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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, Judge Honorable Christina Apostoli, Magistrate Case Numbers 2014JD835, 2016JD798 and 2017JD110	
Petitioner-Appellee, THE PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF U.L.S., Juvenile-Appellant	
Megan A. Ring Colorado State Public Defender MARK EVANS 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Attorney Registration: 40156	Case Number: 2018CA473
REPLY 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 and formatting requirements set forth in C.A.R. 28(g).

It contains 4,219 words.

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

It is now undisputed that when a child was brought to court in shackles, the presiding magistrate refused to allow his attorney to argue that those shackles should be removed. The Answer defends the magistrate's action with a non-existent administrative requirement, while ignoring clearly existing constitutional imperatives. It then defends the district court by arguing that shackling Colorado's children is not a matter of public importance. Both defenses are incorrect. The Constitution demands that a child have some chance, through his or her attorney, to avoid the harms of shackling. Avoiding harm to children—especially a type of harm that risks their ability to develop into productive members of society—is a matter of tremendous public importance.

ARGUMENT

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

A. Applicable facts.

This appeal is about a magistrate's decision to prevent U.L.S.'s attorney from advancing any argument that he should be unshackled for a bond hearing on April 5, 2017. The Answer states that U.L.S. had opportunities to address shackling before that hearing began. (Answer, pp. 11-12, 20-22, 26-29) Regardless of any prior opportunity, however, the right to effective assistance of

counsel, the Due Process Clause, the Code of Judicial Conduct, and the 18th Judicial District's Administrative Order[1] all required the magistrate to allow some chance to be heard when U.L.S. appeared in court. (Opening, pp. 4-22) The facts surrounding his purported other opportunities are nevertheless relevant to the equities of this case.

i. The March 28, 2017, hearing.

The Answer acknowledges that U.L.S. was not represented by his Public Defender, Daniel McGarvey, at this hearing. (Answer, p. 20) Yet it repeatedly faults U.L.S.'s "covering attorney" for not having "filed any evidence or argument on the issue of shackling prior to or during the hearing." (Answer, pp. 20-21, 26-29)

The attorney at the hearing could not have filed anything before it started. The hearing was in the morning, and U.L.S. had been taken into custody the night before. (TR 03/28/17, pp. 5:17-20, 6:20-21) Nor could the attorney have made a coherent argument regarding whether U.L.S. should be unshackled. As she tacitly admitted to the magistrate, these were not her cases. (*Id.* at 7:16-20) That is why

[1] Fully titled: "Administrative Order Revising the Policy Regarding the Use of Restraints on In-Custody Juveniles During Pretrial and Post-Trial Proceedings in Juvenile Court." (CF 14JD835, pp. 287-93 (hereinafter "Administrative Order"))

she asked for a continuance so Mr. McGarvey—who actually knew U.L.S.—could address the substance of the issues. (*Id.*)

ii. The April 5, 2017, hearing.

The Answer faults U.L.S. and Mr. McGarvey for not filing "information with court by noon the day prior to the third or subsequent proceeding[.]" (Answer, pp. 28-29, 31) As explained in the Opening Brief and section I(B)(iii), below, there was no such requirement. (Opening, pp. 15-18, 20-22) Even if there was, however, it could not have been met under the circumstances of this case. The Sheriff's Office did not announce its intent to shackle U.L.S. until 8:11 on the morning of the hearing. (CF 14JD835, pp. 127-29)

B. Applicable law.

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

The Answer reasons that because children have no right to be unrestrained, and children's right to counsel extends only to advocating for other rights, a child must have no right for his attorney to advocate for removing shackles. (Answer, pp. 24-26) Both of the Answer's premises are incorrect. As explained in the following subsection, juveniles have both a natural and a constitutional right to remain unshackled. As explained in this subsection, however, those rights are immaterial to whether attorneys must be allowed to ask that shackles be removed.

The advocacy of attorneys has never been limited to requesting things to which clients have a fundamental right. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Colo. RPC Preamble. That means counsel must act as "diligent and conscientious advocate." *People v. Bradley*, 25 P.3d 1271, 1275 (Colo. App. 2001). "A lawyer must also act with commitment and dedication to the interests of the client with zeal in advocacy upon the client's behalf." Colo. RPC 1.3 comments. When fulfilling those roles, attorneys regularly seek relief or benefits to which their clients are not entitled as a matter of right. Although courts are not always obligated to grant the relief or benefit requested, the Code of Judicial Conduct obligates them to "accord to 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).

Advocating for unshackling is a baseline expectation of competent juvenile defense attorneys. The National Juvenile Defense Standards repeatedly call upon attorneys to "challenge the indiscriminate shackling of children in custody." National Juvenile Defender Center, *National Juvenile Defense Standards*, Standard 2.8, 3.6(d) (2012). Similarly, the American Bar Association has adopted a resolution stating that juveniles should be restrained "only after providing the juvenile with an in-person opportunity to be heard and finding that the restraints

are the least restrictive means necessary …"[2] Both indicate that attorneys must actually challenge shackling and request the opportunity to be heard.

Regardless of whether any person has a right to be free from shackles, advocating for their removal is a fundamental component of a juvenile advocate's job. For a court to completely preclude an advocate from advocating in that capacity is a denial of the right to effective assistance.

ii. Shackling harms children.

All human beings have a natural right to be free from shackles. (Answer, pp. 24-26) It is self-evident that people "are endowed by their Creator with certain unalienable Rights; that among them are Life, Liberty, and the pursuit of Happiness." *The Declaration of Independence* para. 2 (U.S. 1776); Colo. Const. art. II, § 3 ("the right of enjoying and defending their lives and liberties" is among the "natural, essential, and inalienable rights"). Individuals also have a constitutional right to bodily liberty secured by Fifth and Fourteenth Amendments. *See also* Colo. Const. art. II, § 25 ("No person shall be deprived of life, liberty, or property, without due process of law."). "Indeed, liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process

[2]American Bar Association, 2015 Resolution 107A, https://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/107a.pdf; https://www.americanbar.org/news/abanews/aba-news-archives/2015/02/house_of_delegatesu/.

Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (quotation omitted). There are obviously circumstances when the government can constrain the right to bodily freedom. The presence of those circumstances in some instances does not, however, suggest that there is no right to be unchained.

Courts across the country have broadly prohibited indiscriminate shackling of juveniles during court proceedings. *See, e.g.*, *Tiffany A. v. Superior Court*, 59 Cal. Rptr. 3d 363, 375 (Cal. Ct. App. 2007) ("The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid."); *In re Staley*, 364 N.E.2d 72, 74 (1977) ("Physical restraints should not be permitted unless there is a clear necessity for them."); *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)); *State ex rel. Juvenile Dep't v. Millican*, 138 Or. App. 142, 147, 906 P.2d 857, 860 (1995) ("[T]wo factors warrant our extension of the right against physical restraint to juvenile proceedings. First, the right to remain unshackled is based on considerations beyond the potential for jury prejudice, including inhibition of free consultation with counsel. … Second, extending the

right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes of Oregon's juvenile justice system."). As the Answer notes, the State of Idaho has expressly limited that prohibition to only adjudicatory trials. *See State v. Doe*, 333 P.3d 858, 871-72 (Idaho Ct. App. 2014). (Answer, pp. 24-25)

The Answer urges this Court to follow Idaho's lead, reasoning that there is no history in Colorado of addressing the use of restraints in non-trial contexts. (Answer, pp. 24-25) Once again, however, the Answer's premise is incorrect. Over forty years ago the Colorado Supreme Court held it was reversible error to excessively restrain a pro se defendant during a hearing on whether to recuse the judge. *Lucero v. Lundquist*, 196 Colo. 95, 97, 580 P.2d 1245, 1246 (1978). In that non-trial context, it explained: "Only that security is permitted which is necessary to insure that the defendant remains in custody, and will not endanger court personnel or others in the courtroom, and will not disrupt the trial." *Id.* Although the issue arose outside of trial, our supreme court quoted favorably from the *American Bar Association Standards Relating to Trial by Jury*:

> Defendants and witnesses should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, the judge should enter into the record of the case the reasons therefor.

Id. (quotation omitted).

Even had our supreme court never addressed pretrial restraints, there was still a legal basis for U.L.S. to argue he should be unshackled. The 18th Judicial District had a policy creating "a preference in favor of allowing in-custody juveniles to participate in pretrial and post-trial proceedings in Juvenile Court restraint-free." (CF 14JD835, p. 289) It permitted pretrial courtroom shackling only after the Juvenile Court conducted an "individualized, case-by-case evaluation to determine whether restraints are necessary …" (*Id.*) That policy, if nothing else, provided a basis for U.L.S.'s attorney to argue that he should be unshackled. Once the State has created a "liberty interest … due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980) (quotation omitted); *Johnson v. Parke*, 642 F.2d 377, 379 (10th Cir. 1981) ("Liberty interests can be created by rules[.]").

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

The 18th Judicial District's Administrative Order is attached as Appendix A. (CF 14JD835, pp. 287-93)

The keystone of the Answer's argument is that, under the Administrative Order, at a "second or subsequent proceeding, defense counsel must provide any

information in writing before noon the day before the hearing." (Answer, pp. 15, 27-29) If that purported requirement is not followed, the Answer says, a court can completely refuse to address shackling. Notably, however, the Answer never directly quotes what portion of the Administrative Order creates that requirement. There is none.

The language upon which the Answer appears to rely is in the portion of the Administrative Order addressing second appearances:

> The [Sheriff's Office], the Foote, and Probation *may* electronically submit to the [Juvenile Assessment Center] any information relevant to the determination. The [Juvenile Assessment Center], in turn, *must* electronically distribute all such submissions as soon as possible to the Juvenile Court, the District Attorney's Office, the Public Defender's Office, and the Office of the Guardian Ad Litem. *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.
>
> (CF 14JD835, p. 291 (emphasis added))

The plain language of the Administrative Order makes two things clear. First, the authoring Chief Judge deliberately selected between mandatory and permissive language. Second, the Administrative Order uses the word "may" when prescribing the parties' ability to submit information before the second appearance. "The word 'may' denotes a grant of discretion and is usually

permissive." *Cagle v. Mathers Family Tr.*, 295 P.3d 460, 467 (Colo. 2013). The Administrative Order gives parties an *opportunity* to submit information before a hearing, but imposes no *requirement* for them to do so.

Contrary to the Answer's position, the Administrative Order allows parties to be heard on shackling at all court appearances. (Answer, pp. 18, 30) Of course that allowance is not unlimited. Regardless of whether it is a juvenile's first or fortieth appearance, the court "shall decide, in its discretion, the nature of the hearing[,]" if a hearing is requested. (CF 14JD835, p. 292) If shackling has been previously litigated, the court would likely act within its discretion by limiting the hearing to new information.

The opportunity for some chance to be heard, however, is always there. The Administrative Order requires that during a juvenile's second appearance the court "shall hold a hearing" if requested. (*Id.* at 291-92) And it requires that "proceedings following the second appearance … shall be governed by the procedures articulated above with respect to a juvenile's second appearance." (*Id.* at 292) What changes after the second appearance is what the court has to find, not whether a litigant has any opportunity to be heard. (*Id.*) The Administrative Order thus strikes a logical balance. It gives courts discretion to determine the nature of

the hearing, and spares them having to make a thirteen factor finding at every appearance, yet gives litigants some chance to be heard on this critical issue.

It makes no difference whether U.L.S. was "on notice" that the Sheriff's Office would request shackling. (Answer, p. 31) The right to be heard on this issue was not dependent on filing something the day before. Regardless, the Administrative Order contemplates that the opportunity to file something arises after the Sheriff's Office has made its initial recommendation: "*Thereafter*, the parties and the guardian ad litem *may* electronically submit to the Juvenile Court any information relevant to the determination …" (CF 14JD835, p. 291) The word "thereafter" means: "Afterward; later[.]" *Black's Law Dictionary* 1517 (8th ed. 2004). The Sheriff's Office did not make its initial recommendation until the morning of the hearing. (*Id.* at 127-29)

C. Application.

The right to effective assistance, the Due Process Clause, the Code of Judicial Conduct, and the Administrative Order all required that U.L.S.'s attorney be allowed some opportunity to argue that his shackles should be removed. The Answer acknowledges that "the magistrate denied the request to address the shackling issue …" (Answer, p. 22) That was error.

The Answer appears to argue that, because shackling U.L.S. did not render him completely incapable of illustrating positive progress at a subsequent hearing, there was no harm. (Answer, pp. 32-33) It is difficult to understand how that argument matters, as U.L.S. cannot be retroactively unshackled. As explained in section II of the Opening Brief and below, the point of this appeal is to prevent the harm of future shackling to both U.L.S. and other children. Regardless, the Answer is incorrect. U.L.S. was made to feel like a slave, and was deprived of the opportunity to express that feeling to a court. (CF 14JD485, p. 280) That is harm enough.

There are times when attempting to illustrate prejudice, based solely on an appellate record, reaches a point of absurdity. Even when a record shows no particularized harm, human experience can. Anyone who has parented, or even cared for a child, knows that placing children in chains is detrimental to their well-being. That common knowledge is endorsed by abundant social science. (Opening, pp. 13-14) And abundant judicial precedent. *See, e.g.*, *Tiffany A.*, 59 Cal. Rptr. at 375; *In re Amendments to the Fla. Rules of Juvenile Procedure*, 26 So. 3d 552, 556 (Fla. 2009); *R.W.S.*, 728 N.W.2d at 330. Indiscriminate shackling of children is "repugnant, degrading, humiliating, and contrary to the stated

primary purposes of the juvenile justice system …" *In re Amendments*, 26 So. 3d at 556. What happened here harms all children, and it harmed U.L.S.

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. U.L.S. did not waive his right to appeal.

A guilty plea "represents a break in the chain of events which has preceded it in the criminal process and waives all non-jurisdictional errors *in the defendant's conviction*, including the seizure of evidence." *Neuhaus v. People*, 289 P.3d 19, 21 (Colo. 2012) (quotation omitted, emphasis added). Rationales for the general rule include that an admission of guilt renders all issues related to guilt or innocence either forfeited or moot. *See id.* at 22-23. Unrelated issues, however, remain appealable unless specifically waived. *See, e.g., Sanoff v. People*, 187 P.3d 576, 578 (Colo. 2008) ("As a separate, final judgment, however, an order for a specific amount of restitution is itself an appealable order."); *People in Interest of D.W.*, 232 P.3d 182, 184-85 (Colo. App. 2009) (addressing the amount of a restitution order entered following a guilty plea and petition for district court review); *People v. Lassek*, 122 P.3d 1029, 1031 (Colo. App. 2005) (a guilty plea cannot "preclude review of a constitutional flaw in a sentencing proceeding").

U.L.S. is not challenging his guilty pleas. (Answer, pp. 4-5) This appeal challenges the magistrate's April 5, 2017, refusal to hear argument regarding

shackling, and the district court's denial of his petition for review. (CF 14JD835, pp. 305-07) The State has not asserted, either in the trial court or on appeal, that U.L.S. waived his right to district court review. (*Id.* at 294-96) The district court's order denying U.L.S.'s renewed petition, entered *after* his guilty pleas, was completely independent of his adjudications. That order is separately appealable to this Court. *See* C.R.M. 7(a)(10), 7(a)(11). It has nothing to do with whether U.L.S. is guilty or innocent of the offenses to which he pleaded. His ability to appeal that order was thus not waived by his guilty pleas. *See Neuhaus*, 289 P.3d at 21.

Even if a guilty plea could theoretically waive the right to challenge pre-plea shackling decisions, it did not do so here. For a waiver to be "valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quotation omitted). By pleading guilty, U.L.S. expressly surrendered a discrete list of appellate rights:

- "The right to appeal the decision if the Court finds that I violated the terms and conditions of my probation …" (CF 14JD835, p. 266)
- "The right to appeal the verdict of the Court." (CF 16JD798, p. 43; CF 17JD110, p. 78 (same))

That list did not include the magistrate's and the district court's resolution of his shackling argument. The parties, the magistrate, and the district court all knew when U.L.S. entered his pleas that he wanted to challenge the shackling decision. He had already done so, but was denied by the district court because the case was ongoing. (CF 14JD835, pp. 271-72) His pleas were not conditioned upon waiving that challenge. U.L.S. thus had no notice that, by pleading guilty, he would waive any right to review of the magistrate's shackling decision. To dismiss his appeal on that ground would violate the Due Process Clause. *See McCarthy*, 394 U.S. at 466.

B. The issue was not, and is not, moot.

This issue was not moot when the district court denied U.L.S.'s petition for review. (Opening, pp. 28-29) U.L.S. remained subject to being hailed before the same magistrate, and his attorney could be once again precluded from arguing that he should be unshackled. (*Id.*) The same is true now.

U.L.S. is now nineteen and has completed the incarceration components of the sentences in the cases where he pleaded guilty. (Answer, pp. 7-8, 10 n.2) He still owes costs and fees in all of them, however, and is subject to an outstanding

restitution order in 17JD110.[3] The juvenile court "may retain jurisdiction over a juvenile until all orders have been fully complied with by such person … regardless of whether such person has attained the age of eighteen years, and regardless of the age of such person." § 19-2-104(6), C.R.S. 2019. U.L.S. may thus have to appear before the same magistrate again, at least to resolve the outstanding restitution. *See* § 19-2-918(1), C.R.S. 2019 (juvenile courts "shall enter a sentencing order requiring the juvenile to make restitution as required by … part 6 of article 1.3 of title 18"); *see also* § 18-1.3-603(4)(a)(I), C.R.S. 2019 (a restitution order "remains in force until the restitution is paid in full"); *Pineda-Liberato v. People*, 403 P.3d 160, 165-66 (Colo. 2017) (courts have "the authority to enforce such a pending order" for restitution even after charges have been dismissed pursuant to a completed deferred judgment and sentence). The arguments in the Opening Brief remain in force. (Opening, pp. 28-29)

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

Although the Answer cites a federal articulation of this exception to the mootness doctrine, it includes no Colorado case requiring that "the same complaining party will be subject to the same action again …" (Answer, pp. 8-9)

[3] Based on information available through Colorado State Courts Data Access. U.L.S. agrees this Court can take notice of the status of his sentences. (Answer, p. 7 n.1)

There is none. That is because Colorado courts, unlike federal courts, are not subject to the "case or controversy" requirement of the federal Constitution. (Opening, pp. 32-33) The Answer does not refute the applicability of Colorado precedent applying this exception under circumstances where it was virtually impossible for the same party to be subject to the same action again. *See, e.g.*, *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1102 (Colo. 1998) (regarding high school drug testing, in a case where the complaining party had graduated).

The Answer asserts that this issue will not evade review because the Administrative Order "requires an individualized, fact-based determination [of whether shackles are necessary] at each appearance[.]" (Answer, pp. 9-10, 11-12) U.L.S. agrees that is what the order requires. The issue here is not the order; it is that a magistrate is not following it. There can be no individualized determination at each appearance if the magistrate does not allow a juvenile's attorney to ask for one.

This exception to the mootness doctrine does not require that review in another case is *impossible*. Our supreme court has found, for instance, that "whether a criminal defendant is entitled to a resentencing hearing after rejection from community corrections is an important matter capable of repetition yet evading review." *People v. Abdul*, 935 P.2d 4, 6 (Colo. 1997). That is not the type

of question that could *never* be presented in a case where it would matter to the individual defendant. Yet the supreme court addressed the merits, despite the case having "no effect on" the defendant before it. *Id.*

The short duration of juvenile sentences render it likely that review will be evaded. The Opening Brief brought to the State's attention numerous cases relying on that rational to apply this exception to issues of juvenile shackling. *See Tiffany A.*, 59 Cal. Rptr. 3d at 368; *In re M.H.*, 86 A.3d 553, 557 (D.C. 2014); *Doe*, 333 P.3d at 864. (Opening, pp. 26-27) The Answer has not addressed their treatments of the topic. The Answer's hypothetical, involving an adjudication being overturned on appeal, presents the same short sentence issue present in most juvenile cases. (Answer, p. 10) More critically, it does not explain why it makes any difference whether a child is subject to later shackling based on an appellate reversal rather than a probation violation. Under either scenario, the district court should have reviewed the merits of U.L.S.'s petition for review.

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

The Answer argues that this exception to the mootness doctrine does not apply because: (1) U.L.S. waived any constitutional arguments by failing to take action before the April 5, 2017, hearing; and (2) he got the process he was due. (Answer, pp. 11-12) As explained at length in the Opening Brief and above, the

Administrative Order did not require U.L.S. to take any action before the hearing. Even if it did, the right to effective assistance of counsel and the Due Process Clause required that his attorney have some opportunity to be heard on whether his shackles should be removed. And regardless, this exception can apply even if the Constitution was not implicated. A court "may hear a moot case that involves issues of great public importance" even when there was no constitutional violation. *See People in Interest of C.G.*, 410 P.3d 596, 602 (Colo. App. 2015).

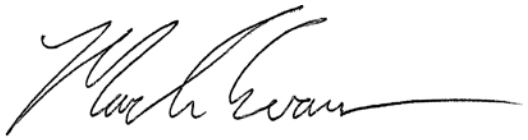
The Answer's concluding response to issue I—no harm no foul—betrays a belief that placing children in shackles simply does not matter to the public or otherwise. (Answer, pp. 32-33) Here too, the Answer is wrong.

Countless professionals, layman, and parents work tirelessly to ensure that Colorado's children overcome the inevitable indiscretions of youth and become productive members of the community. The psychological damage of chaining those children, and teaching them during formative years that they are criminals, is antithetical to that goal. This appeal asks only that children have a chance—through their attorneys—to avoid the harm those chains inflict. Whether children should have that chance is an issue of great importance.

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.

MEGAN A. RING
Colorado State Public Defender



MARK EVANS, #40156
Deputy State Public Defender
Attorneys for U.L.S.
1300 Broadway, Suite 300
Denver, Colorado 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on September 23, 2019, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on John T. Lee of the Attorney General's office.