Spring 3-1-2003

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The "Stunning" Truth: Stun Belts Debilitate, They Prejudice, and They May Even Kill

Philip H. Yoon*

I. Introduction

Brian Hill ("Hill") was sitting in an Alameda County, California, courthouse on July 7, 1998, when he suddenly flipped over backwards, tumbled from his chair, and convulsed on the floor for several seconds.1 Hill was representing himself during the jury selection phase of his assault trial when potential jurors saw him fall to the ground and convulse.2 Hill was sent to the hospital to have his heart monitored.3

Hill's convulsions did not occur because of a seizure. Rather, an Alameda County sheriff's deputy leaned over a chair and accidentally triggered the remote control of the stun belt that the sheriff's department put on Hill before his appearance in court.4 The incident occurred only days after another California judge ordered that a courtroom deputy shock Ronnie Hawkins, a defendant who was wearing a stun belt, because he was interrupting her and disrupting the court.5

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2. Flaherty, supra note 1, at 1.

3. Id.


5. Flaherty, supra note 1, at 1; Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244, 1248 (C.D. Cal. 1999) ("Hawkins I"); see also Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1233, 1242 (9th Cir. 2001) ("Hawkins II") (holding that broad injunction to prevent use of stun belts is
These two incidents in the California courts are examples of a growing trend—the use of stun belts during trials. In Hill's case, the stun belt was triggered without any provocation by the defendant, while in Hawkins's, the judge ordered the shock because the defendant was being disruptive. Trial courts might use stun belts in place of, or sometimes even in conjunction with, other forms of restraint such as handcuffs or shackles. Unfortunately, courts in many states have sparse case law to guide them because stun belts are relatively new devices.

This Article explores the holdings of various appellate courts regarding the use of stun belts and advocates reasons why stun belts should not be used in any court proceeding, particularly in capital proceedings. Specifically, this Article examines the reasons why several state courts have either banned or severely restricted the use of stun belts in the courtroom. Part II briefly describes the actual stun belt and its intended physical and psychological effects on the wearer. Part III examines "accidental" discharges of the belt and the effects such "accidents" may have on a defendant. Part IV reviews the most recent state rulings regarding usage of stun belts in the courtroom. Part V briefly explores the use, or non-use, of stun belts in other countries. Finally, Part VI discusses how a defense attorney can protect her client when a court or law enforcement agency proposes putting the stun belt on the defendant.
II. The Stun Belt

I woke up a short time later to very intense shocking pain running through my body. This electrical current was so intense that I thought that I was actually dying. I had not been causing any trouble; I was belly chained, shackled, seat belted in, and there was a fence between the officers and me, so there was absolutely no reason for them to be using this device on me... Once I was in the cell, several officers came into the cell and again I was shocked by the stun-belt. This electrical blast knocked me to the floor...

"Electricity speaks every language known to man. No translation necessary. Everybody is afraid of electricity, and rightfully so."

Before one can determine whether courts should use stun belts, it is important to understand the nature of the device. The belt that courts use most often is the Remote Electronically Activated Control Technology ("REACT") belt, which is manufactured by Stun-Tech, Inc. The belt is placed over the defendant's waist, and prongs that are connected to two nine-volt batteries are attached to the defendant over the left kidney area. The belt is designed to deliver a 45,000-50,000-volt shock for eight seconds when activated by a remote

unusual punishment). Dahlberg's Comment explores these concerns in detail; therefore, these concerns, although extremely important, will not be further discussed in this Article. See generally Dahlberg, supra note 8.


13. Dahlberg, supra note 8, at 242-43. Another type of belt used commonly is the Remotely Activated Custody Control ("RACC") belt. See Cruelty in Control, supra note 11, at 6 (stating that REACT and RACC devices were only stun belts in use at 1999); see also Rick Minter, Remote-Control Stun Belt Debuts in Clayton Court, ATLANTA J. & CONST., Dec. 9, 1992, at D2, 1992 WL 4641607 (stating that RACC belt was placed on capital murder defendant). Interestingly enough, the defense attorney in the Georgia case favored the stun belt over leg irons or other forms of restraint. Minter, supra, at D2. The attorney stated, "I like it because the jury doesn't see my client in handcuffs.” Id. This case, however, took place in 1992, when very little was known about stun belts or of their existence. Id. Defense attorneys today may need to decide what form of restraint is the lesser of two evils for their clients. See infra, Part VI (examining decisions defense attorneys must make when faced with possible usage of stun belt).

14. Dahlberg, supra note 8, at 247.
control that is within 300 feet of the belt.\textsuperscript{15} Once someone activates the belt, that person cannot stop the shock manually; the shock will last for the full eight seconds.\textsuperscript{16}

The force of the shock knocks most wearers to the ground.\textsuperscript{17} The victim may shake uncontrollably and could remain incapacitated for up to fifteen minutes.\textsuperscript{18} Some victims have suffered more severe or long-term effects, such as muscular weakness for thirty to forty-five minutes, immediate and uncontrolled defecation and urination, welts on the skin that require as long as six months to heal, heartbeat irregularities, and seizures.\textsuperscript{19} Furthermore, the stun belt could cause more severe injuries:

For one thing, some at-risk hearts appear healthy. "You shock someone with 50,000 volts of electricity and that person has some unrecognized congenital problem or conduction mechanism in their heart, and you put them at great risk for arrhythmia [sic]," says Armand Start, a medical doctor who runs the National Center for Correctional Healthcare Studies. "You can't predict this. You can't determine the conduction mechanism in a heart. Arrhythmia [sic] mostly happens in healthy hearts."\textsuperscript{20}

Stun-Tech itself has stated that the belt has strong psychological effects on the wearer. A Stun-Tech distributor advertised the stun belts as creating a "very psychological" effect, and that "at trials, people notice that the defendant will be watching whoever has the monitor."\textsuperscript{21} In fact, one publication has quoted Stun-Tech as saying that "[o]ne of the great advantages [of the stun belt] ... is its capacity to humiliate the wearer."\textsuperscript{22} The stun belt's intended use, therefore, is to control the mind of the defendant.\textsuperscript{23} One court has even compared the effects

\begin{itemize}
\item \textsuperscript{15} Id. at 247, 247 n.40.
\item \textsuperscript{17} Dahlberg, supra note 8, at 248 (citing Anne-Marie Cusac, Stunning Technology: Corrections Cowboys Get a Charge Out of Their Sci-Fi Weaponry, THE PROGRESSIVE, July 1, 1996, at 18, 1996 WL 9254174).
\item \textsuperscript{18} Id. (citing Cusac, supra note 17).
\item \textsuperscript{19} See People v. Mar, 52 P.3d 95, 103 (Cal. 2002) (quoting People v. Mar, 92 Cal. Rptr. 2d 771, 776 (Cal. Ct. App. 2000)) (examining characteristics of stun belts).
\item \textsuperscript{20} Cusac, supra note 17.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Mar, 52 P.3d at 111 n.8 (quoting William F. Schulz, Cruel & Unusual Punishment, N.Y. REV. BOOKS, Apr. 24, 1997, at 51).
\item \textsuperscript{23} See id. (discussing magazine article that described stun belt’s promotional materials as stating: [O]ne of the great advantages [of the stun belt], the company says, is its capacity to
\end{itemize}
of stun belts to "the forced administration of antipsychotic medication to a criminal defendant in advance of, and during, trial." 24

A final concern is the potential physical impact that the mental effects of the belt can cause. The president of Stun-Tech in 1996 stated, "We don't recommend that [the stun belt] be placed on anyone who has a heart condition. The reason is that, if they have to wear it for eight hours, there's a tremendous amount of anxiety. The fear will elevate blood pressure as much as the shock will." 25 These concerns, however, indicate only the potential mental effects before any shock occurs. If the thought of an officer pushing the button at the slightest indiscretion is terrifying to the defendant, one can only imagine the fear of a defendant who has been shocked unexpectedly.

III. "Accidental" Discharges and Their Effects

Jeffrey Remington was convicted in 2000 of capital murder. 26 On August 24, 2000, at 8:30 a.m., the jury was thirty minutes away from continuing its deliberations in the penalty phase of trial. 27 At that time, Remington was waiting for his counsel when his stun belt accidentally shocked him. 28 Remington was taken to the hospital and therefore was absent from court during jury deliberations. 29 Remington made a motion to set aside the verdict because he was not present during deliberations, but the court denied his motion. 30

(quoting Schulz, supra note 22, at 51)).

24. Id. at 112. The Mar court admitted that the medical and psychological risks of the involuntary use of stun belts were not as well established as those risks associated with antipsychotic drugs. Id. The two situations raised enough of the same concerns, however, for the court to question seriously the belt's effect on a defendant's ability to adequately defend him- or herself at trial. Id.; see also infra Part IV.B (describing Mar's effect on use of stun belts in California).

25. Cusac, supra note 17. Some courts state that, although the voltage may appear high, the amperage of the discharge is low, which should cause minimal pain. See United States v. Durham, 219 F. Supp. 2d 1234, 1238 (N.D. Fla. 2002) ("Durham II") (discussing characteristics of stun belt). Evidence of actual discharges, however, indicate that the pain is much more than "minimal." See Flaherty, supra note 1 (reporting on case of Brian Hill, who convulsed and was sent to hospital after stun belt discharged).


27. Id. at 635.

28. Id.; see also Tim Harrington, Jury Recommends Death for Remington, THE DAILY NEWS LEADER, Aug. 25, 2000, at 1A (stating that spokesman from Virginia Department of Corrections claimed that stun belt "was accidentally activated by a corrections officer").

29. Remington, 551 S.E.2d at 635.

30. Id. at 636. The Supreme Court of Virginia upheld the conviction and the denial of Remington's motion because his counsel agreed to allow the jury to deliberate in Remington's absence. Id. The court noted further that the defendant would have been held in custody during deliberations anyway. Id.
Remington’s example illustrates the potential problems which could arise if a defendant is shocked during trial. The problems become even more of a concern if the shock occurs during an important part of trial. Brian Hill was shocked during jury selection. Roy Hollaway was shocked during closing arguments of the penalty phase of his trial. According to 1998 statistics, approximately forty-three percent of actual activations of stun belts were accidental; in other words, the activation was in no way caused by actions of the defendant. These cases illustrate why any defendant should be concerned if she is forced to wear a stun belt.

Another potential concern is whether many of these “accidental discharges” were actually accidents. In most cases, a police or court officer controls the remote control device. In many cases, these are the very people, rather than the judge, who decided that the defendant needed to wear the belt. Although the judge instructs the officers to activate the stun belts on her command, the officers do not always follow the judge’s command. There have been the occasional, isolated incidents in which an overzealous police officer reacted poorly to a defendant or prisoner. The system often justifies the use of stun belts by requiring a judge to give the shock order, but it is the person holding the remote who actually wields all the power.

31. See Flaherty, supra note 1 (reporting on Hill’s case); see also supra Part I (discussing Hill’s shock).


33. Dahlberg, supra note 8, at 289. But see Durham II, 219 F. Supp. 2d at 1239 (stating that of forty-five activations, eleven were accidental, with seven of eleven accidental activations having occurred before plastic guard was installed over activation button). The court failed to note how many of the total activations occurred after the installation of plastic guards. This failure makes a comparison of accidental activation to total activation after installation of the plastic guard impossible.

34. See Durham I, 287 F.3d at 1301 (“The belt is controlled by a remote device held by a security official in the courtroom.”).

35. See State v. Flieger, 955 P.2d 872, 872-73 (Wash. Ct. App. 1998) (quoting trial court’s statement that it would defer to judgment of Sheriff’s Office to determine if shock device should be used on defendant); see also Cruelty in Control, supra note 11, at 16 (stating that in many jurisdictions, sheriff’s office makes initial decision to fit defendant with stun belt).


37. See Cruelty in Control, supra note 11, at 27 (quoting inmate who said he was shocked while he was sleeping, that he was later shocked again without provocation, and that officers were “laughing and making jokes” after administering the shock).

38. For example, it is very easy for someone in possession of the remote to activate the shock belt and then simply claim it was an accident. See Harrington, supra note 28 (stating that spokesman from Virginia Department of Corrections claimed that belt was accidentally activated by officer).
IV. Recent Rulings in Various States

Courts in a variety of jurisdictions have reacted differently to the use of stun belts in the courtroom. Because stun belts are new, some jurisdictions have relied on the case law of other states that have used stun belts for a longer period of time, while some jurisdictions have addressed the problem independently. The following part describes some of the more prominent cases involving stun belts. The cases are listed in order of the most to least restrictive rulings.

A. Indiana: Complete Ban

Matthew Wrinkles was convicted of murder and sentenced to death in Indiana. Before his trial, the trial court told his counsel that he would need to choose between Wrinkles wearing the stun belt or wearing shackles. Wrinkles's attorney chose the stun belt because he thought the jurors would see shackles, but would not see the belt. Wrinkles appealed his conviction and argued that his counsel was ineffective because he chose the stun belt.

The Supreme Court of Indiana held that, from that point on, stun belts would not be permissible in Indiana state courtrooms. The court found that other forms of restraint would serve the same purposes "without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated." Indiana's simple policy, therefore, is the most restrictive in that it no longer allows stun belts in its courtrooms.

B. California: Virtual Ban

Ronnie Hawkins filed a class-action suit in the United States District Court for the Central District of California on behalf of all persons in the custody of the Los Angeles County Sheriff's Department, future defendants of the Los Angeles courts, and any person forced to wear a stun belt, and for an injunction

41. *Id.*
42. *Id.*
43. *Id.* at 1194 (holding that "henceforth stun belts may not be used on defendants in the courtrooms of this State."). Unfortunately for Wrinkles, he was not able to use this argument to his advantage because he alleged ineffectiveness of counsel for this claim. *Id.* at 1195. The standard for stun belts by the Supreme Court of Indiana was not established when Wrinkles's counsel made his decision. *Id.* Wrinkles's counsel testified that he did not object because both he and co-counsel believed that the trial court would make Wrinkles wear shackles instead. *Id.* Therefore, the Supreme Court of Indiana found that Wrinkles did not sufficiently demonstrate that his counsel's performance constituted ineffective assistance. *Id.* See generally Strickland v. Washington, 466 U.S. 668 (1984) (setting forth standard for ineffective assistance of counsel).
44. *Wrinkles*, 749 N.E.2d at 1195.
to prevent any Los Angeles court or the Los Angeles Sheriff's Department from using stun belts. Hawkins brought this action after the trial judge ordered a court official to shock him because he was disruptive in the courtroom. The district court granted his motions for class certification and preliminary injunction. The district court's ruling forbade the Los Angeles County Sheriff from seeking a judicial order to place or activate a stun belt on any prisoner in his custody pending the outcomes of any of those prisoners' trials. The United States Court of Appeals for the Ninth Circuit reversed in part and remanded for modification of the injunction, which it found to be overly broad. The Ninth Circuit, rather than banning stun belts outright, conducted a balancing test between the safety of the court, which included its personnel, and a defendant's rights. The Ninth Circuit stated that the more the issue becomes one of security and less of disruption, the more stun belts become "less prejudicial and the alternatives more so." However, even though the Ninth Circuit ultimately remanded to the district court because the injunction was overly broad, the Ninth Circuit's language implied that it would require specific findings, on the record, of a trial court's justification for using a stun belt.

45. *Hawkins I*, 33 F. Supp. 2d at 1249 (describing Hawkins's lawsuit and request for preliminary injunction under 42 U.S.C. § 1983 against use of stun belts by any Los Angeles County Municipal or Superior Court judge or by Los Angeles County Sheriff's Department); see also supra Part I (describing judge's order to shock Hawkins for being disruptive). Hawkins was convicted of felony burglary and theft charges. *Hawkins I*, 33 F. Supp. 2d at 1248. Hawkins allegedly made threats of violence to the court, so the court ordered the Los Angeles County Sheriff to place a stun belt on Hawkins during a motion hearing and for his sentencing. *Id.* Hawkins was disruptive and spoke out of turn, so the judge ordered the courtroom deputy to activate the belt. *Id.* Hawkins brought suit and sought a preliminary injunction under 42 U.S.C. § 1983 against the use of stun belts by any Los Angeles County Municipal or Superior Court judge or by the Los Angeles County Sheriff's Department. *Id.* at 1249.


47. *Id.* at 1263.

48. *Id.* at 1262.

49. *Hawkins II*, 251 F.3d at 1242-43 (stating that injunction was overly broad because it banned use of stun belts for courtroom security purposes).

50. *Id.* at 1240.

51. *Id.* at 1242.

52. See *id.* at 1233 n.2 (stating that it did not see trial judge's latter claim of concern of danger in the transcript). The district court later dissolved the preliminary injunction after Hawkins submitted the Sheriff's Department's revised stun belt policy. Hawkins v. Comparet-Cassani, No. CV9805605 DDP, 2002 WL 227081, at *1 (C.D. Cal. Feb. 6, 2002). The revised policy restricted use of stun belts to situations of documented attempts or actual escapes from custody, documented violent behavior while in custody, a history of attacks on peace officers, corrections officers, courtroom personnel, or courtroom occupants, or threats of violence toward any victim, witness, courtroom personnel, or courtroom occupant. *Id.* Furthermore, the revised policy restricted activation of the belt to situations of actual or threatened acts of violence, attempted escapes by the defendant, or any attempt to disable or remove the device. *Id.* The district court determined that the revised policy specifically prohibited activation of stun belts solely for verbal disruptions and that it complied with federal law. *Id.* The district court, therefore, dissolved the preliminary
The Supreme Court of California decided *People v. Mar* the next year and issued an opinion with more specific holdings. The defendant, James Mar ("Mar"), did not wear a stun belt during the first day of trial testimony, and the prosecution was able to present testimony without disruptions or incidents from Mar. On the morning of the second day of testimony, Mar's counsel told the court that Mar was now wearing the stun belt and that it was "making him very, very nervous and agitated." The court talked to Mar and his defense counsel. Mar's counsel eventually stated that Mar was willing to wear the stun belt during most of the trial, but that he wanted the belt removed during his testimony. The court deferred its decision and proceeded through the rest of the day without incident from Mar. The next day, the court decided to keep the belt on Mar, stating:

I think the belt's the best insurance that he has that he will comport himself appropriately in the courtroom... so I think in all fairness to him, given the volatility of some of the situations he's found himself in and how he's responded, the Court's of the opinion it's in his best interest, in the time that he is testifying and the remainder of the trial, that the belt remain on...

Mar demonstrated a few instances of excitement while testifying, but he was able to testify to his version of the events, and the trial proceeded without any activation of the belt.

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53. *Id.*
54. See *Mar*, 52 P.3d at 98 (holding that trial courts must consider whether use of proposed stun belt is justified over using a lower voltage belt with a shortened duration and that trial courts should lean more towards using more traditional physical restraints because of the number of accidental activations).
55. *Id.* at 100.
56. *Id.*
57. *Id.* at 100-01.
58. *Id.* at 101.
59. *Id.* at 102.
60. *Mar*, 52 P.3d at 102. Notably, the trial court did not make the original decision to put the stun belt on Mar:

So the bailiff and the security people are concerned that for whatever reason you do have strong emotions and you feel those emotions—that's not unusual—but in your situation, because of what happened at Taft and because of an incident, I guess, that happened several—well, a month or so ago in the courthouse in the transportation situation, you got crossways with somebody in the security detail—and I don't know anything about that other than the fact that something did happen...

*Id.* at 101. In fact, the court appeared to have little information and only very vague ideas on which to base its decision.
61. *Id.* at 102.
The Supreme Court of California noted that the issue of stun belt use in California courtrooms was a matter of first impression. It would therefore decide not only whether stun belts would be available in only the same limited circumstances as other physical restraints, but also whether there were features and aspects of stun belts that were distinct enough to require the trial court to consider additional factors before it could require a defendant to wear one. The court first reaffirmed that defendants could not be subjected to physical restraints of any kind in the courtroom while in the presence of the jury unless there was a "showing of a manifest need for such restraints." It then stated that its prior holdings on physical restraints applied also to stun belts. It found that even though stun belts might not be visible to a jury, their potential effect on a defendant's mental state meant that the same standards and procedural requirements for other physical restraints applies also to stun belts. The court found that the trial court's decision was based on its determination that the stun belt was in Mar's best interest and not that Mar posed a danger to the courtroom. As a result, the trial court failed to demonstrate a "manifest need" for using the stun belt over Mar's objection.

The Mar court created a virtual ban on stun belts in the California state courts. Trial courts first must consider all of the physical and psychological consequences of using the stun belt. The trial court then must find that the belt is "safe and appropriate under the particular circumstances." The Supreme Court of California now directs that stun belts must be "the least restrictive device that will serve the court's security interest." Because the Mar standard requires such a great amount of detail, a hearing on a motion to compel or prohibit the use of stun belts necessarily would take an enormous amount of

62. Id. at 97.
63. Id.
64. Id. at 104 (quoting People v. Duran, 545 P.2d 1322, 1327 (Cal. 1976) (discussing circumstances in which "manifest need" for physical restraints may appear)).
65. Id. at 106.
66. Mar, 52 P.3d at 106; see Duran, 545 P.2d at 1327 (holding that defendants cannot be subjected to physical restraints in courtroom while in presence of jury unless "manifest need" for restraints is shown).
67. Mar, 52 P.3d at 109.
68. Id.
69. See id. (stating that trial court must make specific findings of "manifest need" for stun belts).
70. Id. at 112-13.
71. Id. at 113-14.
72. Id. at 113.
time.\textsuperscript{73} It seems unlikely that trial courts would engage in such a laborious process when other forms of restraint would be easier to impose.\textsuperscript{74}

The \textit{Mar} decision, therefore, appears to create a virtual ban on stun belts in California. \textit{Mar}, however, has not deterred at least one trial court in San Diego.\textsuperscript{75} Christopher Butler sought a new trial on the ground that the stun belt he was forced to wear during the trial made him too nervous to testify effectively in his own defense.\textsuperscript{76} The trial judge wanted Butler to wear the stun belt because he had tried to escape from jail "and was facing life in prison if convicted."\textsuperscript{77} At a post-conviction hearing, Butler testified "that he was terrified a shock could kill him if he made a mistake, or if the sheriff's deputy who held the remote control to the stun belt set it off accidentally."\textsuperscript{78} The trial judge, however, considered Butler's trial testimony to be "among the best" she had heard and thought that "[h]e was as conversational as any defendant I have ever seen as a lawyer or a judge."\textsuperscript{79} If this case is appealed, the decision of the California appellate courts could determine whether \textit{Mar} creates a virtual ban on stun belts in California.\textsuperscript{80}

\textbf{C. \textit{Washington-Trial Court, Not the Police, Decides}}

Phillip Flieger ("Flieger") was on trial for murder when, during voir dire, he asked the court to order that the "shock box" he was wearing be removed.\textsuperscript{81} The court stated:

\begin{itemize}
  \item \textsuperscript{73} \textit{Mar}, 52 P.3d at 112-14 (listing some factors trial courts must consider before approving use of stun belt).
  \item \textsuperscript{74} \textit{See Duran}, 545 P.2d at 1327 (stating that defendant cannot be subjected to physical restraints in jury's presence unless court makes finding of "manifest need" because of possible prejudice in jurors' minds, affront to human dignity, disrespect to judicial system, and effect restraints may have on defendant's decision to testify). On the other hand, courts that are considering the use of stun belts must take the \textit{Duran} factors into account in addition to the many physical and physiological consequences that the \textit{Mar} court cited. \textit{Mar}, 52 P.3d at 112-14. The court must then apply the "safe and appropriate" standard. \textit{Id.} at 113-14.
  \item \textsuperscript{75} \textit{See Onell R. Soto, Judge Won't Give Robber a New Trial; Sentencing is Set for Next Month, SAN DIEGO TRIB.,} Jan. 18, 2003, at NC1, 2003 WL 6561043 (reporting on case in which convicted robber was denied new trial despite claims that stun belt made him nervous during testimony).
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.}
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} As of this writing, the record for Butler's case was not available. It is not known, therefore, whether the trial court made detailed findings and whether it met the \textit{Mar} standards.
\end{itemize}
The Court is not the one that determines the initial security precautions, if you will, and the Court must defer to the Sheriff's Office in that regard, and if the Sheriff's Office determines that it's necessary to use the box, then unless shown otherwise, then the Court will respect the wishes of the Sheriff's Office in that regard. Two jurors admitted to the court that they noticed the shock box on Flieger's back and that they discussed it with each other. One of those jurors also stated that "he saw the sheriff holding something" and that he thought it might have been related to the shock box. The court only asked the jurors to stop their discussions of the shock box and allowed the trial to proceed while Flieger continued to wear the shock box. Flieger was convicted of second-degree felony murder.

The Court of Appeals of Washington reversed the conviction and remanded for a new trial. According to the court, the trial court erred when it delegated the determination of whether to impose restraints to the sheriff's office without making any real determination of its own. The Court of Appeals of Washington also found the fact that several jurors noticed the shock box to be determinative of potential prejudice to Flieger. Therefore, Washington appears to require, at a minimum, the trial court to make the decision of whether to use the stun belt.

It is important to note, however, that Washington's standard does not place all of the burden on trial courts to make these findings. A few months after Flieger was decided, the Court of Appeals of Washington found that a pro se defendant improperly and untimely objected to the use of a shock belt. The court took a disturbing turn from its analysis in Flieger and stated that "[t]he foundation for Mr. Cobos's nervousness is speculation and is not based upon a record of jury discussion about the restraint as was the case in Flieger [sic]." Even though the trial court made no record of why Cobos was made to wear the shock box or of who initially ordered the restraint, the court gave broad discretion to the trial court because the trial court "did not clearly defer the decision to the executive authorities or refuse to exercise its discretion as was the case in

82. Flieger, 955 P.2d at 872-73 (quoting trial court) (alteration in original).
83. Id. at 873.
84. Id.
85. Id.
86. Id.
87. Id. at 875.
88. Flieger, 955 P.2d at 874.
89. Id. at 874-75.
90. See id. at 873-75 (discussing trial court's duty to exercise its discretion of whether to impose restraints).
92. Id.
The dissent disagreed and found that Cobos's statement of nervousness "indicated the source of his concern and the prejudice he sought to avoid," and that the trial court's failure to hold a hearing was an abuse of discretion.

The majority acknowledged that the trial court "may have erred" by its failure to review the claim on the record, but it found that Cobos "prevented adequate consideration" of the claim because his objection was not timely. This burden on the defendant is not definitive because it is contained in an unpublished opinion, but the decision at least provides some procedural warnings to defendants and defense attorneys.

Other states also are requiring the judiciary, not law enforcement officials, to make the stun belt decision. California, for example, requires the court to determine specifically whether a manifest need exists for using a stun belt; the court must make its own specific findings and "may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others." At the federal level, the United States Court of Appeals for the Eleventh Circuit stated that "due to the novelty of this technology, evidentiary hearings are almost certainly necessary before a decision to employ a stun belt can be supported." Because of the constitutional issues raised by the use of stun belts, it is imperative that a judge, not a law enforcement officer, make the decision of whether to use the stun belt.

D. Nevada—The Prejudice Standard

Roy Hollaway was convicted of first-degree murder for strangling his wife. In closing arguments during the penalty phase, when the prosecutor was describing how violent Hollaway was, the stun belt Hollaway was wearing was activated. The shock to Holloway completely disrupted the proceedings. The court excused the jury and stated that it was "intolerable" that Hollaway was shocked by accident when he was doing "absolutely nothing." The court brought the jury back in and explained to it that Hollaway was wearing a stun belt.

93. Id., at *7 ("We can not discern from this record exactly why Mr. Cobos was made to wear the shock box or what role the court or prosecution played in the initial decision making.").
94. Id., at *11 (Schultheis, C.J., dissenting).
95. Id., at *7. The majority, however, may have ruled in favor of the State because it disapproved of defendants who act pro se. See id., at *8, *10 (stating that "Mr. Cobos acting pro se may be considered to have either invited any error or waived it by failing to object in a proper and timely fashion," and that "[t]his case well illustrates the folly of pro se representation"). One also may conclude that procedural default is a crucial element to any analysis on appeal.
96. Mar, 52 P.3d at 107.
97. Durham, 287 F.3d at 1306-07 n.8.
98. Hollaway, 6 P.3d at 992.
99. Id. at 993.
100. Id.
101. Id.
belt and that he did nothing to warrant its activation. The jury returned a verdict of death, and the court imposed the sentence of death.

The Supreme Court of Nevada affirmed the conviction of guilt, but reversed his sentence and remanded for a new penalty hearing. The court stated that "the timing of the belt's activation could not have been better to reinforce the image of Hollaway as an extremely violent man with whom authorities had to take exceptional security precautions." The court also noted that the jail recently acquired the stun belt and was testing it by routinely placing it on first-degree murder defendants. The court, however, did not affirmatively state that this incident alone was enough to reverse the death sentence. Rather, it stated that the combination of the unprovoked shocking and an error in jury instructions constituted a violation of Hollaway's Eighth Amendment right to a fairly imposed and reasonably consistent death penalty.

E. Eleventh Circuit—Lack of Findings and the Government's Burden

Jeffery Durham was on trial for several felonies when courtroom security decided that it needed to shackle Durham's legs and fit him with a stun belt before bringing him into the courtroom. The decision was based on Durham's recent attempts to break out of jail. Durham filed a motion to prohibit the use of the stun belt and cited many arguments against using the stun belt. Just before trial began, the court held a hearing, outside the presence of the jury, on Durham's motion. Durham's arguments were substantially similar to those laid out at the beginning of this Article. See supra Part II (listing numerous effects that stun belts have on defendants). Durham claimed:

Most stun belt models were designed to administer from 50,000-70,000 volts of electricity sustained over an eight-second period. Shock of that magnitude "typically causes the recipient to lose control of his limbs, to fall to the ground, and often to defecate or urinate upon himself." Durham also argued that the stun belt interfered with his rights to confer with counsel and to participate in his own defense. He further noted that a stun belt may prejudice the defendant in front of the jury, as the belt's presence may imply that the defendant is a violent individual that can only be controlled through extraordinary means.

Durham, 287 F.3d at 1301-02; see also Dahlberg, supra note 8, at 246-53 (describing actual and theoretical effects that stun belts have on defendants mentally and physically).
he also added that “he feared that Durham would be ‘more concerned about
receiving such a jolt than he is about thinking about the testimony and giving me
aid and assistance in the defense of this case.'” The court stated, “I don’t know if it’s interfering with your ability to com-
minate with [Durham]. He’s right beside you and you can communicate with
him . . .” The court then briefly addressed two questions: whether the device
could be adjusted to make Durham more comfortable and whether there was any
possibility of an accidental discharge. The only “evidence” the court received
about the possibility of accidental discharge was questions it asked of a deputy
marshal who was not under oath. The deputy marshal stated that each marshal
was trained in how the belt operates. The marshal also stated that there would
be no mistake, and that if the belt did go off, Durham was aware and advised of
the rules, regulations, and how it worked. The court denied Durham’s motion
with the conclusory findings that Durham was a heightened security risk and that
there was no rational basis for Durham to be apprehensive about the belt.

The Eleventh Circuit vacated Durham’s conviction and remanded to the
district court. The Eleventh Circuit was concerned primarily about the lack of
findings by the district court in denying Durham’s motion. The court outlined
the mental effects of the stun belt and the potential fear Durham may have over
the use of the belt. The court then turned to questions that it felt must be
answered in a proper hearing with sworn testimony, as opposed to the unsworn
testimony the district court received from the deputy marshal. Such questions
were:

Exactly what precautions does the Marshals Service take to ensure the
belt does not go off accidentally? What kind of training does the
deputy with the remote trigger receive? How is it relevant that after
the device is triggered, presumably sending Durham to the floor in

112. Id.
113. Id.
114. Id.
115. Id.
116. Id.; see id. at 1302 n.4 (stating that deputy marshal was not under oath).
117. Durham I, 287 F.3d at 1302-03.
118. Id. at 1303.
119. Id. The court made no factual findings about the operation of the stun belt or the
possibility of accidental discharge, and it made no explanation of why less severe restraints would
have been inadequate. Id.
120. Id. at 1309.
121. Id.
122. Id. at 1305.
123. Durham I, 287 F.3d at 1307.
pain, he is aware of 'the rules and regulations' of how the belt operates? 124

The court also stated that the trial court should have inquired into the criteria for triggering the belt, as well as the force and effect of the shock, in addition to the questions above. 125 The Eleventh Circuit concluded that the district court's lack of concern over these questions constituted reversible error. 126

The Eleventh Circuit's standard is not much different from the California standard. 127 The Eleventh Circuit, however, also indicated that the prosecution bears a burden of proof when the district court abuses its discretion in stun belt cases. 128 The Government now must prove that the burdens on the defendant's fundamental rights are harmless. 129 The court was concerned particularly about the possibility of a defendant being absent for a part of the trial due to the activation of the stun belt. 130 The court found that the right to be present at his or her trial and to participate in his or her defense are the key fundamental rights affected by the use of stun belts. 131 In order to counter a defendant's allegation of prejudice in stun belt cases, therefore:

[I]t is not sufficient for the government to point out that the defendant was represented by an attorney looking out for his interests, thus rendering the defendant's presence or participation at trial unnecessary . . . Nor is it sufficient for the government to argue that the defendant cannot name any outcome-determinative issues or arguments that would have been raised had he been able to participate at trial. 132

The court found that the Government could not rely solely on proof that an attorney acted with the defendant's interests in mind because of the importance of a defendant's active assistance at trial. 133 The court also found that the Government may not transfer the burden of proof to the defendant and oblige her to name the arguments she would have made had she been present. 134 The court held that the trial court's order for Durham to wear the stun belt hampered his ability to participate meaningfully throughout the trial. 135 Because the Gov-

124. Id.
125. Id. at 1306-07 n.8.
126. Id. at 1309.
127. See generally Mar, 52 P.3d at 95 (setting California's standard for use of stun belts in courtroom). See also supra Part V.B (describing California standard after Mar).
128. Durham I, 287 F.3d at 1308.
129. Id.
130. Id. at 1308-09.
131. Id. at 1308.
132. Id. at 1308-09.
133. Id. at 1309.
134. Durham I, 287 F.3d at 1309.
135. Id.
ernment did not meet its burden, the court vacated and remanded for a new trial.136

Durham’s effect on Florida state courts is unclear. The Eleventh Circuit stated that a stun belt “imposes substantial burdens upon a defendant’s constitutional rights.”137 However, the district court, on remand, determined that the stun belt, at least in Durham’s case, did not interfere with his constitutional rights.138 Before Durham, the District Court of Appeal of Florida for the First District stated that “[n]o formal hearing on the use of restraints is necessary, but where there is a total lack of a hearing, the decision should be remanded for a hearing.”139 However, even though Durham’s effect on Florida law is unclear, the Durham opinion and the subsequent “lengthy hearing” by the district court indicate that, at a minimum, substantial findings by the trial court are necessary before a defendant will be required to wear a stun belt.140

136. Id. On remand, the United States District Court for the Northern District of Florida denied Durham’s amended motion to prohibit the use of stun belts at trial. Durham II, 219 F. Supp. 2d at 1242. The court conducted a lengthy evidentiary hearing on Durham’s amended motion. Id. at 1235. The court found “practically no risk” of accidental activation, “no threat” to Durham’s health, and “no likelihood of undue embarrassment or prejudice to the defendant.” Id. at 1239. The court also determined that less restrictive security measures would not suffice because “Durham possesses a rare combination of skill, ingenuity, cunning, and fearlessness.” Id. at 1236. In addition, the court found that the stun belt would not interfere with Durham’s constitutional rights because the belt was “well and fully covered by the defendant’s coat,” Durham “was alert and actively participated, and consulted with his counsel throughout this five-hour hearing . . . during which he wore the stun belt,” and the Deputy Marshals were well-trained in the use of the belt. Id. at 1240-41. The most troublesome finding by the district court, however, was its denial of Durham’s request for a “medical evaluation to ensure that the device does not pose any unforeseen health problems to him.” Id. at 1242. The court stated that the belt did not pose any health threat to Durham because he “appears to be in excellent physical condition.” Id. It also found no evidence that he possessed or could possess any health conditions that could prohibit use of the belt and that his health records from the Bureau of Prisons did “not reflect any medical condition that would pose a health risk in this case.” Id. The court also stated that “there is no evidence in the record that the device is psychologically damaging to the defendant, even if not activated.” Id. It appears that the district court, in making its findings on the record, has shifted the burden of proof once again to defendants. See id. (listing failures of proof by Durham). Durham was convicted of his crimes soon after the district court’s decision; his lawyers indicated that there were plans to appeal. Robber Could Serve Time Underground, PENSACOLA NEWS J., Aug. 31, 2002, at 1C, 2002 WL 24846177. As of this writing, the Eleventh Circuit has not ruled on the district court’s new ruling.

137. Durham I, 287 F.3d at 1309.


139. Childers v. State, 782 So. 2d 513, 518 (Fla. Dist. Ct. App. 2001) (remanding for hearing to determine if counsel was ineffective for failing to object to use of stun belt without hearing).

140. See Durham I, 287 F.3d at 1309 (holding that trial court must make substantial findings before requiring defendant to wear stun belt); Durham II, 219 F. Supp. 2d at 1235 (stating that district court conducted “lengthy evidentiary hearing” to determine whether Durham may be
F. Virginia—To Be Determined?

As of this writing, *Remington v. Commonwealth* is the only reported case in Virginia that involves the use of stun belts. *Remington*, however, addressed the stun belt issue only tangentially in deciding whether defendants have a constitutional right to be present in the courtroom while the jury is deliberating in another room. *Remington* did not address the actual issue of stun belts themselves.

Neither the federal district courts in Virginia, nor the United States Court of Appeals for the Fourth Circuit, nor the United States Supreme Court have addressed the issue. As of now, there are no actual standards in Virginia for trial courts to follow in determining whether to use stun belts on defendants at trial. The lack of case law and standards gives defense attorneys all the more reason to plan carefully any objection to the use of stun belts.

V. Use (or Non-Use) in Other Countries

"[The Committee Against Torture] recommended that the United States abolish electro-shock stun belts and restraint chairs as methods of restraining those in custody . . . ."  

Attorneys will sometimes use international standards to strengthen their arguments against certain policies or statutes. If the attorney uses international standards as her only argument, she will argue that the policy or statute often violates norms of international law, or *jus cogens*. This argument, by itself, will not succeed, but an international norms argument used as a supplementary argument may assist in influencing an undecided court.

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141. 551 S.E.2d 620 (Va. 2001).
142. See *Remington*, 551 S.E.2d at 635-37 (addressing incident where defendant was unavailable in court during jury deliberations because he had been shocked accidentally).
143. See *id.* (addressing only constitutional concerns of lack of defendant’s presence in courtroom). The Supreme Court of Virginia determined that *Remington* did not have a constitutional right to be present because he waived his right to that claim when his counsel agreed to allow the jury to continue in *Remington*’s absence. Id. at 636. The court also added that *Remington* would have been in custody during the proceedings anyway. Id.
144. See *id.*
146. See *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002) (stating that defendant alleged that death penalty imposed on defendant who was a juvenile at time of offense violated *jus cogens* norms of international law).
147. See *id.*
According to Amnesty International, the United States was one of only two countries that utilized stun belts in 1999.149 The United Nations Special Rapporteur on Torture expressed concern specifically about "the use of practices such as chain gangs, of instruments of restraint in court and of stun belts and stun guns, some of which can only be intended to be afflictive and degrading, others of which have the same effect."150 In 2000, the United Nations Committee Against Torture recommended that the United States end its use of stun belts.151 The United States responded by claiming, in a clearly untrue statement, that stun belts are only used for prisoner transport.152

Worldwide, the use of any kind of electro-shock equipment is banned in most countries.153 The United States, however, remains active not only in using such equipment, but also in exporting it.154 Although the United States is not a signatory to any international agreement on the use of stun belts, clearly it strays from the policies of the vast majority of nations.

VI. Steps to Take If the Belt Might Be or Is Used

"If I sneezed the wrong way, that belt would react... [I feared] giving off the demeanor that I was guilty."155

A defense lawyer cannot underestimate the importance of investigation...
when use of a stun belt appears possible. The first step for a defense lawyer in a potential stun belt case is to see if the defendant is or has been wearing one. If the institution holding the defendant in custody puts a stun belt on her, counsel must bring such action to the attention of the court and make sure that notice appears on the record. Counsel should also look to see if a juror possibly can perceive that the defendant is wearing a stun belt; if there is any hint of the belt, counsel must argue that the belt is obviously prejudicial to the defendant. It is also important to emphasize the "alert juror" perspective—that is, to assume that at least one juror is carefully watching and would be likely to notice the belt. It is also important, therefore, to ensure that there is no indication that a bailiff or officer is holding the remote. Counsel should object immediately when the defendant is fitted with a stun belt regardless of the stage of trial. This is particularly true if the defendant has not exhibited any kind of violent behavior in the courtroom. Counsel should also be aware of any policies that the local jails may have regarding their use of belts and whether they have an "automatic policy" of putting belts on certain types of felons.

Defense counsel should emphasize cases in which stun belts accidentally shocked defendants and note that such "accidents" are not rare occurrences. Any accidental shock that occurs in front of a jury is sure to cause prejudice and would require either a mistrial or an overturned conviction on appeal. The combination of the high rate of accidental shockings and the potential for reversal may convince the court to examine other options more thoroughly. Counsel should also point out that even a completely hidden belt has prejudicial effects on the defendant because it will substantially affect the defendant's mindset during her testimony. Most of all, if the defendant is so wary of the stun belt that she is unable or unwilling to confer with her counsel, she is being prejudiced in an extreme manner.

156. Defense attorneys must keep in mind that the stun belt is designed to avoid detection by the jury and that a defendant may not immediately inform her counsel that she is wearing the belt.

157. See Flieger, 955 P.2d at 874 (holding that determination to impose restraints must come from court and not from bailiff or sheriff's office).

158. See id. at 873 (stating that two jurors admitted that they "noticed the shock box on Mr. Flieger's back and were discussing it").

159. See id. (stating that juror said he saw sheriff holding something which he thought was related to device worn by Flieger).

160. See Remington, 551 S.E.2d at 635-36 (finding that defendant was not prejudiced by accidental shock that sent him to hospital during jury deliberations because defense counsel did not object to proceeding with jury deliberations and because defendant did not have absolute right to be present in courtroom during jury deliberations).

161. See Mar, 52 P.3d at 100 (stating that Mar was fitted for stun belt after uneventful first day of trial).

162. See Holloway, 6 P.3d at 994 n.4 (stating that jail was testing new stun belt by "routinely putting it on first-degree murder defendants").

163. See infra Part III (discussing "accidental" discharges).
In capital cases, defense counsel must assert explicitly that the defendant's fundamental rights cannot be abridged. Counsel must be aware of any stun belt issues at the sentencing phase or the guilt phase. The issue of prejudice is most crucial for capital defendants because their lives are at stake; capital defense attorneys are encouraged to resist strongly any proposed form of restraint on their clients.

At a minimum, defense counsel should assert that the court must hold a hearing unless it immediately forbids the use of a stun belt. Counsel should cite Mar to indicate that any effect on the defendant's mental state requires a hearing to determine whether a stun belt at least meets the requirements of other forms of physical restraint. If the case is before a federal court, the Eleventh Circuit standard creates a solid framework on which defense attorneys may rely. Finally, if necessary, counsel should do a careful balancing test to determine whether another form of restraint, such as shackles, or stun belts would be more prejudicial to the jury. While capital defense attorneys should argue against the use of stun belts as much as possible, if there appears to be no way to avoid all forms of restraint, then the attorney must decide which form of restraint is least likely to influence the jury to convict and vote for death.

VII. Conclusion

Stun belts, despite what some courts will say, are still unreliable sources of restraint. The number of "accidental" activations is too high, and the consequences of the activations are too tolling, both physically and legally, for stun belts to be a part of American jurisprudence. Courts that consider only the "visibility" aspect of restraints must consider seriously the psychological effects of stun belts on a person's defense.

Even general rules have been lacking for the use of stun belts in the last ten years. Fortunately, in recent years, state and federal courts have begun to address the issue. Even more fortunately, several of the courts have determined that the

164. See Durham I, 287 F.3d at 1309 (stressing importance of defendant's constitutional rights).
165. See Holloway, 6 P.3d at 994 (stating that stun belt was activated during prosecutor's closing arguments for penalty phase of trial).
166. See Mar, 52 P.3d at 113-14 (holding that trial court must make specific findings of "manifest need" before approving use of stun belt).
167. See id. at 112.
168. See generally Durham I, 287 F.3d at 1297 (requiring trial court to make specific findings and prosecution to meet heavy burden before ordering use of stun belt on defendant). Perhaps of equal importance, a defense attorney can dissuade a court or prosecutor from using stun belts by indicating that Durham II tried to meet the Durham I standard by conducting a five-hour hearing. See Durham II, 219 F. Supp. 2d at 1241 (stating that hearing on Durham's motion to prohibit use of stun belt took five hours).
169. In an interesting twist, one judge ordered bailiffs to replace a stun belt with shackles because the judge feared that he would need to shock the defendant in order to control him. Judge Forces Shackles on Ng During Hearing, CONTRA COSTA TIMES, Mar. 5, 1999, at A10.
stun belt is too dangerous, too mistake-prone, too prejudicial, or all of the above, and have consequently banned or severely restricted its use.

Stun belts are marketed as, and are, psychological dominators. They act as torture devices. At least until they are studied more in detail and until they are failsafe, they have no place in a courtroom.

I was required by my accusers to wear a security belt which totally destroyed my ability to understand the proceedings due to the mental stress and strain of concentrating on the 50,000 volts of electricity contained in the stunning device of the belt... I was constantly worried that if I were to move my hands or body in the wrong manner, my accusers who controlled the activator button could have at their discretion kill [sic] me because I do have a heart condition... No amount of precautions by the Court to cover up the electronic belt with a coat for arrivals and departures by me before the jury will eliminate the mental burden placed on me... To me, this mental restraint was far worse than being beaten. The mental pain and suffering last far longer. 170

170. Cruelty in Control, supra note 11, at 20-21. Roy Melanson, the man who is quoted, was convicted of murder and sentenced to life in prison. Id. at 21.