IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE **CASE NO. SC09-141**

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COMMENTS OF THE SIXTH JUDICIAL CIRCUIT IN OPPOSITION TO PROPOSED AMENDMENTS TO RULE OF JUVENILE PROCEDURE 8.100 AND RULE OF JUVENILE PROCEDURE 8.257

Pursuant to the Court's invitation to comment on proposed amendments to the Rules of Juvenile Procedure, The Honorable Robert J. Morris, Jr., Chief Judge of the Sixth Judicial Circuit, files these comments in opposition to proposed amendments to Rule of Juvenile Procedure 8.100 which prohibits the use of restraints on juveniles and Rule 8.257 which authorizes an electronic recording to be submitted as the record of the proceeding. These are important issues in the State of Florida's juvenile justice system and this Court should consider the perspective of juvenile court judges who have expertise with these issues and should consider the impact of these proposed amendments on trial court operations.

A. PROPOSED AMENDMENTS TO RULE 8.100

The juvenile judges in this circuit oppose amending the Rules of Juvenile Procedure to prohibit the use of any type of restraints on juveniles in court or to require the court to make findings before restraints can be used. The proposed

amendments are inherently flawed and overbroad. Our arguments in opposition to this proposed rule are:

1. The proposed rule is not an appropriate subject matter for rule making and should not be adopted by this Court on the basis of a 12-11-1 vote of the Juvenile Rules Committee.
2. During a time of decreasing revenues, the Court must consider the significant fiscal impact that the adoption of this rule would have on the court system and the ancillary partners of the court who provide court security, transportation of the juveniles, court clerks, state attorneys and public defenders.
3. The Court, for practical and fiscal reasons, should allow juveniles to attend detention hearings via close circuit television.

The proposed amendment to Rule 8.100 provides:

RULE 8.100. GENERAL PROVISIONS FOR HEARINGS

> **(b) Use of Restraints on the Child.** Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during a court proceeding and must be removed prior to the child's appearance before the court unless the court finds both that:
>
> (1) The use of restraints is necessary due to one of the following factors:
>
> (A) Instruments of restraint are necessary to prevent physical harm to the child or another person;
>
> (B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

(C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

I. The proposed rule is not an appropriate subject matter for rule making.

As the minority report from the Rule of Juvenile Procedure Committee noted, there are serious questions about whether the proposed rule is substantive or procedural. The general rule to determine whether a matter is substantive or procedural is that substantive law prescribes rights and duties while procedural law is the method to enforce those rights and duties.

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions. (Citations omitted).

Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975)

As this Court recently stated:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure encompass the course, form, manner, means, method, mode, order,

> process or steps by which a party enforces substantive rights or obtains redress for their invasion. Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses. (Citations omitted).

Massey v. David, 979 So. 2d 931 (Fla. 2008) (finding the statute limiting the recovery of expert witness fees unconstitutional as an intrusion on the Court's rulemaking authority).

The distinction between substance and procedure is not always clear. And recently, in the context of amending the Rules of Juvenile Procedure, the members of the Court have not agreed whether a proposed rule amendment is substantive or procedural. See, *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So. 2d 463, 467 (Fla. 2008) (where the dissent noted that the new right to confer with counsel before waiving the right to counsel was substantive, not procedural); *In re Amendments to Florida Rule of Juvenile Procedure 8.255*, 2009 WL 4851113 (Fla. 2009) (the majority declined to adopt proposed amendments because the proposal was "at variance" with statutory provisions).

In essence, this proposed rule creates a substantive right for a juvenile to appear in court without restraints unless the court makes specific findings about that particular juvenile. If this proposed rule is viewed as a right of the juvenile to appear without restraints, it would be the Legislature's role to create this substantive right, not the Court. And the Legislature has considered and is

considering such legislation. See, e.g., 2007 session, SB 372 and HB 19; 2008 session, SB 140 and HB 1336; and 2009 session SB 108 and SB 786.

But this substantive versus procedural analysis must be superimposed with the trial court's inherent authority to control the conduct of its own proceedings. When the First District Court of Appeal considered a challenge to a blanket order requiring juveniles to appear in court in restraints, the court stated:

> A court has the inherent power to control the conduct of its own proceedings in order to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and to generally further the administration of justice. (Citations omitted).

S.Y. v. McMillan, 563 So. 2d 807 (Fla. 1st DCA 1990).

The vote of the Juvenile Rules Committee on this issue - 12 in favor, 11 opposed, and one abstention, reflects the political nature of this issue. The Court should not wade into a political issue but rather should leave this matter to the trial court's inherent authority to control the conduct of proceedings since a trial judge is in the best position to ensure that security concerns and proper decorum are maintained in his or her courtroom. This is not an appropriate subject matter for rule making.

II. During a time of decreasing revenues, the significant fiscal impact on the court system and the ancillary partners of the court who provide court security and transportation of the juveniles must be considered.

The State of Florida is broad and diverse, urban and rural, with juvenile court proceedings conducted differently across the state. The greatest fiscal impact

of this proposed rule would be brought about in a likely tripling of time necessary to conduct detention hearings throughout the state. An across-the-board prohibition on the use of restraints of any type on juveniles during court proceedings will increase the time and resources required for detention hearings without improving the process. The proposed amendments will further drain the court system's already shrinking resources. Circuit courts cannot conduct hearings with groups of unrestrained juveniles in the courtroom. Additional security will be required. The amount of time required for detention hearings will increase substantially and there will be longer waits because juveniles will have to enter the courtroom one at a time. As a result, juveniles will spend more time away from classes and counseling sessions at the detention center. A prohibition against all restraints will lead to more fights amongst the juveniles and increased disruption in the courtroom. See *S.Y. v. McMillan* 563 So. 2d at 809, (citing testimony that use of restraints reduced fights and escape attempts).

The proposed amendments are overbroad and prohibit use of all types of restraints, no matter how harmless, appropriate or necessary unless the court makes particularized findings. There is a difference between the types of restraints used in various circuits, as well as the procedural differences inherent in the way detention hearings are conducted. Attached as Appendix 1, is a survey conducted by staff in the Sixth Judicial Circuit that notes some of those differences.

In Pinellas County, the juveniles are not chained to each other or to furniture or fixtures as suggested by the proponents; the juveniles have individual ankle restraints. We are fortunate that the Juvenile Detention Center (JDC) is next door to the Pinellas County Criminal Justice Center. After a short transport, juveniles are not paraded through public hallways at the courthouse in a "chain gang" style. Instead, they enter the courthouse through a private sally port and are transported to holding cells near the courtroom. When the detention hearings start, all attending juveniles enter the courtroom together and sit in a group. The typical detention hearing calendar will involve approximately 12 youths. After their case is heard, the juveniles are returned to the holding cells. They are then transported back to the JDC as a group but are not chained to each other or to furniture or fixtures.

Furthermore, the proposed amendments seem to overlook the fact that there are various types of restraints that can be used to ensure the safety of the juveniles, and everyone else in the courtroom, and minimize flight risk. We agree that the use of belly chains is entirely inappropriate, and in many cases the use of handcuffs is unnecessary. However, we firmly believe that the juveniles who appear before the Court need to be restrained in some way and therefore we support the use of ankle chains. These ankle restraints are connected by sixteen inches of chain and do not impair the juveniles ability to walk; only run. While the ankle chains are

barely noticeable and do not obstruct normal movement, they ensure the safety of all and reduce flight risk. The use of ankle chains allows the Court to conduct first-appearance hearings with an entire group of juveniles present in the courtroom at one time. This procedure benefits all involved, including the juveniles who learn by hearing other cases discussed. This is the most efficient use of the court's already diminishing resources. If the Court was prohibited from any type of restraint, or was required to make the findings proposed in the rule, the juveniles would be held in the adjoining holding cells handcuffed and chained awaiting their hearing. Prior to each child coming to the court, additional court security personnel would be necessary to remove the restraining devices. This would be labor intensive for courthouse security and double or triple the length of time necessary to conduct these hearings. Additionally, as noted above none of the juveniles would have the benefit of having been exposed to cases called before their own. If this proposed rule is adopted it will have an adverse effect by requiring substantially more judicial labor, as well as assistance from court clerks, court security, assistant state attorneys, and assistant public defenders. In addition, those families that are present will be required to spend greater amounts of time at the courthouse waiting for their child's case.

The proposed rule also ignores the fact that juveniles in detention have already been determined to be high risk and these are the ones who need to have

restraints when appearing in court. The juvenile initially receives a risk assessment by Department of Juvenile Justice personnel. Only those juveniles, who score high enough on the risk assessment instrument, receive detention. Other juveniles are released on home detention into the custody of their parents and appear in court pursuant to a notice to appear.

III. For Practical and Fiscal Reasons the Court Should Allow Juveniles to Attend Detention Hearings Via Close Circuit Television.

Remote hearings can remedy some of the practical problems created by a prohibition on restraints. Namely, remote hearings will eliminate security and safety concerns associated with transporting juveniles, as they permit the juveniles to remain in the controlled environment of the juvenile detention center.

The Sixth Circuit conducted hearings via closed circuit television when this Court approved such hearings on an interim basis. There was a large impact on the procedure itself. The use of such hearings is highly desirable now more than ever because of the court system's shrinking resources. If the Court adopts the proposed amendments to Rule 8.100, it must for practical and fiscal reasons, and in the interest of justice, revisit the issue of allowing juveniles to attend detention hearings remotely via closed-circuit television (CCTV).

The Supreme Court of Florida first addressed this issue in 1996, when judges in the fifth, ninth, thirteenth, seventeenth, and nineteenth judicial circuits

petitioned the Court to amend Rule 8.100(a) to allow juveniles to attend detention hearings remotely via audiovisual devices. *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So. 2d 195 (Fla. 1996). Although the Court declined to adopt the proposed rule change, it authorized the circuits' chief judges to institute a one-year pilot program that allowed juveniles to attend hearings via audiovisual devices, namely closed circuit television. Following the successful pilot program, judges from the participating circuits again petitioned the Court in 1999 to amend the Rules to allow them to continue to conduct hearings in this manner. *See Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 753 So. 2d 541 (Fla. 1999). In light of the overwhelmingly favorable evaluations of the pilot program submitted to the Court by the participating circuits, the Court adopted the amendment on an interim basis. The Court discovered that none of the opponents to the amendment had firsthand familiarity with the pilot program, not even as observers. Furthermore, as the Court wisely noted, it was the juvenile judges themselves who initiated the proposal, those who are intimately familiar with the way detention hearings function and have no interest in this proposal except to make the juvenile justice system work more effectively.

In his dissenting opinion to the Court's 1999 decision, Justice Lewis warns against a system of "robotic justice" and "TV chambers." 753 So. 2d at 546. The Court stated that discretionary release of juveniles is determined in part by the

juveniles' personal interaction with their parents and with the judge. While remote hearings would affect this personal interaction, they would not depersonalize the hearings to the point of mechanization, as was suggested. The sad reality is at detention hearings rarely do 50% of the children in detention have a parent present at the hearing, and of those who are present 50% of them are usually there as a victim. The concept of substantial interaction between the detained children and their parents is a myth. In 2001, the Court repealed the interim rule due to concerns that the video hearings were for institutional convenience and economy. *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470 (Fla. 2001).

Juvenile detention hearings without restraints will result in increased costs for additional security as well as require more time for the hearings, which will no longer be able to occur in groups. On the other hand, CCTV hearings provide an unmatched convenience for all parties involved and decrease the cost associated with traditional hearings (transportation, security, time). This is particularly important right now because the State Courts System is already dealing with shrinking resources. The use of CCTV also benefits the juvenile, resulting in less time away from classes and reduced stress.

We base these conclusions on our observations and intimate familiarity with the juvenile detention hearing process, and on the research of others. In 2007, two

Honors Students from the University of South Florida conducted research into the issue of how remote hearings would affect juveniles. Trae Wainwright & Jennifer Young, *Exploring Criminal Justice and Child Psychology as it Applies to the Present Day Court System* (unpublished Honors Thesis, U. of South Florida, 2007), attached as Appendix 2. Their research was conducted through extensive interviews with juveniles and court personnel in the Unified Family Court, Sixth Judicial Circuit, Pinellas County. Essentially, the study found that CCTV hearings will simplify the process, save money, and alleviate unnecessary stress on all those involved. Furthermore, CCTV hearings are logistically the best process because the juveniles are already in a controlled, central location (the JDC) and attempting to move them can be problematic.

Juveniles will benefit from the use of video hearings. They will no longer need to be transported and face the risks associated with traveling often long distances. They will not be taken from the juvenile center where they receive education, counseling, medical care, and other beneficial services. These services are important to the rehabilitation of the juvenile and reducing the time available for such services is detrimental to the juvenile. Further, the juveniles in the survey seemed to be intimidated by appearing in court but were more comfortable in the detention center.

As we noted earlier, the resources available to the State Courts System continue to diminish. Prohibiting restraints on juveniles will lead to increased cost due to additional security, time, and transportation issues. The amendments will in no way improve the juvenile detention hearing process. On the other hand, allowing juveniles to attend hearings remotely via CCTV can improve the juvenile justice system by conserving resources, keeping juveniles in the controlled environment of the JDC, and making the process easier on and safer for everyone involved, including the juvenile.

IV. Conclusion

This Court should reject the proposed amendments to Rule 8.100(a). The use of restraints should be governed by the needs of each county and should not be based upon a statewide policy that would create a substantive right for a juvenile. Rather, the Court should rely upon the sound discretion of the trial judges who are in the best position to control the proceedings in their courts. The rule as proposed will have a significant fiscal impact at a time when the resources of the court system and our justice partners are stretched beyond limit. In addition to rejecting the proposed amendments to Rule 8.100(a), the Court should reinstitute the former rule which allowed a child to appear for detention hearings either in person or by an electronic audiovisual device in the discretion of the court. Alternatively, the Court should take this opportunity to reconsider the use of closed circuit television

for detention hearings and direct that the Rule of Juvenile Procedure Committee re-evaluate that proposal. The use of video hearings would eliminate many of the concerns about the use of restraints that the proponents seek to address.

B. PROPOSED AMENDMENTS TO RULE 8.257

The juvenile judges in this circuit oppose amending the Rules of Juvenile Procedure to allow an electronic recording to be submitted when filing exceptions to the report of the general magistrate. The proposed amendments to Rule 8.257 define the record as[1]:

> (g) Record.
>
> (1) For the purpose of the hearing on exceptions, a record, substantially in conformity with this rule, shall be provided to the court by the party seeking review. The record shall consist of
> . . . .
>
> (C) the transcript of the proceedings, electronic recording of the proceedings, or stipulation by the parties of the evidence considered by the general magistrate at the proceedings.

This is a significant change from current practice and would convert the electronic recording of a court proceeding into an official record of court proceedings, something that is directly contrary to longstanding practice and contrary to proposed Rule of Judicial Administration 2.420. See *In re Amendments to the*

[1] The proposed amendments to Rule 8.257 also have conforming changes that should also be rejected.

Rules of Judicial Administration – Recommendations of the Commission on Trial Court Performance and Accountability (SC08-1658). The Commission on Trial Court Performance and Accountability and the Rules of Judicial Administration Committee considered the issue of electronic court reporting and determined that the official record of court proceedings is a transcript of the proceeding. The official record of court proceedings has historically been a transcript of the proceedings and a transcript is required under the Rules of Appellate Procedure. See *Moorman v. Hatfield*, 958 So.2d 396, 400 (Fla. 2d DCA 2007) (J. Altenbernd, concurring).

Most circuits use electronic recordings so that the transcript can be prepared in a more economical fashion. The electronic record was never intended to be the official record of court proceedings; rather the transcript of the proceeding is the official record.

In the Sixth Circuit, proceedings where the court is required to make a record are recorded by the CourtSmart™ system, with a few exceptions. The CourtSmart™ system is so sensitive that it will pick up conversations in the courtroom, whether such conversations are part of the court proceedings or not. Such conversations may occur before a calendar is started, in between cases on a calendar, or after the conclusion of the court proceedings. Such conversations may also occur during the court proceedings, for instance, in a judicial review

proceeding the parents of the minor child may have a conversation between themselves that is not part of the court proceeding but is nevertheless captured on the audio. None of these conversations were previously recorded by a stenographer. This level of sensitivity is necessary to ensure that court reporters can hear the entire court proceedings in order to produce the transcript, the purpose for which the recording is made.

Electronic recordings may contain attorney-client communications. Releasing an electronic recording of the proceeding could result in disclosure of confidential attorney-client communications. The importance of the attorney-client privilege cannot be overemphasized. See *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). It is important that a litigant be able to speak "fully and frankly" with his or her attorney while in the courtroom, without fear that the audio of these conversations, which could not be heard by the general magistrate, are heard by the judge reviewing the exceptions. The consequences of releasing attorney-client communications that are incriminating in nature could be disastrous, not only for the litigant in question, but for the integrity of the judicial system. In *Holt v. Chief Judge of the Thirteenth Judicial Circuit*, the Second DCA acknowledged the potential for recording privileged communications and noted that the issue gave the Court "considerable pause." 920 So.2d 814, 818 (Fla. 2d DCA 2006).

Importantly, the proposed rule would require a judge to listen to an audio recording, something that would likely take significantly more time than reading a transcript. The impact upon the judge who may need additional equipment and training on use of the equipment must be considered. While the proponents suggest that proposed rule will be less costly to the litigant, it will be more costly to the court system because of the additional time of the judge to listen to the audio.

The Court should not adopt a means to review exceptions to the report of a magistrate that is different from appellate review. Opening the door to use of an electronic recording for review of a magistrate proceeding is the first step to using electronic recordings for appellate review, something that would have a significant impact upon the workload of appellate courts.

The minority view of the Rule of Juvenile Procedure Committee should be adopted and the Court should reject the proposed amendments to Rule 8.257.

For the above stated reasons, this Court should reject the proposed amendments to Rule of Juvenile Procedure 8.100(a) and Rule 8.257.

Respectfully submitted this ____ day of March, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David N. Silverstein, 501 E. Kennedy Blvd., Suite 1100, Tampa, FL 33602-5242.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 9.100(*l*) I certify that this computer generated response is prepared in Times New Roman 14 point font and complies with the Rule's font requirements.

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B. Elaine New