IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 98-64

DEPARTMENT OF JUVENILE JUSTICE,

Appellant,

-vs-

E.R. et al., juveniles,

Appellees.

ANSWER BRIEF OF APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

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INTRODUCTION

The Appellant, the Department of Juvenile Justice, was over objection (R. 74, 77; T. 26, 28-29, 339) made a party to the commitment modification proceedings below. While, for the reasons set forth in their response to the prior prohibition petition filed by the Department in this Court (DCA Case No. 97-2423; see Response therein at 20-24), the juveniles do not agree with the legal correctness of the party ruling, but in the interest of narrowing issues and focusing on the compelling ones withhold any claim in that regard before this Court. The State Attorney or the Attorney General would be (and is) the proper party to appeal.

In this brief, the designation "R." will refer to the main record on appeal filed in this cause, and the designation "T." will refer to the hearing transcript of November 13 through November 20, 1997. Other transcripts will be designated ("TR. ___") by specific date. The designation "JE__" followed by

a page number will refer to the juveniles' exhibits below, which have been identified by the clerk on the record cover sheets as "defense" exhibits.

STATEMENT OF THE CASE AND FACTS

Much of what the Court needs to know about this case is embodied in the following, pre-hearing renewal by the Department of Juvenile Justice[1] (notwithstanding prior prohibition denial of such claim) that the lower courts lack jurisdiction to inquire into restrictiveness level placements by the Department:

> JUDGE LEVINE: You're not arguing that the Department can apply whatever level they want to any program that they have. Are you?
>
> MR. DAKAN [DEPARTMENT COUNSEL]: Yes, I am as a matter of fact, Your Honor.
>
> JUDGE LEVINE: So if you have a program where they now hang you upside down by a gallows for 24-hour period, you can call that a level two, low risk commitment?
>
> MR. DAKAN: Yes, we could.
>
> JUDGE LEVINE: Is that what you're saying?
>
> MR. DAKAN: Yes, Your Honor. Absolutely. . . . [T]his Court does not have the authority to question an executive decision through chapter 39 [now chapter 985].

(Tr. Oct. 1, 1997 at 35.)

Chapter 985, as will be further described in the Argument portion of this brief, sets forth restrictiveness levels for judicial commitments to the Department. The juveniles contend that the restrictiveness levels are distinct and meaningful, and the Department contends that they blur and overlap. The Department operates two facilities, the Pahokee and Polk Youth Development Centers, which are indistinguishable as will be hereinafter described, one (Pahokee) designated at the moderate-risk restrictiveness level and the other (Polk) at the high-risk restrictiveness level. The Department contends that the committing court lacks authority and jurisdiction to conclude that a facility has not

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[1] Hereinafter "Department" or "DJJ."

been properly classified by the Department.

Polk and Pahokee were contracted by the Corrections Privatization Commission to Esmore, the predecessor name of Correctional Services Corporation, ("CSC") to design, build and operate as youthful offender prisons. (JE2; T. 614-15.) At executive branch initiative, i.e., at the Governor's request, the Department reviewed whether it could use the facilities, and, upon requesting additional funding for increased "security" staffing, the facilities were transferred by the Legislature to the Department in November of 1995. (T. 614-15, 713-17.) At the time the Department received the facilities, ground had been broken and preliminary site work done but not construction; the Department saw no need to make physical changes, and, in renegotiating the contracts with the vendor (the programmatic portions of which were simply accomplished by interlineations from youthful offender population to "high-risk" and "moderate-risk" labeling), staff "security and control" levels were substantially increased. (JE2 at 36, 45, 49; JE3; JE4.)

Polk and Pahokee were described by the Department's Assistant Secretary for Programming and Planning, George Hinchliffe, as "remarkably similar . . . indistinguishable(,)" and as having indistinguishable security levels and very similar staffing patterns and budget. (T. 621-22.) (See also JE2 at 62, 105, 107-12, 152-60, 177-88, reflecting virtually identical budgets and numbers and categorization of staff.) They were described by CSC employee Richard Hoffman, who at the time of the hearing was both the Administrator for Polk and the Acting Administrator (after a succession of prior administrators) for Pahokee, as having only "very, very minuscule" differences, with the "same architecture, same construction(,)" and "other than the color scheme, they are exactly the same facility." (T. 971.)

The physical characteristics of Pahokee, which is located in sugar cane fields approximately 100 miles from Dade County, include multiple tiers of razor wire on double fencing around the facility.

as well as razor wire on the external top and internal top parts of the buildings around an enclosed courtyard. (T. 256-59, 381, 628-29, 860, 926-27, 1191-92; JE1 nos. 6, 17, 18, 19, 33, 34, 39, 43 at R. 3-22 and JE12 (R. 1697).) There are also cameras. (T. 860.) Recreational areas are either fenced and razor-wired around, or, completely caged on the sides and top. (T. 265, 267; JE1 nos. 38, 39, 60 (R. 20, 30).) The population of 350 youths, which is the same at both facilities, is divided into "pods" of 48, with two children each in a relatively small room furnished solely with two beds and a one-piece stainless steel sink/toilet unit. (T. 266, 1003; JE1 nos. 58 and 59 (R. 29-30).) Each room is secured by an "institutional" metal grate door, and each is locked down at night. (T. 937, 1046-47.) Youths are moved around the facility under supervision in groups of twelve, and required to walk with their arms behind their backs, with wrists holding on opposite wrist or elbow as if handcuffed. (T. 220-22, 259; JE1 nos. 20, 25, 26, 27 (R. 10, 13, 14).) Pahokee opened in later January of 1997, and first reached full capacity of 350 in early April of that year. (T. 656.) From the time of the facility opening to the time of the November 1997 hearing, there were 700 uses of the confinement rooms, typically with use of handcuffs or leg irons or both, and approximately 300 of which were documented in a restraint log commencing in mid-May and continuing through the time of hearing. (T. 1082, 1157, 1173-74; JE13, R. 1703-17.)

The confinement rooms contain a metal bedframe bolted to the floor, with the mattresses removed from 7:00 a.m. to 9:00 p.m. in order to prevent the children from sleeping or lying down; the juveniles testified to water being thrown on them in the cold rooms to prevent them from sleeping. (T. 78-86, 104-07, 148-49, 159-61, 194, 229-37, 306, 498-06, 1209.) The Acting Facility Administrator, Richard Hoffman, did not monitor the restraint log; he agreed that if shackling, or water being thrown, occurred, it was grossly inappropriate. (T. 952-53, 1028.) The restraint log, documenting multiple daily uses of confinement rooms, including handcuffs, leg irons, or both, speaks for itself. (JE13, R. 1703-

1717.) The juveniles described wrists being handcuffed to each other, ankles being shackled to each other, handcuffs attached to leg irons, with the child being secured to the metal-frame mattressless bed. (T. 83, 159-60, 229-31.) Quality Assurance Director Eric Casas testified that water to the confinement room is turned off from outside the locked room, and the juvenile has to get permission to use the commode. (T. 958-59.)

The decision to classify Polk as a high-risk (level 8) facility and Pahokee as a moderate-risk (level 6) facility was made solely by assistant secretary Hinchliffe, without utilization of any committees or reports. (T. 617; JE14.) The Department seeks to geographically disperse facilities around the state, and Polk, which was expected to come on line somewhat before Pahokee, was in an area of the state in which high-risk facilities were not as prevalent, and level 8 facilities were needed, while Pahokee was located in an area of the state where there already were level 8 facilities and coming on line later (T. 619-20, 634-35.) There are virtually no programming differences between the facilities. (T. 639-42, 848-49.) While the Department sought to differentiate the facilities not by their nature but by their populations or length of stay, no data or statistics had been accumulated or was proffered. (T. 643-44, 659-59, 847.)

Progress through the facility by a child is through a series of (four) levels, which are designed solely by the vendor CSC, who has a direct financial interest in the facility population; if, and to the extent of, population reduction, the reimbursement to the vendor also reduces. (T. 667-71, 692.) The vendor's instructions to its facility administrators are to have full population. (T. 1036-37.) The vendor has primary responsibility for monitoring movement through the levels (this refers, again, to intra-facility standard levels, not the levels of moderate risk or high risk), and unless a problem is flagged or brought to the attention of the Department, the vendor regulates progress levels. (T. 753-54.) If a juvenile has a problem with level progress, and makes a grievance, that grievance is heard by the vendor.

(*Id.*)

All of the children involved in this case were committed by the Circuit Court at the moderate-risk restrictiveness level, and most were 13 or 14 years of age at time of entry to the facility. All but one (A.D.) entered the facility in January of 1997 within a week or two of its opening, and all (but A.D.) at the time of the hearing herein, notwithstanding the loose assertion that "length of stay" for moderate-risk commitments is designed to be shorter (T. 971-73, 1062), were at level 1 or 2 at the time of the November hearing herein. (T. 61, 71, 144, 172, 207-08, 227, 267-68, 496, 498, 519-20, 548, 565-67, 602-03.) A.D., on the other hand, entered the facility in April and progressed with relative speed to the extent that he had been scheduled to be released on the hearing date following the date of his testimony. (T. 566.) The testimony of all the youths was that there was inconsistent application of rules within the facility, arbitrary treatment, aggressive testing by staff, including cursing and physical force, lockdown for periods of a day, a week, or longer, non-responsiveness to grievances, fighting and subgroups, and children being put down, not being built up, by the facility. (T. 64-77, 88-89, 91-92, 93-95, 98, 104, 116, 146-58, 165-67, 171, 192-93, 209, 218-28, 240-46, 250, 259, 263-65, 497-513, 535-39, 549-50, 577-78, 588, 596-600.)

Visitation is fairly strictly limited by the vendor, is held in a small room used for multiple visitations such that a couple of dozen people are present, or, alternatively, visitation at the decision of the staff is held on a no-contact basis, separated by the built-in no-contact area, consisting of phones separated by glass. (T. 105-13, 179-80, 263, 312-19, 1089-90; JE45 (R. 23).)

There was no community involvement or contact permitted to the juveniles, and no home visits allowed. (T. 819-20, 992.) The clinical director is unaware of attempted suicides, nor are parents notified. (T. 320-21, 1105, 1132-33, 1164-65.) Staff taunted D.D., who slashed his writs repeatedly, to commit suicide. (T. 150, 163-64, 168.)

Paul DeMuro, had been an Assistant Commissioner of the Massachusetts Department of Youth Services, Commissioner of Children and Youth in Pennsylvania, a consultant to the United States Justice Department with respect to several Georgia prison facilities, and a federal court monitor in Florida for the Bobby M. litigation and settlement, testified as an expert witness for the juveniles. (T. 339-42, 394, 428; JE11 (R. 1691-96.) The Department stipulated to his expertise. (T. 341.) Mr. DeMuro visited both Polk and Pahokee, and concluded of Pahokee:

> [I]t's a prison-like facility. There's a negative sub-culture, it permeates the living units, where kids from various cities, whether it is gang-affiliated or turf-affiliated, often fight with one another.
>
> There's a pecking order, a sub-culture pecking order that is clear, where larger and stronger kids can take advantage of weaker kids.
>
> There are often fights. There is [in]appropriate treatment. There are a number of kids who have serious problems with their family or with drugs, who don't get treatment.
>
> There are kids on psychotropics, who aren't monitored carefully.
>
> There are other kids who had been on psychotropics, who aren't getting psychotropics.
>
> There's a behavior management system, which is inconsistently applied across the units, so that some kids can spend ten or eleven months on Level One. This is particular true for younger kids who have a poor impulse control or a tension deficient disorder.
>
> So that you often have first-time offenders, who have first-time commitments, who have either low IQ's or are hyperactive, have difficulty making their levels, so the behavior management doesn't really connect individual treatment.
>
> There is inconsistent use of force and take-downs. Staff often curse at kids, abuse kids —
>
> Staff often curse at youngsters, talk about their family situations.

> There is an inappropriate use of force by banging kids against the wall and taking them down.
>
> There is an inappropriate use of isolation, where youngsters [are] placed in the isolation for long periods of time without due process hearings.
>
> And there is an inappropriate use of restraints, where kids' hands and feet are affixed together. The very rough term of art is called "hog-tying" and that goes on.
>
> And really one other thing I mentioned there is a shackling of kids to beds in the isolation unit.
>
> When kids are in the discipline unit during the day, they are not given mattresses. If they fall asleep or sing, water is thrown on them.
>
> So, I can go on, but essentially this is a prison-like environment. Built as a prison and in some ways, conducted as a prison.

[T. 343-45.]

Mr. DeMuro found nothing to distinguish this facility from a prison, and described a prison as a "[l]arge secure facility, with varying levels of isolation and segregation, group punishment, punitive interactions between staff and inmates, inappropriate or no treatment[, and] [b]ad time equals more time." (T. 353.) He found punishment imposed for age-typical behavior and "a sub-culture of violence, turf violence between kids and staff and kid violence, which permeates the entire facility." (T. 355, 358.) If as a matter of statutory construction treatment considerations prevail over security at the moderate-risk restrictiveness level, Mr. DeMuro found Pahokee to be an entirely inappropriate facility. (T. 356-58.) He further dispelled the Department's proffered cost rationale relating to cost per day, by identifying that extended stays caused by escalation of violence and lack of appropriate treatment raised the cost. (T. 437, 453-54.)

Forty-three percent of the population of Pahokee was identified by CSC-employed Assistant

Principal Skinner at the on-site school as ESE (exceptional education students), commonly understood as learning disabled, but there is no protocol for interchange or sharing of that information between the school and the facility. (T. 1147-48, 1155, 1233-34, 1260-61.) Additionally, there were approximately 25 to 30 juveniles at the facility who were identified as having mental illness or mental health problems. (T. 1219.)

The trial court, Circuit Judge Steven D. Robinson, after a five-day-long hearing at which the Department was permitted to produce all the witnesses it wished, in a considered order found Pahokee not a moderate-risk facility and ordered the Appellees removed.

SUMMARY OF ARGUMENT

The Department maintains that Pahokee Youth Development Center is a "moderate-risk" facility. The overwhelming evidence adduced below established that it is, to the contrary, prison-like and at least a "high-risk" facility or above. Pahokee was built as a prison, maintains the architecture and security features of a prison, the children are locked in barren (bed and commode/sink only furnishings) rooms each night, and the incomprehensibly high utilization of confinement rooms and shackling (700 instances in the ten months the facility had been open until the time of hearing below) compels the conclusion that it is an oppressive punitive, and not a treatment driven, atmosphere and operation. The agency has failed to present a construction of the statute authorized by that statute, and has instead done essentially what it wishes with its facilities and with statutory misconstruction.

The trial court, in finding that Pahokee is not a statutorily-qualified moderate-risk facility, properly checked the agency's excess and abuse of assumed authority. The trial court's jurisdiction to entertain the modification motion was already established as the law of the case by this Court's denial of the Department's prior petition for writ of prohibition, and the evidence compellingly supports the trial court's ruling.

ARGUMENT

I.

EFFECT OF PRIOR PROHIBITION DENIAL IN DCA CASE NO. 97-2423 UPON THIS CASE; THE DEPARTMENT'S JURISDICTIONAL ARGUMENT HAS ALREADY BEEN ADJUDICATED ADVERSELY TO IT.

Pleading through different counsel, while correctly acknowledging that its prior petition for writ of prohibition "challenged the subject matter jurisdiction of the lower court to address the appellees' modification motions[,]" the Department now characterizes its argument therein as "somewhat speculativ[e;]" on the basis of this presumed speculativeness it imputes no effect to this Court's denial of the petition "without explanation in a September 17 unpublished order." (Brief of Appellant at 6.) This is, to say the least, a cavalier, and in any event legally inadequate, treatment of the effect of prohibition denial. As it acknowledges, the Department in that prohibition petition specifically argued the lack of jurisdiction of the trial court to address or grant the relief sought in the juveniles' motion to modify (Petition for Writ of Prohibition at 15-19), and after hearing oral argument on the matter on September 17, 1997, on the same day this Court "ordered that said petition is hereby denied." (DCA Case No. 97-2423; order of September 17, 1997.)

Apart from being presumptuous and unseemly in characterizing this Court's view of its position therein as "speculative," the Department ignores or is unaware of the applicable law. In *Obanion v. State*, 496 So. 2d 977 (Fla. 3d DCA 1986), *review denied*, 504 So. 2d 768 (Fla. 1987), this Court specifically addressed the effect of a denial of prohibition which, such as the instant one, is unqualified (such as by a statement of denial without prejudice) by language of limitation:

> In this court, an order denying a petition for a writ of prohibition, as here, has traditionally covered a variety of grounds, including: (1) a technically defective petition, (2) insufficient supporting record, (3) undue delay by the petitioner in filing the petition on the eve of trial, and (4) and otherwise non-meritorious claim

> presented by the petition. This being so, it follows that past denials of a petition for a writ of prohibition by this court do not necessarily constitute a ruling on the merits of the petition, as the denial could have rested on procedural or other non-merit grounds. We acknowledge, however, a certain looseness in our past practices and, accordingly, *we serve notice to the bench and bar that in the future a denial of a petition for a writ of prohibition will, in fact, be a ruling on the merits, unless otherwise indicated.*

Id. at 980 (emphasis added).

After, based on the previous practice, noting that denial of Obanion's own previous petition could have rested on a basis other than the merits, this Court proceeded to adjudicate the merits of his claim and to grant relief, reiterating: "We again caution, however, that in the future such a denial, unless otherwise indicated, will constitute an adjudication on the merits." *Id.*

Obanion has been uniformly applied by this Court to bar relitigation of issues raised in a prior summarily denied prohibition. *Nordqvist v. Nordqvist*, 586 So. 2d 1282 (Fla. 3d DCA 1991) (appellate affirmance on basis of denial of prior prohibition which challenged trial court's jurisdiction to entertain motion for attorney's fees); *Freeman v. State*, 554 So. 2d 621 (Fla. 3d DCA 1989) (affirmance based on denial of prior prohibition which asserted statute's unconstitutionality), *review denied*, 562 So. 2d 345 (Fla. 1990); *Reyes v. State*, 554 So. 2d 625 (Fla. 3d DCA 1989) (affirmance on basis of denial of prior prohibition asserting lapse of statute of limitations), *review denied*, 562 So. 2d 346 (Fla. 1990). *See also Peterson v. Federal Deposit Ins. Corp.*, 678 So. 2d 843 (Fla. 3d DCA 1996); *Lozelle v. Torres*, 672 So. 2d 108 (Fla. 3d DCA 1996) (summary affirmances citing *Obanion*).

As stated in *Reyes*:

> Because the identical issue was the subject of an earlier petition for writ of prohibition which this court denied, the denial is deemed to be a ruling on the merits. . . . Even if *Obanion* were not controlling, the briefing of the petition for writ of prohibition was directed to the merits and not to any procedural deficiency. Under either analysis, we conclude that an earlier panel of this

> court has passed on the merits of defendant's statute of limitations defense, . . . and the issue may not now be revisited.

554 So. 2d at 625 (citations omitted.)

It should be parenthetically noted that, while the Florida Supreme Court has not itself elected to adopt the *Obanion* rule, it has expressly approved its utilization by this Court. *Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995).

Therefore, the obvious legal fact that the trial court possessed jurisdiction in this case to inquire into the question of the Department's compliance with statutorily defined, court-ordered restrictiveness level commitments by vehicle of motion to modify has already been properly adjudicated and constitutes the law of the case. That, in light of the evidence adduced below, constitutes a conclusive basis for affirmance.

II.

IN A DELINQUENCY CASE, UNLIKE IN A CRIMINAL CASE, THE TRIAL COURT HAS CONTINUING POST-COMMITMENT JURISDICTION.

Even if the foregoing were not, as it is, so, it cannot be concluded that the trial court was acting in any manner other than consistent with its statutory and inherent jurisdiction.

The circuit courts have "original jurisdiction not vested in the county courts . . . and all writs necessary or proper to the complete exercise of their jurisdiction." Art. V, § 5, Fla. Const. The circuit court is statutorily vested with "exclusive original jurisdiction of proceedings in which a child is alleged to have committed a delinquent act or violation of law." § 985.201(1), Fla. Stat. (1997). It is further, as a general grant, vested with jurisdiction "in all cases in equity including all cases relating to juveniles except traffic offenses[.]" § 26.012, Fla. Stat. Additionally, as this court has recently noted: "Historically, the courts have possessed inherent and statutory authority to protect children. The circuit court inherited the common law jurisdiction of the courts of chancery in which minors were wards of the court and the courts had inherent power to protect them." *Simms v. State, Department of Health & Rehabilitative Services*, 641 So. 2d 957, 961 (Fla. 3d DCA 1994). *See also In the Interest of J.M.*, 499 So. 2d 929, 931 (Fla. 1st DCA 1986) ("[A] circuit court has inherent and continuing jurisdiction to entertain matters pertaining to child custody and to enter any order appropriate to a child's welfare.")[2]

For the juveniles herein, the circuit court entered commitments at the moderate risk restrictiveness level. (See Argument III, below.) Unlike criminal cases where, (with few exceptions,

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[2] While these observations have been made in the context of dependency cases, nothing, particularly in light of the chapter's intent (§§ 985.01, 985.02), would restrain their application in delinquency cases, save for the additional due process protections which inhere in such cases on a child's behalf. *See, e.g., In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967). That aspect of limitation on inherent authority is not, of course, one which avails DJJ at all herein.

such as Fla. R. Crim. P. 3.800), the circuit court *loses jurisdiction* upon the defendant being sentenced and committed to the Department of Corrections, in delinquency cases (part II of Chapter 985) the court *expressly retains jurisdiction* until the child reaches the age of 19, § 985.201(4)(a), and longer (until age 21) for serious or habitual juvenile offenders as well as for certain younger children. §§ 985.201(4)(b), 985.31, 985.313.

This jurisdiction continues "unless relinquished by [the court's] order[.]" § 985.201(4)(a). In each of the cases herein, upon entering commitments, the court retained jurisdiction, and has not relinquished it. DJJ cannot alter a restrictiveness level commitment, to either a higher or lower level, without the court's agreement:

> (4) The department may transfer a child, when necessary to appropriately administer the child's commitment, from one facility or program to another facility or program operated, contracted, subcontracted, or designated by the department. The department shall notify the court that committed the child to the department, in writing, of its transfer of the child from a commitment facility or program to another facility or program of a higher or lower restrictiveness level. The court that committed the child may agree to the transfer or may set a hearing to review the transfer. If the court does not respond within 10 days after receipt of the notice, the transfer of the child shall be deemed granted.

§ 985.404(4), Fla. Stat.

Although in *J.E. v. State*, 676 So. 2d 39 (Fla. 3d DCA 1996), a panel of this court, in holding that under the statutory restrictiveness level scheme double jeopardy protections did not preclude modification by *the court* to a higher level, stated in dictum that the section "affords [DJJ] enormous discretion to transfer a committed juvenile to a program or facility of a higher or lower restrictiveness level[,]" that is not in fact the case under the statute. The statute reserves review, i.e., veto power, to the court. No provision for restoration of a department imposed restrictiveness level is provided if, upon review, a court decides that a transfer should not be permitted.

This is consistent with the court's further full authority, notwithstanding that the initial commitment must be for an indeterminate period of time (§ 985.231(1)(d)), to prevent the Department from discharging a juvenile from a commitment, institution or program, or even from temporarily releasing the juvenile for more than three days. *Id.*

In *J.M. v. State*, 677 So. 2d 890 (Fla. 3d DCA 1996), which dealt with the scope of a child's right to appeal a disposition, the dissent thoughtfully observed that: "The weighing of the various dispositional factors . . . is a matter addressed to the discretion of the trial court. The entire system is geared toward having the trial judge make a reasoned decision based on the totality of the circumstances." (Judge Cope, dissenting, *id.* at 903.)[3]

Finally, in complete effectuation of its continuing statutory authority over commitments, § 985.231(1)(c) provides that "Any order made pursuant to paragraph (a)[4] may thereafter be modified or set aside by the court." This provision operates without limitation of the sixty-day mitigation provision of paragraph (1)(h), i.e., is not time bounded. *T.R. v. State*, 677 So. 2d 670 (Fla. 1996). As stated therein, "Section 39.054(1) [now § 985.231(1)] empowers the trial court to determine an appropriate sanction and rehabilitative program for the adjudicated delinquent child. Moreover, subdivision (3) [now paragraph (1)(c)] allows the trial court to modify or set aside such an order without

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[3] A preceding statement, however, that "the Department determines the exact period of incarceration, and determines when the juvenile will be furloughed back into the community[,]" *id.* at 902, is out of context; furlough under the chapter is not used in the colloquial sense. Furlough signifies a type of delinquency program [former § 39.01(19)(a), now § 985.03(15)(a)] and the transfer of a child to it by the Department is subject to review, i.e., to permission, by the trial court, [former § 39.021(4), now § 985.404(4)]. Probably due to the somewhat scattered nature of organization of [former] chapter 39 [part II], the dissent did not note the latter provision, the terms of which fully underscore its conclusion that the system is based upon the trial judge's reasoned decisionmaking.

[4] Which includes commitments to the Department. § 985.231(1)(a)(3).

reference to any time limit." *Id.* at 271. Subsection (3) is obviously entrusted to the sound discretion of the trial court; no statutory limitations are placed thereon.

Therefore, the Department's position is necessarily relegated to the proposition that a trial court may not, within its proper jurisdiction, find that a judicial commitment order is not being complied with and order removal of the child because the facility grossly fails to comply with the ordered restrictiveness level. While the respondents do not dispute that, within a given restrictiveness level, the court cannot determine *into* which program or facility the Department places a child, *see, e.g., T.W. v. State*, 338 So. 2d 549 (Fla. 2d DCA 1976), that principle centrally presupposes that the Department possesses authority, and only such authority, to place the child in a facility has been properly classified within the statutory contemplation. Furthermore, DJJ may not alter a trial court's restrictiveness level, either higher or lower, except by notice to the court, and subject to the court's review power. § 985.404(4). DJJ gave no such notice herein; it merely contends that Pahokee, an elephant among gazelles, classifies as a moderate-risk restrictiveness facility. That assertion is a gross abuse, constituting contempt both for the legislative classification and the commitment powers of the court.[5] The Department's construction of the statute and the nature of Pahokee are fully addressed in Arguments IV and V, below.

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[5] That it is the Department which is in fact defying the court's restrictiveness level commitments, rather than the courts interfering with the Department's placement, is apparent both from the nature of the facility in which the Department has placed the juveniles and its great effort to characterize, inaccurately, these juveniles as predominantly a risk to the public. See, e.g., T. 407.

Not only do all these cases comprise initial, not repeat, commitments to the Department, but the Department overlooks the underlying statutory recognition that post-adjudication, juveniles suitable for moderate risk placement may, unlike juveniles committed in high or maximum risk levels, while awaiting actual placement post-commitment, be ordered by the court in monitored home detention rather than in a detention facility or in a juvenile assignment center. § 985.215(10)(a)(1),(2).

III.

THE STATUTORY SCHEME DEFINES COMMITMENT RESTRICTIVENESS LEVELS IN DISCRETE AND DISTINCT CUSTODIAL LEVELS AND THE ENTIRE COMMITMENT SCHEME IS PREDICATED UPON THE COURT, NOT THE DEPARTMENT, CHOOSING THE LEVELS.

The delinquency commitment scheme provides for five tiers of commitment, from non-residential placement ("minimum-risk") to "maximum-risk residential placement." The statute specifically prescribes that restrictiveness level "means the level of custody" (§ 985.03(45), Florida Statutes (1997)),[6] and as pertinent herein the following two levels are included:

> (c) Moderate-risk residential.--Youth assessed and classified for placement in programs in this restrictiveness level represent a moderate risk to public safety. Programs are designed for children who require close supervision but do not need placement in facilities that are physically secure. Programs in the moderate-risk residential restrictiveness level provide 24-hour awake supervision, custody, care, and treatment. Upon specific appropriation, a facility at this restrictiveness level may have a security fence around the perimeter of the grounds of the facility and may be hardware-secure or staff-secure. The staff at a facility at this restrictiveness level may seclude a child who is a physical threat to himself or others. Mechanical restraint may also be used when necessary. Programs or program models in this restrictiveness level include: halfway houses, START Centers, the Dade Intensive Control Program, licensed substance abuse residential programs, and moderate-term wilderness programs designed for committed delinquent youth that are operated or contracted by the Department of Juvenile Justice. Section 944.401 applies to children in moderate-risk residential programs.

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[6] While this litigation was in progress, the provisions of Chapter 985, to which the former delinquency provisions in Chapter 39 had been transferred (technically, repealed and reenacted), became effective. Insofar as pertinent to this litigation, as was acknowledged below (TR. Oct. 1, 1997 at 20), for the specific statutory provisions bearing upon or impacting this case, there was no material change to those sections as previously contained within Chapter 39 and now contained within Chapter 985.

> (d) High-risk residential.--Youth assessed and classified for this level of placement require close supervision in a structured residential setting that provides 24-hour-per-day secure custody, care and supervision. Placement in programs in this level is prompted by a concern for public safety that outweighs placement in programs at lower restrictiveness levels. Programs or program models in this level are staff or physically secure residential commitment facilities and include: training schools, intensive halfway houses, residential sex offender programs, long-term wilderness programs designed exclusively for committed delinquent youth, boot camps, secure halfway house programs, and the Broward Control Treatment Center. Section 944.401 applies to children placed in programs in this restrictiveness level.

§ 985.03(45)(c), (d).

The terms "level 6" and "level 8," which did not appear in the statute, are artifacts of prior administrative terminology[7] but remain in practical use as interchangeable for, and synonymous with, "moderate-risk" and "high-risk," respectively, restrictiveness level facilities.

The means by which a decision for commitment at a particular restrictiveness level is reached is quite carefully and thoughtfully statutorily delineated. After a court finds that a juvenile has committed a violation of law, it must then first address the question of disposition. "Disposition hearing" is statutorily defined as a hearing in which *"the court* determines the *most appropriate dispositional services* in the *least restrictive* available setting provided for under § 985.231[.]" § 985.03(21) (emphasis added). As a threshold matter, the court must determine the "suitability or unsuitability for adjudication and commitment of the child to the department." § 985.23(2). This is a fairly complex evaluative process, involving a number of prescribed criteria. *Id.* As an example of the limited role of DJJ, while the statute calls for preparation of a pre-disposition report by DJJ for the court

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[7] In *B.H. v. State*, 645 So. 2d 987 (Fla. 1994), administrative, rather than statutory, designation of levels was held unconstitutional insofar as application of the escape statute was concerned, and it was in part out of that holding on vagueness and unlawful delegation grounds that the present scheme, which statutorily defines the restrictiveness levels, emerged.

to utilize in this threshold determination, §§ 985.229(1), 985.23(2), a court's failure to obtain or utilize a PDR does not, for purposes of a complaint by the state as distinct from a juvenile, render a disposition illegal so as to authorize an appeal. *State v. F.P.*, 630 So. 2d 581 (Fla. 3d DCA 1993), *approved*, 638 So. 2d 515 (Fla. 1994); *State v. T.G.*, 630 So. 2d 585 (Fla. 3d DCA 1993).

If the court determines that adjudication and commitment to the Department are appropriate (§ 985.23(3)(a)), it then obtains from DJJ a recommendation of the "most appropriate placement and treatment plan, specifically identifying the restrictiveness level most appropriate for the child." § 985.23(3)(b). This recommendation is just that, a means of informing the court, and not binding upon it. The court may commit at the recommended restrictiveness or at a different one; if it commits to a different level, then appeal is authorized. § 985.23(3)(c). Restrictiveness level is, of course, referenced as those levels are defined in § 985.03(45). § 985.231(1)(a)(3).

As should be obvious from the foregoing, it is for the trial court, not the Department, to make the reasoned decision of which commitment level is appropriate, and, as both a direct construction matter of the restrictiveness level definitions themselves, and the reflective process that goes into a commitment level decision and fact of appealability of a recommendation-variant restrictiveness level commitment, there must be a meaningful and ascertainable difference between levels. Put simply, those facilities which fall within the moderate risk restrictiveness level category must be differentiatable from those which fall within the "high-risk" level, or the entire statutory premise that "there shall be five restrictiveness levels" (§ 985.03(45), with considered judicial determination of placement within such levels and appealability of recommended level-variant commitments, becomes a meaningless and futile exercise.

As will be discussed within the next two arguments, the Department construes the statute as not establishing differentiable restrictiveness levels but rather, in particular as to moderate-risk and high-

risk (level 6 and level 8), giving the Department the authority to do whatever it wishes, including operating a pair of indistinguishable facilities, one at the higher level, and one at the lower level. For the reasons which will follow, the trial court was entirely correct and justified in rejecting that construction and the designation of Pahokee as a statutorily-qualified "moderate-risk" facility.

IV.

THE DEPARTMENT'S "CONSTRUCTION" MANGLES THE STATUTE AND IS UNAUTHORIZED.

The Department, acknowledging that it fact construes the statute to have "significant overlap in the restrictiveness levels, particularly in the descriptions of moderate and high risks(,)" (Brief of Appellant at 40), then proceeds to try to justify this construction on some ostensible objective statutory basis. (*Id.* at 40-47.) This "construction" not only demonstrate the pinnacle of agency hubris, but the single matter urged of "critical importance" in differentiating levels, "length of stay" (Brief of Appellant at 43), finds no support whatsoever either in the facts of this case or, more fundamentally, as will be momentarily demonstrated, in the statute itself.

Through what purports to be a "nuts and bolts" inspection of the definitional provisions, the Department reasons that because there could be *some* physical similarities in moderate-risk and high-risk facilities (i.e., fence, locks, or whether a staff member stays awake, see T. 1325-30, 1336, 1344, 1347; Brief of Appellant at 41-43), that in essence the agency can operate a given facility at either level as it pleases. As pointed out in the response to the Department's earlier petition for writ of prohibition, if enough is done semantically to a horse it becomes a bird. The fundamental principle of deference to agency discretion presumes agency expertise and a soundness of judgment. The agency has demonstrated none of that herein. It has selectively extracted only some language of particular definitional provisions, without dealing with the overall definitional provisions themselves, or the legislative command that there "shall be five restrictiveness levels," or that there are direct appealability implications of recommendation-variant restrictiveness commitments. Again, it is absurd for a statute to be structured around such carefully-articulated concerns if the difference between definitions means nothing. This is true even a priori the Department's utter reading out of the statute the basic legislative intent of "the most appropriate dispositional services in the least restrictive available setting"

(§ 985.03(21); the legislative expression of primary intent "[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state's care[;]" the directive to site facilities "in areas of the state close to the home communities of the children they house in order to ensure the most effective rehabilitation efforts and the most intensive post-release supervision and case management(,) § 985.02(6)(c), and avoidance of "the inappropriate use of correctional programs and large institutions." § 985.02(6)(d).

A responsible agency construction of the statute, one which, unlike the instant one, would deserve deference, would seek to establish an objectively-based distinction between the custodial levels such that both the agency internally and the courts and committed children could identify and ascertain the difference. The agency has not sought to do this at all. It has simply sought to opportunize, on the basis of isolated identification of self-selected language, to do that which it wishes in whatever way it wishes with facilities. The distinction which can and must be drawn between moderate-risk and high-risk residential facilities is that, while security indeed can be in place in a moderate-risk facility, it does not prevail over treatment and rehabilitation interests, whereas at the high-risk level security concerns must prevail. It is impossible by any interpretation of any imaginable evidence, and certainly by no interpretation of the evidence adduced in this case, to construe Pahokee as anything other than at least a level 8, that is, a high-risk facility.

Having forsaken any principled interpretation of difference between moderate-risk and high-risk facilities in terms of their physical or programmatic features although nevertheless recognizing that the distinction between programs is one of custody, the Department then proceeds to justify distinctions between the categories of facility on the most unlikely of grounds, that of "length of stay." (Brief of Appellant at 43.) The ultimate irony here is that length of stay is not at all part of either of the definition

of moderate-risk or high-risk residential facilities; length of stay only comes in as a statutory matter within the "maximum-risk residential" definition, which refers to "long-term[.]" § 985.03(45)(e). Further, and apart from the irony that there was no evidentiary basis to distinguish length of stay in this case between such facilities as Polk and Pahokee, and indeed the children herein had been in Pahokee from the time the facility opened in January of 1997 until the November 1997 hearing, length of stay itself is not something peculiar within the agency's authority. To the contrary, the trial court maintains an overriding power in this regard, by virtue of its distinctly enumerated powers to modify or set aside any order of commitment, § 985.231(1)(c); to review any agency decision to transfer a child from a facility program in one restrictiveness level to that in another level, § 985.404(4); and indeed to prevent the discharge by the Department of a child from a commitment or a program. § 985.231(1)(d). The Department's distinction by "length of stay" lacks evidential support and more fundamentally has no statutory support between moderate-risk and high-risk categories.

The mere fact of transfer and appropriation of the facility, which the Legislature did not classify (T. 605) operates neither as a factual justification for categorization by the Department this facility as "moderate-risk," nor as legal justification. "It is clear . . . that the Appropriations Act cannot be used as authority for the establishment and licensing of new programs and facilities not otherwise authorized by substantive law. *HRS v. The Florida Psychiatric Society*, 382 So. 2d 1280, 1283 (Fla. 1st DCA 1980) and cases cited therein.

Nor has the Department on appeal adequately informed this Court of its rationale in statutory construction and designation of facilities. The Department reasons that "[s]ince the placement at a restrictiveness level is the responsibility of the court and lacking statutory guidance, the courts must make subjective decisions[.]" (JE14 at R. 1722; T. 619.) Mr. Hinchliffe further testified that the courts operate subjectively in an ambiguous legislative framework; that the legislative process is not a

"continuous stream of consciousness(,)" and that the courts did not possess expertise in the commitment area. (T. 698-700, 1338-39, 1718-23.)

In addition to so 'correcting' for such subjectivity, the Department also seeks to adjust for geographic variations in views of commitments statewide, i.e., the judges in one part of the state may consider a given offense or child/offense profile as a level 8 (high-risk) commitment basis whereas in other areas the same profile is seen as the basis for a level 6 (moderate-risk) commitment. The Appellees will not respond to the pejorative view of judicial subjectivity manifested. However, to the extent that statewide variation may be a legitimate area of agency concern, it need only be pointed out that it is the agency in the first instance which controls its recommendations on a regional, and collectively, a statewide basis. Given that if a judge rejects a restrictiveness level recommendation and commits to another level that is an appealable event, it is clear that the statutorily proper way for the agency to obtain some degree of uniformity in this regard would be to have some statewide criteria or compilation process for its recommendations. Having declined or failed to do that (T. 1389-90), the agency is not permitted to seek to rectify it at the "back-end" by a process of statutory construction which nullifies both the definitionally distinct restrictiveness levels and the considered judicial commitments with respect thereto.

Nor, in a definitional scheme which talks to nature of facility (custodial level) and not to housed population as such, may the agency assert a population difference to differentiate a Polk from a Pahokee. Not only does this, too, lack evidentiary support, but, as the trial court properly observed, this "makes the dispositional process a meaningless gesture and begs the issue because a definition of the level cannot include the assignment decision of the court." (Order Modifying Commitment at R. 117.)

Succinctly put, the agency's construction of the statute is flatly incorrect and entitled to no

deference whatsoever. The statute contemplates and requires that there be an identifiable and ascertainable scope of moderate-risk facilities objectively distinct from high-risk facilities.

V.

PAHOKEE MASQUERADES AS A "MODERATE RISK" FACILITY.

It should be apparent from the abundance of evidence produced in this case that it is essentially impossible to justify Pahokee as a moderate-risk statutorily qualified facility. In addition to its architectural, security and programmatic identicality to Polk, it maintains an atmosphere of control, extensive use of punishment and confinement, inadequate efforts to systematically identify and therapeutically respond to the nearly half of the population that is learning disabled, let alone properly address the 25 to 30 children with psychiatric or mental health problems.

In this light, and particularly in light of the refusal of the Department to recognize any judicial authority in the area at all, its claim of procedural disadvantage because it could not depose the children turns a blind eye to how it conducted this case. It is, moreover, immaterial even if correct (which it is not) because most of the evidence in the case came from either documents or photographs which were stipulated into admission save for the Department's reservation of its jurisdictional argument (see, e.g., T. 84-85, 135-40, 141, 336-38, 564-65), and because even apart from the children's testimony, as to which the Department had substantial cross-examination (approximately 115 pages, T. 116-32, 187-98, 206, 268-305, 519-47, 555-64, 591-603), the compelling balance of evidence fully supports the trial court's conclusion. The testimony of the physical, security, and programming identicality came from the Department's own witnesses. Extensive use of the confinement rooms, quite apart from the juveniles' testimony, was established by Ms. Pelcyger, who sat on 700 confinement review hearings, and by the restraint logs themselves, which bear serial numbers for each of several handcuffs and leg irons, with each of approximately 300 entries from mid-May to the time of the hearing in November showing documented use of handcuffs, or leg irons, or both for almost all confinements.

Further, James Irving, CSC Vice-President, specifically testified Pahokee is a "training

school[.]" (T. 815, 842-45.) "Training schools," however, are found only in the high-risk statutory enumeration of residential commitment facilities, and not in the moderate-risk description. § 985.03(45)(c),(d).

Finally, the Department's ostensible implementation of new "admission" criteria on July 23, 1997 (see T. 913-14), is utterly ineffective and inadequate to rebut the extensive evidence as to the nature of this facility. In the first instance, the criteria do nothing to alter the facility itself. In the second instance, the criteria basically, and improperly, assert a recharacterization of the commitment level, dealing, as they do, with severity of offense, recommitment, or prior escape. (T. 914.) Third, the Department acknowledged that as to the children herein, they did not fit the criteria but were still in the facility some four months after presumed adoption (T. 51-52), which was clearly intended to forestall judicial inquiry.

Fourth, the so-called criteria are merely theoretical, and can be bypassed. (T. 721-22.) No statistics are kept, the vendor has no responsibility for application of the criteria, and there is no information whether the Department actually complies in its commitment process -- there is no profile of incoming children maintained. (T. 721-22, 1035-36.) In short, the so-called admission criteria are legally unsupportable and functionally a sham.

"It is a generally accepted principle of administrative law that an agency, being a creature of statute, has only those powers given to it by the Legislature[.]" *Division of Family Services v. State*, 319 So. 2d 72, 76 (Fla. 1st DCA 1975). The Department's categorization of this facility as "moderate-risk" is utterly unauthorized by statute and unsustainable. The trial court ruled properly.

CONCLUSION

Based on the foregoing arguments and supporting authorities, this cause should be affirmed as having already been, by the prior prohibition denial, properly adjudicated adversely to the Department and in favor of the trial court's jurisdiction. Alternatively, the Department's construction of the statute is unauthorized and unsustainable, and its designation and operation of the Pahokee Youth Development Facility as a "moderate-risk" facility under that misconstruction of the statute is similarly unsustainable. The trial court's ruling should be affirmed on the merits as a proper and responsible exercise of its jurisdiction and authority and as fully supported by the evidence.

Respectfully submitted,

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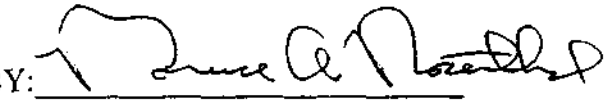
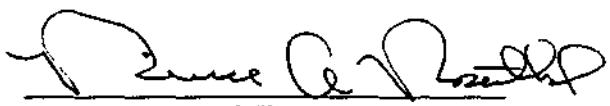
BY: 
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to John Milla, Assistant General Counsel, Department of Juvenile Justice, 2737 Centerview Drive, Suite #312, Tallahassee, Florida 32399-3100, and hand-delivered to Michael J. Neimand, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on July 27, 1998.



BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 98-64

DEPARTMENT OF JUVENILE JUSTICE,

Appellant,

-vs-

E.R., et al., juveniles,

Appellees.

_____/

APPENDIX TO ANSWER BRIEF OF APPELLEES

In the Interest of E.R., et al., 5 Fla. L. Weekly Supp. 303 (Fla. 11th Cir. Ct. 1997)

ever, the above condition precedent does not contain a null and void clause. The entire marital settlement agreement does not contain any language that requires upon the failure of the condition, the agreement would become null and void. Therefore, the Court finds that the marital settlement agreement is not null and void or voidable but valid and enforceable.

For the foregoing reasons, it is hereby ORDERED and ADJUDGED

A. The Petitioner's motion is granted because she is entitled to an award of the pension fund and attorney fee amounts sought.

B. The Petitioner's Motion for contempt is denied.

C. The Petitioner's Motion for Attorney fees and costs for the filing of this motion is granted.

D. All prior orders not inconsistent herewith are reaffirmed.

E. The parties are directed to comply with the settlement agreement forthwith.

* * *

Attorney's fees—Offer of judgment—Insurance—Motion to strike insurer's offer of judgment granted—Section 768.79 is in direct conflict with section 672.428, which offers attorney's fees only to successful insured or beneficiary

ALBERTO CRUZ and ANGELA CRUZ, Plaintiffs, vs. ALLSTATE INSURANCE COMPANY, Defendant. 11th Judicial Circuit in and for Dade County, General Jurisdiction Division. Case No. 97-11401 CA 30. November 12, 1997. Murray Goldman, Judge.

ORDER

THIS CAUSE came on to be heard upon the plaintiffs' motion to strike the defendant's offer of judgment. The Court has heard argument of counsel and reviewed the applicable law. This is a case of first impression as there are no appellate decisions directly on this issue.

Pursuant to §768.79 Florida Statutes (1997) Allstate Insurance Company served an offer of judgment. Plaintiffs filed a motion to strike this offer of judgment on the grounds that §768.79 is in direct conflict with §627.428 Florida Statutes (1997), and is unconstitutional as applied to a first party insured.

§627.428 is a one way street offering attorney's fees only to a successful insured or beneficiary. The public policy of this aspect of the statute is to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their own policies. Under the statute, an insured who prevails is entitled to attorney's fees. The statute offers no similar prospect to the insurance carrier. See *Danis Industries Corporation v. Ground Improvement Technics, Inc.*, 645 So. 2d 420 (Fla. 1994).

While there is no appellate decision directly on point, there is an excellent opinion issuing from the County Court in Dade County, in the case *Holcomb v. Fortune Insurance Company for Florida Law Weekly Supplement 479* (1996). The Court therein noted the inherent conflict between the two statutes and considered that to apply the offer of judgment statute and permit an insurer to recover attorney's fees is to vitiate the purpose and protections of a statute such as 627.428. The County Court opinion certified this question as being of great public importance and the matter was in fact taken to the Third District Court of Appeals (Appellate Case Number - 96-2564); however, was dismissed without the matter being considered on the merits by the Third District Court of Appeals.

This Court agrees with the reasoning as set forth by the County Court; and therefore, grants plaintiffs' motion to strike the defendant's offer of judgment.

* * *

Juveniles—Modification of commitment orders—Jurisdiction—Public defender's motion for modification of commitments of various clients committed to certain facility on ground that facility does not constitute moderate risk facility under either statutes or operation manuals of Department of Juvenile Justice—Court has authority to amend its disposition orders in order to remove children from facility if they are able to prove that their placements are contrary to law—Evidence established that facility to which juveniles were assigned constituted high risk rather than moderate risk facility—Department of Juvenile Justice directed to correct its misassignment of juveniles by placing juveniles in actual moderate risk program

IN THE INTEREST OF: E.R., et al. 11th Judicial Circuit in and for Dade County, Family/Juvenile Division. Case No. 97-2423. October 14, 1997. Order Modifying Commitment November 20, 1997. Steven D. Robinson, Judge.

ORDER

The public defender's office moved for modification of the commitments of various clients currently committed to Pahokee Youth Development Center (Pahokee). It alleges on behalf of its clients that Pahokee does not conform to either Florida Statutes, Chapter 985 (formerly chapter 39) or the operation manuals of Department of Juvenile Justice (Department) as a moderate risk facility. The Department is the real party interest, because granting the children's motion would cause the Department great expense and administrative complication. For that reason and for the reason that the court is invoking its inherent power as well, the court has allowed the Department to assume party status. Oral argument was heard on October 1, 1997. The Department alleged lack of subject matter jurisdiction in the juvenile division of the Circuit Court to consider the children's motion. They correctly alleged that this court may not override placement by the Department in particular commitment facilities.

However, the remedy sought here is not for the court to exercise its executive judgments over the better judgments of the Department, but to amend its disposition orders in order to remove the children from Pahokee, if they are able to prove that their placements are contrary to law. The court holds that it does have statutory and inherent power to consider the relief sought by the children under the motion to modify filed. On further consideration since the October 1st hearing, it rejects the idea that contempt is the better or sole remedy.

The court recognizes that its discretion is not unfettered.

(1) The court may not "place", or conversely remove, a child at or from a particular facility. *T.W. v. State*, 338 So.2d 549 (Fla. 2d DCA, 1976).

(2) Neither can the court exercise general supervisory jurisdiction over the Department. *Florida Department of*

Health and Rehabilitative Services, Division of Youth Services v. Crowell, 327 So. 2d 115 (Fla. 1st DCA 1976).

(3) The court does not have the power to search beyond specific harms alleged by specific children. That is why its contempt power may be limited in this case. *See Department of Health and Rehabilitative Services v. Schreiber*, 561 So. 2d 1236 (Fla. 4th DCA 1990).

However, the children are not seeking any of these remedies. They are seeking to be moved from a facility that they allege is not what it says it is, one that they contend only fits the definition of a high risk or maximum risk facility. Through their attorneys, the children assert authority under section 985.231, Florida Statutes, which states that any dispositional order may be modified by the court. They also assert that the court has the inherent power to do so.

Courts have the "inherent power 'to do all things that are reasonably necessary for the administration of justice within the scope of [their] jurisdiction, subject to valid existing laws and constitutional provisions.' " *Schreiber, supra*, quoting *Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla. 1978). This concept was early expressed in the juvenile context by the First District Court of Appeal as the "reasonable discretionary powers vested . . .by Chapter 39, Florida Statutes, F.S.A. [compared to] . . . such an arbitrary exercise thereof as would entitle this [the appellate] court to intervene." *Pendarvis v. State*, 104 So. 2d 651 (Fla. 1st DCA 1958).

Certainly this court has the right to transfer a child from a non-moderate risk facility to an actual moderate risk facility when a moderate risk placement was ordered. "Broad discretion is vested to the court to do those things which appear to the court to be in the best interest of the child." *In the Matter of J.S.D.*, 156 So. 2d 780 (Fla. 2d DCA 1963).

The Third District Court of Appeal rejected the Department's challenge to its jurisdiction by writ of prohibition in *State, Department of Juvenile Justice v. E.R.*, (case no. 97-02423 September 17, 1997). Furthermore, nothing that the Department argued orally on October 1st has indicated a lack of jurisdiction to hear this matter on the merits. The court does not have the power to tell the Department to change or improve Pahokee. *See Florida ex rel. Wainright v. Booth*, 291 So. 2d 74 (Fla. 2nd DCA 1974). However, it does have the power to modify a disposition from what is not moderate risk to one that is.

Since the children have the burden of proof to show that they are illegally placed, the court again ORDERS the children to be transported to the Dade County Juvenile Detention Facility at least three working days before an evidentiary hearing that will be scheduled under separate Notice of Hearing.

ORDER MODIFYING COMMITMENT

This cause is before the court on the motion of eleven children committed by the court on various orders to moderate risk placement. At present all but three of these children, E.R., J.R., and M.C., have been released from their placement, Pahokee Youth Development Center. This order is only directed to these children remaining at Pahokee. Through their counsel Bruce Rosenthal, Marie Osborne and Robin Faber of the Miami-Dade Public Defender's Office the children allege that they were placed higher than the court's intended moderate risk placement. The Department of Juvenile Justice (Department), joined by the State Attorney, asserts a lack of jurisdiction and lack of proof. Agreeing with the children and asserting jurisdiction under Chapter 985, the court ORDERS the department to place the children in an appropriate placement for the remainder of their commitment.

Two issues predominated the motion's five day hearing. The first, and, in the court's opinion the salient one, is whether by designating Pahokee a moderate-risk facility is the Department defining moderate risk consistent with legislative direction? The second issue is whether Pahokee could be considered in any manner or respect a facility appropriate for moderate risk children?

Section 985.03(45)(c) defines a moderate risk facility as follows:

> (c) Moderate-risk residential.—Youth assessed and classified for placement in programs in this restrictiveness level represent a moderate risk to public safety. Programs are designed for children who require close supervision but do not need placement in facilities that are physically secure. Programs in the moderate-risk residential restrictiveness level provide 24-hour awake supervision, custody, care, and treatment. Upon specific appropriation, a facility at this restrictiveness level may have a security fence around the perimeter of the grounds of the facility and may be hardware-secure or staff-secure. The staff at a facility at this restrictiveness level may seclude a child who is a physical threat to himself or others. Mechanical restraint may also be used when necessary. Programs or program models in this restrictiveness level include: halfway houses, START Centers, the Dade Intensive Control Program, licensed substance abuse residential programs, and moderate-term wilderness programs designed for committed delinquent youth that are operated or contracted by the Department of Juvenile Justice.

This definition needs to be compared to the definition of high-risk residential in subsection (45)(d) of the same statute.

> (d) High-risk residential.—Youth assessed and classified for this level of placement require close supervision in a structured residential setting that provides 24-hour-per-day secure custody, care and supervision. Placement in programs in this level is prompted by a concern for public safety that outweighs placement in programs at lower restrictiveness levels. Programs or program models in this level are staff or physically secure residential commitment facilities and include: training schools, intensive halfway houses, residential sex offender programs, long-term wilderness programs designed exclusively for commited delinquent youth, boot camps, secure halfway house programs, and the Broward Control Treatment Center.

Pahokee fits the definition of a high risk program. Key language is the statement that placement "is prompted by a concern for public safety," a position argued repeatedly by the Department at the hearing. When the court placed the children at moderate risk it had expected that the department would heed the fact, inherent in the court's order, that the programming, though allowably secure, would be designed for children who "do not [particularly] need placement in facilities that are physically secure."

Instead, according to the children's expert, Paul DeMuro, the evidence bears that the children were placed in a virtual prison. The Department contended at the hearing that there is no difference between the two levels other than the types of offenses committed by the children placed. For there to be no difference but the almost unfettered discretion of the Department makes the dispositional process a meaningless gesture and begs the issue because a definition of the level cannot include the assignment decision of the court. George Hinchliffe, Assistant Secretary for Programming, incredibly opined that moderate risk is the same as high risk except that instead of having to be staff secure, it can have a "24-hour awake supervision" instead. The court finds that these amorphous, almost non-definitions cannot have been intended by the legislature. Mr. Hinchliffe further testified that the lack of definition allows the Department the freedom to standardize commitments statewide among a wide variety of commitment alternatives so as to reduce differences in the exercise of discretion among the various juvenile court judges in Florida. Therefore, he said that there would be within each level a continuum of programming with various degrees of restriction, and this concept allowed programming at both high and moderate risk to be virtually the same.

Two institutions, Polk and Pahokee Youth Development Centers were built and opened at the same time. They are both staffed by a contractor, the Correctional Services Corporation (C.S.C.) and they, at present, have the same administrator, Richard Hoffman, who also testified that their programs and layouts are identical. He said the only difference between the two schools was the length of stay. Another Department witness testified that difference was only one or possibly two months of residence. This court has committed many children to high risk with departmental assignment to Polk because the safety of the public required certain boys to go there. However, the court had no expectation that the children involved in this case would be at Polk's twin.

The court's expectation is borne out in reading subsections (1) and (3) of section 985.02, Florida Statutes. They read:

985.02. Legislative intent for the Juvenile justice system

(1) General protections for children.—It is a purpose of the Legislature that the children of this state be provided with the following protections:

(a) Protection from abuse, neglect, and exploitation.

(b) A permanent and stable home.

(c) A safe and nurturing environment which will preserve a sense of personal dignity and integrity.

(d) Adequate nutrition, shelter, and clothing.

(e) Effective treatment to address physical, social, and emotional needs, regardless of geographical location.

(f) Equal opportunity and access to quality and effective education, which will meet the individual needs of each child, and to recreation and other community resources to develop individual abilities.

(g) Access to preventive services.

(h) An independent, trained advocate, when intervention is necessary and a skilled guardian or caretaker in a safe environment when alternative placement is necessary.

(3) Juvenile justice and delinquency prevention.—It is the policy of the state with respect to juvenile justice and delinquency prevention to first protect the public from acts of delinquency. In addition, it is the policy of the state to:

(a) Develop and implement effective methods of preventing and reducing acts of delinquency, with a focus on maintaining and strengthening the family as a whole so that children may remain in their homes or communities.

(b) Develop and implement effective programs to prevent delinquency, to divert children from the traditional juvenile justice system, to intervene at an early stage of delinquency, and to provide critically needed alternatives to institutionalization and deep-end commitment.

(c) Provide well-trained personnel, high-quality services, and cost-effective programs within the juvenile justice system.

(d) Increase the capacity of local governments and public and private agencies to conduct rehabilitative treatment programs and to provide research, evaluation, and training services in the field of juvenile delinquency prevention.

The Legislature intends that detention care, in addition to providing secure and safe custody, will promote the health and well-being of the children committed thereto and provide an environment that fosters their social, emotional, intellectual, and physical development.

For this statute to be more than rhetoric there must be certainty for the court that moderate risk children are placed where children can gain the developmental advantages promised them by the legislature. Moderate risk children are usually serious property offenders who have not completed previous residential commitments. Appropriate interpretation of the legislative intent, just quoted, would lead to the development of the right kind of programming which could turn such children in the right direction and lead to the overall safety of the public. Whereas safety of the public is paramount, the legislature has directed that safety best be achieved by considering the least restrictive placement, the placement closest to the reality in which the child will live on release. Section 985.03(21), Florida Statutes. It is a fallacy of the Department, when defining its role as a criminal justice agency, to feel compelled to emphasize punishment over achieving behavioral change.

There are aspects of Pahokee that seem perfectly fine: the haircuts, the requirement that the children follow consistent rules, that they attend and progress in school, etc. However, there is another side. Paul DeMuro, a nationally recognized, eminent expert on the nature of juvenile facilities and a former court monitor of juvenile facilities in Florida for the federal courts, visited Pahokee and described it as an inappropriate institution for children. He credibly described the existence of negative subcultures, pecking orders in which stronger children took advantage of weaker ones, and children with family and drug problems who were not receiving adequate treatment. He found that children, as young as thirteen, who suffered from poor impulse controls, were kept indefinitely at levels that restricted their freedom of movement and privileges because they acted out. He found staff that inappropriately used force and solitary confinement. Because of this, any treatment gains were eroded. He found that children were sometimes punished for behaviors totally appropriate for their developmental ages. He found that the insufficiently trained staff, recruited from the local community, resorted to verbal and sometimes physical abuse against children that they did