Permissible Use of Restraints in the Courtroom: Michigan and Federal Law

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I. Introduction

"According to incident data gathered by the Center for Judicial and Executive Security (CJES), the number of security threats and violent incidents in court buildings has increased dramatically in recent years."[1] CJES studies reveal that "a majority of violent incidents in courthouses are 'case-related,'" meaning that "the person committing or plotting a violent act was involved in a past or present matter before the court."[2] A violent act by a litigant could be provoked by "a sentence, verdict, testimony, bond revocation, custody status, or criminal, civil, or family court ruling, order, or fine[;]" in other words, "all court proceedings have an associated inherent risk and potential for violence escalation."[3]

"Tragic firearm incidents in courthouses around the nation witnessed prisoners grabbing and successfully firing the firearm of the nearest uniformed officer assigned the task of guarding the prisoner."[4] Ensuring that prisoners are secured and safely transported in courthouses is essential to protecting against these and other types of security breaches.[5] Caselaw and secondary sources suggest that the use of restraints[6] while escorting in-custody defendants in the courthouse[7] and in non-jury courtroom proceedings is very

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[1] Fautsko *et al*., *Status of Court Security in State Courts: A National Perspective*, National Center for State Courts (June 2013), p *i*, http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/184 (accessed September 15, 2016).

[2] Fautsko *et al*., *Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today*, National Center for State Courts, Future Trends in State Courts 2012, p 103, http://cdm16501.contentdm.oclc.org/cdm/ref/collection/facilities/id/163 (accessed September 15, 2016).

[3] *Id*., p 104.

[4] New York State Unified Court System, *The Task Force on Court Security Report to the Chief Judge and Chief Administrative Judge* (October 2005), p 24, http://www.nycourts.gov/reports/security/SecurityTaskForce_Report.pdf (accessed September 15, 2016).

[5] *Id*.

[6] The terms *shackles* and *shackling* are generally used in caselaw and some secondary sources to describe any type of prisoner restraint device, including handcuffs, belly chains, leg irons, and stun belts. The terms *restraints* and *shackles* are used interchangeably in this document.

[7] It is commonly recommended (or mandated) in court security policy resources that in-custody defendants be escorted by a minimum of two uniformed officers, and some resources additionally recommend that the officer in direct contact with the defendant be unarmed. See, e.g., *The Task Force on Court Security Report to the Chief Judge and Chief Administrative Judge*, pp *viii-ix*, 24-26 (additionally recommending that officers carry firearms in holsters with safety ratings of Level III); also Colorado State

commonplace nationwide.[8] Local policies and practices vary regarding the types of restraints that are commonly used in the courthouse and courtroom, ranging from handcuffs to full restraints (including chains and leg irons) and electronic devices such as stun belts.[9]

In Michigan, there are no impediments to the use of any particular *type* of restraint, and, as a matter of both Michigan and binding federal precedent, there are no restrictions against the use of restraints in any courtroom proceedings other than jury trials. An overview of these governing legal standards is provided in Section II of this report. Section III contains summaries of relevant federal and Michigan caselaw. Section IV identifies special considerations that may apply in the restraint of certain types of inmates. Finally, Section V contains suggested language for a model court policy governing the use of restraints in the courtroom.

II. Overview of Applicable Caselaw Standards

Inherent Authority of the Court to Control Courtroom Procedures. The trial court has very broad inherent authority "to control the course of trial," including the authority to shackle a defendant during trial or to shackle a witness while he or she testifies. *People*

Court Administrator's Office, *Colorado Courthouse Security Resource Guide* (April 2008), p 4-2, https://www.courts.state.co.us/userfiles/File/Administration/Financial_Services/Court_Security_Resource_Guide.pdf (accessed September 15, 2016) (noting that although "officers assigned to control prisoners should not be armed when they are in a courtroom or holding cell area," the law enforcement agency should make a determination regarding whether these officers should carry intermediate weapons such as stun guns, mace, or batons) (emphasis omitted).

[8] See, e.g., *The Task Force on Court Security Report to the Chief Judge and Chief Administrative Judge*, p 26 (noting that "[r]eview of other jurisdictions' court security protocols demonstrates the predominant policy that prisoners appearing before judges are restrained at all times except as protection of defendants' rights may otherwise require"). For example, it is the policy of the United States Marshals Service that "[a]ll prisoners produced for court, with the exception of a jury trial, are to be fully restrained unless otherwise directed by a United States District Judge or United States Magistrate Judge." U.S. Marshals Service, USMS Directives, Prisoner Operations (June 1, 2010), § 9.1(D)(3)(b), https://www.usmarshals.gov/foia/directives/prisoner_ops/restraining_devices.pdf (accessed September 15, 2016). See also Montana Department of Corrections, Montana State Prison Operational Procedure, DOC Policy No. 3.1.12 (July 13, 2009), p 8, https://cor.mt.gov/Portals/104/Resources/Policy/MSPprocedures/3-1-12InmateEscortTransport.pdf (accessed September 15, 2016) (requiring that in-custody defendants be kept in restraints during court appearances unless the judge orders restraint removal).

[9] See, e.g., *The Task Force on Court Security Report to the Chief Judge and Chief Administrative Judge*, p 26 (recommending that in-custody defendants be rear-handcuffed at all times in the courthouse except when appearing before the judge or during extended hearings); Georgia Council of Superior Court Judges, *Georgia Standards for the Security of Courthouses and Other Court Facilities* (June 2012), p 74, http://www.cscj.org/files/download/courthouse_security_standards_final.pdf (accessed September 15, 2016) (providing that "[f]ull restraints, including handcuffs, waist belt or chain, and leg irons are recommended[]" when in the courthouse); see also *id*. at 77 (noting that "[w]ritten policy and procedures should provide alternative measures for maintaining prisoner security," such as a TASER or electronic stun belt, "whenever the judge orders restraints to be removed from the inmate[]").

v Johnson, ___ Mich App ___, ___ (2016) (Docket No. 325857), citing *People v Dunn*, 446 Mich 409, 425-427 (1994); *People v Banks*, 249 Mich App 247, 256-257 (2002). When a courtroom procedure is inherently prejudicial, due process considerations require that the procedure be "necessary to further an essential state interest." *Johnson*, ___ Mich App at ___, citing *Holbrook v Flynn*, 475 US 560, 568-569 (1986).

Presence of Security Officers in the Courtroom.[10] The presence of armed and uniformed security personnel in the courtroom at trial is not inherently prejudicial, and a defendant claiming the denial of a fair trial on this basis must establish actual prejudice. *Holbrook v Flynn*, 475 US 560, 568-569, 572 (1986) (holding that the conspicuous presence of four armed, uniformed state troopers at trial did not deny a criminal defendant his right to a fair trial).

Prohibition Against *Routine* Use of Restraints in Jury Proceedings. *Deck v Missouri*, 544 US 622 (2005), provides the constitutional standard governing the use of restraints in jury trials. Under *Deck*, 544 US at 629, 632, a criminal defendant may not be *visibly* restrained in a jury proceeding "if the trial court has not taken account of the circumstances of the particular case." Michigan law similarly prohibits the use of physical restraints at a jury trial unless the court concludes that the use of restraints is necessary under the particular circumstances of the case. See *People v Arthur*, 495 Mich 861, 862 (2013); *People v Dunn*, 446 Mich 409, 426-427 (1994); *People v Payne*, 285 Mich App 181, 186-187 (2009). Michigan law is somewhat unsettled regarding whether the judge must make such a finding in order to permit the use of restraints that are *not* visible to the jury (for example, leg restraints that are hidden behind a table skirt or a stun belt that is hidden under the defendant's clothing).[11] Because of this uncertainty, as a best

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[10] According to the National Center for State Courts (NCSC), the "presence of security officers during courtroom proceedings is an extremely critical need[.]" The NCSC recommends as best practice guidelines that a minimum of two armed security officers be present in the courtroom during any criminal hearing, plus a third officer during a criminal trial, an additional officer to accompany an in-custody defendant, and yet another officer if additional security risks are apparent. The officers should use triple-retention holsters. *Status of Court Security in State Courts: A National Perspective*, pp 7-12 to 7-13. See also *Colorado Courthouse Security Resource Guide*, p 4-3 (noting that "[t]he proper placement and positioning of sheriff's personnel in courtrooms is essential when securing prisoners," and that officers "assigned to secure prisoners should not only be positioned within direct proximity, but also between the prisoner and any potential target (i.e. escape routes and judges)[]").

[11] Although the use of restraints that are not visible to a jury would likely be considered harmless by an appellate court, there is no clear statement in Michigan caselaw that a judge need not conduct individualized findings before permitting, in a jury trial, the use of a restraint that is not visible. See *Payne*, 285 Mich App at 186-187 (holding that "the trial court abused its discretion by requiring [the] defendant to wear leg shackles in the courtroom," even though the shackles were not visible to the jury, where there was "no evidence to suggest that [the] defendant was a flight risk, that he was likely to attempt to escape, or that shackles were needed to maintain order in the courtroom," but further concluding that the error was harmless); see also *Arthur*, 495 Mich at 862 (concluding that the trial court properly ordered the defendant to wear leg shackles during trial after consideration of his violent history and other security concerns, and additionally noting that *Deck*, 544 US at 629, is implicated only when restraints are "'*visible*

practice, the judge should make the required findings regarding the use at a jury trial of any restraint, whether visible or not.

Juror Viewing Defendant in Restraints During Transport. "[T]he prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom," and "when jurors inadvertently see a defendant in shackles, there . . . must be some showing that the defendant was prejudiced." *People v Horn*, 279 Mich App 31, 37 (2008). Courts addressing the issue have generally found a lack of prejudicial effect when jurors have inadvertently viewed criminal defendants in restraints outside the courtroom. See, e.g., *Horn*, 279 Mich App at 37; *People v Wells*, 103 Mich App 455, 458-461 (1981); *People v Smith*, 87 Mich App 18, 26-27 (1978); see also *Mendoza v Berghuis*, 544 F3d 650, 655 (CA 6, 2008) (noting that "[r]estraining a defendant in the courtroom, and restraining him [or her] during transport there, are two very different things," and holding that a criminal defendant was not prejudiced when jurors saw him in shackles when he was being transported by officers to the courtroom).

Restraint of Criminal Defendants During Non-Jury Proceedings. Neither Michigan nor federal law prohibits or limits the use of restraints outside the presence of the jury.[12] There are no applicable statutes or court rules.

Bench Trials. The federal and state prohibitions against the routine use of restraints in the courtroom specifically apply only to restraints that are *visible to the jury*. However, because applicable caselaw regarding restraint use cites concerns in *addition* to the rights to a fair trial and the presumption of innocence—such as maintaining the dignity and decorum of the courtroom and the right to assist counsel[13]—the trial court may wish, as a

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to the jury'"). See also *United States v Miller*, 531 F3d 340, 344-345 (CA 6, 2009) (holding that due process requires an individualized hearing on the use of a stun belt during trial, even if it is not visible to the jury); however, more recent Sixth Circuit Court of Appeals cases have held, to the contrary, that *visibility* is critical to a due process claim based on shackling. *Adams v Bradshaw*, 826 F3d 306, 317 (CA 6, 2016); *Earhart v Konteh*, 589 F3d 337, 347-349, 349 n 5 (CA 6, 2009).

[12] The United States Ninth Circuit Court of Appeals is apparently alone among the federal circuits in limiting the use of restraints in non-jury court proceedings. The Ninth Circuit Court of Appeals has recently determined that the Southern District of California's implementation in 2013 of the U.S. Marshals Service's recommendation "that defendants would be produced in full restraints for all non-jury proceedings, with the exception of guilty pleas and sentencing hearings, and subject to the rule that any judge may ask the Marshals to remove the restraints in a particular case," was impermissible in the absence of "adequate justification" for the adoption of such a policy. *United States v Sanchez-Gomez*, 798 F3d 1204, 1205-1206 (CA 9, 2015) (noting that although "a policy that permits routine use of shackles is not 'forbidden' in non-jury proceedings under the Fifth Amendment's Due Process Clause[]" and *Deck v Missouri*, 544 US 622 (2005), Ninth Circuit precedent required that "a generalized shackling policy must rest on an 'adequate justification of its necessity[]'") (citation omitted). However, the Ninth Circuit Court of Appeals has since issued an order directing that the case "be reheard en banc" and that *Sanchez-Gomez*, 798 F3d 1204, "shall not be cited as precedent by or to any court of the Ninth Circuit." *United States v Sanchez-Gomez*, ___ F3d ___, ___ (CA 9, 2016).

[13] See, e.g., *Deck v Missouri*, 544 US 622, 630-631 (2005).

best practice, to place on the record specific findings justifying the use of restraints in a bench trial.

Types of Restraints that May be Used. There are no statutes or court rules addressing the particular *types* of restraints that may (or may not) be used; nor does binding caselaw provide any guidance.[14] Accordingly, as long as the use of a particular restraint is consistent with any applicable court orders or policies and with constitutional principles governing the use of force[15] and conditions of confinement,[16] the restraint may presumably be used in any non-jury court proceeding (or, if ordered by the court, in a jury proceeding[17]).

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[14] Federal and state cases addressing the constitutional requirement of an individualized assessment of special need before visible shackles may be used in jury proceedings have applied the rule to various restraints, including handcuffs, leg irons, belly chains, and stun belts, and have not drawn any distinctions between different types of restraints; furthermore, there is no applicable caselaw *prohibiting* the use of any specific type of restraint.

[15] In general, a pretrial detainee (that is, a criminal defendant who is in detention prior to being convicted) has either a Fourth Amendment or substantive due process right (or perhaps both) requiring that the use of police force be *objectively reasonable under the circumstances*. See *Kingsley v Hendrickson*, 576 US ___, ___ (2016) (holding that in order to prove an excessive force claim under 42 USC 1983 and the Fourteenth Amendment's Due Process Clause, a pretrial detainee need show only that an officer's use of force was *objectively* unreasonable, rather than that the officer *subjectively* intended to violate, or recklessly disregarded, the detainee's rights); see also *Kingsley*, 576 US at ___ (Alito, J., dissenting) (noting that the United States Supreme Court had "not yet decided" the question "whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee," and that "if a pretrial detainee can bring such a claim, it apparently would be indistinguishable from [a] substantive due process claim"); *Graham v Connor*, 490 US 386, 395 n 10 (1989) (noting that although United States Supreme Court "cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, . . . the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment[]"). The court must make its determination whether a pretrial detainee was subjected to excessive force "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Kingsley*, 576 US at ___. "A court must also account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Kingsley*, 576 US at ___, quoting *Bell v Wolfish*, 441 US 520, 540, 547 (1979) (alterations in original).

[16] In general, the treatment of a pretrial detainee may not amount to punishment; a particular condition of pretrial confinement must be reasonably related to a legitimate, non-punitive governmental purpose and may not be excessive in relation to that purpose. *Bell v Wolfish*, 441 US 520, 533-539 (1979).

[17] See, e.g., *Earhart v Konteh*, 589 F3d 337, 347-349 (CA 6, 2009) (citing *Deck v Missouri*, 544 US 622, 624, 626 (2005), and noting that although "the [United States] Supreme Court has yet to consider the issue of whether and when a trial court, consistent with constitutional protections, may order a defendant to wear a stun belt during his [or her] trial," it was clear "that a trial court may not impose a physical restraint upon a defendant's person without an individualized finding of dangerousness or risk of escape[;]" accordingly, if a "stun belt [is] a visible restraint, due process mandates an individualized finding of necessity before . . . state courts [can] require [a defendant] to wear the belt[]") (additional citations omitted); see also *Adams v Bradshaw*, 826 F3d 306, 317 (CA 6, 2016) (citing *Earhart*, 589 F3d at

Standard of Review When Defendant is Improperly Restrained at Trial. "[S]hackling is 'inherently prejudicial.'" *Deck v Missouri*, 544 US 622, 635 (2005), quoting *Holbrook v Flynn*, 475 US 560, 568 (1986). Therefore, the burden is on the government to prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Deck*, 544 US at 635 (citation and quotation marks omitted). See also *People v Davenport*, 488 Mich 1054, 1054 (2011) (remanding for consideration of the defendant's preserved claim that he was denied due process by being shackled during trial, and directing the trial court to "determine whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict against the defendant[]"). See also *Keys v Booker*, 798 F3d 442, 454 (CA 6, 2015) (noting that "[t]he government may rebut the presumption of prejudice by proving that the error was harmless[] . . . by showing overwhelming evidence of the defendant's guilt[]").

Equal Protection Claims Based on Differences in Treatment of In-Custody Defendants and Defendants Posting Bail. In *Estelle v Williams*, 425 US 501, 505-506 (1976), the United States Supreme Court noted that compelling a prisoner to wear prison garb at trial "operates usually against only those who cannot post bail prior to trial," while those "who can secure release are not subjected to this condition," and that imposing this "condition on one category of defendants, over objection," would present Equal Protection concerns.

It may, therefore, be posited that the courtroom practice of restraining in-custody defendants, or the deployment of additional security forces for such defendants, is violative of the Equal Protection Clause because these practices are not used for defendants who are free on bond. However, in *Holbrook v Flynn*, 475 US 560 (1986), the Court concluded that the deployment of additional security personnel at the trial of an in-custody defendant did not present an Equal Protection concern:

> [S]ufficient cause for [the increased] level of security could be found in the State's need to maintain custody over defendants who had been denied bail after an individualized determination that their presence at trial could not otherwise be ensured. Unlike a policy requiring detained defendants to wear prison garb, the deployment of troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail had been

349, and noting that "the visibility of a physical restraint [such as a stun belt] upon a defendant to a jury [is] a critical factor to obtaining relief").

denied. [*Holbrook*, 475 US at 571-572, citing *Williams*, 425 US at 505-506.][18]

Restraining In-Custody Witnesses. "[T]he propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants, i.e., the handcuffing or shackling of a witness during trial should be permitted only to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial." *People v Banks*, 249 Mich App 247, 257 (2002).

III. Applicable Caselaw

A. United States Supreme Court Caselaw

***Deck v Missouri*, 544 US 622 (2005).** "[D]ue process [under the Fifth and Fourteenth Amendments] does not permit the use of visible restraints" in a jury proceeding "if the trial court has not taken account of the circumstances of the particular case." *Id*. at 629, 632. Although the *routine* use of visible restraints in the presence of juries is forbidden, the trial court may determine, "in the exercise of its discretion," that restraining the defendant is "justified by a state interest specific to a particular trial." *Id*. at 629, 632 (noting that the Court did "not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations[]"). Examples of permissible state interests include "physical security, escape prevention, or courtroom decorum," and the judge's determination may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." *Id*. at 628-629, 633 (holding that the principles that apply to shackling during the guilt phase of a jury trial apply equally to the *penalty* phase of a capital proceeding before a jury).

In reaching the conclusion that visible restraints are inherently prejudicial and may not be used in jury proceedings absent a case-specific determination of special need, *Deck*, 544 US at 626, 629, 635, the United States Supreme Court noted that its precedent expressing "[j]udicial hostility to shackling" emphasized "three fundamental legal principles[:]"

> First, . . . [v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a "need to separate a defendant from the community at large."
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[18] Presumably, similar reasoning would apply to the use of restraints on in-custody defendants, of whom the government has a legitimate interest in maintaining custody. See *Williams*, 425 US at 505 (noting that "[u]nlike physical restraints, . . . compelling an accused to wear jail clothing furthers no essential state policy[]").

> Second, the Constitution, in order to help the accused secure a meaningful defense, provides him [or her] with a right to counsel. The use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his [or her] lawyer. Indeed, they can interfere with a defendant's ability to participate in his [or her] own defense, say, by freely choosing whether to take the witness stand on his [or her] own behalf.
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> Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. [*Deck*, 544 US at 630-631 (citations omitted).]

***Holbrook v Flynn*, 475 US 560 (1986).** The "deployment of security personnel in a courtroom during trial is [not] the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial[;]" rather, whether the deployment of a particular security detail in a courtroom is consistent with the right to a fair trial under the Sixth and Fourteenth Amendments must be determined on a case-by-case basis, and the defendant must establish actual prejudice. *Id*. at 568-572 (holding that the conspicuous presence of four armed, uniformed state troopers in the front row of the courtroom's spectator section did not deny a criminal defendant his right to a fair trial). "While shackling and [forcing a prisoner to wear] prison clothes are unmistakable indications of the need to separate a defendant from the community at large[]" and are therefore inherently prejudicial courtroom practices, "the presence of guards at a defendant's trial need not be interpreted as a sign that he [or she] is particularly dangerous or culpable." *Id*. at 569 (noting that "it is entirely possible that jurors will not infer anything at all from the presence of the guards[,] . . . so long as their numbers or weaponry do not suggest particular official concern or alarm[]").

***Estelle v Williams*, 425 US 501 (1976).** "Unlike physical restraints, permitted under [*Illinois v Allen*, 397 US 337 (1970),] compelling an accused to wear jail clothing [over

objection at trial] furthers no essential state policy[]" and is violative of the right to a fair trial under the Fourteenth Amendment. *Id*. at 503-505, 512-513.

***Illinois v Allen*, 397 US 337 (1970).** The issue in this case did not involve the use of restraints as a security measure; rather, at issue was whether a trial court should bind and gag an obstreperous defendant instead of removing him or her from the courtroom during trial. *Id*. at 342. Although the case is not precisely on point, it is often cited for its general disapproval of the use of shackles and gags at a jury trial. The Court held that when confronted with a disruptive, unruly criminal defendant, a trial judge has discretion to take steps to maintain order and decorum, including removing the defendant from the courtroom, holding the defendant in contempt, or binding and gagging him or her. *Id*. at 343-344. However, although in some situations "binding and gagging might possibly be the fairest and most reasonable way to handle" an unruly defendant, "no person should be tried while shackled and gagged except as a last resort." *Id*. at 344.

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his [or her] ability to communicate with his [or her] counsel, is greatly reduced when the defendant is in a condition of total physical restraint. [*Allen*, 397 US at 344.]

B. Michigan Caselaw

***People v Arthur*, 495 Mich 861 (2013).** "[T]he trial court did not violate the defendant's due process rights by ordering the [pro se] defendant to wear leg shackles" during trial; "the court was justified in imposing those limited restraints to avoid the risk of flight and to ensure the safety of those present in light of the defendant's reported escape attempt and the fact that the defendant required extra police security when he was transported to court." *Id*. at 862 (noting that "[t]he court addressed [the defendant's violent history and other concerns] by placing [him] in the most reasonable restrictive restraints available[]"). The Michigan Supreme Court further emphasized that because "the court sought to shield the defendant's leg restraints from the jury's view[, and] . . . no juror actually saw the defendant in shackles," the trial court's ruling did not violate *Deck v Missouri*, 544 US 622, 629 (2005), which prohibits "'the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.'" *Arthur*, 495 Mich at 862.

***People v Davenport*, 488 Mich 1054 (2011).** The Michigan Supreme Court, concluding that the defendant had properly preserved his claim that "shackling during trial constituted a due process violation," remanded to the circuit court with directions that "[i]f it is determined that the jury saw the defendant's shackles, the circuit court [must] determine whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict against the defendant." *Id*. at 1054, citing *Deck v Missouri*, 544 US 622, 635 (2005).

***People v Dunn*, 446 Mich 409 (1994).** The trial court denied the defendant's motion that he not be required to wear leg irons during his trial; the trial court "indicat[ed] that because of the physical arrangement of the courtroom, the shackles should not be visible to the jury," and that they "would be removed before he took the witness stand." *Id*. at 424. Because the record did not show "that any member of the jury saw or could see the leg irons," the defendant was not deprived of a fair trial. *Id*. at 425. However, the trial court's ruling was erroneous because it was not supported by record evidence that physical restraints were reasonably necessary to maintain order. *Id*. at 426-427.

> The rule is well-established in this and other jurisdictions that a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order.
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> [A] defendant in a criminal case should not be subjected to physical restraint while in court unless the judge, for reasons entered on the record, finds such restraint "reasonably necessary to maintain order." [*Dunn*, 446 Mich at 425-426, quoting 3 ABA Standards of Criminal Justice (2d ed), Standard 15-3.1(C), pp 15-77 to 15-78.]

***People v Duplissey*, 380 Mich 100 (1968).** This is the earliest Michigan case addressing shackling before a jury. See *id*. at 103. The Court held that the defendant was prejudiced by being jointly tried with his codefendants when, due to the obstreperous behavior of two of the codefendants, he was tried before a jury while handcuffed. *Id*. at 101-104. The Court quoted the following rule:

> "Freedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial. Ordinarily such procedure should be permitted only to prevent the escape of the prisoner or to prevent him [or her] from injuring bystanders and officers of the court or to maintain a quiet and peaceable trial." [*Id*. at 103-104 (citation and internal citation omitted).]

***People v Payne*, 285 Mich App 181 (2009).** "[T]he trial court abused its discretion by requiring [the] defendant to wear leg shackles in the courtroom" where there was "no evidence to suggest that [the] defendant was a flight risk, that he was likely to attempt to escape, or that shackles were needed to maintain order in the courtroom." *Id*. at 186-187. However, the defendant suffered no actual prejudice as a result of the error because "the defense table in the courtroom was skirted with paper, which prevented the jury from seeing the shackles," and the "defendant entered and left the courtroom while the jury was not present." *Id*. at 187.

***People v Horn*, 279 Mich App 31 (2008).** The defendant "failed to show that he suffered prejudice as a result of the use of [leg] restraints[]" during trial where the jury never saw him in restraints in the courtroom. *Id*. at 36-37 (noting that "[a] cloth was placed around the defense table, and the restraints were removed outside the presence of the jury before [the] defendant walked to the witness chair to testify[]").

Additionally, "the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom," and "when jurors inadvertently see a defendant in shackles, there still must be some showing that the defendant was prejudiced." *Horn*, 279 Mich App at 37.

***People v Banks*, 249 Mich App 247 (2002).** "[A] trial court has broad discretion in controlling the course of a trial," including the "authority to handcuff or shackle a witness other than a defendant[.]" *Id*. at 256-257. "[T]he propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants, i.e., the handcuffing or shackling of a witness during trial should be permitted only to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial." *Id*. at 257-261 (concluding that "the trial court abused its discretion when it ruled that [a witness] would testify while restrained by handcuffs[]" based solely on the statement of the officer who accompanied the witness that he "*preferred* that [the witness's] handcuffs be left on," and further determining that the error was not harmless).

***People v Dixon*, 217 Mich App 400 (1996).** The defendant was not "denied a fair trial when the trial court required him to wear shackles and belly chains in the presence of the jury." *Id*. at 404. The trial court properly based its decision to restrain the defendant "on information contained in documents maintained by the Department of Corrections and the Kalamazoo County Jail[]" regarding the defendant's "extensive institutional misconduct record, [which] . . . demonstrate[d] that [he] lack[ed] respect for authority, lack[ed] the discipline to conform his behavior to accepted norms, and ha[d] a tendency toward violence." *Id*. at 405 (noting that "[p]rior conduct of this nature amply support[ed] the trial court's decision").

***People v Williams*, 173 Mich App 312 (1988).** "[T]he trial court properly exercised its discretion in ordering that [the] defendant wear leg restraints during his trial[; the d]efendant's past history of assaultive and disruptive behavior both in and out of court and the unique configuration of the courtroom in which the trial was held (including seven separate entries into the courtroom and three entries into an adjacent gallery) were credible justification for the court's decision to restrain [the] defendant for the purpose of having a peaceable trial, despite the absence of any indication on [the] defendant's part that he would attempt an escape." *Id*. at 315 (additionally noting that "the trial court also exercised its discretion to protect [the] defendant by taking precautions to prevent the type of prejudice that may have occurred from [the] defendant's being seen walking to the witness stand in leg irons[, and] the trial court offered to give curative instructions to the jury").

C. United States Sixth Circuit Court of Appeals Caselaw[19]

***Adams v Bradshaw*, 826 F3d 306 (CA 6, 2016).** "[T]he visibility of a physical restraint upon a defendant to a jury [is] a critical factor to obtaining relief[.]" *Id*. at 317 (citing *Earhart v Konteh*, 589 F3d 337, 349 (CA 6, 2009), and holding that where "there [was] no evidence that the jury knew that [the petitioner] was wearing a stun belt," he was not entitled to habeas corpus relief). Additionally, the trial court's "finding that security concerns justified ordering the stun belt[]" was not unreasonable or contrary to clearly established federal law. *Adams*, 826 F3d at 318 (noting that the trial court considered evidence including testimony of law-enforcement personnel that the petitioner, who had recently been convicted of rape and murder and was "in the high-risk segment of the jail population," should wear a stun belt; competency evaluations indicating that the petitioner "could willfully create a disturbance during trial[;]" and "testimony that the stun belt was the safer alternative for securing the courtroom in case of an outburst by [the petitioner] as the impact upon [him] was greatly diminished, and the risk to both security personnel and bystanders was minimized[]").

***Keys v Booker*, 798 F3d 442 (CA 6, 2015).** In this habeas corpus action, the Sixth Circuit Court of Appeals held that the Michigan Court of Appeals did not unreasonably apply clearly established federal law when it determined that a defendant was not denied his due process right to a fair trial when the jury panel saw him in shackles during voir dire. *Id*. at 453-455. The Sixth Circuit Court of Appeals first noted that *Deck v Missouri*, 544 US 622 (2005) (prohibiting the *routine* use of shackles visible to the jury during the guilt phase of a jury trial or the penalty phase of a capital proceeding) was presumably inapplicable to the facts of the case, in which the defendant was left in shackles *inadvertently*, rather than by court order, for less than 90 minutes during voir dire. *Keys*,

[19] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See *People v Gillam*, 479 Mich 253, 261 (2007); *People v Bosca*, 310 Mich App 1, 76 n 25 (2015).

798 F3d at 454-455. Furthermore, "'a brief and fortuitous [viewing of the defendant in shackles] is not prejudicial and requires an affirmative showing of prejudice by the defendant.'" *Keys*, 798 F3d at 455, quoting *Kennedy v Cardwell*, 487 F2d 101, 109 (CA 6, 1973) (alteration in original).

***Earhart v Konteh*, 589 F3d 337 (CA 6, 2009).** An Ohio trial court did not violate the defendant's due process rights under *Deck v Missouri*, 544 US 622 (2005), when—in deference to the policy of the sheriff's department to require every pro se defendant charged with a felony to wear a Remote Electronically Activated Control Technology (REACT) stun belt at all court proceedings—the trial court, without making any findings of necessity, required the defendant to wear a stun belt while representing himself at his jury trial. *Earhart*, 589 F3d at 341-342, 347-351. The Sixth Circuit Court of Appeals first noted that although "the [United States] Supreme Court has yet to consider the issue of whether and when a trial court, consistent with constitutional protections, may order a defendant to wear a stun belt during his [or her] trial," precedent made it clear "that a trial court may not impose a physical restraint upon a defendant's person without an individualized finding of dangerousness or risk of escape." *Id*. at 347-348. However, "*Deck* 'concerned only *visible* restraints at trial.'" *Earhart*, 589 F3d at 348, quoting *Mendoza v Berghuis*, 544 F3d 650, 654 (CA 6, 2008). Accordingly, if the "stun belt was a visible restraint, due process mandate[d] an individualized finding of necessity before the state courts could require [the defendant] to wear the belt[;]" however, because the record indicated that the stun belt was *not* visible, no individualized findings were required under clearly established federal law. *Earhart*, 589 F3d at 349, 349 n 6 (denying habeas corpus relief, but noting that as a matter of Ohio *state* law, individualized findings *were* required before a restraint such as a stun belt could be used at trial).

***Lakin v Stine*, 431 F3d 959 (CA 6, 2005).** "[F]actors to be considered by [federal district] courts in making shackling decisions[]" include the following:

> "(1) the defendant's record, his [or her] temperament, and the desperateness of his [or her] situation; (2) the state of both the courtroom and the courthouse; (3) the defendant's physical condition; and (4) whether there is a less prejudicial but adequate means of providing security." [*Id*. at 964 (citation omitted).]

"A corrections officer's preference does not excuse the district court from conducting the appropriate inquiry[; n]or does the convenience of shackling a defendant justify its use." *Lakin*, 431 F3d at 964, citing *Estelle v Williams*, 425 US 501, 505 (1976). "Furthermore, . . . the use of guards [is preferable] in light of the inherent prejudice attendant to shackling." *Lakin*, 431 F3d at 964.

> "The use of guards for security purposes, when wisely employed, provides the best means for protecting a defendant's fair trial right and only in rare cases would greater security precautions be warranted. Since guards can be strategically placed in the courtroom when more than normal security is needed and can be hidden in plainclothes, the jury never need be aware of the added protection so that no prejudice would adhere to the defendant." [*Lakin*, 431 F3d at 964 (citation omitted).]

IV. Special Considerations

Juvenile Proceedings. There is no statute, court rule, or binding precedent prohibiting or restricting the use of restraints in juvenile delinquency proceedings, and it is apparently statewide practice to routinely use restraints on detained juveniles during court appearances in Family Division. Several states have implemented policies (via legislation, court rule, administrative order, or appellate decision) restricting the indiscriminate shackling of juveniles in delinquency proceedings. The State Court Administrative Office has assembled a Juvenile Restraints Workgroup to consider whether to recommend the adoption of court rules to address the issue.

Pregnant Women and Girls. Special care should be taken when restraining pregnant women and girls. For example, the use of abdominal restraints may prove harmful to the fetus, and leg or ankle restraints may pose the risk of a fall.[20]

V. Suggested Model Policy Language for Maintaining Security During Court Appearances by Prisoners[21]

Minimum Restraints Policy. Except as otherwise directed by the court, all in-custody criminal defendants, litigants, and witnesses must be restrained, while in any area of the courthouse, either by handcuffs *behind the back* or handcuffs attached to belly chains. In

[20] See National Task Force on the Use of Restraints with Pregnant Women under Correctional Custody, *Best Practices in the Use of Restraints with Pregnant Women and Girls Under Correctional Custody*, U.S. Department of Health and Human Services (2012), p 7, http://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant(2).pdf (accessed September 15, 2016).

[21] Standard policies concerning restraint of in-custody criminal defendants in the courtroom are prohibited only with respect to proceedings before a jury. There is no prohibition against adopting a standard restraint policy for in-custody criminal defendants in all other settings (transportation, movement through court facilities, and non-jury courtroom proceedings); nor are there any specific limitations on the types of restraints that may be utilized, including handcuffs, leg irons, ankle cuffs, belly chains, or stun belts. Adoption of a model policy requiring (in the absence of a court order directing otherwise) the use of specific restraints (for example, five-point restraints or handcuffs) for all in-custody defendants in non-jury settings, irrespective of the perceived level of security threat presented, may be ideal, with allowances for the use of additional restraints in situations in which supplementary security measures are warranted.

the discretion of an officer of the law enforcement agency tasked with providing courthouse security, additional restraints (including, but not limited to, stun belts, leg irons, or ankle cuffs) may be utilized. In the absence of direction otherwise by the presiding judge, restraints must be retained while in the courtroom.

Presence of Security Officers. Officers in *direct control* of the prisoner must be unarmed. At least one other *armed* officer should be present while escorting the prisoner throughout the courthouse and while in the courtroom. In the discretion of the law enforcement agency tasked with providing courthouse security, additional security officers may be present. All firearms must be secured in Level III holsters.

Special Rules for Jury Trial Proceedings.

- **Prison or jail clothing is not permissible for jury proceedings.** A defendant may not appear before a jury in his or her jail or prison uniform. For security purposes, the defendant should be permitted to change into street clothes at the jail or prison facility rather than at the courthouse.

- **Level of security risk and use of restraints in the courtroom should be determined prior to trial.** The defendant has a constitutional right to be present at trial without the use of physical restraints that are visible to the jury, in the absence of a judicial determination that the use of restraints is warranted under the circumstances. Only the trial court may decide that restraints will be used during jury proceedings; the opinions of security officers and prison or jail officials regarding the security risk posed, although relevant, are not conclusive. The law enforcement agency tasked with providing courthouse security should be in contact with the trial court prior to trial to determine whether restraints will be used in the courtroom.

- **Removal of restraints when jury is present.** Although the defendant must remain restrained while being transported through the courthouse to the courtroom, care should be taken to prevent any juror from seeing the defendant in restraints. If the court orders that restraints will not be used during trial, all restraints must be removed once in the courtroom, before the jury enters.

- **Use of restraints following judicial determination of necessity.** The trial judge may determine, based on an individualized assessment of the security or escape risk posed by the particular defendant, that the defendant should remain restrained during trial. Efforts should be taken to prevent the jury from viewing any restraints, to the extent possible in light of the judicial determination regarding which restraints will be utilized. (For example, if leg irons or ankle cuffs are used, the defense table should be skirted for this purpose.)

- **Presence of security officers.** The presence of a reasonable number of security officers in the courtroom during a jury trial is permitted. At a minimum, one unarmed security officer should accompany the defendant and a second armed security officer should monitor the courtroom.

Use of Videoconferencing Technology Whenever Permissible. Courts should consider using video technology to conduct proceedings involving in-custody defendants whenever permissible.[22]

[22] MCR 6.006(A) provides:

> Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.