To be argued by:
THOMAS THEOPHILOS, Esq.

Oral argument requested
Time requested: 30 minutes

STATE OF NEW YORK : COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

vs Indictment # 99-022

INGVUE BUCHANAN

Defendant - Appellant

APPEAL FROM A JUDGMENT OF THE SUPREME COURT,
CHAUTAUQUA COUNTY

BRIEF ON BEHALF OF DEFENDANT - APPELLANT

THOMAS THEOPHILOS, Esq.
Attorney for defendant - appellant

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PRELIMINARY STATEMENT

Appellant, Ingvue Buchanan, was convicted in Chautauqua County Court (Ward, J.) of one count of Murder in the Second Degree and sentenced to an indeterminate term of incarceration of twenty-five years to life. The defendant now appeals and requests that his conviction be reversed. The People of the State of New York are represented by David W. Foley, Chautauqua County District Attorney. Appellant is represented by Thomas Theophilos, Esq.

RELEVANT FACTS

Prior to trial, appellant was required to wear a stun belt under his clothing that was capable of delivering an incapacitating electric shock to his body if activated. Specifically, the trial judge stated that he was going to "have the defendant either in leg shackles, which I don't like to do, or the belt that could deliver a shock should there be a problem." (A-13; T-425) ("T" refers to trial transcript and "A" refers to appendix).

Initially, prior to jury selection, the defendant informed the court that the stun belt that he was wearing caused him problems while he was seated, and the belt was removed at that time (A-12; T-10). After jury selection and before the first witness was called to testify, defense counsel objected to the requirement that

the defendant wear a stun belt under his clothing throughout the trial. The court reiterated that, in cases of a serious nature such as this, it was the court's policy to require a defendant to wear either leg shackles or a stun belt during trial (A-13, 17; T-425, 429).

The court advised appellant that he could wear leg shackles as an alternative to the stun belt. Appellant refused, however, asserting that he "would rather have as any other innocent person has" the benefit of the presumption of innocence until proven guilty (A-17; T-429). He further argued, "my right to...be assumed innocent by a jury and by anyone else is being robbed away from me." (A-19; T-431).

Appellant registered numerous objections to the court's decision (A-14-15; T-426-427). The court acknowledged his objections and afforded appellant a standing objection "every minute that he is wearing the belt." (A-14, 19; T-426, 431). Appellant further objected that forcing him to wear a stun belt would be "extremely uncomfortable physically" and mentally as well (A-18; T-430).

The defendant continued to object to the use of the stun belt on a number of grounds, stating that the stun belt was uncomfortable, affected his concentration, caused an unusual appearance under his clothing, and essentially undermined his right to a fair trial. Defendant noted that he was not required to wear a stun belt

during jury selection and that he had not caused any problems at that time. Defendant stated that there was sufficient security in the courtroom and that he had not previously acted in a manner to give the court any reason to place the stun belt on him. He further stated that the court had known him for many years.

As to the mental anguish associated with wearing the belt, the appellant protested that the sheriff's deputies "strapped 100,000 volts to me. How can I relax? I mean there's no way. I cannot relax." (A-15; T-427). Defense counsel reiterated this concern saying, "[H]e cannot concentrate on the trial with the belt on." (A-14; T-426). Appellant continued, "I have to worry about the way the jury is looking at me - like hey, how is this guy innocent, we just strapped a thousand volts to him." (A-18; T-430). He expressed his concern that he had to worry throughout the trial that "someone with their finger, I'm going to get zapped." (A-15, T-427).

Appellant also argued that the jury will see the belt through "his shirt and his mannerisms" and wearing the belt caused his clothes to buckle which would be noticed by the jury. (A-14, 18; T-426, 430). He was expressly concerned about the way the jury would be looking at him. (A-18; T-430). Appellant made specific claims that wearing the belt deprived him of a fair trial and the presumption of innocence. (A-14, 15, 17, 19, 25-28; T-426, 427, 429, 431, 576-579).

Both appellant and his counsel stated emphatically that the appellant had done nothing wrong in his appearances before the court to justify taking such measures (A-14-15, 17, 26; T-426-427, 429, 577). The trial judge concurred that the appellant's behavior was completely in conformance with proper court etiquette and that he never had problems with him - which is why he did not require the stun belt to be worn during jury selection (A-14; T-426).

Notwithstanding the objections, the court ordered the appellant to wear the stun belt throughout the entire trial. The court supported this decision by noting its "policy in cases of this nature, this degree of seriousness" to require shackles or a stun belt. (A-13; T-425). The court added, "this is something that I would do for anybody charged with murder." (A-14; T-426). The trial judge opined that because others had worn the belt in his courtroom, it was proper for him to require appellant to do likewise. (A-18; T-430). Specifically, the court stated, "a lot of people sat there with their belt on." (A-18; T-430). Appellant responded, "if they didn't exercise their right to maintain their innocence, then that's not my - I can't fight for somebody else. I'm standing up for my right." (A-18; T-430). The court stated, "Pete, I'm sorry, but I'm going to keep it on you. It's not personal." (A-19; T-431).

At one point after appellant complained that he had "done absolutely

nothing [to justify the requirement that he wear the stun belt]," the court agreed, "You haven't Pete. What I am telling you is I have a policy since that belt is available, and it's serious, a case like this, that in the interest of being overly cautious for security that everyone is going to be wearing that." (A-17; T-429).

The court asked a Sheriff's Department officer whether or not that department's position was that the belt should stay on, to which a court officer responded that it should. (A-18; T-430). Immediately thereafter, the court reaffirmed its decision to require appellant to wear the stun belt. (A-19; T-431). With respect to the court's delegation of judicial authority to the Sheriff's department, appellant objected, "because of somebody else's paranoia or whatever they want to call it, I'm being forced to put it back on." (A-26; T-577). The court responded, "I'm not an expert in court security, I have to rely on the people that are bringing you over. They are the people that - the security experts that I have to rely on, their opinions." (A-27; T-578).

During the trial, the appellant again voiced his objection to being required to wear the stun belt, noting "it's causing me to sit forward and while I'm looking at the jury, it looks as if I am panting." (A-22; T-573). He added, "I can't assume a posture of innocence because of the constant scratching." (A-25; T-576). He advised the court, "The jurors are looking at me scratching and itching," and "I

can't sit back because it's in the small of my back." (A-26; T-577). The court justified keeping the belt on in professing, "I think an innocent man on trial for murder is more dangerous than a guilty one." (A-27; T-578).

When appellant complained that the belt was causing skin irritation, welts, and sweating, and that he was developing a rash, the judge directed that medical attention be provided (A-21-22; T-572-573). The court thereafter acknowledged a physician's findings of eczema which the court noted could be treated by application of an ointment, and ordered continued medical monitoring of the appellant (A-25, 28; T-576, 579). Also, the court directed that the stun belt be removed during breaks, including the lunch hour (A-25; T-576).

The record reflects, however, that appellant wore the stun belt under his clothing throughout the trial and to verdict.

ISSUE PRESENTED

The central issue raised below is whether the use of a "stun-belt" to physically and psychologically restrain appellant during his jury trial deprived him of the presumption of innocence, due process of law, his right to counsel, and a fair trial. It is respectfully submitted that the trial court committed reversible error in requiring appellant to wear a stun-belt capable of delivering a debilitating jolt of electricity to his body throughout his trial.

POINT 1

THE USE OF AN ELECTRIC STUN-BELT TO PHYSICALLY AND PSYCHOLOGICALLY RESTRAIN APPELLANT DURING HIS JURY TRIAL DEPRIVED HIM OF A FAIR TRIAL AND DUE PROCESS OF LAW

In Deck v. Missouri, 544 U.S. 622, the United States Supreme Court set forth the legal standard to be applied when determining whether or not the use of visible restraints during a jury trial violates a defendant's constitutional rights. Since the criminal process presumes that a defendant is innocent until proven guilty, the use of restraints "undermines the presumption of innocence and the related fairness of the fact finding process." Id. at 630. This, in turn, violates the due process clause of the Fifth and Fourteenth Amendments. Id. at 627.

The use of restraints likewise diminishes a defendant's Sixth Amendment right to counsel because their use can interfere with the appellant's ability to communicate with his lawyer. Id. at 631. Restraints impair a defendant's ability to participate in his own defense by, for example, freely choosing whether to take the witness stand on his own behalf. Id. at 631. Restraints also impose physical burdens, pains, and restrictions that tend to confuse and embarrass a defendant's mental faculties. Id.

The Court determined that no showing of prejudice is required to make out

a due process violation, emphasizing the importance of analyzing the use of restraints in the context of three fundamental legal principles:

> First, the criminal process presumes that the appellant is innocent until proven guilty...[V]isible shackling undermines the presumption of innocence and the related fairness of the fact finding process. Id. at 630.
>
> Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel... [S]hackles can interfere with the accused's ability to communicate with his lawyer. Id. at 631, *quoting* Illinois v. Allen, 397 U.S. 337, 344.
>
> 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. Id.

The Court specifically found that the use of shackles must be subjected to close judicial scrutiny and the development of a case specific record when such restraints are used. Id. at 624, 632.

With respect to jury trials, challenges to the use of stun belts - even when not visible - as a form of restraint, and the possible implications to a criminal defendant's constitutional rights, have arisen throughout the country. In United States v. Durham, 287 F.3d 1297 (2002), the Court of Appeals for the Eleventh Circuit found that, although they are "less visible than many other restraining

devices, and may be less likely to interfere with an appellant's entitlement to the presumption of innocence," they nevertheless impose "a substantial burden on the ability of an appellant to participate in his own defense and confer with his attorney during a trial." Id. at 1306. The court observed that when the device is activated, it "poses a serious threat to the dignity and decorum of the courtroom." Id. Accordingly, the stun belt "must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints." Id. In Gonzalez v. Pliler, 341 F.3d 897, 901 [2003], the Court of Appeals for the Ninth Circuit agreed with the reasoning of the Eleventh Circuit in Durham.

In Gonzalez, *supra*, the court discussed the operation of a 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 electrical 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 (*citing* United States v. Durham, 219 F.Supp.2d 1234, 1239 [N.D.Fla. 2002], which reported a

> survey showing that 11 out of 45 total activations, or 24.4%, were accidental, but which noted the low percentage of accidental activations or general usage)." Gonzalez v. Pliler, 341 F.3d 897, 901 (2003) (*id*. at 899).

Although some federal courts have concluded that the use of a stun belt is prejudicial even when it is not visible to the jury, other courts have concluded that the presumption of prejudice with the use of a stun belt applies only if the stun belt is visible to the jury. *See e.g.*, United States v. McKissick, 204 F.3d 1282, 1299 (10th Circuit 2000); United States v. Edelin, 175 F.Supp.2d 1 (D.D.C. 2001). These courts failed, however, to adequately consider those arguments presented to this Court herein.

In Zygadlo v. Wainwright, 720 F.2d 1221, 1223 (11th Circuit 1983), the court observed that shackles "may confuse the appellant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses." It is difficult to see how the use of a 50,000 volt stun belt would alter this possibility. In United States v. Durham, 287 F.3d 1297, 1306, the court held that it is reasonable to presume that the mere wearing of a stun belt will cause the appellant's focus of attention to be occupied by anxiety over the possible triggering of the belt. This cognitive pre-occupation - a factor present irrespective of the belt's actual operability - necessarily interferes with a defendant's right to

consult with counsel and participate in his defense. Id. at 1306. Furthermore, even a defendant who chooses not to consult with his counsel or participate in his own defense has a right to "follow [the] proceedings." Durham, at FN. 7. Here, the stun belt compromised that right.

In this case, the trial court set forth on the record three reasons for the use of the stun belt:

1. That it was its policy to place all defendants accused of a crime of a serious nature in either leg shackles or a stun belt during trial;

2. That the Sheriff's Department wanted appellant to wear the stun belt;

3. That "an innocent man on trial for murder is more dangerous than a guilty one."

First, the court conceded that appellant had done nothing to warrant the use of the stun belt, and fully acknowledged that appellant had never caused any problems in the courtroom in his previous appearances before the court. The court's ruling indicated that any individual on trial for a serious offense would be required to wear a stun belt during trial. Thus, the court's blanket policy of placing all defendants in restraints based on the nature of the crime charged is directly contrary to the requirement that there be a case by case determination by the court concerning the necessity for the use of restraints along with the close judicial scrutiny required before such restraints are employed.

As to the Sheriff's Department's request that appellant wear the stun belt, the trial court erred by deferring to law enforcement on that issue rather than exercising its own independent discretion. People v. Thomas, 125 A.D.2d 873, 874. Here, the court did not simply "consider the recommendation" of the Sheriff's Department. To the contrary, the court acceded to it simply because the judge - as most judges - was not an "expert in security." (A-27; T-578). This was error.

Finally, the court's comment that an innocent man on trial for murder is more dangerous than a guilty one erodes the presumption of innocence, has no basis in fact and impairs society's interest in the fairness and integrity of the judicial process.

One must also consider the psychological restraint imposed on appellant as a result of being required to wear the belt. The mere fact that appellant repeatedly stated his objection to the stun belt is itself a testament to the fact that he could not get his mind off of it. There was no stated procedure in place alerting appellant to what specific conduct might cause his keepers to activate the device. Moreover, and perhaps more importantly, there existed the possibility (not insignificant, as noted above) that the device could malfunction or be accidentally activated. Certainly, a reasonable person would not be able to get this thought out of his

head. Consequently, appellant could not be expected to be able to devote the requisite time and attention - a right under our constitution - to confer with his attorney and participate in his defense.

The use of the stun belt psychologically inhibited appellant from meaningfully participating in his defense of the charge against him. The presence of a stun belt necessarily preoccupies a defendant's thoughts, impairs his ability to focus on the proceeding and affects his demeanor before the jury. People v. Mar, 52 P.3d 95, 106 (Cal. 2002). Here, appellant was forced to defend himself under the constant fear of a severe and debilitating electrical shock. The mental anguish, anxiety, and discomfort of wearing this device adversely affected appellant's ability to be present at his trial.

Furthermore, whether the appellant's concentration was *in fact* distracted by the belt is not the issue. The simple possibility that the belt *could* distract the appellant is what is dispositive. This was made clear in Zygadlo, *supra*, where the court noted that restraints "may confuse the appellant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses." The Deck court similarly indicated that the *possibility* of impairing the appellant's constitutional rights was the dispositive issue. Specifically, the Court observed that the use of shackles diminished the defendant's Sixth Amendment rights

because their use *can* interfere with a defendant's ability to communicate with his lawyer. Deck at 631.

Based on the foregoing, the undersigned urges this Court to hold that the use of a stun belt significantly impairs the ability of a defendant to participate in his own defense and must be subjected to the same close judicial scrutiny applied to the use of other physical restraints. The trial court's requirement that appellant wear an electronic stun belt deprived him of his state and federal constitutional rights to counsel, due process of law, and a fair trial.

Appellant's ability to focus on the trial and confer with his attorney was irreparably and unjustifiably impeded. Accordingly, the judgment of conviction should be reversed and a new trial ordered.

CONCLUSION

The judgment should be reversed.

Respectfully Submitted,

Thomas Theophilos, Esq.
Attorney for Appellant

To be argued by:
THOMAS THEOPHILOS, Esq.

Oral argument requested
Time requested: 30 minutes

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POINT 1

THE USE OF AN ELECTRONIC STUN BELT TO PHYSICALLY AND PSYCHOLOGICALLY RESTRAIN APPELLANT DURING HIS TRIAL DEPRIVE HIM OF A FAIR TRIAL AND DUE PROCESS OF LAW

The People argue that case law respecting defendants who are shackled during trial is not applicable to the instant case because shackles are clearly visible to a jury and are more likely to physically inhibit the defendant's movements. (People's Brief at 2). Missouri v. Deck, 544 U.S. 622, does involve a defendant who was shackled. However, the Deck Court set forth criteria to be used by a court when deciding to impose restraints in general. Deck, for example, emphasizes how a particular restraint may impair a defendant's ability to participate in his own defense, confuse his mental faculties, interfere with his ability to communicate with counsel, and compromise a dignified judicial process. These criteria are all directly pertinent to the case at bar. Indeed, Deck is cited in the federal court cases mentioned in appellant's principal brief dealing with the issue of stun belts.

The People further argue that stun belts do not physically restrict a defendant's movements or speech in the way that shackles, handcuffs, or gags do and therefore courts should use a less stringent standard of review to determine

whether the use of a stun belt violates one's constitutional rights. (People's Brief at 2-3, 5). This contention ignores the argument that use of a stun belt necessarily preoccupies a defendant emotionally and psychologically so as to effectively interfere with his ability to participate in his own defense. Furthermore, it may cause him to more severely restrict his movements than shackles for fear of being electrically shocked. U.S. v. Durham, 287 F.3d 1297, 1306.

The key to determining whether a restraint violates one's constitutional rights is whether or not it *may* have impaired a defendant's ability to participate in and fully focus on his defense. In Deck, the high court spoke of the *possibility* of an impairment of one's rights when it observed that shackles *can* interfere with an accused's ability to communicate with his lawyer and participate in his own defense. Deck at 631; italics added. Indeed, the People essentially concede that the issue is whether or not there is a possibility that restraints *may* impair a defendant's rights. Specifically, they note that historically the courts have determined that a defendant's ability to confer with counsel or concentrate on the trial *may* be impaired if he is placed in physical restraints. (People's Brief at 4-5).

The standard to apply in this case as in many cases involving constitutional issues is one of reasonableness. Specifically the question to be addressed is whether or not it is reasonably possible that requiring one to wear the stun belt

would interfere with his ability to participate in his own defense. This was the holding in U.S. v. Durham, 287 F.3d 1297, which stated that it was *reasonable* to assume that wearing a stun belt diverts a defendant's focus of attention away from the trial. Id. at 1306. The Durham court observed that stun belts *may* interfere with the defendant's ability to direct his defense. Id at 1306. Moreover, they have the *potential* to be highly detrimental to the dignified administration of criminal justice. Id. Italics added.

The People further argue that the trial court had a legitimate basis to require that the defendant wear the stun belt. They reiterate that the reasons expressed by the judge for requiring the belt included the following: the charge of murder is serious; the stun belt was required in the interest of security; the judge offered leg shackles to the defendant; the defendant was dangerous; a court officer requested that the belt be worn. (People's Brief at 6). The claim that the defendant was dangerous was predicated exclusively on the fact that he was charged with murder and the claim that the stun belt was required in the interest of security was also predicated on the fact that the defendant was charged with murder. That the court offered the option of leg shackles is nothing but a further expression of the judge's opinion that the defendant might be a security risk because of the nature of the charges. The contention that the court officer wanted the stun belt is equally

unhelpful. The Sheriff's Department never offered a reason for the request. It is entirely conceivable that the request was predicated on the nature of the charges.

All of the reasons proffered by the People are merely a reiteration of the judge's real reason for requiring the belt, which was exclusively predicated on the fact that the defendant was on trial for murder. This violates the requirement of Deck that the use of restraints must be predicated on the development of a case specific record. Furthermore, Deck involved a defendant facing capital murder charges and the court required that numerous criteria exclusive of the nature of the charge be satisfied before restraints could be employed. Deck, therefore, stands for the proposition that the nature of the charge standing alone is not a sufficient predicate to require the imposition of restraints. Unquestionably, the trial court violated the principles enunciated in Deck when it stated twice on the record that the defendant had done nothing wrong to warrant the use of the belt (A-16, 17; T-428, 429) and further told the defendant: "Pete...it's not personal." (A-19; T-431).

The People claim that the trial judge "...not[ed] his opinion that the defendant was dangerous..." (People's Brief at 7). The People cite to A-27 and T-578 to support this claim. In fact what the judge said on that page of the transcript is: "I think an innocent man on trial for murder is more dangerous than a guilty man." To the extent that this statement can be construed as an opinion that the

defendant is dangerous, it is predicated on his innocence. Claiming that a defendant is more dangerous because he is innocent and using that as a reason to impose restraints has no basis in law and erodes the presumption of innocence and the appearance of fairness requisite to judicial proceedings. Further, the judge cites to no specific studies or opinions nor does he offer any rationale to support his contention.

The People assert that a defendant's non-obtrusive courtroom behavior should not be a dispositive factor in determining whether or not a stun belt should be employed. They reason that such a conclusion would force judges to stand by and wait for a defendant to cause a dangerous situation in a courtroom prior to imposing the restraint (People's Brief at 7). This amounts to a claim that because it is possible that the defendant could cause a security risk that therefore the belt should be required. Such a standard sweeps with a broad brush and would require the wearing of restraints in derogation of the criteria mandated in Deck. It is interesting to note that the People believe the belt should be worn because of a theoretical possibility of the defendant engaging in disruptive behavior, but claim that the defendant does not have a right to decline to wear the belt because of a very real likelihood that it may interfere with his rights to a fair trial.

The People argue that the record does not support the conclusion that the

jury ever noticed the belt. (People's Brief at 9). However, the only way to definitively establish a record on this issue would be to conduct a *voir dire* of individual jurors and ask them whether or not they noticed the belt. In any event, appellant clearly objected on the basis that his gait, posture, and mannerisms were affected by the belt and neither the people nor the court ever contradicted this claim. Thus, there is every reason to believe that the jury *may have* known that appellant was restrained.

Appellant explicitly expressed concern that the jury might take notice of the fact that he was scratching himself and leaning forward and otherwise assuming an altered posture as a result of being forced to wear the belt. (Appellant's Brief at 5). The People attempt to minimize this concern by claiming that "a juror viewing the defendant sitting forward in his seat might presume only that the defendant was alert and participating in his trial." (People's Brief at 9). This constitutes rank speculation and there is no way for anyone to know how the defendant's appearance actually impressed the jury.

The People assert that there is no evidence in the record to establish that appellant was in fact impaired or otherwise unable to concentrate on the trial or communicate with counsel. (People's Brief at 6). This amounts to a claim of harmless error. However, harmless error is inapplicable in this case.

It is impossible to establish empirical proof of cognitive impairment due to the imposition of restraints. Indeed, it is not possible to empirically prove that visibly shackling a defendant impaired his rights. It is conceivable that some jurors may be sympathetic to a defendant so-restrained prior to a finding of guilt and vote to acquit partly because he was shackled. The stress of being attached to 50,000 volts could easily impact the operation of one's mind. It does not prevent one from thinking altogether or speaking in court.

Empirically proving cognitive impairment because restraints were employed requires one to predict what the defendant's thought process would have been if the trial had been conducted without the belt – an obviously impossible task in this case. See, Riggins v. Nevada, 504 U.S. 127, 137, which rejected harmless error analysis when it said that "the consequences of compelling a defendant to wear prison clothing" or forcing him to stand trial while medicated "cannot be shown from a trial transcript." See Also, People v. Damiano, 87 N.Y.2d 477, 484 and People v. Jones, 47 N.Y.2d 409, 417, rejecting harmless error analysis because the court could not assess the prejudicial impact of the complained of error; People v. Hoffler, 53 A.D.3d 116, 123-124, where the court said "we find the applicability of harmless error to be particularly inappropriate here due to the impossibility of quantifying or otherwise assessing the effect of this defect on the proceeding."

Furthermore, wearing a stun belt impedes a defendant's right to be present at his own trial (Durham, 287 F.3d 1297, 1308) and thereby necessarily also impairs his right to counsel, to confer with counsel and to assist in his own defense. If the belt caused the defendant's concentration to fail during critical testimony it is the de facto equivalent of his absence from a material stage of the proceedings in which case harmless error analysis would be inapplicable. People v. Mehmedi, 69 N.Y.2d 759; People v. Chichester, 197 A.D.2d 699; People v. Johnson, 189 A.D.2d 318; People v. Jones, 159 A.D.2d 644; People v. Boyd, 166 A.D.2d 659. Furthermore, such errors are reviewable even if not preserved at the trial court. Id. Impeding one's ability to concentrate at trial necessarily also compromises one's right to self representation, the denial of which is similarly not amenable to harmless error analysis. McKaskle v. Wiggins, 465 U.S. 168, 177, FN. 8. In Holbrook v. Flynn, 475 U.S. 560, 568-9, the Supreme Court held that shackling is inherently prejudicial - - terminology that is inconsistent with the application of harmless error analysis. Durham did give lip service to harmless error analysis but stated that the standard under such an analysis is whether "the defense was harmed" by the required use of the stun belt. Durham, supra, at 1309. However, such a standard necessarily considers the same criteria applicable to determining whether the defendant's constitutional rights were violated in the first

place. Deck cryptically mentions harmless error analysis in a single sentence at the end of the opinion but also refers to shackling as "inherently prejudicial," which as previously stated constitutes terminology inconsistent with an application of such an analysis.

Recall also that in this case the court delegated its duty of judicial scrutiny to the Sheriff's Department. The delegation of judicial responsibilities to non-judicial personnel is error that is also not subject to harmless error analysis and is reviewable even if not preserved. People v. Jones, 159 A.D.2d 644; People v. Boyd, 166 A.D.2d 659.

As an argument in the alternative, even assuming that harmless error analysis applies, it is the People who have the obligation to prove that a violation of the defendant's constitutional rights was harmless. Durham, supra at 1309. The People in their reply brief, however, erroneously placed the burden on the defendant when they said that there was no evidence in the record to establish that the defendant's rights were impaired (People's Brief at 6). Nevertheless, despite the fact that the defendant has no burden, he put forth affirmative evidence on the record that the belt did cause him harm including, but not limited to, claims that the jury would notice the belt or perceive that his gait or appearance was altered so as to create a suspicion in the minds of the jury that he was being physically

restrained and that his concentration was impaired. The trial court never made findings of fact which contradicted any of these claims and the People at trial did not contradict them either. In fact, the trial judge found that the defendant required medical treatment to deal with certain of the impairments caused by the belt and basically conceded the legitimacy of the defendant's complaints when he came close to reversing his ruling only to relent to the request of the court officer (A-18-19; T-430-431).

The People cannot meet their burden on this issue by establishing that the defendant cannot point to some argument or issue that would have been raised had the belt not been worn (Durham, supra at 1309). However, the People basically made such a claim when they asserted that the defendant's sporadic arguments at trial meant that the belt caused him no constitutional harm (People's Brief at 10-11). The People should not be allowed to claim that error was harmless simply because the defendant spoke. Simple speech by the defendant on one issue does not permit one to conclude that his ability to speak on that issue or on other issues was not impaired. Furthermore, in the case at bar, most of the time that the defendant spoke he did so to protest the belt. The People's claim therefore reduces to an argument that if the defendant preserves the record by objecting that he automatically loses his right to appeal the issue.

CONCLUSION

The judgment should be reversed.

Respectfully Submitted,

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