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047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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DEBBIE CAUSSEAUX
JUN 17 1999
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By _____

Case No. 84,021

AMENDMENT TO FLORIDA RULE
OF JUVENILE PROCEDURE 8.100(a).
_____/

COMMENTS ABOUT INTERIM
FLORIDA RULE OF JUVENILE PROCEDURE 8.100(a)

COMES NOW undersigned counsel, Blaise Trettis, and comments about the interim change to Fla. R. Juv. P. 8.100(a) that the Court has approved. Undersigned counsel suggests that the Court adopt the following modified version of Fla. R. Juv. P. 8.100(a):

> RULE 8.100 GENERAL PROVISIONS FOR HEARINGS
> Unless otherwise provided, the following provisions apply to all hearings:
> (a) Presence of the child. The child shall be present unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interests, except that the child's presence may be either in person or by electronic audiovisual device in the discretion of the Court for detention hearings provided the child's appearance by electronic audiovisual device is not conducted in a county jail or other adult detention facility.

If this additional provision is not included, counsel submits that the Court may unwittingly cause the same type of problems that the interim amendment is intended to alleviate. Many judicial circuits now conduct adult first appearances via audiovisual equipment that has been installed in the county jails. Undersigned counsel believes

that these same judicial circuits do not have audiovisual equipment installed in the juvenile detention centers because its use has not been allowed under the rules of juvenile procedure. It is likely that the installation of audiovisual equipment in juvenile detention centers will not be forthcoming any time soon because of: 1) the very limited scope of their use now authorized by interim rule 8.100(a); 2) their expense; 3) the likelihood that county governments will balk at paying for expensive audiovisual equipment that will be installed in a facility owned and operated by the State of Florida.

Under the interim rule as it is now worded, it is possible, if not likely, that circuits will begin to have juveniles appear for detention hearings via audiovisual device by having the juveniles taken into the county jails where the audiovisual equipment is already installed. This is what was done years ago in Brevard County when there was a closed-circuit television system between the county jail and the branch courthouses. Despite the best efforts by jail personnel to keep the juveniles separated from the sight and sound of adult prisoners, the juveniles would encounter adult prisoners who would not hesitate in haranging them - especially the female children. Such a scenario could happen throughout Florida if rule 8.100(a) does not specifically address this undesireable and probably

unanticipated result. As currently worded, interim rule 8.100(a) could result in jail encounters with adults that are not now possible because the juveniles are transported directly from the juvenile detention facility to the courthouses. Although it might be an insult to a child's dignity to have to walk through a courthouse while handcuffed, this indignity could not compare to a frightening and degrading trip into the county jail where encounters and physical contacts with adult inmates could occur. What is even worse is that this transport of juveniles into county jails for the purpose of appearing via television may occur in circuits with modernly-designed courthouses that separate prisoners from the public through separate entrances, hallways, and elevators. The result in these circuits would be juveniles in the juvenile detention centers who previously made safe, segregated, trips to a modern courthouse to appear in-person before a judge would now be taken into a dangerous county jail for the purpose of appearing on a television screen. This is an especially alarming situation when one considers the type of children that may in the future be required by statute to be detained until they appear before a judge at a detention hearing. Personnel from the Department of Juvenile Justice informed undersigned counsel that legislation was introduced in 1999 that would mandate that every juvenile arrested for

committing an act of domestic violence be detained until appearing at a detention hearing. This legislation was not passed but it could very well be passed by the legislature next year. If this ever becomes law, then a thirteen-year-old girl who has never been in any trouble could be arrested for throwing an object (assault) at a sibling or parent or step-parent and then be taken into a county jail to appear on a television screen for a detention hearing. Any version of Fla. R. Juv. P. 8.100(a) that would permit this to occur would only add insult to the injury caused by the statute.

Undersigned counsel's proposed amendment to interim rule 8.100(a) might cause consternation among some judges because it may require them to go to a jail to preside at adult first appearances and juvenile detention hearings rather than conducting all of the hearings through audiovisual device as permitted under interim rule 8.100(a) and Fla. R. Crim. P. 3.130(a). Any inconvenience of this nature, however, would provide the incentive for the judges to see that audiovisual equipment is installed in juvenile detention facilities rather than simply having the juveniles transported to jails for detention hearings. Requiring installation of audiovisual equipment in juvenile detention facilities in order for judges to take advantage of the change made to rule 8.100(a) is consistent with the Court's

concern that Florida's children are not short-changed in the allocation of judicial resources.

Having made this suggestion, undersigned counsel would like to take this opportunity to voice disapproval of any expanded use of appearance by audiovisual equipment in either adult proceedings or juvenile proceedings. It is surprising to undersigned counsel that judges and state attorneys have been in favor of audiovisual appearances. Maybe the judges and state attorneys who see no problem with conducting court via video do not know what they have been missing. For example, I have witnessed televised first appearances where a defendant is mumbling incoherently due to mental illness. Although everyone in the courtroom is aware of the man's condition, the judge and the assistant state attorney are oblivious to it because they are located miles away in a courthouse and the defendant's condition is not seen or heard by them. Either by coincidence or calculation the defendant is able to maintain his composure during the very brief time that he must stand before the podium when he is "on camera". Jail personnel then look at the assistant public defender present in the jail's courtroom in expectation that the man's condition will be brought to the attention of the court.

Video appearances also inevitably result in *ex parte* communications between the state and the court. For

example, I once appeared with a defendant for his first appearance in the Pinellas County jail where first appearances were conducted via video. Not knowing beforehand that the first appearance would be conducted via video, I brought photocopies of statutes and caselaw with me to convince the judge, if need be, that the court has discretion to set bail even though the defendant had been arrested pursuant to a fugitive warrant.[1] When I began to argue, the judge and the assistant state attorney who were together at the courthouse began to discuss the issue. Their discussion, however, was not audible to me because of the placement of the microphones and quality of the audio equipment. Of course I was unable to provide photocopies of the statutes and caselaw. Had I been able to hear the conversation to rebut any argument that was being made and had I been able to physically hand the judge the applicable law, I am quite sure the judge would have ruled differently.

These are only two types of instances where undersigned counsel has experienced problems caused by the use of audiovisual equipment. An article titled, "The Folly of Video Courts" from the Indigent Defense newsletter of the National Legal Aid & Defender Association (NLADA) is

[1] Section 941.16 Fla. Stat. (1997) provides the court "may" set bail in fugitive warrant cases unless the charged offense is punishable be death or life imprisonment. "Words of permission shall in certain cases be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word *may* means the same as *shall*." Mitchell v. Duncan, 7 Fla. 13 at 21 (1857); Woodland v. Lindsey, 586 So.2d 1255 (Fla. 4th DCA 1991).

attached which provides another attorney's observations about video appearances. The article also discusses evolving American Bar Association standards regarding the use of video technology.

Respectfully submitted this
14th day of June, 1999.

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Indigent Defense

Trends, Resources and News for the Indigent Defense Professional

INSIDE

Don't forget

NLADA's 76th Annual Conference

December 9-12
San Antonio, Texas

The Folly of Video Courts

By JULIANA B. HUMPHREY

The practical pitfalls and plain unfairness of two-way video for criminal courts overwhelm any perceived advantage to our system of justice.

San Diego County has had two-way video court since 1981 – seven years before it established the Office of the Public Defender. In the initial four-year pilot project, the San Diego Municipal Court limited its use of video to misdemeanor in-custody arraignments. The cost was approximately $62,000 to equip a video room in the jail and $69,000 to outfit an arraignment courtroom – just to avoid transferring accused misdemeanants from the jail to the courtroom *within the same building.*

In fairness, the main San Diego courthouse has some very serious design flaws which make movement of persons in custody awkward at best and unsafe at worst. There are no alternate passageways, so marshals walk handcuffed groups of defendants down the public corridors like chain gangs, leaving potential jurors agape. Attorneys meet with clients in the few cramped holding cells, or in converted jury rooms – neither offering any privacy for confidential communications.

The perceived benefit of video to the courts, and specifically to court security staff, was that with fewer inmates personally appearing in court, the holding cells and courtrooms would be less crowded and thus safer. Bailiffs could concentrate on accused felons while the "small fry" were handled by sheriffs in the jail video rooms. Because they were only accused of petty offenses, the insult to the right to personal presence was not considered as great as it would be for felony defendants. Attorneys would be in the jail with the defendants to make sure all rights were protected. Finally, if a defendant chose, he could refuse to sign the waiver form and personally appear in court.

But theory and practice in video court are two separate things. In San Diego, misdemeanor arraignment is really the first opportunity to settle the case. Attorneys do not simply review the complaint, counsel defendants on their rights, and enter a not guilty plea. They must review discovery, then evaluate and give advice on the settlement offer by the prosecution. When appropriate, plea forms, probation condition forms, and stay away orders are explained and signed.

All this takes time, but while the defendant and the public defender are out of sight, they are out of mind. As they toil, the sheriffs within the jail want the procedure to speed up so they can get back to "real" duties; the marshals (court bailiffs) want to get on with their calendars; the prosecutor is sitting in the courtroom kibitzing with court personnel who wonder aloud why arraignments have not begun; and the judge paces, waiting to begin. The work of defenders in a remote location becomes invisible and unreal to the other court participants. If there are interpreter issues or mentally ill or special-needs clients, a "simple" morning session may stretch into the afternoon.

So why waive personal appearance? The problem in misdemeanor court is twofold. First, the court, marshals and sheriffs quickly adapted their personnel needs and schedules on the assumption that *every* defendant would participate in the video setup. When a defendant requests personal appearance in court, there is much consternation and a sense that the court has somehow been "put out" by the request – which obviously does not inure to the defendant's benefit at bail setting or sentencing.

More pragmatically, many misdemeanor defendants are released from jail the same day they settle their cases. If they request personal presence in court, release might be delayed until the next day. Court efficiency appears to take precedence over individual justice.

After the four-year pilot period in San Diego, video court was expanded. The North county branch added video court from its jail to courthouse located within the same complex of buildings. In 1992, After a new "city jail" (misdemeanors only) was opened in East Mesa (24 miles from downtown), additional video courts were set up downtown and in the South Bay court in Chula Vista (11 miles from downtown). The cost was approximately 171,000: $63,000 for the jail equipment, 59,000 for the South Bay courtroom, and 49,000 for a super fax machine. Deputy public defenders now had to drive 24 miles to counsel misdemeanor defendants for two courts. Confusion and problems were magnified when the downtown court began alternating hearings between the downtown jail video and the East Mesa jail video – at the same time that the South Bay video court was also demanding defenders' appearance.

The remote location added new problems. Attorneys from downtown staffed the East Mesa jail because most clients were charged in the downtown jurisdiction. However, there was no prosecutor nearby to speak with, or get needed discovery from, because the City Attorney claimed it did not have enough staff to send one attorney (to our three) down to East Mesa. There was a fax machine that ran continuously but was usually two days behind in spitting out needed case documents. Logistically, attorneys would counsel in a trailer near the jail then wait to be escorted through three locked passageways into the video room. Coordinating the right defendants with the right paperwork for the right court that was "ready" to begin was very frustrating. A miscalculation could waste 30 minutes returning with a guard to the trailer to fetch the right clients or paperwork. Downtown attorneys were at a disadvantage handling the South Bay cases because they were unfamiliar with either the prosecutors or judges who were together in the courtroom. Its "courthouse culture" was quite different from downtown, so cases often did not settle.

Upon the recent completion of the new downtown jail, no inmates are housed in the East Mesa facility and all video courts are located downtown. Because there was no efficient way to transport needed paperwork to arraign South Bay defendants, they are taken to appear personally in that court. There is still no video court facility downtown for female inmates.

With court consolidation recently approved by California voters and the courts, the specter of using two-way video for felony matters has reared its ugly head. In fact, a 1994 statute authorizes a defense attorney's presence in the courtroom *away from the defendant*, and allows the acceptance of felony pleas by video. The defendant's permission for this procedure is still required by written waiver, but as with misdemeanors, a systemic expectation of universal waiver would be the likely result.

The logistical problems and patent unfairness inherent in misdemeanor video court will only increase if felony cases are added. Among the pitfalls of video court:

♦ Prosecutors and their witnesses appear live in court for a more compelling and real presentation than the miniature defendant and attorney on the 12-inch monitor. The most pronounced impact is in the setting of bail; our attorneys have observed bail creeping higher in misdemeanor cases. The problem would be even worse in felony cases where the stakes are higher.

♦ The defense attorney and client cannot see or hear anything happening in the courtroom beyond the judge's face at the microphone. The attorney has less information than everyone in the courtroom and no access to the court file for review.

♦ The audio/video technology is not good. There is a sound delay in conjunction with a jittery picture that makes the proceeding appear like a badly dubbed Godzilla movie. The somber and dignified aura of the courtroom is lost for ev-

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Standards for Video Proceedings

Guidance restricting the use of video technology in criminal arraignments and other proceedings has been adopted by NLADA and is in the process of adoption by the American Bar Association.

The NLADA Board of Directors in March 1990 resolved that the Association "strongly opposes the employment of closed circuit television for criminal arraignments because of the adverse impact on the accused's Sixth Amendment right to the effective assistance of counsel."

The Standards Committee of the ABA's Criminal Justice Section is currently in the process of revising its standards regarding the special functions of the trial judge in criminal cases. Proposed new standard 6-1.8 provides that "[t]he trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present."

The draft standard goes on to provide: "When electronic procedures for transmission or recording are allowed and utilized, the venue transmitted or recorded should reflect the decorum of the courtroom, and, when the right to counsel applies, should not result in a situation where only the prosecution or defense counsel is physically present before the judge."

Draft commentary states that "if the defendant and defense attorney are not physically present before the judge, then the prosecution should also appear via video linkup." It adds that "the provisions of this section are not intended to interfere with the advance of technology which may make possible procedures not inconsistent with the spirit of this section." Other commentary is planned to discuss "the possibility of waiver of the requirements of this rule."

In August, these standards had their first reading before the ABA Criminal Justice Council, and no objections were raised to the quoted language. The Standards Committee includes representatives of the National District Attorneys Association, the National Association of Attorneys General, the U.S. Justice Department, NLADA, the National Association of Criminal Defense Lawyers, and various judges. The membership of the Criminal Justice Council is similarly varied. The Council's second reading is scheduled for November 1998, with final adoption by the House of Delegates expected in February 1999.

ford a reasonable wage." Hourly rates in most federal districts are currently set at $45 for out-of-court work and $65 in-court, while the national average for law office overhead expenses is $57 per hour. Although an increase to an across-the-board rate of $75 has been legislatively authorized since 1986, Congress has never provided appropriations to fund it. During those dozen years, inflation has reduced the effective rates of compensation by nearly 35 percent.

NLADA is working with the U.S. Judicial Conference, which is preparing a major push for the additional funding – some $14 million would be required – for the coming fiscal year appropriations cycle.

Federal Death Penalty Cost Study Released

The first study to compare prosecution and defense costs in federal death penalty cases was issued in early October by the U.S. Judicial Conference.

In the average case, defense costs are $218,000, and prosecution costs are $365,000, the report found. The prosecution figure does not include support such as law enforcement assistance or expert witnesses, nor office overhead costs such as are paid by appointed defense counsel out of their CJA compensation.

The $580,000 total cost compares to an average of $56,000 where the Department does not seek the death penalty.

Included in the report, which was commissioned by the Judicial Conference's Defender Services Committee, are 11 recommendations for reducing capital-case costs, ranging from limiting appointments to two attorneys per defendant except in unusual cases, to suggesting that federal defender offices retain a full-time investigator to assist in the penalty phase of capital trials. One recommendation targets the prosecution, urging that the Justice Department speed up its capital review process, which can take as much as a year. The report also lays blame on Congress, for expanding the federal death penalty.

Who Needs Kevorkian?

Whatever state and federal lawmakers decide to do about physician-assisted suicide, the availability of direct government assistance in taking one's own life shows no sign of abating.

A paranoid schizophrenic Georgia man who shot and killed a couple so that the state would help him commit suicide was sentenced to death on October 13. Daniel Colwell, who testified that he had committed the killings because he lacked the resolve to kill himself, smiled as the jury announced the death sentence on October 13, according to the Associated Press. The 1996 killings occurred two days after Colwell was released from a mental health program, and during the sentencing phase, he warned jurors that he might return and kill them if he were not executed.

On the same day, triple murderer Jeremy Sagastegui, who had asked his jury for a death sentence and promised he would kill again, was executed in Washington state. Two days before his execution, Sagastegui asked that all appeals be dropped after the Ninth Circuit Court of Appeals ruled 2-1 that hearings were warranted on evidence presented by his mother to the effect that he was sexually abused as a child and mentally ill. It was only the third execution in Washington since 1976.

Video Courts, from page 2

eryone, particularly the defendant. Defendants are often confused by the bad communication channel and have to rely even more on their attorneys to explain what happened. These effects are magnified for defendants with special needs such as interpreters, mental illness, or borderline IQ.

Logistical issues regarding attorney efficiency are also of concern. A defender with several court appearances may be stuck across the street at the jail waiting to be seen on video rather than checking in with the arraignment court and returning later after appearing on other matters. Defenders may feel pressure to appear in the courtroom, leaving their clients in the jail to appear alone on video (as permitted by statute) for the sake of efficiency. What message does this send to our clients about the fairness of a system where they cannot even physically stand next to their attorney, and where their day in court is reduced to a TV show with bad reception? How can our system decry the inhumanity of our clients' actions when the system itself lacks the humanity to treat those before it with the basic dignity of a face-to-face court appearance?

A powerful lesson of San Diego's experience is the ease with which a narrow, short-term "pilot project" can grow in scope and become established permanently. There is no advantage to any felony defendant to waive physical presence in the courtroom. Video court, and particularly its extension to felony cases, should be resisted by defenders based on common decency and fairness. If two-way video is to be incorporated into the courtroom, it must be done without banishing the very human beings these hearings are supposed to be about ■

State Legislation, from page 11

A November ballot initiative in **Pennsylvania** would allow judges to deny bail to any defendant they deem dangerous, regardless of the crime; current law applies only to capital cases or defendants likely to flee.

To comply with *the Federal Adoption and Safe Families Act of 1997*, **Illinois** facilitated termination of parental rights if a parent has been convicted of aggravated assault with a firearm, aggravated battery or aggravated criminal sexual assault. **Alaska** passed similar legislation.

Alaska also made failure to stop at the direction of a police officer a felony. **Michigan** legislators passed tough penalties for injuring a fetus – up to life for intentionally causing miscarriage or stillbirth. They also criminalized photographing dead bodies. ■