No. 24-____

IN THE

# Supreme Court of the United States

JESSIE J. BARNES,

*Petitioner,*

v.

DAVID A. ROCK, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


BENJAMIN ZWEIFACH
CARLA SUNG AH YOON
FRESHFIELDS US LLP
700 13th Street N.W.
10th Floor
Washington, D.C. 20005
(202) 777-4764

SCOTT A. EISMAN
*Counsel of Record*
AEDAN COLLINS
MARCUS LEVY
JAKE MORGAN ROTHSTEIN
FRESHFIELDS US LLP
3 World Trade Center
175 Greenwich Street
51st Floor
New York, NY 10007
(212) 284-4986
Scott.Eisman@freshfields.com

*Counsel for Petitioner*


December 9, 2024


WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

## QUESTION PRESENTED

The Fifth Amendment's Due Process Clause forbids courts from requiring litigants to be physically restrained during a jury trial in the absence of a special need. In *Deck v. Missouri*, 544 U.S. 622 (2005), this Court reiterated that a trial court may order a litigant to be physically restrained only after determining that restraints serve an essential state interest particular to that trial and are a measure of last resort.

In 2022, Petitioner Jessie J. Barnes was forced to wear shackles during the trial of his civil rights claims against corrections officers who had severely beaten him, leaving him with a fractured leg and a severed finger. At the beginning of the trial, the judge solicited a correctional officer's "instructions" on how Mr. Barnes should be retrained. Without giving any reasons, the officer recommended leg shackles. The court adopted the recommendation, without giving any substantive reasons of its own, let alone any justification specific to Mr. Barnes. The Second Circuit affirmed the trial court's decision.

The question presented is:

Whether the *Deck* test allows a trial judge to require a litigant to wear physical restraints during a jury trial without stating on the record the case-specific state interests or reasons justifying such restraints, as long as the judge concludes that the order is based on his or her independent judgment, as the Second and Fifth Circuits have held, or whether the trial court must instead enumerate the essential state interests justifying the restraints, as the Sixth Circuit, Ninth Circuit, and several state high courts have held.

## PARTIES TO THE PROCEEDING

Petitioner is Jessie J. Barnes. Petitioner was the plaintiff in the district court proceedings and plaintiff-appellant in the court of appeals proceedings.

Respondents are Brian Fischer, in His Individual Capacity as Commissioner of DOCCS, David A. Rock, in His Individual Capacity as Superintendent of Upstate Correctional Facility, and Donald Uhler, in His Individual Capacity as Deputy Superintendent of Security of Upstate Correctional Facility. Respondents sued in their Official Capacity as employees of Upstate Correctional Facility include: Captains Theodore Zarniak and Reginald Bishop; Lieutenants Steven Salls, James Antcil, and Richard Rendle; Sergeants Gary Gettmann, Laura Gokey, Allen Bango, II, Scott Santamore, Timothy Allen, William Hungerford, Beau J. Brand, and Michael Albert (retired); and Correctional Officers Michael Sisto, Eric Wood, Timothy Ramsdell, Timothy Arquitt, Richard Bond, Michael Riley, Brian Grant, Brian Derouche, Tim Bowman, Jason Marlow, Tony Nephew, Todd Manley, Bruce Bogett, Bryan Clark, Craig Manville, Stanley Tulip, Roy Perham, Brian Malloux, Roy Richards, James E. Sorrells, George G. Martin, Mark Boyd, Scott D. Simons, Lawrence N. Hopkins, Trevor Dunning, Robert Paige, Paul Gokey, Casey Keating, David Norcross, Leon Tuper, Douglas Barney, Darren Vanornum, and Jeffrey Clark (retired). Respondents were defendants in the district court and defendants-appellees in the court of appeals.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

United States District Court (N.D.N.Y.)

*Barnes v. Fischer*, 13-cv-164 (Apr. 4, 2023)

*Barnes v. Fischer*, 13-cv-164 (Sept. 19, 2022)

United States Court of Appeals (2d Cir.)

*Barnes v. Rock*, No. 22-2902 (June 13, 2024) (Lead) (summary order)

*Barnes v. Rock*, No. 22-3152 (Con.)

*Barnes v. Rock*, No. 23-729 (Con.)

*Barnes v. Fischer*, 13-cv-164 (Sept. 19, 2022)

*Barnes v. Rock*, No. 22-2902 (July 26, 2024) (Lead) (denying rehearing)

*Barnes v. Rock*, No. 22-3152 (Con.)

*Barnes v. Rock*, No. 23-729 (Con.)

*Barnes v. Fischer*, 13-cv-164 (Sept. 19, 2022)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## PETITION FOR WRIT OF CERTIORARI

Petitioner Jessie J. Barnes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The decision of the court of appeals affirming the district court (App. 23a–27a) is unreported but available at 2024 WL 2973709. The order of the court of appeals denying the petition for a rehearing (App. 28a–29a) is unreported. The district court's decision requiring Petitioner to wear shackles (App. 30a–39a) is unreported, as is the district court's decision denying Petitioner's motion for a new trial (App. 1a–22a).

## JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment on June 13, 2024, and denied a petition for rehearing on July 26, 2024. App. 28a–29a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

## INTRODUCTION

For almost forty years, trial courts have understood that the Due Process Clause forbids them from ordering that litigants be restrained during a jury trial unless an "essential state interest specific to [the] trial" justifies the restraints. *Holbrook v. Flynn*, 475 U.S.

560, 568–69 (1986). Lower courts are divided, however, on what procedures a trial court must follow before requiring shackling.

This case implicates that split. Petitioner Jessie J. Barnes, an incarcerated individual, sought to vindicate his civil rights in court when he sued a group of corrections officers at the Upstate Correctional Facility in New York in 2013 over a series of repeated and brutal physical attacks Mr. Barnes suffered in 2010 and 2011. Several of these vicious attacks, two of which resulted in a severed fingertip and a fractured leg, followed closely on the heels of grievances that Mr. Barnes filed against corrections officers. Among other claims, Mr. Barnes asserted that the officers used excessive force against him, in violation of the Eighth Amendment and retaliated against him for exercising his First Amendment right to grieve.

When the case went to trial in 2022, the district court ordered Mr. Barnes to wear leg restraints in the courtroom without providing any case-specific factual basis or explanation for its decision. The court started from the presumption that Mr. Barnes should be restrained and merely solicited the views of a corrections officer on *how* Mr. Barnes should be restrained, agreeing with the officer's recommendation that Mr. Barnes wear "at least . . . leg shackles." App. 32a. The district court then made passing reference to its "responsibility to maintain safety in the courtroom" and Mr. Barnes's "right to due process." App. 33a. Beyond that, the court recited its duty to use independent judgment and made a generic comment that there would be "highs and . . . lows" to the trial. App. 32a. Nowhere in this colloquy did the court cite any fact showing *why* Mr. Barnes should be forced to wear shackles in the first place. On the contrary, the district

court observed that Mr. Barnes "ha[d]n't posed any issues" during past court appearances. *Id*. The decision proved particularly (and predictably) prejudicial to Mr. Barnes's case, given that the defendant officers' main defense was that the extreme force they used against Mr. Barnes was justified because Mr. Barnes was a violent and unruly prisoner who continually needed to be subdued.

In affirming that decision, the Second Circuit held that the district court had satisfied Mr. Barnes's due process rights simply by "recogniz[ing] that it 'had to exercise an independent judgment' regarding how Barnes 'should be restrained in the courtroom.'" App. 27a (quoting App. 32a). The Second Circuit took no issue with the district court's failure to articulate any case-specific essential state interest why shackles were required—or do anything other than concur with the security officer's unreasoned recommendation.

That decision calls out for this Court's review, for three reasons.

*First,* the decision below deepens a split among lower courts over what level of procedure meets the constitutional requirements for shackling. Like the Second Circuit, the Fifth Circuit also lets trial courts rubberstamp the recommendation of a security officer on the shackling of a litigant. In fact, the Fifth Circuit does not require a trial court to make any express finding on the record at all when it imposes physical restraints. By contrast, the Sixth and Ninth Circuits, as well as several state high courts, forbid trial courts from ordering that a litigant be restrained without first determining that restraints serve an essential state interest particular to the trial and finding that no other method of protecting that interest. If Mr. Barnes had appealed to one of these courts, his appeal

would have come out differently. Unlike the Second Circuit, those courts would have held that the district court violated Mr. Barnes's due process rights by simply agreeing with the officer who recommended leg restraints, without considering or articulating any factors particular to Mr. Barnes that would justify shackling. The Court should grant certiorari to ensure a uniform national standard for when shackling a litigant during trial violates the Constitution.

*Second*, the decision below conflicts with this Court's precedent. Indeed, the district court's conclusory decision to shackle Mr. Barnes—which the Second Circuit endorsed in full—is precisely the type of decision that this Court has said violates due process in *Deck*. There, this Court held that the trial court had violated a litigant's due process rights by requiring him to wear shackles because he had a past conviction, without explaining why that conviction was relevant to the litigant's case. Here, too, the district court never explained what about Mr. Barnes's case required him to wear shackles, instead making a vague comment about the "highs and the lows" of trial and then accepting the security officer's recommendation without question.

*Third,* this case is a suitable vehicle for this Court to address an exceptionally important and recurring question. The question whether a litigant should be restrained affects parties in criminal and civil proceedings across the country—not least the nearly two million people currently incarcerated in the United States, whose civil rights depend on their right to seek justice under § 1983. And as seen here, a common defense strategy against prisoners seeking redress for injuries sustained in facilities is to focus on the litigants' violent tendencies, making the imposi-

tion of shackles particularly pernicious. Mr. Barnes (personally and by counsel) also preserved the issue by expressing repeated concerns about wearing shackles at trial. And finally, because the shackling prejudiced Mr. Barnes, who was facing a defense that he was a violent initial aggressor, the error was material to his case and would thus be grounds for a new trial.

This Court should grant certiorari to provide courts and litigants with much-needed guidance on the shackling of litigants—an issue this Court has not considered in two decades.

## STATEMENT

### A. Factual background

In 2010 and 2011, corrections officers at the Upstate Correctional Facility in New York repeatedly and brutally attacked Petitioner Jessie J. Barnes. In these incidents, the officers ganged up against Mr. Barnes, often in unmonitored parts of the facility.

In each attack, the officers used extreme physical violence—breaking Mr. Barnes's leg in one attack and severing his fingertip in another—and most followed closely on the heels of grievances that Mr. Barnes filed against many of the assaulting officers.

For instance, in June 2010, officers who were delivering Mr. Barnes's belongings—including his legal briefs—to his cell began rifling through his documents, damaging papers that Mr. Barnes had paid to have bound. Dist. Ct. Dkt. 785, at 11–13, 137–40. Mr. Barnes begged them to stop and splashed water through his cell window. *Id*. Even though Mr. Barnes had stopped and had put his hands behind his back to be cuffed, six officers in riot gear entered his cell for an "extraction." *Id*. at 16. One officer sprayed an already-handcuffed

Mr. Barnes with a chemical spray, and two other officers kicked and punched him and twisted his handcuffs, leaving marks on his wrists. *Id*. at 17–21. After this incident, Mr. Barnes filed grievances against several of the officers involved. *Id*. at 131–33.

In another incident, in April 2011, Mr. Barnes asked to see a nurse when he was suffering from a stomach ailment. *Id*. at 37. Rather than bring a nurse to Mr. Barnes's cell, officers wheeled him to the infirmary, one of the few locations in the facility without security cameras. *Id*. at 137. As Mr. Barnes would later testify, once he reached the infirmary, officers choked him with his own shirt, pushed him against a wall, threw him to the floor, and stood on the back of one of his legs. *Id*. at 40–41. When Mr. Barnes asked to leave the infirmary, more officers arrived and joined in the assault, one of them repeatedly punching Mr. Barnes until the officer had to be directed to stop by one of his colleagues. *Id*. at 41–44.

In May 2011, after Mr. Barnes refused to return his razor and a food tray, six officers in full riot gear entered Mr. Barnes's cell and took him to a holding pen. *Id*. at 52–57. There, Mr. Barnes later testified, the officers punched and kicked him and twisted on his handcuffs until his wrists began bleeding. *Id*. at 57–59. This assault occurred six days after Mr. Barnes had submitted a grievance about one of the officers. *Id*. at 52–59, 58–60.

Later that year, two officers came to Mr. Barnes's cell under the pretext that they were taking him to the infirmary for an X-ray, which Mr. Barnes had not asked for, and did not need. *Id*. at 78–79. When Mr. Barnes arrived in the infirmary, five other officers appeared, and together the group descended on Mr. Barnes, punching and kicking him. As in April, the

infirmary had no security cameras to record this abuse. *Id*. at 80–86, 92. As Mr. Barnes would testify, one of the officers—against whom Mr. Barnes had previously filed a grievance—shouted, "Run your mouth now" before placing a plastic bag over Mr. Barnes's head and threatening to kill him if he struggled. *Id*. at 75, 85. Mr. Barnes eventually passed out. *Id*. at 86. When he woke up, an officer was kicking him, and two others began to beat his legs and feet with nightsticks. *Id*. The beating was so intense that the officers broke Mr. Barnes's leg. *Id*. at 87, 91. Mr. Barnes filed a grievance based on this incident.

Two weeks later, some of the same officers arrived at Mr. Barnes's cell to escort him to a medical appointment for his broken leg. *Id*. at 100–01. Apprehensive about being assaulted again, Mr. Barnes asked to stay in his cell. *Id*. at 102–03. To facilitate his reentry to the cell, officers used a retention strap—a lead attached to Mr. Barnes's handcuffs—which they threaded through the metal hatch attached to the cell door. *Id*. at 103. This procedure allows the officers outside the cell to restrain the inmate in the cell and to uncuff the inmate's hands after the cell door is closed. Dist. Ct. Dkt. 784, at 115. But when Mr. Barnes reentered his cell, before he was uncuffed, an officer held the strap on one side of the cell door, restraining Mr. Barnes, while another officer punched Mr. Barnes in the jaw. Dist. Ct. Dkt. 785, at 103. One of the officers then pulled the strap taut, yanking Mr. Barnes's hands into the hatch. *Id*. at 103–04. Next, after uncuffing but before Mr. Barnes could withdraw both his hands, the officers pushed down the plexiglass cover of the hatch over Mr. Barnes's left hand. *Id*. at 104. According to Mr. Barnes, one of the officers slammed down the cover repeatedly, trapping Mr. Barnes's ring finger between

the glass cover and the metal frame, eventually severing the top of the finger. *Id*. at 104–05.

Mr. Barnes's finger was so badly damaged that doctors later needed to amputate more of his finger to alleviate the nerve pain that had been inflicted by the bludgeoning. *Id*. at 112–15, 127–28.

### B. Procedural history

In 2013, Mr. Barnes sued more than fifty corrections officers, including Respondents, under 42 U.S.C. § 1983 for violating his constitutional rights during the assaults. Dist. Ct. Dkt. 1, ¶¶ 90–106. Among other claims, Mr. Barnes asserted that Respondents used excessive force against him, in violation of the Eighth Amendment and retaliated against him for exercising his First Amendment right to grieve. Dist. Ct. Dkt. 784, at 43–45. The case went to trial in 2022. Respondents' main defense was that the extreme force they used against Mr. Barnes was not retaliatory, but simply reasonable use of force to respond to violent behavior from Mr. Barnes. Dist. Ct. Dkt. 788, at 54–59.

1. At the start of the trial, the court ordered that Mr. Barnes wear leg shackles during the proceedings. App. 32a–33a. Instead of holding a hearing to consider the facts or reasons in favor of ordering any restraints at all, the court simply asked a corrections officer for his "instructions or [his] views" on *how* Mr. Barnes "should be restrained." App. 32a. Without any explanation or reasoning, the officer responded that he thought Mr. Barnes should wear "at least the leg shackles." *Id.* The trial judge—despite noting that Mr. Barnes had not "posed any issues" when he "ha[d] been in [the] courtroom" "[i]n the past"—agreed with the corrections officer's recommendation that Mr. Barnes wear leg shackles, saying, "[t]hat's what I was thinking." *Id.* The

court noted that it had to "exercise an independent judgment," *id*., but provided no explanation or reasoning. Indeed, although the district court mentioned in passing both the "responsibility to maintain safety in the courtroom" and Mr. Barnes's "right to due process," App. 33a, the court did not say what about Mr. Barnes's case made shackling necessary to keep the courtroom safe.

The trial court received no evidence, made no factual findings that shackling was necessary, and offered no reasoning to support its "thinking" that Mr. Barnes should be forced to wear physical restraints before the jury throughout the trial. *See* App. 32a–33a. Instead, the court simply observed that trials have "highs and . . . lows," and claimed that it had balanced Mr. Barnes's due process rights with safety concerns—without identifying those concerns. App. 32a. After the court had already made up its mind, defense counsel said that it would be "fine" for Mr. Barnes to wear leg shackles. *Id.*

Once the trial judge decided that Mr. Barnes should be shackled, Mr. Barnes's attorneys tried to mitigate the resulting prejudice as best they could. Although Mr. Barnes's trial counsel had "originally"—before the shackling ruling—planned "to put Barnes on the outside of counsel's table," counsel requested that the court allow Mr. Barnes to sit "in the middle between [lawyers] so that his legs are underneath the table." App. 33a. The trial judge granted that request, ruled that Mr. Barnes would take the witness stand outside the jury's presence, and repositioned the courtroom so that Mr. Barnes's table would be "farthest away from the jury." *Id.*

When Mr. Barnes was brought into the courtroom and realized he would be shackled during the trial, he

expressed distress that the jury was "going to see the restraints." App. 37a.

2. At trial, Mr. Barnes presented evidence about each of the assaults that underlay his claims. He testified in detail about the violent nature of the assaults and resulting physical injuries. Dist. Ct. Dkt. 785, 10–129; *see supra* pp. 5–8.

Respondents' case, in turn, centered on showing that Mr. Barnes was a violent, unpredictable prisoner, whose actions justified the severe force that Respondents used. Respondents' opening argument focused on portraying Mr. Barnes as having "consistently demonstrated that he is a violent and erratic inmate." Dist. Ct. Dkt. 784, at 121. They blamed Mr. Barnes for "trigger[ing]" each violent "interaction with staff," *id*. at 123, and testified that he would "scream, holler, [and] make allegations of abuse that simply aren't occurring," *id*. at 126. Respondents outlined Mr. Barnes's refusal to exit his cell and series of altercations with officers, while leaving out the harassment and violence that precipitated this conduct. *Id*. at 123–31. For instance, they blamed Mr. Barnes for the incident in which they severed his fingertip, claiming that they had no choice but to repeatedly slam the hatch cover on his finger because he had reached for the handcuff keys through his cell window, *id*. at 129–30, and wove a story of self-defense to explain away Mr. Barnes's broken leg, without so much as mentioning that an officer had stomped on the leg of an incapacitated, incarcerated person, *id*. at 127–28. Respondents' cross-examination of Mr. Barnes focused on his disciplinary history, run-ins with officers, and misbehavior reports. *See, e.g.*, Dist. Ct. Dkt. 785, at 135–38, 149–50; Dist. Ct. Dkt. 785-1, at 5–9. In closing, Respondents again stressed that Mr. Barnes was someone who would "react

violently . . . if the rules are being enforced." Dist. Ct. Dkt. 788, at 58.

When Mr. Barnes's case-in-chief concluded, the trial judge granted judgment as a matter of law to several respondents on Mr. Barnes's First Amendment retaliation claims, finding that Mr. Barnes had not linked those officers' attacks to grievances that he had filed. Dist. Ct. Dkt. 785-1, at 74–75. The jury later found for Respondents on Mr. Barnes's remaining claims at the close of trial. Dist. Ct. Dkt. 788-2, at 8–13.

3. Mr. Barnes moved for a new trial on several grounds. Among other things, Mr. Barnes argued that the trial court had violated his due process rights by requiring him to be shackled throughout trial. *See* App. 32a. The court denied Mr. Barnes's motion and, for the first time, offered a reason for its order requiring Mr. Barnes to wear shackles: the trial judge noted that it was "intimately familiar" with the "numerous undisputed incidents" Mr. Barnes has had with correctional staff, Mr. Barnes's sentence of 35 years to life, and Mr. Barnes's 38-page history of "disciplinary problems" from his time in prison. App. 6a. Even so, the court observed that Mr. Barnes's "conduct before this Judge always has been courteous, even in circumstances where Mr. Barnes became agitated and upset." App. 7a.

4. On appeal to the Second Circuit, Mr. Barnes challenged the district court's decision to order and keep him shackled during trial and the district court's order granting judgment as a matter of law to three Respondents on Mr. Barnes's retaliation claims.

The Second Circuit affirmed. As to shackling, the Second Circuit held that the district court "recognized that it 'had to exercise an independent judgment'" on

how Mr. Barnes should be restrained in the courtroom. App. 27a (alteration omitted). In so ruling, the Second Circuit cited no factual findings or justifications that the district court offered for why Mr. Barnes should wear any restraints in the first place. App. 26a–27a. The Second Circuit also ruled that the district court had "mitigated possible prejudice resulting from the leg shackles" by allowing Mr. Barnes to sit between his attorneys during trial. App. 27a. As to retaliation, the Second Circuit reasoned that "[t]he jury verdict that [the three Respondents] did not subject Barnes to excessive force precludes a finding that the same, objectively serious conduct was exercised in retaliation for grievances filed against them." App. 26a.

## REASONS FOR GRANTING THE PETITION

This Court has long recognized that a court can order a litigant to be shackled only "as a last resort." *Illinois v. Allen*, 397 U.S. 337, 344 (1970); *accord, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 628 (2005). Although the Court originally announced that rule in a criminal case, it has now become a uniform rule in civil cases in every court of appeals to have decided the issue. *See, e.g.*, *Claiborne v. Blauser*, 934 F.3d 885, 895–97 (9th Cir. 2019); *Maus v. Baker*, 747 F.3d 926, 927 (7th Cir. 2014); *Sides v. Cherry*, 609 F.3d 576, 580–81 (3d Cir. 2010); *Davidson v. Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995); *Holloway v. Alexander*, 957 F.2d 529, 530 (8th Cir. 1992).

That rule—with "deep roots in the common law"—protects both litigants and judicial proceedings. *Deck*, 544 U.S. at 626. The rule prevents jurors from prejudging a litigant as someone who "need[s] to be separate[d] . . . from the community at large." *Id.* at 630 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)). The rule also protects a litigant's "ability to communicate with his counsel." *Allen*, 397 U.S. at 344.

And the rule protects the "judicial process" by ensuring that it remains "dignified"—including by helping maintain the "seriousness of purposes 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." *Deck*, 544 U.S. at 631; *accord Allen*, 397 U.S. at 344.

Given the harms that result from shackling, this Court has allowed shackling only when it is the "fairest and most reasonable way to handle a particularly obstreperous and disruptive" person. *Holbrook*, 475 U.S. at 568 (quotation marks omitted). To justify the extreme measure, the trial judge must make a case-specific determination that "an essential state interest specific to each trial" so outweighs the person's right to liberty that shackling is "unavoidable." *Deck*, 544 U.S. at 624, 632.

Here, the judge asked the correctional officer how Mr. Barnes should be restrained. App. 32a. The officer stated simply that his preference was "at least leg shackles, if that's all right." *Id.* The judge then adopted that recommendation, without articulating any specific interest or reason justifying the shackles. *Id.* And despite this Court's case law to the contrary—in *Allen, Holbrook,* and particularly *Deck*—the Second Circuit panel found that this cursory colloquy satisfied the constitutional standard. App. 26a–27a.

The Second Circuit's erroneous decision deepens the circuit split on the application of the constitutional test. Its holding that the trial court's conclusory finding is enough to satisfy due process reflects an unduly permissive interpretation of this Court's case law and conflicts with the rigorous readings of this Court's *Allen*, *Holbrook*, and *Deck* line of cases by other courts of appeals. The Second Circuit's approach

departs, for instance, from the Sixth Circuit's, which enumerates several factors that a court must expressly consider on the record. Had Mr. Barnes been tried in the Sixth Circuit, the district court's conclusory statement on shackling would have failed to pass constitutional muster. This type of inconsistent application renders a rule futile and undermines the principles behind *Allen*, *Holbrook*, and *Deck*.

Aside from the circuit split, the Second Circuit panel's decision to affirm the district court also violates this Court's shackling precedents. In fact, the panel did not even engage with the fact that the district court had already accepted the premise that some degree of shackling was appropriate before deciding to shackle Mr. Barnes's legs. The decision is all the more egregious because the trial court's failure to articulate any reasons to justify shackling closely resembles the facts of *Deck*, in which this Court found the trial court violated due process.

Finally, this case has implications in the tens of thousands of trials every year involving incarcerated civil plaintiffs or criminal defendants—two groups of people whose constitutional rights are particularly vulnerable. A constitutional safeguard is only as good as the rigor with which it is applied. This Court should grant certiorari to ensure a uniformly rigorous national standard for the due process protections against shackling a litigant appearing before a jury.

## I. The decision below deepens the split among lower courts on the due process *Deck* requires to justify physical restraints before a jury.

The decision below deepens a split on what a court must find before requiring a litigant to wear shackles during trial.

### A. The Second and Fifth Circuits allow trial courts to order shackles by deferring to corrections officers, without making any particularized findings of need.

In the decision below, the Second Circuit endorsed an approach that allows district courts to force litigants to wear shackles without making any factual findings. Indeed, the district court here ordered Mr. Barnes shackled based on a correction officer's comment that Mr. Barnes should wear "at least leg shackles." App. 32a. Neither the officer nor the court explained its reasoning. App. 32a–33a. And yet the Second Circuit held that the district court had properly exercised its duty simply by paying lip-service to the obligation for district courts to exercise their "independent judgment" in deciding whether to shackle a litigant. App. 27a.

The Fifth Circuit likewise allows courts to rubberstamp the recommendations of law enforcement without making their own independent findings on the record. In *United States v. Hill*, the trial court required defendants to wear leg shackles and electronic restraint devices without offering a single reason for completely deferring to a U.S. Marshal's report. 63 F.4th 335, 344–46 (5th Cir. 2023). This decision was all the more remarkable because the judge previously presiding over the case had already granted defendants' motion against leg restraints. *Id*. at 344. Yet the Fifth Circuit

affirmed. According to the Fifth Circuit, trial courts may "rely heavily" on law enforcement in making shackling decisions. *Id*. at 346. In fact, the Fifth Circuit held, the trial court need not even *expressly* state its finding on the record, for "even when a district court gives *no reasons* even for shackling a defendant, those reasons may be apparent on the record when viewed in light of the specific facts of the case." *Id*. at 345 (emphasis added).

In short, Second and Fifth Circuits do not require courts to make independent findings on the record to justify decisions to restrain a party. And the Fifth Circuit goes so far as to permit shackling without *any* findings from the trial court.

### B. The Sixth Circuit, Ninth Circuit, and several state high courts stand on the other side of the split.

1. The Sixth Circuit requires trial courts to consider specific factors before ordering a litigant to wear shackles: "(1) the defendant's record, his temperament, and the desperateness of his situation; (2) the state of both the courtroom and the courthouse; (3) the defendant's physical condition; and (4) whether there is a less prejudicial but adequate means of providing security." *Lakin v. Stine*, 431 F.3d 959, 964 (6th Cir. 2005) (quoting *United States v. Waagner*, 104 F. App'x 521, 526 (6th Cir. 2004)).

*Lakin* involved nearly identical facts to Mr. Barnes's case, but the Sixth Circuit held that the trial court had violated the defendants' due process rights by failing to consider "all of the relevant factors." 431 F.3d at 965. In considering whether defendants had to wear leg irons during trial, the judge asked the "the security officers as to their feeling," and the head security

officer recommended that the defendants be shackled because the charges against them—attempted escape from prison—suggested that defendants presented a flight risk. *Id*. at 964. Based on that exchange, the court ordered that defendants wear leg irons throughout trial. *Id*. In granting defendants habeas relief, the Sixth Circuit held that "[a]lthough a trial court might find a corrections officer's opinion highly relevant to the ultimate inquiry as to whether shackling is necessary in a particular case, an individualized determination under the due process clause requires more than rubber stamping that request." *Id.* Nor was it enough for the trial court to note that defendants had been charged with escape. As the Sixth Circuit explained, the shackling "determination should be case specific; that is to say, it should reflect particular concerns . . . related to the defendant on trial," including, but not limited to, "[t]he nature of the charges against a particular defendant." *Id.* at 965 (quoting *Deck*, 544 U.S. at 633). So the trial court had to consider "all of the relevant factors . . . , including alternative means of provid[ing] a safe and fair trial"—not just "[t]he risk of escape." *Id.* at 964–65.

In other words, the Sixth Circuit has interpreted this Court's shackling case law to forbid a trial court from simply agreeing with a corrections officer's recommendation or making a finding of necessity without considering all the relevant factors and articulating how those factors justify shackling under this Court's precedent. That is the opposite of how the Second and Fifth Circuits apply this Court's cases.

2. Like the Sixth Circuit, the Ninth Circuit requires trial courts to consider specific facts before requiring a litigant to wear restraints. In the Ninth Circuit, trial courts must first assess whether there are "compelling

circumstances" that the restraints are needed for security, and then must consider less restrictive alternatives. *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995); *accord Claiborne v. Blauser*, 934 F.3d 885, 895 (9th Cir. 2019).

*Gonzalez v. Pliler* presented similar facts to this case, but with a different outcome. 341 F.3d 897 (9th Cir. 2003). There, Gonzalez was forced to wear a stun belt—a device around the waist that can deliver a 50,000-bolt shock and immediately incapacitate—after the bailiff told the court that Gonzalez had "three strikes" against him, had "some problems," was "a little uncooperative," and had "a little attitude." *Id*. at 899, 901. After soliciting the bailiff's opinion, the court decided to keep Gonzalez in the stun belt during trial, reasoning that the belt "is not visible to anyone." *Id.* at 901–02. Yet the Ninth Circuit reversed. In the Ninth Circuit's opinion, the trial court never found "compelling circumstances" that necessitated such measures, deferring instead to the bailiff. *Id.* at 902. Nor did the district court take the second step of considering less restrictive alternatives; it merely stated that the stun belt's lack of visibility was sufficient. *Id*. Thus, the Ninth Circuit concluded, "the trial court clearly failed to meet even minimal constitutional standards applicable to the use of physical restraints in the courtroom." *Id*.

Several state high courts also require trial courts to consider specific factors before ordering a litigant to appear in restraints. When reviewing a trial court's decision to restrain a defendant, the Supreme Court of Montana adopted the Ninth Circuit's two-step analysis. *See State v. Herrick*, 101 P.3d 755, 759–60 (Mont. 2004) (concluding that the lower court's analysis satisfied the first part of the test only where it cited a pattern of threatening behavior specific to defendant; it satisfied

the second part by denying the State's request for more onerous restraints). The Supreme Court of Alaska has articulated a similar framework, holding that measures to physically restrain "should be taken only after the defendant has been given an opportunity for a hearing, and the restraints imposed should be the least intrusive which will accomplish the desired result." *Anthony v. State*, 521 P.2d 486, 496 (Alaska 1974). And the Supreme Court of Kentucky has allowed shackling only in "*exceptional* cases . . . where the trial courts appeared to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials." *Barbour v. Commonwealth*, 204 S.W.3d 606, 612 (Ky. 2006) (emphasis and omission in original; quoting *Tunget v. Commonwealth*, 198 S.W.2d 785, 786 (Ky. 1947)). In finding that the lower court abused its discretion by relying on the nature of the charges against the defendant to justify shackling, the court in *Barbour* cited the Sixth Circuit's decision in *Lakin*. *Id.* at 613.

Had Mr. Barnes appealed to the Sixth or Ninth Circuit, or the highest courts of Montana, Alaska, or Kentucky, his appeal would have come out differently. Unlike the Second Circuit, those courts would have found that the district court violated Mr. Barnes's due process rights by simply agreeing with the officer who recommended leg restraints, without considering any factors particular to Mr. Barnes that would justify shackling. Indeed, the district court here noted that Mr. Barnes "ha[d]n't posed any issues" in the courtroom in the past, yet the court decided that Mr. Barnes would be shackled because of the "highs and the lows" of a trial. App. 32a. That—and the fact that Mr. Barnes had been subject to leg shackles in the past—was the entirety of the court's justification. *See id.* The judge did not, for instance, cite Mr. Barnes's

record, the state of the courtroom, the risk of escape, Mr. Barnes's physical condition, or alternative means of security, as the Sixth Circuit requires, *see Lakin*, 431 F.3d at 964. Nor did the court consider whether "compelling circumstances" justified shackling and, if so, whether shackles were the least restrictive means of maintaining order, as the Ninth Circuit requires, *see Gonzalez*, 341 F.3d at 902.

The point of the analysis in cases like *Lakin* and *Gonzalez* is to fulfill this Court's mandate that a litigant be shackled only to achieve a compelling state interest. But the district court here did not even try to identify such an interest. It simply remarked on how the trial would feature "highs and . . . lows"—an observation that the court never linked to any sort of state interest in restraining Mr. Barnes throughout trial, and one that generally applies to most trials. App. 32a.

In sum, the trial court did not even ask whether Mr. Barnes should wear shackles in the first place; it questioned only how much shackling was required. That approach would be reversible error in the Sixth and Ninth Circuit, and in Montana, Alaska, and Kentucky. But not in the Second Circuit. This Court should intervene to resolve that split.

## II. The Second Circuit's decision conflicts with this Court's precedent.

The procedure that the Second Circuit blessed here clashes with this Court's case law on shackling litigants.

A. This Court has held that "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." *Deck*, 544 U.S. at 632. If the trial court has failed to take those steps, this Court recently reiterated in

*Deck*, then shackling is improper. *See id.* at 634–35. There, for instance, the trial court made "no formal or informal findings" and "did not refer to" an essential state interest, such as "a risk of escape . . . or a threat to courtroom security." *Id.* Instead, the judge merely mentioned a past conviction and said that "the shackles would take any fear out of the juror[s'] minds." *Id.* (quotation marks omitted). This Court faulted the trial court for failing to "explain[] any special reason for fear." *Id.* at 634–35.

In other words, *Deck* held that a trial court may not order shackling after simply naming a factor, such as courtroom security, in conclusory and general terms; the court must explain *why* it has come to that decision and explain on the record the nature of the "state interest specific to [that] particular trial." *Id.* at 629.

B. The procedure that the Second Circuit endorsed here mirrors the one this Court held violated due process in *Deck*. The district court here solicited the "views" of a corrections officer on how Mr. Barnes "should be restrained," and then simply agreed with the officer's opinion that Mr. Barnes should wear "at least the leg shackles." App. 32a. Other than stating that Mr. Barnes had not "posed any issues" in the courtroom in the past, the district court's analysis amounted to an observation that courtroom safety and Mr. Barnes's due process rights were at issue and a declaration that the trial would have "highs and . . . lows." *Id.* But simply remarking on those truisms is a far cry from "weigh[ing] the particular circumstances of the case," *Deck*, 544 U.S. at 623, much less concluding based on that test that restraints are necessary as a last resort. The court provided no actual individualized fact finding on the record to justify or explain its agreement with the corrections officer's

opinion that shackles were necessary, App. 32a–33a, let alone a "last resort," *Deck*, 544 U.S. at 628 (quoting *Allen*, 397 U.S. at 344). In fact, the district court here gave even *less* explanation than what this Court found constitutionally deficient in *Deck*: there, the trial court mentioned a past conviction and explained its additional (inadequate) thinking by raising—without any basis—the "fear" in juror's minds. *Id*. at 634. The district court's passive reference to "the highs and the lows" of trial—a factor with no unique connection to Mr. Barnes's case at all—had nothing to do with courtroom security or escape. *See* App. 32a. Put another way, the district court's reasoning contained no "state interest specific to [Mr. Barnes's] particular trial." *Deck*, 544 U.S. at 629.

## III. The question presented is of exceptional importance, and this case is a suitable vehicle for resolving it.

### A. The question presented is fundamentally important.

Under this Court's precedents, litigants may not be forced to wear shackles during a trial, absent an essential state interest "specific to each trial." *Holbrook*, 475 U.S. 560 at 568–69 (1986). In practice, however, litigants have few safeguards to their due process right to appear before a jury without the prejudicial effect and indignity of shackles. *Deck* provided examples of essential state interests but no further guidance on the kinds of interests that may allow the State to infringe on a litigant's due process right to be free from restraints before a jury. 544 U.S. at 629. Trial courts have thus kept litigants in shackles by offering superficial reasons—such as the district court here, which cited "the highs and the lows" of a trial. App. 32a. The district court here is hardly alone. A Mississippi trial

court, for instance, required a litigant to wear shackles because the court believed the litigant to have an "angry demeanor." *McCollins v. State*, 952 So. 2d 305, 309 (Miss. Ct. App. 2007). And as discussed above, the trial court in *Hill*—in a decision the Fifth Circuit blessed—did not even "explain the reason" it required a litigant to wear shackles. 63 F.4th at 344.

Shackling is detrimental to those incarcerated plaintiffs seeking to vindicate their civil rights in court. As such, these standards affect the rights of nearly two million people currently incarcerated in the United States, whose civil rights depend on their right to seek justice under § 1983.[1] In the 12-month period ending March 31, 2023, civil rights petitions from prisoners filed in federal district courts, such as those brought under § 1983, ballooned by 10% to reach a total of 18,488.[2] Moreover, from 2011 to 2020, more than 1% of incarcerated individuals had engaged in a civil rights filing, with that number reaching as high as nearly 1.5% in 2020.[3] Incarcerated individuals subject to abuse and mistreatment by correctional staff already face significant barriers to justice. Prison grievance and disciplinary systems provide little accountability: New York City's prison system, for instance, has a well-documented culture of covering up

---

[1] Jacob Kang-Brown & Jess Zhang, Vera Inst. of J., *People in Jail and Prison in 2024* 1 (2024), https://bit.ly/4gkP1f1.

[2] *Federal Judicial Caseload Statistics 2023*, United States Courts Statistics and Reports (Mar. 31, 2023), https://bit.ly/4f3XXEJ.

[3] Margo Schlanger et al., *Data Update*, Incarceration and the Law Cases and Materials, https://bit.ly/3VnKdxm (last visited Dec. 12, 2024).

officers' misconduct.[4] Incarcerated individuals who file grievances, like Mr. Barnes, often face retaliatory punishment.[5] Section 1983 is one of the only recourses incarcerated individuals have to protect their constitutional rights.[6]

Shackling in the courtroom is not only an affront to these litigants' dignity but makes their pursuit for justice and fair treatment even more difficult. As was the case here, when incarcerated individuals seek redress and bring meritorious claims of excessive use of force under § 1983, a common defense strategy is to dehumanize the incarcerated civil plaintiff and signal their supposed bad character and/or dangerousness to the jury. Shackles predispose the jury against the inmate from the beginning of the trial, and significantly impact the outcome of the trial. *Deck*, 544 U.S. at 622–23; *Allen*, 397 U.S. 337 at 344. In Mr. Barnes's trial, the defense painted Mr. Barnes as a violent and erratic man who would resort to violence "when the opportunity presents itself." Dist. Ct. Dkt. 788, at 58. Respondents justified their use of force—so

---

[4] A study of New York City's correctional system found that of 270 corrections officers who were disciplined, 56% had lied or filed misleading reports, suggesting "pervasive attempts by guards to cover up uses of force or other infractions." Jan Ransom, *In N.Y.C. Jail System, Guards Often Lie About Excessive Force*, N.Y. Times (Apr. 24, 2021), https://bit.ly/4fZGlLs.

[5] *See* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021, 2056–57 (2018).

[6] Even then, prisoners filing § 1983 suits face a host of legal and procedural barriers, such as "the law of immunities; civil procedure; standing; supervisory liability; administrative exhaustion; various doctrines unique to § 1983 litigation; prudential limitations on federal court procedure; and a variety of federal statutes." Shapiro & Hogle, *supra* note 5, at 2054–56.

brutal that it resulted, in one incident, in a broken fibula—as reasonable and defensive. For the jury to then see Mr. Barnes in shackles throughout trial undermined his case from the get-go. Without clear guidance from the Court, incarcerated civil plaintiffs' right to due process in seeking redress for violations of their constitutional rights will be wholly conditioned on the jurisdiction where they are serving their sentence or have suffered the alleged abuse.

*Deck* also safeguards the constitutional rights to a fair trial and to due process of the over 27,000 individuals standing jury trial in state criminal proceedings and some 1,600 in federal criminal proceedings every year.[7] In the 12-month period ending March 31, 2024, 1,368 defendants were convicted in jury trials in federal district courts and another 158 were acquitted.[8] For each defendant, the unwarranted use of restraints at trial could tip the scale towards a wrongful conviction, in violation of the Constitution's guarantee of a fair trial, to the presumption of innocence, and to due process. This Court's intervention is warranted to protect those defendants from "inherently prejudicial"

---

[7] According to data from 20 states collected by the Court Statistics Project, there were 27,746 criminal jury trials in state courts in 2023. Sarah Gibson et al., *CSP STAT Criminal*, Court Statistics Project (last updated Oct. 2024), https://bit.ly/49myaWS. In addition, there were 1,596 circuit and district court criminal jury trials during the 12-month period ending on June 30, 2024. *Table T-1—U.S. District Courts–Trials Statistical Tables For The Federal Judiciary (June 30, 2024)*, United States Courts Statistics and Reports (June 30, 2024), https://bit.ly/41lM9KL.

[8] *Table D-4—U.S. District Courts–Trials Statistical Tables For The Federal Judiciary (March 31, 2024)*, United States Courts Statistics and Reports (Mar. 31, 2024), https://bit.ly/3ZobhxP.

shackling without adequate justification. *Deck*, 544 U.S. at 635 (quoting *Holbrook*, 475 U.S. at 568).

### B. This case presents a suitable vehicle.

This case is a suitable vehicle to resolve the conflict among the lower courts and provide clear guidance on an important due process right.

To start, the question presented was preserved. Both Mr. Barnes's counsel and Mr. Barnes raised concerns over the physical restraints with the trial court. App. 33a, 37a. The Second Circuit incorrectly stated that Mr. Barnes consented to leg shackles. App. 27a. In fact, the record shows that Mr. Barnes's counsel originally believed that Mr. Barnes would not be shackled at all, and only *after* the court had made its decision did counsel try to mitigate prejudice by proposing alternatives. App. 33a. Moreover, Mr. Barnes's exchange with the district court when he learned that his legs would be shackled during the trial shows Mr. Barnes himself expressed distress that the jury would see the restraints. App. 37a.

The Second Circuit also overstated the extent to which the court cured possible prejudice by placing Mr. Barnes between his lawyers. App. 27a. For one thing, the record does not reveal whether the jurors could see the shackles. Indeed, the "precise consequences" of restraining a defendant during trial "cannot be shown from a trial transcript." *Riggins v. Nevada*, 504 U.S. 127, 137 (1992). In such a case, "[e]fforts to prove or disprove actual prejudice from the record . . . would be futile." *Id.* And even if the jury could not see the shackles, the jury could have still inferred that Mr. Barnes was restrained, given his unique treatment, including by being the only witness not to walk to and from the witness stand in front of them.

The error here was also harmful, such that a new trial would follow if this Court ruled for Mr. Barnes. As this Court has long recognized, the effect of shackles and gags is "inherently prejudicial," *Holbrook*, 475 U.S. at 568, because "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant," *Allen*, 397 U.S. at 344. The effect was all the more prejudicial here because Respondents' entire case depended on discrediting Mr. Barnes as dangerous and untrustworthy. *See supra* pp. 10–11, 24. The shackles acted as an official imprimatur of Respondents' theory.

* * * *

The Court has declined to address this issue for nearly 20 years. The circumstances that Mr. Barnes faces, however, should cause it to do so once again. The district court's prejudicial shackling, without any semblance of a clear showing of state interest, unlawfully hindered Mr. Barnes's access to a fair trial. It is a salient example of the dangers of giving lower courts the freedom to apply *Deck*'s standard without the Court's necessary guidance. Mr. Barnes's case urgently requires the Court's action to protect not only Mr. Barnes himself, but thousands of his incarcerated peers seeking access to justice throughout the Nation.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN ZWEIFACH
CARLA SUNG AH YOON
FRESHFIELDS US LLP
700 13th Street N.W.
10th Floor
Washington, D.C. 20005
(202) 777-4764

SCOTT A. EISMAN
*Counsel of Record*
AEDAN COLLINS
MARCUS LEVY
JAKE MORGAN ROTHSTEIN
FRESHFIELDS US LLP
3 World Trade Center
175 Greenwich Street
51st Floor
New York, NY 10007
(212) 284-4986
Scott.Eisman@freshfields.com

*Counsel for Petitioner*

December 9, 2024

# APPENDIX

APPENDIX TABLE OF CONTENTS

**APPENDIX A**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---

1:13-CV-0164
(DJS)

---

JESSIE J. BARNES,

*Plaintiff*,

v.

DAVID A. ROCK, *et al.*,

*Defendants*.

---

APPEARANCES:

JESSIE J. BARNES
Plaintiff *Pro Se*
09-B-2707
Mid-State Correctional Facility
P.O. Box 2500
Marcy, New York 13403

NIXON PEABODY LLP
Pro Bono Trial Counsel for Plaintiff
677 Broadway
10th Floor
Albany, New York 12207

HON. LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

DANIEL J. STEWART
United States Magistrate Judge

OF COUNSEL:

DANIEL J. HURTEAU, ESQ.
TRAVIS HILL, ESQ.
SARAH L. TUFANO, ESQ.
CHRISTOPHER J. STEVENS, ESQ.
VINCENT D. NGUYEN, ESQ.

MELISSA A. LATINO, ESQ.
WILLIAM A. SCOTT, ESQ.
STEVE NGUYEN, ESQ.
Assistant Attorneys General

---

DECISION and ORDER

## I. INTRODUCTION

This long-running civil rights case arises out of a series of use of force events that occurred involving Plaintiff Jessie Barnes and corrections officers at the Upstate Correctional Facility between June 15, 2010, and September 9, 2011. Dkt. No. 1, Compl.; Dkt. No. 186, Am. Compl. According to the pleadings and proof, Plaintiff sustained various injuries because of these incidents, including a broken leg and a partially amputated finger. After the Complaint was originally filed on February 12, 2013, an extensive period of discovery commenced, amendments were made, and motions followed. As a result of Defendants' Cross-Motion for Summary Judgment filed on April 21, 2017, Dkt. No. 485, this Court issued a Report-Recommendation and Order which recommended granting in part and denying in part the Defendants' Motion, Dkt. No. 590. That Report-Recommendation was adopted by United

States District Court Judge Gary L. Sharpe on September 28, 2018. Dkt. No. 609.

As a result of those Decisions and Orders, numerous claims remained against over fifty Defendants.[1] First, there were claims that on six occasions — June 15, 2010, April 23, 2011, May 19, 2011, May 25, 2011, August 23, 2011, and September 9, 2011 — certain Defendants used excessive force against Plaintiff in violation of Mr. Barnes' rights under the Eighth Amendment. As to each of those incidents, Plaintiff also asserted that another group of Defendants were aware of the use of excessive force but failed to intervene to stop it. Next, Plaintiff alleged that on several occasions Defendants retaliated against him for exercising his constitutional right to file grievances about things he alleged were happening at Upstate Correctional Facility in violation of his First Amendment rights. Plaintiff also alleged that Defendant Uhler did not act as an impartial hearing officer during certain disciplinary hearings in violation of his right to due process under the Fourteenth Amendment. Finally, Plaintiff claimed that several Defendants were aware of some or all of these incidents because of their supervisory positions at Upstate Correctional Facility but failed to take action to remedy the violation of his rights and to protect Plaintiff

As the case progressed, the parties consented to jurisdiction before this Magistrate Judge. Dkt. No. 644.

---

[1] One Defendant, Michael Yaddow, passed away prior to trial. Dkt No. 685. His case was then severed from the others as part of this Court's pretrial Order. Dkt. No. 714 at p. 4. No motion was made to substitute a representative of Defendant Yaddow within 90 days of the Notice of Death, and accordingly, the Court dismissed Plaintiff's claims against Defendant Yaddow on November 8, 2022. Dkt. No. 762.

There were several attempts to resolve this matter prior to trial, but those efforts were ultimately unsuccessful. *See* Text Minute Entries dated May 12, 2016, July 19, 2019, & August 7, 2020. The matter was further delayed during the Covid-19 pandemic, but ultimately went to trial in September 2022. Plaintiff was appointed pro Bono counsel to assist him at trial. Dkt. Nos. 638 & 682. The trial lasted for nine days, including three days of jury deliberations. Dkt. Nos. 783-785, 787-788. At one point during deliberations, the jury indicated that they were deadlocked on two of the claims, Dkt. No. 742, but ultimately returned a verdict in favor of the Defendants and against Plaintiff Jessie Barnes. Did No. 746.

Presently before the Court is a Motion by Mr. Barnes, acting *pro se,* requesting a new trial pursuant to FED. R. CB/. P. 59 because of various trial errors and deficiencies that he alleges prejudiced him. Dkt. No. 760; *see also* Dkt. No. 772. Counsel for the Defendants oppose the Motion for New Trial. Dkt. No. 774. Defendants have also filed a Bill of Costs in the amount of $57,929.33. Dkt. No. 754.[2]

## II. RULE 59 MOTION

### A. STANDARD OF REVIEW

Under Rule 59(a), a court may "grant a new trial . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court," FED. R. Qv. P. 59(a)(1)(A), "including if the verdict is against the weight of the evidence." *Raedle v. Credit Agricole Indosuez,* 670 F.3d 411, 417 (2d Cir. 2012). As the

[2] Plaintiff has filed other miscellaneous motions which, as a result of the trial and entry of judgment, are now moot. Dkt. Nos. 664, 665, 678, & 723. Likewise, pending letter requests related to the Motions addressed by this Opinion are also moot.

Second Circuit has noted: "a decision is against the weight of the evidence . . . if and only if the verdict is [1] seriously erroneous or [2] a miscarriage ofjustice." *Farrior v. Waterford Bd. of Educ.,* 277 F.3d 633, 635 (2d Cir. 2002). On a Rule 59 motion for a new trial, the court "is free to weigh the evidence . . . and need not view it in the light most favorable to the verdict winner." *DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 134 (2d Cir. 1998). "A court considering a Rule 59 motion for a new trial must bear in mind, however, that the court should only grant such a motion when the jury's verdict is 'egregious.'" *Id.* (quoting *Dunlap-McCuller v. Riese Org.,* 980 F.2d 153, 158 (2d Cir. 1992)). Although a court "may weigh the evidence and the credibility of witnesses" when considering a Rule 59 motion, "a judge should rarely disturb a jury's evaluation of a witness's credibility, . . . and may not freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees with the jury." *Raedle v. Credit Agricole Indosuez,* 670 F.3d at 418 (citation and internal quotation marks omitted).

B. DISCUSSION

*1. Shackling of the Plaintiff*

Plaintiff Barnes initially objects to the fact that his legs were shackled during the trial, which he believes created prejudice against him in the eyes of the jury and mandates a new trial. Dkt. No. 760 at pp. 3, 5, & 18. While courts should attempt to minimize the need to do so, "[t]he trial court has discretion to order physical restraints if the court has found those restraints necessary to maintain safety or security." *Hameed v. Mann,* 57 F.3d 217, 222 (2d Cir. 1995). When it is necessary, "[t]he 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.*

Mr. Barnes contends that the Court failed to hold a hearing on this issue as required by Second Circuit precedent. As to the latter, Mr. Barnes is mistaken. Prior to the jury being selected, the Court held a conference with all counsel regarding this very issue. Dkt. No. 784, Transcript, at pp. 3-5. The Court solicited the input from the DOCCS security staff who had the responsibility of maintaining control of Mr. Barnes, and their recommendation was to have Mr. Barnes remain in leg irons but allow the handcuffs to be removed. *Id.* This Court recognized that the request of the security staff was merely advisory, and that the ultimate decision to balance court security with the interests of the Plaintiff, rested with the Court itself. *Id.* The Court had already viewed videos of the events in question and considered Plaintiff's disciplinary history Plaintiff in connection with prior Motions. *See* Dkt. Nos. 435, 485, & 714. As such, the Court was intimately familiar with the numerous undisputed incidents that Mr. Barnes has had with correctional staff during his lengthy incarceration. These included assaults on staff, involving biting, spitting, and threats of severe violence. *See* Report-Recommendation and Order at pp. 24-25; Dkt. No. 710, Defs.' Proposed Trial Exhibits # 5, 7, 13, 24, 26, & 30. Mr. Barnes is serving a thirty-five year to life prison sentence, and because of disciplinary problems he has had many years of SHU confmement. Indeed, his disciplinary history was, at the time of trial, 38 pages long. Exhibit D-26. Because of Plaintiff's disruptive behavior, his cell door was affixed with a fixed protective hatch cover, and at certain times during his incarceration, when he was moved within the prison it was with the use of a

retention strap attached to his handcuffs and while being recorded. Exhibits D-18 & 20.

On the other hand, Mr. Barnes has appeared in front of this Court on several occasions. While some of Mr. Barnes' written submissions have been vitriolic and extreme, his conduct before this Judge always has been courteous, even in circumstances where Mr. Barnes became agitated and upset. The Court also considered the fact that the jury would be aware that Mr. Barnes was incarcerated because it was central to his claim and would see numerous videos of Plaintiff Barnes while in custody, and at all times he was in restraints.[3]

Based upon all this information, the Court concluded that to maintain order and security in the courtroom it was appropriate to have Plaintiff's leg restraints remain in place, but to allow Mr. Barnes to have his hands free so that he could take notes and communicate with his counsel. Transcript at p. 3. No objection to this proposal was made by either side, but modifications were requested and granted. *Id.* at pp. 3-5, 21. Mr. Barnes was to be seated in between two members of his counsel; the counsel table was solid so that the jury would not be able to see Plaintiff's legs or restraints; he was assigned the counsel table farthest away from the jury; and Plaintiff was called into the courtroom and placed in the witness stand prior to the jury being called in, thereby preventing jurors from seeing Mr. Barnes walking with leg shackles on. *Id.* at pp. 5, 21. Staff from the Department of Corrections and Community

[3] When discussing the matter of leg shackles with Mr. Barnes, Plaintiff recognized that because of the nature of his claim, the jury would understand that he is presently incarcerated, with all that entails: "You know, that's why I was going to just wear my greens because it's not secret I got life. So I ain't got nothing to hide." Transcript at p. 22.

Supervision sat behind Mr. Barnes during the trial. As the record generally reflects on each occasion Mr. Barnes either took the stand, or left the courtroom, the jury was excused prior to that event. *See* Transcript at pp. 137-138; 185; 200; 201; 248; 250-251; 290; 338; 361; 363; 428; 429; 466; 470; 472; 525; 580-581; 635; 690; 694; 704; 766; 798; 876; 886; 892; 934; 942; 1138; 1141; 1172; 1227-1228; & 1240. Mr. Barnes was not placed in a position where the Jury would be able to see any leg shackles, including those times that he was on the stand, or when he requested to leave the court room to return to his holding cell because of the disquieting nature of the testimony, or during disputes he had with counsel.

Under the circumstances set forth above, the Court denies Plaintiff's request for a new trial upon the grounds that he had non-visible leg restraints affixed during the proceedings. *See Davidson v. Riley,* 44 F.3d 1118, 1122-23 (2d Cir. 1995) ("the trial court has discretion to order physical restraints on a party or witness 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."); *see also United States v. Melendez,* 2022 WL 3640449, at *5 (2d Cir. Aug. 24, 2022) ("The district court followed the proper procedure and acted within its discretion in ordering Jones to wear concealed leg shackles during trial after considering Jones's disciplinary history, the severity of the sentence he faced, and the recommendation of the U.S. Marshals Service that Jones should be restrained.").

*2. Admission of Plaintiff's Disciplinary History*

Plaintiff requests a new trial based upon the fact that "bad act" evidence was submitted before the jury, including 25 years of his disciplinary history. Dkt. No. 760 at pp. 1-5, 13, 28. When considering the Defendants' in limine Motion to allow admission of Plaintiff's prior disciplinary history, the Court reserved, but indicated that some of the disciplinary history may well be relevant. Dkt. No. 714, Pre-Trial Order, at pp. 3-4. As one part of his many claims, Plaintiff asserted that the five-year SHU penalty imposed by Defendant Uhler as a result of the August 23, 2011 incident was excessive and improper. Am. Compl. at ¶¶ 107-112. Defendant Uhler denied the allegations and maintained that the sentence imposing further disciplinary housing was appropriate considering Mr. Barnes' significant prior disciplinary history. Transcript at pp. 1056-1057. Plaintiff also claimed that Uhler retaliated against him with respect to his handling of Plaintiff's disciplinary matters. Am. Compl. at ¶ 105. Uhler also denied this claim. Transcript at pp. 1056-1057. In such a mixed motive case, the jury may well be entitled to hear not only the hearing officer's reasons for imposing the sentence, but also to see the related factual information. Pretrial Order at p. 3 ("Likewise, to the extent Plaintiff's due process claim rests to some degree on the severity of the punishment imposed his prior disciplinary history might well be relevant there as well."); *see also Colon v. Howard,* 215 F.3d 227, 234-35 (2d Cir. 2000) ("this information was part of the reason for the penalty that [the] Hearing Officer . . . assessed, and was relevant at least to disprove [plaintiff's] allegation of partiality on [defendant's] part."). In fact, Mr. Barnes and his appointed counsel discussed this very issue and counsel suggested that,

in light of this fact, Mr. Barnes should consider dropping the due process claim. Dkt. No. 760 at p. 29. Mr. Barnes did not agree to do so.

Faced with the Court's pretrial ruling, and the continued existence of the due process claim, it appears that Plaintiff and his counsel made a strategic decision to address Plaintiff's disciplinary history up front with the jury. Transcript at p. 164 ("I got like 30 years in the box now."). They did so in a way which attempted to bolster the argument that the force used against Mr. Barnes during his detention at Upstate Correctional Facility was based upon corrections officers' dislike of him and because they considered him to be a problem inmate. Transcript at pp. 709-710 (Mr. Barnes "[had] the reputation of a troublemaker or a rabble-rouser."). Accordingly, Plaintiff's counsel argued that the force used in Mr. Barnes' case was done maliciously and sadistically. This was an argument that was dove tailed into Attorney Travis Hill's closing. *See* Transcript at pp. 1190 ("And during his time at Upstate, and you've heard the testimony from many of the officers that they didn't like Mr. Barnes, that he was a problem inmate."); Tr. at pp. 1205 ("he had a reputation as being difficult, and these officers knew it, and they were retaliating against him.").

Defense counsel did stipulate to the admission of a printout of Plaintiff's disciplinary history (Exhibit D-26) which, as noted above, was quite lengthy. Plaintiff himself was upset by this fact:

> THE PLAINTIFF: That's a bit extreme. It's from different [DIN] numbers. There is absolutely – you know, because when they asked me the questions about me having assaults, I said that it happened. I don't know if it was five. I had admitted that incident had

> occurred, that I had assaulted somebody. So the jury know that. They knew that. When I was on the stand, I admitted that I had bit a man. They see that. So they wouldn't need to go through a laundry list of stuff that happened 25 years ago and draw these prejudicial inferences against me about something that happened in 2000 that had absolutely nothing to do with the incident that hadn't yet occurred in 2010 and 11. That wouldn't make sense, sir. That would be very, very, very prejudicial to me.
>
> THE COURT: I certainly do understand your argument with regard to the prejudicial nature of the entire disciplinary history going in.

Transcript. at p. 471.

Prior to the disciplinary history being shown to the jury as a Joint Exhibit, the Court heard, *and granted,* the request of Plaintiff's counsel to withdraw their stipulation upon the grounds that the disciplinary history, in total, was unduly prejudicial. Transcript at pp. 694-695. Plaintiff requested that the portion of the disciplinary history admitted be limited to the time he was housed at Upstate Correctional Facility from late 2009 until 2012 at the latest. *Id.* The Court granted that Motion despite the prior stipulation, and agreed to a redacted disciplinary history that included only discipline from September 5, 2009 to September 23, 2011. Transcript at pp. 701-704. This was history that would have been considered by Defendant Uhler in assessing an appropriate penalty for Mr. Barnes' misconduct and would also be relevant to the issue of damages. *Id.*

Therefore, Plaintiff's argument for a new trial upon the grounds that his counsel stipulated to the admission of 25 years of "bad act" disciplinary history, is simply misplaced. The record reflects that any such stipulation was withdrawn, and the Court granted Plaintiff's request to limit the time period for the admission of prior discipline. This was all completed prior to Exhibit D-26 being presented at trial.

Plaintiff's other arguments concerning exhibits, which videos were played and when, the decision to not present a rebuttal case, and the decision not to attempt to introduce the Amended Complaint as evidence, have all been considered by the Court but do not warrant the granting of a new trial, as they did not affect substantial justice. *Toliver v. New York City Dep't of Corr.,* 202 F. Supp. 3d 328, 341 (S.D.N.Y. 2016) ("With respect to strategic and tactical decisions concerning the conduct of trials, including decisions regarding which evidence to introduce, parties are deemed to repose decision-making authority in their lawyers. Even assuming, *arguendo,* that Plaintiff's lawyers did not, for whatever reason, carry out Plaintiff's wishes, none of the errors alleged by Plaintiff remotely threatened a miscarriage of justice or a seriously erroneous outcome, the usual bases for a new trial. The Court concludes that whatever complaints Plaintiff might have regarding his counsel's performance, neither a new trial nor alteration of the judgment is an appropriate remedy for those complaints. Accordingly, the Court denies Plaintiff's motion pursuant to Rule 59.") (internal quotations, alterations, and citations omitted).

*3. Rule 50 Rulings*

Plaintiff also seeks a new trial based upon this Court's dismissal of certain claims and/or Defendants in response to defense counsel's Rule 50 Motion at the

close of Plaintiff's proof. Particularly egregious, in Mr. Barnes's view, was the Court's dismissal of supervisory liability claims against Superintendent David Rock and Deputy Superintendent Donald Uhler.[4] While various arguments and assertions against Defendants Rock and Uhler had been presented in the pleadings, and in connection with the pretrial filings, the testimony at trial in support of these claims was thin. Plaintiff testified that, as to Defendant Uhler, after the August 23 incident he spoke with the Deputy Superintendent outside his cell. "I guess I told him what they had did to me." Transcript at p. 220. As to Superintendent Rock, it was the testimony of Plaintiff that Rock was in the position to receive grievances, and that Plaintiff had in fact sent a complaint to him about Defendants Derouchie and Woods. Transcript at pp. 166 & 169. Pursuant to procedure, the Superintendent would normally assign the matter to the Deputy Superintendent to investigate. Transcript at pp. 140, 141, & 166.

In opposition to Defendants' Rule 50 Motion, Plaintiff's counsel argued that Rock and Uhler were notified of misconduct by corrections officers, but despite their positions, they failed to protect the Plaintiff. Transcript at pp. 349-350. There was no specific evidence of what was done with any particular grievance; whom the Superintendent would have assigned to investigate a filed grievance by Barnes; what any such investigation disclosed; or what was reported back to the Superintendent or Deputy Superintendent. Plaintiff himself was not aware of this information. *See* Transcript at pp. 167-168. Nor was it shown how the need for any different investigation could be causally related to the Plaintiff's claims. For example, when Plaintiff spoke

[4] A separate due process claim against Defendant Uhler was allowed to proceed.

with Defendant Uhler, the August 23, 2011 event had already occurred. In sum, no non-conclusory evidence was presented in Plaintiff's case about what the Superintendent or Deputy Superintendent actually knew, or how they acted or failed to act with either deliberate indifference to a serious risk of harm, or how they authorized force be used maliciously or sadistically.

In 2020, the Second Circuit clarified that to establish liability against a correctional official, a plaintiff must prove that the defendant was personally involved in a constitutional violation and not simply that, in his or her supervisory position, it was possible that his supervision was, for example, grossly negligent. *Tangreti v. Bachmann,* 983 F.3d 609, 618 (2d Cir. 2020) ("We join these circuits in holding that after *Iqbal,* there is no special rule for supervisory liability. Instead, a plaintiff must plead and prove 'that each Government-official defendant, through the official's own individual actions, has violated the Constitution.") (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009)). "Accordingly, for deliberate-indifference claims under the Eighth Amendment against a prison supervisor, the plaintiff must plead and prove that the supervisor had subjective knowledge of a substantial risk of serious harm to an inmate and disregarded it." *Id.* at 616. This standard of proof was not met at trial, and therefore granting of the Rule 50 Motion on these claims was appropriate.

As part of the Rule 50 Motion, the Court also granted dismissal of certain claims against some Defendants, and dismissed all claims against Defendants Boyd, Currier, A. Johnson, Keating, and Tuper. *See* Transcript at pp. 362-363; Dkt. No. 747. Plaintiff complains about the dismissal of retaliation claims against B. Clark., G. Gettman, and T. Ramsdell. Dkt.

No. 760 at pp. 47-48. The Court did dismiss the retaliation claims against Gettmann arising out of the August 23, 2011 incident because the grievance that the Plaintiff wrote and relied upon in support of the retaliation claim, was not received until after that date, *see* Transcript at pp. 208-211, 353, & 362. The Court also dismissed the retaliation claims against Defendant B. Clark and Defendant Ramsdell relating to the September 9, 2011 finger amputation incident, Transcript at p. 363, as there was no admissible evidence of retaliatory intent for that incident offered at trial.

*4. Ineffective Assistance of Counsel*

A substantial portion of Plaintiff's request for a new trial is predicated upon the argument that his appointed counsel were ineffective. *See* Dkt No. 760 at pp. 28, 30, & 38. In support of that assertion, Plaintiff cites to the Sixth Amendment of the United States Constitution. *Id.* The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The most direct answer to Plaintiff's argument presented in this Motion, therefore, is from the Second Circuit itself: "To the extent that [Plaintiff] argues that the judgment should be reversed because [his] first attorney was ineffective, this argument is meritless because, 'except when faced with the prospect of imprisonment, a litigant has no legal right to counsel in civil cases' – and, by extension, no right to effective counsel. *Cousar v. New York-Presbyterian Queens,* 845 F. App'x 34, 37 n.2 (2d Cir.), *cert. denied,* 142 S. Ct. 412 (2021); *see also Singh v. Home Depot U.S.A., Inc.,* 580 F. App'x 24, 25 (2d Cir. 2014) ("a lawyer's purported shortcomings present no cognizable ground for relief in a civil matter, where the Sixth

Amendment right to counsel does not apply."); *Espaillat v. Cont'l Express, Inc.,* 33 F. App'x 567, 568-69 (2d Cir. 2002) ("Ineffective assistance of counsel is not a proper ground for relief in a civil matter.").

Even if the Court found it appropriate to apply the effective assistance of counsel test applicable in criminal cases, the members of the Nixon Peabody team far surpassed that standard. "To establish ineffective assistance of counsel 'a defendant must show both deficient performance by counsel and prejudice.' *Premo v. Moore,* 562 U.S. 115, 121 (2011) (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009)). Deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter,* 562 U.S. 86, 104 (2011) (quoting *Strickland v. Washington,* 466 U.S. at 689). Establishing prejudice requires Petitioner to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. at 694. The *Strickland* test imposes a "high bar." *Padilla v. Kentucky,* 559 U.S. 356, 371 (2010).

In the Court's view, the Plaintiff was substantially aided in the presentation of his claims by highly competent trial counsel. Because of the number of discrete events at issue, and the vast breadth of Plaintiff's *pro se* Complaint, representing Mr. Barnes in this matter was always going to be a substantial task. Throughout the course of litigation, the Court has attempted to assist Mr. Barnes to navigate through the

discovery process and had previously appointed counsel for him to consider a settlement proposal. Dkt No. 619. Mr. Barnes complained bitterly regarding that counsel's assistance. *See* Dkt. Nos. 620 & 621. Next, the Court appointed Adam Shaw, a partner in the law firm of Boies, Schiller & Flexner LLP, with years of litigation experience, to represent Mr. Barnes at trial. Dkt. No. 638. Mr. Barnes relationship with that counsel went quickly downhill, and he made numerous requests to have that counsel terminated. Dkt. Nos. 646, 649, 650, & 651.

It is against this backdrop that the Court appointed Daniel Hurteau of Nixon Peabody, a very experienced trial attorney, to represent Mr. Barnes. Mr. Hurteau worked tirelessly to advance a compelling and comprehensive case. As a partner with Nixon Peabody, Mr. Hurteau utilized numerous attorneys in the firm throughout the state to assist him. The lawyers effectively prepared for trial by submitting comprehensive pretrial submissions. When it was discovered that Mr. Barnes' daughter might have numerous relevant documents in her possession that Plaintiff had sent to her throughout the years, counsel arranged to obtain the evidence and review it. *See* Dkt. No. 688. During trial, the attorneys from Nixon Peabody coordinated with Plaintiff Barnes to make the process go smoothly, even to the point of buying Mr. Barnes lunch every day so that he would feel confident in the food he was provided while he was in custody.[5] Mr. Hurteau's team presented gripping opening and closing statements; effectively cross-examined the substantive witnesses;

[5] This conduct by counsel, observed by the Court, stands in stark contradiction to the Plaintiff's present assertion that his appointed attorneys showed little or no regard for him as a human being.

raised appropriate objections; utilized the time before the jury in a considerate and effective manner; and, in short, provided stellar representation. While the end result was not the one that Mr. Barnes had hoped for, or felt that he deserved, it was a close case and the jury obviously struggled for days and hours with many aspects of his claims. Mr. Barnes had a full and fair opportunity to present himself and his claims to that impartial body.

Mr. Barnes' claims that his counsel was ineffective at trial are not supported for several reasons. Initially, Mr. Barnes maintains that Mr. Hurteau was somehow biased against him because he was born at Alice Hyde Medical Center in Malone, New York. Dkt. No. 760 at pp. 1 & 38. Although not specifically stated, it appears that Mr. Barnes is implying that because his appointed counsel was born in upstate New York, he must have been conspiring and collaborating with the Defendant corrections officers who also may have been born in upstate New York. Mr. Barnes demanded that Mr. Hurteau identify who his friends were, and it appears that Mr. Hurteau rightfully declined to do so. Dkt. No. 760 at p. 12. None of this rank speculation by Plaintiff establishes any impropriety on the part of pro Bono counsel, and indeed counsel's spirited representation of Mr. Barnes throughout the course of the case belies this very assertion.

Plaintiff asserts that counsel was deficient because he did not seek to introduce the Plaintiff's Amended Complaint as evidence. The Court would not likely have allowed such an exhibit to be received if offered by Plaintiff. First, the admission of such a pleading would cause substantial confusion, and possibly prejudice to the Plaintiff, as the Amended Complaint contained numerous claims and defendants that were

no longer in the case at the time of trial, which would have to be explained to the jury. In addition, all the statements and legal assertions from Plaintiff contained in the *pro se* pleading that he intended on using, would be inadmissible hearsay. While Plaintiff's statements in the pleading could be used by defense counsel to impeach the Plaintiff himself, *Bermudez v. City of New York,* 2019 WL 136633, at *16 (E.D.N.Y. Jan. 8, 2019), they were not admissible simply to bolster Plaintiff's in-court testimony, or to fill in evidentiary holes in the case that may have existed.

Plaintiff's remaining claims are similarly unavailing. Plaintiff objects to the fact that his counsel refused to admit as evidence the video tape of the August 23, 2011 event. *See* Dkt. No. 760 at p. 34. In fact, that tape was admitted during the trial, Transcript at pp. 1069-1070, 1139, and the Jury viewed it again during their deliberations, Transcript at p. 1214.

Whether to offer a rebuttal case was within the discretion of the trial attorney, *United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir. 1987), and there is no showing by Plaintiff that anything that could have been submitted in rebuttal would have changed the outcome of the case.

Finally, Plaintiff asserts that the transcripts of his Tier III Disciplinary Hearings, D-48, should not have been admitted at trial. Dkt. No. 760 at p. 29. At one point Plaintiff asserted that these records were inadmissible because they were not signed. Transcript at pp. 891 & 935. However, Defendant Uhler specifically testified that he had reviewed the transcripts, and that they were fair and accurate. Transcript at pp. 1045-1050. The transcripts reflected evidence that was clearly relevant to Plaintiff's claims, in particular when and in what manner Plaintiff was removed or

left the disciplinary hearings that related to the August 23, 2011, and September 9, 2011, incidents. *See* Transcript at pp. 1055-1059; Exhibit D-48 at p. 747.

In sum, none of Plaintiff's arguments - whether taken singly or in combination - raises a possibility that the jury verdict in this case was "seriously erroneous" or a "miscarriage of justice." *Farrior v. Waterford Bd. of Educ.,* 277 F.3d 633, 635 (2d Cir. 2002). The Court therefore denies Plaintiff's motion for a new trial.

III. BILL OF COSTS

As a result of the favorable verdict, Defendants seek $1,421.20 in transcript costs, as well as $56,508.13 for witness fees and lodging, for a total of $57,929.33. Dkt. No 754. Plaintiff concedes that he owes that amount for transcripts, but objects to the remaining costs as excessive. Dkt. No. 765.

Federal Rule of Civil Procedure 54(d)(1) states in relevant part that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs . . . should be allowed to the prevailing party." "[T]he Supreme Court has held that the term 'costs' includes only the specific items enumerated in 28 U.S.C. § 1920." *Whitfield v. Scully,* 241 F.3d 264, 269 (2d Cir. 2001), *abrogated on other grounds by Bruce v. Samuels, 577* U.S. 82 (2016). Section 1920 provides that the following costs are taxable: (1) fees of the clerk and marshal; (2) fees for transcripts "necessarily obtained for use in the case"; (3) fees for printing and witnesses; (4) fees for exemplification and copying costs "where the copies are necessarily obtained for use in the case"; (5) docketing fees under 28 U.S.C. § 1923; and (6) fees for court-appointed experts and interpreters. 28 U.S.C. § 1920. "The burden is on the prevailing party to

establish to the court's satisfaction that the taxation of costs is justified." *Cohen v. Bank of NY. Mellon Corp.,* 2014 WL 1652229, at *1 (S.D.N.Y. Apr. 24, 2014) (quoting *John G. v. Bd. of Educ.,* 891 F. Supp. 122, 123 (S.D.N.Y. 1995)). "[B]ecause Rule 54(d) allows costs 'as of course,' such an award against the losing party is the normal rule obtaining in civil litigation, not an exception." *Whitfield v. Scully,* 241 F.3d at 270 (internal quotation omitted).

Under the Prison Litigation Reform Act, courts have the authority to assess costs against an indigent prisoner. *See* 28 U.S.C. § 1915(0(2)(A) & (B). This authority lies within the discretion of the trial judge. *See* 28 U.S.C. § 1915(0(2)(A) ("If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered."); *see also Keesh v. Smith,* 2008 WL 2242622, at *3 (N.D.N.Y. May 29, 2008) ("[D]istrict courts retain discretion to limit or deny costs based on indigency.").

"[T]he discretionary imposition of costs should be informed by any factor the court deems relevant, including the purpose of the *in forma pauperis* statute, the history of the party as litigator, good faith and the actual dollars involved." *Feliciano v. Selsky,* 205 F.3d 568, 572 (2d Cir. 2000) (internal quotation omitted). As to indigency, "[c]ourts in this circuit typically only deny costs based on indigency for plaintiffs who are unemployed or make just pennies an hour working in correctional facilities." *Rowell v. City of New York,* 2022 WL 627762, at *1 (S.D.N.Y. Mar. 3, 2022).

Mr. Barnes is clearly indigent, and while the Plaintiff has a significant history of litigation, the Court feels that this case was pursued in good faith and was premised upon serious injuries that Mr. Barnes sus-

tained while in custody. As a result, and in an exercise of discretion, the Court limits the award of costs simply to the transcript fees.

IV. CONCLUSION

WHEREFORE, it is hereby

ORDERED, that Plaintiff's Motion for a New Trial (Dkt. Nos. 760) is DENIED; and it is further

ORDERED, that Plaintiff's Motions (Dkt. Nos. 664, 665, 678, 723, 753, & 757) are DENIED as moot; and it is further

ORDERED, that Defendants' Motion for a Bill of Costs (Dkt. No. 754) is GRANTED in the amount of $1,421.20 and is otherwise DENIED, and it is further

ORDERED, that the Clerk of the Court serve a copy of this Decision and Order upon the parties to this action.

IT IS SO ORDERED.

Dated: April 4, 2023
Albany, New York

/s/ Daniel J. Stewart
Daniel J. Stewart
U.S. Magistrate Judge

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

22-2902 (L), 22-3152 (Con), 23-729 (Con)

---

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of June, two thousand twenty-four.

PRESENT:

JOSÉ A. CABRANES,
BARRINGTON D. PARKER,
MARIA ARAÚJO KAHN,
*Circuit Judges*.

---

JESSIE J. BARNES,

*Plaintiff-Appellant*,

v.

DAVID A. ROCK, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY, SUED IN INDIVIDUAL CAPACITY, *et al.*,

*Defendants-Appellees*,

BRIAN FISCHER, COMMISSIONER OF DOCCS, SUED IN INDIVIDUAL CAPACITY, *et al.*,

*Defendants*.

---

FOR PLAINTIFF- APPELLANT:

SCOTT A. EISMAN, Freshfields Bruckhaus Deringer US LLP, New York, NY (Carla Sung Ah Yoon, Aedan Collins, Freshfields Bruckhaus Deringer US LLP, New York, NY, Benjamin Zweifach, Freshfields Bruckhaus Deringer US LLP, Washington, DC, *on the brief*).

FOR DEFENDANTS-APPELLEES:

JONATHAN D. HITSOUS (Barbara D. Underwood, Victor Paladino, *on the brief*), *for* Letitia James, Attorney General, State of New York, Albany, NY.

Appeal from the April 4, 2023 judgment of the United States District Court for the Northern District of New York (Daniel J. Stewart, *Magistrate Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the April 4, 2023 judgment of the District Court is AFFIRMED.

Plaintiff-Appellant Jessie J. Barnes commenced a 42 U.S.C. § 1983 action against former and current employees of the New York State Department of Corrections and Community Supervision ("DOCCS") alleging, *inter alia*, violations of his First and Eighth Amendment rights. Barnes alleges that he sustained serious injury, including a broken leg and a partially amputated finger, and that Defendant Officers Gettmann, B. Clark and Ramsdell—who were among the defendant officers involved in the most egregious incidents—targeted him in retaliation for filing grievances against them.

Before jury deliberation, the District Court granted Defendants Gettmann, B. Clark, and Ramsdell judgment as a matter of law on Barnes's retaliation claims. The Court also declined to issue an adverse-inference instruction against Defendants for a missing video of an altercation between Barnes and Defendants, reasoning that Barnes failed to compel production of this footage during discovery. The Court nonetheless permitted Barnes to make an adverse-inference argument about the video to the jury during closing arguments. Joint Appendix ("JA") 818-20. The Court also declined to issue an adverse-inference instruction against Defendants for the destruction of the protective hatch that was allegedly involved in the partial amputation of Barnes's finger. JA 817-18. The Court found that the failure to preserve the hatch did not prejudice Barnes because he was able to introduce a replica hatch and photographs of the original as evidence. JA 817-18. Finally, the Court required that Barnes wear leg shackles during trial. JA 295-96.

The jury found for Defendants on all of Barnes's remaining claims, and Barnes timely appealed. We assume the parties' familiarity with the underlying

facts, the procedural history, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.

*First,* Barnes challenges the District Court's order granting Defendants Gettmann, B. Clark and Ramsdell judgment as a matter of law on Barnes's retaliation claims. Having carefully reviewed Barnes's arguments *de novo*, *see Legg v. Ulster County,* 979 F.3d 101, 116 (2d Cir. 2020), we find no reversable error. The jury verdict that Defendants Gettmann, B. Clark and Ramsdell did not subject Barnes to excessive force precludes a finding that the same, objectively serious conduct was exercised in retaliation for grievances filed against them. *See Baskerville v. Mulvaney*, 411 F.3d 45, 49–50 (2d Cir. 2005) (holding that plaintiff's retaliation claim fails where "evidence before the jury would not support ... a theory of actionable *de minimis* force" and "the jury found ... that the officers' use of force did not violate the Eighth Amendment").

*Second,* Barnes argues that the District Court erred in declining to issue an adverse-inference instruction for the missing video footage and the protective hatch on Barnes's cell door. We disagree. When "the nature of the alleged breach of a discovery obligation is the non-production of evidence, a district court has broad discretion in fashioning an appropriate sanction." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). Finding no "abuse of discretion" in the Court's decisions, we affirm for substantially the reasons given by Magistrate Judge Stewart.

*Third,* Barnes argues that the District Court violated his due process rights by requiring him to wear leg shackles throughout the trial. We disagree. The District Court's decision to restrain a defendant is reviewable for "abuse of discretion," unless the Court

"has deferred entirely to those guarding the prisoner." *Hameed v. Mann*, 57 F.3d 217, 222 (2d Cir. 1995). The District Court recognized that it "ha[d] to exercise an independent judgment" regarding how Barnes "should be restrained while in the courtroom," and the correction officer's recommendation—that only leg shackles, not handcuffs or a waist chain, were necessary—was consented to by Barnes. *See* JA 295-96. Moreover, the Court mitigated possible prejudice resulting from the leg shackles by granting Barnes's request that he sit between his attorneys, "so that his legs are underneath the desk." JA 296. On these facts, the District Court did not err, much less "abuse its discretion," in having Barnes wear leg shackles during trial.

* * *

We have considered Barnes's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the District Court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[Seal Catherine O'Hagan Wolfe United States Court of Appeals Second Circuit]

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

Docket Nos: 22-2902 (Lead)
22-3152 (Con)
23-729 (Con)

---

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of July, two thousand twenty-four.

---

JESSIE J. BARNES,

*Plaintiff - Appellant*,

v.

DAVID A. ROCK, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY, *et.al.*,

*Defendants - Appellees*,

BRIAN FISCHER, COMMISSIONER OF DOCCS; SUED IN INDIVIDUAL CAPACITY, *et al*.,

*Defendants*.

---

ORDER

Appellant, Jessie J. Barnes, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[Seal Catherine O'Hagan Wolfe United States Court of Appeals Second Circuit]

**APPENDIX D**

[1] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

———

CASE NO. 13-cv-164

———

JESSIE J. BARNES,

*Plaintiff*,

vs.

DAVID A. ROCK, *et al.*,

*Defendants*.

———

Jury Trial – Day 1

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. DANIEL J. STEWART
MONDAY SEPTEMBER 19, 2022
ALBANY, NEW YORK

FOR THE PLAINTIFF:

NIXON PEABODY

By: DANIEL J. HURTEAU, ESQ., TRAVIS HILL, ESQ., CHRISTOPHER J. STEVENS, ESQ., and SARAH L. TUFANO, ESQ. 677 Broadway, 10th Floor
Albany, New York 12207-2996

FOR THE DEFENDANTS:

ATTORNEY GENERAL OF THE STATE OF NEW YORK
By: MELISSA LATINO, ESQ., WILLIAM SCOTT, ESQ., and STEVEN NGUYEN, ESQ.
The Capitol
Albany, New York 12224

[2] (Chambers.)

THE COURT: The record can reflect that we're in my chambers with all counsel being present, and it's quite a group. And we're here just as a preliminary matter. We'll have the jurors come in.

Do we know how many jurors we have?

THE CLERK: High 30s.

THE COURT: My goal is to pick nine jurors. So that would be six plus three alternates in case we have someone who comes down with COVID or something along the way. As I indicated, we're going to schedule this for two weeks.

As I understand from plaintiff's counsel, you're just going to call the plaintiff; is that correct?

MR. HURTEAU: That is correct.

THE COURT: Do you think a day and a half for him?

MR. HURTEAU: I am going to try my best to keep it to four to five hours. So I would suspect depending on when we start with him, to be done noon hour, maybe an hour after lunch if we were to start in the morning, and them let them cross him.

THE COURT: So we'll pick the jury this morning.

We'll instruct the jury, do opening statements. Do you have an idea from whoever is doing the openings as to how long they're going to be?

MR. HURTEAU: I'm doing the opening for us. I'll keep it under a half hour.

[3] MR. SCOTT: About the same.

THE COURT: Okay. So then we may get Mr. Barnes on this afternoon, at least to start.

As far as the security issue goes, who is in charge of Mr. Barnes?

CORRECTION OFFICER: I am, Your Honor.

THE COURT: Just identify yourself for the record.

CORRECTION OFFICER: I'm sorry, sir. Officer LaRoque.

THE COURT: So Officer, part of my responsibility is to make a determination as to how he should be restrained while in the courtroom. I have to exercise an independent judgment with regard to that, but obviously I am interested in your instructions or your views as how you think he should be restrained.

CORRECTION OFFICER: As far as the handcuffs and the waist chain, I would be fine with that not being on, but at least the leg shackles, if that's all right.

THE COURT: That's what I was thinking. In the past when Mr. Barnes has been in my courtroom, we've done the leg shackles. He hasn't posed any issues. Obviously, this is a longer process, and there's going to be the highs and the lows of the trial. So that's going to be subject to change if for any reason I see any type of outburst, and I'll talk with him a little bit about that.

Let me hear from the defense counsel. I assume that [4] you're taking the position that the correction officer's taken. Do you want to add anything further?

MS. LATINO: No, Your Honor. I think that's fine.

THE COURT: If anybody has any concerns, let me know from either side. I actually did a trial one time where I was defending, but the pro bono counsel

actually asked the client to be reshackled at some point in time. So we all have a responsibility to maintain safety in the courtroom. We also, of course, want to make sure that we don't deprive him of his right to due process. I think the handcuffs and the belt would be kind of shocking.

What about other – do we have other guards? CORRECTION OFFICER: It's myself and Officer Smalls that will be present, sir.

MR. HURTEAU: Your Honor, if I could just ask one thing.

THE COURT: Yes.

MR. HURTEAU: So we were originally going to put Mr. Barnes on the outside of counsel's table. I would ask he be put in the middle between us so that his legs are underneath the desk so that people can't see that he has leg shackles. Then obviously – I know this would happen anyway – when he goes up to testify and comes back down, the jury goes out so they don't see he's in shackles.

THE COURT: I think that that's more appropriate. [5] Now, we were going to have the plaintiff's counsel sit at the table farthest away from the jury. I know that's traditionally not how it's done, but I think in this case, that that's an appropriate situation here. So that, again I'll talk with Mr. Barnes with regard to that.

One issue I did want to speak briefly about is just obviously the number of defendants that we have is historic. So how would you like to handle that, either in jury selection or anywhere else? I'm going to instruct the jury that both sides worked together to try to coordinate the trial, make it run as smoothly and quickly as possible; that not all the defendants, even

though they're entitled to, will be here every day, and they're not to draw any adverse inference as a result of that.

What about jury selection? How do you want to handle that?

MR. SCOTT: Just logistically speaking, I don't think we're going to be able to fit the jurors and all defendants in the back of the courtroom just now. Certainly don't have any strong preference in that regard, but it might make sense to – at some point, if they're introduced to the jury one way or the other, maybe do it in halves, somehow break it up, whatever. Obviously you don't want the defendants sitting shoulder to shoulder with the jurors as they're being picked either.

THE COURT: That would be my primary concern. I don't ascribe any type of misconduct to any of the defendants, but [6] you've got so many correction officers.

* * *

[18] THE CLERK: We are now on the record. Monday, September 19, 2022, 9:57 a.m. The case is Jessie J. Barnes versus David A. Rock and others, case No. 13-CV-164. May we have appearances for the record, please.

MR. HURTEAU: Your Honor, for the plaintiff, the law firm of Nixon Peabody. I'm Dan Hurteau with that firm. I'm [19] also here with Travis Hill with Nixon Peabody.

MR. HILL: Good morning.

MR. HURTEAU: I'm also here with Chris Stevens from Nixon Peabody.

MR. STEVENS: Good morning, Your Honor.

THE COURT: Good morning.

MR. HURTEAU: I'm here with Sarah Tufano from Nixon Peabody. We have one other member of our team who is not here today, Vincent Nguyen. I'm here to represent Mr. Barnes, and Mr. Barnes is here with us today.

THE COURT: Very good.

Why don't we have defense counsel just introduce themselves.

MS. LATINO: Yes, Your Honor. Assistant Attorney General Melissa Latino.

MR. SCOTT: William Scott also from the Office of the Attorney General, Your Honor.

MR. S. NGUYEN: Good morning, Judge. Steve Nguyen for the Office of the Attorney General for defendants.

THE COURT: Good morning. So we have the jury pool ready to be brought in. The record can reflect that we did have a conference with counsel before court just to deal with some logistical issues, and those have been completed. I have received extensive submissions on behalf of both sides. I appreciate all the work that's gone into this.

[20] So Mr. Barnes, let me just start with you. Obviously, this is one of the first cases I had when I became a judge. It's been a long time getting here. So now it's really an opportunity for you and for the defendants to present the case. We've got a lot of jurors. We've got two weeks scheduled to get this done.

So one, let me just ask you. How are you doing?

THE PLAINTIFF: Not good. The same way, they won't move me. They keep me up there. That man, they abusing me out of this world.

THE COURT: Well, let me deal with a couple issues up front with you, Mr. Barnes, just so we know. Obviously the only thing that we're doing here in this particular case is what the allegations are, and obviously these are allegations which occurred a long time ago. From your communications with the Court, I understand that you have ongoing issues. Obviously you're familiar with the process to file complaints and everything, and that's perfectly appropriate.

What I want to emphasize to you, a couple things is that we've got this trial. It's going to last two weeks. I did trial work for 30 years. You're going to have your opportunity to talk to the jurors. You've got a whole team of counsel here ready to present your interest.

There's going to be highs and lows during the course of this trial, just like there is for any trial. I can tell you [21] that. You've been nothing but respectful to me during the course of all the conferences that we've had, and we've had quite a few in connection with this case. I wouldn't expect anything further. I know it's a stressful situation for you. It's also stressful for the defendants. Obviously now is going to be the time for this jury to make a determination.

So if at any point in time, you're getting to the point where you need a break, can you just let your counsel know? We'll try to accommodate you with regard to that.

THE PLAINTIFF: Yes.

THE COURT: We have made accommodations as far as your hands are not shackled with regard to this so

you can take notes or do whatever is appropriate. I'm doing that primarily because, as I said before, you and I have had a number of conferences, and there's never been an issue.

THE PLAINTIFF: They going to see the restraints. I got restraints on my legs.

THE COURT: Right. So what we're going to do with regard to that is the same thing we've done before. So the jury is not here right now. When you testify, you may be the first witness to testify. I'm going to excuse the jury. I'll have you come sit at the witness stand so they can't see the restraints.

I will ask you to introduce yourself to the jurors. You don't have to stand up if you don't wish. You can if you [22] wish. Obviously they know, at some level, they know you're incarcerated because that's the nature of the claim you have. So it's not going to be a surprise with regard to that.

THE PLAINTIFF: You know, that's why I was going to just wear my greens because it's not secret I got life. So I ain't got nothing to hide. I ain't in jail for killing nobody. The judge just wanted to give me life. So that's what I got.

THE COURT: No. That, I understand. My goal in this particular case is to make it go as smoothly as possible.

You've got an argument that you want to bring to this jury. The defendants and their counsel have an argument. I want them to get the evidence, but we're only going to talk about this case, what's left of this case, nothing else.

If you stray into other areas, I'm going to tell you to stop. I'm not doing that because I dislike you in any

way. Just we need to have the case proceed in an orderly fashion. Do you understand that?

THE PLAINTIFF: Yes, sir. But what I'm saying, I don't even know what's going on. I ain't receive no trial motions. I don't know what's going on. They got all them videotapes, and a lot of the videotapes don't got the proper time. I ain't talk to the lawyer so he can get the logbook. I FOILed some of them, and I know the logs, the videotape, one of them got 29 minutes on the videotape.

THE COURT: You're going to have a chance through your [23] counsel to make whatever arguments you think. You're going to be able to testify first. The videos will be shown. Your counsel, both in the opening and closing, will have an opportunity to comment on it. If there's some issue with regard to the video, I'm sure it will be raised. So we're not going to make these arguments now. I'm just telling you how the case is going to proceed, Mr. Barnes, okay.

THE PLAINTIFF: Right. But I'm trying to acknowledge to you I ain't seen no trial motions. I don't even know nothing. You know, this is my case. You know, if I don't feel adequate about the representation, I don't care how many lawyers it is. I would rather lose my own case. These people cut my finger off. They done brutalize me beyond conscience. So I don't care. I'd rather lose it myself before – because he ain't told me. He ain't came back there and seen me before the court. I was back there for an hour. I want to see some motions.

THE COURT: Mr. Barnes, the important thing is I saw the motions, and they were all well done. They're pretty comprehensive with regard to it. So we have appointed counsel for you. These are the very best

counsel in the Capital Region. There were other issues that you had with counsel. I got new counsel for you. I'm not going to do that again.

THE PLAINTIFF: I might not need no more counsel. If I can look at the motions myself and I can see what's been done, [24] I can put in a trial motion myself verbally for all the logbooks and the videotapes. I know what's on them.

THE COURT: Well, first thing we're going to do, and I can get you copies of the motions, but the first thing we're going to do is we're going to select the jury.

Plaintiff's counsel, are you ready to proceed at this point in time?

MR. HURTEAU: I am, Your Honor.

THE COURT: Is defense counsel ready to proceed?
MS. LATINO: Yes, Your Honor.

THE COURT: Why don't we call in the jury, the proposed jury.

THE PLAINTIFF: Excuse me, Your Honor.

MR. HURTEAU: Your Honor, Mr. Barnes was asking something of you.

THE COURT: Okay. I'm sorry.

THE PLAINTIFF: I don't feel comfortable with this because the record, it's not good representation for me. I haven't seen any trial motions, Your Honor, and I have that right. I don't feel that I'm being properly represented here because it's my trial. I did the work. I've been physically abused. I need to see the motions.

(Prospective jury in.)

* * *

## APPENDIX E

## CONSTITUTION OF THE UNITED STATES OF AMERICA

* * *

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *