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To: Adam Keller

From: Chris Provost, Assistant Public Advocate

Subject: Proposed Delinquency Rule addition regarding Use of Restraints on the Juvenile in the courtroom

INTRODUCTION

The issue of shackling surfaced in a meeting on September 22, 2010 at Judge Gleason's chambers in the context of exploring greater efficiencies for in-custody hearings at MYC. In attendance were the Masters, DJJ Supervising Probation Officer Linda Moffit, juvenile defenders from the Office of Public Advocacy and the Public Defender Agency, and Assistant District Attorney Joan Wilson. The practice of indiscriminate shackling in court raises larger questions that this memorandum and proposed delinquency rule addition seek to address.

RECENT NATIONAL REFORMS

The recent trend among state courts is to ban shackling without an individualized analysis of risk. Since 2007 California, Connecticut, Florida, New Mexico, New York, North Dakota, North Carolina and Vermont no longer routinely shackle juveniles as a result of State Supreme Court decisions that have ruled against blanket shackling for juveniles, rule changes, or statutes that prohibit unnecessary restraints. Some of these states have created a presumption against shackling absent an individualized determination of need.

Aside from judicial efficiency, there are sound constitutional and policy reasons to reform our shackling practice in Alaska. Shackling of juveniles in courtroom

proceedings is antithetical to the juvenile court goal of rehabilitation and treatment. Psychological and medical experts have rendered opinions in pleadings and evidentiary hearings in jurisdictions where this issue has been litigated. They opine that children suffer (emotionally, psychologically, and medically) when held in restraints.

One such expert is Dr. Marty Beyer, a national consultant on juvenile justice issues. She opines that "being shackled in public is humiliating for young people, whose sense of identity is vulnerable. The young person who feels he/she is being treated like a dangerous animal will think less of him/herself. Children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults." She argues that indiscriminate and routine shackling of children in court, before family and strangers, is damaging to the juvenile's fragile sense of identity. She notes that the practice could undermine a juvenile's willingness to trust adults in positions of authority, could damage the juvenile's moral identity and development, and could undermine the rehabilitative goals of court intervention. As an expert in the interplay between adolescent development, trauma, and disability, she expresses particular concern about the traumatic impact of shackling juveniles who have been previously traumatized by physical and sexual abuse, loss, neglect, and abandonment; she further notes that shackling exacerbates trauma, reviving feelings of powerlessness, betrayal, self-blame, and could trigger flashbacks and reinforce early feelings of powerlessness.

Another expert, Dr. Gwen Wurn, a board certified developmental-behavioral and general pediatrician, University of Miami Miller School of Medicine, opined that the policy of subjecting all children and adolescents in the juvenile system to shackling without regard to their age, gender, mental health history, history of violence, or risk of running, "goes against the basic tenets of developmental pediatric practice." She notes that being shackled conveys that others see the child as "a contained beast," an image that "becomes integrated in his own identity formation, possibly influencing his behavior and responses in the future." Like Dr. Beyer, Dr. Wurm warns that shackling can cause emotional, mental, and physical harm and could exacerbate symptoms associated with post-traumatic stress disorder, depression, anxiety disorder, attention deficit disorder, conduct disorder, and interfere with the child's receptivity to rehabilitation.

Following are examples of recent shackling reform in other states:

Florida Established a Presumption Against Shackling:

The Supreme Court of Florida adopted its Juvenile Court Rules Committee's proposed rule change regarding the indiscriminate use of shackling on December 17, 2009. The Committee's proposals were in response to the National Juvenile Justice

Center's report in 2006 entitled Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings.

The Court made this finding: "We find the indiscriminate shackling of children in Florida courtrooms as described in the NJDC's Assessment repugnant, degrading, humiliating, and contrary to the stated purposes of the juvenile justice system and to the principals of therapeutic justice…" It went on to rule: "We agree with the proponents of this amendment that the presumption should be that children are not restrained when appearing in court and that restraints may be used only upon an individualized determination that such restraint is necessary."[1]

Florida's Delinquency Rule 8.100(b) now reads as follows:
Use of Restraints on the Child. Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during a court proceeding and must be removed prior to the child's appearance before the court unless the court finds both that:
(1) The use of restraints is necessary due to one of the following factors:
(A) Instruments of restraint are necessary to prevent physical harm to the child or another person;
(B) The child 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; or
(C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and
(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

New York Enjoins the Government From Shackling a Child Without an Individualized Determination of Dangerousness:

The Supreme Court of the State of New York granted summary judgment and certified a class action lawsuit on January 19, 2010 to enjoin the government from joining the hand and foot of a child that is in restraints.[2] The Court enjoined the government from restraining the particular plaintiff juvenile in the lawsuit for future court appearances unless the government determines that the juvenile constitutes a serious and evident danger to himself and others while in the courthouse.

[1] See attachment A: In Re: Amendments to the Florida Rules of Juvenile Procedure, No. SC09-41 [December 17, 2009],
[2] See attachment B: Order of the Supreme Court of the State of New York dated January 19, 2010

Justice Tingling found that the agency's policy violated the state's own law on shackling youth in custody. [3] Title 9, New York Code, Rules and Regulations Sec 168.3: Use of Physical and Medical Restraints, subsection (a) and (a)(2) states:

> (a) Physical Restraints: Permissible physical restraints, consisting solely of handcuffs and footcuffs, shall be used only in cases where a child is uncontrollable and constitutes serious and evident danger to himself and to others. They shall be removed as soon as the child is controllable….
>
> (a)(2) Physical restraints may be utilized beyond one-half hour only in the case of vehicular transportation where such utilization of physical restraints is necessary for public safety.

Massachusetts:

Effective March 1, 2010 the practice of routinely shackling juveniles was eliminated. This change in policy was accomplished without litigation because of the leadership of the Court's Chief Justice Edgerton.[4] This state's new policy directly references the reasoning and wording of the Florida shackling decision referenced above. The Amendment to Trial Court of the Commonwealth Court Officer Policy and Procedures Manual, under Use of Restraints in the Juvenile Court Department, creates a presumption that restraints will be removed from juveniles while appearing in a courtroom unless there is a specific finding by a Juvenile Court justice that restraints are necessary because there is reason to believe that the juvenile may try to escape, or that the juvenile may pose a threat to his or her own safety, or to the safety of other people in the courtroom, or if it is reasonably necessary to maintain order in the courtroom. Point 5 in the amendment states in relevant part: The justice presiding in the courtroom shall consider one or more of the following factors prior to issuance of any order or findings: (a) the seriousness of the present charge (supporting a concern that the juvenile had an incentive to attempt to escape); (b) the criminal history of the juvenile; (d) any past behavior that the juvenile presented a threat to his or her own safety, or the safety of other people; (e) any present behavior that the juvenile represents a current threat to his or her own safety, or the safety of other people in the courtroom; (f) any past escapes, or attempted escapes; (g) risk of flight from the courtroom; (h) any threats of harm to others, or threats to cause a disturbance, and (i) the security situation in the courtroom and courthouse, including risk of gang violence, or attempted revenge by others. The last provision of the amendment states: "…No Juvenile Court justice shall impose a blanket policy to maintain restraints on all juveniles, or a specific category of juveniles, who appear before the court."

[3] There is an argument to be made the same is true in Alaska based on the Alaska Administrative Code on restraints.

[4] See attachment C: Memorandum of Massachusetts Chief Justice Edgerton dated February 25, 2010.

California Bans the Shackling of Children Without an Individualized Determination/Practice of Shackling Cannot be Justified Solely on Basis of a Lack of Sufficient Security Personnel:

California has adopted the "individualized shackling determinations" approach to shackling juveniles. A California appellate court found blanket juvenile shackling policies unconstitutional in *In re* Tiffany A.[5] The court ruled that: "any decision to shackle a minor who appears in the juvenile delinquency court for a court proceeding must be based on the nonconforming conduct and behavior of that individual minor. Moreover, the decision to shackle a minor must be made on a case-by-case basis…the juvenile delinquency court may not, as it did here, justify the use of shackles *solely* on the inadequacy of the courtroom facilities or the lack of available security personnel to monitor them." (Emphasis in the original.)

North Dakota Finds Violation of Child's Constitutional Rights by not Holding Evidentiary Hearing on Necessity of Restraints:

The North Dakota Supreme court issued a constitutionally grounded decision barring the use of shackles to adjudicatory hearings in juvenile delinquency court in In the Interest of R.W.S..[6] The court held that the juvenile court violated the offender's constitutional rights by refusing to remove his handcuffs at an evidentiary hearing, deferring to the sheriff's office's policies on courtroom security, without first independently deciding the necessity of restraints.

North Carolina Legislation Limit's the Judge's Authority to Use Juvenile Restraints in the Courtroom:

In 2007 the North Carolina Assembly unanimously voted to ratify a bill that provides a standard procedure for deciding when to use restraints on detained juveniles in the courtroom. Under their new law, a judge can only allow a juvenile to be restrained in the courtroom to maintain order in the court, prevent the juvenile's escape, or provide for the safety of the courtroom.

Pennsylvania:

As a result of the recent judicial corruption scandal in Luzerne County the Juvenile Law Center conducted a study and made recommendations to the Interbranch Commission on Juvenile Justice in May 2010. Recommendation 5.1 recommends prohibiting the handcuffing and shackling of youth in juvenile court. The investigators found that: "The policy of indiscriminate shackling led children and parents to lose

[5] See 150 Cal. App. 4th 1344 (Cal. Ct. App.2007)
[6] See 728 N.W. 2d 326 (N.D. 2007)

their faith in the rule of law. In Luzerne County, children and parents came to expect degrading behavior and injustice." The study makes two specific recommendations: 1) The General Assembly should amend the Juvenile Act to prohibit the use of mechanical restraints on juveniles absent a clear public safety concern; and 2) The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to prohibit the use of mechanical restraints on children during juvenile court proceedings, set forth criteria to guide judges in determining whether such restraints are necessary in the interests of public safety, and guarantee the juvenile's opportunity to contest the use of restraints at a hearing. The report further recommends that judges should not defer to sheriffs or law enforcement – that restraints in the courtroom should be used only as a last resort and be deemed a drastic measure that can only be ordered by a court.

This memo provides suggested language for a rule addition. Because the use of restraints is not addressed in the DL Rules, I am proposing a new rule. Perhaps the most logical place in the sequence of the DL Rules to add such a Rule would be around Rule 12-14: Rule 12 Temporary Detention Hearing, Rule 13 Judge's Responsibility Concerning Conditions of Detention, and Rule 14 Arraignment on Petition, which would be the first court appearance.

ALASKA STATUTE 47.14.020, DUTIES OF DEPARTMENT, ALASKA ADMINISTRATIVE CODE 7 AAC 52.365, RESTRAINTS, AND ALASKA DELINQUENCY RULE 13, JUDGE'S RESPONSIBILITY CONCERNING CONDITIONS OF CONFINEMENT PROVIDES THE COURT AND THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES THE AUTHORITY AND THE DUTY TO LIMIT USE OF RESTRAINTS

Relevant Alaska Statutes, Administrative Code, and Delinquency Rule arguably appear consistent with recent reforms in other states, but have not been put to use for this purpose. AS 47.14.020 sets out the duties of the department to provide for the welfare, control, care, custody, and placement of juveniles. 7 AAC 52.365 Restraints, states that "handcuffs and other physical restraints may be used only when necessary to protect the juvenile, an employee of the facility, or the public, when there is immediate danger of violence, escape, or damage to government or facility property." Delinquency Rule 13 states: "A court exercising jurisdiction under these rules has a continuing duty to ascertain that appropriate conditions of detention of juveniles are observed concerning visitation, clothing, exercise, private visitation of counsel and confinement. A juvenile may not be confined in solitary confinement for punitive purposes." [7]

[7] As noted above, New York Chief Justice Tingling found that the agency's policy violated the state's own law on shackling youth in custody. Title 9, New York Code, Rules and Regulations Sec 168.3: Use of Physical and Medical Restraints, subsection (a) and (a)(2).

Yet our Masters and trial judges see juveniles as young as 12 years of age shackled every day for offenses like shoplifting, or for probation violations such as violating curfew, failing to attend school, failing to contact the probation officer, minor consuming alcohol, or testing positive for marijuana use. Any juvenile defender can cite instances where the parent broke down at the sight of the son or daughter shuffling shackled into the courtroom for the first time and whispering that he or she would not have cooperated in the process had they known their child would be treated in this manner.

THE UNITED STATES SUPREME COURT FORBIDS SHACKLING OF ADULTS – THIS RATIONALE EQUALLY APLLIES TO JUVENILES

The Supreme Court has acknowledged that the decision to use shackles in the courtroom requires an evaluation of the circumstances presented in each individual case. In *Deck v. Missouri*[i] the Supreme Court provides a comprehensive, historical analysis of shackling in the courtroom. The case involved a capital murder penalty phase re-trial where the defendant was restrained in shackles and sentenced to death. The Supreme Court reversed, noting that the rule "forbid[ding] routine use of visible shackles during the phase…permit[ting] a State to shackle a criminal defendant only in the presence of a special need" has "deep roots in the common law." The Supreme Court also struck down the practice of parading defendants before the criminal court in prison garb, on both fairness and dignitary grounds in *Estelle v. Williams*[8]: "When an accused is tried in identifiable prison garb, the dangers of denial of a fair trial and the possibility of a verdict not based on the evidence are obvious. Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him…with an unmistakable mark of guilt." A year later, a federal district court ruled in *Pena v. New York State Division for Youth*[9] found that shackling of juveniles to be "punitive and anti-therapeutic and therefore unconstitutional." It held that use of restraints "should be tolerated only in cases where a child is a serious and evident danger to himself or others and incapable of being controlled by any less restrictive means."

The practice of shackling juveniles during pre-trial hearings is inherently prejudicial as well. If intake at DJJ declines to accept an arrested juvenile when the police call in for a directive, the juvenile appears at the arraignment and all other subsequent hearings in his/her civilian clothing. But if the juvenile was detained, he/she will appear at all hearings in restraints. Though jury trials for juveniles are infrequent, masters and judges are not immune from the inherent, subconscious bias from *always* seeing detained juveniles appear before them in shackles. The blanket use of shackles

[8] 425 U.S. 501, 96 S.Ct. 1691 (1976)
[9] 419 F. Supp. 203 (S.D.N.Y. 1976)

communicates to the court that the juvenile has not only been alleged to have committed a crime, but that he/she is violent and dangerous. Thus, even if shackles may not be used at the trial itself, the judge functioning as trier of fact and sentence will be unable to avoid the taint conveyed by the image of a shackled and dangerous juvenile prisoner.

PROPOSED DELINQUENCY RULE ADDITION REGARDING THE USE OF RESTRAINTS ON JUVENILES

Rule __. Use of Restraints on the Juvenile.

Instruments of restraint, such as handcuffs, waist belts, and footcuffs, may not be used on a juvenile during a court proceeding and must be removed prior to the juvenile's appearance before the court unless the court finds that: (1) The use of restraints is necessary where a juvenile is uncontrollable and constitutes a serious and evident danger to himself/herself and to others; or (2) there is reason to believe that the juvenile may try to escape.

The decision to shackle a juvenile must be made on a case by case basis based on an individualized assessment of the particular juvenile. The judge presiding in the courtroom shall consider one or more of the following factors prior to the issuance of any order or findings: (a) any present behavior that the juvenile represents a current threat to his or her own safety, or the safety of other people in the courtroom; (b) the seriousness of the present charge (supporting a concern that the juvenile had an incentive to attempt to escape, risk of gang violence, or attempted revenge by others); any threats of harm to others, or threats to cause a disturbance; (c) past behavior that the juvenile represents a current threat to his or her own safety; and (d) any past escapes or attempted escapes.

CONCLUSION

In conclusion, the logistical problems of holding in-custody hearings at MYC has provided this opportunity to initiate reform of Alaska's blanket shackling policy through this proposed rule addition. Most in-custody hearings that take place at MYC could take place in the Anchorage state courthouses if the shackling policy is reformed. States that have reformed blanket shackling policies for juveniles have not completely banned courtroom shackling – appellate courts have determined that juvenile courts must consider various factors when making a finding whether an individual juvenile is to be shackled in court. Blanket and indiscriminate shackling is a physically and psychologically damaging practice that contravenes the ultimate goal in juvenile justice of rehabilitating juveniles. We should end this practice in Alaska.

[i] 544 U.S. 622 (2005)