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Criminal Procedure - Spain v. Rushen: Shackles or Show Time? A Defendant's Right to See and Be Seen

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CRIMINAL PROCEDURE

SPAIN v. RUSHEN: SHACKLES OR SHOWTIME? A DEFENDANT'S RIGHT TO SEE AND BE SEEN

I. INTRODUCTION

In Spain v. Rushen,¹ the Ninth Circuit affirmed the District Court's grant of the defendant's writ of habeas corpus² on the ground that shackling him throughout the trial denied his due process right to a fair trial.³ The Ninth Circuit clearly found that a trial judge must consider less drastic alternatives before ordering a defendant shackled. However, the court's opinion was

1. 883 F.2d 712 (9th Cir. 1989) (per Hall, C.; the other panel members were Kozinski, A., and Noonan, J., dissenting), cert. denied, 58 U.S.L.W. 3678 (1990).
2. Id. at 728-29. A federally issued writ of habeas corpus is granted only if a conviction was obtained in violation of the United States Constitution. See Smith v. Phillips, 455 U.S. 209, 221 (1982), aff'd on rehearing, 717 F.2d 44 (1983), cert. denied, 465 U.S. 1027 (1984). See Cupp v. Naughton, 414 U.S. 141, 143 (1973) (armed robbery). The Supreme Court noted federal courts can overturn state convictions only if the State's action violated a right guaranteed by the Fourteenth Amendment. Id. at 146. The federal writ cannot be sought by a defendant until he has exhausted his state remedies. See id. at 143.
3. Spain, 883 F.2d at 728-29 (Spain involves a state action). U.S.CONST. amend. XIV, section 2 provides, in part:
   ... nor shall any State deprive any person of life, liberty, or property without due process of law.
See Duncan v. Louisiana, 391 U.S. 145 (battery), reh. denied, 392 U.S. 947 (1968). The Supreme Court found that the fourteenth amendment guarantees all persons all rights which are fundamental to the federal Constitution. Id. at 148. U.S.Const. amend. VI provides, in part,
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defense.
As these rights are fundamental to our federal scheme of criminal justice, defendants are guaranteed these rights in state actions. See Duncan, 391 U.S. at 149.

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unclear about when less drastic alternatives may be rejected. Further, the Ninth Circuit found that shackling a defendant where less drastic security measures are available is \textit{per se} a violation of that defendant's due process rights.

II. FACTS

A. THE PRISON INCIDENT AND TRIAL

The defendant, Johnny Spain ("Spain"), was a Black Panther. Spain had been transferred to San Quentin prison in May of 1971 to continue serving a life sentence stemming from a 1967 first degree murder conviction.

On August 21, 1971, George Jackson, led a bloody outburst of violence at San Quentin. The evidence implicated Spain in the violence. Following the incident, Spain was charged with five counts of murder, one count of conspiracy, and one count of assault.

Spain's trial was held in the same courtroom in Marin County in which there had been a prior episode of violence and death. The trial judge ordered Spain and five other inmate de-

5. Id. at 714.
6. Id. at 713-14. Spain was convicted of murder while committing armed robbery at age seventeen. Id.
7. Id. at 714. Jackson was also a member of the Black Panther party. Id. His brother, Jonathan Jackson, had led a violent hostage takeover and escape of defendants on trial in the Marin County Courthouse. See infra note 11.
8. Id. at 714. Once order was restored, the police found two guards shot to death, one guard stabbed to death, three other guards injured with slashed throats, and two inmates killed. Id.
9. Id. at 714. See also infra note 23.
10. Spain, 883 F.2d at 714.
11. Id. at 719, n.9. On August 7, 1970, James McClain stood trial for stabbing a prison guard. Id. at 731. McClain called a number of fellow inmates as witnesses. Id. The trial judge ruled against shackling McClain in order to avoid jury prejudice. Id. Jonathan Jackson, George Jackson's brother who was a Black Panther, stormed the courtroom and provided arms to McClain and two other inmate witnesses. Id. at 719, n.9. They kidnapped the judge, the district attorney, and three jurors. Id. at 731. The judge was murdered, the district attorney was shot and paralyzed for life, and two jurors were injured. Id. Following the incident, the Black Panther Minister of Defense proclaimed Jackson's
fendants shackled throughout the pretrial and trial proceedings. The pretrial proceedings lasted four years and the trial lasted seventeen months. Spain’s shackles weighed 25 pounds which included leg irons and eight-inch individual wrist chains attached to a waist chain.

Spain made numerous complaints of physical pain to the trial court due to the shackles. Several physicians examined him during the trial and confirmed that the shackles caused him physical problems. Spain also complained during the proceedings that the shackles so preoccupied him that they impaired his ability to assist his defense counsel. However, Spain did participate in a successful Section 1983 action concerning physical conditions at San Quentin which was decided several months before the conclusion of the trial.

From November 1973 to April 1975, Spain and his counsel filed a number of affidavits requesting that Spain be excluded from the trial. Several times Spain specifically indicated he actions as courageous and revolutionary. Id.

12. See id. at 714.
13. Id. at 723.
14. Id.
15. Id. at 714. The waist chain was further bound to his chair. Id.
16. Id. at 723. Complaints included: the handcuffs were too tight (October 5, 1971), the defendant experienced pain to wrists (May 11, 1973), the chains were digging into his skin (November 1973), complaints of pain (December 17, 1973; January 11, 1974; February 27, 1975; March 3, 1975; March 10, 1975; March 18, 1975). Id.
17. Id. The first examining doctor noted rectal and low back pain with weight loss. Id. He recommended Spain not be chained at trial. Id. On February 11, 1975, a second examining doctor stated the chains were aggravating Spain’s back condition and recommended their removal. Id. at 724. A third doctor made similar findings. Id. However, prison staff physician, Dr. William Clark, examined Spain on March 21, 1975, and concluded Spain was in perfect health. Id. at 732.
18. Id. at 724. On March 18, 1975, Spain filed an affidavit stating that the pain from the shackles made it impossible for him to concentrate on the trial. Id. On July 24, 1975, he filed another affidavit stating the pain caused him to become so frustrated that he could not concentrate. Id. at 725. On April 11, 1975, Spain supplied a handwritten affidavit stating he was of little assistance to his counsel. Id. at 727.
19. Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979). Spain and five other California state prisoners alleged the conditions of their confinement constituted cruel and unusual punishment. Id. at 191. The District Court found the living conditions and sanitary conditions were adequate. Id. at 192. However, the court found the use of neck chains constituted cruel and unusual punishment. Id. at 197. The court ordered mechanical restraints, including manacles, were only to be employed when such use was in line with the prison’s standards on the same. Id. at 198.
20. Spain, 883 F.2d at 726. Spain filed a handwritten affidavit indicating he was
wished to waive his right to be present at trial.21 Following his last request, the court held an evidentiary hearing and concluded he could be excluded from the pretrial proceedings, but was required to attend the jury selection and the trial.22

A prison guard’s testimony strongly implicated Spain.23 Spain was found guilty of two counts of murder and conspiracy.24 He was acquitted on the other counts.25

B. SPAIN’S HABEAS CORPUS ACTION

After Spain exhausted his state remedies26 Spain filed for a writ of habeas corpus alleging ex parte communications27 between a juror and the judge denied him a fair trial.28 He also

21. Id. at 724. He filed a handwritten affidavit one week before the trial stating he was waiving his right to be present at trial due to the physical pain caused by the shackles and his inability to concentrate. Id. In Paragraph B of the affidavit he stated, “Under the circumstances I do not feel it worth chance any further and perhaps irreversible physical damage to my person just to claim some phony ‘due process’ rights when under the above circumstances ‘due process’ really means being subjected to pain as a sham and mockery of justice.” Id.

22. Id. at 727.

23. Id. at 714. The guard testified that Spain held the gun used in the murder of the guards and that Spain helped bind the guards with telephone wire. Id. Further, ammunition and an escape map was found in Spain’s jail cell and an explosive was found on Spain. Id.

24. Id. at 714.

25. Id.

26. Spain v. Rushen, 543 F.Supp. 757 (N.D. 1982). On the day he was convicted, Spain filed an appeal with the California Court of Appeals alleging that ex parte communications between a juror and the judge and the shackling denied him a fair trial. Id. at 763. Four years later his conviction was affirmed since the appellate court did not find any prejudice as a result of either of these events. Id. at 764. Thereafter, the California Supreme Court denied review on whether the ex parte communications denied Spain a fair trial. Id. Spain then filed for a writ of habeas corpus with the District Court. Id. The District Court found that Spain might not have exhausted his State remedies as the California Supreme Court had not ruled on whether the shackling had denied him a fair trial. Id. He then filed for a review with the California Supreme Court on this issue. Id.

27. Id. During voir dire, a juror denied any association with or attitude about the Black Panther party. Id. at 761. During testimony, the juror discovered that a friend of hers had been killed by a Black Panther and the juror had discussions with the trial judge concerning this without the knowledge of Spain’s attorney. Id.

28. Id. at 760. After the California Supreme Court denied his petition for review, Spain again filed for a writ of habeas corpus with the District Court alleging his right to
alleged that the shackling had denied him a fair trial as it impaired his ability to aid in his own defense and testify on his own behalf.\textsuperscript{29}

The District Court granted the writ on the ground that \textit{ex parte} communications denied him his right to a fair trial\textsuperscript{30} and the Ninth Circuit affirmed.\textsuperscript{31} The United States Supreme Court vacated the writ\textsuperscript{32} and remanded the case to the District Court to resolve whether the shackling had denied Spain a fair trial.\textsuperscript{33} On remand, the District Court referred the case to a magistrate for an evidentiary hearing to determine what effect the shackles had on Spain's ability to aid in his defense and to testify on his own behalf.\textsuperscript{34}

At the evidentiary hearing, Spain testified that the shackles impaired his ability to assist his counsel in his defense,\textsuperscript{35} although he admitted that he was able to discuss the testimony of adverse witnesses with his defense counsel.\textsuperscript{36} A psychologist testified that Spain was so depressed due to the chains that he was

\begin{itemize}
  \item a fair trial had been denied due to the \textit{ex parte} communications and the shackling. \textit{Id.}
  \item The District Court granted him a hearing on whether he had been denied his federal constitutional right to a fair trial. \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} at 777. The District Court found that defense counsel must be allowed to ensure the defendant is being tried by an impartial jury. \textit{Id.} at 767. If defense counsel is denied information allowing him to ensure his client is being tried by an impartial jury, the defendant is denied his right to counsel. \textit{Id.} Since the court could not say without reasonable doubt that the error was not harmless in not having defense counsel present during the discussions, the District Court granted the writ. \textit{Id.} at 776.
  \item Spain v. Rushen, 883 F.2d 712, 715 (9th Cir. 1989), \textit{cert. denied}, 58 U.S.L.W. 3678 (1990). The Ninth Circuit had affirmed the original writ in an unpublished decision. 701 F.2d 186 (9th Cir. 1982).
  \item Rushen v. Spain, 464 U.S. 114, 122 (1983), \textit{reh. denied}, 465 U.S. 1055 (1984). The Court observed that \textit{ex parte} communications can be harmless error. \textit{Id.} at 119. The federal court is to decide if constitutional error was harmless. \textit{Id.} at 120. Deference should be given to the fact finding state court. \textit{Id.} Here, the state and appellate court both found the error was harmless. \textit{Id.} The evidence does not show that this finding was incorrect. \textit{Id. at 121.}
  \item \textit{Id.} at 117, n.1. Neither the District Court, nor the Ninth Circuit determined whether the shackling had denied Spain a fair trial. \textit{Id.}
  \item \textit{Id.} at 718. He testified that due to the pain caused by the shackles he was unable to concentrate on the trial proceedings. \textit{Id.}
  \item \textit{Id.} at 732. He told his counsel that he could not remember events of the prison outbreak, but did discuss incriminatory evidence found in his cell and the guards' proposed adverse testimony. \textit{Id.}
\end{itemize}
unable to reasonably assist in his defense. Spain's attorney, Charles Garry, testified that he had trouble communicating with Spain throughout the proceedings. The magistrate reviewed the prison medical records and Spain's testimony at the Section 1983 action challenging prison conditions at San Quentin. Based on the above evidence, the magistrate found that the shackles aggravated Spain's preexisting physical and psychological problems, preoccupied his mind, interfered with his ability to participate in his own defense, and impaired his ability to testify on his own behalf. The District Court, adopting these findings, granted Spain a writ of habeas corpus. The State appealed.

III. BACKGROUND
A. DISCRETION TO EMPLOY SECURITY MEASURES

The safety of a state's courtroom is an essential state interest, and the proper administration of justice requires an orderly trial. A trial judge is in the best position to determine how to prevent harm to those in the courtroom and maintain an orderly trial. He has these responsibilities during the trial.

37. Id. at 717. The psychologist, Dr. Delman, interviewed Spain on four occasions post-trial, reviewed prison psychiatric records, and interviewed Spain's friends. Id. In contrast, Dr. Sutton, staff psychiatrist at San Quentin, testified that Spain did not experience any mental interferences due to the chains. Id. at 732. She based her testimony on two interviews (one was a group interview) which she conducted before and during the trial. Id.

38. Id. at 718. However, the magistrate discounted the value of his testimony as it was “marked by hyperbole.” Id.

39. Id. at 717.

40. Id. at 718. See supra note 19 and accompanying text for discussion on this earlier action.

41. Id. at 715.

42. Id. at 715-16.

43. Id.


45. See Illinois v. Allen, 397 U.S. 337, 343 (armed robbery),reh. denied, 398 U.S. 915 (1970). The court noted, “It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country.” Id. See also United States v. Hack, 782 F.2d 862, 867 (10th Cir.) (conspiracy to commit air piracy and attempted air piracy; court has an interest in maintaining an orderly trial), cert. denied, 476 U.S. 1184 (1986).

46. See Stewart v. Corbin, 850 F.2d 492 (9th Cir. 1988) (armed robbery), cert. denied, 109 S.Ct. 1737 (1989). The trial judge is in the best position to assess the need for security measures and has discretion to balance the State's interest of having a safe courtroom against the defendant's interest of receiving a fair trial. Id. at 497. See also
and has broad discretion to determine if security measures are needed.\textsuperscript{48}

In \textit{Illinois v. Allen},\textsuperscript{49} the defendant, while representing himself, argued abusively with the judge during \textit{voir dire} examinations,\textsuperscript{50} threatened the judge,\textsuperscript{51} and told the judge he was not going to allow a trial to proceed.\textsuperscript{52} The Court in \textit{Allen} found that a trial judge is justified in employing security measures to control a disruptive defendant.\textsuperscript{53} Subsequent courts have followed \textit{Allen}.\textsuperscript{54} In \textit{Stewart v. Corbin},\textsuperscript{55} the defendant refused to obey the court's order to refrain from mentioning the victim's prior conviction\textsuperscript{56} and the State's refusal to give him a lie detector

\begin{footnotes}
\footnotetext{47.} See \textit{United States v. Pina}, 844 F.2d 1, 14 (1st Cir. 1988) (federal weapons violations). The court noted, “The trial judge has an obligation to maintain order and dignity so that the process can vindicate all legitimate interests.” \textit{Id.}
\footnotetext{48.} See \textit{Stewart}, 850 F.2d at 497-98 (broad discretion given since a reviewing court unable to view reactions of jurors and witnesses to a disruptive or dangerous defendant). See also \textit{United States v. Apodaca}, 843 F.2d 421, 424 (10th Cir.) (manufacturing and distributing narcotics; unlawful possession of firearms), \textit{cert. denied}, 109 S.Ct. 325 (1988). The decision to order security measures is within the “informed discretion” of the trial court. \textit{Id.} at 431.
\footnotetext{50.} \textit{Id.} at 339.
\footnotetext{51.} \textit{Id.} at 340. The defendant stated, “When I go out for lunchtime, you're [the judge] going to be a corpse here.” \textit{Id.}
\footnotetext{52.} \textit{Id.}
\footnotetext{53.} \textit{Id.} at 342-44.
\footnotetext{54.} See \textit{Woodard v. Perrin}, 692 F.2d 220, 221-22 (1st Cir. 1982) (first degree assault; evidence that defendant had urinated on the floor in the holding cell and used abusive language supported shackling him). See also \textit{Scurr v. Moore}, 647 F.2d 854 (8th Cir.) (murder of defendant's wife), \textit{cert. denied}, 454 U.S. 1098 (1981). In \textit{Scurr}, the defendant's conduct was not as flagrant as the defendant in \textit{Allen}. \textit{Id.} at 857. However, since he had argued with the trial judge and challenged the judge to remove him from the trial, the judge had adequate justification to exclude the defendant from the trial. \textit{Id.} at 858. See also \textit{United States v. Theriault}, 531 F.2d 281 (5th Cir. 1976) (wilful depredation of federal property and assault of two correctional officers), \textit{cert. denied}, 434 U.S. 870 (1977). The Fifth Circuit found that the trial judge properly took into account the defendant's use of foul language, calling a witness a liar on the stand, his threats of escape, and his conduct at a contemporaneous civil case. \textit{Id.} at 284-85. See also \textit{Badger v. Cardwell}, 587 F.2d 968 (9th Cir. 1978) (assault with intent to commit murder; prisoner in possession of weapon). The court sustained the first exclusion of the defendant since he taunted the judge into removing him from the trial and displayed a clenched fist at the judge. \textit{Id.} at 972-73.
\footnotetext{56.} \textit{Id.} at 495.
\end{footnotes}
test. The State’s witness was afraid to testify due to the defendant’s actions. The Ninth Circuit affirmed the trial judge’s decision to bind and gag the defendant.

A trial judge’s ability to employ security measures is not limited to responding to an unruly defendant’s actions at trial. Rather, it is well-established that a trial judge may employ security measures where the defendant poses a serious threat of escape or presents a serious danger to those in the courtroom.

57. Id. at 495-96.
58. Id. Further, the trial judge considered that the defendant had previously struck a deputy in the chest and made verbal threats in court. Id. at 494.
59. Id. at 500.
60. See United States v. Hack, 782 F.2d 862, 866 (10th Cir.) (government requested and was granted a hearing before trial to determine if defendant posed a security threat to courtroom and thus should be shackled), cert. denied, 476 U.S. 1184 (1986). See also Woodard v. Perrin, 692 F.2d 220, 222 (1st Cir. 1982) (trial judge does not have to wait until defendant causes a problem before ordering him shackled).
61. See Stewart v. Corbin, 850 F.2d 492, 496 (9th Cir. 1988) (defendant previously convicted of escape and currently wanted for escape), cert. denied, 109 S.Ct. 1737 (1989); United States v. Apodaca, 843 F.2d 421, 431 (10th Cir.) (defendant may have helped another individual to escape from federal prison and further posed an escape threat as he was facing a possible life sentence without parole), cert. denied, 109 S.Ct. 325 (1988); Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983) (robbery, false imprisonment, use of firearm in committing felony, grand larceny), cert. denied, 466 U.S. 941 (1984). In Zygadlo, the defendant had previously tried to escape. Id. at 1223. See also United States v. Gambina, 564 F.2d 22, 24 (8th Cir. 1977) (attempted escape, use of firearm in attempted escape, and assault on United States marshal; defendant previously convicted of attempted escape, involved in another attempted escape, and told court he intended to try to escape); United States v. Theriault, 531 F.2d 281, 283 (5th Cir. 1976) (while shackled during transport, defendant tried to escape following an accident which he may have caused), cert. denied, 434 U.S. 870 (1977); Kennedy v. Cardwell, 487 F.2d 101, 103 (6th Cir. 1973) (defendant sawed through a jail cell with four other prisoners resulting in the subject trial), cert. denied, 416 U.S. 959 (1974); United States v. Kress, 451 F.2d 576 (9th Cir. 1971) (armed bank robbery), cert. denied, 406 U.S. 923 (1972). In Kress, the defendant had previously escaped from custody. Id. at 577. See also Loux v. United States, 389 F.2d 911, 914 (9th Cir.) (kidnapping of elderly couple), cert. denied, 393 U.S. 867 (1968). In Loux, the defendants had made some preparations to escape, were involved in a several prison escapes, and the courtroom was not as secure as most. Id. at 919.
62. See Gilmore v. Armontrout, 861 F.2d 1061, 1071 (8th Cir. 1988) (defendant considered dangerous since he was charged with capital murders and had previously been convicted of capital murder), cert. denied, 109 S.Ct. 3176 (1989); Stewart, 850 F.2d at 494 (defendant’s former attorney testified that the defendant was dangerous, defendant made verbal threats to court, and previously assaulted deputy while wearing handcuffs); Apodaca, 843 F.2d at 431 (defendant committed dangerous acts in past); Wilson v. McCarthy, 770 F.2d 1482, 1483 (9th Cir. 1985) (assault with deadly weapon and possession of sharp instrument while in prison; defendant’s chief witness shackled; witness in prison for murder and was involved in transporting weapons within prison); Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983) (defendant previously convicted of armed robbery and
The Court in *Allen* observed that a trial judge must be given sufficient discretion to determine if security measures are needed. In *Zygadlo v. Wainwright*, the Eleventh Circuit interpreted this finding to mean that a trial judge must be given reasonable discretion. The First Circuit interpreted this finding to mean that a trial judge has flexibility to ensure courtroom security dependent upon the circumstances.

A trial judge must show adequate justification for employing a particular security measure. The fact that the defendant is an inmate is an insufficient ground to order shackling. The trial court must show that a constitutionally justifiable interest is served by employing security measures.

charged with armed robbery and assault with intent to kill), *cert. denied*, 469 U.S. 820 (1984); Woodard v. Perrin 692 F.2d 220, 221-22 (1st Cir. 1982) (defendant put a cigarette in someone's face at State hospital and kicked or threatened a policeman); *Theriault*, 531 F.2d at 285 (defendant had thrown food at prison guards and broke prison chapel door); Bibbs v. Wyrick, 526 F.2d 226 (8th Cir.) (assault with intent to commit murder), *cert. denied*, 425 U.S. 981 (1976). In *Bibbs*, the defendant's attorney requested trial judge have two strongest bailiffs available due to defendant's reputation of violence. *Id.* at 227.


65. *Id.* at 1223. The court noted that the trial judge properly observed defendant's behavior and considered him an escape threat in deciding to shackle him. *Id.*

66. United States v. Pina, 844 F.2d 1, 15 (1st Cir. 1988) (trial judge's discretion is not fixed by rigid mechanical rules to deal with every situation; there is not one best security measure for all circumstances).

67. See United States v. Samuel, 431 F.2d 610, 615-16 (4th Cir.) (only support on the record for shackling defendant was that he was an inmate), *aff'd on rehearing*, 433 F.2d 633 (1970), *cert. denied*, 401 U.S. 946 (1971). Only if other factors were present in the trial judge's decision would this decision to order the defendant shackled be affirmed. *Id.* at 616.

68. *Id.* at 615. See also *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985) (shackling of defendant's witness justified due to witness's prior convictions and his prison gang membership; mere fact he was an inmate would have been insufficient). See also *Harrell v. Israel*, 672 F.2d 632, 634 (assault of corrections officer). In *Harrell*, the defendant's witness was shackled because he was a maximum security prisoner. The shackling was not justified as there was no showing he was dangerous, unruly, or an escape threat. *Id.* at 635-37. Nevertheless, the defendant's petition was denied as the shackling of his witness was not prejudicial and less intrusive measures would have been less effective and more prejudicial. See *id.* at 637.

69. See *Elledge v. Dugger*, 823 F.2d 1439, 1452 (11th Cir.) (first degree murder), *modified*, 833 F.2d 250 (1987), *cert. denied*, 108 S.Ct. 1487 (1988). The trial judge was unable to show a constitutional interest was served by ordering the defendant shackled at his sentencing hearing. *Id.* However, if the reasons for shackling the defendant are not on the trial court's record, the circuit court may remand to the trial court to state their reasons for shackling the defendant. See *Samuel*, 431 F.2d at 615. See also United States v. Thompson, 432 F.2d 997, 997-98 (4th Cir. 1970) (trafficking in narcotics; remanded to
B. CONSTITUTIONALLY ACCEPTABLE SECURITY MEASURES

The Court in *Allen* identified several constitutionally acceptable security measures, such as the imposition of criminal contempt.70 However, the Court recognized that a defendant faced with a more severe sentence, such as life imprisonment, is unlikely to be deterred by a fairly limited sentence for contempt.71 A trial judge may also cite the defendant for civil contempt.72 The Court in *Allen* recognized a problem with this measure as it could be part of the defendant's strategy to behave inappropriately until adverse witnesses are no longer available to testify against him.73

A defendant may be tried *in absentia*74 as a defendant can-

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71. Id. at 345. See also Stewart v. Corbin, 850 F.2d 492 (9th Cir. 1988), cert. denied, 109 S.Ct. 1737 (1989). Citing the defendant for contempt in *Stewart* would have been meaningless based on his current armed robbery charge and four prior armed robbery convictions. Id. at 499. See also United States v. Pina, 844 F.2d 1 (1st Cir. 1988). In *Pina*, the defendant continued to be disruptive despite 33 contempt charges. Id. at 5. See also United States v. Theriault, 531 F.2d 281 (5th Cir. 1976), cert. denied, 434 U.S. 870 (1977). In *Theriault*, the defendant continued to be disruptive despite two prior contempt charges. Id. at 284.
72. See *Allen*, 397 U.S. at 345. This allows the court to imprison the defendant and delay the trial until he promises to behave appropriately. Id.
73. Id.
74. *Allen*, 397 U.S. at 343 (trial judge removed defendant due to disruptive behavior). See supra notes 50-53 and accompanying text for discussion on the defendant's behavior in *Allen*. However, the Court in *Allen* observed that this may not an available option in capital offenses as Fed. R. Crim. Proc. 43 provides, in part:

[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial and including the return of the verdict.

See *Allen*, 397 U.S. at 343, n.2. *Trial in absentia* has been approved despite the loss of several well-established rights in such a proceeding. First, a defendant has a right to be present at his own trial based on the due process clause of the fifth amendment. See Hopt v. People of the Territory of Utah, 110 U.S. 574, 579 (1884) (first degree murder). The right to be present at trial is also applicable to state actions. See Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934) (murder; attempted robbery). Second, a defendant has a right to be present at his own trial based on the confrontations clause of the sixth amendment. See id. at 106. See also United States v. Gagnon, 470 U.S. 522 (cocaine distribution conspiracy; defendant has right to be present wherever his presence bears a
not be allowed to destroy the court’s decorum and efforts to try him for crimes allegedly committed. This measure is constitutional if the defendant continues to be disruptive after the trial judge’s warnings and the judge determines the trial cannot continue with such disruptive behavior. A defendant’s behavior can also result in the loss of the right of self-representation and the right to testify on one’s own behalf.

Binding and gagging a defendant is constitutional when used as a “last resort.” Shackles may be appropriately employed as a security measure where there is an “extreme need,” as when a defendant poses a danger to those in the courtroom or when an escape threat exists. However, a growing trend indi-

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75. *Allen*, 397 U.S. at 346.

76. *Id.* at 343. However, a trial judge should advise the defendant that he can return to the trial if he promises to behave in an appropriate manner. *Id.* This security measure is distinguished from a civil contempt charge as it allows the trial to continue. *See id.*

77. *See Stewart v. Corbin*, 850 F.2d 492, 500 (9th Cir. 1988) (interference with right to self-representation is necessary due to defendant’s disruptive behavior), *cert. denied*, 109 S.Ct. 1737 (1989); *See also United States v. Kizer*, 569 F.2d 504 (9th Cir.) (attempted bank robbery), *cert. denied*, 435 U.S. 976 (1978). In Kizer, the defendant’s persistent arguing with judge in front of jury required her to be removed from the courtroom. The defendant’s behavior also warranted the loss of defendant’s right of self-representation. *See id.* at 506-07.

78. *See United States v. Ives*, 504 F.2d 935, 941 (9th Cir.) (*Allen* court standards applied in determining when disruptive defendant could be removed from the courtroom and used to determine when defendant will have waived his right to testify on his own behalf), *vacated on other grounds*, 421 U.S. 944 (1974), *opinion reinstated*, 547 F.2d 1100 (9th Cir. 1976), *cert. denied*, 415 U.S. 919 (1980).


It is in part because of these inherent disadvantages and limitations in his method of dealing with disorderly defendants that we decline to hold with the Court of Appeals that a defendant cannot under any possible circumstances be deprived of his right to be present at trial. However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here.

*Id.* at 344.

80. *Harrell v. Israel*, 672 F.2d 632, 635-36 (7th Cir. 1982) (no “extreme need “ shown as defense witnesses not shown to be potentially disruptive or posed as escape threats; nevertheless no reversible error).

81. *See United States v. Hack*, 782 F.2d 862, 866-67 (10th Cir.) (sufficient need to shackle defendant shown by serious charges against him and escape attempts; court did not require that the trial judge consider less drastic alternatives), *cert. denied*, 466 U.S. 1184 (1986).
cates that a trial judge must consider less drastic alternatives before employing shackles.

The Eleventh Circuit has affirmed the decision to shackle a defendant when an extreme danger to those in the courtroom existed. That court, in Elledge v. Dugger, ordered a new sentencing hearing under similar circumstances when the trial judge failed to consider less drastic alternatives. Similarly, other circuits have found that the trial judge must consider less drastic alternatives before ordering the defendant shackled.

The Ninth Circuit appears to be following this trend. Although the court has not always required such a showing recent opinions have reflected the movement toward requiring a trial court consider such alternatives before ordering a defendant shackled.

Shackling has several drawbacks, including potentially

84. Id. at 1452 (no showing court considered less drastic alternatives before shackling defendant as is required).
85. See Woodards v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982). However, less drastic alternatives may have been considered even if they are not stated on the trial record. Id. See also Kennedy v. Cardwell, 487 F.2d 101, 111 (6th Cir. 1973) (abuse of discretion if court fails to use available less drastic alternatives), cert. denied, 416 U.S. 959 (1974).
86. See Loux v. United States, 389 F.2d 911, 919 (9th Cir.) (court affirmed trial judge's decision to order the defendants shackled since they posed a danger to those in the courtroom and presented a threat of escape; no requirement that the trial judge consider less drastic security measures before employing shackling), cert. denied, 393 U.S. 867 (1968).
87. See Turpin v. Finner, 709 F.2d 1274 (9th Cir. 1983) (involuntary commitment hearing involving permanently retarded adult). The court noted that even if the petitioner was dangerous the trial court should have considered less drastic alternatives to soothe him such as increasing his medication or having family members nearby. Id. at 1284. See Wilson v. McCarthy, 770 F.2d 1482, 1486 (9th Cir. 1985) (court affirmed the defendant's conviction but expressed its concern that the trial record did not reflect consideration of less drastic alternatives to shackling; reasoned that the defendant is required to show less drastic alternatives were available and failed to do so). See Stewart v. Corbin, 850 F.2d 492, 499 (9th Cir. 1988) (trial judge offered defendant option of being tried in absentia from soundproof cell with closed circuit television), cert. denied, 109 S.Ct. 1737 (1989). The defendant refused this option. Id. at 499-500. Therefore, the court held that binding and gagging the defendant was appropriate since less drastic alternatives were not available. See id.
harming the presumption of innocence. The duration and conspicuousness of the shackling bears on the measure of this harm. The majority of circuits have expressly held that shackles are inherently prejudicial. In Holbrook v. Flynn, the Supreme Court reached the same conclusion. Shackles are an affront to the decorum of a judicial proceeding and may impair the ability of a defendant to communicate with counsel. In Kennedy v. Cardwell, the Sixth Circuit noted that a defendant's ability to communicate with counsel may be impaired by shackling as it tends to interfere with his mental faculties. Further, the presumption of innocence is the basis of our criminal justice system. See also Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982). The Seventh Circuit observed:

For this presumption to be effective, courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion. As one court has observed, if a defendant is to be presumed innocent, he must be allowed the indicia of innocence.

*Id.* at 635. (citing Estelle v. Williams, 425 U.S. 501, 503 (1976)).

91. See Gilmore v. Armontrout, 861 F.2d 1061, 1071 (8th Cir. 1988) (court considered that leg irons were not visible and jurors were dismissed whenever defendant had to walk around courtroom, therefore no prejudice existed), *cert. denied*, 109 S.Ct. 3176 (1989). See also United States v. Pina, 844 F.2d 1, 8 (1st Cir. 1988) (three jurors briefly saw defendant in shackles and defendant was not prejudiced). See also Billups v. Garrison, 718 F.2d 665, 668-69 (4th Cir. 1983) (not prejudicial when jurors saw defendant shackled once), *cert. denied*, 469 U.S. 820 (1984).

92. *Id.* at 568. The Supreme Court observed that shackles are inherently prejudicial to a defendant as jurors may infer the defendant is dangerous or culpable based on the shackles. *See id.* at 569.


94. *Id.* One of the prime advantages a defendant has in being present at trial is the ability to confer with counsel and being shackled interferes with this ability. *Id.*


96. *Id.* at 106.

... In my opinion any order or action of physical burdens,
ther, shackles may cause physical pain. However, modern restraints have substantially reduced this concern.

In addition to those measures cited by Allen, the court may employ police officers in the courtroom to promote security. However, if the presence of officers interferes with the defendant's ability to communicate with counsel this measure is deemed unconstitutional. Prisoner docks segregating the defendant have been used as a security measure although this may cause substantial harm to the presumption of innocence. Finally, an electronic magnometer to detect hidden weapons

pains, and restraints upon a prisoner during the progress of a trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.

Id. (quoting People v. Harrington, 42 Cal. 165, 168 (1871)).

97. Kennedy, 487 F.2d at 106.

98. Id. This concern of the early courts has been abated by the use of modern lightweight handcuffs. Krauskopf, Physical Restraints Of The Defendant In The Courtroom, 15 St. Louis M.L.J. 351, 354 (1971).

99. See Holbrook v. Flynn, 475 U.S. 560 (1985). In Flynn, the normal courtroom security force was supplemented by four uniformed state troopers who were seated in the front row in the spectator's section. Id. at 562. This security measure is not inherently prejudicial to the presumption of innocence since society expects security guards in public places. Id. at 569. See also United States v. Clardy, 540 F.2d 439 (9th Cir. 1976) (assault with intent to murder). In Clardy, the trial judge properly exercised his discretion to add additional armed plainclothes police officers within the courtroom and armed officers outside where terrorist threats received. Id. at 442. Availability of such personnel and the courtroom layout will determine if this measure can be effective. See Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983) (shortage of available police officers supported the trial judge's decision to order the defendant shackled), cert. denied, 469 U.S. 820 (1984). The dissent in Billups, criticized the majority's opinion, noting that the trial judge could have delayed the trial until additional officers were available. Id. at 670. See also Patterson v. Estelle, 494 F.2d 37, 38 (5th Cir.) (theft of cattle; decision to shackle the defendant sustained because several exits in the courtroom could not be adequately guarded), cert. denied, 419 U.S. 871 (1974).

100. Hardee v. Kuhlman, 581 F.2d 330, 332 (2nd Cir. 1978) (second degree manslaughter). At the trial in Hardee, the presence of a guard seated three feet behind the defendant was found to be a constitutional security measure. Id. There was no showing that the guard's presence interfered with the private communication between the defendant and his attorney. See id.


102. Id. at 1080 (segregation gives inference accused is somehow different or dangerous and is not the least restrictive means to ensure courtroom safety). See also Young v. Callahan, 700 F.2d 32, 37 (1st Cir.) (assault and battery with dangerous weapon and two counts of murder; conviction reversed as prisoner dock may have prejudiced the presumption of innocence), cert. denied, 444 U.S. 863 (1983).
may be a constitutional security measure.\textsuperscript{103}

C. \textit{Effect of the Trial Judge's Decision on the Outcome of the Trial}

The defendant's right to a fair trial is denied only when the trial judge abuses his discretion in ordering shackles.\textsuperscript{104} The trial judge will have abused his discretion if shackling the defendant was not necessary.\textsuperscript{105} However, the defendant has the burden of making this showing.\textsuperscript{106} The determination of whether a defendant was denied a fair trial is often based on whether the defendant's presumption of innocence was unconstitutionally harmed by the shackles.\textsuperscript{107} Despite the inherent prejudice of shackling, courts have considered additional factors in determining if the defendant was denied a fair trial such as jurors' prior knowledge of the defendant's dangerous propensity,\textsuperscript{108} the overwhelming evidence against the defendant,\textsuperscript{109} and the trial judge's efforts to conceal the shackles from the jurors' view.\textsuperscript{110} The courts have

\textsuperscript{103} See United States v. Heck, 499 F.2d 778, 788 (9th Cir.) (conspiracy to forcibly rescue property seized by United States Marshals and interfere with the Marshals protection of that property), \textit{cert. denied}, 419 U.S. 1088 (1975). During the trial in \textit{Heck}, the court received threats through mail, received information that a demonstration was planned for the courtroom, and previously had to admonish the spectators at the trial due to their verbal outbursts. \textit{Id.} In addition to the magnetometer, the trial judge also properly ordered additional Marshals be present. \textit{Id.}

\textsuperscript{104} See Zygadlo v. Wainwright, 720 F.2d 1221, 1223 (11th Cir. 1983) (shackles do not deny defendant fair trial as matter of law; only if trial judge abused his discretion in ordering shackles is defendant's right to a fair trial denied), \textit{cert. denied}, 466 U.S. 941 (1984).

\textsuperscript{105} See \textit{supra} notes 85-87 and accompanying text.

\textsuperscript{106} See Kennedy v. Cardwell, 487 F.2d 101, 111-12 (6th Cir. 1973) (abuse of discretion to employ shackling if less drastic security measures are available; burden of proof on defendant to show less drastic measures were available), \textit{cert. denied}, 416 U.S. 959 (1974); \textit{See also} Wilson v. McCarthy, 770 F.2d 1482, 1486 (9th Cir. 1985) (defendant must show less drastic alternatives available and trial judge abused his discretion by not using them).

\textsuperscript{107} See \textit{supra} notes 89-90 and accompanying text.

\textsuperscript{108} Corley v. Cardwell, 544 F.2d 349, 352 (9th Cir.) (second degree murder), \textit{cert. denied}, 429 U.S. 1048 (1977). In \textit{Corley}, the court found no jury prejudice as defense counsel already admitted to the jury that the defendant was dangerous and had admitted to killing someone. \textit{Id.} Loux v. United States, 389 F.2d 911, 919 (9th Cir.) (unlikely jury prejudice as trial would reveal that the defendants escaped from a maximum security prison and thus jurors would then know of defendants dangerous propensity anyway), \textit{cert. denied}, 393 U.S. 867 (1968).

\textsuperscript{109} Stewart v. Corbin, 850 F.2d 492, 500 (9th Cir. 1988) (no prejudice despite defendant being bound and gagged), \textit{cert. denied}, 109 S.Ct. 1737 (1989).

\textsuperscript{110} Wilson v. McCarthy, 770 F.2d 1482, 1485 (9th Cir. 1985) (shackled defense wit-
also considered curative instructions given by the trial judge\(^{111}\) and jury polls where jurors denied any prejudice.\(^{112}\)

A fair trial requires that the defendant be able to communicate with counsel.\(^{113}\) In *United States v. Myers*,\(^{114}\) the Third Circuit considered this question and found that the defendant was not denied his right to a fair trial noting that he failed to show that the shackles prevented communication between the defendant and his counsel.\(^{115}\) Although circuit courts continue to find that a defendant's right to counsel may be impaired due to shackling, rarely have convictions been overturned on this basis.\(^{116}\)

\(^{111}\) See *Billups v. Garrison*, 718 F.2d 665, 668 (4th Cir. 1983) (trial judge instructed jury that no prejudice should be considered due to seeing defendant in shackles), *cert. denied*, 469 U.S. 820 (1984). See also *Wilson*, 770 F.2d at 1485 (preferable to give instruction, but not necessary).

\(^{112}\) See *Woodard v. Perrin*, 692 F.2d 220, 222 (1st Cir. 1982) (no showing defendant did not receive fair, impartial trial where jurors denied any prejudice).

\(^{113}\) See *Illinois v. Allen*, 397 U.S. 337, 344, *reh. denied*, 398 U.S. 915 (1970). See also *Herring v. New York*, 422 U.S. 853, 858 (1975). In *Herring*, the Court found the right to assistance of counsel provided by the sixth and fourteenth amendments for criminal trials, guarantees that no restrictions present on the functions of defense counsel. *Id.* The ability to communicate with the client is a necessary function for defense counsel to properly defend a client. *See Allen*, 397 U.S. at 344.

\(^{114}\) 367 F.2d 53 (3rd Cir. 1966) (first degree murder while in prison), *cert. denied*, 386 U.S. 920 (1967).

\(^{115}\) See *id.* at 54 (defendant handcuffed to sheriff on first day of trial; decision to shackles defendant reasonable as he appeared emotionally unstable and posed an escape threat). In order to sustain a claim that one's constitutional rights had been violated because communication between a defendant and his counsel was impaired, the defendant must show actual prejudice. *Id.* See *Quiroz v. Wawrzaszek*, 749 F.2d 1375, 1378 (9th Cir. 1984), *cert. denied*, 471 U.S. 1055 (1985) (citing *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979)). In *Quiroz*, the court upheld the conviction despite the defendant's claim that he was denied effective assistance of counsel at trial. *Id.* Here, the defendant spoke Spanish and received information from his attorney through an interpreter. See *id.* at 1377. In order to show that the language barrier denied him his right to the assistance of counsel the defendant must show actual prejudice. *Id.* at 1378. The trial record showed that the defendant's attorney made the defendant aware of the possible sentence the defendant faced. See *id.*

\(^{116}\) See *Stewart v. Corbin*, 850 F.2d 492, 500 (9th Cir. 1988) (communication with counsel and defendant present since one hand free to write notes and gag periodically removed), *cert. denied*, 109 S.Ct. 1737 (1989). See also *supra* notes 94-96 and accompanying text.
IV. COURT'S ANALYSIS

A. MAJORITY OPINION

Affirming the District Court's grant of Spain's petition for writ of habeas corpus, the Ninth Circuit reviewed the District Court's findings of fact for clear error. The court gave wide latitude to the District Court as the findings were based on the credibility of the evidence. The court noted that the magistrate gave limited weight to the testimony of the psychologists and Spain's attorney. Further, the court observed that the magistrate's acceptance of Spain's testimony concerning the effect of the shackling was plausible in light of the duration and extent of the shackling. Accordingly, the court found no clear error in the District Court's findings that the shackles impaired Spain's ability to aid in his own defense and testify on his own behalf.

117. Spain v. Rushen, 883 F.2d 712, 728-29 (9th Cir. 1989), cert. denied, 58 U.S.L.W. 3678 (1990). The court reviewed the decision to grant the writ of habeas corpus de novo. Id. at 716. The court relied on Carter v. McCarthy, 806 F.2d 1373, 1375 (9th Cir. 1986) (forgery and possession of stolen checks), cert. denied, 108 S.Ct. 198 (1987). An appellate court must make its own independent determination as to whether the writ of habeas corpus should be granted. See id.

118. Id. at 717. The court relied on Fed. R. Civ. Proc. 52a which provides, in part:

Findings of fact . . . should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Id. Further, the court relied on Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1980) (sexual discrimination). In Anderson, the Supreme Court noted that this rule does not allow a reviewing court to overturn findings of fact merely because they are convinced that they would have found differently. Id. at 574. If the finding is plausible in light of the evidence, the court must affirm the finding. Id. at 573-74. Where findings are based on credibility of the witnesses, Rule 52a requires greater deference to the factfinder. Id. at 575.

119. Id. at 717.

120. Id. at 717-18. See also supra note 37 and accompanying text for testimony of Dr. Delman on behalf of Spain, and Dr. Sutton on behalf of the State.

121. Id. at 718. The magistrate gave some credibility to Spain's attorney's testimony as an expert in the criminal justice field. Id.

122. Id. at 719.

123. See supra note 41 and accompanying text for magistrate's findings which were adopted by the District Court.

124. Spain, 883 F.2d at 719.
1. Trial Judge's Discretion To Employ Security Measures

Relying on *Zygadlo v. Wainwright*, the court found that an accumulation of factors are considered in determining whether security measures are appropriate. The trial judge properly considered the political atmosphere of the trial and the prior violence in the same courtroom. He also considered the violent crimes allegedly committed by Spain, the threat that Spain might try to escape, and Spain's disruptions during the pretrial proceedings. These combined factors gave the trial judge adequate justification to employ some type of security measure.

2. Trial Judge's Decision To Order Defendant Shackled

The court next considered whether the trial judge abused his discretion in employing shackles as a security measure. Relying on the finding by the Court in *Illinois v. Allen* that binding and gagging should be done only as a "last resort," the Ninth Circuit noted that shackling is constitutional only if less drastic alternatives are not available. The court observed that there are several burdens associated with shackling. Therefore, it is the duty of the trial judge to weigh the benefits and burdens of shackling against other alternatives. The court noted that an accused's presumption of innocence is jeopardized when the accused must appear in shackles. In the instant case, the prejudice was great because the shackles were extensive,

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126. Spain, 883 F.2d at 719.
127. Id. Spain was a Black Panther. *See supra* note 4.
128. Spain, 883 F.2d at 719.
129. Id.
130. Id.
131. Id. at 719. Spain interrupted the pretrial proceedings on thirteen occasions between April 17, 1972 and March 14, 1975. *Id.* at 719 n.10.
132. Id. at 719-20.
133. Id. at 716.
135. *Id.* at 344.
137. *See id.* at 720. *See also supra* notes 88-98 and accompanying text for discussion of the burdens or disadvantages shackling imposes upon a defendant.
138. Spain, 883 F.2d at 721.
139. *Id.*
highly visible, and were on for a lengthy duration. In addition, Spain's ability to communicate with counsel was significantly impaired and judicial dignity was clearly diminished as five defendants were heavily chained throughout the trial. Finally, the court observed that Spain's mental faculties were impaired and he suffered physical pain because of the shackles.

As each burden associated with shackling was present in the instant case, the Ninth Circuit considered whether less drastic alternatives were available. The court noted that the trial judge considered allowing the defendant to remain unrestrained, but did not find that to be an acceptable alternative. The court considered the constitutional alternatives set out in Allen. Citing Spain for contempt would have been meaningless because of his prior sentence of life imprisonment.

Excluding Spain from the trial would have been a less drastic and constitutional alternative, notwithstanding defendant's right to be present at trial.

The Ninth Circuit then found that the trial judge abused his discretion by ordering Spain shackled, as he did not consider

140. Id. at 722.
141. Id. The court relied on Fed. R. Civ. Proc. 52a and also found the magistrate's findings plausible in light of the evidence. Id.
142. Id. This was recognized by the court as the least weighty concern. Id.
143. Id. Again, the court relied on Fed. R. Civ. Proc. 52a in finding the record clearly supported this finding. Spain complained of the same throughout the trial and this was consistent with the magistrate's findings that Spain's ability to communicate with counsel was impaired. Id.
144. Id. The court found it was not implausible that a man wearing twenty-five pounds of chains for five years would suffer physical pain. Id.
145. Id. at 728.
146. Id. at 726. The court interpreted the trial judge's statement that he considered all options from total restraint to no restraint to mean that only those two options were considered. Id.
147. Id.
148. Id.
150. Id. The court relied on United States v. Gagnon, 470 U.S. 522, 526 , reh. denied, 471 U.S. 1112 (1985). The Supreme Court found that a defendant has a right to confront witnesses, help prepare his own defense, listen to the testimony, and testify on his own behalf. Id. See also Badger v. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978).
this alternative.\textsuperscript{151} The court observed that excluding Spain from trial would have at least eliminated Spain's physical pain\textsuperscript{152} and allowed him to better assist in his own defense.\textsuperscript{153}

The court concluded its analysis by noting that the objective of providing a safe, secure courtroom could have been met by this action.\textsuperscript{154} This alternative would have been as beneficial to the courtroom and less burdensome to Spain.\textsuperscript{155} Therefore, the court held that Spain's due process right to a fair trial had been denied\textsuperscript{156} and the District Court's grant of Spain's writ of habeas corpus was affirmed.\textsuperscript{157}

B. DISSenting OPINION

Dissenting, Judge Noonan\textsuperscript{158} asserted that the majority considered the wrong question.\textsuperscript{159} Relying on \textit{Stewart v. Corbin},\textsuperscript{160} he urged that the question was not whether the trial judge abused his discretion in shackling the defendant, but whether he abused it to the extent that Spain did not receive a fair trial or was denied his right to counsel.\textsuperscript{161} The trial judge is required to balance the potential danger to the courtroom against any prejudice the defendant might suffer because of the shackling.\textsuperscript{162} Due to the extreme danger presented by Spain,\textsuperscript{163} continuing unreported incidents,\textsuperscript{164} the ability of prisoners to inflict harm with ordinary utensils,\textsuperscript{165} and the other extraordinary circum-

\textsuperscript{151} Spain, 883 F.2d at 728. The court noted that the trial judge stated at an evidentiary hearing that he did not think it was possible to exclude Spain from trial once it began. \textit{Id.} at 727-28, n.18.
\textsuperscript{152} Id. at 728.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 728-29.
\textsuperscript{158} Spain, 883 F.2d at 729 (Noonan, J., dissenting).
\textsuperscript{159} Id.
\textsuperscript{160} 850 F.2d 492 (9th Cir. 1988), \textit{cert. denied}, 109 S.Ct. 1737 (1989).
\textsuperscript{161} Spain, 883 F.2d at 729-30 (Noonan, J. dissenting).
\textsuperscript{162} Id. at 730.
\textsuperscript{163} Id. at 730-31.
\textsuperscript{164} See \textit{id.} at 731. Judge Noonan stated that the trial judge attempted to keep knowledge of these incidents from the jury due to fear it might prejudice the jury, but does not mention what these incidents were. See \textit{id.}
\textsuperscript{165} Id. Relying on \textit{Bruscino v. Carlson}, 854 F.2d 162, 165 (7th Cir. 1988) (maximum security prisoners filed for a writ of habeas corpus alleging that prison conditions consti-
stances which were present. Judge Noonan believed the trial judge was justified in shackling Spain.

Judge Noonan agreed that reviewing for clear error was the appropriate standard of review of factual findings. However, he observed that findings of fact should be overturned if the appellate court has a firm conviction that error was made. In Spain, the magistrate discounted much of the live testimony and relied on documentary evidence in making her findings. Further, Spain demonstrated his ability to effectively aid his defense counsel by successfully pursuing habeas relief for prison conditions. Therefore, the appellate court should not have accepted the District Court’s findings of fact.

In addition, Judge Noonan observed that the Court in Allen did not intend that courts interpret the phrase “last resort” literally. Rather, he urged shackles may be used in “extreme need”, where “urgently demanded due to the circumstances”, where there is a serious threat of danger to those in the courtroom, or a serious threat of escape.

As such concerns were present, shackles were inappropriate only if the defendant showed less drastic alternatives were available. It is the defendant’s burden to show less drastic alternatives were available. Spain did not make this showing by demonstrating that he requested to be absent from trial. The

tuted cruel and unusual punishment), cert. denied, 109 S.Ct. 3193 (1989). That court noted that bulbs, pencils, and bare hands are used by maximum security prisoners to maim and kill. Id.
166. Spain, 883 F.2d at 731 (Noonan, J., dissenting).
167. Id. at 738-39.
168. Id. See also supra note 118.
169. Spain, 883 F.2d at 733. Judge Noonan relied on Goodman v. Lukens Steel, 777 F.2d 113, 128 (3rd Cir. 1985) (class action employment discrimination), cert. dismissed, 487 U.S. 1211 (1988). That court found that an appellate court should set fact findings aside if the court has a firm conviction mistake was committed. See id.
170. Spain, 883 F.2d at 733.
171. Id. at 734-36 (Noonan, J., dissenting).
172. Id.
173. Id. at 736.
174. Id.
175. Id. at 737.
176. Id.
177. Id. Judge Noonan did not believe that mere requests to be tried in absentia demonstrated that this security measure was available to the trial court. See id.
dissent urged that the majority erroneously conducted its own fact-finding and determined this alternative was available.\textsuperscript{178}

Judge Noonan did not believe absence from trial was less drastic as the right to confront one's accusers is a fundamental right guaranteed by the United States Constitution.\textsuperscript{179} Further, excluding Spain from trial might have deprived him of immediate communication with his counsel during the trial.\textsuperscript{180}

The trial judge specifically indicated that he considered all the options.\textsuperscript{181} Judge Noonan concluded that Spain's right to a fair trial was not denied and he would have overturned the District Court's grant of Spain's writ of habeas corpus.\textsuperscript{182}

V. CRITIQUE

In \textit{Spain} \textsuperscript{183}, the Ninth Circuit provided a sound interpretation of "last resort." The court properly observed that the Supreme Court found shackling had more serious potential drawbacks than other security measures.\textsuperscript{184} Accordingly, it is appropriate to require that a trial judge consider other security measures, including trying the defendant \textit{in absentia}, before ordering a defendant shackled.

However, comparing the instant case to the Ninth Circuit's recent opinion in \textit{Stewart}, it is unclear when it is proper to order shackling. More specifically, it is unclear when less drastic security measures cease to be an available alternative. Apparently, the court places significant weight on the willingness of the defendant to be excluded from the trial. In determining if trying the defendant \textit{in absentia} is an available security measure, it appears improper to focus on the defendant's willingness. Such cooperation may not be forthcoming, as in \textit{Stewart},\textsuperscript{185} or the de-

\textsuperscript{178} Id.
\textsuperscript{179} Id. at 737.
\textsuperscript{180} Id. at 738.
\textsuperscript{181} Id. at 737. Judge Noonan interpreted the trial judge's statement that he considered "all the options" to mean he did just that, and not merely the two options cited by the majority. Id.
\textsuperscript{182} Id. at 739.
\textsuperscript{183} 883 F.2d 712 (9th Cir. 1989), \textit{cert. denied}, 58 U.S.L.W. 3678 (1990).
\textsuperscript{184} See supra note 79 and accompanying text.
\textsuperscript{185} See supra note 87.
fendant may state his willingness in such a manner as to indicate a "hidden agenda" as in Spain. Spain qualified his requests by indicating he was being compelled to give up his "phony due process" right to be present at his own trial. The dissent recognized that Spain's requests may have been an attempt to establish grounds for an appeal. A trial judge faced with such "willingness" is uncertain if a defendant is freely consenting to being tried in absentia or has, in effect, refused this option. In such circumstances, it may be impossible for the trial judge to determine if trying the defendant in absentia is an appropriate option.

Further, focusing on the defendant's consent is somewhat inconsistent with Allen. Allen, expressly approved of the trial court's decision to try the defendant in absentia despite the defendant's unwillingness.

The better approach is to analyze the potential effects of the proposed shackling upon the defendant. The trial judge should determine if another security measure, such as trying the defendant in absentia, is likely to have less prejudicial effects. Such an analysis is consistent with Allen as it may not always be clear which security measure is less drastic or less detrimental. This approach is more rational and provides clearer guidance to trial judges than mandating trial in absentia wherever the defendant does not object to its use.

Spain presents a significant departure from prior due process claims that shackling led to a denial of a fair trial. The ma-

186. Spain, 883 F.2d at 738. Dissenting, Judge Noonan noted, "If that had been done the petition before us now might allege that he had been deprived of his right to confront the witnesses against him and his right to confer immediately with counsel." Id. at 738. The majority answers this concern by asserting such an appeal would have been groundless if trying Spain in absentia was determined to be the least drastic alternative available. See id. at 728, n. 22.


188. Id. at 343. The Supreme Court observed that there is not one best measure for all circumstances. See id. The Court further observed that despite approving binding and gagging a defendant only when used as a "last resort", there may be circumstances when it would be the fairest security measure. See id. at 344.

189. See Stewart v. Corbin, 850 F.2d 492, 499 (9th Cir. 1988), cert. denied, 109 S.Ct. 1737 (1989). In Stewart, the gag was periodically removed so the defendant could confer with counsel. One hand was left free so the defendant could write notes and the defendant did not make any complaints of pain or that he experienced interference with his mental faculties. Id.
majority of courts have focused on the prejudice to the defendant in analyzing such cases. Accordingly, those courts have consistently held that the trial judge's decision may not have affected the outcome of the trial. In Spain, the Ninth Circuit observed the potential harm to Spain's presumption of innocence, but based its decision on his ability to aid in his own defense. Despite the different approach, the reasoning is valid as shackling does potentially interfere with the defendant's ability to aid in his own defense.

The decision in Spain is seemingly at odds with prior Ninth Circuit decisions as well as those of other circuits in establishing a per se violation of a defendant's due process rights if less drastic alternatives were available and not considered. As due process rights exist to ensure fairness, this standard, on its face, would seem unwarranted where the defendant does not show the shackling denied him a fair trial. However, it is evident that a shackled defendant has a difficult time demonstrating that the trial outcome was unfairly affected because of the shackles. Convictions have rarely been overturned as shackled defendants often have a history of past violence or have considerable evidence against them leading to the decision to order them shackled. Absent the standard of a per se due process violation, a trial judge would not be deterred from using shackles even where less drastic alternatives were available. The standard announced by the Ninth Circuit preserves the trial judge's discretion in ordering security measures and also provides protection for a defendant against unreasonable use of shackling.

VI. CONCLUSION

The Ninth Circuit has provided a clear explanation of "last resort." It is evident that future trial courts must consider less drastic alternatives before ordering shackling. However, the court has gone further than the other circuits in holding that a failure to do so, in and of itself, denies a defendant a fair trial. This should serve as strong notice to all trial courts that the

190. See supra note 107 and accompanying text.  
191. See supra note 140 and accompanying text.  
192. See supra notes 141 and 153 and accompanying text.  
193. See supra notes 94-96 and accompanying text.  
194. See supra notes 108-09 and accompanying text.
consequences of failing to demonstrate consideration of less drastic alternatives will result in an overturned conviction even if the shackling did not affect the defendant’s presumption of innocence or his ability to assist in his own defense.196

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195. The Marin County District Attorney has decided not to retry Spain. San Francisco Banner Daily Journal, Monday, April 30, 1990, at 2, col. 4. He noted that Spain has been on parole since 1988 and would unlikely receive a jail sentence if convicted. Id. Further, a retrial would require that the deceased guards’ family members and surviving guards relive the tragedy. See id.

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