STATE OF WISCONSIN IN SUPREME COURT

In the Matter of Amending Wis. Stats. §48.299 and §938.299 Regulating the Use of Restraints on Children in Juvenile Court **Petition 21-___**

MEMORANDUM IN SUPPORT

INTRODUCTION

This petition requests that the Supreme Court amend Wis. Stat. §48.299 and §938.299 by creating a new sub. (2m) to each rule that would end the practice of indiscriminately shackling children in juvenile court. The proposed amendment to the Children's Code (Ch. 48) and the Juvenile Justice Code (Ch. 938) would establish a presumption against shackling. It would authorize the juvenile court to make a discretionary determination whether shackling is necessary, using the criteria set forth in this court's decision in ***State v. Grinder***, 190 Wis 2d 541, 527 N.W. 2d 326 (1995). ***Grinder*** states: "a circuit court must carefully exercise its discretion in deciding whether to shackle a defendant and then, on the record, must set forth its reasons justifying the need for restraints in that particular case. The circuit court should not order the imposition of restraints unless they are 'necessary to maintain order, decorum, and safety in the courtroom....'" ***Id.*** at 552 (citing ***Flowers v. State***, 43 Wis. 2d 352, 362 (1969).

Every weekday, children ages 10 to 17, are brought into Wisconsin juvenile courtrooms in shackles. A few are shackled because a judge or court commissioner has found them likely to flee, or likely to be disruptive in the courtroom. But most are shackled simply because it is routine – sometimes based on a sheriff's policy, sometimes because it is the way it has always been done.

Some Wisconsin counties, including La Crosse, Eau Claire, Marathon, Milwaukee and Dane, have successfully implemented county-level juvenile court shackling rules that, like the proposed rule, establish a presumption against shackling, which can be overridden by a court finding, on the record, that the child is likely to flee, or to cause harm to self or others. Approximately 20 additional counties rarely shackle children in court. However, at least 25 counties practice indiscriminate shackling of children in juvenile court.

If this court promulgates the proposed rule, Wisconsin will join 33 other states and the District of Columbia, that have implemented a statewide presumption against shackling children in the courtroom, with the court authorized to order shackling when necessary to maintain order,

decorum and safety.[1] It will join our neighboring states of Illinois, Iowa, and Michigan, in establishing that statewide procedure through judicial rule.[2]

I. THE COURT HAS AUTHORITY TO ADOPT THE PROPOSED RULE

The rule requested here is squarely within this court's authority for rule making, pursuant to Wis. Const. Art. VII, § 3, and Wis. Stat. §751.12(1)[3].

The proposed rule goes to the very core of judicial authority – to "maintain order, decorum and safety in the courtroom." ***Grinder, supra,*** 190 Wis. 2d at 552. In ***Grinder***, the court specifically held that the trial court erred by basing its shackling decision on sheriff's department policy, rather than independently weighing the defendant's risk to courtroom order, decorum and safety. More recently this court affirmed the court's authority over courtroom security when it adopted SCR 68.04 in 2012, stating:

> SCR 68.04 Judicial Officer Authority. Day to day security decisions and case specific security are within the discretion of each individual judicial officer. The judicial officer shall consult as needed, with the chief judge, the sworn officers, or the court security officers.

The comment to that section states: "This provision confirms the authority of a presiding judge in his or her own courtroom. *See, e.g.,* ***Stevenson v. Milwaukee County***, 140 Wis. 14 (1909)."

Both SCR 68.04 and the ***Grinder*** decision are predicated on the court's inherent and constitutional authority. Wis. Const. Art. VII, § 3. For more than a century, this court has recognized that the constitutional authority of the court to "make such rules and orders as may be necessary to properly perform their functions," includes the authority of a circuit court to make decisions regarding courtroom security. In ***Stevenson v. Milwaukee County, id.,*** the court upheld a circuit court's appointment of a bailiff as within its inherent authority. *See also* ***In re Janitor of Supreme Court***, 35 Wis. 410, 416 (1874) (appointment of janitor, in part based on need for confidentiality of court documents).

The proposed rule is also authorized by Wis. Stat. §751.12(1), providing that the supreme court has authority to promulgate rules regulating "pleading, practice and procedure" in court proceedings. The proposed rule would regulate court practice and procedure, and it does not affect

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[1] https://njdc.info/wp-content/uploads/Shackling-Statewide-Bans-2019.pdf; https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2020-17_2021-07-28_FormattedOrder_AddMCR3.906.pdf; Chapter 11 - MN Laws

[2] See Appendix D, setting forth the text of the judicial rules in those states.

[3] Wis. Stat. s. 751.12(1) states in relevant part: "The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant."

substantive rights. The very statutes sought to be amended by this rule, Wis. Stat. §48.299 and §938.299, are entitled "procedures at hearings."

Although this court's §751.12 rulemaking authority is shared with the legislature, this court has held that "the power to regulate procedure, at the time of the adoption of the constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power." ***In re Constitutionality of Section 251.18***, 204 Wis. 501, 510, 236 N.W. 717 (1931). Additionally, the court held: "the powers essential to the function of courts, in the absence of the clearest language to the contrary in the constitution, are to be taken as committed solely to them as a necessary incident to their creation." ***Id.***, 712.

In this case, the Court is the more appropriate authority to regulate shackling of children in juvenile court, for two reasons. First, as set forth above, because the authority to ensure the safety and security of the courtroom is at the very core of judicial authority. Second, because trial courts in Wisconsin are currently making decisions every day about whether the children who appear in juvenile court will be shackled. It is entirely consistent with this court's role and responsibility to establish statewide standards governing those decisions, ensuring consistency in the statewide court system and compliance with decisions of this court and the United States Supreme Court.

Given this recognized judicial authority over shackling, the National Council of Juvenile and Family Court Judges has urged the judiciary to take the lead on juvenile shackling policy, stating: "consistent judicial leadership is necessary to ensure that policies regarding shackling continue to be upheld regardless of changes in leadership or administration."[4]

Further evidence of the appropriateness of court enactment of this rule is the fact that this court has previously amended Wis. Stat. §48.299 by rule, creating a subsection (5) to allow telephone or live audiovisual hearings under certain circumstances. Sup. Ct. Order at 141 Wis. 2d xiii. (1987). At the time of that amendment, Chapter 48 applied to all juvenile court proceedings, including delinquency proceedings.[5]

Finally, additional evidence of the appropriateness of a statewide judicial rule regulating shackling of children in juvenile court, is the fact that 14 state Supreme Courts have elected to regulate juvenile shackling by court rule. Florida was first, setting forth Fla. R. Juv. P. 8.1000 in 2010, (amended, 2021).[6] In 2016, Illinois adopted Ill. Comp. Stat. Sup. Ct. R. 943, and in 2017, Iowa adopted Iowa R. Juv. P. r, 8.41. On July 28, 2021, the Michigan Supreme Court adopted MI Rules MCR 3.906. Other states that have adopted statewide judicial rules include Alaska (Alaska Ct. Delinq. R. 21.5, 2015), Arizona (Ariz. Juv. Ct. R. P. 12(E), 2017), Kentucky (Ky. Juv. Ct. R. Proc. & Prac. r. 23, 2016), Maine (2015 Me. Rules 20; Me. R. of Crim. P. 43A), New Jersey (N.J.R. Ch. Div. Fam. Pt. R. 5:19-4, 2017), New Mexico (N.M. Child Ct. R. 10-223A,

[4] https://www.ncjfcj.org/wp-content/uploads/2019/08/regarding-shackling-of-children-in-juvenile-court.pdf

[5] Delinquency proceedings were renumbered to Chapter 938 by 1995 Act 77. Many of the procedural sections of Chapter 48 and Chapter 938 remain the same.

[6] The 2021 Florida rule is very similar to the rule proposed here. This and other state rules are set forth in Appendix D.

2012), North Dakota (N.D.R. Juv. P. 10.1, 2017), Ohio (Sup. R. § 5.01, 2016), Tennessee (Tenn. R. Juv P. 204, 2016), and Washington (Wash. Juv. Ct. R.1.6, 2014).

In fact, more states have barred indiscriminate juvenile shackling through judicial rule than through legislative action. Twelve states have barred juvenile shackling by legislation, and the remaining eight jurisdictions have used various types of administrative rules, policies, and court decisions.[7]

II. INDISCRIMINATE SHACKLING: THE PROBLEM DEFINED

A. Indiscriminate shackling of children unnecessarily humiliates, stigmatizes, and traumatizes them.

The law has long recognized that shackling is inherently humiliating. In 2 W. Hawkins, Pleas of the Crown, ch. 28, §1, p. 308 (1716–1721), the court referred to shackles as a "mark of ignominy and reproach," saying: "[A] defendant 'ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach ... unless there be some Danger of a Rescous [rescue] or Escape.' " (cited in ***Deck v. Missouri***, 544 U.S. 622, 630 (2005). The ***Deck*** court also quoted an 1871 California case holding that shackles "ten[d] to confuse and embarrass" defendants' "mental faculties." ***People* v. *Harrington*** (42 Cal. 165, 168).

This shame and humiliation is especially damaging to adolescents, who are in the developmental process of forming their own identities and who are intensely concerned with how others perceive them.[8] Shame is different than guilt. Guilt is a negative emotion about a specific behavior, ie. "the crime I committed was wrong;" while shame is a negative evaluation of self, ie. "I am a bad person." Shame and humiliation, unfortunately "can lead to maladaptive behaviors such as defensiveness, avoidance and aggression."[9] Because of their developmental status, adolescents are also at an increased risk of internalizing the perception that they need to be shackled to avoid harming others. Dr. Patricia Coffey concludes, "it is probable that indiscriminate shackling leads to self-stigma and self-dehumanization, which may be especially impactful for adolescents' development of their identity" and "may, in turn promote increased engagement in antisocial behavior."[10]

Children with mental illness, and children with a history of trauma exposure suffer additional harm from shackling. Research shows that about 70 percent of children involved with juvenile justice have at least one diagnosable psychiatric condition.[11] Additionally, approximately 70 to 90 percent of youth involved with juvenile justice have had exposures to significantly adverse or traumatic experiences.[12] For those children, shackling can "directly contribute to the worsening

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[7] https:/njdc.info/wp-content/uploads/Shackling-Statewide-Bans-2019.pdf

[8] Affidavit of Dr. Patricia Coffey, Appendix A.

[9] Id., par. 8.

[10] Id., par. 18.

[11] https://njdc.info/wp-content/uploads/2014/09/NCMHJJ-Position-Statement-on-Shackling-of-Juveniles-032615-with-logos.pdf

[12] Id.

of symptoms of mental disorders, compromising daily functioning" and "precipitate reactive behavior arising from emotional dysregulation due to fear and/or anger."[13] Shackling may also "trigger memories of past maltreatment and specifically exacerbate post-traumatic symptoms such as anger, anxiety, dissociation, mistrust and non-compliance."[14] It "may also deepen depression due to the shame and humiliation associated with public shackling, and in some cases may contribute to self-harming behavior or suicidality."[15]

B. Indiscriminate shackling of children also has a negative impact on attorney-client communication, dignity and decorum in the courtroom, and the rehabilitative goals of juvenile court.

In ***Illinois v. Allen***, 397 U.S. 337 (1970), a foundational case on shackling disruptive defendants during jury trials, the Supreme Court said that shackling should only be used "as a last resort," and gave three reasons why. First, the presumption of innocence is imperiled when jurors see a defendant in shackles. Second, a defendant's ability to communicate with his counsel, "is greatly reduced when the defendant is in a condition of total physical restraint." ***Id., at 344***. Third, "the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." ***Id.,*** at 344.

There is currently no case law in Wisconsin directly pertaining to juvenile shackling. However, appellate courts in Illinois, North Dakota, California, Idaho, Oregon and Maryland have concluded that the reasoning of ***Allen*** applies to non-jury proceedings involving children in juvenile court. As long ago as 1977, the Illinois Supreme Court held that indiscriminate shackling, without a showing of a strong necessity to do so, is an affront to the dignity and decorum of juvenile court proceedings, and impedes the child's ability to communicate effectively with counsel. ***In re Staley***, 364 N.E. 2d 72 (1977). The court specifically rejected an argument that a presumption against shackling only applies to jury proceedings, holding that it jeopardizes the presumption of innocence "and demeans our justice for an accused without clear cause to be required to stand in a court room in manacles or other restraints while he is being judged." Also, the court held, "shackling restricts the ability of an accused to cooperate with his attorney and to assist in his defense." ***Id.*** at 73.

Similarly, the Supreme Courts in North Dakota, Oregon, Idaho, California and Maryland have held that children have the right to be free from shackling, unless the child presents a danger to the safety and security of the court. In ***Interest of R.W.S.***, 728 N.W.2d 326 (N.D. 2007), ***State ex rel. Juvenile Department v. Millican***. 906 P. 2d 857 (Ore. 1995), ***State v. Doe***, 333 P. 3d 858 (Idaho App. 2014), ***Tiffany A. v. Super. Ct.***, 150 Cal.App. 4th 1344 (2007) and ***In Re D.M.,*** 139 A.3d 1073 (Md. App. 2016). Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may also foster respect for the judicial process, the court held in ***Millican, supra,*** at 860.

Moreover, in each of these cases, the court concluded that a presumption against shackling during juvenile court proceedings is consistent with the rehabilitative purposes of the juvenile justice system. In those states, as in Wisconsin, "a primary purpose of the juvenile court is the

[13] Id.
[14] Id.
[15] Id.

rehabilitation of juveniles." ***In re Hezzie R.***, 210 Wis. 2d 848, 873, 220 Wis. 2d 360, 580 N.W. 2d 660 (1998). As the court concluded in ***In Re D.M., supra***, at 1022, the "presumption against shackling would more closely serve those [juvenile court] objectives while indiscriminate shackling threatens them." The courts' reasoning on the effect of shackling on rehabilitation echoes the U.S. Supreme Court's opinion in ***In re Gault***, 387 U.S. 1, 26 (1967), noting that "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."

The State Bar of Wisconsin cited the same negative effects of shackling children in Wisconsin as those identified in case law, saying shackling "impedes the attorney-client privilege, chills juveniles' constitutional right to due process, runs counter to the presumption of innocence and draws into question the rehabilitative ideals of the juvenile court."[16]

Wisconsin lawyers who represent children in juvenile court have described the effect of shackling on attorney-client communication. Public Defender Eileen E. Fredericks described her shackled clients as being "distracted and embarrassed. . . They crouch down. Sometimes they have to sign papers, but it's hard for them to sign with cuffs chained to their waists." Public Defender Alaina Fahley said she has had "numerous clients who are physically harmed by the use of shackles. I have seen red marks and indentations on my client's wrists and legs." Beyond the physical pain, it impacts on their ability to "be present and responsive in court." Attorney Fahley also noted that children who come from homes with a history of trauma experience strong emotions around shackling, sometimes making the shackles "all they can talk about or look at," and in other cases, causing them to disassociate from the proceedings.

Any number of national organizations opposed to indiscriminate shackling cite its negative impact on the rehabilitative objectives of the juvenile court. For example, the National Council of Juvenile and Family Court Judges (NCJFCJ), the American Bar Association (ABA), and the Child Welfare League of America (CWLA) all agree that shackling undermines rehabilitation. In 2015, NCJFCJ passed a resolution supporting rules against shackling children without good cause, concluding that shackling "is contrary to the goals of juvenile justice."[17] The ABA also adopted a position against indiscriminate shackling, reporting that shackling "is contrary to the rehabilitative ideals of the juvenile court."[18] And the CWLA policy states: "Shackling is inherently shame-producing. Feelings of shame and humiliation may inhibit positive self-development and productive community participation. Shackling doesn't protect communities. It harms them.[19]

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[16] BOGPolicyPositions2021.3.pdf (wisbar.org)

[17] https://www.ncjfcj.org/wp-content/uploads/2019/08/regarding-shackling-of-children-in-juvenile-court.pdf

[18] https://njdc.info/wp-content/uploads/2014/09/ABA-Report-Resolution-2015-107A-Revised-Approved.pdf

[19] https://www.cwla.org/cwla-policy-statement-juvenile-shackling/

C. Despite approximately five years of effort by courts, attorneys, and state and national organizations to reform indiscriminate shackling practices, hundreds of Wisconsin children are routinely indiscriminately shackled in juvenile court.

At its August, 2016, Juvenile Law Seminar, the Office of Judicial Education offered a session on reforming juvenile court shackling practices in Wisconsin led by Christina Gilbert, the manager of the Campaign Against Indiscriminate Juvenile Shackling (CAIJS).

In December 2017, the State Bar of Wisconsin published an "Inside Track" article, "Shackling Kids: Counties Shifting on Policy, but Wisconsin is in the Minority." It featured proponents of establishing a presumption against shackling, including La Crosse County Judge Ramona Gonzalez, Dane County Judge Everett Mitchell, and Milwaukee County Judge Joe Donald. The judges and others quoted in the article discussed the harm to children, the effects on dignity and decorum in the courtroom and rehabilitation, and the problems with attorney-client communications.[20]

The State Public Defender has trained defense attorneys to object to shackling of their child-clients, providing a model motion and references. The State Bar Board of Governors unanimously adopted a resolution endorsing a presumption against shackling in 2019.[21] Also in 2019, bills to end indiscriminate shackling were introduced in the Wisconsin legislature, although neither the Senate nor the Assembly bill got a committee hearing. (2019 SB 813, 2019 AB 774).

Despite these efforts, a 2020 survey by the State Public Defender revealed that hundreds of Wisconsin children are routinely brought into juvenile courtrooms in shackles. Some of these children are thought to be mentally ill and are in court for commitment hearings pursuant to Chapter 51, Wis. Stats. Most are children, as young as 10 years old, who were held in secure detention before a court appearance on a CHIPS or delinquency petition. Some have been taken into custody for an alleged delinquent act and were securely detained in a juvenile detention facility because they were thought to be either a substantial risk of running away, or of causing physical harm to another person. (Wis. Stat. §938.208). Others have not been accused of a crime but are instead children within the court's jurisdiction because they are in need of protection or services. If they have run from a non-secure custodial placement, they may be placed in secure detention and brought to court in shackles. (Wis. Stat. §48.208). Some are "dual status" children, with cases under both Chapter 48 and Chapter 938. Many are in court for their first detention hearing, and many of them will be released by judges or court commissioners to a less secure placement.

Many of these children are not shackled because the court has found them likely to flee, or likely to be disruptive in the courtroom. They are shackled simply because it is routine – sometimes based on a sheriff's policy, sometimes because it is the way it's always been done.

In at least 25 Wisconsin counties, shackling of children held in secure detention is routine – with no case-by-case determination of necessity. Brown County attorneys, for example, reported that children are shackled "in every case and for every hearing," and Marinette and Oconto county

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[20] https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx2?Volume=9&Issue=23&ArticleID=26018

[21] BOGPolicyPositions2021.3.pdf (wisbar.org)

attorneys report a "one size fits all policy." Columbia, Douglas, Fond du Lac, Racine, St. Croix, Sheboygan, Washington, Winnebago and Wood Counties are among the counties that reported indiscriminate shackling of children in juvenile court. When an attorney in Washington County questioned the practice, he was told, "that's the way it has always been done."

Attorneys from eight counties reported in the 2020 State Public Defender survey that when children are brought to court from secure detention, the sheriff's department "calls the shots," or the court "defers" to the sheriff's department in determining whether a child in juvenile court will be shackled.[22] In Waukesha County, courtroom shackling is the sheriff's decision. And in Outagamie County, the decision is "often deferred to the sheriff's department." Similar reports came from Calumet, Chippewa, Jefferson, Kenosha, Sauk, and Manitowoc counties.

Finally, when attorneys request that the court order removal of restraints, they are met with widely varying responses. In Polk and St. Croix counties, children are shackled even if attorneys object, but in Waupaca and Trempealeau counties, shackles are removed on attorney request. In other counties, attorney requests are "sometimes" honored.

III. INDISCRIMINATE SHACKLING: THE SOLUTION

A. Wisconsin counties that have established a presumption against shackling have experienced positive outcomes.

Five large and medium-sized Wisconsin counties have implemented local court rules or practices eliminating indiscriminate shackling of children in juvenile court. While their procedures differ in detail, all establish a presumption against shackling children in court, and provide that the presumption can be overridden by evidence that the child is at risk of fleeing, harming self or others, or causing a major disruption in the courtroom. The experiences of these counties will be briefly recounted here.

1. La Crosse County

La Crosse County eliminated indiscriminate shackling of children in juvenile court in 2015, and adopted a written policy in 2016, developed by the Security and Facilities Committee. Although the exact policy is part of a confidential security plan, Judge Ramona Gonzalez reports that the "default" position is that a child is not shackled in the courtroom. The sheriff's office can request that a specific child be shackled in court, but Judge Gonzalez could remember only two such requests in the last five years. In both cases, defense counsel conferred with the child client and decided not to contest the sheriff's request.

La Crosse County Sheriff's Department Court Services Sergeant Brandon Penzkover estimates that La Crosse has about 10 court hearings a month in which children are transported from secure detention to the courtroom. He could recall two instances of a child running out of

[22] The data stated in this paragraph and the next two paragraphs is based on reports of public defender staff attorneys, who described the shackling policies of the counties in which they practiced. It is summarized at Appendix B.

the courtroom since the policy was implemented; one was caught in the courthouse, the other "down the block." Judge Gonzalez noted two or three instances of disruptive behavior in the courtroom, but none serious enough to precipitate a change in policy. Sergeant Penzkover, who has worked in the sheriff's department both before and after the no-shackling default was implemented, said his experience with the policy has been "very good."

2. Eau Claire County

Eau Claire County also implemented a court rule in 2016 that established a presumption against use of shackles, both during transportation to court and in court. The County Juvenile Justice Collaborating Committee drafted and established the rule, which allows for the use of shackles only for "justified and documented reasons, such as uncontrollability, threats of serious and evident danger to self or others, evidence of potential escapes and there is no less restrictive alternative means to maintain order and safety." [23]

Judge Michael Schumacher said the Collaborating Committee reviewed research showing that indiscriminate shackling was unnecessary, unsafe, and traumatizing and humiliating to youth. Since implementing the presumption against shackling, he remembers only one or two instances of a youth being shackled in his courtroom. He believes that kids are less sullen, less embarrassed, and more likely to engage in conversation in the courtroom if they are not shackled. Courtroom interactions are better and more productive. He has seen "no downside" to a presumption against shackling.

Hannah Keller, the Youth Services Manager in the County Human Services Department, said she knew of only five times since the policy was implemented, that a child has been shackled while being escorted to court. They have had zero escapes, and zero significant incidents of harm or disruption. They had one or two minor incidents in a hallway, when a child had a difficult conversation with a parent, so they have limited hallway conversations. Ms. Keller supports the policy, noting that the juvenile justice system's goal is accountability and safety, not shame and dehumanization.

Secure Detention Manager Rob Fadness credited the collaborative process of developing their new policy with smooth implementation in Eau Claire. People believed it was the right thing to do, he said, so they were willing to take possible security risks. One such risk was that children being escorted through a public hallway to and from court, might try to run. But no one has done so. He and his staff, who escort children to and from court, are very comfortable with the policy of shackling only in rare cases for safety or security reasons.

3. Dane County

Dane County established a presumption against shackling children in secure custody while in hearings before judges in 2016. When Dane County Judge Everett Mitchell was interviewed in 2016, he cited dignity and decorum as a reason for his decision to have children appear in court without shackles whenever possible. He said that his goal was for youth "to see a court process in

[23] The Eau Claire County policy is set forth in Appendix C.

which they are respected and heard."[24] In 2019, Dane County extended that practice to hearings in front of court commissioners. John Bauman, the Dane County Juvenile Court Administrator reported: "This change has gone remarkably well and there have been no significant issues by youth in court since that time. Youth report that they feel more respected and their behavior in court has demonstrated that belief. The change has been very positive for all involved."

Judge Mitchell said the county had not had any issues with disruptions or acting out since the policy was implemented. In fact, he believes the practice has led to fewer security problems rather than more. Hearings about shackling have been very brief, he said, with none lasting longer than five minutes.

4. Milwaukee County

After many years of discussion, Milwaukee County "flipped" the presumption that children from the county's secure detention center would be shackled in court, to a presumption of no shackling. Children's Division Presiding Judge Laura Crivello said eliminating the indiscriminate use of restraints was a priority for her because she believed that the county's practice of indiscriminate use of restraints was contrary to law.

Judge Crivello had willing partners. Secure Detention Director Kevin Gilboy believed that shackling had a negative impact on children, especially those of color. Milwaukee County Sheriff Earnell Lucas supported a policy that maximized "the rights, safety, and human dignity of youth in County care."

The policy allows the use of restraints in juvenile court only if a judge is presented with specific documented reasons to justify the use of restraints and that the use of restraints is the least restrictive means to maintain order, decorum, and safety in the courtroom.[25] That determination, Judge Crivello said, "shouldn't be solely based on the offense, but rather on observations of behavior, past history and recent developments."

The policy was implemented in February 2020, just before the Covid pandemic resulted in court hearings becoming virtual. During the time court hearings have been in-person, though, officials report no significant security concerns or major incidents. Judge Crivello said that adding hearings about use of restraints to the court's already busy calendars was an initial concern, but it has not been an issue. With about 100 to 125 hearings per week involving children in secure detention, there were only a handful of requests per week for the use of restraints. When shackling hearings transpired, they were brief and lasted approximately two to five minutes. Secure Detention Director Gilboy said the children who appeared in court without shackles felt more respected.

Director Gilboy believes that the new policy "is a benefit to all involved who are trying to change the life of these kids for the kids to see themselves differently. If they see themselves as

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[24] https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx2?Volume=9&Issue=23&ArticleID=26018

[25] Milwaukee County's policy is set forth in Appendix C.

dangerous or evil they will act that way." He believes Milwaukee County has proven that it can be done safely. And Sheriff Lucas agrees. He believes "that our experiences demonstrate the safety of shifting toward a presumption against shackling, when informed by clear communication between all relevant stakeholders and formalized through detailed governing procedures."

5. Marathon County

Marathon County's presumption against shackling children in juvenile court grew out of its Trauma-Informed Care Team, according to Marathon County Judge Suzanne O'Neill. Members of that team, including judges, the sheriff's office, prosecutors, defense attorneys, social workers and others, recognized that many children in juvenile court had experienced trauma, and appreciated that shackling "could mirror those past traumatic experiences, further traumatizing them. So we worked collaboratively to develop a process that better serves young people in our youth justice system," according to County Administrator Lance Leonhard.

Marathon County adopted a local court rule in 2018 that establishes a presumption against shackling. The court is authorized to order shackling, based on criteria that mirror the criteria of the proposed rule.[26] Judge O'Neill said the shackling hearings are not time intensive, and the county had not experienced any behavioral issues. "Public safety has been protected while allowing juveniles to feel valued and to better focus, understand and express themselves throughout the proceedings," she said. "Implementation of the policy appears to be a success."

B. The experiences of these Wisconsin courts are consistent with those of courts in the 33 states and the District of Columbia that have eliminated indiscriminate shackling.

Thirty-three states and the District of Columbia have state-wide court rules, statutes or administrative orders prohibiting or limiting the indiscriminate shackling of youth.[27] Miami-Dade County Florida was an early pioneer, having limited shackling since 2006. In 2011, the Dade County Public Defender reported that more than 20,000 children had appeared in juvenile court without injury or escape.[28]

In 2016, the Campaign Against Indiscriminate Juvenile Shackling reported:

-After 12 years of limited shackling in Albuquerque, N.M., the court system had seen no escapes and only three incidents of children "acting out" in court.

-In New Orleans, which handles about 4,000 juvenile hearings a year, there had been no incidents, even though security staffing was *reduced* after shackling reform.

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[26] Marathon County's Local Court Rule 6.80, is set forth in Appendix C.

[27] https://njdc.info/wp-content/uploads/Shackling-Statewide-Bans-2019.pdf; https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2020-17_2021-07-28_FormattedOrder_AddMCR3.906.pdf; Chapter 11 - MN Laws

[28] *Policy Report, "Unchain the Children: Five Years Later in Florida" by Public Defender Carlos J. Martinez, December, 2011.* (On file with the Campaign Against Indiscriminate Juvenile Shackling) See http://njdc.info/campaign-against-indiscriminate-shackling/

-In Maricopa County (Phoenix) Arizona, 2500 detained youth have appeared in court since the county began limiting shackling. There have been no escapes and no safety concerns.

-In Connecticut, with limited shackling, 1,500 youth had appeared, with only one attempted escape.[29]

Moreover, as in Wisconsin, every jurisdiction that has moved away from indiscriminate shackling reports that the hearings are not burdensome. Nationally, shackling hearings are rare, because none of the parties object to the child appearing unshackled.

C. The judicial rule proposed here is based on a Model Rule developed by the Campaign Against Indiscriminate Juvenile Shackling, is consistent with principles established by this court in *State v. Grinder*, and is similar to those adopted in other states.

The rule proposed in this petition is based on a national Model Rule developed by the Campaign Against Indiscriminate Juvenile Shackling.[30] It is applicable to all proceedings in juvenile court, and translates the general standard set forth in ***State v. Grinder, supra,*** 190 Wis. 2d at 552 ("the circuit court should not order the imposition of restraints unless they are 'necessary to maintain order, decorum, and safety in the courtroom . . ..'") into more specific criteria.

In the first section, the Model Rule defines terms, establishes a presumption against shackling, then describes circumstances relevant to order, decorum and safety, that would justify use of shackles:

> "1. Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a child during a court proceeding and must be removed prior to the child being brought into the courtroom and appearing before the court unless the court finds that:
>
> (A) The use of restraints is necessary due to one of the following factors:
>
> (i) Instruments of restraint are necessary to prevent physical harm to the child or another person;
>
> (ii) 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
>
> (iii) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and
>
> (B) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person,

[29] Microsoft Word - safetyletterhead.docx (njdc.info)

[30] CAIJS-Model-Statutes-Court-Rules-May-15.pdf (njdc.info)

including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs."

The second and third sections of the proposed rule provide for a hearing on the issue, and add common sense limitations on shackles:

"2. 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 make written findings of fact in support of the order."

"3. Any restraints shall allow the child limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a child be restrained using fixed restraints to a wall, floor or furniture."

The rule proposed in this petition makes minor changes in form, not substance, from the Model Rule. The proposed rule creates a nearly identical subsection (2m) in two statutes, §48.299 and §938.299. The only difference is that a title has been added to §938.299, at the suggestion of the Legislative Reference Bureau (LRB), in order to maintain consistency in style.

On the advice of LRB, the first paragraph of the Model Rule is divided into two parts, (a) and (b). The definitional section (a) has been changed to use the definition of restraints found in the Milwaukee County policy, again with one change suggested by the LRB – the brand name "band-it" has been changed to "an electric immobilization device."

In the new section (2m)(b) the words of the model rule are changed only to refer to "restraints" rather than "instruments of restraint." Also numbers and letters are used to delineate sections and subsections in keeping with LRB style.

In section 2 of the Model Rule, the proposed rule changes "juvenile's attorney" to "child's counsel" and omits the word "written" in the second sentence. At the suggestion of the Director of State Courts, a sentence has been added to address a child's arguable right to personally participate in the hearing. No changes are made in section 3 of the Model Rule.

The Model Rule is the basis for judicial rules established in other states. It closely tracks the Florida rule and is very similar to the rules adopted in our neighboring states of Illinois, Iowa, and Michigan. The rules for Florida, Illinois, Iowa and Michigan, as well as Washington and Pennsylvania, are set forth in full in Appendix D.

Additionally, the Model Rule has been the basis for county policies and rules adopted in the five Wisconsin counties described above. The county policies described above are consistent with the general standards of the Model Rule. The Model Rule was designed to be a statewide rule; it is broad enough to establish parameters for circuit court rules, but leaves room for local stakeholders to collaborate on the specific procedures that will work best for each county's unique circumstances.

VI. The proposed rule is consistent with the recommendations of the National Council of Juvenile and Family Court Judges, the American Bar Association, the Wisconsin Bar Association, and other nationally-recognized organizations. Petitioners have also consulted with Wisconsin stakeholders.

Dozens of national organizations have recommended a policy that begins with presumption that children will not be shackled in juvenile court and authorizes courts to override that a presumption only when individual circumstances demonstrate a threat to courtroom security.

A. Judicial Organizations

The National Council of Juvenile and Family Court Judges, recognized in 2015 that "continued attention and consistent judicial leadership is necessary to ensure that policies regarding shackling continue to be upheld regardless of changes in leadership or administration," and resolved as follows:

> The NCJFCJ supports the advancement of a trauma-informed and developmentally appropriate approach to juvenile justice that limits the use of shackles in court.
>
> The NCJFCJ calls for judges to utilize their leadership position to convene security personnel and other justice system stakeholders to address shackling and to work together to identify ways to ensure the safety of children and other parties.
>
> The NCJFCJ encourages judges and court systems to continually review policies and practices relating to shackling children.
>
> The NCJFCJ supports a presumptive rule or policy against shackling children; requests for exceptions should be made to the court on an individualized basis and must include a cogent rationale, including the demonstrated safety risk the child poses to him or herself or others.
>
> The NCJFCJ believes judges should have the ultimate authority to determine whether or not a child needs to be shackled in the courtroom.[31]

B. Lawyers and Legal Associations

In 2015, the American Bar Association passed Resolution 107A urging all levels of government to "adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an opportunity to be heard and finding that the restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others." The report supporting the resolution stated: "Shackling interferes with the attorney-client relationship, chills notions of fairness and due process, undermines the presumption of innocence, and is contrary to the rehabilitative ideals of the juvenile court."[32]

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[31] https://www.ncjfcj.org/wp-content/uploads/2019/08/regarding-shackling-of-children-in-juvenile-court.pdf

[32] https://njdc.info/wp-content/uploads/2014/09/ABA-Report-Resolution-2015-107A-Revised-Approved.pdf

The Wisconsin State Bar Board of Governors unanimously approved a policy position in 2019 that states: "The State Bar of Wisconsin supports a presumption that juveniles not be shackled during court proceedings. Judges would retain authority to order shackling in cases deemed necessary. The State Bar believes the practice impedes the attorney-client relationship, chills juveniles' constitutional right to due process, runs counter to the presumption of innocence, and draws into question the rehabilitative ideals of the juvenile court."[33]

The National Association of Counsel for Children, a group that primarily focuses on children in the welfare system, has taken this position: "Children should not be shackled, except in circumstances where it is demonstrable that a failure to shackle the child would present an immediate, substantial risk of harm to another individual."[34]

The National Juvenile Defender Center has taken a position against indiscriminate shackling, and hosts the Campaign Against Indiscriminate Juvenile Shackling.[35]

The National District Attorneys Association has not taken a position regarding juvenile shackling. However, the Association of Prosecuting Attorneys has issued a statement of principles in support of its position: "There should be a presumption against the use of restraints on juveniles in court without appropriate evidence-based and data-driven assessments indicating that 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 public, court personnel, law enforcement officers, or bailiffs.[36]

C. Law Enforcement Organizations

To the best of petitioner's knowledge, there are no national law enforcement organizations that have adopted policy statements either supporting, or opposing indiscriminate shackling of children in juvenile court.

D. Social Services and Mental Health Organizations

Since 1921, the Child Welfare League of America (CWLA) the oldest child welfare organization in the country, has advocated for the best interests of all children and their families. They "stand firmly against the practice of automatically shackling children and adolescents in our nation's juvenile courts." The CWLA pointed out that shackling is likely to have negative effects on children, especially those previously exposed to trauma. Shackling "should be done only in the rarest of circumstances when all other options to ensure the safety of all courtroom participants have been exhausted." [37]

The National Center for Mental Health and Juvenile Justice also opposes indiscriminate shackling, stating: "In the vast majority of cases, shackling of youth is not necessary to assure

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[33] BOGPolicyPositions2021.3.pdf (wisbar.org)

[34] NACC Policy Agenda - National Association of Counsel For Children (naccchildlaw.org)

[35] Campaign Against Indiscriminate Juvenile Shackling – NJDC

[36] https://njdc.info/wp-content/uploads/2015/12/Association-of-Prosecuting-Attorneys_Policy-Statement-on-Juvenile-Shackling.pdf

[37] https://www.cwla.org/cwla-policy-statement-juvenile-shackling/

safety or prevent flight by the youth. It substantially undermines the positive development of youth, compromises the basic fundamental fairness and due process guaranteed by the Constitution, and imposes significant additional burdens and risks upon youth with behavioral health needs who are disproportionately represented among youth in the juvenile justice system."[38]

The American Academy of Child and Adolescent Psychiatry states that: "the mandatory or routine shackling of juveniles in courtroom settings should be prohibited, and that shackling should only be used in cases in which an individualized determination has been made that such restrictive procedures are necessary to ensure and maintain safety."[39]

E. Consultation with Wisconsin Stakeholders

In addition to the persons specifically identified in this memorandum, petitioners consulted regularly with Eileen E. Fredericks, the Juvenile Practice Coordinator for the State Public Defender Office, and Christina Gilbert, the manager of CAIJS. Petitioners Hirsch and Rondini briefed the Committee of Chief Judges and District Court Administrators about the proposed rule at their August 13, 2021 meeting, and solicited their input. Petitioners Hirsch and Rondini also met with the leadership of the Badger Sheriff's Association to discuss the proposed rule. They have also provided information to representatives of the State Bar, the Wisconsin Juvenile Court Intake Association and the Wisconsin District Attorney Association.

CONCLUSION

There is universal recognition that shackling a child is humiliating and stigmatizing. If the child has suffered trauma or mental illness, the shackling can exacerbate PTSD or mental health symptoms. Many courts and legal organizations agree that shackling has a negative impact on attorney-client communication, dignity and decorum in the courtroom, and the rehabilitative goals of juvenile court. However, despite approximately five years of effort by courts, attorneys, and state and national organizations to reform indiscriminate shackling practices, hundreds of Wisconsin children are routinely indiscriminately shackled in juvenile court.

Experience shows that indiscriminate shackling is not necessary. Wisconsin counties that have established a presumption against shackling have experienced positive outcomes, as have the 33 states and the District of Columbia that have eliminated indiscriminate shackling.

The judicial rule proposed here is a national model that has been the basis for statewide court rules in other states. It is consistent with constitutional standards. And it is broad enough to establish clear parameters for circuit court policies, while allowing circuit courts to collaborate on procedures that will work best for each county's unique circumstances.

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[38] NCMHJJ-Position-Statement-on-Shackling-of-Juveniles-032615-with-logos.pdf (njdc.info)

[39] Mandatory Shackling In Juvenile Court Settings (aacap.org)

For these reasons, petitioners respectfully request that the court create the proposed new Wis. Stat. (Rule) §48.299 (2m) and §938.299 (2m) regarding the use of restraints on children in juvenile court.

Dated this 13th day of September, 2021.

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