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Attorney for SHACKLED CHILD

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF FRESNO, JUVENILE DIVISION

IN THE MATTER OF: SHACKLED CHILD	Fresno County Superior Court Case No.: **[deleted]** MOTION TO ALLOW CLIENT THE DIGNITY OF ENTERING THE COURTROOM WITHOUT SHACKLES

RELEVANT PROCEDURAL HISTORY

During the 8:30 a.m. calendar in Department 99C, counsel was present to accept appointment as conflict counsel on the case of SHACKLED CHILD. The case involved two other co-participants. Because of the policy of the juvenile court to shackle children for all hearings involving co-participants, counsel for SHACKLED CHILD made statements to court personnel and counsel for co-parts that, once again, he was going to be objecting to the use of shackles on a client. (This was done because counsel's practice of objecting has become – not by any wish of counsel – very disruptive of the court procedures and counsel has unsuccessfully petitioned various juvenile court judges to require deputies to know, in advance, the reasons for the shackling of children. The procedure adopted thus far by the court – which counsel has tried to explain does not appear to be supported by law – creates delays of anywhere from a half-hour to several hours, on average.)

Counsel for SHACKLED CHILD was informed, off the record, that he would be allowed to state that he was objecting to the shackles, but the court was "aware of what happened

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yesterday, next door" and counsel would not be allowed to make any further comments, or arguments, concerning the issue.[1] The court would then order the deputies "to look into the matter" and court would trail the issue until the 1:30 p.m. calendar for "an unshackling hearing."

The matter being adjourned, with instructions to return at 1:30 p.m. for the "unshackling hearing," counsel returned to his office to prepare for the afternoon hearing.

This Motion follows.

It should be noted that counsel for both co-parts stated they were not objecting to the shackles. Parents for the co-parts later approached counsel for SHACKLED CHILD indicating they were not in agreement with the lack of objection. In order to avoid potential conflict, counsel walked away from that discussion after explaining to the family of SHACKLED CHILD that we would be returning at 1:30 p.m. to argue the "unshackling motion." As counsel was leaving the area, he could hear apparently unhappy parents in the background asking if anyone had cards for counsel for SHACKLED CHILD. Some of these parents were parents of the co-parts, who had indicated they did not agree with the failure of counsel for their children refusing to object to the shackles.

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[1] Counsel for SHACKLED CHILD has, in other cases, repeatedly argued that the "default position" for the shackling of minors is "no shackles" and that if someone wishes the children shackled, they should have to bring a motion for that purpose. What "happened yesterday, next door" was that counsel objected to the fact that the hearing was conducted notwithstanding the objection, while the deputy was "researching" the issue. The end result of this procedure was that counsel's objection caused all minors in that case to be shackled longer than they would have been shackled if counsel had made no objection. When the deputy returned, the hearing was essentially over, although counsel was arguing to the court concerning the procedure. When the deputy returned, no "unshackling hearing" was necessary, as the deputy informed the court that "the Sheriff's Department will not be objecting to the minor being unshackled." The minor was then unshackled and further comments in that case were made by counsel "for the record." These comments included that the result validated counsel's belief that minors were being shackled without advance thought and without reason.

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POINTS & AUTHORITIES

I

ABSENT A PARTICULARIZED SHOWING OF UNRULINESS, INTENT AND ABILITY TO ESCAPE, OR CONDUCT DISRUPTIVE IN COURT, SHACKLING SHACKLED CHILD IS A VIOLATION OF HIS RIGHTS AND OF THE VALUES THE COURT EXISTS TO UPHOLD

"A court must not…have a general policy of shackling all defendants." (*In re Deshaun M.* (2007) 148 Cal.App.4th 1384, 1387 [56 Cal.Rptr.3d 627].) In the current case, the reason SHACKLED CHILD is shackled is because he is involved in a case involving multiple children. Deputies have, on numerous occasions, stated both to counsel for SHACKLED CHILD *and to judges* in the presence of counsel for SHACKLED CHILD that "we don't have enough deputies" and children are shackled "because it is a co-part case." (Declaration of Attorney Rick Horowitz.) Thus, there is a general policy of shackling all persons of a particular class; i.e., the class of children whose cases are consolidated with, or who make court appearances with, other children.

The singling out of children for shackling because they are appearing in co-participant cases when the law makes a general policy of shackling all defendants illegal is a violation of equal protection under both the State and Federal Constitutions. (U.S. Const., 14th amend.; Cal. Const., art. I, § 7.)

> """"'The concept ... compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'"" [Citation.] It is often stated that '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citation.] The use of the term 'similarly situated' in this context refers only to the fact that '"[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." ...' [Citation.] There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and

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> does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified."

(*People v. Taravella* (February 23, 1010) -- Cal.Rptr.3d ----, 3 [2010 WL 617373, Cal.App. 6 Dist., 2010], quoting *People v. Nguyen* (1997) 54 Cal.App.4th 705, 714 [63 Cal.Rptr.2d 173], alterations and omitted citations by the *Taravella* Court.)

The use of physical restraints is forbidden absent a showing of necessity. (*In re Deshaun M., supra,* 148 Cal.App.4th at 1386.) A primary concern over the use of restraints is prejudice if viewed by a jury, but this is not the only reason for limiting their use. (*Id*. at 1387.) Shackling prisoners is an "affront to human dignity" and "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." (*Tiffany A. v. Superior Court of Los Angeles County* (2007) 150 Cal.App.4th 1344, 1355-1356 [59 Cal.Rptr.3d 363]; *Deshaun M., supra,* 148 Cal.App. 4th at 1387.)

> The removal of physical restraints is also desirable to assure that 'every defendant is…brought before the court with the appearance, dignity, and self-respect of a free and innocent man.'

(*People v. Duran* (1976) 16 Cal.3d 282, 290 [545 P.2d 1322], quoting *Eaddy v. People* (1946) 115 Colo. 488, 492 [174 P.2d 717].)[2]

The principles outlined by the California Supreme Court count just as much in proceedings other than jury trials as in jury trials. (*Tiffany A., supra,* 150 Cal.App.4th at 1356.) The standard applied in preliminary hearings for adults is similar to that applied in juvenile proceedings. (*Id.* at 1356-1357.) It is a "lesser showing" than that required at a jury trial. (*Id*. at 1357.) However, this "lesser showing" should not be utilized to rubber-stamp the decisions of law enforcement. The California Supreme Court has held that "restrictions on shackling should apply to preliminary hearings, where no jury is present." (*People v. Fierro* (1991) 1 Cal.4th 173, 219 [3 Cal.Rptr.2d 426].)

The *Fierro* Court held that the "lesser showing" was permitted because "the dangers of

[2] For some reason, our Supreme Court utilized single quotation marks here and those have been retained.

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unwarranted shackling at the preliminary hearing…are not as substantial as those presented during trial." (*Fierro, supra,* 1 Cal.4th at 220.) *Fierro* dealt with the shackling of adults. When it comes to the question of the dangers of unwarranted shackling, that fact distinguishes *Fierro* from all cases involving the shackling of minors.

Shackling of children has been shown to have negative consequences on neurological (i.e., brain) development. (*See* Bernard P. Perlmutter, "Unchain the Children: Gault, Therapeutic Jurisprudence, and Shackling 9 Barry L. Rev. 1.) Additionally,

> Shackles affect a juvenile's sense of right and wrong; cause physical and psychological harm, stigma, and embarrassment; foster a sense of distrust for the justice system; and teach children that they will be treated like criminals.

(Anita Nabha, "Shuffling to Justice: Why Children Should Not Be Shackled in Court" (2008) *Brooklyn Law Review*, vol. 73:4, 1549, 1566-1567.)

Shackling minors not only makes them look like criminals; it makes them think of themselves as criminals. (Daniel Zeno, "Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms" (2009) 12 J. Gender Race & Just 258.) "Shackling is also a physical indication that the juvenile is beyond treatment or rehabilitation." (*Id*. at 275.) As Zeno's article notes, the United States Supreme Court has recognized that shackling creates the unmistakable indication that the shackled individual must be separated from the community at large. (*Ibid*.)

Perhaps this is the reason – plus the fact that shackling children is a violation of constitutional, state and international law – that a movement is spreading across the United States to limit the shackling of children. (Perlmutter, *supra,* 9 Barry L. Rev. at 3.) Last month, in Manhattan, a judge "slapped the agency in charge of the state's juvenile prison system for shackling kids being taken to court appearances in the city." (Jose Martinez, "Don't chain kids to court unless it is needed, judge rules" (January 27, 2010) NYDailyNews.com Daily News (http://www.nydailynews.com/news/ny_crime/ 2010/01/27/2010-01-27_dont_chain_kids_unless_needed_judge_rules.html, last visited February 26, 2010.) Florida has been re-writing its laws relating to the shackling of juveniles. (*Cf.* Carlos Martinez, "Why are Children in Florida Treated as Enemy Combatants?" (May-August 2007) National Legal Aid

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& Defender Association, vol. 29, no. 1; Editorial, "Court made right call in limiting juvenile shackles" (December 28, 2009) Miami Herald (available at http://www.miamiherald.com/2009/12/28/1400257/court-made-right-call-in-limiting.html, last visited February 26, 2010.) And Los Angeles County Superior Court Judge James R. Brandlin notes that

> *Tiffany A.* held that minors cannot be shackled in any juvenile court proceedings without an individualized showing of need, the same as in jury trials, even though no jurors are present in juvenile court.

(James R. Brandlin, "Safety First" (Date Unknown) The Daily Journal, p. 7 (available at http://www.dailyjournal.com/cle.cfm?show=CLEDisplayArticle&qVersionID=281&eid=900647&evid=1, last visited February 26, 2010.)

Although the "lesser showing" some courts have talked about for shackling decisions is not defined, the courts are clear that a generalized policy which does not take into account the individual characteristics of the accused is unacceptable. The standard applied at a jury trial…

> …was deemed to arise only when a defendant demonstrated through his or her conduct unruliness or an intent to escape, or engaged in other "nonconforming conduct or planned nonconforming conduct" that would disrupt the judicial process unless restraints were in place.

(*Tiffany A., supra,* 150 Cal.App.4th at 1356.)

Arguably, a "lesser showing" might not require a demonstration of conduct that would disrupt the judicial process unless restraints were in place. However, to take that position practically nullifies any consideration of the particularized characteristics of an individual accused person, whether adult or juvenile. Even so, the evidence of conduct utilized in adult cases that justify the use of restraints focuses on conduct relating to court proceedings. This includes threats to kill witnesses, attempts to hide weapons in the courtroom, escape attempts, repeated shouting obscenities in a courtroom, kicking the counsel table, attacking officers in the courtroom, and throwing oneself on the floor in the courtroom. (*See particularly Duran, supra,* 16 Cal.3d at 291.) So the "lesser showing" should require at least some connection to the potential for disruption within the courtroom.

A lesser showing which does not require anything more than someone's supposition that, perhaps because of the charges against them, or their history in other circumstances, some minor

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may disrupt the courtroom should be insufficient to hurdle even the "lesser showing" bar. As the courts discussing this issue in a juvenile setting have repeatedly noted, the values the court seeks to uphold are of high importance. The *Tiffany A.* Court ended its discussion of the issue by stating:

> While we are sympathetic to the obligations and responsibility our conclusion may impose upon the juvenile delinquency court, the Sheriff's Department and the People, those pale in comparison to the values we uphold.

(*Tiffany A., supra,* 150 Cal.App.4th at 1362.)

Additionally,

> [N]o California State court has endorsed the use of physical restraints based solely on the defendants' status in custody, the lack of courtroom security personnel, or the inadequacy of the court facilities.

(*Tiffany A., supra,* 150 Cal.App.4th at 1358.)

Shackling minors is contrary not only to California *case* law; it is contrary to statutory law. Penal Code section 688 states that "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." Minors are persons. ("minor." Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002. http://unabridged.merriam-webster.com (last visited 8 July 2009).)

Penal Code section 688 was enacted in 1872 by the legislature. Prior to that, it was a matter of common law that a man could not be shackled in court. (*People v. Harrington* (1871) 42 Cal. 165, 168-169 [10 Am.Rep. 296].)

That both California's Supreme Court and California's legislature – the latter going back to 1872, as noted – have deemed shackling to be illegal "without evident necessity for such restraint" should be good enough for the Juvenile Court of Fresno County. (*Harrington, supra,* 42 Cal. At 169.)

In the current case, when initially queried, the Bailiff responsible for courtroom security in Department 99C was unaware of any particularized reason necessitating the shackling of the minor. No one in or near the courtroom was aware of any particularized reason necessitating the shackling of the minor. Certainly *the court* was unaware of any particularized reason

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necessitating the shackling of the minor.

For the above reasons, the Juvenile Court should stop the routine practice of "shackle first, ask questions later."

II
THE DEFAULT POSITION RELATING TO SHACKLING IS FOR "NO SHACKLES"; THE PEOPLE SHOULD BE REQUIRED TO BRING A MOTION TO SHACKLE, FOLLOWED BY A PARTICULARIZED FINDING OF NECESSITY BY THE COURT

The real party in interest – the Bailiff does not have standing in this case anyway – it is "the People." (*See Tiffany A., supra,* 150 Cal.App.4th at 1348.) The People did not demonstrate any knowledge of the need for (nor had they actually requested) shackles.

And the burden of showing the necessity for shackling is on the People. (*See Tiffany A., supra,* 150 Cal.App.4th at 1348.) The burden for showing that he or she should not be shackled is not placed on the child.

As noted in footnote 1 of this brief, requiring otherwise creates unnecessary disruption to the court's processes and sometimes results in children being in chains longer, if counsel objects to the restraints, than if no objection is made.

The law clearly goes against the practice of shackling. No less an authority than the California Supreme Court has stated this in virtually every case cited within this brief. The California Supreme Court has gone farther, though, by stating "the disrespect for the entire judicial system…is incident to the unjustifiable use of restraints." (*Duran, supra,* 16 Cal.3d at 290.)

CONCLUSION

For the above reasons, counsel for the child urges the court to uphold the same values, in the same way, as they have previously been upheld in the cases cited above: the child should not be shackled in court.

February 26, 2010

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF FRESNO, JUVENILE DIVISION

IN THE MATTER OF: SHACKLED CHILD D.O.B. 2/2/1992	Fresno County Superior Court Case No.: **10CEJ11012-1** DECLARATION OF ATTORNEY RICK HOROWITZ IN SUPPORT OF MOTION TO ALLOW CLIENT THE DIGNITY OF ENTERING THE COURTROOM WITHOUT SHACKLES

DECLARATION OF ATTORNEY RICK HOROWITZ

I, Rick Horowitz, declare as follows:

1. That I am an attorney licensed to practice in the State of California,
2. That I am the attorney of record for the minor SHACKLED CHILD;
3. That I have, on numerous occasions, brought motions relating to shackling before the juvenile courts in and for the County of Fresno;
4. That on many such occasions, I have been informed of various reasons for the shackling of children;
5. That always, the initial reasons given have been either, “it’s the policy of J pod,” “it’s our policy,” “those are the rules,” “it’s a co-part case,” and, more often since I began bringing these motions, “I don’t know”;

6. That after failing to prevail in one such motion not long ago, a comment was later made by a bailiff that, "our policy has not changed, Mr. Horowitz";
7. That there has never been a minor brought before the court in shackles for whom the reason for shackling the minor was known in advance;
8. That the courts routinely allow anywhere from a half an hour to several hours for the Sheriff's Department to "research" and subsequently "explain why the minor is in shackles";
9. That in what I believe to be approximately 40% of these cases since I began tracking the information, the result of my objection has been the unshackling of the child;
10. That this fact shows that a large number of minors are being shackled unnecessarily, to be relieved of shackles *only if* their attorney challenges shackles;
11. That because of the procedure followed by the juvenile court, most attorneys will not challenge shackles, even if their clients would prefer that, because to do so would delay the completion of their cases;
12. That in addition to testifying under oath in the past that children were shackled because it was the policy (specifically, in one case, "the policy of J pod"), the deputies have stated that the primary reason for the policy is that the sheriff can only normally provide one deputy per courtroom;
13. That on occasion, such statements by deputies have been made in the presence of judges of the Superior Court in and for the County of Fresno, Juvenile Division.

I swear under penalty of perjury that the above is true and correct except as to those matters stated on information and belief, and as to those matters I believe them to be true to the best of my knowledge and belief.

Executed in Fresno, California on February 26, 2010.

_____

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