

# Order

Michigan Supreme Court  
Lansing, Michigan

July 28, 2021

Bridget M. McCormack,  
Chief Justice

ADM File No. 2020-17

Addition of Rule 3.906  
of the Michigan Court  
Rules

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

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 3.906 of the Michigan Court Rules is adopted, effective September 1, 2021.

## [NEW] Rule 3.906 Use of Restraints on a Juvenile

- (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 juvenile during a court proceeding 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 juvenile or another person.
  - (2) The juvenile 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 juvenile presents a substantial risk of flight from the courtroom.
- (B) The court's determination that restraints are necessary must be made prior to the juvenile being brought into the courtroom and appearing before the court. The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. 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 juvenile in the courtroom shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture.

*Staff comment:* The addition of MCR 3.906 establishes a procedure regarding the use of restraints on a juvenile in court proceedings.

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.

CAVANAGH, J. (*concurring*). I support the majority's order—and I am not alone; a majority of the public comments received likewise support the adoption of this rule.<sup>1</sup> And Michigan now joins 31 other states (plus the District of Columbia) that have established a procedure regarding the use of restraints on a juvenile in court proceedings.<sup>2</sup> That there is overwhelming support for this court rule, and others like it across the country, should not be misconstrued as suggesting that the majority does not appreciate the complexity of the problem and the available solutions, or that the majority does not value or prioritize the safety and security of our local courtrooms. To the contrary, this Court, like every other court in this state, is often called upon to weigh competing interests in difficult situations and make the best decision it can. That is, in fact, the very essence of our job. Here, in my view, those potentially competing interests include giving trial judges the flexibility, discretion, and autonomy they need to control the procedures and security in their courtrooms and ensuring that juveniles who interact with Michigan's justice system are not subjected to physical, mental, and emotional trauma or judicial bias as a result of being shackled. There is no serious debate that these interests are important and deserving of careful consideration, and I find it unfair to suggest, as my dissenting colleague does, that the court rule is “underdeveloped” or adopted without careful consideration.

Our careful consideration of these competing interests has revealed that the indiscriminate shackling of juveniles is a practice to be avoided when it does not jeopardize the safety of the courtroom. Social science shows that the use of restraints on a juvenile has the potential to cause bias or prejudice on the part of the judge or jury in a courtroom setting, thereby possibly impinging on a juvenile's rights to due process and the presumption of innocence. It has also been shown that shackling causes unnecessary stress and is harmful to juveniles and their families because it causes shame and humiliation. Children with disabilities are at risk of exacerbated harm from shackling, and the use of restraints can create difficulties for the attorney-client relationship. While no one seriously disputes that courtroom safety is important, studies show that shackling

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<sup>1</sup> The Court received 15 comments during the public comment period. Nearly all commenters expressed support for the concept of the proposal or the actual published version.

<sup>2</sup> See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling*, available at <<https://njdc.info/campaign-against-indiscriminate-juvenile-shackling/>> (accessed July 18, 2021) [<https://perma.cc/ZPE4-FZN6>].

youth has little effect on courtroom safety<sup>3</sup> and is inconsistent with the rehabilitative goals of the juvenile justice system, which are not punitive in nature. In fact, minimizing restraints has been shown to improve engagement and communication in the courtroom and between a juvenile and her attorney.<sup>4</sup>

My dissenting colleague argues that trial judges should have flexibility to exercise their discretion to manage the security of the courtrooms. I agree. This rule simply requires exercise of that discretion before a young person is shackled in the courtroom. I also agree that the factors identified by my dissenting colleague as relevant to the safety and security of our local courtrooms are valid concerns for a trial court to consider in evaluating whether a juvenile should be shackled while in the courtroom. But I disagree that the new court rule does not give trial courts the ability to consider these factors in making that decision. For example, nothing in this court rule prohibits a trial court from considering a juvenile's mental condition, character, or reputation for dangerousness when considering whether "[i]nstruments of restraint are necessary to prevent physical harm to the juvenile or another person" as provided in MCR 3.906(A)(1). The rule does, however, prohibit a trial judge from *indiscriminately* shackling young people appearing in the courtroom without considering these factors. But why would a trial judge want to shackle a young person when it is not necessary for safety reasons?

I am, admittedly, less concerned than my dissenting colleague about our trial courts' ability to establish the actual procedures necessary to effectuate the requirements of MCR 3.906. With virtually every other court rule established by this Court, we have successfully relied on our trial courts to exercise their discretion and experience to ensure—at the granular level—that both the spirit and the letter of the court rule are complied with. I have complete confidence that this rule does not present a challenge our trial courts cannot meet with the same level of competence they continue to exhibit with respect to all other court rules, especially with the discretion afforded to trial courts to use remote or virtual hearings when necessary.

VIVIANO, J. (*dissenting*). I dissent from the majority's order because I think the new rule it adopts is underdeveloped and confusing, and, as a result, has the potential to jeopardize the safety and security of judges, court staff, litigants, and members of the public who attend court hearings. Although I do not necessarily object to a rule governing the procedure for determining whether restraints should be used on juvenile

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<sup>3</sup> See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling: Toolkit*, available at <<https://njdc.info/wp-content/uploads/2016/01/Toolkit-Final-011916.pdf>> p 5 (accessed July 18, 2021) [<https://perma.cc/KX79-99LW>].

<sup>4</sup> See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling: Issue Brief*, available at <[https://njdc.info/wp-content/uploads/2016/01/NJDC\\_CAIJS\\_Issue-Brief.pdf](https://njdc.info/wp-content/uploads/2016/01/NJDC_CAIJS_Issue-Brief.pdf)> pp 2-3 (accessed July 18, 2021) [<https://perma.cc/YCK6-WFJD>].

defendants during court hearings, we should allow considerable flexibility for trial judges to manage their own courtrooms, including making determinations regarding the level of security that is necessary to protect the safety and security of all involved. That concern was universally expressed by every law enforcement agency and judicial association that submitted public comments concerning this proposed rule change.

My primary concern with this new rule is that it limits the safety factors that a trial court may consider and apparently does not allow trial courts to consider other factors that they have always considered in making pretrial release decisions. Thus, for example, a trial court apparently cannot consider a juvenile's "mental condition, including character and reputation for dangerousness." MCR 6.106(F)(1)(d). Also excluded from the list are "the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence," MCR 6.106(F)(1)(e), and the juvenile's "prior criminal record, including juvenile offenses," MCR 6.106(F)(1)(a).<sup>5</sup> I can think of no justification for limiting trial courts from full consideration of all factors bearing on the safety and security of court proceedings.

In addition, although the new procedure appears to allow for a determination regarding the use of restraints to be made before a juvenile enters the courtroom (in contrast to the proposed rule, which appeared to require the restraints to be removed even before the trial court had an opportunity to address the issue), it remains unclear how such a determination will be initiated (i.e., by the court on its own initiative or at the request of the prosecutor or law enforcement officer?). What we do know is even more problematic: the court's determination regarding the use of restraints will be made out of the presence of the juvenile, since the trial court's "determination . . . must be made prior to the juvenile being brought into the courtroom and appearing before the court." MCR 3.906(B). This may raise questions regarding a defendant's constitutional right to be present during "stage[s] of trial where [their] substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247 (1984). And, as if to emphasize the Court's indifference to the safety concerns that have been raised, the new rule omits any express reference to a procedure whereby the prosecutor or a law enforcement official can raise the issue of restraints, but instead requires that only one party to the proceeding—"the juvenile's attorney"—be given "an opportunity to be heard before the court orders the use of restraints." MCR 3.906(B). Does this mean that the prosecutor does not have a right to be heard on this topic?

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<sup>5</sup> It is also unclear what is meant by "*a founded belief* that the juvenile presents a substantial risk of flight from the courtroom." MCR 3.906(A)(3) (emphasis added). Is that as opposed to an *unfounded* belief?

Court security lapses can have tragic consequences. Because I think this new rule is confusing and has the potential to jeopardize the safety of court proceedings, I respectfully dissent.

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

July 28, 2021

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

Clerk