IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0717

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DARRELL DEAN SHARP,

Defendant and Appellant.

# BRIEF OF APPELLANT

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

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## STATEMENT OF THE ISSUES

1. Did the trial court erroneously deny Appellant's choice to represent himself when the court's ruling was based on Appellant's lack of legal knowledge and Appellant briefly voicing his displeasure with the court's ruling?

2. The trial court ordered Appellant visibly bound in handcuffs, a belly chain, and leg restraints throughout the trial. Did the court err by adopting such restraints without weighing the alternative of non-visible restraints accompanied by more courtroom security personnel?

## STATEMENT OF THE CASE

The State charged Darrell Dean Sharp with attempted intimidation under Mont. Code Ann. §§ 45-4-103 and -5-203. (D.C. Doc. 42.) The Third Judicial District Court, Powell County, denied Sharp's choice to represent himself based on an assessment that Darrell did not "know enough about the law" and because Darrell briefly expressed his disagreement with the court's ruling. (7/14 Tr. at 6–8 (attached at App. A).) Over defense objection, the District Court ordered Darrell visibly shackled at trial in handcuffs, a belly chain, and leg restraints. (Trial Tr. at 7–12 (attached at App. B).) The jury delivered a guilty verdict.

(D.C. Doc. 96.) The court sentenced Darrell to five years in prison. (D.C. Doc. 109 (attached at App. C).)

## STATEMENT OF THE FACTS

### I. Denial of self-representation

The State filed its initial charging documents in April 2020. (D.C. Doc. 1, 5.) At Darrell's initial appearance in June 2020, Darrell noted he had attempted to file a motion to represent himself with standby counsel. (6/9 Tr. at 10.) Because the motion was not filed properly, the District Court did not rule on the motion but explained the court would "force" an attorney on Darrell "if necessary to make sure that the, the process is fair and uh, it's done correctly." (6/9 Tr. at 11–12.)

In July 2020, the District Court held a hearing on Darrell's now-filed self-representation motion. (D.C. Doc. 20.) The following colloquy occurred:

> THE COURT: I believe that just leaves us with uh, the Motion for Standby Counsel and Self-Representation. Now, that's your motion Mr. Sharp, but why should I grant you uh, the right to represent yourself uh, and I think you're asking that standby counsel be appointed. Why should I do that?
> MR. SHARP: It's my Constitutional Right.
> THE COURT: Okay.
> MR. SHARP: I have the right to exercise that right.
> THE COURT: Uh, anything else?

MR. SHARP: And I believe you're wrong on the denial of my Motion for Preliminary Hearing too.[1] I'll need to appeal that.
THE COURT: Go ahead. What else?
MR. SHARP: That's about it and I'll follow a due process.
THE COURT: Alright. Uh, what provision of which Constitution uh, do you believe has been violated or believes it gives you the right to self-represent?
MR. SHARP: Section 17, section 24 of the Montana Constitution.
THE COURT: Okay.
MR. SHARP: I have the right to self-representation, and I also have the right to meet the witness against me. I've been here four times now and I still have not received the charging documents. I still have not received an arrest warrant. I still have not been duly given a probable cause hearing. Now, how do you find a probable cause to give an Information? Now, if you're finding probable cause then you need [to] recuse yourself.
THE COURT: Alright.
MR. SHARP: As, as a sitting-- you can't find probable and then sit a[t] judgment.
THE COURT: Alright, so, you believe that any judge that grants leave to file an Information is somehow disqualified from uh, proceeding as the presiding judge?
MR. SHARP: Yes, I do.
THE COURT: Alright. Now, uh, uh let me see...
MR. SHARP: Especially without a hearing.
THE COURT: Alright, how many p[]e[r]emptory challenges Mr. Sharp would you be entitled to if this case went to trial?
MR. SHARP: I believe I can have up to 25.
THE COURT: Okay. Uh, you know, *I think I've seen and heard enough. Uh, you don't know anything about the law Mr. Sharp. You don't know enough about the law to be able to represent yourself.* Uh, you...

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[1] Earlier in the hearing, the court denied Darrell's motion for a preliminary hearing. (7/14 Tr. at 4–5.)

> MR. SHARP: Well, I know enough to [know] that my rights are being violated.
> THE COURT: Uh, well, uh, uh I haven't seen where your rights are being violated anywhere. Uh, you know, my uh...
> MR. SHARP: Finding probable cause without a hearing, that's not a violation of the law?
> THE COURT: *You're arguing with me while I'm trying to talk to you is also indicative of that I don't want you in the Courtroom without an attorney.* Uh, uh Mr. Demers [defense counsel], he's [] still your guy. *The Motion for Self-Representation is...*
> MR. SHARP: Whatever.
> THE COURT: *denied.* Uh, thank you Mr. Sharp you can, you can go.

(7/14 Tr. at 6–8 (emphases supplied).)

## II. Physical restraints at trial

A week after the denial of Darrell's motion to proceed pro se, the State moved to "restrain Defendant with visible body restraints through the course of the trial." (D.C. Doc. 26 at 1.) The State requested that Darrell be shackled in handcuffs, a belly chain, and leg restraints "within the preview [sic] of the jury." (D.C. Doc. 26 at 3.)

Attached as an exhibit to the State's motion was a silent video of a scene that occurred in 2018 in the Toole County Courthouse. As depicted in the video, guards escorted Darrell into that courtroom for a different trial. Darrell wore handcuffs, a belly chain, and leg restraints. (3/25 Motions Hearing Ex. 1 at 00:28–00:37 (offered and admitted, 3/25

Tr. at 22).) According to Darrell, members of the jury pool saw him shackled as he was escorted into the courtroom. (3/25 Tr. at 34–35.) Upon Darrell reaching the defense table, a guard removed Darrell's handcuffs and belly chain. (Ex. 1 at 00:37–1:09.) Upon Darrell propping out his shackled ankles, the attending guard pulled Darrell's pant leg over the leg restraints instead of removing those restraints. (Ex. 1 at 1:09–1:24.) According to Darrell, there had been no prior discussion of him being shackled during trial. (3/25 Tr. at 35.)[2] Darrell pulled his pant leg back up, spoke to the guard, and gestured toward the leg restraints and the skirt around the defense table. (Ex. 1 at 1:24–1:48.) After about twenty-five seconds, Darrell stood up and pulled the skirt off the defense table. Guards converged on Darrell, tased him, slammed him down on the defense table, and removed him from the courtroom. (Ex. 1 at 1:48–6:00.)

The District Court held a hearing on the State's motion requesting visible body restraints. A Montana State Prison Associate Warden of

[2] The transcript reads, "They did-- even ask the Judge if they needed restraints. They just did it." (3/25 Tr. at 35.) Context seemingly imparts that Darrell was saying restraints were *not* requested before trial as "[t]hey just did it." (*See* 3/25 Tr. at 35.)

Security testified that "[l]eg restraints . . . would be sufficient," but, "I also request the belly restraints." (3/25 Tr. at 9.) The witness based his request on Darrell having previously been charged with assault on a peace officer and having some write-ups while he was incarcerated. (3/25 Tr. at 9.)

The District Court noted that it had "never had a guy belly chained in my Courtroom during a trial." (3/25 Tr. at 32.) The District Court told the story of a trial in which "the prison and prosecutor were very, very, very concerned" and the State requested more than just leg restraints because the prisoner-defendant "had a history of when he didn't get it his way . . . he would act up." (3/25 Tr. at 32.) The court recounted how it asked that defendant whether he would "be a gentleman" and participate in the trial without "concerns that you or anybody else is going to be hurt or you're going to be disruptive," and the defendant agreed. The court recounted how, on that basis, it denied the motion for visible restraints while warning that the court could impose more restraints should they become necessary during trial, and the trial transpired without any problems. (3/25 Tr. at 34.)

The District Court addressed Darrell and explained that the court was "concerned" because, "You interrupt me and you say, well as long as I get my way, as long as this, as long as that it's going to be fine, and I won't be disruptive." (3/25 Tr. at 34.) Darrell responded by trying to explain the context of the 2018 incident—that he was shackled for trial without prior warning or order. (3/25 Tr. at 34–35.) Darrell explained, "I don't want that to happen again. . . . I just want to be able to go to trial and help my attorney without any complications. That's all I want." (3/25 Tr. at 35.) The court asked Darrell, "[I]f you['re] brought into the Courtroom, seated at counsel table, shackled with a curtain around the front of the uh, table, no handcuffs, no belly chain, are you going to act up?" (3/25 Tr. at 36.) Darrell said, "No. That'll be fine as long as I know what's going on prior." (3/25 Tr. at 36.) The court said, "I'll consider that when I make my decision." (3/25 Tr. at 36.)

In a subsequent written order, the court characterized Darrell's response "as basically stating that, as long as everything went his way, the Defendant would not act out violently." (D.C. Doc. 60 at 3.) The court wrote it would "make further inquiry of the Defendant at pretrial proceedings" but, "[i]f the Court had to make a decision now, every

indication is that additional restraints would be required." (D.C. Doc. 60 at 3.)

By the time this case went to trial in 2022, the Toole County Courthouse incident was four years in the past. At this case's final pretrial conference, the court addressed the shackling issue and noted,

> it's always something for a defendant to know that we will ratchet up restraint as necessary to provide for an orderly trial, the safety of everybody in the Courtroom . . . . [T]he goal is to not do any of that we don't have to but, but we have the ability uh, should, you know, that be, that be the course the defendant takes . . . .

(4/4 Tr. at 47.) The court explained it would "look at it again the morning of trial," but Darrell was going to,

> at a minimum be-- have leg restraints. Uh, if, if I can be made comfortable uh, that uh, we shouldn't have belly chains or, or handcuffs I'll do it, I'll try it. Uh, right now . . . with no further information, just the evidence that I had uh, at the Motions Hearing he's going to be belly chained, handcuffed, and leg shackled.

(4/4 Tr. at 47.)

Before the trial, the State filed a security plan document drafted by the Powell County Sheriff's Office. (D.C. Doc. 83, Ex. 1.) The document outlined both a "Plan A" and a "Plan B." "Plan A" would have Darrell in "full restraints" throughout the trial. "Full restraints"

consisted of "leg restraints, handcuffs and [a] transport belt that the handcuffs are secured to" and the leg restraints possibly "connected to the handcuffs." (D.C. Doc. 83, Ex. 1 at 2.) Two or three Montana State Prison guards and a Powell County Sheriff's Office employee would provide courtroom security. (D.C. Doc. 83, Ex. 1 at 2.) The plan suggested a skirt placed around the defense table would allow "restraints to be hidden from the jury," but the plan did not explain how such a skirt would hide upper body restraints as opposed to just lower body restraints. (D.C. Doc. 83, Ex. 1 at 2.)

"Plan B" proposed transporting Darrell in full restraints but having him wear only leg restraints, concealed by a table skirt, during the trial. In addition to the three or four additional courtroom security personnel outlined in Plan A, "[w]ith Plan B there may be another plain clothes Powell County Sheriff's Deputy available in the gallery." (D.C. Doc. 83, Ex. 1 at 2.)

The Powell County Sheriff ultimately recommended,

> Plan A as it would provide all parties with the greatest level of security. This recommendation is based on the defendant's previous courtroom history, his violent criminal history and a recent public statement made at a Board of Pardons and Parole hearing where he told MSP State

> Transportation Coordinator Cari Ray "you guys are going to be sorry if you try to keep my shackles on."[3]
>
> With this in mind, I recommend Plan A as the highest security/least disruptive alternative. I believe that this plan considers our allowing the defendant dignity and full participation without posing a danger to courtroom personnel or the jury. I make this recommendation based on the provided threat assessment, and the safety of all parties involved.

(D.C. Doc. 84, Ex. 1 at 4.) Besides the assertion, the report did not explain how Darrell being shackled in handcuffs, a belly chain, and leg restraints during his trial was consistent with Darrell's dignity and full participation. (*See* D.C. Doc. 84, Ex. 1.)

Darrell was brought into the courtroom for his trial wearing handcuffs, a belly chain, and leg restraints. (Trial Tr. at 7.) Defense counsel asked the District Court to order the belly chain and handcuffs removed, noting those restraints would inhibit Darrell's ability to write notes to counsel and to adjust his hearing aids as necessary to hear testimony. (Trial Tr. at 7.) The State responded that "the solution" was "frequent breaks" and asserted, "Mr. Sharp has made an excellent

[3] This is only reference to such an alleged statement contained anywhere in the record on appeal.

record for himself that um, he's going to cause problems if things don't go his way." Darrell personally responded to the State, "Where do you come up with that[?]" Jumping in, the court said, "You see now there's a, there's part of the problem right there. I, I normally don't get a Defendant interjecting . . . ." (Trial Tr. at 8.)

Darrell kept trying to be heard on the matter until the court said, "See, there you go. You don't like the way it's going to go you're going to act out. So, Plan A . . . [y]ou're going to be shackled just like you are." (Trial Tr. at 9.) The court confirmed, "So, for security right now uh, on our safety plan, we're calling it Plan A, he's going to remain uh, uh secure as he is now." (Trial Tr. at 11.) The court never discussed Plan B from the proposed security plan. (*See* Trial Tr. at 7–12.)

## III. Trial evidence

The evidence introduced at trial established that Darrell has been incarcerated since 2009 and had long sought legal remedies for that incarceration. (Trial Tr. at 215–16.) In that context, Darrell mailed two handwritten letters from Montana State Prison in late 2018. (Trial Tr. at 215.)

The first letter was addressed to then-governor Steve Bullock and Department of Corrections ("DOC") Deputy Director Cynthia Wolken. The letter reads:

> I received your letter. According to you, you are required to follow the sentence judgment. Even if it is invalid and illegal. Try to tell you this for 9½ years!
>
> You instructed me to file Habeas Corpus. I have already done that. Took to the 9th Cir Court of Appeals and got no due process. District Court and Supreme Court failed to give me evidentiary hearing. Courts have not followed their own rule of procedure. So I guess I'll resort to killing someone since the State of Montana wants to continue to illegally hold me and assault me. I've been held on breached plea and on an invalid and illegal sentence and judgment.
>
> Either Dept of Corrections follow policy [unclear] and give me remedy to illegally being held or suffer the consequences.
>
> State of Montana has been given plenty of time to correct, plenty of my patience. Any blood shed will be on the heads of Gov. Bullock & Reginald Michael Director. Tired of this shit tired of the fucking run around by courts and this Dept.
>
> State of Mt. can go fuck itself since it want to inflict cruel and unusual punishment. I have been held in violation of law. You have duty to Correct, duty to release someone illegally held.

(Trial Exhibit 1 (offered and admitted, Trial Tr. at 127).) The letter's second page reads:

> Hope I got your attention.
> Dept. needs to follow law.
> State needs to follow law.
> Court need to follow law.

> There is supposed to be something called Due Process!! Quit enforcing invalid sentence and judgement!
>
> Have not seen my son in 9½ years. That's because Gov. then attorney Gen. gave money to wife so she could go to California with my son, without consent! See court Docket DC-51-2009. Held in County jail on oppressive Bail in violation of U.S. and Mt. Constitution.
>
> I sent executive clemency paperwork over 2 years ago to Gov.
>
> Sick of telling everyone same thing! Sent and judgment are VOID. "Nullity" has no effect in law! Improperly induced by threat of P.F.O. done in violation of Double Jeopardy. Prosecution breached plea agreement! Justice Laurie McKinnon violated 5th Amend.

(Trial Exhibit 1.)

Tyler Campbell, a "citizen's advocate" in the governor's office, responded to Darrell with a letter explaining, "Your legal claims can only be adjudicated by the courts and their decisions are not appealable to the Governor. As you were told by Deputy Director Wolken in her letter dated 11/14/2018, the state must carry out the sentences and judgments of the courts." (Trial Exhibit 2 (offered and admitted, Trial Tr. at 147–48).)

Darrell responded with another letter addressed to Governor Bullock, dated December 14, 2018:

> Show me where you have right to enforce illegal sentence!

I keep trying to tell you that my sentence & judgment is illegal. You cannot enforce an invalid illegal sentence. You either fix it and give me remedy or I will fuck you up when I do get out of statute custody!!

Quite ignoring the facts. Quit intercepting letters by citizen advocates & people who have no authority to grant clemency.

My sentence & judgment does not comply with MCA 46-18-224, MCA 46-18-242, MCA 46-18-241 through 249. State violated double jeopardy, induced plea by threat of P.F.O. on 1st time felony offender, assaulted me while awaiting trial, violated U.S. & Mt Const.

I want remedy. Either you assist me now or pay the consequences later.

Fucking tired of run around by your department and the courts. You have duty to see courts do their job. The are not! They are violating my due process!! State prison is holding me illegally on illegal invalid sent & judgment.

You don't give me remedy and release me I will make the state pay for it later.

Fucking tired of bullshit.

Tired of being held illegally.

Fucking punks. See back [arrow sign] Darrell Sharp

(Trial Exhibit 2.) The letter's second page reads:

If Tyler J. Campbell is a citizen's advocate why and the hell isn't he assisting me instead of running "cock blocker" to justice.

I sent BOP and Gov. executive clemency paperwork close to 3 years ago. Why am I not getting a hearing?

According to MSP policy 4.1.1 they are also to make sure I'm committed legal?! So why am I being held on illegal sentence judgment?!!

According to classification I must do 11 years 69 days in order to see parole board on a [indiscernible] sentence and judgment that gave 434 days of credit?!!

> U.S. Dist Court & 9th cir Court of Appeals, Toole County Dist Court have all violated Mt Const. Art II § 19 by suspending writ of habeas corpus.
>
> I have not seen my son for 9½ years. State took my property. State violated "liberty interest" held me on oppressive bail, then assaulted me in county detention center.
>
> Attorney Generals Office has also violate my rights. Threat of charged with P.F.O. violated rights self-representation. Justice Oldenburg forced attorney's on me without consent!! DC-15-19. Officer Anthony Bolst assaulted me. State knew it. State and CCA officials tried to cover it up!
>
> Proper remedy of violations of US and MT Const 6th Amend 5th & 14th dismissal of States case, dismissal of charges with prejudice and immediate release from custody. Fay v. Noia 372 US 391. St v. Lott, St v. Hilgers, St v Pritchett, St v. Brown

(Trial Exhibit 2.)

Darrell's letters were never reached or were read by Governor Bullock or Deputy Director Wolken. (Trial Tr. at 153–54.) Instead, DOC and Office of the Governor staff received and read the letters and forwarded them to the Montana State Highway Patrol's Executive Protection Detail. The detail determined there was no imminent threat to the governor. (Trial Tr. at 165, 171.)

Thirteen months after the letters were sent, in January 2020, Jeffrey Crowe, a DOC Investigator, interviewed Darrell about the letters. Crowe's report notes, "Sharp emphasized that he was only

trying to get the attention of Governor Bullock and had no intention of initiating violence toward anyone." (Trial Tr. at 206.)

Without the District Court altering its shackling order or relieving Darrell of any of the imposed restraints, Darrell took the stand. Darrell testified that he did not intend to threaten to commit violence upon anyone and his words were largely to vent his frustration with his situation. (Trial Tr. at 228.) His words about "fucking . . . up" Bullock and telling Bullock and the State to give him a remedy or "pay[ing]" for it referred to him filing a civil rights suit for damages. (Trial Tr. at 218.) His words about having to kill someone were about how he would be forced to defend himself when other prison inmates continued to assault him. (Trial Tr. at 221, 225.)

Darrell was not disruptive at trial. The District Court did not give any instructions to the jury addressing the shackles locked around Darrell. (*See* Trial Tr. at 42–302.)

## STANDARDS OF REVIEW

This Court reviews de novo whether an order denying a request to proceed pro se violates the constitutional right to self-representation. *State v. Jones*, 2020 MT 7, ¶ 17, 398 Mont. 309, 459 P.3d 841.

This Court generally reviews for an abuse of discretion a lower court's imposition of physical restraints upon a defendant at trial. *State v. Rickett*, 2016 MT 168, ¶ 6, 384 Mont. 114, 375 P.3d 368. A trial court abuses its discretion through imposing physical restraints without first engaging in the two-step process specified by precedent. *Rickett*, ¶ 8.

## SUMMARY OF THE ARGUMENT

The District Court violated Darrell's right to self-representation. The District Court's reasoning that Darrell did not know enough about the law to represent himself conflicts with settled law that legal skill and knowledge do not control whether a defendant can competently choose to proceed pro se. Darrell's disagreement with the court's ruling fell far short of establishing Darrell would refuse to comply with the court's rules while representing himself. The District Court's unconstitutional denial of Darrell's request to proceed pro se was a structural error requiring reversal.

The District Court committed another constitutional and structural error by ordering Darrell bound in full body restraints at trial. Imposing physical restraints upon a defendant at trial is unconstitutional if the physical restraints are not a last resort. Under

precedent, trial courts must follow a specific process before imposing physical restraints. The District Court was required to compare the State's requested visible, full-body restraints against the alternative of non-visible, leg restraints (plus extra security) with regard to how those different measures of restraint would serve courtroom security balanced by the necessity of preserving a fair trial and maintaining a dignified process. The record shows the District Court did not conduct the required comparison and balancing before shackling Darrell to an extent that appears unprecedented for criminal defendants in Montana. The District Court's faulty process and unprecedented decision was an abuse of discretion and a constitutional violation.

Such unconstitutional shackling is structural error when its impact is pervasive. In cases where the Court has concluded shackling was not pervasive enough to constitute structural error, the defendant wore only lower body restraints—the very alternative that the District Court rejected in this case—or the defendant was bound only for a short time. Darrell, by contrast, was bound in full body restraints throughout the entire trial, including while testifying. The restraints were

pervasive and compromised the structure, dignity, and fairness of the trial, requiring reversal.

## ARGUMENT

### I. The District Court committed structural error and violated the right to self-representation.

Article II, Section 24 of the Montana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution provide defendants the right to self-representation. *Faretta v. California*, 422 U.S. 806, 818–19 (1975); *State v. Marquart*, 2020 MT 1, ¶ 28, 398 Mont. 233, 455 P.3d 460.

The District Court gave two reasons when denying Darrell's motion to proceed pro se. Because neither reason was legally sufficient to justify the District Court's ruling, the District Court's ruling violated Darrell's constitutional right to self-representation.

First, after quizzing Darrell on various legal rules, the District Court concluded, "You don't know enough about the law to be able to represent yourself." (7/14 Tr. at 7.) The District Court's statement betrays the District Court's own legal misunderstanding.

Contrary to the District Court, a "defendant's technical legal knowledge is not relevant to the assessment" of whether the defendant

is competent to choose to proceed pro se. *State v. Wilson*, 2011 MT 277, ¶ 15, 362 Mont. 416, 264 P.3d 1146; *accord Godinez v. Moran*, 509 U.S. 389, 400 (1993) (explaining "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation" (emphasis in original)). To be competent to proceed pro se, the defendant must merely knowingly, voluntarily, and intelligently choose to proceed pro se. *Wilson*, ¶¶ 15, 21; *accord* Mont. Code Ann. § 46-8-102. Nothing in the record suggested Darrell's choice to invoke his right to self-representation was not knowing, voluntary, and intelligent. While the District Court indicated it would "force" an attorney on Darrell to ensure "the process is fair" (6/9 Tr. at 12), such concerns do not suffice to override a defendant's choice to proceed pro se. Defendants have "the right to represent themselves and go down in flames if they wish[], a right the district court [is] required to respect." *U.S. v. Johnson*, 610 F.3d 1138, 1140 (9th Cir. 2010). The District Court's "[d]enial of the constitutional right to self-representation on the basis that [the] defendant could not adequately represent himself constitutes reversible error." *Jones*, ¶ 17.

The District Court additionally told Darrell that him "arguing with me while I'm trying to talk to you is also indicative of that I don't want you in the Courtroom without an attorney." (7/14 Tr. at 8.) But Darrell talking over the judge a few times—shortly after the same judge repeatedly *encouraged* Darrell to speak (*see* 7/14 Tr. at 7) —falls far short of the standard to "terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n. 46. If the District Court had granted Darrell's motion and Darrell showed himself incapable of following the court's rules and upholding decorum during trial, then the District Court would have been within its rights to terminate self-representation going forward. The law, however, did not sanction nipping Darrell's right to self-representation in the bud based on a few brief comments at the representation hearing.

A self-representation violation is a structural error that requires automatic reversal. *Wilson*, ¶ 15. This Court should reverse the District Court's violation of Darrell's right to self-representation.

## II. The shackling at trial also warrants reversal.

### A. The District Court abused its discretion and violated Darrell's constitutional rights by ordering him bound in full body, visible restraints at trial.

Shackling a defendant at trial is odious to at least three ideals that are central to the justice system. First, the presumption of innocence is a "bedrock, axiomatic, and elementary tenet" of a fair trial. *State v. Lawrence*, 2016 MT 346, ¶ 10, 386 Mont. 86, 385 P.3d 968. What a defendant's shackling communicates to a jury, however, is that the defendant is dangerous and violent, "undermin[ing] the presumption of innocence and the related fairness of the factfinding process." *Deck v. Missouri*, 544 U.S. 622, 630 (2005). Second, a fair trial requires a defendant's free participation in the making of the defense in coordination with counsel. But "[s]hackles can interfere with the accused's 'ability to communicate' with his lawyer" and thus interfere with a defendant's participation in the defense. *Deck*, 544 U.S. at 631 (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)). Third, it is necessary to maintain the dignity of the judicial process and to respect the dignity of its participants. *Deck*, 544 U.S. at 631. But the "use of shackles at trial 'affront[s]' the 'dignity and decorum of judicial

proceedings . . . .'" *Deck*, 544 U.S. at 631 (quoting *Allen*, 397 U.S. at 344).

In recognition of shackling's repulsiveness, shackling a defendant at trial violates the due process clauses of the Montana and federal constitutions except when the shackling occurs as "a last resort." *State v. Hartsoe*, 2011 MT 188, ¶¶ 22, 27, 361 Mont. 305, 258 P.3d 428 (citing, *e.g.*, *Allen*, 397 U.S. at 344 ("[N]o person should be tried while shackled . . . except as a last resort.")).

In *State v. Herrick*, 2004 MT 323, 324 Mont. 76, 101 P.3d 755, this Court adopted the Ninth Circuit's two-step test for assessing whether the "last resort" exception has been established. *Herrick*, ¶¶ 14–15 (citing *Morgan v. Bunnell*, 24 F.3d 49 (9th Cir. 1994)). The first step requires the trial court to find "compelling circumstances" warrant a defendant's physical restraint at trial. *Herrick*, ¶ 14. The second step requires the trial court to pursue the least restrictive restraint available under the circumstances. *Herrick*, ¶ 14.

A trial court's imposition of physical restraints at trial "without first engaging in the two-step process [this Court] adopted in *State v. Herrick* constitutes a denial of due process." *Hartsoe*, ¶ 22; *accord*

*Rickett*, ¶ 8; *see also Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) ("[I]t is a denial of due process if a trial court orders a defendant shackled without first engaging in a two-step process.").

Here, the defense agreed the circumstances warranted some measure of physical restraint, but the parties disputed the type and extent of restraint that was appropriate. (Trial Tr. at 7.) The dispute implicates the least restrictive means test found in *Herrick*'s second step.

As this Court has explained,

> In assessing less restrictive alternatives, the district court must begin by analyzing the harm associated with the use of shackles, including shackles' potential to (1) cause physical pain; (2) undermine the presumption of innocence and affect the venire's impartiality in the fact-finding process; (3) inhibit the defendant's ability to communicate with his or her attorney; and/or (4) affront the dignity of the court. After considering these factors, the district court must weigh the benefits and burdens associated with shackling against other possible alternatives. The second prong of *Herrick* is met only when the record demonstrates the district court considered less restrictive alternatives before imposing shackles as a last resort.

*Hartsoe*, ¶ 28 (internal citations omitted). Thus, shackling a defendant at trial is an abuse of discretion and unconstitutional in the "absence of a record demonstrating" a court's consideration of less restrictive

alternatives and that the implemented shackling was done as the last resort. *Hartsoe*, ¶ 29; *accord Hartsoe*, ¶ 48 (Nelson, J., concurring, with Baker, J., joining) (explaining that, under Montana law, "the mere failure of the record to reveal whether the trial judge pursued less restrictive alternatives before imposing physical restraints on the defendant is, itself, a due process violation"; this provides "trial courts and prosecutors with a strong incentive to create a proper record where a defendant has been shackled.").

Here, the District Court ordered full body restraints without adhering to the *Herrick* test, and the implemented restraints were not a last resort.

As an initial matter, caselaw illustrates the extreme nature of the physical restraints imposed upon Darrell—and this is in an area of law that, by nature, is concerned with extreme measures. In the four cases in which this Court has applied the *Herrick* test, none have included anything so severe as a defendant being shackled with chains around his legs, hands, and waist during the entire course of a trial. In *Rickett*, the defendant wore a leg brace during trial. *Rickett*, ¶ 9. In *Hartsoe*, the defendant was shackled to a chair but only during prosecution voir

dire. *Hartsoe*, ¶ 29. In *State v. Merrill*, 2008 MT 143, 343 Mont. 130, 183 P.3d 56, the defendant wore only non-visible leg restraints. *Merrill*, ¶¶ 23–27. In *Herrick*, the defendant wore only non-visible leg irons. *Herrick*, ¶¶ 23–24. In comparison, the District Court's full body shackling of Darrell during his entire trial appears unprecedented in Montana.

With the full body shackling being unprecedented in substance, there was even more need for the District Court to adhere to precedent on procedure. Namely, the District Court had to compare and weigh the implemented physical restraints against alternative measures of control in their potential to undermine the presumption of innocence, inhibit communication, affront dignity, and cause pain. *Hartsoe*, ¶¶ 28–29.

The District Court failed to conduct the required analysis. The District Court did not acknowledge that the State's requested visible restraints were bound to be much more detrimental to the presumption of innocence than the proposed alternative of non-visible restraints. The State's charge of attempted intimidation under §§ 45-4-103(1) and -5-203(1)(a) required the State to prove Darrell had the purpose or conscious object to communicate a violent threat. Lower body restraints

that were not visible to the jury would have a limited effect on Darrell's presumption of innocence against such a charge. *See Rickett*, ¶ 11. By contrast, the visible body restraints the State requested would communicate to Darrell's jury that Darrell was violent and dangerous. *See Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (noting visible "shackles essentially branded [the defendant] as having a violent nature"). Especially in light of the charge being tried, the visible shackling's suggestion of Darrell having a violent character would subvert the presumption of innocence and the fairness of the proceedings.

Nor did the District Court ever acknowledge that the handcuffs would inhibit Darrell's ability to communicate with his counsel through notes during trial, that handcuffing for hours on end would presumably cause pain, or that the shackling itself would affront the dignity and decorum of judicial proceedings. *See Deck*, 544 U.S. at 631.

The record also does not demonstrate that the District Court weighed the almost certain harms of its imposed shackles against their more speculative benefits. *Contra Hartsoe*, ¶ 28 ("[T]he district court must weigh the benefits and burdens associated with shackling against

other possible alternatives."). While Darrell's conduct in a different courtroom in 2018 may have implicated compelling circumstances for some measure of restraint, this trial occurred four years later, in a different courtroom, in a different context. Darrell explained the 2018 incident was due to him being shackled without warning, and Darrell explained he would "be fine" in this case if he received warning before trial. (3/25 Tr. at 34.) The District Court obliged by warning Darrell that he would at least wear leg restraints at trial. (4/4 Tr. at 47.) An Assistant Warden of Security testified such "leg restraints . . . would be sufficient" for security. (3/25 Tr. at 9.) If the District Court declined to order full body restraints and instead ordered just leg restraints, the security plan's "Plan B" would have stationed an extra officer in the courtroom (in addition to the three or four other officers present in the courtroom). (D.C. Doc. 83, Ex. 1 at 2.) Plan B would have reasonably ensured courtroom security while being much less prejudicial to the defense. Nonetheless, the District Court never discussed the proposed security plans, or weighed Plan A against Plan B, or explained why it rejected leg restraints accompanied by additional security personnel in favor of more prejudicial, full body shackling. (*See* Trial Tr. at 7–12.)

The "absence of a record demonstrating" the District Court's consideration of less restrictive alternatives and that the implemented full body shackling was done as a last resort establishes a constitutional violation. *Hartsoe*, ¶ 29.

**B. The error was structural, prejudicial, and reversible.**

Structural errors "so infect and contaminate the framework of a trial as to render it fundamentally unfair, requiring automatic reversal." *State v. Charlie*, 2010 MT 195, ¶ 40, 357 Mont. 355, 239 P.3d 934. "Once it has been established that either prong of *Herrick* has been violated, the first question is whether the error is structural." *Hartsoe*, ¶ 31. "In the context of shackling, structural error occurs 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 determined the illegal shackling was not pervasive enough as to render it structural error when (1) the shackling was limited to a portion of voir dire and Hartsoe remained free of shackles for the rest of trial and (2) the jury was instructed that Hartsoe's shackling was due to his "'unique beliefs,' which caused

Hartsoe to refuse to submit to the District Court's jurisdiction, as opposed to Hartsoe's violent nature." *Hartsoe*, ¶ 33. In *Rickett*, this Court determined a shackling error was not so pervasive as to render it structural when the leg restraints were "not immediately visible" and Rickett admitted being "an inmate and escapee." *Rickett*, ¶ 10.

The physical restraints erroneously imposed in this case were pervasive enough to qualify as structural error. In contrast to *Hartsoe*, the shackling here occurred for the entire trial and the jury received no instruction addressing or dispelling the prejudice from the shackling. In contrast to *Rickett*, the record shows the restraints must have been visible to the jury because the State referred to the restraints imposed as "visible body restraints" within the "[]view of the jury" (D.C. Doc. 26 at 1, 3); the restraints included upper body restraints that could not be covered by pant legs or a table skirt; and Darrell got up on the stand without any relief from the full panoply of restraints. Further unlike *Rickett*, Darrell was not an admitted escapee. *See Rickett*, ¶ 10. Darrell's visible restraints worn throughout the entire trial without instruction to the jury would be expected to substantially undermine the presumption of innocence and to compromise the fairness and

framework of the trial. Darrell's unconstitutional shackling was structural error. *Hartsoe*, ¶ 31.

Even examined under harmless error review, the District Court's error warrants reversal. Under harmless error review of a shackling error, the State must demonstrate "there is no reasonable possibility that the violation prejudiced the defendant" and "the violation was harmless in light of the interests that the right to remain free of physical restraints was designed to protect." *Hartsoe*, ¶ 32. While Darrell testified it was not his purpose to threaten unlawful violence, Darrell's shackles impeached his testimony and character, branding him as violent and dangerous. The State cannot show there is no reasonable possibility that the shackling did not influence juror's assessments of the defense. Further, the State cannot demonstrate the visible shackling did not compromise the presumption of innocence, Darrell's ability to communicate with counsel and participate in the proceedings, and the dignity of the judicial process. Accordingly, the shackling error warrants reversal.

## CONCLUSION

The District Court's errors warrant reversal.

Respectfully submitted this 21st day of May, 2024.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 6,698, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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# APPENDIX

## CERTIFICATE OF SERVICE

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