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Criminal Defendants: Maintaining the Appearance of Innocence

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CRIMINAL DEFENDANTS: MAINTAINING THE APPEARANCE OF INNOCENCE

I. INTRODUCTION: THE GARB OF INNOCENCE

That all persons accused of crimes are entitled to a fair and impartial trial is the most basic premise of Anglo-American criminal law. A defendant is presumed innocent until proven guilty beyond a reasonable doubt by due process of law. To be effective, however,

> the presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require.[1]

"Garb of innocence" refers to the right of the defendant to appear in court free from those factors which might tend to portray him as a criminal before his guilt is proved. This "garb" includes three general rights: (1) The right to stand trial *free of physical restraints;* (2) the right to appear in *civilian rather than prison clothes;* and (3) the right to have the *courtroom itself free from an unduly heavy guard.*

The purpose of this comment is to analyze the scope and basis of these rights. This segment of the law is in its adolescence and is now a mass of confusing, contradictory, and bewildering cases that often ignore the basic, unifying principles in the area. The goal of this work is to draw these principles from the mass, rejecting or criticizing those cases that are wrongly decided or reasoned.

II. PHYSICAL RESTRAINTS

A. *Restraint During Trial*

Even before the adoption of the Constitution, the English common law recognized that the appearance of the accused could have a prejudicial effect upon the jury. Although the underlying reasons do not clearly appear, it seems it was felt that if the defendant was forced to stand trial in irons, the jury might infer that he was known to be dangerous or untrustworthy.[2] Competing with this principle was the danger that the accused, if unrestrained, might take the opportunity to escape, or inflict injury on a participant at the trial, or otherwise disrupt the proceeding. Thus, the rule developed as follows:

> The prisoner, though under an indictment of the highest crime, must be brought to bar without irons, and all manner of shackles or bonds . . . unless there be a danger of escape . . . .[3]

1. Eaddy v. People, 115 Colo. 488, 492, 174 P.2d 717, 718-19 (1946).

2. State v. Williams, 18 Wash. 47, 50 P. 580 (1897). However, one author doubts that this was the original reason for the rule, believing it was originally meant to prevent the infliction of any punishment on the defendant before the issue of his guilt was determined. *See* Krauskopf, *Physical Restraint of the Defendant in the Courtroom,* 15 ST. LOUIS U.L.J. 351, 352 (1971).

3. M. HALE, PLEAS OF THE CROWN 219 (1678). Krauskopf traces the historical development of the rule from Virgil and the Bible through Magna Carta to Blackstone and, finally, the Missouri Supreme Court. Krauskopf, *supra* note 2, at 351-52.

The defendant's right to be tried free of shackles has been incorporated into the criminal law of the various states. Most of these states recognized the rationale of the rule to be that of avoiding prejudice in the minds of the jury. However, some states, either as an alternative or additional rationale, hold that to violate the rule could impair a defendant's right to consult freely with counsel[4] or could so confuse or embarrass him that he could not adequately confront the witnesses against him and participate in his own defense.[5] Finally, it has been suggested that to try a person in chains or handcuffs is an affront to the dignity of the court itself.[6]

Assuming that the rationale is to avoid prejudice in the minds of the jury, the rule should only be applied in those cases where the defendant is tried by a jury. This principle seems almost too clear to be contested. However, in *Sparkman v. State*,[7] the defendant asserted that the rule was absolute and moved for a new trial because he had been seen shackled by the *trial judge* at the preliminary hearing and several pretrial hearings. The Wisconsin Supreme Court properly rejected this argument and affirmed the conviction.[8]

When the accused is to be brought into the presence of the jury shackled, the danger of prejudice (*i.e.*, the rationale for the rule) is clear. Therefore, if there is no competing consideration of possible escape or disruption of the trial the trial court should have no discretion to permit the shackling.[9] But when a competing consideration does exist, the questions then become: Who is to make the decision on shackling, on what evidence, and, in the event of a challenge to that decision, what constitutes reversible error?

A Massachusetts court has implied that the sheriff is charged with maintaining control of the defendant during the trial, with the trial court's supervision.[10] However, this is contrary to the overwhelming weight of authority, and it is more likely that the court meant only that the sheriff has legal custody and can suggest that the defendant be shackled.[11] Some courts have held that reliance on the opinion of the sheriff alone is insufficient and that the court must make an independent inquiry. For example, when a trial court has stated to the jury that the decision was the sheriff's[12] or stated that this was routine procedure required by the state prison authorities,[13] the higher courts stated the decision was for

4. *See* People v. Mendola, 2 N.Y.2d 270, 140 N.E.2d 353, 159 N.Y.S.2d 473 (1957), *rev'g* 1 App. Div. 2d 413, 151 N.Y.S.2d 278 (1956).

5. *See* Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946); Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916); State v. Williams, 18 Wash. 47, 58 P. 580 (1897).

6. *See* Krauskopf, *supra* note 2, at 356.

7. 27 Wis. 2d 92, 133 N.W.2d 776 (1965).

8. *Id.* at 96, 133 N.W.2d at 778-79. It should be noted Oklahoma has a statute which does make the right absolute. OKLA. STAT. tit. 22, § 15 (1969).

9. *Cf.* People v. Shaw, 381 Mich. 467, 474, 164 N.W.2d 7, 9-10 (1969), *aff'g* 7 Mich. App. 187, 151 N.W.2d 381 (1967).

10. Commonwealth v. Ladetto, 353 Mass. 746, 230 N.E.2d 914 (1967).

11. State v. McKay, 63 Nev. 118, 155, 165 P.2d 389, 405, *rehearing denied*, 63 Nev. 180, 167 P.2d 476, *habeas corpus denied*, 63 Nev. 263, 168 P.2d 315, *cert. denied*, 329 U.S. 749 (1946).

12. State v. Farmer, 90 Ohio App. 49, 103 N.E.2d 289 (1951).

13. State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965).

the trial court.[14] The rule now seems to be established beyond doubt that the discretion to allow or not allow trial in shackles is the trial court's.[15] In the absence of an abuse of this discretion, the trial court's decision is not subject to appellate review.[16]

When the defendant states before trial that he will attempt to escape, restraints are clearly warranted.[17] Likewise, if the defendant has attempted to escape immediately before the trial, there would appear to be no problem.[18] But an early Missouri case held that the reasons for shackling must come from the defendant's conduct *at trial,* and that the defendant had attacked a state's witness at an earlier trial was held to be insufficient grounds for forfeiture of such an important right.[19] This case has caused considerable confusion. As late as 1941, the Missouri Supreme Court held that because neither of the codefendants "did anything *during* the trial, . . . their rights were substantially prejudiced" by trying them with handcuffs, even though the sheriff had testified that they both caused a disturbance when the cuffs were removed prior to trial.[20] Most courts have properly rejected this limitation[21] and the Ninth Circuit Court of Appeals has expressly declared this not to be the rule today.[22]

Prior conduct of the defendant, it is generally held, can also properly serve as the basis of the trial court's decision. Such prior conduct can indicate the probability that a defendant will attempt escape or do violence. The circumstances of each case should be weighed to determine whether the probability is high enough to overcome the inevitably resulting prejudice. The fact that a defendant has a prior record of escapes is often cited,[23] as is the information that the accused is expected to have outside

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14. Interestingly, the court in State v. Farmer, 90 Ohio App. 49, 103 N.E.2d 289 (1951), held that the trial court did exercise its discretion by deciding to overrule defendant's motion for a mistrial. *Id.* at 53, 103 N.E.2d at 292.

15. *See* State v. Randolph, 99 Ariz. 253, 408 P.2d 397 (1965); State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960); State v. Robinson, 6 Ariz. App. 419, 433 P.2d 70 (1967); McPherson v. State, 178 Ind. 583, 99 N.E. 984 (1912); State v. Bryan, 69 Ohio App. 306, 43 N.E.2d 625 (1942); State v. Long, 195 Ore. 81, 244 P.2d 1033 (1952); Gray v. State, 99 Tex. Crim. 305, 268 S.W. 941 (1925).

16. Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938); Commonwealth v. Agiasottelis, 336 Mass. 12, 142 N.E.2d 386 (1957).

17. People v. Kimball, 5 Cal. 2d 608, 55 P.2d 483 (1936); People v. Mendola, 2 N.Y.2d 270, 140 N.E.2d 353, 159 N.Y.S.2d 473 (1957); Gray v. State, 99 Tex. Crim. 305, 268 S.W. 941 (1925).

18. Commonwealth v. Chase, 350 Mass. 738, 217 N.E.2d 195, *cert. denied,* 385 U.S. 906 (1966); Sefton v. State, 72 Nev. 106, 295 P.2d 385 (1956), *habeas corpus denied,* 73 Nev. 2, 306 P.2d 771, *cert. denied,* 354 U.S. 914 (1957).

19. State v. Kring, 1 Mo. App. 438, 443 (St. L. Ct. App. 1876), *aff'd,* 64 Mo. 591 (1877).

20. State v. Rice, 347 Mo. 812, 814, 149 S.W.2d 347, 348 (1941). Even in 1953, the Missouri Supreme Court, sitting en banc, cited the rule with approval, although the court did not actually apply it. State v. Boyd, 256 S.W.2d 765, 766 (Mo. En Banc 1953).

21. Hall v. State, 199 Ind. 592, 602-03, 159 N.E. 420, 424 (1928).

22. The court of appeals flatly stated: "We do not think that this is the law." Loux v. United States, 389 F.2d 911, 919 (9th Cir.), *cert. denied,* 393 U.S. 867 (1968).

23. *See, e.g.,* State v. Meadows, 215 Tenn. 668, 389 S.W.2d 256 (1965).

assistance in an escape attempt.[24] If the crime is such that it is inevitable that the jury will learn that the accused is presently serving time in prison, less prejudice is believed to exist in shackling at trial.[25] In any case, it is clear that the trial court can base the exercise of its discretion on knowledge it has acquired from outside the formal evidence.[26] In doubtful cases, the court should explore reasonable alternatives to physical restraints, such as having guards present in the courtroom.[27]

The procedure by which a defendant challenges an attempt to try him in shackles varies. When the accused knows before trial that he will be forced to appear shackled, he should have the issue decided at a pretrial hearing. This is clearly the "better practice" and is suggested by most courts.[28] The failure to have the issue decided before the trial is not reversible error, however.[29] The most important thing is that the trial judge lay out on the record his reasons for allowing the restraints so that the appellate court can examine and weigh them.

If there is no opportunity to dispose of the matter before trial, the defendant should make his objection or motion for a mistrial at the earliest possible opportunity. A defendant cannot wait until after the state has presented its case to make his motion.[30] Also, to protect the record for appeal, defense counsel should not rely on his own objection to establish the existence of the incident, but should present evidence by testimony of a witness.[31]

The scope of a defendant's rights in this area is poorly defined. In *Moulton v. State*,[32] the jury was shown pictures of defendant at the scene of the homicide in handcuffs. Because the defendant had admitted the killing and defended only on the ground of insanity, the appellate court refused to reverse. However, there is dicta to the effect that the same rules apply as when the defendant is seen in person at trial in cuffs.[33]

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24. *See* United States v. Samuel, 433 F.2d 663 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); Hall v. State, 199 Ind. 592, 159 N.E. 420 (1928); Makley v. State, 49 Ohio App. 359, 197 N.E. 339 (1934); Pierpont v. State, 49 Ohio App. 77, 195 N.E. 264 (1934).

25. United States v. Samuel, 433 F.2d 663 (4th Cir. 1970), *cert denied*, 401 U.S. 946 (1971).

26. Hall v. State, 199 Ind. 592, 159 N.E. 420 (1928); State v. McKay, 63 Nev. 118, 165 P.2d 389 (1946).

27. Woodards v. Maxwell, 303 F. Supp. 690 (S.D. Ohio 1969), *aff'd sub nom.* Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965); DeWolf v. State, 95 Okla. Crim. 287, 245 P.2d 107 (1952), *appeal dismissed*, 96 Okla. Crim. 380, 255 P.2d 949, *habeas corpus denied*, 96 Okla. Crim. 382, 256 P.2d 191, *cert. denied*, 345 U.S. 953, *habeas corpus denied*, 205 F.2d 234 (10th Cir.), *cert. denied*, 346 U.S. 837 (1953).

28. *See* Townsend v. Sain, 372 U.S. 293 (1963); State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965); People v. Mendola, 2 N.Y.2d 270, 140 N.E.2d 353, 159 N.Y.S.2d 473 (1957).

29. People v. Mendola, 2 N.Y.2d 270, 140 N.E.2d 353, 159 N.Y.S.2d 473 (1957).

30. People v. Shaw, 381 Mich. 467, 164 N.W.2d 7 (1969), *aff'g* 7 Mich. App. 187, 151 N.W.2d 381 (1967); Vela v. State, 33 Tex. Crim. 322, 26 S.W. 396 (1894); State v. Allen, 45 W. Va. 65, 30 S.E. 209 (1898).

31. Zunago v. State, 63 Tex. Crim. 58, 138 S.W. 713 (1911).

32. 155 Tex. Crim. 450, 235 S.W.2d 645 (1950).

33. *Id.* at 458, 235 S.W.2d at 650-51.

If there are multiple defendants, one of whom merits the shackling and another who does not, only that defendant who merits the treatment should be shackled. But some courts have recognized that the mere presence of a codefendant in handcuffs may tend to prejudice the rights of the unshackled defendant and have required separate trials.[34]

A witness may be called who appears in shackles. If this witness is called by the defense, or even if he is called by the state and is an associate of the accused, his appearance may reflect directly upon the accused. For example, where defendant's only two witnesses appeared in court several days in handcuffs with their hands chained to a belt around their waists, the Minnesota Supreme Court said: "It seems obvious that the appearance of the manacled witnesses in court day after day would create an effect that would be prejudicial to defendant's right to a fair trial."[35] The considerations are the same as in restraining the defendant himself, and the trial court has the discretion.[36] Again, only an abuse of this discretion is reversible error.[37]

Once the trial court has properly determined that some precaution is necessary, it should take only those measures required to prevent the danger. The range of possible precautions is limitless and the court has considerable discretion. An extreme example of the extent of the trial court's discretion is found in the trials of two members of the John Dillinger gang.[38] The two men were on trial for murdering a sheriff in Lima, Ohio, while freeing Dillinger from jail. At that time they were escapees from the Indiana State Penitentiary, and also had made a successful escape after the murder. Just before the trial began, Dillinger escaped from jail after swearing to repay his debt and free the defendants. The trial judge ordered both defendants tried in handcuffs and leg irons. He allowed the state militia to cordon off the courthouse and to place guards throughout the building and on the floor on which the trial was held. He initiated a system of identification passes, and only those who had been searched, including the jury, were allowed to enter the building. Guards armed with rifles were stationed in the courtroom. It even appears the new sheriff, son of the late sheriff, once entered with a machine gun (although he was ordered out). The Ohio court held that the measures taken were justified and the trial judge had not abused his discretion.[39]

Even where restraints are warranted, the court should give a cau-

34. *See, e.g.,* People v. Duplissey, 380 Mich. 100, 155 N.W.2d 850 (1968). *But see* Loux v. United States, 389 F.2d 911 (9th Cir.), *cert. denied,* 393 U.S. 867 (1968).

35. State v. Coursolle, 255 Minn. 384, 389, 97 N.W.2d 472, 476 (1959).

36. McDonald v. United States, 89 F.2d 128 (8th Cir.), *cert. denied,* 301 U.S. 697 (1937); State v. Chavez, 98 Ariz. 236, 403 P.2d 545 (1965); People v. Metzger, 143 Cal. 447, 77 P. 155 (1904); State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472 (1959); State v. Rudolph, 187 Mo. 67, 85 S.W. 584 (1905).

37. State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472 (1959); State v. Rudolph, 187 Mo. 67, 85 S.W. 584 (1905).

38. Makley v. State, 49 Ohio App. 359, 197 N.E. 339 (1934); Pierpont v. State, 49 Ohio App. 77, 195 N.E. 264 (1934). *See also* Shepherd v. Florida, 341 U.S. 50 (1951).

39. Makley v. State, 49 Ohio App. 359, 376, 197 N.E. 339, 347 (1934); Pierpont v. State, 49 Ohio App. 77, 86, 195 N.E. 264, 267 (1934).

tionary instruction to the jury to disregard the defendant's appearance in determining his guilt or innocence—although the effectiveness of such an instruction is questionable:

> In any case . . . it is of the essence that he (the trial judge) instruct the jury in the clearest and most emphatic terms that it give such restraint no consideration whatever in assessing the proofs and determining guilt. This is the least that can be done toward insuring a fair trial. It may be doubted whether any jury, even with the best of cautionary instructions, can ever dismiss from its mind that the accused has appeared before it in handcuffs or chains. His being restrained must carry obvious implications even to the most fairminded of juries.[40]

The final question is what test is the appellate court to apply in determining whether there has been an abuse of discretion. This writer has uncovered no formulation by a court of the test applied.[41] The courts look to the facts of each case, and make a decision based on the reasonableness of the trial judge's decision. They do not substitute their own judgment.

It is submitted that a general test which would encompass every case cannot and should not be laid down. The delicate balance which must be struck requires an ad hoc examination of the facts and surrounding circumstances of each particular case.[42] When, in light of all these facts and the possible alternatives, it is reasonable to believe that the prejudice to the defendant was outweighed by the necessity for precautions against escape or violence, then the lower court has not abused its discretion. As a rough mathematical guide, the Kentucky Supreme Court has written that "[a] court would hardly be justified in permitting this to be done (shackling the defendant at trial) in one murder case out of an average hundred coming to trial."[43]

There is clearly a trend away from permitting defendants to be tried "in irons," with the appellate courts making a closer examination of the facts on which the trial court's decision rests. Although technically the defendant has always had the right to appear free of restraints, with the burden of justifying the shackling on the state,[44] this burden, until recently, was easily satisfied by a minimal showing that there was a danger of escape, violence, etc.[45] Once such a showing had been made, and the trial court had decided to allow shackling, the only grounds for challenge to

40. State v. Roberts, 86 N.J. Super. 159, 168, 206 A.2d 200, 205 (1965).

41. One writer believes, however, that the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution absolutely prohibit the trial of any defendant bound and gagged. *See* 5 SUFFOLK L. REV. 344, 351 (1970). Another thinks that at least the sixth and fourteenth amendments prohibit this. *See* 19 KAN. L. REV. 305, 310-11 (1971). However, most writers feel Illinois v. Allen, 397 U.S. 337 (1970), expressly and properly allows this practice in some circumstances. *See, e.g.,* 9 DUQUESNE L. REV. 93, 108 (1970).

42. *See, e.g.,* United States v. Samuel, 433 F.2d 663, 664 (4th Cir. 1970), *cert. denied,* 401 U.S. 946 (1971).

43. Tunget v. Commonwealth, 303 Ky. 834, 836, 198 S.W.2d 785, 786, *cert. denied,* 331 U.S. 833 (1947).

44. Krauskopf, *supra* note 2, at 356-57.

45. Krauskopf feels there is a distinction between direct appeals and habeas corpus proceedings on this issue of who has the burden of proof. *Id.* at 357.

this decision was that the trial court had abused its discretion. Further, there was a strong presumption that the trial court's decision was correct.[46] However, the latest cases illustrate a reluctance by the appellate courts to rely blindly on the lower court's assessment, and in the absence of a statement of the lower court's reasons or of substantial facts in the record which would justify the shackling, remand has been ordered.[47]

All of the foregoing assumes that the defendant has engaged in no active conduct which brought on the restraint. Although any detailed examination of the problem of the unruly defendant is beyond the scope of this comment, the common denominator of restraining the defendant requires that it be mentioned. It is now clear that when a defendant so disrupts his trial that he makes it impossible to proceed, the trial court has the power to restrain him.[48] The leading case in the area is *Illinois v. Allen*.[49] The Seventh Circuit Court of Appeals in this case had held that it was reversible error to rule that by his conduct, Allen had waived his right to be present at his trial.[50] The court stated his right to be present at his trial was absolute, relying on *Hopt v. Utah*[51] and *Shields v. United States*.[52] In reversing, the United States Supreme Court set out three alternative methods of dealing with such defendants. These are: (1) To hold the defendant in contempt (either civil or criminal); (2) to exclude the defendant from the courtroom until he gives assurances that he will behave; or (3) to bind and gag the defendant in the courtroom. The Court noted the latter method was generally the most objectionable and should be avoided if possible.[53]

B. *Restraint Not Throughout Trial but in View of Jurors*

Closely related to the cases in the area of trying a defendant in handcuffs is a line of cases where the defendant, though not forced to stand trial in this condition, is seen by the jury in handcuffs sometime during or immediately before the trial. Most often, the defendant is either brought into the courtroom before his handcuffs are removed or he is seen outside

46. Territory v. Kelly, 2 N.M. 292, 305 (1882); Moulton v. State, 155 Tex. Crim. 450, 235 S.W.2d 645 (1950); State v. Allen, 45 W. Va. 65, 30 S.E. 209 (1898).

47. *See* United States v. Samuel, 433 F.2d 663 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); United States v. Thompson, 432 F.2d 997 (4th Cir. 1970), *cert. denied*, 401 U.S. 944 (1971).

48. *See, e.g.*, State v. Boudoin, 257 La. 583, 243 So. 2d 265 (1971); People v. Reynold, 20 Mich. App. 397, 174 N.W.2d 25 (1969); State v. Richards, 467 S.W.2d 33 (Mo. 1971); State v. McGinnis, 441 S.W.2d 715 (Mo. 1969); McQueen v. State, 421 P.2d 284 (Okla. Crim. App. 1966).

49. 397 U.S. 337 (1970). This case has been noted and commented upon by many authors. *See, e.g.*, Helwig, *Coping with the Unruly Criminal Defendant: Options of the Allen Case*, 7 GONZAGA L. REV. 17 (1971); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 90 (1970); Comment, *Exclusion from the Trial as Controlling Defendant Misbehavior: An Alternative Approach*, 1970 U. ILL. L.F. 273; Note, *The Power of the Judge to Command Order in the Courtroom: The Options of Illinois v. Allen*, 65 NW. U.L. REV. 671 (1970); 7 CAL. W.L. REV. 286 (1970); 9 DUQUESNE L. REV. 93 (1970); 19 KAN. L. REV. 305 (1971); 5 SUFFOLK L REV. 344 (1970).

50. United States *ex rel.* Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969).

51. 110 U.S. 574 (1884).

52. 273 U.S. 583 (1927).

53. Illinois v. Allen, 397 U.S. 337, 344 (1970).

the courtroom in handcuffs by a juror or prospective juror. Most of these cases are completely inconsistent with the above discussion. A great many jurisdictions have simply held that it is never prejudicial error for the defendant to be seen manacled while the trial is not in progress.[54] Some courts say this is only a "technical violation," insufficiently prejudicial to warrant a reversal or new trial.[55] Others say it is up to the officer who has custody of the accused.[56] Although these courts state that there is a distinction between this situation and trying the defendant in shackles, they fail to explain why.[57]

The obvious contradiction between this line of cases and those strictly limiting the trial of an accused in manacles is aptly illustrated by *State v. Cassel*.[58] In this case, the Wisconsin Supreme Court stated: "Prejudice is likely to be engendered psychologically by view of a man presumed to be innocent in the chains and handcuffs of the convicted."[59] However, the court went on to add: "We think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jurors."[60]

Although several courts have stated, in effect, that "law enforcement officers should not permit this to happen,"[61] they refuse to reverse if it

54. *See* Glass v. United States, 371 F.2d 418 (7th Cir. 1965), *cert. denied,* 386 U.S. 968 (1967); Cwach v. United States, 212 F.2d 520 (8th Cir. 1954); State v. Sherron, 105 Ariz. 277, 463 P.2d 533 (1970); State v. Boag, 104 Ariz. 362, 453 P.2d 508 (1969); State v. George, 98 Ariz. 290, 403 P.2d 932 (1965); McCoy v. State, 175 So. 2d 588 (Fla. Ct. App. 1965), *cert. denied,* 384 U.S. 1020 (1966); Starr v. State, 209 Ga. 258, 71 S.E.2d 654 (1952); Haden v. State, 176 Ga. 304, 168 S.E. 272 (1933); Young v. Commonwealth, 245 Ky. 570, 53 S.W.2d 963 (1932); Donehy v. Commonwealth, 170 Ky. 474, 186 S.W. 161 (1916); State v. Linzy, 279 Minn. 154, 156 N.W.2d 92 (1968); State v. Temple, 194 Mo. 228, 237, 92 S.W. 494, 869 (1906) (separate opinion); State v. Gomez, 82 N.M. 333, 481 P.2d 412 (1971); Powell v. State, 50 Tex. Crim. 592, 99 S.W. 1005 (1907); Stockton v. State, 148 Tex. Crim. 360, 187 S.W.2d 86 (1945).

55. *See, e.g.,* Starr v. State, 209 Ga. 258, 260, 71 S.E.2d 654, 656 (1952).

56. *See* Smith v. State, 247 Ala. 354, 24 So. 2d 546 (1946); Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 821 (1937); Donehy v. Commonwealth, 170 Ky. 474, 186 S.W. 161 (1916); South v. State, 111 Neb. 383, 196 N.W. 684 (1923); Bradbury v. State, 51 Okla. Crim. 56, 299 P. 510 (1931); State v. Hanrahan, 49 S.D. 434, 207 N.W. 224 (1926).

57. *See* Smith v. State, 247 Ala. 354, 24 So. 2d 546 (1946); State v. Craft, 164 Mo. 631, 65 S.W. 280 (1901); State v. Sykes, 93 N.J. Super. 90, 225 A.2d 16 (1966), *distinguishing* State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965). Krauskopf distinguishes between these two situations, saying:

> When the sight was momentary the degree of prejudice resulting is likely to be less than that engendered by the jurors seeing the defendant chained throughout a trial. Since some justification is present in the goal of preventing escapes during transportation in all these situations, one can understand why a court might conclude that, in general, the amount of prejudice fairly presumable is not sufficient to violate the precept against chains during trial.

Krauskopf, *Physical Restraint of the Defendant in the Courtroom,* 15 ST. LOUIS U.L.J. 351, 359 (1971).

58. 48 Wis. 2d 619, 180 N.W.2d 607 (1970).

59. *Id.* at 625, 180 N.W.2d at 611.

60. *Id.*

61. State v. Yates, 442 S.W.2d 21, 27 (Mo. 1969).

does.[62] To preserve an objection on this ground for appeal, there are so many pitfalls that apparently no defendant has avoided them all. A first requirement is that the objection be timely made. For example, if the defendant is seen by a prospective juror or jurors, he should object before the jury is sworn.[63] If only one or two jurors saw the defendant, he should exhaust his challenges for cause and peremptory challenges.[64] If the defendant is not sure how many jurors saw him, he should ask "a blind question, to be answered by a show of hands, whether any jurors had seen the [defendant] prior to [his] appearance in the courtroom."[65] If many have, the matter could be further explored by additional questions, with possible challenges or cautionary instructions.[66] If the objection is that the defendant was brought into the courtroom in handcuffs, he must make it at that time, because any delay has been construed as a waiver.[67]

Another requirement is that the defendant prove that he was seen[68] by those jurors who are actually selected to try his case.[69] The assertion of defense counsel in his motion or objection that his client was seen is insufficient.[70]

A third requirement is that the defendant make an affirmative showing of prejudice,[71] although no hint is given as to how this is done.[72] There has been an indication that where the defendant is presently serving another term,[73] or where he declined to take the stand in his own behalf,[74]

62. *See* State v. George, 98 Ariz. 290, 403 P.2d 932 (1965); State v. Owen, 6 Ariz. App. 24, 429 P.2d 516 (1967); State v. Klinkert, 271 Minn. 548, 136 N.W.2d 399 (1965); State v. Yates, 442 S.W.2d 21 (Mo. 1969); Burks v. State, 50 Tex. Crim. 47, 94 S.W. 1040 (1906); State v. Ollison, 68 Wash. 2d 65, 411 P.2d 419 (1966).

63. State v. Boone, 355 Mo. 550, 196 S.W.2d 794 (1946).

64. Canon v. State, 59 Tex. Crim. 398, 128 S.W. 141 (1910).

65. O'Shea v. United States, 400 F.2d 78, 80 (1st Cir. 1968), *cert. denied,* 393 U.S. 1069 (1969).

66. *Id.*

67. Rayburn v. State, 200 Ark. 914, 141 S.W.2d 532 (1940); State v. Klinkert, 271 Minn. 548, 136 N.W.2d 399 (1965); State v. Berkins, 2 Wash. App. 910, 471 P.2d 131 (1970).

68. State v. Yurk, 203 Kan. 629, 456 P.2d 11 (1969); Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721 (1937); State v. Sallee, 436 S.W.2d 246 (Mo. 1969); Rivera v. State, ____ Tenn. App. ____, 443 S.W.2d 675 (1969); State v. Roberts, 69 Wash. 2d 921, 421 P.2d 1014 (1966); State v. Berkins, 2 Wash. App. 910, 471 P.2d 131 (1970).

69. State v. Meeks, 458 S.W.2d 245 (Mo. 1970).

70. State v. Hashimoto, 46 Hawaii 183, 389 P.2d 146 (1963): State v. Caffey, 404 S.W.2d 171 (Mo. 1966); State v. Sawyer, 60 Wash. 2d 83, 371 P.2d 932 (1962).

71. *See* State v. Owen, 6 Ariz. App. 24, 429 P.2d 516 (1967); State v. Yurk, 203 Kan. 629, 456 P.2d 11 (1969); State v. Sallee, 436 S.W.2d 246 (Mo. 1969); State v. Sykes, 93 N.J. Super. 90, 225 A.2d 16 (1966); Burks v. State, 50 Tex. Crim. 47, 94 S.W. 1040 (1906); State v. Roberts, 69 Wash. 2d 921, 421 P.2d 1014 (1966); State v. Berkins, 2 Wash. App. 910, 471 P.2d 131 (1970).

72. The rule that a jury cannot impeach its own verdict operates here to prevent a defendant from producing testimony of a juror to the effect that the sight of the defendant chained prejudiced that juror against the defendant.

73. *See* People v. Burwell, 44 Cal. 2d 16, 279 P.2d 744, *cert. denied,* 349 U.S. 936, *habeas corpus denied,* 226 F.2d 309 (9th Cir.), *rev'd on other grounds per curiam sub nom.* Burwell v. Teets, 350 U.S. 808 (1955).

74. *See* O'Shea v. United States, 400 F.2d 78 (1st Cir. 1968), *cert. denied,* 393 U.S. 1069 (1969).

or even where the gravity of the offense charged was great,[75] no such showing could be made. The constitutionality of such a rule would appear to be doubtful as it would deprive this sort of defendant of rights enjoyed by others.

As a fourth requirement, the defendant must have exhausted all possible remedies to cure the prejudice at trial. As noted above, challenges to the jury panel should be utilized when appropriate.[76] A motion for mistrial should also be accompanied by a request for a cautionary instruction from the court.[77] The court is under no obligation to so instruct *sua sponte*.[78] To poll the jury, asking whether the incident prejudiced them, is useless, because of the rule that a juror cannot impeach his own verdict.[79]

It should also be noted that a few courts have used different rationales in holding that a view of the accused in handcuffs is not prejudicial. For example, if the reason for the rule is that it affects the accused's credibility, no prejudice results unless he testifies.[80] Likewise, if the reason is to provide him the full use of his facilities at trial,[81] or to avoid confusing or embarrassing him at trial,[82] any view of him shackled other than during the actual progress of the trial is irrelevant.

III. Prison Clothes

Of much more recent origin is the defendant's right to stand trial in civilian clothes. The earliest case to mention such a right was in 1940,[83] and the first case actually to recognize it was decided only 27 years ago.[84]

Early analysis of this right proceeded along the same lines as the shackling cases and often used those cases as authority. As a procedural right,[85] the objection must be raised by the defendant when it first becomes obvious that he will be forced to go to trial in the prison clothes.[86] Also, a defense strategy of allowing the defendant to be seen in prison clothes which backfires cannot be attacked later.[87] If the objection is timely, there is no reason for denying the request, because the wearing of

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75. *See* People v. Ross, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd on other grounds per curiam,* 391 U.S. 470 (1968); Jessup v. State, ——— Ind. ———, 269 N.E.2d 374 (1971).

76. State v. Hashimoto, 46 Hawaii 183, 389 P.2d 146 (1963).

77. State v. Ollison, 68 Wash. 2d 65, 411 P.2d 419, *cert. denied,* 385 U.S. 874 (1966); State v. Berkins, 2 Wash. App. 910, 471 P.2d 131 (1970).

78. State v. Sykes, 93 N.J. Super. 90, 225 A.2d 16 (1966); State v. Cassel, 48 Wis. 2d 619, 180 N.W.2d 607 (1970).

79. State v. Cassel, 48 Wis. 2d 619, 180 N.W.2d 607 (1970).

80. State v. Norman, 8 N.C. App. 239, 174 S.E.2d 41 (1970).

81. State v. Temple, 194 Mo. 228, 237, 92 S.W. 494, 869 (1906) (separate opinion).

82. Hanser v. People, 210 Ill. 253, 71 N.E. 416 (1904).

83. Collins v. State, 70 Okla. Crim. 340, 106 P.2d 273 (1940) (dictum).

84. Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946).

85. Sharpe v. State, 119 Ga. App. 222, 166 S.E.2d 645 (1969).

86. Clark v. State, 280 Ala. 493, 195 So. 2d 786, *cert. denied,* 387 U.S. 571 (1967); Sharpe v. State, 119 Ga. App. 222, 166 S.E.2d 645 (1969); People v. Shaw, 7 Mich. App. 187, 151 N.W.2d 381 (1967), *aff'd,* 381 Mich. 467, 164 N.W.2d 7 (1969); Watt v. State, 450 P.2d 227 (Okla. Crim. App. 1969); Ring v. State, 450 S.W.2d 85 (Tex. Crim. App. 1970); Yates v. Peyton, 207 Va. 91, 147 S.E.2d 767 (1966).

87. Timmons v. State, 223 Ga. 450, 156 S.E.2d 68 (1967).

prison or civilian clothes has little to do with security measures.[88] However, many courts have said that if the lower court does refuse the request, a reversal or new trial is appropriate only if prejudice can be shown.[89] Thus, if the clothes are not obviously prison clothes,[90] if the trial court gives a full charge on the presumption of innocence or a cautionary instruction,[91] or if the defendant was not seen by the jury,[92] there is usually no prejudice. One federal court has gone so far as to state the burden is on the defendant to show the sight of the defendant in jail clothes seriously affected the fairness of the trial.[93] When the evidence of guilt is particularly strong, the court will be more reluctant to reverse.[94] Additionally, a few courts in this area also have seen fit to pose obstacles for the unwary defendant who fails to press his objection at every possible opportunity. For example, if the jury has not been selected, challenges should be utilized,[95] and requests to allow the defendant to change clothes should be made.[96] Habeas corpus in federal court is inappropriate unless defendant has exhausted state appellate review.[97]

For purposes of claiming this right, it is essential to know what prison clothing is, and what type of clothing is not objectionable. In *Eaddy v. People*,[98] the court was particularly concerned because the clothing had the words "County Jail" on it in large letters:

> It is difficult to find any distinction, as to the humiliation involved, between requiring a prisoner to wear the words 'County Jail' branded upon his clothing and requiring him to wear them upon a placard attached about his neck; either is a mockery, an indignity and a humiliation not consonant with innocence and freedom.[99]

The court did hint that any "fit and decent clothing furnished by the jailor" (presumably including striped overalls) is permissible if there is a substantial reason why the defendant cannot wear his own.[100] However,

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88. Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971). *But see* Clark v. State, 280 Ala. 493, 195 So. 2d 786, *cert. denied*, 387 U.S. 571 (1967).

89. *See, e.g.*, Yates v. Peyton, 207 Va. 91, 99, 147 S.E.2d 767, 773 (1966); Wilkinson v. State, 423 S.W.2d 311, 313 (Tex. Crim. App. 1968).

90. Tillery v. United States, 396 F.2d 790 (5th Cir. 1968).

91. Sharpe v. State, 119 Ga. App. 222, 166 S.E.2d 645 (1969).

92. People v. Arntson, 10 Mich. App. 718, 160 N.W.2d 386 (1968); State v. Hendrick, 164 N.W.2d 57 (N.D. 1969).

93. McFalls v. Peyton, 270 F. Supp. 577, 579 (W.D. Va. 1967), *aff'd*, 401 F.2d 890 (4th Cir. 1968), *cert. denied*, 394 U.S. 951 (1969).

94. Collins v. State, 70 Okla. Crim. 340, 106 P.2d 273 (1940).

95. People v. Garcia, 124 Cal. App. 2d 822, 269 P.2d 673, *cert. denied*, 348 U.S. 901 (1954), 350 U.S. 1000 (1956).

96. People v. Garcia, 124 Cal. App. 2d 822, 269 P.2d 673, *cert. denied*, 348 U.S. 901 (1954), 350 U.S. 1000 (1956); French v. State, 416 P.2d 171 (Okla. Crim. App. 1966), *aff'g* 377 P.2d 501 (Okla. Crim. App. 1963).

97. May v. Peyton, 268 F. Supp. 928 (W.D. Va. 1967), *rev'd on other grounds*, 398 F.2d 476 (4th Cir. 1968).

98. 115 Colo. 488, 174 P.2d 717 (1946).

99. *Id.* at 492, 174 P.2d at 718.

100. *Id. See also* Claxton v. People, 164 Colo. 283, 292, 434 P.2d 407, 411 (1967).

it is contended that even this limitation is unjustified. A better rule would be to prohibit any clothing which is suggestive of prison garb.[101]

All of the foregoing considerations are irrelevant if the right to be tried in civilian clothes is absolute. Several courts have held that "the right to wear civilian clothes during trial is not a constitutional right 'so basic to a fair trial that [its] infraction can never be treated as harmless error.' "[102] But a few courts are moving toward making this a right of constitutional dimensions,[103] capable of being ignored only by an affirmative waiver.[104] By this view, to force an accused to stand trial in prison clothes would be prejudicial regardless of the evidence in support of the conviction.[105] A waiver in this context means purposely relinquishing a known right, it is not a waiver of a known right to fail to complain at trial because the law then did not recognize this right.[106]

This writer firmly believes that the "constitutional right" line of cases represents the better view.[107] Here, contrary to the shackling cases, there is no overriding interest served by trying a person in prison clothes, while the possibility for prejudice is obvious. Any inconvenience caused to the custodial authorities would be more than repaid in the benefits of fairer trials.

One problem in this area which has seemed to nag at the back of the judicial mind, militating against making the right absolute, is the problem of how to handle the defendant who is so poor he cannot afford suitable civilian clothing. *Griffin v. Illinois*,[108] construed broadly, holds that to deny a defendant a right because he cannot afford to take advantage of it is "invidious discrimination" in violation of both the due process and equal protection clauses. Faced with this very argument, a federal district court in *Hall v. Cox*[109] stated: "If [defendant] was denied the right to wear civilian clothing solely because of his poverty, it was not that kind of denial

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101. *Cf.* McClain v. State, 432 S.W.2d 73 (Tex. Crim. App. 1968).

102. Xanthull v. Beto, 307 F. Supp. 903, 906 (S.D. Tex. 1970), *citing* Chapman v. California, 386 U.S. 18, 23 (1966). *See also* Atkins v. State, 210 So. 2d 9, 10-11 (Fla. Ct. App. 1968), *cert. denied*, 396 U.S. 859 (1969), where the court said that requiring defendant to stand trial in prison garb would be automatic error, except

> in extraordinary circumstances, as for example where the defendant committed the alleged crime while he was an inmate of a custodial institution where prison garb is his normal attire or where the defendant himself is responsible for the absence of civilian attire . . . .

103. Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967) (dictum).

104. *See* Miller v. State, 249 Ark. 3, 5, 457 S.W.2d 848, 849 (1970), where the court said: "[A]bsent a waiver, accused should not be forced to trial in prison garb."

105. *Id.* at 6, 457 S.W.2d at 850.

106. Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir.), *cert. denied*, 404 U.S. 958 (1971).

107. No decision was located which relied solely upon the equal protection argument. This theory would appear to have more promise for defendants in that it would obviate the requirements of showing prejudice, of making timely objection, etc. The Fifth Circuit has written, as dictum, that to force a defendant to trial in jail garb is a violation of the equal protection clause, but the theory was not relied on in the holding. *See* Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967).

108. 351 U.S. 12 (1956).

109. 324 F. Supp. 786 (W.D. Va. 1971).

of a fundamental right which the Commonwealth was obliged to redress."[110] However, the Pennsylvania Supreme Court disagrees. In *Commonwealth v. Keeler*[111] the defendant was tried in a uniform supplied by the County Clinic, although his attorney, the public defender, had attempted to obtain civilian clothes, asked for a postponement so they could be obtained, and moved to disqualify the jury before they were sworn. The appellate court held:

> No purpose was served by requiring appellant to appear in his prison garb. It only prejudiced the jury against him and demeaned him before conviction. The court abused its discretion by not continuing appellant's case and proceeding with the trial of another. If there were no others conveniently able to try, *the court itself should have procured civilian attire for appellant.* In no case should appellant have undergone the severe prejudice of appearing before the jury as this man was required.[112]

Furnishing suitable civilian clothes on the rare occasions when a defendant does not have any suitable clothing of his own would put an insignificant burden on the state. This could easily be handled through the prosecuting attorney's office. Any cost the county would incur would be far outweighed by the cost involved in a new trial when the appellate court, as in *Keeler,* reverses the conviction.

The discussion of this area would be incomplete without mention of a recent Pennsylvania district court case where civil liability was imposed on prison authorities who withheld the defendant's civilian clothes, forcing him to stand trial in his prison uniform.[113] In a 42 U.S.C. section 1983 action, the court stated that prisoners are entitled to protection from such violations of their civil rights.[114] The denial of the constitutional right to be tried in civilian clothes was held to be a violation of the statute,[115] even though the defendant had waived jury trial (possibly because he felt this was the only alternative open to him to avoid undue prejudice).[116] The obvious ramification of this case is that not only may the accused have his conviction reversed, but he may also recover a judgment from those officials responsible.

IV. Excessive Guard

The third garment in the "garb of innocence" is the defendant's right to be tried in a courtroom free of excessive guards. Two basic reasons underlie this right. First, having armed guards next to the defendant or in the courtroom could create the impression in the minds of the jury

110. *Id.* at 787.
111. 216 Pa. Super. 193, 264 A.2d 407 (1970).
112. *Id.* at 198, 264 A.2d at 410 (emphasis added).
113. United States *ex rel.* Diamond v. Social Serv. Dep't, 263 F. Supp. 971 (E.D. Pa. 1967).
114. *Id.* at 973, *citing* Cooper v. Pate, 378 U.S. 546 (1964) *and* Brown v. Brown, 368 F.2d 992 (9th Cir. 1966).
115. The court assumed it to be established that the constitutional right to a fair trial included the right to be tried in civilian clothes. *Id.* at 974-75.
116. The court did note that if the waiver had been for other considerations, defendant would have no complaint. *Id.* at 975.

that he is dangerous or untrustworthy.[117] Second, a guard too close to the defendant could limit his right to consult freely with counsel.[118] The scope of this right is the least clearly defined of any of the three because no case could be found where a court has reversed a conviction on this ground alone. Therefore, it is impossible to say what the limit is.

There are valid reasons for allowing law enforcement officers to be present in the courtroom. As indicated in the shackling cases, if the defendant is dangerous or likely to attempt escape, an inconspicuous policeman at the door would provide the necessary security without the greater prejudice of physical restraints on the defendant.[119] Also, if local interest or prejudice in the community is high, resulting in many spectators at the trial, police may be needed for crowd control.[120]

If the accused himself knows that the officer is to provide security in the courtroom, it is unnecessary for the officer to carry arms openly or even wear a badge or uniform. This would minimize any possible prejudicial effects on the jury.[121] But the fact that an officer does openly display his weapon is not such an abuse as to require reversal.[122] To warrant reversal, the officer must have "misconducted" himself,[123] although no definition of misconduct has been provided. Evidently, the number of guards,[124] their proximity to defendant,[125] whether they wore their arms openly,[126] and if they caused any kind of disturbance[127] are relevant factors; however, all must be considered in light of the amount of security required.[128] The defendant would be well advised to have the existence of the incident established in the record by some type of evidence and to have the judge state his reasons for requiring the guard.[129] Here again an affidavit of a

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117. Beecher v. State, 280 Ala. 283, 193 So. 2d 505 (1966), *rev'd on other grounds,* 389 U.S. 35 (1967); Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174, *cert. denied,* 323 U.S. 784 (1944); Sheppard v. State, 167 Ga. 326, 145 S.E. 654 (1928).

118. Kelley v. Oregon, 273 U.S. 589 (1927); Fowler v. State, 196 Ga. 748, 27 S.E.2d 557 (1943); Sheppard v. State, 167 Ga. 326, 145 S.E. 654 (1928).

119. People v. Harris, 98 Cal. App. 2d 662, 220 P.2d 812 (1950); State v. Duncan, 116 Mo. 288, 22 S.W. 699 (1893); DeWolf v. State, 95 Okla. Crim. 287, 245 P.2d 107 (1952), *appeal dismissed,* 96 Okla. Crim. 380, 255 P.2d 949, *habeas corpus denied,* 96 Okla. Crim. 382, 256 P.2d 191, *cert. denied,* 345 U.S. 953, *habeas corpus denied,* 205 F.2d 234 (10th Cir.), *cert. denied,* 346 U.S. 837 (1953).

120. Patton v. State, 246 Ala. 639, 21 So. 2d 844 (1945); State v. Layton, 217 La. 57, 46 So. 2d 37, *cert. denied,* 340 U.S. 839 (1950); State v. McKeever, 339 Mo. 1066, 101 S.W.2d 22 (1936).

121. DeWolf v. State, 95 Okla. Crim. 287, 245 P.2d 107 (1952); Garcia v. State, 435 S.W.2d 533 (Tex. Crim. App. 1968).

122. State v. Daniels, 347 S.W.2d 874, 876 (Mo.), *cert. denied,* 369 U.S. 862 (1961).

123. State v. McKeever, 339 Mo. 1066, 1082, 101 S.W.2d 22, 31 (1936).

124. Beecher v. State, 280 Ala. 283, 193 So. 2d 505 (1966), *rev'd on other grounds,* 389 U.S. 35 (1967); Flowers v. State, 43 Wis. 2d 352, 168 N.W.2d 843 (1969).

125. Flowers v. State, 43 Wis. 2d 352, 168 N.W.2d 843 (1969).

126. *Id.*

127. State v. Hashimoto, 46 Hawaii 183, 389 P.2d 146 (1963).

128. Beecher v. State, 280 Ala. 283, 193 So. 2d 505 (1966), *rev'd on other grounds,* 389 U.S. 35 (1967).

129. Flowers v. State, 43 Wis. 2d 352, 168 N.W.2d 843 (1969).

juror testifying to the prejudicial nature of the incident would be useless, as a juror can not impeach his own verdict.[130]

The second ground for objection, denial of right to consult with counsel, is simply a factual question. As a practical matter, the point should never require an appeal. If defense counsel believes the policeman is so close as to be limiting free conversation with his client, he should simply object to the court.[131] The security of the defendant and the decorum of the court can be maintained equally as well with the officer out of earshot of the defendant and his counsel. A defendant should be unable to raise the point for the first time on appeal.[132] If, on objection, the policeman is ordered to move, then the problem is solved, and reversal would not be appropriate.[133]

V. Miscellaneous "Apparel"

A discussion of the garb of innocence would be incomplete without mention of a few rights which fit into none of the above categories. All of the following come within the subject of this comment in that they relate to prejudicing the defendant's right to appear to be innocent.

The first in this group is the right of the defendant not to be seen in jail by the jury. These cases arise when the jury is shortsightedly given a tour of the jail during a recess in the trial, and sees the defendant. The only two cases discovered on this point are split. The Washington Supreme Court held this was not prejudicial error (although it did not condone the practice) because the average juror would know "that a person charged with an offense is detained in jail during the pendancy of a trial, unless he has been released on bond or on his personal recognizance . . . . [and] would not relate detention in jail with guilt or innocence."[134] On the other side is the Oklahoma court which held the sight of the defendant in jail definitely was prejudicial.[135]

A second item involves a defendant or defense witness being ordered into custody immediately after he finishes testifying, in the presence of the jury. This is such a clear expression by the trial court of its opinion of the truth of the testimony that it is automatic error.[136]

The last two rights are related in that, if violated, they tend to make the defendant appear more dangerous than the average person. The first of these is the right not to be searched for weapons in the courtroom in the jury's presence. Although this is not automatically reversible error, it is hard to imagine a case where it would be excused.[137] The second right in this group involves the case where the accused defends himself but, because he is considered dangerous, is not permitted to approach the jury

130. Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174, *cert. denied*, 323 U.S. 784 (1944).
131. Fowler v. State, 196 Ga. 748, 27 S.E.2d 557 (1943).
132. *Id.* at 752, 27 S.E.2d at 560.
133. People v. David, 12 Cal. 2d 639, 86 P.2d 811 (1939).
134. State v. Boggs, 57 Wash. 2d 484, 489, 358 P.2d 124, 127 (1961).
135. Moore v. State, 430 P.2d 340 (Okla. Crim. App. 1967). However, in this case the evidence of guilt was so strong that a reduction in sentence by about one-half was appropriate, rather than reversal. *Id.* at 342.
136. *Cf.* State v. Mangum, 245 N.C. 323, 96 S.E.2d 39 (1957).
137. Baker v. State, 432 P.2d 935, 940 (Okla. Crim. App. 1967).

box or the witness stand. The only case treating this point holds that the accused can gain no more privileges by conducting his own defense than he would have had if defended by an attorney.[138] If some type of restraint would have been permissible, the court's decision should stand.

In all these cases, the earlier discussion regarding timely objection, exhausting all remedies, and showing prejudice is apropos.

VI. A Combination of Ingredients

The foregoing discussion has treated each area as an independent abuse, unrelated to the other areas. However, more than one of these factors could be, and occasionally are, combined in a single case, as where the defendant is tried in handcuffs and prison clothes. It would seem logical that if one of these abuses alone is sufficient to require a reversal, then there would be little hesitation when two appear together. But here, as elsewhere in dealing with these problems, the courts have not been completely logical.

A strong case can be made for the argument that if trying a defendant in handcuffs alone, or in prison garb alone, is sufficiently prejudicial to warrant a reversal, the two together would be substantially more prejudicial. However, the California court in *People v. Chacon*[139] disagreed. The court seemed to ignore the additional fact of prison garb altogether and, relying on the rules and precedents in the handcuffing area, held that there was no timely objection and no prejudice because of the cautionary instruction.[140] In a similar Texas case, where the defendant was brought into the courtroom handcuffed to another prisoner and dressed in prison clothes with a large "P" on the back, the court stated that defendant waived his objection by failing to challenge the prospective jurors on this point.[141] Thus, the court ignored the prisoner's dress, when combined with shackles. However, in *Brooks v. Texas*,[142] decided the next year, it was held that to try a defendant in prison garb with handcuffs was error.[143]

Some courts, on the other hand, have recognized that a stronger case is made when these two factors appear together. As early as 1938 the Florida court called such a practice "highly improper," saying that "in many cases it might be sufficient ground for a reversal."[144] But this conviction was reversed on other grounds, so this language was only dictum. However, a federal district court in Louisiana held in a habeas corpus proceeding that

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138. People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001, *cert. denied*, 343 U.S. 915, (1951).

139. 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968).

140. *Id.* at 778, 447 P.2d at 114-15, 73 Cal. Rptr. at 18-19.

141. Clark v. State, 398 S.W.2d 763, 766 (Tex. Crim. App. 1966), *cert. denied*, 385 U.S. 1011 (1967) (dictum).

142. 381 F.2d 619 (5th Cir. 1967).

143. The Michigan Court, in People v. Thomas, 1 Mich. App. 118, 126, 134 N.W.2d 352, 357 (1965) stated: "It is admitted that it would have been better in this case if appellant had been brought into court in civilian clothes and unchained," but refused to reverse due to the crime charged and the character of the accused.

144. Shultz v. State, 131 Fla. 757, 758, 179 So. 764, 765 (1938).

a trial under these circumstances was so prejudicial to the defendant's rights as to be a denial of due process.[145] The court stated:

> The prejudice that would obviously operate against a defendant being tried before a jury for murder, unnecessarily attired in striped prison garb, safety chains, restraining belt, handcuffs and leg irons would, without doubt, outweigh any danger under the circumstances of this case that this one individual could possibly present . . . .[146]

The court implied that the prison clothes would probably justify granting the writ, but combined with the security measures, the conclusion was inescapable that defendant was denied a fair and impartial trial.[147]

Another combination of abuses which has served as grounds for appeal is trying a defendant both in handcuffs and with an excessive guard. Here too, many courts ignore the extra prejudice involved and reason as if shackling was the only prejudicial factor[148]—although some have added as an afterthought that an excessive guard should be avoided.[149] However, the Tenth Circuit Court of Appeals has held that shackling a defendant during his trial "coupled with an unusual display of hostility toward a defendant, might well reach a point where the trial is a farce and a fair trial impossible."[150] Oklahoma, under a statute,[151] holds this to be prejudicial error as a matter of law.[152]

When all three factors are combined in one case, it would seem irrefragable that prejudice sufficient to deny an accused a fair and impartial trial would result. But, typically, there are cases going both ways.[153] If the above analysis has any validity at all, then forcing a defendant to stand trial under guard, in handcuffs and in prison clothes must destroy all pretense of a presumption of innocence. Shorn of his garb of innocence, the defendant is portrayed as a criminal.[154] This can only act to his detriment and deny him his constitutional right to a fair trial by a fair tribunal.[155] Therefore, it is contended that if all three of these factors appear in a trial in any degree, the conviction should be reversed as a matter of law. This would have the effect of requiring the trial courts to use only that amount of restraint necessary to insure the security of the defendant and the decorum of the courtroom.

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145. Dennis v. Dees, 278 F. Supp. 354 (E.D. La. 1968). The conviction had been affirmed in State v. Dennis, 250 La. 125, 194 So. 2d 720 (1967).

146. Dennis v. Dees, 278 F. Supp. 354, 357 (E.D. La. 1968).

147. *Id.* at 359.

148. *See* Corey v. State, 126 Conn. 41, 9 A.2d 283 (1939); Commonwealth v. Millen, 289 Mass. 441, 194 N.E. 463, *cert. denied,* 295 U.S. 765 (1935).

149. *See, e.g.,* Commonwealth v. Dirring, 254 Mass. 523, 238 N.E.2d 508 (1968).

150. Odell v. Hudspeth, 189 F.2d 300, 302 (10th Cir.), *cert denied,* 342 U.S. 873 (1951).

151. 22 OKLA. STAT. tit. 22, § 15 (1969).

152. *See* French v. State, 377 P.2d 501 (Okla. Crim. App. 1963).

153. *Compare* State v. Brooks, 44 Hawaii 82, 352 P.2d 611 (1960), *with* Dennis v. Dees, 278 F. Supp. 354 (E.D. La. 1968).

154. United States *ex rel.* O'Halloran v. Rundle, 266 F. Supp. 173, 174 (E.D. Pa.), *aff'd,* 384 F.2d 997 (3d Cir. 1967), *cert. denied,* 393 U.S. 860 (1968).

155. *See* Lane v. Warden, 320 F.2d 179 (4th Cir. 1963); Baker v. Hudspeth, 129 F.2d 779 (10th Cir.), *cert. denied,* 317 U.S. 681 (1942).