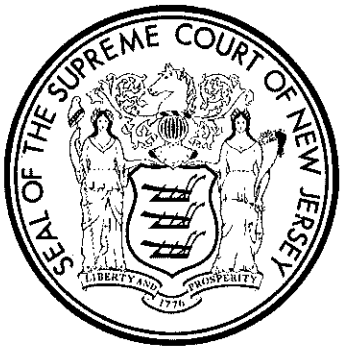
NEW JERSEY SUPREME COURT

WORKING GROUP ON THE INDISCRIMINATE SHACKLING OF JUVENILES IN COURT



REPORT AND RECOMMENDATIONS

May 27, 2016

INTRODUCTION

The Working Group on the Indiscriminate Shackling of Juveniles in Court (Working Group) was charged by Chief Justice Stuart Rabner to develop court rule recommendations to end the practice of indiscriminately shackling[1] youth appearing in court in juvenile delinquency matters. At present, New Jersey lags behind the twenty-four jurisdictions around the country, which have limited the automatic shackling of juveniles during court proceedings[2]. The Working Group is comprised of judges, court managers, and designated representatives from the Sheriffs' Association of New Jersey, Office of the Attorney General, Office of the Public Defender, Association of Criminal Defense Lawyers, County Prosecutors Association of New Jersey, Juvenile Justice Commission, American Civil Liberties Union and Advocates for Children of New Jersey.

Over the course of five months, the Working Group debated the balance between safety in the courtroom, due process and psychological considerations of the juvenile. For the reasons set forth below, the Working Group has developed and recommends a court rule to end the practice of indiscriminately shackling youth appearing in court in juvenile delinquency matters.

CONSIDERATIONS

The National Juvenile Defender Center's Campaign Against Indiscriminate Juvenile Shackling (CAIJS) presented to the Working Group the legal background, research on the effects of shackling on youth and the nationwide trend to end the practice. CAIJS also provided model court rules to the Working Group for its consideration. As part of the CAIJS presentation, the

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[1] "Shackling" refers to the use of instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items.

[2] Alaska, California, Connecticut, Washington D.C., Florida, Idaho, Illinois, Indiana, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Utah, Vermont and Washington.

Working Group was informed that the American Bar Association (ABA) passed a resolution in February 2015 to end the indiscriminate shackling of juveniles. The ABA resolution presumes juveniles will not be shackled unless it is unsafe or escape prevention is necessary, and recognizes the judge's authority to decide this before the juvenile enters the courtroom. Additionally, the Working Group also considered a policy statement passed by the National Association of Prosecuting Attorneys (NAPA) on June 19, 2015, supporting the presumption against the use of restraints on juveniles in court. The NAPA recognized a need for appropriate evidence-based and data-driven assessments before ordering the shackling of youth. This includes considering less restrictive alternatives to shackling. Finally, the Working Group considered the resolution of the National Counsel of Juvenile and Family Court Judges (NCJFCJ) adopted on July 25, 2015 supporting a presumptive rule against shackling children in juvenile courts as part of a trauma-informed and developmentally appropriate approach to juvenile justice.

Some states have incorporated the language of the model court rules into their court rules, resolutions or legislation. The model rules define restraints and presume removal of restraints prior to entry into the courtroom. The model rules give a judge the ultimate authority on shackling, and include an opportunity for counsel to be heard prior to rendering the decision. The model rules presume the youth will not be restrained unless restraints are necessary to prevent physical harm to the youth or another or there is a founded belief that the youth presents a substantial risk of flight, and there are no less restrictive alternatives to shackling. Under the model rules, the prosecutor, defense counsel or security personnel have an opportunity to address the court on these issues before the juvenile enters the courtroom. The model rules provide that, if the juvenile is to be shackled, the court must make findings of fact in support of its decision.

A. CONSTITUTIONAL AND PSYCHOLOGICAL IMPLICATIONS OF SHACKLING JUVENILES.

The Working Group considered the following constitutional and psychological implications of shackling.

1. The disparate treatment of adults and juveniles.

Adults are shackled in preliminary proceedings although usually not during trial, while juveniles are restrained in all appearances, unless a request to remove restraints has been made. Whether a juvenile remains shackled varies by county, as there is no uniform policy on shackling. One difference between adult and juvenile proceedings is that adult guilt or innocence is determined by a jury, which is not present during preliminary proceedings where the adult may be shackled. However in juvenile proceedings, the judge who sees the youth in shackles is also the impartial trier of fact. This raises the issue of implicit bias. Shackling gives the impression that a juvenile is guilty, violent or not trustworthy. Even if the judge remains truly impartial, the perception to parents, spectators in the courtroom or even the juvenile may be otherwise.

2. The presumption of innocence.

Youths not yet adjudicated guilty are presumed innocent in a court of law. Youths and parents are expected to understand this basic principle. However, the routine shackling of youth in preliminary proceedings gives the impression that youth are not considered innocent or trustworthy, which runs counter to this principle.

3. The impact on the attorney-client relationship and court proceeding.

Instruments of restraint, such as handcuffs, chains and irons physically impede the juvenile from communicating with his attorney and assisting in his own defense. They prevent the juvenile from writing and using gestures to communicate. Shackles are distracting, making it

difficult for the juvenile to listen to his attorney and the judge and to understand and remember the court proceeding[3]. Shackling may cause a youth to freeze and disassociate entirely from the proceeding[4].

4. The rehabilitative purpose of juvenile justice.

The juvenile justice system maintains rehabilitation as its primary goal for juvenile offenders, a mission that relies heavily on a youth's ability to regulate his own behavior. Developmental psychology research indicates that the adolescent brain, still in development, differs from adults. The prefrontal cortex, which governs reasoning, advanced thought and impulse control, is the final area of the brain to mature[5]. Children and adolescents are far more susceptible to outside influences and irresponsible behavior than adults[6].

Shackling runs counter to the scientific research and the rehabilitative goal of the system. Shackling prevents youth from controlling their own behavior[7]. Shackling is inherently shame producing and traumatic to youth who have already experienced trauma[8]. Re-traumatization hinders recovery and increases the likelihood of problematic conduct, including criminal behaviors[9]. The Working Group considered situations involving relatively minor offenses and juveniles of very tender years who had come to court in shackles and the trauma to them and their families.

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[3] Gene Griffin, Ph.D., Affidavit Regarding Indiscriminate Shackling ¶20 (2014), *available at* http://njdc.info/wp-content/uploads/2014/09/Griffin-Affidavit-II.pdf; [hereinafter "Griffin Affidavit"].
[4] Griffin Affidavit ¶19.
[5] Paul Thompson, Ph.D., Time-Lapse Imaging Tracks Brain Maturation From Ages 5 to 20, National Institutes of Mental Health, and the University of California Los Angeles, May 2004.
[6] Roper v. Simmons, 543 U.S. 551, 569-570 (2015).
[7] Donald Rosenblitt, M.D., Affidavit Regarding Indiscriminate Shackling ¶¶ 9-10 (2015), available at http://njdc.info/wp-content/uploads/2014/09/Rosenblitt-Affidavit-Notarized-CV-Final-1-6-15.pdf; [hereinafter "Rosenblitt Affidavit"]. *See also* Policy Statement of the American Orthopsychiatric Association on Shackling Children in Court (2015), available at http://njdc.info/wp-content/uploads/2014/09/Shackling_Reform_Position_Statement.pdf.
[8] Gwen Wurm, M.D., M.P.H., Affidavit Regarding Indiscriminate Shackling ¶¶ 11, 13 (2015) available at http://njdc.info/wp-content/uploads/2015/01/Gwen-Wurm-full-shackling-affidavit-Jan-2015.pdf.
[9] Rosenblitt Affidavit ¶12.

B. SAFETY AND RELATED CONCERNS

The Working Group considered safety concerns and related issues of a presumed no-shackling policy.

1. The necessity of shackling to maintain safety.

The Working Group considered whether the use of restraints on every juvenile brought to court from detention is necessary to guarantee safety in the courtroom. On one hand, the Juvenile Detention Alternatives Initiative (JDAI)[10] is designed to ensure that only the most serious offenders are detained. As such, it was asserted that shackling these most serious offenders during court proceedings is necessary because they pose the greatest danger. However, it was noted that some of these serious offenders are released from detention after the first court appearance. Also, even the most serious offenders may not, at a particular moment in time and in certain circumstances (i.e., during a court proceeding), present a safety or flight risk.

The Working Group considered data from other jurisdictions that now prohibit indiscriminate shackling[11]. Miami Dade County, Florida, eliminated routine shackling in 2006 and since then, 25,000 unshackled youth have come to court without injury or escape. In Travis County, Texas, more than 3,000 detention hearings per year in 2013 and 2014 were conducted, and no youths were shackled. In 2014, in Boulder, Colorado, there were three cases where restraints were used out of 534 cases, and there were no reported incidents.

2. The need for additional courtroom security and cost.

[10] In 2004, the Annie E. Casey Foundation selected New Jersey to be among the first states to replicate the nationally recognized JDAI. JDAI provides a framework of strategies designed to reduce the use of detention, while maintaining public safety. The goal of JDAI is to use detention for the most serious and chronic offenders while providing alternatives to detention for other youth.

[11] These jurisdictions provided the statistics to CAIJS.

The Working Group considered whether a presumptive no-restraint policy might increase the need for additional courtroom security. It was noted that without additional funding, the measure could adversely affect the wardens and the sheriffs. According to CAIJS, however, jurisdictions have implemented such a policy without the necessity of additional funding. The Working Group discussed the implementation of bail reform[12], noting that fewer people will be incarcerated, which would result in the availability of existing security personnel without additional cost.

3. The increase in length of time of court proceedings.

The Working Group considered whether a court proceeding might be lengthened if the shackling issue is raised for a youth. According to CAIJS, the need for hearings in jurisdictions that have adopted the no-shackling policies have been rare and court time to address this issue have been relatively short. The Working Group also considered the results of Camden County's 14 calendar day analysis (December 6, 2015 to January 7, 2016) of the use of restraints during court appearances. The data revealed that a decision on the use of restraints had no impact on the length of the proceeding.

4. The exposure to civil liability upon use of force.

The Working Group considered a law enforcement representative's concern about the potential to use force to subdue an unshackled juvenile who attempts harm or flight, and the increased exposure of law enforcement to civil lawsuits. However, based upon data provided by CAIJS, there are no instances where this has occurred in the jurisdictions that have adopted a presumptive no-restraint policy.

[12] By Jan. 1, 2017, New Jersey will shift from a system that relies principally on setting monetary bail as a condition of release to a risk-based system that is more objective and fairer to defendants because it is unrelated to their ability to pay monetary bail. A risk-based system also promotes basic liberty interests of defendants since it will result in a significant reduction in the pretrial detainee population.

C. DEVELOPMENT OF A COURT RULE

Having weighed the balance between safety in the courtroom and due process and psychological considerations of the juvenile, the Working Group recommends a court rule establishing limits on the shackling of youth during court proceedings.

The Working Group recommends that New Jersey's rule include evaluative factors the court can consider in determining whether restraints are necessary. The proposed new court rule would prohibit the use of restraints on a juvenile during a court proceeding unless the court makes a judicial determination that the child presents a substantial, present risk of harm or flight, and there are no less restrictive alternatives other than the use of restraints. An application to restrain a juvenile can be made to the court or be brought by the court itself. If restraints are deemed necessary, the least restrictive restraints shall be used. The judge will be required to consider enumerated factors designed to assess present risk and make findings of fact on the record in support of an order requiring restraints.

RECOMMENDATIONS

Based upon its deliberations, the Working Group recommends adoption of the following court rule:

5:19-4. Use of Restraints on a Juvenile. [new]

(a) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, shall not be used on a juvenile during a court proceeding and must be removed prior to the juvenile being brought into the courtroom and appearing before the court. Instruments of restraint may be used if, on application to or by the court, the court finds 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 juvenile or another person;

(B) 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 the juvenile or others as evidenced by recent behavior; or

(C) The juvenile 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 juvenile or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(b) In making the determination that instruments of restraint are necessary, the factors that can be considered are:

(1) any past escapes or attempted escapes by the juvenile;

(2) evidence of a present plan of escape involving the juvenile;

(3) any credible threats by the juvenile to harm him or herself or others during court;

(4) evidence of self-injurious behavior on the part of the juvenile;

(5) any other factors the court deems relevant to assess present risk in the court proceeding.

(c) The court shall provide the juvenile's attorney and the prosecutor an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall make findings of fact on the record in support of the order.

(d) If restraints are deemed necessary, the least restrictive restraints shall be used. Any restraints 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 to a stationary object or another person.

Note: Adopted _____ to be effective _____.

The Working Group thanks the Supreme Court for this opportunity to serve.

Respectfully submitted,

Hon. Deborah J. Venezia, Chair

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