

## 21.6 Right to Appear Free of Physical Restraints

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## 21.6 Right to Appear Free of Physical Restraints

### A. Constitutional Basis of Right

**Federal constitution.** The due process and fair trial guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the use of physical restraints visible to the jury unless the trial judge has determined, in the exercise of his or her discretion, that the restraints are justified by an essential state interest specific to a particular trial. *See Deck v. Missouri*, 544 U.S. 622 (2005). Examples of essential state interests include physical security, escape prevention, and courtroom decorum. Courts can take into account factors traditionally relied on by courts in determining potential security problems and the risk of escape at trial. A non-exhaustive list of factors appropriately used to determine whether restraints are necessary is set out below.

The U.S. Supreme Court observed that the routine use of shackling would:

- undermine the presumption of innocence and the related fairness of the factfinding process;
- interfere with the defendant’s ability to communicate with his or her lawyer and to participate in his or her own defense; and
- affront the dignity and decorum of judicial proceedings.

*Id.* at 630–32.

Where a trial judge, without adequate justification, orders a defendant to be visibly shackled during trial, the defendant need not demonstrate actual prejudice to make out a due process violation. Instead, the burden is on the State to prove beyond a reasonable doubt that the shackling error did not contribute to the verdict obtained against the defendant. *Id.* at 635.

**State constitution.** Before the U.S. Supreme Court’s decision in *Deck v. Missouri*, 544 U.S. 622 (2005), the N.C. Supreme Court recognized that a criminal defendant is entitled under the Due Process Clause of the federal constitution and the Law of the Land Clause in article I, section 19 of the state constitution to be tried “free from all bonds or shackles except in extraordinary instances.” *See State v. Tolley*, 290 N.C. 349, 365 (1976). Unless there is a showing of necessity, compelling a defendant to stand trial while physically restrained is inherently prejudicial. *Id.*

While *Tolley* involved a superior court jury trial, it can also be argued that the state and federal constitutions likewise bar physical restraint of a defendant in a district court nonjury proceeding unless the judge finds that it is necessary to do so (see subsection B., below).

**Factors relevant to consideration.** The court in *Tolley* set out circumstances appropriate for the trial judge to consider in determining whether restraints are necessary. These include but are not limited to:

- the seriousness of the charges,
- the defendant’s temperament and character,
- the defendant’s age and physical attributes,
- the defendant’s past record,
- any past escapes or attempted escapes, and evidence of a present plan to escape,
- any threats to harm others or cause a disturbance,
- any self-destructive tendencies,
- the risk of mob violence or of attempted revenge by others,
- the possibility of rescue by other offenders still at large,
- the size and mood of the audience,
- the nature and physical security of the courtroom, and
- the adequacy and availability of alternative remedies.

*State v. Tolley*, 290 N.C. 349, 368–69 (1976) (“The propriety of physical restraints depends upon the particular facts of each case, and the test on appeal is whether, under all of the circumstances, the trial court abused its discretion.”).

**Type of restraint.** The appropriateness of the particular type of restraint also appears to depend on the circumstances of each case. Compare *State v. Forrest*, 168 N.C. App. 614 (2005) (no abuse of discretion by trial judge in requiring defendant to appear in court strapped to his chair, handcuffed and wearing a white mask covering his mouth and nose, Hannibal-Lecter-style, where defendant was on trial for brutally attacking his former attorney and biting a deputy during a previous trial), with *State v. Locklear*, 231 N.C. App. 714 (2014) (unpublished) (trial judge lacked a sufficient basis to require defendant to wear a “stun vest” under his clothing that was operated by a uniformed officer seated on the row behind defendant where the State had presented only unsworn information that jail personnel recommended the use of the vest based on unspecified incidents that had taken place at the jail involving defendant and his co-defendants).

**Hearing required as constitutional matter.** To comply with due process considerations, when a trial judge contemplates the use of visible restraints, he or she must state for the record, outside the jury’s presence, the specific reasons for ordering the restraints. See *State v. Tolley*, 290 N.C. 349, 368 (1976). The trial judge must also give defense counsel an opportunity to voice objections and to persuade the judge that such measures are not necessary. Regardless of whether the trial judge chooses to hold a formal or informal hearing, a meaningful record must be made that reflects the reasons for the action taken

by the judge and indicates “that counsel have been afforded an opportunity to controvert these reasons and thrash out any resulting factual questions.” *Id.* at 369.

The obligation to hold a hearing and provide a meaningful record is not excused when attempts are made to conceal the use of shackles or other restraints from the jury. Even if the restraints are not visible to the jury, “the concerns that shackling interferes with the defendant’s thought processes and communications with counsel, and affronts the dignity of the trial process, are not cured by mere concealment from the jury.” *State v. Jackson*, 162 N.C. App. 695, 701 (2004) (cautioning trial judges in the practice of shackling “to adhere to the proper use of their discretion and provide the rationale for that discretion, via some finding substantiated in the record” even if the jury will not be made aware of the restraints).

Statutory hearing requirements also apply, discussed below.

## **B. Statutory Basis of Right**

**Restraint of adult defendants in superior court.** G.S. 15A-1031 reflects the concerns about shackling expressed in *State v. Tolley*, 290 N.C. 349 (1976), and provides that a defendant may be physically restrained during his or her trial only “when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant’s escape, or provide for the safety of persons.” Under this statute, if the trial judge determines that a defendant should be restrained, he or she must:

- enter in the record out of the presence of the jury and in the presence of the person to be restrained and his or her counsel, if any, the reasons for the restraint;
- give the restrained person an opportunity to object; and
- unless the defendant or his or her attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

*See* G.S. 15A-1031. If the defendant objects to the stated reasons for the restraint, the judge must conduct a hearing and make findings of fact. *Id.* The judge may base his or her findings supporting the decision to use restraints on information, if reliable, that would not be admissible at trial. *State v. Paige*, 316 N.C. 630 (1986) (permissible to consider hearsay testimony from deputy that defendants had attempted to escape the week before trial). The judge must make a “meaningful record” evidencing the basis of his or her discretion and “provide the rationale for that discretion, via some finding substantiated in the record.” *State v. Jackson*, 162 N.C. App. 695, 701 (2004).

**Restraint of adult defendants in district court.** While G.S. 15A-1031 discusses the procedures for the court to follow in a jury trial (for example, the judge must instruct the jury not to consider the restraints unless the defendant objects to the instruction), it is not expressly limited to jury trials. Its language and title allow for the argument that a district court judge is prohibited from trying a defendant while shackled. The statute is part of Subchapter X, General Trial Procedure, which is applicable both to superior and district court. Also, the reasons articulated by *Deck* and *Tolley*, discussed in subsection A.,

above, apply to bench trials as well as to jury trials (other than the potential impact on the presumption of innocence and the fairness of the factfinding process when a lay jury is the factfinder).

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**Practice note:** If your district court client is shackled and you would like him or her to be tried free of restraints, you should make a motion to have them removed and assert that G.S. 15A-1031 requires that the shackles be removed. You should also assert that the denial of your motion without holding a hearing and making the findings described in *Tolley* violates your client’s rights to due process under the state and federal constitutions. You can argue that even though one of the reasons that physical restraints are inherently prejudicial is not present when the proceeding is not in front a jury—i.e., that the physical restraints may cause jury prejudice and affect the presumption of innocence—there are other reasons to restrict their use in district court. Shackles may:

- impair the defendant’s mental faculties;
- impede communication between the defendant and his or her attorney;
- detract from the dignity and decorum of the judicial proceedings; and
- be painful to the defendant.

*See State v. Russ*, 709 N.W.2d 483, 491 (Wis. Ct. App. 2005) (Anderson, J., concurring) (quoting *Spain v. Rushen*, 883 F.2d 712, 721 (9th Cir. 1989)); *see also Illinois v. Allen*, 397 U.S. 337, 344 (1970) (“[N]o person should be tried while shackled and gagged except as a last resort”).

You also can cite G.S. 7B-2402.1 (discussed below) in support of your motion and argue that by enacting this statute limiting the restraint of juveniles, the General Assembly recognized the importance of subjecting a person to physical restraint only after a judicial determination of need even in nonjury proceedings. *See also In re Staley*, 364 N.E.2d 72, 73–74 (Ill. 1977) (holding in juvenile delinquency case that “[t]he reasons for forbidding shackling are not limited to trials by jury” and that in the absence of a showing of clear necessity “an accused cannot be tried in shackles whether there is to be a bench trial or a trial by jury”).

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**Restraint of juveniles.** G.S. 7B-2402.1, enacted in 2007, provides that in a delinquency hearing, “the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile’s escape, or provide for the safety of the courtroom.” These restrictions are comparable to those in the statute on restraint of adult defendants, discussed above.

Before ordering the use of restraints, the judge, whenever practical, must provide the juvenile and his or her attorney an opportunity to be heard to contest the use of restraints.

**Restraint of witnesses during trial.** G.S. 15A-1031 also grants the trial judge the authority to restrain witnesses. The procedures applicable to the restraint of the defendant, described above, also are applicable to the restraint of witnesses. Whether to restrain a witness is a discretionary decision and will not be disturbed absent an abuse of

discretion. *See State v. Abraham*, 338 N.C. 315 (1994) (no abuse of discretion or expression of opinion on credibility shown where trial judge permitted incarcerated prosecuting witness to appear without shackles but required three incarcerated defense witnesses to be restrained while testifying).

### C. Preservation of Issue for Appeal

**Record must affirmatively show physical restraint.** To preserve the right to appellate review, the record must show that the defendant was physically restrained. The burden is on the defendant to show that restraints were employed. *See State v. Valentine*, 200 N.C. App. 436 (2009) (unpublished) (overruling assignment of error because defendant failed to demonstrate that he was in fact shackled at trial).

**Necessity for objection.** Appellate review is waived if counsel fails to object to the trial judge's order of restraint. *See State v. Sellers*, \_\_\_ N.C. App. \_\_\_, 782 S.E.2d 86 (2016) (holding that defendant waived the right to appeal shackling issue where no objection was made at trial); *State v. Thomas*, 134 N.C. App. 560 (1999) (same); *see also State v. Paige*, 316 N.C. 630 (1986) (holding that the defendant's failure to object to the trial court's lack of instructions to the jury that restraints could not be considered in weighing evidence or determining guilt waived the right to review the lack of instructions); *State v. Tolley*, 290 N.C. 349 (1976) (holding that the defendant waived the right to appeal the lack of instructions concerning shackles and to shackling itself by failing to object). A constitutional and statutory basis for the objection must be given to preserve the issue on both grounds on appeal. *See State v. Holmes*, 355 N.C. 719 (2002) (where defendant failed to object on constitutional grounds, review of the trial judge's decision to restrain was limited to statutory error pursuant to the abuse of discretion standard).

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**Practice note:** If the trial judge, over objection, orders the defendant or a defense witness to be physically restrained during trial, counsel should request that the jury's view of the restraints be obstructed and that the defendant or witness walk to and from the witness chair outside the presence of the jury. *See, e.g., State v. Wilson*, 354 N.C. 493 (2001) (defendant's leg braces were hidden underneath his clothing); *State v. Atkins*, 349 N.C. 62 (1998) (cloth was draped over defense table to conceal defendant's leg restraints from jury); *State v. Wright*, 82 N.C. App. 450 (1986) (oversized briefcase placed by defendant's chair to obstruct jurors' view of his shackles). If the restraints are not visible to the jury, the risk is reduced that the restraints will create prejudice in the minds of the jurors. *See Holmes*, 355 N.C. 719. However, the restraints may still impede the defendant's thought processes and ease of communication with counsel.

To preserve any error for appeal, make sure the record reflects that the defendant was in fact restrained during trial. Also identify the type of restraints used and the effect that the restraints had on the defendant and the proceedings.

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