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Appellate Division, Fourth Department - People v. Buchanan

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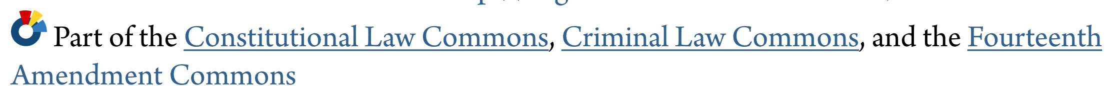
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SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

People v. Buchanan[1]
(decided June 6, 2008)

Ingvue Buchanan was convicted of second-degree murder, after a jury trial, during which he was physically restrained by a stun belt that he was required to wear under his clothes.[2] Buchanan appealed to the Appellate Division, Fourth Department, which addressed "whether the use of a stun belt that is not visible to the jury is subject to the same judicial scrutiny as other forms of [visible] physical restraint[s]."[3] More specifically, the court addressed whether the use of any restraint on the defendant violated his rights under the Due Process Clause of the United States Constitution[4] or the New York Constitution.[5] The appellate division affirmed the trial court's decision, holding that "the use of any type of physical restraint requires the court to make the same individualized security determination required for the use of physical restraints that are visible."[6] However, the court concluded that the defendant's right to due process was not violated when he was required to wear a stun belt during trial.[7]

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[1] 859 N.Y.S.2d 791 (App. Div. 4th Dep't 2008).

[2] *Buchanan*, 859 N.Y.S.2d at 793.

[3] *Id.* This is an issue of first impression in New York. *Id.*

[4] U.S. CONST. amend. XIV, § 1, states, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

[5] N.Y. CONST. art. I, § 6, states, in pertinent part: "No person shall be deprived of life, liberty or property without due process of law."

[6] *Buchanan*, 859 N.Y.S.2d at 793.

[7] *Id.*

Buchanan was ordered to wear an invisible stun belt by the trial court.[8] Before jury selection, the defendant complained that the stun belt made it problematic for him to sit comfortably.[9] In response, the court had the belt removed, but after the completion of voir dire, defendant's counsel objected to the use of the stun belt at trial.[10] Despite the objection and the defendant's non-disruptive behavior in previous proceedings, the court replied that it was "policy" to have a defendant wear leg shackles or a stun belt in "cases of a serious nature."[11] After trial, but outside the presence of the jury, the defendant complained that the stun belt was causing skin irritation.[12] Thereafter, the defendant was examined by a physician, who prescribed hydrocortisone cream for the irritation, but ultimately concluded that the defendant was fit for trial.[13] Following the examination, the court continued to use the stun belt, but allowed it to be removed during breaks.[14] As a final objection, the defendant contended that the use of the stun belt "infringed on [his] presumption of innocence,"[15] but the court reasoned that " 'an innocent man on trial for murder is more dangerous than a guilty one.' "[16]

On appeal, Buchanan's primary claim was that the use of the stun belt to physically restrain him violated his to due process rights because "his ability to confer with defense counsel was adversely af-

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[8] *Id.*
[9] *Id.* at 795 (Fahey, J., dissenting).
[10] *Id.* at 795.
[11] *Buchanan*, 859 N.Y.S.2d at 795.
[12] *Id.* at 796 (Fahey, J., dissenting).
[13] *Id.*
[14] *Id.*
[15] *Id.* at 796 (Fahey, J., dissenting).
[16] *Buchanan*, 859 N.Y.S.2d at 796.

fected both because he was physically uncomfortable and because he feared that the stun belt would be activated."[17] In determining whether the defendant's due process rights were violated, the court analyzed the " 'three fundamental legal principles' "[18] regarding the use of visible restraints: (1) "the presumption of innocence;" (2) "the right to counsel;" and (3) "the interest in maintaining a dignified judicial process."[19] With respect to the first principle, the court concluded that the defendant's presumption of innocence was protected because the stun belt was not visible to the jury, negating any suggestion that he was a danger to the community.[20] Secondly, the defendant's right to counsel was also deemed protected because the belt was invisible and because the court ordered a physical examination to ensure the defendant's physical health.[21] Despite the defendant's complaints of his fear to confer with his counsel, the court stated that the complaints were subjective and that he never stated he was, in fact, unable to confer with his counsel.[22] Lastly, the "dignity of the judicial process was maintained" because the defendant was "treated respectfully with regard to the use of the stun belt."[23] Although the court determined that these legal principles were protected, it stated that the trial court should have made it clear on the record that the

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[17] *Id.* at 793.

[18] *Id.* (quoting Deck v. Missouri, 544 U.S. 622, 630 (2005)).

[19] *Id.*

[20] *Id.*

[21] *Buchanan*, 859 N.Y.S.2d at 793.

[22] *Id.* Buchanan also asserted that "he was denied effective assistance of counsel based on defense counsel's failure to request a hearing with respect to the court's determination to require [him] to wear a stun belt," but the argument was denied because it was on record that the defendant's counsel "strenuously objected" to the use of the belt. *Id.* at 794.

[23] *Id.*

stun belt would not be visible to the jury.[24]

Additionally, the appellate division rejected the defendant's argument that the trial court did not have justification for ordering him to wear a stun belt.[25] The court reasoned that even if the trial court did not have adequate justification, the "defendant must demonstrate actual prejudice to establish a due process violation," because the belt was not visible.[26]

The dissent acknowledged that the use of the stun belt as a physical restraint, and its potential impediment of a defendant's constitutional rights, has been a controversial issue in federal and state courts.[27] In holding that the trial court's judgment should be reversed, the dissent noted that it was "well settled [in New York] that a criminal defendant may not be physically restrained in the presence of a jury without a reasonable basis that is articulated on the record."[28] Therefore, any standard less than a reasonable basis may constitute a reversal unless it was "clear that the jury was not prejudiced."[29] Based on this precedent, the dissent criticized the trial court for not directly addressing the visibility of the stun belt.[30] Furthermore, the dissent concluded that the trial court's "blanket policy" regarding physical restraints violated the established case law in New York and due process because it contradicted the requirement of

[24] *Id.* at 793.
[25] *Id.* at 794.
[26] *Buchanan*, 859 N.Y.S.2d at 794.
[27] *Id.* at 796-97 (Fahey, J., dissenting).
[28] *Id.* at 797-98. *See* People v. Rouse, 591 N.E.2d 1172, 1173 (N.Y. 1992); People v. Mendola, 140 N.E.2d 353, 356 (N.Y. 1957).
[29] *Buchanan*, 859 N.Y.S.2d at 798.
[30] *Id.* (quoting United States v. Durham, 287 F.3d 1297, 1306 (11th Cir. 2002)).

" 'close judicial scrutiny' " on a case-by-case determination.[31] The majority's statement that " 'an innocent man on trial for murder is more dangerous than a guilty one' "[32] was the dissent's primary concern.[33] It concluded that the presumption of innocence cannot be "undermined by a desire for convenience or . . . bureaucratic policies."[34] Moreover, the dissent noted that to ensure a fair trial, any physical restraint should only be used when "there is an essential state interest," which was not evident in this case.[35]

The *Buchanan* Court relied on the United States Supreme Court decision in *Deck v. Missouri*,[36] where the defendant was convicted of capital murder and given a death sentence after wearing leg braces that were supposedly concealed from the jury during his trial.[37] The defendant appealed to the Missouri Supreme Court, which affirmed the conviction, but set aside the death penalty.[38] A new sentencing proceeding was held where the defendant "was shackled with leg irons, handcuffs, and a belly chain."[39] The defendant's counsel made several objections before, during, and after voir dire, claiming that the defendant should not remain in shackles during the penalty phase because it would suggest to the jury that the defendant was still violent or a threat.[40] All of the objections were over-

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[31] *Id.*
[32] *Id.* at 796.
[33] *Id.* at 798 (Fahey, J., dissenting).
[34] *Buchanan*, 859 N.Y.S.2d at 798 (Fahey, J., dissenting).
[35] *Id.* at 798-99.
[36] 544 U.S. 622 (2005).
[37] *Deck*, 544 U.S. at 624-25.
[38] *Id.* at 625.
[39] *Id.*
[40] *Id.*

ruled because the court reasoned that the defendant was already convicted and his restraint will " 'take[] any fear out of [the jurors'] minds.' "[41] Ultimately, the defendant was sentenced to death again.[42]

On appeal, the defendant "sought postconviction relief from his sentence," claiming that "his due process and equal protection rights were violated by the trial court's requirement that he appear in shackles."[43] The Missouri Supreme Court rejected these claims, reasoning that the defendant was a flight risk and that the evidence showed he committed the murders to avoid being imprisoned.[44] In addition, the court reasoned that the jury's awareness of the restraints was not on the record and the defendant did not actually claim that his right to participate in the proceedings was diminished.[45] The Supreme Court granted certiorari, considering two issues: (1) whether the U.S. Constitution allows States to use visible restraints on a defendant during the guilt phase of a trial; and (2) whether visible restraints are allowed in the penalty phase of a capital proceeding.[46] The Court reversed the state supreme court's judgment, holding that with respect to the first issue, "[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special

[41] *Id.*

[42] *Deck*, 544 U.S. at 625.

[43] *Id.* at 637 (Thomas, J., dissenting). *See* U.S. CONST. amend. XIV, § 1, states, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See also* MO. CONST. art. I, § 10, which states, in pertinent part: "That no person shall be deprived of life, liberty or property without due process of law." It also states "that all persons are created equal and are entitled to equal rights and opportunity under the law." *Id.* § 2.

[44] *Deck*, 544 U.S. at 637 (Thomas, J., dissenting).

[45] *Id.* at 625.

[46] *Id.* at 626, 630.

need."[47] Regarding the second issue, the Court held that defendants cannot be visibly restrained during the penalty phase, unless there is a case specific determination that justifies it.[48]

In determining whether the visible restraints on a defendant were allowed by the U.S. Constitution during the guilt phase, the Court acknowledged at the outset that its holding did not apply to proceedings that are solely before a judge, such as arraignments.[49] Furthermore, the Court reasoned that its holding was supported by common law precedent and constitutional foundation.[50] The Court stated that the use of visible physical restraints on a defendant during the guilt phase of a trial should be a " 'last resort,' " which "may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."[51] Even so, the Court acknowledged that it is still unclear how much discretion should be given to a trial judge and what procedural process a court must go through before shackling a defendant.[52]

The Court also analyzed whether the U.S. Constitution would allow a defendant to wear visible restraints during the penalty phase of the trial.[53] The analysis began by highlighting the reason for the general rule of defendants not being shackled, which is to comport

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[47] *Id.* at 626.

[48] *Id.* at 633.

[49] *Deck*, 544 U.S. at 626.

[50] *Id.* at 626-27. "[A] defendant 'must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.' " *Id.* at 626 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 317, 322 (1769)). *See* U.S. CONST. amend. XIV. *See also* U.S. CONST. amend. V.

[51] *Deck*, 544 U.S. at 628.

[52] *Id.* at 627, 629.

[53] *Id.* at 630.

with the three fundamental legal principles.[54] The defendant's presumption of innocence would be undermined by visible restraints because it would suggest to the jury that the defendant was a threat, which would diminish "the related fairness of the factfinding process."[55] Also, the use of shackles affects the defendant's right to counsel because it may impede the defendant's ability to freely participate in the proceedings, such as testifying in his own defense, and restricting communication with his counsel.[56] Lastly, the preservation of a dignified judicial process would be affected by the use of visible restraints because the objective of "respectful treatment of defendants" would be undermined.[57] In addition, the Court noted the importance of accuracy in a decision "between life and death" in a capital case.[58]

Despite the general rule, the Court stated that the use of shackles may be necessary, but the particular circumstances of a case must be considered to comport with due process.[59] Ultimately, the Court rejected Missouri's claims because the jury was aware of the restraints to some extent, no good reason existed to shackle the defendant, and the State did not prove that the shackling did not affect the verdict because actual prejudice need not be shown by the defen-

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[54] *Id.* At common law, the primary reason for prohibiting shackling during the penalty phase was the concern that the defendant may suffer from the pain of the restraints. *Id.*

[55] *Id.* at 630. This fundamental legal principle is not of primary concern because the defendant has already been convicted. *Id.* at 632.

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

[57] *Id.*

[58] *Id.* at 632.

[59] *Id.*

dant.[60] The dissent criticized the holding, stating that more emphasis should have been put on safety in the courtrooms.[61]

Regardless of the holding in *Deck*, the federal courts are still split "on the issues of whether and how a stun belt may be used," with visibility being the primary factor.[62] Some courts, including *Buchanan*, take the position that "the use of a stun belt is prejudicial even when it is not visible to the jury."[63] In *United States v. Durham*,[64] the defendant was convicted of armed robbery, firearm possession, and firearm possession by a convicted felon.[65] During trial, he was forced to wear a stun belt.[66] When the defendant became aware of the trial court's intentions, he filed a motion to prohibit the use of the stun belt, citing safety concerns, an impeded ability to communicate with his counsel, and the inability to facilitate in his own defense.[67] The trial court denied the motion at a pretrial hearing, reasoning that the defendant was a " 'heightened security risk' " because of his two previous escape attempts and assurance from the sheriff that the device was safe.[68]

On appeal to the Supreme Court, the defendant claimed that "the district court erred in requiring [him] to wear a stun belt throughout the guilt phase of his trial."[69] The Court vacated the con-

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[60] *Id.* at 634-35.
[61] *Deck*, 544 U.S. at 654 (Thomas, J., dissenting).
[62] *Buchanan*, 859 N.Y.S.2d at 797 (Fahey, J., dissenting).
[63] *Id.*
[64] 287 F.3d 1297 (11th Cir. 2002).
[65] *Durham*, 287 F.3d at 1300.
[66] *Id.*
[67] *Id.* at 1302.
[68] *Id.* at 1302-03.
[69] *Id.* at 1303.

viction, holding that the stun belt interfered with the defendant's constitutional rights, even though it was not visible because, if seen, it may suggest to the jury that the defendant needed to be under a higher level of control.[70] Therefore, before forcing a defendant to wear a stun belt, the trial court must, under careful judicial scrutiny,[71] consider: "addressing factual questions related to [the stun belt's] operation, the exploration of alternative, less problematic methods of restraint, and a finding that the device is necessary in that particular case for a set of reasons that can be articulated on the record."[72] This analysis was not exercised by the trial court, nor was there a showing that the error was harmless.[73]

Agreeing with *Durham*, the Ninth Circuit in *Gonzalez v. Piler*[74] held that an evidentiary hearing regarding the use of a stun belt must be conducted before requiring a defendant to wear one.[75] In *Gonzalez*, the defendant appealed the denial of his writ of habeas corpus, claiming that requiring him to wear a stun belt violated his due process rights.[76] The Ninth Circuit vacated the district court's judgment, reasoning that the stun belt raised traditional constitutional concerns, but with the added psychological impact of the stun belt on a defendant, such as increased anxiety and fear, the defendant may be discouraged from testifying.[77] Therefore, the court concluded that a

[70] *Durham*, 287 F.3d at 1305-06, 1309.
[71] *Id.* at 1309.
[72] *Id.*
[73] *Id.*
[74] 341 F.3d 897 (9th Cir. 2003).
[75] *Gonzalez*, 341 F.3d at 899.
[76] *Id.*
[77] *Id.* at 900.

prerequisite for using a stun belt is careful judicial scrutiny as set forth in *Durham*.[78]

In *Gonzalez*, the defendant wore a stun belt during jury selection and the trial, which were both decisions made by the bailiff, and not by the trial judge.[79] The defense counsel objected to the stun belt, claiming that the defendant did not pose a "true threat."[80] The district court overruled the objection after noting that the belt was invisible and after the bailiff told the judge that the defendant was being uncooperative.[81] The circuit court of appeals found several errors in this process, highlighting that "[t]he use of physical restraints is subject to close *judicial*, not law enforcement, scrutiny."[82] As a result, the trial court's conversation with the bailiff did not fulfill the constitutional requirements of judicial scrutiny, which may have been protected had an evidentiary hearing taken place.[83]

On the other hand, other federal courts have stated that "the presumption of prejudice with the use of a stun belt applies only if the stun belt is visible to the jury."[84] In *United States v. McKissick*,[85] a co-defendant, Delmar Ziegler, was convicted of two counts of drug trafficking, after a trial in which both defendants were tried together.[86] Both defendants appealed, with Ziegler claiming that the trial court erred in denying a mistrial "because he was prejudiced by

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[78] *Id.* at 901.

[79] *Id.*

[80] *Gonzalez*, 341 F.3d at 901.

[81] *Id.* at 901-02.

[82] *Id.* at 902.

[83] *Id.*

[84] *Buchanan*, 859 N.Y.S.2d at 797 (Fahey, J., dissenting).

[85] 204 F.3d 1282 (10th Cir. 2000).

[86] *McKissick*, 204 F.3d at 1286-87.

the use of a stun belt restraint" during his trial.[87] After voir dire, but before the trial began, Ziegler's counsel learned that both defendants were wearing stun belts, and argued that they should be removed because of the possible prejudice if the jury saw the belts.[88] The Tenth Circuit affirmed the denial, concluding that there was no abuse of discretion by the trial court.[89] The court reasoned that they believed other gang members would try disturb the trial, that the stun belts were not visible to the jury, and that no record existed of any juror being aware of the belts.[90] Therefore, the court concluded that it could not "presume prejudice to [the defendant]."[91]

The United States District Court for the District of Columbia also takes this position in *United States v. Edelin.*[92] In *Edelin*, the six defendants were charged with various counts of "violent crimes and drug related activity," but only one defendant, Tommy Edelin, faced capital punishment.[93] Edelin, joined by four of his co-defendants, filed a "[m]otion to preclude the use of stun belts during the trial in [his] case," but it was orally denied by the court.[94] The court reasoned that "[m]aintaining courtroom order and security is a legitimate goal of the [c]ourt, and the use of devices that can increase the security of the courtroom without threatening the life of any individual

[87] *Id.* at 1299.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *McKissick*, 204 F.3d at 1299.
[92] 175 F. Supp. 2d 1 (D.D.C. 2001).
[93] *Edelin*, 175 F. Supp. 2d at 2.
[94] *Id.*

does not violate the Constitution."[95]

The defendant objected to the use of the stun belts for several reasons, including violations of his Fifth Amendment due process rights and general safety concerns regarding the operation of the stun belt.[96] The government contended that the stun belts did not cause any substantial health concerns and that the risk of malfunction was low.[97] The court found the government's arguments persuasive, but also reasoned that a lack of disruptive behavior by the defendants was not the only factor to consider.[98] Additionally, the defendants did not complain of any actual psychological damage or inability to communicate with their counsel, and the government made a sufficient showing of the level of danger the defendants may pose in court.[99] Furthermore, the court stated that the use of stun belts did not "shock the conscience" of the rights asserted by the U.S. Constitution,[100] and concluded that stun belts are a better alternative, compared to other visible physical restraints, because they reduce the potential for

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[95] *Id.* at 5.

[96] *Id.* at 2. The defendant objected to use of the stun belts for the following reasons:

> "(1) the device constitutes an unknown health threat to him and perhaps his counsel if triggered; (2) the device is subject to malfunction and could injure him; (3) his conduct in court during numerous previous court appearances does not justify such an extraordinary action; (4) the criteria for determining when to activate the device are over-broad and vague; (5) the device is psychologically damaging to him, even if it is not activated; (7) the device interferes with his ability to assist counsel; and (8) there has been an appalling error rate in activating the belt in other cases in which it has been used."

Id.

[97] *Id.* at 3.

[98] *Edelin*, 175 F. Supp. 2d at 3.

[99] *Id.*

[100] *Id.* at 5.

prejudice by jurors.[101] After weighing these various factors,[102] under a lesser standard than careful judicial scrutiny, the court found that the use of stun belts was appropriate for the defendants' trial.[103]

Prior to *Buchanan*, New York precedent stated that "the display of a physical restraint is inherently prejudicial 'and constitutes reversible error unless a reasonable basis therefor is in the record or it is clear that the jury was not prejudiced thereby.' "[104] In *People v. Rouse*,[105] the defendant was convicted of second-degree murder and attempted murder, after being forced to appear before the jury in leg shackles at his trial.[106] The New York Court of Appeals affirmed the trial court's ruling, holding that there was a reasonable basis articulated on the record for restraining the defendant because he made

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[101] *Id.* at 4.

[102] *Id.* at 5. The court analyzed the following factors to determine whether stun belts should be used as security measures:

> (1) the seriousness of the crimes charged and the severity of the potential sentences; (2) the numerous allegations of threats of violence made by defendants against witnesses; (3) previous guilty pleas or convictions of a substantial number of the defendants to prior gun charges and/or violent crimes; (4) belligerent and threatening comments made to the Deputy U.S. Marshals by each of the defendants other than defendant Tommy Edelin; (5) allegations of gang activity, and the likelihood that associates or rivals of the alleged gang may be present at trial; (6) the strong opinion of the U.S. Marshal for this District, particularly as it relates to knowledge of security in this courthouse and with cases of this nature; (7) potential prejudice to the defendants through the use of the stun belts; (8) likelihood of accidental activation of the stun belts; (9) potential danger to the defendants if the belts are activated; (10) the availability and viability of other means to ensure courtroom security; (11) the potential danger for the defendants and others present in the courtroom if other means are used to secure the courtroom; and (12) the existence of a clear written policy governing the activation of stun belts worn by defendants.

Id.

[103] *Edelin*, 175 F. Supp. 2d at 5-6.

[104] *Buchanan*, 859 N.Y.S2d at 798 (quoting People v. Paul, 645 N.Y.S.2d 682, 683 (App. Div. 4th Dep't 1996)).

[105] 591 N.E.2d 1172 (N.Y. 1992).

[106] *Rouse*, 591 N.E.2d at 1173.

several escape attempts prior to his trial.[107] Also, the court held that although a court should "minimize the possibility of prejudice" with a jury instruction, the defendant must request the instruction, reasoning that a defendant may not want a jury instruction that may bring more attention to the restraints.[108] Therefore, because the defendant did not request an instruction, the court did not have an obligation to give one.[109]

In *People v. Mendola*,[110] after two trials, the defendant was convicted of conspiracy of aiding escape, robbery, grand larceny, and escape from prison after he was forced to remain "handcuffed to a deputy sheriff throughout both trials."[111] The Appellate Division, Fourth Department reversed the convictions and ordered a new trial, holding that handcuffing the defendant was prejudicial error even though the evidence of record supported the conviction.[112] However, the New York Court of Appeals reversed the appellate division's order for a new trial, holding that the trial court was justified in not allowing the handcuffs to be removed from the defendant.[113] It reasoned that the defendant confessed to "his frantic desire to escape," and that he successfully escaped from custody before trial, so therefore, the precautions taken by the trial court were not excessive against the defendant.[114] Even so, the court scolded the trial court for

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] 140 N.E.2d 353 (N.Y. 1957).
[111] *Mendola*, 140 N.E.2d at 354.
[112] *Id.*
[113] *Id.* at 356-57.
[114] *Id.* at 356.

not stating the reasons necessary for the extreme precautionary measures on the record.[115]

Similar to the conflicts amongst federal courts, other state courts are also split on the issue of whether stun belts should be used as security measures and to what extent they should be used.[116] One position taken by state courts, including New York in *Buchanan*, is that "the use of a stun belt should be subjected to the same close judicial scrutiny as any other restraining device, whether visible or not."[117] Illinois also took this position in *People v. Allen*,[118] where the defendant was convicted of burglary after he was forced to wear a stun belt during his trial.[119] The defendant appealed, and the appellate court reversed, holding that the trial court abused its discretion in requiring the defendant to wear the stun belt without performing a proper analysis beforehand.[120] The defendant appealed to the Illinois Supreme Court, which addressed "whether a *concealed electronic stun belt* worn under a defendant's garments should be classified as a 'physical restraint' which lends itself to due process scrutiny."[121] The court reversed, holding that electronic stun belts are subject to the same type of review as other physical restraints, meaning that a "manifest need for the restraint" must be shown before it is used.[122]

Contrarily, other state courts hold that "the use of a stun belt

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[115] *Id.*

[116] *Buchanan*, 859 N.Y.S.2d at 797.

[117] *Id. Accord* Hymon v. State, 111 P.3d 1092, 1099 (Nev. 2005) (stating that the "decision to use a stun belt is subject[ ] to close judicial scrutiny").

[118] 856 N.E.2d 349 (Ill. 2006).

[119] *Allen*, 856 N.E.2d at 350-51.

[120] *Id.* at 355.

[121] *Id.* at 352.

[122] *Id.* at 353.

is only prejudicial when it is visible."[123] Ohio takes this position in *State v. Gulley*,[124] where the defendant was convicted for burglary and theft after wearing a stun belt during trial.[125] The trial court did not hold a hearing before determining to use the stun belt, but conferred with the deputy sheriff, who testified that the belt was used because of the high emotions of defendants on trial and because it was "standard procedure."[126] In addition, the defendant agreed to wear the belt, although there were allegations that he was tampering with it.[127] On appeal, the defendant claimed that "the trial court abused its discretion when it failed to hold a hearing regarding the necessity for the stun belt," thereby violating "his constitutional rights to a fair trial."[128] The court did not find that the trial court abused its discretion by not holding a hearing before using the stun belt.[129]

The court reasoned that holding a formal hearing is not a mandatory prerequisite to using a stun belt as a security measure.[130] Furthermore, the defendant did not actually contend that his right to assist in his own defense or his ability to communicate with his counsel was infringed, and there was no evidence that the jury had knowledge of the stun belt or that it was exposed.[131] Therefore, the defendant did not prove a violation of his rights under the Ohio

[123] *Buchanan*, 859 N.Y.S.2d at 797.
[124] No. CA2005-07-066, 2006 WL 1064062, at *1 (Ohio Ct. App. Apr. 24, 2006).
[125] *Gulley*, 2006 WL 1064062, at *1.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Gulley*, 2006 WL 1064062, at *1.
[131] *Id.* at *2.

Constitution.[132]

Each side of the divergence, on both the federal and state levels, recognize that a defendant's due process rights have a high potential to be violated if the physical restraint is visible to the jury, which justifies the high judicial scrutiny required before visible physical restraints are used.[133] It further justifies the courtroom etiquette of escorting the defendant into the courtroom before the jury, as to keep restraints, such as shackles, out of the view of jurors. The courts that follow the logic that the physical restraint is only prejudicial when visible seem to rely on the theory that if the jury is not aware of the stun belt, it lowers the potential for a defendant's presumption of innocence to be tainted.[134] On the other hand, *Buchanan* and other courts do not rely on the obvious prejudice caused by visibility, but rather concentrate on the psychological effects the belt may have on the defendant, which may correlate into prejudice by the jury.[135] The theory behind the close judicial scrutiny point of view is that the defendant may convey anxiety or fear, through their body language, of being shocked by the stun belt. It follows that the defendant's right to confer with his or her counsel and to assist in his or her own defense is at a higher risk of being violated.

Based on these theories, the courts favoring close judicial scrutiny for the use of a stun belt, such as *Buchanan*, are more cau-

[132] *Id.*

[133] *See, e.g.*, *Rouse*, 591 N.E.2d at 1173.

[134] *See, e.g.*, *Gulley*, 2006 WL 1064062, at *2.

[135] *See, e.g.*, United States v. Durham, 287 F.3d 1297, 1310 (11th Cir. 2002) (Tjoflat, J., concurring) (stating that the producer of the stun belt promotes it as able to achieve " 'total psychological supremacy' " of the defendant)).

tious, and ultimately follow the better practice. These courts not only hold the defendant's constitutional rights in high regard, but place some emphasis on the physical well-being of the defendant, which seems to be a heated debate inside and outside the courtroom.

Aside from the defendant's constitutional right to due process of law, the issue to be reconciled is balancing the defendant's health and safety against maintaining safe courtrooms. Tipping the scale to the defendant's side, the safety concerns of the stun belt are increasing based on its detrimental effect during and after the shock. The *Gonzalez* Court gave a detailed description of the operation and effects of the stun belt:

> A stun belt is an electronic device that is secured around a prisoner's waist. Powered by nine-volt batteries, the belt is connected to prongs attached to the wearer's left kidney region. When activated remotely, "the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds." Upon activation of the belt, an electric current enters the body near the wearer's kidneys and travels along blood channels and nerve pathways. The shock administered from the activated belt "causes incapacitation in the first few seconds and severe pain during the entire period." "Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal." Activation of a stun belt can cause muscular weakness for approximately 30-45 minutes and heartbeat irregularities or seizures. Accidental activations are not unknown.[136]

[136] *Gonzalez*, 341 F.3d at 899 (citations omitted).

Moreover, Amnesty International[137] asserts that the excruciating pain and humiliation suffered by the defendant amounts to "cruelty."[138] It further states that, in order for the stun belt to be effective, " 'it relies on the wearer's fear of severe pain and humiliation that could follow activation. Such fear is a leading component of the mental suffering of a victim of torture or cruel, inhuman or degrading treatment which is banned under international law.' "[139] In addition, when a defendant was actually shocked, the reaction of witnesses was negative.[140]

Weighing in favor of courtroom safety is the fear of courtroom attacks, usually resulting in innocent casualties.[141] Is " 'an innocent man on trial for murder . . . more dangerous than a guilty one?' "[142] This may be the sentiment of courts that choose the stun belt over other alternatives, such as handcuffs, shackles, or an increased number of guards present during proceedings. A proponent of the stun belt even suggests that a better solution is for courthouses to be "gun-free zones."[143] The rationale is that courtroom shootings

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[137] Amnesty International USA, About Amnesty International, http://www.amnestyusa.org/about-us/page.do?id=1101195 ("Amnesty International undertakes research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.") (last visited Nov. 22, 2008).

[138] Amnesty International USA, *Stun Belt – Cranking Up the Cruelty*, News & Events, June 3, 1999, http://www.amnestyusa.org/document.php?lang=e&id=20AE047C564087A4802569000069 3289 (last visited Nov. 24, 2008).

[139] *Id.*

[140] Jennifer Auther & Associated Press, *Judge's Order to Shock Defendant Stuns Witnesses*, CNN.COM, Jul. 10, 1998, http://www.cnn.com/US/9807/10/stun.belts/index.html.

[141] David Feige, *Put Down Your Gun*, N.Y. TIMES, Mar. 19, 2005, at A15.

[142] *Buchanan*, 859 N.Y.S.2d at 796.

[143] Feige, *supra* note 141, at A15.

will be prevented if there are no weapons for the defendants to use.[144]

A part of the general problem is that courts and prisons are straying from the original purpose for physical restraints. Stun belts originally were used for the most dangerous prisoners and defendants, but have progressively become commonplace in prisons and courtrooms across the nation.[145] For this reason, the close judicial scrutiny standard at least places some limitation on the use of stun belts. These limitations are now becoming increasingly important as juveniles are being subjected to the stun belt.[146]

Since the stun belt will, most likely, continue to be used, a feasible balance needs to be created to protect a defendant's constitutional, health, and safety concerns, and to maintain courtroom safety. To protect a defendant's due process rights, more courts should adopt the close judicial scrutiny standard for stun belts, as it will eliminate the budding "blanket policies," which result in the automatic use of the stun belt.[147] The defendant may not be completely comfortable wearing the stun belt, but the anxiety of being shocked may be eased with increased training for guards operating the belt, and use for absolute emergencies and not minimal annoyances.[148]

Even with these precautions, the courts have left one issue open for debate—the pro se defendant. The majority of cases concern constitutional issues regarding the defendant's inability to confer

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[144] *Id.*

[145] Amnesty International USA, *supra* note 138.

[146] *Id.*

[147] *Buchanan*, 859 N.Y.S.2d at 798 (Fahey, J., dissenting).

[148] Auther, *supra* note 140 (reporting that a pro se defendant was stunned because of his "constant talking").

with counsel and assist in his or her own defense. The pro se defendant poses a whole new issue because of the increased movement by this defendant, which may lower the threshold for allowing use and activation of the stun belt. Should there be a blanket policy for use of the stun belts for pro se defendants? If not, good luck to the pro se defendant trying her case in shackles.

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