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7 **IN THE SUPERIOR COURT, DIVISION III OF THE STATE OF ARIZONA**

8 **IN AND FOR THE COUNTY OF MOHAVE**

9 STATE OF ARIZONA,

10 Plaintiff,

11 vs.

12 JOHN CHARLES MCCLUSKEY,

13 Defendant.

Case No.: CR-2010-00~~823~~ 823

**MOTION TO PRECLUDE THE USE  
OF RESTRAINING DEVICES ON  
DEFENDANT DURING TRIAL**

**Evidentiary hearing requested**

14

15 The Defendant, through counsel undersigned and pursuant to the due process clauses of

16 the Arizona and United States Constitutions, moves this Court to preclude the use of restraining

17 devices, including but not limited to "stun belt" type restraints. As further grounds for this

18 motion, the Defendant attaches the following Memorandum of Law.

19 **MEMORANDUM**

20

21 The use of any type of restraint on a defendant during a jury trial raises constitutional

22 implications that must be addressed by the court. The sight of physical restraints has a

23 significant impact on the jury and on the defendant's ability to communicate with his attorney

24 and to participate in the defense of his case. Illinois v Allen, 397 U.S. 337, 344 (1970). The use

1 of physical restraints may also “confuse and embarrass the defendant thereby impairing his  
2 mental faculties and it may cause him pain”. Duckett v Godinez, 67 F.3d 734, 748 (9th Cir.  
3 1995). Therefore, to avoid unnecessary implication of these concerns, “no person should be tried  
4 while shackled and gagged except as a last resort.” 397 U.S. at 344.

5 A defendant has the right to be free from all restraints in the courtroom, unless there is  
6 evident danger in the record that supports the trial judge’s exercise of discretion to restrain the  
7 defendant. Deck v. Missouri, 544 U.S. 622, 627 (2005). The Arizona Supreme Court,  
8 following Deck, held that a convicted defendant should not be visibly shackled even during the  
9 sentencing phase of trial in front of a jury, absent specific justification on the record that there  
10 were “indisputably good reasons for shackling.” State v Gomez, 211 Ariz. 494, 503 (2005). In  
11 Gomez, the shackles were visible and there was no record of any special need other than jail  
12 policy that required “shackling of all defendants in prison garb.” Id. At 504.

13 The same rules apply to restraining devices hidden from the view of the jury, such as a  
14 stun belt. The state is required to establish some reason for the restraint in the courtroom. The  
15 trial court would then be required to use its discretion to determine necessity. State v Mills, 196  
16 Ariz. 269 (App. 1999). The use of a stun belt in particular raises several concerns, as addressed  
17 in United States v Durham, 287 F.3d 1297 (11<sup>th</sup> Cir. 2002).

18 First, although worn under clothing and supposedly hidden from the jurors view, it is  
19 common for the stun belt to protrude to a noticeable degree and very possible that it will be seen  
20 by the jury. This is even more prejudicial than shackles because the implication is that a drastic,  
21 unique force is required to control the defendant. Second, the stun belt creates the fear of  
22 receiving a painful and humiliating shock for any gesture that could be perceived as threatening,  
23 thus chilling a defendant’s inclination to make any movement during trial-including those  
24 movements necessary for effective communication with counsel. Third, the stun belt may have

1 an adverse impact on the defendant's Sixth Amendment and due process rights to be present at  
2 trial and to participate in his defense. The defendant may worry more about the stun belt and  
3 preventing its activation than to fully participate in his defense. Fourth, stun belts are highly  
4 detrimental to the dignified administration of criminal justice. The discharge of the stun belt  
5 could cause the defendant to lose control of his limbs, collapse to the floor, and defecate on  
6 himself.

7 After noting these concerns, the Court in Durham overturned a conviction where a stun  
8 belt had been used on the defendant at trial, despite the fact that the defendant had on two prior  
9 occasions attempted to escape from custody. *Id.* at 1301. The Court held that the trial court had  
10 not made specific findings that the belt was necessary, nor had it explored alternatives;  
11 furthermore, the State had not met its burden of proving that this infringement of the defendant's  
12 constitutional rights was harmless. *Id.* at 1309.

13 In State v. Bassett, 215 Ariz. 600 (App.Div 1,2007), the court adopted the Durham  
14 analysis, but found in that instance the defendant had waived the issue by not raising it in a  
15 pretrial motion. The Bassett holding implies that a pretrial evidentiary hearing is required when  
16 the issue of the constitutional permissibility of restraints is raised before trial, and that the State  
17 has the burden to show that such restraints will not prejudice the defendant's constitutional rights  
18 as set forth above in Durham. See also State v. Dixon, 2011 WL 1706904 (Ariz. 2011) (holding  
19 inter alia no Durham violation where defendant did not object to use of stun belt); State v.  
20 Rodriguez, 2010 WL 2889565 (Ariz.App.Div 1,2010) (memorandum op.) (remanding for  
21 hearing to determine whether restraints, including stun belt, were necessary and whether  
22 defendant's rights violated); State v. Cruz, 218 Ariz. 149, 168 (2008) ("Given the constitutional  
23 ramifications of the use of shock belts, courts should provide a hearing—evidentiary if  
24 necessary—at which the defendant may contest the use of shock belts or other restraints").

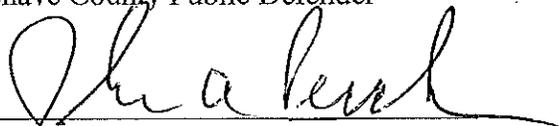
1 CONCLUSION

2 In Arizona, "[m]atters of courtroom security are left to the discretion of the trial court."  
3 State v. Davolt, 207 Ariz. 191, 211 (2004). However, the use of restraints is constitutionally  
4 suspect due to the prejudicial effect on the defendant's right to a fair trial. Restraints should not  
5 be used without specific, compelling rationale justifying the intrusion on the defendant's rights.  
6 In this case, Mr. McCluskey objects to the use of any type of restraining device during his trial; if  
7 the State or the Court disagree, then he has the right to a hearing where the State must prove that  
8 such restraints are necessary.

9 DATED THIS 20 <sup>th</sup> DAY OF MAY, 2011.

10  
11 Respectfully Submitted,

12 John A. Pecchia  
13 Mohave County Public Defender

14   
15 By: JOHN A. PECCHIA  
16 Public Defender

17 Jason R Steffen  
18 Deputy Public Defender

19   
20 By: JASON R STEFFEN  
21 Deputy Public Defender

22 A copy of the foregoing sent  
23 this 20 day of May, 2011 to:

24 Victoria Stazio  
25 Mohave County Attorney's Office

John Charles McCluskey, Defendant

Honorable Steven F. Conn

By: eh