

**IN THE SUPREME COURT OF FLORIDA**

**IN RE: AMENDMENTS TO FLORIDA  
RULE OF CRIMINAL PROCEDURE 3.220;  
FLORIDA RULE OF CIVIL  
PROCEDURE FOR INVOLUNTARY  
COMMITMENT OF SEXUALLY VIOLENT  
PREDATORS 4.310; AND FLORIDA RULE  
OF JUVENILE PROCEDURE 8.060**

**SC22-312**

**CRIMINAL COURT STEERING COMMITTEE’S (“CCSC”) REPLY TO  
COMMENTS**

The Honorable Debra J. Riva, Chair and on behalf of the CCSC, files this reply to three comments: One joint comment from the Criminal Procedure Rules Committee (“CPRC”) and the Juvenile Procedure Rules Committee (“JPRC”); one comment from the Florida Association of Criminal Defense Attorneys (“FACDL”); and one comment from the Florida Sheriffs Association (“FSA”).<sup>1</sup>

**Reply to CPRC/JPRC**

The CCSC identified nine arguments in the joint CPRC/JPRC comment. The CCSC responds to each argument as follows:

**#1 – Significant shift in habits**

---

<sup>1</sup>The comments did not provide a breakdown of committee or association votes.

RECEIVED, 05/23/2022 05:12:23 PM, Clerk, Supreme Court

The CCSC disputes that its proposal will result in a significant shift in habits, with one exception. Videorecording adult deponents in criminal and delinquency cases is not - and has never been - a customary practice. Therefore, the CCSC's proposed general rule, which prohibits videorecording of adult deponents, will not have a significant effect. Moreover, Fla. R. Crim. P. 3.220(h)(4) states that depositions of children under the age of 18 must be videotaped unless otherwise ordered by the court. Thus, the CCSC's proposal for videorecording child deponents in criminal cases will not have any "shift in habits." The only significant alteration would be to change the general delinquency rule to require videorecording of child deponents. Currently, Fla. R. Juv. P. 8.060(d)(9) states that depositions of children under 16 shall be videotaped upon demand of any party unless otherwise ordered by the court. Therefore, on the topic of videorecording child deponents, there are two significant differences between the delinquency rule and the criminal rule. First, the ages of the children are different. Second, the adult rule mandates videorecording child deponents while the delinquency rule mandates videorecording child deponents only

upon demand of a party. The CCSC believes harmonizing the two rules is the logical approach.

The adult criminal rule is based on the CPRC's belief (expressed in Committee Notes 30-plus years ago) that there was a compelling need to prevent the harassment or intimidation of children. If there is no longer a compelling need to protect child deponents, the CPRC would likely have changed its rule mandating the videorecording of child deponents. The CCSC believes a compelling need to protect child deponents still exists. The CCSC continues to recommend that the criminal and delinquency rules on the topic of videorecording child deponents should be consistent. However, if the Court opposes the idea of mandating videorecording of child deponents as a general rule and if the Court concludes there is no need for complete harmonization of the two rules, the CCSC recommends the Court at least change the age in Fla. R. Juv. P. 8.060(d)(9) from 16 to 18.<sup>2</sup>

**#2 - Reversion to require physical appearance of deponents**

---

<sup>2</sup>It is unclear to the CCSC why 17-year-old children are excluded from the protections provided by the rule.

The joint comment states the CCSC's proposals would constitute a reversion to the requirement that witnesses appear physically for depositions, however the CCSC disagrees with this assertion. The CCSC's proposals do not preclude the parties using communication equipment to conduct a deposition. The CCSC's objection is to the videorecording of an adult deponent. In fact, the CCSC's proposal for "Location of Depositions" mimics the Covid Workgroup's proposal in SC21-990 for the adult criminal rule and adds the identical provision into the delinquency rules. Under those proposals, depositions may be taken by communication equipment. There is no requirement for physical appearance by a deponent in the CCSC/Covid Workgroup's proposals if neither party objects to the deposition being taken via communication equipment.

### **#3 – No apparent need**

The joint comment asserts there has been no apparent need to prohibit videorecording of all adults and to require audio-visual recording of all children. The need to require the audio-visual recording of child deponents is self-evident and apparent from the Committee Notes at the end of the adult criminal discovery rule. The protection of children is ingrained in all aspects of our culture.

The need for a general rule prohibiting videorecording of adult deponents was explained in the CCSC petition. The use of social media continues to grow exponentially and once a videotape is published or released, there is no adequate remedy to protect the deponent. The likelihood of videorecorded depositions appearing on social media to intimidate or harass witnesses is great and there are valid security and public records concerns for law enforcement officers.

Additionally, a prohibition on videorecording of adult deponents would minimize the burden on the judiciary during the discovery process. In fact, the “no apparent need” argument is what caused the CCSC to create its proposals in the first place. The majority of the CCSC (10-1 vote) concluded there was no compelling need for prosecutors and defense attorneys to suddenly need to videorecord adult deponents just because technology makes it easier to do so.

#### **#4 Stalled case progress due to limited resources**

The joint comment notes that depositions are often recorded using only audio recording and a transcript is prepared later by a

court reporter, if needed. The CCSC rule proposals would not prevent this practice.

The joint comment also states the committees are particularly concerned with an anticipated increase of costs to obtain reporter services as parties would be required to record stenographically at the same time as the [audio-visual] deposition. The CCSC notes that if a deposition is not (audio) tape-recorded, it is a common practice for the party taking the deposition to use a court reporter. Therefore, hiring a court reporter to stenographically capture questions and answers during a videorecorded deposition should not add to costs. Also, Fla. R. Civ. P. 1.310 - which applies in criminal and delinquency cases via Fla. R. Crim. P. 3.220(h)(1) and Fla. R. Juv. P. 8.060(d)(2)(E) - requires that audiovisually recorded depositions be transcribed, unless all parties agree otherwise. Thus, under the CCSC proposals, the party taking the deposition could hire a court reporter to stenographically capture the deposition with an agreement that the deposition not be transcribed unless needed. Finally, if swayed by this cost argument, the Court can delete the portions of the proposals that require simultaneous stenographic

recording but retain the core ideas within the CCSC's proposed general rules.

## **#5 Burdensome**

The joint comment states that it would be difficult and costly to obtain permission from the court to record an audiovisual deposition. But the same argument can be made for the opposing view. The CCSC questions the wisdom of having rules that require witnesses to obtain protective orders.<sup>3</sup> If true that it would be difficult and costly to obtain some type of court permission, the CCSC does not believe the burden should be placed on witnesses. If difficult and costly to obtain court permission, those witnesses might be inclined not to pursue a judicial remedy knowing they would be subjecting themselves to harassment and intimidation. Most individuals do not voluntarily find themselves in the role as a victim or witness in a criminal or delinquency case. The CCSC concluded the criminal justice system should not be designed to make things even more difficult for those citizens.

## **#6 – Pretrial discovery delays in juvenile cases**

---

<sup>3</sup>Unless the witness is represented by a lawyer, it is far from clear that prosecutors and defense attorneys will file motions for protective order on behalf of deponents.

The CCSC does not agree that general rules prohibiting the videorecording of adult deponents and mandating the videorecording of child deponents would delay delinquency cases. The attorneys can file a motion to deviate from the general rules. The requirement to file one simple motion is not likely to cause a delay of significance, especially in delinquency cases which do not have jury trials. Moreover, even assuming that difficulty in obtaining hearing time will cause delay, a deponent's motion for a protective order would similarly cause delay.

**#7 – Demeanor, mannerisms, tone, body language, etc.**

Not videorecording a deponent obviously means not capturing the demeanor, tone, body language, etc., of the deponent. However, the CCSC concluded that our criminal justice system has historically performed well without the videorecording of deponents. Moreover, it is difficult at best to impeach a witness with a videorecorded deposition and thus the resultant benefit of capturing the demeanor, body language, tone, etc., of the witness is very limited. Finally, the CCSC concluded the costs of videorecording adult deponents significantly outweighs the benefits.

**#8 – No current problem**

The CCSC requests the Court to review the FSA comment and Appendix C in the FSA comment. The FSA referred to cases where a jail surveillance video was posted on social media and where a defense attorney posted a police body cam video on Facebook and commented on the deputy's truthfulness while the case was pending. It is not difficult to foresee the scope of the problem if videorecording adult deponents becomes widespread.

**#9 – Need to emphasize protection for fragile witnesses**

The joint comment states that it is necessary to emphasize special protections for witnesses with fragile emotional strength and intellectual disabilities in accordance with Fla. Stat. 92.55.<sup>4,5</sup> The CCSC deliberately did not refer to certain witnesses in its proposals because to emphasize those witnesses would be to deemphasize other witnesses. The CCSC believes it better to give trial judges broad authority to protect all deponents with a rule such as:

---

<sup>4</sup>Fla. R. Crim. P. 3.220(h)(4) does not refer to a “sexual offense victim or witness,” which is covered in Fla. Stat. 92.55. Fla. R. Juv. P. 8.060(d)(9) does not refer to either a sexual offense victim or witness or a witness with an intellectual disability.

<sup>5</sup> The CCSC notices the Court that CS/CS/SB 772, which is mentioned in footnote 2 in the petition, did not pass in the last legislative session.

To protect deponents and the rights of the parties and to ensure compliance with statutes, the court may enter orders, including but not limited to the orders allowed by rule 3.220(e) and (l), upon motion of a party, the deponent, or on its own motion, for good cause shown.

In summary, no CCSC member changed his or her vote as a result of the joint CPRC/JPRC comment.

### **Reply to FACDL**

FACDL noted the current rules allow for the filing of a motion for protective order to prevent the videorecording of a deposition. That is accurate. The question for the Court remains one of policy: Which option (allowing or prohibiting videorecording) should be the general rule and which option should be the exception? The CCSC continues to believe the general rules should prohibit videorecording of adult deponents and mandate videorecording of child deponents.

FACDL pointed out there exists Florida Bar rules designed to prevent the dissemination of case information by lawyers for improper purposes. As addressed in the petition, the CCSC concern is more for the clients of defense attorneys or related parties, not for the attorneys themselves.

FACDL does not agree that a ban on videorecording is necessary for the safety of law enforcement. In response, the CCSC notes: 1) There is a significant difference in the picture quality of a videorecording of a moving law enforcement officer on patrol versus videorecording a stationary deponent in good lighting; 2) at least some defense attorneys will want to videorecord police officers who made undercover drug buys which will put them at risk or put public safety at risk or both; and 3) the CCSC's proposals are not designed solely for law enforcement safety. Also, on the issue of public safety, the CCSC recommends the Court review the comments that were sent to the CCSC from State Attorney Katherine Fernandez Rundle. See Appendix D of the CCSC's petition.

FACDL argues that to adopt the CCSC's proposals would lead to bad precedent related to in-court testimony of a law enforcement officer. The CCSC is not convinced of the slippery slope. But more importantly, a major CCSC concern was the effect videorecording depositions would have on witnesses, especially civilian witnesses. While the Court's referral originated from the Sheriffs Association,

the CCSC took a broader approach. The problems associated with the videorecording of depositions go far beyond law enforcement.

FACDL is also concerned about the cost of court reporters. The cost issue has already been addressed above in the CCSC's response to the CPRC/JPRC joint comment.

In summary, no CCSC member changed his or her vote as a result of the FACDL comment.

### **Reply to FSA**

The FSA agrees with the CCSC proposals. The CCSC highlights that if the rules remain unchanged, trial judges are likely to lean heavily toward denying motions to prohibit the videorecording of adult deponents because the rules allow such videorecording. See Appendix B of the FSA's comment. For the reasons stated in the petition and in this reply, the CCSC concluded that any benefit from videorecording adult deponents is outweighed by the costs.

### **Conclusion**

In summary, the proposals from the CCSC are based on the committee's conclusions that there is no compelling need to videorecord adult deponents in criminal, delinquency, and Jimmy

Ryce cases but there is a compelling need to videorecord child deponents in those cases.

Respectfully submitted,

s/Judge Debra J. Riva  
Honorable Debra J. Riva,  
Chair, Criminal Court Steering  
Committee  
Circuit Judge, Twelfth Judicial  
Circuit  
P.O. Box 3000  
Bradenton, FL 34206  
Email:  
driva@jud12.flcourts.org  
Phone: 941-861-4866  
Fla. Bar No.: 879703

### **CERTIFICATE OF SERVICE AND FONT**

I certify that this response has been typed using Bookman Old Style 14 and that a true and correct copy has been sent through the portal to: 1) Justin Grosz at [justin@justiceforkids.com](mailto:justin@justiceforkids.com); 2) Alan Apte at [alan@florida-mediate.com](mailto:alan@florida-mediate.com); 3) Mikalla Davis at [midavis@floridabar.org](mailto:midavis@floridabar.org); 4) Candice Brower at [candice.brower@rcl.myflorida.com](mailto:candice.brower@rcl.myflorida.com); 5) Krys Godwin at [kgodwin@floridabar.org](mailto:kgodwin@floridabar.org); 6) Jason Stearns at [jstearns@freeborn.com](mailto:jstearns@freeborn.com); 7) Carter Hillstrom at [carter@shlawfl.com](mailto:carter@shlawfl.com); 8) Pamela Marsh at [pmarsh@floridafaf.org](mailto:pmarsh@floridafaf.org); 9) Paul Hawkes at

[hawkes.paul@gmail.com](mailto:hawkes.paul@gmail.com); 10) R.W. Evans at [reevans@anblaw.com](mailto:reevans@anblaw.com);  
11) Jennifer Pritt at [jpritt@fpca.com](mailto:jpritt@fpca.com); 12) Garrett Berman at  
[gberman@yourfpaa.org](mailto:gberman@yourfpaa.org); 13) Rex Dimmig at [rdimmig@pd10.org](mailto:rdimmig@pd10.org); 14)  
Jason Cromey at [jason@cromeylaw.com](mailto:jason@cromeylaw.com); 15) Avron Bernstein at  
[bernsteina@flcourts.org](mailto:bernsteina@flcourts.org); 16) Judge Hope Bristol at  
[jbristol@17th.flcourts.org](mailto:jbristol@17th.flcourts.org); 17) Rene Landa at  
[rlanda@southmiamifl.gov](mailto:rlanda@southmiamifl.gov); 18) Sheriff Dennis Lemma at  
[DLemma@seminolesheriff.org](mailto:DLemma@seminolesheriff.org); 19) Mary Ann Klein at  
[MAKlein@seminolesheriff.org](mailto:MAKlein@seminolesheriff.org); 20) Virginia Hamrick at  
[vhamrick@floridafaf.org](mailto:vhamrick@floridafaf.org); 21) Katherine Fernandez Rundle at  
[kathrinefernandezrundle@miamisao.com](mailto:kathrinefernandezrundle@miamisao.com); 22) Brenda Mezick at  
[brendamezick@miamisao.com](mailto:brendamezick@miamisao.com); 23) Arthur Jacobs at  
[jacobsscholzlaw@comcast.net](mailto:jacobsscholzlaw@comcast.net); 24) Judge Debra Riva at  
[driva@jud12.flcourts.org](mailto:driva@jud12.flcourts.org); this 23rd day of May, 2022.

s/Bart Schneider  
Bart Schneider  
Staff Liaison  
500 S. Duval Street  
Tallahassee, Florida 32399  
Fla. Bar No.: 0936065  
EMail: [schneidb@flcourts.org](mailto:schneidb@flcourts.org)