IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0249

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MAKUEEYAPEE DELENE WHITFORD,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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2. Whether this Court should apply plain error review to Whitford's claim that the court erred when it allowed three officers to sit behind him during his trial.

STATEMENT OF THE CASE

Appellant Makueeyapee Whitford was charged with two counts of assault with bodily fluid, a misdemeanor, after he spit on two correctional officers in the Montana State Prison. (Docs. 1, 4.) Before trial, correctional officers raised concerns that Whitford was a security risk based on his behavior in the prison. (2/3/20 Tr. at 7-11.) The court sought to balance the need for security with its concern that visible physical restraints could prejudice Whitford at the jury trial. (*Id*. at 5-6, 21.) After several discussions about the security measures necessary for trial, the court decided that it would require Whitford to wear leg restraints, which would be hidden from the jury, and it would allow multiple officers to sit in the row behind Whitford. (*Id*. at 30-31.) Contrary to the advice from correctional

officers, the court did not require Whitford to wear a belly chain or handcuffs. (*Id*.) A jury convicted Whitford of both counts of assault with bodily fluid. (Doc. 27.)

STATEMENT OF THE FACTS

I. The assault with bodily fluid

Whitford was convicted of homicide in 2014 and is serving his sentence in the Montana State Prison. *State v. Whitford*, 2018 MT 195N. In March 2019, Whitford was housed in a locked housing unit. (2/3/20 Tr. at 113, 118, 192.) Locked housing units are the highest level of security in the prison. (*Id*. at 113.) Inmates in a locked housing unit are never moved without wearing handcuffs and, depending on the inmate's classification, they are escorted by two or three officers when they are moved anywhere. (*Id*. at 113, 116, 195-96.) If they leave the locked housing unit, they have to wear belly chains and shackles on their legs. (*Id*. at 196.)

On May 10, 2019, Officer Charles, Officer Proehl, and Sergeant Coughlin escorted Whitford to the shower in the locked housing unit. (*Id*. at 120-22, 141-44, 157.) Whitford's hands were handcuffed behind his back, and Officer Charles and Officer Proehl each held one of Whitford's arms. (*Id*. at 120-21, 143-44.)

Whitford did not like how tightly Officer Charles gripped his arm, and he complained about it. (*Id*. at 120, 158.)

Officer Charles later testified that "we maintain a firm grip on them, but, just enough so that we can maintain control um, but not so much that it's in excess." (*Id*. at 120.) When Officer Charles had previously escorted Whitford, Whitford resisted being escorted. (*Id*.) On May 10, 2019, Whitford tried to yank and complained about Officer Charles's grip. (*Id*. at 122-23.) Despite Whitford's complaints, Officer Charles did not believe he was gripping Whitford hard enough to cause Whitford pain. (*Id*. at 122.)

When Whitford went into the shower, Officer Charles told him that he had not caused too many problems in the past, and he should just calm down. (*Id*. at 124-25, 133.) Officer Charles was trying to deescalate the situation, but he later realized that Whitford may have seen his statement as antagonistic. (*Id*. at 128, 133.) As Officer Charles was bending down to lock the door to the shower, Whitford spit on his face. (*Id*. at 124-26.) The spit went into Officer Charles's mouth and one of his eyes and also landed on Officer Proehl's face. (*Id*. at 124, 161.) Although Officer Charles only remembered Whitford spitting one time, the other officers saw Whitford spit at least twice. (*Id*. at 128, 148, 161.)

Whitford was charged with assaulting Officer Charles and Officer Proehl with bodily fluid. (Docs. 1, 4.) At trial, Whitford testified that every time he was

moved in the locked housing unit, a sergeant was called so there would be three people to escort him. (*Id*. at 198-99.) When he was escorted, each of his arms was supposed to be held by an officer. (*Id*. at 198-200.) But Whitford testified that some officers did not follow through with that and would not hold onto his arm. (*Id*. at 198-201.)

Whitford testified that Officer Charles had escorted him several times, and Whitford believed Officer Charles grabbed him too hard and had malicious intent. (*Id*. at 202-03.) Whitford explained that Officer Charles did that "two or three times before I actually confronted him." (*Id*. at 202.) Whitford explained that the next time, Whitford "turned around and looked at him and I said hey 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?" (*Id*. at 205.) Whitford said Officer Charles wrote him up for intimidation after that incident. (*Id*.)

Whitford testified that on the morning of March 10, 2019, another inmate had been arguing with Officer Charles. (*Id*. at 206.) Whitford said, "the rest of the inmates started to uh, target him because of what he was doing to the other inmate." (*Id*.) Whitford said "Officer Charles was riled up that morning. . . . [E]verybody was calling him a fat ass, they were talking, talking crap to him." (*Id*. at 207.) Whitford alleged that Officer Charles was kicking the inmates' cages and antagonizing them. (*Id*.)

Whitford complained that Officer Charles was "in my face talking" when Whitford got in the shower. (*Id*. at 211.) Whitford claimed that he was provoked, and he did not know if Officer Charles was going to open the door and do something, so he reacted "the only way [he] could react," by spitting. (*Id*. at 211-12, 219-20.) Whitford acknowledged that he spit a "[c]ouple times at least." (*Id*. at 223.) Whitford stated that he intended to hit Officer Charles with his saliva, but that it was done in self-defense. (*Id*. at 223.)

The State played a video taken from the locked housing unit that showed the officers escorting Whitford to the shower. (State's Ex. 1 at 7:17:27-7:18:13.) Although the video does not show the shower, it does show Officer Charles pulling away from the shower suddenly, consistent with him being spit on. (*Id*. at 7:18:38-7:19:02.)

II. Security measures at trial

At the first pretrial conference, the State noted that the standard procedure in Powell County was to have defendants from the prison wear leg shackles that are hidden behind the tables. (9/24/19 Tr. at 21.) The court appeared to agree because it told Whitford that he would be secured with leg shackles, and the court warned him that if he acted up, the court would restrain him further. (*Id*. at 22-23.) The court also informed Whitford that he would have correctional officers behind him.

(*Id*. at 23.) Whitford's counsel, who was later replaced, did not raise any objection to the security measures. (*Id*.)

Another pretrial hearing was scheduled for January 21, 2020. (1/21/20 Tr. at 4.) Whitford was represented by new counsel at that hearing. (*Id*.) The State informed the court that Whitford was not present because he had refused to leave his cell and had to be extracted with OC spray, which is similar to pepper spray. (*Id*. at 4-5.) The parties suggested that the pretrial hearing instead be held on the morning of trial. (*Id*. at 5.) The court agreed to hold a pretrial hearing on the morning of the trial, but the court discussed jury selection with counsel at that time. (*Id*. at 5-7.)

Whitford's counsel, apparently unaware of the prior discussion, asked the court its policy on security. (*Id*. at 8.) The court observed that it had just learned that Whitford had to be pepper sprayed to attempt to get him to court, so it needed to have Whitford "at least [wear] leg cuffs." (*Id*.) The court explained that its standard policy was to not have the defendant handcuffed, to have the tables skirted, and to not move the defendant in front of the jury so the jury would not see the leg restraints. (*Id*.) But the court also noted that was a "best-case scenario," and if the defendant acted up, the court could use a restraint chair. (*Id*. at 8.)

Before the trial, the State filed a memorandum regarding additional restraints in which the State set out the authority to use additional restraints if Whitford

displayed aggression during the trial. (Doc. 46.) The State asserted that Whitford "is repetitively noted to be aggressive and is alleged to spit on people while angry. He did not attend the recently scheduled Pre-Trial Conference, which was vacated, as the prison reported his aggressive behaviors forced deployment of pepper-spray and he was not in a fit state to attend." (*Id*. at 2.) The State indicated that Whitford would be restrained with concealed leg shackles per court custom. (*Id*. at 3.) The State explained that it believed that no further restraint was necessary unless Whitford became aggressive, and if he did, a spit hood would become necessary. (*Id*. at 2-3.)

In the morning, before the trial began, the court held a "meeting" in chambers without Whitford present to discuss security concerns. (2/3/20 Tr. at 5-17.) Whitford's counsel agreed with the court that having Whitford present would be "counterproductive." (*Id*. at 12.) The court also indicated that it would not make any decisions at that meeting. (*Id*. at 8.) The court addressed the State's memorandum, and explained again that its normal procedure was to have defendants who are in custody wear leg restraints that are concealed by table skirts and to not move a shackled defendant in front of the jury. (*Id*. at 6.) But the court stated that it would progress to more significant restraints if Whitford acted up. (*Id*. at 6.)

A correctional officer who was present at the meeting explained that officers were concerned about Whitford not wearing a belly chain because "he likes to charge at officers," and he did it "frequent[ly]." (*Id*. at 7-8.) The officer stated that Whitford did that "less than five days ago uh, where we had to put him fully in [a] restraint chair, spit hood. Uh, so far this morning he hasn't been problematic, but …." (*Id*.) The officer also said Whitford had destroyed one of the visiting cells in the last three months and "his reaction is just a quick in your face type mode, attack type." (*Id*. at 8-9.)

The court asked about the presence of the officers in the courtroom during the trial. (*Id*. at 9.) The correctional officer stated that there would be one armed officer and two correctional officers carrying tasers with OC10 vapor. (*Id*.) The officer confirmed that he believed there was a risk that Whitford could be a problem. (*Id*.)

After noting that it was not a security professional, the court asked the correction officer, "do you need him belly chained?" (*Id*. at 10.) The officer responded, "we prefer to have him belly chained. . . . Even up to the chain of command that would like to see him belly chained back up." (*Id*.)

Whitford's counsel then raised his objection, stating "I think having a belly chain [o]n him—I appreciate the safety concerns. I'm not downplaying those in any way. I think starting with a belly chain on him is going to cause a problem. I

can—I mean I'm going to have to object to that." (*Id*. at 10-11.) Whitford's counsel argued that it would be prejudicial to his client for the jury to see him in chains. (*Id*. at 11.) He also noted that Whitford had not done anything that morning to cause an issue. (*Id*.)

The court expressed concern about the risk of injury. (*Id*.) The court then noted that officers could be right behind Whitford. (*Id*. at 12.) While discussing the arrangement with the correctional officer, the court stated, "we want two, we want two guys right behind him. We want them positioned where the officers can be right behind him then if he were to jump up or anything we can suppress it, we can call a recess and then when they, they come back he'll be in chains." (*Id*.)

The court noted that it had been unable to conduct the pretrial hearing when scheduled because Whitford would not come out of his cell and was confrontational with correctional officers. (*Id*. at 13.) The court proceeded to explain that it was "standard operating procedure that we have officers within virtual arms reach with everybody from the prison." (*Id*.) The court continued to explain that Whitford would not be moved in front of the jury in chains, and stated again that officers would be within arms' reach of him at all times. (*Id*. at 14.) Whitford's counsel replied, "Okay Judge." (*Id*.)

After further discussion, the court stated, he's going to have the belly chain and the handcuffs. . . . 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. . . . 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. . . . I personally observed him coming in. He has an agitated expression on his face. Um so, no, I'm not going to . . . ignore security professional's advice to me. (*Id*. at 14-15.)

Whitford's counsel asked whether the court was requiring Whitford to wear belly chains in the courtroom. (*Id*. at 16.) The court replied, "I think so. That's the advice to me from security. These guys are uh, uh experts on security and they're uh, more knowledgeable about this guy than any of us." (*Id*.) Counsel replied, "Okay. . . . Just make sure that my objections noted on that." (*Id*.)

The court then began a formal pretrial hearing with Whitford present. (*Id*. at 17.) The court informed Whitford that it would like to start the trial without requiring him to wear handcuffs. (*Id*. at 18.) The court informed Whitford that it had discussed security in chambers and that correctional officers were concerned because of his previous activity. (*Id*.)

Whitford stated that he would not be a problem. (*Id*.) He asserted that he had been "doing a lot of activism and everything back here . . . . [A] lot of the employees and stuff don't like the fact that I'm, I'm speaking out uh, against the injustice and the abuse that happened behind this, behind these walls." (*Id*.) He

asserted that he had written 500 grievances and that he was assaulted the day the last hearing was scheduled "because I was being provocative with my voice." (*Id*. at 18-19.) But he stated that he would hold himself to a higher standard in court. (*Id*. at 19.) He also stated, "either way it, it really don't matter. I'm in prison and everybody's going to know it so." (*Id*.)

In response, Whitford's counsel expressed concern that having him wear visible handcuffs could be prejudicial. (*Id*. at 20.) The court explained to Whitford that if a jury is not present, it is standard procedure to require inmates to wear belly chains. (*Id*. at 21.) But, the court explained, in front of a jury, they are "careful about it." (*Id*.) The court told Whitfold that he would have to wear leg restraints but that it was still considering handcuffs and belly chains. (*Id*.)

The court moved on to other pretrial matters, but issued its decision on security before the hearing was completed. (*Id*. at 30-31.) The court ordered that Whitford would wear leg restraints that would be concealed behind the skirted tables, and he would not be moved in front of the jury. (*Id*. at 30.) The court ordered that "the prison can have as many security people. Looks like they got three guys. . . . [T]hey'll take whatever action's necessary uh, and we'll go from there. I'm going to start them off with uh, leg irons only, okay? We'll see how it goes." (*Id*. at 31.) Whitford's counsel thanked the judge in response. (*Id*.)

When Whitford testified, he was brought to the stand with the jury absent.

(*Id*. at 190.) The court instructed Whitford to stand up when the jury came in and indicated that it did not think anyone could see the restraints. (*Id*. at 190-91.) Whitford replied, "No, I'm just–I'll be alright." (*Id*. at 191.)

At the conclusion of the trial, the court indicated that three security officers were present during the trial. (*Id*. at 287.)

SUMMARY OF THE ARGUMENT

Whitford did not preserve his claims that the court erred in requiring him to wear concealed leg irons and in allowing three officers to sit behind him during his trial for assaulting two correctional officers with bodily fluid. Neither of these claims should be reviewed under the plain error doctrine because Whitford has not demonstrated that failing to review either claim would result in a manifest miscarriage of justice. The record demonstrates that the court thoroughly discussed security with the parties and considered requiring more significant restraints based on the advice of a correctional officer. But after hearing from Whitford, the court lessened its requirements and allowed him to appear wearing only concealed leg irons, to which his counsel did not object. Under these circumstances, this Court should decline to review Whitford's claims under the plain error doctrine.

If this Court does review the claims, they should be rejected. The court considered the evidence and correctly determined that compelling circumstances required Whitford to wear concealed leg irons to ensure the safety of everyone in the courtroom. Further, the court considered the options and chose the least restrictive option. Requiring Whitford to wear leg irons was appropriate under these circumstances. Finally, even if the court erred in failing to conduct a sufficient analysis, the error was harmless.

Similarly, the court did not err in allowing three officers to sit behind Whitford during the trial because he was an inmate who posed a clear security threat. Further, the jury was aware from testimony that Whitford was an inmate in the locked housing unit who was required to wear handcuffs and be escorted by three officers when he was moved within the locked housing unit. Under these facts, having three officers sit behind Whitford did not prejudice his right to a fair trial.

ARGUMENT

I. Standard of review

This Court reviews a district court's decision to restrain a defendant during a criminal trial for abuse of discretion. *State v. Rickett*, 2016 MT 168, ¶ 6, 384 Mont. 114, 375 P.3d 368. If a discretionary ruling is based on a conclusion of

law, however, this court reviews the legal conclusion to determine whether it is correct. *Id.*

II. Whitford has not met his burden to demonstrate that his claim regarding his concealed leg shackles should be reviewed under the plain error doctrine.

A. Whitford's claim cannot be reviewed unless this court applies plain error.

This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g.*, *State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court's inherent authority and establishes failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the

circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

Whitford did not object to wearing concealed leg restraints. The only objection Whitford made was to wearing belly chains. (2/3/20 Tr. at 10-11, 16.) Whitford's counsel expressed concern that it would be prejudicial for the jury to see him in belly chains. (*Id*. at 11.) In contrast, he did not raise any objection to wearing concealed leg restraints or make any argument that he should not be required to wear them. (1/21/20 Tr. at 8; 2/3/20 Tr. at 5-21, 31.) When the court retracted its earlier ruling that Whitford would have to wear belly chains, and instead decided that he would only need to wear leg restraints, his counsel simply thanked the court. (*Id*. at 31.) Because Whitford did not object to wearing concealed leg restraints, his due process claim cannot be reviewed unless he meets his burden to firmly convince this court that a manifest miscarriage of justice would result if this Court declines to review his claim about his concealed leg irons.

B. Applicable law on shackling

This Court has repeatedly held, beginning in *State v. Herrick*, 2004 MT 323, 324 Mont. 76, 101 P.3d 755, that the Due Process Clauses of the United States and Montana Constitutions entitle a criminal defendant to appear before a jury free of shackles and other physical restraints. *Herrick*, ¶¶ 12-13; *see also Rickett*, ¶ 8,

State *v. Hartsoe*, 2011 MT 188, ¶ 22, 361 Mont. 305, 258 P.3d 428; *State v. Merrill*, 2008 MT 143, ¶ 12, 343 Mont. 130, 183 P.3d 56, *overruled in part by Hartsoe*, ¶ 30. But this Court has noted that the right to appear without shackles is "not absolute," and "a trial judge's decision to shackle a defendant is not unconstitutional per se." *Herrick*, ¶ 12.

In *Herrick*, this Court adopted the two-part test for determining whether a trial court has abused its discretion in restraining a criminal defendant at trial applied by the Ninth Circuit Court of Appeals. *Herrick*, ¶ 15. Relying on *Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994), this Court held that to allow a defendant to be shackled at a jury trial, "the court must be persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom, and must pursue less restrictive alternatives before imposing physical restraints." *Herrick*, ¶ 14 (citing *Morgan*, 24 F.3d at 51), ¶ 15 (adopting the test). This Court noted that "a trial court 'has wide discretion to decide whether a defendant who has a propensity for violence poses a security risk and warrants increased security measures.'" *Herrick* ¶ 15 (quoting *Morgan*, 24 F.3d at 51).

This Court held that the court's decision to make Herrick wear concealed leg irons was permissible because compelling circumstances supported the decision, and the court used the least restrictive alternative. *Herrick*, ¶¶ 19-24. Compelling

circumstances supported the need for the shackles because Herrick had engaged in a pattern of defiant behavior toward correctional officials and authorities and had engaged in threatening conduct. *Herrick*, ¶¶ 21-22. The requirement that the court pursue less restrictive alternatives was met because "shackling of Herrick's ankles was a significantly less restrictive alternative than the other methods requested in the State's motion for additional security." *Herrick*, ¶ 23. This Court noted that the district court denied the State's request to restrain Herrick with handcuffs and to move him in shackles in the jury's presence. *Id*.

In contrast, this Court held in *Merrill* that the district court erred in requiring a defendant to wear concealed leg shackles where the only evidence they were necessary was an officer's statement that the defendant had had "some difficulties with law enforcement." *Merrill*, ¶¶ 17-20. Similarly, this Court held in *Hartsoe* that the district court erred in allowing a disruptive defendant to be shackled to a chair without making a record demonstrating that the court had pursued the least restrictive option, assessed the harm of the shackles, and attempted to conceal the shackles from the jury. *Hartsoe*, ¶ 29. But this Court held that the error was not structural because Hartsoe was shackled for only a portion of voir dire and remained free for the remainder of the trial, his ability to conduct his defense was not impaired, and the shackling did not suggest that he was violent because it was based on his failure to take his seat. *Hartsoe*, ¶ 33.

This Court remanded to the district court to develop a record to enable a harmless error analysis. *Hartsoe*, ¶ 34.

This Court held in *Rickett* that the district court erred when it denied the defendant's request to remove his leg brace without analyzing the two *Herrick* factors. *Rickett*, ¶¶ 4, 9. But this Court held again that the error was not structural because the leg brace was unobtrusive and Rickett himself testified that he had escaped from a pre-release center. *Rickett*, ¶ 10. This Court held that the error was harmless in *Rickett* because there was no indication the jury could see the leg brace, Rickett admitted to being an inmate and an escapee, and, even if jurors saw the brace, jurors would attribute it to his status as an escapee, rather than assuming he had a proclivity for violence. *Rickett*, ¶ 12.

Although this Court has applied the two-part Ninth Circuit test to all shackles, regardless of whether they are visible, the United States Supreme Court does not treat visible and nonvisible shackles the same. The year after this Court adopted the Ninth Circuit's test in *Herrick*, the Supreme Court decided *Deck v. Missouri*, 544 U.S. 622 (2005), which addressed the use of shackles during the penalty phase of a death penalty proceeding. The *Deck* Court held "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." *Id*. at 624 (emphasis in original). The Court explained that

> There will be cases, of course, where these perils of shackling are unavoidable. We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of *visible* restraints if the trial court has not taken account of the circumstances of the particular case.

(*Id*. at 632 (citation omitted; emphasis added).)

Throughout *Deck*, the Court repeatedly discussed limitations on the use of *visible* shackles. *Id.* at 624-33. While there may still be some limitations on the use of nonvisible shackles, *Deck* suggests that those limitations are not as difficult to overcome as limitations on the use of visible shackles.

C. Failure to review this claim will not result in a manifest miscarriage of justice.

Whitford has not met his burden to demonstrate that failing to review his claim challenging the use of leg irons would result in a manifest miscarriage of justice. The court was aware that Whitford was an inmate in the Montana State Prison. The court knew that Whitford spit in the correctional officer's face because Whitford admitted he had done so when he attempted to enter a guilty plea, which the court did not accept. (9/24/19 Tr. at 13 ("I did spit in this guys face, so I know that I'm wrong.").) The court was also aware that Whitford failed

to attend the pretrial hearing because he refused to come out of his cell until he was pepper sprayed. (1/21/20 Tr. at 4-5.) Further, before the trial began, a correctional officer informed the court that he had a "[m]ajor concern" about Whitford being present in the courtroom without belly chains because he "likes to charge at officers." (2/3/20 Tr. at 7.) The officer explained that Whitford had charged at officers less than five days earlier, and they had had to restrain him in a restraint chair with a spit hood. (*Id*.) The officer stated that Whitford's attacks were "frequent," and "his reaction is just a quick in your face type mode, attack type." (*Id*. at 8-9.)

The record demonstrates that there were compelling circumstances justifying the court's order that Whitford wear concealed leg irons. It also demonstrates that the court imposed the least restrictive option that would still ensure safety in the courtroom. After the court learned that Whitford had to be extracted from his cell with pepper spray, the court determined having "at least leg cuffs" would be necessary. (1/21/20 Tr. at 8.) After hearing a correctional officer discuss the security threat Whitford posed, the court initially decided that he would have to wear handcuffs and a belly chain. (2/3/20 Tr. at 14, 16.) But after hearing from Whitford, the court changed its mind and ruled that Whitford would only be restrained by concealed leg irons. (*Id*. at 30-31.) Given the security threat that Whitford posed and the court's efforts to impose the least restrictive restraints,

Whitford has not demonstrated that failing to review this claim would result in a manifest miscarriage of justice.

Further, Whitford's failure to oppose wearing concealed leg restraints indicates that the restraints were not prejudicial to him. Whitford's counsel objected only to him having to wear a belly chain. And Whitford himself told the court during a discussion about handcuffs that "either way it, it really don't matter. I'm in prison and everbody's going to know it so." (*Id*. at 19.) Whitford's statement that it would not matter if he was wearing handcuffs during trial demonstrates that a manifest miscarriage of justice would not occur if this Court declines to consider his claim about concealed leg irons, which do not have the same potential for prejudice. Accordingly, the claim should be denied without review.

D. If this Court reviews Whitford's claim under the plain error doctrine, the claim should be rejected.

If this Court exercises plain error review to consider Whitford's claim, the claim should be denied because the Court did not err in ordering him to wear concealed leg irons and, if it did, the error was harmless.

Although the court did not explicitly discuss the two-step *Herrick* test, the court's analysis satisfies that test. Before reaching its final decision, the court gathered information from a correctional officer who stated that Whitford charged officers and frequently tried to attack officers in the prison. (2/3/20 Tr. at 7-9.)

The officer expressed concern about Whitford not wearing a belly chain. (*Id*. at 7.) Similar to *Herrick*, the State presented evidence, undisputed by Whitford, that Whitford hadengaged in a pattern of defiant behavior toward correctional officials. *See Herrick*, ¶ 21. The first step in the *Herrick* test is satisfied because the record demonstrates that the district court was persuaded by compelling circumstances that some measure was needed to maintain the security of the courtroom.

And the second step in the test is satisfied because the court pursued, and ultimately required, the least restrictive restraints. The court reasonably determined based on Whitford's behavior that it needed to "at least" require him to wear leg irons. (1/21/20 Tr. at 8.) Although the court initially ordered that Whitford would have to wear handcuffs and a belly chain throughout the trial, the court reconsidered and ordered that he only had to wear concealed leg irons. Similar to this case, this Court held in *Herrick* that the second part of the test was satisfied when the State asked for more significant restraints and the court ordered the defendant to wear only concealed leg shackles. *Herrick*, ¶ 23. The district court satisfied both parts of the *Herrick* test and did not abuse its discretion when it ordered Whitford to wear concealed leg irons.

Although the court obtained statements from a correctional officer outside of the presence of Whitford during a "meeting" rather than a formal hearing, that process does not establish a constitutional violation. First, the Ninth Circuit has

"refuse[d] to hold . . . that a trial court must conduct a hearing and make findings before ordering that a defendant be shackled." *United States v. Cazares*, 788 F.3d 956, 965 (9th Cir. 2015). Second, Whitford did not object to the procedure, and his counsel agreed with the court that Whitford's presence would be counterproductive. (2/3/20 Tr. at 12.)

Finally, even if the court did not adequately satisfy the two-step *Herrick* test, the error was harmless. Erroneously shackling a defendant is not structural error unless "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. If the violation is not structural, the State must demonstrate that there is no reasonable possibility that the violation prejudiced the defendant. *Hartsoe*, ¶ 32; *see also Deck*, 544 U.S. at 635 (requiring the State to prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.").

As this Court held in *Rickett*, the impact of Whitford's concealed leg irons was not pervasive and is not structural error. This case is similar to *Rickett*, where this Court held that a concealed leg brace was harmless because there was no indication the jury saw the brace, it only suggested his custodial status, Rickett admitted to being an escapee, and the brace did not suggest that he had a proclivity for violence. *Rickett*, ¶ 12. There is no indication in this case that the jury was

aware that Whitford was wearing leg irons. Nor is there any indication that his concealed leg irons interfered with his defense or undermined the presumption of innocence.

Further, the jury was aware from the testimony at trial that Whitford had been uncooperative with correctional officers, which would have explained the presence of leg irons to jurors if they had seen them. Whitford himself testified that he spit on Officer Charles at least a couple of times during the incident that led to the charges and that he had previously "confronted" Officer Charles when he believed Officer Charles was gripping him too hard. (2/3/20 Tr. at 205, 219, 223.) Further, Whitford's testimony demonstrated that he was considered a security risk in the prison. Whitford testified that he was housed in one of the locked housing units. (*Id*. at 192.) Officer Charles explained that inmates in the locked housing units are escorted by two or three officers based on their classification. Whitford testified that he had had restrictions on him for approximately six months, and during that time he could not be moved without three escorts. (*Id*. at 197-98.) During those escorts, he was handcuffed and each of his arms was supposed to be held by an officer. (*Id*. at 198.) And when inmates in the locked housing unit leave the unit, they have to have their legs shackled, wear a belly chain, and be double cuffed. (*Id*. at 196.) Given the testimony about the extreme measures taken in the prison any time Whitford is moved, jurors would expect Whitford to be

wearing some kind of restraints during his trial and would not infer that he is a violent person from the use of restraints.

The evidence in this case was also so overwhelming that there is not a reasonable possibility that restraints would have had any impact on the jury's verdict. Whitford admitted that he committed the act. His defense was that he felt vulnerable and did not know what Officer Charles would do, so he had to spit at Officer Charles. (*Id*. at 211-12.) There was no support in the record for that claim. There was no indication that Officer Charles would do anything to try to harm Whitford while Whitford was behind locked bars and another officer was present. If the court erred in ordering Whitford to wear concealed leg restraints without sufficiently satisfying the two-part *Herrick* test, the error was harmless because there is not a reasonable possibility that it had any effect on the verdict.

III. Whitford has not met his burden to demonstrate that this Court should review his claim about the presence of three officers under the plain error doctrine.

Whitford did not preserve his claim that having two correctional officers and a law enforcement officer seated behind him in the courtroom would violate his right to due process. As explained above, Whitford objected only to the court's ruling that he was going to have to wear a belly chain, which the court later

retracted. Whitford never argued that it would be improper to have three officers in the courtroom.

Whitford's trial counsel's statement about having officers behind Whitford was incomplete because he was interrupted. He stated, "I normally don't like having the guards right behind my client is—some prejudice can be seen there too. I think in a case such as this, given his past behavior, even as early as two weeks ago, I think that that would be uh . . . ." (2/3/20 Tr. at 12-13.) The remainder of counsel's statement is inaudible because the judge began speaking. But it appears that counsel recognized that Whitford's behavior made him a security threat, which justified having officers stationed behind him. More importantly, Whitford's counsel did not later object to the officers presence. In contrast, he objected to Whitford wearing belly chains and later insisted that the record reflect his objection to belly chains. (*Id*. at 11, 16.)

Because Whitford failed to object to the presence of security personnel, this Court cannot review this claim unless Whitford demonstrates that failing to review the claim would result in a manifest miscarriage of justice. He has not done that.

The United States Supreme Court has held that the presence of armed officers in the courtroom is not inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986); *see also Kills on Top v. State*, 273 Mont. 32, 57, 901 P.2d 1368, 1384 (1995). The *Flynn* Court explained that the presence of security

personnel is less prejudicial than shackling a defendant because jurors are less likely to draw prejudicial inferences and may infer that officers are there to guard against disruptions in general or to ensure that tense courtroom exchanges do not erupt into violence, rather than inferring that the defendant is dangerous. 475 U.S. at 569. The Court recognized that courtroom security could lead jurors to infer that the defendant may be dangerous under certain conditions, and determined that cases have to be evaluated on a case-by-case basis. *Id*.; *see also Kills on Top*, 273 Mont. at 57, 901 P.2d at 1384.

The courtroom security in *Flynn* consisted of four uniformed state troopers, two deputy sheriffs, and six court security officers, but the defendant objected only to the presence of the four state troopers seated in the front row behind the defendants. *Id*. at 570. The Court concluded that the troopers did not prejudice the defendants and were "unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." *Id*. at 571. The Court further concluded that, even if a slight degree of prejudice could be discerned, the State's need to maintain custody of defendants who have been denied bail created sufficient cause for the level of security used. *Id*. The Court noted that "the deployment of troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings." *Id*. at 571-72.

The court's discretion to allow officers to be present in the courtroom seated behind a defendant and Whitford's history of charging officers both demonstrate that failing to review this claim would not result in a manifest miscarriage of justice. Accordingly, this Court should decline to review this claim under the plain error doctrine.

If this Court does review this claim, it should be denied. The mere fact that Whitford was a prison inmate created a need for substantial security. That need was even more significant for Whitford, who had a history of aggression toward correctional officers. The district court was informed by a correctional officer that officers were worried that Whitford might act out during trial, that Whitford had a history of frequently trying to attack officers, and that correctional officers believed he should wear a belly chain. (2/3/20 Tr. at 7-10.) To avoid prejudice to Whitford, the court went against the correctional officer's advice and ordered that Whitford would only have to wear concealed leg irons. The court had a justified concern that Whitford would act out and had to ensure the safety of everyone in the courtroom, including Whitford's counsel who would be sitting right next to him. Under these circumstances, the court's decision to allow officers to sit right behind Whitford did not violate his right to a fair trial. Given the testimony at trial demonstrating that Whitford was an inmate who could not be moved without three escorts, having officers behind him would not have been prejudicial. The only

inferences jurors were likely to draw was that the officers were there based on Whitford's custodial status, which they were well aware of. And in *Flynn*, the Court concluded that even if a slight degree of prejudice could be discerned, that is permissible where the State uses a degree of security needed to maintain security. *Id*. at 571. The degree of security used in this case was necessary to ensure the safety of everyone in the courtroom. For all of these reasons, the court's decision to allow three officers to sit behind Whitford during trial did not violate his right to a fair trial.

Finally, even if the court erred in allowing three officers to sit behind Whitford, the error was harmless. As explained above, the evidence against Whitford was overwhelming, as demonstrated by Whitford's own testimony admitting that he spit on Officer Charles. If the court erred by allowing the officers to be present, the error was harmless because there is not a reasonable possibility that it affected the verdict.

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CONCLUSION

Whitford's convictions for assault with bodily fluid should be affirmed.

Respectfully submitted this 6th day of August, 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 Times New Roman 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 7,115 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-06-2021:

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