Order

Michigan Supreme Court
Lansing, Michigan

September 25, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2022-24

Proposed Amendments of
Rules 6.907, 6.909, and 6.933
of the Michigan Court Rules

On order of the Court, the proposed amendments of Rules 6.907, 6.909, and 6.933 of the Michigan Court Rules having been published for comment at 512 Mich 1214 (2023), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action.

BOLDEN, J. (*concurring*). Although these proposed amendments to our court rules are well-intended, I concur in the Court's decision declining to adopt them because I believe that the Legislature is best suited to address the authority of correctional agencies to place youthful inmates in isolation under Michigan law.[1] Moreover, as a practical matter, the Michigan Department of Corrections (MDOC) remains bound to the federal regulation that inspired the proposed amendments—28 CFR 115.14—so long as Michigan continues to accept federal funds under the Prison Rape Elimination Act (PREA), 34 US 30301 *et seq*.

Had we adopted the proposed amendments, the court rules would have provided that "[b]est efforts must be made to avoid placing youthful inmates in isolation" to comply with other court rules mandating that youthful inmates be placed separately from adults when they are incarcerated in the same facility. Proposed MCR 6.907(B), MCR 6.909(B)(4), and MCR 6.933(G)(2). This Court received public comments in support of this proposal from the University of Michigan Law School's Juvenile Justice Clinic, the State Appellate Defender Office, and the Board of Commissioners and Children's Law Section of the State Bar of Michigan. These organizations broadly highlighted the detrimental impact that solitary confinement can have on incarcerated youth, particularly on their mental and psychological well-being.

The negative effects of placing youth in isolation while incarcerated are well documented in social science research. And as compared to adults, the harms to youth are particularly severe. Solitary confinement of youth is associated with higher rates of suicide, depression, and post-traumatic stress disorder. See Birckhead, *Children in*

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[1] In this context, isolation is generally synonymous with solitary confinement, which refers to "[s]eparate confinement that gives a prisoner extremely limited access to other people" or "the complete isolation of a prisoner." *Black's Law Dictionary* (11th ed).

Isolation: The Solitary Confinement of Youth, 50 Wake Forest L Rev 1, 10-11 (2015); Dierkhising, Lane, & Natsuaki, *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 Psychol Pub Pol'y & L 181, 182 (2014). Isolation can also cause or exacerbate serious mental health problems. American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* (October 9, 2012), pp 23-24, available at <https://www.aclu.org/publications/growing-locked-down-youth-solitary-confinement-jails-and-prisons-across-united-states> (accessed June 10, 2024). It is therefore no surprise that many major health organizations oppose the use of solitary confinement for youthful offenders under almost all circumstances. See, e.g., Owen & Wallace, *Advocacy and Collaborative Health Care for Justice-Involved Youth*, 146 Pediatrics 1 (July 2020), available at <https://publications.aap.org/pediatrics/article/146/1/e20201755/37020/Advocacy-and-Collaborative-Health-Care-for-Justice> (accessed June 10, 2024); American Psychiatric Association, *Position Statement on Solitary Confinement (Restricted Housing) of Juveniles* (July 2018), available at <https://www.psychiatry.org/getattachment/7bc96d18-1e73-4ac1-b6b5-f0f52ed4595a/Position-2018-Solitary-Confinement-Restricted-Housing-of-Juveniles.pdf> (accessed June 10, 2024) [https://perma.cc/XQ5V-GZEG]; American Academy of Child & Adolescent Psychiatry, *Solitary Confinement of Juvenile Offenders* (April 2012), <https://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx> (accessed June 10, 2024) [https://perma.cc/3BTN-QSA9]. Because "children are different" from adults, *Miller v Alabama*, 567 US 460, 480 (2012); *People v Parks*, 510 Mich 225, 259 (2022), detention policies that may be appropriate for adults may not be so for youth. Even where isolation may be justified as a means of ensuring the physical safety of incarcerated youth, any safety benefits should be weighed against the mental and psychological harm that isolation can cause. In sum, there are persuasive policy arguments why placement of youth in isolation should be highly disfavored.

That said, while some reforms are well-suited for implementation by court rules, others are not. In this circumstance, separation-of-powers principles animate my agreement with this Court's decision declining to adopt the proposed amendments. As one of the foundational doctrines of our government, Michigan's Separation of Powers Clause states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

This Court has elaborated that "the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296 (1998). "If the grant of authority to one branch is

limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Id*. at 297. This Court's rulemaking authority derives from our state Constitution. Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."). Just as the Legislature may not interfere with this Court's exclusive role to enact rules on judicial practice and procedure, "this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *McDougall v Schanz*, 461 Mich 15, 27 (1999). I am concerned that this Court may lack authority, by court rule, to interfere with the day-to-day decision-making of correctional officers regarding whether to use isolation in these circumstances. In particular, the Legislature has assigned "exclusive jurisdiction" to the MDOC over state prisons, "[s]ubject to constitutional powers vested in the executive and judicial departments of the state . . . ." MCL 791.204(c). Thus, unless our constitutional authority allows otherwise,[2] matters involving the administration of Michigan's prison system are generally within the exclusive purview of the MDOC. The same logic applies to local jails, which generally fall under the jurisdiction of our county sheriffs' offices. No doubt, this Court has general superintending control over *lower courts*. Const 1963, art 6, § 13; *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 568-569 (2002). But state and local correctional departments are entities of a different kind.

The proposed amendments are also unlike times when this Court adopts or amends court rules to be consistent with statutes. For instance, this Court recently amended MCR 3.950 to provide that, when the family court waives its jurisdiction over a juvenile and allows criminal proceedings to occur in circuit court, the juvenile must be transferred to the adult criminal justice system and is "required to be kept separate and apart from adult prisoners *as required by MCL 764.27a*." MCR 3.950(E)(2) (emphasis added). See also MCR 6.909(B)(4) (providing that a juvenile detained before trial or sentencing "must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a"). MCL 764.27a(3) provides that most juveniles confined in county jail "must be held physically separate from adult prisoners." Before the amendment, MCR 3.950(E)(2) had stated that "[j]uveniles waived pursuant to this rule are *not* required to be kept separate and apart from adult prisoners." MCR 3.950(E)(2), as adopted February 4, 2003, 467 Mich ccliv (2003) (emphasis added). Thus, this Court amended MCR 3.950 to reconcile it with the mandate of MCL 764.27a(3), which faithfully complies with the separation of powers. See *McDougall*, 461 Mich at 30-31 ("If a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the court rule should yield.") (cleaned up).

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[2] To be clear, claims of constitutional violations arising from the placement of a juvenile in isolation are reviewable on a case-by-case basis by this Court. I offer no opinion on the merits of any such claim.

It is true that the proposed amendments would have mirrored 28 CFR 115.14, an implementing regulation of the PREA. This regulation provides in relevant part:

> (a) A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.
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> * * *
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> (c) *Agencies shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision*. [28 CFR 115.14 (emphasis added).]

As a condition of receiving federal funding under the PREA, states must generally comply with these implementing regulations. See 34 USC 30307(e)(2). By all indications, the MDOC receives federal funds under the PREA. See Department of Corrections, *Prison Rape Elimination Act (PREA) Reports* <https://www.michigan.gov/corrections/public-information/statistics-and-reports/prea> (accessed June 10, 2024) [https://perma.cc/EE2Q-XFYV]. Accordingly, to receive full funding, the MDOC must already comply with 28 CFR 115.14(c); this Court's decision not to incorporate this condition into the court rules does not change that reality.[3] But the decision of the MDOC to voluntarily comply with federal regulations as a condition precedent to funding does not transform federal regulations into a requirement of Michigan law. Therefore, I am not persuaded that this Court should adopt the proposed amendments simply because they mirror federal regulations promulgated under the PREA that are adhered to by Michigan agencies as a funding condition.

This leads me to my final point. A practical and appropriate solution to the valid concerns raised by the public commenters is for the Legislature to exercise its constitutional authority to "scrutinize, examine, and if necessary, fix the issues brought before this Court today[.]" *People v Johnson*, 511 Mich 1047, 1048-1049 (2023) (BOLDEN, J., concurring). The Legislature has done so recently, in a related context and in a comprehensive and bipartisan fashion, when it implemented many recommendations of the Michigan Task Force on Juvenile Justice Reform. See 2023 PA 287 through 2023 PA 305. I would invite

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[3] Current MDOC policy states: "Prisoners at high risk for sexual victimization or who are alleged to have suffered sexual abuse shall not be placed in involuntary temporary segregation unless an assessment of all available alternatives is completed and a determination has been made that *no less restrictive means* of separation from likely abusers exists." MDOC Policy Directive 04.05.120(N) (emphasis added). This policy arguably encompasses the spirit of the "best efforts" requirement in 28 CFR 115.14, although it is not limited to youth.

the Legislature to study this issue as well to consider whether the PREA regulation disfavoring the placement of youthful inmates in isolation should be adopted into Michigan law and whether any additional protections beyond those provided by federal regulation are warranted. With these additional thoughts, I concur in the Court's decision but encourage the Legislature to examine the concerns underlying the proposed amendments that we now decline to adopt.

CLEMENT, C.J. and CAVANAGH, J., join the statement of BOLDEN, J.