IN THE
FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

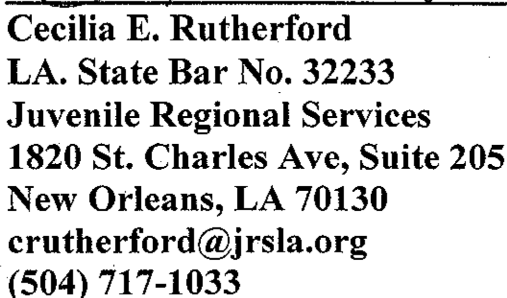
No. 2009-C-1280

STATE OF LOUISIANA
IN THE INTEREST OF A.B.

2009 SEP 17 PM 4:
CLERK OF COURT

Application for Writs of Certiorari and Prohibition From the
Juvenile Court for the Parish of Orleans, Case No.: 2009-113-06-DQ-C
Honorable David L. Bell, Judge, Presiding

**JUVENILE'S APPLICATION FOR
WRITS OF CERTIORARI AND PROHIBITION**



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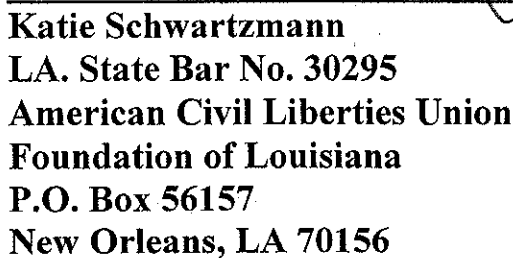

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JUVENILE DELINQUENCY CASE

REQUEST FOR EXPEDITED CONSIDERATION

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Exhibit A	Transcript of August 26, 2009 hearing
Exhibit B	July 29, 2009 Judgment
Exhibit C	August 26, 2009 Judgment
Exhibit D	Notice of Intent to Seek Writs
Exhibit E	September 17, 2009 Order

REQUEST FOR STAY OF PROCEEDINGS

Pursuant to the Uniform Rules - Courts of Appeal Rule 4-4(A), A.B. hereby requests a stay of proceedings pending the outcome of the writ application, due to the illegal order of the Orleans Parish Juvenile court that he cut his hair or be incarcerated by September 23, 2009. Such request for a stay of proceedings was presented to the trial court when the application for writs was sought, and was denied by the trial court.

REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to the Uniform Rules - Courts of Appeal Rule 5-1 (a) (3), A.B. hereby requests expedited consideration, due to the illegal order of the Orleans Parish Juvenile court that he cut his hair or be incarcerated by September 23, 2009.

JURISDICTION

This Honorable Court has jurisdiction over this cause pursuant to Article 5, Section 10 of the Louisiana Constitution and Article 338 of the Louisiana Children's Code.

STATEMENT OF THE CASE

On July 29, 2009, A.B., a minor, was placed on probation in Section C of the Orleans Parish Juvenile Court, hereinafter referred to as the "trial court." (R. 17).

On August 26, 2009, A.B. appeared, with his mother, before the trial court. (R. 1). At that hearing the trial court stated unequivocally that a formal condition of A.B.'s probation is that he get his hair cut. (R. 25). The court further stated that if A.B.'s hair is not cut by September 23, 2009, A.B. will be incarcerated for one year. (R. 27).

Counsel for A.B. objected (R. 35-36), and, on September 10, 2009, counsel filed for supervisory writs with this Honorable Court.

STATEMENT OF FACTS

A.B., a minor, is currently on supervisory probation for violation of La. R.S. 14:69, "illegal possession of stolen things."

On August 26, 2009, A.B. appeared before the trial court. (R.1). At that hearing, the court found that A.B. is compliant with the terms of his probation. (R. 1). He is successfully attending the 10th grade, he has been compliant with house arrest, and he has tested negative for drugs. (R. 1). However, the court threatened to revoke probation and incarcerate A.B., because A.B. had failed to get a hair cut. (R. 27).

Specifically, the trial court stated that it ordered A.B. to get a haircut at a previous hearing, and questioned why his hair had not been cut. (R. 25). A.B.'s mother stated that the child had not gotten a hair cut because they want to go to trial, and his hair is evidence, to which the trial court responded, "Well, put it in a

bag, baby. Put it in a bag." (R. 26). The trial court continued, "Let me explain something to you, ma'am, I want to be clear. You don't have to always like my orders but they're my orders and you have to follow them, all right?" (R. 26). The court then instructed A.B.'s mother, in no uncertain terms, that the child would be incarcerated under the state criminal code unless she cut his hair. (R. 26). The court stated, "Probation is something I allow you to be on if you do the things I ask you to do…I hope we don't have to have a discussion again about this because again I am telling you his sentence is one year. I don't know how much those twists are worth but I hope they worth a year of his life because it's going to be the longest year of his life, I promise you. I hope that you find it in your heart to abide by the terms of his probation…Because you're going to miss him for that year. I'm telling you." (sic) (R. 27).

Although the court had previously verbally instructed A.B. to cut his hair, there was nothing in writing instructing that this was a formal term of his probation. (R. 35). Therefore, when the court threatened to incarcerate A.B. for not having his hair cut, A.B.'s mother objected. (R. 35). The court reiterated that it considered the verbal hair cut order to be a formal order of the court. (R. 35). Counsel for A.B. objected, at which time the court stated, "I'm telling you, you're about to make me tell him to go get his haircut right now and come back…As a matter of fact, go get his hair cut and come back." (R. 36). Once A.B.'s mother indicated that she would get a haircut, the court relented and ordered that she simply have his hair cut by the time of the next hearing, or face jail time. (R. 36). The court date is September 23, 2009. (R. 36).

ISSUES PRESENTED FOR REVIEW

1. Whether the haircut order violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the haircut order violated the Due Process Clause of the Fifth Amendment to the United States Constitution?

3. Whether the haircut order violated the Louisiana Children's Code?

ASSIGNMENT OF ERROR

1. The trial court's haircut order violates the Due Process Clause because it exceeds the scope of the trial court's authority.

2. The trial court's haircut order violates the Due Process Clause because it unconstitutionally infringes upon A.B.'s liberty interest.

3. The trial court failed to comply with the noticing requirements of the Fifth Amendment to the United States Constitution.

4. The trial court's haircut order is fundamentally inconsistent with the principles of the Louisiana Children's Code.

ARGUMENT

I. The Order Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution

A. The Order Exceeds the Trial Court's Discretion and is Arbitrary and Excessive, in Violation of the Due Process Clause and the Louisiana Constitution

The Due Process Clause of the Fourteenth Amendment places limits on the authority of the government to restrict the liberty of a person, including persons involved in the criminal justice system. Specifically, the Due Process Clause provides that no state shall "deprive any person of life, liberty or property without due process of the law." U.S. CONST. Amend. XIV. Likewise, the Louisiana Constitution, Article I, Section 20 prohibits excessive punishment. In the instant case, the trial court was acting arbitrarily and *ultra vires*, and, in so exceeding the scope of its authority, violated these provisions.

The Louisiana Children's Code provides as follows, with regard to terms of probation: "As conditions of probation, if ordered pursuant to Subparagraph A(3) of this Article:

(1) The court shall impose all of the following restrictions:

(a) Prohibit the child from possessing any drugs or alcohol.

(b) Prohibit the child from engaging in any further delinquent or criminal activity.

(c) Prohibit the child from possessing a firearm or carrying a concealed weapon, if he has been adjudicated for any of the following offenses and probation is not otherwise prohibited: first or second degree murder; manslaughter; aggravated battery; aggravated, forcible, or simple rape; aggravated crime against nature; aggravated kidnapping; aggravated arson; aggravated or simple burglary; armed or simple robbery; burglary of a pharmacy; burglary of an inhabited dwelling; unauthorized entry of an inhabited dwelling; or any violation of the Uniform Controlled Dangerous Substances Law which is a felony or any crime defined as an attempt to commit one of these enumerated offenses.

(2) The court may impose any other term and condition deemed in the best interests of the child and the public, including:

(a) A requirement that the child attend school, if the school admits the child.

(b) A requirement that the child perform court-approved community service activities.

(c) A requirement that the child make reasonable restitution to any victim for any personal or property damage caused by the child in the commission of the delinquent act.

(d) A requirement that the child participate in any program of medical or psychological or other treatment found necessary for his rehabilitation.

(e) A requirement suspending or restricting the child's driving privileges, if any, for all or part of the period of probation. In such cases, a copy of the order shall be forwarded to the Department of Public Safety and Corrections, which shall suspend the child's driver's license or issue a restricted license in accordance with the order of the court.

(f) A requirement prohibiting the child from possessing a firearm or carrying a concealed weapon.

(g) A requirement that the child pay a supervision fee of not less than ten nor more than one hundred dollars per month, payable to the Department of Public Safety and Corrections or other supervising agency, to defray the costs of supervision. The amount of the fee shall be based upon the financial ability of the payor to pay such a fee. The court may order a parent, tutor, guardian, or other person who is financially responsible for the care of the child to be responsible for payment of all or part of any supervision fee imposed.

La. Ch. Code Art. 897 (B).

The language in 897(B) allowing "any other term and condition deemed in the best interests of the child and the public," clearly affords the trial judge wide latitude in assessing conditions of probation. "This discretion is not without its bounds, however." State v. Parker, 423 So.2d 1121 (La. 1982). In Parker, the Louisiana Supreme Court struck down a treatment and fee plan being imposed by a trial court because "there exists no authority under the law for the judge to prescribe the tests as treatment." Id. at 1126. Similarly, in the instant case, there is no authority under the law for the trial court to order A.B. to cut his hair.

The trial court was overtly aware that its discretion in sentencing has been limited by the state legislature. A.B.'s mother suggested that, as part of his sentence, the court disallow her son from driving her car anymore. The court stated, "I apply the facts to the law...When I read the code, no where in the code does it say the sentence should be the child is not permitted to drive anymore. It gives a sentencing range." (R. 7.) Similarly, the Code does not authorize judicially-mandated hairstyles, yet the trial court proceeded to impose exactly that.

It cannot be contested that the government has a fundamental interest in punishing people who break its laws, and in protecting society from those that would do harm. But where, as here, the government threatens to deprive an individual of his liberty for reasons wholly unrelated to these goals, it runs afoul of these constitutional checks.

Freedom from confinement is a core liberty interest, perhaps the most basic of all "liberties" protected by the Due Process Clause. See, Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (freedom from bodily restraint and unnecessary physical confinement is "one of the most elemental of liberty interests"); see also Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always

been at the core of the liberty protected by the Due Process Clause"); id. ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty.") (quoting U.S. v. Salerno, 481 U.S. 739, 750 (1987)). Accordingly, government restrictions on liberty through incarceration require an exceedingly persuasive justification to withstand scrutiny. Even if a particular punishment or restriction were permissible within the statutory framework, (which A.B. argues it is not,) it is still subject to constitutional review, to determine whether it comports with due process, and whether it is "constitutionally excessive" pursuant to the Louisiana Constitution Art. I § 20. State v. Hall, 775 So.2d 52 (La. App. 4th Cir. 2000).

It is inconsistent with the Due Process Clause to deprive an individual of his liberty for reasons unrelated to the state's penological interests. See, Bearden v. Georgia, 461 U.S. 660, 667 (1983) (Due Process Clause offended where state incarcerated indigent defendants for failure to pay fines, where that failure was not related to the legitimate state penological interests in punishment and deterrence.) Deprivations of liberty are also inconsistent with the Louisiana Constitution. This Court has held, "a sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime." State v. Hall, 775 So.2d 52, 58 (La. App. 4th Cir. 2000).

Indeed, courts in Louisiana (and elsewhere) have consistently refused to allow probation conditions that are not related to the crime to stand. State v. Norman, 484 So.2d 952 (La. App. 1st Cir. 1986) (declaring invalid a condition forbidding probationer from having children out of wedlock; there was no evidence that her participation in a crime was in any way related to her child-rearing responsibilities); State v. Alleman, 439 So.2d 418 (La. 1983) (declaring invalid a requirement that probationer attend substance abuse classes after obscenity

conviction; there was no evidence that substance abuse was related to his crime or that treatment was related to his rehabilitation); U.S. v. Stafford, 983 F.2d 25 (5th Cir. 1993) (declaring invalid a requirement that probationer disclose excessive financial information to the government); U.S. v. Woods, 547 F.3d 515 (5th Cir. 2008) (declaring invalid a restriction on persons with whom probationer could live); State v. Parker, 423 So. 2d 1121 (La. 1982) (declaring *ultra vires* testing provisions invalid).

The purpose of the probation system is to keep people from jail, thereby saving society the enormous financial and human costs associated with incarceration. The probation system has the aim of "helping individuals reintegrate into society as soon as they are able." Gagnon at 783. Accordingly, "the probation officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation," and the focus of the entire system is "rehabilitative rather than punitive." Id. at 784-785. See also, State v. Parker, 423 So.2d 1121, 1124 (La. 1982).

In the instant case, the trial court found A.B. to be compliant with its mandate that he attend school, as well as with the terms of his house arrest. (R. 1). He also has been compliant regarding cooperating with restitution, and his drug screens were negative. (R. 1). The sole reason for threatening to incarcerate A.B., then, is that he has not gotten a hair cut that meets the court's approval. (R. 27). To force A.B. to cut his hair does nothing to further the state's penological interest in rehabilitation, and is simply punitive. The trial court did not cite anything linking the child's hair to a crime, and neither did it even indicate what, exactly, the state interest is in having a child maintain a particular hairstyle. The record is completely silent as to why the court ordered the haircut.

If this Court is to accept this as a legitimate probation condition, it is difficult to determine what the logical outer limits of such conditions would be.

Could a court require probationers to wear certain colors of clothing? Could a court require probationers to dye their hair a certain color? Could a court require plastic surgery, to meet the aesthetic whimsy of that particular court? If the instant policy is accepted, it is difficult to discern where such authority would end. The haircut requirement is so obscure as to be totally arbitrary, and as such, it offends the Due Process Clause, and the Louisiana Constitution.

B. The Order Impinges Upon A.B.'s Liberty Interest

A.B. has a protected Fourteenth Amendment liberty interest in his appearance, including his hair style. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972). Because this interest is not a "fundamental right," government restriction of it is subjected to rational basis review. "In order to satisfy due process requirements, legislative means must bear reasonable relation to proper legislative purpose and be neither arbitrary nor discriminatory." U.S. v. Coastal States Crude Gathering Co., 643 F.2d 1125 (5th Cir. 1981). That is, the state must show that the requirement that A.B. cut his hair is rationally related to a legitimate government interest.

Rational basis review is not a toothless standard. To the contrary, the Supreme Court has repeatedly demonstrated that, even under the lowest level of scrutiny, it will not hesitate to strike down an unlawful government action. See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (discrimination against gay individuals); Quinn v. Millsap, 491 U.S. 95 (1989); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

The record is absolutely silent as to why the court believed that A.B. should cut his hair. Therefore, A.B. must speculate as to what the purported "legitimate state interest" is in this case. In the public school context, educators sometimes

advance an interest in classroom discipline and order, as justification for hairstyle restrictions. This assertion is most often rejected by the courts, see Buckholz v. Leveilee, 194 NW 2d 427 (Mich. App. 1971); Richards v. Thurston, 424 F.2d 1281 (Mass. App. 1970), but has sometimes been accepted by the courts. See, Karr, *supra*. An argument that short hair is necessary for the decorum of the courtroom has been rejected. Morrow v. Roberts, 467 S.W.2d 393 (Ark. 1971). However, even the educational interest in classroom uniformity, and the interest in courtroom decorum, are not present in this instant case. It is unclear what interest the trial court has in regulating A.B.'s hair, where there is no relationship between either rehabilitation or deterrence and hairstyle. For that reason, the regulation is invalid under the rational basis review of the Due Process Clause of the Fourteenth Amendment.

II. The Order violates the Due Process Clause of the Fifth Amendment to the United States Constitution

The trial court failed to provide A.B. with constitutionally adequate notice that his probation is being revoked for a failure to cut his hair. The requirement that he cut his hair was not written into the original order. When the court threatened to incarcerate A.B. for failure to cut his hair, A.B.'s mother protested to the court that she did not see the requirement in any order. (R. 35). The court responded, "M'am did you hear me say it the last time we were in court?... Do you understand that I am the judge?... Do you understand that whether you like what I say or not it has to be done?" (R. 35.)

It is well-established that a person has a significant liberty interest in probation. Probation revocation results in a loss of liberty. It cannot be said that one has a lessened liberty interest simply because probation is an "act of grace." Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973). Because of the liberty interest implicated, a probationer is entitled to due process protections, which includes

written notice of the term of probation he is alleged to have violated. Id., citing Morrissey v. Brewer, 408 U.S. 471 (1972).

In Gagnon, the Supreme Court expressly noted that a juvenile in a delinquency proceeding should be entitled to greater rights than an adult probationer. Gagnon at 789, n. 12. However, the trial court in the instant case failed to even provide A.B. with the "minimal due process" protections, much less any heightened protections. For that reason also, the court's order that A.B. get his hair cut is invalid.

III. The Order is Inconsistent with the Louisiana Children's Code

Finally, the trial court's order that A.B. cut his hair is inconsistent with the Louisiana Children's Code. The Code mandates that children be afforded "the least restrictive disposition authorized by articles 897 through 900 of this Title which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interests of society." Ch. Code Art. 901(B). The Code is clear that children are not to be incarcerated except under the very serious circumstances. Ch. Code Art. 901(C). "Commitment of the child to the custody of the Department of Public Safety and Corrections may be appropriate if any of the following exists:

(1) There is an undue risk that during the period of a suspended commitment or probation the child will commit another crime.
(2) The child is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment.
(3) A lesser disposition will deprecate the seriousness of the child's delinquent act.
(4) The delinquent act involved the illegal carrying, use, or possession of a firearm.

Id. This statutory provision makes clear that children are not to be incarcerated except were absolutely necessary.

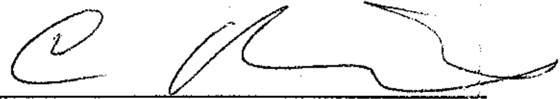
In the instant case, A.B. has complied with the terms of his probation, yet the trial court is threatening to incarcerate him for his hairstyle. The court advised

his mother that he would receive one year in jail if he did not cut his hair, in spite of the fact that the child has complied with every substantive provision of probation. (R. 27). This punishment is inconsistent with the mandate of the Code, which strongly disfavors incarcerating children.

CONCLUSION

The juvenile court erred in ordering A.B. to be incarcerated if his hair is not cut by September 23, 2009. For the foregoing reasons, A.B. prays that this Honorable Court vacate the juvenile court's order requiring him to get a haircut.

Respectfully Submitted,



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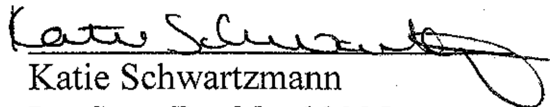

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COUNSEL FOR A.B.

AFFIDAVIT OF CECILIA E. RUTHERFORD

STATE OF LOUISIANA

PARISH OF NEW ORLEANS

BEFORE ME, the undersigned notary, personally appeared

Cecilia E. Rutherford

who, after being duly sworn, did depose and say:

1. I represent A.B. I am employed by Juvenile Regional Services, 1820 St. Charles Avenue, Suite 205, New Orleans, LA 70130.
2. I was present in Section C, Juvenile Court of Orleans Parish on August 26, 2009 and am personally familiar with the facts relating to the events in court on that day.
3. I have read the foregoing Application for Writ of Review and affirm to the best of my knowledge and recollection they are true.
4. Prior to filing this Application for Writ, pursuant to Uniform Rules – Court of Appeals 4-4 (C) and 4-5, I notified the Honorable Judge David Bell, Orleans Parish Juvenile Court, Section C and Orleans Parish District Attorney's Office that said Writ Application would be filed, and delivered copies to both individuals at 421 S. Loyola, New Orleans, Louisiana 70112.

Cecilia E. Rutherford, Esq.

SWORN TO AND SUBSCRIBED ON THIS THE 17TH DAY OF SEPTEMBER, 2009.

NOTARY PUBLIC #88835