

Order

Michigan Supreme Court
Lansing, Michigan

June 1, 2022

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-20

Proposed Amendment of
Rule 6.001 and Proposed
Addition of Rule 6.009 of
the Michigan Court Rules

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.001 and an addition of Rule 6.009 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the [Public Administrative Hearings](#) page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

- (A) [Unchanged.]
- (B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.009, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters in criminal cases cognizable in the district courts.
- (C) Juvenile Cases. MCR 6.009 and ~~t~~The rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.
- (D)-(E) [Unchanged.]

[NEW] Rule 6.009 Use of Restraints on a Defendant

- (A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds that the use of restraints is necessary due to one of the following factors:
- (1) Instruments of restraint are necessary to prevent physical harm to the defendant or another person.
 - (2) The defendant has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.
 - (3) There is a founded belief that the defendant presents a substantial risk of flight from the courtroom.
- (B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.
- (C) Any restraints used on a defendant in the courtroom shall allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be restrained using fixed restraints to a wall, floor, or furniture.

Staff comment: The proposed addition of MCR 6.009 would establish a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the proposed amendment of MCR 6.001 would make the new rule applicable to felony, misdemeanor, and automatic waiver cases.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [Court's Proposed & Adopted Orders on Administrative Matters](#) page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-20. Your comments and the comments of others will be posted under the chapter affected by this proposal.

CAVANAGH, J. (*concurring*). I concur with this Court's order publishing for comment the proposed addition of MCR 6.009 regarding the use of restraints on adult criminal defendants. As an initial matter, I'm not sure the constitutional floor set by *Deck v Missouri*, 544 US 622, 629 (2005), is as low as Justice ZAHRA claims. *Deck* reviewed American decisions dating back to 1871 and concluded that, while there was disagreement about the degree of discretion that trial judges possess, those cases "settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so." *Deck*, 544 US at 627. Courts sometimes analyze whether violations of *Deck* are harmless by inquiring whether jurors saw a defendant's shackles. See *Brown v Davenport*, 596 US ___; 142 S Ct 1510 (2022). But that speaks to at most one of the three "fundamental legal principles" supporting the prohibition on routine shackling: the presumption of innocence, the right to counsel, and "a judicial process that is a dignified process." *Deck*, 544 US at 630-631. Even if the inquiry into whether the shackles were visible to jurors effectively analyzes the question of prejudice from unconstitutional shackling, we should strive to avoid the error in the first place, rather than knowingly commit the error while rendering it unreviewable. But, regardless of where the constitutional floor lies, we are not prohibited from considering more than the constitutional minimum, and at this point we are only publishing the proposed rule for comment. Because I would not deprive the public of the opportunity to comment on this proposal, I concur in the order publishing for comment.

ZAHRA, J. (*dissenting*). I dissent from this Court's order publishing for comment the proposed addition of MCR 6.009 regarding the use of restraints on adult criminal defendants. I would only publish for comment a rule that conforms to the constitutional requirements set by the Supreme Court of the United States' decision in *Deck v Missouri*, 544 US 622, 629 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.") (emphasis added). See also *People v Arthur*, 495 Mich 861, 862 (2013) (concluding that, under *Deck*, no constitutional violation occurred where "the court sought to shield the defendant's leg restraints from the jury's view" and "the record on remand ma[de] clear that no juror actually saw the defendant in shackles"). Contrary to Justice CAVANAGH's suggestion, the holding of *Deck* only applies when the jury sees and is made aware of the restraints; otherwise, the " 'inherent[] prejudic[e]' " the Court described in *Deck* would not exist. *Deck*, 544 US at 635 (citation omitted); see also *id.* at 633 ("The appearance of the offender . . . in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community[.]"); *id.* at 635 ("[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation."). Indeed, the published rule would extend *Deck* even to bench trials held before the very judge who would have earlier made the decision on

whether to shackle the defendant. Because this Court's order, as written, goes well beyond the constitutional floor set by *Deck*, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 1, 2022

A handwritten signature in black ink, appearing to read "Larry S. Royster", written over a horizontal line.

Clerk