verdict. R. 100 at 3-4.

We agree with the district court's finding in this regard. As the Supreme Court's jurisprudence makes clear, visible restraints have long been deemed to be inherently prejudicial to the accused. It was for that very reason that the Court in *Deck* relieved the defendant of having to document the prejudice when a shackling error is raised on direct review. 544 U.S. at 635, 125 S. Ct. at 2015; *see also United States v. Cooper*, 591 F.3d 582, 588 (7th Cir. 2010) (noting that "the Court [in *Deck*] saw nothing even potentially benign in shackles, nor did it suggest that a jury might feel sympathy rather than fear or aversion for a shackled defendant"). It is true enough that Wilber was only confined for the closing phase of the trial, as the attorneys delivered their closing arguments and the judge gave the jury its final instructions. But as Judge Griesbach pointed out, it is at this stage of the trial that a jury is most likely to be [54] focused on the defendant, as it considers the charge, weighs the evidence and arguments marshaled by counsel, and begins to ponder the defendant's fate. Particularly where, as here, a defendant is accused of a violent crime, his sudden appearance in multiple sets of manacles can only signal that the court itself believes he presents a danger to those in the courtroom, including the jury—and by extension, the general public—and must be physically and forcibly separated from them. At the same time, the State's case, although adequate to support the guilty verdict, was not so overwhelming that we can discount the

possibility that the restraints had a substantial adverse effect on the verdict.

To the district court's rationale we would add the point that Wilber's belligerent and violent behavior on the night that Diaz was killed was mentioned repeatedly by the State's witnesses and was a subject of emphasis in the State's closing arguments. As noted earlier, prior to the house party, Wilber had been drinking at a local bar with family and friends. When the bar closed, patrons were invited to continue socializing—in what witnesses called an "after set"— at the house where Diaz and his family lived. By the time Wilber's group left the bar, he was intoxicated and had already shown the first signs of hostile behavior. Jamie Williams was at the bar and testified that Wilber seemed drunk. He had asked her to buy him a beer, and when she declined, he responded, "[F]uck you, bitch." R. 61-23 at 135. Later, at the after party, he walked into the living room of the house and, unprovoked, threatened Leah Franceschetti, "Bitch, I will slap you." *Id.* at 123. Antonia West, Wilber's sister, who herself was intoxicated, described Wilber as being "pretty buzzed up" at the party. R. 61-20 at 96. When Wilber's behavior subsequently escalated from verbal abuse to physical violence, it apparently [55] did not come as a surprise to those who knew him. Wilber's cousin, Donald Jennings, recalled that he tried to calm Wilber down, "'[c]ause I know my cousin. … [When] [h]e get mad, he get mad." R. 61-21 at 108. Williams recalled that prior to the shooting, she was encouraged to leave the party because "there's going to be some drama." R. 61-23 at 136. Oscar Niles told police he too left the party before the shooting because

given "the way [Wilber] was acting, [Niles] felt that it was time for him to go." R. 61-26 at 25.[8] Witnesses used a variety of adjectives to describe Wilber's behavior, including "not acting right" (R. 61-23 at 135), "agitated" (R. 61-26 at 19), "wild, kind of crazy, as if possessed" (R. 61-24 at 290), all of them suggesting that Wilber was, to use a phrase that his sister Antonia West endorsed, "completely out of control" (R. 61-20 at 99). In keeping with that characterization, in the moments leading up to the shooting, Wilber had "tussled" with multiple individuals, knocking or pulling a chain off of Niles' neck, choking Jeranek, and punching Torres hard enough for him to briefly lose consciousness. When individuals like Jeranek and Diaz attempted to intervene and calm him down, Wilber responded with threats. When Diaz admonished Wilber to demonstrate some respect for his house and his family, Wilber reportedly said "I will fuck you up. … I don't give a fuck about you and your family. I'll burn this motherfucking crib down with or without your family." R. 61-24 at 291–92.

It comes as no surprise that the State highlighted the descriptions of Wilber's behavior in its closing arguments to the jury. The emphasis was entirely appropriate, given the defense's own focus on the lack of first-hand testimony [56] identifying Wilber as the shooter and the physical evidence which raised some question as to whether Wilber could have

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[8] Niles later acknowledged that he was, in fact, present when Diaz was shot.

fired the shot that killed Diaz. Wilber's out-of-control behavior, and his escalating series of threats and altercations in the moments leading up to the shooting, reasonably supported an inference that he was in fact the one who shot Diaz.

But this only serves to confirm why the decision to visibly shackle Wilber at a stage of the trial when the State's counsel was recounting and emphasizing Wilber's behavior was necessarily prejudicial. When the jury heard these arguments, Wilber was in a courtroom, sitting at the defense table, on trial for murder. He was not drunk, at an after-hours party, arguing with other inebriated guests. He had every incentive to behave himself in front of the jury charged with deciding his fate. Yet the visible shackles that he wore for closing arguments signaled to the jury that Wilber was incapable of self-control even when his own freedom was at stake, that the court itself perceived him to pose such a danger that he must be physically strapped to a wheelchair in order to protect everyone else in the courtroom. *See Deck*, 544 U.S. at 630, 125 S. Ct. at 2013 (visible shackling "suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large'") (quoting *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346). The visible shackles reinforced the very argument that the prosecutor was making as to why Wilber must have been the person who shot Diaz, effectively signaling that the court itself agreed with the State's characterization of Wilber as "[a] guy who couldn't control himself." R. 61-28 at 130. It is difficult to imagine a more prejudicial action the court could have taken at that point in the trial. [57]

III.

For all of the foregoing reasons, we agree with the district court that the Wisconsin Court of Appeals' decision finding the evidence sufficient to support Wilber's conviction was not an unreasonable application of *Jackson*. However, we also agree with the district court that the state appellate court's decision sustaining the restraints imposed on Wilber represented an objectively unreasonable application of *Deck*. In the absence of any rationale justifying a need for visible restraints, the decision to visibly shackle Wilber deprived him of his due process right to a fair trial. We sustain the district court's decision to grant a writ of habeas corpus (allowing the State time in which to decide whether to re-try Wilber) on that basis. Like the district court, we find it unnecessary to reach, and do not reach, Wilber's claim of trial counsel ineffectiveness.

AFFIRMED [58]

APPENDIX B

COURT OF APPEALS DECISION
DATED AND FILED
September 3, 2008

Appeal No. 2007AP2327-CR
Cir. Ct. No. 2004CF609

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANNY L. WILBER,

DEFENDANT-APPELLANT

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 KESSLER, J. Danny L. Wilber appeals from a judgment convicting him of first-degree intentional homicide by use of a dangerous weapon [1] contrary to Wis. STAT.§§ 940.0l(l)(a) and 939.63 (2003-04),[1] and from an order denying his motion for postconviction relief. Wilber argues that he is entitled to a new trial because: (1) the trial court erroneously admitted evidence concerning burned shoes to establish consciousness of guilt; and (2) the trial court erroneously exercised its discretion when it ordered that Wilber be placed in a wheelchair with restraints during closing argument. We reject his arguments and affirm.

BACKGROUND

¶2 Wilber was convicted of first-degree intentional homicide by use of a dangerous weapon in connection with the January 31, 2004 shooting death of David Diaz. Diaz was shot at an after-hours house party after a fight broke out. It was undisputed that Wilber was present and fought with Diaz and others. However, Wilber's defense was that he was not the shooter.[2]

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Because Wilber does not challenge the sufficiency of the evidence against him, we provide only this brief summary of the facts concerning the shooting.

¶3 At trial, the State sought to introduce evidence that less than 24 hours after Diaz was shot, a pair of shoes was burned in an outdoor grill located at 2548 West Forest Home Avenue, where, the parties stipulated, Wilber was living with his sister at the time of the shooting. For reasons discussed below, the trial court denied Wilber's motion in limine seeking to exclude the evidence and allowed the evidence to be admitted. [2]

¶4 During closing arguments, Wilber was physically restrained in a manner that was visible to the jury. He was found guilty and sentenced to life in prison, with eligibility for extended supervision after forty years.

¶5 Wilber filed a postconviction motion alleging that the trial court had erroneously exercised its discretion when it admitted evidence of the burned shoes and had Wilber restrained in a visible way during closing arguments. The trial court denied the motion without a hearing. This appeal follows.

DISCUSSION

I. Admission of evidence of the burned shoes.

¶6 At issue is whether the evidence of the burned shoes was relevant and, if so, whether it should nonetheless have been excluded because it was unfairly prejudicial. Relevant evidence is defined by WIS. STAT. § 904.01 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

> ¶7 In reviewing evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. If there exists a reasonable basis for the trial court's determination, this court will uphold the trial court's ruling. [3]

State v. Kuntz, 160 Wis. 2d 722,745,467 N.W.2d 531 (1991) (internal quotation marks and citations omitted); *see also* ***State v. Davidson,*** 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606 ("[T]he trial court's exercise of discretion will be sustained if the trial court reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion.").

¶8 In this case, Wilber filed a motion in limine seeking to exclude evidence that burned shoes (more specifically, the soles that remained after the shoes were burned) were recovered from an outdoor grill in the yard of Wilber's residence. Wilber said the

State intended to argue that the burned shoes were evidence that Wilber intended to destroy evidence, and that this showed consciousness of guilt.

¶9 According to a police report, the shoes were recovered from a grill in Wilber's yard on February 1, 2004, and a witness reported smelling something burning in the grill the evening of January 31, 2004. Wilber argued that evidence concerning the shoes should not be admitted because there was nothing to connect Wilber to the shoes. Indeed, Wilber asserted, there was evidence that the shoes could not be his, because his feet are size fourteen and a half, and the burned shoes were size 12. Wilber explained:

> No evidence supports the assertion that Wilber was at the location where the burned shoe soles were found on either January 31 or February 01, 2004. No evidence demonstrates that on January 31 Wilber owned or wore shoes having the type of sole recovered on February 01.
>
> The bald assertion anticipated to be opined by the State that the burned shoe soles demonstrate consciousness of Wilber's guilt is completely lacking in foundation or a basis in fact. This evidence cannot reasonably be characterized as relevant and because its introduction poses the threat of unfair prejudice ... [it should be excluded]. [4]

¶10 The State said that it did not intend to prove the shoes were Wilber's and argued that the unique facts themselves-evidence that shoes and perhaps other items[3] were burned in the backyard of the suspect's residence in the dead of winter within a day of a homicide-were circumstantial evidence of destruction of evidence and consciousness of guilt.

¶11 The trial court denied the motion in limine, concluding that the expected testimony was admissible circumstantial evidence on the issue of consciousness of guilt. The trial court said it found a nexus to Wilber because within 20 hours of a homicide, in the middle of winter, at night, there was a fire in the grill in Wilber's yard. The trial court continued:

> [O]fficers, detectives who are investigating this case find the remnants of what appear to be what one witness might suggest to be clothing and a shoe remnant left in[] the grill. The thinking being that your family-you and the family members that reside there have access to that grill.

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[3] The officer found "a large amount of burned material" in the grill but was not able to identify anything other than the soles of two shoes and a partially smoked cigarette. While Wilber complains about references to burned clothes that he asserts were never found in the grill, his argument is focused on the admission of evidence concerning the shoes. Thus, we will not address the details

. . . .

> It is in this court's opinion admissible circumstantial evidence to which the State can argue to a jury that they can use reasonable inferences using their common experiences in the affairs of life.

The trial court acknowledged that the shoes were not direct evidence tied to Wilber, but found that the evidence had some connection from which a jury could draw reasonable inferences. [5]

¶12 Ultimately, the jury heard testimony from the woman who lived in the other unit of the duplex where Wilber resided. She testified that on the night of January 31, 2004, she smelled "a real strong smoke odor" and "smoke coming from the barbecue." She said: "I actually looked out my back porch because I thought my house was on fire." She said she did not see anybody by the grill.

¶13 Detective Joseph Erwin testified that on February 1, 2004, he observed the grill in Wilber's yard. He said it contained "burn material" and that when he sifted through it, he found the soles of two shoes, a cigarette butt, ash and charcoal briquettes. Erwin said he was not able to determine who owned the shoes. Detective Carl Buschmann testified that by

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concerning clothing (or lack thereof). *See* ***State v. Pettit,*** 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (We generally do not consider arguments inadequately developed.).

working with the shoes' manufacturer, he was able to determine that the soles came from a Timberland shoe, size twelve.

¶14 Wilber called as a witness a shoe salesman who testified that Wilber's foot was a size fourteen-and-a-half. On cross-examination, the salesman acknowledged that Wilber was wearing size 13 wide shoes in court, and that there was one-sixth of an inch between the defendant's toe and the front of the size 13 wide shoe. In closing, Wilber's attorney implied that the shoes could not be Wilber's because they would not have fit his feet. In contrast, the State asserted that Wilber could fit into size 13 wide shoes with room at the toe, and therefore could have fit into the shoes that were burned in the grill.

¶15 At issue is whether the trial court erroneously exercised its discretion when it allowed the State to present evidence concerning the burned shoes. The trial court concluded that the evidence was relevant, circumstantial evidence of destruction of evidence that could evince Wilber's consciousness of guilt. Wilber recognizes that destruction of evidence can be probative of guilt, *see* WIS JI–[6]CRIMINAL 172,[4] but contends the evidence was inapprop1iately

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[4] WISCONSIN JI–CRIMINAL 172, entitled "Flight, Escape, Concealment," provides:

> Evidence has been presented relating to the defendant's conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether

admitted here because the alleged burning of evidence was not directly attributable to Wilber. The State argues that there is circumstantial evidence that Wilber, or someone acting on his behalf, destroyed evidence from which the jury could infer consciousness of guilt: someone burned items, including a pair of shoes, in a grill in the defendant's yard, at night, in the winter, within 20 hours of the homicide.

¶l6 We conclude that the trial court reviewed the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion when it concluded that the circumstantial evidence of destruction of evidence was relevant to Wilber's consciousness of guilt. *See* ***Davidson,*** 236 Wis. 2d 537, ¶53. The circumstances of the burning were sufficient to establish a potential link between Wilber and the shoes. From this circumstantial evidence, the jury could infer that evidence was destroyed by Wilber or someone acting on his behalf, and that this evinced consciousness of guilt.

¶17 We further conclude that the trial court did not erroneously exercise its discretion when it concluded that the relevance of the evidence was not substantially outweighed by the risk of unfair prejudice. *See* WIS. STAT.§ 904.03. [7]

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consciousness of guilt shows actual guilt, are matters exclusively for you to decide.

> Evidence is unfairly prejudicial if it has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Franklin, 2004 WI 38, 4]23, 270 Wis. 2d 271, 677 N.W.2d 276 (internal quotation marks and citation omitted). Wilber offers no argument that the evidence was unfairly prejudicial under § 904.03, focusing instead on his contention that it was not relevant due to the lack of a direct connection to Wilber, and on his argument that admission of the evidence was not harmless error. We discern no error by the trial court.

II. Use of visible restraints during closing argument.

¶18 During closing argument, Wilber was restrained in a way that was visible to the jury. Specifically, he was seated in a wheelchair and his wrists were chained together. His arm was strapped to the wheelchair. Wilber contends that the trial court erroneously exercised its discretion when it ordered him to be restrained in that manner, and that the visible restraints violated his right to a fair trial. We reject his arguments and conclude that the trial court did not erroneously exercise its discretion when it ordered the use of the restraints during closing argument.

A. Summary of events leading to the imposition of restraints.

¶19 As we explain below, the trial court's order for the use of a wheelchair, wrist chains and arm restraints was the last in a series of orders concerning security that were made over the course of the seven-day trial. Less restrictive means of restraint were employed, but they were unsuccessful at controlling Wilber's behavior. Wilber does not challenge the imposition of earlier [8] restraints, contesting only the use of the wheelchair[5] and wrist and arm restraints during closing argument because these restraints were actually visible to the jury, unlike the prior restraints.

¶20 The trial court discussed Wilber's behavior and the need for security at least eight times throughout the trial. The trial court's comments on this matter were extensive, composing nearly fifty pages of the transcript. The most relevant events are summarized below.

¶21 On the first day of trial, outside the presence of the jury, the trial court observed Wilber making facial gestures and being disrespectful to the court. It admonished Wilber to control his reactions,

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[5] It appears that the wheelchair was used as part of the security employed, perhaps to secure the restraints or to more easily transport Wilber. There is no evidence that the wheelchair was needed for health reasons.

noting that his reactions would not look good in front of the jury. At the time this occurred, Wilber's ankles were chained together and the chain was bolted to the floor. These restraints were kept out of sight of the jury by skirting around the prosecution and defense tables.

¶22 On the third day of trial, outside the jury's presence, the trial court made an evidentiary ruling in the State's favor. Just as the trial court was adjourning the proceedings for lunch, Wilber spoke directly to the trial court, complaining that it was deciding issues in favor of the State. The following exchange occurred:

> [WILBER): It's not new.
>
> THE COURT: Stop it.
>
> [WILBER]: It's not new. What objection haven't you denied of my lawyer's. [9]
>
> THE COURT: Stop it.
>
> [WILBER]: You are granting everything the D.A. is throwing at you.
>
> THE COURT: Deputies, in the back with him.
>
> [WILBER]: What haven't you denied, that's nothing new. Put that on the record. I'm speaking up on my behalf. This is my life.
>
> THE COURT: [Counsel], please talk to your client.

[COUNSEL]: I will, your honor.

[WILBER]: You don't intimidate me with that shit, man.

THE COURT: Mr.-Mr. Wilber.

[WILBER]: You gonna hold me in contempt? What, you gonna hold me in contempt? It's my life right here.

THE COURT: Mr. Wilber, I'm going to if you don't –

[WILBER]: Do it.

THE COURT: -settle down and behave.

[COUNSEL]: Danny, please relax.

THE COURT: If you don't behave-

[WILBER]: It ain't doing me no good her overruling–sustaining everything he throw out whether it is bogus or not.

THE COURT: Mr. Wilber, you are doing yourself no good.

[WILBER]: Grab my folder, man. You need to come speak to me too.

Wilber then left the courtroom. The trial court did not discuss the exchange and shortly thereafter, a recess was taken.

¶23 At the beginning of the afternoon session, the trial court discussed Wilber's outburst. The trial court asked Wilber if he could control himself and he [10] said he could. The court also noted that additional security had been added, including increasing the number of deputies in the courtroom to four and placing a stun belt on Wilber's arm, under Wilber's clothes. The court stated that it did not believe additional steps would have to be taken because Wilber had indicated he would control his behavior.

¶24 The next day, the trial court provided more explanation about why additional security had been ordered. It explained that on the previous day, after the exchange with the court, Wilber "continued to be highly agitated, not only at them but at anyone back in the bullpen area, as well as [at] his own lawyer for the better part of the lunch hour." The court said the deputies had reported that Wilber made statements which the court paraphrased as: "[I am] not going down for this, you might as well use your gun and kill me now." Finally, the trial court said, Wilber had asked the deputies detailed questions about the path he would walk to the courtroom each morning, what floor he would be coming and leaving from, when he would be coming and going, and which people would have access to that same path. The trial court said this alarmed the deputies, who believed Wilber might try to flee, perhaps with the help of others. For this reason, the Sheriff's Department had recommended the stun belt and the trial court had agreed with that recommendation.

¶25 The trial court said that if there were further problems, two things might occur: Wilber might have his hands secured or he might be removed from the courtroom for the duration of the trial and have to watch the trial via video conference. However, the trial court noted, there had been no additional problems since the stun belt was added and additional deputies were assigned to the courtroom. [11]

¶26 The trial court also noted for the record that three men had approached the trial court's clerk the day before and made comments to her that were unclear, but caused the trial court some concern.[6] In addition, three men unfamiliar to the trial court had watched the trial and were seen next to witnesses who were under a sequestration order. As a result of these incidents, the trial court sequestered the jury for the remainder of the case, requiring them to report in the morning and remain together as a group until the end of each day.

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[6] The trial court explained:

> The specifics of the comments had to do with whether or not she was going to be getting her fingers ready. Fingers ready for what we could only speculate and so we don't know what that means. The court looks at it, as I think a prudent court does, as an ill-advised comment at best, and-and a possible threat at wors[t].

¶27 On the fifth day of trial, the trial court admonished Wilber when it perceived him acting disrespectfully to the court. The trial court asked Wilber's counsel to talk with him again and took a ten minute break to do so.

¶28 On the afternoon of the seventh day of trial, just before closing arguments, Wilber was seated in a wheelchair with his wrists secured and his arm was strapped to the wheelchair with two-inch wide straps. The trial court summarized the events of the previous days and then explained what had caused it to order the wheelchair and additional restraints. The court stated that its instructions to the defendant and the addition of the stun belt apparently were insufficient,

> because on today's date the defendant used absolutely inappropriate, vulgar, profane language to the deputies who were in charge of security of this courtroom, and [this] will not be tolerated or accepted. He also physically fought [12] with the deputies, such that they had to decentralize [sic] him in the back hallway leading back to the bullpen.

¶29 The trial court emphasized that Wilber's actions led it to order the additional security, stating:

> [W]e're at the stage where we charge the jury, we have closing arguments, where quite honestly the State is going to be making their closing argument that I'm

> sure is going to have parts of it that the defendant is going to simply find annoying, wrong, incorrect, lying, disrespectful of him, and if he was already demonstrating to me at the very beginning of these proceedings that he didn't agree with my rulings and was going to act out, God only knows how he's going to react when the State starts making its closing argument.. ..
>
> I'm not prepared to risk that. Not given the history with this defendant .... will not be dissuaded from having him in any less secure form than he is right now.

¶30 Wilber's attorney objected to the constraints, asserting that Wilber's appearance in the wheelchair was "disturbing because it looks absolutely horrible." He suggested that there were constitutional problems with Wilber's appearance in restraints.

¶31 In response, the trial court reminded counsel that Wilber had been warned and that the use of increased restraints had been progressive. It also referenced an incident that occurred in the same courtroom several years earlier in which a defendant grabbed a deputy's gun, wounded the deputy and was then shot to death by another law enforcement officer. The trial court observed that even though Wilber had been wearing a sum belt, he was still able to "get into it, both physically and verbally" with the bailiffs when they were escorting Wilber to the bullpen. [13]

¶32 Wilber's counsel urged the trial court to proceed without the wheelchair and wrist and arm restraints. The trial court denied the request, referencing Wilber's prior comments that the deputies should just "shoot him now" and stating: "This is someone who is by his own language and conduct ... a security 1isk and I am not going to ratchet it back down."

¶33 As the trial court proceeded to bring the jury into the room, the prosecutor asked the court if he should see if his office had a sport coat or blazer that Wilber could wear. The trial court responded that it was not necessary and there was no further discussion of covering the arm and wrist restraints.

¶34 The closing arguments occurred without incident. Later, the parties made a record of Wilber's motion for mistrial that was based on his appearance in restraints. The trial court denied the motion.

B. Legal standards and analysis.

¶35 At issue is the visible, physical restraint of Wilber during closing arguments. "A criminal defendant generally should not be restrained during the trial because such freedom is 'an important component of a fair and impartial trial.'" ***State v. Champlain,*** 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007) (quoting ***Sparkman v. State,*** 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965)). However, a defendant may be subjected to physical restraint while in court if the trial court "has found such restraint reasonably necessary to maintain order." ***Id.;*** *see also* ***State v. Cassel,*** 48

Wis. 2d 619, 624, 180 N.W.2d 607 (1970) ("[T]he safety of the court, counsel, witnesses, jurors, and the public may demand shackles on an accused even in the presence of a jury."). [14]

¶36 "A trial court maintains the discretion to decide whether a defendant should be shackled during a trial as long as the reasons justifying the restraints have been set forth in the record." ***State v. Grinder,*** 190 Wis. 2d 541, 550, 527 N.W.2d 326 (1995). The court's "'discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (citation omitted). The court's decision to restrain a defendant will be upheld unless it can be shown that the court erroneously exercised its discretion. ***Id.***

¶37 Wilber argues that the trial court erroneously exercised its discretion and violated his right to a fair trial by requiring him to appear before the jury bound to a wheelchair. Wilber contends that no real security interests were served by the additional restraints, given that he was already chained to the floor and wore a stun belt. He acknowledges that both his outburst to the trial court on the first day of trial and his physical altercation with deputies on the last day of trial "merited reasonable measures" but asserts that "neither required more stringent measures than those to which Wilber was already subjected." Wilber also argues that the trial court failed to explain "what increased security benefit was obtained" and

erroneously considered the shooting that had occurred in the same courtroom several years earlier.

¶38 We conclude that the trial court did not erroneously exercise its discretion when it ordered the additional restraints. There is no question that the trial court engaged in a "'rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" *See* ***id.*** The trial court took great pains to explain its concerns and each level of increased security that it imposed. [15] It warned Wilber numerous times what would occur if there were continued threats to security and decorum. Despite these warnings, on the final day of trial Wilber engaged in a verbal and physical altercation with the sheriff's deputies.[7] The trial court determined that in light of that altercation, the security measures in place were insufficient and additional restraints should be used. We discern no erroneous exercise of discretion.[8]

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[7] At no time has Wilber contested the trial court's summaries of his behavior inside and outside the courtroom.

[8] The trial court offered to give the jury a cautionary instruction about the use of restraints. *See* ***State v. Champlain,*** 2008 WI App 5, ¶33, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007). ("[W]henever a defendant wears a restraint in the presence of jurors trying the case, the court should instruct that the restraint is not to be considered in assessing the proof and determining guilt."). However, Wilber' s counsel declined the instruction. Counsel said he doubted that any instruction "could be fashioned, that would take away the impact of what Mr. Wilber was presenting to the jury as a result

of the ¶39 We reject Wilber's suggestion that the trial court's reference to the courtroom shooting that occurred three years earlier renders its discretionary determination erroneous. The trial court's reference to that shooting was only one of myriad facts the trial court discussed, and it did not discuss it for long. The trial court did not use that shooting incident to make an automatic, unreasoned judgment about Wilber's case. Rather, the record reveals extensive discussion and thought went into each decision about security.

¶40 We conclude that the trial court did not erroneously exercise its discretion when it ordered the additional restraints for closing arguments. The record provides ample support for the trial court's conclusion that restraints were necessary to maintain order and ensure the safety of the participants. *See* [16] ***Champlain,*** 307 Wis. 2d 232, ¶22; ***Cassel,*** 48 Wis. 2d at 624. Therefore, we reject Wilber's claim that the use of visible restraints denied him a fair trial.

III. Wilber's argument that real controversy was not fully tried.

¶41 In his conclusion, Wilber asserts that this court should grant him a new trial because the real controversy was not fully tried. Specifically, he

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physical constraints placed upon him." On appeal, Wilber twice states that the trial court should have given a jury instruction on restraints, but he does not develop this argument. We decline to address it further. *See* ***Pettit,*** 171 Wis. 2d at 647.

contends that "[t]he issue of the burned shoes served as a distraction from the real issues at trial-what did the witnesses really see, and was their testimony in court consistent with the physical evidence and their previous statements." It is within our discretion to grant a new trial if the real controversy has not been fully tried. WIS. STAT. § 752.35. We are unconvinced that a new trial is wa!1"anted in this case.

By the Court.–Judgment and order affirmed.

Not recommended for publication in the official reports. [17]

APPENDIX C

IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,
PLAINTIFF,

v. Case No. 2004CF609

DANNY L. WILBER,
DEFENDANT.

JURY TRIAL

THE HONORABLE MARY M KUHNMUENCH
CIRCUIT COURT JUDGE
February 14, 2005

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law, appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico
Official Court Reporter [1]

[Beginning of Excerpt pages 4–7]

And I wanted some additional fleshing out of that concept because that was in my research and my thinking about this issue of concern to me as well. And what I have determined is that this evidence is going to be admissible. I'm going to allow it into the record under the following reasons and with the following restrictions.

I'm going to first state, Mr. Wilber, one of the things that I wanted to explain to you, and -- and your lawyer's been practicing for a long time, he's been in front of me in the past, but one of the things you've got to do, and he's probably told you it and maybe it will make more sense if it comes from me, you can think I'm the biggest horse's patootie, lawyers think it, defendants think it, you can't show it. You can't make facial gestures, you can't make sounds, you can't act imprudently in the court, you can't be disrespectful to the court. If you do, I'm going to have to end up taking some steps I really don't want to take.

In addition, just as a practical matter, as I'm sure your lawyer told you, [4] looks really bad in front of a jury. Really bad. One of the things that I noticed throughout the morning's session when I was having the lawyers arguing this legal point, and I do emphasize it's a legal appointment, you can have your own opinion about it, but it's the lawyers who have the right to make a legal argument on it, every time Mr. Griffin would make some comment that -- in terms of how he was going to couch this -- this evidence, and why he thought it was admissible, your

head was straining at the bit at times looking back at him and -- and maybe it was just a a reflex on your part.

But again, those kind of things, when we get into trial, when we're in front of a jury, are not going to be allowed. You can't do that. You have to face front wards at all times. You're not allowed to look back into the gallery. You're not allowed to turn back and make faces or gestures at the State table. You're supposed to be sitting straight in front in your chair, eyes forward, confer with your lawyer, but always facing this direction. [5]

And again, just as a practical matter, it just -- to do otherwise just looks bad in front of a jury. And your lawyer will tell you that. So I'm just trying to give you a helpful hint that you can think, as I said, whatever you want to think, you just can't show that. One, because it's disrespectful, and I'm going to have to take some steps to stop you if you don't do it, if you don't stop, and I don't want to have to do that. And the second thing is it's -- it's bad for you and it looks bad in front of a jury. So I'm going to ask you to be careful about how you act and how you react to the different things that happen during a trial here.

Mr. Chernin.

ATTORNEY CHERNIN: Judge, I want to say something. I know that Mr. Wilber, who's -- does not have -- all right, I should say this positively. Mr. Wilber has respect for the court. He is very into this legal ruling however. He has worked very, very diligently on the case along with me, he was familiar

with legal arguments. I think that his -- it's not hostility on his part, he just [6] strongly disagrees with the ruling. And –

THE COURT: And I told him that's perfectly acceptable. I have lawyers and defendants who disagree all the time. That's why we have a Court of Appeals and Supreme Court. What I'm trying to tell you is it's a disrespect to the court to show that you disagree. You have to keep a poker face. And more importantly, the point I'm really trying to make to you is in your interest, it looks bad in front of a jury. And that I don't think your lawyer can disagree with.

ATTORNEY CHERNIN: We don't, Your Honor, and I -- I wasn't arguing with the court.

THE COURT: The reason I find this to be -- first of all, it is circumstantial evidence, and circumstantial evidence is permissible in a trial. And in fact, there's a jury instruction, Mr. Wilber, that in fact indicates as a point of law that, you know, circumstantial evidence can prove up a fact just as direct evidence can. Neither form of evidence is better than the other. They're both -- they both can, both forms, [7]

[End of Excerpt]

APPENDIX D

IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,
PLAINTIFF,

v. Case No. 2004CF609

DANNY L. WILBER,
DEFENDANT.

JURY TRIAL (DAY 3 – A.M.)

THE HONORABLE MARY M KUHNMUENCH
CIRCUIT COURT JUDGE
February 16, 2005

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law, appeared on behalf of the defendant.

Defendant appeared in person.

Cynthia A. Dobbs
Certified Shorthand Reporter [1]

[Beginning of Excerpt pages 116–17]

MR. CHERNIN: Okay.

MR. GRIFFIN: That's all I'm asking.

THE COURT: And he has the right to do that. If they don't want to do it and they want to take the time to read it while they are on the stand, that's their business.

MR. GRIFFIN: I just –

THE COURT: There's nothing to preclude that. There's nothing improper about the State asking them to familiarize themselves with their purported statements. All right, gentlemen, so I'm going to deny your objection. It's 12:15. We are going to be back here in an hour, at 1:15.

THE DEFENDANT: It's not new.

THE COURT: Stop it.

THE DEFENDANT: It's not new. What objection haven 't you denied of my lawyer's.

THE COURT: Stop it.

THE DEFENDANT: You are granting everything the D.A. is throwing at you.

THE COURT: Deputies, in the back with him.

THE DEFENDANT: What haven't you denied, that's nothing new. Put that on the record. I'm speaking up on my behalf. This is my life.

THE COURT: Mr. Chernin, please talk to [116] your client.

MR. CHERNIN: I will, Your Honor.

THE COURT: Thank you.

THE DEFENDANT: You don't intimidate me with that shit, man.

THE COURT: Mr. -- Mr. Wilber.

THE DEFENDANT: You gonna hold me in contempt? What, you gonna hold me in contempt. It's my life right here.

THE COURT: Mr. Wilber, I'm going to if you don't –

THE DEFENDANT: Do it.

THE COURT: settle down and behave.

MR. CHERNIN: Danny, please relax.

THE COURT: If you don't behave –

THE DEFENDANT: It ain't doing me no good her overruling -- sustaining everything he throw out whether it is bogus or not.

THE COURT: Mr. Wilber, you are doing yourself no good.

THE DEFENDANT: Grab my folder, man. You need to come speak to me too.

THE COURT: Mr. Chernin, wait a few moments, please. Ms. West, you may step down.

(The witness leaves the stand.) [117]

[End of Excerpt]

APPENDIX E

IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,
PLAINTIFF,

v. Case No. 2004CF609

DANNY L. WILBER,
DEFENDANT.

JURY TRIAL

THE HONORABLE MARY M KUHNMUENCH
CIRCUIT COURT JUDGE
February 16, 2005

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law, appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico
Official Court Reporter [1]

[Beginning of Excerpt pages 3–5, 149–54]

[Excerpt pages 3–5]

THE COURT: State of Wisconsin v. Danny Wilber, 04CF000609, first degree intentional homicide while armed with a dangerous weapon. Appearances, gentlemen.

ATTORNEY GRIFFIN: Assistant DA Jim Griffin for the State with Detective Tom Casper of the Milwaukee Police Department.

ATTORNEY CHERNIN: Michael Chernin appearing on behalf of Danny Wilber. Danny Wilber appears in person.

THE COURT: Good afternoon.

ATTORNEY CHERNIN: Good afternoon.

THE COURT: How you doing this afternoon, Mr. Wilber?

THE DEFENDANT: I'm all right.

THE COURT: Okay. Let's just remember, you gotta stay in control when you're in front of a jury. I talked to you about that a couple of days ago. You can be as angry as you want at me, that -- you know, that ' s why I'm up here. If you want to be angry at anybody be angry at me. But if you do those kinds of things in front of a jury, [3] it only works to your disadvantage. Do you understand what I'm saying?

THE DEFENDANT: Yeah, I hear you.

THE COURT: All right. Do you think you're going to be able to control yourself this afternoon?

THE DEFENDANT: Yeah, I'm all right. I'm all right.

THE COURT: Okay. We're going to continue with the examination of Antonia West. We're going to have her back on the witness stand. We'll continue with the direct examination of her.

The court does want to make a record of the fact that we have had to -- we have had to add additional security in the courtroom, we've added two additional deputies and so there are four deputies inside of court, and I would have one or two in the gallery. We've also added a stun belt to your, I believe it's on your arm, and one of my deputies -- is it going to be you, Tim?

DEPUTY: Yes.

THE COURT: That is going to control that, and that's a way of keeping you [4] safe, everybody around you safe, the staff safe and the jury safe so that the trial can continue without hopefully any additional incidences. That's necessary -- it's necessitated, Mr. Wilber, because of some of the statements that you made to the court and to the deputies in -- I'm hoping was a moment of anger , but when you make those kinds of statements and you indicate that you don't really have any respect for my authority or for the authority of the deputies, it becomes a -- a real safety

concern , an issue for everyone involved in the trial, and it doesn't do anybody any good.

So we have added the extra security at this time. I don't think anything else is going to need to happen or to -- to occur, I don't think we're going to need to take any additional steps, because you're giving me your word that you're all right and you're going to continue to behave while we're in front of the jury a n d during the duration of the trial. So I'll take you at your word.

All right. Let's bring the jury out. [5]

[Excerpt pages 149–54]

THE COURT: We had a third discussion that was a part of that -- of one of those side bars, actually I wouldn't call it a side bar, I believe it was a discussion that **we** had in chambers off the record, right around the noon hour after the defendant had been -- had demonstrated a certain level of agitation directed at the court, and made some statements that were problematic in many regards, including statements that required that I take additional safety precautions with him in the administration of a stun belt to his person in the afternoon session.

I had indicated to the parties that I felt that that was necessary and appropriate, and I was going to abide by what the Sheriff's Department, particularly my two deputies who are assigned to this court and are charged with the safety of everyone in it, I would acquiesce to their -- to their judgment. In

that discussion, the subject of the demonstration -- demonstrative evidence, that is again having the defendant be directed by the State at some point during its case in chief to stand and to make some motions with [149] his arms in relation to some markings on a wall that have to do with size, not only the defendant's size, but victim's size.

That discussion was going to be -- and is ultimately going to be on the record, where both sides are able to articulate their arguments more fully to the court. But during the discussion of that possibility of demonstrative evidence by the State, the court was made aware, and again, I don 't know by which side, but one or both of the lawyers indicated that that may create some additional problems for or with Mr. Wilber. And I indicated that we were going to need to -- depending on what my ruling was, we were going to have to take some steps to make sure that when that demonstration, if and when it occurred, occurred as safely as possible for everyone in here, and also mindful of protecting the defendant's constitutional rights, and so as to minimize the exposure or any exposure he might have in front of the jury as to his restraints.

That conversation was carried out [150] further into the courtroom, where we were standing or abutting the defense table, and I made some suggestions to the State. We ended it at that point, because I believe Mr. Chernin was going to go back and speak to his client. And it was the lunch hour and it was an issue in terms of the demonstrative evidence that we were going to need to take up more fully on the record later, and we have yet to do it.

The purpose of my summarizing that discussion now however is because it was sort of an offshoot of the discussion we were having in chambers of security measures and safety measures in this courtroom, that was the context of which it sort of evolved, and what reaction, if any, we might receive from the defendant. I believe that's a fairly accurate summary of that discussion that I believe occurred over the lunch hour immediately after the ending of the morning session.

Mr. Griffin?

ATTORNEY GRIFFIN: Correct.

THE COURT: Mr. Chernin? [151]

ATTORNEY CHERNIN: That is correct. And I think one of the other things that we discussed in that immediate conference was we try to recall what one other side bar has been about, and that was the one with the pictures regarding Antonia West. And I have to give Mr. Griffin full credit for his recollection of that as what we had discussed, and the court and I agreed with that.

THE COURT: All right, gentlemen. Those are the three sort of off-the-record discussions that I recall from the morning session. Do either of you have any additional recollections of things that we need to put on the record from the morning session, or for that matter from the afternoon session?

Mr. Griffin?

ATTORNEY GRIFFIN: For the afternoon session, Judge, there was another side bar, I think either one of the deputies or you noticed Antonia West sitting in the gallery, essentially in violation – I'm not saying that. I think it was willful or intentional, Judge, but in any event she was [152] in the courtroom, and I believe you asked the bailiff to ask her to leave.

THE COURT: Mr. Chernin?

ATTORNEY CHERNIN: Yes, and that was about three or four questions into Mr. Jennings 1 testimony.

THE COURT: And that's correct. The court had issued a -- on the first day of this trial a sequestration order for all witnesses to remain outside the court until called to testify by this court, and not to discuss their testimony with each other or with anyone unless directed to do so by this court. Miss West I observed in the back row of the courtroom, indicated to my deputy that she is still under sequestration, that we would need to have that communicated to her. I advised the lawyers at side bar that that's what was going to happen, and they both understood the court's position in that regard. I think both parties' recollection is correct, I think it was fairly early into whether it was one, two or three questions into it I'm not sure, but it was fairly early into the testimony of Mr. Jennings. [153]

All right, gentlemen. We're going to start early tomorrow. We're going to go on the record at 8:30. It 1 s more of a hassle for my staff than it is for you folks

because they've got to -- particularly my clerk, be paying attention to this thing, but also trying to work with the lawyers that are coming in and out, we're going to try to spin as many things as we can, and my clerk will, if possible, leave the courtroom and go out in the hallway and try to schedule things with lawyers out there as well. But it's -- we're going to get on the record so we can keep pace into -- this is Wednesday, we're into the early morning of Thursday, and we need to sort of just pick it up a bit.

We're going to continue with Mr. Jennings' testimony tomorrow morning. we need to take an abbreviated lunch hour tomorrow we'll do that as well, and also on Friday. I want to keep things moving, otherwise I fear just as you do that we may lose the jury. All right. We'll see you folks at 8:30 tomorrow morning.

(End of proceedings.) [154]

[End of Excerpt]

APPENDIX F

IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,
PLAINTIFF,

v. Case No. 2004CF609

DANNY L. WILBER,
DEFENDANT.

JURY TRIAL

THE HONORABLE MARY M KUHNMUENCH
CIRCUIT COURT JUDGE
February 17, 2005

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law, appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico
Official Court Reporter [1]

[Beginning of Excerpt pages 107–17]

fresh air. In the summertime we routinely do that, not so much in the wintertime. If that's something you want to do as well. Again, it has to be done collectively and with my deputies. Thank you.

DEPUTY: All rise for the jury please.

(Jury out of box.)

THE COURT: Please be seated. The court wants to make a brief record of the -- a brief record of the basis £or the court making the ruling that I have made with respect to the jury and the sequestration order requiring them to remain together for lunches, when they come and when they depart in the evening. And it's based on the following factors. This court has the primary duty of not only insuring the defendant has a fair trial, but I have an equal duty to make sure that the fair trial is done in a safe fashion. And in that regard, specific issues have arisen over the course, primarily of the last day, for certain over the last 48 hours, with respect to additional security measures being taken. [107]

I was advised, and I then with my deputies advised the lawyers, that there were several things that came to my attention yesterday, some directly to my attention and some indirectly. The things that came to my attention directly I think I've already spoken about in an earlier session yesterday with the defendant, and that is the defendant's behavior, which was primarily directed at the court, that is me, at the end of the morning session yesterday,

Wednesday, February 16th. And it had to do with the court's ruling on a particular matter.

The defendant wanted to -outside the presence of the jury, admonish the court for not ruling in any way since the beginning of the trial in the defense's favor. In addition, the defendant, in what I took to be an aggressive posture towards the court, indicated that I don't, that is the court, does not intimidate him. And finally, that the defendant is not going down for this, I believe these are fairly accurate quotes. And then finally, what are you going to do about it, hold me in contempt. [108]

My response at the time was I think fairly measured. It is clear to the court and I think clear to anyone who observed that outburst yesterday, that it was a clear basis for this court to in fact find the defendant in contempt. The court decided that that was an extreme measure that in my judgment wasn't necessary, at least from my perspective, in terms of the way he had addressed the court, and that I would at least admonish him and as well talk to his lawyer about making sure that he understood what the restraints were, the constraints I should say, about his behavior in the court, both in front of the jury and outside the presence of the jury.

That took care of the issue with respect to the defendant's behavior towards -- directly towards the court. But I have, as I said earlier, an obligation to make sure that any proceeding in here is done in a safe fashion. So in that regard, mindful of my obligation to the jury, to my staff and to any individuals who are **in** the gallery during this trial, in

conjunction with the advice and [109] direction of my deputies, we decided to take the following steps.

First, it was decided that we would add additional security to the courtroom. That was accomplished yesterday afternoon with two additional deputies inside the courtroom and at least one outside the courtroom in the gallery for the better part of the afternoon session. That would continue as I had worked it out with my deputies for the duration of the trial.

Secondly, the court indicated that the -- I consented to the deputy's directive that they should use the stun belt for the defendant, who I was advised after he departed my court was continued to be highly agitated, not only at them but at anyone back in the bullpen area, as well as his own lawyer for the better part of the lunch hour yesterday. In addition, my deputies advised me as to the reasons for the stun belt, that the defendant had made certain statements to them back there during the lunch hour, as well as earlier in the day, he was not going down for this, you might as well use your gun and [110] kill me now.

Finally, there was some statements made by the defendant as it relates to his coming and going from the courtroom. That is, when he had been brought up yesterday by my deputy from the jail to the court, he was asking questions directly related to the path that he would be taking every day in the morning, what floor he'd be coming and leaving from, what time he does that, whether there are any other individuals who are allowed, is it a public entrance, a private entrance, are people allowed to have access --

other people allowed to have access to this same pathway.

Those are the types of questions that good law enforcement take heed of and analyze to determine whether or not the defendant or anyone in custody is considering abusing his in-custody status. That's longhand for saying whether or not he's interested in fleeing or having an attempt to flee or have others assist him in fleeing. Based upon those comments, the court, in addition to my own observation of the defendant, agreed with the Sheriff's [111] Department that they should take the additional step of securing the defendant with a stun belt for the duration of the trial. That has also been accomplished.

The third thing that I indicated to the Sheriff's Department was that I wanted the defendant to continue to have the use of his hands, but he must be fully restrained, continue to be fully restrained at his ankle to the eye bolt directly under the floor. As indicated in my ruling earlier, both tables, defense and the State, have skirted tables, thus blocking the jury's direct line of vision to the defendant, and the security measures that are ostensibly out of their view, that is around his ankle and under the table, secured to an eye bolt.

Finally, I indicated to the deputies that if it should become necessary, should the defendant engage in any further disturbances, either out of my presence or directly in my presence, we may in fact be forced to take the following two measures. Number one, we will secure his hands, but direct him to keep

his hands below the table [112] for the duration of the trial. If that was unsuccessful, then the court would take the most drastic step, which would be to secure the defendant outside the presence of the jury for the remainder of the trial. He would still have access either through a video conferencing directly from the jail, or in Judge John Franke's courtroom, which has a glassed-in area that is for that specific purpose, to have defendants who have become disruptive or unruly in front of a jury, to separate them from the defense table and to actually have them in a separate area of the courtroom.

Fortunately, after the lunch hour yesterday when I explained certain things to the defendant, he indicated to the court that he was all right, that he was going to be compliant with all further directives, even though he may not agree with them, and that it would not be a necessity to take those additional steps. Today, Thursday we have had no problems with the defendant at all. So again, since noon yesterday we have not found it necessary to engage in any additional [113] security measures.

However, at least in terms of the defendant directly, it also came to my attention however that there were individuals, as I mentioned in a -- a brief comment yesterday towards the end of the day, and whether they are one and the same we do not know, but there are three male individuals, they appear to be African-American, who had approached my clerk, a member of my staff, and made some comments to her outside this court, which again is inappropriate. The specifics of the comments had to do with whether or not she was going to be getting her fingers ready.

Fingers ready for what we could only speculate and so we don't know what that means. The court looks at it, as I think a prudent court does, as an ill-advised comment at best, and -- and a possible threat at worse.

In addition, the three individuals, again of African-American heritage, young males, entered the courtroom yesterday afternoon, I had not seen them prior to that time. They had been in the gallery. [114] I had asked both counsel whether or not they recognized them or whether they were witnesses. Neither one indicated that they were familiar with them. I asked my deputy to make sure that he watched them throughout the rest the trial. One of the things – actually two things became clear to the court. Certain individuals were found at the end of this hallway down in the direction, I believe, of Judge Conen's court, although I could be mistaken on that.

In any event, they were out in the hallway at the same time witnesses in this trial were under a sequestration order from the court. Those individuals had come in and out of the court on at least one or two opportunities yesterday afternoon, and I was advised, again by one of my deputies, that on one occasion a few of them were in the direct vicinity, if not immediately next to, witnesses that had been scheduled or were scheduled to testify in this case.

When I combined all of those types of observations and comments, in light of the defendant's behavior in my court, it [115] became clear to me that additional steps needed to be taken to protect the sanctity of the jury and of witnesses.

And indeed I advised my -- both lawyers and my deputy that we needed to remind Antonia West, a witness who had already testified in this case but had not been releases from her subpoena, that she was to remain outside the courtroom and not discuss her testimony with anyone until directed to do so by this court. And yet, we found her in the back row of the gallery during the initial stages of Mr. Jennings' testimony yesterday afternoon.

With that as a backdrop, the court believed that the most prudent steps to be taken to secure, as I said, the sanctity of the jury from any direct or indirect contact or interaction with potential witnesses or other people connected to this case, that the State's request that I sequester them for the duration of the trial be granted. My ruling -- I believe the defense had asked that I not make such a broad statement.

I don't think that the State wanted me to initially announce the [116] sequestration order in court, and the defense had asked that I somehow communicate my desires or my directives through my deputies. I advised both of them that I was denying those requests. Everything we do in here has to be on the record. That's for appellate purposes, and so that is why I advised – why I'm making the record the way I am right now, and I advised the parties that I would be addressing the jurors myself.

Finally, Mr. Chernin's request that I allow the deputy to sort of communicate that to them, to the jurors about coming and going and taking smoking breaks and so forth, that that come from my deputy,

and again, I denied that request. It is not a sheriff's directive, it's a court order, and it must come from the court.

The directive is as follows. As I have indicated to the jurors today before they broke, that they will, for the duration of the trial, be kept together. When they're coming in the morning they'll report down to Jury Management to a particular area. We will work the logistics of that out. Then they [117]

[End of Excerpt]

APPENDIX G

IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,
PLAINTIFF,

v. Case No. 2004CF609

DANNY L. WILBER,
DEFENDANT.

JURY TRIAL

THE HONORABLE MARY M KUHNMUENCH
CIRCUIT COURT JUDGE
February 18, 2005

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law, appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico
Official Court Reporter [1]

[Beginning of Excerpt pages 45–49]

going to ask Mr. Wilber to do this right now, he has a restraining device on his arm which will be exposed to the jury, and I would ask that that item be removed if the court is inclined.

THE COURT: Why would that be exposed to the jury? He 1 s got a shirt on, you had indicated it's the same thing he was wearing the other day when I asked you why you didn't bring the sweater to cover it up you said, it would be too warm in here, but besides it appears to be completely covered by his clothing.

ATTORNEY CHERNIN: Right, from this position. But if he's -- I mean -- Danny, could you show her your arm. I mean, there's -- it's obvious that there's something on here.

THE COURT: Well, one of the ways you do that is to simply pull his – excuse me?

THE DEFENDANT: I pull my thing here. My shirt here.

THE COURT: Thank you. I thought you were being disrespectful to the court [45] again. I get that impression from time to time when you sigh or make noises emanating from your -- from your vocal words, demonstrating to this court a certain level of disgust. It could just be me.

THE DEFENDANT: I have nothing to say, Your Honor.

THE COURT: I'm sorry?

THE DEFENDANT: I have nothing to say, Your Honor.

THE COURT: Well, you said it already. You already said it.

Mr. Chernin, please advise him about his conduct in this court, because as I said the other day, I'm not going to have you folks mistake my kindness for weakness. I have been doing this as restrained as I can outside the presence of the jury, and given his outburst the other day, he's lucky he hasn't been charged with threatening a judge, that he hasn't been charged with disorderly conduct, that he hasn't been charged with contempt. And you know whereof I speak.

ATTORNEY CHERNIN: Well, Judge --

THE COURT: And I am not going to [46] continue to run my court with this gentleman, you know, being disrespectful to me from the minute he comes in the court till the minute he leaves. I'm not going to tolerate it and I don't have to, quite honestly. I don't have to. Tell me if I have to. I don't think I do. I don't think there's anything in the rules of judicial conduct that require a judge to be disrespected and do nothing about it. Tell me if I'm wrong. I'm not going to. Today's the end. You do it again, we are going to add additional restraints to you in front of the jury.

ATTORNEY CHERNIN: Well –

THE COURT: I'm done, Mr. Chernin.

ATTORNEY CHERNIN: I--

THE COURT: I'm going to have him go in the back again with you and you are going to spend some time with him, explaining to him the proper conduct in court. I am not going to sit here from 10:00 o'clock this morning until 6:00 o'clock tonight having the defendant show utter disregard and respect for this court. It ain't gonna happen. I'm not [47] going to enable that kind of disrespectful, inappropriate conduct in a court of law. It ain't gonna happen on my watch, period.

ATTORNEY CHERNIN: Judge, we're well aware of that fact. I'm not arguing with you.

THE COURT: He doesn't seem to get it, Mr. Chernin.

ATTORNEY CHERNIN: I will talk to him. I do believe that Mr. Wilber understands it and I know that he did not mean any disrespect.

THE COURT: Mr. Chernin --

ATTORNEY CHERNIN: Yes.

THE COURT: -- he doesn't mean any disrespect, then why do it?

ATTORNEY CHERNIN: He sighed, Your Honor. And what we will do is the prop and I know what he's sighing about when we asked if we could

cover up this side of his arm, the cufflink doesn't hold on that side. And, Judge, the only thing we could do is this, if you're going to rule that you're going to allow this demonstration and he's going to have to stick up his hand, all we ask [48] is that we do the best we can to try to cover the restraint that's on his arm. And that's what we're asking -- that's what I'm asking for now. You haven't ruled yet, so let me not jump ahead.

THE COURT: The court's going to take a ten-minute break. The defendant can go back in the holding cell and you can chat with him back there.

(Break taken.)

THE COURT: Recalling *State of Wisconsin v. Danny Wilber*, 04CF000609, first degree intentional homicide while armed with a dangerous weapon. Appearances please.

ATTORNEY GRIFFIN: Assistant DA Jim Griffin for the State with Detective Tom Casper of the Milwaukee Police Department.

ATTORNEY CHERNIN: Michael Chernin appearing on behalf of Danny Wilber. Danny Wilber is present in the courtroom.

THE COURT: The court has had an opportunity to read the relevant case law, I've heard the arguments of the parties and I'm actually going to deny the State's request for this demonstration. The court's denying [49]

[End of Excerpt]

APPENDIX H

IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,
PLAINTIFF,

v. Case No. 2004CF609

DANNY L. WILBER,
DEFENDANT.

JURY TRIAL

THE HONORABLE MARY M KUHNMUENCH
CIRCUIT COURT JUDGE
February 22, 2005

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law, appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico
Official Court Reporter [1]

[Beginning of Excerpt pages 99–113, 196-207]

[Excerpt pages 99–113]

ATTORNEY CHERNIN: Your Honor, I respect the court's decision, I do need to place a couple more matters on the record in that regard. First, based upon the court' s ruling, I'd seek a mistrial.

THE COURT: That will be denied.

ATTORNEY CHERNIN : And next, Your Hon or, I would submit that irrespective of the seeming lack of corroboration between the two witnesses as to who said what to whom with regard to the concocting of the, I'll send a confession notion from the third -- that the third party would send a confession, both identified a witness who was present in the house, and that would be the gentleman who -- Roberto Gonzalez, who's now in your bullpen. And minimally I'd like the opportunity to interview him.

THE COURT: That is denied. No more record. That is denied. We've made a record. We've gone over that twice and you can interview him on your own time, for whatever reason or purpose that you see fit, but the court is not going to bring Mr. Gonzalez in here for any testimony as to [99] the -- as to the offer of proof. We're moving on now to the second issue before I bring the jury in, and that is the State of the defendant being in a secured wheelchair with -- not only secured at his ankles but at his wrists.

The record on that can be fairly stated as follows. Mr. Wilber is responsible for his own

predicament and for his own position, that is to be restrained and to have that obvious restraint being shown to the jury. This court started out at the very beginning of these proceedings, and with good faith as to the -- as to the parties, including the defendant. His behavior throughout this trial, beg inning with the very beginning, has been contemptible. The court has already made a record of -- of the basis for my having, if I had wanted to or found it necessary to find him in contempt, which I believe many, if not most of my colleagues, would have.

I even indicated, please do not, by not doing that don't mistake my kindness for weakness. That apparently fell on deaf [100] ears. This defendant, through his gestures, through his facial gestures at the court, through his facial expressions, through his body language, through his tone, and most particularly through his language, including the tirade that he had at the end of the second day or the end of the second morning of this trial, directed at this court, and challenging this court, quite honestly, to find him in contempt, thereby setting the stage for his defiance throughout the proceedings.

I told my staff at that time that I would not go the full route of additional safety measures, which include the belly chains, wrist chains, the security in the RIPP cord around his waist, and to the -- to the chair that he finds himself in now, that none of those things, in my opinion, would be necessary if I were to address the defendant respectfully and tell him that I don 't expect any further outbursts of that kind.

I also indicated that I felt that there was enough of a disturbance and enough of what I felt to be a personal threat to not [101] only my safety, but more importantly the safety of my staff, people in the gallery, and particularly the people in the jury, that it warranted going an extra step with security measures, including having a stun belt placed on his arm. I believe it 1 s been on his right arm for the since the second or third day of the trial, as of result of his outbursts to the court right before noon on that day.

The court a ls o looked at it in context, because there the court had done nothing but ruled on a defense motion, which is a part of these proceedings and is a part of trial since the beginning of time. The parties make their motions, the court rules. If the parties don't agree with the motion or what the court has ruled on, they then have the appellate court as their next resource.

That seems as such a normal part of these proceedings, it 1 s as normal to me as breathing, and if in fact my rulings one way or another were going to be the subject of a tirade each -- by the defendant each time I made them, we are going to have a long week and a long trial if the defendant was going to [102] gesture or have sounds of exasperation each time the court took a position that was different from what he thought or that, as I said to him earlier, you can think I'm the biggest moron that walked the planet, you just can 1 t show that to the court or to the jury.

I thought that that was enough of a guidance to him to get him to understand that such a disrespect to the court to these proceedings was not going to be

tolerated, and that by using the stun belt in addition to my words and guidance to him we would have nipped this in the bud. Apparently it was not a sufficient amount of restraint, because on today's date the defendant used absolutely inappropriate, vulgar, profane language to the deputies who were in charge of security of this courtroom, and will not be tolerated or accepted. He also physically fought with the deputies, such that they had to decentralize him in the back hallway leading back to the bullpen.

That conduct will not be rewarded, it will not be tolerated, and I will not be manipulated int o allowing a defendant, [103] by his actions, to dictate how I run this court. So when I say that it is through his own actions, his profane disregard for my use of language, his disregard of my admonitions, earlier in the week in terms of his behavior, and my overriding concern for the safety of everyone in this courtroom now that we're at the stage where we charge the jury, we have closing arguments, where quite honestly the State is going to be making their closing argument that I'm sure is going to have parts of it that the defendant is going to simply find annoying, wrong , incorrect, lying, disrespectful of him, and if he was already demonstrating to me at the very beginning of these proceedings that he didn't agree with my rulings and was going to act out , God only knows how he's going to react when the State starts making its closing argument and summing up what it believes the evidence is showing or not showing in this case.

I'm not prepared to risk that. Not given the history with this defendant. So when I say that he is the product in the position that he's in by his own

doing, I mean [104] it. And he will not -- and I will not be dissuaded from having him in any less secure form than he is right now. He is, I think I've aptly described it, secured at both the ankle and at the wrist. He's secured with a stun belt and with a rip cord to the chair so that there will be no further physical outburst of any kind by this defendant in the presence of the jury.

Mr. Chernin, you may make your record.

ATTORNEY CHERNIN: Thank you, Your Honor.

My client's also seated in a wheelchair, and I think the court didn't otherwise describe his physical constraints. This -- I find having to sit next to Mr. Wilber in this condition disturbing. disturbing because it looks absolutely horrible. I think that there are unconstitutional issues that come into play as the result of how the court has now chosen to display, be it as a result of Mr. Wilber's actions or -- or otherwise.

THE COURT: What's a less form of [105] intrusion on his constitutional rights, would you suggest that he just be completely excluded from these proceedings? Would that be -- where he is -- where he watches the remaining of the proceedings through a video -- a video conference? Is - - is that more or less violative of his constitutional rights?

ATTORNEY CHERNIN: That's bad too, Your Honor. I mean, is it more or less -- I mean both of them are, in my opinion --

THE COURT: Mr. Chernin, did I or did I not direct this defendant on a prior occasion when he had an outburst, which clearly I believe the defense would acknowledge was grounds for me to find him in contempt, did I or did I not admonish him as to his behavior going forward? Did I or did I not?

ATTORNEY CHERNIN: Of course you did, Your Honor.

THE COURT: Did I in fact tell him that we would take this step-by- step and the only security measures we added at that [106] time was the stun belt to his arm, which was not seen by the jury?

ATTORNEY CHERNIN: Right. But now we're at a different step -- stage in the proceedings. We 1 re at the end of these proceedings, we have my client in complete restraint. I have talked -- I've never had this experience in front of a jury, I don't believe anyone--

THE COURT: This court has never had that experience. I've been doing this for seven years and -- including a sexual assault/ homicide calendar, which I presided over without any trouble in the last year, without having any defendant act in such a way that I've had to take these measures. So this is a novel concept for the court as well. But I also know, Mr. Chernin, as you do as well, that there are in fact a precedent for taking these extra measures. This is in fact the courtroom where someone was shot and killed, a defendant, by law enforcement at the reading of a verdict. And he did not have any security measures on him at all.

And I -- and I would dare say [107] that the public, as well as law enforcement, would be arguing with the court as to how that could have been prevented if the court had taken the appropriate measures and steps. Here we're taking the appropriate measures, given this gentleman's behavior and his tone and tenor with the court, and I'm also being told that it's a violation of his constitutional rights. What the court needs to do, as they do in all cases, is to balance those things with what our overall goal in the se courts is, to provide a safe environment by which a defendant can have a fair trial.

ATTORNEY CHERNIN: Well --

THE COURT: And in that regard, there have been law enforcement individuals in this very court that were also shot and wounded and no longer are part of the sheriff's staff as a result of that incident from May of 2002 or 2003.

ATTORNEY CHERNIN: And -- and, Judge, I'm not trying to be disrespectful of the court. I have a client whose interests I have to protect. And I would find the current display of Mr. Wilber to a jury in the [108] condition he's in, violative of his Fifth, Sixth and Eighth Amendment Rights. I think that when the court spoke of the situation, and clearly, I -- I am very sensitive of the fact that Mr. Griffin was a participant in that situation, and you know, we all abhor what happened, but I think that the court has indicated that yes, there were – the situation in that case, in that situation, Mr. Ball was not chained to the floor

by way of the eye. I think that that would serve to offer the security that has previously existed.

I think that the--

THE COURT: That is the security that we had in place when he had his outburst at the beginning of this trial.

ATTORNEY CHERNIN: Your Honor, I -- I appreciate --

THE COURT: We're beyond that. We went to the next level, which I outlined in a memo to both the chief judge and to the parties, that the next level of security required that we go to -- on advice of my bailiffs who are in charge of security and [109] safety in this courtroom -- to go to the next level, which is to secure him with the stun belt. We have done that as well. That doesn't seem to have restricted his ability or desire to still get into it, both physically and verbally with -- with the bailiffs as they're escorting him back to the bullpen.

What else do you suggest we do short of gagging him while he's in the courtroom?

ATTORNEY CHERNIN: Well, Judge, I don't think that -- I'm certainly not advocating doing any greater restraint. I'm asking the court to step it back to the level that it was at with respect to his courtroom restraint prior to what he's in today. think that -- that there would be ample security in having Mr. Wilber chained.

THE COURT: Mr. Chernin, I ' m going to deny that request. I -- I simply can't do that. I can't go against the advice of law enforcement or my own instincts and beliefs as to how -- why we're here and why it's warranted. This gentleman, early on in these proceedings, and again, I've made a [110] record of this early on in these proceedings, indicated to the -- to the deputies that they should, you know, take their guns and shoot him now because he's not going down for this.

This is someone who is by his own language and conduct, throughout these proceedings, not just to the court, but to my -- my staff, that he is a security risk and I am not going to ratchet it back down. I don't believe that it's warranted. If anything, I think I -- I'm using a little bit more restraint because one of the options that was suggested was to have him simply be out of the courtroom for the closings and for the jury instructions. I'm not there yet. My view of that is that that creates more of a problem for the jury, and my belief is that he is entitled to remain in the courtroom, but in -- under circumstances by which I believe we can conduct these proceedings and conclude these proceedings in a safer fashion.

ATTORNEY CHERNIN: Well, I -- I respect what the court is saying. I'm asking that certainly knowing that 50,000 volts can go through his arm at the s lightest misconduct [111] is certainly an ample manner of restraint in addition to what we've previously had. And let's -- and I'm seated close to Mr. Wilber, I'm not of -- I'm the one that would be the first person that would have any sort of problem, and I

don't believe Mr. Wilber is going to engage in any misconduct before the jury that would --

THE COURT: But that's not -- your -- your belief is not my concern, Mr. Chernin. And I make my decision, your belief doesn't enter into it.

ATTORNEY CHERNIN: Okay. Well, in any regard, Your Honor, it's my position that Mr. Wilber would be ill advised to engage in any sort of misconduct in front of the jury. I think that he in -- in -- with respect to his conduct in front of the jury, he has not engaged in misconduct in front of the jury. There's no question that the court engaged in a colloquy with him that -- where he was the person who used the word contempt, not the court initially, and it would seem to me to be a reasonable manner of restraint to engage in the restraint that I've had my [112] client sitting in -- sitting next to me with for these proceedings. And I-- I-- I strongly object to --

THE COURT: So noted.

ATTORNEY CHERNIN: Thank you.

THE COURT: We're going to bring the jury out.

ATTORNEY GRIFFIN: Judge, if I may, does the court want me to look and see upstairs if we have some kind of a sport coat or blazer that Mr. Wilber could wear?

THE COURT: That's not necessary.

(Discussion off the record.)

THE COURT: Everyone will remain seated when the jury comes in.

DEPUTY: All rise.

THE COURT: No. Parties remain seated. Come on in, folks.

(Jury in box.)

THE COURT: Please be seated.

Thank you, ladies and gentlemen of the jury, for your patience. I'm now going to instruct you on the principles of law which are -- which you are to follow in considering the evidence and in reaching your verdict. [113]

[Excerpt pages 196–207]

forms themselves?

THE COURT: Yes.

(Discuss ion off the record.)

THE COURT: 480 is now being tendered back along with the verdict forms to both counsel as well as to the jury.

In addition, the court understands that the defense wanted to make a motion outside the presence of the jury. You may do that at this time, Mr. Chernin.

ATTORNEY CHERNIN: Thank you, Your Honor. Instead of interrupting the court or Mr. Griffin as they commenced their respective presentations, after the jury came out and saw Mr. Wilber shackled and chained to the wheelchair with the stun belt on him - -

THE COURT: Well, l et 's make -- why don't you make an it an accurate description, whatever he is -- how he appears, Mr. Chernin, otherwise there's going to be an inaccurate record, I'll have to step in and correct it, and I'd rather you just make a correct record. Shackled and chained are the same term, so he's not both, he's either shackled or he's chained. Which one is it? [196]

ATTORNEY CHERNIN: Well, I guess they can't see where he's chained to the floor, but his hands are shackled.

THE COURT: together at the wrists. His hands are chained He also has black straps on his right arm which are attached to the chair. They're black, about -- I'm going to say two inches wide, that attach to the chair at his wrist and to his arm. And with respect to his legs, there is no visible -- that was not visible to the jury during the trial, nor was it visible from this court's perspective now.

In addition, he has had on him at all times since the second or third day of this trial, and since his outburst with the court, a stun belt, which is sort of a misnomer. It's a sleeve that actually goes up, it's not a belt to be worn around the waist although, that's

what it used to be, it's a sleeve that's on and attached under his clothing out of sight to the jury under h i s long sleeve gray shirt, and has not been visible to the jury. It's on his arm and I believe it is a gain on his left – strike [197] that, his right arm.

ATTORNEY CHERNIN: Well - - and I'm sorry, Judge, and then, Judge, I'm pointing to his left arm. That also has the same type of --

THE COURT: The black ties or tethers, it looks like a black two-inch wide, maybe two-and-half-inch wide at best, tether on his left arm as well to the back of the chair.

ATTORNEY CHERNIN: Right. And what is visible as the chaining to the front is shackling with handcuffs and a cinch belt shackle. And it has the appearance also on his right arm, if -- even if one can't see the stun belt or stun wrap, if I can us e the word.

THE COURT: Even if they can't -- they can't see it, are you claiming that it's visible from your perspective right now next to him?

ATTORNEY CHERNIN: Well --

THE COURT: The stun belt is visible to the jury?

ATTORNEY CHERNIN: A portion of the stun belt is just -- just on. [198]

ATTORNEY GRIFFIN: Does the court want me to see if I can get a camera and we can just take a picture instead of going through all of this?

ATTORNEY CHERNIN: Sure, that would be great, Mr. Griffin. In any regard, my motion goes to a mistrial based upon the jury having to view Mr. Wilber in this condition, and on the basis of the same Fifth, Six and Eighth Amendment issues that I raised in my earlier argument, I also incorporate Article **1,** Section 7 and Article 1, Section 8 of the Wisconsin Constitution in that regard. And that is what my motion is for a mistrial, Your Honor.

THE COURT: Mr. Griffin, I think it's a fair assessment that we -- or statement that we had this conversation in chambers, prior to the court discharging the jury -- or I should say was actually prior to your doing your rebuttal, closing, wherein Mr. Chernin wanted to apprise me of the motion that he intended to bring and in fact is the motion that he has just brought. And I indicated to him at that [199] time that we had a -- I was going to offer to him a cautionary instruction to the jury to address that specific issue, in addition to the instructions that I've already given them, which is to assess the defendant's -- not to hold his silence against him in any way and to make their decision based on the evidence in the trial, not the appearance of the defendant. But I offered to do a cautionary instruction in that regard as well.

The defense -- well, is that correct, Mr. Griffin?

ATTORNEY GRIFFIN: Yes.

THE COURT: Mr. Chernin, is that correct?

ATTORNEY CHERNIN: Yes. Although, Your Honor, the sequence was that I asked -- said I had a motion prior to my beginning, my closing, and then Mr. Griffin was concerned that it affected part of his argument, and that's why his -- that's what he said, but it wasn't addressed towards that at all, and that was -- we took the break before Mr. Griffin's rebuttal.

THE COURT: So we went into [200] chambers and you advised both Mr. Griffin and myself as to what your motion was going to be and your basis for, and that you were going to do it outside the presence of the jury. And I advised you that I would be willing to give a cautionary instruction and to fashion one if you would so wished, and your response to the court was?

ATTORNEY CHERNIN: I'm not certain if there's any instruction that could be fashioned, that would take away the impact of what Mr. Wilber was presenting to the jury as a result of the physical constraints placed upon him, and that's -- that was my concern. And the court did make that offer, I can't -- and again, there is no pattern instruction and I'm not certain that one has ever been formulated in that regard, so I'm not certain what you can tell the jury that would take away the stain of what's visible.

THE COURT: Mr. Griffin, you responded with respect to some of the issues Mr. Chernin was raising about constitutional rights, with an argument about -- or position that you wanted to put on the record with [201] respect to constitutional responsibilities.

ATTORNEY GRIFFIN: Well, I -- I – that's what I said. I said there's always a lot of talk, as there should be, about constitutional rights, but in this particular case I think Mr. Wilber has constitutional responsibilities. I think that you can 1 t fight with the deputies and then claim you're being deprived of a fair trial because they restrain you. It's -- it's -- the law is not meant to guarantee a particular result outside of a fair trial. But ultimately, you can't have a fair trial if the defendant presents a risk to everyone in the courtroom.

And what -- what there -- what we get away from in these courts or what we bend over backwards to protect are constitutional rights. But they're not absolute. There's no constitutional right that a defendant can ' t give up. I mean, a defendant can waive his right to a jury trial, to remain silent, and he can waive his right through speech or conduct, as in this case, to be free from -- from restraints in front of a jury. [202]

I don't know Mr. Wilber, I don't know what his issue is. I indicated to Mr. Chernin before, he strikes me as a bright guy. Most defendants don't seem to talk with their lawyers about the legal things that I think -- I try not in listen to what they're saying and I look away -- but he clearly has some kind of, I believe, temper issue. And if he's going to fight with the bailiffs he can't come and in later and claim foul, constitutional foul, because he's restrained. It just -- it's -- there's no such-- fairness is not one-sided, it's two-sided. And if he's going to not exercise his constitutional responsibilities, then quite frankly, he

can't come in and cry about his constitutional rights. That's what I believe.

I think this court has done exactly what it should do, which is take steps. The court did not jump the first time that the defendant did what he did. We talked about that on the record, personally and professionally I was surprised he essentially challenged this court to hold him in contempt. So I think the record speaks for [203] itself that this was a -- not something that the court came here for one reason and one reason only, and this is where Danny Wilber led to this court.

And to pretend like this is something the court did to him is misleading and mischaracterizing what's happened here this week in terms of his behavior and then today fighting with the bailiffs. What does he think's going to happen? He's not a dumb guy. It's provocative behavior at the very least, and I believe that the court has every responsibility to protect the people in this courtroom and the jurors and all of that, while maintaining a fair trial. And I believe that this jury will do as they're told, and you've told them to judge this case based on the evidence.

THE COURT: The court believes one of the very first things that I learned probably as a judge is probably the most important thing I learned, the lawyers have probably heard this before, but I think it's worth repeating. It' s almost a paraphrase of some of the comments you've made, [204] Mr. Griffin. The defendant is not entitled to a perfect trial. He's entitled to a fair trial. That's why we have the Court of Appeals and the Supreme Court. To know that

there are some imperfections that go beyond just being a mere imperfection and trample on someone's constitutional rights.

So that's what the Court of Appeals is there for and the Supreme Court, to make assessments as to whether or not the trial court exercised its discretion in any way during the course of the trial that may have been imperfect, but it didn't cause or create a -- a constitutional showdown. Or that it exercised its discretion imprudently and did cause a constitutional problem. That's what they're looking at, I believe, when they examine the trial record. At least that's what I hope they're looking at.

That having been said, the -- the defendant, as the State has indicated, does have a certain amount of responsibility in terms of exercising those very rights that his counsel has so artfully described for the court. And his responsibility is to ensure [205] that for him to have a fair trial that he complies with the rules of the court. And no defendant has the right to simply disregard the rules of a court, and then as the State has correctly stated, later claim foul when the court reacts to those rules violations. That in a sense is basically turning over or making a court and a judge hostage to the demands or the actions of a defendant.

And I don't know of any trial court judge that's going to acquiesce to this -- that type of behavior to simply say, well, oh, I'm afraid I'm violating his constitutional rights so I can't take the steps that I need to to make sure that in my estimation, in my discretion, we need to take to make sure that the trial

that's supposed to be fair also is in a safe environment. We aren't handcuffed that way just yet, and I don't think that the appellate courts are going to handcuff trial courts in that regard. They ask us and tell us to make a record as to why we act in measured steps and make a record of why we do what we do, and I believe the court has done that from day one [206] in this trial.

If the defendant is in the state that he's in, which is in a more secured fashion and that's visible to the jury, it is by his own actions, both verbally and through his physical actions that have created this dilemma for him, and the court was forced to take the steps that it was. So in that regard he has in effect waived his right to be unshackled and unsecured in front of a jury. He does not have the right to misbehave and then when the court takes steps to address that, as the State has correctly stated, cry foul. That to me seems to be holding, as I said earlier, the court hostage, and I'm not about to let that happen.

That having been said, I acknowledge your concern, and I deny your motion. The jury has just buzzed once, I believe they have a question. Before I send my deputies back to find out what that question is, the lawyers need to address -- I need to make a phone call and the lawyers need to address, if it is to see exhibits, what exhibits can go in, what should go in in the [207]

[End of Excerpt]

APPENDIX I

APPENDIX

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CIRCUIT COURT'S COMMENTS, MADE ON FIRST DAY OF TRIAL, ON WILBER DEMEANOR (44:4-6)

THE COURT: ....

I'm going to first state, Mr. Wilber, one of the things that I wanted to explain to you, and - and your lawyer's been practicing for a long time, he's been in front of me in the past, but one of the things you've got to do, and he's probably told you it and maybe it will make more sense if it comes from me, you can think I'm the biggest horse's patootie, lawyers think it, defendants think it, you can't show it. You can't make facial gestures, you can't make sounds, you can't act imprudently in the court, you can't be disrespectful to the court. If you do, I'm going to have to end up taking some steps I really don't want to take.

In addition, just as a practical matter, as I'm sure your lawyer told you, looks really bad in front of a jury. Really bad. One of the things that I noticed throughout the morning's session when I was having the lawyers arguing this legal point, and I do emphasize it's a legal appointment, you can have your own opinion about it, but it's the lawyers who have the right to make a legal argument on it, every time Mr. Griffin would make some comment that - in terms of how he was going to couch this - this evidence, and why he thought it was admissible, your head was straining at the bit at times looking back at him and - and maybe it was just a - a reflex on your part.

But again, those kind of things, when we get into trial, when we're in front of a jury, are not going to be allowed. You can't do that. You have to face front wards at all times. You're not allowed to look back into the gallery. You're not allowed to turn back and make faces or gestures at the State table. You're supposed to be sitting straight in front in your chair, eyes forward, confer with your lawyer, but always facing this direction. [101]

And again, just as a practical matter, it just - to do otherwise just looks bad in front of a jury. And your lawyer will tell you that. So I'm just trying to give you a helpful hint that you can think, as I said, whatever you want to think, you just can't show that. One, because it's disrespectful, and I'm going to have to take some steps to stop you if you don't do it, if you don't stop, and I don't want to have to do that. And the second thing is it1s - it's bad for you and it looks bad in front of a jury. So I'm going to ask you to be careful about how you act and how you react to the different things that happen during a trial here.

EXCHANGE, AT CONCLUSION OF MORNING SESSION ON THIRD DAY OF TRIAL, BETWEEN CIRCUIT COURT AND WILBER (47: 116-17):

THE COURT: There's nothing to preclude that. There’s nothing improper about the State asking them to familiarize themselves with their purported statements. All right, gentlemen, so I'm going to deny your objection. It's 12:15. We are going to be back here in an hour, at 1:15.

THE DEFENDANT: It's not new.

THE COURT: Stop it.

THE DEFENDANT: It's not new. What objection haven't you denied of my lawyer's.

THE COURT: Stop it.

THE DEFENDANT: You are granting everything the D.A. is throwing at you.

THE COURT: Deputies, in the back with him. [102]

THE DEFENDANT: What haven't you denied, that's nothing new. Put that on the record. I'm speaking up on my behalf. This is my life.

THE COURT: Mr. Chemin, please talk to your client.

MR. CHERNIN: I will, Your Honor.

THE COURT: Thank you.

THE DEFENDANT: You don't intimidate me with that shit, man.

THE COURT: Mr. - Mr. Wilber.

THE DEFENDANT: You gonna hold me m contempt? What, you gonna hold me in contempt. It's my life right here.

THE COURT: Mr. Wilber, I'm going to if you don't –

THE DEFENDANT: Do it.

THE COURT: -- settle down and behave.

MR. CHERNIN: Danny, please relax.

THE COURT: If you don't behave –

THE DEFENDANT: It ain't doing me no good her overruling - sustaining everything he throw out whether it is bogus or not.

THE COURT: Mr. Wilber, you are doing yourself no good.

THE DEFENDANT: Grab my folder, man. You need to come speak to me too. [103]

THE COURT: Mr. Chemin, wait a few moments, please. Ms. West, you may step down.

CIRCUIT COURT'S COMMENTS, MADE AT BEGINNING OF AFTERNOON SESSION ON THIRD DAY OF TRIAL, REGARDING ADDITIONAL SECURITY MEASURES (48:3-5):

THE COURT: How you doing this afternoon, Mr. Wilber?

THE DEFENDANT: I'm all right.

THE COURT: Okay. Let's just remember, you gotta stay in control when you're in front of a jury. I talked to you about that a couple of days ago. You can be as angry as you want at me, that - you know, that's

why I'm up here. If you want to be angry at anybody be angry at me. But if you do those kinds of things in front of a jury, it only works to your disadvantage. Do you understand what I'm saying?

THE DEFENDANT: Yeah, I hear you.

THE COURT: All right. Do you think you're going to be able to control yourself this afternoon?

THE DEFENDANT: Yeah, I'm all 1ight. I'm all right.

THE COURT: Okay. We're going to continue with the examination of Antonia West. We're going to have her back on the witness stand. We'll continue with the direct examination of her.

The court does want to make a record of the fact that we have had to - we have had to add additional security in the courtroom, we've added two additional deputies and so there are four deputies inside of court, and I would have one or two in the gallery. We've also added a stun belt to [104] your, I believe it's on your arm, and one of my deputies - is it going to be you, Tim?

DEPUTY: Yes.

THE COURT: That is going to control that, and that1s a way of keeping you safe, everybody around you safe, the staff safe and the jury safe so that the trial can continue without hopefully any additional incidences. That's necessary - it's necessitated, Mr. Wilber, because of some of the statements that you

made to the court and to the deputies in - I'm hoping was a moment of anger, but when you make those kinds of statements and you indicate that you don1t really have any respect for my authority or for the authority of the deputies, it becomes a - a real safety concern, an issue for everyone involved in the trial, and it doesn't do anybody any good.

So we have added the extra security at this time. I don't think anything else is going to need to happen or to - to occur, I don1t think we're going to need to take any additional steps, because you're giving me your word that you're all right and you're going to continue to behave while we're in front of the jury and during the duration of the trial. So I'll take you at your word.

All right. Let's bring the jury out.

CIRCUIT COURT'S ADDITIONAL COMMENTS, MADE AT CONCLUSION OF AFTERNOON SESSION ON THIRD DAY OF TRIAL, REGARDING ADDITIONAL SECURITY MEASURES (48:149-51):

THE COURT: We had a third discussion that was a part of that - of one of those side bars, actually I wouldn't call it a side bar, I believe it was a discussion that we had in chambers off the record, right around the noon hour after the defendant had been - had demonstrated a certain level of agitation directed at the court, and made some [105] statements that were problematic in many regards, including statements that required that I take additional safety precautions with him in the

administration of a stun belt to his person in the afternoon session.

I had indicated to the parties that I felt that that was necessary and appropriate, and I was going to abide by what the Sheriffs Department, particularly my two deputies who are assigned to this court and are charged with the safety of everyone in it, I would acquiesce to their – to their judgment. In that discussion, the subject of the demonstration - demonstrative evidence, that is again having the defendant be directed by the State at some point during its case in chief to stand and to make some motions with his arms in relation to some markings on a wall that have to do with size, not only the defendant's size, but [the] victim's size.

That discussion was going to be - and is ultimately going to be on the record, where both sides are able to articulate their arguments more fully to the court. But during the discussion of that possibility of demonstrative evidence by the State, the court was made aware, and again, I don't know by which side, but one or both of the lawyers indicated that that may create some additional problems for or with Mr. Wilber. And I indicated that we were going to need to - depending on what my ruling was, we were going to have to take some steps to make sure that when that demonstration, if and when it occurred, occurred as safely as possible for everyone in here, and also mindful of protecting the defendant's constitutional rights, and so as to minimize the exposure or any exposure he might have in front of the jury as to his restraints.

That conversation was carried out further into the courtroom, where we were standing or abutting the defense table, and I made some suggestions to the State. We ended it at that point, because I believe Mr. Chemin was [106] going to go back and speak to his client. And it was the lunch hour and it was an issue in terms of the demonstrative evidence that we were going to need to take up more fully on the record later, and we have yet to do it.

The purpose of my summarizing that discussion now however is because it was sort of an offshoot of the discussion we were having in chambers of security measures and safety measures in this courtroom, that was the context of which it s01i of evolved, and what reaction, if any, we might receive from the defendant. I believe that's a fairly accurate summary of that discussion that I believe occurred over the lunch hour immediately after the ending of the morning session.

CIRCUIT COURT'S COMMENTS, MADE AT CONCLUSION OF MORNING SESSION ON FOURTH DAY OF TRIAL, REGARDING ADDITIONAL SECURITY MEASURES THAT WERE TAKEN AND THAT WOULD BE TAKEN IF NECESSARY (49:107-14):

(Jury out of box.)

THE COURT: Please be seated. The court wants to make a brief record of the - a brief record of the basis for the court making the ruling that I have made with respect to the jury and the sequestration order requiring them to remain together for lunches,

when they come and when they depart in the evening. And it's based on the following factors. This court has the primary duty of not only insuring the defendant has a fair trial, but I have an equal duty to make sure that the fair trial is done in a safe fashion. And in that regard, specific issues have arisen over the course, primarily of the last day, for certain over the last 48 hours, with respect to additional security measures being taken.

I was advised, and I then with my deputies advised the lawyers, that there were several things that came to my [107] attention yesterday, some directly to my attention and some indirectly. The things that came to my attention directly I think I've already spoken about in an earlier session yesterday with the defendant, and that is the defendant's behavior, which was primarily directed at the court, that is me, at the end of the morning session yesterday, Wednesday, February 16th. And it had to do with the court's ruling on a particular matter.

The defendant wanted to - outside the presence of the jury, admonish the court for not ruling in any way since the beginning of the trial in the defense's favor. In addition, the defendant, in what I took to be an aggressive posture towards the court, indicated that I don't, that is the court, does not intimidate him. And finally, that the defendant is not going down for this, I believe these are fairly accurate quotes. And then finally, what are you going to do about it, hold me in contempt.

My response at the time was I think fairly measured. It is clear to the court and I think clear to

anyone who observed that outburst yesterday, that it was a clear basis for this court to in fact find the defendant in contempt. The court decided that that was an extreme measure that in my judgment wasn't necessary, at least from my perspective, in terms of the way he had addressed the court, and that I would at least admonish him and as well talk to his lawyer about making sure that he understood what the restraints were, the constraints I should say, about his behavior in the court, both in front of the jury and outside the presence of the jury.

That took care of the issue with respect to the defendant's behavior towards - directly towards the court. But I have, as I said earlier, an obligation to make sure that any proceeding in here is done in a safe fashion. So in that regard, mindful of my obligation to the jury, to my staff and to any individuals who are in the gallery during [108] this trial, in conjunction with the advice and direction of my deputies, we decided to take the following steps.

First, it was decided that we would add additional security to the courtroom. That was accomplished yesterday afternoon with two additional deputies inside the courtroom and at least one outside the courtroom in the gallery for the better part of the afternoon session. That would continue as I had worked it out with my deputies for the duration of the trial.

Secondly, the court indicated that the ~ I consented to the deputy's directive that they should use the stun belt for the defendant, who I was advised after he departed my court was continued to be highly

agitated, not only at them but at anyone back in the bullpen area, as well as his own lawyer for the better part of the lunch hour yesterday. In addition, my deputies advised me as to the reasons for the stun belt, that the defendant had made certain statements to them back there during the lunch hour, as well as earlier in the day, he was not going down for this, you might as well use your gun and kill me now.

Finally, there was some statements made by the defendant as it relates to his coming and going from the courtroom. That is, when he had been brought up yesterday by my deputy from the jail to the court, he was asking questions directly related to the path that he would be taking every day in the morning, what floor he'd be coming and leaving from, what time he does that, whether there are any other individuals who are allowed, is it a public entrance, a private entrance, are people allowed to have access - other people allowed to have access to this same pathway.

Those are the types of questions that good law enforcement take heed of and analyze to determine whether or not the defendant or anyone in custody is considering abusing his in-custody status. That's longhand for saying [109] whether or not he's interested in fleeing or having an attempt to flee or have others assist him in fleeing. Based upon those comments, the court, in addition to my own observation of the defendant, agreed with the Sheriffs Department that they should take the additional step of securing the defendant with a stun belt for the duration of the trial. That has also been accomplished.

The third thing that I indicated to the Sheriffs Department was that I wanted the defendant to continue to have the use of his hands, but he must be fully restrained, continue to be fully restrained at his ankle to the eye bolt directly under the floor. As indicated in my ruling earlier, both tables, defense and the State, have skirted tables, thus blocking the jury's direct line of vision to the defendant, and the security measures that are ostensibly out of their view, that is around his ankle and under the table, secured to an eye bolt.

Finally, I indicated to the deputies that if it should become necessary, should the defendant engage in any further disturbances, either out of my presence or directly in my presence, we may in fact be forced to take the following two measures. Number one, we will secure his hands, but direct him to keep his hands below the table for the duration of the trial. If that was unsuccessful, then the court would take the most drastic step, which would be to secure the defendant outside the presence of the jury for the remainder of the trial. He would still have access either through a video conferencing directly from the jail, or in Judge John Franke's courtroom, which has a glassed-in area that is for that specific purpose, to have defendants who have become disruptive or unruly in front of a jury, to separate them from the defense table and to actually have them in a separate area of the courtroom.

Fortunately, after the lunch hour yesterday when I explained certain things to the defendant, he indicated to [110] the court that he was all right, that he was going to be compliant with all further

directives, even though he may not agree with them, and that it would not be a necessity to take those additional steps. Today, Thursday we have had no problems with the defendant at all. So again, since noon yesterday we have not found it necessary to engage in any additional security measures.

However, at least in terms of the defendant directly, it also came to my attention however that there were individuals, as I mentioned in a - a brief comment yesterday towards the end of the day, and whether they are one and the same we do not know, but there are three male individuals, they appear to be African-American, who had approached my clerk, a member of my staff, and made some comments to her outside this court, which again is inappropriate. The specifics of the comments had to do with whether or not she was going to be getting her fingers ready. Fingers ready for what we could only speculate and so we don't know what that means. The court looks at it, as I think a prudent court does, as an ill-advised comment at best, and - and a possible threat at worse.

CIRCUIT COURT'S WARNING, MADE ON THE FIFTH DAY OF TRIAL, OF ADDITIONAL SECURITY MEASURES THAT WOULD BE TAKEN IF DEFENDANT DID NOT STOP ENGAGING IN INAPPROPRIATE CONDUCT (51 :45-48):

THE COURT: Thank you. I thought you were being disrespectful to the court again. I get that impression from time to time when you sigh or make noises emanating from your - from your vocal words,

demonstrating to this court a certain level of disgust. It could just be me.

THE DEFENDANT: I have nothing to say, Your Honor. [111]

THE COURT: I'm sorry?

THE DEFENDANT: I have nothing to say, Your Honor.

THE COURT: Well, you said it already. You already said it.

Mr. Chemin, please advise him about his conduct in this court, because as I said the other day, I'm not going to have you folks mistake my kindness for weakness. I have been doing this as restrained as I can outside the presence of the jury, and given his outburst the other day, he's lucky he hasn't been charged with threatening a judge, that he hasn't been charged with disorderly conduct, that he hasn't been charged with contempt. And you know whereof I speak.

ATTORNEY CHERNIN: Well, Judge –

THE COURT: And I am not going to continue to run my court with this gentleman, you know, being disrespectful to me from the minute he comes in the court till the minute he leaves. I'm not going to tolerate it and I don't have to, quite honestly. I don't have to. Tell me if I have to. I don't think I do. I don't think there's anything in the rules of judicial conduct that require a judge to be disrespected and do nothing about it. Tell me if I'm wrong. I'm not going to. Today's

the end. You do it again, we are going to add additional restraints to you in front of the jury.

ATTORNEY CHERNIN: Well -

THE COURT: I'm done, Mr. Chemin.

ATTORNEY CHERNIN: I -

THE COURT: I'm going to have him go in the back again with you and you are going to spend some time with [112] him, explaining to him the proper conduct in court. I am not going to sit here from 10:00 o'clock this morning until 6:00 o'clock tonight having the defendant show utter disregard and respect for this court. It ain't gonna happen. I'm not going to enable that kind of disrespectful, inappropriate conduct in a court of law. It ain't gonna happen on my watch, period.

ATTORNEY CHERNIN: Judge, we're well aware of that fact. I'm not arguing with you.

THE COURT: He doesn't seem to get it, Mr. Chemin.

CIRCUIT COURT'S COMMENTS, MADE AT AFTERNOON SESSION OF SEVENTH DAY OF TRIAL BEFORE CLOSING ARGUMENT, EXPLAINING WHY VISIBLE RESTRAINTS, ABOUT WHICH COMPLAINT IS BEING MADE ON APPEAL, WERE BEING UTILIZED (55:100-12):

THE COURT: . . . We're moving on now to the

second issue before I bring the jury in, and that is the State [sic] of the defendant being in a secured wheelchair with - not only secured at his ankles but at his wrists.

The record on that can be fairly stated as follows. Mr. Wilber is responsible for his own predicament and for his own position, that is to be restrained and to have that obvious restraint being shown to the jury. This court started out at the very beginning of these proceedings, and with good faith as to the - as to the parties, including the defendant. His behavior throughout this trial, beginning with the very beginning, has been contemptible. The court has already made a record of - of the basis for my having, if I had wanted to or found it necessary to find him in contempt, which I believe many, if not most of my colleagues, would have. [113]

I even indicated, please do not, by not doing that don't mistake my kindness for weakness. That apparently fell on deaf ears. This defendant, through his gestures, through his facial gestures at the court, through his facial expressions, through his body language, through his tone, and most particularly through his language, including the tirade that he had at the end of the second day or the end of the second morning of this trial, directed at this court, and challenging this court, quite honestly, to find him in contempt, thereby setting the stage for his defiance throughout the proceedings.

I told my staff at that time that I would not go the full route of additional safety measures, which include the belly chains, wrist chains, the security in

the RIPP cord around his waist, and to the - to the chair that he finds himself in now, that none of those things, in my opinion, would be necessary if I were to address the defendant respectfully and tell him that I don't expect any further outbursts of that kind.

I also indicated that I felt that there was enough of a disturbance and enough of what I felt to be a personal threat to not only my safety, but more importantly the safety of my staff, people in the gallery, and particularly the people in the jury, that it warranted going an extra step with security measures, including having a stun belt placed on his arm. I believe it's been on his right arm for the - since the second or third day of the trial, as [a] result of his outbursts to the court right before noon on that day.

The court also looked at it in context, because there the court had done nothing but ruled on a defense motion, which is a part of these proceedings and is a part of trial since the beginning of time. The parties make their motions, the court rules. If the parties don't agree with the motion or what the court has ruled on, they then have the appellate court as their next resource. [114]

That seems as such a normal part of these proceedings, it's as normal to me as breathing, and if in fact my rulings one way or another were going to be the subject of a tirade each - by the defendant each time I made them, we are going to have a long week and a long t1ial if the defendant was going to gesture or have sounds of exasperation each time the court took a position that was different from what he thought or that, as I said to him earlier, you can think

I'm the biggest moron that walked the planet, you just can't show that to the court or to the jury.

I thought that that was enough of a guidance to him to get him to understand that such a disrespect to the court to these proceedings was not going to be tolerated, and that by using the stun belt in addition to my words and guidance to him we would have nipped this in the bud. Apparently it was not a sufficient amount of restraint, because on today's date the defendant used absolutely inappropriate, vulgar, profane language to the deputies who were in charge of security of this courtroom, and will not be tolerated or accepted. He also physically fought with the deputies, such that they had to decentralize him in the back hallway leading back to the bullpen.

That conduct will not be rewarded, it will not be tolerated, and I will not be manipulated into allowing a defendant, by his actions, to dictate how I run this court. So when I say that it is through his own actions, his profane disregard for my use of language, his disregard of my admonitions, earlier in the week in terms of his behavior, and my overriding concern for the safety of everyone in this courtroom now that we're at the stage where we charge the jury, we have closing arguments, where quite honestly the State is going to be making their closing argument that I'm sure is going to have parts of it that the defendant is going to simply find annoying, wrong, incorrect, lying, disrespectful of him, and if he was [115] already demonstrating to me at the very beginning of these proceedings that he didn't agree with my rulings and was going to act out, God only knows how he's going to react when the State starts

making its closing argument and summing up what it believes the evidence is showing or not showing in this case.

I'm not prepared to risk that. Not given the history with this defendant. So when I say that he is the product in the position that he's in by his own doing, I mean it. And he will not - and I will not be dissuaded from having him in any less secure form than he is right now. He is, I think I've aptly described it, secured at both the ankle and at the wrist. He's secured with a stun belt and with a rip cord to the chair so that there will be no further physical outburst of any kind by this defendant in the presence of the jury.

Mr. Chemin, you may make your record.

ATTORNEY CHERNIN: Thank you, Your Honor.

My client's also seated in a wheelchair, and I think the court didn't otherwise describe his physical constraints. This - I find having to sit next to Mr. Wilber in this condition disturbing. It's disturbing because it looks absolutely horrible. I think that there are constitutional issues that come into play as the result of how the court has now chosen to display, be it as a result of Mr. Wilber's actions or - or otherwise.

THE COURT: What's a less form of intrusion on his constitutional rights, would you suggest that he just be completely excluded from these proceedings? Would that be - where he is - where he watches the remaining of the proceedings through a

video - a video conference? Is – is that more or less violative of his constitutional rights? [116]

ATTORNEY CHERNIN: That's bad too, Your Honor. I mean, is it more or less - I mean both of them are, in my opinion –

THE COURT: Mr. Chernin, did I or did I not direct this defendant on a prior occasion when he had an outburst, which clearly I believe the defense would acknowledge was grounds for me to find him in contempt, did I or did I not admonish him as to his behavior going forward? Did I or did I not?

ATTORNEY CHERNIN: Of course you did, Your Honor.

THE COURT: Did I in fact tell him that we would take this step-by-step and the only security measures we added at that time was the stun belt to his arm, which was not seen by the jury?

ATTORNEY CHERNIN: Right. But now we're at a different step - stage in the proceedings. We're at the end of these proceedings, we have my client in complete restraint. I have talked - I've never had this experience in front of a jury, I don't believe anyone –

THE COURT: This court has never had that experience. I've been doing this for seven years and – including a sexual assault/homicide calendar, which I presided over without any trouble in the last year, without having any defendant act in such a way that I've had to take these measures. So this is a novel concept for the court as well. But I also know, Mr. Chernin, as you do as well, that there are in fact a

precedent for taking these extra measures. This is in fact the courtroom where someone was shot and killed, a defendant, by law enforcement at the reading of a verdict. And he did not have any security measures on him at all. [117]

And I - and I would dare say that the public, as well as law enforcement, would be arguing with the court as to how that could have been prevented if the court had taken the appropriate measures and steps. Here we're taking the appropriate measures, given this gentleman's behavior and his tone and tenor with the court, and I'm also being told that it's a violation of his constitutional rights. What the court needs to do, as they do in all cases, is to balance those things with what our overall goal in these courts is, to provide a safe environment by which a defendant can have a fair t1ial.

ATTORNEY CHERNIN: Well –

THE COURT: And in that regard, there have been law enforcement individuals in this very court that were also shot and wounded and no longer are part of the sheriffs staff as a result of that incident from May of 2002 or 2003.

ATTORNEY CHERNIN: And - and, Judge, I'm not trying to be disrespectful of the court. I have a client whose interests I have to protect. And I would find the current display of Mr. Wilber to a jury in the condition he's in, violative of his Fifth, Sixth and Eighth Amendment Rights. I think that when the court spoke of the situation, and clearly, I - I am very sensitive of the fact that Mr. Griffin was a participant

in that situation, and you know, we all abhor what happened, but I think that the court has indicated that yes, there were - the situation in that case, in that situation, Mr. Ball was not chained to the floor by way of the eye. I think that that would serve to offer the security that has previously existed.

I think that the –

THE COURT: That is the security that we had in place when he had his outburst at the beginning of this trial. [118]

ATTORNEY CHERNIN: Your Honor, I - I appreciate -

THE COURT: We're beyond that. We went to the next level, which I outlined in a memo to both the chief judge and to the parties, that the next level of security required that we go to - on advice of my bailiffs who are in charge of security and safety in this courtroom - to go to the next level, which is to secure him with the stun belt. We have done that as well. That doesn1t seem to have restricted his ability or desire to still get into it, both physically and verbally with - with the bailiffs as they're escorting him back to the bullpen.

What else do you suggest we do short of gagging him while he's in the courtroom?

ATTORNEY CHERNIN: Well, Judge, I don't think that - I'm certainly not advocating doing any greater restraint. I'm asking the court to step it back to the level that it was at with respect to his

courtroom restraint prior to what he's in today. I think that - that there would be ample security in having Mr. Wilber chained.

THE COURT: Mr. Chernin, I'm going to deny that request. I - I simply can't do that. I can't go against the advice of law enforcement or my own instincts and beliefs as to how - why we're here and why it's warranted. This gentleman, early on in these proceedings, and again, I've made a record of this early on in these proceedings, indicated to the - to the deputies that they should, you know, take their guns and shoot him now because he's not going down for this.

This is someone who is by his own language and conduct, throughout these proceedings, not just to the court, but to my - my staff, that he is a security risk and I am not going to ratchet it back down. I don't believe that it's warranted. If anything, I think I - I'm using a little bit [119] more restraint because one of the options that was suggested was to have him simply be out of the courtroom for the closings and for the jury instructions. I'm not there yet. My view of that is that that creates more of a problem for the jury, and my belief is that he is entitled to remain in the courtroom, but in - under circumstances by which I believe we can conduct these proceedings and conclude these proceedings in a safer fashion.

ATTORNEY CHERNIN: Well, I - I respect what the court is saying. I'm asking that certainly knowing that 50,000 volts can go through his arm at the slightest misconduct is ce1iainly an ample manner of restraint in addition to what we've

previously had. And let's - and I'm seated close to Mr. Wilber, I'm not of - I'm the one that would be the first person that would have any sort of problem, and I don't believe Mr. Wilber is going to engage in any misconduct before the jury that would –

THE COURT: But that's not - your - your belief is not my concern, Mr. Chernin. And I make my decision, your belief doesn't enter into it.

CIRCUIT COURT'S FURTHER EXPLANATION, MADE ON THE SEVENTH DAY OF TRIAL AFTER JURY WAS EXCUSED FOR DELIBERATIONS, OF WHY IT UTILIZED RESTRAINTS ABOUT WHICH COMPLAINT IS BEING MADE (55: 196-207):

THE COURT: . . . .

In addition, the court understands that the defense wanted to make a motion outside the presence of the jury. You may do that at this time, Mr. Chernin.

ATTORNEY CHERNIN: Thank you, Your Honor. Instead of interrupting the court or Mr. Griffin as they commenced their respective presentations, after the jury [120] came out and saw Mr. Wilber shackled and chained to the wheelchair with the stun belt on him –

THE COURT: Well, let's make - why don't you make an [sic] it an accurate description, whatever he is - how he appears, Mr. Chemin, otherwise there's going to be an inaccurate record, I'll have to step in and correct it, and I'd rather you just make a correct

record. Shackled and chained are [not] the same term, so he's not both, he's either shackled or he's chained. Which one is it?

ATTORNEY CHERNIN: Well, I guess they can't see where he's chained to the floor, but his hands are shackled.

THE COURT: His hands are chained together at the wrists. He also has black straps on his right arm which are attached to the chair. They're black, about - I'm going to say two inches wide, that attach to the chair at his wrist and to his arm. And with respect to his legs, there is no visible - that was not visible to the jury during the trial, nor was it visible from this court's perspective now.

In addition, he has had on him at all times since the second or third day of this trial, and since his outburst with the court, a stun belt, which is sort of a misnomer. It's a sleeve that actually goes up, it's not a belt to be worn around the waist although, that's what it used to be, it's a sleeve that's on and attached under his clothing out of sight to the jury under his long sleeve gray shirt, and has not been visible to the jury. It's on his arm and I believe it is again on his left - strike that, his right arm.

ATTORNEY CHERNIN: Well - and I'm sorry, Judge, and then, Judge, I'm pointing to his left arm. That also has the same type of –

THE COURT: The black ties or tethers, it looks like a black two-inch wide, maybe two-and-half-inch

wide at best, tether on his left arm as well to the back of the chair. [121]

ATTORNEY CHERNIN: Right. And what is visible as the chaining to the front is shackling with handcuffs and a cinch belt shackle. And it has the appearance also on his right arm, if - even if one can't see the stun belt or stun wrap, if I can use the word.

THE COURT: Even if they can't - they can't see it, are you claiming that it's visible from your perspective right now next to him?

ATTORNEY CHERNIN: Well -

THE COURT: The stun belt is visible to the jury?

ATTORNEY CHERNIN: A portion of the stun belt is just - just on.

ATTORNEY GRIFFIN: Does the court want me to see if I can get a camera and we can just take a picture instead of going through all of this?

ATTORNEY CHERNIN: Sure, that would be great, Mr. Griffin. In any regard, my motion goes to a mistrial based upon the jury having to view Mr. Wilber in this condition, and on the basis of the same Fifth, Six[th] and Eighth Amendment issues that I raised in my earlier argument, I also incorporate Article 1, Section 7 and Article 1, Section 8 of the Wisconsin Constitution in that regard. And that is what my motion is for a mistrial, Your Honor.

THE COURT: Mr. Griffin, I think it's a fair assessment that we - or statement that we had this conversation in chambers, prior to the court discharging the jury - or I should say was actually prior to your doing your rebuttal, closing, wherein Mr. Chernin wanted to apprise me of the motion that he intended to bring and in fact is the motion that he has just brought.

And I indicated to him at that time that we had a – I was going to offer to him a cautionary instruction to the [122] Jury to address that specific issue, in addition to the instructions that I've already given them, which is to assess the defendant's - not to hold his silence against him in any way and to make their decision based on the evidence in the trial, not the appearance of the defendant. But I offered to do a cautionary instruction in that regard as well.

The defense - well, is that correct, Mr. Griffin?

ATTORNEY GRIFFIN: Yes.

THE COURT: Mr. Chernin, is that correct?

ATTORNEY CHERNIN: Yes. Although, Your Honor, the sequence was that I asked - said I had a motion prior to my beginning, my closing, and then Mr. Griffin was concerned that it affected part of his argument, and that's why his - that's what he said, but it wasn't addressed towards that at all, and that was - we took the break before Mr. Griffin's rebuttal.

THE COURT: So we went into chambers and you advised both Mr. Griffin and myself as to what

your motion was going to be and your basis for, and that you were going to do it outside the presence of the jury. And I advised you that I would be willing to give a cautionary instruction and to fashion one if you would so wished [sic], and your response to the court was?

ATTORNEY CHERNIN: I'm not certain if there's any instruction that could be fashioned, that would take away the impact of what Mr. Wilber was presenting to the jury as a result of the physical constraints placed upon him, and that's - that was my concern. And the court did make that offer, I can't - and again, there is no pattern instruction and I'm not certain that one has ever been formulated in that regard, so I'm not certain what you can [123] tell the jury that would take away the stain of what's visible.

THE COURT: Mr. Griffin, you responded with respect to some of the issues Mr. Chernin was raising about constitutional rights, with an argument about - or position that you wanted to put on the record with respect to constitutional responsibilities.

ATTORNEY GRIFFIN: Well, I - I - that's what I said. I said there1s always a lot of talk, as there should be, about constitutional rights, but in this particular case I think Mr. Wilber has constitutional responsibilities. I think that you can't fight with the deputies and then claim you're being deprived of a fair trial because they restrain you. It's - it's - the law is not meant to guarantee a particular result outside of a fair trial. But ultimately, you can't have a fair trial if the defendant presents a risk to everyone in the courtroom.

And what - what there - what we get away from in these courts or what we bend over backwards to protect are constitutional rights. But they're not absolute. There's no constitutional right that a defendant can't give up. I mean, a defendant can waive his right to a jury trial, to remain silent, and he can waive his right through speech or conduct, as in this case, to be free from – from restraints in front of a jury.

I don't know Mr. Wilber, I don't know what his issue is. I indicated to Mr. Chemin before, he strikes me as a bright guy. Most defendants don't seem to talk with their lawyers about the legal things that I think - I try not [to] listen to what they're saying and I look away - but he clearly has some kind of, I believe, temper issue. And if he's going to fight with the bailiffs he can't come and [sic] in later and claim foul, constitutional foul, because he's restrained. It just - it's - there's no such - fairness is not one-sided, it's two-sided. And if he's going to not exercise [124] his constitutional responsibilities, then quite frankly, he can't come in and cry about his constitutional rights. That's what I believe.

I think this court has done exactly what it should do, which is take steps. The court did not jump the first time that the defendant did what he did. We talked about that on the record, personally and professionally I was surprised he essentially challenged this court to hold him in contempt. So I think the record speaks for itself that this was a - not something that the court came here for one reason and one reason only, and this is where Danny Wilber led to this court.

And to pretend like this is something the court did to him is misleading and mischaracterizing what's happened here this week in terms of his behavior and then today fighting with the bailiffs. What does he think's going to happen? He's not a dumb guy. It's provocative behavior at the very least, and I believe that the court has every responsibility to protect the people in this courtroom and the jurors and all of that, while maintaining a fair trial. And I believe that this jury will do as they're told, and you've told them to judge this case based on the evidence.

THE COURT: The court believes one of the very first things that I learned probably as a judge is probably the most important thing I learned, the lawyers have probably heard this before, but I think it's worth repeating. It's almost a paraphrase of some of the comments you've made, Mr. Griffin. The defendant is not entitled to a perfect trial. He's entitled to a fair trial. That's why we have the Court of Appeals and the Supreme Court. To know that there are some imperfections that go beyond just being a mere imperfection and trample on someone's constitutional rights.

So that's what the Court of Appeals is there for and the Supreme Court, to make assessments as to whether or [125] not the trial court exercised its discretion in any way during the course of the trial that may have been imperfect, but it didn't cause or create a - a constitutional showdown. Or that it exercised its discretion imprudently and did cause a constitutional problem. That's what they're looking at, I believe, when they examine the trial record. At least that's what I hope they1re looking at.

That having been said, the - the defendant, as the State has indicated, does have a ce1iain amount of responsibility in terms of exercising those very rights that. his counsel has so artfully described for the court. And his responsibility is to ensure that for him to have a fair trial that he complies with the rules of the court. And no defendant has the right to simply disregard the rules of a court, and then as the State has correctly stated, later claim foul when the court reacts to those rules violations. That in a sense is basically turning over or making a court and a judge hostage to the demands or the actions of a defendant.

And I don1t know of any trial court judge that's going to acquiesce to this - that type of behavior to simply say, well, oh, I'm afraid I'm violating his constitutional rights so I can't take the steps that I need to to make sure that in my estimation, in my discretion, we need to take to make sure that the trial that's supposed to be fair also is in a safe environment. We aren't handcuffed that way just yet, and I don't think that the appellate courts are going to handcuff trial court in that regard. They ask us and tell us to make a record as to why we act in measured steps and make a record of why we do what we do, and I believe the court has done that from day one in this trial.

If the defendant is in the state that he's in, which is in a more secured fashion and that's visible to the jury, it is by his own actions, both verbally and through his physical actions that have created this dilemma for him, and the [126] court was forced to take the steps that it was. So in that regard he has in effect waived his right to be unshackled and

unsecured in front of a jury. He does not have the right to misbehave and then when the court takes steps to address that, as the State has correctly stated, cry foul. That to me seems to be holding, as I said earlier, the court hostage, and I'm not about to let that happen.

That having been said, I acknowledge your concern, and I deny your motion. [127]

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DANNY WILBER,

Petitioner,

v. Case No. 10-C-179

MICHAEL THURMER,

Respondent.

DECISION AND ORDER GRANTING PETITION FOR RELIEF UNDER § 2254

Having fully exhausted his state court remedies, Petitioner Danny Wilber seeks federal relief under 28 U.S.C. § 2254 from his state court conviction for first degree intentional homicide by use of a dangerous weapon. Wilber filed his original petition more than ten years ago on March 3, 2010, but immediately moved for a stay so that he could exhaust his state court remedies as to additional claims. After significant delays attributed to ongoing investigations by retained counsel, Wilber filed a pro

se motion for postconviction relief in the state trial court on March 17, 2014. Wilber thereafter amended his pro se motion for postconviction relief and retained new counsel. After the Wisconsin Supreme Court denied his petition for review on April 9, 2019, he moved to lift the stay and proceed on an amended petition. Wilber alleges in his amended petition that his constitutional rights were violated because there was insufficient evidence presented at trial to support his conviction, his trial and post-conviction counsel provided ineffective assistance, and the trial court violated his due process right to a fair trial by ordering him shackled to a wheelchair in a way that was visible to the jury during closing arguments. Because the court concludes that [1] visibly shackling him to a wheelchair during closing arguments violated Wilber's due process right to a fair trial, his petition will be granted.

BACKGROUND

In the early morning hours of January 31, 2004, Milwaukee police were dispatched to a residence at 1128 W. Mineral Street to investigate a fatal shooting at a house party. Upon arrival, the police discovered the body of David Diaz, who lived at that address, lying on the floor with a gunshot wound to the head. Most of those in attendance at the party had fled before police arrived. In the days that followed, two witnesses, Richard Torres and Jeranek Diaz (no relation to the victim and hereinafter referred to as Jeranek), allegedly identified Wilber as the shooter. According to statements taken by police both witnesses said that Wilber had been acting belligerently during the house party, and at some

point, Wilber pulled out a handgun and shot Diaz. Shortly thereafter, Torres and Jeranek heard Antonia West, Wilber's sister, urge Wilber to leave, saying "Oh my God. You shot him. Get out of here. You shot him." Several days later, Wilber was charged with Diaz's murder.

At trial, the prosecutor called a number of individuals who had been present at the party at the time of the shooting, but they all testified that they did not see who shot Diaz. Contrary to their earlier statements, Jeranek and Torres denied actually seeing Wilber shoot Diaz, and Antonia West denied making the statement attributed to her. Jeranek denied even seeing a gun, and though Torres testified that he did not see Wilber shoot Diaz, he saw him immediately afterwards holding a gun in a crouched position and assumed he was the shooter. West testified she did not see the shooting and was not looking at her brother when Diaz was shot. The State offered the prior inconsistent statements of the witnesses to impeach them and as substantive evidence. [2]

Perhaps even more problematic for the prosecution than the testimony of its witnesses was the physical evidence. The medical examiner testified that the bullet that killed Diaz was fired at close range (two to three inches), entered the back of his head on the upper left, traveled in a downward trajectory, and exited to the right of his nose. Diaz had fallen face-forward in a northerly direction from where he was standing in the doorway to the kitchen on the south side of the room, consistent with being shot from behind. Three bullet fragments were found

under the stove on the north wall of the kitchen directly across from where Diaz was standing when he was shot, also consistent with having been shot from behind. Yet, all of those present at the time of the shooting testified that Wilber was in the kitchen in front of where Diaz was standing, and at least one of the witnesses testified that Ricky Munoz, who had also been at the party, also had a gun. According to the diagram of the layout drawn by Torres, Munoz was in the living room behind where Diaz was standing at the time the shot rang out. Dkt. No. 69-61. Another difficulty with the State's theory was that the witnesses who claimed to have seen Wilber with a gun said it was a semiautomatic, which would have expelled a casing when fired. Yet, no casing was found at the scene, and the firearms examiner who examined the bullet jacket testified that it was fired from a revolver. Despite these difficulties, the jury found Wilber guilty of first-degree intentional homicide in the death of David Diaz.

The trial did not proceed smoothly. At various times throughout the seven-day trial, the trial judge commented on what she viewed as Wilber's disrespectful behavior. Beginning the first day of trial before jury selection had even begun, the trial judge cautioned Wilber that he would not be allowed to make "facial gestures," "sounds," "act imprudently," or be disrespectful to the court. Dkt. No. 61-17 at 4:18–21. The judge stated that she had noticed during the morning session that Wilber was reacting inappropriately to the arguments of the prosecutor: "Every time Mr. [3] Griffin would make some comment that -- in terms of how he was going to couch this – this evidence, and why he thought it was

admissible, your head was straining at the bit at times looking back at him and -- and maybe it was just a reflex on your part." *Id.* at 5:8–14. When "we're in front of the jury," the court warned, this would not be allowed:

> You can't do that. You have to face frontwards at all times. You're not allowed to look back into the gallery. You're not allowed to turn back and make faces or gestures at the State table. You're supposed to be sitting straight in front in your chair, eyes forward, confer with your lawyer, but always facing this direction.

Id. at 5:15–25. The court offered two reasons why such behavior would not be allowed:

> One, because it's disrespectful, and I'm going to have to take some steps to stop you if you don't do it, if you don't stop, and I don't want to have to do that. And the second thing is it's -- it's bad for you and it looks bad in front of a jury. So I'm going to ask you to be careful about how you act and how you react to the different things that happen during a trial here.

Id. at 6:07–15. Wilber's attorney explained to the judge that his client meant no disrespect but had worked closely with counsel on preparing his defense, was familiar with the legal arguments, and strongly disagreed with the court's rulings. *Id.* at 6:20–7:01. Disagreement was fine, the judge noted, but "what

I'm trying to tell you is it's a disrespect to the court to show you disagree." *Id.* at 7:06–08. "You have to keep a poker face," she continued, noting that it was in his interest to do so because it "looks bad in front of the jury." *Id.* at 7:08–11.

On the second day of trial, the court also noted that it had taken all the necessary steps to make sure this is "a safe proceeding." Dkt. No. 61-18 at 75:22–24. The court noted that Wilber was to remain shackled throughout the trial. Leg irons were placed on Wilber's ankles and anchored to the floor beneath defense counsel's table. The court also noted that steps had been taken to prevent jurors from becoming aware that Wilber was shackled and maintain the presumption of innocence to which he was entitled. Both the prosecution and the defense tables were skirted to prevent the shackles from being visible to the jury. *Id.* at 75:21–76:02. In addition, [4] the court noted that the defendant was allowed a change in the civilian clothes he was wearing "so that all steps -- all reasonable steps are being made to continue to have the presumption of innocence for the defendant protected." *Id.* at 76:08–11.

At the same time, however, the court expressed its view "that even if jurors do see an individual defendant secured in some fashion that that sight or that observation in and of itself is not enough for a default of that particular juror or that they are somehow exempted." *Id.* at 76:13– 18. "There has to be something about those observation[s]," the court continued, "that have affected them one way or the other that they articulate to the parties and to the

court -- that would cause them to be an unsuitable juror." *Id.* at 76:18–22.

After two days of jury selection and several lengthy discussions of legal issues, the attorneys gave their opening statements on the third day and began the presentation of evidence. When the jury was released for lunch, the court granted the prosecution's request over the objection of the defense that two of the State's witnesses be instructed to read their statements over the break so that their direct examinations could proceed more efficiently. In response to the court's ruling, Wilber stated, "It's not new." Dkt. No. 61-20 at 16:14. The court instructed Wilber to "Stop it," to which Wilber responded, "You are granting everything the D.A. is throwing at you." *Id.* at 116:18–20. As the court ordered the courtroom deputies to remove Wilber from the courtroom, the discussion continued:

> THE DEFENDANT: What haven't you denied, that's nothing new. Put that on the record. I'm speaking up on my behalf. This is my life.
>
> THE COURT: Mr. Chernin, please talk to your client.
>
> MR. CHERNIN: I will, Your Honor.
>
> THE COURT: Thank you.
>
> THE DEFENDANT: You don't intimidate me with that shit, man. [5]

> THE COURT: Mr. -- Mr. Wilber.
>
> THE DEFENDANT: You gonna hold me in contempt? What, you gonna hold me in contempt. It's my life right here.
>
> THE COURT: Mr. Wilber, I'm going to if you don't –
>
> THE DEFENDANT: Do it.
>
> THE COURT: Settle down and behave.
>
> MR. CHERNIN: Danny, please relax.
>
> THE COURT: If you don't behave –
>
> THE DEFENDANT: It ain't doing me no good her overruling – sustaining everything he throw out whether it is bogus or not.
>
> THE COURT: Mr. Wilber, you are doing yourself no good.

Id. at 116:22–17:20.

After lunch, before the trial resumed, the trial court again cautioned Wilber that he had to stay in control when he was in front of the jury. Dkt. No. 61-21 at 3:19–20. Wilber stated he understood and was "all right." *Id.* at 4:07–08. The court then stated that it wanted to make a record of the fact that it had added additional security in the courtroom. It added two additional deputies in the courtroom, bringing

the total to four, and had also added a stun belt to Wilber's arm that one of the deputies would control as "a way of keeping you safe, everybody around you safe, the staff safe and the jury safe so that the trial can continue without hopefully any additional incidences." *Id.* at 4:25–5:04. These steps were necessitated, the court explained, "because of some of the statements that you made to the court and to the deputies in -- I'm hoping was a moment of anger, but when you make those kinds of statements and you indicate that you don't really have any respect for my authority or for the authority of the deputies, it becomes a -- a real [6] safety concern, an issue for everyone involved in the trial, and it doesn't do anybody any good." *Id.* at 5:05–14.

On the fourth day of the trial, as the morning session was ending, the trial court advised the jury that they would be sequestered during the day over their breaks and when coming to and leaving the courtroom. Dkt. No. 61-22 at 104:08–07:05. The sequestration was "to avoid even the appearance of somebody suggesting that the jury was somehow tainted, talking or overhearing conversations in the hallway, talking to people." *Id.* at 106:08–11. After the jury left the courtroom, the court set forth the reasons for the sequestration order and additional measures that were being implemented on the record.

The court noted that specific issues had arisen over the course of the trial requiring that additional security measures be taken and that the jury be sequestered. *Id.* at 107:21–25. Referring back to Wilber's outburst at the court's ruling the previous day, the judge stated that Wilber had been highly

agitated, not only with the court, but according to the deputies, also with anyone who was in the bullpen area and even with his own attorney. The judge noted that the deputies had advised her that Wilber made certain statements to them, such as "[I am] not going down for this, you might as well use your gun and kill me now." *Id.* at 110:15–11:01. Wilber also asked detailed questions about the paths he would walk to the courtroom each morning, what floors they would be on, and who would have access to that same path. These questions alarmed the deputies and suggested that Wilber might attempt to flee, potentially with the help of others. *Id.* at 111:02–22.

The court also expressed concern that three men had approached the trial court's clerk and made comments that were ill-advised at best, and a possible threat at worse. The three men had also watched the trial and were seen near witnesses who were under a sequestration order. Although Wilber denied any connection with the men, the court noted their presence as an [7] additional reason for its sequestration order and concern for security. *Id.* at 114:21–16:14; 120:12–19.

As a result, in consultation with the deputies, the court had decided that certain security measures would be added. First, two additional deputies would be added inside the courtroom and at least one outside. In addition, the court had agreed with the recommendation that a stun belt be placed on Wilber's arm under his shirt which would allow one of the deputies to administer a shock to him if he became disruptive. *Id.* at 110:03–16. The court explained that it wanted Wilber to continue to have the use of his

hands, but the court also warned that, if any further disruptions occurred, Wilber may either have his hands secured below the table, or he may be removed from the courtroom for the duration of the trial. At the same time, the court acknowledged that there had been no problems with Wilber since his outburst the previous day. *Id.* at 112:05–13:25.

At the beginning of the fifth day of trial, the court returned to a discussion of an issue that the prosecutor had raised earlier—whether Wilber could be directed to participate in a courtroom demonstration intended to show the State's theory of how Wilber, given his height (over six feet, six inches), could have fired a gun at an angle at which the bullet would have caused the entrance and exit wounds to Diaz's head. Dkt. No. 61-24 at 4:13–13:01. Wilber's attorney strenuously objected to forcing his client to, in effect, reenact the crime he was accused of committing before the jury. *Id.* at 32:14–33:02; 42:04–17. The question arose as to whether doing so would expose the stun belt around his arm. *Id.* at 44:22–45:18. Wilber stated that when he raised his hand as the prosecutor was requesting, he would pull his shirt a certain way to prevent such exposure. The court, apparently under the impression that Wilber was again being disrespectful, directed his attorney to warn him:

> Mr. Chernin, please advise him about his conduct in this court, because as I said the other day, I'm not going to have you folks mistake my kindness for weakness. I have [8] been doing this as restrained as I can outside the presence of the jury,

> and given his outburst the other day, he's lucky he hasn't been charged with threatening a judge, that he hasn't been charged with disorderly conduct, that he hasn't been charged with contempt. And you know whereof I speak.

Id. at 46:13–23. As counsel attempted to explain that his client meant no disrespect, the court continued:

> And I am not going to continue to run my court with this gentleman, you know, being disrespectful to me from the minute he comes in the court till the minute he leaves. I'm not going to tolerate it and I don't have to, quite honestly. I don't have to. Tell me if I have to. I don't think I do. I don't think there's anything in the rules of judicial conduct that require a judge to be disrespected and do nothing about it. Tell me if I'm wrong. I'm not going to. Today's the end. You do it again, we are going to add additional restraints to you in front of the jury.

Id. at 46:25–47:13. The court directed Wilber's counsel to explain to Wilber the proper conduct in court and took a ten-minute break to decide the issue before it and to allow counsel to converse with his client. *Id.* at 48–49.

The trial proceeded to its conclusion with no further comments on the record about Wilber's behavior. After the evidence was closed, however, and

just before closing arguments were to begin, defense counsel moved to reopen the case and allow him to investigate a report by Wilber's sisters that there was an eyewitness who saw someone else shoot David Diaz. In the course of an offer of proof outside the presence of the jury and a lengthy cross-examination by the State, one of Wilber's sisters testified that her boyfriend Roberto Gonzalez told her that he was at the party at Diaz's house and saw one of Wilber's friends shoot Diaz. Dkt. No. 61-28 at 11:10–68:06. Based upon the offer of proof, Wilber's attorney asked for an opportunity to interview Gonzalez before closing. The trial court found the testimony of Wilber's sisters inconsistent and incredible and denied the defendant's motion for an offer of proof and for a mistrial. *Id.* at 89:09–99:18. [9]

At that point, before the jury was brought back into the courtroom for closing arguments, the court noted that Wilber was "in a secured wheelchair with -- not only secured at his ankles but at his wrists." *Id.* at 100:04–06. His feet remained in shackles anchored to the floor, but now his hands were chained together at the wrists and two-inch wide black straps held both his wrists and at least one of his arms fast to the wheelchair. *Id.* at 197:04–09; Dkt. No. 69-73. The court stated that "Wilber is responsible for his own predicament and for his own position, that is to be restrained and to have that obvious restraint being shown to the jury." Dkt. No. 61-28 at 100:08–12. His behavior throughout the trial, the court stated, "has been contemptible." *Id.* at 100:15–17.

The trial court went on to summarize Wilber's previous behavior and the measures taken to insure

the trial would proceed in an orderly and safe manner. Describing Wilber's previous behavior, the court stated:

> This defendant, through his gestures, through his facial gestures at the court, through his facial expressions, through his body language, through his tone, and most particularly through his language, including the tirade that he had at the end of the second day or the end of the second morning of this trial, directed at this court, and challenging this court, quite honestly, to find him in contempt, thereby setting the stage for his defiance throughout the proceedings.

Id. at 101:01–12. The court then noted that in response to this behavior, additional deputies had been stationed in the courtroom and a stun belt had been placed on Wilber's right arm. This was in addition to the shackles around his ankles that were anchored to the floor under the counsel table where Wilber was seated.

The judge stated that she had thought these measures, along with her words of advice, would be enough "to get him to understand that such disrespect to the court to these proceedings was not going to be tolerated." *Id.* at 103:08–10. "Apparently," the judge concluded, "it was not a sufficient amount of restraint." *Id.* at 103:13–14. She then explained why: [10]

> because on today's date the defendant used absolutely inappropriate, vulgar, profane language to the deputies who were in charge of security of this courtroom, and will not be tolerated or accepted. He also physically fought with the deputies, such that they had to decentralize him in the back hallway leading back to the bullpen. That conduct will not be rewarded, it will not be tolerated, and I will not be manipulated into allowing a defendant, by his actions, to dictate how I run this court.

Id. at 103:14–04:02.

The court noted that "we're at the stage where we charge the jury, we have closing arguments, where quite honestly the State is going to be making their closing argument that I'm sure is going to have parts of it that the defendant is going to simply find annoying, wrong, incorrect, lying, disrespectful of him, and if he was already demonstrating to me at the very beginning of these proceedings that he didn't agree with my rulings and was going to act out, God only knows how he's going to react when the State starts making its closing argument and summing up what it believes the evidence is showing or not showing in this case." *Id.* at 104:07–21. Not wanting to risk any "further physical outburst of any kind by this defendant in the presence of the jury," *id.* at 105:07–09, the judge stated, I will not be dissuaded from having him in any less secure form than he is right now." *Id.* at 105:01–03.

Wilber's attorney objected, noting that Wilber's appearance in the wheelchair was "disturbing" and that there were constitutional problems with the restraints. *Id.* at 105:14–24. The trial court reminded counsel that Wilber had been admonished for his behavior and that the restraints had been progressive. *Id.* at 106:13–20. It explained that there is a precedent for taking these extra measures and described an incident that a defendant, who did not have any security measures on him at all, was shot and killed by law enforcement at the reading of a verdict in that courtroom. *Id.* at 107:20–23. The court determined that it was "taking the appropriate measures" in this case, "given this gentleman's behavior and his tone and tenor with the court." *Id.* at 108:05–09. Counsel again requested that the court proceed without the visible restraints and limit Wilber [11] to the restraints he wore prior to that day, noting that it was in his interest to avoid misconduct in front of the jury and reminding the court that Wilber had not engaged in any misconduct in front of the jury up to that point. *Id.* at 112:14–20. The court denied the request, noting that Wilber was someone who "by his own language and conduct" toward the court and court staff posed a security threat. *Id.* at 111:05–09. Shortly thereafter, the trial court instructed deputies to bring the jury into the courtroom. As they moved to do so, the prosecutor offered to see if his office had a sport coat or blazer that Wilber could wear, presumably to cover the visible restraints. *Id.* at 113:08–11. The trial court, without explanation, responded, "That's not necessary." *Id.* at 113:12. The jury thereupon entered the courtroom, and the closing arguments proceeded

without incident. The court then directed the jury to begin deliberations. *Id.* at 197.

After closing arguments, Wilber moved for a mistrial based on the jury viewing him in restraints. Counsel argued that allowing the jury to view him in restraints violated his rights under the United States and Wisconsin constitutions. *Id.* at 199:06–15. The trial court denied the motion. The jury ultimately found Wilber guilty, and Wilber was sentenced to life in prison with the possibility of extended supervision after forty years.

Wilber filed a post-conviction motion, seeking a new trial on the grounds that the trial court erroneously allowed the admission of certain evidence not relevant to this petition and improperly ordered that Wilber be visibly restrained in a wheelchair during closing arguments. The postconviction court denied the motion, the Wisconsin Court of Appeals affirmed, and the Wisconsin Supreme Court denied Wilber's petition for review on December 9, 2008.

Following this court's stay of his § 2254 petition, Wilber filed a Wis. Stat. § 974.06 motion for postconviction relief, seeking physical and digital copies of the crime scene photographs the State used at trial, and asserting claims of newly discovered evidence and ineffective assistance of [12] defense and postconviction counsel. Wilber then amended the postconviction motion alleging that: (1) the evidence was insufficient to support his conviction; (2) trial counsel and postconviction counsel were ineffective; (3) newly discovered evidence proved that Fidel Muniz, a/k/a Ricky, admitted to the murder of Diaz;

and (4) he was entitled to a new trial in the interest of justice. The postconviction court denied the motion without a hearing, the Wisconsin Court of Appeals affirmed, and the Wisconsin Supreme Court denied Wilber's petition for review.

ANALYSIS

Wilber's petition for federal relief is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. Under AEDPA, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from the United States Supreme Court, or was "based on an unreasonable application of the facts." 28 U.S.C. § 2254(d); *see also Woods v. Donald*, 575 U.S. 312, 315–16 (2015). A state court decision is "contrary to . . . clearly established Federal law" if the court did not apply the proper legal rule, or, in applying the proper legal rule, reached the opposite result as the Supreme Court on "materially indistinguishable" facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision is an "unreasonable application of . . . clearly established federal law" when the court applied Supreme Court precedent in "an objectively unreasonable manner." *Id.*

A state court decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" when it is so clearly incorrect that it would not be debatable among reasonable jurists. *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) ("If reasonable minds

reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." (internal quotations [13] and brackets omitted)). The determination of a factual matter made by a state court is presumed to be correct, and that presumption can be overcome only by clear and convincing evidence. § 2254(e)(1); *Janusiak v. Cooper*, 937 F.3d 880, 888 (7th Cir. 2019) ("The petitioner must show by clear and convincing evidence that the findings were unreasonable."). Although habeas courts cannot "second-guess the reasonable decisions of state courts," *Renico v. Lett*, 559 U.S. 766, 779 (2010), "deference does not imply abandonment of or abdication of judicial review . . . ." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Goudy v. Basinger*, 604 F.3d 394, 399 (7th Cir. 2010) ("[A] decision involves an unreasonable determination of facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence.").

This is, and was meant to be, an "intentionally" difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

A. Sufficiency of the Evidence

Wilber claims that the evidence presented at trial was insufficient to constitutionally support his conviction. If true, then unlike his other claims of constitutional error, he would be entitled to full and final relief. This is because an "appellate court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal." *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988). *Burks v. United States* held that when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict, [14] the Double Jeopardy Clause bars a retrial on the same charge. 437 U.S. 1, 18 (1978). The same is true for collateral review under § 2254. "Because reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, such a reversal bars a retrial." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010). The court therefore turns first to Wilber's claim that the evidence was insufficient to support his conviction.

As a preliminary matter, Wilber argues that the Wisconsin Court of Appeals did not directly address his argument regarding sufficiency of the evidence, and as such, this claim is not subject to deference under AEDPA. The court of appeals undoubtedly adjudicated Wilber's sufficiency claim on the merits. The court explicitly noted that it rejected Wilber's sufficiency claim when discussing Wilber's postconviction discovery argument. Dkt. No. 61-11, ¶ 43 ("Because we have concluded that the evidence was sufficient . . ."). The court of appeals examined

the evidence in the record, including testimony from multiple witnesses and the testimony of the investigator assigned to the case, and determined that the evidence was sufficient for conviction. *Id.*, ¶ 37. This is plainly an adjudication on the merits, and thus, the decision of the court of appeals is entitled to AEDPA deference.

1. Clearly established federal law governing sufficiency of evidence

In *Jackson v. Virginia*, the United States Supreme Court held that the relevant inquiry into a sufficiency of the evidence claim is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319 (1979) (emphasis in original). And while the court looks to Wisconsin law for the substantive elements of the crime, federal law governs the minimum amount of evidence required by the Due Process Clause. *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam). With these standards in mind, the court may only [15] overturn the state court's finding of sufficient evidence if it was "objectively unreasonable." *Maier v. Smith*, 912 F.3d 1064, 1074 (7th Cir. 2019). This is not an easy standard to satisfy, and indeed, review under § 2254 "involves a double dose of deference: Federal courts defer to the state courts, which in turn defer to the jury." *London v. Clements*, 600 F. App'x 462, 466 (7th Cir. 2015). The Seventh Circuit has consistently characterized the *Jackson* standard as a "nearly insurmountable

hurdle." *Winfield v. Dorethy*, 956 F.3d 442, 455 (7th Cir. 2020).

2. The Wisconsin Court of Appeals reasonably applied *Jackson*

Wilber argues that the court of appeals either unreasonably applied *Jackson* or relied upon objectively unreasonable findings of fact because it failed to consider evidence that Wilber believes "directly conflicts" with the court of appeals' decision. Namely, Wilber argues that the conviction is "so in conflict with the laws of nature" that no reasonable jurist could conclude that the conviction is consistent with the due process requirements of *Jackson*. Wilber draws from a variety of items in the record, primarily asserting that, based on where the victim was shot, where the bullet fragments were found, and where the victim fell, Wilber could not possibly have been the shooter. Dkt. No. 70, at 15–16.

The Wisconsin Court of Appeals' decision was not contrary to, or an unreasonable application of, the clearly established federal law set forth in *Jackson*, or an unreasonable determination of the facts. Although the court of appeals did not cite to the relevant cases such as *Jackson* and its Wisconsin analogue, *State v. Poellinger*, 451 N.W.2d 752 (Wis. 1990), the court of appeals engaged in the proper analysis. *See Adams v. Bertrand*, 453 F.3d 428, 432 (7th Cir. 2006) (noting that Wisconsin "effectively duplicates" the standard created by *Jackson*). So long as "neither the reasoning nor the result of the state-court decisions contradicts [United States [16] Supreme Court precedent]," the

state court need not cite the controlling federal case. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam).

Here, the court of appeals described in detail the evidence supporting Wilber's conviction. This included not only the witnesses' testimony at trial, but also the inconsistent statements several had given to police during the investigation naming Wilber as the shooter. Dkt. No. 61-11 at ¶¶ 2, 5, 8, 9, 11. Under Wisconsin law, prior inconsistent statements, even when not under oath, constitute substantive evidence. *See* Wis. Stat. § 908.01(4)(a)1; *Vogel v. State*, 96 Wis. 2d 372, 386, 291 N.W.2d 838 (1980). The court also discussed the multiple witnesses who testified that Wilber was acting aggressively and violently prior to the shooting, testimony that indicated Wilber had a gun in his hand immediately after the shooting, testimony that supported the theory that the gunshot came from the direction in which Wilber was standing, and the investigator's testimony regarding various details about the house and where the victim's body was found in relation to those details. *Id.* at ¶ 37.

The court applied the standard announced in *Poellinger* that the court must affirm unless "the evidence, viewed most favorably to the state . . . is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt," 451 N.W.2d at 757–58, and therefore adhered to the standard in *Jackson*. The jury was entitled to credit and discredit certain testimony as it felt appropriate, and the court of appeals was required to give deference to the jury's decisions on such matters. While the court of appeals

may not have explicitly reviewed every detail of the record in its opinion, the court of appeals undoubtedly reviewed the record and specifically described the evidence it thought was sufficient to sustain the conviction. [17]

Notwithstanding the eye-witness evidence, Wilber argues that the physical evidence renders the State's theory of the case impossible. He contends, as his attorney did in his closing argument to the jury, that the location of Diaz's body at the entrance on the south side of the kitchen with his head to the north, the bullet fragments under the stove on the north wall of the kitchen, the medical examiner's testimony concerning the entrance and exit wounds, and the undisputed testimony placing Wilber inside the kitchen in front of Diaz at the time he was shot make it physically impossible for Wilber to have been the shooter. To be sure, this is not an unreasonable argument, but it is not dispositive. In response, the prosecutor cited testimony that Diaz was turning away at the time he was shot and noted the height discrepancies between Wilber and Diaz. With respect to the location of the bullets, the detective who examined the crime scene testified that bullets often do strange things when they hit something like bone or ricochet off floors, walls, or appliances. Based on his experience, he testified that forensic evidence often ends up in unexpected places. In this case, he found the bullet jacket on the kitchen table. Dkt. No. 61-20 at 52:19–53:03.

In sum, the court of appeals plainly followed the mandate of both *Jackson* and *Poellinger* and found, albeit implicitly, that a reasonable trier of fact

could have found guilt beyond a reasonable doubt based on the evidence produced at trial. Wilber has not put forth "clear and convincing evidence that the findings were unreasonable." *Janusiak*, 937 F.3d at 888. While Wilber's evidence, on its own, may paint one picture, the court of appeals reviewed the record in its entirety and came to the reasonable conclusion that the evidence was sufficient to sustain the conviction. That is all that is required of it, and thus, Wilber is not entitled to relief on this claim. [18]

B. Use of Restraints

Wilber argues that his visible shackling to a wheelchair at trial denied him his due process right to a fair trial. As an initial matter, Wilber argues that he is entitled to a *de novo* review of this claim because the state court did not adequately adjudicate the claim on the merits. Wilber asserts, in particular, that the Wisconsin Court of Appeals only addressed whether *additional* restraints were justified, not whether *visible* restraints were justified. Thus, Wilber contends AEDPA deference would be inappropriate here. The court of appeals, throughout its nine-page decision, indicated that it was addressing the visible restraint issue raised by Wilber and ultimately rejected Wilber's claim that the use of visible restraints denied him a fair trial. Dkt. No. 61-5, ¶ 40. In short, the court finds that the Wisconsin Court of Appeals decided the issue on the merits and will apply AEDPA deference to this claim. That means this court cannot grant relief under § 2254 unless the decision of the Wisconsin Court of Appeals affirming Wilber's conviction "was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

1. Clearly established federal law governing use of shackles

Clearly established federal law prohibits forcing a defendant in a criminal trial to appear before a jury in shackles absent extraordinary reasons. In *Deck v. Missouri*, the United States Supreme 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." 544 U.S. 622, 629 (2005). The reason for the rule is obvious: "visible shackling undermines the presumption of innocence and the related fairness of the factfinding process" and it suggests to the jury that the justice system itself sees a need to "separate a defendant from the community at large." *Id.* at 630 (citations [19] omitted). The Court further noted in *Deck* that, historically, physical restraints were also forbidden because they could potentially interfere with the accused's ability to communicate with his attorney and their use was considered an affront to the dignity and decorum of judicial proceedings. *Id.* at 631. As one court has observed, "[a] presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain." *United States v. Sanchez-Gomez*, 859 F.3d 649, 661 (9th Cir. 2017) (en banc), *vacated as moot*, --- U.S. ---, 138 S. Ct. 1532 (2018).

Deck involved the shackling of a defendant during the punishment phase of a capital murder trial after the jury had already determined the defendant's guilt and the presumption of innocence no longer applied. Notwithstanding this fact, the Court held that the same rule applied during the punishment phase: "The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases." *Id.* at 632.

Of course, the rule prohibiting visibly shackling a defendant during trial is not absolute. In *Deck*, the Court acknowledged that there are cases where the perils of shackling are unavoidable:

> We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.

Id. The question presented in this case is whether the Wisconsin Court of Appeals reasonably applied this clearly established federal law in upholding the trial court's decision to visibly shackle Wilber during closing arguments. [20]

2. The Wisconsin Court of Appeals unreasonably applied federal law

The Wisconsin Court of Appeals concluded the trial court did not erroneously exercise its discretion when it ordered Wilber to appear before the jury visibly restrained and bound to a wheelchair. It explained that the trial court "took great pains to explain its concerns and each level of security it imposed," and further concluded that the "record provid[ed] ample support for the trial court's conclusion that restraints were necessary to maintain order and ensure the safety of the participants." Dkt. No. 61-5, at ¶¶ 38, 40. It ultimately rejected Wilber's claim that the use of visible restraints denied him a fair trial. *Id.*, ¶ 40. While the court of appeals is entitled to AEDPA deference on this issue because it undeniably adjudicated the claim on the merits, its discussion as to why *visible* restraints were required was not only inadequate, but also an unreasonable application of federal law to the undisputed facts of the case.

The court of appeals noted that "the trial court discussed Wilber's behavior and the need for security at least eight times throughout the trial," and that "its comments on this matter were extensive, composing nearly fifty pages of the transcript." Dkt. No. 61-5 at ¶ 20. A careful review of the record, however, reveals no misconduct on the part of Wilber that justified the kind of visible restraints placed on him during closing arguments.

It is true that Wilber verbally protested the court's ruling just before the noon break on the third

day of trial, complaining that all of the court's rulings were in favor of the State. Dkt. No. 61-20 at 116:14–24. He also used vulgarity, stating "You don't intimidate me with that shit, man" when the court ordered the deputies to remove him. *Id.* at 117:04–06. But the jury had already left for lunch, and his outburst in the courtroom, as inappropriate as it was, was entirely verbal. When court resumed after the noon break, the court asked him if he would be able to control himself going forward. Wilber replied: "Yeah, I'm all right. I'm all right." Dkt. No. 61-21 at [21] 4:04–08. The record reflects no further instances of courtroom misconduct by Wilber for the duration of the trial.

The only other instances of improper courtroom behavior reflected in the record over the seven-day trial were his nonverbal reactions to the court's rulings and the prosecutor's arguments for which the court admonished Wilber on the first day of trial. Dkt. No. 61-17 at 4:18–21. In other words, over the entire trial, the record reflects only two instances, one verbal and the other nonverbal, and both outside the jury's presence and early in the trial, when Wilber acted inappropriately. This is not the kind of record that justifies visibly shackling a defendant before the jury.

In *Illinois v. Allen*, some thirty-five years before *Deck*, the Court recognized that shackling and gagging a defendant at trial was so offensive and prejudicial that it could be done only as a last resort. 397 U.S. 337, 344 (1970). The contrast between the facts in *Allen* and those in this case demonstrate the degree to which the court of appeals' decision in this case deviates from clearly established federal law.

In *Allen*, the defendant, on trial for armed robbery, continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He told the judge, "When I go out for lunchtime, you're going to be a corpse here." He then tore up his attorney's file and threw the papers on the floor. The trial judge warned him, "One more outbreak of that sort and I'll remove you from the courtroom." The warning had no effect. The defendant continued to talk back to the judge, saying, "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." *Id.* at 340. At that point, the judge ordered the defendant removed from the courtroom but told him he could return if he [22] behaved. The defendant agreed to behave, but when he returned, he became upset when his sister and friends were ordered out of the courtroom under a witness sequestration order. The defendant then announced, "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me." *Id.* at 341. The trial judge again had the defendant removed. After this second removal, the defendant remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, the defendant responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to the defendant that he could

return to the courtroom whenever he agreed to conduct himself properly. The defendant gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense. His defense was of no avail, however, and the jury returned a verdict of guilty. On appeal, he claimed that the trial court had violated his Sixth Amendment rights by removing him from the courtroom. When his State appeal failed, he sought habeas relief in federal court.

In rejecting his challenge to his conviction, the Court concluded that the defendant's behavior "was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." *Id.* at 346. The Court declined to adopt one approach over the other, explaining:

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself [23] something of an affront to the very dignity and decorum

> of judicial proceedings that the judge is seeking to uphold.

Id. at 344. Here, of course, the trial court did not order Wilber gagged, but the use of shackles, visible to the jury, conveyed the unmistakable message to the jury that Wilber was too dangerous to be permitted even the use of his hands. Yet, the record in this case reflects none of the extreme, persistent, and ongoing obstruction and abuse the court confronted in *Allen*.

Also missing in this case is any reasonable explanation as to why the visible restraints on Wilber's hands and arms were suddenly needed just as the trial was coming to a close. It is clear from the trial judge's comments that the added security was in reaction to the report from the deputies that Wilber had "used absolutely inappropriate, vulgar, profane language" toward them and engaged in a physical altercation with them in the back hallway leading to the lock-up earlier that day. Dkt. No. 61-28 at 103:14–22. Up until that time there had been no record of inappropriate behavior by Wilber since the brief verbal outburst just before the noon break on the third day of trial. More importantly, the recent behavior reported by the deputies was not only outside the presence of the jury, it was outside of the courtroom. At the time the court ordered the additional restraint, there was no indication that once seated at counsel table with his feet shackled and anchored to the floor, the stun belt around his arm, and virtually surrounded by deputies, Wilber posed any threat to the safety of the judge, her staff or the public. And based on his behavior up to that point and his continued hope for an acquittal, there was no

reason to believe he would do anything to cause the jury to fear or disdain him.

Also troubling is the fact that from some of the judge's comments it appears that the court was to a large extent deferring to the Sheriff's deputies in ordering additional restraints. At the end of the afternoon session on the third day of trial, for example, the court recounted its earlier in-chambers comments regarding the additional security measures it had just implemented, stating [24] "I had indicated to the parties that I felt that that was necessary and appropriate, and I was going to abide by what the Sheriff's Department, particularly my two deputies who are assigned to this court and are charged with the safety of everyone in it, I would acquiesce to their -- to their judgment." Dkt. No. 61-21 at 149:14–21. Likewise, in response to the defense suggestion that the level of restraint be left as it was throughout the trial, the court stated, "Mr. Chernin, I'm going to deny that request. I -- I simply can't do that. I can't go against the advice of law enforcement or my own instincts and beliefs as to how -- why we're here and why it's warranted." Dkt. No. 61-28 at 110:19–14.

A trial judge cannot delegate the decision of whether and how a defendant is to be restrained to law enforcement or other correctional or security staff. "Of course, there is no constitutional prohibition on the trial court's giving significant weight to the view of law enforcement authorities as to the necessity of certain security measures." *Lopez v. Thurmer*, 573 F.3d 484, 493 n.4 (7th Cir. 2009). "[S]uch respect for the advice of those charged with protecting public safety is prudent." *Id.* But "the

actual due process determination must be made by the judicial officer. Law enforcement officials hardly can be said to be neutral in balancing the rights of the defendant against their own view of necessary security measures." *Id.*; *see also Woods v. Theiret*, 5 F.3d 244, 248 (7th Cir. 1993) ("While the trial court may rely 'heavily' on the marshals in evaluating the appropriate security measures to take with a given prisoner, the court bears the ultimate responsibility for that determination and may not delegate the decision to shackle an inmate to the marshals."). To the extent the trial court delegated its responsibility for deciding the courtroom security issues here, it was error.

Other comments suggest that the trial judge viewed visibly shackling the defendant as punishment for what she perceived as disrespect. On the fifth day of the trial, for example, when [25] she again cautioned Wilber about his reaction to her rulings, the trial judge warned him, "You do it again, we are going to add additional restraints to you in front of the jury." Dkt. No. 61-24 at 47:11-13. And in announcing the additional restraints that were imposed just before the closing arguments, the court explained, "Wilber is responsible for his own predicament and for his own position, that is to be restrained and to have that obvious restraint being shown to the jury." Dkt. No. 61-28 at 100:08–12. Also weighing on the judge's mind was the tragic event that had occurred in the same courtroom one or two years earlier when a defendant had grabbed a court officer's gun during a trial, and shot and wounded him before the defendant himself was fatally shot by another deputy, though as counsel pointed out, the

defendant in that case was not anchored to the floor. Dkt. No. 61-28 at 108:15–09:13. Neither of these considerations justified the additional restraints added just before closing argument.

Even if the record supported additional restraints on Wilber's wrists and arms, however, no explanation was offered as to why the restraints had to be visible to the jury. After all, the chief danger that the rule against shackling the accused is intended to guard against is the risk of prejudice that displaying a defendant in shackles to the jury creates. As the Seventh Circuit explained in *Stephenson v. Wilson*, "[e]ven when a visible restraint is warranted by the defendant's history of escape attempts or disruption of previous court proceedings, it must be the least visible secure restraint, such as, it is often suggested, leg shackles made invisible to the jury by a curtain at the defense table. (There should of course be a curtain at the prosecution table as well, lest the jury quickly tumble to the purpose of the curtain at the defense table.)" 619 F.3d 664, 668–69 (7th Cir. 2010); *see also Deck*, 544 U.S. at 634–45 ("Nor did [the trial judge] explain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see—apparently the arrangement used at trial."). [26]

Apparently realizing the need to hide the shackles, the prosecutor offered to find a sport coat that Wilber could wear presumably to cover the restraints before the jury was brought into the courtroom. Dkt. No. 61-28 at 113:08–11. Without explanation, the trial court responded, "That's not necessary." *Id.* at 113:12. The court of appeals, in affirming Wilber's conviction, likewise offered no

reason why the restraints needed to be visible to the jury. Absent any explanation for displaying Wilber to the jury in such a manner, the state court's decision must be seen as contrary to, or an unreasonable application of, clearly established federal law.

Finally, Respondent asserts that even if the visible use of shackles during closing argument violated Wilber's constitutional rights, he is not entitled to relief because he has failed to show any prejudice. Respondent contends that it is Wilber's burden to show prejudice and, given the strength of the State's case against him, he is unable to do so. Respondent is wrong on both points. The burden of showing prejudice is not on Wilber, and the State's case was not overwhelming.

Deck held that "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.'" 544 U.S. at 635 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Thus, the burden of proving prejudice is not Wilber's. Instead, the State must prove that visibly shackling Wilber during closing argument did not contribute to his conviction. And as the discussion of Wilber's claim concerning the sufficiency of the evidence shows, Respondent cannot meet his burden. Given the inconsistent testimony of the eyewitnesses and the physical evidence suggesting Wilber could not have fired the fatal shot, the error may well have contributed to Wilber's

conviction. His petition for relief under § 2254 must therefore be granted. [27]

CONCLUSION

For the reasons set forth above, the court concludes that Wilber is entitled to relief under § 2254. Wilber's petition for relief under 28 U.S.C. § 2254 is therefore **GRANTED**, and he is ordered released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 4th day of August, 2020.

s/ William C. Griesbach
William C. Griesbach
United States District Judge [28]

APPENDIX K

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens> [1]

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV

Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

APPENDIX L

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

Effective: April 24, 1996

Currentness

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of

the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[1]

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court

shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

> **(A)** the claim relies on—
>
> > **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such

part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18. [2]

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

Notes of Decisions (8401)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

APPENDIX M

SUPREME COURT OF THE
UNITED STATES

125 S.Ct. 2007

Carman L. DECK, Petitioner,

v.

MISSOURI.

No. 04-5293.

Argued March 1, 2005.

Decided May 23, 2005.

Synopsis

Background: Defendant was convicted in the Circuit Court, Jefferson County, Missouri, Gary P. Kramer, J., of first-degree murder and related offenses, and sentenced to death. The Supreme Court of Missouri affirmed, 994 S.W.2d 527. On postconviction relief motion, following remand for resentencing, 68 S.W.3d 418, second penalty phase was held during which defendant was shackled in leg irons, handcuffs and belly chain, and death penalty was again imposed. The Supreme Court of Missouri affirmed, 136 S.W.3d 481. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Breyer, held that:

Due Process Clause prohibits routine use of physical restraints visible to jury during guilt phase of criminal trial;

courts also may not routinely place defendants in visible restraints during penalty phase of capital proceedings;

shackling in instant case was not shown to be specifically justified by circumstances, and thus offended due process; and

no showing of prejudice is required to make out due process violation from routine use of visible shackles.

Reversed and remanded.

Justice Thomas filed dissenting opinion joined by Justice Scalia.

****2008 *622** *Syllabus**

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner Deck was convicted of capital murder and sentenced to death, but the Missouri Supreme Court set aside the sentence. At his new sentencing proceeding, he was shackled with leg irons, handcuffs,

and a belly chain. The trial court overruled counsel's objections to the shackles, and Deck was again sentenced to death. Affirming, the State Supreme Court rejected Deck's claim that his shackling violated, *inter alia,* the Federal Constitution.

Held: The Constitution forbids the use of visible shackles during a capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest"—such as courtroom security—specific to the defendant on trial. *Holbrook v. Flynn,* 475 U.S. 560, 568–569, 106 S.Ct. 1340, 89 L.Ed.2d 525. Pp. 2010–2015.

(a) The law has long forbidden routine use of visible shackles during a capital trial's guilt phase, permitting shackling only in the presence of a special need. In light of *Holbrook, Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, early English cases, and lower court shackling doctrine dating back to the 19th century, it is now clear that this is a basic element of due process protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit using physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that restraints are justified by a state interest specific to the particular defendant on trial. Pp. 2010–2012.

(b) If the reasons motivating the guilt phase constitutional rule—the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings—apply with like force at the penalty phase, the same rule will apply there. The

latter two considerations obviously apply. As for the first, while the defendant's conviction means that the presumption of innocence no longer applies, shackles at the penalty phase threaten related concerns. The jury, though no longer deciding between guilt and innocence, is deciding between life and death, which, given the sanction's severity and finality, is no less important, *Monge v. California,* 524 [1] U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615. Nor is accuracy in making that decision any less critical. Yet, the offender's appearance in shackles almost inevitably implies to a jury that court authorities consider him a danger to the community (which is often a statutory aggravator and always a relevant factor); almost inevitably affects adversely the jury's perception ***623** of the defendant's character; and thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations when determining whether the defendant deserves death. The constitutional rule that courts cannot routinely place defendants in shackles or other restraints visible to the jury during the penalty phase is not absolute. In the judge's discretion, account may be taken of ****2009** special circumstances in the case at hand, including security concerns, that may call for shackling in order to accommodate the important need to protect the courtroom and its occupants. Pp. 2012–2015.

(c) Missouri's arguments that its high court's decision in this case meets the Constitution's requirements are unconvincing. The first—that that court properly concluded that there was no evidence that the jury saw the restraints—is inconsistent with the record, which shows that the jury was aware of them, and overstates what the court actually said, which was

that trial counsel made no record of the *extent* of the jury's awareness of the shackles. The second—that the trial court acted within its discretion—founders on the record, which does not clearly indicate that the judge weighted the particular circumstances of the case. The judge did not refer to an escape risk or threat to courtroom security or explain why, if shackles were necessary, he did not provide nonvisible ones as was apparently done during the guilt phase of this case. The third—that Deck suffered no prejudice—fails to take account of *Holbrook's* statement that shackling is "inherently prejudicial," 475 U.S., at 568, 106 S.Ct. 1340, a view rooted in this Court's belief that the practice will often have negative effects that "cannot be shown from a trial transcript," *Riggins v. Nevada,* 504 U.S. 127, 137, 112 S.Ct. 1810, 118 L.Ed.2d 479. Thus, where a court, without adequate justification, orders the defendant to wear shackles visible to 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] did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Pp. 2015–2016.

136 S.W.3d 481, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 2016.

Attorneys and Law Firms

Rosemary E. Percival, Kansas City, MO, for petitioner.

Cheryl C. Nield, for respondent.

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, James R. Layton, State Solicitor, Cheryl Caponegro Nield, Evan J. Buchheim, Counsel of Record, Assistant Attorneys General, Jefferson City, MO, for Respondent.

Opinion

Justice BREYER delivered the opinion of the Court.

***624** We here consider whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution. We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is "justified by an essential state interest"—such as the interest in courtroom security—specific to the defendant on trial. *Holbrook v. Flynn,* 475 U.S. 560, 568–569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); see also *Illinois v. Allen,* 397 U.S. 337, 343–344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

I

In July 1996, petitioner Carman Deck robbed, shot, and killed an elderly couple. In 1998, the State of Missouri tried Deck ****2010** for the murders and the

robbery. At trial, state authorities required Deck to wear leg braces that apparently were not visible to the jury. App. 5; Tr. of Oral Arg. 21, 25, ***625** 29. Deck was convicted and sentenced to death. The State Supreme Court upheld Deck's conviction but set aside the sentence. 68 S.W.3d 418, 432 (2002) (en banc). The State then held a new sentencing proceeding.

From the first day of the new proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain. App. 58. Before the jury *voir dire* began, Deck's counsel objected to the shackles. The objection was overruled. *Ibid.*; see also *id.,* at 41–55. During the *voir dire,* Deck's counsel renewed [2] the objection. The objection was again overruled, the court stating that Deck "has been convicted and will remain in leg irons and a belly chain." *Id.,* at 58. After the *voir dire,* Deck's counsel once again objected, moving to strike the jury panel "because of the fact that Mr. Deck is shackled in front of the jury and makes them think that he is ... violent today." *Id.,* at 58–59. The objection was again overruled, the court stating that his "being shackled takes any fear out of their minds." *Id.,* at 59. The penalty phase then proceeded with Deck in shackles. Deck was again sentenced to death. 136 S.W.3d 481, 485 (Mo.2004) (en banc).

On appeal, Deck claimed that his shackling violated both Missouri law and the Federal Constitution. The Missouri Supreme Court rejected these claims, writing that there was "no record of the extent of the jury's awareness of the restraints"; there was no "claim that the restraints impeded" Deck "from participating in the proceedings"; and there was "evidence" of "a risk" that Deck "might flee in that he

was a repeat offender" who may have "killed his two victims to avoid being returned to custody." *Ibid.* Thus, there was "sufficient evidence in the record to support the trial court's exercise of its discretion" to require shackles, and in any event Deck "has not demonstrated that the outcome of his trial was prejudiced.... Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice." ***626** *Ibid.* The court rejected Deck's other claims of error and affirmed the sentence.

We granted certiorari to review Deck's claim that his shackling violated the Federal Constitution.

II

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

This rule has deep roots in the common law. In the 18th century, Blackstone wrote that "it is laid down in our antient books, that, though under an indictment of the highest nature," a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnote omitted); see also 3 E. Coke, Institutes of the Laws of England *34 ("If felons come in judgement to answer, ... they shall be out

of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"). Blackstone and other English authorities recognized that the rule did not apply at "the time of arraignment," or like proceedings before the judge. Blackstone, *supra,* at 317; see also *Trial of Christopher* ****2011** *Layer,* 16 How. St. Tr. 94, 99 (K.B.1722). It was meant to protect defendants appearing at trial before a jury. See *King v. Waite,* 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B.1743) ("[B]eing put upon his trial, the Court immediately ordered [the defendant's] fetters to be knocked off").

American courts have traditionally followed Blackstone's "ancient" English rule, while making clear that "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles ***627** may be retained." 1 J. Bishop, New Criminal Procedure § 955, p. 573 (4th ed. 1895); see also *id.,* at 572–573 ("[O]ne at the trial should have the unrestrained use of his reason, and all advantages, to clear his innocence. Our American courts adhere pretty closely to this doctrine" (internal quotation marks omitted)); *State v. Roberts,* 86 N.J.Super. 159, 163–165, 206 A.2d 200, 203 (App.Div.1965); *French v. State,* 377 P.2d 501, 502–504 (Okla.Crim.App.1962); *Eaddy v. People,* 115 Colo. 488, 490, 174 P.2d 717, 718 (1946) (en banc); *State v. McKay,* 63 Nev. 118, 153–158, 165 P.2d 389, 405–406 (1946); *Blaine v. United States,* 136 F.2d 284, 285 (CADC 1943) *(per curiam); Blair v. Commonwealth,* 171 Ky. 319, 327–329, 188 S.W. 390, 393 (App.1916); *Hauser v. People,* 210 Ill. 253, 264–267, 71 N.E. 416, 421 (1904); *Parker v.*

Territory, 5 Ariz. 283, 287, 52 P. 361, 363 (1898); *State v. Williams,* 18 Wash. 47, 48–50, 50 P. 580, 581 (1897); *Rainey v. State,* 20 Tex.App. 455, 472–473, 1886 WL 4636 (1886) (opinion of White, P. J.); *State v. Smith,* 11 Ore. 205, 8 P. 343 (1883); *Poe v. State,* 78 Tenn. 673, 674– 678 (1882); *State v. Kring,* 64 Mo. 591, 592 (1877); *People v. Harrington,* 42 Cal. 165, 167, 1871 WL 1466 (1871); see also F. Wharton, Criminal Pleading and Practice § 540*a,* p. 369 (8th ed. 1880); 12 Cyclopedia of Law and Procedure 529 (1904). While these earlier courts disagreed about the degree of discretion to be afforded trial judges, see *post,* at 2020–2023 (THOMAS, J., dissenting), they settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so. [3]

More recently, this Court has suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments' due process guarantee. Thirty-five years ago, when considering the trial of an unusually obstreperous criminal defendant, the Court held that the Constitution sometimes permitted special measures, including physical restraints. *Allen,* 397 U.S., at 343–344, 90 S.Ct. 1057. The Court wrote that "binding ***628** and gagging might possibly be the fairest and most reasonable way to handle" such a defendant. *Id.,* at 344, 90 S.Ct. 1057. But the Court immediately added that "even to contemplate such a technique ... arouses a feeling that no person should be tried while shackled and gagged except as a last resort." *Ibid.*

Sixteen years later, the Court considered a special courtroom security arrangement that involved having uniformed security personnel sit in the first row of the courtroom's spectator section. The Court held that the Constitution allowed the arrangement, stating that the deployment of security personnel during trial is not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook,* 475 U.S., at 568–569, 106 S.Ct. 1340. See also *Estelle v. Williams,* 425 U.S. 501, 503, 505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy").

****2012** Lower courts have treated these statements as setting forth a constitutional standard that embodies Blackstone's rule. Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum. See, *e.g., Dyas v. Poole,* 309 F.3d 586, 588–589 (C.A.9 2002) *(per curiam); Harrell v. Israel,* 672 F.2d 632, 635 (C.A.7 1982) *(per curiam); State v. Herrick,* 324 Mont. 76, 78–82, 101 P.3d 755, 757–759 (2004); *Hill v. Commonwealth,* 125 S.W.3d 221, 233–234 (Ky.2004); *State v. Turner,* 143 Wash.2d 715, 723–727, 23 P.3d 499, 504–505 (2001) (en banc); *Myers v. State,* 2000 OK CR 25, ¶ 19, 17 P.3d 1021, 1033; *State v. Shoen,* 598 N.W.2d 370, 374–377

(Minn.1999); ***629** *Lovell v. State,* 347 Md. 623, 635–645, 702 A.2d 261, 268– 272 (1997); *People v. Jackson,* 14 Cal.App.4th 1818, 1822– 1830, 18 Cal.Rptr.2d 586, 588–594 (1993); *Cooks v. State,* 844 S.W.2d 697, 722 (Tex.Crim.App.1992) (en banc); *State v. Tweedy,* 219 Conn. 489, 504–508, 594 A.2d 906, 914–915 (1991); *State v. Crawford,* 99 Idaho 87, 93–98, 577 P.2d 1135, 1141–1146 (1978); *People v. Brown,* 45 Ill.App.3d 24, 26–28, 3 Ill.Dec. 677, 358 N.E.2d 1362, 1363–1364 (1977); *State v. Tolley,* 290 N.C. 349, 362–371, 226 S.E.2d 353, 365–369 (1976); see also 21A Am.Jur.2d, Criminal Law §§ 1016, 1019 (1998); see generally Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis U.L.J. 351 (1970– 1971); ABA Standards for Criminal Justice: Discovery and Trial by Jury 15–3.2, pp. 188–191 (3d ed.1996).

Lower courts have disagreed about the specific procedural steps a trial court must take prior to shackling, about the amount and type of evidence needed to justify restraints, and about what forms of prejudice might warrant a new trial, but they have not questioned the basic principle. They have emphasized the importance of preserving trial court discretion (reversing only in cases of clear abuse), but they have applied the limits on that discretion described in *Holbrook, Allen,* and the early English cases. In light of this precedent, and of a lower court consensus disapproving routine shackling dating back to the 19th century, it is clear that this Court's prior statements gave voice to a principle deeply embedded in the law. We now conclude that those statements identify a basic element of the "due process of law" protected by the Federal Constitution.

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

***630** III

We here consider shackling not during the guilt phase of an ordinary criminal trial, but during the punishment phase of a capital case. And we must decide whether that change of circumstance makes a constitutional difference. To do so, we examine the reasons that motivate the guilt-phase constitutional rule and determine whether they apply with similar force in this context.

A [4] Judicial hostility to shackling may once primarily have reflected concern for the ****2013** suffering—the "tortures" and "torments"—that "very painful" chains could cause. Krauskopf, *supra,* at 351, 353 (internal quotation marks omitted); see also *Riggins v. Nevada,* 504 U.S. 127, 154, n. 4, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (THOMAS, J., dissenting) (citing English cases curbing the use of restraints). More recently, this Court's opinions have not stressed the need to prevent physical suffering (for not all modern physical restraints are painful). Instead they have emphasized the importance of giving effect to three fundamental legal principles.

First, the criminal process presumes that the defendant is innocent until proved guilty. *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) (presumption of innocence "lies at the foundation of the administration of our criminal law"). Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. Cf. *Estelle, supra,* at 503, 96 S.Ct. 1691. It suggests to the jury that the justice system itself sees a "need to separate a defendant from the community at large." *Holbrook, supra,* at 569, 106 S.Ct. 1340; cf. *State v. Roberts,* 86 N.J.Super., at 162, 206 A.2d, at 202 ("[A] defendant 'ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach ... unless there be some Danger of a Rescous [rescue] or Escape' " (quoting 2 W. Hawkins, Pleas ***631** of the Crown, ch. 28, § 1, p. 308 (1716–1721) (section on arraignments))).

Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. See, *e.g.,* Amdt. 6; *Gideon v. Wainwright,* 372 U.S. 335, 340–341, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his lawyer. *Allen,* 397 U.S., at 344, 90 S.Ct. 1057. Indeed, they can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf. Cf. *Cranburne's Case,* 13 How. St. Tr. 222 (K.B.1696) ("Look you, keeper, you should take off the prisoners irons when they are at the bar, for they should stand at their ease when they are tried" (footnote omitted));

People v. Harrington, 42 Cal., at 168 (shackles "impos [e] physical burdens, pains, and restraints ..., ... ten[d] to confuse and embarrass" defendants' "mental faculties," and thereby tend "materially to abridge and prejudicially affect his constitutional rights").

Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen, supra,* at 344, 90 S.Ct. 1057; see also *Trial of Christopher Layer,* 16 How. St. Tr., at 99 (statement of Mr. Hungerford) ("[T]o have a man plead for his life" in shackles before ***632** "a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present," undermines the "dignity of the Court").

****2014** There will be cases, of course, where these perils of shackling are unavoidable. See *Allen, supra,* at 344, 90 S.Ct. 1057. We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts

latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.

B

The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. This is obviously so in respect to the latter two considerations mentioned, securing a meaningful defense and maintaining dignified proceedings. It is less obviously so in respect to the first consideration mentioned, for the defendant's conviction means that the presumption of innocence no longer applies. Hence shackles do not undermine the jury's effort to apply that presumption. [5]

Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the " 'severity' " and " 'finality' " of the sanction, is no less important than the decision about guilt. *Monge v. California,* 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (quoting *Gardner v. Florida,* 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)).

Neither is accuracy in making that decision any less critical. The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. *Monge, supra,* at 732, 118 S.Ct. 2246 (citing *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ***633** plurality opinion)). The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. Cf. Brief for Respondent 25–27. It also almost inevitably affects adversely the jury's perception of the character of the defendant. See *Zant v. Stephens,* 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (REHNQUIST, J., concurring in judgment) (character and propensities of the defendant are part of a "unique, individualized judgment regarding the punishment that a particular person deserves"). And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." *Sochor v. Florida,* 504 U.S. 527, 532, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (internal quotation marks omitted); see also *Riggins,* 504 U.S., at 142, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment) (through control of a defendant's appearance, the State can exert a "powerful influence on the outcome of the trial").

Given the presence of similarly weighty considerations, we must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It ****2015** permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

***634** IV

Missouri claims that the decision of its high court meets the Constitution's requirements in this case. It argues that the Missouri Supreme Court properly found: (1) that the record lacks evidence that the jury saw the restraints; (2) that the trial court acted within its discretion; and, in any event, (3) that the defendant suffered no prejudice. We find these arguments unconvincing.

The first argument is inconsistent with the record in this case, which makes clear that the jury was aware of the shackles. See App. 58–59 (Deck's attorney stated on the record that "Mr. Deck [was] shackled *in front of the jury* " (emphasis added)); *id.,* at 59 (trial court responded that "him being shackled takes any fear out of their minds"). The argument also overstates the Missouri Supreme Court's holding. The

court said: "Trial counsel made no record *of the extent* of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings." 136 S.W.3d, at 485 (emphasis added). This statement does not suggest that the jury was unaware of the restraints. Rather, it refers to the degree of the jury's awareness, and hence to the kinds of prejudice that might have occurred.

The second argument—that the trial court acted within its discretion—founders on the record's failure to indicate that the trial judge saw the matter as one calling for discretion. The record contains no formal or informal findings. Cf. *supra,* at 2014 (requiring a case-by-case determination). The judge did not refer to a risk of escape—a risk the State has raised in this Court, see Tr. of Oral Arg. 36–37—or a threat to courtroom security. Rather, he gave as his reason for imposing the shackles the fact that Deck already "has been convicted." App. 58. While he also said that the shackles would "tak[e] any fear out of" the juror's "minds," he nowhere explained any special reason for fear. *Id.,* at 59. Nor did he explain why, if shackles were necessary, he chose ***635** not to provide for shackles that the jury could not see—apparently the arrangement used at trial. If there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one. [6]

The third argument fails to take account of this Court's statement in *Holbrook* that shackling is "inherently prejudicial." 475 U.S., at 568, 106 S.Ct. 1340. That statement is rooted in our belief that the

practice will often have negative effects, but—like "the consequences of compelling a defendant to wear prison clothing" or of forcing him to stand trial while medicated—those effects "cannot be shown from a trial transcript." *Riggins, supra,* at 137, 112 S.Ct. 1810. 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." ****2016** *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

V

For these reasons, the judgment of the Missouri Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

Carman Deck was convicted of murdering and robbing an elderly couple. He stood before the sentencing jury not as an innocent man, but as a convicted double murderer and robber. Today this Court holds that Deck's due process rights were violated when he appeared at sentencing in leg irons, handcuffs, and a belly chain. The Court holds that such restraints may only be used where the use is

" 'justified by an essential state interest' " that is "specific to the defendant ***636** on trial," *ante,* at 2009, and that is supported by specific findings by the trial court. Tradition—either at English common law or among the States—does not support this conclusion. To reach its result, the Court resurrects an old rule the basis for which no longer exists. It then needlessly extends the rule from trials to sentencing. In doing so, the Court pays only superficial heed to the practice of States and gives conclusive force to errant dicta sprinkled in a trio of this Court's cases. The Court's holding defies common sense and all but ignores the serious security issues facing our courts. I therefore respectfully dissent.

I

Carman Deck and his sister went to the home of Zelma and James Long on a summer evening in 1996. After waiting for nightfall, Deck and his sister knocked on the door of the Longs' home, and when Mrs. Long answered, they asked for directions. Mrs. Long invited them in, and she and Mr. Long assisted them with directions. When Deck moved toward the door to leave, he drew a pistol, pointed it at the Longs, and ordered them to lie face down on their bed. The Longs did so, offering up money and valuables throughout the house and all the while begging that he not harm them.

After Deck finished robbing their house, he stood at the edge of their bed, deliberating for 10 minutes over whether to spare them. He ignored their pleas and shot them each twice in the head. Deck later told

police that he shot the Longs because he thought that they would be able to recognize him.

Deck was convicted of the murders and robbery of the Longs and sentenced to death. The death sentence was overturned on appeal. Deck then had another sentencing hearing, at which he appeared in leg irons, a belly chain, and handcuffs. At the hearing, the jury heard evidence of Deck's numerous burglary and theft convictions and his assistance in a jailbreak by two prisoners.

***637** On resentencing, the jury unanimously found six aggravating factors: Deck committed the murders while engaged in the commission of another unlawful homicide; Deck murdered each victim for the purpose of pecuniary gain; each murder involved depravity of mind; each murder was committed for the purpose of avoiding a lawful arrest; each murder was committed while Deck was engaged in a burglary; and each murder was committed while Deck was engaged in a robbery. The jury recommended, and the trial court imposed, two death sentences.

Deck sought postconviction relief from his sentence, asserting, among other ****2017** things, that his due process and equal protection rights were violated by the trial court's requirement that he appear in shackles. The Missouri Supreme Court rejected that claim. 136 S.W.3d 481 (2004) (en banc). The court reasoned that "there was a risk that [Deck] might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody," and

[7] thus it could not conclude that the trial court had abused its discretion. *Id.,* at 485.

II

My legal obligation is not to determine the wisdom or the desirability of shackling defendants, but to decide a purely legal question: Does the Due Process Clause of the Fourteenth Amendment preclude the visible shackling of a defendant? Therefore, I examine whether there is a deeply rooted legal principle that bars that practice. *Medina v. California,* 505 U.S. 437, 446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); *Apprendi v. New Jersey,* 530 U.S. 466, 500, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (THOMAS, J., concurring); see also *Chicago v. Morales,* 527 U.S. 41, 102–106, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (THOMAS, J., dissenting). As I explain below, although the English common law had a rule against trying a defendant in irons, the basis for the rule makes clear that it should not be extended by rote to modern restraints, which are dissimilar in certain essential respects to the irons that gave rise to ***638** the rule. Despite the existence of a rule at common law, state courts did not even begin to address the use of physical restraints until the 1870's, and the vast majority of state courts would not take up this issue until the 20th century, well after the ratification of the Fourteenth Amendment. Neither the earliest case nor the more modern cases reflect a consensus that would inform our understanding of the requirements of due process. I therefore find this evidence inconclusive.

A

English common law in the 17th and 18th centuries recognized a rule against bringing the defendant in irons to the bar for trial. See, *e.g.,* 4 W. Blackstone, Commentaries on the Laws of England 317 (1769); 3 Coke, Institutes of the Laws of England *34 (hereinafter Coke). This rule stemmed from none of the concerns to which the Court points, *ante,* at 2012–2015—the presumption of innocence, the right to counsel, concerns about decorum, or accuracy in decisionmaking. Instead, the rule ensured that a defendant was not so distracted by physical pain during his trial that he could not defend himself. As one source states, the rule prevented prisoners from "any Torture while they ma[de] their defence, be their Crime never so great." J. Kelyng, A Report of Divers Cases in Pleas of the Crown 10 (1708).[1] This concern was understandable, for the irons of that period were heavy and painful. In fact, leather strips often lined the irons to prevent them from rubbing away a

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[1] See Coke *34 ("If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"); *Cranburne's Case,* 13 How. St. Tr. 222 (K.B.1696) (prisoners "should stand at their ease when they are tried"); The Conductor Generalis 403 (J. Parker ed. 1801) (reciting same); cf. *ibid.* ("[t]hat where the law requires that a prisoner should be kept in *salva* & *arcta custodia,* yet that must be without pain or torment to the prisoner").

defendant's ***639** skin. T. Gross, Manacles of the World: A Collector's Guide to International Handcuffs, Leg Irons and other Miscellaneous Shackles and Restraints 25 ****2018** (1997). Despite Coke's admonition that "[i]t [was] an abuse that prisoners be chained with irons, or put to any pain before they be attained," Coke *34, suspected criminals often wore irons during pretrial confinement, J. Langbein, The Origins of Adversary Criminal Trial 50, and n. 197 (2003) (hereinafter Langbein). For example, prior to his trial in 1722 for treason, Christopher Layer spent his confinement in irons. Layer's counsel urged that his irons be struck off, for they allowed him to "sleep but in one posture." *Trial of Christopher Layer,* 16 How. St. Tr. 94, 98 (K.B.1722).

The concern that felony defendants not be in severe pain at trial was acute because, before the 1730's, defendants were not permitted to have the assistance of counsel at trial, with an early exception made for those charged with treason. Langbein 170–172. Instead, the trial was an " 'accused speaks' " trial, at which the accused defended himself. The accused was compelled to respond to the witnesses, making him the primary source of information at trial. *Id.,* at 48; see also *Faretta v. California,* 422 U.S. 806, 823–824, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As the Court acknowledges, *ante,* at 2010, the rule against shackling did not extend to arraignment.[2]

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[2] When arraignment and trial occurred on separate occasions, the defendant could be brought to his arraignment in irons. *Trial of Christopher Layer,* 16 How. St. Tr. 94, 97 (K.B.1722) (defendant arraigned in irons); *King v. Waite,* 1

A defendant remained in irons at arraignment because "he [was] only called upon to plead by *advice of his counsel*"; he was not on trial, ***640** where he would play the main role in defending himself. *Trial of Christopher Layer, supra,* at 100 (emphasis added).

A modern-day defendant does not spend his pretrial confinement wearing restraints. The belly chain and handcuffs are of modest, if not insignificant, weight. Neither they nor the leg irons cause pain or suffering, let alone pain or suffering that would interfere with a defendant's ability to assist in his defense at trial. And they need not interfere with a defendant's ability to assist his counsel—a defendant remains free to talk with counsel during trial, and restraints can be employed so as to ensure that a defendant can write to his counsel during the trial. Restraints can also easily be removed when a defendant testifies, so that any concerns about testifying can be ameliorated. Modern restraints are therefore unlike those that gave rise to the traditional rule.

The Court concedes that modern restraints are nothing like the restraints of long ago, *ante,* at 2012–2013, and even that the rule at common law did not rest on any of the "three fundamental legal principles"

Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B.1743) (fetters could not be removed until the [8] defendant had pleaded); but cf. R. Burns, Abridgment, or the American Justice 37 (1792) ("The prisoner on his arraignment ... must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons").

the Court posits to support its new rule, *ibid.* Yet the Court treats old and modern restraints as similar for constitutional purposes merely because they are both types of physical restraints. This logical leap ignores that modern restraints do not violate the principle animating the common-law rule. In making this leap, the Court strays from the appropriate legal inquiry of examining common-law traditions to inform our understanding of the Due Process Clause.

B

In the absence of a common-law rule that applies to modern-day restraints, state practice is also relevant to determining ****2019** whether a deeply rooted tradition supports the conclusion that the Fourteenth Amendment's Due Process Clause limits shackling. See *Morales,* 527 U.S., at 102–106, 119 S.Ct. 1849 (THOMAS, J., dissenting). The practice among the States, however, does not support, let alone require, the conclusion ***641** that shackling can be done only where "particular concerns ... related to the defendant on trial" are articulated as findings in the record. *Ante,* at 2015. First, state practice is of modern, not longstanding, vintage. The vast majority of States did not address the issue of physical restraints on defendants during trial until the 20th century. Second, the state cases—both the earliest to address shackling and even the later cases—reflect substantial differences that undermine the contention that the Due Process Clause so limits the use of physical restraints. Third, state- and lower federal-court cases decided after *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d

126 (1976), and *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), are not evidence of a current consensus about the use of physical restraints. Such cases are but a reflection of the dicta contained in *Allen, Estelle,* and *Holbrook*.

1

State practice against shackling defendants was established in the 20th century. In 35 States, no recorded state-court decision on the issue appears until the 20th century.[3] ***642** Of those 35 States, 21

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[3] *State v. Mitchell,* 824 P.2d 469, 473–474 (Utah App.1991); *Smith v. State,* 773 P.2d 139, 140–141 (Wyo.1989); *Frye v. Commonwealth,* 231 Va. 370, 381–382, 345 S.E.2d 267, 276 (1986); *State v. White,* 456 A.2d 13, 15 (Me.1983); *State v. Baugh,* 174 Mont. 456, [9] 462–463, 571 P.2d 779, 782–783 (1977); *Brookins v. State,* 354 A.2d 422, 425 (Del.1976); *State v. Phifer,* 290 N.C. 203, 219, 225 S.E.2d 786, 797 (1976); *State v. Lemire,* 115 N.H. 526, 531, 345 A.2d 906, 910 (1975); *Anthony v. State,* 521 P.2d 486, 496 (Alaska 1974); *State v. Palmigiano,* 112 R.I. 348, 357–358, 309 A.2d 855, 861 (1973); *Jones v. State,* 11 Md.App. 686, 693–694, 276 A.2d 666, 670 (1971); *State v. Polidor,* 130 Vt. 34, 39, 285 A.2d 770, 773 (1971); *State v. Moen,* 94 Idaho 477, 479–480, 491 P.2d 858, 860–861 (1971); *State v. Yurk,* 203 Kan. 629, 631, 456 P.2d 11, 13–14 (1969); *People v. Thomas,* 1 Mich.App. 118, 126, 134 N.W.2d 352, 357 (1965); *State v. Nutley,* 24 Wis.2d 527, 564–565, 129 N.W.2d 155, 171 (1964), overruled on other grounds by *State v. Stevens,* 26 Wis.2d 451, 463, 132 N.W.2d 502, 508 (1965); *State v. Brooks,* 44 Haw. 82, 84–86, 352 P.2d 611, 613–614 (1960); *State v. Coursolle,* 255 Minn. 384, 389, 97 N.W.2d 472, 476–477 (1959) (handcuffing of witnesses); *Allbright v. State,* 92 Ga.App. 251, 252–253, 88 S.E.2d 468, 469–470 (1955); *State v. Roscus,* 16 N.J. 415, 428, 109 A.2d 1, 8 (1954); *People v. Snyder,* 305 N.Y. 790, 791, 113 N.E.2d 302 (1953); *Eaddy v. People,* 115 Colo. 488, 491, 174 P.2d 717, 718 (1946) (en banc); *State v. McKay,* 63 Nev. 118, 161–163, 165 P.2d 389, 408–409 (1946) (also discussing a 1929

States have no recorded decision on the question until the 1950's or later.[4] The 14 state (including then-territorial) courts that addressed ****2020** the matter before the 20th century only began to do so in the 1870's.[5] The ***643** California Supreme Court's decision in *People v. Harrington,* 42 Cal. 165 (1871), "seems to have been the first case in this country where this ancient rule of the common law was considered and enforced." *State v. Smith,* 11 Ore. 205, 208, 8 P. 343 (1883). The practice in the United States is thus of contemporary vintage. State practice that was only nascent in the late 19th century is not evidence of a consistent unbroken tradition dating to the common law, as the Court suggests. *Ante,* at 2010–2011. The Court does not even attempt to account for the century of virtual silence between the practice established at English common law and the emergence of the rule in the United States. Moreover, the belated and varied state practice is insufficient to warrant the conclusion that shackling of a defendant violates his due process rights. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 159, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (where no history of a right to appeal much before the 20th century, no historical support for a right to self-representation on appeal).

Nevada statute that limited the use of restraints prior to conviction); *Rayburn v. State,* 200 Ark. 914, 920–922, 141 S.W.2d 532, 535–536 (1940); *Shultz v. State,* 131 Fla. 757, 758, 179 So. 764, 765 (1938); *Commonwealth v. Millen,* 289 Mass. 441, 477–478, 194 N.E. 463, 480 (1935); *Pierpont v. State,* 49 Ohio App. 77, 83–84, 195 N.E. 264, 266–267 (1934); *Corey v. State,* 126 Conn. 41, 42–43, 9 A.2d 283, 283–284 (1939); *Bradbury v. State,* 51 Okla. Cr. 56, 59–61, 299 P. 510, 512 (App.1931); *State v. Hanrahan,* 49 S.D. 434, 435–437, 207 N.W. 224, 225 (1926);

South v. State, 111 Neb. 383, 384–386, 196 N.W. 684, 685–686 (1923); *Blair v. Commonwealth,* 171 Ky. 319, 327, 188 S.W. 390, 393 (1916); *McPherson v. State,* 178 Ind. 583, 584–585, 99 N.E. 984, 985 (1912); *State v. Kenny,* 77 S.C. 236, 240–241, 57 S.E. 859, 861 (1907); *State v. Bone,* 114 Iowa 537, 541–543, 87 N.W. 507, 509 (1901). The North Dakota courts have yet to pass upon the question in any reported decision.

[4] See n. 3, *supra.* It bears noting, however, that in 1817 Georgia enacted a statute limiting the use of physical restraints on defendants at trial, long before any decision was reported in the Georgia courts. Prince's Digest of the Laws of the State of Georgia § 21, p. 372 (1822). Its courts did not address shackling until 1955. *Allbright v. State, supra,* at 252–253, 88 S.E.2d, at 469–470.

[5] *Parker v. Territory,* 5 Ariz. 283, 287–288, 52 P. 361, 363 (1898); *State v. Allen,* 45 W.Va. 65, 68–70, 30 S.E. 209, 210–211 (1898), overruled in relevant part, *State v. Brewster,* 164 W.Va. 173, 182, 261 S.E.2d 77, 82 (1979) (relying on *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), and *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)); *State v. Williams,* 18 Wash. 47, 50–51, 50 P. 580, 581–582 (1897); *Commonwealth v. Weber,* 167 Pa. 153, 165–166, 31 A. 481, 484 (1895); *Rainey v. State,* 20 Tex. Ct.App. 455, 472 (1886); *Upstone v. People,* 109 Ill. 169, 179 (1883); *State v. Thomas,* 35 La. Ann. 24, 26 (1883); *State v. Smith,* 11 Ore. 205, 208, 8 P. 343 (1883); *Territory v. Kelly,* 2 N.M. 292, 304–306 (1882); *Poe v. State,* 78 Tenn. 673, 677–678 (1882); *Faire v. State,* 58 Ala. 74, 80–81 (1877); *State v. Kring,* 1 Mo.App. 438, 441–442 (1876); *Lee v. State,* 51 Miss. 566, 569–574 (1875), overruled on other grounds, *Wingo v. State,* 62 Miss. 311, 315–316 (1884); *People v. Harrington,* 42 Cal. 165, 168–169 (1871).

The earliest state cases reveal courts' divergent views of visible shackling, undermining the notion that due process cabins shackling to cases in which "particular concerns ... related to the defendant on trial" are supported by findings on the record. *Ante,* at 2015.

The Supreme Court of the New Mexico Territory held that great deference was to be accorded the trial court's decision to put the defendant in shackles, permitting a reviewing court to presume that there had been a basis for doing so if the record lay silent. *Territory v. Kelly,* 2 N.M. 292, 304–306 (1882). Only if the record "affirmatively" showed "no ***644** reason whatever" for shackling was the decision to shackle a defendant erroneous. *Ibid.;* see *State v. Allen,* 45 W.Va. 65, 68–70, 30 S.E. 209, 211 (1898) (following *Kelly*), overruled in relevant part, *State v. Brewster,* 164 W.Va. 173, 182, 261 S.E.2d 77, 82 (1979). The Alabama Supreme Court also left the issue to the trial court's discretion and went so far as to bar any appeal from the trial court's decision to restrain the defendant. *Faire v. State,* 58 Ala. 74, 80–81 (1877); see *Poe v. State,* 78 Tenn. 673, 677 (1882) (decision to manacle a defendant during trial "left to the sound discretion of the trial court" and subject to abuse-of-discretion standard of review). Mississippi concluded that the decision to shackle a defendant ****2021** "may be safely committed to courts and sheriffs, whose acts are alike open to review in the courts and at the ballot

box."[6] *Lee v. State*, 51 Miss. 566, 574, 1875 WL 4718 *6 (1875), overruled on other grounds, *Wingo v. State*, 62 Miss. 311 (1884). [10]

By contrast, California, Missouri, Washington, and Oregon adopted more restrictive approaches. In *People v. Harrington, supra,* the California Supreme Court held that shackling a defendant "without evident necessity" of any kind violated the common-law rule as well as state law and was prejudicial to the defendant. *Id.,* at 168–169. A few years later, the Missouri courts took an even more restrictive view, concluding that the use of shackles or other such restraints was permitted only if warranted by the defendant's conduct "at the time of the trial." *State v. Kring,* 64 Mo. 591, 593 (1877); see *State v. Smith, supra,* at 207–208, 8 P., at 343 (following *Kring* and *Harrington* without discussion); *State v. Williams,* 18 Wash. 47, 50–51, 50 P. 580, 581–582 (1897) (adopting *Kring*'s test).

***645** Texas took an intermediate position. The Texas Court of Appeals relied on *Kring,* and at the same time deferred to the decision made by the sheriff to bring the defendant into the courtroom in shackles. See *Rainey v. State,* 20 Tex. Ct.App. 455, 472 (1886); see also *Parker v. Territory,* 5 Ariz. 283, 287–288, 52 P. 361, 363 (1898) (following *Harrington* but

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[6] Pennsylvania first addressed the question of the shackling of a defendant in the context of a grand jury proceeding. It too concluded that deference was required, finding that the appropriate security for the defendant's transport was best left to the officers guarding him. *Commonwealth v. Weber, supra,* at 165, 31 A., at 484.

permitting the shackling of a defendant at arraignment based on the crime for which he had been arrested as well as the reward that had been offered for his recapture).

Thus, in the late 19th century States agreed that generally defendants ought to come to trial unfettered, but they disagreed over the breadth of discretion to be afforded trial courts. A bare majority of States required that trial courts and even jailers be given great leeway in determining when a defendant should be restrained; a minority of States severely constrained such discretion, in some instances by limiting the information that could be considered; and an even smaller set of States took an intermediate position. While the most restrictive view adopted by States is perhaps consistent with the rule Deck seeks, the majority view is flatly inconsistent with requiring a State to show, and for a trial court to set forth, findings of an " 'essential state interest' " "specific to the defendant on trial" before shackling a defendant. *Ante,* at 2009. In short, there was no consensus that supports elevating the rule against shackling to a federal constitutional command.

3

The modern cases provide no more warrant for the Court's approach than do the earliest cases. The practice in the 20th century did not resolve the divisions among States that emerged in the 19th century. As more States addressed the issue, they continued to express a general preference that defendants be brought to trial without shackles. They

continued, however, to disagree about the latitude to be given trial courts. Many deferred to the judgment of the trial ***646** court,[7] and ****2022** some to the views of those responsible for guarding the defendant.[8] States also continued to disagree over whether the use of shackles was inherently prejudicial.[9] Moreover, States differed over the information that could ***647** be considered in deciding to shackle the defendant and the certainty of the risk that had to be established, with a small minority limiting the use of shackles to instances arising from conduct specific to the particular trial or otherwise requiring an imminent threat.[10] The remaining States permitted courts to consider a range of information outside the trial, including past escape,[11] prior convictions,[12] the nature of the crime for which ****2023** the defendant was on trial,[13] conduct prior to trial while in prison,[14] any prior disposition toward ***648** violence,[15] and physical attributes of the defendant, such as his size, physical strength, and age.[16]

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[7] See, *e.g., State v. Franklin,* 97 Ohio St.3d 1, 18–19, 776 N.E.2d 26, 46 (2002) (decision to shackle a defendant is left to the sound discretion of a trial court); *Commonwealth v. Agiasottelis,* 336 Mass. 12, 16, 142 N.E.2d 386, 389 (1957) ("[A] judge properly should be reluctant to interfere with reasonable precautions which a sheriff deems necessary to keep secure prisoners for whose custody he is responsible and, if a judge fails to require removal of shackles, his exercise of a sound discretion will be sustained"); *Rayburn v. State,* 200 Ark., at 920–921, 141 S.W.2d, at 536 ("Trial Courts must be allowed a discretion as to the precautions which they will permit officers ... to take to prevent the prisoner's escape, or to prevent him from harming any person connected with the trial, or from being harmed"); *State v. Hanrahan,* 49 S.D., at 436, 207 N.W., at 225 ("It is the universal rule that while no unreasonable restraint may be exercised over the defendant during his trial, yet it is within the

discretion of the trial court to determine what is and what is not reasonable restraint"); *McPherson v. State,* 178 [11] Ind., at 585, 99 N.E., at 985 ("[W]hether it is necessary for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge").

[8] See, *e.g., Commonwealth v. Millen,* 289 Mass., at 477–478, 194 N.E., at 477–478.

[9] See, *e.g., Smith v. State,* 773 P.2d, at 141 ("The general law applicable in situations where jurors see a handcuffed defendant is that, absent a showing of prejudice, their observations do not constitute grounds for a mistrial"); *People v. Martin,* 670 P.2d 22, 25 (Colo.App.1983) (shackling is not inherently prejudical); *State v. Gilbert,* 121 N.H. 305, 310, 429 A.2d 323, 327 (1981) (shackling is not inherently prejudicial); *State v. Moore,* 45 Ore.App. 837, 840, 609 P.2d 866, 867 (1980) ("[A]bsent a strongly persuasive showing of prejudice to the defendant and that the court abused its discretion, we will not second guess [the trial court's] assessment of its security needs"); *State v. Palmigiano,* 112 R.I., at 358, 309 A.2d, at 861; *State v. Polidor,* 130 Vt., at 39, 285 A.2d, at 773; *State v. Norman,* 8 N.C.App. 239, 242, 174 S.E.2d 41, 44 (1970); *State v. Brooks,* 44 Haw., at 84–86, 352 P.2d, at 613–614; *State v. Brewer,* 218 Iowa 1287, 1299, 254 N.W. 834, 840 (1934) ("[T]his court cannot presume that the defendant was prejudiced because he was handcuffed"), overruled by *State v. Wilson,* 406 N.W.2d 442, 449, and n. 1 (Iowa 1987); but see *State v. Coursolle,* 255 Minn., at 389, 97 N.W.2d, at 476–477 (shackling is inherently prejudicial).

[10] See, *e.g., ibid.* (defining "immediate necessity" as "some reason based on the conduct of the prisoner at the time of the trial"); *Blair v. Commonwealth,* 171 Ky., at 327–328, 188 S.W., at 393; *State v. Temple,* 194 Mo. 237, 247, 92 S.W. 869, 872 (1906) (citing *State v. Kring,* 64 Mo. 591, 592–593 (1877)).

[11] See, *e.g., Commonwealth v. Chase,* 350 Mass. 738, 740, 217 N.E.2d 195, 197 (1966) (attempted escape on two prior occasions, plus the serious nature of the offense for which

defendant was being tried supported use of restraints); *People v. Thomas,* 1 Mich.App., at 126, 134 N.W.2d, at 357 (prison escape for which defendant was on trial sufficed to permit use of shackles); *People v. Bryant,* 5 Misc.2d 446, 448, 166 N.Y.S.2d 59, 61 (1957) (attempts to escape "on prior occasions while in custody," among other things, supported the use of restraints).

[12] See, *e.g., State v. Roberts,* 86 N.J.Super. 159, 165, 206 A.2d 200, 204 (App.Div.1965) ("In addition to a defendant's conduct *at the time of trial*, ... defendant's reputation, *his known criminal record*, his character, and the nature of the case must all be weighed" in deciding whether to shackle a defendant (second emphasis added)); *State v. Moen*, 94 Idaho, at 480–481, 491 P.2d, at 861–862 (that three defendants were on trial for escape, had been convicted of burglary two days before their trial for escape, and were being tried together sufficed to uphold trial court's shackling him); *State v. McKay*, 63 Nev., at 164, 165 P.2d, at 409 (prior conviction for burglary and conviction by army court-martial for desertion, among other things, taken into account); *People v. Deveny*, 112 Cal.App.2d 767, 770, 247 P.2d 128, 130 (1952) (defendant previously convicted of escape from prison); *State v. Franklin, supra*, at 19, 776 N.E.2d, at 46–47 (defendant just convicted of three brutal murders).

[13] See, *e.g., State v. Roberts, supra,* at 165–167, 206 A.2d, at 204.

[14] See, *e.g., State v. Franklin, supra,* at 18–20, 776 N.E.2d, at 46–47 (defendant "had stabbed a fellow inmate with a pen six times in a dispute over turning out a light").

[15] See, *e.g., Frye v. Commonwealth,* 231 Va., at 381, 345 S.E.2d, at 276 (permitting consideration of a "defendant's temperament"); *De Wolf v. State,* 95 Okla. Cr. 287, 293–294, 245 P.2d 107, 114–115 (App.1952) (permitting consideration of both the defendant's "character" and "disposition toward being a violent and dangerous person, both to the court, the public and to the defendant himself").

[16] See, *e.g., Frye v. Commonwealth, supra,* at 381–382, 345 S.E.2d, at 276 ("A trial court may consider various factors

The majority permits courts to continue to rely on these factors, which are undeniably probative of the need for shackling, as a basis for shackling a defendant both at trial and at sentencing. *Ante,* at 2012. In accepting these traditional factors, the Court rejects what has been adopted by few States—that courts may consider only a defendant's conduct at the trial itself or other information demonstrating that it is a relative certainty that the defendant will engage in disruptive or threatening conduct at his trial. See *State v.* [12] *Coursolle,* 255 Minn. 384, 389, 97 N.W.2d 472, 477 (1959) (defining "immediate necessity" to be demonstrated only by the defendant's conduct "at the time of the trial"); *State v. Finch,* 137 Wash.2d 792, 850, 975 P.2d 967, 1001 (1999) (en banc); *Blair v. Commonwealth,* 171 Ky. 319, 327–328, 188 S.W. 390, 393 (1916); *State v. Temple,* 194 Mo. 237, 247–248, 92 S.W. 869, 872 (1906); but see 136 S.W.3d, at 485 (case below) (appearing to have abandoned this test). A number of those traditional factors were present in this case. Here, Deck killed two people to avoid arrest, a fact to which he had confessed. Evidence was presented that Deck had aided prisoners in an escape attempt. Moreover, a jury ***649** had found Deck guilty of two murders, the facts of which not only make this crime heinous but also demonstrate a propensity for

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in determining whether a defendant should be restrained" including his "physical attributes"); *State v. Dennis,* 250 La. 125, 137–138, 194 So.2d 720, 724 (1967) (no prejudice from "defendant's appearance in prisoner garb, handcuffs and leg-irons before the jury venire" where it was a " 'prison inmate case' " and "defendant is a vigorous man of twenty-eight or twenty-nine years of age, about six feet tall, and weighing approximately two hundred and twenty to two hundred and twenty-five pounds").

violence. On this record, and with facts found by a jury, the Court says that it needs more. Since the Court embraces reliance on the traditional factors supporting the use of visible restraints, its only basis for reversing is the requirement of specific on-the-record findings by the trial judge. This requirement is, however, inconsistent with the traditional discretion afforded to trial courts and is unsupported by state practice. This additional requirement of on-the-record findings about that which is obvious from the record makes little sense to me.

4

In recent years, more of a consensus regarding the use of shackling has developed, ****2024** with many courts concluding that shackling is inherently prejudicial. But rather than being firmly grounded in deeply rooted principles, that consensus stems from a series of ill-considered dicta in *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

In *Allen,* the trial court had removed the defendant from the courtroom until the court felt he could conform his conduct to basic standards befitting a court proceeding. 397 U.S., at 340–341, 90 S.Ct. 1057. This Court held that removing the defendant did not violate his due process right to be present for his trial. In dicta, the Court suggested alternatives to removal, such as citing the defendant for contempt or binding and gagging him. *Id.,* at 344, 90 S.Ct. 1057. The Court, however, did express some revulsion at the

notion of binding and gagging a defendant. *Ibid. Estelle* and *Holbrook* repeated *Allen's* dicta. *Estelle, supra,* at 505, 96 S.Ct. 1691; *Holbrook, supra,* at 568, 106 S.Ct. 1340. The Court in *Holbrook* went one step further than it had in *Allen,* describing shackling as well as binding and gagging in dicta as "inherently prejudicial." 475 U.S., at 568, 106 S.Ct. 1340.

***650** The current consensus that the Court describes is one of its own making. *Ante,* at 2011. It depends almost exclusively on the dicta in this Court's opinions in *Holbrook, Estelle,* and *Allen.* Every lower court opinion the Court cites as evidence of this consensus traces its reasoning back to one or more of these decisions.[17] These ****2025** lower courts were

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[17] *Dyas v. Poole,* 309 F.3d 586, 588–589 (C.A.9 2002) *(per curiam)* (relying on *Holbrook*), amended and superseded by 317 F.3d 934 (2003) *(per curiam); Harrell v. Israel,* 672 F.2d 632, 635 (C.A.7 1982) *(per curiam)* (relying on *Allen* and *Estelle*); *State v. Herrick,* 324 Mont. 76, 80–81, 101 P.3d 755, 758–759 (2004) (relying on *Allen* and *Holbrook*); *Hill v. Commonwealth,* 125 S.W.3d 221, 233 (Ky.2004) (relying on *Holbrook*); *State v. Turner,* 143 Wash.2d 715, 724–727, 23 P.3d 499, 504–505 (2001) (en banc) (relying on *State v. Finch,* 137 Wash.2d 792, 842, 975 P.2d 967, 997–999 (1999) (en banc), which relies on *Allen, Estelle*, and *Holbrook*); *Myers v. State,* 2000 OK CR 25, ¶¶ 46–47, 17 P.3d 1021, 1033 (relying on *Owens v. State,* 1982 OK CR 1, 187, ¶¶ 4–6, 654 P.2d 657, 658–659, which relies on *Estelle*); *State v. Shoen,* 598 N.W.2d 370, 375–376 (Minn.1999) (relying on *Allen, Estelle,* and *Holbrook*); *Lovell v. State,* 347 Md. 623, 638–639, 702 A.2d 261, 268–269 (1997) (same); *People v. Jackson,* 14 Cal.App.4th 1818, 1829– 1830, 18 Cal.Rptr.2d 586, 593–594 (1993) (relying on *People v. Duran,* 16 Cal.3d 282, 290–291, 127 Cal.Rptr. 618, 623, 545 P.2d 1322, 1327 (1976) (in bank), which relies on *Allen*); *Cooks v. State,* 844 S.W.2d 697, 722 (Tex.Crim.App.1992) (en banc) (relying on *Marquez v. State,* 725 S.W.2d 217, 230

interpreting ***651** this Court's dicta, not reaching their own independent consensus about the content of the Due Process Clause. More important, these decisions represent recent practice, which does not determine whether the Fourteenth Amendment, as properly and traditionally interpreted, *i.e.,* as a statement of law, not policy preferences, embodies a right to be free from visible, painless physical restraints at trial.

(Tex.Crim.App.1987) (en banc), overruled on other grounds, *Moody v. State,* 827 S.W.2d 875, 892 (Tex.Crim.App.1992) (en banc), which relies on *Holbrook*); *State v. Tweedy,* 219 Conn. 489, 505, 508, 594 A.2d 906, 914, 916 (1991) (relying on *Estelle* and *Holbrook*); *State v. Crawford,* 99 Idaho 87, [13] 95–96, 577 P.2d 1135, 1143–1144 (1978) (relying on *Allen* and *Estelle*); *People v. Brown,* 45 Ill.App.3d 24, 26, 3 Ill.Dec. 677, 358 N.E.2d 1362, 1363 (1977) (same); *State v. Tolley,* 290 N.C. 349, 367, 226 S.E.2d 353, 367 (1976) (same). See also, *e.g., Anthony v. State,* 521 P.2d, at 496, and n. 33 (relying on *Allen* for the proposition that manacles, shackles, and other physical restraints must be avoided unless necessary to protect some manifest necessity); *State v. Brewster,* 164 W.Va., at 180–181, 261 S.E.2d, at 81–82 (relying on *Allen* and *Estelle* to overrule prior decision permitting reviewing court to presume that the trial court reasonably exercised its discretion even where the trial court had not made findings supporting the use of restraints); *Asch v. State,* 62 P.3d 945, 963–964 (Wyo.2003) (relying on *Holbrook* and *Estelle* to conclude that shackling is inherently prejudicial, and on *Allen* to conclude that shackling offends the dignity and decorum of judicial proceedings); *State v. Wilson,* 406 N.W.2d, at 449, n. 1 (relying in part on *Holbrook* to hold that visible shackling is inherently prejudicial, overruling prior decision that refused to presume prejudice); *State v. Madsen,* 57 P.3d 1134, 1136 (Utah App.2002) (relying on *Holbrook* for the proposition that shackling is inherently prejudicial).

III

Wholly apart from the propriety of shackling a defendant at *trial,* due process does not require that a defendant remain free from visible restraints at the penalty phase of a capital trial. Such a requirement has no basis in tradition or even modern state practice. Treating shackling at sentencing as inherently prejudicial ignores the commonsense distinction between a defendant who stands accused and a defendant who stands convicted.

A

There is no tradition barring the use of shackles or other restraints at sentencing. Even many modern courts have concluded that the rule against visible shackling does not apply to sentencing. See, *e.g., State v. Young,* 853 P.2d 327, 350 (Utah 1993); *Duckett v. State,* 104 Nev. 6, 11, 752 P.2d 752, 755 (1988) *(per curiam); State v. Franklin,* 97 Ohio St.3d 1, 18–19, 776 N.E.2d 26, 46–47 (2002); but see *Bello v. State,* 547 So.2d 914, 918 (Fla.1989) (applying rule against shackling at sentencing, but suggesting that "lesser showing of necessity" may be appropriate). These courts have rejected the suggestion that due process imposes such limits because they have understood the difference between a man ***652** accused and a man convicted. See, *e.g., Young, supra,* at 350; *Duckett, supra,* at 11, 752 P.2d, at 755.

This same understanding is reflected even in the guilt-innocence phase. In instances in which the jury knows that the defendant is an inmate, though not yet convicted of the crime for which he is on trial, courts

have frequently held that the defendant's status as inmate ameliorates any prejudice that might have flowed from the jury seeing him in handcuffs.[18] The Court's decision shuns such common sense.

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[18] See, *e.g., Harlow v. State,* 105 P.3d 1049, 1060 (Wyo.2005) (where jury knew that the prisoner and two witnesses were all inmates, no prejudice from seeing them in shackles); *Hill v. Commonwealth,* 125 S.W.3d, at 236 ("The trial court's admonition and the fact that the jury already knew Appellant was a convicted criminal and a prisoner in a penitentiary mitigated the prejudice naturally attendant to such restraint"); *State v. Woodard,* 121 N.H. 970, 974, 437 A.2d 273, 275 (1981) (where jury already aware that the defendant was confined, any prejudice was diminished); see also *Payne v. Commonwealth,* 233 Va. 460, 466, 357 S.E.2d 500, 504 (1987) (no error for inmate-witnesses to be handcuffed where jurors were aware that they "were ... convicted felons and that the crime took place inside a penal institution"); *State v. Moss,* 192 Neb. 405, 407, 222 N.W.2d 111, 113 (1974) (where defendant was an inmate, his appearance at arraignment in leg irons did not prejudice him); *Jessup v. State,* 256 Ind. 409, 413, 269 N.E.2d 374, 376 (1971) ("It would be unrealistic indeed ... to hold that it was reversible error for jurors to observe the transportation of an inmate of a penal institution through a public hall in a shackled condition"); *People v. Chacon,* 69 Cal.2d 765, 778, 73 Cal.Rptr. 10, 447 P.2d 106, 115 (1968) (in bank) (where defendant was charged with attacking another inmate, "the use of handcuffs was not unreasonable"); *State v. Dennis,* 250 La., at 138, 194 So.2d, at 724 (no prejudice where defendant of considerable size appeared in prisoner garb, leg irons, and handcuffs before the jury where it was a " 'prison inmate case' ").

****2026** B

In the absence of a consensus with regard to the use of visible physical restraints even in modern practice, we should not forsake common sense in determining what due process requires. Capital sentencing jurors know that the defendant [14] has been convicted of a dangerous crime. It ***653** strains credulity to think that they are surprised at the sight of restraints. Here, the jury had already concluded that there was a need to separate Deck from the community at large by convicting him of double murder and robbery. Deck's jury was surely aware that Deck was jailed; jurors know that convicted capital murderers are not left to roam the streets. It blinks reality to think that seeing a convicted capital murderer in shackles in the courtroom could import any prejudice beyond that inevitable knowledge.

Jurors no doubt also understand that it makes sense for a capital defendant to be restrained at sentencing. By sentencing, a defendant's situation is at its most dire. He no longer may prove himself innocent, and he faces either life without liberty or death. Confronted with this reality, a defendant no longer has much to lose—should he attempt escape and fail, it is still lengthy imprisonment or death that awaits him. For any person in these circumstances, the reasons to attempt escape are at their apex. A defendant's best opportunity to do so is in the courtroom, for he is otherwise in jail or restraints. See Westman, Handling the Problem Criminal Defendant in the Courtroom: The Use of Physical Restraints and Expulsion in the Modern Era, 2 San Diego Justice J. 507, 526–527 (1994) (hereinafter Westman).

In addition, having been convicted, a defendant may be angry. He could turn that ire on his own counsel, who has failed in defending his innocence. See, *e.g., State v. Forrest,* 168 N.C.App. 614, 626, 609 S.E.2d 241, 248–249 (2005) (defendant brutally attacked his counsel at sentencing). Or, for that matter, he could turn on a witness testifying at his hearing or the court reporter. See, *e.g., People v. Byrnes,* 33 N.Y.2d 343, 350, 352 N.Y.S.2d 913, 917, 308 N.E.2d 435, 438 (1974) (defendant lunged at witness during trial); *State v. Harkness,* 252 Kan. 510, 516, 847 P.2d 1191, 1197 (1993) (defendant attacked court reporter at arraignment). Such thoughts could well enter the mind of any defendant in these circumstances, from the most dangerous to the most docile. That a defendant now ***654** convicted of his crimes appears before the jury in shackles thus would be unremarkable to the jury. To presume that such a defendant suffers prejudice by appearing in handcuffs at sentencing does not comport with reality.

IV

The modern rationales proffered by the Court for its newly minted rule likewise fail to warrant the conclusion that due process precludes shackling at sentencing. Moreover, though the Court purports to be mindful of the tragedy that can take place in a courtroom, the stringent rule it adopts leaves no real room for ensuring the safety of the courtroom.

A

Although the Court offers the presumption of innocence as a rationale for the modern rule against

shackling at trial, it concedes the presumption has no application at sentencing. *Ante,* at 2014. The Court is forced to turn to the far more amorphous need for "accuracy" in sentencing. *Ibid.* It is true that this Court's cases demand reliability in the factfinding that precedes the imposition of a sentence of death. ****2027** *Monge v. California,* 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). But shackles may undermine the factfinding process only if seeing a convicted murderer in them is prejudicial. As I have explained, this farfetched conjecture defies the reality of sentencing.

The Court baldly asserts that visible physical restraints could interfere with a defendant's ability to participate in his defense. *Ante,* at 2013. I certainly agree that shackles would be impermissible if they were to seriously impair a defendant's ability to assist in his defense, *Riggins v. Nevada,* 504 U.S. 127, 154, n. 4, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (THOMAS, J., dissenting), but there is no evidence that shackles do so. Deck does not argue that the shackles caused him pain or impaired his mental faculties. Nor does he argue that the shackles prevented him from communicating with his counsel during trial. ***655** Counsel sat next to him; he remained fully capable of speaking with counsel. Likewise, Deck does not claim that he was unable to write down any information he wished to convey to counsel during the course of the trial. Had the shackles impaired him in that way, Deck could have sought to have at least one of his hands free to make it easier for him to write. Courts have permitted such arrangements. See, *e.g., People v. Alvarez,* 14 Cal.4th

155, 191, 58 Cal.Rptr.2d 385, 926 P.2d 365, 386 (1996); *State v. Jimerson,* 820 S.W.2d 500, 502 (Mo.App.1991).

The Court further expresses concern that physical restraints might keep a defendant from taking the stand on his own behalf in seeking the jury's mercy. *Ante,* at 2013. But this concern is, again, entirely hypothetical. Deck makes no claim that, but for the physical restraints, he would have taken the witness stand to plead for his life. And under the rule the Court adopts, Deck and others like him need make no such [15] assertion, for prejudice is presumed absent a showing by the government to the contrary. Even assuming this concern is real rather than imagined, it could be ameliorated by removing the restraints if the defendant wishes to take the stand. See, *e.g., De Wolf v. State,* 96 Okla. Cr. 382, 383, 256 P.2d 191, 193 (App.1953) (leg irons removed from defendant in capital case when he took the witness stand). Instead, the Court says, the concern requires a categorical rule that the use of visible physical restraints violates the Due Process Clause absent a demanding showing. The Court's solution is overinclusive.

The Court also asserts the rule it adopts is necessary to protect courtroom decorum, which the use of shackles would offend. *Ante,* at 2013. This courtroom decorum rationale misunderstands this Court's precedent. No decision of this Court has ever intimated, let alone held, that the protection of the "courtroom's formal dignity," *ibid.,* is an individual right enforceable by criminal defendants. Certainly, courts have always had the inherent power to ensure that both those who appear before them and those

who observe their ***656** proceedings conduct themselves appropriately. See, *e.g., Estes v. Texas,* 381 U.S. 532, 540–541, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

The power of the courts to maintain order, however, is not a right personal to the defendant, much less one of constitutional proportions. Far from viewing the need for decorum as a right the defendant can invoke, this Court has relied on it to *limit* the conduct of defendants, even when their constitutional rights are implicated. This is why a defendant who proves himself incapable of abiding by the most basic rules of the court is not entitled to defend himself, *Faretta v. California,* 422 U.S., at 834–835, n. 46, 95 S.Ct. 2525, or to remain in the courtroom, see *Allen,* 397 U.S., at 343, 90 S.Ct. 1057. The concern for courtroom ****2028** decorum is not a concern about defendants, let alone their right to due process. It is a concern about society's need for courts to operate effectively.

Wholly apart from the unwarranted status the Court accords "courtroom decorum," the Court fails to explain the affront to the dignity of the courts that the sight of physical restraints poses. I cannot understand the indignity in having a convicted double murderer and robber appear before the court in visible physical restraints. Our Nation's judges and juries are exposed to accounts of heinous acts daily, like the brutal murders Deck committed in this case. Even outside the courtroom, prisoners walk through courthouse halls wearing visible restraints. Courthouses are thus places in which members of the judiciary and the public come into frequent contact with defendants in restraints. Yet, the Court says, the

appearance of a convicted criminal in a belly chain and handcuffs at a sentencing hearing offends the sensibilities of our courts. The courts of this Nation do not have such delicate constitutions.

Finally, the Court claims that "[t]he appearance of the offender during the penalty phase in shackles ... almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a ***657** relevant factor in jury decisionmaking." *Ante,* at 2014. This argument is flawed. It ignores the fact that only relatively recently have the penalty and guilt phases been conducted separately. That the historical evidence reveals no consensus prohibiting visible modern-day shackles during capital trials suggests that there is similarly no consensus prohibiting shackling during capital sentencing. Moreover, concerns about a defendant's dangerousness exist at the guilt phase just as they exist at the penalty phase—jurors will surely be more likely to convict a seemingly violent defendant of murder than a seemingly placid one. If neither common law nor modern state cases support the Court's position with respect to the guilt phase, I see no reason why the fact that a defendant may be perceived as a future danger would support the Court's position with respect to the penalty phase.

B

The Court expresses concern for courtroom security, but its concern rings hollow in light of the rule it adopts. The need for security is real. Judges face the possibility that a defendant or his confederates might

smuggle a weapon into court and harm those present, or attack with his bare hands. For example, in 1999, in Berks County, Pennsylvania, a "defendant forced his way to the bench and beat the judge unconscious." Calhoun, Violence Toward Judicial Officials, 576 Annals of the American Academy of Political and Social Science 54, 61 (2001). One study of Pennsylvania judges projected that over a 20–year career, district justices had a 31 percent probability of being physically assaulted one or more times. See Harris, Kirschner, Rozek, & Weiner, Violence in the Judicial Workplace: One State's Experience, 576 Annals of the American Academy of Political and Social Science 38, 42 (2001). Judges are not the only ones who face the risk of violence. Sheriffs and courtroom bailiffs face the second highest rate of homicide in the workplace, a rate which is 15 times higher than the national average. Faust & Raffo, ***658** [16] Local Trial Court Response to Courthouse Safety, 576 Annals of the American Academy of Political and Social Science 91, 93–94 (2001); Weiner et al., Safe and Secure: Protecting Judicial Officials, 36 Court Review 26, 27 (Winter 2000).

****2029** The problem of security may only be worsening. According to the General Accounting Office (GAO), the nature of the prisoners in the federal system has changed: "[T]here are more 'hard-core tough guys' and more multiple defendant cases," making the work of the federal marshals increasingly difficult. GAO, Federal Judicial Security: Comprehensive Risk–Based Program Should Be Fully Implemented 21 (July 1994). Security issues are particularly acute in state systems, in which limited manpower and resources often leave judges to act as

their own security. See Harris, *supra,* at 46. Those resources further vary between rural and urban areas, with many rural areas able to supply only minimal security. Security may even be at its weakest in the courtroom itself, for there the defendant is the least restrained. Westman 526.

In the face of this real danger to courtroom officials and bystanders, the Court limits the use of visible physical restraints to circumstances "specific to a particular trial," *ante,* at 2012, *i.e.,* "particular concerns ... related to the defendant on trial," *ante,* at 2015. Confining the analysis to trial-specific circumstances precludes consideration of limits on the security resources of courts. Under that test, the particulars of a given courthouse (being nonspecific to any particular defendant) are irrelevant, even if the judge himself is the only security, or if a courthouse has few on-duty officers standing guard at any given time, or multiple exits. Forbidding courts from considering such circumstances fails to accommodate the unfortunately dire security situation faced by this Nation's courts.

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***659** The Court's decision risks the lives of courtroom personnel, with little corresponding benefit to defendants. This is a risk that due process does not require. I respectfully dissent.

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