

**FAILURE TO OBJECT TO IN-COURT RESTRAINTS:
THE *BOOSE* AND PLAIN ERROR DOCTRINES
IN *PEOPLE V. ALLEN***

The presumption of innocence is central to our administration of criminal justice. In the absence of exceptional circumstances, an accused has the right to stand trial “with the appearance, dignity, and self-respect of a free and innocent man.”¹

INTRODUCTION

Before an Illinois trial court may place a defendant in physical restraints, it must conduct a *Boose* hearing to determine whether there is “manifest need” for the restraints.² Questions surrounding the impact of denying a criminal defendant a *Boose* hearing before placing him in physical restraints³ have arisen with marked frequency in recent years.⁴ Confusion has been further compounded when defendants did not properly preserve the issue for appellate review and wished to avail themselves of the hard-to-read plain error doctrine.⁵

On June 2, 2006, the Illinois Supreme Court decided *People v. Allen*,⁶ a case that will significantly impact future criminal proceedings. The *Allen* court held that restraining a defendant without the benefit

1. *In re Staley*, 364 N.E.2d 72, 73 (Ill. 1977) (quoting *Eaddy v. People*, 174 P.2d 717, 719 (Colo. 1946)).

2. *People v. Boose*, 362 N.E.2d 303, 305–06 (Ill. 1977).

3. Courts have tended to use the term “shackles” interchangeably with other terms such as “restraints,” “physical restraints,” and “fettters.” *See, e.g.*, *People v. Martinez*, 808 N.E.2d 1089, 1091–92 (Ill. App. Ct. 2004) (alternating the terms “restraints,” “physical restraints,” and “shackling” in reference to electronic stun belts). This usage is confusing, because, at times, courts have been forced to address the propriety of varying degrees of physical restraints, from handcuffs, to traditional shackles, to electronic stun belts. *See, e.g.*, *Staley*, 362 N.E.2d at 74–75 (Underwood, J., dissenting) (comparing a complex system of chains and belts to simple handcuffs). For clarity’s sake, this Note will confine its usage of the term “shackle” to the word’s traditional meaning, “a pair of fetters connected together by a chain, used to fasten a prisoner’s wrists or ankles together.” *THE NEW OXFORD AMERICAN DICTIONARY* 1554 (2d ed. 2005). This Note will use the terms “restraints” or “physical restraints” to refer to any type of device that induces a “deprivation or restriction of personal liberty or freedom of movement.” *Id.* at 1444. To avoid future confusion, the author encourages courts to do the same.

4. *See, e.g.*, *People v. Buckner*, 831 N.E.2d 676, 678–80 (Ill. App. Ct. 2005); *People v. Brown*, 828 N.E.2d 351, 354 (Ill. App. Ct. 2005); *People v. Crutchfield*, 820 N.E.2d 507, 514–15 (Ill. App. Ct. 2004).

5. *See, e.g.*, *Buckner*, 831 N.E.2d at 679–80; *Brown*, 828 N.E.2d at 354; *Crutchfield*, 820 N.E.2d at 514–15.

6. *People v. Allen*, 856 N.E.2d 349 (Ill. 2006).

of a *Boose* hearing does not constitute *per se* plain error, thus requiring defendants to show something more than improper restraint to obtain a remedy.⁷ This Note focuses on *Allen*'s effect on the *Boose* and Illinois plain error doctrines. Part II exposes the roots of the *Boose-Staley* doctrine as well as the inner workings of the Illinois plain error doctrine.⁸ Part III summarizes the majority and dissenting opinions in *Allen*.⁹ Part IV examines *Allen* from both *Boose* and plain error perspectives, concluding that *Allen* is inconsistent with the spirit of the *Boose-Staley* doctrine and unjustly distorts the Illinois plain error doctrine.¹⁰ Finally, Part V presents *Allen*'s impact on the *Boose* and Illinois plain error doctrines.¹¹

II. BACKGROUND

To understand the significance of the *Allen* decision, one must first understand the histories of both the *Boose-Staley* doctrine and the Illinois plain error doctrine. First, this Part provides a brief history of the English common law prohibitions against unnecessary in-court restraints, the adoption of that rule by American courts, and how that adoption led to the *Boose-Staley* doctrine in Illinois.¹² Next, this Part addresses the confusion in Illinois courts surrounding the application of the *Boose-Staley* doctrine to defendants who failed to properly preserve the restraints issue for appellate review.¹³ Finally, this Part summarizes the current plain error doctrine, including the doctrine's purpose and application in Illinois.¹⁴

7. *Id.* at 357. Illinois courts have been divided as to what the remedy should be for a defendant who was improperly restrained during his judicial proceedings. Compare *Buckner*, 831 N.E.2d at 680 (finding plain error in the unjust restraining of a defendant and remanding the case for a "retrospective *Boose* hearing"), with *Brown*, 828 N.E.2d at 354 (finding plain error after a trial court improperly restrained the defendant, reversing the conviction, and remanding the case).

8. See *infra* notes 12–66 and accompanying text.

9. See *infra* notes 67–102 and accompanying text.

10. See *infra* notes 103–189 and accompanying text.

11. See *infra* notes 190–224 and accompanying text.

12. See *infra* notes 15–30 and accompanying text.

13. See *infra* notes 32–53 and accompanying text.

14. See *infra* notes 54–66 and accompanying text. For a more elaborate history of the Illinois plain error doctrine, how it differs from the federal plain error rule, and how it has been clarified in recent decisions, see Steven W. Becker, *To Review or Not to Review: The Plain Truth about Illinois' Plain Error Rule*, 37 LOY. U. CHI. L.J. 455 (2006).

A. The History of Prohibiting In-Court Restraints

The prohibition of unnecessary in-court restraints dates at least as far back as seventeenth-century English common law.¹⁵ English courts assumed that improperly placing a defendant in restraints invariably jeopardized his ability to participate in his own defense.¹⁶ Consequently, physical restraints were properly placed on a defendant during trial only when the court feared that the defendant might escape.¹⁷

Toward the end of the nineteenth century, this idea gained recognition in the United States.¹⁸ The first American courts to address improper physical restraint echoed English courts' concerns that restraining a defendant during trial "inevitably tends to confuse and embarrass [a defendant's] mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense" and should only be used when the court fears that the defendant will escape.¹⁹ In addition, American courts were concerned that physical restraints might adversely affect the defendant's presumption of innocence—a presumption central to the constitutionality of criminal pro-

15. The Missouri Court of Appeals in *State v. Kring*, 1 Mo. App. 438 (1876), *aff'd*, 65 Mo. 591 (1877), traced the prohibition against unnecessary in-court restraints back through its origins in English common law, potentially past the seventeenth century and as far back as Bracton, Fleta, and the Magna Carta:

It is laid down in our ancient books of the law that, though under indictment of the highest nature, as murder or high treason, the prisoner must be brought to the bar without irons or any manner of shackles or bonds; unless there be evidence danger of an escape, and then he may be secured by irons.

Id. at 440 (citing WILLIAM BLACKSTONE, 4 Commentaries 322). See also Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 351–53 (1971) (describing a similar, but more detailed, history of common law prohibitions on in-court restraints).

16. Not all justices, however, interpret the common law this way. Compare *Kennedy v. Cardwell*, 487 F.2d 101, 106 (6th Cir. 1973) (recognizing the English concern that restraints inhibit a defendant's ability to defend himself despite the fact that English cases seemed more concerned with the "physical pain and torment" caused by the restraints used at that time), and *People v. Harrington*, 42 Cal. 165, 165 (1871) (asserting that unnecessary physical restraints of any type placed upon a prisoner during his trial inevitably inhibit his ability to participate in his own defense), with *Deck v. Missouri*, 544 U.S. 622, 638–40 (2005) (Thomas, J., dissenting) (declaring that the common law rule is not relevant in today's courts because it developed under a system that required defendants to present their own cases without counsel and because ancient shackles induced torturous pain not experienced by today's defendants).

17. See *Harrington*, 42 Cal. at 167.

18. See *id.* (adopting the English common law's "entitle[ment] to appear free of all manner of shackles or bonds"); *Kring*, 1 Mo. App. at 440–41 (recognizing the English tradition of requiring that defendants be allowed to present themselves unfettered in court).

19. *Harrington*, 42 Cal. at 168; see also *Kring*, 1 Mo. App. at 440.

ceedings²⁰—and that such restraints would offend the “dignity and decorum of the judicial process.”²¹ Although these rules emerged at the state level in the nineteenth century, a majority of states, including Illinois, did not address this issue until the twentieth century.²²

1. *Prohibition on Fetters in Illinois*

In a 1904 case, *Hauser v. People*, Illinois first addressed the issue of in-court restraints.²³ There, the Illinois Supreme Court echoed the concerns of earlier English and American courts that physical restraints may result in unfair jury prejudice.²⁴ The *Hauser* court granted sheriffs “a large degree of discretion” in restraining a defendant while bringing him into the courtroom and affirmed that physical restraints should be removed once they are no longer necessary.²⁵ After *Hauser*, the issue of in-court physical restraint went largely unnoticed in Illinois until the 1970s.

In the 1970s, both state and federal courts decided several key cases that addressed the propriety of physically restraining defendants in the courtroom.²⁶ Most notably, in *Illinois v. Allen*, the United States Supreme Court noted that “no person should be tried while shackled and gagged except as a last resort.”²⁷ In *Kennedy v. Cardwell*, the Sixth Circuit decided whether manacled a defendant to a deputy sheriff during trial infringed upon the defendant’s due process rights.²⁸ The Sixth Circuit, reiterating the teachings of *Illinois v. Allen*, found that “it is an abuse of discretion precipitously to employ shackles when less drastic security measures will adequately and reasonably suffice.”²⁹ Finally, in 1977, the Illinois Supreme Court reexamined the issue of unnecessary restraints in the *Boose* and *Staley* cases. Therein,

20. See, e.g., *State v. Kring*, 64 Mo. 591, 593 (1877); *State v. Roberts*, 206 A.2d 200, 203 (N.J. Super. Ct. App. Div. 1965).

21. *Kennedy*, 487 F.2d at 106. One can find some reference to concerns for the dignity of the court in English common law as well, though such concerns do not seem pervasive. See Krauskopf, *supra* note 15, at 356 (citing Mr. Hungerford at the trial of Christopher Layer).

22. See *Deck*, 544 U.S. at 641–42 nn.3–4 (Thomas, J., dissenting) (providing a list of the thirty-five states that did not address this issue until the 1900s, as well as a list of the twenty-one states that did not address the issue until the 1950s).

23. 71 N.E. 416, 421–22 (Ill. 1904).

24. *Id.*

25. *Id.*

26. See *United States v. Theriault*, 531 F.2d 281 (5th Cir. 1976); *People v. Duran*, 545 P.2d 1322 (Cal. 1976); *Commonwealth v. Brown*, 305 N.E.2d 830 (Mass. 1973); *State v. Tolley*, 226 S.E.2d 353 (N.C. 1976).

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

28. *Kennedy v. Cardwell*, 487 F.2d 101, 103 (6th Cir. 1973).

29. *Id.* at 111. The Sixth Circuit defined “shackling” to signify “all forms of handcuffs, leg irons, restraining belts and the like.” *Id.* at 103 n.1.

the court more clearly defined standards for using in-court physical restraints.³⁰

B. *The Boose-Staley Doctrine*

1. *People v. Boose*

In *Boose*, despite the defense attorney's objections that restraints were unnecessary and would irrevocably prejudice the defendant,³¹ the court required a fifteen-year-old murder defendant to wear shackles and handcuffs in front of a jury throughout his competency hearing.³² After the hearing, the defense counsel moved for a new trial, arguing that the state abused its discretion.³³ The defense based its motion on the defendant's previous good behavior in court, the presence of trained, armed guards in the courtroom, and the jury prejudice caused by the visibility of the restraints.³⁴ The trial court denied the motion, and the defendant appealed.³⁵

On appeal, the Illinois Supreme Court looked to other jurisdictions, both state and federal,³⁶ for guidance in deciding that physical restraints should only be used when there is a "showing of manifest need."³⁷ Restraining the accused, the court explained, is undesirable for three reasons: (1) it unfairly prejudices the jury; (2) it inhibits the accused's ability to participate in his own defense; and (3) it "offends the dignity of the judicial process."³⁸ The court, therefore, declared that the trial court should use its discretion to determine the necessity of restraints and should consider fourteen factors regarding the defendant, the courtroom, and the case at bar.³⁹ Further, the court held that the trial court should state its reasons for restraining the defen-

30. See *In re Staley*, 364 N.E.2d 72 (Ill. 1977); *People v. Boose*, 362 N.E.2d 303 (Ill. 1977).

31. 362 N.E.2d at 304.

32. *Id.*

33. *Id.* at 305.

34. *Id.*

35. *Id.* at 304-05.

36. *Id.* at 305-06; *Illinois v. Allen*, 397 U.S. 337 (1970); *United States v. Theriault*, 531 F.2d 281 (5th Cir. 1976); *Kennedy v. Cardwell*, 487 F.2d 101 (6th Cir. 1973); *People v. Duran*, 545 P.2d 1322 (Cal. 1976); *Commonwealth v. Brown*, 305 N.E.2d 830 (Mass. 1973); *State v. Tolley*, 226 S.E.2d 353 (N.C. 1976); AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 4.1(c) (approved draft 1968).

37. *Boose*, 362 N.E.2d at 305.

38. *Id.*

39. The factors are as follows: (1) the gravity of the accusations against the defendant; (2) the defendant's character; (3) the defendant's physical qualities, including age; (4) the defendant's prior record; (5) the defendant's previous escape attempts; (6) evidence of the defendant's plans to escape; (7) the defendant's threats to cause a disturbance; (8) the defendant's threats to harm others; (9) the defendant's threats to harm himself; (10) the risk of retaliation by mobs or other persons; (11) the possibility that other offenders may attempt to free the defendant; (12) the

dant on record, defense counsel should have the opportunity to rebut the need for restraints, and the jury should not be present during this hearing.⁴⁰ Because the trial court neither considered the fourteen factors, nor held a hearing regarding physical restraint, the court found that the trial court had abused its discretion and that the defendant's guilty plea should be reversed.⁴¹

2. In re Staley

Two months after *Boose*, the Illinois Supreme Court revisited the issue in *In re Staley*.⁴² In *Staley*, the trial court ordered that a fifteen-year-old boy wear handcuffs in court. The boy had been accused of delinquency for actively inhibiting a counselor and superintendent from aiding a teacher who was being attacked.⁴³ The trial court rejected the defense's objection to the handcuffs, citing lax courtroom security.⁴⁴ The defendant appealed.⁴⁵

Staley differed from *Boose* primarily because the defendant in *Staley* stood before a judge, not a jury, and because the defendant in *Staley* was only required to wear handcuffs, not full shackles.⁴⁶ The Illinois Supreme Court, citing the same sources as *Boose*, found that *Boose*'s underpinnings—presumption of innocence, ability to participate in one's own defense, and the dignity of the court system—also apply to bench trials and when the defendant is merely placed in handcuffs.⁴⁷ The court recognized that, in *Staley*, there was no fear of prejudicing a jury, because the hearing took place before a judge. Despite this, the court relied on the two remaining principles to extend the *Boose* requirements to bench proceedings.⁴⁸ As a result, the Illinois Supreme Court reversed, finding that the trial court had erred.⁴⁹

In recent years, much confusion has surrounded the scope of the *Boose-Staley* doctrine, particularly regarding how an appellate court should treat a defendant who was denied a proper *Boose* hearing but

character of the audience; (13) the characteristics of the courtroom; and (14) the availability of satisfactory, alternate remedies. *Id.* at 305–06.

40. *Id.* at 305.

41. *Id.* at 306–07.

42. 364 N.E.2d 72 (Ill. 1977).

43. *Id.* at 72.

44. *Id.*

45. *Id.*

46. *Id.* at 74 (Underwood, J., dissenting).

47. *Id.* at 73 (majority opinion) (“It jeopardizes the presumption[] [of innocence’s] value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged.”).

48. *Staley*, 364 N.E.2d at 73–74.

49. *Id.*

did not properly preserve the issue for review.⁵⁰ In 2004, the Illinois Supreme Court reiterated that a trial court's failure to conduct a *Boose* hearing violates a defendant's constitutional due process rights.⁵¹ It remained unclear, however, how such a determination applied when the issue was not properly preserved. As a result, a split developed among Illinois appellate districts. One appellate district claimed that restraining a defendant without first conducting a *Boose* hearing amounted to reversible plain error *per se*.⁵² Other courts asserted that the defendant must show something more than mere restraint.⁵³

C. *The Illinois Plain Error Doctrine*

The Illinois plain error doctrine, codified in Illinois Supreme Court Rule 615(a), allows appellate courts to examine forfeited claims "affect[ing] substantial rights."⁵⁴ A claim is considered forfeited when the defendant fails to preserve an issue for appellate review.⁵⁵ The rule signifies that "[t]he judicial system itself retains its own right to be free of certain particularly egregious errors" despite procedural default⁵⁶ and solidifies the court's position as the ultimate "guardian[] of constitutional rights and the integrity of the criminal justice system."⁵⁷ Since its enactment in 1967, Rule 615(a) has not been amended,⁵⁸ and few scholars have attempted to analyze it,⁵⁹ even though the propriety of its application has been frequently debated in Illinois reviewing courts⁶⁰ because of its seemingly omnipresent, yet enigmatic, use in Illinois criminal appeals.⁶¹

50. Staley and Boose both objected to the use of restraints during their proceedings. *Id.* at 72; *People v. Boose*, 362 N.E.2d 303, 304 (Ill. 1977).

51. *See People v. Martinez*, 808 N.E.2d 1089, 1090 (Ill. App. Ct. 2004).

52. *People v. Brown*, 828 N.E.2d 351, 354 (Ill. App. Ct. 2005).

53. *See, e.g., People v. Crutchfield*, 820 N.E.2d 507 (Ill. App. Ct. 2005) (requiring the defendant to show that the error actually prejudiced him in some way); *see also People v. Strickland*, 843 N.E.2d 897 (Ill. App. Ct. 2006).

54. ILL. SUP. CT. R. 615(a).

55. Becker, *supra* note 14, at 458.

56. Paul T. Wangerin, "Plain Error" and "Fundamental Unfairness": Toward a Definition of Exceptions to the Rules of Procedural Default, 29 DEPAUL L. REV. 753, 778 (1980).

57. Becker, *supra* note 14, at 455 (citing *People v. Blue*, 724 N.E.2d 920, 941 (Ill. 2000)).

58. *Id.* at 460.

59. There have been only two scholars who have attempted to provide a framework for the Illinois plain error doctrine. *See id.*; *see also Wangerin, supra* note 56.

60. *See, e.g., People v. Nitz*, 848 N.E.2d 982, 988–93 (Ill. 2006), *reh'g denied*, 2006 Ill. LEXIS 638 (Ill. May 22, 2006); *People v. Harvey*, 813 N.E.2d 181, 192–94 (Ill. 2004); *People v. Boyd*, 845 N.E.2d 921, 932–34 (Ill. App. Ct. 2006).

61. Becker, *supra* note 14, at 456.

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1. *The Two-Pronged Approach*

In Illinois, an appellant who has forfeited a claim may invoke the plain error doctrine if the facts surrounding his proceedings fall under one of two prongs. The first, known as the closely balanced evidence prong, requires that the evidence was “so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence.”⁶² The second, known as the fair trial prong, allows a defendant to appeal a forfeited claim that “so seriously undermine[d] the integrity of judicial proceedings as to warrant reversal.”⁶³

In 2005, the Illinois Supreme Court decided *People v. Herron*, which confirmed that, unlike the federal plain error doctrine, the Illinois plain error doctrine does not require a harmless error analysis under either prong.⁶⁴ Under the first prong, defendants need only show that error occurred and the evidence was closely balanced.⁶⁵ Under the second prong, defendants need only show “that there was ‘plain error’ and that such error ‘challenged the integrity of the judicial process.’”⁶⁶

Despite that attempt to clarify the doctrine, however, the waters surrounding its application remain murky and difficult to maneuver. More specifically, under the second prong, what makes an error “plain,” and how is plain error distinguishable from regular error? Further, how can a defendant satisfy the test for *finding* plain error if he must somehow *show* plain error? This circular pattern has kept courts and practitioners guessing.

III. SUBJECT OPINION: *PEOPLE V. ALLEN*

Defendant Peri Allen was tried for burglary in Will County, Illinois.⁶⁷ Before the State rested, there was a brief exchange between the defense counsel and the trial judge in which the defense counsel noted that the defendant was wearing something unusual under his clothes that formed a noticeable bump on his back.⁶⁸ The judge then

62. *People v. Allen*, 856 N.E.2d 349, 355 (Ill. 2006) (quoting *People v. Herron*, 830 N.E.2d 467, 475 (Ill. 2005)).

63. Becker, *supra* note 14, at 462.

64. *Id.* at 459. Harmless error analysis applies when a defendant properly preserves an objection for appeal. The term “harmless error” refers to errors at trial that were not prejudicial to the defendant. Under harmless error analysis, the State bears the burden of persuading the court that the errors were *de minimus* and did not, in fact, cause prejudice to the defendant. *Id.* “In other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *People v. Thurow*, 786 N.E.2d 1019, 1025 (Ill. 2003).

65. Becker, *supra* note 14, at 485–86.

66. *Id.* at 486 (quoting *Herron*, 830 N.E.2d at 479–80).

67. *Allen*, 856 N.E.2d at 350–51.

68. *Id.* at 351.

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asked if defense counsel would prefer that the defendant be seated in the witness stand prior to the jury's entrance so that the jury would not see the bump, to which the defense responded "*I would prefer unless [the stun belt] can be removed somehow.*"⁶⁹

The trial judge explained that, "for security purposes," the defendant was wearing a "security device" controlled by the deputy and that the defendant was not shackled, handcuffed, or "restrained in [any] other manner."⁷⁰ This exchange took place before the jury entered the courtroom.⁷¹ The jury convicted the defendant of burglary and sentenced him to four years in prison.⁷²

On appeal, the defense raised the issue of unnecessary restraints for the first time, claiming that the trial court's failure to conduct a *Boose* hearing constituted reversible plain error.⁷³ The appellate court agreed and held that it could be inferred from the judge's words that the security belt was an electronic stun belt, that such belts have been construed as restraints under *Boose*, and that requiring a defendant to wear restraints without first conducting a *Boose* hearing is an abuse of court discretion that constitutes reversible error.⁷⁴ The appellate court reversed the conviction and remanded for a new trial.⁷⁵

A. *Majority Opinion*

The four-justice majority began its opinion by agreeing with the appellate court that the security device in question was an electronic stun belt and that such devices are physical restraints.⁷⁶ Although the *Allen* jury never saw the stun belt, the Supreme Court reiterated *Staley*'s concerns that the use of unnecessary restraints "hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings."⁷⁷ Therefore, courts must conduct proper *Boose* hearings to support the "manifest need" for restraints before stun belts may be used.⁷⁸ Be-

69. *Id.* (emphasis in original).

70. *Id.*

71. *Id.*

72. *Id.*

73. *People v. Allen*, 821 N.E.2d 335, 337 (Ill. App. Ct. 2004).

74. *Id.* at 337–39.

75. *Id.* at 339.

76. *Allen*, 856 N.E.2d at 351–52.

77. *Id.* at 353 (citing *In re Staley*, 364 N.E.2d 72, 73 (Ill. 1977)). The court also recognized that the U.S. Supreme Court reaffirmed these same concerns. *Id.* at 352 (citing *Deck v. Missouri*, 544 U.S. 622 (2005)). Though the court distinguished *Allen*'s case from *Deck—Deck* addressed visible restraints, while *Allen*'s restraints were hidden under his clothes—the court asserted that the underlying concerns were the same. *Id.*

78. *Id.* at 353.

cause Allen never received a proper *Boose* hearing, the court found that the trial court's actions violated the defendant's due process rights.⁷⁹

Yet Allen failed to object to the stun belt during trial⁸⁰ and, therefore, could only avail himself of the plain error doctrine to argue the issue on appeal.⁸¹ Because there was no suggestion that the evidence was closely balanced, Allen based his appeal on the second prong of the plain error doctrine: the fair trial prong.⁸² In its plain error analysis, the majority noted a split among appellate districts regarding whether errors resulting in due process violations—at least with regard to unnecessary restraints—that went uncontested at trial are necessarily plain errors.⁸³

The court sided with the Fifth District and found that, to prove plain error under the second prong, defendants have the burden of proving that “the presumption of innocence, ability to assist his counsel, or the dignity of the proceedings was compromised.”⁸⁴ Thus, the court reaffirmed its previous assertion that “even constitutional errors can be forfeited” if the defendant cannot prove that the errors deprived him of a fair trial.⁸⁵ According to the majority, the transcript did not indicate that Allen was in pain, experienced anxiety resulting from the stun belt, or was in any way impeded from assisting counsel.⁸⁶ The court was also unwilling to consider the propriety of stun belts altogether, citing a lack of information in the record to make such a determination and asserting that it would reserve judgment on

79. *Id.* at 354 (citing *People v. Martinez*, 808 N.E.2d 1089, 1092 (Ill. App. Ct. 2004)).

80. There was some disagreement between the majority and the dissent as to whether the defense's remarks should have been properly construed as a contemporaneous objection, but the dissent dismissed this disagreement as “academic quibble” given that the defendant did not include this argument in his post-trial motion. *Id.* at 361 (Freeman, J., dissenting).

81. *Id.* at 355 (majority opinion).

82. *Allen*, 856 N.E.2d at 356.

83. *Id.* at 355–56. Compare *People v. Brown*, 828 N.E.2d 351, 354 (Ill. App. Ct. 2005) (holding that due process violations resultant from being shackled without the benefit of a *Boose* hearing are not waiveable), with *People v. Crutchfield*, 820 N.E.2d 507, 514 (Ill. App. Ct. 2004) (holding that a defendant must prove actual prejudice to avail himself of plain error).

84. *Allen*, 856 N.E.2d at 357.

85. *Id.* at 356 (citing *People v. Thurow*, 786 N.E.2d 1019, 1025 (Ill. 2003)). The court continued, reaffirming its previous assertions as follows:

The plain-error doctrine is not a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the court. . . . Instead, it is a narrow and limited exception to the general rule of forfeiture, whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process.

Id. (citing *People v. Herron*, 830 N.E.2d 467, 474 (Ill. 2005)).

86. *Id.* at 358–59.

that issue for another day.⁸⁷ The court, therefore, did not have enough evidence to find reversible error. Finally, the majority indicated in dicta that, had some objection to wearing the stun belt appeared in the record, as in *Martinez*, *Deck*, *Boose*, and *Staley*, it would have found a *per se* reversible error.⁸⁸

B. Dissenting Opinion

The lengthy three-justice dissent began by agreeing that the restraints issue was not properly preserved for review and that the case should thus be analyzed under the plain error doctrine.⁸⁹ It also agreed that, in the instant case, the second prong was the appropriate vehicle, because the defendant had only asserted that “the error . . . eroded the integrity of the judicial process and undermined the fairness of his trial,” not that the evidence was evenly balanced.⁹⁰ Likewise, the dissent did not challenge the assertion that the defendant bears the burden of persuasion under the second prong.⁹¹ It disagreed, however, as to what the defendant’s burden entails. The dissent interpreted precedent to mean that defendants do not have to show actual prejudice; rather, under the second prong, they need only show “that the error served to erode the integrity of the judicial process and undermined the fairness of the trial proceedings.”⁹² According to the dissent, requiring proof of specific prejudice corrupts the second prong of the doctrine.⁹³

Unlike the majority, the dissent believed that the trial court’s error resulted in fundamental unfairness.⁹⁴ In reaching that conclusion, the dissent reiterated the three basic rights emphasized in *Boose* and *Sta-*

87. *Id.* at 358.

88. *Id.* at 360. In *People v. Martinez*, the defendant objected both before and during trial, claiming that he would rather be tried in absentia than wear a stun belt. 808 N.E.2d 1089, 1090–91 (Ill. App. Ct. 2004). In *Deck v. Missouri*, the defense objected three times during *voir dire* and once again afterwards. 544 U.S. 622, 625 (2005). In *People v. Boose*, the defense objected to the restraints before the competency hearing and filed for a new trial after the hearing. 362 N.E.2d 303, 304–05 (Ill. 1977). In *In re Staley*, the defense objected once at the defendant’s initial hearing and again at the morning session of the adjudicatory hearing, but not at the afternoon session. 364 N.E.2d 72, 72 (Ill. 1977).

89. *Allen*, 856 N.E.2d at 361–62 (Freeman, J., dissenting).

90. *Id.* at 363.

91. *Id.*

92. *Id.* at 362. Prejudice to the defendant need not be proven as it “*is presumed because of the importance of the right involved . . . ‘regardless of the strength of the evidence.’*” *Id.* (citing *People v. Blue*, 724 N.E.2d 920, 941 (Ill. 2000)) (emphasis in original).

93. *Id.* at 368.

94. *Id.* at 361.

ley⁹⁵ and noted that plain error can exist without prejudice to the jury. More specifically, the dissent found that the right to dignified trial proceedings was central to the *Staley* decision.⁹⁶

According to the dissent, the *Staley* court opted to forego a harmless error analysis, because it believed the error to be so offensive that it was not necessary to prove actual prejudice in order to grant a reversal.⁹⁷ The *Staley* court reversed the defendant's conviction on its merits without any showing of prejudice, because it found that handcuffing a defendant or placing him in any other type of restraints without cause affronts our notions of justice and tarnishes the public's perception of the justice system.⁹⁸ It was this "systemic effect" that compelled *Staley's* remand.⁹⁹ Thus, to the dissent, it seemed inconsistent that, because the issue was not properly preserved in a post trial motion, a constitutional violation not subject to harmless error analysis should be converted into an error that necessitates a showing of prejudice.¹⁰⁰ Finally, because the transcript provided no record of discomfort or anxiety, the dissent questioned the court's reasoning that the defendant could not prove prejudice. The dissent asserted that, because actual prejudice would be exceedingly difficult to demonstrate,¹⁰¹ the court should consider case law regarding the nature and effect of stun belts.¹⁰²

IV. ANALYSIS

The *Allen* court weakened the *Boose-Staley* doctrine by straying from the doctrine's original concerns. Although the court attempted to reaffirm its commitment to the three concerns raised in *Boose* and *Staley*,¹⁰³ it chose to provide more protection to those who properly preserve a claim for appeal than to those who do not.¹⁰⁴ This preference for procedural accuracy is inconsistent with the idea of funda-

95. The three rights are "the presumption of innocence, the ability to assist in the defense, and the dignity of the judicial process." *Allen*, 856 N.E.2d at 365 (Freeman, J., dissenting).

96. *Id.*

97. *Id.* at 365–66.

98. *Id.* at 367–68.

99. *Id.* at 368.

100. *Id.*

101. *Allen*, 856 N.E.2d at 374 (Freeman, J., dissenting).

102. See, e.g., *People v. Martinez*, 808 N.E.2d 1089, 1093 (Ill. App. Ct. 2004) (McDade, J., specially concurring); *Wrinkles v. State*, 749 N.E.2d 1179, 1193–94 (Ind. 2001).

103. *Allen*, 856 N.E.2d at 352–53, 360.

104. *Id.* at 360.

mental fairness that underscores both the *Boose-Staley*¹⁰⁵ and plain error doctrines.¹⁰⁶ This Part analyzes these claims and provides a more detailed description of the doctrines involved. It first compares *Allen*'s ultimate disposition to the holdings of the jurisdictions cited therein.¹⁰⁷ It then analyzes how the *Allen* court applied the policy considerations underlying *Boose* and *Staley*.¹⁰⁸ Finally, it examines the *Allen* court's application of the Illinois plain error doctrine.¹⁰⁹

A. *Comparing Allen to Precedent from Other Jurisdictions that Helped Form the Basis of the Boose-Staley Doctrine*

By holding that appellate courts shall not review the issue of in-court restraints unless the defendant objected at trial, the Illinois Supreme Court was, to a certain extent, faithful to the precedent cited by the *Boose* and *Staley* courts.¹¹⁰ Virtually none of the jurisdictions cited in *Boose* allowed for a *per se* reversal on the issue of restraints.¹¹¹ For instance, the *Boose* and *Staley* courts relied heavily upon *State v. Tolley*, a North Carolina case.¹¹² Although *Tolley* asserted the three trial concerns emphasized by *Boose* and *Staley* and reinforced the need for judges to conduct hearings before restraining defendants during court proceedings, the North Carolina Supreme Court dismissed the petitioner's restraints claim, because he did not properly object.¹¹³ As a result of the defendant's failure to object, the court concluded that the defendant received a fair trial.¹¹⁴ Today, North Carolina continues to reject a defendant's improper restraints claim if it was not properly preserved for appellate review.¹¹⁵

105. "[A] fair trial . . . is a fundamental requirement in a criminal prosecution and when such requirement is not met, it amounts to a denial of due process of law." *People v. Boose*, 362 N.E. 2d 303, 306-07 (Ill. 1977).

106. The plain error rule's "purpose is to ensure that a defendant 'is not denied his right to a fair and impartial . . . trial.'" Becker, *supra* note 14, at 459 (quoting *People v. Underwood*, 378 N.E.2d 513, 516 (Ill. 1978)).

107. See *infra* notes 110-122 and accompanying text.

108. See *infra* notes 123-168 and accompanying text.

109. See *infra* notes 169-195 and accompanying text.

110. See *Boose*, 362 N.E.2d at 305-06 (citing *Kennedy v. Cardwell*, 487 F.2d 101 (6th Cir. 1973)); *People v. Duran*, 545 P.2d 1322 (Cal. 1976); *Commonwealth v. Brown*, 305 N.E.2d 830 (Mass. 1973); *State v. Tolley*, 226 S.E.2d 353 (N.C. 1976).

111. See *supra* note 36 and accompanying text.

112. See, e.g., *Boose*, 362 N.E.2d at 305-06 (citing *Tolley*, 226 S.E.2d at 353).

113. *Tolley*, 226 S.E.2d at 370. "[T]he better-reasoned rule is that defendant, while ordinarily constitutionally entitled to appear at his own trial free of shackles, must, when shackling is suggested, object to the proposed restraint and, absent reasonable excuse therefore, failure to do so will ordinarily preclude the shackling as an issue on appeal." *Id.*

114. *Id.* at 371.

115. See *State v. Black*, 594 S.E.2d 258 (N.C. Ct. App. 2004).

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Likewise, in *Duran*, the California Supreme Court reinforced the “necessity of objecting to use of physical restraints.”¹¹⁶ Although the California court did not explain why such a requirement was necessary, it recognized the importance of preserving the error. Today, the court continues to hold the failure to object to in-court restraints in great disdain.¹¹⁷ “It is . . . well settled, however, that the use of physical restraints in the trial court cannot be challenged for the first time on appeal.”¹¹⁸

Additionally, Massachusetts refuses to examine the restraints issue if the defendant failed to object at trial. The *Boose* court frequently cited *Commonwealth v. Brown*, a Massachusetts Supreme Court decision.¹¹⁹ *Brown*, like *Duran* and *Kennedy*, denounced the perils of unnecessary physical restraints and emphasized the importance of inquiring into the need for restraint before implementation.¹²⁰ The Massachusetts court, however, refused to analyze the issue of physical restraints on its own; rather, the court weighed the restraint issue against the prejudice present in the “trial as a whole” to evaluate the abuse of judicial discretion.¹²¹ Massachusetts continues to uphold its requirement that defendants receive a hearing before being restrained in the courtroom, but refuses to treat such hearings “as a rigid legislative formulation, any deviation from which must result in reversal.”¹²²

B. *The Allen Decision Conflicts with the Philosophical Underpinnings of the Boose-Staley Doctrine*

The aforementioned courts rejected the proposition that restraints should be judged on their merits. Such considerations, however, are irrelevant to the *Boose-Staley* doctrine, because they did not form the

116. *People v. Duran*, 545 P.2d 1322, 1326 (Cal. 1976) (citing *People v. Chacon*, 447 P.2d 106, 114–15 (Cal. 1968)). In *Chacon*, the California Supreme Court found restraints reasonable in part because “[a]pparently counsel did not think [the restraints] improper, for he did not object to them.” 477 P.2d at 114–15.

117. *See, e.g., People v. Anderson*, 22 P.3d 347, 382 (Cal. 2001) (citing *People v. Cox*, 809 P.2d 351 (Cal. 1991)). The prohibition of in-court physical restraints “seeks to avoid the pernicious effect of the possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system . . . as well as the effect such restraints have upon a defendant’s decision to take the stand.” *Id.* (quoting *Cox*, 809 P.2d at 367) (internal quotations omitted).

118. *People v. Ward*, 114 P.3d 717, 730 (Cal. 2005) (internal quotations omitted).

119. *See People v. Boose*, 362 N.E.2d 303, 305 (Ill. 1977) (citing *Commonwealth v. Brown*, 305 N.E.2d 830 (Mass. 1973)).

120. *Brown*, 305 N.E.2d at 834.

121. *Id.* at 835.

122. *Commonwealth v. Martin*, 676 N.E.2d 451, 456 (Mass. 1997).

basis of the doctrine.¹²³ In deciding *Boose* and *Staley*, the court interpreted several cases from other jurisdictions whose philosophical underpinnings—not ultimate dispositions—indicated that, when physical restraints are not used only as a last resort, the defendant did not receive a fair trial.¹²⁴ As a result, Illinois developed a unique doctrine for addressing the issue of unjust restraints.¹²⁵ The dissent was, therefore, correct in indicating that the *Allen* decision is inconsistent with the underpinnings of the well-established *Boose-Staley* doctrine.

As mentioned above, the *Boose* court relied heavily upon the California Supreme Court's decision *People v. Duran*, a definitive case regarding unnecessary in-court restraints.¹²⁶ What the *Boose* court found compelling in *Duran* was not the contention that defendants must object to restraints; rather, the *Boose* court was drawn to the court's analysis of the detrimental effects of in-court restraints.¹²⁷ In *Duran*, the court denounced the use of unnecessary physical restraints, proclaiming that "possible prejudice in the minds of jurors, the affront to human dignity, the disrespect for the entire judicial system . . . is incident to unjustifiable use of physical restraints."¹²⁸ Ultimately, the *Boose* court shared *Duran*'s concern that, when defendants are placed in restraints without the benefit of a hearing,

123. Likewise, "a growing trend indicates that a trial judge must consider less drastic alternatives before employing shackles," and several cases have been remanded on that basis. Randall E. Tuskowski, Spain v. Rushen: *Shackles or Showtime? A Defendant's Right to See and Be Seen*, 20 GOLDEN GATE U. L. REV. 175, 185–86 (1990).

124. In *Staley*, the court ignored both the ultimate dispositions of the cases it cited and the specific tests for prejudice that those courts developed. The two-justice dissent in *Staley* disagreed with the majority partly because of this issue. 364 N.E.2d 72, 74–75 (Ill. 1977) (Underwood, J., dissenting). Justice Underwood stated that "in each of the cases, other than *Boose* and *Duran*, cited by the majority, the convictions were upheld, and in *Duran* multiple errors in addition to the shackling, contributed to the reversal." *Id.* at 74. It can be inferred, then, that the majority was not concerned with these differences; rather, it was concerned with the broader, underlying policy reasons for the rules set forth in those cases.

125. The *Boose-Staley* doctrine differs from the doctrines of other jurisdictions in several ways. It considers unjust restraints prejudicial regardless of the weight of the evidence against a defendant. *See State v. Finch*, 975 P.2d 967, 1006–07 (Wash. 1999) (noting that Illinois jurisprudence stemming from *Boose* marks an exception to the more common rule that unjust restraints are harmless if the evidence against a defendant is great). It also applies its restraints jurisprudence to situations that do not involve the prejudicing of a jury. *Compare Staley*, 364 N.E.2d at 73 (asserting that prohibitions on restraints are enforceable in both jury and bench trials), *with People v. Vigliotti*, 611 N.Y.S.2d 413 (N.Y. App. Div. 1994) (holding that "shackling a defendant in the presence of a jury is inherently prejudicial and constitutes reversible error") (emphasis added).

126. *People v. Duran*, 545 P.2d 1322, 1322 (Cal. 1976).

127. *People v. Boose*, 362 N.E.2d 303, 305 (Ill. 1977). The California Court made its assertion in dicta, as could have the Illinois Court. *Duran*, 545 P.2d at 1326.

128. *Duran*, 545 P.2d at 1327. The court cited the Massachusetts and North Carolina decisions for the same reason it cited *Duran*: to emphasize the concerns raised by unjustly restraining a defendant. *Boose*, 362 N.E.2d at 305–06.

the action “implies a general policy of shackling all inmate defendants.”¹²⁹ Such a blanket policy constitutes an unacceptable abuse of judicial discretion.¹³⁰

Likewise, in *Boose* and *Staley*, the Illinois Supreme Court cited several Sixth Circuit cases with approval.¹³¹ In part, the court drew its conclusions from language in *Woodards v. Cardwell* that addressed the effect of restraint on courtroom prejudice.¹³² In *Woodards*, the Sixth Circuit asserted that prejudice occurs when a defendant is shackled in the courtroom and that the rule against such fettering constitutes “an important component” of the right to a fair and impartial trial.¹³³ The *Woodards* court held that, because the trial court did not make a finding of necessity regarding the defendant’s restraints, the court had abused its discretion and denied the defendant his right to a fair trial.¹³⁴

Finally, the *Boose* and *Staley* courts borrowed their three basic concerns¹³⁵ regarding restraints from another Sixth Circuit decision, *Kennedy v. Cardwell*, decided three years after *Woodards*.¹³⁶ *Kennedy* expressed a “general rule that a fair trial demands that a defendant be tried free of bonds except in extraordinary circumstances.”¹³⁷ That is, unless extraordinary circumstances warranted the use of restraints, a defendant who was tried while physically restrained did not receive a fair trial. “The test on appeal is whether the trial court abused its discretion in ordering [the defendant] shackled.”¹³⁸ The *Kennedy* court defined “abuse of discretion” as a “firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.”¹³⁹

The *Boose* court followed *Kennedy*’s guidelines to arrive at its conclusion. The court examined the record to determine whether the trial court abused its discretion and found that the factors relevant to in-court restraints had not been weighed.¹⁴⁰ The sparse record revealed

129. *Boose*, 362 N.E.2d at 306 (quoting *Duran*, 545 P.2d at 1329).

130. *Duran*, 545 P.2d at 1329.

131. *Kennedy v. Cardwell*, 487 F.2d 101, 107 (6th Cir. 1973); *Woodards v. Cardwell*, 430 F.2d 978, 982 (6th Cir. 1970).

132. *Woodards*, 430 F.2d at 982.

133. *Id.*

134. *Id.* at 980–82.

135. *See supra* note 95 and accompanying text.

136. *See People v. Boose*, 362 N.E.2d 303 (Ill. 1977).

137. *Kennedy*, 487 F.2d at 110.

138. *Id.*

139. *Id.* at n.19.

140. *Boose*, 362 N.E.2d at 306; *see also supra* note 39.

little justification for Boose's shackling.¹⁴¹ As a result, the Illinois Supreme Court found that the trial court had imposed a blanket restraint policy like the one found unacceptable in *Duran*.¹⁴² Thus, the court held that the trial court had abused its discretion and Boose's right to a fair trial had been violated.¹⁴³ The court decided *Staley* using similar logic.¹⁴⁴ Neither the *Boose* nor the *Staley* decision addressed actual prejudice to the defendant.¹⁴⁵ The *Boose* court noted the defense counsel's argument that the jury would be "irrevocably prejudiced" if it saw Boose in restraints.¹⁴⁶ The court, however, never considered the defense's objection in its analysis, nor did it consider whether any of its three concerns were *actually* offended.¹⁴⁷ The court was content to find reversible error and that the defendant had not been afforded a fair trial on the *possibility* that such offenses occurred.

The *Allen* decision signifies a deviation from *Boose*, *Staley*, and other precedent. The *Allen* court purported to adhere to the *Boose-Staley* doctrine.¹⁴⁸ Instead, it weakened the doctrine, holding that it

141. *Boose*, 362 N.E.2d at 306.

142. *Id.* (citing *People v. Duran*, 545 P.2d 1322, 1329 (Cal. 1976)).

143. *Id.*

144. *In re Staley*, 364 N.E.2d 72, 74 (Ill. 1977). The court noted that the State's allegations of "poor security" in the courtroom "d[id] not impress." *Id.* Because the court found no "exceptional circumstances" and it was clear that a jury could not have been influenced—there was no jury—the court concluded that *Staley's* "appearance, dignity, and self-respect" had been harmed and his right to a fair trial affronted. *Id.* at 73–74 (citing *Eaddy v. People*, 174 P.2d 717, 719 (Colo. 1946)).

145. The court correctly did not apply *Hauser*, the first Illinois case to tackle the issue of in-court shackling. *Hauser v. People*, 71 N.E. 416, 421 (Ill. 1904). In *Hauser*, the court asserted that jurors understood that prisoners, regardless of their guilt or innocence, would be taken to and from the courtroom in fetters. Therefore, the jury would not be materially prejudiced against defendants and their claims for relief were without merit. *Id.* Furthermore, the court stated that the prohibition on in-court restraints applied only *during* the trial proceedings. In reaching its conclusion, however, the *Hauser* court only considered one of the three concerns set forth by *Boose* and *Staley*: unfair jury prejudice. In the *Hauser* court's view, prejudice to the defendant was "[t]he *only* possible ground of complaint." *Id.* (emphasis added). The court at that time did not recognize the remaining two reasons that in-court fettering is disfavored, reasons that were later recognized in various courts around the country. *See, e.g., Kennedy v. Cardwell*, 487 F.2d 101, 110 (6th Cir. 1973); *Duran*, 545 P.2d at 1327. Because the *Hauser* court did not address the other two concerns—a defendant's ability to assist his counsel and courtroom dignity—the *Boose* and *Staley* courts appropriately disregarded the decision.

146. *Boose*, 362 N.E.2d at 304.

147. *Id.* at 304–05.

148. *People v. Allen*, 856 N.E.2d 349, 352–53 (Ill. 2006).

[A] *Boose* hearing is required in stun belt cases, as in shackle or handcuff cases, because regardless of the differences between the types of restraints, they each implicate due process concerns and thus require strict limits be placed on their use.

Additionally, this opinion takes judicial notice of the routine use of stun belts on felons in other Will County cases in order to establish the fact of their use here, and cites cases both in and outside our jurisdiction in support of our holding that stun belts should be subject to a *Boose* hearing.

will not provide *per se* protection to those who do not object to restraints,¹⁴⁹ while suggesting that it will provide *per se* protection to those who do.¹⁵⁰ Although the majority recited the incantation that “a fair trial is different from a perfect trial,”¹⁵¹ in order to reject Allen’s claim of reversible error, *Boose* and *Staley* insist that an improperly restrained defendant did not receive a fair trial.¹⁵² A statement to the contrary implicates a weakening of the doctrine and a “willingness to put form over substance.”¹⁵³

The *Allen* court recognized that the *Boose* court frowned upon blanket policies of restraining all defendants in lieu of individual hearings.¹⁵⁴ Further, the *Allen* court, quoting the passage *Boose* adopted from *Duran*, determined that such a policy existed in Will County.¹⁵⁵ Therefore, Allen’s due process rights were violated.¹⁵⁶ Despite recognizing such a policy, which was enough for the *Boose* and *Staley* courts to remand, the *Allen* court concluded that such a showing was insufficient to merit a reversal: an objection is necessary.¹⁵⁷

The *Allen* court believed that, by objecting, a defendant shows actual harm caused by restraints, therefore, proving that he did not receive a fair trial.¹⁵⁸ The *Boose* and *Staley* courts, however, were not concerned with actual harm; rather, they were frightened by the potential harm to both the defendant and the judicial process caused by unjustified in-court restraints.¹⁵⁹ The *Boose* court could have emphasized the importance of objection—as the *Duran* court had¹⁶⁰—but

Id. at 358.

149. *Id.* at 360.

150. *Id.*

151. *Id.* at 356 (citing *People v. Herron*, 830 N.E.2d 467, 480 (Ill. 2005)).

152. *See* *People v. Boose*, 362 N.E.2d 303, 306-07 (Ill. 1977).

153. Petition for Rehearing for Defendant-Appellee, at 10, *People v. Allen*, 856 N.E.2d 349 (Ill. 2006).

154. *Allen*, 856 N.E.2d at 354. In fact, the unacceptability of such blanket policies allowed the conclusion that *Boose*’s fair trial rights had been breached, thus necessitating a reversal. *Boose*, 362 N.E.2d at 305.

155. *Allen*, 856 N.E.2d at 354.

156. *Id.*

157. *Id.* at 356.

158. *Id.* The majority distinguishes *Allen* from a case in which the court reviewed restraints on their merits because, in that case, the defendant entered a pretrial motion to remove the restraints and included the issue in his post-trial motion. The court reviewed the restraints issue on its merits only in the alternative. *Id.* at 357 (citing *People v. Buss*, 718 N.E.2d 1, 40 (Ill. 1999)).

159. *Boose*, 362 N.E.2d at 305. “However strong the evidence against an accused may be . . . a fair trial, in all its stages, is a fundamental requirement in a criminal prosecution.” *Id.* at 306 (quoting *People v. Finn*, 162 N.E.2d 354, 356 (Ill. 1959)).

160. *People v. Duran*, 545 P.2d 1322, 1327 (Cal. 1976).

chose not to.¹⁶¹ As the dissent stated, the *Staley* decision illustrates that unjust restraints affront our notions of justice and tarnish the judicial system.¹⁶² It is difficult to understand how failing to insert the word “objection” into the record can convert a *per se* reversible error into something less that requires a defendant to prove actual prejudice.¹⁶³

Finally, as the dissent properly indicated, it is unclear how a defendant may prove actual prejudice on appeal.¹⁶⁴ Appellate courts are limited to information in the record.¹⁶⁵ If a defendant fails to object, it is exceedingly difficult to prove from a transcript that the restraints influenced a jury, interfered with the assistance of counsel, or compromised the dignity of the judicial proceeding.¹⁶⁶ This was one of *Kennedy*'s criticisms of jurisdictions that required that defendants show something more than mere restraint for reversal.¹⁶⁷ The *Allen* majority, however, does not offer a solution. If the majority's intention was—as it appears to have been—to remain faithful to *Boose* and *Staley*,¹⁶⁸ it failed. Instead, it weakened the protections of a powerful doctrine and lost sight of *Boose* and *Staley*'s underpinnings.

C. *The Allen Decision and the Illinois Plain Error Doctrine's Second Prong*

The *Allen* decision contorted the second prong of the Illinois plain error doctrine, while providing little guidance for its application to *Boose* issues. In 2005, *Herron* attempted to clarify the second prong of the plain error doctrine by articulating that “the defendant must prove there was plain error *and* that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.”¹⁶⁹

Examined through the lens of the Illinois plain error doctrine and *Herron*'s test, a defendant's unjustified restraint would constitute plain error *per se*. First, *Herron* asserted that the error must be

161. *Boose*, 362 N.E.2d at 303–05.

162. *Allen*, 856 N.E.2d at 368 (Freeman, J., dissenting).

163. *Id.* The inverse is equally incomprehensible: inserting the word “objection” into the record would raise a proof-contingent error to the level of a *per se* reversible error.

164. *Id.* at 373.

165. *Id.* at 358 (majority opinion).

166. *Id.* at 373 (Freeman, J., dissenting).

167. *Kennedy v. Cardwell*, 487 F.2d 101, 107 n.12 (6th Cir. 1973) (“These decisions do not state how the defendant is to show prejudice and the rule that a jury cannot impeach its own verdict would appear to operate here to foreclose any attempt by the defendant to show he was in fact prejudiced.”).

168. *Allen*, 856 N.E.2d at 358.

169. *Id.* at 356 (citing *Herron*, 830 N.E.2d at 479) (emphasis in original).

“plain.” The semantic confusion caused by the requirement that one must *prove* that there was plain error in order to *show* reversible plain error can be overcome by an examination of case law. In Illinois, “plain” error refers to errors concerning “substantial rights.”¹⁷⁰ Plain errors “reveal breakdowns in the adversary system, as distinguished from typical trial mistakes;”¹⁷¹ that is, “the asserted error must be something ‘fundamental to the integrity of the judicial process.’”¹⁷² In its application to the *Allen* case, the dissent correctly noted that *Boose* deemed errors affecting a defendant’s right to a fair trial fundamental.¹⁷³ More narrowly, the *Staley* court found that rights affecting the presumption of innocence are “central to our administration of justice.”¹⁷⁴ The majority likewise conceded that errors affecting a defendant’s right to a fair trial, including the improper implementation of in-court restraints, constitute due process violations.¹⁷⁵

The defendant must then address the “affected the fairness of the defendant’s trial” component and the “challenged the integrity of the judicial process component.”¹⁷⁶ These factors should be satisfied by the mere use of restraints. The *Boose* and *Staley* decisions imply that, when a defendant is improperly placed in physical restraints, the defendant’s trial was inherently unfair, in part, because the judicial pro-

170. *People v. Keene*, 660 N.E.2d 901, 909 (Ill. 1995).

171. *Id.* at 910 (citing Wangerin, *supra* note 56, at 778) (internal quotations omitted).

172. *Id.* (citing *People v. Green*, 386 N.E.2d 272, 277 (Ill. 1979) (Ryan, J., specially concurring)).

173. *Allen*, 856 N.E.2d at 365 (Freeman, J., dissenting). *See also* *People v. Blue*, 724 N.E.2d 920, 940 (Ill. 2000) (“[W]hen a defendant’s right to a fair trial has been denied, this court must take corrective action so that we may preserve the integrity of the judicial process.”).

174. *In re Staley*, 364 N.E.2d 72, 73 (Ill. 1977).

175. *Allen*, 856 N.E.2d at 354. The majority, however, curiously relies on the court’s interpretation of the prison garb scenario in *Estelle v. Williams*, 435 U.S. 501 (1976), to support its conclusion that the failure to object to a *Boose* violation waives all right to appeal the issue: “[t]he failure to make an objection to the court to being tried in such clothes . . . is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.” *Allen*, 856 N.E.2d at 354 (citing *Estelle*, 435 U.S. at 512–13); *see* *People v. Hyche*, 396 N.E.2d 6, 12 (Ill. 1979) (citing the same passage from *Estelle* to dismiss an appellant’s restraints claim). Such an application seems inappropriate in *Allen*’s situation considering that the court found that the judge’s abuse of discretion did, in fact, establish a constitutional violation. *Allen*, 856 N.E.2d at 354. Both defense counsel and Justice Freeman’s dissent argued that *Hyche*’s relevant conclusions were overruled in 1999 by *People v. Buss* when the court chose to review physical restraints on their merits. *See* Petition for Rehearing for Defendant-Appellee, *supra* note 153, at 8; *Allen*, 856 N.E.2d at 366 (Freeman, J., dissenting) (both citing *People v. Buss*, 718 N.E.2d 1, 40 (Ill. 1999)). It would have seemed more appropriate, however, for the dissent to argue that, because the court concluded that *Allen*’s restraints constituted a due process violation, *Hyche* was irrelevant, regardless of whether *Buss*’ analysis trumped *Hyche*.

176. Though these components appear to overlap with the court’s definitions of plain error, perhaps folding themselves in under the concept, one might conceive of a situation in which, for instance, an error affected something fundamental to the judicial process without challenging the process’s integrity.

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cess was jeopardized.¹⁷⁷ The majority quoted *Staley*'s assertion that restraining a defendant without cause "jeopardizes the presumption" of innocence's "value and protection and *demeans our justice*."¹⁷⁸ "[A]ny unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans *both the defendant and the proceedings*."¹⁷⁹ These citations support the proposition that both the fairness of the defendant's trial was affected and the integrity of the judicial process was challenged *per se*.

Having proven that the judge's plain error affected the fairness of Allen's trial and challenged the integrity of the judicial process, the *Herron* plain error analysis should have ended.¹⁸⁰ In its desire to keep the plain error doctrine narrow,¹⁸¹ however, the majority embedded a new step into Illinois plain error analysis: a showing of actual prejudice. It found justification for such a requirement in *Herron*'s confusing language.¹⁸² In *Herron*, the court stated that, under the second prong, "[p]rejudice to the defendant is presumed because of the importance of the right involved, 'regardless of the strength of the evidence.' [Under both prongs], the burden of persuasion remains with the defendant."¹⁸³ While the dissent interpreted this passage to indicate that, under the second prong, prejudice need not be shown,¹⁸⁴ the majority concluded the opposite.¹⁸⁵ To reach this conclusion, the majority focused on the second sentence, interpreting it to place a burden on the defendant to prove actual prejudice at trial.¹⁸⁶ This construction is troubling, because it renders the first sentence meaningless. If a defendant must point to something in the record that indicates that he was in some way prejudiced, then prejudice is not assumed.

177. See *supra* notes 30–52 and accompanying text.

178. *Allen*, 856 N.E.2d at 352 (quoting *Staley*, 362 N.E.2d at 73) (emphasis added).

179. *Id.* at 353 (citing *Staley*, 362 N.E.2d at 73) (emphasis added).

180. The majority, however, misapplied the above citations from *Staley* to conclude only that stun belts should be treated as any other form of physical restraint. *Id.* That is, "electronic stun belts are restraining devices the use of which is subject to the same restrictions as shackles." *Id.*

181. *Id.* at 356.

The plain error doctrine is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' Instead, it is a narrow and limited exception to the general rule of forfeiture, whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process.

Id. (citations omitted).

182. *Id.*

183. *People v. Herron*, 830 N.E.2d at 480 (citation omitted).

184. *Allen*, 856 N.E.2d at 362 (Freeman, J., dissenting).

185. *Id.* at 357 (majority opinion).

186. *Id.* at 356.

A closer reading of the paragraph surrounding the quotation sheds light on the interaction between the two sentences:

We reiterate: the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *In the first instance, the defendant must prove “prejudicial error.”* That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. *In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. Prejudice to the defendant is presumed* because of the importance of the right involved, “regardless of the strength of the evidence.” In both instances, the burden of persuasion remains with the defendant.¹⁸⁷

Read in a broader context, the sentence asserting that the court will presume prejudicial error is used to contrast the first prong of the plain error doctrine with the second. That is, a defendant must prove prejudicial error under the first prong, but *not* under the second. Thus, the defendant’s burden of persuasion, as indicated in the last sentence, refers to a showing that (1) a plain error (2) was serious enough to have an effect on the fairness of his trial and (3) cause harm to the judicial system’s integrity. As discussed above, a showing that the defendant was unjustly restrained fulfills the requirements of this test.¹⁸⁸

The court offers little guidance to practitioners for determining what constitutes a showing of prejudice sufficient to carry the defendant’s burden. The court asserted that the defendant must, at a minimum, point to something in the record that is indicative of prejudice to the defendant.¹⁸⁹ What evidence the court would accept, however, is unclear. Practitioners may glean from *Allen*’s use of *Martinez* that, when a defendant “object[s] vigorously” to the use of restraints, but fails to properly preserve the issue in his post-trial motion, he has shown prejudice.¹⁹⁰ Likewise, the court hints that, if some indication

187. *Herron*, 830 N.E.2d at 479–80 (citations omitted) (first two emphases added).

188. *See supra* notes 149–80 and accompanying text.

189. *Allen*, 856 N.E.2d at 359.

190. *Id.* at 354.

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of nervousness or anxiety can be shown, the defendant might also be able to carry his burden.¹⁹¹

The requirement that a defendant show specific instances of prejudice in the record is disturbing, particularly in *Boose* cases. Both Allen's defense counsel and Justice Freeman's dissent offer another valid concern regarding record proof of prejudice in *Boose* cases: unless the defendant makes an actual, verbal statement against the use of restraints, the record will not show hindrance to the defendant.¹⁹² Apart from nodding to indicate "yes" or head-shaking to indicate "no," trial transcripts do not note non-verbal gesticulations, incidents, or demeanors.¹⁹³ It would be difficult for a defendant to show, for instance, that he hesitated to approach his counsel for fear that the stun belt would be activated, thus proving an inability to assist in his own defense. Likewise, the record would not reflect outward indicia of anxiety—such as shaking, stuttering, or twitching—that would demonstrate an assault on the defendant's dignity and the dignity of the judicial proceedings.¹⁹⁴ Furthermore, the record would not indicate whether the jury was aware of handcuffs, irons, belts, or the like, which would be necessary to prove jury prejudice.

By requiring that defendants prove actual prejudice, the court corrupted the plain error doctrine's second prong. As a result, it punishes defendants for their attorneys' procedural errors.¹⁹⁵ Because of its preference for form over function, the court created more confusion and ambiguity for applying the plain error doctrine to *Boose* cases.

V. IMPACT

After *Allen*, Illinois appellate courts will not find *per se* reversible plain error when a defendant is physically restrained without the benefit of a *Boose* hearing: for reversal, the defendant must show actual prejudice. As a result, *Allen* significantly affected how both trial and appellate attorneys should approach cases in which a defendant was physically restrained during court proceedings. This Part examines the practical effects that the *Allen* decision will have on the *Boose*-

191. *Id.* at 358.

192. *See id.* at 374 (Freeman, J., dissenting); Petition for Rehearing for Defendant-Appellee, *supra* note 153, at 5.

193. *See* Petition for Rehearing for Defendant-Appellee, *supra* note 153, at 5.

194. *Allen*, 856 N.E.2d at 374 (Freeman, J., dissenting).

195. Petition for Rehearing for Defendant-Appellee, *supra* note 153, at 5.

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Staley doctrine,¹⁹⁶ the Illinois plain error doctrine,¹⁹⁷ and *Boose* cases involving plain error.¹⁹⁸

A. *Allen and the Boose-Staley Doctrine*

Allen's finding that unjust restraints do not constitute *per se* reversible error marks an erosion of the *Boose-Staley* doctrine. Despite the court's assertion that it has left *Boose* and *Staley* whole,¹⁹⁹ it removed a key foundational component of the decisions' reasoning. As discussed above, the *Staley* court believed that the potential for harm caused by unjust physical restraints was so grave that the failure to administer a *Boose* hearing merited reversal of the entire proceeding.²⁰⁰ In *Allen*, however, the Illinois Supreme Court truncated the scope of its concerns. The *Allen* majority abandoned the court's belief that the potential harm created by unjustly restraining a defendant produces unfair trial conditions and, instead, argued that only actual, proven harm may create such conditions.

Thus, the court shifted its analysis of *Boose-Staley* cases from a focus on the *possibility* of harm caused by applying in-court physical restraints to a focus on *actual* harm caused by such restraints. As a result, defendants in *Boose* cases must now prove that unjust restraints prejudiced their proceedings, rather than simply proving that in-court restraints were unjust. The court, therefore, removed from *Boose* and *Staley*'s protection the class of defendants that can demonstrate potential harm but cannot prove actual harm.

Although the *Allen* majority suggested that, in non-plain-error cases, a trial objection may satisfy the proof of prejudice requirement so as to invoke *Boose-Staley*'s protections, it remains to be seen what level and frequency of objection must be made to demonstrate prejudice.²⁰¹ The *Allen* majority cited a variety of cases—*Martinez*, *Deck*, *Boose*, and *Staley*—which illustrate varying degrees of objection to in-court restraints that the court found persuasive.²⁰² The intensity of objection in these cases ranged from *Martinez*'s vigorous protest,²⁰³ in which the defendant repeatedly expressed his aversion to restraints, ultimately declaring that he would prefer to be tried in absentia rather

196. See *infra* notes 199–207 and accompanying text.

197. See *infra* notes 208–214 and accompanying text.

198. See *infra* notes 215–224 and accompanying text.

199. See *Allen*, 856 N.E.2d at 360.

200. See *supra* notes 142–147 and accompanying text.

201. *Allen*, 856 N.E.2d at 360.

202. *Id.*

203. *Id.* at 354.

than remain restrained,²⁰⁴ to Staley's mild objection, in which defense counsel objected once during the initial hearing and once again at the adjudicatory hearing.²⁰⁵ The *Allen* court found that these factual situations sufficiently demonstrated prejudicial conditions.²⁰⁶ The court made clear, however, that a mere colloquy between the defense attorney and the trial judge, such as in Allen's case, shall not constitute sufficient evidence of prejudice.²⁰⁷ Any amount or intensity of objection that lies in the middle ground will likely be the subject of future appeals.

B. Allen's Effect on the Illinois Plain Error Doctrine

The *Allen* decision will benefit practitioners to the extent that it clarified whether a proof-of-prejudice requirement applies to the second prong of the Illinois plain error doctrine.²⁰⁸ When an appellant wishes to appeal an issue under plain error's second prong, he must now prove that (1) plain error (2) caused harm to the judicial system's integrity, (3) was serious enough to have an effect on the fairness of his trial, and (4) actually prejudiced his trial.²⁰⁹ To satisfy the fourth component, the appellate court will subject the defendant to a prejudicial error test, in which the defendant bears the burden of indicating specific evidence that proves prejudice.

The prejudicial error test, however, should not be confused with the harmless error test. Although the harmless error test was originally part of the Illinois plain error doctrine,²¹⁰ many believed that *Herron* reaffirmed the inapplicability of such a test under the fair trial prong.²¹¹ This remains true after *Allen*. *Allen* did not reinsert a harmless error provision into the plain error doctrine. Although, under *Allen*, an error not proven prejudicial will be deemed inconsequential,

204. *People v. Martinez*, 808 N.E.2d 1089, 1090–91 (Ill. App. Ct. 2004).

205. *In re Staley*, 364 N.E.2d 72, 73 (Ill. 1977).

206. *Allen*, 856 N.E.2d at 360.

207. *Id.* at 359.

208. *See id.* at 360.

209. *Id.*

210. *See, e.g., People v. Kliner*, 705 N.E.2d 850, 890–91 (Ill. 1998); *People v. Childs*, 636 N.E.2d 534, 542 (Ill. 1994).

211. *See generally* Becker, *supra* note 14. Errors under the second prong are “so fundamental to the integrity of the judicial process, they must be considered by the court regardless of the guilt of the defendant and therefore the harmless error test, even harmless error beyond a reasonable doubt.” *Id.* at 485 (citing *People v. Green*, 386 N.E.2d 272, 278 (Ill. 1979)). Therefore, “[*Herron's*] holding leaves no doubt that harmless error is not a component in the plain error analysis under Illinois' fair trial prong.” *Id.* at 486.

the harmless error test is not implicated.²¹² Under the harmless error test, the state has the burden of proof; under the new plain error test, the defendant has the burden of proof.²¹³ That is, *Allen* inserted a requirement that is roughly the inverse of the harmless error test: instead of requiring the prosecution to prove that an error was harmless, *Allen* requires the defendant to show that an error was not harmless.²¹⁴

C. *Allen's Effect on Boose Cases Considered Under the Illinois Plain Error Doctrine*

Reiterating its finding in *Herron*, the *Allen* court declared that most errors will not be reviewed under the plain error doctrine and that the doctrine will remain “a narrow and limited exception to the general rule of forfeiture,” reserved only for grave errors that deny a defendant a fair trial.²¹⁵ *Boose* violations only fall under this category when the defendant proves prejudice. The court carried this restrictive approach even further, affirming *Thurrow's* statement that “even constitutional errors can be forfeited if the error is not of such magnitude that it deprives the defendant of a fair trial.”²¹⁶ Therefore, neither *Boose's* protections nor the finding of a constitutional error will necessarily result in a successful appeal if the defendant did not object at trial.²¹⁷

Additionally, by requiring proof of actual prejudice, the court subordinated its concern for the integrity of the judicial process to the other two *Boose* concerns: jury prejudice and the ability to assist counsel. The *Allen* court cited with approval *People v. Barney*, an appellate decision declaring that “[t]he necessity to preserve the integrity and reputation of the judicial process is a purpose of the [plain error] doctrine, not a lone, triggering factor for its implementation.”²¹⁸ Because a defendant could presumably prove plain error by showing damage to jury perception or ability to assist counsel without demonstrating harm to the judicial process,²¹⁹ the court minimized the im-

212. Under harmless error analysis, the State must prove beyond a reasonable doubt that the errors committed during the proceedings were *de minimus* and did not prejudice the defendant. *Id.* at 459.

213. See *People v. Herron*, 830 N.E.2d 467, 477 (Ill. 2005) (stating that “the two analyses differ on which party bears the burden of proof”).

214. See *Allen*, 856 N.E.2d at 356.

215. *Id.*

216. *Id.* (citing *People v. Crutchfield*, 820 N.E.2d 507, 514–515 (Ill. App. Ct. 2004)) (citation omitted).

217. *Id.*

218. *Id.* at 360 (citing *People v. Barney*, 844 N.E.2d 80, 87 (Ill. App. Ct. 2006)).

219. See *Allen*, 856 N.E.2d at 359.

portance of proving harm to judicial integrity. The damage alone is not enough; coupled with one of the other *Boose* concerns, it becomes unnecessary.

Finally, the court never determined what remedy would be appropriate for a *Boose* violation found under the plain error doctrine.²²⁰ Nevertheless, the court suggested that a reversal would be appropriate. It took notice of the split among districts—some districts have reversed convictions and remanded cases, while others have simply mandated retrospective *Boose* hearings—but reserved the question for a later date.²²¹ The court suggested, however, that, if plain error were found, it would warrant a reversal, not simply a remand for a retrospective restraints hearing.²²² In comparing *Allen* to *Boose*, *Staley*, *Martinez*, and *Deck*, the court indicated that the factual situations present in the latter four “allow for a *per se* finding of reversible error.”²²³ It, therefore, seems probable that, where plain error is found in *Boose* cases, the Court will find reversible error.²²⁴

VI. CONCLUSION

People v. Allen demonstrates the current tension between the Illinois plain error and *Boose-Staley* doctrines over the extent of protection that Illinois courts will offer defendants. *Allen* now requires a defendant who wishes to invoke the plain error doctrine’s protections to demonstrate (1) plain error that (2) caused harm to the judicial system’s integrity, (3) was serious enough to have an effect on the fairness of his trial, and (4) actually prejudiced his trial. To satisfy the fourth element, a defendant must provide record evidence of an objection made during proceedings, prove from the record that the restraints prejudiced the jury, or demonstrate that the defendant’s ability to assist counsel was inhibited. If these elements are satisfied, the court will recognize plain error and reverse and remand the conviction.

220. *Id.* at 360.

221. *Id.* Compare *People v. Buckner*, 831 N.E.2d 676, 680 (Ill. App. Ct. 2005) (finding plain error in the unjust restraining of a defendant and remanding the case for a “retrospective *Boose* hearing”), with *People v. Brown*, 828 N.E.2d 351, 354 (Ill. App. Ct. 2005) (finding plain error after a trial court improperly restrained the defendant and subsequently reversing and remanding the conviction).

222. *Allen*, 856 N.E.2d at 360.

223. *Id.*

224. Since *Allen*, dissenting Justice McMorrow has retired and has been replaced by Justice Burke. Despite the close four-to-three division of the court, Justice McMorrow’s departure will not likely affect the outcome of future, similar cases. The majority remains in tact, with Justice Karneier (the author of the majority opinion), Justice Fitzgerald, Justice Garman, and Chief Justice Thomas remaining on the bench.

Although *Allen* clarified the district court split regarding whether *Boose* violations amount to *per se* reversible error—they do not—it undermined the *Boose* doctrine and corrupted the Illinois plain error doctrine. If the Illinois Supreme Court’s intent was to leave *Boose* and *Staley* intact, it failed. By purging itself of its fear of the potential harm caused by physical restraints, contradicting *Staley*’s underpinnings, the Illinois Supreme Court watered down the doctrine. Likewise, if the court’s intent was to remain faithful to *Herron*, it also failed. By misinterpreting *Herron*’s language, it added a new component to the doctrine’s second prong: proof of prejudice. *Allen* weakened the *Boose-Staley* and Illinois plain error doctrines and left defendants with more hurdles to jump.

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