OFFICE OF THE STATE PUBLIC DEFENDER

DOUGLAS K. WILSON
STATE PUBLIC DEFENDER

May 20, 2015

The Honorable Karen Ashby, Chair
Rules of Juvenile Procedure Revision Committee
Colorado Court of Appeals
Ralph L. Carr Colorado Judicial Center
2 East 14th Avenue
Denver, CO 80203

Dear Judge Ashby:

Increasingly, states are abandoning the practice of indiscriminate shackling of children by enacting statewide policies to address the circumstances under which children may be shackled in court. Currently, 15 jurisdictions—14 states and the District of Columbia—have rules or statutes that prohibit indiscriminate shackling. (*See* Attachment A, collected rules and statutes from other states). Four states have prohibited the practice through case law. (*See* Attachment B). I write to you and the other members of the Rules of Juvenile Procedure Revision Committee to urge you to join those states that have adopted a statewide rule to end indiscriminate shackling of children. Such a rule would protect both the best interests of Colorado children and communities.

"Shackling doesn't protect communities. It harms them." (Attachment C, Jim Felman & Cynthia Orr, *Report,* 2015 A.B.A. Sec. Crim. Just. at 7-8). The Felman & Orr report was the basis for the ABA's resolution urging state governments to restrict the use of restraints on juveniles in court to those juveniles who present a risk of harm or flight; to employ a presumption against the use of restraints in court; and to give the juvenile an opportunity to be heard on whether restraints are the least restrictive alternative, prior to the decision to shackle. That report relied upon a number of affidavits from mental health professionals and medical doctors. (*See* Attachment D, collected affidavits from mental health professionals and medical doctors concerning the damage caused by indiscriminate shackling) The report concluded that shackling harms communities because shackling a child is an inherently shaming process. The teenage years are a time of identity, moral and ethical development. Feelings of shame can inhibit this development and discourage a teenager from productive community participation. For similar reasons, the American Academy of Child and Adolescent Psychiatry also adopted a policy statement strongly opposed to indiscriminate juvenile shackling in February of this year. (*See* Attachment E).

Shackling also impairs a child's ability to participate in her own case. Shackling a child greatly limits her ability to consult or confer with counsel, to hold papers, and to take

notes. (*See* Attachment C at 5). Physical restraints tend to confuse and embarrass a person's "mental faculties," and thereby "prejudicially affect his constitutional rights of defense." *People v. Harrington,* 42 Ca. 165, 168 (Cal. 1871); *see also* Attachment D-1. Shackling children impedes their abilities to answer questions truthfully, clearly, or concisely. Shackling children impairs their comprehension and interferes with long-term memory of what was said or ordered in court. In addition, shackling interferes with functional reading strategies and functional writing. (*See* Attachment D-2)

Moreover, indiscriminate shackling diminishes the respect the juvenile justice system commands from participants by degrading procedural fairness. Both actual fairness and the appearance of fairness are of the utmost importance in juvenile adjudicatory proceedings because fairness is crucial to a child's rehabilitation. The primary goal of the juvenile justice system is to reform and rehabilitate the child in a manner consistent with his best interests, not merely to punish him. *People in the Interest of A.C.*, 16 P.3d 240, 242 (Colo. 2001); *People in the Interest of R.A.D.*, 196 Colo. 430, 433, 586 P.2d 46, 48 (1978); *see* §19-2-102, C.R.S. 2014. In *In re Gault*, the Supreme Court stated, "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. 1, 26 (1967). (*See* Attachment F, Victoria Weisz, et al., *Children and Procedural Justice*, 44: 1/2 Court Review: The Journal of the American Judges Association 36-42 (2007-2008)). Thus, juvenile courts must be scrupulous about the appearance of fairness.

I am aware that Chief Justice Rice has directed all Chief Judges to enact administrative orders in their judicial districts to address indiscriminate shackling. The orders that have been put into place so far demonstrate the need for a uniform, statewide rule. (*See* Attachment G, administrative orders). For example, in the 15th judicial district, the decision on whether to shackle a child is left solely in the discretion of law enforcement. In the 22nd judicial district, the judicial officer's decision is "not subject to argument by counsel or respondents." In the 1st, 8th, 10th, 12th and 15th judicial districts, neither the juvenile nor her lawyer has the right to be heard prior to the juvenile being restrained. In the 4th judicial district, a juvenile has neither the right to be heard prior to being restrained, nor the right to have a judicial officer decide whether he should be restrained in the first instance. These are only a few examples of how the irregularities in these policies deny children in Colorado equal access to the courts on this issue. As well, the majority of judicial districts have yet to enact any local order on shackling.

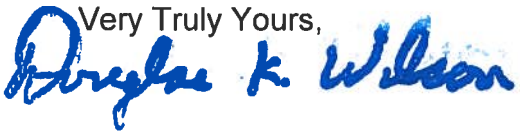
Leaving this issue to individual judicial districts creates unfair, confusing and unworkable results. How and whether children are shackled in court is a matter of statewide concern and is properly the subject of this body's statewide rulemaking authority pursuant to Article VI, section 21 of the Colorado Constitution. That section requires the Supreme Court "to make rules governing the administration of state courts." *Walgreen Co. v. Charnes,* 819 P.2d 1039, 1046 (Colo. 1991).

I recognize that there will always be some juveniles who will need to be restrained in court, for their safety or the safety of others. All I ask is that the members of this

committee enact a uniform rule to end the practice of indiscriminate shackling in Colorado, using the three benchmarks identified in the ABA report as a guide. A rule that shackles only those children who present a risk of harm or flight; that employs a presumption against shackling; and that affords a right to be heard on whether restraints are the least restrictive alternative prior to their imposition would position Colorado to join the 19 jurisdictions that have abolished indiscriminate shackling in their juvenile courts.

Because my lawyers represent the vast majority of children who are shackled in Colorado, and because there is currently no Public Defender representative on the Committee, I would be very glad to designate one or more of my lawyers to assist your committee with this endeavor, if you believe that would be helpful to you. I look forward to hearing from you in response to this letter in the near future.

Very Truly Yours,



Douglas K. Wilson
Colorado State Public Defender

cc: all members of the committee, via email
Representative Daniel Kagan
Senator Ellen Roberts
Ann M. Roan

OFFICE OF THE STATE PUBLIC DEFENDER

DOUGLAS K. WILSON
STATE PUBLIC DEFENDER

July 31, 2015

The Honorable Karen Ashby, Chair
Rules of Juvenile Procedure Revision Committee
Colorado Court of Appeals
Ralph L. Carr Colorado Judicial Center
2 East 14th Avenue
Denver, CO 80203

Dear Judge Ashby:

After I sent you my letter concerning indiscriminate shackling of juveniles last week, both the 18th and 13th judicial districts enacted orders on that subject. I wanted to bring those to your attention as your committee considers this subject. Copies of both those orders accompany this letter, for your review.

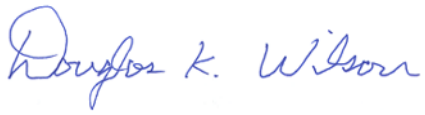
In its order, the Chief Judge of the 18th Judicial District declares that indiscriminate shackling of children will continue in his jurisdiction. In support of this position, he cites courtroom design, lack of law enforcement personnel in the courtroom and his conclusion that assessing the need to shackle juveniles on a case-by-case basis is too time-consuming an undertaking.

The 13th Judicial District's order creates a presumption against shackling in some cases. However, that presumption is defeated in counties where, in the judgment of law enforcement, a lack of law enforcement personnel in the courtroom or courtroom design presents a security concern.

Other courts have considered and rejected these arguments on constitutional grounds. *See, Tiffany A. v. Superior Court,* 59 Cal.Rptr.3d 363, 372-76 (Cal. Ct. App. 2007); *People v. Staley* 364 N.E.2d 72 7 (Ill. 1977); *see also, Deck v. Missouri,* 544 US. 622, 633 (2005) (any decision to shackle an accused must be case-specific and made by a judicial officer). Both of these orders are examples of the need for your committee to enact a consistent, reasoned and evidence-based policy in Colorado on this important juvenile justice issue.

I also wanted to bring to your attention that in my original letter I made reference to a policy from the 4th Judicial District. That policy is still in draft form and has not yet been finalized. And a copy of the policy from the 15th Judicial District was inadvertently omitted from the original attachments. It is attached to this letter.

Sincerely,



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