

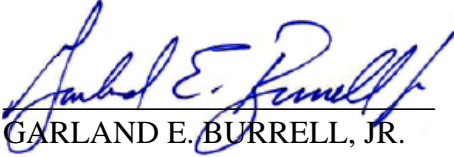
**FILED**  
January 10, 2008  
CLERK, US DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
Y. Williams  
DEPUTY CLERK

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

**IN RE:** )  
 )  
**IMMEDIATE ADOPTION OF** ) **GENERAL ORDER NO. 465**  
**AMENDED LOCAL RULE CRIM 43-401** )  
\_\_\_\_\_ )

IT IS HEREBY ORDERED that the majority of the judges of the Eastern District of California hereby VACATE General Order No. 460 and Local Rule Crim 43-401 adopted May 24, 2007, 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 attached Amended Local Rule Crim 43-401, to be effective immediately (Amended Local Rule Crim 43-401 and Findings Attached).

DATED: January 9, 2008

FOR THE COURT:  
  
GARLAND E. BURRELL, JR.  
Chief United States District Judge

## 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) “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.

(2) “Fully Shackled” means leg restraints (including waist chains), and handcuffs.

(3) “Long Cause Proceeding” means a proceeding that is expected to last at least 30 minutes, such as an evidentiary hearing.

**(c) Shackling at Initial Appearance.** Unless the Court determines otherwise, at the commencement of initial appearances, all in custody defendants shall be in leg restraints (including waist chains).

**(d) Shackling Determination and Waiver.** At the initial appearance, unless the in custody arrestee/defendant waives a shackling determination, by express waiver or by failure to mention it, the Court 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 Court shall, where practical and immediately available, consider the following:

(1) 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,

(2) The weight of the evidence against the in custody defendant;

(3) The history and characteristics of the in custody defendant, including:

(A) 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

(B) 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;

(4) Whether the in custody defendant will be one of multiple defendants appearing in court proceedings in tandem.

**(e) Default Determination.** The Court's shackling determination made under subsection (d) above, or leg restraints (including waist chains) if no shackling determination is made under subsection (d), will be the default for the in custody defendant in all subsequent proceedings, unless further information demonstrates otherwise.

**(f) Persons in Jail Facilities.** 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 (d)(1), (3), or (4).

**(g) Multiple Defendants.** 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 Court determines otherwise on its own motion.

**(h) Unshackling of Writing Hand.** When an in custody defendant is fully shackled:

(1) At Rule 11 proceedings, the in custody defendant shall be permitted the unshackled use of the defendant's writing hand, unless the Marshal recommends full shackling for particularized reasons, and the Court adopts the recommendation.

(2) In long cause proceedings, the in custody defendant shall be permitted the unshackled use of the defendant's writing hand, unless the Marshal recommends full shackling for particularized reasons, and the Court adopts the recommendation. The in custody defendant shall remain seated at the defense table, except when giving testimony.

**(i) Jury Proceedings.** This rule does not apply to trial proceedings at which a jury is being chosen or has been impaneled.

## FINDINGS<sup>1</sup>

### 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.<sup>2</sup> 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

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

<sup>2</sup> Full shackling means leg shackles and both arm wrist shackles attached to a waist 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.<sup>3</sup> under United States v. Howard.<sup>4</sup> 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.

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<sup>3</sup> 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).

<sup>4</sup> 429 F.3d 843 (9th Cir. 2005), withdrawn and superseded by United States v. Howard, 463 F.3d 999 (9th Cir. 2006), withdrawn by United States v. Howard, 480 F.3d 1180 (9th Cir. 2007) and replaced by United States 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).<sup>5</sup>

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.

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<sup>5</sup> 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.

6. On May 24, 2007, General Order 460 immediately adopted Amended Local Rule Crim 43-401 and directed the Clerk of the Court to provide the public with notice and an opportunity to comment on the amended rule. Comments were received from Ann Taylor Schwing and Dick Nichols, and from the Office of the Federal Defender.
7. In a July 9, 2007 letter to the Court, the Federal Defender objected to Amended Local Rule Crim 43-401, and the findings underlying it (including the policy itself, as well as the exclusion of the Fresno division from the policy). For example, the Federal Defender notes that “the heavy criminal caseload in this district” is actually “considerably lower than other California districts that do not have such a restrictive shackling policy.” (“The Eastern District had 919 criminal cases pending as of September 30, 2005. The Northern District of California had 1,267 cases. The Southern District of California had 1,457 cases. Neither of these two districts shackle, except in extraordinary circumstances. The Central District had 2,276 cases. This district uses only leg shackles.”). Additionally, the Federal Defender argues that “[i]t is incorrect to state that criminal calendars ‘frequently are lengthy’” since “[t]he felony criminal initial appearance arraignment calendars before magistrate judges [in February 2006] showed . . . the average number of defendants arraigned per day . . . was 2.6 . . . .” The Federal Defender further contends, inter alia, that “the movement of prisoners is quite limited” in the Sacramento and Fresno courthouses; “[a]lternatives to full shackling are practical”; “[u]nshackling would result in neither a considerable delay nor a disruption of court operations”; “[c]ourtroom design is hardly an excuse to shackle defendants”; and “[c]oncern for the prisoner’s safety and demeanor is . . . misplaced.” The Federal Defender also takes issue with the provision of the rule permitting full shackling of defendants who have been housed in a jail facility for less than one business day, asserting that security assurances can be made prior to an initial appearance.
8. The shackling subcommittee reviewed and considered the public comments, made certain structural/ descriptive modifications to the rule in accordance with the Schwing/ Nichols letter, and modified these findings to address some of the concerns raised by the Federal Defender.

### 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, given the restrictive nature of full shackles. However, the Marshal’s recommendation that some level of shackling is justified in the Sacramento Courthouse is heeded in light of the Ninth Circuit’s indication in Howard, 480 F.3d at 1013-14, that courts should pay attention to and follow the advice of the Marshal on security issues. Therefore, based on the Marshal’s recommendations, and 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 (including waist chains) on all in custody defendants at the commencement of the initial appearance, and placing full shackles on in custody defendants in specific limited instances. At the initial appearance, leg shackles are used to address the risk of violence and escape, and waist chains enable the Marshal to more easily and quickly fully shackle a defendant if necessary (and were added to the rule as a result of the Marshal's recommendation that handcuffs and waist chains be used in the event full shackling is not the presumption). The rule provides for an individualized determination of the level of restraint that should be imposed on an in custody defendant in post-initial appearance proceedings by providing that, unless the in custody defendant waives a shackling determination, the court will determine at the initial appearance whether leg shackles (including waist chains) are necessary and/or sufficient, and that shackling determination will be applied in post-initial appearance proceedings. The section of the rule authorizing the Marshal to fully shackle at the commencement of the initial appearance, defendants who have been housed in a jail facility for less than one business day if the Marshal finds specific justification for full shackles, is designed to address the situation in which the Marshal does not have enough information or enough time to inform the court whether a particular defendant should be fully shackled at the commencement of the initial appearance.

The Federal Defender's objections prompted the shackling subcommittee to obtain additional comparative resources information from the Marshal and criminal case statistics from the Clerk's office. The criminal caseload statistics encompassing the most recent fiscal year demonstrate a heavy criminal caseload in the Eastern District. For the 12 month period ending in June 2007, the Eastern District had slightly more weighted criminal filings per judge than the Southern District of California (170 versus 168), and approximately 4 times the number of weighted criminal filings per judge than the Central and Northern Districts (170 vs. 43 and 38 respectively). In absolute, non-weighted terms (because of many immigration cases), the Southern District had more per judge criminal filings than did the Eastern District (265 vs. 200), but again the Eastern District approached 4 times the number of unweighted criminal filings per judge when comparing the Central and Northern Districts (200 vs. 53 and 52 respectively).

Similarly, the Marshal's resources lag behind the other districts. For fiscal year 2006, only the Southern District of California, with its massive alien caseload, surpassed the Eastern District when prisoner production in court is broken down on a per deputy basis. The Eastern District produced 387 prisoners per deputy; the Northern District only 228; and the Central District only 250. Just looking at the Eastern District, prisoner production has increased from a total of 7,356 in fiscal year 2002, to 10,442 in fiscal year 2006.

Thus, the statistics germane to shackling demonstrate a heavy criminal caseload in the Eastern District.

Moreover, while removal of hand/arm restraints from the waist chain connection for a good number of prisoners is not likely to cause significant delay, completely removing shackles -- arms, legs and waist chains -- and then completely re-shackling at the end of the appearance, will cause untoward delay. Finally, personnel involved in the processing of new arrests, including Pre-trial Services Officers, Assistant United States Attorneys, and the Deputy Federal Defenders are often unable to timely acquire and verify otherwise available information on those new arrests given the press of duties with respect to known defendants. Discussion with the Marshal and his staff indicate that they face the same difficulties.

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; 4. 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 agencies other than the Marshal Service and whose primary functions do not include courtroom security.