IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0249

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MAKUEEYAPEE WHITFORD,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Third Judicial District Court,
Powell County, the Ray J. Dayton, Presiding

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STATEMENT OF THE ISSUE

1. Was Appellant Makueeyapee Whitford's right to a fair trial violated and the presumption of innocence undermined when the trial court ordered physical leg restraints while flanked by two armed security officers next to him, and another security officer armed with a 9mm pistol in the courtroom throughout his defense for a misdemeanor prosecution?

STATEMENT OF THE CASE

Appellant Makueeyapee Whitford appeals from the sentence of the Third Judicial District Court, Powell County, following his guilty verdict for two counts of assault with bodily fluids—to wit, saliva. (*See* Judgment (attached as App. A).) Whitford was charged by Information of these two counts of misdemeanor assault with bodily fluids in violation of Mont. Code Ann. § 45-5-214. (*See* D.C. Doc. 1.) According to the affidavit in support of the Information, three officers were escorting Whitford from his cell to the shower. (D.C. Doc. 1 at 1–2.) When they got to the shower, Whitford allegedly, for no rhyme or reason, began threatening Officer Nathaniel Charles and when the officer told him to knock it off, Whitford elected to spit multiple times at the officer's face.

(*See* D.C. Doc. 1 at 1–2.) Some of the spit allegedly "hit" Officer David Proehl's face. (D.C. Doc. 1 at 1–2.)

The case proceeded to trial. At trial, the district court ordered Whitford, over his objection, to appear in court while restrained by physical leg shackles and flanked behind by two armed officers at all times throughout the proceedings against him.

Whitford made a timely appeal.

STATEMENT OF THE FACTS

Since 2013, Whitford has been incarcerated at Montana State Prison (MSP). In his mind's eye he is an American Indian civil rights activist waging a protracted campaign to highlight abuses and mistreatment of inmates at MSP through acts of civil disobedience. (2/3/20 Tr. at 225; 3/10/20 Tr. at 14–15; 22.) Whitford has filed grievance reports a "foot high" detailing abuses of inmates at MSP. (*See* 3/10/20 Tr. at 10.) His long disciplinary record details countless acts of civil disobedience. Although Whitford filed numerous grievances against Officer Charles, he believes MSP finally fired Officer Charles not for how he maliciously mistreated inmates but for threatening another correction officer. (*See* 2/3/20 Tr. at 280.)

Whitford currently occupies the locked housing unit where the inmates are on 23-hour lockdown in a segregated unit. (2/3/20 Tr. at 193, 195.) During Whitford's long tenure at MSP he has seen the way the MSP correctional officers treat—or rather mistreat—inmates. (2/3/20 Tr. at 204.) Whitford feels like 80 to 90 percent of correction officers at MSP are solid individuals who are not out to cause problems for inmates. (2/3/20 Tr. at 227.) But there were a few bad apples like Officer Charles who deliberately provoke, threaten, and mistreat inmates:

> But there is a good percentage of officers here that allow themselves to get out of line and to step out of their qualified immunity and step out of their, out of, out of their qualified immunity of the government because the government protects them.

(2/3/20 Tr. at 228.)

Whitford speaks out about the abuses and injustice perpetrated by MSP correction officers and has filed several hundred grievances. (*See* 2/3/20 Tr. at 204, 224.) "And um, when I see an officer treating us [inmates] that way where they're, where they're, where they're um, going above and beyond or in excess of what they're doing, what they're supposed to be doing I'll speak up about it." (*See* 2/3/20 Tr. at 204.)

One of the tactics Whitford uses in his struggle for human rights at MSP, apart from speaking out, is civil disobedience—and he readily accepts disciplinary consequences for his acts of civil disobedience. (2/3/20 Tr. at 225.)

MSP correction officers have a culture of mistreating inmates. Some correction officers intentionally assault inmates in the blink of an eye away from cameras and take them down—the same inmates assaulted by the correction officers then receive write-ups for some infraction or other. (*See* 2/3/20 Tr. at 215.) For the assaulted inmate it is impossible to prove the assault by MSP guards even took place. (*See* 2/3/20 Tr. at 215 ("And then, and then nobody listens to what you have to say. So, it's like well, you're just inmate, you ain't got no rights. Well we do have rights.").) If an inmate even looks at a correction officer wrong the inmate receives a major write-up. (2/3/20 Tr. at 217.) The number of write-ups racked up from infractions affect whether a prisoner will be housed in the most restrictive 23-hour segregated units or whether they stay at the less restrictive areas of MSP. (*See* 2/3/20 Tr. at 217.) Once an inmate receives five or six major write-ups, they will be moved to the locked housing units—the most restrictive and

segregated area of MSP—and it becomes really difficult to dig themselves out of that hole. (*See* 2/3/20 Tr. at 217–18.)

Whitford had interacted with Officer Charles five or six odd times and Officer Charles always grabbed Whitford "hard." (2/3/20 Tr. at 202, 225.) At their first interaction, Officer Charles grabbed Whitford "hard," and he took issue with the unnecessary roughness. (2/3/20 Tr. at 203.) Whitford walked back into his cell and refused to be escorted out to the shower. Officer Charles gave Whiford a major write-up for "intimidation." (2/3/20 Tr. at 213.) Whitford complained to Sergeant Coughlin about the mistreatment doled out by Officer Charles. (*See* 2/3/20 Tr. at 216.) Officer Charles received no consequence. Whitford received a major write-up for some infraction. (2/3/20 Tr. at 203.) Whitford explained: "[b]ut I'll tell you this, that there comes a point in time where a, enough abuse is enough abuse when a[n] officer regularly abuses inmates over and over and over again when the inmate is handcuffed and vulnerable something is gonna give." (2/3/20 Tr. at 203.) Whitford felt the continuous ongoing abusive treatment by Officer Charles was systematic, cruel, and unusual punishment under the Eighth Amendment of the Constitution of the United States. (2/3/20 Tr.

at 230.) Whitford explained: "[O]nce you build that environment where this, this can happen all the time then this abuse is the kind of abuse that happens."

On the morning of March 10, 2019, three prison guards—two correctional officers and a sergeant—were escorting Whitford from his cell to the shower. (2/3/20 Tr. at 197, 201.) That morning, Officer Charles had grabbed Whitford in the same "hard" manner as he had done five or six times before that. (2/3/20 Tr. at 202.) It felt like Officer Charles was trying with "malicious intent" to hurt Whitford. (2/3/20 Tr. at 202–03 ("There's no reason to grab people like that when you're grabbing them hard unless you're trying to provoke them into doing something or to do something or unless they're provoking something, you know what I mean?").) This was not the first time Officer Charles had grabbed Whitford this hard. (2/3/20 Tr. at 203.) Whitford explained that on the day in question he was not throwing a "tantrum." (*See* 2/3/20 Tr. at 204.) He was only speaking against being treated in an "indignified manner" by Officer Charles who was trying to maliciously take advantage of his power and abuse that power to cause somebody else harm—to wit Whitford. (*See* 2/3/20 Tr. at 204.) Each

time Whitford interacted with Officer Charles the mistreatment kept getting worse and worse and worse. (2/3/20 Tr. at 204.)

Whitford had turned around, looked Officer Charles in the eyes and said: "[H]ey man don't-- every time you do that, you're, you're trying to grab me all hard. There's no need for that, you know what I mean?" (2/3/20 Tr. at 204.) At the shower, Officer Charles got in Whitford's face and verbally threatened and goaded Whitford—yet another show of excessive force. (2/3/20 Tr. at 219.) Whitford spit at Officer Charles. (2/3/20 Tr. at 219.) To the guards like Officer Charles, it seemed like a game to provoke the inmates. (2/3/20 Tr. at 227.) Whitford explained he felt he could not protect himself against Officer Charles's antics. This grabbing was not an isolated incident: "This was a series of incidents where this individual continue to grab, grab me on, on this." (2/3/20 Tr. at 220.) Every single interaction Whitford had with Officer Charles, he grabbed Whitford too hard and Whitford always complained for the hard gripping to stop. (2/3/20 Tr. at 220.) That morning, Whitford pleaded: "[H]ey, look you, you know, you don't really have to grab me that hard man." (2/3/20 Tr. at 220.) Officer Charles was dismissive and continued unperturbed: "[I]t's always the

same thing with you Whitford." (2/3/20 Tr. at 220.) Other correction officers would gently hold on to Whitford's clothing or the back of his arm. (2/3/20 Tr. at 232.) Whitford acknowledged the control grip used by correction officers was not comfortable. However, Officer Charles's grip was different, it felt like Officer Charles was trying to inflict pain on Whitford. (*See* 2/3/20 Tr. at 220.) Whitford felt that Officer Charles was "going over and beyond"—squeezing him to get a reaction, like when "You pinch a baby and the baby's gonna cry." (2/3/20 Tr. at 221.) Whitford's uncontroverted testimony was that he "absolutely" did not spit at nor intended to spit at Officer Proehl, who carried himself in a respectful manner and was also a "real respectful person." (2/3/20 Tr. at 221.) Whitford remembered he did not spit on Officer Proehl's face because Officer Charles was the one in Whitford's face. (2/3/20 Tr. at 221 ("When they told me that I spit on [Officer Proehl] I was like, man I didn't spit in his face because uh, Charles was right in my face.").) Whitford later spoke to Officer Proehl and asked him whether some spit made contact with his face: "And he said, yeah, he was sure. I said, well, I said, well if I did, I apologize. . . . . I didn't-- I wasn't trying to, trying to do that to you." (2/3/20 Tr. at 221.)

The State's theory of the case was that Whitford spit at Officer Charles without any provocation or being threatened by any of the three officers who were escorting him from his cell to the shower for his morning shower. (*See* 2/3/20 Tr. at 183, 185.) Without provocation or threats from anyone, Whitford unexplainedly started spitting at Officer Charles. (*See* 2/3/20 Tr. at 183, 185.) Even though Whitford may have not intended it, some spit landed on Officer Proehl's face. (*See* 2/3/20 Tr. at 183.) His criminal intent towards Officer Charles transferred towards Officer Proehl because saliva directed at Officer Charles came in contact with Officer Proehl's face.

Whitford's theory of defense was that his spiting at Officer Charles was justifiable use of force because Officer Charles always threatened him and used unnecessary force against him the five or six previous times they interacted with each other.

On February 3, 2020, just before trial, the trial court held a meeting in chambers to discuss the State's security concerns. (2/3/20 Tr. at 5–6.) Whitford was not in chambers but defense counsel was. (2/3/20 Tr. at 8.) The trial court noted that Whitford was scheduled to come for trial but there was a "confrontation" with security officers at

Whitford's cell and the guards had pepper-sprayed him. (2/3/20 Tr. at13.) The trial court indicated it would not hold a hearing on the issue of placing restraints on Whitford: "I'm not going to call it a hearing, it's just a meeting so I can obtain information uh, about security concerns." (2/3/20 Tr. at 5, 8.) The trial court said it received word from the prosecution that Whiford was a security threat—a danger to himself and others. (2/3/20 Tr. at 5.) The trial court indicated it would continue with the trial with whatever restraints necessary to facilitate the trial, but at the same time be safe. (2/3/20 Tr. at 5.) The trial court noted that the prosecution had requested Whitford be restrained with a spithood and handcuffs but the trial court was disinclined to employ such restraints on the grounds that a jury seeing Whitford restrained would conclude him guilty even before he was tried. (2/3/20 Tr. at 5.) The trial court indicated that its normal practice was to restrain the defendant with leg irons concealed under the table skirts so that the defendant can't run, or even if they ran, they could not get very far away without security officers having time to get a hold of them. (2/3/20 Tr. at 6.) The trial court noted that a defendant chained with leg irons behind the table skirt can sit up, or sit down, stand up, same as

everybody else so he doesn't look different than anybody else. (2/3/20 Tr. at 6.) The trial court continued:

> Uh, but where the inmate, the Defendant, will try to be so disruptive you can't get the trial done. Uh, uh and the law does provide for it. I don't think it's ever happened in Montana uh, but it does provide for-- you can have a guy chained, strapped to a restraint chair with a muzzle on. I don't know if you can put a cue ball in their mouth uh, but you can gag them uh, and proceed with the trial. Uh, we don't want to go there. Uh, concerns?

(2/3/20 Tr. at 7.)

Officer Channey, a correctional officer, expressed concern that Whitford would not have a belly chain on. (2/3/20 Tr. at 7.) The trial court asked whether Whitford had done something recently that was beyond what an average inmate would do. (2/3/20 Tr. at 20.) Officer Channey responded: "He likes to charge at officers. Uh, he just did it about less than five days ago uh, where we had to put him fully in restraint chair, spit hood. Uh, so far this morning he hasn't been problematic, but..." (2/3/20 Tr. at 7.) The prosecutor elicited that Whitford "frequently" attacks correctional staff members with quick and in-your-face "attack" types. (2/3/20 Tr. at 8–9.) Officer Channey informed the trial court that within three months Whitford destroyed a visiting cell. (2/3/20 Tr. at 9.) The trial court further inquired how

many officers were in the courtroom and what had they armed themselves with:

> **THE COURT**: Well, how many officers do you have?
> **CORRECTIONAL OFFICER**: I've got two and one armed officer.
> **THE COURT**: One armed?
> **CORRECTIONAL OFFICER**: One armed and two of us that are, that can...
> **THE COURT**: Armed with what?
> **CORRECTIONAL OFFICER**: Uh, a 9 millimeter. Uh, each one of my officers has a taser with OC10 vapor.
> **THE COURT**: Remember you're in a Courtroom. You're not in a prison.
> **CORRECTIONAL OFFICER**: Right, uh, uh yes sir. No, we just wanted, we want to make it, you know, easy going as possible ourselves.
> **THE COURT**: So, you think there's a risk that he could be a problem?
> **CORRECTIONAL OFFICER**: He could be yes.

(2/3/20 Tr. at 9–10.)

The trial court said: "I don't know if [Whitford] is somehow stimulated uh, to cause his acting out before or, you know, whether he's just a mean a guy, whether it's a, you know, psych type guy, I don't know? Uh, but I'm not a security professional." (2/3/20 Tr. at 9–10.)

The trial court asked the State whether the belly chains were necessary, and the State insisted it preferred Whitford in belly chains:

> **THE COURT**: Uh, do you need him belly chained?
> **CORRECTIONAL OFFICER**: Uh, we prefer to have him belly chained even up to...
> **THE COURT**: Is that a yes?
> **CORRECTIONAL OFFICER**: Yes, sir.
> **THE COURT**: Alright.
> **CORRECTIONAL OFFICER**: Even up to the chain of command that would like to see him belly chained back up.

(2/3/20 Tr. at 10.)

The defense counsel objected to restraining Whitford with belly chains on the grounds that if the jury were to see him with all those physical restraints it would presume him guilty even before his trial for the present offenses. (2/3/20 Tr. at 10–11.) The defense counsel argued that Whitford had not done anything that morning that could be considered a security issue. (2/3/20 Tr. at 11.)

The trial court ordered two officers—armed with tasers— to be stationed right behind Whitford within arm's reach of him during trial. (2/3/20 Tr. at 12–13.) And it indicated that if Whitford acted up there would be a recess and when trial resumed Whitford would be restrained in handcuffs, belly chains, and leg shackles. (*See* 2/3/20 Tr. at 12–13.) The defense counsel objected to positioning two police officers behind Whitford throughout the trial on the grounds that such flanking positioning resulted in the same prejudice as the other visibly physical

restraints. (*See* 2/3/20 Tr. at 12–13.) The trial court recalled there was "confrontation" between Whitford and correction officers during which the officers pepper-sprayed him. (2/3/20 Tr. at 13.) The trial court reasoned it was "standard operating procedure" to position officers within virtual arm's reach with everybody from the prison. (2/3/20 Tr. at 13.) As such, it ordered two officers to be stationed within arm's reach of Whitford at all times including when he took the stand. (2/3/20 Tr. at 14.)

The trial court indicated Whitford would be restrained with belly chains and handcuffs behind his back:

> Well, he's going to have the belly chain and the handcuffs. You know, he's-- we've-- I've decided that, okay. You've made your objection. Uh, we don't have prejudice either, but uh, this has been established to my satisfaction that this is uh, an extraordinary individual and an extraordinary situation uh, at least not ordinary. Uh, uh and uh, you know, uh I don't want an officer hurt. I don't want you hurt. I don't want him lunging for the bench. I don't want him scaring the jury. Uh, and he's acted up enough to where with an audience who knows what he's going to do? Uh, uh I personally observed him coming in. He has an agitated expression on his face. Um so, no, I'm not going to uh, uh, uh I'm not going to ignore security professional's advice to me.

(2/3/20 Tr. at 14–15.)

Whitford, through counsel, objected and explained that his prosecution for assault with bodily fluids would be compromised if the jury saw him in handcuffs as they would presume him to be a dangerous person who needed to be restrained. (*See* 2/3/20 Tr. at 20.) The trial court explained to Whitford that it was standard operating procedure to have a prisoner in handcuffs, leg restraints, and a belly chain. (*See* 2/3/20 Tr. at 20.)

> **THE COURT**: you know, the whole thing. Uh, we just-- that's just standard operating procedure. But when we have a jury want uh-- and, and, and we're careful about it, but they know, like you say, they know you're at the prison uh...
> **MR. WHITFORD**: Yeah, I promise you on my uh, children and on my, my family and on my way of life, my religion, you know, I'm not gonna, I'm not gonna uh, act (INAUDIBLE-JUDGE BEGAN SPEAKING AT SAME TIME)...
> **THE COURT**: You, you'd have to keep the leg irons on. You would have to keep the leg irons on.
> **MR. WHITFORD**: Yeah.
> **THE COURT**: Uh, but...
> **MR. WHITFORD**: That's understandable.
> **THE COURT**: as far as the cuffs and the belly chain, you know, I'm still thinking about that. Um, Pre-Trial uh, it's, it's kind of, you know, how many jurors should we call? Well, too late, we've got them out here.

(2/3/20 Tr. at 20–22.)

Throughout trial, Whitford had leg shackles and there were several officers stationed within arm's reach of him. (2/3/20 Tr. at 20–22.)

Trial

At trial, Officer Charles, a correctional officer with MSP, testified he was working first shift at the locked housing units. (*See* 2/3/20 Tr. at 112-113.) Officer Charles and three other officers came to escort Whitford from his cell to the showers. (*See* 2/3/20 Tr. at 121.) The officers had Whiford in handcuffs behind his back. (*See* 2/3/20 Tr. at 121.) Officer Charles acknowledged he gripped Whitford with a firm grip to maintain control of him. (*See* 2/3/20 Tr. at 120.) Whitford took exception with the firmness of the grip, commented that Officer Charles should ease up as he was "holding on too tight." (*See* 2/3/20 Tr. at 120, 122.) Officer Charles thought Whitford tried to pull away, and so he pulled Whitford saying: "if you try to pull away from me my grasp is going to have to get tighter." (2/3/20 Tr. at 120, 122.) Officer Charles explained that as soon as an inmate got "squirmish" his grip tightened to maintain control to prevent the inmate from slipping out of the grip. (2/3/20 Tr. at 122.) At the shower, Whitford entered the shower and as

Officer Charles was locking the shower door with a padlock, Whitford allegedly spat at Officer Charles without provocation because none of the other officers had threatened him or otherwise done anything to him. (2/3/20 Tr. at 126.) On cross-examination, Officer Charles acknowledged it was possible Whitford perceived their verbal exchange and previous five of six interactions with him as threatening or provoking. (*See* 2/3/20 Tr. at 130.)

Sergeant Brent Coughlin testified that as he was assisting other officers to move Whitford from his cell to the shower he saw Whitford spit on Officer Charles two or three times. (2/3/20 Tr. at 147–8.) Sergeant Coughlin said he could not see what caused Whitford to start spitting and other officers did not retaliate or threaten to come through the bars and beat Whitford. (2/3/20 Tr. at 147–8.)

Officer Proehl testified that he did not see Whitford trying to pull away from Officer Charles, but he heard Whitford complain that Officer Charles was holding on to him too tightly. *(See* 2/3/20 Tr. at 159.) Officer Proehl testified the officers escorted Whitford to the shower and then after they got him into the shower Whitford and Officer Charles were exchanging words, and Whitford started to spit at Officer Charles

as he was locking the gate to the bathroom door. (2/3/20 Tr. at 159–60.) Officer Proehl thought Officer Charles was "pretty passive" and not threatening and was not making any implicit or explicit threats. (2/3/20 Tr. at 159–60.) Officer Proehl testified that as Whitford spit at Officer Charles, some of the spit landed on his face. (2/3/20 Tr. at 159–60.) The video of the incident was played for the jury although it did not seem to capture the alleged spitting incident. (*See* 2/3/20 Tr. at 170–78.)

After the State rested its case, Whitford, through counsel, moved for a directed verdict and also argued that Montana's statutory double jeopardy scheme precluded punishing him for both counts of assault with a bodily fluid because the second count involved the same transaction and was included in the first count. (*See* 2/3/20 Tr. at 185–86.) The State opposed the motion for a directed verdict and countered that Whitford could be charged and punished for both offenses and maintained that Whitford's intent towards Officer Charles when he spat at him transferred to Officer Proehl—the same single event caused two crimes to be committed because two officers came in contact with Whitford's saliva. (See 2/3/20 Tr. at 182–83.) The district court agreed with the State and rejected Whitford's argument to dismiss Count II

saying it did not think the double jeopardy prohibition applied to the facts of the present case. (*See* 2/3/20 Tr. at 186.) The district court denied Whitford's motion for a directed verdict. (*See* 2/3/20 Tr. at 186.)

Whitford testified in his own defense. (2/3/20 Tr. at 191–233.)

After the defense rested its case, Whitford, through counsel, renewed his motion for a directed verdict. (2/3/20 Tr. at 234.) The district court again denied the motion for a directed verdict. (2/3/20 Tr. at 234–235.)

As the State was making a closing, arguing there was no circumstantial evidence to show Whitford genuinely had a reasonable belief that he was under imminent threat of being attacked by Officer Charles, Whitford interrupted the summation: "and he [meaning Officer Charles] got fired for threatening another CO [correction officer]. How about that?" (2/3/20 Tr. at 280.)

Sentencing

Before he was sentenced, the trial court gave Whitford a chance to address the trial court. Whitford maintained he was an American Indian civil rights activist engaged in civil disobedience at MSP: "I'm willing to take full responsibility for my actions. I spit in the guy's face

and I admitted that and I took this on justifiable use of force [defense]." (3/10/20 Tr. at 22.)

The trial court sentenced Whitford to a one-year sentence for each of the two counts of assault with a bodily fluid. (3/10/20 Tr. at 24.) The two counts were to run concurrently with each other but consecutive with his 60-year-with-25-suspended MSP sentence.[1] (3/10/20 Tr. at 24.)

STANDARDS OF REVIEW

In the context of "a district court's decision to restrain a criminal defendant during trial," this Court has stated it will review such decision for abuse of discretion. *State v. Rickett*, 2016 MT 168, ¶ 6, 384 Mont. 114, 375 P.3d 368. "Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, [the] standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law." *Rickett*, ¶ 6 (quotation marks and citation omitted). This Court reviews a district court's decision to restrain a defendant during a jury trial for an abuse of discretion. *State v. Herrick*, 2004 MT 323, ¶ 15, 324 Mont. 76, 101 P.3d 755. Moreover, this Court's "review of the constitutional issue of

[1] *State v. Whitford*, 2018 MT 195N, 393 Mont. 539, 424 P.3d 600.

due process, a matter of law, is plenary." *In re T.W.*, 2005 MT 340, ¶ 11, 330 Mont. 84, 126 P.3d. 491.

SUMMARY OF THE ARGUMENT

A trial court abuses its discretion and violates due process if it physically restrains a defendant during a jury trial without first having (1) been persuaded by compelling circumstances in the record that restraint measures are needed to maintain courtroom security or decorum and (2) pursued less restrictive alternatives to physical restraints. The district court here did neither, imposing leg restraints on Whitford and then flanking him with two armed officers throughout trial by deferring to what the trial court termed "standard operating procedure" preferred by the MSP chain of command without any record of compelling circumstances requiring such measures and without considering less restrictive alternatives. In addition to the physical restraints, the district court allowed two officers to flank Whitford behind him throughout trial and another officer armed with a 9mm pistol to be present throughout trial. The resulting violation of Whitford's due process rights was structural error, mandating remand for a new trial.

ARGUMENT

I. The district court violated Whitford's right to due process when it ordered that he appear at his trial with physical leg restraints and flanked by several armed officers within arm's reach of him for his misdemeanor trial.

The Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee the right to fair trial. Central to that right "is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986), quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

It is not possible "to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant," therefore our legal system relies on primarily "the adversary system and the presumption of innocence" to ensure a defendant's due process. *Holbrook*, 475 U.S. at 567. Implementing the presumption of innocence requires courts to "be alert to factors that

may undermine the fairness of the fact-finding process" and "carefully guard against dilution of the principle that guilt is to be established by probative evidence." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "[T]he probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle*, 425 U.S. at 504.

The United States Supreme Court has explained that certain trial procedures so threaten the fairness of trial that they are presumed on their face to be "inherently prejudicial." *Holbrook*, 475 U.S. at 568–69. Such practices, such as visible physical restraints on a defendant, are constitutionally prohibited unless the trial court makes a reasoned and supported determination that the practice is justified "by an essential state interest" that is "specific to [the] particular trial." *Deck v. Missouri*, 544 U.S. 622, 624, 629 (2005).

A. Leg restraints

"The due process clauses of the United States Constitution and Montana Constitution entitle criminal defendants to appear before a jury free from physical restraints." *State v. Hartsoe*, 2011 MT 188, ¶ 22, 361 Mont. 305, 258 P.3d 428. Although the right is not absolute, restraining a defendant without first satisfying the two-step process

this Court adopted in *Herrick* "constitutes a denial of due process." *Hartsoe*, ¶ 22. Under the *Herrick* test, "a district court abuses its discretion in restraining a defendant during trial unless: (1) the court is persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom, and (2) the court pursues less restrictive alternatives before imposing physical restraints." *Hartsoe*, ¶ 22 (citing *Herrick*, ¶¶ 14–15). The district court did not satisfy either step here.

The district court had before it no record of compelling circumstances requiring placing leg shackles upon Whitford and stationing two armed officers within arm's reach behind him at all times. This Court has made clear that "a district court's decision that compelling circumstances exist 'must be based on the factual information of record'" and that a detention officer's general statement of security concerns is "factually insufficient." *Hartsoe*, ¶ 23 (quoting *State v. Merrill*, 2008 MT 143, ¶ 21, 343 Mont. 130, 183 P.3d 56, *reversed on other grounds by Hartsoe*, ¶ 30). The trial court deferred to the general statement of security concern by MSP prison guards that were factually insufficient to establish a record of compelling

circumstances requiring Whitford to be physically restrained and then flanked throughout trial by two security officers and another officer armed with a 9mm pistol.

The district court failed to pursue less restrictive alternatives before imposing physical leg restraints, and two officers behind Witford at all times. The district court ruled without ever discussing that or any other alternative to Whitford's physical restraint.

The district court violated the second prong of *Herrick* and Whitford's due process rights because the record does not demonstrate that the district court itself considered less restrictive alternatives. *Hartsoe*, ¶¶ 28–29.

The due process right to be tried free of physical restraints "exists unless and until compelling circumstances persuade a trial court that some added measure is necessary to maintain the security of the courtroom; even then, a court must pursue less restrictive alternatives before imposing physical restraints." *Merrill*, ¶ 23.

The district court here satisfied neither the compelling circumstances requirement nor the less restrictive alternatives requirement. The district court's decision to accede to general

"standard operating procedure" along with the recommendations of the correction officers that were accusing Withford of spiting on their fellow officers and physically restrain Whitford for trial was an abuse of discretion in violation of Whitford's right to due process of law. *See Hartsoe*, ¶ 29; *Merrill*, ¶ 26.

1. Structural error

Once either prong of the *Herrick* test has been violated, the Court must determine whether that error was structural. *Hartsoe*, ¶ 31. "A structural error is one 'which so infect[s] and contaminate[s] the framework of the trial as to render it fundamentally unfair, requiring automatic reversal.'" *Hartsoe*, ¶ 31 (quoting *State v. Charlie*, 2010 MT 195, ¶ 40, 357 Mont. 355, 239 P.3d 934). A physical restraint violation is structural error "where the impact of the shackling upon the defendant or the defense is so pervasive that the error is not susceptible to analysis under harmless error standards." *Hartsoe*, ¶ 31. In *Hartsoe*, this Court held that the defendant's being shackled to a chair was not structural error because the defendant "was shackled for only a portion of voir dire before the District Court ordered his release" and then

"remained free from shackles for the remainder of his trial." *Hartsoe*, ¶ 33.

The physical restraint violation here was structural error as Whitford was restrained in violation of due process for the entire trial. Unlike the defendant in *Hartsoe*, Whitford was never released from the physical restraint. From before the start of voir dire, when his attorney objected, through his testimony, trial, and verdict, Whitford was physically restrained. Nor was any benign explanation given to the jury for Whitford's restraint. *Cf. Hartsoe*, ¶ 33 (reasoning that violation was not structural in part because the district court had explained to the jury that the defendant's shackling was due to his refusal to submit to the court's jurisdiction, rather than due to any violent nature or guilt). Whiford may wish to argue that such pervasive, structural error requires "'automatic reversal.'" *Hartsoe*, ¶ 31 (quoting *Charlie*, ¶ 40).

B. Positioning security officers within arm's reach of Whitford at all times.

As the Court explained in *Holbrook*, not every presence of security officers in a courtroom inherently prejudices the fairness of a trial:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a

> juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable.

Holbrook, 475 U.S. at 569.

Depending on the measure's implementation, jurors may simply believe "officers are there to guard against disruptions emanating from outside the courtroom." *Holbrook*, 475 U.S. at 569. Indeed, "[i]f they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status." *Holbrook*, 475 U.S. at 569.

Accordingly, the Court will not presume that any use of a security guard in a courtroom is an inherently prejudicial practice. *Holbrook*, 475 U.S. at 569.

Nevertheless, as the Court further recognized, "it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Holbrook*, 475 U.S. at 569 (quotation marks and citation omitted).

Accordingly, courts must employ "a case-by-case approach," assessing the use of security in a particular case to determine whether, as to that defendant, the arrangement was "so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial." *Holbrook*, 475 U.S. at 569–70; *Kills on Top v. State*, 273 Mont. 32, 57, 901 P.2d 1368, 1384 (1995) ("Where a question of prejudice due to armed officers is raised, the question must be answered on a case-by-case basis."), citing *Holbrook*, 475 U.S. at 569.

Where, as here, "a courtroom arrangement is challenged as inherently prejudicial, . . . the question must not be whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook*, 475 U.S. at 570, quoting *Estelle*, 425 U.S. at 505.

Here, that unacceptable risk was presented.

In *Holbrook*, 475 U.S. at 562, 571, during the trial of six codefendants, four officers sat quietly in the first row of the courtroom's spectator section, separated from the defendants by the bar.

The Court concluded that the jurors would see the officers' presence as merely "normal official concern for the order and safety and order of the proceedings." *Holbrook*, 475 U.S. at 571. Indeed, having only four officers, outnumbered by the six defendants, may have actually dispelled jurors' concerns about the dangerousness of the defendants. *Holbrook*, 475 U.S. at 571.

Here, in stark contrast, not only were three armed guards present in the courtroom, two officers were stationed visibly at arm's length to Whitford throughout trial. This is precisely the scenario contemplated in *Holbrook* in which the manner in which security is implemented could "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Holbrook*, 475 U.S. at 569 (quotation marks and citation omitted). This was not the placement of guards "at some distance from the accused" such that jurors would perceive them "more as elements of an impressive drama." *Holbrook*, 475 U.S. at 569. This was the obvious positioning of two armed guard next to Whitford throughout the entire proceeding—a "reminder[] of the defendant's special status." *Holbrook*, 475 U.S. at 569.

Unlike the security scenarios contemplated in *Holbrook* from which a wide "range of inferences" could be drawn, not necessarily one that a defendant was "particularly dangerous or culpable," the only reasonable interpretation of the positioning of three uniformed security officers by Whitford during the entirety of trial was that Whitford was "dangerous or untrustworthy." *Holbrook*, 475 U.S. at 569. Placing a guard within arm's length reach throughout these proceedings, along with physically shackling his feet, were "unmistakable indication [] of the need to separate the defendant from the community at large." *Holbrook*, 475 U.S. at 569. The court sent a message to the jurors that Whitford was under official suspicion and continued custody, was dangerous, and was liable to escape. This was just the "unacceptable risk" of "impermissible factors coming into play," that concerned the Court in *Holbrook*, 475 U.S. at 570. It prejudiced Whitford's right to the presumption of innocence and a fair trial.

The district court abdicated its duty to ensure that its trial procedures did not threaten Whitford's right to a fair trial and the presumption of innocence. *See Holbrook*, 475 U.S. at 567. Rather than following its mandate to "be alert to factors that may undermine the

fairness of the fact-finding process," *Estelle*, 425 U.S. at 503, the court placed two officers close to Whitford and a third officer armed with a 9mm handgun to guard Whitford throughout the trial merely because it is this particular court's unquestioning practice to do so whenever an in-custody defendant comes to court or the trial court deferred to the prison guards who were accusing Whitford of assault when they insisted those measures were necessary. This defendant was facing two simple assault charges; branding him as liable to escape or dangerous created a particular risk and threatened his presumption of innocence. Whitford was already wearing physical restraints. The courtroom had three security officers present.

The trial court refused to engage in any analysis of the relevant circumstances or alternative measures, refusing any consideration of measures short of such an obvious signal of Whitford's in-custody status and risk of escape.

Any assertion the district court acted within its discretion "founders on the record's failure to indicate that the trial judge saw the matter as one calling for discretion." *Deck*, 544 U.S. at 634 (rejecting assertion that trial court acted within its discretion where court made

no findings or reference to a risk of escape or threat to courtroom security nor alternative measures to visible shackles). The district court here refused to comply with courts' mandate to "do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle and common human experience." *Estelle*, 425 U.S. at 504.

Instead, the court marked Whitford—a man accused of two minor misdemeanors—as a dangerous person, a threat to the jury, and a person likely to try to escape from the courtroom—while refusing to consider alternatives or whether such a measure was necessary. That threat to the presumption of Whitford's innocence and a fair trial was, in this case, inherently prejudicial. *See Holbrook*, 475 U.S. at 570.

Where, as here, a security measure is determined to be "inherently prejudicial" in a particular case, "the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 635. Whitford's right to due process was violated.

Although such a constitutional violation may be harmless, the State cannot meet its heavy burden to establish harmlessness here.

As to the violation of Whitford's federal constitutional rights, "[t]he State must prove 'beyond a reasonable doubt'" that the error "'did not contribute to the verdict obtained.'" *Deck*, 544 U.S. at 635, quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).

Similarly, as to the violation of Whitford's state constitutional rights, the State must "demonstrate that there is no reasonable possibility that" the error prejudiced Whitford. *See Rickett*, ¶ 11.

Where the error involves security measures prejudicing a defendant's right to a fair trial, the State must show the violation was "harmless in light of the interests" the right was designed to protect. *Rickett*, ¶ 11 (citation omitted). Those interests include having guilt decided solely on trial evidence, not "official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Holbrook*, 476 U.S. at 567 (citation omitted). Prejudicial security measures may "undermin[e] the presumption that the defendant is innocent." *See Rickett*, ¶ 11 (analyzing claim regarding physical restraints).

As this Court has explained concerning visible restraints, prejudicial security measures create "a 'high risk of prejudice' because

they indicate that the court believes there is a 'need to separate the defendant from the community at large,' creating an inherent danger that [the] jury may form the impression that the defendant is dangerous or untrustworthy." *Rickett*, ¶ 11 (citation omitted).

In *Rickett*, ¶ 12, this Court reasoned that Rickett's leg brace would signal to the jury "his custody and escapee status"—facts which Rickett admitted. This Court further concluded that Rickett's presumption of innocence was not undermined: "At most, the leg brace might indicate that Rickett was a potential flight risk. Such an indication would not undermine Rickett's presumption of innocence because Rickett admitted to be an escapee." *Rickett*, ¶ 12. Whereas a leg brace is "designed to prevent rapid movement" and "does not suggest a proclivity for violence," *Rickett*, ¶ 12, Whitford was guarded throughout the entire proceedings by two security officers placed close to him at all times. In addition to physical leg restraints that Whitford wore, the jury saw multiple security officers in the courtroom. That the court found it necessary to station two armed officers to guard Whitford at all times throughout the proceedings sent a message to the jury that, beyond

typical security measures to maintain the courtroom, Whitford required special guard. It suggested a proclivity for violence.

Even more importantly, however, it undermined Whitford's presumption of innocence. In stark contrast to Rickett who admitted to escape as part of his defense against multiple other charges, *Rickett*, ¶ 12, Whitford was trying to defend himself against two charges of assault, all the while the court was sending a message to the jury that the court believed Whitford was not only potentially dangerous, but that he also was a "potential flight risk," *Rickett*, ¶ 12.

And here, adding two armed officers in addition to physical leg restraints exacerbated the prejudice: the court reminded the jurors of Whitford's "special status" throughout a trial that hinged on a credibility contest, pitting him—a defendant under "official suspicion" in "continued custody" whom the court itself feared would try to escape or harm others—against a correction officer that goaded him into spiting through the use of excessive and unnecessary roughness. *Compare with Hartsoe*, ¶ 33 (shackling occurred only during portion of voir dire). Nor was any sort of mitigating instruction or benign explanation given to the jury. *Compare with Hartsoe*, ¶ 33.

In *State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 385 P.3d 968, this Court concluded a prosecutor's improper suggestion to the jury that the presumption of innocence no longer applied was "apt to carry much weight against the accused," even undermining the court's instructions on the issue. *Lawrence*, ¶ 20 (citation omitted). Such a concern is amplified here, with the district court itself sending the message that Whitford—a man supposedly presumed innocent of assault charges levelled against him—was so dangerous and such an escape risk that additional security measures to protect the jurors and prevent his escape were required. The State cannot establish the error was harmless in light of the interests the right to a fair trial and against prejudicial security measures were designed to protect.

CONCLUSION

Whitford respectfully requests the Court to reverse and remand for further proceedings.

Respectfully submitted this 8th day of June 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,521, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-08-2021:

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