Nos. 13-50561, 13-50562, 13-50566, 13-50571

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

RENE SANCHEZ GOMEZ, ET AL.,
DEFENDANTS-APPELLANTS

On Appeal from the United States District Court for the Southern District of California

PETITION FOR REHEARING EN BANC BY THE UNITED STATES

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INTRODUCTION

In 2013, the United States Marshals Service for the Southern District of California experienced a significant increase in violent courtroom incidents. That year, there were four "inmate on inmate" assaults and seven "inmate on staff" assaults. SER 61-62. In one incident, a defendant wearing leg restraints attacked and bloodied the face of another inmate while waiting in court. In another, an inmate assaulted a deputy marshal in the courtroom and continued the assault into the holding area. *Id.* The Marshals also discovered multiple weapons, including metal pins and razor blades, in secured areas of the courthouse. SER 63.

Partly in response to these security concerns, the Marshals made a presentation to all of the district judges in the Southern District, proposing new courtroom security policy. Under the policy, the Marshals would be allowed to produce defendants in arm and leg restraints for most non-jury proceedings. This new practice was consistent with the national policy directive of the U.S. Marshals Service, and it was already the practice in every other district along the southwest border. SER 64. The district court approved of the policy, so long as the restraints were not used during guilty plea or sentencing proceedings before the district court, and so long as each judge retained the discretion to order restraints removed at any time. ER 259-60.

On August 25, 2015, a panel of this Court struck down the Marshals' security policy on the grounds that the Southern District of California had failed to provide "adequate justification" for the change in policy. *United States v. Sanchez-Gomez*, 798 F.3d 1204, 1206 (9th Cir. 2015). Because the panel's decision (1) fails to mention or apply the due process standard for appropriate pre-trial prisoner restrictions established by *Bell v. Wolfish*, 441 U.S. 520 (1979), (2) creates significant tension with the law of the Second and Eleventh Circuits, and (3) upends courtroom security

practices for districts that account for 40 percent of the Marshals' nationwide daily prisoner population, the United States respectfully petitions for rehearing *en banc*. Fed. R. App. P. 35.

QUESTION PRESENTED

Whether, consistent with *Bell v. Wolfish*, 441 U.S. 520 (1979), the Marshals Service's policy of presenting defendants in leg-and-arm restraints during non-jury proceedings is reasonably related to the legitimate governmental objective of providing courtroom security.

STATEMENT OF FACTS

On October 21, 2013, the U.S. Marshal Service in the Southern District of California began producing in-custody defendants in "full restraints" for non-jury proceedings. ER 11, 22. These restraints included leg restraints, handcuffs, and a "belly chain," which secured the defendants' hands in front, at waist level. SER 73-75.

Shortly after the policy went into effect, three defendants objected to the use of restraints in the courtroom of Magistrate

Judge Barbara L. Major. Judge Major overruled the objections. She noted that "prison-made weapons have been found in the court holding cells" and "there have been several incidents of assault by prisoners in courts and holding cell areas." ER 14. Judge Major also found that the judiciary's limited staffing meant magistrate judges had to "process a large number of criminal defendants in criminal matters" at times when, given the preliminary nature of an arraignment proceedings, "security information regarding each defendant, including gang affiliation" is "often unknown or incomplete." ER 16.

The following week, the defendants filed an emergency motion challenging Judge Major's ruling, and asking the district court to "revoke" the Marshals' policy. The court treated the defendants' motion as a consolidated challenge to the use of restraints. A declaration from Assistant Chief Deputy U.S. Marshal Keith Johnson outlined the Marshals' reasons for the change:

- First, the Marshals Service is responsible for a "massive" volume of in-custody defendants in the Southern District of California, making approximately 39,000 in-custody court appearances per year. SER 57.

- Second, the Marshals Service receives in-custody defendants from a number of detention facilities and the deputy marshals "typically know little about the defendants" at the time they make their appearance. *Id.*

- Third, the cellblock and courtroom responsibilities of the Marshals Service have increased due to the 2012 completion of a new 16-story annex courthouse, even as staffing has shrunk. SER 59.

- Fourth, the magistrate courtrooms to which the Marshals routinely produce as many as 40 to 50 in-custody defendants are "quite small," and require the defendants to stand in the jury box, less than 10 feet from counsel table and the interpreters, and less than 20 feet from the judge, clerk, public gallery, and unlocked doors leading to the public hallway. SER 60.

- Fifth, in recent years, there had been a notable "increase in security incidents," which Johnson specifically enumerated. SER 61-63.

- Finally, the Marshals Service had surveyed restraint practices in similarly situated districts and found that the Southern District of California was "the only district along the southwest United States border producing in-custody defendant

without restraints for non-jury proceedings." Combined, these southwest border districts—along with the Southern District of California—account for roughly 40 percent of the total nationwide daily prisoner population handled by the Marshals Service. SER 64.

Based on these justifications, the district court concluded that the shackling policy was "reasonably related to legitimate government interests" and did not "violate Defendant's constitutional rights." ER 149. The three defendants, along with a fourth defendant whose objections were similarly overruled, were consolidated on appeal. On August 25, 2015, a panel of this Court vacated and remanded, concluding that any policy requiring the use of restraints in court "must be adopted with adequate justification of its necessity," and "the record here falls short of that showing." *Sanchez-Gomez*, 798 F.3d at 1209.

DISCUSSION

A. Background Legal Principles

The Supreme Court has recognized two general due process concerns in the context of pre-trial prisoner restraints. First, a pre-trial detainee cannot be "punished" before receiving due process of law. *Bell*, 441 U.S. at 520. In *Bell*, the Court considered

the conditions of confinement for detainees at the Metropolitan Correctional Center (MCC) in New York. After a class-action lawsuit, the Second Circuit struck down several restrictive MCC policies on the grounds that pretrial detainees were innocent until proven guilty and therefore could only be subject to restrictions that were "justified by compelling necessities of jail administration." *Id.* at 531. The Supreme Court rejected that "compelling necessity" standard and held that in evaluating the constitutionality of pretrial restrictions, the "proper inquiry" was whether the "conditions amount to punishment of the detainee." *Id.* at 535. The Court explained that in making this determination "wide-ranging deference" should be given to the decisions of prison officials. *Id.* at 539. So long as a particular pre-trial condition was "reasonably related to a legitimate government objective," it did not, "without more, amount to 'punishment.'" *Id.* The Court further held that it was the defendants who bore the "heavy burden" of demonstrating that a specific policy was not reasonably related to a specific security concern or that officials had "exaggerated their response." *Id.* at 561-62.

The second concept of due process in the pre-trial context involves the use of visible restraints before a jury. In *Deck v.*

Missouri, 544 U.S. 622 (2005), the Supreme Court recognized that there was a longstanding common law rule against presenting a defendant in visible restraints to the jury during the guilt phase of the trial. *Id.* at 626. The Court summarized "three fundamental legal principles" underlying this common law rule. First, the use of visible shackles undermines the presumption of innocence by suggesting to the jury that "the justice system itself sees a need to separate a defendant from the community at large." *Id.* at 630. Second, the use of shackles "can interfere with a defendant's ability to participate in his own defense." *Id.* at 631. Finally, "the routine use of shackles in the presence of juries" is an affront to the "dignity and decorum of judicial proceedings." *Id.*

While recognizing each of these concerns, the Court made it clear that the common law rule against shackling did not apply to proceedings before a judge:

> Blackstone and other English authorities recognized that the rule did not apply at "the time of arraignment," or like proceedings before the judge. Blackstone, supra, at 317; see also *Trial of Christopher Layer*, 16 How. St. Tr. 94, 99 (K.B.1722). It was meant to protect defendants appearing at trial before a jury.

Id. at 626. The Court in *Deck* applied these principles to the penalty phase of death penalty proceedings, and held that due

process prohibited the use of restraints before the jury, since the sight of a defendant in shackles "inevitably undermines the jury's ability to weigh accurately all relevant considerations when determining whether the defendant deserves death." *Id.* at 623.

It was against the backdrop of these two Supreme Court cases—one involving pre-trial restrictions in jail and one involving the use of restraints before a jury—that this Court first considered the question at issue in this case: What standard should apply to the use of restraints in *court*, when there is no jury present? This question arose in *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007), when this Court considered an interlocutory appeal from the Central District of California challenging a Marshals' policy requiring the use of leg restraints during initial appearances in magistrate court. As a result of sequential rehearing petitions, this Court eventually issued three separate opinions in *Howard*.

First, in 2005, a divided panel invalidated the leg-restraints policy, declaring that a "court should insist on some showing that a policy impinging on defendants' freedoms and ability to communicate, as well as diminishing the decorum of the court proceedings, is reasonably related to a legitimate goal." *United States v. Howard*, 429 F.3d 843, 851 (9th Cir. 2005) (*Howard I*).

Although the Court did not require an "individualized determination" of the necessity of shackling—as the defendants had advocated—the Court nevertheless held that "there must be some justification" for the policy, in order to permit a "court to ensure that the policy does not constitute punishment of pretrial detainees during judicial proceedings." *Id.* at 851-52 (citing *Bell*, 441 U.S. at 520). Because the only support for the policy in the record was the "conclusory declaration of a single representative of the Marshals Service," the majority remanded for a "showing of adequate justification." *Id.* at 852.

Judge Clifton dissented, relying on *Bell*, and reasoning that, because there was not the "slightest suggestion" the Central District's policy on leg restraints "was intended to be punitive," the only question for the Court was whether it was "reasonably related to a legitimate governmental objective." *Id.* at 853 (quoting *Bell*, 441 U.S. at 539). Judge Clifton noted that the Supreme Court placed the burden, which it described as "heavy," on the defendants to demonstrate that the "'officials ha[d] exaggerated their response to the genuine security concerns,'" a burden they had not met, in the face of the "plain" security concerns identified by the Marshals Service. *Id.* (quoting *Bell*, 441 U.S. at 561-62).

Following the initial decision, the United States petitioned for rehearing, and in 2006, the panel changed position and upheld the Central District's policy—largely adopting Judge Clifton's position from the dissent. See *United States v. Howard*, 463 F.3d 999 (9th Cir. 2006) (*Howard II*). The now-unanimous panel applied *Bell* and held that the leg-restraints policy was "reasonably related to a legitimate security purpose" and "impose[d] no greater restriction than necessary on the in-custody defendants." *Id.* The panel noted that "[t]he policy is also reasonably related to a legitimate security purpose because understaffed security officers must provide courtroom security in a large and unsecure space." *Id.* at 1007. Finally, the Court expressly recognized that the restraint policy "comes within the Supreme Court's admonition that courts should rely heavily on professional expertise in determining the proper means for carrying out security responsibilities." *Id.* And, because the panel "found no evidence in the record that the Marshals Service exaggerate[d] the security concerns in the [Los Angeles] Courthouse," the panel upheld the policy. *Id.*

The next year, after defendants petitioned for rehearing, the panel once again significantly changed the analysis in its opinion.

See *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007) (*Howard III*). In its third opinion, the Court jettisoned *Bell*'s reasonably-related test altogether. Instead, the Court began by stating simply that the Central District policy had been adopted with "adequate justification." *Id.* at 1008. The Court noted that almost all of the case law on the subject involved proceedings before a jury. *Id.* at 1012. The court then cited *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997), for the proposition that "the rules regarding shackling do not apply in proceedings before a judge, rather than a jury." *Id.* at 1013. Finally, the Court described the security concerns created by the courthouse in Los Angeles, noted that the magistrate judges adopted the restraint policy "following consultation with the Marshals Service," and then affirmed the Central District policy without further analysis. *Id.* at 1014.

B. Argument

In the third iteration of *Howard*, this Court upheld the Central District's leg-restraints policy on the grounds that it had been "adopted with an adequate justification of its necessity." *Id.* at 1008. *Howard III* used the phrase "adequate justification" only once, in the introductory paragraph of the opinion, and did not cite

any authority or provide any analytical framework for its adoption. As a result, it was unclear how far the new "adequate justification" standard had departed from *Bell* or how the new standard might be applied in the future. The panel opinion in this case shows that the conflict with *Bell* is significant.

First, the panel opinion demonstrates that, as applied, the "adequate justification" standard is far more stringent than the "reasonably related" standard of *Bell*. There is no real dispute that the restraints policy in this case was "reasonably related to a legitimate governmental objective." *Bell*, 441 U.S. at 539. The considerable record developed by the district court demonstrates that the full-restraints policy was not "arbitrary or purposeless," but was expressly and reasonably related to the legitimate objective of ensuring the safety of everyone in the courtroom—judges, court staff, attorneys, defendants, and the public. *Id*. The policy was in accord with Marshals Service's Policy Directive 9.18.E.3.b, which instructs deputy marshals to produce in-custody defendants in full restraints in non-jury proceedings unless otherwise directed by a judge. SER 63. It was also in accord with the full-restraints policies adopted by all of the other districts along the southwest border. SER 24. Moreover, as assiduously

chronicled in Deputy Marshal Johnson's declaration and Judge Major's ruling, it was the reasoned judgment of the Marshals Service that, in light of numerous factors—including staffing shortages, the added responsibility of securing an additional courthouse, the configuration of the courtrooms, the huge daily volume of in-custody detainees, and a recent increase in security incidents—the full-restraints policy was "necessary to secure the safety and security of all persons who participate in federal court proceedings." SER 67.

Second, while *Bell* made it clear that "wide ranging deference" should be given to the professional decisions of officials responsible for securing prisoners, the panel's application of the "adequate justification" standard reflects no deference to the Marshals' security expertise at all. For example, the panel declared that the government had failed to show the Southern District courthouses "pose similar problems for security" as the courthouse at issue in Los Angeles. *Sanchez-Gomez*, 798 F.3d at 1208. But there is considerable evidence in the record concerning the cramped conditions of the magistrate courtrooms and the physical layout of the district courtrooms. SER 60-61; ER 15-16. Deputy Marshal Johnson averred that, when combined with

staffing shortages, these physical features exacerbated the security concerns of the Marshals Service. Further, though Deputy Marshal Johnson cited the recent "increase in security incidents" and shifting inmate demographics as factors contributing to an increased risk of violence among unrestrained detainees, the panel demanded proof of the "causes or magnitude of the asserted increased risk." *Id* at 1209. The panel also dismissed the staffing shortages at the Marshals Service, declaring that the government failed to show that "less restrictive measures, such as increased staffing, would not suffice." *Id*. In sum, via the "adequate justification" standard, the panel effectively second-guessed and dismissed the judgments of the Marshals Service, including its core conclusion that the full-restraints policy is "a prudent method for maintaining order and security, rather than attempting to restore order and security with limited staffing following an incident that may occur in any courtroom across a sprawling federal courthouse complex." SER 68.

Finally, *Bell* made it clear that the burden, which it described as "heavy," lies with the defendants challenging pre-trial restrictions. In order to successfully challenge a policy,

defendants are required to provide "substantial evidence" showing that officials "exaggerated their response to the genuine security considerations." 441 U.S. at 561. In this case, the defendants offered no evidence—much less "substantial evidence"—that the U.S. Marshal was exaggerating its response to genuine security concerns. Under *Bell*, that should have been the end of the matter. Instead, the panel opinion turned *Bell* on its head and placed the burden on the Marshals to meet a heightened necessity standard.

Bell, of course, involved the use of pre-trial restraints in a jail setting. When, as here, defendants appear in restraints in court, additional Constitutional considerations are implicated. See *Deck*, 544 U.S. at 2013. Nevertheless, the "paramount concern" of those cases addressing the use of in-court restraints has always been the "possibility of juror bias." *Howard III*, 480 F.3d at 1013 (citing *Zuber,* 118 F.3d at 103-04). Once the jury is removed from the equation, the only concerns remaining are (1) the possibility that restraints might interfere with a defendant's ability to communicate with his attorney, and (2) the possibility that the "dignity and decorum of judicial proceedings" could be negatively affected. *Deck*, 544 U.S. at 626. Neither of these concerns justifies the wholesale abandonment of *Bell* in the panel opinion.

As to the Sixth Amendment concerns, the panel opinion conceded that the record raised only a "risk" of the interference with counsel. And the Southern District's restraint policy accounted for that risk by allowing defendants "in individual cases" to ask "the judge to direct that the restraints be removed in whole or in part." ER 260. This built-in discretion provided judges with the flexibility to adapt to any Sixth Amendment concerns. Furthermore, to the extent that some future defendant was truly restricted in his or her ability to communicate with counsel in violation of the Sixth Amendment, that violation could be remedied on direct appeal. This hypothetical possibility cannot be enough to prospectively invalidate the entire security policy.

Likewise, the concern over the "dignity and decorum" of judicial proceedings is not implicated to the degree it was in *Deck*. The Southern District's policy does not apply to the most critical stages of criminal proceedings, including appearances before a jury, as well as guilty pleas and sentencing hearings before the district court. Moreover, the Southern District policy allows individual judges to order the restraints removed at any time, which significantly reduces the risk of undermining the "formal dignity" of the courtroom. 544 U.S. at 631. Finally, as the dissent

noted in *Howard I*, when "the policy at issue was specifically approved by the judicial officers most affected and in the best position to evaluate the impact on the court," abstract concerns over the "dignity and decorum" of the courtroom add little weight to the due process analysis. *Id.* at 856.

In addition to its conflict with Supreme Court precedent, the panel opinion's "adequate justification" standard also creates significant tension with the holdings of the Second Circuit and Eleventh Circuit. In *Zuber*, 118 F.3d at 101, a defendant appeared before the district court in full restraints for his sentencing hearing. On appeal, he argued that the district court violated due process by "deferring to the recommendation of the Marshals Service" on the need for restraints. *Id.* at 103. Recognizing that even without a jury, the use of in-court restraints might offend the "dignity and decorum of judicial proceedings" and hamper a defendant's "ability to communicate with his counsel," the Court nevertheless affirmed the district court's use of restraints without an individual hearing and without any "further inquiry" as to the need for the restraints. *Id.* at 104. Likewise, in *United States v. Lafond*, 783 F.3d 1216 (11th Cir. 2015), a defendant objected to the use of restraints at sentencing on the grounds that their use

"offended the dignity of the public courtroom" and interfered with his ability to communicate with counsel. *Id.* 1221. The Eleventh Circuit nevertheless affirmed the use of restraints, holding broadly that "the rule against shackling" does not to apply to sentencing proceedings outside the presence of the jury.

Both cases involved individual challenges to case-specific shackling decisions rather than district-wide policies. Nevertheless, the holdings of the Second and Eleventh Circuits are hard to reconcile with the panel opinion here. Both Courts concluded that for non-jury proceedings, due process allows district courts to defer entirely to the security recommendations of the Marshals without further inquiry. This Court's contrary holding, requiring the Marshals to justify the use of in-court restraints, is in significant tension, if not conflict, with those cases.

In conclusion, the panel opinion in this case applied a new "adequate justification" standard that ignores *Bell*, places the burden on the district court to justify its security policies, and offers virtually no deference to the professional expertise of the Marshals or the experience of the judges whose courtrooms are directly affected. In short, the standard represents precisely the "sort of unguided substitution of judicial judgment" that the

Supreme Court warned against in *Bell*. 441 U.S. at 554. The United States respectfully seeks rehearing *en banc*.[1]

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NOVEMBER 23, 2015.

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[1] Before the panel, the United States acknowledged that "the district courts' orders affirming the magistrate judges' rulings were appealable collateral orders" under the ruling in *United States v. Howard*, 480 F.3d 1005, 1011 (9th Cir. 2007). See United States' Brief at 3. The jurisdictional ruling in *Howard* relied primarily on *United States v. Sell*, 539 U.S. 166 (2003), in which the Supreme Court held that a pretrial order requiring a defendant to be involuntarily medicated was an immediately appealable collateral order. See *id.* at 175-177. In reaching that conclusion, however, the Supreme Court placed "particular[]" emphasis on "the severity of the intrusion and corresponding importance of the constitutional issue" of involuntarily medication. *Id.* at 177. Should rehearing en banc be granted, the United States respectfully submits that the Court might revisit whether a pre-trial challenge to the use of shackles in non-jury proceedings similarly justifies a deviation from the rule that a defendant must "normally . . . wait until the end of the trial to obtain appellate review of a pretrial order." *Id.* at 176; see *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) ("We have interpreted the collateral order exception with the utmost strictness in criminal cases.") (internal quotation marks omitted).

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc has been prepared in a proportionally spaced typeface, 14-point Century Schoolbook, using Microsoft Word 2010, and contains 3,625 words (petitions and answers must not exceed 4,2000 words).

s/ *Daniel E. Zipp*

Assistant U.S. Attorney

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Plaintiff-Petitioner,

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Appeal from the United States District Court
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Honorable Janis L. Sammartino Presiding

RESPONSE IN OPPOSITION TO GOVERNMENT'S PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RENE SANCHEZ-GOMEZ, et al., Defendant-Appellants.	U.S.C.A. Nos. 13-50561,13-50562, 13-50566, 13-50571 U.S.D.C. Nos. 13MJ3928-BLM (LAB) 13MJ3883-JMA (LAB) 13CR4126-JLS (LAB) 13CR3876-MMA RESPONSE IN OPPOSITION TO GOVERNMENT'S PETITION FOR REHEARING

INTRODUCTION

For more than 40 years, absent some identifiable risk of harm or escape, arrestees were brought before the Southern District bar free from handcuffs, leg irons, and belly chains. In those 40 years, no member of the public, bar, or judiciary was ever harmed. No escape ever took place.

In March 2013, motivated not by any substantial increase in in-court violent incidents or attempts at escape (indeed, the past 5 years have seen only two altercations between detainees and no other incidents) but rather by concern that national policy required more personnel for each unshackled defendant than he was willing to assign[1], the District's Marshal asked permission to bring all pretrial

[1] ER 403.

detainees to court in chains. Federal Defenders and the district's CJA panel representative opposed this change as unnecessary, inconsistent with the dignity and decorum appropriate to proceedings in federal court, and dehumanizing, not only to those chained but to all present at such proceedings.

In July, at a closed meeting of the district court, the Marshal presented his proposal, focusing now on claimed security issues.[2] The Court acquiesced. In October 2013, for the first time, nearly all defendants, the halt and the lame, the blind and the pregnant, came before the bar in chains. Federal Defenders challenged this policy. When those challenges failed, this appeal followed.

Following this Court's precedent in *United States v. Howard*,[3] the panel found that the reasons offered by the district court (the same reasons proffered in the government's PFR[4]) did not justify placing every defendant in leg irons, handcuffs, and belly chains at nearly every non-jury proceeding. The government now argues that no reasons need be offered, that so long as indiscriminate shackling is related to courtroom security, the policy must stand unless respondents can show it is irrational or intended as punishment. This is not the law. As the Supreme Court set out in its only case addressing in-court shackling, *Deck v. Missouri*,[5] the common law bars

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[2] *Id.*
[3] 480 F.3d 1005 (9th Cir. 2007).
[4] "PFR" refers to the Government's Petition for Rehearing.
[5] 544 U.S. 622, 626 (2005).

the needless shackling of defendants. This rule is compelled by fundamental principles of fairness. In *Howard*, this Court confirmed that the rule applies even when no jury is present.

To support its unprecedented claim, the government relies on *Bell v. Wolfish*,[6] a case that addresses conditions of confinement in a pretrial detention facility. But the standards by which courts judge claims that double-bunking or searches of detainees' cells deny due process are not those applicable to a defendant's right to dignity when brought before the bar. And in making this argument the government ignores that both this Court and the Supreme Court, fully aware of the holding in *Bell*, have applied a very different standard: Individuals may not be brought before a court in chains unless the government shows adequate justification. It did not do so here. The panel's decision is correct and need not be reheard.

FACTS

Below, respondents contested nearly every fact on which the government now relies.[7] The government opposed any evidentiary hearing or discovery which might have resolved disputes,[8] and the district court refused respondents' request, choosing

[6] 441 U.S. 520 (1979).
[7] ER 424-27; 431-39.
[8] ER 450-58.

instead to resolve disputes by weighing proffers and "counter-proffers," [9] leaving few if any findings entitled to deference.

In any case, there are only two facts asserted that bear on the need for security *in the courtroom*. First is the claim that, in recent years, there has been an increase in security incidents. Second is an assertion that the magistrate courtrooms to which the Marshals produce as many as 40-50 in-custody defendants are "quite small." As to the first, the relevant "increase" involves only two in-court incidents (skirmishes between defendants noted above). As to the second, the Marshals alone decide how many of these 40-50 defendants will be in the courtroom at any one time, and these same small courtrooms have served without serious incident for more than 40 years. The government's factual support for the policy is either irrelevant or non-existent. And, the facts it cites are wrong or misleading. Respondents have demonstrated:

- The Southern District of California has long been one of the country's busiest districts.[10] No surge in prosecutions justified the new shackling policy.[11]

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[9] ER 147, 850.

[10] *See, e.g.*, United States Courts, U.S. District Courts – Criminal Statistical Tables for the Federal Judiciary, http://www.uscourts.gov/statistics/table/d-cases/statistical-tables-federal-judiciary/2011/12/31 (fourth busiest federal criminal docket in 2010 and 2011); (second highest criminal docket in 2000 and third highest in 2001).

[11] In fact, they have decreased every year since 2011. *See, e.g.*, United States Courts, U.S. District Courts – Criminal Statistical Tables for the Federal Judiciary, http://www.uscourts.gov/statistics/table/d-cases/statistical-tables-federal-judiciary/2012/12/31 (10.4% decrease in 2012);

- Because pretrial detainees in this district are screened before initial appearance for criminal history, gang affiliation, and health issues, as much is known about them as in any district.[12]

- Since the new courthouse opened, prosecutions have decreased more than 30%,[13] radically reducing the Marshals' workload.

- For more than 40 years, Marshals have produced large numbers of defendants to the same "quite small" magistrate courtrooms.[14]

- There has been no showing of a "significant" increase of "security incidents" *in court.*[15]

The facts which the government argues justify rehearing were all argued to the panel.

None justify rehearing.

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http://www.uscourts.gov/statistics/table/d-cases/statistical-tables-federal-judiciary/2013/12/31 (14.6% decrease in 2013); http://www.uscourts.gov/statistics/table/d-cases/statistical-tables-federal-judiciary/2014/12/31 (18.1% decrease in 2014).

[12] ER 286-93.

[13] United States Courts, U.S. District Courts – Judicial Business, http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2014; http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2013.

[14] ER 154.

[15] SER 61-62 (reporting only 2 incidents out of 39,000 court appearances in 2013).

I.

The panel was right to ignore *Bell v. Wolfish*, a case addressing the constitutionality of conditions at a jail where pretrial detainees were held. *Bell* has no relevance in deciding whether those detainees may be shackled when brought before the court.

The government claims that the question in this case is: "Whether, consistent with *Bell v. Wolfish* . . ., the Marshals Service's policy of presenting defendants in leg-and-arm restraints during non-jury proceedings is reasonably related to the legitimate governmental objective of providing courtroom security."[16] The government is wrong. *Bell* addresses conditions at a jail housing detainees and sentenced prisoners. It has no relevance to in-court shackling. In *Deck v. Missouri*, the Supreme Court affirmed that the same rules do not govern the jail and the courtroom. Reviewing the shackling of a convicted capital murderer at sentencing, the Court recognized *Bell*'s irrelevancy by ignoring it, instead focusing on "three fundamental legal principles" attendant to the courtroom: the presumption of innocence, the right to present a meaningful defense, and the need for dignity and decorum throughout criminal proceedings.[17] Recognizing the import of *Deck* and

[16] PFR 3.
[17] *Deck*, 544 U.S. at 630-32.

its disregard of *Bell*, this Court excised discussion of *Bell* from its opinion in *United States v. Howard*.[18] The panel here appropriately followed suit.

A. *Bell* is irrelevant because it concerns jails not courtrooms.

Bell addressed conditions of confinement at the Metropolitan Correctional Center (MCC) in New York. Among the conditions lower courts had invalidated as denying due process were double-bunking of detainees in single cells and prohibiting inmates from receiving packages containing food and personal items.[19] In the context of judging these claims, the Supreme Court articulated the tests the government seeks to apply in this very different context.[20]

That courts would disregard *Bell* in evaluating the courtroom shackling of detainees is not surprising. *Bell* and its choice of test to evaluate the prisoners' claims were animated by understandings, irrelevant here, that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves" and "[s]uch considerations are peculiarly within

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[18] *Compare United States v. Howard*, 429 F.3d 843, 851 (9th Cir. 2005) (*Howard I*) (distinguishing *Bell* from courtroom proceedings), *and* 463 F.3d 999, 1006 (9th Cir. 2006) (*Howard II*) (applying *Bell* in upholding the Central District's policy), *with* 480 F.3d 1005, 1012-14 (9th Cir. 2007) (upholding policy by applying *Deck* but never mentioning *Bell*).

[19] *Bell*, 441 U.S. at 528-29.

[20] Rules prohibiting receipt of hardcover books other than from the publisher were evaluated under the First Amendment, *Bell*, 441 U.S. at 548-52 while conditions concerning searches of cells and individuals were addressed under the Fourth Amendment, *id.* at 556-59.

the province and professional expertise of corrections officials."[21] This is the context for the Court's conclusion that

> [p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.[22]

These reasons for *Bell*'s deference to prison officials and security concerns are absent in the courtroom. "Institutional consideration of internal security" is not central to "all other . . . goals" of courts. Due process is. Providing due process is the central mission of courts. Whatever expertise marshals have in providing security, they have none in weighing how chaining a detainee diminishes the presumption of innocence, the right to present a meaningful defense, or the dignity and decorum of the court, values protected by the Due Process Clause and its prohibition against needless shackling.[23] The decision whether to allow the chaining of pretrial detainees is not one that can be abdicated by the courts through deference to the marshals. *Deck, Howard,* and the panel here recognize this.

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[21] *Bell*, 441 U.S. at 547-48 (citations omitted).
[22] *Id*. at 547 (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S 119, 128 (1977)).
[23] *See Deck*, 544 U.S. at 630-32.

B. The Supreme Court found *Bell* irrelevant when considering courtroom shackles.

The irrelevance of *Bell* is confirmed by the Supreme Court's approach in *Deck*. There, the Court considered a claim that the in-court shackling of a defendant violated due process. The petitioner, convicted of robbing and murdering an elderly couple had been sentenced to death.[24] On appeal, Missouri's Supreme Court remanded for resentencing. The trial court required Deck, a convicted murderer, to remain in shackles throughout his resentencing. On appeal, Deck challenged his shackling. Missouri's courts affirmed. The Supreme Court reversed with Justice Breyer penning the opinion holding that Deck's shackling denied him due process. Justice Thomas filed a dissenting opinion joined by Justice Scalia. Yet, nowhere in these 35 pages of opinion, majority and dissent, is *Bell* mentioned. Not a single justice thought *Bell* relevant to deciding whether due process allowed petitioner to be shackled in the courtroom.

C. This Court found *Bell* equally irrelevant.

Following *Deck*, this Court likewise concluded in *Howard* that *Bell* is irrelevant when deciding whether detainees may be brought to court in chains. The three separate opinions in *Howard* demonstrate that this Court fully considered and

[24] 544 U.S. at 624.

rejected as irrelevant the standard articulated in *Bell*.[25] In its petition, the government accurately describes the evolution of the *Howard* Court's views.[26] In *Howard I*, this Court invalidated the Central District of California's policy requiring leg shackles at initial appearances, with the majority rejecting *Bell*'s framework because "[r]estrictions on defendants during judicial proceedings [ ] are not within the realm of correctional officials. The conduct of judicial proceedings is the domain of the courts. Preservation of dignity and decorum are necessary for the conduct of judicial proceedings that determine issues of liberty and life."[27] *Howard II*, filed following the government's petition for rehearing, embraced the *Bell* standard in approving the Central District's policy of leg restraints at initial appearance.[28] But after the defendants filed their own petition for rehearing, the Court issued its final opinion in *Howard III*.[29] Though it upheld the Central District's limited shackling policy, the decision abandoned any reference to, let alone reliance upon, *Bell*, instead looking to the principles articulated by the Supreme Court in *Deck*, *infra* at 11-18 [30] The evolution of the opinions in *Howard* demonstrates that this Court carefully considered the applicability of *Bell*'s test to the shackling of pretrial detainees but

[25] *See* PFR 9-12.
[26] PFR 9-12.
[27] 429 F.3d at 851.
[28] 463 F.3d at 1006.
[29] 480 F.3d 1005.
[30] *Id.* at 1012-14.

ultimately, in light of the then-recent decision in *Deck*, concluded that *Bell* is irrelevant.

Both *Deck* and *Howard* establish that *Bell*'s standard of deference to jailers has no relevance here. The values that must be guarded when deciding whether a detainee should be brought to court in chains are the province of judges, not jailers. The panel correctly disregarded *Bell* and its rational relation test. There is no need for rehearing.

II.

Deck confirmed that due process forbids unnecessary shackling of defendants and that fundamental principles of fairness underlie this rule. Those principles forbid needless shackling here.

Surveying the common law, *Deck* recognized that courts have "settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so."[31] *Deck* distilled from this rule "the importance of giving effect to three fundamental legal principles" that guide the due process analysis in the courtroom: (1) the presumption of innocence; (2) the right to a meaningful defense and effective representation by counsel; and (3) the need to maintain a dignified judicial process.[32] Seeking to avoid *Deck's* import, the government claims

[31] 544 U.S. at 627.
[32] 544 U.S. at 630-33.

that it is relevant only to jury proceedings. The government is wrong. Two of the three principles the Supreme Court identifies are as relevant and compelling here as they were in Deck's capital sentencing. *Deck* controls.

A. Through embarrassment, humiliation, and pain, shackles impair a defendant's willingness and ability to present a meaningful defense and engage the assistance of counsel.

Deck recognized that shackles impair a defendant's ability to present a meaningful defense and engage the assistance of counsel. *Deck* endorsed the California Supreme Court's conclusion in *People v. Harrington*[33] that shackles "'impos[e] physical burdens, pains, and restraints . . . ten[ding] to confuse and embarrass' defendants' 'mental faculties,' and thereby tend 'materially to abridge and prejudicially affect his constitutional rights.'"[34] And as the California Supreme Court has more recently recognized, *Harrington*'s reasoning "leave[s] no doubt that the same principles would apply in [preliminary hearings]" because "the *Harrington* rule … serves not merely to insulate the jury from prejudice, but to maintain the composure and dignity of the individual accused . . . ."[35] That a defendant's treatment in non-jury proceedings will inform his understanding of just how fair the process is and how much his rights really mean can hardly be gainsaid: "The fact

[33] 42 Cal. 165, 168 (1877).
[34] *Deck*, 544 U.S. at 631.
[35] *People v. Fierro*, 1 Cal.4th 173, 219 (1991).

that [a] proceeding is non-jury does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles." [36]

In *United States v. Brandau*, this Court considered the effects of shackling defendants, recognizing that pretrial proceedings shape a defendant's understanding of and willingness to embrace the rights attendant to our criminal justice system:

> A criminal defendant's first and sometimes only exposure to a court of law occurs at his initial appearance. The conditions of that appearance establish for him the foundation for his future relationship with the court system, and inform him of the kind of treatment he may anticipate, as well as the level of dignity and fairness that he may expect.[37]

And if a defendant does not expect to be treated fairly, he will believe his rights to be meaningless. And if a defendant has no will to assert his rights because he believes them to be meaningless, what does it matter that they exist in the abstract?

The humiliating effect of shackles on a defendant's ability and willingness to participate in the criminal process and exercise his constitutional rights is evidenced here in the case of Mr. Montes de Oca. Before the district's indiscriminate shackling began, Mr. Montes de Oca had appeared in court three times, and his family attended

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[36] *United States v. Zuber*, 118 F.3d 101, 106 (2d Cir. 1997) (Cardamone, J., concurring).

[37] 578 F.3d 1064, 1065 (9th Cir. 2009).

each appearance.[38] His family had been "very supportive and want[ed] to help [him] through this difficult time." *Id*. But shamed to learn that henceforth he would appear in chains, Mr. Montes de Oca asked his family not to come to court again. *Id.* Other pretrial detainees have shared this sense of humiliation, *id.* at 301, and these examples demonstrate a real injury that defendants in the Southern District experience.

The effect of losing family support during hearings and the extent of humiliation that defendants feel in the courtroom may be difficult to quantify, but appreciation of these intangible, yet very real concerns gave rise to the rule against shackling detainees.

The government dismisses *Deck*'s concerns about the effect of shackling on defendants' exercise of rights claiming: "the Southern District's restraint policy accounted for that risk by allowing defendants 'in individual cases' to ask 'the judge to direct that the restraints be removed in whole or in part.'"[39] But this misses the point. How likely is it that a defendant who is "paraded about the courtroom, like a dancing bear on a lead" from her very first appearance will feel sufficiently comfortable to speak out when she needs to? And the record shows that these

[38] ER 300.
[39] PFR 17 (citing ER 260).

requests are seldom if ever granted.[40] Instead it demonstrates that shackles hamper the defendant's full participation in her defense, and the government offers no persuasive reason why this concern should be ignored.

B. Shackles impair the dignity and decorum of the court, whether used in pretrial proceedings or trial.

The dignity and decorum of the courtroom reflects the importance of matters committed to the judiciary, chief amongst them, potential deprivation of an individual's liberty as punishment for crime:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. [41]

Judges are charged with maintaining this dignity and "must seek to maintain a judicial process that is a dignified process." [42]

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[40] *See* ER 251-252 (judge denying a request to have shackles lessened at a motion hearing when counsel was concerned about the defendant's ability to communicate with counsel in writing because judge didn't think such need would arise "in a zillion years"); *and compare* ER 496-97 (magistrate judge denying request to lessen restraints and suggesting "If there is a concern, first off, [the fully shackled defendant whose arms are secured to a belly chain] can move her arms."), *with* PFR at 3, SER 73 (showing a picture of the shaft attaching the belly chain and hand restraints that makes one wonder how defendants could possibly use their arms to communicate).

[41] *Deck*, 544 U.S. at 631.

[42] *Id.*.

Courts maintain dignity, not primarily for their own sake, but for that of the public and defendants: The courtroom's dignity inspires confidence essential to acceptance of the rule of law. In this context, it is not the perceptions of judges but those of lay people, including defendants, who observe and judge the courts that matters. As the Supreme Court explained, the dignity and decorum of the court "reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve."[43]

Shackling detracts from a court's dignity and diminishes its power to inspire confidence--in the public and in defendants. It "undermine[s] these symbolic yet concrete objectives."[44] As this Court stated: It is "undisputed" that shackling, even solely at initial appearances, "detracts to some extent from the dignity and the decorum of a critical stage of a criminal prosecution."[45]

The government discounts shackling's affront to courtroom dignity because "[t]he Southern District's policy does not apply to the most critical stages of criminal proceedings, including appearances before a jury, as well as guilty pleas and

[43] *Id.*.
[44] *Deck*, 544 U.S. at 631.
[45] *Howard*, 480 F.3d at 1012.

sentencing hearings before the district court."[46] But parading defendants before the bar in chains is no less an affront to the court's dignity[47] because it does not happen in every proceeding.

Moreover, though arguing that the policy does not apply at the "most critical stages," the government must concede that indiscriminate shackling is the rule in the vast majority of appearances. For the record provides little support for the claim that shackles are removed for these "most critical" proceedings.[48] Moreover, in the Southern District, the overwhelming majority of pleas are taken by magistrates (where defendants are shackled) not by district judges,[49] and, at sentencings, defendants, at last unchained, are stripped of all trial rights and have little to do other than allocute. Yet at equally "critical" motion hearings, evidentiary hearings, and bench trials, proceedings where the government and its evidence are tested, and where defendants fully exercise their constitutional rights, the Southern District's policy requires that they appear in chains.

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[46] PFR 17.

[47] *Deck*, 544 U.S. at 631-32.

[48] *See, e.g.*, ER 203-04 (district judge denying motion to unshackle a woman in a wheelchair at sentencing whose condition even the government characterized as "pretty dire and deteriorating"); ER 251-53 (judge denying motion to remove shackles at sentencing not because he posed a risk of flight or danger or because he appeared in a group of detainees, but for "his protection").

[49] ER 424.

This leaves jury trials. But jury trials are a diminishing fraction of federal courts' dockets,[50] a vanishingly small percentage of the 39,000 appearances the court sees.[51] And it is a number likely to decline further, for what confidence can we expect detainees to have in the fairness of trial, and what willingness to proceed to trial, when from their first moments in court, they are required to appear chained even though they present no risk of flight and no danger to anyone?

It is beyond peradventure that the indiscriminate use of shackles diminishes the dignity and decorum of the court and so undermines confidence in its fairness and in the justice of its judgments.

III.

Sanchez-Gomez struck down a district-wide policy of indiscriminate shackling. It creates no tension with out-of-circuit decisions allowing the shackling of dangerous individuals.

The government claims, unavailingly, that *Sanchez-Gomez* "creates significant tension" with decisions from the Second and Eleventh Circuits.[52] First, neither *Zuber* nor *LaFond*[53] addresses district-wide shackling policies like the

[50] *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); *Laffler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).
[51] Indeed, there were only 87 jury trials in the Southern District in 2013. *See* United States Courts, U.S. District Courts – Trials Judicial Business, www.uscourts.gov/statistics/table/na/judicial-business/2013/09/30-10.
[52] PFR 2, 18.
[53] 783 F.3d 1216 (11th Cir. 2015).

Southern District's where no one – not even the Marshals – makes a first-instance individualized determination that shackling is necessary for courtroom security. Neither decision addresses shackling of a pretrial detainee, nor shackling at any court appearance other than sentencing.[54]

Nor does *Zuber* support a policy of shackling all defendants brought into all federal courts. The majority "share[d] Judge Cardamone's concern for the consequences of using physical restraints," but found it "impossible to avoid *some* appearances by defendants in physical restraints since the Marshals Service is responsible in the first instance for deciding how defendants are to be brought into the courtroom."[55]

Unlike the individuals brought into court in this district, there was individualized information in *Zuber* as well as *LaFond* about both defendants to support the Marshal's first-instance shackling decisions. Zuber had already fled twice before his trial, and even Judge Cardamone who disagreed that the in-court shackling was constitutionally permissible, wrote that had such a hearing been held: "the information derived would have justified [the shackles]."[56]

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[54] *Zuber*, 118 F.3d at 102; *LaFond*, 783 F.3d at 1225.
[55] 118 F.3d at 104 n.2.
[56] *Id.* at 105 (Cardamone, J. concurring).

As for *LaFond*, the defendant was being sentenced for his role in a white supremacist gang murder of another inmate. His trial jurors were anonymous for their own protection.[57] But unlike every pretrial detainee subject to the Southern District's shackling policy, most of which are not even charged with murder let alone convicted of it, LaFond was not in five-point restraints – his complaint was that "his *hands remain shackled* during his sentencing hearing." *Id*. at 1225 (emphasis added).[58]

The government's claim that "the holdings of the Second and Eleventh Circuits are hard to reconcile with the panel opinion here" lacks all support in both those circuits' decisions.[59]

CONCLUSION

The common law required that though there is "nothing else but to call the prisoner to the bar of the court" for arraignment, he shall be completely unfettered by shackles, unless presenting "evident danger of an escape."[60] *Deck* affirmed that the accused cannot be brought to court in chains absent a specific need. This Court in *Sanchez-Gomez* and *Howard* followed *Deck* in applying the "adequate

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[57] 783 F.3d at 1217.

[58] That the Marshals in the Eleventh Circuit only deemed hand shackles necessary to ensure courtroom security at Lafond's sentencing suggests that the Southern District's far-reaching and more restrictive shackling policy is excessive.

[59] PFR 19.

[60] 4 WILLIAM BLACKSTONE, COMMENTARIES *317 (1769).

justification standard." This Court should decline the government's invitation to ignore precedent and abandon detainees to jailors who lack understanding of the Due Process Clause's meaning.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is:

_X_ Proportionately spaced and has typeface of 14 points or more and contains **3871 words** (petitions and answers must not exceed 4,200 words).

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Monospaced, has 10.5 fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text)

Or

In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Date: February 16, 2016

/s Ellis M. Johnston
ELLIS M. JOHNSTON, III.