

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

Case No. 4D06-4338  
2006CJ-04506, 04398, 56560, 05434,  
05739, 00553, 05569,  
2005CJ-02331 A02,  
2001CJ-003415 A02, *et al.*

R. C., A CHILD,  
AND OTHER CHILDREN SIMILARLY SITUATED  
Petitioners

v.

JUVENILE COURT JUDGES  
OF THE FIFTEENTH JUDICIAL CIRCUIT,  
STATE OF FLORIDA,  
DEPARTMENT OF JUVENILE JUSTICE,  
Respondents.

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**UNIVERSITY OF MIAMI SCHOOL OF LAW CHILDREN & YOUTH  
LAW CLINIC AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS**

**INTERESTS OF AMICUS**

The Children & Youth Law Clinic (“CYLC”) is an in-house legal clinic staffed by faculty and students of the University of Miami School of Law. Students and supervising attorneys in the Clinic serve as attorneys for the legal interests of adolescents and represent these young people in juvenile court.

The CYLC has participated as *amicus curiae* in numerous cases implicating fundamental rights of children in Florida, including: *Amendment to the Rules of Juvenile Procedure*, Fla. R. Juv. P. 8350, 804 So. 2d 1206 (Fla. 2001) and 842 So. 2d

763 (Fla. 2003)(due process rights of foster children placed in psychiatric treatment facilities); *S.C. v. GAL*, 845 So. 2d 953 (Fla. 4th DCA 2003) (foster children’s medical privacy rights); and *DCF v. Statewide Advocacy Council*, 884 So. 2d 1162 (Fla. 2d DCA 2004) (health care rights). In addition, the CYLC has participated in several recent *amicus curiae* briefs of national significance submitted on behalf of children’s advocacy organizations, including: *Roper v. Simmons*, 543 U.S. 551 (2005) (constitutionality of juvenile death penalty); and *Smook v. Minnehaha County* (U.S. S.Ct. Case No. 06-1034) (constitutionality of detention center policy of strip-searching juveniles).

The CYLC is interested in this case based on its desire to advance the due process rights and therapeutic interests of juveniles as they move through the juvenile justice system. This case concerns the deprivation of the fundamental liberty interest to be free from the arbitrary use of external restraint by the government. It thus presents an opportunity to strengthen the body of law recognizing children’s rights to “fair hearings by a respectful and respected court...the recognition, protection and enforcement of their constitutional and other legal rights, while ensuring that public safety interests and the authority and the dignity of the courts are adequately protected.” § 985.01(1) (a), Fla. Stat. (2006).

## **SUMMARY OF ARGUMENT**

This case presents questions implicating fundamental liberty, due process and therapeutic interests of juveniles to be free from external restraint when they appear before the juvenile court. There are four reasons why this Court should grant the petition for habeas corpus. First, the legislature has not authorized the Department of Juvenile Justice (“DJJ”) to adopt a blanket policy of requiring all juveniles in court appearances to be wrist and ankle shackled regardless of their age, size, gender, pending charges, history of violence, or risk of escape, and thus the policy is *ultra vires* and null and void. Second, the policy has not been adopted as a rule in conformity with the notice and comment requirements of the Administrative Procedure Act and is therefore invalid. Third, as this case concerns the deprivation of the fundamental liberty to be free from external restraint, due process requires an individualized determination by the court of dangerousness and a finding that there are no less restrictive alternatives before permitting the juvenile to be restrained in court. Finally, the blanket shackling policy is anathema to the rehabilitative aims of the juvenile justice system and anti-therapeutic.

## **ARGUMENT**

### **I. The DJJ Blanket Courtroom Shackling Policy is *Ultra Vires* and Therefore Null and Void**

A government agency may not exercise authority not delegated to it by the legislature and, when the agency purports to have authority that infringes on a

constitutionally protected fundamental right, the U.S. Supreme Court has insisted upon an explicit legislative expression of that authority. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105-14 (1976). In *Kent v. Dulles*, 357 U.S. 116 (1958), the Court invoked the delegation doctrine to overturn an agency’s authority under regulations promulgated pursuant to a broad congressional delegation in a federal statute, to deny a passport to a member of the Communist Party, declining to “find in this broad generalized power an authority to trench so heavily on the rights of a citizen.” *Id.* at 129. Thus when an agency asserts an “unbridled discretion” to act in a constitutionally questionable manner, pursuant to broad legislative authority containing inadequate standards, a Court should construe narrowly all delegated powers that curtail or dilute constitutionally protected rights and find that the agency’s action infringing on those rights is *ultra vires* and null and void.

In this case, which involves the fundamental right to be free from external physical restraint, *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992), the Florida legislature has not explicitly authorized DJJ to enact a blanket policy of shackling all juveniles in the courtroom, but DJJ nonetheless has asserted that it has unbridled discretion to do so.<sup>1</sup> In fact, contrary to DJJ’s assertions, the Florida

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<sup>1</sup>The Florida Legislature is currently considering two bills (HB 19 and SB 372) that would restrict the use of “instruments of restraint, such as handcuffs, irons, or straightjackets,” in the courtroom, unless the court finds that restraints “are necessary to prevent harm to the child or another person,” “there are no less restrictive alternatives to prevent physical harm to the child or another person,” and

## **II. The DJJ Blanket Shackling Policy Fails to Conform to the Notice and Comment Requirements of the Florida Administrative Procedure Act and is Therefore Invalid**

In addition to exceeding its delegated statutory authority under Chapter 985, DJJ has failed to comply with statutory rulemaking requirements under the Administrative Procedure Act prior to adopting its blanket policies governing the shackling of juveniles in the courtroom. The legislature has made it plain that “[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.” § 120.54 (1), Fla. Stat. (2006). *See McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 580-81 (Fla. 1<sup>st</sup> DCA 1977) (policy statements of general applicability require rulemaking). Section 120.52 (15), Fla. Stat. (2006), provides in pertinent part:

(15) “Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

The blanket shackling policy in force in the Fifteenth Judicial Circuit is of general applicability. By applying this policy and not following the rulemaking procedures provided in § 120.54, Fla. Stat. (2006), DJJ has exceeded its delegated authority. *See* § 120.52 (8), Fla. Stat. (2006). Because DJJ has not followed the rulemaking procedure prescribed in § 120.54, Fla. Stat. (2006), in fashioning its

legislature has authorized DJJ to utilize mechanical restraints and other similarly restrictive forms of discipline in only two circumscribed contexts: first, in carrying out disciplinary treatment of children as part of its responsibility to administer a system of detention services for children under the “juvenile justice continuum,” § 985.404 (10), Fla. Stat. (2006); and second, as part of the agency’s responsibility to have a “protective action response policy” governing “the use of verbal and physical intervention techniques, mechanical restraints, aerosol and chemical agents, and Tasers by employees” in detention facilities, delinquency programs, or commitment programs operated by DJJ or its contract providers, § 985.645, Fla. Stat. (2006).

Pursuant to these limited grants of legislative authority, DJJ has promulgated rules that govern the discipline of youth in DJJ detention facilities and programs, which provide for the use of a “behavior management system” that meets the needs of the youth and the facility, explicitly prohibits the use of corporal punishment and drugs to control behavior of youth in the facility, and expressly limits of the use of restrictive behavior controls such as mechanical restraints and confinement.

For example, Fla. Admin. Code § 63G-2.012(3)(a) provides that mechanical

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“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 others as evidenced by recent behavior.” Even if neither bill passes, DJJ lacks the express statutory authority to enact an unwritten blanket policy of using instruments of restraint in the courtroom, and this Court should decline to infer any such authority.

restraints “shall be used as a method of controlling *youth who present a threat to safety and security* within the facility.” (Emphasis added). Fla. Admin. Code § 63G-2.012(3)(b) requires the use of mechanical restraints when transporting youth “outside the secure area of the facility.”<sup>2</sup> And in the clearest statement of the agency’s own limitations on the use of restraints, Fla. Admin. Code § 63G-2.012(3)(c) expressly prohibits the blanket use of mechanical restraints in its facilities as “a form of discipline.”<sup>3</sup> DJJ authority to use mechanical restraints is thus confined to the control of youth who present a threat to safety and security within secure detention facilities, and to situations when it transports youth outside

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<sup>2</sup>As a further accountability check on the use of restraints in facilities, Fla. Admin. Code § 63G-2.012(3)(d) requires that “[w]henver mechanical restraints are used, a report shall be completed and submitted for review,” except when restraints are used to transport youth outside the secure area of the facility.

<sup>3</sup>In addition to published rules, DJJ has detailed agency policies and procedures which govern the use of restraints in facilities and during transportation. *See, e.g.*, Florida Department of Department of Juvenile Justice Policies and Procedures, Protective Action Response (PAR) Policy, § FDJJ-1508-03(III)(C)(3) (revised 08/15/03) *available at* [http://www.djj.state.fl.us/policies\\_procedures/departmentwide/par/par\\_policy.pdf](http://www.djj.state.fl.us/policies_procedures/departmentwide/par/par_policy.pdf); Florida Department of Department of Juvenile Justice Policies and Procedures, Statewide Transportation Offender Policy (STOP), § FDJJ-5000(II)(C)(4) (revised 05/25/04) *available at* [http://www.djj.state.fl.us/policies\\_procedures/detention/statewide\\_transportation\\_offender\\_policy\\_rev5-25-04.pdf](http://www.djj.state.fl.us/policies_procedures/detention/statewide_transportation_offender_policy_rev5-25-04.pdf); Department of Juvenile Justice 2006 Detention Services Manual, Chapter 8, *available at* [http://www.djj.state.fl.us/manuals/approvedmanuals/detention/detention\\_manual\\_chapter-8.pdf](http://www.djj.state.fl.us/manuals/approvedmanuals/detention/detention_manual_chapter-8.pdf).

secure facilities, but the agency's authority to use mechanical restraints ends at the courthouse door.<sup>4</sup>

The trial courts' claim that they are not "security expert[s]" (February 1, 2007 Order Denying Motion to Appear Free of All Mechanical Restraints At All Judicial Proceedings, at 2) reveals both the lack of guidance from the legislature, which enables DJJ to assert "unbridled discretion" to use mechanical restraints in the courtroom, and complete abdication by the courts in refusing to restrain DJJ's unbridled discretion, which in turn trenches on petitioners' fundamental liberty interest to be free from external restraint. In view of the limited legislatively-conferred authority for DJJ to use mechanical restraints, and the fundamental liberty interest at stake here, this Court should carefully scrutinize DJJ's *de facto* blanket policy of using restraints in the courtroom, find that the agency has exceeded its statutory authority, and hold that its policy is *ultra vires* and null and void.

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<sup>4</sup>DJJ does not consider juvenile court as one of its "facilities." The Department distinguishes between what it defines as facilities and agencies involved in the juvenile justice continuum. In the DJJ Detention Services Manual, Chapter 2, Section XI- Interagency and Community Relations, the distinction is made clear:

A. The facility shall maintain open lines of communication and shall meet and/or make contact quarterly with representatives of agencies involved in the juvenile justice continuum, including: 1. The juvenile court(s); 2. The State Attorney's Office; 3. The Public Defender's Office; 4. Local law enforcement agencies; 5. School system; 6. Contracted programs / agencies.

unwritten blanket shackling policy, this Court should hold that this policy is an invalid exercise of delegated legislative authority and remand to the trial court for a ruling consistent with that holding. *See Matthews v. Weinberg*, 645 So. 2d 487 (Fla. 2<sup>nd</sup> DCA 1994) (holding that the Department of Health and Rehabilitative Services exceeded its delegated authority by not following rulemaking procedures in fashioning foster parent licensing policies excluding homosexuals and unmarried couples).<sup>5</sup>

### **III. The DJJ Blanket Shackling Policy Violates Petitioners' Fundamental Liberty Interests to be Free from External Restraint and is Therefore Unconstitutional**

This case involves intrusions on the historic, fundamental right to “[l]iberty from bodily restraint,” long recognized as “the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Greenholtz v. Nebraska*

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<sup>5</sup>While DJJ has written agency protocols regarding the use of mechanical restraints in DJJ detention facilities and for transportation of juvenile offenders between secure facilities, there is no such policy on conditions inside a courtroom. *See* Argument I, *supra*. The only suggestion of a written “guideline” as to the use of mechanical restraints on juveniles in a courtroom appears in Chapter 8 of the Department of Juvenile Justice 2006 Detention Services Manual, which states that “[t]he Judge may request restraints be removed while the youth is in the courtroom. The youth will be restrained upon leaving the courtroom and entering the courtroom.”

However this operational guideline scarcely qualifies as a “rule” pursuant to 120.52 (15), Fla. Stat. (2006), and because it provides no specific guidance as to how the court should exercise discretion in deciding whether or not to remove restraints, it does not come close to the individualized assessment of safety and security risk contained in Fla. Admin. Code § 63G-2.012(3) (a) that DJJ itself must make before it uses mechanical restraints to control a youth or others in a secure detention facility.

*Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part). As a result, the Court should apply a heightened level of scrutiny of DJJ’s justifications for its policy of shackling all juveniles in court regardless of their age, size, gender, pending charges, history of violence, or risk of escape. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibited a decision to physically restrain a patient in a mental health facility for prolonged periods of the day if the professionals’ decision to use restraints amounted to “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.” *Id.* at 323.

In this case, the prolonged use in the courtroom of instruments of restraint, such as handcuffs, chains, irons, or straightjackets, on a thirteen-year-old charged with a nonviolent offense, with no history of disruptive courtroom behavior, about whom no finding has been made by the court that restraints are necessary to prevent harm to the child or another person, and with no consideration by DJJ or the court of less restrictive alternatives to ensure the security of the courtroom and its occupants, arguably constitutes a “substantial departure from accepted professional judgement, practice or standards.” The *Youngberg* professional judgment standard is violated in this case because DJJ uses, and the court

countenances, a blanket, across-the-board standard for using restraints in the courtroom, irrespective of the child’s age, size, gender, pending charges, history of violence, or risk of escape, in clear derogation of the “protective action response policy” that it has adopted pursuant to § 985.645, Fla. Stat. (2006), for use in secure detention facilities. That response policy carefully details how the agency is to exercise its professional judgment when using mechanical restraints in DJJ facilities and programs. The policy circumscribes the use of mechanical restraints in secure detention facilities, limiting their use to “situations where a youth has initiated active, combative, or aggravated resistance; and in situations where a youth poses a physical threat to self, staff, or others.”<sup>6</sup> In contrast, in the courtroom, DJJ asserts free rein, immune from any standards and any oversight by the judge, to use restraints at will, even where the youth has initiated no aggravated resistance and poses no physical threat to self or others in the courtroom.

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<sup>6</sup>Florida Department of Department of Juvenile Justice Policies and Procedures, Protective Action Response (PAR) Policy, § FDJJ-1508-03(III)(C)(3), n. 3, *supra*. Indeed, the 31-page Protective Action Response Policy contains a detailed (over 17-page) description of the protocols for use of handcuffs, restraint belts, leg cuffs, restraint chairs, soft restraints, and waist chains in “Level 3 Response” situations, and training for staff to use in subduing a youth who initiates active, combative, or aggravated resistance, or who poses a physical threat to self or others. This detailed protocol, designed to ensure stringent accountability measures for the use of mechanical restraints to “establish and maintain safe environments for staff and youth,” “ensure public safety,” “provide for order and discipline,” and ensure that Level 3 [mechanical restraints] responses are “used as a last resort” (*id.* at 1), illustrates the glaring absence of guidance for the exercise of professional judgment in the use of restraints by DJJ in the courtroom.

Thus, it is essential that this Court hold that DJJ bears the burden of justifying to the trial court its use of restraints in the courtroom on an individual, case-by-case basis. Not only is this consistent with the professional judgment standard articulated in *Youngberg*, it clearly violates the petitioners' rights under the Due Process Clause of the Fourteenth Amendment to be free from restraints in the courtroom unless DJJ first demonstrates to the court that the use of restraints is "justified by an essential state interest"—such as courtroom security—specific to any danger posed by the individual child. *Deck v. Missouri*, 544 U.S. 622, 624 (2005)(quoting *Holbrook v. Flynn*, 475 U.S. 560 (1986)).

In *Deck*, the Supreme Court cited three reasons to require the state to justify the need to shackle a defendant at the penalty phase of a capital proceeding, all of which are relevant to this case. First, "the appearance of the offender in the penalty phase in shackles... almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community." *Id.* at 632. Second, "[s]hackles can interfere with the accused's 'ability to communicate' with his lawyer." *Id.* at 631 (citation omitted). And third, "the use of shackles at trial 'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Id.* (citation omitted). In holding that the defendant's due process rights were violated when he appeared at sentencing in leg irons, handcuffs, and a belly chain, the Court set forth precisely

the individualized judicial fact-finding and risk assessment balancing process that petitioners seek in this habeas proceeding for juveniles who have not yet been adjudicated delinquent but must routinely appear in shackles and other restraints before the court:

[W]e must conclude that courts cannot routinely place defendants in shackles or other restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

*Id.* at 633. If an adult defendant, convicted of double murder and robbery, and thus with a proven history of dangerousness, is entitled to a rebuttable presumption that he will not appear before the criminal court at the penalty phase of a capital proceeding in leg irons, handcuffs and belly chains, should a thirteen-year-old charged with a nonviolent offense and with no history of disruptive courtroom behavior be entitled to any less protection of his due process rights at a non-adjudicatory hearing in a West Palm Beach courtroom? Although this Court can certainly rule that Florida statutory law disallows an unwritten, across-the-board policy of shackling every juvenile offender who appears in the courtroom in these hearings, the Court should also hold that the DJJ policy violates petitioners' right

to be free from external restraint, and that due process requires an individualized determination of dangerousness and a finding that there are no less restrictive alternatives before permitting the juvenile to be restrained in court.<sup>7</sup>

#### **IV. The Rehabilitative Aims of the Juvenile Justice System and Considerations of Therapeutic Jurisprudence Strongly Argue Against The DJJ Blanket Shackling Policy**

In addition to being *ultra vires*, an invalid exercise in legislatively-delegated rulemaking, and in derogation of petitioners' constitutionally protected liberty interests, the blanket use of restraints in the courtroom is contrary to the rehabilitative aims of the juvenile justice system and is anti-therapeutic.<sup>8</sup> A central

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<sup>7</sup>Support for the case against indiscriminate shackling of juveniles is also found in *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976), in which the district court found the shackling of juveniles to be "punitive and anti-therapeutic and therefore unconstitutional." The court admonished against indiscriminate shackling and stated that the use of physical restraints "should be tolerated only in cases where a child is a serious and evident danger to himself or others and incapable of being controlled by any less restrictive means." *Id.* at 211. The court identified rare instances when shackling might be necessary, such as short-term transportation from one institution to another, and limited the use of physical restraints to no more than 30 minutes except in the instance of "vehicular transportation" where their utilization is "necessary for public safety." *Id.* at 210. In contrast, the DJJ policy permits the prolonged and unnecessary use of restraints and shackles, anywhere from two to four hours, in a guarded holding area while juveniles await hearings, without any individualized findings of dangerousness, and none of the public safety considerations attendant to vehicular transportation or risk of flight.

<sup>8</sup>The arbitrariness of DJJ's blanket shackling policy is shown by policies adopted by the United States Department of Health and Human Services ("HHS") in regulations that lay out detailed rules for restraining mental health patients. These regulations, which govern all state and local mental health facilities that

purpose of the juvenile justice system is “[t]o ensure the protection of society, by providing for a comprehensive standardized assessment of the child’s needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the act committed, the community’s long-term need for public safety, the prior record of the child, and the

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accept federal funding, limit the use of restraints on patients “only ...when less restrictive interventions have been determined to be ineffective to protect the patient a staff member or others from harm.” 42 C.F.R. §482.13(e)(2). In addition, the regulations state that restraints “may only be imposed to ensure the immediate physical safety of the patient, a staff member, or others and must be discontinued at the earliest possible time.” 42 C.F.R. §482.13(e). Thus, federal HHS regulations do not allow the restraint of mental facility patients, whether adults or juveniles, except in those situations in which there is no other available choice, and require their removal at the earliest possible time. Additionally, the regulations prohibit the use of standing orders for restraint, 42 C.F.R. §482.13(f)(4)(a), and limit the duration of restraint to two hours for children and adolescents ages nine through seventeen, or one hour for patients under age nine. 42 C.F.R. §482.13(f)(4)(g).

These guidelines, which illustrate the “best practices” in the use of restraints to control mental health patients in psychiatric facilities, clearly demonstrate that DJJ’s unbridled use of mechanical restraints upon children and adolescents in the courtroom, without any consideration of less restrictive alternatives, any limits on the use of restraints to situations involving an immediate risk of safety to the juvenile or others in the courtroom, and any durational limits, is, at best, arbitrary and capricious, and at worst, anti-therapeutic. *Cf. Eckerhart v. Hensley*, 475 F. Supp. 908, 927 (W.D. Mo. 1979)(use of seclusion or restraint in a psychiatric facility constitutionally may be used as a form of institutional discipline for infraction of ward rules, at least for dangerous patients housed in a forensic unit, but in such cases, there must be a formal hearing, including written notice of the alleged violation, a written statement by the fact-finder of the evidence relied upon and the reasons for the disciplinary action, and the opportunity to call witnesses and present other evidence in defense).

specific rehabilitative needs of the child....” § 985.01(1)(c), Fla. Stat. (2006). A blanket courtroom shackling policy which fails to take into account on an individual basis any of these factors is profoundly contrary to this key purpose of the Florida juvenile justice system.

Moreover, considerations of therapeutic jurisprudence strongly argue against a blanket policy of shackling juveniles in court.<sup>9</sup> In the lower court proceedings, two of the undersigned submitted an affidavit in the trial court in support of the petitioners’ motion, setting forth their opinions regarding this policy, and Bruce Winick, Professor of Law and Professor of Psychiatry and Behavioral Sciences at the University of Miami, was prepared to provide telephonic testimony to the court, but the court chose not to hear any testimony in support of the petitioners’ motion. Because the lower court did not have the benefit of hearing the testimony of Professor Winick, this *amicus* briefly recapitulates and highlights the points set forth in the affidavit that he prepared with Professor Bernard Perlmutter.

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<sup>9</sup>Therapeutic jurisprudence is a field of social inquiry with a law reform agenda, which studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. Therapeutic jurisprudence is a study of the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. *See generally* Bruce J. Winick, Civil Commitment: A Therapeutic Jurisprudence Model (2005); Bruce J. Winick and David B. Wexler, eds., Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (2003); David B. Wexler and Bruce J. Winick, eds., Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (1996).

Therapeutic jurisprudence seeks to promote policies, systems, and relationships, consistent with normative principles of justice and constitutional law, which will secure positive therapeutic outcomes and minimize negative psychological and behavioral effects of anti-therapeutic legal rules and practices. The principles of therapeutic jurisprudence are especially germane to the juvenile court setting, which was designed to meet a rehabilitative agenda by which judges dispense an assortment of therapeutic services to children who are victims of abuse or charged with delinquent offenses.<sup>10</sup>

Indiscriminate shackling brands and stigmatizes juvenile defendants in ways that adversely affect how others regard them, and the manner in which they regard themselves. This “self-fulfilling prophecy” effect has strong support in the social psychology and sociological literature.<sup>11</sup> Labeling persons or otherwise treating

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<sup>10</sup>Therapeutic jurisprudence has been embraced by the Florida courts, particularly in proceedings implicating the due process and dignitary interests of juveniles. *See, e.g., M.W. v. Davis*, 756 So. 2d 90, 107 (Fla. 2001) (Pariente, J.) (noting the psychological benefits to juveniles from being afforded procedural protections prior to being placed in psychiatric treatment facilities); *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 894 So. 2d 1206, 1210-11 (Fla. 2001) (Pariente, C.J.) (expressly applying the principles of therapeutic jurisprudence in the Florida Supreme Court’s adoption of a rule of juvenile procedure requiring the court to consider the child’s views before ordering him or her into residential treatment). *See also* Hon. Barbara J. Pariente, *Introduction, Symposium Issue: Therapeutic Jurisprudence in Clinical Legal Education*, 17 *St. Thomas L. Rev.* 403 (2005).

<sup>11</sup>*See generally* Thomas J. Scheff, Being Mentally Ill: A Sociological Theory (1966) (deviancy labeling serves to marginalize those labeled, causing them to

them in ways that convey to them a negative or discrediting message, sets in motion forces that lead them to behave in ways that confirm their ascribed roles. It does so in two ways. First, it produces behavior in individuals observing the labeled person that causes them to act toward the branded person that confirm the label's negative attributes. Second, it causes the labeled individual to regard himself differently, accepting the discrediting impact of the label and transforming his identity in ways that subsequently cause him to act in accordance with the stigmatizing label.

Shackling is a particularly pernicious form of labeling. It conveys the unmistakable message that the shackled individual is dangerous, violent, and must have committed a serious crime. It conveys this message to the judge, who will adjudicate his guilt, the prosecutor and other court personnel. Shackling gives the juveniles who are labeled a spoiled identity: they are “bad” and “dangerous” people who must be restrained in the most primitive way. They must thereby lack self-control. This is exactly the opposite message from the one we want to convey to juveniles struggling with their identity who get into trouble with the law.

Lastly, as the Supreme Court in *Deck* observed, a routine policy of shackling offends basic judicial notions of “formal dignity, which includes the respectful

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internalize a deviant self-image, and sometimes as a result, to engage in acts of secondary deviance); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 Psychol. Pub. Pol’y & L. 6 (1995) (same).

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.” *Deck*, 544 U.S. at 631. This symbolic yet concrete objective is no less important in a juvenile court proceeding than it is in a criminal proceeding, both of which should aim to secure positive therapeutic outcomes and minimize negative psychological and behavioral effects of anti-therapeutic legal rules and practices.

In sum, the practice of requiring all juvenile offenders be held in restraints, shackles and chains for their appearances in the Fifteenth Judicial Circuit, without individualized risk or dangerousness assessments, or consideration of less restrictive or drastic safety precautions, is counter-therapeutic in that it brands and stigmatizes them as dangerous and deprives them of fair and dignified hearings by a respectful and respected court. For rehabilitative and therapeutic jurisprudence reasons, this practice should cease.

### **CONCLUSION**

For the foregoing reasons, the University of Miami School of Law Children & Youth Law Clinic respectfully urges the Court to grant the writ of habeas corpus sought by R.C. and other children similarly situated, and quash the juvenile court's February 1, 2007, Order Denying Motion to Appear Free of All Mechanical Restraints at All Judicial Proceedings.

Respectfully submitted,

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**CERTIFICATE OF FONT SIZE**

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was furnished this \_\_\_\_ day of February, 2007, to:

The Hon. Ronald Alvarez, the Hon. Moses Baker, the Hon. Peter D. Blanc, the Hon. Thomas Barkdull III, Circuit Court Judges of the Fifteenth Judicial Circuit, 205 N. Dixie Highway, West Palm Beach, Florida 33401 by Federal Express;

Daniel Cohen and Travis Dunnington, Assistant Public Defenders 421 - 3rd Street, West Palm Beach, FL 33401-4203 by Federal Express;

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<sup>12</sup>We gratefully acknowledge Todd Allison, legal intern in the Children & Youth Law Clinic, for his assistance researching and drafting this brief.

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