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U.S. COURTS

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	
)	CR No. 07-023-N-EJL
Plaintiff,)	
)	MOTION FOR PROTECTIVE
vs.)	ORDERS (FILED UNDER SEAL)
)	
JOSEPH EDWARD DUNCAN, III,)	
)	
Defendant.)	
_____)	

The undersigned, court-appointed Guardian ad Litem (“GAL”) for the minor child victim/witness, Shasta Greene (“Shasta”), and hereby moves this Court for various protective orders pursuant to 18 U.S.C. § 3509. This Motion is supported by the Affidavits of Laura Taylor, MSW, LCSW, and Clare Lucas, MS, LMHC. The undersigned requests oral argument on this Motion and reserves the right to supplement the Motion by further affidavits and/or testimony at a hearing scheduled for the hearing of this Motion, subject to proper notice to prosecution and defense counsel.

Specifically, the GAL is requesting that this Court enter orders as follows:

1. Allowing an “adult attendant” to accompany Shasta throughout the judicial process for the purpose of providing emotional support;
2. Protecting Shasta from public disclosure of her name or any other information concerning her in the course of the proceedings when she or any other witness may divulge her name or any other information concerning her;

3. Closing the courtroom during Shasta's testimony to all persons, including members of the press, who do not have a direct interest in the case;

4. Providing that Shasta may testify by live 2-way closed circuit television.

The Court will notice that all of these protections for a child victim/witness are provided for by 18 U.S.C. § 3509 and further described herein below.

ADULT ATTENDANT

The term "adult attendant" is defined at 18 U.S.C. § 3509(a)(1): "the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support." Subsection (i) states:

(i) Adult Attendant. - A child testifying at or attending a judicial proceeding *shall* have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape. (Emphasis supplied.)

Since Shasta has the unconditional right to an adult attendant, the Court need only determine the scope of the adult attendant's physical proximity to Shasta. The GAL argues that, to the extent reasonably possible, it is incumbent on this court to afford Shasta as "safe, stable, [and] therapeutic environment" (as Ms. Taylor states it) as possible, so as to limit the deleterious effects of having to testify in what is, for her, an inherently unsafe and uncontrolled environment. The kind of "emotional support" indicated in Shasta's situation simply cannot be provided from afar. While Shasta is too full-grown to need to sit in the lap of the adult attendant,

certainly it is reasonable, given the psychological risk to her in testifying in this proceeding in the first place, that the adult attendant be allowed to be in close physical proximity to or in contact with Shasta while she testifies.

Although the statute does not seem to place any limitation on who may serve as an adult attendant, the undersigned here provides notice that the adult attendant most likely to serve Shasta's needs and the expectations of 18 U.S.C. § 3509(i), is ***. Ms. *** is a law enforcement officer who was assigned to Shasta's case upon Shasta's return, and has remained an important support for Shasta since then. Ms. *** was to be Shasta's adult attendant at the trial in the case of State of Idaho vs. Joseph Duncan.

PROTECTION FROM PUBLIC DISCLOSURE

The provision of 18 U.S.C. § 3509(d)(3) is an extension of the provisions already in place in this case pursuant to the court's designation of this case as one of "special public importance" and the more general provisions of 18 U.S.C. §3509(d)(1) and (2). Subsection (3) provides:

(3) Protective orders. -

(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may -

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

The undersigned is not unaware that Shasta's name is not unknown to the public, and that therefore disclosure of her name is not something the Court (or anyone else) is in a position to attempt to prevent. However, that is not the import of the above-quoted provision. The protective

order sought here would preclude any witness from testifying in an open courtroom where there is reason to believe the witness may mention Shasta's name or other information concerning her. And there is relatively little in this case that does not, in fact, involve mention of Shasta's name or of other information concerning her.

Ms. Taylor mentions the "excessive media attention" and the "tremendous amount of public attention" to which Shasta has already been subjected. Such attention may have been unavoidable in Shasta's situation, and to a large extent is certainly an expression not of prurient, but of charitable, interest. But what concerns Shasta's therapist is the wide-ranging effect of public attention on Shasta personally. Ms. Taylor goes on to state:

Most sexual abuse victims suffer from guilt and shame even though they are not in any way to blame for the abuse. Children are often embarrassed to have others know what happened to them. Shasta is no different. Many of the school based or social problems that Shasta has already encountered in the past two years are related to media attention and public disclosure of information about Shasta and her family. She already deals with embarrassment, shame, fear, anger and worry regarding the amount of public information about what happened to her and her family. If she knows that people outside of the courtroom, specifically those in her community and school environment whom she sees everyday, are able to see and hear her during her testimony, it is probable that she will not be able to communicate clearly.

Guilt and shame and embarrassment would be difficult enough for an adult victim of abuse and exploitation to endure; but for a child such as Shasta, moving along a normal course of child development is difficult enough without having to endure publicly what she must endure testifying in front of strangers in the courtroom, which necessarily is, as Ms. Taylor says, is a source of personal worry and school and social problems.

Ms. Lucas describes also the effects of media and public attention on Shasta:

It is also the writer's concern that public disclosure of information would also increase Shasta's symptoms. Shasta has reported to this writer that she still

struggles to go to school, due to the fact that other children ask her questions about her abduction and other alleged traumas. She has also reported not liking the attention the public gives her. She reports this has somewhat subsided and it is this writer's concern that the attention of the public would increase with public disclosure of the court case. It is this writer's concern that there may be an increase in questions and public attention and Shasta will feel significantly feel more isolated, different from others, and will want to run away.

CLOSING THE COURTROOM

The provision of 18 U.S.C. § 3509(d)(3) and that of 18 U.S.C. § 3509(e) might seem, at least in this case, to be functionally equivalent. However, the latter provision contains language which the former does not:

(e) Closing the Courtroom. - When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. *Such an order shall be narrowly tailored to serve the Government's specific compelling interest.* (Emphasis supplied.)

From the perspective of the GAL, of course, it is difficult to imagine that the Government would have a more compelling interest to serve than the well-being of Shasta. Moreover, since "the attorney for the Government" can move under 18 U.S.C. § 3509(b)(1) for live 2-way closed circuit testimony, one might speculate that vindicating the specific compelling interest under subsection (e) might preclude a motion under subsection (b). Regardless of how compelling imagination or speculation might be, however, it is clear that it is the opinion of Shasta's therapist that she could suffer psychological harm by having to testify in front of strangers:

Taking into account the scope of her traumas, to prevent further academic and social problems, as well as increased emotional and physical symptoms, it is recommended the courtroom be closed and the court order protection for Shasta from any further public disclosure.

As quoted above, Ms. Taylor is also of the opinion that “it is *probable* that [Shasta] will not be able to communicate clearly” (emphasis supplied) if she knows that people she knows can hear or see her testify in court.

The GAL recognizes that the court could conceivably close the courtroom during Shasta’s testimony, but decide not to protect Shasta from public disclosure of her name or other information concerning her during the testimony of other witnesses. Given the horrendous nature of the crimes alleged to have been perpetrated against her, and the public appetite already demonstrated for information about Shasta, and the opinion of her therapist of the probability of increased emotional and physical symptoms and disruptions in the ability to communicate effectively as the result of having to testify in a public forum, it is beyond cavil that the court should both close the courtroom and protect Shasta from the divulging of information concerning her arising during testimony of other witnesses.

ALTERNATIVE MEANS OF TESTIMONY

In *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993), the Ninth Circuit upheld the use of 2-way closed circuit television (per 18 U.S.C. §3509(b)(1)) for testimony for victim/witnesses who so feared the physical presence of the defendant in the courtroom that she was rendered unable to testify in open court due to more than *de minimis* emotional distress, which is not related to being in the courtroom in general, but is directly related to being in the physical presence of the defendant. The statutory provision reads:

- (b) Alternatives to Live In-Court Testimony. -
 - (1) Child's live testimony by 2-way closed circuit television. -
 - (A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an

order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph

(A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are -

(i) the child's attorney or guardian ad litem appointed under subsection (h);

(ii) persons necessary to operate the closed-circuit television equipment;

(iii) a judicial officer, appointed by the court; and

(iv) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

Thus, the statute adds factors to be considered by the court in allowing closed circuit testimony in addition to the one discussed in Garcia. Those are: the conduct of the defendant and defense counsel in court; mental or other infirmity; substantial likelihood of emotional trauma from testifying. It seems relatively unlikely that Shasta will have to encounter defendant or

defense counsel in open court before her actual testimony. However, it does appear that all other factors to be considered by the court in considering closed circuit television testimony are present.

Ms. Taylor is clear and unequivocal that Shasta is fearful, not of appearing in open court, but of Joseph Duncan:

It is my opinion, based on my training and experience, and my professional relationship with Shasta, that merely having to be in Duncan's physical presence will result in a substantial increase in her mental health symptoms. She has stated many times that she is fearful of ever having to see Duncan again and of him seeing her....

Being forced to testify in his presence poses a significant risk that Shasta will suffer re-traumatization and regress even further therapeutically than she likely will with a trial where she is not forced to see him....

She does not want to have to testify. She does not want to face Duncan. She is extremely fearful of both of these things. Having to testify in the upcoming trial will have long-lasting negative effects on her overall wellbeing, her further development and recovery.

The amount of fear and emotional distress Ms. Taylor is describing is not *de minimis*; it is re-traumatizing, it is long-lasting, it is extreme, and it poses a significant risk of regression in therapy. The nature of the fear and distress is enlarged upon by Ms. Lucas, quoting Shasta:

In regards to the possibility of having to testify in court, Shasta reported, "I don't want to be in the same room as him (alleged perpetrator). I hate him and don't want to see his face. He killed my family and he shouldn't be here." Shasta reports being anxious and fearful of having to testify. It is this writer's opinion that having to see her alleged perpetrator in court would be detrimental to the progress she has made. It is highly likely that seeing the alleged perpetrator would trigger an increase in symptoms.

And the psychological risk Shasta faces in testifying is compounded by the fact that she comes into court with symptomology which, according to Ms. Taylor "currently meets the DSM-IV TR (2000) criteria for diagnoses of Posttraumatic Stress Disorder (PTSD) and Depression."

Ms. Lucas agrees. (Whether a diagnosis of PTSD or Depression constitutes a "mental or other

infirmity” does not appear to be an issue addressed by any appellate decision, and does not appear to be defined in the original House Bill, H.R. 5269. However, Ms. Taylor does refer (quoted above) to the “increased emotional and physical symptoms” resulting from Shasta’s trauma, which would indicate that there is a compromised functionality associated with the effects of trauma on Shasta, which would at least arguably or logically be tantamount to an infirmity, mental or physical.)

As Ms. Taylor states, “...trauma work must be handled very sensitively and at the client’s pace.”

Controlled exposure to traumatic memories is a key part of PTSD treatment. However, the only type of therapy for PTSD which has been shown to produce psychiatric complications is flooding, a type of therapy in which the person is exposed to high intensity real or imaginary stimuli reminiscent of the original trauma. For Shasta, direct examination as a witness with Mr. Duncan in the courtroom will be similar to flooding although not in a safe, therapeutic environment. Flooding is not part of a treatment plan that I recommend; however, if it is done, it is in a controlled environment with a trained mental health professional with whom the client has built rapport and feels safe. Testifying will require Shasta to provide all the information at once while she sits at the witness stand with possibly one adult attendant in a courtroom with a jury (adult strangers), a judge, a court reporter, the defense team, Mr. Duncan, the prosecution team, and many other people even if the courtroom is closed.... The court should take into account not only her age, but also her existing diagnoses of PTSD and Depression as well as the knowledge that increased exposure to and flooding (i.e., the mere fact of the trial, having to testify, the content of her testimony) of memories, thoughts and emotions connected to her abduction and Duncan are likely to cause an overwhelming physiological and emotional response. I predict that for a long period of time she will feel disturbing emotions, experience increased trauma symptoms (including flashbacks, intrusive thoughts, disrupted sleep patterns, nightmares, hypervigilance, etc.) and it will likely be disruptive to her treatment and further recovery.

Ms. Lucas concurs:

It is this writer’s concern that Shasta’s suicidal ideation may increase and that she may start to have nightmares more times per week, struggle to fall asleep more significantly, withdraw, have increased flashbacks, psychosomatic symptoms,


increase in sadness and depression, and an increase in overall anxiety. If Shasta has to testify this writer would suggest that other methods be used instead of live in-court testimony.

It is important to recognize that Ms. Taylor and Ms. Lucas do not say that affording Shasta all of the protections being sought by the GAL will ensure Shasta's recovery from the trauma she has suffered and continues to suffer. On the contrary, Ms. Taylor says, "It is of great concern that in a safe, stable, therapeutic environment Shasta has moved very slowly in processing many of the experiences and issues about which she will be asked to testify in this trial against Mr. Duncan." What is important for Shasta is that she not be re-victimized by the very process that, at least in part, is supposed to afford her some sense of "justice done." And what is crucial in that effort is giving Shasta some sense of control over her environment and her person, control which she lost in the abuse and exploitation suffered during her abduction in 2005, and which she attains only sporadically now that she is the focus of intense national attention, and star witness of a highly publicized trial.

Ms. Taylor says, "To assist Shasta in moving along a normal course of child development and recovery from her traumatic experiences, it is important that she be given appropriate amounts of control whenever possible." It is possible with the protections sought herein to give Shasta appropriate amounts of control without intruding on the constitutional rights of the defendant or on the judicial process.

The GAL respectfully requests the Court grant the relief sought in the best interests of the child victim/witness, Shasta Greene.

DATED this 5th day of November 2007.



JOHN H. SAHLIN
Attorney at Law

CERTIFICATE OF SERVICE

I CERTIFY that I am an employee of the United States Attorney's Office for the District of Idaho, and that a copy of the foregoing Motion for Protection Orders (Filed Under Seal) was served on all parties named below this 5th day of November 2007.

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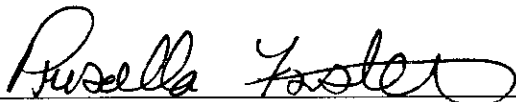
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