# NOTES

## Shackling Prejudice: Expanding the *Deck v. Missouri* Rule to Nonjury Proceedings

*Courts in the United States have traditionally held that criminal defendants have the right to be free from unwarranted restraints visible to the jury during the guilt phase of a trial. The term "unwarranted restraints" refers to the use of restraints on a defendant absent a court's individualized determination that such restraints are justified by an essential state interest. In* Deck v. Missouri*, the Supreme Court expanded the prohibition against unwarranted restraints to the sentencing phase of a trial. The law regarding the unwarranted shackling of defendants in nonjury proceedings, however, remains unsettled. The U.S. Courts of Appeals for the Second and Eleventh Circuits have held that courts may validly use restraints on defendants in nonjury proceedings absent a showing of individualized need. Conversely, the Ninth Circuit has determined that the holding in* Deck *extends to nonjury proceedings, and therefore defendants have a right to be free from unwarranted shackles in jury and nonjury proceedings. This Note advocates for the Ninth Circuit's approach and argues that the Supreme Court should expand the rule established in* Deck *to nonjury proceedings. Unwarranted restraints violate criminal defendants' due process rights under the Fifth and Fourteenth Amendments regardless of the presence of a jury. This Note then proposes factors for courts to use in conducting individualized shackling determinations and offers further recommendations for implementation of the* Deck *rule to all court proceedings—jury and nonjury.*

## INTRODUCTION

Fifty years ago, Bobby Seale, the cofounder of the Black Panther Party, was charged in Chicago with conspiring to cross state lines with the intent to cause riots.[1] His arrest occurred in connection with the 1968 Democratic National Convention,[2] and at his heated, racially charged trial, Seale called the presiding judge a "pig" and a "fascist."[3] In response, the judge ordered Seale bound and silenced.[4] "Seale, trying to scream through [a] gag, was then carried into the courtroom" tied to

1. Bob Greene, *A Courtroom Circus?*, CHI. TRIB. (Oct. 11, 1995), https://www.chicagotribune.com/news/ct-xpm-1995-10-11-9510110064-story.html [https://perma.cc/XGA7-UVEV].

2. *Id.*

3. *See Judge Julius J. Hoffman, 87, Dies: President at Trial of the Chicago 7*, N.Y. TIMES (July 2, 1983), https://www.nytimes.com/1983/07/02/obituaries/judge-julius-j-hoffman-87-dies-president-at-trial-of-the-chicago-7.html [https://perma.cc/V46J-UJN9] (stating that Seale called Federal District Judge Julius J. Hoffman, the judge presiding over Seale's trial, a "pig" and a "fascist"). *See generally* Greene, *supra* note 1 (explaining that tensions escalated between Seale and the judge when Seale demanded the right to defend himself during trial, instead of using the attorney of record, and the judge refused).

4. Greene, *supra* note 1.

a wooden chair as the jury looked on at the spectacle.[5] And when the judge could still faintly hear Seale through the gag, he ordered it tightened.[6]

Of course, judges do not habitually gag and chain defendants to wooden chairs.[7] But the Seale case demonstrates the prejudice that can result from the use of restraints in a courtroom. If a criminal defendant enters a courtroom shackled and gagged, those present in the courtroom may perceive the defendant as dangerous and threatening. Furthermore, restraints may signify that the defendant needs to be forcibly separated from the rest of society. These perceptions can taint the justice system with prejudice against defendants.

Undoubtedly, courts sometimes need to restrain particular defendants for the safety of themselves and others in the courtroom. But certain courts in the United States have outfitted all defendants in full restraints as a routine and indiscriminate policy for nonjury courtroom proceedings.[8] "Full restraints" require defendants to wear tight handcuffs connected to a heavy chain wrapped around their waist with their feet shackled and chained together. When a court utilizes an indiscriminate shackling policy, the court requires defendants to wear full restraints regardless of perceived need or "a defendant's individual characteristics."[9] Thus, while such a policy ensures that defendants who do pose a threat are effectively restrained, it also results in the shackling of defendants who are disabled, seriously ill, or injured.[10]

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5. *Id.*

6. *Id.*

7. While scenes as dramatic as that in the Seale trial occur very rarely, defendants are often gagged or otherwise shackled in a shocking manner. *Id.*; *see* State v. Brewer, 301 So. 2d 630, 636 (La. 1974) (holding that it was not abuse of discretion for the trial judge to order that one of the defendant's hands be tied behind his back and his mouth be "taped"); State v. Forrest, 609 S.E.2d 241, 246 (N.C. Ct. App. 2005) ("[T]he trial court did not abuse its discretion in requiring that defendant be secured to his chair, handcuffed, and masked during his trial."); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1239–40 (2012) (citing Shaw v. State, 846 S.W.2d 482, 485–86 (Tex. Crim. App. 1993)) (describing how a judge had a defendant "bound and gagged" for speaking out of turn).

8. *See, e.g.*, United States v. Sanchez-Gomez, 859 F.3d 649, 653 (9th Cir. 2017) (stating that the Southern District of California implemented a district-wide policy of allowing the U.S. Marshals Service to produce all in-custody defendants in full restraints for most nonjury proceedings), *vacated as moot*, 138 S. Ct. 1532 (2018); Alaska Pretrial Detainees for End of Unwarranted Courtroom Shackling v. Johnson, No. 3:17-CV-00226-SLG, 2018 WL 2144345, at *1 (D. Alaska May 9, 2018) (describing that state courts in Alaska, as a policy, require that pretrial detainees be shackled together in a "human chain"' before entering the courtroom).

9. *See, e.g.*, *Sanchez-Gomez*, 859 F.3d at 654.

10. *Id.* (stating that full restraints were used on a defendant with a fractured wrist, a defendant with a vision impairment, and a defendant brought to court in a wheelchair who had serious and worsening health issues).

The U.S. Supreme Court first directly adjudicated the constitutionality of shackling defendants in *Deck v. Missouri*.[11] In *Deck*, the Court prohibited the use of visible shackles during the sentencing phase of a trial, except when the use of restraints could be "justified by an essential state interest."[12] Courts had traditionally held that defendants have the right to be free from unwarranted restraints visible to the jury during the guilt phase of a trial, but *Deck* marked the first time that the Supreme Court explicitly expanded that recognized right to the sentencing phase.[13] The term "unwarranted restraints" refers to the use of restraints on a defendant without a trial court's determination that such restraints are justified by a state interest specific to the particular defendant.[14] The law regarding the indiscriminate shackling of defendants in nonjury proceedings remains unsettled, however, and the circuit courts disagree on whether *Deck* applies to such cases.[15]

This Note examines the Supreme Court's opinion in *Deck v. Missouri* and comments on whether it applies to nonjury courtroom proceedings. Specifically, this Note analyzes whether the rule established in *Deck*, which prohibits indiscriminate shackling in the sentencing phase of trial, should be expanded to prohibit the use of indiscriminate shackling in all phases of trial—regardless of the presence of a jury.

Part I explains the history of shackling and restraining defendants, and details the *Deck v. Missouri* decision. Part II articulates the legal principles the Supreme Court relied on in *Deck* and analyzes how these principles fit within the context of nonjury proceedings. Part II additionally considers the circuit split that has arisen over the application of *Deck* to nonjury proceedings. Finally, Part III proposes that the Supreme Court expand the rule established in *Deck* to nonjury proceedings and argues that the unwarranted use of

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11. 544 U.S. 622 (2005).

12. *Id.* at 624 (quoting Holbrook v. Flynn, 475 U.S. 560, 568–69 (1986)).

13. *See id.* at 628:

> Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum.

14. *Id.* at 629.

15. *See Sanchez-Gomez*, 859 F.3d at 666 (holding that the rule established in *Deck* applies to nonjury proceedings as well); United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015) (holding that the Constitution does not prohibit the shackling of a defendant during a sentencing hearing before a judge); United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) ("We decline to extend the rule . . . requiring an independent, judicial evaluation of the need to restrain a party in court—to the context of non-jury sentencing proceedings.").

restraints in nonjury proceedings violates defendants' due process rights under the Fifth and Fourteenth Amendments. Part III then proposes factors to be used in conducting individualized shackling determinations and provides further recommendations for implementing the *Deck* rule.

## I. BACKGROUND

The use of restraints in the courtroom is a longstanding practice. Courts have grappled with questions of how and when defendants should be shackled in court proceedings for longer than the United States has existed. This Part will discuss the legal background on shackling defendants by analyzing English common law and American case law. It will focus specifically on three U.S. Supreme Court cases that mention the use of shackles on defendants: (1) *Illinois v. Allen*,[16] (2) *Estelle v. Williams*,[17] and (3) *Holbrook v. Flynn*.[18] It will then discuss the factual and procedural background of *Deck v. Missouri*.[19]

### *A. English Common Law Background*

The practice of restraining defendants has deep roots in the common law. According to William Blackstone's *Commentaries on the Laws of England*, under English common law, a court could not shackle or otherwise restrain a defendant unless there was a clear risk that the defendant would attempt to escape.[20] After describing this general prohibition, Blackstone noted the example of "Layer's Case," where a defendant with a prior escape attempt was shackled during arraignment. In Layer's Case, the court distinguished between the use of shackles at the "time of arraignment" and at the "time of trial," implying that shackles are less injurious during arraignment.[21] Blackstone does not present Layer's Case to support a general rule

16. 397 U.S. 337 (1970).

17. 425 U.S. 501 (1976).

18. 475 U.S. 560 (1986).

19. 544 U.S. 622 (2005).

20. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *317 (1769) ("[I]t is laid down in our ancient books, that, though under an indictment of the highest nature, [a defendant] must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." (footnote omitted)); *see also* 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (1797) ("If felons come in judgement to answer . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.").

21. 4 BLACKSTONE, *supra* note 20, at 317; *see also Deck*, 544 U.S. at 626 (citing Layer's Case); *Sanchez-Gomez*, 859 F.3d at 663 (citing Layer's Case).

allowing restraints during arraignment hearings, however.[22] Instead, Layer's Case can be read as an exception to the general ban on shackling in the courtroom.[23] In Layer's Case, the defendant's prior attempt at escape revealed an individualized need for restraints during the arraignment hearing.[24] Layer's Case therefore demonstrates that shackling defendants at arraignment was "not a standard practice, or even permissible, absent a demonstrated need."[25]

While limited information exists to explain the prohibition against shackling in English common law, commentators have hypothesized that the rule was introduced to serve multiple purposes: to guarantee defendants a fair trial; to prevent punishing defendants before they receive a conviction; to allow defendants to meaningfully engage in their own defense without the distraction of wearing shackles; to prevent defendants from suffering excessive pain from heavy, uncomfortable shackles; and to maintain the dignity and decorum of the courtroom.[26]

### *B. American Case Law Background*

The English common law rule on shackling defendants in the courtroom has had lasting significance. Indeed, American courts have largely adopted Blackstone's legal principles.[27] The first reported case in the United States on physically restraining defendants was *People v. Harrington*[28] in 1871.[29] In *Harrington*, the California Supreme Court embraced the English common law rule and restricted the ability of the court to shackle criminal defendants during trial proceedings.[30]

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22. 4 BLACKSTONE, *supra* note 20, at 317.

23. *Id.*

24. *Id.*

25. *Sanchez-Gomez*, 859 F.3d at 663.

26. Tara J. Mondelli, Note, Deck v. Missouri*: Assessing the Shackling of Defendants During the Penalty Phase of Trials*, 15 WIDENER L.J. 785, 786 (2006) (citing David E. Westman, Note, *Handling the Problem Criminal Defendant in the Courtroom: The Use of Physical Restraints and Expulsion in the Modern Era*, 2 SAN DIEGO JUST. J. 507, 509–10 (1994)).

27. *See* Deck v. Missouri, 544 U.S. 622, 629 (2005) (adopting the limitations on shackling promulgated by Blackstone by declaring that the Constitution "prohibit[s] physical restraints visible to the jury absent a trial court determination . . . that [restraints] are justified by a state interest specific to a particular trial," and extending the rule against visible restraints to the sentencing phase of a trial); 4 BLACKSTONE, *supra* note 20, at 317.

28. 42 Cal. 165 (1871).

29. *See Deck*, 544 U.S. at 643 (Thomas, J., dissenting) (stating that *Harrington* was the first case in the United States to enforce the English common law rule against shackling defendants (citing State v. Smith, 8 P. 343 (Or. 1883))).

30. *Harrington*, 42 Cal. at 168–69 ("[T]o require a prisoner during the progress of his trial before the Court and jury to appear and remain with chains and shackles upon his limbs, without evident necessity for such restraint . . . is a direct violation of the common law rule . . . .").

*Harrington* emphasized the prejudicial aspect of restraints and held that the use of restraints is prohibited when "such physical bonds and restraints . . . materially impair and prejudicially affect [the defendant's] statutory privilege of becoming a competent witness and testifying in his own behalf."[31] Other states addressed the issue shortly after *Harrington* but disagreed over the proper level of discretion to accord the court in making restraint determinations.[32] Despite the minor divergences, however, the states shared a "general preference that defendants be brought to trial without shackles."[33]

The Supreme Court eventually weighed in on the issue in three important cases: (1) *Illinois v. Allen*,[34] (2) *Estelle v. Williams*,[35] and (3) *Holbrook v. Flynn*.[36] Although the discussions on defendant restraints were dicta in all three cases, they nevertheless provide an important glimpse into the Supreme Court's approach toward the constitutionality of shackling. Furthermore, the Court relied heavily on *Allen*, *Estelle*, and *Holbrook* in deciding *Deck v. Missouri*.[37]

### 1. *Illinois v. Allen*

In 1970, the Supreme Court decided *Illinois v. Allen*, which affirmed the general prohibition against the use of restraints during trial. The Court's decision was notable for its emphasis on the injurious effects of shackling.[38] The Court acknowledged, however, that such a

31. *Id.* at 168.

32. Justice Thomas's *Deck* dissent provides a thorough overview of the divergence among the states in regard to the deference given to judges for restraint decisions. *Deck*, 544 U.S. at 643–45 (Thomas, J., dissenting). He states that in the earliest cases on the issue, in the late 1800s, New Mexico, Alabama, and Mississippi gave courts wide latitude to determine if a defendant needed to be restrained. *Id.* at 643–44; *see, e.g.*, Faire v. State, 58 Ala. 74, 80–81 (1877); Lee v. State, 51 Miss. 566, 574 (1875); Territory v. Kelly, 2 N.M. 292, 304–06 (1882). "California, Missouri, Washington, and Oregon adopted more restrictive approaches," however, and imposed rules that limited the ability to shackle criminal defendants, while Texas adopted an "intermediate" approach. *Deck*, 544 U.S. at 644–45; *see, e.g.*, *Harrington*, 42 Cal. at 168–69; State v. Kring, 64 Mo. 591, 593 (1877); *Smith*, 8 P. at 343; Rainey v. State, 20 Tex. Ct. App. 455, 472 (1886); State v. Williams, 50 P. 580, 581–82 (Wash. 1897).

33. *Deck*, 544 U.S. at 645 (Thomas, J., dissenting).

34. 397 U.S. 337 (1970).

35. 425 U.S. 501 (1976).

36. 475 U.S. 560 (1986); *see Deck*, 544 U.S. at 649 (Thomas, J., dissenting) (declaring that the decisions in *Allen*, *Estelle*, and *Holbrook* shaped modern American case law on shackling).

37. *Deck*, 544 U.S. at 650.

38. *Allen*, 397 U.S. at 344:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of

prohibition is not absolute. In *Allen*, the defendant threatened others in the courtroom,[39] ripped documents, and exhibited increasingly aggressive behavior.[40] In these circumstances, the Court indicated that the judge had the right to take action to control the defendant.[41] The Court listed three methods trial judges could employ to handle disorderly or violent defendants, one of which involved restraining the defendant.[42] In fact, the Court stated that "in some situations . . . binding and gagging might possibly be the fairest and most reasonable way to handle" an uncontrollable defendant.[43]

Nevertheless, the Court in *Allen* expressed significant concerns about the negative effects of shackling. The Court cautioned that "no person should be tried while shackled and gagged except as a last resort."[44] Furthermore, the Court stressed that the use of physical restraints causes prejudice to the defendant because it significantly affects the jury's feelings, impairs the defendant's ability to participate in the trial, and offends the "dignity and decorum" of the courtroom.[45] In short, *Allen* stated that judges may use restraints in the courtroom if the situation warrants such a response but warned in dicta that these measures should not be used flippantly.[46]

### 2. *Estelle v. Williams*

Six years after *Allen*, the Supreme Court again confronted the shackling issue in *Estelle v. Williams*.[47] In *Estelle*, the defendant was forced to remain in prison clothing during his trial, and after the conclusion of his trial he argued that appearing before a jury in prison attire was inherently unfair.[48] The Court noted that unlike the use of physical restraints, which serves the purpose of controlling a disruptive

being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.

39. *Id.* at 340 (explaining that the defendant threatened that the judge would be a "corpse" by the time the defendant went to lunch).

40. *Id.*

41. *Id.* at 343–44.

42. *Id.* ("We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.").

43. *Id.* at 344.

44. *Id.*

45. *Id.*

46. *Id.*

47. 425 U.S. 501 (1976).

48. *Id.* at 502–03.

defendant and maintaining order in the courtroom,[49] forcing a defendant to remain in prison clothing during trial does not further an essential state interest.[50] Noting the prejudicial effect of prison garb, the Court stated that the Fourteenth Amendment prohibits the state from compelling a defendant to wear prison attire during a jury trial.[51] The Court, however, held that the defendant's failure to object to his attire at trial negated the presence of compulsion, which was necessary to establish a constitutional violation.[52] Because the defendant did not object, the Court held that the State did not violate the defendant's constitutional right to wear alternative clothing.[53]

In dissent, Justice William J. Brennan Jr. critiqued the majority for "imput[ing] the effect of waiver" to the failure of the defendant to object to the prison attire.[54] He argued that the defendant in *Estelle* had not "knowingly, voluntarily, and intelligently consented to be tried in" the prison garb.[55] Furthermore, he stressed that criminal defendants are entitled to a presumption of innocence, and when defendants wear prison clothing during a trial, they are "rob[bed]" of that presumption.[56] Justice Brennan additionally argued that requiring a defendant to wear prison clothing "surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt."[57] He wrote that due process rights do not tolerate even a minimal risk that the defendant's prison outfit could influence a juror and erode the defendant's right to a presumption of innocence.[58]

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49. *See Allen*, 397 U.S. at 343 (stating that trial judges need discretion to take action, including shackling and gagging a defendant, to maintain the "dignity, order, and decorum" of the courtroom).

50. *Estelle*, 425 U.S. at 505 ("[C]ompelling an accused to wear jail clothing furthers no essential state policy.").

51. *Id.* at 504–05, 512.

52. *Id.* at 512–13 (declaring that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," but holding that here, because the defendant had not objected, there was no constitutional violation).

53. *Id.*

54. *Id.* at 515–16 (Brennan, J., dissenting) (stating that "respondent's trial in identifiable prison garb constituted a denial of due process of law" and "present[ed] the possibility of an unjustified verdict of guilt").

55. *Id.* at 516.

56. *Id.* at 518.

57. *Id.*

58. *Id.*; *see* Brandon Dickerson, Note, *Bidding Farewell to the Ball and Chain: The United States Supreme Court Unconvincingly Prohibits Shackling in the Penalty Phase in* Deck v. Missouri, 39 CREIGHTON L. REV. 741, 764–65 (2006) (summarizing Justice Brennan's opinion).

### 3. *Holbrook v. Flynn*

In 1986, a decade after *Estelle v. Williams*, the Supreme Court decided *Holbrook v. Flynn*.[59] In *Holbrook*, four uniformed state troopers sat in the front row of the spectator section of the courtroom during the guilt phase of the defendant's jury trial.[60] The courtroom's normal security force did not include troopers,[61] but the court used them for supplemental security specifically for the defendant's trial.[62] The court used additional security measures because the defendant "had been denied bail after an individualized determination" that the State could not otherwise ensure his presence at trial.[63] The defendant claimed that the presence of the uniformed guards would likely influence the jury by suggesting that the defendant was of bad character. The Supreme Court disagreed, however, holding that the "conspicuous" presence of additional uniformed officers at the trial was not inherently prejudicial and thus did not deprive the defendant of his constitutional right to a fair and unbiased trial.[64]

The Court arrived at its conclusion by comparing the prejudicial effects of the uniformed state troopers' presence at trial with the prejudicial effects of physical restraints and prison clothing.[65] The Court stated that shackles and prison attire are clear indications that the defendant needs to be controlled and separated from the public, which may result in improper juror bias against the defendant.[66] Conversely, however, the Court noted that jurors would not necessarily interpret the guards as a sign that the defendant is dangerous.[67] Instead, there are a "wider range of inferences that a juror might reasonably draw from the officers' presence."[68] For example, a juror may interpret the presence of officers as protection against disturbances from outside the courtroom, or simply as a routine element of a criminal proceeding.[69] The presence of officers should, therefore, be

59. 475 U.S. 560 (1986).

60. *Id.* at 562.

61. *Id.*

62. *Id.*

63. *Id.* at 571.

64. *See id.* at 569 (" '[R]eason, principle, and common human experience' counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial." (quoting Estelle v. Williams, 425 U.S. 501, 504 (1976))).

65. *Id.* at 569.

66. *Id.*

67. *Id.*

68. *See id.* at 569, 571 ("Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings.").

69. *Id.*

distinguished from shackling and prison clothing.[70] The Court accordingly held that the defendant's constitutional due process rights had not been violated.[71]

### *C.* Deck v. Missouri

After *Holbrook*, the Supreme Court did not encounter another shackling case until *Deck v. Missouri* in 2005. In *Deck*, the Court held that the Due Process Clause prohibits the use of visible shackles during *the sentencing phase* of a criminal proceeding, except when an essential state interest, specific to a particular defendant, requires the use of restraints.[72] *Deck* therefore expanded the generally accepted rule prohibiting indiscriminate shackling during the guilt phase of trial to the sentencing phase of trial, thereby increasing the recognized rights of criminal defendants.[73]

#### 1. Factual Background of *Deck v. Missouri*

On July 8, 1996, Carman Deck drove to rural Jefferson County, Missouri, to rob James and Zelma Long, an elderly couple that he had been surveilling.[74] He knew the Longs' grandson and had previously accompanied the grandson to break into a safe that the Longs kept in their home.[75] When Deck arrived at the Longs' house with a plan to rob the safe, he knocked on their door under the guise of needing directions to a nearby town.[76] Mrs. Long invited Deck inside their home, and soon after, Deck pulled a pistol from his waistband and demanded that the Longs enter their bedroom and open the safe.[77] Deck then instructed the Longs to lie face down on the bed, where he debated whether or not to kill them for approximately ten minutes before ultimately killing both James and Zelma with the pistol.[78] Deck then fled the scene and

70. *Id.* at 569. *But see Estelle*, 425 U.S. at 508 (noting that although prison garb may prejudice the jury against a defendant, producing a defendant in prison attire can also be used as a "defense tactic" to elicit sympathy from the jurors).

71. *See Holbrook*, 475 U.S. at 569–72.

72. Deck v. Missouri, 544 U.S. 622, 632 (2005).

73. *Id.*

74. State v. Deck (*Deck I*), 994 S.W.2d 527, 531 (Mo. 1999).

75. *Id.*

76. *Id.*

77. *Id.* at 531–32.

78. *Id.*

returned home before he was arrested that evening.[79] Later, he fully confessed to the robbery and murders of James and Zelda Long.[80]

### 2. Procedural Background of *Deck v. Missouri*

The Circuit Court of Jefferson County convicted Deck of first-degree murder and related offenses before sentencing him to death.[81] State authorities required that Deck wear leg braces throughout his trial, but the braces were not visible to the jury.[82] On direct appeal, the Supreme Court of Missouri upheld the conviction.[83]

Deck then argued that he was denied effective assistance of counsel and petitioned the Supreme Court of Missouri for post-conviction relief.[84] The court agreed that he was denied effective assistance of counsel and remanded for a new penalty phase.[85] At retrial of the penalty phase, Deck was forced to "appear before the jury wearing leg irons and handcuffed to a belly chain."[86] The restraints at the retrial, unlike the leg braces worn during the original trial, were clearly visible to the jurors.[87] Deck's counsel objected to the physical restraints before *voir dire* commenced, but the court overruled the objection.[88] Deck's counsel renewed the objection during *voir dire*, and again the court overruled the objection.[89] Then, after *voir dire*, Deck's counsel *again* objected to the shackling.[90] Deck's counsel moved to strike the jury panel, arguing that the jury would perceive Deck as violent after witnessing him in leg irons and a belly chain.[91] Again, the court overruled the defense's objection, and the penalty phase of the trial

79. *Id.* at 532. A police officer, tipped off by an informant, searched Deck's car and found a pistol hidden under the front seat. *Id.*

80. *Id.*

81. *Id.*

82. Deck v. Missouri, 544 U.S. 622, 624 (2005).

83. *Deck I*, 994 S.W.2d at 531.

84. Deck v. State (*Deck II*), 68 S.W.3d 418, 422 (Mo. 2002).

85. The Supreme Court of Missouri found that Deck had been denied effective assistance of counsel because Deck's counsel had failed to recommend proper mitigation instructions to the court. *Id.* at 431–32.

86. State v. Deck (*Deck III*), 136 S.W.3d 481, 485 (Mo. 2004).

87. *Compare id.* (noting that at the retrial, Deck "appear[ed] before the jury" wearing restraints), *with Deck*, 544 U.S. at 624 (noting that Deck's leg braces were not visible to the jury at the original trial).

88. *Deck*, 544 U.S. at 625.

89. *Id.*

90. *Id.*

91. *Id.*

commenced with Deck outfitted in restraints.[92] Deck was, once again, sentenced to death.[93]

After the resentencing, Deck appealed, citing nine points of error.[94] Among other points, Deck argued that the trial court abused its discretion when it forced Deck to appear shackled before the jury during the retrial of the penalty phase.[95] Deck claimed the restraints violated his constitutional right to "due process, equal protection, confrontation of the evidence, a fair and reliable sentencing and freedom from cruel and unusual punishment."[96]

The Supreme Court of Missouri held that the trial court acted within its discretion in deciding to shackle Deck throughout the trial, including the retrial of the penalty phase.[97] In rejecting Deck's argument, the Supreme Court of Missouri declared that (1) there was no record of the jury's awareness of the shackles, (2) Deck was not prevented from participating in the proceeding due to the shackles, and (3) Deck posed a flight risk because he was a repeat offender who had "killed his two victims to avoid being returned to custody."[98] Additionally, the court held that Deck failed to demonstrate that the shackles prejudiced the outcome of his proceeding.[99] Thus, the death sentence was affirmed.[100]

Deck submitted a writ of certiorari to the Supreme Court to consider whether the Circuit Court of Jefferson County violated Deck's constitutional rights by forcing him to appear in shackles during the retrial of his sentencing hearing.[101] Specifically, the issue was whether the visible shackles violated the Fifth and Fourteenth Amendment guarantees that no person shall be deprived "of life, liberty, or property, without due process of law."[102] The Supreme Court reversed the

92. *Id.*

93. *Deck III*, 136 S.W.3d 481, 484 (Mo. 2004).

94. *Id.* Deck, in addition to arguing against the use of physical restraints, argued against the admission of a double hearsay statement; the submission of certain sentencing guidelines to the jury; the trial court's failure to provide shortened jury recess instructions; the court's admission of certain victim-impact evidence and family testimony; a specific portion of the State's closing argument to the jury; the exclusion of venire members from the jury; the court's imposition of the death penalty; and the court's exercise of jurisdiction over the case. *Id.* at 484–90.

95. *Id.* at 485.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* ("Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.").

100. *Id.* at 490.

101. Petition for Writ of Certiorari at 1, Deck v. Missouri, 544 U.S. 622 (2005) (No. 04-5293), 2004 WL 2338088, at *1.

102. *Deck*, 544 U.S. at 624, 627; *see* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

Supreme Court of Missouri and extended the constitutional prohibition against visible shackles during the guilt phase of trial to the penalty phase of trial.[103] Specifically, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendments prohibits the use of visible shackles during the penalty phase unless an essential state interest that is "specific to the defendant on trial" justifies use of the shackles.[104]

In deciding to extend protection to the penalty phase of the trial, the Supreme Court relied on the English common law background on shackling and addressed the deep common law roots against unwarranted shackling.[105] The Court also relied on three fundamental legal principles in deciding to expand the prohibition against unwarranted shackles to the sentencing phase of trial: (1) the presumption of innocence until proven guilty; (2) the right to secure a meaningful defense; and (3) maintaining the "dignity and decorum" of the courtroom and the judicial process.[106] These principles are largely generated from the Court's analysis of dicta from its prior decisions about shackling, specifically *Allen*,[107] *Estelle*,[108] and *Holbrook*.[109]

## II. ANALYSIS

In *Deck*, the Supreme Court expanded the ban on unwarranted shackling *specifically* to the penalty phase of trial; it did not extend such protections any further.[110] The *Deck* Court did include brief dictum[111] noting that the common law prohibition against shackles did not apply to nonjury proceedings.[112] But, because *Deck* focused on shackles at the

103. *Deck*, 544 U.S. at 623–24.

104. *Id.* at 624 ("We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986))).

105. *See supra* notes 20–21 and accompanying text.

106. *Deck*, 544 U.S. at 630–32 (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970) for the third fundamental legal principle).

107. 397 U.S. 337.

108. Estelle v. Williams, 425 U.S. 501 (1976).

109. 475 U.S. 560.

110. The Supreme Court narrowly tailored the holding in *Deck* by explicitly limiting the established rule to the penalty phase of trial. *Deck*, 544 U.S. at 633 ("[W]e must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.").

111. *See Deck*, 544 U.S. at 626; United States v. Sanchez-Gomez, 859 F.3d 649, 663 (9th Cir. 2017) ("[A] statement on pretrial proceedings is undoubtedly dictum in a case about shackling at capital sentencing."), *vacated as moot*, 138 S. Ct. 1532 (2018).

112. *See Deck*, 544 U.S. at 626 ("Blackstone and other English authorities recognized that the rule did not apply at 'the time of arraignment,' or like proceedings before the judge." (quoting 4

sentencing phase of trial and did not directly address shackles in nonjury proceedings, the language does not preclude the Court from expanding the rule prohibiting unwarranted shackling further. The question regarding the constitutionality of shackling nonjury defendants remains open.

This Part will analyze the Supreme Court's opinion in *Deck* and apply its reasoning to nonjury proceedings. Specifically, it will consider how the *Deck* Court relied on English common law background and legal principles extrapolated from U.S. case law and apply such reasoning to nonjury proceedings. It will then discuss the circuit split concerning whether the holding in *Deck* should be extended to nonjury proceedings.

### *A. English Common Law Shackling Background Applied to Nonjury Proceedings*

The Supreme Court in *Deck* interpreted Blackstone's *Commentaries* as making a distinction between shackling during a trial and shackling during an arraignment.[113] The Court, using Blackstone as support, noted that the rule against the unwarranted use of shackles applies only when the defendant appears at a jury trial; defendants have no similar protection against restraints during an arraignment hearing or other proceedings solely in front of the judge.[114] In addition, the Court emphasized that the English common law rule was primarily designed to prevent defendants from experiencing the distracting pain caused by heavy iron restraints commonly used in the eighteenth century.[115]

Blackstone's *Commentaries on the Laws of England*, however, does not support but in fact rebuts the Supreme Court's interpretation of early English common law practices in *Deck*. The Court in *Deck* reads Blackstone's *Commentaries* as making the distinction between shackles at the time of trial and at the time of arraignment because Blackstone, after stating the general prohibition against shackles, noted: "But yet in Layer's case . . . a difference was taken between the time of

BLACKSTONE, *supra* note 20, at 317)); *see also Sanchez-Gomez*, 859 F.3d at 663 (noting that "[t]he Supreme Court in *Deck* found that the common law drew a distinction between trial and pretrial proceedings" in regard to the prohibition against unwarranted shackles).

113. *Deck*, 544 U.S. at 626.

114. *Id.*

115. *See id.* at 630 (stating that "[j]udicial hostility to shackling . . . primarily . . . reflected concern for the suffering" the restraints caused, citing as authority English case law prohibiting the use of restraints); *id.* at 638–39 (Thomas J., dissenting) (stating that the English common law rule "ensured that a defendant was not so distracted by physical pain during his trial that he could not defend himself").

arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment."[116] Blackstone introduces Layer's Case, however, not as establishing a firm rule that existed in early English common law, but rather as an exception to the general rule that defendants ought not be shackled in the courtroom.[117] In addition, the rule against unwarranted shackles appears in the chapter of *Commentaries* labeled "Of Arraignment, and it's Incidents."[118] This heavily undermines the Court's statement in *Deck* that "Blackstone and other English authorities recognized that the rule [against unwarranted shackling] did not apply at 'the time of arraignment,' " since Blackstone chose to place that rule *in* the chapter on arraignment.[119]

Further, the assertion in *Deck* that the prohibition against unwarranted shackles in early English common law was primarily implemented to avoid causing defendants pain may have also been misguided. Indeed, preventing defendants from enduring unnecessary pain served as one reason to limit the use of restraints in early English common law.[120] But the rule was also enforced to achieve several other ends: to guarantee defendants a fair trial; to prevent punishment before conviction; to allow defendants to meaningfully participate in their own defense; to remove the distraction of shackles; and to maintain the dignity of the court.[121]

### *B. The Legal Principles Supporting* Deck *Applied to Nonjury Proceedings*

Although the Supreme Court in *Deck* ruled on the constitutionality of indiscriminate shackling at the sentencing phase in particular, the Court's reasoning applies with equal force to nonjury proceedings. In *Deck*, the Court held that the right of a defendant to be free from indiscriminate shackling protects three fundamental legal principles: (1) the presumption that the defendant is innocent until proven guilty, (2) the right to secure a meaningful defense, and (3) the dignity and decorum of the courtroom and the judicial process.[122] The Court held in *Deck* that an indiscriminate shackling policy breached

116. *See id.* at 626 (majority opinion); 4 BLACKSTONE, *supra* note 20, at 317.

117. The use of "[b]ut yet" supports the interpretation that Layer's Case was the exception, not the rule, in early English common law cases. 4 BLACKSTONE, *supra* note 20, at 317.

118. *Id.*

119. *See Deck*, 544 U.S. at 626; 4 BLACKSTONE, *supra* note 20, at 317.

120. *See* Mondelli, *supra* note 26, at 786.

121. *Id.*

122. 544 U.S. at 630–32 (reasoning that the unwarranted shackling of defendants in the sentencing phase of a trial contravenes the three listed legal principles).

these legal principles such that there must be a showing of an essential "state interest" in using shackles in a jury proceeding to avoid a due process violation.[123] These legal principles apply with equal force when the court indiscriminately shackles defendants during a nonjury proceeding, so the *Deck* rule should be expanded to require individualized need before a defendant can be shackled in a nonjury proceeding.

### 1. Presumption of Innocence

The maxim that a criminal defendant is "innocent until proven guilty" is one of the most sacred principles of the American criminal justice system.[124] But a disparity exists between the ideal of that legal principle and the "lived experiences of many suspected criminals in the United States."[125] Defendants in pretrial nonjury proceedings are routinely required to wear full restraints, consisting of handcuffs, a belly chain, and leg irons—and the use of such restraints conveys the message that defendants are dangerous, threatening, and aggressive. In other words, the restraints betray the ideal that defendants are presumed "innocent."

In *Deck*, the Supreme Court considered the constitutionality of shackling a defendant during the sentencing phase of the trial when a jury was present.[126] Accordingly, in analyzing the case, the Court focused on the prejudicial effect of the shackles on the jurors' minds.[127] The Court stated that visible restraints weaken the presumption that the defendant is innocent until proven guilty because the shackles express to the jurors that "the justice system itself sees a 'need to

123. *Id.* at 629 ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.").

124. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."); Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

125. Case Comment, *Ninth Circuit Deems Unconstitutional Routine Shackling in Pretrial Proceedings:* United States v. Gomez, 131 HARV. L. REV. 1163, 1163 (2018); *see also* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (stating that the legal principle of "presumption of innocence" does not apply to the treatment of pretrial defendants).

126. 544 U.S. at 625 (describing that during the retrial of the sentencing hearing, the defendant was required to wear full restraints in view of the jury).

127. *Id.* at 634–35.

separate a defendant from the community at large.' "[128] The Court further noted that the appearance of a defendant in shackles "almost inevitably affects adversely the jury's perception of the character of the defendant," which compromises a jury's "ability to weigh accurately all relevant considerations."[129]

The practice of unwarranted shackling, however, offends the presumption of innocence regardless of whether a jury is present. The concerns regarding bias that the Court described in *Deck* apply to nonjury proceedings as well, as judges are not wholly immune from exhibiting bias in the courtroom. Indeed, viewing defendants in shackles may cause judges to exhibit prejudice, even if unintentionally.[130] Studies have shown that judges tend to overestimate their own resistance to prejudice,[131] which as a result makes them more susceptible to act based on implicit biases.[132] One such form of implicit bias—"representativeness bias"—refers to the tendency to assume that a person's character aligns with his appearance.[133] Judges therefore may be more likely to infer that defendants in restraints are dangerous and a threat to the public, which could in turn cause judges to issue biased decisions.

There has not yet been sufficient investigation into whether and to what extent judges specifically are biased by the use of restraints in

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128. *Id.* at 630 (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986)); *see also* Mondelli, *supra* note 26, at 794 ("The Court [in *Deck*] focused on the need for accurate decisions to be made by the jury, arguing the decision making process is compromised if a jury sees a defendant in shackles.").

129. *Deck*, 544 U.S. at 633; *see also* Sheldon R. Shapiro, Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R. 3d Art. 17, § (2)(a) (1979).

130. *See* People v. Best, 979 N.E.2d 1187, 1190 (N.Y. 2012) (Lippman, C.J., dissenting) (arguing that the assumption that judges are immune from prejudice "is to degrade a defendant's right to be presumed innocent. Visible shackles give the impression to any trier of fact that a person is violent, a miscreant, and cannot be trusted."); *cf.* MICHAEL D. CICCHINI, TRIED AND CONVICTED: HOW POLICE, PROSECUTORS, AND JUDGES DESTROY OUR CONSTITUTIONAL RIGHTS 96–102 (2012) (describing a case in which a judge showed clear indications of bias); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 49 (1994) ("[M]any judges are slow to accept the possibility of bias in their own decision-making, viewing the existence of partiality as improbable instead of as an inherent aspect of the human perceptual process.").

131. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) (describing a study in which ninety percent of judges considered themselves to be in the top half of all judges in resisting bias).

132. *See* Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 269 (2015) (citing Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORG. BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007)).

133. Brief for National Ass'n of Federal Defenders as Amicus Curiae Supporting Respondents, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) (No. 17-312), 2018 WL 1156630, at *13 (citing Marouf, *supra* note 132, at 268–69).

the courtroom.[134] However, a 2015 study by Magistrate Judge Andrew Wistrich and law professors Jeffrey J. Rachlinski and Chris Guthrie indicated that judges are swayed by their emotions when evaluating cases.[135] The study required judges to respond to hypothetical cases,[136] and the results revealed that the judges were influenced by legally insignificant circumstantial factors and the personal characteristics of the fictional litigants.[137] The study acknowledged that "judges may be less susceptible than jurors" to bias but stated that judges "are not immune" from exhibiting prejudice in the courtroom.[138] Additional studies on judicial bias also confirm that judges' emotions may affect the outcome of proceedings.[139]

Wistrich's 2015 study examined how judges react to circumstantial differences in cases rather than how judges react to the physical appearance of the defendants they confront.[140] Thus, Wistrich's study does not directly relate to shackling.[141] Nevertheless, the study does reveal that "judges are comparable to jurors in that both are susceptible to influence from external factors."[142] Neither judges nor jurors, research shows, can act wholly dispassionately in the courtroom. And if judges are susceptible to prejudice in the courtroom, "judges may also be influenced by the same external factors that affect jurors—including shackles."[143]

While many—if not most—judges are fair and impartial, some judges likely are not capable of disregarding their biases completely when viewing defendants in shackles. For that reason, the *Deck* rule should not hinge on the presence of a jury. Although the Court in *Deck* focused its discussion on juror bias specifically, the Court's rationale in prohibiting the unwarranted use of shackles hinged on the Court's

134. Neusha Etemad, Note, *To Shackle or Not to Shackle? The Effect of Shackling on Judicial Decision-Making*, 28 S. CAL. REV. L. & SOC. JUST. 349, 374 (2019).

135. Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 900 (2015).

136. *Id.* at 874, 913–22. The hypothetical cases used in the study involved (1) illegal immigration, (2) medical marijuana, (3) a civil rights claim, (4) credit card debt, (5) an employment case involving a narcotics search, and (6) environmental pollution. *See id.* at 913–22.

137. *Id.* at 898–900 (indicating that judges were less likely to interpret the law favorably and more likely to rule against defendants considered to be "unsympathetic"); *see also* Etemad, Note, *supra* note 134, at 364–67 (discussing the results of the Wistrich study).

138. Wistrich et al., *supra* note 135, at 900.

139. *See* Holger Spamann & Lars Klöhn, *Justice is Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 256 (2016) (detailing a study in which judges were shown to disfavor unsympathetic litigants in a statutory interpretation issue).

140. Wistrich et al., *supra* note 135, at 900.

141. *Id.*

142. Etemad, Note, *supra* note 134, at 368 (citing Wistrich et al., *supra* note 135, at 900).

143. *Id.* at 377.

concern over bias in the courtroom *generally*.[144] The Court expressed concern over the prejudicial effect of shackles, and eliminating such prejudice requires eliminating unwarranted restraints in jury and nonjury proceedings. "[I]n a system in which every person is presumed innocent until proved guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk" that bias, from a jury or from a judge, could unduly influence the result of a courtroom proceeding.[145]

Moreover, while the presumption of innocence furthers the impartiality of the factfinding process at trial,[146] it also operates as a "normative principle, directing state authorities as to the proper way of treating a person who has not yet been convicted."[147] This function of the presumption of innocence arises from its ties to the Due Process Clause,[148] which has often been interpreted as safeguarding equality and fairness.[149] Thus, interpreted in light of due process, the presumption of innocence functions to preserve individual liberties and minimize the stigma placed on criminal defendants—purposes that are not dependent on the presence of a jury.[150]

Shackling criminal defendants degrades the presumption of innocence by subjecting criminal defendants to unwarranted oppression, public shame, and embarrassment.[151] These "harms and indignities having nothing to do with the presence of a jury . . . formed the substance of the common-law rule," while the concern for juror

144. Deck v. Missouri, 544 U.S. 622, 630 (2005) (noting a shift in debate from the pain of shackles to other general legal principles).

145. Estelle v. Williams, 425 U.S. 501, 518–19 (1976) (Brennan, J., dissenting) (agreeing with the Court's holding that forcing the defendant to wear prison attire violated the defendant's due process rights, but dissenting from the holding that the defendant's failure to object to the prison attire negates the violation).

146. *See* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 404 (1995) (stating that "[t]he presumption of innocence should operate as both an evidentiary restriction and a constraint on partiality, deriving its meaning and authority from the right to a fair trial, as well as the right to trial by an impartial jury").

147. Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 272 (2002).

148. *See Estelle*, 425 U.S. at 517 ("One of the essential due process safeguards that attends the accused at his trial is the benefit of the presumption of innocence . . . .").

149. *See* Brief for National Ass'n of Federal Defenders, *supra* note 133, at *23 n.21; Laufer, *supra* note 146, at 353.

150. *See* Laufer, *supra* note 146, at 353.

151. *See* Anita Nabha, *Shuffling to Justice: Why Children Should Not Be Shackled in Court*, 73 BROOK. L. REV. 1549, 1578 (2008) (stating that shackles "cause embarrassment and shame" and exacerbate negative feelings in juveniles accused of a crime). Although Nabha's article focuses on the effect of shackles on juvenile delinquents, the principles apply to defendants of all ages. In fact, Nabha states that the use of shackles as a punitive measure "has no place in the adult criminal system prior to the determination of guilt" as well. *Id.* at 1574 n.155.

prejudice emerged as a "relatively recent American addition."[152] Indiscriminate shackling erodes the presumption of innocence even when the proceeding contains no jury, so the reasoning in *Deck* cannot be limited to the phases of a trial where jurors are present.

In fact, the presumption of innocence may be more offended by shackling in a nonjury, pretrial proceeding than in the penalty phase of a trial. In *Deck*, the Court ruled that requiring the defendant to wear shackles in a postconviction sentencing hearing eroded the presumption of innocence.[153] Thus, if the Court believes that trial courts cannot routinely force defendants to wear shackles after a court has *convicted* them of a crime, then the prohibition against the use of unwarranted shackles should extend to pretrial proceedings as well, where a defendant comes to the court as an "innocent."[154]

### 2. Right to Secure a Meaningful Defense

The Supreme Court in *Deck* held that indiscriminate shackling in the penalty phase of trial also impairs the defendant's right to counsel and to secure a meaningful defense.[155] The Court stressed that shackling diminishes the defendant's right to secure a meaningful defense in the guilt phase of trial because the restraints "interfere with the accused's 'ability to communicate' with his lawyer"[156] and restricts the defendant's ability to engage in his own defense.[157] The Court then reasoned that such concerns were equally important in the sentencing phase of a criminal trial.[158] But the constitutional right to secure a meaningful defense through effective assistance of counsel does not

152. Brief for National Ass'n of Federal Defenders, *supra* note 133, at *12 (citing Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 355 (1971)).

153. *See* Deck v. Missouri, 544 U.S. 622, 633 (2005) (holding that courts cannot routinely force defendants to wear shackles during the penalty phase of a trial).

154. *See* David R. Wallis, Note, *Visibly Shackled: The Supreme Court's Failure to Distinguish Between Convicted and Accused at Sentencing for Capital Crimes*, 71 MO. L. REV. 447, 467 (2006) ("[T]he jury, by finding the defendant guilty, has essentially already recommended that the defendant be removed from the community at large. It is complete fiction to suggest that a defendant who has just been found guilty by a jury somehow retains any degree of innocence.").

155. 544 U.S. at 631; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); Powell v. Alabama, 287 U.S. 45, 69 (1932) ("[The defendant] requires the guiding hand of counsel at *every* step in the proceedings against him." (emphasis added)).

156. *Deck*, 544 U.S. at 631 (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970)).

157. *Id.* ("[Shackles] can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf.").

158. *Id.* at 632.

depend on the presence of a jury.[159] Indeed, in *Lafler v. Cooper*, the Supreme Court held that the "constitutional guarantee" of effective assistance of counsel applies to pretrial proceedings and noted that during such proceedings, "defendants cannot be presumed to make critical decisions without counsel's advice."[160] Put differently, defendants have the right to seek guidance from counsel and to participate unhindered in their own defense, regardless of whether a jury is present.[161] Shackling a defendant hinders his ability to communicate effectively with counsel and participate in his defense, and therefore the Supreme Court should extend the rule established in *Deck* to nonjury proceedings.

### 3. Dignity and Decorum of the Courtroom

Lastly, the Supreme Court in *Deck* declared that indiscriminate shackling of defendants during the sentencing phase of trial violates the dignity and decorum of the courtroom. The Court in *Deck* noted that "judges must seek to maintain a judicial process that is a dignified process," which includes the "respectful treatment" of defendants.[162] The Court then concluded that the indiscriminate use of shackles on defendants "in the presence of juries" would undercut such objectives.[163] However, in reaching this conclusion, the Court relied on its prior decision in *Illinois v. Allen*, where the Court labeled shackling "an affront" to the "dignity and decorum of judicial proceedings."[164] The Court in *Allen*, unlike the Court in *Deck*, did not base its decision on the presence of a jury.[165] *Deck* therefore adopted a narrower version of the proposition in *Allen*, although *Deck* does not question or overrule the

159. Lafler v. Cooper, 566 U.S. 156, 165 (2012); *see* Spain v. Rushen, 883 F.2d 712, 719, 728 (9th Cir. 1989) (holding that the defendant's due process rights were violated because he was forced to wear twenty-five pounds of leg irons, chains, and shackles to pretrial and trial proceedings, which caused him pain and humiliation and "prevented him from meaningfully participating in aiding his counsel" in his defense).

160. *Lafler*, 566 U.S. at 165.

161. *Id.*

162. 544 U.S. at 631–32.

163. *Id.*

164. 397 U.S. 337, 344 (1970); *see Deck*, 544 U.S. at 631 (quoting *Allen*, 397 U.S. at 344, in support of the proposition that the "routine use of shackles in the presence of juries would undermine" the dignity and decorum of the courtroom).

165. *Allen*, 397 U.S. at 343 ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of *all* court proceedings in our country." (emphasis added)); *see also* People v. Fierro, 821 P.2d 1302, 1320–23 (Cal. 1991). In *Fierro*, the court reasoned that a rule against the unwarranted use of shackles "maintain[s] the composure and dignity of the individual accused" and "preserve[s] respect for the judicial system as a whole." *Id.* at 1322. The court in *Fierro* then further emphasized those are "paramount values to be preserved irrespective of whether a jury is present during the proceeding." *Id.*

broader reasoning.[166] Instead, the Court in *Deck* likely limited the proposition to fit the facts at issue in the case, which involved a defendant who was shackled during the sentencing phase of his trial in the presence of jurors.[167]

Forcing defendants to wear heavy shackles absent a compelling interest undermines the dignity and decorum of the judicial process regardless of who witnesses the practice. "The fact that the proceeding is non-jury does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles."[168] Defendants must be treated with respect throughout all phases of a trial to maintain the dignity and decorum of the courtroom, whether in a pretrial proceeding, the guilt phase, or a sentencing hearing, and whether or not a jury is present.

### *C. Circuit Split Over* Deck *as Applied to Nonjury Proceedings*

As noted before, *Deck v. Missouri* held that the Constitution prohibits shackling a defendant in the sentencing phase of a trial absent an individualized determination that restraints are justified by an essential state interest. This ruling expanded prior prohibitions on shackles that applied only in the guilt phase of trial.[169] The Supreme Court in *Deck*, however, did not dismiss the possibility of expanding the prohibition to *all* proceedings, and thus whether the Constitution prohibits the unwarranted use of shackles in proceedings without a jury remains unanswered. In fact, a circuit split has arisen over whether *Deck* should be extended to nonjury proceedings.[170] The U.S. Courts of Appeals for the Second and Eleventh Circuits have determined that

166. *Allen*, 397 U.S. at 344.

167. 544 U.S. at 624–25.

168. United States v. Zuber, 118 F.3d 101, 106 (2d Cir. 1997) (Cardamone, J., concurring). Judge Cardamone joined the majority in *Zuber* because he agreed that the error in the particular case at issue was harmless. *Id.* at 105. He wrote separately, however, to assert his "strong conviction that before a defendant is subjected to the humiliating prospect of pleading his case in chains, a trial judge must make an inquiry regarding the necessity for the restraints—even if no jury is present." *Id.*

169. *Deck*, 544 U.S. at 624 (quoting Holbrook v. Flynn, 475 U.S. 560, 568–69 (1986)); *see* U.S. CONST. amend. V (establishing the right of due process under the law for those accused of a crime).

170. The Courts of Appeals involved in the circuit split at issue here are the Second Circuit, Ninth Circuit, and Eleventh Circuit. These are the only Courts of Appeals to directly rule on shackling defendants during nonjury proceedings and therefore this Note focuses specifically on these three circuits. The Seventh Circuit confronted the constitutionality of shackling defendants in nonjury proceedings in *United States v. Henderson*, but dismissed the case on jurisdictional grounds, and therefore failed to decide the issue. 915 F.3d 1127, 1133 (2019). In dissent, however, Judge David F. Hamilton advocated for adoption of the Ninth Circuit's approach. *Id.* at 1141 (Hamilton, J., dissenting) (arguing that the Seventh Circuit should "require individualized decision-making before a district court may impose full restraints in the courtroom on pretrial defendants who are still presumed innocent.").

courts may restrain defendants in nonjury proceedings without showing an individualized need.[171] These circuits reason that, in nonjury proceedings, defendants do not require protection from unwarranted shackling. Conversely, in *United States v. Sanchez-Gomez*, the U.S. Court of Appeals for the Ninth Circuit held that the Constitution prohibits the shackling of a defendant absent an individual inquiry into the necessity of restraints, regardless of whether jurors are present.[172]

1. The Second and Eleventh Circuit Approach

The Second and Eleventh Circuits have held that courts may, consistent with the Due Process Clause, use shackles in nonjury proceedings without a showing of individualized need.[173] In *United States v. Zuber*, for instance, the Second Circuit held that in nonjury proceedings, courts are not required to independently evaluate the need for restraints before shackling defendants.[174] In *Zuber*, the U.S. Marshals Service decided as a matter of course to force Zuber to attend his sentencing hearing in arm and leg restraints.[175] Zuber's counsel unsuccessfully protested the restraints, and Zuber was sentenced to 151 months in prison.[176] Zuber appealed this sentence, arguing that the district court erred in "deferring to the recommendation of the Marshals Service that the defendant be restrained."[177] The Second Circuit disagreed, however, holding that the district court was not in error.[178] The Second Circuit stressed that the limitations on the use of shackles in the courtroom operate primarily to prevent juror bias, and because "judges, unlike juries, are not prejudiced by impermissible factors," safeguards on the use of shackles are unnecessary when the jury is not present.[179]

171. *See* United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015) (holding that the Constitution does not prohibit the shackling of a defendant during a sentencing hearing before a judge); *Zuber*, 118 F.3d at 104 ("We decline to extend the rule . . . requiring an independent, judicial evaluation of the need to restrain a party in court [ ] to the context of non-jury sentencing proceedings.").

172. 859 F.3d 649, 666 (9th Cir. 2017), *vacated as moot*, 138 S. Ct. 1532 (2018).

173. *See LaFond*, 783 F.3d at 1225; *Zuber*, 118 F.3d at 104.

174. 118 F.3d at 102 ("We hold that the rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury sentencing hearing.").

175. *Id.* at 103 ("The decision to have [the defendant] appear in restraints was made in the normal course by the U.S. Marshals Service.").

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 103–04 (stating that "juror bias certainly constitutes the paramount concern" in cases dealing with the permissibility of shackling criminal defendants).

The Second Circuit decided *Zuber* in 1997, eight years before *Deck v. Missouri*, leaving the court with no authoritative Supreme Court precedent to guide its analysis.[180] However, the Second Circuit decided *Zuber* in the aftermath of the Supreme Court's decision in *Illinois v. Allen*,[181] and *Deck* ultimately adopted the rationale outlined in *Allen*.[182] The Court's comments on shackling in *Allen* are dicta and, as a result, were not binding on the Second Circuit in *Zuber*.[183] But *Allen* demonstrates both the Supreme Court's concerns with unwarranted shackling and its skepticism over the practice's constitutionality.[184] The Second Circuit thus should have afforded the case more deference. Instead, the Second Circuit addressed—but then quickly disregarded—the fact that unwarranted shackling of criminal defendants undermines the right to a meaningful defense and the dignity and decorum of the courtroom.[185] This creates detrimental, humiliating, and injurious effects on defendants whether or not a jury is present.[186]

The Eleventh Circuit reached a similar result in *United States v. LaFond*, where it held that the rule against shackling a defendant without justification does not apply to nonjury sentencing hearings.[187] The defendant in *LaFond* argued that the district court abused its discretion when it mandated that he remain shackled throughout his

180. As previously mentioned, there are three fundamental Supreme Court cases prior to *Deck* that consider the practice of shackling criminal defendants. *See* Holbrook v. Flynn, 475 U.S. 560 (1986); Estelle v. Williams, 425 U.S. 501 (1976); Illinois v. Allen, 397 U.S. 337 (1970). *Deck*, however, was the first Supreme Court case to rule on the constitutionality of shackling defendants directly. 544 U.S. 622, 632 (2005). Furthermore, the Second Circuit has not ruled on the constitutionality of indiscriminate shackling in nonjury proceedings since *Zuber* in 1997.

181. 397 U.S. at 344 (explaining that the use of restraints prejudices the jury against the defendant, significantly reduces the defendant's ability to participate meaningfully in his defense, and "affront[s] . . . the . . . dignity and decorum" of the courtroom).

182. *Deck*, 544 U.S. at 630–32 (discussing the importance of dignity in the courtroom and citing *Allen* for the proposition that shackling is an "affront" to this dignity).

183. *Allen*, 397 U.S. at 344.

184. *Deck* confirmed the importance of *Allen*. *See Deck*, 544 U.S. at 630–32; *Allen*, 397 U.S. at 344. *Deck* heavily cites *Allen* to support its holding; it also relies on *Allen*'s explanation of the legal principles violated by indiscriminate shackling. *Deck*, 544 U.S. at 630–32.

185. *Zuber*, 118 F.3d at 103 n.2.

186. *Id*. at 105–06 (Cardamone, J., concurring):

> Physical restraints detract from the dignity and decorum of court proceedings, and on that basis alone are disfavored. Restraints may also substantially interfere with the accused's ability to present his case—by impeding easy communication with counsel, confusing a defendant to a degree sufficient to impair his mental faculties, and causing the prisoner to suffer pain. These concerns are implicated regardless of whether a jury is witness to the physical restraints placed on a defendant.

(citations omitted).

187. 783 F.3d 1216, 1225 (11th Cir. 2015).

sentencing hearing.[188] The defendant argued that, although no jurors were present, the restraints caused him to suffer an "indignity" that "his conduct did not merit" and prevented him from writing during the hearing.[189] The defendant further contended that shackles are "inherently prejudicial" and should not be used on defendants absent necessity.[190] The Eleventh Circuit disagreed, however: because the defendant appeared in shackles before only a judge, and not a jury, he had no protection against indiscriminate shackling.[191]

The Eleventh Circuit's opinion was misguided. Although the Eleventh Circuit decided *LaFond* ten years after the Supreme Court decided *Deck*, the former disregards the legal principles outlined in the latter. The Eleventh Circuit failed to mention the effect that shackling has on a defendant's right to a meaningful defense and the "dignity and decorum" of the courtroom and scarcely mentioned the implications that indiscriminate shackling has on the presumption of innocence.[192] Although the Supreme Court relies heavily on these principles in *Deck*, the Eleventh Circuit in *LaFond*, without explanation, did not analyze the application of those principles to the case; indeed, it did not even mention them.[193] Instead, the Eleventh Circuit incorrectly relied on ancient English common law to conclude that defendants may be shackled indiscriminately during nonjury proceedings.[194]

The Eleventh Circuit should have given greater weight to the Supreme Court's analysis in *Deck* and applied the legal principles outlined there to *LaFond*.[195] In fact, since the defendant in *LaFond* claimed that the heavy restraints prevented him from writing during the hearing and were "inherently prejudicial," the court should have applied *Deck*'s three legal principles and ruled that the shackles in that case were unconstitutional.[196]

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188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* ("Because the rule against shackling pertains only to a jury trial, we hold that it does not apply to a sentencing hearing before a district judge.").

192. *Id.*

193. *Id.*

194. *Id.* (citing 4 BLACKSTONE, *supra* note 20, and a 1722 English court opinion as support for the proposition that unwarranted shackling is permissible during nonjury proceedings); *see also* 4 BLACKSTONE, *supra* note 20, at 317 (providing historic precedent that while a defendant did not stand in chains during trial, he did so during arraignment); Trial of Christopher Layer, 16 How. St. Tr. 94, 100–01 (K.B. 1722) (providing an example of the distinction between shackling at trial and at arraignment).

195. *See* Deck v. Missouri, 544 U.S. 622, 630–32 (2005) (analyzing the detriments of shackling during the punishment phase of a capital trial).

196. *LaFond*, 783 F.3d at 1225.

### 2. The Ninth Circuit Approach

Taking a different approach, the Ninth Circuit held in *United States v. Sanchez-Gomez* that the rule prohibiting the unwarranted shackling of criminal defendants established in *Deck v. Missouri* applies to nonjury proceedings as well.[197] The Ninth Circuit wrote that "[b]efore a presumptively innocent defendant may be shackled, the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom."[198] The court held that the constitutional safeguards against shackling apply to all courtroom proceedings—jury or no jury.[199]

*Sanchez-Gomez* involved a courtroom policy adopted by the U.S. District Court for the Southern District of California that permitted the indiscriminate shackling of "all in-custody defendants" for nonjury proceedings.[200] As part of the district-wide policy, restraints were used uniformly on defendants, regardless of their individual characteristics.[201] As a result, the court used full restraints on, among others, a defendant with a fractured wrist, a defendant with a cane, and a defendant in a wheelchair.[202] In *Sanchez-Gomez*, four defendants had been forced over their objections to wear shackles in the courtroom.[203] Magistrate judges overruled the defendants' objections; these decisions were then appealed to the district court.[204] The defendants also filed an emergency motion to challenge the constitutionality of the court's shackling policy, claiming that the policy violated their Fifth Amendment due process rights.[205] However, the district court disagreed and denied relief for the defendants.[206] The defendants appealed, and the Ninth Circuit consolidated the four cases.[207]

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197. United States v. Sanchez-Gomez, 859 F.3d 649, 660 (9th Cir. 2017), *vacated as moot*, 138 S. Ct. 1532 (2018).

198. *Id.* at 661. As an example, the interest in courtroom security and interest in preventing escape are "compelling government purpose[s]." *Id.*

199. *Id.*

200. *Id.* at 653.

201. The policy in the United States District Court for the Southern District of California called for the use of "full restraints" for "all" defendants in nonjury proceedings, which meant that each defendant had to wear handcuffs tied closely together, a waist chain, and additional shackles chaining the defendant's feet together. *Id.* at 653–54.

202. *Id.* at 654.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

In deciding the case, the Ninth Circuit relied on its decision in *United States v. Howard*, a holding that the court characterized as requiring "adequate justification for a generalized policy authorizing the pretrial use of shackles."[208] The Ninth Circuit in *Howard* upheld a district-wide policy requiring pretrial detainees to wear leg shackles the first time they appeared before a magistrate judge, claiming the policy was sufficiently justified.[209] The court in *Howard* relied on declarations from the Chief Deputy U.S. Marshal for the Central District of California in upholding the policy.[210] The Chief Deputy declared that a generalized shackling policy was necessary to ensure order and safety in the courtroom in light of staffing shortages in the Marshals Service.[211] In addition, he noted that "the greatest risks of escape and violence occur during transportation from detention facilities and in the courtroom," which supports the need for indiscriminate pretrial restraints.[212] In light of *Howard*, the Ninth Circuit remanded *Sanchez-Gomez* for a determination of whether an "adequate justification" existed for the indiscriminate shackling policy at issue in that case.[213] In so doing, the court dodged the question of whether an indiscriminate shackling policy violates the Due Process Clause.

Soon after, however, the circuit voted to rehear the case en banc.[214] The en banc court overruled *Howard* and held that "if the government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant."[215] Courts must then determine if the stated need "outweighs the infringement on a defendant's right" to be free of unwarranted restraints.[216] The Ninth Circuit stated that courts cannot

208. United States v. Sanchez-Gomez, 798 F.3d 1204, 1206 (9th Cir. 2015); *see also* United States v. Howard, 480 F.3d 1005, 1008 (9th Cir. 2007) (upholding the shackling policy because it "was adopted with an adequate justification of its necessity"), *overruled by Sanchez-Gomez*, 859 F.3d at 661 n.10.

209. 480 F.3d at 1008.

210. *Id.* at 1008–09.

211. *Id.*

212. *Id.* at 1009.

213. *Sanchez-Gomez*, 798 F.3d at 1206; *see also Howard*, 480 F.3d at 1008 (establishing the "adequate justification" standard for cases like *Sanchez-Gomez*).

214. United States v. Sanchez-Gomez, 831 F.3d 1263, 1264 (9th Cir. 2016) (mem.).

215. United States v. Sanchez-Gomez, 859 F.3d 649, 666 (9th Cir. 2017), *vacated as moot*, 138 S. Ct. 1532 (2018). The Ninth Circuit interpreted the defendant's appeals as writs of mandamus. It denied the writ, but held that it had jurisdiction to consider the constitutionality of the district-wide shackling policy. *Id.* at 655–57, 666. At the time the Ninth Circuit voted to rehear the case, the four defendants' cases had ended and the district-wide shackling policy had changed. *Id.* at 657–59. The Ninth Circuit explained, however, that the case was not moot because the defendants represented a broader group of similarly situated people who could be similarly injured if the shackling policy was reinstated. *Id.* at 659.

216. *Id.* at 666.

defer such determinations to U.S. Marshals or other security providers.[217] Moreover, the circuit asserted that courts must conduct individualized rulings on each defendant; the decision cannot be "presumptively answered by routine policies."[218] The circuit then emphasized that the Constitution's right to be free from unwarranted restraints applies in all courtroom proceedings, whether or not a jury is present.[219]

In reaching the holding in *Sanchez-Gomez*, the Ninth Circuit emphasized the deep common law roots prohibiting the use of physical restraints and soundly labeled the right to be free from unwarranted shackles a "fundamental right."[220] Additionally, the Ninth Circuit stressed that lower courts addressing claims of unwarranted shackling must consider concerns similar to those outlined by the Supreme Court in *Deck v. Missouri*, including "whether shackles would prejudice the jury, diminish the presumption of innocence, impair the defendant's mental capabilities, interfere with the defendant's ability to communicate with counsel, detract from the dignity and decorum of the courtroom or cause physical pain."[221] The Ninth Circuit recognized that such concerns do not hinge on the presence of a jury, and therefore must be safeguarded in equal force in nonjury proceedings.[222] Courts must strive to protect the constitutional rights of defendants in jury and nonjury proceedings.[223]

The Supreme Court granted certiorari to *United States v. Sanchez-Gomez* in December 2017 and vacated and remanded the case to the Ninth Circuit to dismiss as moot.[224] In deciding to remand the case, however, the Supreme Court did not decide the constitutionality of an indiscriminate shackling policy in a nonjury proceeding, leaving it an open question.[225]

## III. SOLUTION

The Supreme Court should adopt the Ninth Circuit's approach and extend the holding in *Deck v. Missouri* to all courtroom

217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 662, 666.
221. *Id.* at 660.
222. *Id.*
223. *Id.*
224. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018). This Note specifically focuses on the constitutionality of indiscriminate shackling, and thus will not engage in a detailed discussion of the Supreme Court's reasoning in holding the case moot.
225. *Id.*

proceedings.[226] Indiscriminately shackling defendants in nonjury proceedings is inconsistent with the Supreme Court's well-reasoned opinion in *Deck*,[227] and defendants have a constitutional right to be free from the use of unjustified restraints irrespective of the presence of a jury. Thus, in both jury and nonjury proceedings, shackling defendants without a showing that an essential state interest necessitates the use of restraints violates the Due Process Clause.

The principles that the Supreme Court advances in *Deck* apply with equal force to nonjury proceedings. While the Ninth Circuit in *Sanchez-Gomez* recognized this,[228] the Second and Eleventh Circuits gave only cursory treatment to the rights of defendants in nonjury proceedings.[229] Those circuits appear to assume incorrectly that the absence of a jury negates the defendant's right to the presumption of innocence and to secure a meaningful defense, as well as the need to preserve the dignity and decorum of the courtroom. The Ninth Circuit's position, on the other hand, preserves these fundamental legal principles and ensures that the constitutional rights of defendants are protected—jury or no jury.[230]

The Ninth Circuit in *Sanchez-Gomez*, however, does not provide guidance on how courts should conduct the individualized shackling determinations or on the type of restraints that should be used in the event shackles are deemed justified.[231] This Part will thus propose factors for courts to consider in the shackling analysis and offer further recommendations for the implementation of the *Sanchez-Gomez* rule.

The following factors shall be considered by courts in implementing the rule against the unwarranted shackles during nonjury and jury proceedings:

> (1) [T]he seriousness of the present charge against the defendant, (2) the defendant's temperament and character, (3) the defendant's age and physical characteristics, (4) the defendant's past record, (5) any past escapes or attempted escapes by the defendant, (6)

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226. 544 U.S. 622, 624 (2005).

227. *Id.*

228. 859 F.3d at 660–62 (stating that the "Supreme Court identified three constitutional anchors for the right" to be free from unwarranted shackles, and applied those "constitutional anchors" to nonjury proceedings).

229. *See* United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015) ("Because the rule against shackling pertains only to a jury trial, we hold that it does not apply to a sentencing hearing before a district judge."); United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) ("We decline to extend the rule that we set forth in *Davidson*—requiring an independent, judicial evaluation of the need to restrain a party in court—to the context of non-jury sentencing proceedings.").

230. *See Sanchez-Gomez*, 859 F.3d at 661 ("We now clarify the scope of the right [to be free from unjustified restraints] and hold that it applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without.").

231. *Id.* at 666.

> evidence of a present plan of escape by the defendant, (7) any threats by the defendant to harm others or create a disturbance, (8) evidence of self-destructive tendencies on the part of the defendant, (9) the risk of mob violence or of attempted revenge by others, (10) the possibility of rescue attempts by other offenders still at large, (11) the size and mood of the audience, (12) the nature and physical security of the courtroom, and (13) the adequacy and availability of alternative remedies.[232]

These factors, adopted from an Illinois case involving a restraint determination,[233] oblige judges to fully consider security concerns and order restraints when justified.[234] This discredits the argument that expansion of the *Deck* rule threatens safety in the courtroom.[235] Furthermore, the factors require the judge to consider the defendant's age, physical characteristics, and temperament, which mitigates the risk that the court will shackle defendants unnecessarily.[236] The factors are not exhaustive; courts could choose to use the provided factors as a foundation from which to add additional relevant considerations.[237]

In addition, if the court does make an individualized determination that shackles are warranted, the court must not default to ordering full restraints. Rather, the judge should impose the minimum amount of restraints necessary in the particular case to adequately address the security concerns. Examples of less restrictive alternatives to full restraints include partial restraints (e.g., one hand cuffed discreetly to a chair[238]) and the use of police officers or supplementary security personnel in the courtroom.[239]

Critics of the *Sanchez-Gomez* opinion argue that expansion of the *Deck* rule to nonjury proceedings will cause administrative delay

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232. People v. Allen, 856 N.E.2d 349, 353 (Ill. 2006); *see also* Leah Rabinowitz, *Due Process Restrained: The Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Delinquency Proceedings*, 29 B.C. THIRD WORLD L.J. 401, 422 (2009) (suggesting the Illinois factors should be at least considered while attempting to preserve dignity in juvenile proceedings that involve shackling).

233. *Allen*, 856 N.E.2d at 353.

234. *See* Deck v. Missouri, 544 U.S. 622, 628 (2005) ("[T]he right [to be free from shackles] may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."); Kennedy v. Cardwell, 487 F.2d 101, 110–11 (6th Cir. 1973) (stating that factors to be considered by trial courts in making shackling decisions include: (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).

235. *See* Brief of Amici Curiae Senator Jeff Flake et al. at 12, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2017) (No. 17-312), 2017 WL 4350725, at *12 ("The obvious effect of *Sanchez-Gomez*, then, will be to require more officers to maintain an expected level of courtroom security over an ever-increasing number of prisoners with less certain safety for the public.").

236. *Allen*, 856 N.E.2d at 353.

237. *See* Rabinowitz, *supra* note 232, at 422–23 (noting that states like California and Texas utilize separate, though similar, factors when determining the necessity of shackling).

238. *See* Jones v. Meyer, 899 F.2d 883, 885 (9th Cir. 1990).

239. *See* Holbrook v. Flynn, 475 U.S. 560 (1986)).

and hamper the efforts of law enforcement.[240] However, courts already employ a similar shackling analysis in determining whether and how to use restraints on defendants during jury proceedings.[241] Thus, it would not be an undue burden to require them also to make individualized shackling determinations during nonjury proceedings. In *Deck*, the Supreme Court noted that the decision to shackle defendants in the courtroom traditionally requires an individualized, nuanced evaluation of the circumstances that may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial."[242] Put differently, trial courts have abundant experience with making such determinations in jury proceedings, and the approach can easily be adapted for use at nonjury proceedings as well.[243]

## CONCLUSION

The unwarranted use of shackles on defendants is unconstitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments regardless of the presence of a jury. Thus, the Supreme Court should adopt the approach taken in the Ninth Circuit case *United States v. Sanchez-Gomez* and hold that courts may not shackle defendants in any courtroom proceeding absent an individualized determination that an essential state interest necessitates the use of the restraints.[244] Shackling criminal defendants

240. *See* Brief of Amici Curiae Senator Jeff Flake et. al., *supra* note 235, at *10 (arguing that an expansion of the *Deck* rule to nonjury proceedings will force courtroom security officers to spend time on "layer upon layer of administrative functions and not on assessing and avoiding actual security concerns").

241. *See, e.g.*, Deck v. Missouri, 544 U.S. 622, 628–29 (2005) (explaining that one's right to be free from shackles "may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum"); United States v. Haynes, 729 F.3d 178, 190 (2d Cir. 2013) (explaining that in making shackling decisions in jury trials, "judges make an independent determination, on a case-by-case basis, whether the use of shackles is warranted" after taking into account security concerns); United States v. Durham, 287 F.3d 1297, 1304 (11th Cir. 2002) (asserting that in making shackling determinations, "[t]rial judges are to be accorded reasonable discretion to balance the interests involved and to decide which measures are necessary to ensure the security of the courtroom"); Duckett v. Godinez, 67 F.3d 734, 749 (9th Cir. 1995) ("In all the cases in which shackling has been approved, there has also been evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities."); Kennedy v. Cardwell, 487 F.2d 101, 111 (6th Cir. 1973) ("[O]nly upon a *clear showing* of necessity should shackles ever be employed.").

242. *Deck*, 544 U.S. at 629.

243. Furthermore, requiring courts to balance the interests involved and make a determination of the necessity of shackles addresses the counterargument that there are no "procedural steps for how a . . . court may come to a constitutional conclusion that a purportedly dangerous defendant should be shackled." Dickerson, *supra* note 58, at 781.

244. 859 F.3d 649, 666 (9th Cir. 2017), *vacated as moot*, 138 S. Ct. 1532 (2018).

for no reason other than the fact that they are criminal defendants is an affront to the presumption of innocence, the right to a meaningful defense, and the dignity and decorum of the judicial process as a whole. The Supreme Court should extend the holding in *Deck v. Missouri* to apply to all criminal proceedings, jury and nonjury.

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