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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court for Arapahoe County Honorable Christina Apostoli, Magistrate Honorable Theresa M. Slade, Judge Case Nos. 14JD835, 16JD798, 17JD110	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, IN THE INTEREST OF U.L.S., Juvenile-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 18CA0473
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 6,249 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ John C. Stockley

Signature of attorney

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STATEMENT OF THE CASE

ULS, a juvenile, pled guilty in three separate cases to counts of burglary, theft, and violating the terms and conditions of probation and was adjudicated delinquent (CF 14JD835, pp 264-70). Two other cases were dismissed (*id.*). Pursuant to the plea agreement, the court sentenced ULS to 12 months of probation (*id.*).

Prior to entering his plea, ULS filed a petition to the district court to review the magistrate's order that he be shackled at a bond reduction hearing (CF 14JD835, pp 232-42). The petition was denied on the basis that it was not ripe for review (CF 14JD835, pp 271-72). After entering his plea, ULS filed a renewed petition seeking review of the same magistrate order (CF 14JD835, pp 275-86). His renewed petition was denied on the basis that his guilty plea rendered the petition moot (CF 14JD835, pp 305-07).

ULS now appeals the district court's order rejecting his renewed petition and argues that the magistrate erred in precluding him from arguing against the use of shackles at the bond hearing.

STATEMENT OF THE FACTS

A. ULS's three juvenile delinquency cases.

1. 14JD835

On October 5, 2014, ULS, 14 at the time, entered a home through an unlocked garage (CF 14JD835, pp 1-2). He was charged with criminal trespass (CF 14JD835, p 6). He pled guilty to attempted criminal trespass; the original charge and another case, 15JD355, was dismissed. He received a stipulated sentence of 12 months of probation (CF 14JD835, p 49). Later, his probation was revoked and reinstated for nine months (CF 14JD835, pp 76-78, 347).

2. 16JD798

On November 21, 2016, ULS, 16 at the time, entered the home of his half-sister and punched her stepfather in the mouth (CF 16JD798, pp 1-3). He was charged with counts of first-degree burglary, third degree assault, violation of a protection order, and violation of bond conditions (he was on bond in 16JD658 for possession of marijuana and tampering with physical evidence) (CF 16JD798, p 5, 97).

3. 17JD110.

On November 26, 2016, the then 16-year-old Juvenile borrowed a man's cell phone in a McDonald's restaurant in Aurora and then fled with the phone (CF 17JD110, pp 2-3, 5). He was charged with counts of theft from a person, violation of bail bond conditions, and obstructing a peace officer (CF 17JD110, pp 7, 172).

SUMMARY OF THE ARGUMENT

ULS is precluded from raising this appeal because he pled guilty and thus waived his ability to appeal this non-jurisdictional issue.

Even if that were not so, the district court properly found that ULS's renewed petition was moot because of his guilty plea. He can no longer suffer the harm alleged because his juvenile cases are closed, and he is now an adult. There is no due process right to be free from shackles at a pre-trial hearing for juveniles or adults, so his complaint does not raise constitutional concerns or important matters of public policy.

In any event, the magistrate followed the procedures under the chief judge's directive for maintaining the use of restraints during the

April 5, 2017 hearing and appropriately rejected the defense's challenge to the restraints. ULS failed to request a hearing on shackling at his second appearance as contemplated by the directive, and then failed to provide the court with evidence of changed circumstances prior to the April 5, 2017 hearing. Thus, his complaint that he was precluded from arguing about his shackling is refuted by the record below.

ARGUMENT

I. This appeal should be dismissed because ULS pled guilty, waiving his right to direct appeal.

A. Preservation and Standard of Review

ULS does not address this issue in his opening brief. But, whether ULS's plea agreement bars his appeal is a question of law that this Court should review de novo. *See St. James v. People*, 948 P.2d 1028, 1030 (Colo. 1997).

B. Law and Analysis

The general rule is that "a valid guilty plea waives all non-jurisdictional objections, including allegations that constitutional rights have been violated." *People v. Neuhaus*, 240 P.3d 391, 393 (Colo. App.

2009), aff'd, 289 P.3d 19 (Colo. 2012). A defendant has no right to raise even a constitutional claim after pleading guilty unless such a claim relates directly to the adequacy of the guilty plea. *Id.* (citing *People v. Isham*, 923 P.2d 190, 195 (Colo. App. 1995)). Colorado caselaw precludes the use of conditional guilty pleas which preserve the right to appeal issues litigated prior to the plea. *Neuhaus v. People*, 289 P.3d 19, 23 (Colo. 2012).

On appeal, ULS does not allege that the use of pre-trial in-court shackles somehow made his guilty plea inadequate. And because his complaint does not raise a jurisdictional issue, he is precluded from raising it now. The appeal should be dismissed.

II. Alternatively, this Court should affirm the district court's conclusion that ULS's renewed petition was moot.

A. Preservation and Standard of Review

If this case is reviewable, the People agree ULS preserved the issue of the denial of his renewed petition based on mootness (CF, pp 126-134). The People agree that this Court reviews de novo whether an

issue is moot. *People In Interest of C.G.*, 410 P.3d 596, 599 (Colo. App. 2015).

B. Law and Analysis

1. The district court properly found the renewed motion was moot.

"Mootness is a threshold question concerning the scope of [this Court's] jurisdiction" that it "must answer … before [it] analyze[s] the contention's merits." *People v. Chipman*, 2015 COA 142, ¶ 38.

"A case is moot when the relief sought, if granted, would have no practical legal effect on an existing controversy." *People ex. rel. L.O.L.*, 197 P.3d 291, 292 (Colo. App. 2008); *accord People v. DeBorde*, 2016 COA 185, ¶ 32; *People in Interest of R.W.V.*, 942 P.2d 1317, 1319 (Colo. App. 1997); *People v. Espinoza*, 819 P.2d 1120, 1121 (Colo. App. 1991). Similarly, an appeal is moot where the outcome of the appeal will have no practical effect on the complaining party. *DeBorde*, ¶ 32 (holding that defendant had already been granted relief, his claim on appeal was moot); *People v. Garcia*, 89 P.3d 519, 520 (Colo. App. 2004).

Where a petitioner alleges that his pre-trial confinement was illegal, there is no remedy available to him if he is no longer confined. *See People v. Rodriguez*, 43 P.3d 641, 644 (Colo. App. 2001) (where defendant was no longer in custody, his claim on appeal that trial court erred by revoking his bond before sentencing was moot); *see also People v. Abdul*, 935 P.2d 4, 6 (Colo. 1997) (since defendant discharged his sentence and cannot be resentenced, any decision by reviewing court could have no effect on defendant).

Here, ULS entered a plea in this case and is now over 18 years-old. He will never have another hearing in this or any other delinquency matter. Furthermore, his cases are closed, and he was sentenced to 12 months of probation (CF 14JD835, pp 264-70). Though ULS continued to engage in conduct that forced the magistrate to revoke and reinstate his probation several times, he most recently was revoked and sentenced to 10 days of in-home detention (*See* Data Access Court Record for 17JD110, 16JD798).[1] He has completed that sentence (*id.*).

[1] This Court can take judicial notice of the status of ULS's sentence. *See People v. Linares-Guzman*, 195 P.3d 1130, 1135-36 (Colo. App. 2008).

All of his juvenile matters are closed out and he is no longer subject to the juvenile justice system. Thus, as the district court found, the issue is moot as to him.

2. No exception to the mootness doctrine applies.

An otherwise moot issue may be considered on appellate review only if it is (1) "capable of repetition, yet evading review"; (2) "of great public importance"; or (3) involves a "recurring constitutional violation". *People v. Back*, 412 P.3d 565, 567 (Colo. App. 2013); *see also Abdul*, 935 P.2d at 6.

The capable of repetition yet evading review doctrine only applies in exceptional cases where both: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (internal quotations omitted).

Here, ULS cannot be subject to pre-plea shackling in this or any other juvenile delinquency matter because he is now over 18 years-old

(*see* CF 14JD835, p 61). This distinguishes it from many cases where this Court has found an issue capable of repetition but evading review. *See Back*, 412 P.3d at 568 (Defendant granted indefinite parole during appeal could have his parole revoked and so issue was capable of repetition); *see also Johnson v. Griffin*, 240 P.3d 404, 406 (Colo. App. 2009) (erroneously setting hearing on campaign finance violation after the relevant election was capable of repetition for plaintiff and the tight timelines make it impossible to review); *but see Abdul*, 935 P.2d at 6 (addressing issue of re-sentencing after rejection from community corrections even though defendant had discharged sentence and could not be re-sentenced in that specific case).

Even if this issue is capable of repetition, it would not evade review because, as the district court found, "each appearance effectively allows a review" and so ULS is not "forever deprived of the opportunity of a review" (CF 14JD835, p 306 *citing Rocky Mountain Ass'n of Credit Mgmt. v. Dist. Court of City and Cty. Of Denver*, 565 P.2d 1345, 1346 (Colo. 1977)). The chief judge's order requires an individualized, fact-based determination at each appearance, ensuring that "no single order

on the use of restraints for a particular juvenile is permanent" (CF 14JD835, p 307).

ULS argues that the district court found his initial petition unreviewable because it was not a final judgment and subsequently found it moot when he pled guilty, so this issue evades review (OB, pp 29-30). He argues that the review contemplated by the doctrine must be by a higher court (*id.*).

Even if review must be from a higher court, the directive applies to all cases in the district (CF 14JD835, p 289). An appeal can be taken from a case where the juvenile goes to a bench trial, is adjudicated delinquent, and timely files his petition for review to the district court. In such a case, the issue would not be moot because the juvenile may be subject to pre-trial shackling again if his adjudication is overturned and the case is remanded for a new trial. Such a procedural posture is likely to happen, so ULS's complaint that this issue evades review by a higher court fails.[2]

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[2] ULS argues that when he filed the renewed petition, he could have been subject to another revocation and reinstatement of his probation,

Furthermore, as the trial court found, ULS abandoned his constitutional complaint by failing to follow the requirements of the chief judge's directive (CF 14JD835, p 307). He could have raised the issue at the second appearance or filed information before the third but did not do so.

Even if he did properly raise constitutional arguments, as the last section of this brief explains, the thorough procedures under the chief judge's order – and followed here – provide more than what due process requires and so ULS's constitutional rights were not violated. *See State v. Doe*, 333 P.3d 858, 871 (Idaho 2014) (holding there is no right for juveniles to be free from shackles at pre-trial hearings). And, his complaint that he was totally precluded from arguing against shackling is unsupported since he had the opportunity to bring the issue up at the second appearance or file information with the court prior to the

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and therefore subject to in-court shackling (OB, pp 28-29). While that may have been the case when the petition was filed, he has now completed his sentence and is no longer subject to the juvenile justice system.

hearing (*see* CF 14JD835, p 307). Thus, his complaint does not involve recurring constitutional violations or matters of important public policy.

Because another case is likely to present this issue in a reviewable manner, ULS can never again be subject to pre-trial shackling as a juvenile, and his constitutional complaint is factually and legally unsupported, his complaint is moot, and no exception applies.

This appeal should be dismissed.

III. In any event, the magistrate followed the procedures in the chief judge's directive, ULS failed to give prior notice of changed circumstances as required by the order, and there is no constitutional right to be free from shackles at pre-trial hearings.

A. Preservation and Standard of Review

Contrary to ULS's contention, the issue here is not whether the court can "completely prohibit an attorney from arguing that his client should be unshackled" (OB, p 4). That was not the case below. Instead, the issues are whether (1) defense counsel failed to present mitigating evidence and argument as required by the directive, (2) counsel waived ULS's right to a hearing on shackling by not requesting one at the

second appearance as required by the directive, but most importantly, (3) whether a fundamental right is even at issue.

The People agree that interpretation of the text of the chief judge's order should be reviewed de novo. *Cf. People v. Hernandez*, 250 P.3d 568, 570-581 (Colo. 2011) (issues of statutory construction are reviewed de novo); *cf. also People v. Nozolino*, 298 P.3d 915, 918 (Colo. 2013) (interpretation of court rules is reviewed de novo).

The magistrate's pretrial shackling order mainly concerned determinations of fact which this court should not set aside unless clearly erroneous. C.R.M. 7; *In re G.E.R.*, 264 P.3d 637, 638-39 (Colo. App. 2011).

Whether a juvenile has a due process right to be free from shackles at a pre-trial hearing is a question of law that should be reviewed de novo. *See Fitzgerald v. People*, 394 P.3d 671, 673 (Colo. 2017).

On appeal, the prevailing party below may defend the district court's judgment on any ground supported by the record, whether or not

it was relied on or even considered by the district court. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006).

B. Additional Background

1. The chief judge's administrative directive regarding pre-trial shackling of in-custody juveniles.

In the district where this case was heard, there is a standing chief judge directive outlining the way courts are to address pre-trial shackling of in-custody juveniles (CF 14JD835, pp 287-93). It directs trial courts hearing juvenile delinquency matters to "conduct an individualized, case-by-case evaluation to determine whether restraints are necessary" (CF 14JD835, p 289).

Under the directive, for a juvenile to be shackled in court at a pre or post-trial hearing, the sheriff's office must make a written request alleging that at least one of three authorized reasons for shackling apply: (1) the juvenile is uncontrollable or constitutes a danger to self or others; (2) there is reason to believe the juvenile will attempt to escape; or (3) there is no less restrictive alternative than the use of restraints to maintain order and safety in the courtroom given available resources

(CF 14JD835, pp 289-92). The detention facility or probation department may give the court additional information about the juvenile helpful for its determination (CF 14JD835, pp 291-92). The juvenile's counsel may provide the court with favorable information about the juvenile (CF 14JD835, p 291). If the appearance is considered a second or a subsequent proceeding, defense counsel must provide any information in writing before noon the day before the hearing (*id.*). With all available information, the court must then consider the following several factors to determine if shackles are necessary under the reason(s) alleged by the sheriff's office:

> (a) the age of the juvenile;
>
> (b) the number of times, if any, the juvenile has previously been accused of violating the criminal law and the nature of any such accusations;
>
> (c) whether the juvenile is currently on summons, bond, probation, or parole in another case;
>
> (d) the nature of the charges pending against the juvenile, including: the nature of the alleged conduct; and whether the juvenile is charged with a Class 1 Felony, a Class 2 Felony, Escape, Attempted Escape, or a Crime of Violence pursuant to § 18-1.3-406, C.R.S. (2015);

(e) any DAR reports, evaluations, and Incident Reports from the Foote Center;

(f) whether the juvenile has previously attempted to escape, has a present plan to escape, has escaped or attempted to escape from any other facility or placement, or whether there is any other reason to believe that the juvenile presents a higher risk to escape than the majority of juveniles;

(g) whether the juvenile has a history within the past five years of failing to comply with orders or instructions from law enforcement, court security personnel, pretrial officers, probation officers, parole officers, or juvenile detention facility staff;

(h) the juvenile's mental health during the past five years and the juvenile's current mental health, including whether, since being arrested for the charged offense(s), the juvenile has engaged in, or has threatened or attempted to engage in, combative, disruptive, assaultive, or self-harming behavior;

(i) credible threats of harm made by the juvenile to members of the community or law enforcement personnel, including the Sheriff's Office, during the past five years;

(j) whether the juvenile has a high "CJRA score," has been designated by law enforcement as "SHODI," or has previously been committed to the Department of Youth Corrections;

> (k) whether, in a case involving a Crime of Violence under § 18-1.3-406, C.R.S. (2015), a Class 1 or a Class 2 Felony, or a charge of Escape or Attempted Escape, there will be multiple co-defendants present in the courtroom when the juvenile is in the courtroom;
>
> (l) the available security resources and the existence of any alternative that is less restrictive than the use of restraints; and
>
> (m) any other factor that the Juvenile Court finds is relevant to its determination regarding whether restraints are necessary under this Administrative Order.

(CF 14JD835, pp 289-90).

The level of evaluation required by the court depends how many pre-trial hearings the juvenile has attended (CF 14JD835, pp 291-92). If it is a first appearance, the court must engage in a totality of the circumstances evaluation based on the information available and give the parties its decision prior to the hearing (CF 14JD835, p 291). If it is a second appearance, the court engages in the same analysis, though it may consider, but is not bound by, the prior determination (*id.*). If it is a third or subsequent hearing, the court follows "the procedures

[regarding] a juvenile's second appearance. However, … the Juvenile Court may rely on the determination made [at the] second appearance – as long as the circumstances have not materially changed" (CF 14JD835, p 292). The inquiry before the court at a subsequent hearing is "whether the circumstances … have materially changed since the second appearance" (*id.*). At the first or second court appearance, if any party requests a hearing on the use of shackling, the court must hold a hearing (CF 14JD835, p 292). A hearing on shackling is not required at a third or subsequent hearing. (*see id.*).

Courts in the judicial district use a form order when making a shackling determination. First, the court indicates whether its decision is to order shackling or not. Next, if it is ordering shackling, it indicates which of the three authorized reasons it found present. Finally, it indicates which of the factors it found persuasive in determining shackling was necessary (*see* CF 14JD835, pp 130-32).

2. ULS's pre-plea court appearances.

a. February 9, 2017.

Prior to ULS's first court appearance, the sheriff's office submitted a shackling request (CF 14JD835, pp 100-02). The magistrate issued a pre-hearing order granting the request (CF 14JD835, pp 103-05). ULS appeared shackled and his counsel addressed the issue on the record (TR 2/9/17, pp 3-5). Defense counsel argued that he spoke to ULS's mother and counsel had no concerns about his potential behavior in the courtroom (*id.*). Defense counsel proffered no evidence prior to or during the hearing on the issue (*see id.*). After hearing argument from the parties, and considering the available information, the magistrate declined to change her pre-hearing ruling (TR 2/9/17, pp 5-7). She found that shackles were necessary due to the nature of the new charges, the fact that ULS was on probation when he picked up the new case, and his previous commitments to the Department of Youth Corrections (*id.*).

b. March 15, 2017.

ULS appeared only in case number 17JD110 on bond and out of custody (TR 3/15/17, p 3:6-7). The court ordered that the public defender's office be appointed to represent him (TR 3/15/17, p 6:4-13).

c. March 28, 2017.

At this appearance in case numbers 14JD835, 16JD798, and 17JD110, ULS was again in custody after being picked up on an outstanding warrant (TR 3/28/17, pp 5-7). The magistrate granted the People's motion to revoke bond (TR 3/28/17, p 7:6-13). ULS was represented by the public defender's office, but his primary attorney was not present. His covering counsel requested to set a bond reduction hearing the next week when his primary counsel would be available (TR 3/28/17, p 7:16-20).

Prior to the hearing, the sheriff's office submitted the same request that he be shackled in the courtroom (CF 14JD835, pp 120-22). The magistrate entered a pre-hearing order that he be shackled (CF 14JD835, pp 123-25). Though this hearing was a "second hearing" under the chief judge's directive, neither ULS's primary attorney, nor

the covering attorney filed any evidence or argument on the issue of shackling prior to or during the hearing (*see* TR 3/28/17, pp 1-12).

d. April 5, 2017.

On the morning of ULS's bond reduction hearing, the sheriff's office again submitted a third request that he be shackled in court citing the same factors listed in prior two requests (CF 14JD835, pp 127-29). Though ULS had been in custody for 8 days, and a determination had been made 55 days prior that he be shackled while in custody, defense counsel did not file any evidence or argument with the court prior to the hearing. The magistrate made a pre-hearing ruling that he be shackled (CF 14JD835, pp 130-132).

During the hearing, ULS' counsel requested to address his in-court shackles (TR 4/5/17, p 3:20-21). The magistrate noted that the hearing was "at least a third" appearance under the chief judge's directive and found no material change in circumstances (TR 4/5/17, pp 3-4). The prosecution argued that defense counsel failed to file information with the court by noon the day prior to the hearing as required by the chief judge's directive (TR 4/5/17, p 4:16-24). Without

commenting on that fact, the magistrate denied the request to address the shackling issue and ruled that ULS remain shackled (TR 4/5/17, p 5:3-7).

Defense counsel noted his objection (TR 4/5/17, p 5:8-9). [3]

3. ULS's guilty plea and renewed petition for review.

Five days later, ULS filed a petition for review in the district court, challenging his shackling at the bond hearing (CF-14CA835, pp 375-86). The district court denied the petition concluding that the magistrate's order was not a final order and not reviewable under C.R.M. 7.

At the final hearing, ULS entered into a global guilty plea resolving all of his outstanding juvenile delinquency cases (TR 7/26/17, p 3:10-17; CF 14JD835, pp 264-270). Fifteen days later, he filed a renewed petition to the district court challenging the magistrate's pre-

[3] ULS also appeared out-of-custody on May 24, 2017. The transcript shows a positive interaction with the magistrate judge where the magistrate told ULS that she was proud of him for earning his "Big Foote" shirt, apparently earned through good behavior while at the detention center (TR 5/24/17, pp 4-5).

plea shackling order at the April 5, 2017 hearing (CF 14JD835, pp 275-86). The prosecution filed a response (CF-14CA835, pp 294-96), and the district court issued a written order denying the petition, concluding that ULS's guilty plea rendered the issue moot (CF-14CA835, pp 305-307).

C. Law and Analysis

ULS argued below that there is a due process right to be free from shackles in juvenile cases absent an individualized determination and a hearing (CF 14JD835, pp 239-40). He argues on appeal that it violates the right to effective assistance of counsel to preclude an attorney from arguing against shackling (*see* OB, pp 9-12). Because (1) there is no right to be free from shackles at a pre-trial hearing, (2) his assertion that his attorney was entirely precluded from argument about shackling is factually unsupported, and (3) he has alleged no specific harm from his shackling, his complaint fails.

1. There is no due process right to be free from shackles at a pre-trial hearing in a juvenile delinquency case.

There is no Colorado caselaw recognizing a due process right to be free from shackles at a pre-trial hearing, either for adults or juveniles. Idaho addressed the issue and held that while public policy suggests that pre-trial shackling of juveniles should be rare, no due process right exists to prohibit it. *See Doe*, 333 P.3d at 871.

Doe held that prior to shackling juveniles during the guilt phase of a bench trial, the court must make a finding that "the restraints are necessary in the case of a specific juvenile for physical security, to prevent escape, or to maintain courtroom decorum." *Id.* This holding was premised on the right in adult criminal cases to appear unshackled before a jury during trial. *Id.* Specifically though, *Doe* did not extend this right to pre-trial hearings, noting that the United States Supreme Court has never made such a requirement. *Id.*; *cf. Tiffany A. v. Superior Court*, 59 Cal. Rptr. 3d 363, 375 (Cal. App. 2007) (extending right to pre-trial juvenile hearings because California state law recognized such

a right for adult criminal defendants). Finding otherwise would "require [the court] to forge entirely new ground without [legal] basis[.]" *Id. Doe* recognized that the relevant judicial rules committee would have to impose such a pre-trial requirement. *Id.*

Here, the chief judge's directive adopts nearly the exact language of *Doe*, but extends it to pre-trial hearings (*see* CF 14JD835, pp 287-93). While the directive may create beneficial public policy for reasons cited by ULS (OB, pp 11-14), due process does not require it. Adult criminal defendants in Colorado may be restrained in pre-trial hearings but not during the guilt phase of trial, and ULS cites no authority to contrary. Thus, there is no due process right to be free from shackles at a pre-trial hearing in a juvenile case.

Since Colorado has recognized no due process right for adults to be free from shackles prior to trial, no such right extends to juveniles. And, since no due process right was at issue, there could be no effective assistance of counsel concern in precluding an attorney from advocating for a right that does not exist. Thus, even if the magistrate completely

disallowed counsel from arguing against shackling, ULS's complaint still would fail.

2. ULS should have requested a hearing at his second appearance or filed exhibits with the court prior to the bond hearing as contemplated by the directive.

ULS concedes that "courts do, of course, have the ability to reasonably limit the arguments of counsel" (OB, p 19). He complains though, that when the magistrate did not allow counsel to argue against shackling at the bond reduction hearing this was a "refus[al] to even entertain the argument" that ULS should appear unshackled (OB, p 34-35). This complaint disregards the fact that defense counsel had ample opportunity to present mitigating information and evidence to the court at the prior hearing or before the hearing in question – as contemplated by the chief judge's directive – but simply failed to do so. Because this complaint is belied by the record, it fails.

ULS raises several contentions about the interpretation of the chief judge's directive. To correctly interpret the directive, it is

important to note the order that the procedures are laid out and how they are broken up.

First, the directive sets out the procedure for a juvenile's first pre or post-trial hearing (CF 14JD835, p 291). It requires the court to make an initial determination on the "information available" and allows the parties to argue the point. It contemplates situations like ULS' first appearance, where he had just met his public defender and limited information and argument is available. Thus, this initial determination gets limited permissive deference (*id.*).

Next, in the second paragraph on CF 14JD835, page 291, the directive sets out the procedures for a second pre or post-trial hearing. It requires that the parties submit information to the court by noon prior to the second appearance. Because the parties will have had more time to investigate the issue, the court is allowed to rely on this second determination unless circumstances change. Importantly, this is the only paragraph – which sets out the *procedures* for a second hearing – that applies to third and "subsequent proceedings" (*id.*).

Lastly, in a separate paragraph beginning on the bottom of CF 14JD835, page 291 and continuing to 292, the directive outlines when a hearing can be requested and when one is mandatory. The parties may make an oral request, and the court must hold a hearing only at the first and second appearances (CF 14JD835, pp 291-92). Because this paragraph specifically lists the first and second appearance, it does not apply to third or "subsequent proceedings" (*see id.*).

The People agree that the directive does not require a juvenile to file anything in order to argue against shackling at a first or second appearance. But, in order to argue against shackling at a third or "subsequent proceeding," or raise the issue generally, it is incumbent on the juvenile's counsel to comply with the directive.

The options available to ULS's counsel were to: (1) orally request to address shackling at the first appearance; (2) present argument or evidence at the first appearance; (3) file information no later than noon the business day before the second appearance; (4) orally request a hearing at the second appearance; (5) present argument or evidence at the second appearance; and (6) file information with the court by noon

the day prior to the third or "subsequent proceeding" (CF 14JD835, pp 291-92).[4]

ULS chose to do two of these things – (1) orally request to address shackling at the first appearance, and (2) present argument at the first appearance. He simply failed to do any of the rest. His primary attorney was not present at his second appearance and failed to submit any information to the court on the issue. ULS's failure to properly raise the shackling issue was the fault of his attorney, not the magistrate. And the magistrate was within her discretion to find, without additional argument, that circumstances had not changed since the previous determination. His complaint fails.[5]

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[4] ULS's covering counsel also could have demanded a hearing on shackling at the second appearance but request it be continued with the bond hearing. She failed to do even that.

[5] If ULS wants to raise a claim of ineffective assistance of counsel against his attorney, such a claim is not appropriate here on direct appeal. *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003) ("[D]efendants have regularly been discouraged from attempting to litigate their counsel's effectiveness on direct appeal").

ULS next argues that the magistrate was not bound to only consider changed circumstances at the subsequent proceeding but should have allowed counsel to argue the shackling issue anew under the factors (OB, p 20-21).[6] While the magistrate is not bound to only consider changed circumstances, the directive explicitly provides that "in subsequent proceedings, [the court] may rely on the determination made [at the] second appearance … as long as the circumstances have not materially changed. Therefore, the inquiry … is whether the circumstances set forth … have materially changed" (CF 14JD835, p 292). There is no requirement that the magistrate hold a hearing on the shackling issue at the "subsequent proceeding" bond hearing, and the directive established a noon deadline the day before the hearing to submit information to the court. Thus, the magistrate was within her discretion to rule on the shackling issue without additional argument.

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[6] This case presents the same interpretive question as People in Interest of JCR, 18CA187 – regarding the same chief judge directive. There, the public defender argues the opposite position – that the *only* question before the magistrate at a third or subsequent proceedings can be whether circumstances have materially changed (18CA187 OB, pp 17-18).

Next, ULS argues that because the sheriff's office submitted their renewed request on the morning of the bond hearing, he could not possibly have anticipated filing information prior to the hearing (OB, pp 21-22). However, both prior times ULS appeared in custody, the sheriff's office submitted identical "information relevant to the [shackling] determination" by requesting ULS be shackled. And the court found it necessary to do so (CF 14JD835, pp 100-02; 103-05; 120-22; 123-25). Thus, ULS was on notice that the sheriff's office would recommend he be shackled, he was in receipt of the "information relevant to the determination," and he knew the court was inclined to order him shackled. The directive gave ULS opportunities to contest the determination, and his counsel failed to comply.

ULS compares this situation to *Herring v. New York*, 422 U.S. 853, 863 (1975) where defense counsel was completely denied the ability to give a closing argument at a bench trial. *Herring* does not apply because (1) the harm alleged here is nothing like a complete denial of a fundamental part of trial, (2) ULS had ample opportunity to argue against the use of shackles but failed to comply with the proper

procedure; and (3) any error did not deprive ULS of the ability to present a defense.

This is merely a situation where the court "[had] the ability to reasonably limit the arguments of counsel" (OB, p 19), not one where the court "[refused] to even entertain the argument" that ULS be unshackled (OB, pp 34-35), and so this complaint fails.

3. ULS has not shown any particularized harm resulting from his shackling.

After the bond reduction hearing, but before the entry of his plea, ULS appeared out of custody on May 24, 2017. The transcript shows an interaction with the magistrate judge where the magistrate told ULS that she was proud of him for earning his "Big Foote" shirt, apparently earned through good behavior while in custody (TR 5/24/17, p 4:6-19).

Accordingly, the transcript does not indicate ULS suffered irreparable harm to his self-image from the two previous appearances for which he was shackled. He was seeking employment at various fast food restaurants, keeping in contact with his probation officer while providing clean urinary analyses, and completed a positive mental

health evaluation (TR 5/24/17, p 4:6-19). His guardian ad litem noted that he had "a lot of great stuff going on" (TR 5/24/17, p 4:18-19).

Furthermore, while he alleges generalized concerns about shackling juveniles broadly (OB, pp 11-15), there is no indication that ULS suffered any actual harm to his ability to communicate with his counsel or participate in the proceedings when he was shackled. The directive itself requires that the shackles used in juvenile cases must "allow a juvenile limited movement of [their] hands to write …[when] necessary … [as well as] any other reasonable accommodations that the [court] finds are necessary to allow the juvenile to fully participate in pretrial or post-trial proceedings" (CF 14JD835, p 292).

Here, the three hearings where ULS appeared in shackles spanned 19, 12, and 11 pages of transcripts each (*see generally* TR 2/9/17; TR 3/28/17; TR 4/5/17). No substantive attorney-client interactions occurred on the record (*id.*). Nothing prohibited ULS's attorney from speaking with him or advising him before, during, or after the proceeding.

His complaint fails.

CONCLUSION

For the above reasons, this appeal should be dismissed, or the trial court's order should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **MARK EVANS** and all parties herein via Colorado Courts E-filing System (CCES) on August 15, 2019.

/s/ Tiffiny Kallina