IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUVENILE PROCEDURE 8.010 SC10-252

_____/

COMMENTS OF CARLOS J. MARTINEZ, PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

Carlos J. Martinez, the Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11"), respectfully offers the following comments on the proposed amendments to Florida Rule of Juvenile Procedure 8.010. As appointed counsel for indigent children accused of delinquency, PD-11 is committed to assuring that the rules of procedure ensure fair and equal treatment of children in the juvenile justice system.

PD-11 strongly supports the proposed rule amendment, which closely tracks this Court's recent amendment to Rule 3.130 governing first appearance hearings for adult defendants. *See In re Amendments to Florida Rule of Criminal Procedure 3.130*, 11 So. 3d 341, 341-42 (Fla. 2009). In that opinion this Court noted: "The proposal to amend rule 3.130 recognizes the important role that counsel play in criminal proceedings." *Id*. at 342. PD-11 believes that counsel play an equally important role in delinquency proceedings. Detention hearings for juveniles are the equivalent of first appearance hearings for adults, and they also require the presence of an attorney.

Over forty years ago, the United States Supreme Court announced a constitutional right to counsel for children facing delinquency charges. *See In re Gault*, 387 U.S. 1, 36 (1967) (recognizing the need for "the guiding hand of counsel at every step in the proceedings"). This constitutional requirement is implemented in Florida in Chapter 985, which provides a statutory right to "representation by legal counsel at all stages of any delinquency court proceeding under this chapter." § 985.033(1), Fla. Stat. (2009) (emphasis supplied). A detention hearing is a court proceeding authorized by Chapter 985. *See* § 985.255(3)(a), Fla. Stat. (2009). This Court has recognized detention hearings as "a critical stage in the juvenile process." *In re Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 474 (Fla. 2001). From a child's perspective, the determination of whether he or she will be detained or allowed to go home pending trial is often the most important issue in the case.

Florida Rule of Juvenile Procedure 8.010(e)(2) currently requires that an indigent child be advised of "the right to appointed counsel" at the detention hearing. Rule 8.165(a) provides that a child cannot waive the right to counsel without "a meaningful opportunity to confer with counsel" about that waiver. These rules, in combination with the statutory right to counsel, implicitly require that an assistant public defender be present in court to represent any indigent

children who may come before the court. The proposed amendment makes this implicit requirement explicit.

The need for this proposed amendment is also seen in the conundrum facing a judge if an assistant public defender does not appear at a detention hearing. If the trial court were to proceed with the hearing, it would be in violation of the right to counsel. If the trial court were to continue the hearing, even for a day, to allow an assistant public defender to appear, it would be in violation of the requirement that detention hearings must occur within twenty-four hours of a child being taken into custody. *See* § 985.255(3)(a), Fla. Stat. (2009). PD-11 has found that having attorneys present in detention hearings has been necessary to ensure that children are brought to detention hearings within the statutorily required twenty-four hours. *See D.M. v. Dobuler*, 947 So. 2d 504, 507-09 (Fla. 3d DCA 2006).

The need for an assistant public defender to be present in juvenile detention hearings is perhaps even greater than in adult first appearance hearings. Adults have a constitutional right to release on reasonable conditions, except for those charged with capital crimes and crimes punishable by life in prison. *See* Art. I, § 14, Fla. Const. The conditions of pretrial release are largely a matter of judicial discretion. This constitutional language, however, specifies only those "charged with a crime or violation of a municipal or county ordinance" and does not apply to children charged with juvenile delinquency. Instead, the "power to place those

charged with, or found to have committed, a delinquent act in detention is entirely statutory in nature." *S.W. v. Woolsey*, 673 So. 2d 152, 154 (Fla. 1st DCA 1996).

The detention statute, together with the Rules of Juvenile Procedure, set forth a procedure that, by its nature, requires the presence of counsel in the courtroom. First, the court must determine whether there is probable cause to believe that the child has committed the delinquent act charged by the police. *See* § 985.255(3)(a), Fla. Stat. (2009); Fla. R. Juv. P. 8.010(f)(1). Counsel must bring to the court's attention any insufficiency of the allegations in the arrest affidavit. If the court finds that probable cause does not exist, the child must be released from detention, although the State is not prohibited from filing a petition for delinquency. *See* Fla. R. Juv. P. 8.010(g).

If probable cause is found, the court must determine whether there is a need for continued detention according to the requirements and criteria provided by law. *See* § 985.255(3)(a), Fla. Stat. (2009); Fla. R. Juv. P. 8.010(f)(2). With limited exceptions, all detention decisions must be based on a risk assessment of the child. *See* § 985.245(1), Fla. Stat. (2009). As required by law, a detention risk assessment instrument ("DRAI") has been developed. *See* § 985.245(2), Fla. Stat. (2009). Part II of the DRAI lists those circumstances that, pursuant to section 985.255, Florida Statutes, will permit continued detention by a court of a child initially detained by the Department of Juvenile Justice ("DJJ"). This part directs

that, if any of those circumstances is found to exist, the individual completing the DRAI proceed to part III, entitled Risk Assessment. This part is similar to a sentencing guidelines score sheet, in that it assigns point values to a variety of circumstances. *See S.W. v. Woolsey*, 673 So. 2d at 155 (discussing the DRAI under former Chapter 39).

Completing the DRAI correctly is not always simple. Many sources of potential scoring errors exist, and even a one-point error can result in detention pending trial. Defense counsel must be present in court to bring any scoring errors to the attention of the court. Errors can occur because DRAIs are often prepared under serious time constraints during the twenty-four hours between the arrest of the child and the detention hearing. Errors can also occur because of the criminal history information used to prepare the DRAI. For example, PD-11 has represented children whose DRAI scores, as initially drafted by DJJ using their records, included points for prior felonies. An assistant public defender reviewing the on-line court records, however, can discover whether those felonies were reduced to misdemeanors at the time of a plea. Correcting these errors results in lower DRAI scores that may be the difference between detention and non-detention.

Attorney review of the DRAI is essential for another reason: DJJ has recently switched to preparing DRAIs by computer. Before the switch, the DJJ

personnel who prepared the DRAI were usually non-lawyers who were apparently unaware of the case law that places limits on how the DRAI is scored. For example, case law has long prohibited scoring points on one section of the DRAI for a case or a fact that has already been scored in another section. *See, e.g., P.A.J. v. Gnat*, 684 So. 2d 310, 311 (Fla. 1st DCA 1996); *D.G.H. v. Gnat*, 682 So. 2d 210, 213 (Fla. 1st DCA 1996); *see also M.S. v. Housel*, 907 So. 2d 651, 653-54 (Fla. 4th DCA 2005) (inappropriate double-counting of points on RAI from charges all arising from same incident); *T.B. v. State*, 897 So. 2d 530, 530 (Fla. 4th DCA 2005) (inappropriate to score points on RAI for past history and then add an extra point for significant past history). Yet, until recently, DRAIs, whether prepared by computer or human, often included a three extra points for the "aggravating circumstance" of illegal possession of a firearm when possession of a firearm was already accounted for in the score assigned for the current offense. *See A.M. v. State*, 13 So. 3d 502, 503 (Fla. 3d DCA 2009) (DRAI scored possession of a firearm twice, and without the double counting, the DRAI score was not high enough for secured detention and there were no written reasons to depart from the DRAI); *D.P. v. State*, 8 So. 3d 1203, 1203-04 (Fla. 5th DCA 2009) (double points for same possession of a firearm). In the Eleventh Judicial Circuit, this particular problem seems to have been solved. Whether the computer will cause more errors than it corrects is, as of yet, undetermined, but given the advent of such an

automated system, the need for defense attorneys to verify the accuracy of the computer results is greater than ever.

Thus, PD-11 has found that the presence of attorneys at detention hearings is crucial to avoid or contest illegal detentions that result from improperly scored DRAIs and from failures to otherwise follow the detention requirements of Chapter 985. Attorneys can explain to the judges why a child cannot be placed in detention and, if that fails, can seek appellate relief. The case law is replete with decisions by the district courts of appeal granting habeas corpus relief to children illegally detained. *See, e.g., M.G. v. Berry*, 998 So. 2d 634, 635-36 (Fla. 3d DCA 2008) (double counting on RAI of fact that child was on release for another offense when he allegedly committed the new offense); *Z.B. v. Department of Juvenile Justice*, 938 So. 2d 584, 585-86 (Fla. 1st DCA 2006) (misapplication of provision allowing detention for absconding); *T.D.S. v. State*, 922 So. 2d 346, 346-47 (Fla. 5th DCA 2006) (secure detention despite zero points on the RAI and no written reasons for departure); *D.B. v. State*, 848 So. 2d 1219, 1219 (Fla. 3d DCA 2003) (score on RAI insufficient for secured detention and no written reasons for departure); *J.J. v. Fryer*, 765 So. 2d 260, 263-67 (Fla. 4th DCA 2000) (insufficient points on RAI and no written reasons for departure); *K.C. v. Taylor*, 696 So. 2d 858, 858-59 (Fla. 2d DCA 1997) (practice of knowingly sending children to secured detention illegally with release provision designed to moot habeas corpus petitions).

If an attorney is not present at the detention hearing, an illegal detention will often take days to come to light (if indeed any attorney ever looks at the issue), and even longer to correct. The time to make objections to detention decisions is at the detention hearing, and that can occur only if the attorney is present at those hearings.

The presence of counsel in the courtroom is necessary not only to prevent illegal detentions, but also to assist the court in exercising its discretion to order less restrictive conditions than indicated by the DRAI in cases where harsher conditions are not necessary to assure the presence of the child in court or to protect the public. The trial court cannot properly exercise its discretion unless all the relevant information is gathered and presented. Such information might include any dependency issues, whether the parent or guardian has a restraining order against him or her, whether the child has any mental or physical issues that impact on the detention decision, and whether the child would have support and supervision if released to the home. The attorney representing the child can marshal and succinctly present all of this evidence.

Although PD-11 has a policy of having at least one assistant public defender present at all detention hearings, PD-11 appreciates that this proposed amendment will place additional burdens on some public defender and state attorney offices that do not already have such a policy. PD-11 also knows all too well the impact

that budget reductions have had on state attorney and public defender offices around this state. Because approximately ninety-five percent of PD-11's budget is for salaries, the continuing budget reductions have meant fewer and less experienced attorneys attempting to handle the caseload.

Nevertheless, the solution to high caseloads cannot be leaving children unrepresented at a critical stage where a judge is determining their liberty. The constitutional right to counsel and the Florida Rules of Professional Conduct require defense counsel to diligently and competently defend all clients. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); R. Regulating Fla. Bar 4-1.1 (competence), 4-1.3 (diligence).

The constitutional right to the assistance of counsel cannot depend on Legislative funding decisions. *See Makemson v. Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986) ("it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter."). Likewise, this Court ought not consider objections to this proposed rule of procedure based on an assumption that the Legislature will inadequately fund the state attorney and public defender offices.

CONCLUSION

The proposed amendment to Florida Rule of Juvenile Procedure 8.010 gives effect to the statutory and constitutional right to counsel, makes explicit what is already implicit in the rules, and should be adopted by this Court.

Respectfully submitted,

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
305.545.1961

BY:_____
BETH C. WEITZNER
Assistant Public Defender
Florida Bar No. 203221

CERTIFICATES

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Vice-Chair of the Juvenile Court Rules Committee, Ronald S. Frankel, P. O. Box 5028, Clearwater, FL 33758-5028, this fifteenth day of April 2010.

I HEREBY CERTIFY that this comment is printed in 14-point Times New Roman.

_____
BETH C. WEITZNER
Assistant Public Defender