

FILED
 May 24, 2007
 CLERK, US DISTRICT COURT
 EASTERN DISTRICT OF
 CALIFORNIA
 D. Waggoner
 DEPUTY CLERK

**UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF CALIFORNIA**

IN RE:)	
)	
IMMEDIATE ADOPTION OF)	
AMENDED LOCAL RULE CRIM 43-401)	GENERAL ORDER NO. 460
)	
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IT IS HEREBY ORDERED that the judges of the Eastern District hereby VACATE General Order No. 449 and Local Rule Crim 43-401 adopted September 12, 2006, and find that there is an immediate need to adopt the attached Amended Local Rule applicable to the shackling of in custody defendants during criminal court proceedings convened in the Sacramento Courthouse. Pursuant to 28 U.S.C. §2071(e), this court adopts the Amended Local Rule Crim 43-401, to be effective immediately (Amended Local Rule Crim 43-401 and Findings Attached).

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. §2071(e) and Federal Rule of Criminal Procedure 57, that the Clerk of the Court is directed to provide public notice and the opportunity to comment on Amended Local Rule Crim 43-401, to the bar and public of the Eastern District. Thereafter, the bar and public will have forty-five (45) days to provide comment.

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Comments regarding Amended Local Rule CRIM 43-401 shall be sent to:

United States District Court
Eastern District of California
Office of the Clerk
Attention: LR 43-401 Comments
501 I Street
Room 4-200
Sacramento, CA 95184

or, e-mailed to lrcments@caed.uscourts.gov.

DATED: May 24, 2007

FOR THE COURT:



DAVID F. LEVI
Chief United States District Judge

Attachments

RULE Crim 43-401

SHACKLING OF IN-CUSTODY DEFENDANTS

(A) Applicability.

This rule is applicable to the shackling of in custody defendants during criminal court proceedings convened in the Sacramento Courthouse.

(B) Definitions.

- (1) “Presiding Judge” means the Judge or Magistrate Judge presiding over the proceeding.
- (2) “Crime of Violence” means:
 - (a) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
 - (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
 - (c) any felony under chapter 109A (18 U.S.C. §§ 2241 et seq.), 110 (18 U.S.C. §§ 2251 et seq.), or 117 (18 U.S.C. §§ 2421 et seq.) of Title 18.
- (3) “Fully Shackled” means leg restraints (including waist chains), and handcuffs.
- (4) “Long Cause Proceeding” means a proceeding that is expected to last at least 30 minutes, such as an evidentiary hearing.

(C) Shackling.

- (1) Unless the presiding judge determines otherwise, at the commencement of initial appearances, all in custody defendants shall be in leg restraints (including waist chains).

- (2) Unless the in custody arrestee/defendant waives a shackling determination, at the initial appearance by express waiver or by failure to mention it, the presiding judge shall determine whether the shackling of the in custody defendant in leg restraints (including waist chains) is necessary and/or sufficient. When making a determination on restraints, the presiding judge shall, where practical and immediately available, consider the following:
- (a) The nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism or involves a minor victim or a controlled substance, firearm, explosive, or destructive device,
 - (b) The weight of the evidence against the in custody defendant;
 - (c) The history and characteristics of the in custody defendant, including:
 - (i) the in custody defendant's character, physical and mental condition, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (ii) whether, at the time of the current offense or arrest, the in custody defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law;
 - (d) Whether the in custody defendant will be one of multiple defendants appearing in court proceedings in tandem.
- (3) The presiding judge's shackling determination made under subsection (2) above, or leg restraints (including waist chains) if no shackling determination is made under subsection (2), will be the default for the in custody defendant in all subsequent proceedings, unless further information demonstrates otherwise.

- (4) Notwithstanding any other provision of this rule, a person who has been housed in a jail facility for less than one business day prior to the initial appearance in this court may be fully shackled in the discretion of the United States Marshal's Service, through the United States Marshal or a Deputy Marshal ("Marshal"), provided the Marshal finds justification for full shackling under at least one of the factors set forth in (C)(2)(a), (c), or (d).
 - (5) Notwithstanding any other provision of this rule, in situations where two or more in custody defendants are brought into the courtroom together as a result of the court's attempt and need to manage the court calendar in a timely fashion, the defendants will be fully shackled unless the presiding judge determines otherwise on the presiding judge's own motion.
 - (6) When an in custody defendant is fully shackled:
 - (a) At Rule 11 proceedings, the in custody defendant shall be permitted the unhandcuffed use of the defendant's writing hand, unless the Marshal recommends full shackling for particularized reasons, and the presiding judge adopts the recommendation.
 - (b) In long cause proceedings, the in custody defendant shall be permitted the unhandcuffed use of the defendant's writing hand, unless the Marshal recommends full shackling for particularized reasons, and the presiding judge adopts the recommendation. The in custody defendant shall remain seated at the defense table, except when giving testimony.
- (D) Jury Proceedings.** This rule does not apply to trial proceedings at which a jury is being chosen or has been impaneled.

FINDINGS¹

Background

1. The Eastern District of California adopted General Order 441 on February 15, 2006, which prescribed full shackling of all detained defendants at pretrial proceedings, except Rule 11 and long cause proceedings, to assure the safety of all persons in the courtroom, in accordance with the recommendation of the United States Marshal.² Some of the findings attached to General Order 441 follow:

[] The Eastern District of California has a heavy criminal caseload. Criminal calendars frequently are lengthy and require the movement of many detained prisoners in and out of the courtroom.

[] Most criminal proceedings are brief such that the time in which a defendant is before the court fully shackled is minimal.

[] The alternatives to full shackling are not practical or would merely substitute the presence of much greater numbers of deputy marshals for physical restraints, with no significant increase in decorum or dignity for the defendant. The resources of the Marshal [S]ervice in this district are finite. Unshackling all defendants for all proceedings would cause very considerable delays and would disrupt the operation not just of the calendar court but potentially of all other courtrooms due to the necessity to draw deputy marshal[s] from other courtrooms to provide the additional deputies necessary to assure security when defendants are unshackled.

Further, a letter from the United States Marshal, dated December 8, 2005, which is attached to the findings for General Order 441 states, in pertinent part:

The prisoner population has increased by 40 percent in the Sacramento and Fresno offices . . . since 2001 [but the] district's resources . . . have remained flat over the same period. . . . As the prisoner count and judicial caseload increase, our responsibilities for service of process and fugitive enforcement increases, drawing

¹ These findings are provided only as support for the court's adoption of, and are not included in, Local Rule Crim 43-401.

² Full shackling means leg shackles and both arm wrist shackles attached to a belly chain in the front of the person.

on our already limited manpower. This begins to create a safety issue for our deputies in court and in the detention area.

The courtroom design, particularly the Magistrate's courtrooms, is not conducive to safely securing detainees without additional restraints. Federal courts in the Central District of California and some local courts have hold areas or barriers in the courts to restrain detainees with limited use of individual restraints. We do not have such facilities.

Restraining prisoners is also for their safety, though not an assurance. As the number of defendants increase and the length of court calendars increases defendants remain in holding cells longer. We believe boredom and extended interaction between prisoners is a huge factor for incidences in the holding cells. This may not specifically affect the court proceedings but it does contribute to the prisoners' overall demeanor.

Letter from Antonio C. Amador, United States Marshal, to the Eastern District of California (Dec. 8, 2005).

2. General Order 441 was challenged in United States v. Evans, et al.³ under United States v. Howard.⁴ Evans remanded General Order 441 "to the United States District Court for the Eastern District of California for re-promulgation with appropriate public notice and opportunity to comment." No. 1:06-cr-051-OWW, at *44.
3. Upon remand, the judges considered the shackling policy and the majority of judges decided that General Order 449 should issue. General Order 449 adopted Local Rule Crim 43-401, and directed the Clerk of the Court "to provide notice and the opportunity to comment on Local Rule Crim 43-401 to the bar and public of the Eastern District." Findings underlying General Order 449 are attached thereto.
4. After public comment was received, the Chief Judge appointed a subcommittee of judges to review the public comment and to make a shackling policy recommendation to the Court.

³ No. 1:06-cr-051-OWW (E.D. Cal. Aug. 10, 2006) (discussing General Order 441 and remanding it to the district court for re-promulgation with appropriate public notice and opportunity to comment).

⁴ 429 F.3d 843 (9th Cir. 2005), withdrawn and superseded by U.S. v. Howard, 463 F.3d 999 (9th Cir. 2006), withdrawn by U.S. v. Howard, 480 F.3d 1180 (9th Cir. 2007) and replaced by U.S. v. Howard, 480 F.3d 1005 (9th Cir. 2007).

5. The subcommittee reviewed and considered the public comment and held discussions with the United States Marshal / United States Attorney and the Federal Defender. The subcommittee also considered the United States Marshal’s response to the subcommittee’s question regarding what level of restraints are used throughout the country. The United States Marshal’s response, in a letter dated February 8, 2007, was as follows:

Overall 54 percent of the ninety-four judicial districts use restraints during initial appearances. The survey reports 17 percent of the districts use full restraints while another 37 percent use leg shackles. Judge-by-Judge accounts for 7 percent of the district while 38 percent of the districts report a Case-by-Case. Some reasoning for varying levels of restraint usage may be office staffing levels, judicial preference, or the layout of the courtrooms, such as the use of barriers or holding areas in Los Angeles.

	Full Restraints	Leg Shackles	Judge-by-Judge	Case-by-Case
# of Districts	16	35	7	36
% of Districts	17%	37%	7%	38%

Letter from Antonio C. Amador, United States Marshal, to District Shackling Committee (Feb. 8, 2007) (attached hereto).⁵

The United States Marshal opined that the use of full shackles on in custody defendants is reasonably related to a legitimate security purpose of minimizing the risk of violence that has been realized in this district. The United States Marshal further stated: “I cannot express strongly enough, that we do not favor [a] case-by-case approach [in determining the amount of shackling to be placed on an in custody defendant]. Security assurances cannot be made nor an accurate criminal record obtained prior to an initial appearance.” Id. The United States Marshal further stated that “in the event full shackling is not the presumption, we prefer handcuffs and waist chains instead of leg shackles.” Id.

⁵ Also attached hereto are a letter from Antonio C. Amador, United States Marshal, to the Eastern District of California, emailed as a public comment on October 25, 2006; and a letter from Russell B. Yorke, Assistant Chief Deputy United States Marshal, to the District Shackling Committee, dated January 29, 2007.

Findings

At the present time, the security risk in the Sacramento Courthouse does not justify adoption of the Marshal's recommendation for full shackling of all in custody defendants at all proceedings. However, because of the understaffed Marshal's office; the heavy criminal caseload in this district, which frequently leads to lengthy criminal calendars and requires the movement of many detained prisoners in and out of the courtroom; the configuration of the courtrooms, including the proximity of the prisoners to the public and court personnel; and the frequent presence of multiple defendants in the courtroom, the risk of violence and escape in the Sacramento Courthouse justifies placing leg shackles on all in custody defendants at the commencement of the initial appearance, and placing full shackles on in custody defendants in specific limited instances.

The rule does not apply to the Fresno Courthouse for the following reasons: 1. The relative number of in-custody defendants is higher in the Fresno division; 2. Like many other federal courts, but unlike the Sacramento division, the majority of the Fresno division judges share a single motions day, such that the criminal and civil district court calendars are set on the same day in those courtrooms resulting in the production of in excess of fifty in-custody defendants for the morning and afternoon calendars. While there are efficiencies for both the Bench and Bar that flow from this practice, it places unique overload demands on the Marshal service; 3. The judges of the Fresno division vary in practice on the issue of determining the number of in-custody prisoners brought into the courtroom at any given time, ranging from one to twenty. The variances reflect an ongoing attempt to increase courtroom efficiency and safety within the confines of available resources. 5. In spite of the exclusion of the Fresno division from this policy, each judge in that division is responsible for, and committed to the safety and decorum of the proceedings, and makes shackling decisions on individual cases in consultation with counsel, parties and the United States Marshal.

The rule does not apply to the Bakersfield, Redding, and Yosemite locations because of the type of facilities at those locations, and because the security in those locations is provided by federal officials other than the United States Marshal Service.