RESOLVED that the South Carolina Bar supports a rule of law which restricts the shackling of juveniles in court proceedings, limiting the use of restraints on juveniles to those who pose a risk of harm to themselves or others, a risk of flight, or disruption in the courtroom, and an opportunity for the juvenile to be heard before restraints are employed.

COMMENTARY

The indiscriminate shackling of youth in the nation's juvenile courts, often in handcuffs, belly chains and leg irons, has reached scandalous proportions in recent years. Ultimately the practice reached the front page of USA Today, with the headline *Should Kids go to Court in Chains?*[1]

South Carolina employs this egregious practice generally in its juvenile courts, though there are exceptions depending on the family court judge. In 2010, the National Juvenile Defender Center, together with the Children's Law Center conducted an assessment of the defense of juvenile offenders in the state's family courts. The report described the phenomenon as "commonplace" in the vast majority of counties surveyed.[2]

Children and youth accused of non-violent offenses in the state's juvenile courts are the norm; violent and serious offenses comprised a mere 8.3% of juvenile cases in the family court in 2012-2013[3] Yet youth who are in custody, whether for an initial appearance, adjudication of guilt or post-conviction status are routinely brought before the court in leg irons, handcuffs or more often belly-chains.

[1] USA Today, June 17, 2007

[2] *South Carolina Juvenile Indigent Defense: A Report on Access to Counsel and Quality of Representation in Delinquency Proceedings*, National Juvenile Defender Center, Washington DC (Winter 2010), at p. 40.

[3] South Carolina Department of Juvenile Justice, Annual Statistical Report, 2012-2013 (October 2013) at p. 11.

In response to the shameful practice of shackling children and youth wholesale, many jurisdictions have sharply limited the practice, whether by judicial decision, legislation or court rule-making.

Illinois ended the practice as long ago as 1977, in *In Re Staley*, 40 Ill.App.3d 528, 364 N.E.2d 72 (1977). Other courts have followed suit. *In Re Millican*, 906 P.2d 857 (Ore.Ct.App.1995); *State v. E.J.Y.*, 55 P.3d 673 (Wash.Ct.App. 2002); *In Re: R.W.S.*, 728 N.W.2d 326 (N.D. 2007); *Tiffany A. v. Superior Court*, 150 Cal.App.4th 1334 (2007). North Carolina, New York and Pennsylvania have restricted the practice by statute.[4] Florida, Massachusetts and New Mexico have curtailed the practice through the rule-making authority of those states' highest courts.[5] All employ a presumption against the use of restraints on young people in their courts. All provide limits on judicial discretion in using restraints in circumstances which are to be the exception rather than the rule.

Furthermore, international norms discourage the practice. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, approved by its General Assembly in 1990, urges the use of restraints only in exceptional circumstances, relied upon restrictively for the shortest possible period of time, avoiding humiliation and degradation. *Id*, at Rule 64.[6]

There are compelling reasons to end this routine practice, and the South Carolina Bar should exercise leadership in reforming it.

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[4] N.C. Gen. Stat. § 7B-2402.1 (2010); N.Y. Comp. Codes R. & Regs. Title 9, § 168.3(a) (2011); 237 Pa. Code § 139 (2011).

[5] Fla. R. Juv. P. 8.100(b) (2011); Trial Court of the Commonwealth Court Officer Policy & Procedures Manual ch. 4, § 6 (2010); *In re* Use of Physical Restraints on Respondent Children, No. CS-2007-01, (N.M. Sept. 19, 2007),

[6] The U.N. Convention of the Rights of the Child, famously not yet ratified by the United States, urges parties to the convention to treat children accused of crimes in a manner which promotes the child's dignity and worth, and reinforces the child's respect for human rights, at Article 40. This convention is the most widely ratified U.N. convention in the world, save Somalia, South Sudan and the United States.

The practice is contrary to law.

To begin with, the practice has constitutional implications. Under the U.S. Constitution, under due process of law, at least as regards adults in trial, the use of visible restraints imposed on the accused should only be employed "in the presence of a special need." *Deck v. Missouri*, 544 U.S. 622, 625 (2005). This requires demonstration by the state of an interest specific to a particular trial, such as potential security problems or a risk of flight from the courtroom. Id, at 629. See also, *Holbrook v. Flynn*, 475 U.S. 560, 568-569 (1986). The weighing of any considerations of shackling an individual for trial should result in the use of shackling "as a last resort." *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

South Carolina has long recognized that shackling an accused in a courtroom can be prejudicial to a fair trial. See, *State v. Johnson*, 156 S.C. 63, 152 S.E. 825 (1930), suggesting that restraints visible during trial are impermissible, though the use of restraints in transporting the accused to and from the courtroom are not. See also, *State v. Moore*, 257 S.C. 147, 184 S.E.2d 546 (1971).[7] Prejudice will not be presumed, however. *Humbert v. State*, 345 S.C. 548 S.E.2d 862 (2001).

Moreover, using shackles, and especially handcuffs or belly chains, impairs the ability of the youth to communicate with counsel. *Deck* recognized this, at p. 631, citing *Illinois v. Allen*, supra at 344. Furthermore, Article I, Section 14 of the South Carolina Constitution requires that the accused "...be fully heard in his defense by himself or by his counsel." Shackling a child impedes the youngster's ability to consult or confer with counsel, take notes or even take the stand in defense. *Deck, id.* These considerations apply to every stage of the proceeding for the child, including pretrial detention, adjudication of guilt or innocence, or disposition.

[7] This resolution does not apply to the use of restraints during the transportation of the youth to and from court, which, of course, would be permissible under the law.

Finally, the clear implications of the practice are that the child is being punished through the use of shackles and other restraints prior to an adjudication of guilt. Any such punishment imposed prior to trial is a deprivation of due process of law. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982): "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," citing *Greenholtz* v. *Nebraska Penal Inmates,* 442 U. S. 1, 18 (1979). See also. *Deck v. Missouri*, *supra*, at 630: "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process."

The practice is contrary to the purpose of the court.

It has been said that a court is a temple of justice and a judge is its minister. Irrespective of crimes committed on the streets, our courts are purposely designed to communicate deliberation, decorum and dignity. Discussing the practice of shackling the accused, and limiting its use, at least as applied to adult offenders, the U.S. Supreme Court observed:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

Deck v. Missouri, 544 U.S. 622, at 631 (2005).

These considerations are even more important in the state's juvenile courts, which among their purposes include the goal of rehabilitation, a purpose recognized by the United States Supreme Court in *In Re Gault*, 387 U.S. 1 (1967), recounting that the procedures of the juvenile court from apprehension through institutionalization historically were to be "clinical rather than punitive." *Id* at 14.

After extensive hearings before the Florida Supreme Court conducting an inquiry into the practice as a part of its rule-making authority, the court said:

> We find the indiscriminate shackling of children in Florida courtrooms... repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice, a concept which this Court has previously acknowledged.

In Re: Amendments to the Florida Rules of Juvenile Procedure, 26 So.2d 552, at 556 (2009).

In the wake of the scandal revealing the abhorrent treatment of children and youth in Luzerne County, Pennsylvania, which came to be known as the "kids for cash" scheme, the Pennsylvania supreme court acted on recommendations for reform to enact a rule limiting the use of shackles.[8] The court found

> "[t]he routine use of restraints on juveniles is a practice contrary to the philosophy of balanced and restorative justice and undermines the goals of providing treatment, supervision, and rehabilitation to juveniles."

Adoption of New Rule 139 of the Rules of Juvenile Court Procedure, Pennsylvania Supreme Court, No. 527, April 26, 2011. The Chief Justice of the Massachusetts Trial Courts found that "[s]hackling of juveniles in courtroom proceedings is antithetical to the Juvenile Court goals of rehabilitation and treatment." *Amendment of Trial of the Commonwealth Court Officer Policy and Procedures Manual*, Commentary, March 10, 2010 at p. 3. The Chief Justice likewise imposed a presumption against the use of restraints in that state's juvenile courts and criteria for exceptions.[9]

The routine use of restraints in South Carolina's juvenile proceedings undermines the goals and objectives of the family court.

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[8] The rule was reinforced by an even more restrictive statute, enacted by S.B. 817, signed into law May 24, 2012. See Note 4, supra.
[9] *Id.*

The practice is contrary to the interests of the child.

It should be clear to even a casual observer in a courtroom that the use of shackles on children as young as nine or ten, or even those age fourteen to sixteen, is degrading, to quote from the Florida Supreme Court. In a submission to the court, a psychologist with substantial experience working with juveniles warned against treating a child as a "dangerous animal," with shame and humiliation the likely result.[10] A psychiatrist in North Carolina, arguing against the practice, observed that the "[p]ublic shackling is an inherently humiliating experience for children to endure."[11]

There is an equally compelling interest of the child which is implicated in the procedure, especially in trial, or at any stage where the youngster's freedom is at stake.

To begin with, in proceedings prior to trial, and at trial, the youth accused is presumed innocent. Standing before a court in chains, even in a bench trial, signals to the trier that the youngster is anything but. A juvenile accused "has the right to stand trial 'with the appearance, dignity and self-respect of a free and innocent man.'" *In Re Staley*, *supra*, 67 Ill.2d 33, at 37, 364 N.E.2d 72, at 73, citing *Eaddy v. People*, 115 Colo. 488, 492, 174 P.2d 717, 719 (1946).

> It jeopardizes the presumption's value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged.

Id. See also, *People v. Best*, 19 N.Y.3d 739, 744 (2012): "...judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder."

Furthermore, throughout the juvenile court process, and even at sentencing – or disposition – there is a presumption against incarceration. State policy enunciated in the South

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[10] Affidavit of Dr. Marty Beyer, Ph.D., August, 2006 at p. 3, para. 10.
[11] Affidavit of Dr. Donald L. Rosenblitt, M.D., *In the Matter of Rebecca C.*, NO: 04-JB-000370, Motion to Prohibit Shackling of Minor Child, Exhibit 1.

Carolina Children's Code expresses a preference that children and young people served by the state be placed "in the least restrictive environment possible." S.C. Code Ann. Section 63-1-20(D)(2012 Supp.). Trussing a child up in chains creates a quite different presumption: that the child is dangerous and should be incarcerated.

Hence the use of leg irons, shackles, handcuffs or belly chains hardly serves the interest of the child in being free of degradation and incarceration before or after trial.

CONCLUSION

Wholesale reliance on shackles in the juvenile court, without an individualized determination that they are actually necessary is contrary to law, undermines the purpose of the juvenile court, and is contrary to the interests of children and youth coming before the court.

A core recommendation of the assessment of juvenile defense conducted by the National Juvenile Defender Center urges that the practice of indiscriminate and unnecessary shackling in court proceedings be terminated.[12] Responsible for improving the administration of justice in the state courts, the South Carolina Bar is uniquely positioned to advocate the reform of this barbaric practice, in favor of a rule which promotes the integrity of the courts and the dignity of citizens before them, including the youngest.

[12] Note 2, at p. 51.

APPENDIX A

PENDING LEGISLATION IN THE S.C. GENERAL ASSEMBLY

S 440, S 520; H 3855, pending in the judiciary committee of the Senate and House

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9 # A BILL
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11 TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA,
12 1976, BY ADDING SECTION 63-19-1435 SO AS TO PROVIDE
13 THAT THE USE OF RESTRAINTS ON JUVENILES
14 APPEARING IN COURT ARE PROHIBITED UNLESS THE
15 RESTRAINTS ARE NECESSARY TO PREVENT HARM OR IF
16 THE JUVENILE IS A FLIGHT RISK AND THERE ARE NO
17 LESS RESTRICTIVE ALTERNATIVES AVAILABLE; TO
18 GIVE A JUVENILE'S ATTORNEY THE RIGHT TO BE
19 HEARD BEFORE THE COURT ORDERS THE USE OF
20 RESTRAINTS; AND IF RESTRAINTS ARE ORDERED, TO
21 REQUIRE THE COURT TO MAKE FINDINGS OF FACT IN
22 SUPPORT OF THE ORDER.
23
24 Be it enacted by the General Assembly of the State of South
25 Carolina:
26
27 SECTION 1. Article 13, Chapter 19, Title 63 of the 1976 Code is
28 amended by adding:
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30 "Section 63-19-1435. (A) If a juvenile appears before the court
31 wearing instruments of restraint, such as handcuffs, chains, irons,
32 or straightjackets, the court in any proceeding may not continue
33 with the juvenile required to wear instruments of restraint unless
34 the court first finds that:
35 (1) the use of restraints is necessary due to one of the
36 following factors:
37 (a) the juvenile poses a threat of serious harm to himself
38 or others;
39 (b) the juvenile has a demonstrable recent record of
40 disruptive courtroom behavior that has placed others in potentially
41 harmful situations; or

1 (c) there is reason to believe the juvenile is a flight risk;
2 and
3 (2) there are no less restrictive alternatives to restraints that
4 will prevent flight or physical harm to the juvenile or another
5 person, including, but not limited to, court personnel, law
6 enforcement officers, or bailiffs.
7 (B) The court shall provide the juvenile's attorney an
8 opportunity to be heard before the court orders the use of
9 restraints. If restraints are ordered, the court shall make findings of
10 fact in support of the order."
11
12 SECTION 2. This act takes effect upon approval by the Governor.
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APPENDIX B

Florida Rule of Juvenile Procedure 8.100(b) (as amended)

Florida Rule of Juvenile Procedure 8.100: General Provisions for Hearings

(b) Use of Restraints on the Child. Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during a court proceeding and must be removed prior to the child's appearance before the court unless the court finds both that:

(1) The use of restraints is necessary due to one of the following factors:

(A) Instruments of restraint are necessary to prevent physical harm to the child or another person;

(B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

(C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.