IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE (THREE-YEAR CYCLE)

CASE NO.: SCO9-141

RESPONSE OF THE JUVENILE COURT RULES COMMITTEE TO COMMENTS

David Silverstein, Chair, Juvenile Court Rules Committee (Committee), and John F. Harkness, Jr., Executive Director, The Florida Bar, file this response to comments filed in the above case. The response was considered by the Committee on an e-mail vote and approved by a vote of 24-0-4.

Following filing of the Committee's three-year cycle report on January 28, 2009, a summary of the proposed amendments was published for comment in the March 1, 2009, Florida Bar *News* and posted on The Florida Bar's website, with a requirement that comments be filed with the Court on or before April 1, 2009. Comments were received from Johnny Smith, Sheriff of Levy County; William Farmer, Jr., President, Florida Sheriffs Association; Eric Trombley, Assistant State Attorney, Leon County; the Honorable Robert J. Morris, Chief Judge of the Sixth Judicial Circuit; Jim Coats, Sheriff of Pinellas County; Florida Department of Children and Families (DCF); the Florida Public Defenders Association, Florida

Children's First, and the Florida Association of Criminal Defense Lawyers (joint comment); the University of Miami School of Law Children & Youth clinic; and the University of Miami School of Law Center for the Study of Human Rights. The comments from Johnny Smith and William Farmer, Jr., were letters sent to the Committee chair that were not filed with the Court. The Committee has chosen to address these comments and has attached them as Appendix A.

Before filing, the proposed amendments were published for comment in the June 15, 2008, Florida Bar *News* and posted on The Florida Bar's website. Comments were received from the Florida Public Defenders Association and Florida Children's First and attorney Bernard Perlmutter from the University of Miami School of Law. These comments were addressed in the Committee's report to the court.

Rule 8.100. General Provisions for Hearings.

The majority of the comments were directed to the Committee's proposal to amend *Fla. R. Juv. P.* 8.100. This amendment establishes a procedural framework for juvenile court judges to exercise their inherent discretionary authority over courtroom security. The proposed amendment proscribes indiscriminate chaining and shackling of children and instead provides that restraints, such as handcuffs, chains, irons, or straitjackets, may

not be used during a child's court appearances unless there are no less restrictive alternatives to restraint and the child is a danger to himself or others or there is a founded belief that the child presents a substantial risk of flight from the courtroom.

Although the Florida Bar Board of Governors unanimously supported the amendment by a vote of 30-0-0, the Committee vote approved the amendment by just one vote, 12-11-1. The Committee devoted substantial time and energy to this amendment while engaging in high-spirited discussions. The Committee also heard presentations by non-Committee members during the discussions. Because of the close vote, the Committee included a minority report with its three-year cycle report.

The comments received from Johnny Smith, William Farmer, Jr., Jim Coats, and Eric Trombley focus on security within the courtroom. They believe that the public, courtroom staff, judges, and even the children are safer by the use of mechanical restraints. The Committee discussed these issues when deliberating, including the fact that there are differences in procedure and in the various courtrooms throughout the state. The Committee appreciates the input from these individuals and would like to assure them that their stated ideas were previously discussed.

Honorable Robert Morris filed a comment in opposition to the rule and made three main assertions. His first assertion was that the rule was substantive as opposed to procedural. The issue was hotly debated by the Committee and was also further discussed in the minority report. The second assertion was that the proposed rule would increase the time and resources required for detention hearings and have a significant fiscal impact on the court system. The Committee took this matter into consideration before its final vote. The comment also included a survey of procedures in each of the 20 judicial circuits for detention calendars and use of restraints on juveniles. Again, the Committee is aware that there are vast differences and procedures throughout the state and that each jurisdiction would be affected in a different manner.

Judge Morris's final assertion is that children should not be transported to court, and instead, they should attend detention hearings via closed circuit television (electronic audiovisual devices). The Committee did not consider this argument during its deliberations. However, it should be noted that in 2001, the Supreme Court repealed the interim rule that allowed the child to appear at the detention hearing in person or by electronic audiovisual device at the discretion of the trial court. *Amendment to Florida of Juvenile Procedure 8.100(A),* 796 So. 2d 470 (Fla. 2001). In

this opinion, Justice Lewis stated "our youth must never take a second position to institutional convenience and economy." *Id.* at 474. The Juvenile Court Rules Committee previously opposed the amendment allowing the use of electronic audiovisual devices at the child's detention hearing.

The Florida Public Defender Association, Inc., Florida Children's First, and the Florida Association of Criminal Defense Lawyers filed a joint comment in support of the amendment. Their comments supplement the comment they originally filed and also address the minority report. The Committee appreciates their input and would like to advise each entity that their elucidations and expositions have previously been discussed by the Committee.

The University of Miami School of Law Children & Youth Law Clinic filed a comment in support of the amendment. The Committee is grateful for this work as well as the earlier submission by Bernard Perlmutter (*"Unchain the Children": Gault, Therapeutic Jurisprudence, and Shackling* (Barry L. Rev. Fall 2007)). That comment is Appendix F in the Committee's three-year cycle report and was also the source of much debate as the Committee discussed the issues.

The University of Miami School of Law Center for the Study of Human Rights filed a comment in support of the amendment. The Center urges the Court to approve the proposed amendment and contends that the amendment will bring the rules governing the use of restraints on juvenile offenders into conformity with the United States' obligations under international law, including the Covenant on Civil and Political Rights. The Committee did not consider this argument in making its decision and defers to the Court regarding the significance of the comment.

Ineffective Assistance of Counsel.

The Florida Department of Children and Families (DCF) has requested that the Court adopt its proposed *Rule* 8.235(e), *Rule* 8.515(a)(2), and *Fla. R. App. P.* 9.146. The Committee created a subcommittee approximately two years ago to study the issue of ineffective assistance of counsel and make recommendations to the full Committee. Resolution of this issue will have a significant impact on dependent children, parents, and the dependency court process. This issue is very complex. The subcommittee spent a considerable amount of time creating proposed rules to address the issue. The Committee engaged in vigorous debate and members expressed many viewpoints regarding the issue and the proposed rules from the subcommittee. However, the full Committee determined that

a claim for ineffective assistance of counsel in a termination of parental rights proceeding was a substantive, not procedural, issue. Therefore, the Committee determined that it did not have the jurisdiction to propose rules to this Court.

If the Court makes the substantive determination that a parent can raise a claim of ineffective assistance of counsel in a termination of parental rights proceeding, the Committee respectfully requests that this Court refer the DCF proposals to the Committee for review and consideration. DCF's proposals were not previously submitted to the Committee, and therefore, members have not had an opportunity to consider and fully debate their merits. The Committee agrees that the issue needs to be resolved in some manner. The Committee also recognizes that there are several possible procedural approaches to the issue. The Committee is well-versed in the issues and wants the opportunity to thoroughly review DCF's proposed rules.

Moreover, this Court, as a procedural matter, should refer DCF's proposed rules to the Committee. As stated above, these proposals were not offered during the months that the Committee considered this issue. If DCF had submitted the proposed rules to the Court, and not through a Comment to the Committee's three-year cycle report, the normal procedure would be

for the proposed rules to be submitted to the Committee for review and action. The Committee would then have an opportunity to revisit the proposals it developed and discuss DCF's proposals. Additionally, DCF has submitted proposed amendments to *Rule* 9.146 without providing a copy of the Comment to the Appellate Court Rules Committee or seeking input from that Committee. This Court should not allow DCF to circumvent the rulemaking process by proposing rules through a Comment to a rules committee's three-year cycle report. Therefore, if this Court makes the substantive determination that the claim of ineffective assistance counsel exists, this Court should refer the DCF proposals to this Committee and the Appellate Court Rules Committee.

Rule 8.225. Process, Diligent Searches, and Service of Pleadings and Papers.

DCF contends that service by mail should remain effective service for out-of-state parents. However, the Committee believes that service by mail on out-of-state parents sets forth a different standard of due process for service of in-state versus out-of-state parents. Parents who reside in Florida must be served by a sheriff, process server, authorized agent of DCF, or the guardian ad litem. See § 39.502(12), *Fla. Stat.* (2008). Further, when service of process is effectuated by mail, it is sometimes difficult to

determine who signed the mail receipt. The Committee believes that many parents may not claim certified return receipt mail because certified mail is often associated with unpleasant events such as bill collection. Thus, the Committee respectfully requests that this Court adopt the proposal to strike *Rule* 8.225(a)(4)(A)(iii) and adopt the Committee's other revisions to *Rule* 8.225.

The Committee notes that if the Court strikes *Rule* 8.225(a)(4)(A)(iii), service of process may still be accomplished by other methods such as in a manner prescribed by the law of the place in which service will be made or as directed by the Court. See *Rules* 8.225(a)(4)(A)(ii) and (iv).

Rules 8.235 and 8.310. Motions and Dependency Petitions.

The Committee disagrees with DCF's position that the 2008 amendments to section 39.507(7), Florida Statutes, have any bearing on proposed amendments to *Rules* 8.235 and 8.310.[1] The Committee agrees that dependency describes the legal status of the child and does not

[1] DCF filed a similar Comment to the Committee's proposed Rules 8.330 and 8.332 in the case of *In Re: Implementation of Commission on District Court of Appeal Performance and Accountability* (SC08-1724). However, DCF does not object to the Committee's proposed rules in the three-year cycle report to allow the court and parties to dismiss allegations of a dependency petition.

constitute charges against a particular parent. However, the proposed amendments do not have any effect on this concept.

A child is dependent based on findings by the court that the child has been abandoned, abused, or neglected by a parent or that the child is at substantial risk of imminent abuse, abandonment, or neglect by a parent. §§ 39.01(15)(a), (15)(f), *Fla. Stat.* The statutes require the petition to specifically set forth acts or omissions upon which the petition is based and the identity of the person who committed the acts or omissions. § 39.501(3)(c), *Fla. Stat.* The court may find that a child is dependent and must enter an order briefly stating the facts upon which its finding is based. §§ 39.507(5)–(6), *Fla. Stat.* Therefore, the dependency of the child is based on findings that arise from allegations of parental acts or omissions or of substantial risk of imminent abuse, abandonment, or neglect to the child.

The Committee proposed the amendments to clarify involuntary and voluntary dismissals of dependency petitions. The current rules address the dismissal of the entire dependency petition. There are no rules that concern dismissal of certain allegations of the petition regarding a parent and the consequences of the dismissal. Without direction of a rule, some practitioners treat a dismissal of allegations of the petition regarding a parent to constitute a dismissal of the petition regarding the parent and dismissal of

the parent as a party to the proceedings. In these cases, the proceedings then continue with the petition as to the other parent, with the court and the parties no longer recognizing that the dismissed parent continues to have party status. However, a parent is not dismissed from a petition. The parent is a party to the action even if there are no dependency allegations which pertain to that parent.

The need for a rule to clarify dismissals was apparent in *C.L.R. v. Dept. of Children & Families,* 913 So. 2d 764 (Fla. 5th DCA 2005). In *C.L.R.,* the department orally dismissed the dependency action as to the father. *Id.* at 765–766. The mother consented to dependency. *Id.* at 766. The trial court granted the mother's motion for reunification. *Id.* The father objected to the order of reunification because he did not receive a notice of hearing. *Id.* He also requested discovery. *Id.* The trial court concluded that because the petition had been dismissed against the father, he was not entitled to a hearing or discovery.

The District Court of Appeals, Fifth District, held that although the petition was dismissed as to the father, he remained a party to the proceedings. *Id.* at 766. However, the Court concluded that the father was not entitled to court-appointed counsel because he was not a parent against

whom allegations or acts or omissions giving rise for dependency are made. *Id.* at 767.

C.L.R. illustrates the need for a rule to clarify dismissals of dependency petitions and dismissal of allegations in the petitions regarding a parent. If there had been such a rule prior to *C.L.R.*, the trial court and petitioner would have had direction to dismiss the allegations of the petition regarding the father and continue to treat the father as a party to the proceedings.

The proposed rules allow the court upon motion, or a party upon notice, to dismiss allegations of the petition regarding a parent while still proceeding with the petition based on allegations that pertain to the other parent. The Committee recognizes that DCF primarily objects to the concepts that allegations are "against" a party. Thus, as a compromise, the Committee agrees that this Court could modify the language of the proposals to eliminate the words "against a particular party" in proposed *Rule* 8.235 and "against a party" in proposed *Rule* 8.310. This compromise would alleviate DCF's concerns yet still create a procedural mechanism to dismiss allegations in a petition.

Rule 8.257. General Magistrates.

DCF and the Sixth Judicial Circuit have objected to the Committee's proposal that the record for review of an exception to a report of a general magistrate include an electronic recording of the proceedings.[2] The Committee contends that exceptions to a report of a general magistrate would be resolved more quickly and inexpensively if a reviewing court could consider an electronic recording of the hearing before the general magistrate.

In Florida, hearings before general magistrates are typically recorded by electronic means. Parties can obtain audio copies on CD or DVD of general magistrate hearings within days. It can take weeks to obtain a transcript of the hearing unless the requesting party pays a very high fee for an expedited transcript. It is critical that exceptions to general magistrate reports be resolved as quickly as possible so children can achieve permanency.

An audio recording is more accurate than a transcript made from an audio recording. An audio recording will reveal the tone and emphasis of a person's voice and how long it takes a witness to answer a question. A

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[2] The Committee acknowledges that this Court is considering a similar issue the case of *In Re: Amendments to the Rules of Judicial Administration – Recommendations of the Commission on Trial Court Performance and Accountability* (SC08-1658).

written transcript may not include these aspects. A court reporter has to interpret what is heard on the audiotape. Thus, the transcript is a second-hand interpretation of what actually occurred in the hearing. A court reporter who transcribes a recording may not indicate the correct speaker since the court reporter may not have been present at the actual hearing and may not be familiar with the voices of the hearing participants. One transcribing court reporter may summarily designate portions of the recording as “inaudible,” while another may turn up the volume to determine what is being said. The Committee specifically chose the words “electronic recording” to account for advances in technology that may electronically record or transcribe a proceeding more accurately than a court reporter.

Audio copies on CD or DVD are much less expensive than transcripts. The expense of obtaining a transcript should not be a factor in determining whether someone seeks to exercise the right to a court review of a magistrate’s report.

The inadvertent disclosure of confidential information on an audio recording should not be a basis to find that an electronic recording cannot be part of a record on review. There is no law that prohibits a court reporter from transcribing everything that is said in a hearing, including confidential information. Most courtrooms have notices to hearing participants that

everything said in the courtroom may be recorded. Attorneys are responsible for notifying their clients of the lack of confidentiality in the courtroom.

The amount of time the reviewing judge would be required to listen to an audio recording of a hearing should not be a basis to deny the Committee's proposal. The hearing on review may not be lengthy. Parties could stipulate that the court hear only portions of the hearing if the hearing is lengthy. The reviewing court still has the discretion to request that a party provide a transcript or that the parties attempt to stipulate to the evidence presented to the general magistrate to avoid the court having to listen to a lengthy hearing. See § 90.612, *Fla. Stat.*

The Committee notes that neither DCF nor the Sixth Judicial Circuit opposes the concept of the Committee's proposal that the record may include a stipulation of the parties. DCF has issue with the proposed language, "stipulation of the evidence considered by the general magistrate." DCF would like the stipulation proposal to include all matters relevant to the determination of the exception instead of only evidence presented at the hearing. The Committee does not object to this court modifying the language of the proposal to read "stipulation of all matters relevant to the determination of the exception."

Rule 8.265. Motion for Rehearing.

DCF disagrees with the Committee's proposal that the court rule on a motion for rehearing within 10 days of filing or the motion is deemed denied. DCF contends that if the motion is deemed denied by the court because the court did not rule on the motion within 10 days, factual allegations in a motion for rehearing will stand unaddressed in the record on appeal. However, even if the court considers and rules on the motion, the court could still summarily deny the motion without ruling on any factual allegations.

In its proposal, the Committee sought to balance the child's need for expeditious resolution of issues (hence, the 10-day ruling requirement), with a party's right to resolve a motion for rehearing before seeking appellate remedies. The resolution of issues by rehearing may avoid lengthy appeals that delay permanency for children. The Committee believes it has struck a fair balance with its proposal and respectfully requests that this Court adopt its proposals.

Respectfully submitted ______________________________________.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was provided by U.S. Mail on ________________________________ to the persons on the following page:

____

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APPENDIX A

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March 17, 2009

David N. Silverstein, Committee Chair
The Florida Bar's Juvenile Court Rules Committee
501 East Kennedy Boulevard, Suite 1100
Tampa, Florida 33602-5242

Dear Committee Chair Silverstein

Please be advised that the Sheriffs of Florida are opposed to the proposed amendment to Rule 8.100, Florida Rules of Procedure. The Sheriffs feel strongly that the ability of the bailiffs to maintain security of court clerks, legal counselors, court stenographers and innocent bystanders as well as our judges in the courtroom is based largely upon their ability to control those who are appearing before the court. The proposed amendment to Rule 8.100 providing that restraint not be used on juveniles during a court appearance will clearly jeopardize the bailiff's control of the juvenile.

The Sheriffs feel that in addition to deterring the bailiffs in their protection of those in the courtroom, the lack of restraint will also heighten the possibility of injury during attempted flight by the juvenile.

We feel that having the juvenile restrained and under control is beneficial to the entire judicial process in that it helps to provide a secure and timely docket.

Sincerely,

W.O. "Bill" Farmer, Jr.

Sheriff William O. "Bill" Farmer, Jr.
President, Florida Sheriffs Association

WOF/mm

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JOHNNY M. SMITH, JR. SHERIFF, LEVY COUNTY
MEMBER, FLORIDA SHERIFF'S ASSOCIATION
P.O. DRAWER 1719
BRONSON, FLORIDA 32621-1719

March 13, 2009

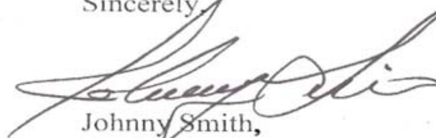
David N. Silverstein, Committee Chair
The Florida Bar's Juvenile Court Rules Committee
501 E. Kennedy Blvd., Suite 1100
Tampa, Florida 33602-5242

Dear Committee Chair Silverstein:

Please accept this letter as opposition to the proposed amendment to Rule 8.100, Florida Rules of Juvenile Procedure. I feel this change would place our court bailiffs, court officials, such as court clerks, counsel, court stenographers, as well as our judges at risk, in the case of a juvenile defendant being able to flee or cause harm to any of these persons in close proximity. Having the juvenile restrained and under control will also benefit the judicial process by having a manageable docket with little delays.

As Sheriff, I am responsible for having bailiffs in the courtroom to provide security for all personnel and maintain control for the judge. I feel this amendment will jeopardize the security and wellbeing of all concerned.

Sincerely,



Johnny Smith,
Sheriff

JS/plg