THE CIRCUIT COURT OF THE STATE OF OREGON
TWENTY-FIFTH JUDICIAL DISTRICT
YAMHILL COUNTY

JOHN L. COLLINS
PRESIDING JUDGE

Yamhill County Courthouse
McMinnville, Oregon 97128
Phone (503) 434-7497
FAX (503) 435-3067

February 7, 2011

Mr. Rick Sanai
Acting Deputy District Attorney
County Counsel
535 NE Fifth Street
McMinnville, OR 97128

Ms. Paula Lawrence
Attorney at Law
235 NE. 3rd Street, No. 1
McMinnville, OR 97128

LETTER SENT BY EMAIL ONLY. NO HARD COPY MAILED.

Re: [Names omitted in this copy]

Counsel:

This matter came before the court on motion for release of youths detained in the Yamhill County Juvenile Detention Center, YCJDC. At the writing of this letter opinion, the youths are not in custody, but the court is proceeding with a ruling in this matter because it raises issues that are likely to re-occur with other youth in detention. Moreover, the issue presented is one of ongoing and important public policy and should be addressed regardless of the present circumstances of the particular youths in this case. *See, e.g., United States v. Howard*, 463 F.3rd 999 (9th Cir. 2006).

The initial motion to release cites ORS 169.770, 169.740 and the Due Process Clause, 14th Amendment to United States Constitution and the Oregon Constitution. The initial motion specifically asserts that YCJDC is in violation of those provisions in the first three practices set forth below. The youths' supplemental motion to release asserts the fourth listed basis:

1. Handcuffing and shackling youth before, during and after in-person court appearances and handcuffing youth before during and after video court appearances.
2. Restricting possession of usual and necessary defense counsel materials during attorney-client visits thereby interfering with the youth's meaningful access to counsel and constituting an illegal administrative search.
3. Unreasonably restricting a youth's access to their legal papers.
4. Strip searching youths following court appearances and at other times without individualized reasonable suspicion.

In further support of youths' position on the fourth issue, the supplementary motion cites restrictions on YCJDC strip searches arising from federal litigation and, specifically, the opinion of United States District Court Judge Michael Mosman in which Judge Mosman ruled, "… it is unconstitutional to strip search juveniles after contact visits and without individualized suspicion that the juvenile has acquired contraband." The youths, here, seek to extend this restriction to strip searches conducted after in-custody court appearances.

I. Shacking of In-Custody Youth Offenders.

The practice present in this case has been commonly referred to as "shackling." Analysis of this issue requires some discussion of how the practice works.

Youth, in the same manner as in-custody adult offenders, prior to being escorted to court, are placed in leg cuffs connected by a chain, sometimes referred to as leg irons. A chain, commonly referred to as a "belly chain" is placed around the youth's waist. Standard police handcuffs are placed on the youth's wrists and those cuffs are looped through a short link to the center of the waist chain. This has the effect of keeping the youth's hands closely connected to the center of the youth's waist.

Youth are not always placed in leg irons, but are consistently placed in belly chain and hand cuffs. Sometimes youth are brought into the courtroom from OYA custody or on transport from another location, as opposed to brought into the courtroom directly from the detention facility connected to the courthouse. Outside transports are most often fully shackled, including leg irons.

Youths in this restraint are escorted by a juvenile court counselor, detention staff member, Oregon Youth Authority officer or, sometimes, a court security officer, to court and remain in that restraint while in court, including when the youth is at counsel table in his or her specific hearing. The youth continues to be shackled as he or she is escorted back to the detention center.

While not a perfect depiction, youths are restrained similarly to the youth in this photograph from a USA Today article submitted to the court.

An attorney may ask the court to direct that the youth be unshackled while at counsel table participating in the hearing. It is generally recognized that this is within the discretion of the judge and will generally be granted, absent presentation to the court of information that would lead the court to conclude that the youth may be a danger to him or herself or others in the courtroom, or is a risk to attempt to escape. Attorneys rarely ask that the client be unshackled, but may do so more often if the appearance is for an evidentiary hearing or trial.

In this particular case, the court, on its own initiative, after inquiring whether there were any indications that the youth might be a risk of harm or flight, directed that the handcuffs be removed while the youth were participating in the proceeding.

The YCJDC is a part of the courthouse-jail-sheriff's office structure. Internal secure passage exists between the detention center to a door that opens onto the second floor of the courthouse. The second floor hallway is open to the public and is where the four courtrooms are located. This is the same door through which adult defendants are brought from the jail, though, for legal and other reasons, they are not intermingled.

Youths are most often taken to courtroom 4, the door to which is located about 30 feet from the detention/jail secure door. This is the same door through which the public enters. The aisle to the front row of seats where the youth will be seated until called, or to the counsel table for his/her case, is through public seating and the same aisle used by the public, attorneys, court staff and the judge.

If proceedings are in the next courtroom down the hall, courtroom 1, detained youth will enter through a non-public side door about 20 feet further down the hall. The hallway with entry to courtrooms 1 and 4 can be closed off to the public on a temporary basis. Once in through the non-public side door, the youths are escorted to seating separated from public access but in the same area as attorneys and court staff.

Access to courtrooms 3 and 2, in that order, require that the shackled youth be escorted down the open public hallway to the courtroom. The detained youth are brought in through the public entrance. The path to counsel table or seating is not as constricted as courtroom 4, but is close to public as well as attorneys and court staff.[1]

The issue of shackling of juveniles has prompted much debate across the state and across the country. Since the 1995 Oregon Court of Appeals decision to be discussed hereinafter, Multnomah County has not shackled juveniles in court. Jackson County has recently implemented a no shackling policy after the issue was raised by the Jackson County Criminal Defense consortium. No court decision was issued, but an agreement was reached. The practice, however, across the state, appears to vary from county to county and from courtroom to courtroom and even from case to case. Some practices appear to depend, at least in part, on whether the courtrooms are configured to provide secure separate access from detention and the extent of available security staff.

According to a report provided to the court in this case, since 2007 shackling without an individualized analysis of risk has been banned in California, Connecticut, Florida, New Mexico, New York, North Dakota, North Carolina and Vermont.[2] These bans are attributed to State Supreme Court decisions that have ruled against blanket shackling for juveniles, rule changes, or statutes that prohibit unnecessary restraints. Some of the states have created a "presumption against shackling" absent an individualized determination of need.

The report also points out that "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 similar to those used in this county.[3]

---

1 The Yamhill County situation, thankfully, does not involve transport of the juvenile by vehicle or across an open area such as the courtyard. Certainly where the youth is transported by vehicle other safety and security considerations apply.

2 *See, e.g., Tiffany A. v. Superior Court,* 150 Cal App 4th 1344 (2007), where the California appellate court held that the juvenile court could not use physical restraints upon all minors who appeared in court *absent an individualized determination of need.*

3 The report identifies one such expert as Dr. Marty Beyer. The expert who testified in this case, Dr. Morrell, adopted much of Dr. Beyer's opinions in presenting his own by affidavit and by telephonic testimony in this proceeding. At the hearing, this court sustained the state's objection that the Beyer memo was hearsay. Upon further reflection, I believe this ruling was in error since the Beyer memo was specifically referred to and adopted by Dr. Morrell as a part of his expert testimony. I have considered the Beyer memo, though most of the information is also referred to in the Alaska report which was submitted to the court without objection. The Alaska report quotes Dr. Beyer as opining 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." The report goes on to state that Dr. Beyer "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

The Florida Supreme Court, on December 17, 2009, adopted its Juvenile Court Rules Committee's proposed rule regarding the indiscriminate use of shackling. The Florida Supreme Court, as quoted in the Alaska report referenced below, 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."

Effective March 1, 2010, routine shackling of juveniles in Massachusetts was eliminated under a Juvenile Court Chief Justice's policy directive. Steps to limit shackling of juveniles have been taken in several other states and in several other courts and counties within Oregon. According to Dr. Morrell, a seasoned clinical psychology consultant to the Oregon Youth Authority Rogue Valley Youth Correctional Facility, shackling is "no longer the model for the Oregon Youth Authority, among many correctional institutions."

The debate goes on in a wide variety of forums. Those who seek to continue the practice of shackling juveniles argue that it is necessary for public safety, safety of others in the courtroom and the safety of the specific juvenile and to prevent escape. Proponents also argue that shackling has a deterrent effect both on the youth in question and on other juveniles that might contemplate delinquent conduct. Proponents see shackling as a way to re-enforce the importance of the proceeding.[4]

Opponents of shackling of youth argue that shackling is demeaning, shaming and contrary to the rehabilitative mission of the juvenile court. Many, supported by expert testimony and studies, take the position that shackling can be particularly harmful to children who have been victims of physical or other abuse as is common among persons later involved in delinquent behavior.

No matter the scope and merit of the broader debate, the Oregon Court of Appeals has clearly held that shackling of youth in court proceedings is a violation of that youth's constitutional right to due process and fair trial. In *State ex rel Juvenile Department of Multnomah County v. Millican*, 138 Or App 142 (1995), the Court of appeals stated:

> Oregon has long recognized the rights of adult defendants to be free from physical restraints during criminal trials. *State v. Smith*, 11 Or 205 (1883). That right, which derives from the common law, as well as from the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, protects the accused from "self-incrimination by mute testimony of a violent disposition." *State v. Moore*, 45 Or App 837 (1980). Although most often invoked as a safeguard against potential jury prejudice, the right to stand trial unshackled also insures that defendants may face the court "with the appearance, dignity and self-respect of a free an innocent person" *State v. Kessler*, 57 Or App (1982) quoting *People v. Harrington*, 42 Cal. 165 (1871). As we stated in *Kessler*:

---

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."

4 On the last two points, this court has no testimony or other evidence, reports or evidence-based studies that would support these theories.

> "[T]he inferences the jury may draw is just one of the elements of prejudice to a defendant who is shackled. The shackles impinge on the presumption of innocence and the dignity of the judicial proceedings and may inhibit consultation with his attorney and his decision whether to take the stand as a witness." 57 Or App at 474.
>
> The right not to be shackled is not, however, absolute. A trial judge has "the discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior. *State v. Moore*, 45 Or App at 839-40. In exercising that discretion, the court must receive and evaluate relevant information and must make a record allowing appellate review of its decision. *Kessler*, 57 Or App at 473. Although the information need not be presented in a formal adversary proceeding, "a conclusory statement alone by a prosecutor or law enforcement officer is not sufficient to permit the independent analysis necessary for the exercise of discretion." *State v. Schroeder*, 62 Or App (1983).
>
> ***
>
> Although some of the concerns underlying Kessler *et al* do not apply in this context because there is no right to a jury in juvenile court proceedings, *State ex rel Juv. Dept. v. Reynolds*, 317 OR 560, 574 (1993), two factors warrant our extension of the right against physical restraint to juvenile proceedings. First, the right to remain unshackled is based on considerations beyond the potential for jury prejudice, including inhibition of free consultation with counsel. … That concern applies equally in the juvenile context.
>
> Second, extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes of Oregon's juvenile justice system. See generally *Reynolds*, 317 Or at 574. 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 foster respect for the judicial process. See also *In re Staley*, 67 Ill.2d 33 (1977) (extending to juveniles the right to remain unshackled in non-jury proceedings absent a showing that the accused posed a threat of escape)

The court, again citing *Kessler*, identified three potential types of prejudice from shackling: (1) impingement on the presumption of innocence and the dignity of judicial proceedings; (2) inhibition of the accused's decision whether to take the stand as a witness; and (3) inhibition of the accused's consultation with his or her attorney.

The court found the court's denial of the youth's request to be unshackled to be harmless error in the particular circumstances and record of that case. "Harmless error" does not mean that the youth was not harmed by the shackling. It means that the error did not warrant overturning the jurisdictional decision of the trial court in the face of substantial incriminating evidence presented in the case.

Notably then Judge DeMuniz, now Supreme Court Chief Justice DeMuniz, dissented and would have not found the error harmless and would have reversed the decision and remanded it for a new trial. A reading of that dissent is worthwhile. Judge DeMuniz points out that the court should also consider "the potentially prejudicial effect on the child's ability to testify, because shackling is likely to be more psychologically jarring for children than adults. Wearing leg irons may seriously undermine a child's confidence in telling his side of the story, which would adversely affect the credibility determinations of even the most experienced juvenile judge." *Millican*, at 149.

Further, Judge DeMuniz notes,

> Since 1907, the focus of this state's juvenile proceedings has been on "rehabilitation" of delinquents and not on "crime control." *State ex rel Juv Dept v. Reynolds*, 317 Or 560, 567 (1993). The purpose of a delinquency hearing is not to punish or convict, but rather to salvage, guide, and protect delinquent youths as wards of the court. *Id,*. at 568. The role of a juvenile judge is fundamentally different from that of a judge in an adult criminal prosecution. The ultimate question in juvenile court is not guilt or innocence, but rather 'what kind of care, custody, and control will best meet the needs of the child." *State v. Stewart*, 123 Or App 147, 155 (1993).
>
> Leaving child in leg irons without finding that he is dangerous disruptive or prone to escape is so far removed from the "best interest of the child" that prejudice is presumed."
>
> I am aware that the recently passed Juvenile Justice Task Force Bill (SB1)[5] replaces the "best interest of the child" standard with the stated purpose of protecting the public, reducing juvenile delinquency and providing fair and impartial procedures for dealing with delinquent conduct .… Even if SB 1 effectively overrules *Reynolds* and makes delinquency hearings more akin to criminal prosecution, that is all the more reason not to deny juveniles the protections afforded adult defendants.

In *Millican*, the youth was before the court for a trial. One could argue that *Millican* was not intended to apply to court appearances less at the core of due process. In other words, it could be argued that a youth need not be unshackled at an arraignment, detention release or review hearing, plea or even disposition (sentencing). At such an appearance, the youth is not faced with the decision whether to testify, giving testimony, communicating with his/her attorney during questioning of witnesses by the prosecution or the youth's own attorney – activities more central to a jurisdictional hearing or trial. I suspect this distinction may be the reason why so many courts in Oregon have continued to allow shackling, except at trial and absent individualized reason, at non-evidentiary or non-testimonial hearings.

Nonetheless, most of the harms or potential harms of shackling identified not only in *Millican* but also in the literature, studies and other information discussed, in part, herein, exist in all types of court appearances. The exception is impact on the youth's decision to testify and in giving testimony as would be the case at a trial or allocution at a dispositional hearing.

Essentially, then, the principal harms exist at all types of appearances by the youth.

The statutory basis for the youth's claims in this case is ORS 169.770. That statute provides:

> "… [T]he juvenile court … shall, upon motion of any party or on its own motion, and after prompt hearing, release any juvenile detained in a facility which violates … ORS 169.740 or 169.750, unless the court finds that such violation is not likely to reoccur."
>
> ORS 169.750 provides:
> "A juvenile detention facility may not … (2) Use any physical force, other means of physical control or isolation on a detained juvenile except as reasonably necessary and justified to prevent escape from the facility, physical injury to another person, to protect a detained juvenile from physical self-injury or

5 SB1, to which the opinion refers, is the present Oregon law.

to prevent destruction of property … and for only so long as it appears that the danger exists. A use of force or other physical means of control may not employ

(a) The use of restraining devices for a purpose other than to prevent physical injury or escape, or in any case, for a period in excess of six hours. However, the time during which a detained juvenile is being transported to another facility pursuant to court order shall not be counted within the six hours; …."

Arguably, ORS 169.730, *et sec* applies only when the youth is in the facility itself. However, when being transported to another facility or to the courtroom the youth is still in the constructive custody of the detention center. Provisions in ORS 169,750(2)(a), implicitly at least, recognizes this by providing that limits on the duration of physical restraint do not apply while the youth, pursuant to court order, is being transported to another facility, thus outside of the facility itself.

Thus, both under the *Millican* decision and the above statute make it clear that a youth may only remain shackled in court where it is reasonably necessary and justified to prevent escape, physical injury to the youth or another person, prevent destruction of property or escape. If restraint is authorized, it must only last for as long as is necessary to meet the danger and must be based on specific information that the specific youth presents a danger to himself or others or predisposition to attempt to escape. The decision must be made by the judge presiding over the case on an individual basis.[6]

The motion in this case raises more than the issue of shackling during court proceedings. The question of shackling while being brought to court and being returned to detention presents some more complex considerations. The youth must pass through areas open to the public and even pass directly among members of the public, attorneys, court staff, witnesses and sometimes the victim of the conduct. This is especially true in courtroom 4, a small courtroom with no direct separate access to the front of the courtroom. During busy court days, no matter to or from which courtroom the juvenile is being taken, there is no access without passing through a public hallway and in close proximity to the public, attorneys and court staff and sometimes witnesses including, possibly, the victim. That same passage to the courtrooms involves potential escape routes down the first set of stairs, the hallway or, beyond courtrooms 4 and 1, the stairway to the front of the courthouse.

The types of prejudice from shackling identified in *Millican*, quoting *Kessler*, -- impingement on the presumption of innocence, inhibition of the accused's decision whether to take the stand and inhibition of the accused's consultation with his or her attorney – are minimally, if at all, implicated during transport to and from court.

The court has a duty to protect the rights of the accused, but the court also has a duty to guard the safety, security and dignity of court proceedings. The duty of safety to the public, attorneys and court staff extends to the hallways of the courthouse, entry into the courtrooms, and along passage to the counsel table. Members of the public have also a Constitutional right to public access, including the courtroom hallways and the courtroom aisles

6 The Massachusetts policy suggests the following factors: The judge presiding in the case 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 has an incentive to attempt to escape); (b) the criminal history of the juvenile;(c) any past disruptive courtroom behavior by 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 presents 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."

leading to the youth's position at counsel table when his or her case is called. In conduct that involves a victim, that victim has a right to be present during critical stages of a case and would not uncommonly be in the hallway outside the courtroom or in the general public area of the courtroom along the way.

The greatest potential harm to the youth that might occur by shackling in transport to and from the courtroom is the potential psychological harm identified in debate across the country and, specifically in this case by Dr. Morrell and Dr. Beyer (as adopted by Dr. Morrell). This potential harm is not insubstantial, especially, as noted, with youths that have experienced abuse in their upbringing – sadly, not an uncommon factor, particularly with troubled youth prone to enter the juvenile delinquency system and meet standards to be placed in or remain in custody in detention facilities.

The harm or potential harm is not absolute with every youth. It has been presented in this case through expert testimony, not direct evidence or evidence-based studies. This is of *some* significance in the weight the court gives to the potential harm, especially where the harm is less implicated in transport to and from the courtroom.

This court spent some time at the beginning of this section of the opinion describing shackling. It is the same restraint used with the most hardened and dangerous adult offenders and the same used in prisons and "chain gangs". It is this type of restraint – shackles – that is the focus of the expert testimony regarding significant harm to juveniles.

The potential for harm must be weighed, then, against the public safety considerations and risk of escape along open public hallways and during courtroom egress to counsel table where the youth will officially stand before the court and the *Kessler/Millican* harms are also implicated.

Of consideration, too, is the fact that juveniles, by nature, can be impulsive. It is this very impulsivity that leads law and society to provide greater protection of juveniles against harm others may impose on them or they may inflict on themselves or others. Common sense dictates that if an impulsive act of harm to self or others, or flight, is to occur, it is most likely to occur during the transport from detention to appearance before the court.

Counsel for the state in this case appropriately points out that not all youth charged with an act that would be a crime if the youth were an adult are held in detention for commission of a delinquent act.[7] Detention of youth accused of a delinquent act is not axiomatic. There are statutory restrictions on detention of youth that tend by their nature to detain persons who are at least alleged to have posed some harm or risk of flight. ORS 419C.145 provides as follows (emphasis added):

> **419C.145 Preadjudication detention; grounds.** (1) A youth may be held or placed in detention before adjudication on the merits *if one or more of the following circumstances exist*s:
>
> (a) The youth is a fugitive from another jurisdiction;
>
> (b) The youth is alleged to be within the jurisdiction of the court under ORS 419C.005, by having committed or attempted to commit an offense which, if committed by an adult, would be chargeable as:
>
> (A) A crime involving infliction of physical injury to another person;
>
> (B) A misdemeanor under ORS 166.023 [Disorderly conduct in the first degree]; or
>
> (C) Any felony crime;

7 More technically, as applied here, "an act that if done by an adult would constitution a violation of the law." ORS 419C.005.

(c) The youth has willfully failed to appear at one or more juvenile court proceedings by having disobeyed a proper summons, citation or subpoena;

(d) The youth is currently on probation imposed as a consequence of the youth previously having been found to be within the jurisdiction of the court under ORS 419C.005, and there is probable cause to believe the youth has violated one or more of the conditions of that probation;

(e) The youth is subject to conditions of release pending or following adjudication of a petition alleging that the youth is within the jurisdiction of the court pursuant to ORS 419C.005 and there is probable cause to believe the youth has violated a condition of release;

(f) The youth is alleged to be in possession of a firearm in violation of ORS 166.250; or

(g)The youth is required to be held or placed in detention for the reasonable protection of the victim.

(2) A youth detained under subsection (1) of this section must be released to the custody of a parent or other responsible person, released upon the youth's own recognizance or placed in shelter care unless the court or its authorized representative makes written findings that there is probable cause to believe that the youth may be detained under subsection (1) of this section, that describe why it is in the best interests of the youth to be placed in detention *and that one or more of the following circumstances are present*:

(a) No means less restrictive of the youth's liberty gives reasonable assurance that the youth will attend the adjudicative hearing; or

(b) The youth's behavior endangers the physical welfare of the youth, the victim or another person, or endangers the community.

(3) When a youth is ordered held or placed in detention, the court or its authorized representative shall state in writing the basis for its detention decision and a finding describing why it is in the best interests of the youth to be placed in detention. The youth shall have the opportunity to rebut evidence received by the court and to present evidence at the hearing.

(4) In determining whether release is appropriate under subsection (2) of this section, the court or its authorized representative shall consider the following:

(a) The nature and extent of the youth's family relationships and the youth's relationships with other responsible adults in the community;

(b) The youth's previous record of referrals to juvenile court and recent demonstrable conduct;

(c) The youth's past and present residence;

(d) The youth's education status and school attendance record;

(e) The youth's past and present employment;

(f) The youth's previous record regarding appearance in court;

(g) The nature of the charges against the youth and any mitigating or aggravating factors;

(h) The youth's mental health;

(i) The reasonable protection of the victim; and

(j) Any other facts relevant to the likelihood of the youth's appearance in court or likelihood that the youth will comply with the law and other conditions of release.

(5) Notwithstanding subsection (2) of this section, the court may not release a youth when:

(a) There is probable cause to believe the youth committed an offense that, if committed by an adult, would constitute a violent felony; and

(b) There is clear and convincing evidence that the youth poses a danger of serious physical injury to or sexual victimization of the victim or members of the public while the youth is on release.

Thus, the effect of this statute is that no youth will be held in detention unless:

1. There is probable cause (facts) to believe the youth committed a serious offense: a felony or a misdemeanor involving infliction of physical injury (or disorderly conduct), or has failed to appear in court, or has allegedly violated probation or violated pre-trial release, possessed a firearm or is a danger to the victim.
2. The court determines that detaining the youth in a detention facility is in the youth's best interest, and
3. Considering factors listed in subsection 4, there is no means less restrictive of the youth's liberty that will give reasonable assurance that the youth will attend the adjudicative hearing; or
4. The youth's behavior endangers the physical welfare of the youth, the victim or another person, or endangers the community.

Stated otherwise, there is some risk of harm, albeit based on the present allegation, or risk of non-appearance or flight. With this in mind, it is appropriate that some degree of restraint be imposed in transporting the youth to and from court provided, however, that the method of restraint used does not result in harm that outweighs the need for the restraint.

In this weighing process applicable to transport to and from the courtroom and up to counsel table, the court must consider what alternatives to full-scale shackling might be used that would mitigate the potential harm to the juvenile while protecting the safety of the public and protecting against risk of escape.[8] The following methods come to mind, but is by no means an exhaustive list:

- Less oppressive restraints. Use of the same full-scale shackles, chains, leg irons, belly chains and handcuffs used with hard-core dangerous adults imposes harm to the juvenile beyond what would appear to be needed to guard against an impulsive attempt to escape or harm someone. It is these "shackles" that impose the potential harm and are not needed except in that unusual case where information specific to the specific youth would justify that level of restraint. This court has urged juvenile officials to look into less oppressive restraints and no leg restraints. I have been made aware options are available or can be created.
- Where there is some indication of flight risk, use of a leg brace, as is used with adult offenders, that will slow movement without the visibility and implications of leg irons and other "full shackling".
- Greater use of video court appearance. This system was only fairly recently established for juveniles even though it has been in place for a long time with adults. With an exception noted later in this opinion, it appears to work well. With hearings that require direct consultation with counsel this method may not be practical, though counsel appearing from detention *with* the juvenile by video may also be an alternative.
- Request for courtroom or hallway adaptation. In some cases, public access and exposure of the youth in restraint (presumably less oppressive restraints) to the hallway to courtrooms 4 and/or 1 could temporarily be limited and/or contain the youth behind the locked hallway door just south of the entry to courtroom 1.
- More assistance from courthouse security. It is recognized that we are in a period of limited funding resources for security personnel and predictions are that funding will only continue to be a tougher issue in years to come. Nonetheless, escort of an unshackled or limitedly restrained youth by a security officer may provide greater security than might be available when escorted by a juvenile counselor.[9] This could require an adjustment in scheduling to not bring juveniles to court during other high demand on security personnel.

---

8 This approach is also consistent with the "least restrictive means" concept. Under that concept, even if there is a compelling governmental interest that might justify restriction on a constitutional or statutory right, it is to be implemented in a manner that least restricts the right. *See, e.g., State v. Wolfe*, 273 Or 518 (1975).

9 It may be that limitations on funding and limitations resulting from courthouse structure or available security personnel will not be a defense to a requirement of unshackling juveniles. *See, e.g., In re Tiffany A.*,150 Cal.App 4th 1344 (Cal.Ct. App.2007).

The motion also raises objection to youth being handcuffed and/or fully shackled while before the video camera for video court appearance. I understand this practice has stopped. If not, it is not justified and must be stopped, absent an individualized showing of necessity and prior court approval. This is based on the same considerations that prohibit shackling or unreasonable restraint of a youth brought to court – *i.e.*, it is in violation of statute and the youth's rights to do so unless there is a judicial finding that the youth presents a danger to him or herself or staff within the detention facility.[10]

Summary of ruling regarding shackling:

1. Youth are not to be shackled in the matter presently practiced, while at counsel table participating in his or her case unless the court, in advance of the appearance in court at counsel table, has made a finding that the youth presents a danger to him/herself or others or a risk of attempt to escape. Criteria for this decision will be like those set forth in footnote 6.
2. Youth brought before the video camera for video appearance in court must not be shackled or otherwise physically restrained unless the court, prior to appearance, has approved reasonable restraint based on risk of self-harm, harm to others or damage to property. That decision must be based on facts specific to the particular youth. Again, see footnote 6.
3. Youth being transported to and from court proceedings, and while in court awaiting their case, may be reasonably restrained. However, the juvenile department is to submit a plan for restraint that does not involve the practice of full scale shackling. Full shackling can be used only with prior judicial approval based on a showing that it is necessary due to risk of harm to self or others or risk of attempted escape that is particular to the specific youth and that lesser restraint is insufficient.

II. ***Restrictions on possession of usual and necessary defense counsel materials during attorney-client visits thereby interfering with the youth's meaningful access to counsel and constituting an illegal administrative search.***

There can be no debate that a youth in detention is entitled to access to counsel. This is both a Constitutional right and a statutory right juvenile detention facilities are required to honor. See ORS169.740(2)(d). Implicit in that right is the requirement that any rules restricting access be limited and reasonable.

This issue was previously raised before this court. The court, in May, 2010, found certain of YCJDC's policies and procedures imposed unjustified impediments to an appropriate level of access to counsel. Those concerns, for the most part, were addressed by YCJDC. Provisions now exist for either a non-contact visit in a room adapted for that purpose, or a contact visit with the juvenile in a secure room. Reasonable restrictions on what attorneys can bring to contact visits were defined and posted and attorneys should be able to know what can and cannot be brought beyond the storage lockers. The YCJDC policy referring to a potentially intrusive "inventory" of attorney paperwork has been addressed. Identity of expert witnesses is now protected. Attorneys are allowed quicker access if known to detention staff or presenting a bar card identification.

Nonetheless, counsel now asserts that the intent, if not the letter, of the court's prior ruling is not being followed in all ways.

---

10 Consideration of risk of flight is not, obviously, a factor when the youth remains in the detention facility. Risk of damage to property, however, *could* be a consideration leading to restraint within the facility, but would require prior approval and be justified by facts specific to the youth. If the concern is for potential damage to video or other equipment, that can be addressed by protecting the equipment rather than shackling the juvenile.

The problem, at this stage appears to come down to staples. While this may seem like a lot of litigation over such a minor item, it is not minor to YCJDC when those staples can be used for self-mutilation, tattooing or other harm within the facility. There is no debate that the facility is entitled to prohibit staples on papers given to and intended to stay with the juvenile in the facility.

From the attorneys' perspective, the policy should not prohibit bringing staples into a contact visit if the staple remains on papers within the control of the attorney and are not readily removable.[11] The practice however, the court is informed, involves a requirement that *all* staples be removed from *all* paperwork brought into a contact visit.

I do not conclude that this issue rises to a denial of meaningful access to counsel. Inconvenient, even annoying, yes, but not a significant barrier to access to counsel.

I strongly urge YCJDC, however, to clarify a ***reasonable*** policy regarding staples that may be on papers an attorney takes to a contact visits. That policy must also be followed in a manner that is not arbitrary, gives counsel a fair opportunity to comply and does not otherwise impose unreasonable restrictions. A requirement of removal, for example, of the deeply embedded staples in a legal pad is over-reaching and certainly prone to be perceived as an over-reaction to litigation, in this court and in federal court. YCJDC is entitled to enact *reasonable* policies and, in fact, has a duty to do so for the protection of youth in the facility as well as staff so long as the policies are reasonable, in writing, and enforced in a reasonable and consistent manner.

On the matter of staples, I suggest the following:

- No staples, paper clips or other metal fasteners on papers to be provided a juvenile for that juvenile to retain in detention. (No dispute here.)
- No restriction on staples or other metal fasteners on papers to be shared with, but not retained by a juvenile during a contact visit unless those staples, etc., are loose or otherwise readily capable of being removed.

I have not re-visited the non-contact visit room. I do understand that it was improved after the court's prior ruling. However, I suggest further improvement that makes the room a more satisfactory alternative to a contact visit, for counsel and client. YCJDC would benefit from this as well as the juvenile, counsel, parents or other authorized visitors and, ultimately, the public.[12] I suggest:

- Seating at a comfortable level for both juvenile and attorney.
- A platform that operates like a desk on each side, but especially the attorney side.
- Adequate sound baffling by use of carpeting or other sound absorption on the walls or other measures to reduce concern about lack of confidentiality.
- Reasonable procedures to pass written material for inspection or signing, with pre-screening for removable staples or other fasteners, if necessary.
- Communication by a microphone system or screened hole in the glass. Telephone communication through opposite sides of a glass barrier is unnecessary and inhibits free communication and hands-free note-taking or other common courtesies of communication.
- Consideration of internet access that would allow attorney and client to communicate at a distance via

11 The court's May 18, 2010, letter refers to "paperclips or *loose* staples that might pose a security risk, not *all* staples.
12 As stated earlier, the lawyer-client facilities in the jail are a good model.

VAI, Skype or similar technology.[13]

III. ***Denial of reasonable access by juveniles to their legal papers.***

Counsel for the youths asserts here that juveniles in detention are not allowed to keep their legal papers in their cells and that the facility's strict rules, programming and restriction discouraged youth from having meaningful access to their legal papers.

The testimony at the hearing was that staff will retrieve papers for youth and allow them to look at the papers, but only at certain locations and during certain hours.

Ready access by the juveniles to their legal papers in their cells would be ideal. However, YCJDC staff present reasonable basis for the system in place. I encourage YCJDC staff to examine procedures and/or practices that might allow legal papers to be more readily available to the detained youth. However, I do not conclude that the current system is a denial of a constitutional or statutory right sufficient to warrant court intervention in these YCJDC practices.

IV. Comprehensive searches after court appearances.

The opinion of Judge Mosman is clear. Juvenile inmates may be subject to a comprehensive search, or strip searches, *on initial entry into the facility*, provided that it is reasonable in scope and performed in a manner that maximized the privacy interest of the juvenile while still allowing a reasonable search for contraband.

The Mosman opinion also restricts comprehensive searches after contact visits to those situations where there is a reasonable suspicion that the juvenile may have acquired contraband.

The same restriction applies to searches after court appearance. Such searches are not to be routinely conducted upon return from court. Search after return to court must only occur based on reasonable suspicion that the person has come into possession of contraband.

A "gut feeling", conclusionary opinion of staff or simple close proximity to other persons outside of detention is not a sufficient basis for a search. The search must be based on articulable facts and reasonably restricted to the facts that form a basis for the search. To allow such searches otherwise places a chilling effect on the willingness of juveniles to come to court and subjects the juveniles to emotional harm and unlawful search.

In this case, the director of YCJDC testified that according to YCJDC policy the director makes the determination whether there is a basis for a comprehensive search or "strip search". That same director testified that close physical association with Ms. Lawrence alone was cause to subject the juvenile to a search because she had, at some point, brought a stapled and glued legal pad into the facility. This is not reasonable suspicion for a search of the juvenile. It smacks of retaliation for Ms. Lawrence's perceived role in litigation challenging YCJDC's policies and practices.

As demonstrated in fact in this case and also as a general policy, the YCJDC director should not be in a position to make these decisions unless directed by clear, unambiguous and objective criteria. That is the reason why searches, even within a detention facility, unless it is an approved administrative search such as an intake

13 I am told the jail is experimenting with this technology for attorney-client communication involving adult inmates.

search, must be subject to the approval of an impartial magistrate.

To enforce the juvenile's right to not be subject to an unconstitutional search following a court appearance, YCJDC will be prohibited from conducting post-court searches without prior judicial authorization.[14]

Ms. Lawrence, I ask that you prepare a judgment based on this opinion. To put it in context, the statutory relief – release of the specific youths in this matter -- is moot. However, you may frame the judgment in a manner that addresses the actions set forth in this letter opinion so that the issues will not need to be addressed again with the next juvenile in a similar situation. I suspect there may be some difficulty in coming to an agreement regarding the final form of the judgment. I expect counsel for both sides to professionally cooperate in developing a mutually acceptable form of judgment and to submit to the court for approval.

I am open to meeting with counsel, if necessary, and am also receptive to any reasonable request for any clarification that might make this matter most productive.

Epilog. I have earlier encouraged the defense bar, juvenile department and detention center administration and others to cooperate constructively on addressing improvements to be made in juvenile justice administration in this county. A Local Juvenile Court Improvement Project committee has been established and has been attended by juvenile and detention administration and representatives of the defense bar. Ms. Lawrence has been invited. Those meetings will continue with a closer examination of improvements suggested by participants and by the Public Defense Services Commission in its audit of issues in juvenile representation. Improvements can be made and this may be a far better forum for that improvement than litigation either in this court or in federal court.

There has been media and public interest in this decision. Unless I hear prompt objection from counsel, I will be making it available in a form that does not reveal names of the particular youths involved.

Sincerely,

JOHN L. COLLINS
Presiding Judge

Cc: Judges
Tim Loewen
File

14 As stated in this opinion, it may be that YCJDC could establish a written administrative search procedure, but before the court would approve that alternative, further argument would need to be presented and examples of such a procedure would need to be submitted, if they exist, along with a specific proposed procedure.