IN THE SUPREME COURT OF FLORIDA

IN RE: SC09-141
AMENDMENTS TO FLORIDA
RULE OF JUVENILE PROCEDURE 8.100
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COMMENTS IN SUPPORT OF AMENDMENT TO FLORIDA RULE OF JUVENILE PROCEDURE 8.100 BY THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., FLORIDA CHILDREN'S FIRST, AND THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Public Defender Association, Inc. ("FPDA"), Florida Children's First ("FCF") and the Florida Association of Criminal Defense Lawyers ("FACDL") respectfully offer the following comments in support of the proposed amendment to Florida Rule of Juvenile Procedure 8.100. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders and support staff. The FACDL is a non-profit organization with a membership of over 1,500 attorneys and 23 chapters throughout the state of Florida. The FACDL's members are all practicing criminal defense attorneys.

As appointed counsel for indigent juvenile defendants, FPDA members are deeply interested in this rule of procedure which provides flexibility for juvenile court judges to balance safety and security needs with the individualized needs and rights of children, and which allows juvenile court judges to exercise their inherent discretionary authority over courtroom security, without blindly abdicating this

authority to the Department of Juvenile Justice. FACDL members who are retained to represent juvenile defendants share this same interest.

Florida's Children First is a non-profit statewide legal advocacy organization that seeks to advance children's legal rights consistent with their medical, educational, and social needs through significant improvements in all systems affecting children's lives. FCF uses litigation, legislative and policy advocacy, executive branch monitoring, training and technical assistance to lawyers representing children, public awareness and the recruiting of pro bono attorneys to represent children to achieve its goals. FCF has studied the impact of court proceedings on youth and knows that how youth are treated when they attend court can have a life-long impact on their social, emotional and psychological well-being. Indiscriminate shackling only compounds the serious problems that arise from the fact that many youth involved in the delinquency system have themselves been victims of trauma and abuse.

The FPDA and Florida Children's First have submitted extensive comments to the Juvenile Rules Committee, which the committee has attached as Appendix E to the Petition. These comments supplement the original comments in order to address some of the Minority Report's claims.

The Scope of the Proposed Rule

The scope of the proposed rule is extremely modest. Contrary to the claims of the Minority Report, the rule would not create new rights, contradict existing statutes governing the use of secure detention, or deprive courts of their inherent authority to control the conduct of their own proceedings. Nor does it address the use of mechanical restraints by the Department of Juvenile Justice outside the courtroom. The rule merely requires courts to *exercise* their discretion concerning their inherent authority – something most refuse to do – and guides the exercise of that discretion.

Indiscriminate Shackling Is Inimical To The Purpose Of The Juvenile Justice System And Violates The Rights Of Florida's Children

Our constitutions preserve the ancient right under the common law to "be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769); *see Deck v. Missouri*, 544 U.S. 622 (2005) (shackling in penalty phase of capital trial violates due process).[1] The right to appear before the court unchained is not limited to jury trials. As discussed in detail in the FPDA's

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[1] "[*S*]*ee also Trial of Christopher Layer*, 16 How. St. Tr., at 99 (statement of Mr. Hungerford) ('[T]o have a man plead for his life' in shackles before 'a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present' undermines the 'dignity of the Court.')." *Deck*, 544 U.S. at 631-32.

and Florida Children's First comments to the committee, a child's right to be free from unnecessary shackling is rooted in due process, the right to counsel, the right to participate in his or own defense, and the presumption of innocence.[2] Thus courts have rejected shackling even where a jury is not present.[3] *See People v. Allen*, 856 N.W.2d 349 (Ill. 2006) ("[E]ven when there is no jury, any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings.") (disapproving use of stun belts on adult defendants absent individualized showing of need); *In the Interest of R.W.S.*, 728 N.W.2d 326, 331 (N.D. 2007) (juvenile adjudicatory hearing); *In re Staley*, 364 N.E.2d 72 (Ill. 1977) (juvenile adjudicatory hearing); *Tiffany A. v. Superior Court*, 150 Cal.App.4th 1344, 1359 (Cal. 2nd Dist. 2007) (juvenile court hearing); *In Re Deshaun M.*, 148 Cal.App.4th 1384 (Calif.App.1 Dist. 2007) (juvenile court hearing); *People v. Nguyen*, 2005 WL 2789459 (Cal. App. 4 Dist. Oct. 26, 2005)

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[2] *See, e.g., People v. Harrington*, 42 Cal. 165, 168 (Cal. 1871) (shackling "tends to confuse and embarrass [the accused's] mental faculties") (quoted in *Deck*, 544 U.S at 631).

[3] The absence of a jury in juvenile proceedings is itself a reason why the blanket practice of shackling must end. The federal and state constitutions permit juvenile proceedings to be conducted without juries precisely because the children are not to be treated—or stigmatized—as criminals. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality opinion).

(unpublished opinion) (bench trial); *State v. Millican*, 906 P.2d 857 (Or. Ct. App. 1995) (delinquency hearing).

The routine shackling of children has no place in Florida's juvenile justice system. The Minority Report claims: "In juvenile courts, the use of mechanical restraints is even more appropriate than in other courts." Minority Report at 14. [4] In enacting Florida's juvenile justice system, the Legislature emphasized its intent that this system will provide children with a "safe and nurturing environment which will provide a sense of personal dignity and integrity." *See* § 985.02(1)(c), Fla. Stat. (2008). The Legislature further stated that the system's purpose is to assure "fair hearings by a respectful and respected court" which ensure the "dignity of the courts." *See* § 985.01(1)(a), Fla. Stat. (2008).

Through its decisions, this Court has ensured that "Florida's oft repeated pledge that 'our children come first' [does] not ring hollow in—of all places—our halls of justice." *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 475 (Fla. 2001) (internal citation omitted). This Court has also emphasized that "[p]ersonalized attention and plans are necessary to properly address the multiple and complex problems facing today's children." *Id.* at 475-

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[4] The minority report is included in its entirety within the Juvenile Court Rules Committee's Petition at 8-17. Further citations to the Minority Report will be indicated thus: "MR".

476. This Court has rejected procedures that eliminate individualized decision-making in juvenile delinquency matters. In repealing a rule that established video detention hearings, this Court observed: "In essence, it was predetermined that a child's absence was always in the child's best interests and judicial discretion totally eliminated." *See Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 796 So. 2d at 472. Writing for the Court, Justice Lewis explained:

> The issue here is not the integrity of individual judges for it is the compulsory approach advanced by the proponents that belies and negates the integrity and judgment of individual judges. The repealed rule forced the implementation of a predetermined policy representing a mechanistic and robotic approach to matters that require individualized care and attention. There is no judicious reason for perpetuation an unacceptable model and further subjecting children to mandatory procedures deemed inappropriate by many directly involved in the juvenile system. In our view, our children deserve more.

Id. at 475. The routine, blanket chaining of children in Florida courtrooms is likewise a "mechanistic and robotic approach" contrary to Chapter 985 and the rehabilitative purpose of the juvenile justice system.

Far from being "more appropriate" for juveniles as the Minority claims, shackling is more *harmful*. It is gratuitously punitive, counter-therapeutic, and psychologically harmful.[5] It impairs the development of the child's identity and

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[5] *See* Affidavits of Burce Winick and Bernard P. Perlmutter at 11-12, http://www.pdmiami.com/unchainthechildren/AppendixCWinickPerlmutter. pdf.

morality, and ruptures their trust in authority.[6] Many children in the juvenile justice system have been victimized by physical and sexual abuse, loss, neglect and abandonment.[7] Shackling exacerbates trauma, reviving feelings of powerlessness, betrayal and self-blame.[8]

Blanket shackling policies are contrary to both due process and the very purpose of the juvenile justice system. It directly harms Florida's children. The Court should adopt a rule that will ensure that mechanical restraints are used only as a last resort.

The Proposed Rule Is Procedural

The Minority claims that "[T]he issue of shackling of children is primarily one of substantive law, not procedure, and thus falls outside the scope of authority of the committee." MR at 8. It further maintains:

> [T]he committee has overstepped its bounds by attempting to create substantive law relating to juvenile detention and use of mechanical restraints by detention staff. In general, detention and control of juveniles under the supervision of the Department of Juvenile Justice

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6 *See* Affidavit of Dr. Marty Beyer at 9-13 ("[A] child's sense of identity is fragile; being chained like a dangerous beast may cause the child to feel like one. The damage from shackling to the fledgling sense of self is even more severe in children of color, who may associate the practice with racism."), http://www.pdmiami.com/unchainthechildren/AppendixDBeyer.pdf.

7 *See id* at 18-19.

8 *See id.*

> is recognized as an area within the realm of authority of the legislature, and is controlled by the provisions of Chapter 985. *See, e.g.*, §§ 985.24-985.275, Fla. Stat.

MR at 9. The minority points to no substantive law governing the courtroom shackling of children. Instead, it cites to the sections of chapter 985 governing the placement of children in *detention* in the custody of the Department of Juvenile Justice.

The proposed amendment to Rule 8.100 establishes a procedural framework exercising a court's discretion and for enforcing a child's existing substantive right to be free from the indiscriminate use of chains and shackles. This rule is a procedural amendment, not a substantive amendment as it provides a mechanism for the enforcement of an existing right. "Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights . . . [S]ubstantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property." *In re Rules of Criminal Procedure*, 272 So. 2d 65, 655 (Fla. 1972) (Adkins, J., concurring)." *Allen v. Butterworth*, 756 So. 2d 52, 59-60 (Fla. 2000). As discussed below, this Court has, moreover, not hesitated to adopt rules of procedure that guide or control a court's exercise of its inherent authority. *See, e.g.*, *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982); Fla. R. Jud. Admin. 2.450.

The Proposed Rule Does Not Encroach Upon A Court's Inherent Authority

The Minority argues that the proposed rule will interfere with a court's inherent authority to control the courtroom.[9] MR at 13. There is no doubt that a court has such inherent authority. It does not follow, however, that a court is free to abdicate that authority or refuse to exercise its discretion in wielding it. Nor does it follow that the Court should not adopt rules to guide and control that discretion.

The amended rule is necessary in part because many judges simply defer to the Department of Juvenile Justice or the Sheriff in permitting all detained children to appear in chains. Others simply adopt their own blanket policy that does not distinguish between an eleven-year-old temporarily detained for unadjudicated minor offenses and a seventeen-year-old with a history of repeated escapes already found delinquent for multiple violent felonies. Both are brought before the court in chains.

The law, however, requires that a court make its own individualized determination before exercising its inherent authority. *See, e.g., Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982) (requiring court apply three-part test in

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[9] The claim that shackling children is a matter of the court's inherent authority is in obvious tension with the Minority's suggestion that it is a matter for the legislature.

determining whether to exclude press from pretrial hearing). While a court has authority over security in the courtroom, it "may not blindly defer to security measures established by the sheriff or other official performing security functions." *Jackson v. State*, 698 So. 2d 1299 (Fla. 4th DCA 1997). In the context of an adult shackled at trial, this Court recently reaffirmed that "a [trial] court cannot place a defendant in visible restraints as a routine matter. . . ." *Hernandez v. State*, 34 Fla. L. Weekly S149 (Fla. Jan. 30, 2009) (citing *Deck*, 544 U.S. at 633). This Court explained that if a trial court decides to exercise its discretion to shackle a defendant based on special circumstances the appropriate procedure is for the court to hold a hearing and inquire into the necessity for shackling.

The fact that a power inheres in the authority of the court does not exclude it from rulemaking. In *Lewis*, relied upon by the Minority, the court laid out a specific three-part test for court's to use in exercising their discretion to exclude the press. *See Lewis*, 426 So. 2d at 6. Indeed, each of the cases that the Minority cites concerning a court's inherent power involves the exclusion of the press. MR at 13. That authority is, of course, the subject of Florida Rule of Judicial Administration 2.450. Likewise, the Court's inherent power of contempt[10] is governed by Florida Rule of Criminal Procedure 3.830.

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[10] *See Walker v. Bentley*, 678 So. 2d 1265 (Fla. 1996).

S.Y. v. McMillan **Does Not Support The Minority Position**

Citing *S.Y. v. McMillan,* 563 So. 2d 807 (Fla. 1st DCA 1990), the Minority contends that "In reality, a Florida court has already justified such a [routine shackling] policy . . ." and that "The *S.Y.* court ruled that routine shackling of juveniles was 'within the discretion of [the] judges.'" MR at 11, 12. This is simply not true.

The district court can hardly be said to have "justified" routine shackling. The court wrote: "[W]e question the propriety of the issuance of a blanket order in the manner in which it was done in this case . . ." but concluded that the petitioners had not established a departure from a clearly established principle of law to justify relief by writ of certiorari. *See S.Y.*, 563 So. 2d at 808-09. Likewise, the district court did not "rule" that routine shackling was within the discretion of the judges. Instead, the court observed: "The mode of trial court practice and procedure is a matter largely within the discretion of trial judges." *Id.* at 809. The district court *ruled* that the standard for certiorari had not been met, but expressly did so "without prejudice to seek review on direct appeal or to pursue other available remedies." *Id.*

Shackling Should Not Be Used For Punishment Or Deterrence

The minority position also argues that indiscriminate shackling may have a deterrent effect on children. MR at 15-16. There is no evidence of this deterrent

effect. It is clear that proponents of this rationale see shame and humiliation as being a deterrent. These proponents either do not know about, or refuse to acknowledge, the opinion of the medical and psychological professions that deterrence does not work the same way for teens and adults. In its recent decision ruling that the death penalty is unconstitutional when applied to juveniles, the United States Supreme Court stated "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper v. Simmons*, 543 U.S. 551, 571 (2005). When adherents of the current deplorable practice support chaining innocent children for deterrent effect, they are advocating pre-trial punishment. That is not the American idea of justice.

Budgetary Concerns Cannot Justify Routine Shackling

The minority position also states that this amendment should not be adopted without due consideration of budgetary concerns. MR at 14-15. Anecdotally, the lack of a necessity for additional courtroom personnel in Miami-Dade casts doubts on the minority position's financial impact concerns. Even if the implementation of the proposed amendment caused additional financial burdens, such concerns should not supersede a child's substantive right to be free from chains. *See Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d at 474 ("However, our youth must never take a second position to institutional

convenience and economy."); *Id.* at 476 ("It is time that we understand that these youths are individuals and require sufficient resources if we are to expect a brighter tomorrow.").

Strong Support Exists within Florida and throughout the Nation For the End of Indiscriminate Shackling

The end to indiscriminate shackling is supported by the Florida Bar's Board of Governors, Legal Needs of Children Committee and Public Interest Law Section. Then Governor-elect Charlie Crist also declared that routine shackling is wrong. "I think it's only fair to judge these things on a case-by-case basis," Crist said to the Associated Press's Curt Anderson.[11] The Miami-Dade County Commission issued a resolution against indiscriminate shackling.[12] There is also significant community support for the end of the indiscriminate policy of chaining children.[13]

The National Juvenile Defender Center questioned the validity of this blanket practice and recommended the end of this practice as one of its core

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[11] Curt Anderson, Crist: Routine Shackling of Juvenile Suspects is Wrong (Dec. 1 2006), http://www.pdmiami.com/Crist-routine_shackling_wrong.htm.

[12] http://www.miamidade.gov/govaction/matter.asp?matter=063613&file=true&yearFolder=Y2006

[13] For a detailed listing of newspaper articles and editorials which support the end of indiscriminate shackling please refer to the following website: http://www.pdmiami.com/unchainthechildren.html.

recommendations.[14] Numerous articles in law reviews have similarly condemned this practice.[15] Throughout the United States, several state courts have denounced the practice of indiscriminate shackling of children and have found that this practice violates a child's substantive rights.[16] The North Carolina legislature has enacted legislation to ensure that this practice ends.[17]

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[14] *See* Patricia Puritz and Cathryn Crawford, *Florida An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings*, National Juvenile Defender Center (2006), at page 5, http://www.njdc.info/pdf/Florida%20Assessment.pdf.

[15] *See* Bernard P. Perlmutter, *"Unchain the Children": Gault, Therapeutic Jurisprudence, and Shackling*, 9 Barry Law Rev. 1 (2007); Daniel Zeno, Shackling *Children During Court Appearances: Fairness and Security in Juvenile Courtrooms*, 12 J. Gender Race & Just. 257 (2008); Anita Nabha, *Shuffling to Justice: Why Children Should Not Be Shackled in Court*, 73 Brook L. Rev. 1549 (2008); Brian D. Gallagher and John C. Lore, *Shackling Children in Juvenile Court: The Growing Debate Recent Trends, and the Way to Protect Everyone's Interest*, 12 U.C. Davis J. Juv. L. & Pol's 453 (2008).

[16] The following state courts have ruled that youths may not be indiscriminately shackled, for a more detailed analysis see FPDA's and FCF's comments to the committee. *See Tiffany A. v. Superior Court*, 150 Cal.App.4th 1344, 1359 (Cal. 2nd Dist. 2007); *In Re Deshaun M.*, 148 Cal.App.4th 1384 (Calif.App.1 Dist. 2007); *In the Interest of R.W.S.*, 728 N.W.2d 326, 331 (N.D. 2007); *State ex rel Juv. Dept. v. Millican*, 906 P.2d 857 (Or. App. 1995); *In re Staley*, 364 N.E.2d 72 (Ill.1977).

[17] In 2007, North Carolina amended its state laws to provide that a child can only be subject to physical restraint in the courtroom when it is necessary to maintain order, prevent escape, or provide for the safety of the courtroom. *See* H.R., 1243, 2007 Session (N.C. 2007) (amending N.C. Gen. Stat. § 24-7B(2007)).

Conclusion

The indiscriminate shackling of children harms the child and the integrity of the judicial system. It is contrary to Chapter 985 and the rehabilitative purpose of the juvenile justice system. The current predetermined blanket policy of chaining and shackling children represents a mechanistic and robotic approach to a matter that requires individualized care and attention. The proposed rule amendment provides the court with the ability to provide the individualized care and attention that our children deserve. It allows juvenile court judges to exercise their inherent discretionary authority over courtroom security, without blindly abdicating this authority. It provides flexibility for the court to balance safety and security needs with the individualized needs and rights of children. We urge the Florida Supreme Court to accept the proposed amendment to Rule 8.100, Florida Rules of Juvenile Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these comments were served by mail on David N. Silverstein, Chair, Juvenile Court Rules Committee, 501 E. Kennedy Boulevard, Suite 1100, Tampa, FL 33602-5242, on this ___ day of _____ 2009.

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CERTIFICATE OF FONT

I hereby certify that these comments were printed in 14-point Times New Roman.

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