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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal, Arapahoe County District Court Honorable Theresa M. Slade and Christina Apostoli Case Numbers: 2014JD835, 2016JD798, and 2017JD110	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF U.L.S., Juvenile-Appellant	
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 7,525 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Juvenile-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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INTRODUCTION

This is about whether Colorado children, and the attorneys who represent them, must have a reasonable opportunity to argue against the short- and long-term detriments of being shackled before the bench. Although courts can limit the arguments of counsel, they cannot outright prohibit attorneys from advocating on their clients' behalf.

STATEMENT OF THE ISSUES PRESENTED

I. Whether a magistrate must provide a child's attorney a reasonable opportunity to argue that the child's shackles should be removed.

II. Whether the mootness doctrine prohibits any review of a magistrate's refusal to allow argument that a child's shackles should be removed.

STATEMENT OF THE CASE AND FACTS

At a bond hearing on April 5, 2017, the magistrate refused to hear argument from U.L.S.'s attorney that he should be unshackled. (TR 04/05/17, pp. 3-5) At that time U.L.S. was a sixteen-year-old black male who was subject to five delinquency cases. None of the alleged acts, however, had occurred within the last four months.[1]

[1] See Attachment A.

After the magistrate refused to address shackling, U.L.S. filed a petition for district court review. (CF 14JD835, pp. 136-231 (exhibits), 232-43 (petition)) The petition explained that had U.L.S.'s attorney been permitted to speak, he would have conveyed: (1) that U.L.S. had a demonstrated history of behaving appropriately while appearing without shackles, and (2) that publically appearing in shackles made U.L.S. feel "like a slave." (*Id.* at 236) The district court denied the petition because the magistrate's order was purportedly not final.[2] (*Id.* at 271-72)

After all of his cases resolved, U.L.S. submitted a renewed petition. (CF 14JD835, pp. 275-86) The district court denied that one on the basis that it was moot. (*Id.* at 305-07) This appeal concerns the magistrate's April 5, 2017, refusal to hear argument regarding shackling, and the district court's finding that the issue was moot.

[2] U.L.S. disagrees. The rule governing review of magistrate decisions applies to orders as well as judgments. C.R.M. 7(a)(3) ("A final order or judgment is that which fully resolves an issue or claim.") The magistrate's decision to prohibit argument was a final order on the shackling issue. Regardless, the district court's original ruling was completely superseded by its ruling on U.L.S.'s renewed petition. Hence it was not appealed and is not challenged here.

SUMMARY OF THE ARGUMENT

Juveniles have a constitutional right to the effective assistance of counsel. An attorney cannot be effective if prohibited from arguing on a client's behalf. U.L.S. and his attorney had a strong interest in arguing that his shackles should be removed for a routine court proceeding, as shackling may inflict both immediate and long-term harms to children. The magistrate's complete refusal to address shackling deprived U.L.S. of the effective assistance of counsel.

The district court erred by finding the magistrate's refusal to address shackling was moot. Courts should only decline to resolve an issue, based on the mootness doctrine, when the resolution can have no effect on an existing controversy and no exception to the doctrine applies. Here the issue was not moot, as U.L.S. remained subject to the same magistrate's jurisdiction for the pendency of his probationary sentence. Even if it was, two exceptions to the doctrine applied. It was capable of repetition and, in the district court's view, could never be reviewed. Additionally, the peril of placing youth in shackles—when they are still attempting to define their own self-image—is an issue of immense public importance.

For the reasons below, this Court should hold that: (1) the magistrate erred by refusing U.L.S. any opportunity to argue that his shackles should be removed, and (2) such errors are reviewable by a district court.

ARGUMENT

I. Magistrates must provide a child's attorney a reasonable opportunity to argue that the child's shackles should be removed.

A. Standard of review.

This issue was preserved. U.L.S. attempted to argue that he should be unshackled. (TR 04/05/17, pp. 3-5) The magistrate prohibited that argument. (*Id.* at 5:3-7) U.L.S. then petitioned the district court for review. (CF 14JD835, pp. 136-231 (exhibits), 275-86 (renewed petition)) The district court denied review. (*Id.* at 305-07)

The issue here is whether a court can completely prohibit an attorney from arguing that his client should be unshackled. That is a question of law. This Court reviews questions of law de novo. *Fitzgerald v. People*, 394 P.3d 671, 673 (Colo. 2017) (where "the fact of this case are not in dispute … we are presented with a question of law").

B. Applicable facts.

This issue concerns the magistrate's decision to preclude counsel's argument at the April 5, 2017, hearing. The case history leading up to that date is relevant to the decision.

U.L.S. pleaded guilty to one count of attempt to commit first degree criminal trespass on October 28, 2015, in case number 14JD835. (CF 14JD835, pp. 49-58) He was represented by Alternate Defense Counsel at the time. U.L.S. was sentenced to probation, which was later revoked and reinstated based on technical violations. (*Id.* at 70-76)

The Probation Department filed a second petition to revoke probation in December 2016, based on a new case in 16JD658. (CF 14JD835, pp. 92-93) The prosecution also filed a petition in delinquency in 16JD798 on December 22, 2016. (CF 16JD798, p. 5) And a petition in delinquency in 17JD110 on January 27, 2017. (CF 17JD110, p. 7) U.L.S.'s first appearance on the second petition to revoke probation was February 9, 2017.

i. The February 9, 2017, hearing.

On the morning of February 9 the Sheriff's Office issued a recommendation that U.L.S. appear in restraints. (CF 14JD835, pp. 100-02) The magistrate then ordered that he be restrained. (*Id.* at 103-05)

Public Defender Daniel McGarvey spoke on U.L.S.'s behalf at the hearing, but had not yet been appointed to represent him. (TR 02/09/17, pp. 13-14) U.L.S. had only been arrested the day before. (*Id.* at 3:20-21) Mr. McGarvey made a brief argument that U.L.S. should be unshackled, based on the information he had at the time. (*Id.* at 3-5) The magistrate ruled that its order from that morning would stand. (*Id.* at 6-7)

The district attorney stated there were other cases pending against U.L.S.—presumably 16JD798, 17JD110 and 17JD157. (TR 02/09/17, p. 12:12-23) The magistrate set bond in all pending cases. (*Id.* at 16-17) The record reflects no behavioral issues.

ii. The March 15, 2017, hearing.

U.L.S. appeared out of custody, and the record reflects no behavioral issues. (TR 03/15/17, p. 3:7) The magistrate formally appointed Mr. McGarvey to represent him. (*Id.* at 5-6)

Following this hearing the Probation Department filed an amended second petition to revoke probation, this time including as violations the new cases in 16JD658, 16JD798, 17JD110, and 17JD157. (CF 14JD835, pp. 117-18) U.L.S.'s first appearance after the amended second petition for revocation was March 28, 2017. He was brought into custody the night before. (TR 03/28/17, p. 5:17-20)

iii. The March 28, 2017, hearing.

On the morning of March 28 the Sheriff's Office issued a recommendation that U.L.S. appear in restraints. (CF 14JD835, pp. 120-22) The magistrate then ordered that he be restrained. (*Id.* at 123-25)

U.L.S. appeared in custody with a different public defender. (TR 03/28/17, p.3:8-9) The issue of shackling was not addressed. The public defender in attendance indicated these were Mr. McGarvey's cases, and asked that they be set over for the next week. (*Id.* at 7:16-20) The record reflects no behavioral issues.

iv. The April 5, 2017, hearing.

At 8:11 a.m. on April 5, the Sheriff's Office issued a recommendation that U.L.S. appear in restraints. (CF 14JD835, pp. 127-29) Fifty-three minutes later the magistrate issued an order that he be restrained. (*Id.* at 130-32)

U.L.S. appeared in shackles with Mr. McGarvey. (TR 04/05/17, p. 3:17-18) When Mr. McGarvey attempted to address shackling, the prosecutor objected and the magistrate refused to hear any argument:

> MR. MCGARVEY: Judge, we would like to address the fact that [U.L.S.] is shackled.
>
> THE COURT: Mr. McGarvey, I show that this is the third, if not – at least the third time that [U.L.S.] has appeared in court. I'm not noting any material change.

I do note that the last time that he appeared in court, he did pick up a new case while he was on probation, and that case being the last one, 17JD157.

MR. MCGARVEY: Judge, I wasn't here at the last court appearance. I believe he appeared with – well, I've only appeared with [U.L.S.] once while he was in custody. I did appear with him out of custody; there were no issues.

With respect to the new case, the date of offense is November 6th of 2016. And when I appeared with him out of custody, that warrant was actually pending; no one knew of it at that time. So, he appeared in front Your Honor out of custody with no issues with an active warrant pending.

I think the biggest concern the Defense has is just based on the information that [U.L.S.] had told me with respect to how he feels being shackled, and that is important.

[DISTRICT ATTORNEY]: Judge, I'm going object to the Defense making any further record on shackling today. The Defense has the ability to file a motion with the Court by noon the day before pursuant to the Chief Judge order when they know that a Juvenile will appear in custody.

Mr. McGarvey should have been aware that the Juvenile would be here this morning in custody and had the opportunity to file that motion, just like the People have the opportunity to file a motion as well.

It's inappropriate that we have to deal with it on the record every single time a Juvenile is in custody.

MR. MCGARVEY: Judge, I wasn't finished.

THE COURT: I – I am denying the request to address the shackling issue. The court has made the determination that the

> Juvenile appeared up here restrained and the Court is not noting any material change; denying that request.
>
> MR. MCGARVEY: Just for the record, we object to him being shackled.
>
> THE COURT: Understood. Thank you.
>
> (*Id.* at 3-5)

C. Applicable law.

i. Attorneys must have a reasonable opportunity to argue that their clients should not be harmed.

Children need "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings …" *In re Gault*, 387 U.S. 1, 36 (1967). Hence juveniles have a due process right to counsel during the adjudicatory process. U.S. Const. amend. XIV; *Gault*, 387 U.S. at 41. That right applies both at trial and at "pretrial critical stages that are part of the whole course of a criminal proceeding ..." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). The right to counsel is "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quotation omitted); *People In Interest of A.R.*, 2018 COA 176, ¶ 38 ("Without effective representation, after all, a party is in no better position than one who has no counsel." (quotation omitted)).

To provide effective assistance, an attorney must serve "in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *See Anders v. California*, 386 U.S. 738, 744 (1967). "[T]he Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." *Evitts v. Lucey*, 469 U.S. 387, 395 (1985). Individuals have a right to receive "effective assistance from an attorney acting as a diligent and conscientious advocate." *People v. Bradley*, 25 P.3d 1271, 1275 (Colo. App. 2001).

A court "violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686. That can occur when a court denies counsel the ability to make argument on the evidence. *See Herring v. New York*, 422 U.S. 853, 863 (1975) (regarding a complete denial of closing argument in a court trial). And it can occur when a court provides no opportunity to be heard on a motion. *See Kent v. United States*, 383 U.S. 541, 561-62 (1966) (regarding a motion for a juvenile court to retain jurisdiction). "Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel." *Id.* at 561.

In addition to constitutional mandates, the Code of Judicial Conduct requires that courts allow advocates to advocate. "A judge shall accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." C.J.C. 2.6(A). Comments to the Code explain that the "right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." *Id.*

ii. Shackling harms children.

In-court shackling detrimentally impacts all people accused of crime. "[E]very defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the [necessary] safety and decorum of the court may otherwise require." *Eaddy v. People*, 115 Colo. 488, 492, 174 P.2d 717, 719 (1946). Routine shackling is "inherently prejudicial" to those ideals for three reasons. *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (quotation omitted).

First, physical restraints diminish the right to counsel. *Id.* at 631. "Shackles can interfere with the accused's ability to communicate with his lawyer." *Id.* (quotation omitted). Restraining an accused before the court "inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and

prejudicially affect his constitutional rights of defense[.]" *Eaddy*, 115 Colo. at 491, 174 P.2d at 718 (quotation omitted).

Second, routine shackling interferes with society's interest in "maintaining dignified proceedings." *Deck*, 544 U.S. at 632. "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." *Id.* at 631.

Third, "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck*, 544 U.S. at 630. This consideration applies even when no jury is present. "[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder." *People v. Best*, 979 N.E.2d 1187, 1189 (N.Y. 2012).

Beyond those three universally-applicable harms, shackling is uniquely detrimental to the welfare of juveniles. "The juvenile justice system is primarily designed to provide guidance, rehabilitation, and restoration for the juvenile and the protection of society, rather than adjudicating criminal conduct and sanctioning criminal responsibility, guilt, and punishment." *Bostelman v. People*, 162 P.3d 686, 691 (Colo. 2007). Indiscriminate shackling of children is "repugnant,

degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system …" *In re Amendments to the Fla. Rules of Juvenile Procedure*, 26 So. 3d 552, 556 (Fla. 2009) (addressing proposed rule changes). It "creates the very tone of criminality juvenile justice proceedings were intended to avoid." *Tiffany A. v. Superior Court*, 59 Cal. Rptr. 3d 363, 375 (Cal. Ct. App. 2007); *In Interest of R.W.S.*, 728 N.W.2d 326, 330 (N.D. 2007) ("extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes of the juvenile justice system" (quotation omitted)).

In addition to legal precedent, social science confirms what most parents intuitively know: the way adults treat a child will shape who that child becomes:

- "Shackling can send all sorts of negative messages: *You are dangerous. You are a criminal. You are less than human.* These are unacceptable perceptions to introduce to someone forming their sense of self, and such perceptions can also increase the likelihood of problematic behaviors, including criminal behaviors." (CF 14JD835, pp. 176 ¶14, 178 (emphasis in original))[3]

- "Given youths' uncertainty related to their identity and their vulnerability to negative messages about who they are as individuals, the experience of shackling can have a lasting negative effect on a young person, making it harder to develop the sense of self-respect that is critical to pro-social behavior …" (CF 14JD835, pp. 196 ¶11, 202)[4]

[3] Affidavit of Dr. Donald Rosenblitt, M.D., Duke University School of Medicine.
[4] Affidavit of Dr. Robert Bidwell, M.D., University of Minnesota.

- "If a young person perceives that societal institutions such as courts view that youth as violent and untrustworthy, as represented by shackling, that still-developing youth may come to believe that she or he must, in fact, be a bad person. This self-image might well lead a youth who would otherwise be rehabilitated to engage instead in violent and other anti-social behaviors." (CF 14JD835, pp. 196-97 ¶12, 202)[5]

- "The young person who feels he/she is being treated as dangerous will think less of him/herself. Children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults." (CF 14JD835, pp. 182 ¶10, 187)[6]

- "Shackling is inherently shame producing, and as such reinforces the underlying psychological problems that make it more likely that a juvenile will resort to problematic behaviors." (CF 14JD835, pp. 175 ¶11, 178)[7]

- "The stated goal of the juvenile justice system is rehabilitation. Shackling erodes self-esteem and feelings of respect for adult authority. It therefore works in opposition to the system's goal." (CF 14JD835, pp. 225 ¶9, 227)[8]

- "When adults treat youth punitively as a matter of course, the relationship and interaction between the adults and the youth will be adversely impacted." (CF 14JD835, pp. 217 ¶15, 220)[9]

- "For youth of color, being degraded in public may be experienced as racism (even if the practice is universal), which is harmful to the development of a positive identity." (CF 14JD835, pp. 183 ¶12, 187)[10]

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[5] Affidavit of Dr. Robert Bidwell, M.D., University of Minnesota.
[6] Affidavit of Dr. Marty Beyer, Ph.D., Yale University.
[7] Affidavit of Dr. Donald Rosenblitt, M.D., Duke University School of Medicine.
[8] Affidavit of Dr. Louis Kraus, M.D., The Chicago Medical School.
[9] Affidavit of Dr. Eugene Griffin, Ph.D. and J.D., Northwestern University.
[10] Affidavit of Dr. Marty Beyer, Ph.D., Yale University.

Colorado statute implicitly acknowledges those same realities. Although the "Protection of Individuals from Restraint and Seclusion Act" does not necessarily apply to in-court proceedings, its existence in statute recognizes that individuals must be *protected* from unnecessary restraint. §§ 26-20-101 to -111, C.R.S. 2018. That protection is greatest, and the practice most closely monitored, in the context of restraining juveniles. §§ 26-20-110, -111, C.R.S. 2018.

None of this is to say juveniles have an absolute right to remain unshackled. "There will be cases, of course, where these perils of shackling are unavoidable." *Deck*, 544 U.S. at 632. What precedent and science make clear, however, is that juveniles have a strong interest in *not* being subject to the disadvantages and indignities of being shackled before the bench. "Indeed, liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (quotation omitted). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

iii. The 18th Judicial District's Administrative Order allows attorneys to argue against shackling.

In March of 2016 then Chief Judge Carlos A. Samour, Jr., signed an "Administrative Order Revising the Policy Regarding the Use of Restraints on In-

Custody Juveniles During Pretrial and Post-Trial Proceedings in Juvenile Court."[11] (CF 14JD835, pp. 287-93 (hereinafter "Administrative Order")) The revised policy created "a preference in favor of allowing in-custody juveniles to participate in pretrial and post-trial proceedings in Juvenile Court restraint-free." (*Id.* at 289)

The Administrative Order requires juvenile courts to "conduct an individualized, case-by-case evaluation to determine whether restraints are necessary on an in-custody juvenile …" (CF 14JD835, p. 289) It lists thirteen factors courts "shall" consider when making that determination. (*Id.* at 289-90)

The procedure for making the restraint determination depends on whether it is the juvenile's first, second, or subsequent pretrial or post-trial appearance. (CF 14JD835, pp. 291-92) First appearance procedures are inapplicable to this appeal. Second appearance procedures have a defined timeline:

- First the Sheriff's Office, the juvenile detention center, and the Probation Department may submit to the Juvenile Assessment Center any information relevant to the restraint determination. (*Id.* at 291)

- Then the Juvenile Assessment Center must distribute the information to the parties. (*Id.*)

[11] The People's Response to U.L.S.'s renewed petition attached a copy of the Administrative Order signed March 10, 2016. (CF 14JD835, pp. 294-96) The district court's order denying U.L.S.'s renewed petition referenced an identically named Administrative Order dated March 24, 2017. (*Id.* at 306) It is unclear whether that was an error, or whether a subsequent revision was made. Regardless, the State has represented that the March 10, 2016, document—as included in the record—was in effect that the time of the April 5, 2017, hearing.

- "Thereafter, the parties and the guardian ad litem *may* electronically submit to the Juvenile Court any information relevant to the determination no later than 12:00 p.m. the business day before the second appearance." (*Id.* (emphasis added))

- "The Juvenile Court *must* then electronically communicate the determination to the parties, the guardian ad litem, and the [Sheriff's Office] no later than 5:00 p.m. the business day before the second appearance." (*Id.* (emphasis added))

The Administrative Order also provides parties the opportunity to orally request a hearing:

> During a juvenile's first appearance or second appearance, the District Attorney's Office, the juvenile, the guardian ad litem, and the [Sheriff's Office] may orally request a hearing regarding the determination. If such a request is made, the Juvenile Court shall hold a hearing before addressing any matter in the juvenile's case.
>
> (CF 14JD835, pp. 291-92)

Subsequent appearance procedures are the same, but excuse the court from making the same thirteen-factor finding if circumstances have not changed:

> Pretrial or post-trial proceedings following the second appearance in a Juvenile Court case (hereinafter "subsequent proceedings") shall be governed by the procedures articulated above with respect to a juvenile's second appearance. However, in subsequent proceedings, the Juvenile Court may rely on the determination made with respect to the juvenile's second appearance—whether the determination was made without a hearing or after a hearing—as long as the circumstances have not materially changed. Thereafter, the inquiry by the Juvenile Court in subsequent proceedings is

> whether the [thirteen circumstances listed above] have materially changed since the second appearance.
>
> (CF 14JD835, p. 292)

The Administrative Order does not make orally contesting a restraint determination contingent upon fulfilling any prior requirement.

D. Application.

i. The magistrate erred by prohibiting U.L.S.'s attorney from arguing that he should not be subject to the harm of shackling.

U.L.S.'s attorney was attempting to perform the quintessential role of counsel: preventing harm to his client. The shackles were harmful to U.L.S. They necessarily interfered with his ability to communicate with Mr. McGarvey, detracted from the dignity of the proceedings, and signaled to everybody in the courtroom that the magistrate believed he was a dangerous criminal. *See Deck*, 544 U.S. at 630-32; *Best*, 979 N.E.2d at 1189. The psychological damage of chaining that label to his body—both figuratively and literally—was immediate, long-lasting, and "contrary to the stated primary purposes of the juvenile justice system …" *In re Amendments*, 26 So. 3d at 556; *see also Eaddy*, 115 Colo. at 491, 174 P.2d at 718.[12] Those harms gave U.L.S. and Mr. McGarvey a strong interest in arguing that the shackles should be removed.

[12] See also notes 3 to 10 and accompanying text.

In order to be effective, U.L.S.'s attorney had to be allowed to make that argument. The right to counsel is meaningless if counsel cannot be an active advocate. *See Evitts*, 469 U.S. at 395; *Anders*, 386 U.S. at 744; *Bradley*, 25 P.3d at 1275. That is especially true in situations like this, where the subject of the desired advocacy is a presently-existing source of lasting harm to a child. The magistrate violated U.L.S.'s right to the effective assistance of counsel by completely preventing Mr. McGarvey from advocating on his behalf. *See Strickland*, 466 U.S. at 686; *Herring*, 422 U.S. at 863; *Kent*, 383 U.S. at 561-62.

Courts do, of course, have the ability to reasonably limit the arguments of counsel. But this is not a case of reasonable limits being imposed. As soon as the district attorney objected, the magistrate denied "the request to *address* the shackling issue." (TR 04/05/17, p. 5:3-4 (emphasis added)) Refusing to even address the issue, rather than limiting the time for addressing it, violated U.L.S.'s right to effective assistance. Even had U.L.S. not been represented, that decision would have violated his independent right—secured by both the Due Process Clause and the Code of Judicial Conduct—"to be heard according to law." *See* C.J.C. 2.6(A); *see also Mathews*, 424 U.S. at 333.

The magistrate's reaction was particularly inappropriate under the circumstances of this case, as Mr. McGarvey *never* had an opportunity to fully

litigate the issue. The only other time he addressed shackling, on February 9, 2017, he had just met U.L.S. and did not yet represent him. (TR 02/09/17, pp. 3:20-21, 3-5, 13-14) The public defender present at U.L.S.'s second in-custody appearance, on March 28, 2017, specifically requested—and was granted—a continuance so that Mr. McGarvey could best represent his client. (TR 03/28/17, p. 7:16-20)

The bottom line is that magistrates must give children's attorneys a reasonable opportunity to argue that those children should not be subject to the harms of shackling. Refusing to address the issue does not provide that opportunity.

ii. The magistrate misapplied the Administrative Order.

The magistrate's references to "material change" appear to refer to the Administrative Order on shackling. (TR 04/05/17, pp. 3:25, 5:5-7) Yet the magistrate did not comply with it.

The Administrative Order excused courts from having to make a thirteen-point finding—for the juvenile's third or subsequent appearance—if no material circumstances had changed. (CF 14JD835, p. 292) It did not, however, prohibit counsel from raising the issue or suggest that counsel could be prohibited from doing so. To the contrary, it expressly provided that during a juvenile's "second

appearance" he "may orally request a hearing regarding the determination[,]" and that subsequent proceedings "shall be governed by the procedures articulated above with respect to a juvenile's second appearance." (*Id.* at 291-92) The change in subsequent appearance procedures was to what courts had to find, not to what attorneys were allowed to argue.

Contrary to the prosecutor's position, U.L.S. was not required to "file a motion" before addressing shackling. (TR 04/05/17, p. 4:16-24) The Administrative Order indicated parties "may" electronically submit information to the court by 12:00 p.m. the proceeding day, but did not require them to do so. (CF 14JD835, p. 291) The Order was deliberate in its use of permissive and mandatory terms. Its carefully selected language indicated that the "12:00 p.m." provision was an opportunity for pre-shackling input, not a mandatory prerequisite for arguing that shackles should be removed.

Even if the "12:00 p.m." provision was intended to be a mandatory perquisite, it could not have been applied as such here. That provision only applied *after* the Sheriff's Office had submitted "information relevant to the determination." (CF 14JD835, p. 291) Here the Sheriff's Office did not provide that information until 8:11 a.m. on the day of the hearing. (*Id.* at 127) It would have been impossible for U.L.S. to have responded the day before. Regardless, a

district court administrative order cannot trump the constitutional rights to due process and the effective assistance of counsel.

In sum, the right to effective assistance of counsel, the Due Process Clause, the Code of Judicial Conduct, and the Administrative Order all provided U.L.S. a right to address shackling when he was brought into the courtroom. The magistrate erred—and deprived U.L.S. of that right—by categorially refusing to "address the shackling issue." (TR 04/05/17, p. 5:3-4)

II. The mootness doctrine does not prevent district court review of a magistrate's refusal to allow argument that a child should be unshackled.

A. Standard of review.

This issue was preserved. The State's response to U.L.S.'s renewed petition for review asserted that the issues it raised were moot and could be readdressed in the future. (CF 14JD835, pp. 294-95) The district court denied the petition on those grounds: it was purportedly moot and no exception to the mootness doctrine applied. (*Id.* at 306-07) The court was thus aware of the applicable legal concepts and capable of avoiding error. *See Moland v. People*, 757 P.2d 137, 139 (Colo. 1988) (implying this Court's holding that an issue was moot permitted supreme court review).

Further, the rule governing petitions for review provides no mechanism for a reply to the opposing party's response, or for a reconsideration of the district

court's decision. *See* C.R.M. 7. U.L.S. thus had no way to argue that the State was wrong, or object to the district court's final ruling. *See* Crim. P. 51 ("if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him …").

This Court reviews "de novo the legal question of whether a case is moot." *People In Interest of C.G.*, 410 P.3d 596, 599 (Colo. App. 2015).

B. Applicable facts.

After the magistrate prohibited U.L.S.'s attorney from arguing that he should be unshackled, U.L.S. petitioned for review. (CF 14JD485, pp. 136-231 (exhibits), 232-43 (petition)) The district court denied the original petition, based on its belief that the magistrate had not issued a final order:

> At the time of this Petition, the Juvenile's cases were ongoing and a final order had not yet been entered. Furthermore, the [Administrative Order] states that, after the second appearance, a shackling order may be changed upon a showing of material change. In this sense, the Magistrate's April 5, 2017 Order does not finally and fully resolve the issue of shackling for this Juvenile.
>
> (*Id.* at 272)[13]

After U.L.S.'s cases became final, he submitted a renewed petition arguing that: (1) the magistrate erred by prohibiting his attorney from arguing that he

[13] As explained in note 2, U.L.S. disagrees.

should be unshackled, and (2) that the magistrate erred by allowing him to remain shackled. (CF 14JD485, pp. 136-231 (exhibits), 275-86 (renewed petition)) The district court did not address those separate arguments, believing the issue as a whole was moot:

> The Court notes that the Juvenile entered a plea and was adjudicated JISP. The pre-trial determinations of restraint are now moot. No remedy for the Juvenile is available as to his prior appearances under restraint. Any future determinations of the use of restraint are speculative, as they depend on the Juvenile appearing in custody, that a recommendation for the use of restraints be made, and that the Juvenile is unable to provide mitigating information.
>
> (*Id.* at 306)

The district court also believed that no exceptions to the mootness doctrine applied:

> Because each appearance effectively allows a review, the Juvenile is not "forever deprived of the opportunity of review." [citation omitted] Any in-custody juvenile has the option to raise the question of the use of restraints at least prior to every court appearance.
> …
>
> At all subsequent in-custody appearances, the prior determination controls unless the judicial officer finds changed circumstances sufficient for a change in the determination have occurred. [citation to Administrative Order omitted] No single order on the use of restraints for a particular juvenile is permanent, and the issue may be revisited with every in-custody appearance.

(CF 14JD485, pp. 306-07)

The district court went on to state that, because U.L.S. did not submit information regarding changed circumstances to the magistrate before 12:00 p.m. the day preceding the hearing, it would not review his constitutional arguments. (CF 14JD485, p. 307) It further stated that U.L.S.'s public policy arguments were "outside of its scope[,]" because it was bound by the Administrative Order. (*Id.*)

C. Applicable law.

Courts generally do not review moot issues. An issue is moot when the relief sought, if granted, would have no practical effect on an existing controversy. *C.G.*, 410 P.3d at 599. When considering whether an issue is moot, this Court "must consider both the direct and collateral consequences that can result from the judgment." *Id.* An issue "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *See Moland*, 757 P.2d at 139 (quotation omitted). "Whether collateral consequences preclude an issue from being deemed moot turns on showing the reasonable possibility of such consequences." *C.G.*, 410 P.3d at 599. The standard requires more than a purely speculative injury, "but does not require proof that it is more probable than not that the prejudicial consequences will occur." *Id.*

Even when an issue is technically moot, two exceptions to the mootness doctrine can facilitate review. "First, a court may resolve a moot case if it concerns a matter that is capable of repetition yet evading review." *C.G.*, 410 P.3d at 602. A case may be capable of repetition yet evading review even when "the precise factual circumstances from which the controversy arose are unlikely to recur." *Id.* Courts have relied on that exception when "the duration of the type of order challenged" is short. *People in Interest of Ofengand*, 183 P.3d 688, 692 (Colo. App. 2008) (regarding a procedure to involuntarily administer medications); *see also People v. Back*, 412 P.3d 565, 567-68 (Colo. App. 2013) (applying the exception "based on the length of the process that must occur before the issue is properly before this court").

Numerous courts have relied on the "capable of repetition" exception to address juvenile shackling issues, even when those issues were moot as to the individual juvenile. *Tiffany A.*, 59 Cal. Rptr. 3d at 368 (reviewing the lower court's shackling policy, which was moot as to the petitioner, because "this petition poses an issue of important public interest concerning the treatment of minors in our juvenile delinquency court system that is likely to reoccur" and due to the pace of juvenile proceedings "may evade review for a significant period of time"); *In re M.H.*, 86 A.3d 553, 557 (D.C. 2014) (finding it could review the

shackling of juveniles during initial appearances because we "have the authority under the mootness doctrine to reach the merits of this recurring controversy[,]" but ultimately not doing so because of an underdeveloped record); *State v. Doe*, 333 P.3d 858, 864 (Idaho Ct. App. 2014) ("the issue of shackling during juvenile proceedings is likely to evade review on appeal because the vast majority of juvenile cases simply do not last long enough for the issues to be decided on appeal if the courts are unwilling to apply an exception to mootness" (quotation omitted)).

Under the second exception to the mootness doctrine, "a court may hear a moot case that involves issues of great public importance or recurring constitutional violation." *C.G.*, 410 P.3d at 602. The "need for an authoritative determination on the liberty interests of minors is of paramount importance." *In re Austin S.*, 45 N.E.3d 1096, 1101 (Ill. App. Ct. 2015); *see also Tiffany A.*, 59 Cal. Rptr. 3d at 368 (shackling children is "an issue of important public interest"). As are other issues related to the welfare of children. *See C.G.*, 410 P.3d at 603. The precedent, social science, and statutory authority provided in section I(C)(ii)—highlighting the detrimental impact of shackling children—all indicate the same.

D. Application.

i. The issue was not moot.

The district court's resolution of this case could have had a practical effect on an existing controversy. *See C.G.*, 410 P.3d at 599. When U.L.S.'s cases reached disposition in July of 2017, he was sentenced to twelve months of intensive supervision probation. (TR 07/26/17, pp. 4-6) He thus remained subject to being hailed before the magistrate for alleged probation violations. Under the terms of his probation, that could occur for failing to make a daily phone call or being out of the home past seven. (CF 16JD798, p. 55)

The magistrate had already expressed a complete unwillingness to address arguments that U.L.S. should be unshackled for future appearances. (TR 04/05/17, p. 5:3-4) That unwillingness gave rise to more than a speculative future injury. Had the district court granted U.L.S.'s requested relief—finding that the magistrate erred by precluding argument on the shackling issue—he could have been spared the harm of future shackling.

To be clear, the magistrate's actual decision to leave U.L.S. shackled on April 5, 2017, is moot. As the district court recognized, it could not retroactively unshackle him. What was not moot, however, was that fact that U.L.S. was subject to the continuing jurisdiction of a magistrate who would not let his attorney

address shackling. He retained an interest in that ongoing issue, which the district court could have resolved.

ii. Even if moot, the issue was capable of repetition yet evading review.

Even if this issue was technically moot as to U.L.S., it was capable of repetition both as to him individually and as to other juveniles. As to him, it could be repeated for the same reasons it was not moot. U.L.S. had a history of juvenile behavior and probation violations, and was thus likely to appear before the same magistrate again.

As to other juveniles, the facts underlying this appeal are hardly unique. There are thousands of children in the juvenile justice system,[14] and the juvenile justice system involves lots of hearings. A magistrate's refusal to hear shackling arguments during those hearings is thus likely to impact numerous juveniles.

The district court's rulings illustrate how review is evaded. Before U.L.S.'s cases resolved, it found the magistrate's shackling decision was not a final order. (CF 14JD485, p. 272) After they resolved, it found the issue was moot. (*Id.* at 306-07) That leaves no time when meaningful review can occur.

[14] In fiscal year 2018 there were 8,313 juvenile delinquency cases filed in Colorado district courts. Colorado Judicial Branch, *Annual Statistical Report* 52 (Fiscal Year 2018), *available at* https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2018/FY2018FINAL.pdf.

The district court's finding, that the Administrative Order allowed shackling decisions to be "revisited with every in-custody appearance[,]" was erroneous for two reasons. (CF 14JD485, p. 306-07) The first is that *review* is different from initial decision making. Even if a new shackling decision can be made in conjunction with every hearing, there must be an opportunity for another court to review that decision. Otherwise there is no check on whether the initial decision maker is correctly applying the law. That check should have been the district court. *See* C.R.M. 7(a)(1). "Meaningful review requires that the reviewing court should review." *Kent*, 383 U.S. at 561.

The second reason is that shackling can only be readdressed at subsequent in-custody appearances if the magistrate allows counsel to address it. If a magistrate is not allowing counsel to make argument on behalf of a client, that practice can only be stopped by another court providing meaningful review. Again, that meaningful review should have come from the district court. *See* C.R.M. 7(a)(1).

U.L.S.'s situation is analogous to *People v. Back*, where a defendant challenged the imposition of a lifetime sentence upon the revocation of his parole. 412 P.3d at 567. He argued that the applicable statute authorized a sentence of only 180 days upon revocation. *Id.* Although he was re-granted parole during the

pendency of his appeal, this Court applied the "capable of repetition" exception to the mootness doctrine:

> If the parole board revokes his parole in the future, the time period that would elapse before this court could review the revocation would exceed the 180–day revocation period to which defendant argues he is entitled.
> …
>
> Thus, based on the length of the process that must occur before the issue is properly before this court on review, we conclude that this case involves an issue that is capable of repetition, yet evading review.
>
> *Id.* at 568.

U.L.S. is in the same boat. If the Probation Department moves to revoke his probation again—as it has a demonstrated history of doing—the magistrate can once again prohibit counsel from arguing that he should be unshackled. Under the district court's view, it can *never* review that decision. It is not final until the cases resolve, and moot once they do.

This case is distinguishable from *United States v. Sanchez-Gomez*, where adult pretrial detainees challenged the constitutionality of pretrial restraints. 138 S. Ct. 1532, 1536 (2018). The defendants' cases resolved before the federal circuit court reached the merits of their challenge, and the Supreme Court found that rendered it moot. Two defendants claimed the issue fell within the "capable of repetition" exception to the mootness doctrine, because they would likely "again

violate the law, be apprehended, and be returned to pretrial custody." *Id.* at 1540-41. The Supreme Court refused to find "that the case-or-controversy requirement is satisfied by the possibility that a party will be prosecuted for violating valid criminal laws." *Id.* at 1541 (quotation omitted). This case, however, is not based on speculation of a new criminal violation. U.L.S. remained subject to proceedings before the same magistrate for the duration of his probationary sentence, and could have his probationary status threatened for innocuous technical violations.

More critically, Colorado courts are not bound by federal mootness doctrine, which relies on the "case or controversy" requirement of the federal constitution. *See id.* at 1537 (quotation omitted); *Wimberly v. Ettenberg*, 194 Colo. 163, 167, 570 P.2d 535, 538 (1977) ("state courts are not subject to the provisions of Article III of the United States Constitution"). *Sanchez-Gomez* turned on the requirement—for the federal "capable of repetition" exception—that "there is a reasonable expectation that the same complaining party will be subjected to the same action again." 138 S. Ct. at 1540. Colorado does not impose such a stringent requirement. When justice requires, Colorado Courts have addressed important issues that are capable of repeating yet evading review, even when it is highly unlikely that the same party will be impacted again. *See, e.g.*, *Trinidad Sch. Dist.*

No. 1 v. Lopez, 963 P.2d 1095, 1102 (Colo. 1998) (regarding high school drug testing); *C.G.*, 410 P.3d at 602-03 (concerning notice requirements in dependency and neglect proceedings). The district court should have done the same, and this Court should do so now.

iii. Even if moot, the issue was of great public importance.

The district court failed to address U.L.S.'s constitutional arguments because: (1) information about shackling "needed to be submitted to the Magistrate's division no later than 12:00 PM the day proceeding the in-custody hearing[,]" and (2) it was bound by the Administrative Order. (CF 14JD485, p. 307) As explained in section I(C)(iii), there was no requirement that U.L.S. submit information the day before. Even if there was, he could not have done so. The district court thus erred by ruling on that basis.

As to the second basis, it makes no difference whether the Administrative Order bound the district court. The Order expressly allowed U.L.S. to argue that he should be unshackled. (CF 14JD835, pp. 291-92) The problem here is not the order. The problem is that the magistrate didn't follow it. The Order's very existence, its "preference" for allowing children to remain restraint-free, nationwide precedent, and abundant social science, all confirms that shackling children is an issue of the utmost public importance.

U.L.S. had been trying to tell the magistrate that wearing shackles made him feel "like a slave." (CF 14JD485, p. 280) The sentiment was tragic yet understandable. A sixteen-year-old black male being shuffled before the bench, bound like an animal for a routine bond hearing, evokes precisely that image. A Yale-trained Doctor of Psychology supports both the validity and the calamity of his feelings:

> For youth of color, being degraded in public may be experienced as racism (even if the practice is universal), which is harmful to the development of a positive identity.
>
> (CF 14JD835, pp. 183 ¶12, 187)

If the juvenile justice system is truly to rehabilitate children, and to correct their mistakes in a way that leaves them capable of becoming productive members of society, then it cannot teach them that they are criminals. *See* § 19-2-102(1), C.R.S. 2018 (stating the goals of the juvenile justice system). That lesson is too devastating and too enduring to be needlessly taught by the authorities we want children to respect. The ephemeral disabilities that shackles place upon the assistance of counsel and the dignity of courts are bad enough. The long-term consequences of teaching a child that he's dangerous, however, are wounds that society cannot simply afford to inflict upon itself.[15] Refusing to even entertain the

[15] See notes 3 to 10 and accompanying text.

argument—that a child could stand before the magistrate unbound—is too grave an error to escape review.

CONCLUSION

U.L.S. respectfully requests that this Court hold: (1) that magistrates must allow attorneys a reasonable opportunity to argue that their juvenile clients should be unshackled, and (2) that a magistrate's refusal to allow that opportunity is reviewable by a district court.

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CERTIFICATE OF SERVICE

I certify that, on February 25, 2019, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.