No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

TROJAN HART

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

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ISSUES PRESENTED FOR REVIEW

(1) Whether the district court erred when it shackled Hart and co-defendant Sharpe?

(2) Whether the district court interfered with the right to counsel when it refused to allow Hart's counsel to enter into evidence favorable stipulations that, among other things, excluded Hart's alleged confession?

(3) Whether the district court gave an imbalanced supplemental instruction that did not adequately inform the jury on the law for determining the threshold quantity of drugs to create criminal liability on a key element of the crime?

(4) Whether the district court erroneously denied Hart the ability to pursue the defense theory that prosecution witnesses should not be believed because Hart had previously commenced a civil law suit claiming wrongful conduct by one of the police officers involved in the federal prosecution?

(5) Whether Hart's sentence of 165 months was substantively unreasonable?

PARTIES TO PROCEEDINGS

The Petitioner in this Court is Trojan Hart. The Respondent is the United States of America.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

TROJAN HART

Petitioner,

against

UNITED STATES OF AMERICA

Appellee- Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Petitioner, Trojan Hart, respectfully prays that a writ of certiorari issue to review the judgment and Summary Order of the United States Court of Appeals for the Second Circuit, wherein the Second Circuit held (1) the district court did not err when it shackled Hart and co-defendant Sharpe; (2) the district court did not interfere with the right to counsel when it refused to allow Hart's counsel to enter into evidence favorable stipulations that,

among other things, excluded Hart's alleged confession; (3) the district court did not give an imbalanced supplemental instruction on the law for determining the threshold quantity of drugs to create criminal liability on a key element of the crime; (4) the district court did not deny Hart the ability to pursue the defense theory that prosecution witnesses should not be believed because Hart had previously commenced a civil law suit claiming wrongful conduct by one of the police officers involved in the federal prosecution; and (5) Hart's sentence of 165 months was not substantively unreasonable.

OPINION BELOW

A copy of the Summary Order of the United States Court of Appeals for the Second Circuit, dated April 29, 2021, has not yet been published. The citation is *United States v. Hart*, ___ Fed. App'x ___, 2021 WL 1685603 (2d Cir. 2021). The Summary Order is reproduced in Appendix A, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Summary Order in *United States v. Hart*, ___ Fed. App'x ___, 2021 WL 1685603 (2d Cir. 2021) is dated and was entered on April 29, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Southern District of New York had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the construction of the Fifth and Sixth Amendments of the United States Constitution, 18 U.S.C. §§ 3553(a); 21 U.S.C. §§ 841, and Federal Rule of Evidence 106; 401; and 611(b). The pertinent texts of the Constitution and statutes are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

Trojan Hart ("Hart") appealed from a Judgment of Conviction and sentence entered in the Southern District of New York (Berman, J.) after a trial in which a jury found him guilty of conspiracy to distribute and possess with intent to distribute 280 grams or more of mixtures and substances containing a detectable amount of cocaine base in violation of 21 U.S.C. §841(b)(1)(A), 100 kilograms or more of marijuana in violation of 21 U.S.C. §841(b)(1)(B), and mixtures and substances containing a detectable amount of heroin in violation of 21 U.S.C. §841(b)(1)(C). On May 24, 2018, Hart was sentenced to 165 months of imprisonment. On May 24, 2018, the Judgment of Conviction was filed. On May 25, 2018, Hart timely filed a notice of appeal.

On appeal to the United States Court of Appeals for the Second Circuit, Hart contended, among other things, that the district court had erred when it shackled Hart and co-defendant Sharpe for the following several reasons: (1) the fact that there were no incidents raising serious security concerns in the courtroom when Hart and Sharpe were not shackled proved that shackling was unnecessary in the courtroom; (2) the judge improperly delegated his duty to decide whether to shackle Hart and Sharpe to the marshals; (3) even if it is assumed that Hart and Sharpe engaged in belligerent or improper conduct, the court erred by failing to use less extreme methods to control them; (4) the court failed to make a finding that

shackling was "necessary as a last resort;" (5) even if the jury did not observe the shackles, there was still reversible error because the district court failed to find on the record that shackling was necessary as a last resort; and (6) alternatively, the district court should have held an evidentiary hearing to determine whether the shackles were either seen or heard by the jury.

The Second Circuit held, among other things, that this Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970) does not "require a district judge to try other methods first or use the words 'necessary as a last resort' when stating on the record that leg shackles are necessary." (App'x, A8) The Second Circuit further stated that "[e]ven if there were an insufficient basis for restraining Hart and Sharpe on the first day they were restrained, we conclude that the error was harmless in light of the independent decision made by the judge on the following morning and the measures taken from the outset to shield the restraints from the jury's view." *Id*.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because, among other things, the Summary Order of the Second Circuit conflicts with the decisions of this Court, including *Illinois v. Allen*, 397 U.S. 337 (1970). This case also involves important questions of first impression and public importance. The main reason this Court should grant certiorari concerns the shackling at trial of Hart and co-defendant Sharpe.

The historical prohibition to shackling unless absolutely necessary

A practice such as shackling is so serious that it constitutes a threat to the "fairness of the fact-finding process" and therefore must be subjected to "close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976). "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 bond; unless there be evident danger of an escape.'" *Deck v. Missouri*, 544 U.S. 622. 626 (2005) (quoting 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 judgment and 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 constrained to answer, but at their free will").

American courts have followed the "ancient" English rule, while recognizing that "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal role imperatively demand, the manacles may be retained." *Deck* at 626-27 (quoting 1 J. Bishop, New Criminal Procedure section 955, P. 573 (4th ed. 1895); see also *id*., at 572-73 ("[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)). American courts have "settled virtually without exception on a basic rule…[that] trial courts may not shackle defendants routinely, but only if there is a particular reason to do so." *Deck* at 627.

Shackling may only be used "as a last resort"

This Court has repeatedly held that shackling may only be used "as a last resort." For example, in *Illinois v. Allen*, 397 U.S. 337 (1970), this Court wrote that "binding and gagging might possibly be the fairest and most reasonable way to handle" an unusually of obstreperous criminal defendant, but "even to contemplate such a technique…arouses a feeling that no person should be tried while shackled and gagged except "*as a last resort*." *Id*. at 343-44 (emphasis added).

Likewise, in *Holbrook v. Flynn*, 475 U.S. 560 (1986), this Court said that a special courtroom security arrangement was 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." *Id*. at 568-69. See also *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (to require a defendant to appear in prison garb poses a threat to the "fairness of the fact-finding process" of such a degree that it can only be justified by "essential state policy").

In *Deck v. Missouri*, 544 U.S. 622, 626 (2005), this Court said that in light of the early English cases and long-standing American precedent, including "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." *Id*. at 629. This Court concluded "that those statements identify a basic element of the 'due process of law' protected by the federal Constitution." *Id*. This Court held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id*. The determination may take into account traditional factors "gauging potential security problems and the risk of escape at trial." *Id*.

Reasons to prohibit shackling during a criminal trial

This Court in *Deck* identified three reasons for prohibiting routine shackling of defendants during trials. "First, the criminal process presumes that the defendant is innocent until proved guilty." *Id*. at 630 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895) (the presumption of innocence "lies at the foundation of the administration of our criminal law"); see also *Estelle*, 425 U.S. at 503. ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of justice.")

"Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel." *Id*. at 631 See, *e.g.,* Amdt. 6; *Gideon v. Wainwright*, 372 U.S. 335, 340-41 (1963). The right to counsel is

diminished when shackles interfere with the defendant's "ability to communicate" with his attorney. *Id*. (quoting *Allen*, 397 U.S. at 344). Among other things, shackles can interfere with a defendant's ability to participate in his defense "by freely choosing whether to take the witness stand on his own behalf." *Id*. Cf. *Cranburnes 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. 165, 168 (1871) (shackles "impos[e] physical burdens, pains, and restraints…, [and] 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 dignified. *Deck* at 631. This dignity 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." *Id*.

This Court recognized "[t]here will be cases, of course, where these perils of shackling are unavoidable." *Id*. at 632. "We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial court's latitude in making individualized security determinations." *Id*.

Methods to deal with a belligerent defendant, including warning the defendant he can be held in contempt

In *Allen*, 397 U.S. 337 (1970), a defendant on trial for armed robbery asked to represent himself. During voir dire examination, he "started to argue with the judge in a most abusive and disrespectful manner." *Id*. at 339. At one point, the defendant threatened that the judge was "going to be a corpse here." *Id*. at 340. The defendant then tore a file from his court-appointed lawyer's hands and threw the papers on the floor. *Id*. The judge warned the defendant that with one more outburst he would be removed from the courtroom. *Id*. The warning had no effect and the defendant continued to talk back to the judge, saying "there's not going to be no trial, either" and that he was "going to sit here" and the judge could "bring your shackles out and straitjacket and put them on me and tape my mouth, but will do no good because there's not going to be no trial." *Id*. The judge ordered the trial to proceed without the defendant. *Id*. The voir dire examination continued without the defendant present.

During a recess, the judge told the defendant he would be allowed to remain in the courtroom if he behaved himself and did not interfere with the introduction of evidence. *Id*. The defendant told the judge he would start talking and "keep on talking all through the trial." The judge again ordered the defendant removed from the courtroom. *Id*. During the state's case-in-chief, the defendant was brought in for purposes of identification. In answer to one of the judge's questions, the defendant responded "with vile and abusive language." *Id*. at 341. The judge

reiterated to the defendant that he could return to the courtroom if he agreed to conduct himself properly. After the defendant gave assurances of proper conduct he was allowed to remain in the courtroom for the rest of the trial. *Id*.

This Court in *Allen* held that the defendant's right had not been violated where, prior to his removal from the courtroom, the defendant was repeatedly warned by the trial judge that he would be removed if he continued in his unruly conduct, that it appeared the defendant would not have been dissuaded by the threat of criminal contempt, and that the defendant was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner.

In *Allen*, this Court stated "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nonetheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id*. at 343. Nonetheless, the right to the present can "be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id*.

This Court recognized it was "essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court

proceedings in our country." *Id*. The flagrant disregard of elementary standards of conduct in the courtroom "cannot be tolerated." *Id*. This Court said "trial judges confronted with disruptive, contemptuous, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id*. While this Court said there was no one formula for maintaining courtroom decorum, trial judges had "at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id*. at 343-44.

When discussing the option of binding and gagging a defendant, this Court in *Allen* said that "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*." *Id.* at 344 (emphasis added). This Court said the concern was more than just whether the jury saw the shackles. Rather, the use of shackles in any circumstances was "itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id*.

This Court also expressed concern that shackling greatly reduces a defendant's ability to communicate with counsel. *Id*. Physical restraints have "inherent disadvantages and limitations" as a "method of dealing with disorderly defendants." *Id*. This Court discussed the possibility of holding or threatening to

hold an unruly defendant with criminal contempt as a technique to make a defendant stop interrupting a trial." *Id*. at 344-45. If the defendant complies after threatening to hold the defendant in contempt, "the problem would be solved easily, and the defendant could remain in the courtroom." *Id*. at 345.

This Court recognized that the threat of contempt may not be a sufficient sanction to thwart a defendant with the fear they would receive a contempt sentence, because the defendant was already facing the possibility of a death sentence or life imprisonment. The contempt remedy also permits the trial judge to imprison "an unruly defendant" and discontinue the trial until the defendant "promises to behave himself." *Id*. "This procedure 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*. This Court recognized the possibility that a defendant might become obstructive as a "calculated strategy" to "elect to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time." *Id*. Therefore, a court must guard against allowing a defendant to profit from his own wrong in this way. *Id*.

The trial judge in *Allen* elected to remove the defendant from the courtroom and continue the trial in his absence unless and until he promised to conduct himself in an orderly manner. This Court said it found nothing unconstitutional in the procedure. *Id*. at 346. This Court said 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*.

It was significant to this Court that the defendant, prior to his removal, had been repeatedly warned that he would be removed if he persisted in his unruly conduct, and nonetheless the defendant was not dissuaded by the judge's use of his criminal contempt powers. *Id*. The defendant was repeatedly informed he could return if he would agree to conduct himself in an orderly manner. *Id*. "Under the circumstances," this Court held that the defendant had lost his right under the Constitution to be present throughout his trial. *Id*. *See also United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013).

Discussion

Hart contends the district court erred when it shackled Hart and Sharpe for the following reasons:

> *(1)The fact that Hart and Sharpe were unshackled during the first day of trial and there were no serious incidents in the courtroom raising significant security concerns demonstrated that shackling was unnecessary in the courtroom*

The district court's "experiment" in not shackling Hart and Sharpe on the first day of trial proved that shackling was unnecessary. There were no serious incidents in the courtroom raising significant security concerns that would have justified the extreme measure of shackling. The trigger for shackling Hart and Sharpe was not that they exhibited dangerous behavior in the courtroom on the first day of trial,

but rather that a supervisor from the marshal's office later told the judge that leaving them unshackled in the courtroom was a "bad idea" because they had engaged in "belligerent" behavior with the marshals while transferred to and from court. As discussed below, the judge improperly "deferred to the marshals" and shackled them. (See Section (2) below)

Only on the third day of trial did the judge, after the fact, try to justify shackling Hart and Sharpe by saying they had engaged in "belligerent" behavior outside the courtroom (cursing, spitting [and] loud physical outbursts) and vague "inappropriate conduct" inside the courtroom (problems in "maintaining self-control" and "inappropriate conduct" with family and the public). As discussed below, the foregoing behavior and conduct was insufficient to justify the extreme measure of shackling. See Section (3) below)

Significantly, the judge admitted that the decision to shackle Hart and Sharpe was "largely based on their behavior outside of the court." The court said it would reconsider shackling them if their behavior "improved dramatically" outside the courtroom, further demonstrating that the primary justification for shackling was the alleged "belligerent" behavior outside the courtroom. There is no basis to shackle a defendant within a courtroom during a trial to control "belligerent" behavior outside the courtroom, particularly when the defendant does not exhibit the "belligerent" behavior inside the courtroom during his trial. The precedent of

this Court demonstrate that the basis for shackling in the courtroom must be a compelling interest to address a serious security concern *within the courtroom* that cannot be resolved by any other means than shackling. Therefore, the fact that there had not been a compelling security concern within the courtroom on the first day of trial is absolute proof that shackling was unnecessary.

(2)The judge improperly delegated his duty to decide whether to shackle Hart and Sharpe to the marshals

The record demonstrates that the court delegated its responsibility to determine whether to shackle the defendants to the marshals. On the first day of trial, the court did not shackle Hart and Sharpe. On the second day of trial, the judge said a supervisor told him the supervisor felt that leaving them unshackled in the courtroom was "a bad idea." In court, the court said "*the marshals* have shackled them in the courtroom…because *they* felt and feel that that's appropriate security-wise." The court said "[t]hose are decisions that I defer to the marshals." Later, the prosecutor said the court had made "an initial determination on shackling" and the court replied "I didn't."

Only after the prosecutor told the court that the prosecutor's office had researched the issue and determined that the court must make the finding and not "defer to the marshals" did the court say it had decided "independently" to shackle Hart and Sharpe. But the court's decision was not "independent" from the marshals. Had it been independent, the court would have left Hart and Sharpe unshackled

because the court's "experiment" on the first day worked. There were no serious incidents that would have justified the extreme measure of shackling. Later, statements by the court that shackling was justified because Hart and Sharpe had engaged in "belligerent" behavior outside the courtroom and "inappropriate conduct" inside the courtroom do not square with the court's statements that the marshals had reported "*that all your clients seem to have behaved appropriately the first day*" and that "they have been fine in the courtroom as far as I can tell *during the course of the trial*."

The court below did not follow precedent of this Court governing whether to shackle a defendant. The district court, among other things, should have made a finding that shackling was necessary as a last resort. (See Paragraph 4 below) Based on the totality of the record, it is apparent the marshals had made the decision to shackle Hart and Sharpe, and the court improperly deferred to that decision.

(3) Even if it is assumed that Hart and Sharpe engaged in belligerent behavior or inappropriate conduct, the court erred by failing to use less extreme methods to control than shackling

As held by this Court, shackling is an extreme method to control a defendant that may only be used "when necessary as a last resort." This Court has identified a number of less extreme methods than shackling. Typically, the less extreme methods work and shackling is unnecessary. The following is a non-exclusive list

of methods:

(a) Warn the defendant that measures may be taken against him if the conduct does not cease

As observed by this Court, it is often effective for a court to simply warn a defendant to stop the behavior or conduct. *See Allen*, 397 U.S. at 345-46. For example, a court may warn the defendant that he or she may be held in contempt and sentenced to an additional term of imprisonment if the behavior or conduct does not cease. *Id*.

(b) Make additional security arrangements in the courtroom to guard against the possibility that a defendant may try to harm others

In *Holbrook v. Flynn*, 475 U.S. 560 (1986), this Court held that a judge may make special security arrangements in the courtroom to guard against a potentially dangerous defendant or a defendant who poses other security concerns. For example, a court may order the strategic placement of additional marshal's in the courtroom who are placed to intervene in the event that a defendant attempts to attack another person in the courtroom.

(c) Remove the defendant from the courtroom until he agrees to behave

In *Allen*, 397 U.S. at 343,44; 346, this Court upheld the decision of a judge to remove a defendant from the courtroom who refused to control his belligerent outbursts, but only after repeated warnings had failed and only after the defendant was told he could regain his right to be present in the courtroom if he promised to

behave.

(d) As a last resort, shackling and/or gagging the defendant in the courtroom

Only when all other methods have failed, or it is clear that taking other methods would be futile, may a judge shackle and/or gag a defendant. In *Allen*, 397 U.S. at 343-44, this Court discussed both "shackling and gagging" a defendant as a last resort. There is a reason the two methods were discussed together. "Shackling" is an extreme method that physically restrains a defendant from attacking others in the courtroom or escaping custody. "Gagging" is an extreme method to prevent a defendant from making belligerent outbursts or spitting in the courtroom. Obviously, both methods need not be used in a given case. It depends on the defendant's type of prohibited behavior. Importantly, shackles do not prevent belligerent outbursts or spitting. Only gagging is the extreme method to prevent such conduct.

In the case at bar, the judge failed to use less extreme methods of control than shackling. Rather than using shackling as a *last* resort, the judge used it as a *first* resort. There is strong evidence in this record that simply warning Hart and Sharpe to stop the alleged belligerent behavior and inappropriate conduct would have succeeded in stopping the behavior and conduct.

Specifically, when Sharpe made an allegedly "threatening gesture" toward the prosecutor out of the presence of the jury on the third day of trial, the court simply

instructed Sharpe's counsel to talk to him and calm him down. The judge said that "[n]othing I've seen suggests that he can't and won't do that." Sharpe's questionable behavior on the third day occurred after the court had ordered Sharpe shackled and was not cited by the court as a ground for the shackling.) After the warning, there is nothing in the record to indicate that Sharpe repeated any questionable behavior in the courtroom. Therefore, a simple warning was sufficient. Obviously, a simple warning would have also worked to stop any other behavior used as a basis to justify the shackling.

Moreover, shackling was completely ineffective to control the alleged belligerent behavior and inappropriate conduct, if it occurred. The behavior and conduct described was essentially verbal in nature. Shackles only prevent the freedom of movement. Gagging prevents verbal outbursts and spitting. (Obviously, if the court had gagged Hart and Sharpe in the courtroom, it would have been outrageously disproportionate to the circumstances and obvious error) Therefore, it appears that the sole reason for the shackles was to punish and humiliate Hart and Sharpe for their alleged "belligerent" behavior toward the marshals outside the courtroom.

The incident with Sharpe also demonstrates that the court could have removed Sharpe from the courtroom if the warning did not work. Again, the most extreme measure of shackling was unnecessary. Despite Sharpe's justifiable protest at being

shackled in the courtroom, Sharpe heeded the judge's warning that he could be removed from the courtroom if he persisted.

(4) The court failed to make a finding that shackling was "necessary as a last resort"

A trial court should make a finding on the record that shackling is "necessary as a last resort." The district court did not. Instead, the judge only said that Hart and Sharpe were shackled because of "belligerent" behavior outside the courtroom and vague "inappropriate conduct" inside the courtroom. Merely identifying conduct that caused the court to shackle a defendant is insufficient. The court should make a finding that the behavior or conduct was of such gravity that there was a compelling interest to cease it and that shackling was the only method left available to the court to stop it. As discussed in Section (3) above, the district court had several methods available to it that would have likely succeeded, if the objectionable conduct in fact occurred. The court said nothing about having tried and failed at less extreme methods, or that such methods would be futile if tried.

The court also failed to conduct a hearing to obtain sufficient information on which to base a finding (if a finding of last resort had been made). The court took at face value the statement of the supervisor that Hart and Sharpe had engaged in "belligerent" behavior with the marshals outside the courtroom without ascertaining from Hart and Sharpe their version of what happened and why it happened. A hearing was particularly necessary because there was no "belligerent"

behavior in the courtroom. It is reasonable to assume that something happened outside the courtroom that caused hostility between the marshals and Hart and Sharpe. Hart also had prior bad experiences with law enforcement as is evident from his civil lawsuit against some police officers. There was no reason to believe that Hart would have hostility toward the court in the courtroom. The fact that no similar "belligerent" behavior happened in the courtroom supports this conclusion.

In any event, the alleged "belligerent" behavior and "inappropriate conduct" never qualified as a compelling interest requiring the court to shackle Hart and Sharpe. For example, the judge never found that Hart and Sharpe were dangerous to the safety of anyone in the courtroom or that they were a risk of escape. There is no evidence that the extreme measure of shackling was necessary, let alone necessary as a "last resort." Therefore, a finding that shackling was "necessary as a last resort" would not have been supported by the record.

(5) Even if the jury did not observe the shackles, there was still error

Hart claimed in his *pro se* post-trial motion, among other things, that the jury could see he was shackled and hear the clanging of the shackles. There are photographs in the record that Hart contends demonstrate the jury likely saw or heard the shackles. If so, Hart was entitled to a new trial.

As discussed below, Hart contends in the alternative that the court should have held a hearing to determine whether Hart's claims were true. See Section (6)

below. But even if the jury did not see or hear the shackles, reversal is still required.

First, Hart contends that the district court still committed reversible error because it failed to make a finding that shackling was necessary as a last resort. Second, the question of whether a jury saw the shackles is only one of several constitutional concerns. "The possibility that jurors will be prejudiced by the presence of physical restraints is not the sole rationale for placing strict limitations on their use in court." *United States v. Zuber*, 118 F.3d 101, 103 (2d Cir. 1997); *see United States v. Sanchez-Gomez*, 859 F.3d 649, 660-666 (9th Cir. 2017) (en banc), *rev'd on other grounds*, 138 S.Ct. 1532 (2018) (the right to be free from unwarranted shackles applies "with or without a jury").

Long ago, courts recognized that shackling negatively affects a defendant's mental functioning in the courtroom. Among other things, it causes a defendant confusion, embarrassment and humiliation. See *Zuber*, 118 F.3d at 106 (Cardamone, J., concurring) (The fact that shackles may not have been visible to a jury "does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles.").

Also, the physical pain caused by shackles should not be underestimated. Shackles are heavy and "sit[] on the ankle bone and just irritates the heck out of it," causing redness and chaffing in this sensitive spot. *How badly does it hurt being*

shackled by hands/feet by the police, https://www.quora.com/How-badly-does-it-hurt-being-shackled-by-the-hands-feet-by-the-police. If the inmate forgets to take little steps when walking "it really hurts your shin when the cuff brings your forward-striding leg to a sudden stop." *Id*. Shackles are secured closely around a prisoner's ankles to prevent the prisoner from slipping the heavy shackles from their ankles and feet. If shackles are tightened too securely, they can tear the skin and cause bleeding.

As recently recounted by one former inmate, "[i]t's painful, painful, and painful…Your wrists hurt, your ankles hurt. You are forced to stay in uncomfortable and unnatural positions, various body parts go numb and your muscles start to cramp up. I still have a scar on my ankle bone because an officer forgot to double lock my ankle cuffs." *Id*. Comment by "Susan Smith, served almost 3 years in county and state facilities," Posted Oct. 4, 2017. "When I came back my ankle were a mess…bruises, scratches, cuts. I was in pain for more than a week." *Id*.

In the case at bar, Hart and Sharpe were shackled over a prolonged number of days during the trial, therefore heightening the probability that they experienced pain from their shackles. Because they were forced to stay in uncomfortable and unnatural positions with their shackles hidden beneath defense counsel tables, various body parts likely went numb and their muscles likely cramped. At a

minimum, Hart and Sharpe would have experienced redness and chaffing around their sensitive ankles as they were repeatedly transported to and from court over many days, causing prolonged pain during the trial. If the shackles were fitted too securely, their pain would have been greater. They also likely did not move their legs during the trial for fear the jury might hear the clanging of their metal cuffs and chains and then surmise they were shackled. In sum, Hart and Sharpe no doubt experienced pain from their shackles during the long trial. The pain, immobility, numbness and humiliation would have distracted them from understanding what was being said during the trial and hindered their ability to communicate with counsel.

Shackling also runs contrary to the presumption of innocence. It is an affront to the dignity of the judicial process, and signals to the defendant that the court does not trust him or views him as dangerous, like a caged animal that must be restrained. It is likely interpreted as a judgment by the court that he is a bad person, and therefore likely guilty of the charged crime.

Finally, to hold that reversal is only required when the jury sees the shackles would effectively eliminate enforceability of the legal principle that shackling is only permitted when it is necessary as a last resort. Lower courts could otherwise routinely shackle defendants with no fear of reversal, so long as courts placed a curtain around the defense counsel table to prevent the jury from seeing the

shackles. A conviction would stand despite the blatant infringement of a defendant's fundamental right.

(6) Alternatively, the court should have held an evidentiary hearing on the issue of whether the jury saw the shackles or heard them clanging.

There is sufficient evidence in this record to raise the concern that the jury saw the shackles and/or heard them clanging. The court failed to address Hart's very serious allegation that the clanging of the shackles was so noticeable to the jurors that the marshals were forced to cover them with duck tape to prevent the noise. It would have been a simple matter for one or more of the marshals to testify whether this was true. In addition, counsel tables were only a few feet from the jury box. Therefore, any movement by Hart and Sharpe's legs would have likely caused the shackles to clang. Unquestionably, Hart and Sharpe were seated in sufficiently close proximity to the jury box that it is reasonable to conclude that the jury heard the clanging—hence the need for the marshals to duct tape the shackles. There are photographs in the record that also demonstrate that the jury likely saw the shackles as they walked from the jury room to the jury box.

The court also based its ruling on its personal observations of the courtroom. It did not sufficiently address Hart's claim concerning how the jurors made their way to the jury box. The court simply said that it was "physically impossible for the jurors to walk directly behind any of the defendants." This statement did not rule out that the jury could see the ankles and feet of Hart and Sharpe from behind

as they walked from the jury room to the jury box.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

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Respectfully submitted by

/s/ Bruce R. Bryan

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