

NO. _____

IN THE
Supreme Court of the United States

OMAR SHARPE,

v.

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner's Due Process rights were violated when the Court of Appeals failed to remedy the District Court's improper shackling of Petitioner during trial for his alleged behavior outside of the courtroom, which conflicts with the Supreme Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970).

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America

Omar Sharpe

Trojan Hart

Rashawn Davidson

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Barnes (Sharpe), 1:15-cr-288-21, is the trial court docket in the District of Southern New York from which this case originates.

TABLE OF CONTENTS

| | |
|---|-----|
| QUESTION PRESENTED | i |
| LIST OF PARTIES IN THE COURT OF APPEALS | ii |
| STATEMENT PURSUANT TO RULE 14(1)(b)(iii)..... | ii |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW..... | 1 |
| JURISDICTIONAL STATEMENT | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 1 |
| STATEMENT OF THE CASE..... | 2 |
| REASONS FOR THE GRANTING OF THE WRIT | 3 |
| THE SHACKLING OF PETITIONER AND CO-DEFENDANT HART FOR THEIR ALLEGED BEHAVIOR OUTSIDE OF THE COURTRoom VIOLATES PETITIONER'S DUE PROCESS RIGHTS AND CONFLICTS WITH DECISIONS OF THIS COURT AND THE SECOND CIRCUIT..... | 3 |
| CONCLUSION..... | 8 |
| APPENDIX: | |
| OPINION OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED 4/29/21 | A1 |
| ORDER ON REHEARING OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED 6/2/21 | A19 |
| U.S. CONST. AMEND. V | A20 |

TABLE OF AUTHORITIES

| | |
|--|---------------|
| <i>Adams v. Bradshaw</i> , 826 F.3d 306 (6th Cir. 2016) | 4 |
| <i>Brewster v. Bordenkircher</i> , 745 F.2d 913 (4th Cir. 1984)..... | 4 |
| <i>Davidson v. Riley</i> , 44 F.3d 1118 (2d Cir. 1995) | 4, 5 |
| <i>Hameed v. Mann</i> , 57 F.3d 217 (2d Cir. 1995) | 5 |
| <i>Illinois v. Allen</i> , 397 U.S. 337 (1970) | <i>passim</i> |
| <i>Lampkins v. Thompson</i> , 337 F.3d 1009 (8th Cir. 2003) | 4 |
| <i>Roche v. Davis</i> , 291 F.3d 473 (7th Cir. 2002)..... | 4 |
| <i>Spain v. Rushen</i> , 883 F.2d 712 (9th Cir. 1989)..... | 4 |
| <i>United States v. Brantley</i> , 342 F. App'x 762 (3d Cir. 2009) | 4 |
| <i>United States v. Haynes</i> , 729 F.3d 178 (2d Cir. 2013)..... | <i>passim</i> |
| | |
| U.S. Const. amend. V..... | 1 |
| 28 U.S.C § 1254(1) | 1 |
| Federal Rule of Evidence 403..... | 2 |
| Federal Rule of Evidence 404(b) | 2 |

In the
Supreme Court of the United States
October Term, 2021

Omar Sharpe,
Petitioner,
v.
United States of America,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

To secure and maintain the uniformity of judicial decisions, it is up to this Court, Petitioner's last resort, to remedy the lower courts' decision which is in conflict with the Constitutional provisions of the United States Constitution and this Court's authority. Such conflicts warrant the grant of the writ.

OPINION BELOW

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A1).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued an opinion affirming Petitioner's conviction on April 29, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the protection of the Due Process Clause of the Fifth Amendment.

The statutory provisions involved are Federal Rules of Evidence 403 and 404(b).

STATEMENT OF THE CASE

Court of Appeals¹

The Court of Appeals affirmed the judgment of the District Court on April 29, 2021. The Court found that there was no abuse of discretion by the District Court when it ordered that Petitioner his co-defendant be shackled during the trial. Rejecting Petitioner's argument, the Court stated that neither *Illinois v. Allen*, 397 U.S. 337 (1970), nor any other authority cited by the defendants requires a district judge to try other methods first or to use the words "necessary as a last resort" when stating on the record that leg shackles are necessary. Also rejecting Petitioner's argument that the District Court impermissibly delegated to the marshals the decision to shackle the defendants, the Second Circuit stated that although the district judge at first indicated that he was deferring to the marshals on the issue, the following day he entered a written statement into the record that made it clear that his decision to shackle the defendants was based on his independent judgment.

¹ Only those portions of the Court of Appeals summary order relevant to the petition will be summarized herein.

REASON FOR THE GRANTING OF THE WRIT

THE SHACKLING OF PETITIONER AND CO-DEFENDANT HART FOR THEIR ALLEGED BEHAVIOR OUTSIDE OF THE COURTROOM VIOLATES PETITIONER'S DUE PROCESS RIGHTS AND CONFLICTS WITH DECISIONS OF THIS COURT AND THE SECOND CIRCUIT.²

This Court has repeatedly held that shackling may only be used “as a last resort.” In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court wrote that “binding and gagging might possibly be the fairest and most reasonable way to handle” an unusually obstreperous criminal defendant, but 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.” *Id.* at 343-44 (emphasis added).

Similarly, as this Court decided that shackling should be used as a last resort, *Id.* at 344., the Second Circuit Court in *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013) held that the district court must make a specific finding on the record that shackling is necessary as a last resort to satisfy a compelling interest. *Id.* at 190-191.

In *Haynes*, the defendant argued that her conviction should be vacated because she was shackled during trial “without a specific finding of necessity on the record by the District Court judge.” *Id.* at 188. The Court held “[i]t is beyond dispute that a defendant may not be tried in shackles unless the trial judge finds on the record that it is necessary to use such a restraint as a last resort to satisfy a compelling interest such as preserving the safety of persons in the courtroom.” *Id.*

²This point has significantly copied the argument made by codefendant Trojan Hart’s Attorney Bruce Brian in his appellate brief in which Petitioner joined. Mr. Hart joins in the Petition.

The Second Circuit further stated “that a trial judge may order physical restraints on a party only ‘when the court has found those restraints to be necessary to maintain safety or security; but the court must impose no greater restraints than are necessary, and it must take steps to minimize the prejudice resulting from the presence of the restraints.’” *Id.* at 189 (quoting *Davidson v. Riley*, 44 F.3d 1118, 1122-23 (2d Cir. 1995)).

The District Court erred when the Court shackled Petitioner and his codefendant. First, the fact that Petitioner and co-defendant were unshackled during the first day of trial and there were no incidents in the courtroom raising significant security concerns, demonstrated that shackling was unnecessary in the courtroom. The trigger for shackling Petitioner was not that he exhibited dangerous behavior in the courtroom on the first day of trial, but rather that a supervisor from the marshal’s office told the judge that leaving the defendants unshackled in the courtroom was a “bad idea” because they had engaged in “belligerent” behavior with the marshals while transferred to and from court. The judge improperly deferred to the marshals and shackled them. Significantly, the judge admitted that the decision to shackle Hart and Sharpe was “largely based on their behavior outside of the court.” 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 and the Second Circuit 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 Court of Appeals' failure to remedy the District Court's error which is in conflict with this Court's authority, requires this Court to exercise its supervisory power and grant certiorari to secure and maintain uniformity of the court's decisions. *Allen*, 397 U.S. at 343-44; *Haynes*, 729 F.3d at 190.

Second, the District Court improperly delegated his duty to decide whether to shackle the defendants. On the second day of trial, the judge said a supervisor told him the supervisor felt that leaving Hart and Sharpe 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." *Id.* 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 the defendants. But the Court's decision was not "independent" from the marshals. Had it been independent, the Court would have left Petitioner and co-defendant unshackled because the court's statements "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 District Court's findings do not align with them engaging in belligerent behavior.

Third, even if it is assumed that the defendants engaged in belligerent behavior, the District Court erred by failing to use less extreme methods to remedy the situation than shackling. The Second Circuit’s failure to remedy the District Court’s decision conflicts with this Court’s precedent that shackling is an extreme method to control a defendant that may only be used “when necessary as a last resort.”

Other circuits also agree that shackling should only be used as a last resort (*See United States v. Brantley*, 342 F. App’x 762, 764 (3d Cir. 2009)(“It is well-settled that shackling a defendant during trial is an extraordinary measure; no person should be tried while shackled except as a last resort”); *Brewster v. Bordenkircher*, 745 F.2d 913, 917 (4th Cir. 1984)(stating that the decision to shackle should be treated as a “last resort”); *Adams v. Bradshaw*, 826 F.3d 306, 308 (6th Cir. 2016); *Roche v. Davis*, 291 F.3d 473, 475 (7th Cir. 2002); *Lampkins v. Thompson*, 337 F.3d 1009, 1016 (8th Cir. 2003)(all stating that no person should be tried while shackled and gagged except as a last resort); *Spain v. Rushen*, 883 F.2d 712, 728 (9th Cir. 1989)(“Due process requires that shackles be imposed only as a last resort”).

In addition, “[a] court may not delegate this discretion to another party, including the Bureau of Prisons or the United States Marshals, because the court must ‘consider all the evidence and ultimately make the decision [for itself].’” *Haynes* at 189 (quoting *Davidson* at 1123). “[T]he ultimate decision to impose any physical restraints during trial must be made by the District Court judge alone and

must be made on the record.” *Id.* at 189 (citing *Hameed v. Mann*, 57 F.3d 217, 222 (2d Cir. 1995)). “When the trial court delegates a decision, and gives no reason for the decision, that is not an exercise of discretion but an absence of and an abuse of discretion.” *Id.* (quoting *Davidson*, 44 F.3d at 1123).

In *Haynes*, the Court said there was no finding that the defendant was “a threat to anyone or why the presence of the United States Deputy Marshals in the courtroom would not have been sufficient to maintain the safety and security of all those present.” *Id.* It was therefore clear error and a violation of the defendant’s due process rights to have been shackled without a specific finding of necessity on the record by the district court.

The Second Circuit held that, “No physical restraints may be imposed on a criminal defendant during trial unless the District Court finds on the record that they are a necessary last resort.” *Id.* at 190. As such, the Second Circuit’s decision in finding no abuse of discretion directly conflicts with this Court’s decision in *Allen*, 397 U.S. at 343-44 and the Second Circuit’s decision in *Haynes*, 729 F.3d at 190, finding that shackling should only be used as a last resort. The grant of certiorari is therefore necessary to secure and maintain uniformity of the court’s decisions.

In sum, the Second Circuit’s failure to remedy the District Court’s error in shackling Petitioner, conflicts with the decision of this Court in *Allen*, 397 U.S. at 343-44 requiring that shackling should only be used as a last resort. Thus, this Court should exercise its supervisory power and grant certiorari.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: August 3, 2021

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