IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF JUVENILE JUSTICE,

Appellant,

v.

E.R., J.R., and M.C., children,

Appellees.

_____/

CASE NO.: 97-3505

11th Circuit Juvenile Division
Case Nos.: 96-5493, 96-4459, 97-1864, 95-8256, 96-8450, 96-8581

CONSOLIDATED CASE NO.: 98-64

STATE OF FLORIDA, DEPARTMENT OF JUVENILE JUSTICE,

Appellant,

v.

C.A., a child,

Appellee.

_____/

CASE NO.: 98-64

11th Circuit Juvenile Division
Case No.: 95-1053

APPELLANT'S AMENDED INITIAL BRIEF

On Appeal from the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida

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PRELIMINARY STATEMENT

The appellant, the Department of Juvenile Justice, will be referred to as "the Department." The children will be referred to by their initials, as "the children," or by their procedural designation.

Although it has been designated a "Supplemental Record," citations to the 137-page record on appeal will be made by the letter "R" and the appropriate page number. Separate, smaller "records" have been prepared for the delinquency cases of E.R., M.C., and C.A. With the exception of "C.A.," whose modification motion was made subsequent to the original three children (E.R., J.R. and M.C.), these additional records will only be cited for the disposition orders that they contain. They are individually numbered, so reference to these smaller records will contain the child's initials and the page number (e.g., R(M.C.):13). Further supplementation was required for E.R., J.R. and M.C.; reference to these three, 5-page supplemental records, containing virtually identical "Motion(s) to Modify Sentence," will appear "SR" and the page number (e.g., SR.4). Cites to the nine volume, 1504-page transcript of the November 13-19, 1997 hearing will be made by the letter "T" and the appropriate volume and page number (e.g., T-IX:1495). Citations to transcripts of the other hearings (August 13; October 1; November 3; December 10) will be made by the letter "T" and the appropriate date and page number (e.g., T-8/13:37).

STATEMENT OF THE CASE AND FACTS

The Appellant, the Department of Juvenile Justice, perfected these appeals in due course from final judgments of the Circuit Court In and For Dade County, Florida, entered on November 20 and December 10, 1997, purporting to modify the commitments of four delinquent juveniles. The challenged order of November 20, which is styled "Order Modifying Commitment," was entered by the Honorable Steven D. Robinson, a judge of the Eleventh Judicial Circuit Court (R.103-12). The challenged order of December 10 modifying the commitment of C.A., was also entered by the Honorable Steven D. Robinson (R(C.A.):73). The Department timely filed its notices of appeal on December 4 and 17, respectively. By its Order of January 15, 1998, this Court consolidated these cases for all appellate purposes.

The subject of this appeal is a pair of post-disposition orders modifying the commitments of four delinquent juveniles.

E.R., J.R., and M.C. were adjudicated delinquent and committed to the Department for moderate-risk placement by Judge Robinson (R.30; R(E.R.):13; R(M.C.):13). C.A. was similarly adjudicated and committed by Judge Thomas K. Petersen (R(C.A.):45). Subsequently, the Department placed each of the subject juveniles in the Pahokee Youth Development Center (hereinafter, "Pahokee"), a moderate-risk facility.

On behalf of these and other Dade County youths that had been placed at Pahokee, the Public Defender filed separate, but identical "Motion(s) to Modify Sentence" in each committing juvenile court in the Eleventh Circuit. Each motion alleged that "the placement of the Petitioner at the Pahokee facility was a *de facto* commitment to a [high-risk] or [maximum-risk] restrictiveness program, and as such, runs counter to this Court's commitment order." (SR.1).* The motion is vague concerning the relief requested, asking only that the court "modify its dispositional order" (SR.5). Factual allegations covered virtually every aspect of life at the Pahokee facility, from the large ("severe shortcomings in the areas of education and treatment," SR.2) to the small ("[t]he only [eating] utensil allowed is one plastic spoon," SR.3).**

In its "Motion to Strike," the Department complained of the ambiguity in the appellees' modification motions. Because it was unclear whether the appellees sought a reduction in restrictiveness level, or some type of change in the placement *within* the ordered level, the Department could not adequately respond, or even be certain that the court had the authority to

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* Although separate motions were filed for each child, they are identical with the exception of some identifying information on the first page. Thus, it is unnecessary to cite all three of the modification motions.

** These complaints included the number of beds (350), the fact that the beds were bolted to the floor, the width (30-36 inches) and thickness (3-4 inches) of the mattresses on the beds, the clothes the children wore, the haircuts they received, the barbed wire at the perimeter of the facility, the length of the meals, the amount of

grant the relief requested (R.70). The appellees moved to dismiss the Department's motion, asserting that the Department lacked standing in modification proceedings (R.74).

At an August 13 hearing on these motions, it became clear to the Department that the appellees were seeking an unprecedented change in *placement* that amounted to a judicial redesignation of the Pahokee facility (see, T-8/13:13). When the lower court ordered the children transported for modification hearings, without ruling on the Department's motion (T-8/13:37-38), the Department promptly sought extraordinary relief in this Court.

In its Petition for Writ of Prohibition (Case No. 97-2423), the Department challenged the subject matter jurisdiction of the lower court to address the appellees' modification motions. Of course, the Department's Motion to Strike had yet to be ruled upon, and it was not yet certain that the lower court would attempt to alter the placement decision. Thus, the Department argued, somewhat speculatively, that it was a foregone conclusion that its Motion to Strike would be denied and that the lower court would proceed to modify placements and make pronouncements far exceeding the permissible scope of its modification authority. Apparently unpersuaded that this scenario was destined to unfold, this Court denied the Department's Petition without explanation in a September 17 unpublished order.

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visitation, and insufficient "freedom of movement," just to name a few.

Proceedings resumed in the lower court on October 1 before a Juvenile Division panel comprised of Judges Robinson, Levine and Johnson. Argument was heard on the Department's Motion to Strike and on the appellees' claim that the Department lacked standing to participate in the proceedings. At the close of the hearing, each judge announced his ruling (T-10/1:65-71), and written orders were entered later. Judge Robinson, in whose court all subsequent proceedings took place, ruled that the Department could assume party status (R.89). According to Judge Robinson, the critical question presented by the appellees' motions was whether the Pahokee facility met the statutory definition of a "moderate-risk" facility. If it did not meet the definition, then "[c]ertainly 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." (R.90-91).

The pretrial hearing on November 3, 1997 was critical to the issues presented on appeal. There the lower court determined, over the Department's objections, that it would hear evidence of abuse and conditions at the facility amounting to cruel and unusual punishment. The Department had argued that to the extent such factual matters did not pertain to the statutory definition of "moderate-risk," they would not be relevant to the proceedings (T-11/3:18-19, 67-68). The court also held in abeyance the Department's request to depose the testifying children (T-11/3:72, 75-76).

The hearing on E.R., J.R. and M.C.'s motions to modify commenced on November 13, 1997, before Judge Robinson. Counsel for the Department moved for dismissal on the grounds previously asserted in the Department's motions; the motion was denied (T-I:4). The Department then noted that the "Evidentiary Points" submitted by the children "point basically to [a] 1983, civil rights action," with allegations that included Pahokee staff physically and verbally abusing the children and permitting children to abuse one another. Because it had not been permitted to depose the children prior to the hearing, the Department requested that its cross-examination of the children be split from their direct testimony, so that the Department's counsel would have an opportunity to prepare for cross-examination and rebuttal (T-I:6-8). The trial court denied this request, and the Department heard the children's substantive allegations for the first time during their direct examination (T-I:13).

The appellees presented much of their case through the testimony of five juveniles, all of whom had been placed at the Pahokee facility, and two of whom were movants (E.R. and M.C.). Much of the children's testimony concerned various forms of abuse and mistreatment allegedly experienced at Pahokee. The Department objected to this testimony on the grounds previously stated at the November 3 hearing - i.e., it was irrelevant to whether or not Pahokee fit within the statutory definition of

"moderate-risk" (T-I:142, 165). Apparently overruling these objections, the court stated:

> [COURT] [T]hat's the question which I haven't quite answered yet and I'll answer it before, you know, probably before the end of the next couple of days, as to whether, but I think I kind of hinted at what I thought the answer was at the last hearing:
>
> *That if a place is a - doesn't reach any level, including Level 10, it certainly can't be a Level 6.*

(T-I:166) (Emphasis added). On this theory, the child witnesses were permitted to testify at length to various forms of abuse and mistreatment allegedly experienced at Pahokee, none of which would have been permissible at any restrictiveness level.

Each of the youths testified that staff had cursed at them (T-I:66, 148; T-II:218; T-IV:549-50, 585, 588). The youths did not feel cared for or respected at Pahokee and generally did not trust staff (T-I:70, 74, 165; T-II:244; T-IV:513, 549, 582-83). Staff would strike children, and frequently permitted or encouraged children to beat up other children (T-I:92-100, 165-67, 183; T-II:227-29, 240-41; T-IV:503-04, 578-82).

Rules were applied inconsistently, and would frequently change at the facility; the staff showed favoritism (T-I:68, 146-47, 162-63, 189; T-II:222, 242-43; T-IV:497, 548, 554-55). Some of the children testified that visitation and family contact was insufficient (T-I:111-12, 175-80). According to some of the children, Pahokee felt like a prison (T-I:171; T-IV:582).

On cross-examination, three of the juveniles, including both of the testifying movants, were questioned about a July 1997 visit to the facility by some public defenders and Judge Thomas K. Petersen of the Eleventh Circuit's Juvenile Division. The juveniles spoke with these visitors in groups and individually. Two of the juveniles testified that Judge Petersen stated he was going to get them out of the program; a third testified that he got the impression that Judge Petersen would get him out (T-I:127; T-II:269-71; T-IV:544-46).

The appellees presented the testimony of Paul DeMuro, an expert retained by the Public Defender's Office to inspect the Pahokee and Polk facilities one week before the hearing. DeMuro toured both facilities in a single day, and spoke to 11 juveniles while at Pahokee, including those who testified at the hearing (T-LII:342-43, 346). When asked to summarize his observations of Pahokee, Mr. DeMuro responded as follows:

> [DEMURO] Pahokee is a prison-like facility, built I believe as a prison, handling about 350 inmates.
>
> . . . .
>
> 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'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 [sic] true for younger kids who have a poor impulse control or a tension [sic] deficit 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.

. . . .

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 is 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.

. . . .

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-III:343-45).

DeMuro briefly toured the Polk high-risk facility that same day. He described the physical layout of the two facilities as identical. Although Mr. DeMuro found similarities in the facilities' contracts and operating manuals, he conceded that he did not have a chance to review the internal programming at Polk so as to render an opinion whether the two programs were structurally identical (T-III:364-65).

On cross-examination, DeMuro stated that "[t]o a great extent" his testimony about conditions at Pahokee came from his interviews with the children. If the youths' charges were untrue, this would affect the validity of his opinions (T-III:402, 403-04). DeMuro conceded that he was not an authority on the Florida statutes governing restrictiveness levels, but

that it was acceptable to have a range of sub-categories within each level that would permit different modes of treatment and security (T-III:412-15). When asked whether Pahokee would be an acceptable moderate-risk facility if abuses were eliminated, Mr. DeMuro responded as follows:

> [DEMURO] It has 350 youngsters in it. It is going to have a problem continually with staff turnover, given its location. It has a problem with connecting kids to families.
>
> For these and other reasons, I don't believe it's appropriate for a Level Six program. Even a -- let's for a hypothetical say there are degrees of Level Six, A through G, with G being the highest, it is not appropriate for a G Level Six program.
>
> That's what you have a boot camp for; that is what we have [Dade Intensive Control Program] for; you have other remedies to that issue; or you can create more remedies to that issue. You can create semi-secured halfway houses. You could do lots of things.

(T-III:459). The expert conceded that boot camps could be found in two or three restrictiveness levels. The only Florida moderate-risk facility he had visited recently other than Pahokee was the Leon County Boot Camp about one year ago. The Camp was located inside a jail, had barbed wire, and the juveniles had uniforms and short haircuts (T-III:421-23). When asked whether he was philosophically opposed to large facilities like Pahokee, Mr. DeMuro candidly responded: "[W]hen the superintendent or director does not know the name of every kid and his worker, you are in trouble." (T-III:437).

For its part, the Department presented the testimony of James Irving, the Vice-President of Correctional Services

Corporation (CSC). CSC operated both the Polk and Pahokee facilities, and Mr. Irving was responsible for the overall operations of all CSC's Florida facilities (T-VI:777-78). Mr. Irving had been a consultant for the Department of Justice and had chaired the American Corrections Association Standards Committee - the association that sets standards for adult and juvenile facilities (T-VI:780). Concerning the size of juvenile facilities, Irving testified that the trend toward small facilities such as halfway houses in the nineteen-seventies and eighties had shifted to larger facilities in the nineties due to higher commitment rates and populations (T-VI:784-87). Larger facilities such as Pahokee could provide a wider range of services and programs (T-VI:788-89).

The Department offered testimony from a number of other CSC employees who worked at the Pahokee facility either full- or part-time.* Eric Casas, Director of Quality Assurance for CSC, testified about efforts made to ensure conditions at Pahokee complied with the Department and facility's policy and procedures (T-VI:893, 944). Richard Hoffman, Pahokee's Facility Administrator, testified about conditions and programming at the facility (T-VI:965).

Gwynne Pelcyger, a psychologist and the Clinical Director at Pahokee, testified about mental health services available at the

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* These witnesses disputed many of the appellees' charges concerning conditions at the facility. Given the Department's position that

facility (T-VII:1070-78). Sitting on the hearing committee which made confinement determinations, she testified that hearings were held and youths were permitted to appeal the committee's rulings (T-VII:1078-96, 1159). Pelcyger witnessed Judge Petersen's July meeting with some of the youths at the facility; Judge Petersen spoke to them collectively in the Chapel. Pelcyger noticed a deterioration in the youths' behavior after the meeting. She explained: "If they are led to believe that they are leaving, regardless of what they do, then they don't need to participate and cooperate with the program." (T-VI:1117-21). This was corroborated by Pahokee's Assistant Principal, Joe Skinner, who testified that the children became unruly in school within one week of Judge Petersen's visit (T-VIII:1247-50). Mr. Skinner also testified about the educational services available at Pahokee.

George Hinchliffe, the Department's Assistant Secretary for Programming and Planning, testified that he made the decision to designate Pahokee a moderate-risk facility once the Department received the facility from the legislature (T-IV:614-17). He described the process by which Pahokee and Polk were designated at moderate- and high-risk, respectively, though the facilities were physically indistinguishable. He also described amendments to the statutory definition of "moderate-risk" which made it possible to designate Pahokee at this level. In sum, the

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conditions of confinement were largely irrelevant to the issue before

legislature authorized increased security by means of fencing and hardware in an effort to reduce the unacceptable frequency of escape at the moderate-risk level. Escapes from halfway houses, which had been typical moderate-risk programs, threatened public safety and resulted in children accruing additional charges. Increased security also allowed the Department to create a continuum in the moderate-risk level which helped alleviate statewide geographic disparity in commitment.* (T-IV:621-28, 689-91). Mr. Hinchliffe testified that there was an overlap between the restrictiveness levels as defined in the relevant statute, such that the upper end of a level could resemble the lower end of the level immediately above it. (T-IV:642-43; T-VIII:1325-30).

The lower court entered its "Order Modifying Commitment" on November 20, 1997. The court relied heavily upon general statements of legislative intent, which it construed to require "the right kind of programming." The Department was thus found to have misinterpreted the statutory definition of "moderate-risk" by emphasizing punishment over behavioral change. (R.117-19). The court went on to recite much of the children's testimony of abuse experienced at Pahokee, though noting that it

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the court, this testimony will not be recounted in detail.

* As an example, Hinchliffe offered a car theft, which might be "the crime of the century" in a small Panhandle town, resulting in a commitment to an upper-end restrictiveness level. In a large urban area, however, the same offense might warrant a diversion program. By allowing the Department wide latitude within the restrictiveness levels, these discrepancies could be minimized so that less serious

"may have heard some exaggerated claims." (R.121-22). The court closed with the following:

> [T]he court cannot accept that such programming is appropriate for children of moderate risk. If the Department's position were correct, a court would be wasting its time in reviewing any commitment orders recommending moderate risk or higher. This court cannot read Chapter 985 as emasculating the power of the court to fulfill the stated purposes of the legislature by a *de facto* definition that moderate risk can be a prison in all but name.
>
> It is ORDERED and ADJUDGED that the Department of Juvenile Justice is directed to correct its mis-assignment and ***reassign*** E.R., J.R., and M.C. to an actual moderate risk program as the court previously ordered.

(R.123) (emphasis added).

On December 1, the Public Defender filed a "Motion to Modify" on behalf of C.A. (R(C.A.):46-47). Judge Petersen had committed C.A. at moderate-risk restrictiveness, and the Department had placed the child at Pahokee. Because Judge Petersen had been disqualified due to his involvement in the circumstances giving rise to the Public Defender's motions, the case was reassigned to Judge Robinson. Relying upon his previous "Order Modifying Commitment," Judge Robinson granted the motion and ordered the Department to place C.A. in "a lawful moderate risk program" (R(C.A.):73).

These consolidated appeals timely followed. Additional facts are set forth in the Argument section of this brief.

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offenders would not be grouped with more dangerous youths. (T-IV:625-26).

SUMMARY OF THE ARGUMENT

The lower court exceeded its statutory authority to modify a disposition order under section 985.231(1)(c), Florida Statutes (1997). The provision authorized the court to modify its disposition orders, wherein it adjudicated the appellees delinquent and committed them to the Department for placement at moderate-risk restrictiveness. Rather than modify the court-ordered restrictiveness level, which was a matter within the court's discretion, the lower court instead purported to "modify" the Department's designation of a specific placement or facility, the selection of which was entirely within the Department's discretion. In this manner, the lower court accomplished through modification proceedings what it could not do when the case was initially disposed - i.e., select or de-select a specific placement within the ordered restrictiveness level.

This improper use of modification proceedings greatly prejudiced the Department. Throughout the proceedings, the appellees contested the Department's right to participate as a party. Although the Department was ultimately permitted to participate, the use of modification proceedings effectively precluded it from conducting meaningful discovery. In addition, the unfortunate use of modification made it possible for the appellees to present a wide array of claims, most of which , concerned alleged abuse and conditions of confinement at the Pahokee facility; these claims had nothing whatsoever to do with

whether or not the facility met the statutory definition of moderate-risk. Finally, under the guise of modification, all these claims were submitted to the discretion of the lower court.

Aside from the procedural deficiencies, which are themselves fatal to the challenged order, the lower court misinterpreted the relevant statute defining "moderate-risk" restrictiveness. By designating Pahokee a moderate-risk facility, the Department was construing a statute that it was charged to administer, and its construction should only be overturned if clearly erroneous. Rejecting the Department's reasonable interpretation of the statute, the lower court relied upon general statements of intent and its own belief that there could be no overlap between the defined restrictiveness levels. Thus, in the lower court's view, Pahokee could not be a proper moderate-risk facility to the extent that its security features were comparable to existing high-risk facilities. However, the clear language of the statute provides for overlap in the moderate- and high-risk restrictiveness levels, and all of the components of the Pahokee facility are expressly permitted by the statute. In the end, the lower court failed to articulate a reasonable or even a cognizable interpretation of this critical definitional statute, leaving the Department to wonder which of its present or future facilities will next undergo this judicial redesignation by "modification."

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT EXCEEDED THE AUTHORITY CONFERRED UPON IT TO MODIFY DISPOSITIONS UNDER SECTION 985.231(1)(c) WHEN IT MODIFIED THE DEPARTMENT'S PLACEMENT OF DELINQUENT JUVENILES?

(A) THE LOWER COURT GRANTED RELIEF THAT WAS NOT OBTAINABLE IN MODIFICATION PROCEEDINGS.

Section 985.23(3)(c), Florida Statutes (1997),[1] sets out the procedure trial courts must use once the court has decided to adjudicate a child delinquent and commit him or her to the Department. In short, the court is required to commit the child to the "restrictiveness level" recommended by the Department. If it opts for a different level, the court must state for the record its reasons for disregarding the Department's recommendation, which reasons must be supported by facts in the record. "Restrictiveness levels" are rather loosely defined in the statute, and indicate the level of custody found at a program or facility. There are five levels, ranging from minimum-risk nonresidential to maximum-risk residential, commensurate with the

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[1] Effective October 1, 1997, those portions of chapter 39 relating to juvenile delinquency were transferred to newly created chapter 985. See Ch. 97-238, § 124, at 4397, Laws of Fla. Although chapter 985 was not yet in effect when the subject children had their disposition hearings, it had taken effect by the time the modification hearings were held. Because the trial court referenced the new statutes in the challenged orders, and there are no substantive changes impacting the instant case, primary reference will be made to the new statutes, with parenthetical or footnote references to the former chapter 39 provisions. Section 985.23(3)(c) was formerly section 39.052(4)(e)3., Florida Statutes (Supp. 1996).

risk posed by the juvenile. See § 985.03(45), Fla. Stat. (1997) (formerly § 39.01(59), Fla. Stat. (Supp. 1996)).

Here, the trial court committed each of the subject children to the Department for moderate-risk ("level 6") placement. In keeping with the procedure outlined above, each child's disposition order provided only that the child was committed to the Department for moderate-risk placement, without specifying the program or facility to which the child should be sent. In this respect, the disposition orders are consistent with Florida Rule of Juvenile Procedure Form 8.947, where the form order of disposition makes no reference to a specific program or placement, but only provides: "The court orders the child placed in _____ level." Similarly, the relevant statutes and case law uniformly provide that the Department, and not the trial court, determines the proper placement within the court-ordered restrictiveness level. § 985.23(3)(c), Fla. Stat. (1997) (trial court commits to a restrictiveness level); § 985.231(1)(a)3., Fla. Stat. (1997) (formerly § 39.054(1)(c), Fla. Stat. (1995)); Department of Juvenile Justice v. E.W., 704 So.2d 1148 (Fla. 4th DCA 1998); Department of Health and Rehabilitative Services v. State, 616 So.2d 91 (Fla. 5th DCA 1993); see Department of Juvenile Justice v. C.M., 704 So.2d 1123 (Fla. 4th DCA 1998) (court cannot direct an executive agency to expend its funds for a particular placement); R.L.B. v. State, 693 So.2d 130 (Fla. 1st DCA 1997); B.J.M. v. Department of Health and Rehabilitative

Services, 627 So.2d 512, 515 (Fla. 3d DCA 1993) (recognizing the "almost total discretion in the area of placement" the legislature has given to the Department), quashed in part on other grounds, 656 So.2d 906 (Fla. 1995).

Initially, this procedure was followed, as the trial court committed the subject children to the Department at the moderate-risk restrictiveness level. The Department then placed the children at its moderate-risk Pahokee facility in accordance with the disposition orders.

Standing this procedure on its head, the public defender moved the lower court to "modify" its disposition orders to direct a moderate-risk placement ***other than*** Pahokee. Though somewhat vague as to the relief requested, the motion alleged that the Pahokee facility was not a moderate-risk (level 6) facility, but was actually a high-risk (level 8) or maximum-risk (level 10) program. The request for relief was vague in that it did not specify whether the public defender sought a simple change in the ordered restrictiveness level (presumably, a reduction), or the unprecedented step of changing the Department's placement of the child.[2] As it turned out, the

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[2] Fearing that the public defender intended to change the *placement* of the child, the Department sought extraordinary relief in this Court, arguing that the lower court did not have jurisdiction to "modify" the Department's discretionary decision to place a committed child in a specific program. Since the lower court clearly had jurisdiction to modify its disposition order, and it was not yet apparent that an unauthorized modification of *placement* would be undertaken, this Court denied the Department's petition and returned the matter to the lower court. See Department of Juvenile Justice v. E.R., et al., No. 97-02423 (Fla. 3d DCA Sept. 17, 1997) (unpublished order).

public defender sought to change the placement, and have the trial court, in essence, redesignate the Pahokee facility at high- or maximum-risk.

It was clear, however, that the motion was brought pursuant to section 985.231(1)(c), Florida Statutes (1997) (formerly § 39.054(3), Fla. Stat. (1995)) which provides that "**[a]ny [disposition] order . . . may thereafter be modified or set aside by the court.**" This brief provision, inconspicuously tucked away in the otherwise detailed description of the court's powers of disposition, is referenced nowhere else in chapter 985, nor is there a corresponding provision in the Rules of Juvenile Procedure. In fact, there appear to be only two cases in which Florida's appellate courts have addressed this modification provision, and neither case involved a modification in ***placement***.

In T.R. v. State, 677 So.2d 270 (Fla. 1996), a juvenile was adjudicated delinquent and committed to the Department of Health and Rehabilitative Services (hereinafter, "HRS") for low-risk residential placement. Because the child was adjudicated for an aggravated battery, and was thus not eligible for low-risk placement, HRS moved for modification to permit moderate-risk placement. The trial court modified the disposition to the requested higher restrictiveness level; ultimately, the supreme court affirmed the modification.

In J.E. v. State, 676 So.2d 39 (Fla. 3d DCA 1996), a juvenile was committed to the Department for moderate-risk

placement. At his entrance interview, the juvenile stated that he liked to set fires and abuse animals, causing the moderate-risk program to deny admission. A motion for upward modification was filed, and the trial court committed the child to high-risk. This Court affirmed the modification, correctly noting that an increase in the restrictiveness level "does not necessarily indicate an increase in the sanction or the period of commitment, but refers to the level of security." Id. 676 So.2d at 40.

It is not an accident that the modifications in T.R. and J.E. involved changes in the court-ordered restrictiveness level. Indeed, given the disposition scheme discussed above, the restrictiveness level is the only thing in the disposition order for the court to modify. By necessity, a disposition order is silent as to the specific program or facility, making "modification" of ***placement*** an absurdity.

Moreover, one must wonder how a court modifying a disposition order should be permitted to accomplish through modification that which it did not have the authority to accomplish when the case was originally disposed - i.e., naming a specific placement. Such an expansive interpretation of the modification provision must be rejected because it would produce just such an absurd or anomalous result. See State v. Goodson, 403 So.2d 1337 (Fla. 1981); State v. Upshaw, 469 So.2d 922 (Fla. 3d DCA 1985). Yet this is precisely what the appellees have

urged, and what the challenged order in this case seeks to accomplish.

The challenged "Order Modifying Commitment" does not modify a single provision of the initial disposition orders. The subject children remain committed to the Department at the moderate-risk level, just as they were prior to these "modification" proceedings. The only thing that has been modified is the facility where they can be placed. Simply, the court has prohibited placement at the Pahokee facility, and has thus used modification as the means of injecting itself into the Department's placement decision. That the court did not select a new placement, opting instead to "de-select" the placement chosen by the Department, should make no difference to the issue presently before the Court. In either case, the lower court exceeded its authority to modify a disposition, and proceeded into the area of placement which is reserved to the Department's discretion.

The Department does not now suggest, nor has it maintained at any time in these proceedings, that its placement decisions are unassailable or somehow beyond the reach of Florida's courts. Had the Department placed a child in a program which was designated outside the court-ordered restrictiveness level, the placement would be subject to challenge, though, for the reasons outlined above, such a challenge would not properly be addressed in modification proceedings. Contempt proceedings might be the

most suitable vehicle in such a case, where the Department has clearly failed to comply with the disposition order. More to the point, and closer to the instant allegations, is the situation where the child is placed in a program at the court-ordered restrictiveness level, but the program itself is incorrectly designated. Contempt proceedings, a suit for injunctive relief, or even a federal civil rights action under 42 U.S.C. § 1983 might be appropriate in such a case.[3] See, e.g., H.C. v. Jarrard, 786 F.2d 1080 (11th Cir. 1986) (class action suit under 42 U.S.C. § 1983 challenging conditions at juvenile detention center); Alexander S. v. Boyd, 876 F.Supp. 773, 787 (D.S.C. 1995) (South Carolina's classification system for juvenile offenders subject to declaratory and injunctive relief). Even a petition for writ of habeas corpus might have been an appropriate vehicle for these claims. See D.L.T. v. Heisner, 469 So.2d 891 (Fla. 1st DCA 1985) (juvenile's challenge to detention placement, and his argument that HRS misconstrued the detention catchment statute, addressed in habeas proceeding).

The general rule in Florida provides that a trial court may not modify, amend or vacate an order of final judgment except as

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[3] In fact, the appellees initially sought to bring contempt proceedings, but quickly abandoned this effort. (R.42-46). At the October 1 hearing, when the case was still being heard by the juvenile division sitting "en banc," Judge Levine candidly asked the appellees' counsel why contempt would not be "more appropriate" for their claims. Counsel responded: "The short answer is we've gone the polite way." (T-10/1:33). Apparently unmoved by this display of courtesy, Judge Levine denied the motions to modify, ruling that claims contesting the Department's designation of the Pahokee facility should be made in contempt proceedings (T-10/1:65-66).

provided by rule or statute. State v. M.C., 666 So.2d 877, 878 (Fla. 1995), (citing Kippy Corp. v. Colburn, 177 So.2d 193 (Fla. 1965)). As discussed above, there was no basis in section 985.231(1)(c) for modifying the appellees' placement or for redesignating the Pahokee facility. That this was not a proper modification is seen in the fact that the court's order fails to change, alter or modify even a single word of the disposition orders supposedly "modified."

(B) THE MISUSE OF MODIFICATION PROCEEDINGS PRODUCED PROCEDURAL IRREGULARITIES THAT PREVENTED THE DEPARTMENT FROM EFFECTIVELY CONTESTING THE APPELLEES' CLAIMS.

This was not simply an instance of misnomer or mispleading, where the appellees made some inconsequential technical error in the description of their claim. Rather, the appellees' decision to assert these claims under "modification," and the lower court's decision to allow them to proceed on this basis, had far-reaching implications that may well have determined the outcome. The rules governing the proceeding, the standard to be applied by the lower court, and even the Department's right to participate, were all influenced by the decision to proceed in this manner; in each instance the effect was to place the Department at a disadvantage.

1. The Department's Right to Participate:

It is hardly a mystery why the appellees persisted in bringing this as a "motion to modify," despite the Department's

repeated protestations. From the outset, the appellees insisted that the Department was not a party to these proceedings, because only the prosecuting authority and the children themselves were parties to the initial disposition; hence, any subsequent modifications must be limited to these same parties. Once it became clear that the sole target of the motion was the Department's alleged improper designation of the Pahokee facility, the lower court rejected the appellees' effort to deny the Department standing, correctly concluding that the Department was the real party in interest. (R.89). Still, the appellees continued to argue, erroneously, that the Department was not a party to the initial disposition and subsequent modification proceedings (see T-I:23, 26; T-IX:1493-94).[4]

2. The Standard to be Applied by the Lower Court:

More troubling than the attempt to preclude the Department's participation was the appellees' effort, this time successful, to disguise their claims as ones addressed to the court's discretion. Modification is generally addressed to the discretion of the trial court. See Sanchez v. State, 541 So.2d 1140, 1142 (Fla. 1989); Sims v. State, 624 So.2d 365 (Fla. 3d DCA

[4] Of course, the appellees were incorrect in asserting that the Department was not a party to the disposition proceedings. Section 985.23(1)(d), Florida Statutes (1997) (formerly § 39.052(4)(c)4., Fla. Stat. (Supp. 1996)) which pertains to disposition hearings specifically provides that "[p]arties to the case shall include . . . representatives of the department." Department of Juvenile Justice v. J.R., 23 Fla. L. Weekly D1139 (Fla. 1st DCA May 5, 1998); see Department of Health and Rehabilitative Services v. R.S., 567 So.2d 532 (Fla. 5th DCA 1990) (as a party to disposition hearings, HRS was entitled to notice of the proceedings).

1993); Marsh v. State, 497 So.2d 954 (Fla. 1st DCA 1986). Indeed, this is how the appellees submitted their case (see T-IX:1494-95). However, if modification were appropriate, and the appellees' claims could properly be submitted to the discretion of the lower court, then an absurd result would obtain. The lower court, in its discretion, could modify a specific program or placement selected by the Department, though the court was without authority to decide or even address this issue when the case was initially disposed. If this were allowed, disposition would become a mere formality - a statutorily-mandated preliminary step - to be promptly abandoned in favor of modification, where statutory constraints would disappear and the court would be left to select or de-select specific programs in its discretion.

3. The Scope of the Inquiry:

Another reason why modification was inappropriate, and the Department was disadvantaged by its use, may be found in the absence of discernable rules governing the scope of the proceedings. Had this been a typical modification proceeding, the moving party would seek to establish that the court-ordered restrictiveness level was no longer appropriate for the child's commitment. The child's progress, and any changed circumstance necessitating a reduction or increase in the level of custody would be relevant to such an inquiry. The appellees' claims did not address such issues. Rather, they focussed on claimed civil

rights abuses and philosophical differences about the overall efficacy of the Pahokee facility. Thus, the hearing degenerated and quickly expanded far beyond the boundaries of a modification proceeding. At times it even appeared to exceed the broad boundaries set by the lower court.

As is evident from the transcript of the November proceedings, much of the appellees' case concerned instances of alleged abuse and mistreatment at the Pahokee facility. The Department strenuously objected to this testimony, which was irrelevant to the appropriateness of moderate-risk placement for the subject children. Abuse is intolerable at any restrictiveness level, but even if it occurred as alleged, this would not mean that the Pahokee facility failed to satisfy the statutory definition of moderate-risk. Nor would the existence of abuse at a moderate-risk facility necessitate its redesignation to high- or maximum-risk, as if abuse were somehow tolerable at higher levels. Yet this is precisely what the appellees successfully asserted below.

Not only was the alleged abuse suffered by E.R. and M.C. the basis for removing them from Pahokee, but this same alleged abuse was sufficient to remove J.R. and C.A., neither of whom testified to being the victims of abuse. If every facility at which there is an occurrence of abuse is deemed to have lost its designated restrictiveness level, thus entitling all the resident children to "modify" their placement to another facility, the resulting

disruption will be devastating to the Department and its mission. Children will be placed in a succession of designated and redesignated facilities, with each placement ending abruptly when even a single child at the facility is prepared to testify in modification proceedings that he or she has been the victim of some form of abuse. Fortunately for the Department, the relevant statutes do not permit such a scenario. However deplorable and unacceptable, abuse must be dealt with on a case-by-case basis; no reasonable interpretation of section 985.03(45) would make the occurrence of abuse the basis for redesignating a facility.

Once the lower court allowed the appellees to proceed under modification, the Department was subjected to a series of often inconsistent rulings that made it virtually impossible for the Department to defend its interpretation of the statute. As alluded to in the preceding paragraphs, there was considerable confusion concerning the relevance of the appellees' allegations of abuse. In Judge Robinson's Order of October 14 allowing the proceedings to continue in his court, he concluded that the appellees' allegations questioned only whether Pahokee conformed to the statutory definition of moderate risk: "They are seeking to be removed from a facility . . . that they contend only fits the definition of a high risk or maximum risk facility." (R.90).

At the November 3 hearing, it became apparent that the appellees intended to base their case upon alleged instances of abuse at the facility. The Department argued that conditions of

confinement and possible instances of cruel and unusual punishment were not relevant to whether the facility met the bare bones statutory definition of "moderate-risk" (T-11/3:12-16). This time, however, the court stated that its previous order had been "misinterpreted," and that evidence of abuse constituting cruel and unusual punishment ***would*** be heard to the extent that such instances "would not be a standard kind of thing that existed in the level six [moderate-risk] facility" (T-11/3:18). Thus, evidence of abuse was invited into the proceedings to establish that the facility was not moderate-risk, even though it was clear that abuse was improper at ***any*** restrictiveness level. In the end, the Department's relevancy objection to abuse testimony was overruled (T-I:165-66).

Similar confusion arose as to the relevant time period from which these instances might be drawn. Initially, the court decided to address only the present condition of the facility, without going back in time to consider conditions that had changed (T-11/3:20; see, T-II:248). When the time came to prepare its Order, however, the court seems to have reversed itself. There, it described "[t]he most dramatic incident" testified to, wherein a former administrator of the facility refused to furlough a child (not a party) to attend his grandfather's funeral (R.122-23). This single instance, which the court attributed to personal insensitivity and poor training, occurred almost five months prior to the hearing, and was the act

of an administrator who had since been replaced. (T-II:323-25; T-VI:968)..

Also at the November 3 hearing, the Department was assured that its philosophy of treatment would not be called into question by the court:

> [COURT] If there were philosophies of treatment that I disagree, for example, that they felt that psychological model versus behavioral model versus the punishment model and so forth that that was really up to the Department of Juvenile Justice and that if you - if I disagree with your philosophy as to how to treat a child on level six, I really couldn't interfere in any way.

(T-11/3:18). Despite this assurance, the "Order Modifying Commitment" appears to do this very thing. The Department is taken to task for not developing "the right kind of programming," and for "emphasiz[ing] punishment over achieving behavioral change." (R.119). The court goes on to offer the following critique:

> Achieving for some of the children only minimal behavior change, Pahokee is turning back into the communities of the state children who have experienced punishment with little positive reinforcement for positive change. While this may be appropriate for children who are direct filed as adults, or who have reached, through chronic misbehavior, the status of deserving habitual offender or maximum risk, the court cannot accept that such programming is appropriate for children of moderate risk.

(R.123). So much for not interfering with the Department's choice of programming.

This, by itself, necessitates reversal, since the court did not have the authority to manage the details of how the

Department attempts to rehabilitate juveniles. Department of Health and Rehabilitative Services v. Nourse, 437 So.2d 221 (Fla. 4th DCA 1983); see Department of Health and Rehabilitative Services v. Schreiber, 561 So.2d 1236 (Fla. 4th DCA 1990), rev. denied, 581 So.2d 1310 (Fla. 1991); State *ex rel.* Department of Health and Rehabilitative Services v. Sepe, 291 So.2d 108 (Fla. 3d DCA 1974)(although the court could commit a criminal defendant to HRS, its further instructions concerning the method and duration of treatment invaded the executive function in derogation of the separation of powers doctrine).

4. The Rules of Discovery:

This confusion and inconsistency is symptomatic of the inappropriateness of modification proceedings to address the appellees' claims. Most troubling, however, was the absence of reasonable discovery which prevented the Department from preparing a defense. Once it became clear that the court would hear allegations of abuse from the appellees, it was imperative that the Department have the opportunity to depose the child witnesses on the specifics of these allegations. At the November 3 hearing, the lower court agreed that "it would make a difference if you take the depositions or not" (T-11/3:72). The appellees objected, and no depositions were ordered (T-11/3:73-74).

At the start of the November 13 hearing, the Department pointed out that it had not been permitted to take the

depositions of the child witnesses. Because the appellees' recently-submitted statement of "evidentiary points" suggested a civil rights action (with claims that the children feared for their personal safety) the Department's counsel requested some opportunity to prepare a defense to whatever factual allegations the children might make. Specifically, counsel suggested that the children's testimony be taken on direct, but that cross-examination be put off until later in the proceedings. This would give the Department an opportunity to prepare a cross-examination and to produce witnesses from the facility to rebut the abuse allegations. (T-I:6-10). Though not ruling out some other measure, the lower court refused to split direct and cross-examination (T-I:13).

The Department then requested "at least some short time to informally speak to these children or take their depositions," given the fact that there were allegations of Pahokee staff sexually "teasing" children and looking on as children attacked other children. This prompted the court to ask appellees' counsel, "Just remind me why I may have felt that the children should not be deposed?" Counsel responded, arguing that the instant proceeding was similar to a sentencing hearing or a motion to mitigate, and there was no right to depose the defendant in such a case (T-I:21-22). The court was unpersuaded, noting that the children would not be testifying about their court-ordered restrictiveness level or their offenses, but only

about the conditions of their confinement. Thus pressed for another reason, appellees' counsel trailed off into yet another restatement of their position that the Department should not be a party to the modification proceedings. In short, the appellees argued that the Department was lucky to be in court in the first place, and should not have the audacity to demand discovery rights (T-I:23-26).

Announcing that it had "heard enough," the court ended discussion on this issue and proceeded to opening statements (T-I:26-27). Although it is not reflected in the record, the Department's counsel was permitted to speak briefly with the witnesses during an afternoon recess. Of course, this was after one of the children had already testified, and immediately prior to the testimony of two more children. This token gesture did not give counsel the opportunity to obtain testimony from alleged abusers or eyewitnesses to the abuse so as to prepare effective cross-examination. In the end, the Department was confronted with previously unrevealed testimony involving specific instances of abuse allegedly committed at Pahokee, while its counsel hurriedly prepared rudimentary cross-examination.

The Department's inability to depose the children precluded effective cross-examination. Given the lower court's reliance upon this testimony (R.121-22), the refusal seriously impaired the fairness of the proceedings. See Clayman v. Clayman, 536

So.2d 358 (Fla. 3d DCA 1988); Anderson v. State, 314 So.2d 803 (Fla. 3d DCA 1975), cert. denied, 330 So.2d 21 (Fla. 1976).

There was even confusion as to whether the civil or criminal rules of discovery should apply. At the November 3 hearing, Judge Robinson wondered out loud whether civil rules should apply to modification proceedings so as to permit the appellees to serve interrogatories on the Department's Secretary. (T-11/3:78). Noting that his "bias [was] toward the openness that exists under the Rules of Civil Procedure," Judge Robinson permitted limited interrogatories of the Department's Secretary and the appellees' expert witness (T-11/3:81-83). Of course, this did not prevent the appellees from later arguing - with apparent success - that ***criminal*** discovery rules should apply to preclude the Department from deposing the child witnesses. This inconsistency was wholly attributable to the improper characterization of appellees' claims as motions to modify, and confusion was inevitable once the court decided to hear the claims on this basis.

ISSUE II

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT THE DEPARTMENT MISINTEPRETED THE STATUTORY DEFINITION OF "MODERATE-RISK" RESTRICTIVENESS IN SECTION 985.03(45)(c)?

Even if one were to overlook the misuse of modification proceedings that produced the challenged order, the conclusions in the order are themselves erroneous. Specifically, the lower court interpreted the statute defining the "moderate-risk" restrictiveness level to exclude the Pahokee facility. In doing so, the court rejected the Department's reasonable construction of its own statute.

Section 985.03(45), Florida Statutes (1997), defines "restrictiveness level" as "***the level of custody*** provided by programs that service the custody and care needs of committed children." (Emphasis added). The statute provides skeletal descriptions of five such levels ranging from minimum-risk nonresidential and progressing through low-, moderate-, high-, and maximum-risk residential restrictiveness.[5] Moderate-risk restrictiveness is described as follows:

> (c) ***Moderate-risk residential.***—Youth assessed and classified for placement in programs at 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 restrictiveness level

[5] Although no longer found in statute or rule, it is still common in much of the case law and in the lexicon of the juvenile courts to refer to these as levels "2," "4," "6," "8" and "10," respectively.

> 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.

§ 985.03(45)(c), Fla. Stat. (1997).

The appellees argued that the Pahokee facility did not fit within this definition; if anything, it must be designated at high-risk because the Polk Youth Development Center (a virtually identical facility in terms of architecture) was designated at high-risk. Thus, also relevant, is the statute's definition of high-risk restrictiveness:

> (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-secure 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.

§ 985.03(45)(d), Fla. Stat. (1997).

Without specifically redesignating Pahokee a high-risk facility, the trial court seems to have agreed with the appellees that the similarities between Polk and Pahokee precluded their being designated at different restrictiveness levels. In this way, the trial court began its discussion with the above-quoted definitions, but quickly abandoned them in favor of a comparison and contrast of existing commitment facilities. In doing this, the trial court misinterpreted the relevant statutes.

The position adopted by the appellees and the trial court presumes that there can be no overlap between the restrictiveness levels. Thus, since Polk was a high-risk facility, and Pahokee was its "twin," Pahokee could not be a moderate-risk facility. (See, R.117-18). Admittedly, there is some superficial appeal to this position. Each level is viewed as a self-contained, mutually exclusive category which can only include certain facilities, to the exclusion of all others, so that no single facility (or its "twin") could fall within more than one category.

The appeal of this interpretation was not lost on the lower court, nor was it merely implicit in the challenged order. Midway through the proceedings, Judge Robinson offered the following insight:

> [COURT] When I got here a number of years ago, people said, "Why are you going over there, because you are going to be a lackey of HRS?" And I said, "Well, no." I looked at the thing and I said: "No, I have the ability to place a child at a particular level; and if I don't feel that the

> level is being recommended, I can move the child to another level." Now, what you are telling me is that whether I place a child at moderate risk or a[t] high risk is meaningless.

(T-IV:698-99). Later in the proceedings, Judge Robinson wondered out loud "why I spend all this time trying to decide between the 6 and 8" (T-VIII:1336). This concern was amplified in the court's order, which closed with the following:

> If the Department's position were correct, a court would be wasting its time in reviewing any commitment orders recommending moderate risk or higher. This court cannot read Chapter 985 as emasculating the power of the court to fulfill the stated purposes of the legislature by a *de facto* definition that moderate risk can be a prison in all but name.

(R.123). Having begun its inquiry with the statutory language, the court proceeds in this manner to construe the relevant provisions in a way that will not "emasculate" its power to select a restrictiveness level. Unfortunately, it does so without making further reference to the plain language of the statute.

The court erred, both in its assumption that there must be no "overlap" between the restrictiveness levels, and in its conclusion that the existence of such overlap would "emasculate" its power to select a level.

1. <u>The Statute Contemplates Overlap in the Levels</u>:

Even a cursory examination of the statute establishes that there is significant overlap in the restrictiveness levels, particularly in the descriptions of moderate and high risk.

Wilderness programs, for example, are listed in both the moderate- and high-risk levels, with the former being a "moderate-term" program and the latter being a "long-term" program. Aside from the shorter length of stay in the moderate-risk program, which similarly differentiated Polk and Pahokee, the statute clearly permits some overlap between the two levels. Halfway houses are included in the description of moderate-risk, and "secure" halfway houses are included in high-risk. These are virtually identical facilities, particularly since the legislature authorized additional security at the moderate-risk level. (See, T-V:744-45).

Perhaps the best example of this "built-in" overlap is found in the classification of boot camps. Although section 985.03(45) only mentions these in the description of high-risk, chapter 985 clearly envisions boot camps at the moderate-risk and even at low-risk restrictiveness levels. See § 985.309(6), Fla. Stat. (1997) (providing for minimum lengths of stay in low- and moderate-risk boot camps) (formerly § 39.057(6), Fla. Stat. (1995)). These facilities are surrounded by barbed wire or razor ribbon fences, and the children are uniformed and given short haircuts. The appellees argued that some of these same characteristics precluded Pahokee's designation as a moderate-risk facility, yet these are found in boot camps at low-, moderate- and high-risk levels. In fact, boot camps are often

co-located with adult jail facilities, yet even this does not preclude moderate-risk designation. (T-V:745-46).

Critical to the instant case is the overlap in the security measures at the different restrictiveness levels, and this is particularly true at the moderate- and high-risk levels. Thus, section 985.03(45)(c)-(d) provides that facilities at both levels may be "staff-secure," meaning that staff are alert around the clock so that youths attempting an escape will be detected and stopped. However, whereas staff-secure custody is *required* at high-risk, it is permissible but not mandatory at the moderate-risk level. Rather, at moderate-risk, "24-hour ***awake*** supervision" is all that is mandated. This lesser degree of supervision only requires that a staff member be awake at all times so that an escape can be detected and promptly reported to police. (See, T-VIII:1328-30). Similarly, a high-risk facility may be "physically secure" under the statute. Although moderate-risk children "do not need placement in facilities that are physically secure," section 985.03(45)(c) goes on to permit facilities at that level to have a security fence around the perimeter and to be "hardware-secure." Since the fence secures the perimeter, and the hardware secures the buildings within the perimeter, the statute in essence permits moderate-risk facilities to be physically secure. (See, T-IV:686-87). In sum, from the standpoint of custody and security, a facility at the

upper end of the moderate-risk level may be substantially similar to a high-risk facility given the overlap in the statute.

2. The Court's Authority to Assign a Restrictiveness Level is Not Eliminated by Overlap in the Levels:

This does not mean, however, that the trial court is "wasting its time" when it decides upon a restrictiveness level, or that its power to select a level is somehow "emasculated" by the existence of overlap in the levels. (See, R.123). The court's selection of a restrictiveness level has a significant impact upon the duration of the child's commitment - a matter of critical importance. The average "length of stay" for a moderate-risk program is four to six months; at high-risk the average is nine to twelve months (T-VIII:1347-48). The decision also impacts the nature of the delinquent population that the child will encounter upon arriving at the facility. Generally, delinquent youths in moderate-risk placements have committed property offenses, while youths in high-risk facilities are more likely to have committed crimes against persons in addition to property offenses (T-VIII:1348).

To the extent the statutory overlap in the restrictiveness levels is perceived as lessening the trial court's authority to select a level, it must be recognized that the overlap is ***statutory***. Aggrieved parties should petition the legislature for a remedy. Any marginal reduction of the court's authority is not sufficient grounds to depart from the plain language of the statute. See State v. Dugan, 685 So.2d 1210, 1212 (Fla. 1996);

Crooks v. State Farm Mut. Auto. Ins. Co., 659 So.2d 1266, 1268 (Fla. 3d DCA) (the terms of a statute must be given their plain meaning), rev. dismissed, 662 So.2d 933 (Fla. 1995); J.J. v. State, 620 So.2d 1139, 1140 (Fla. 3d DCA 1993) (same).

3. The Court Ignored the Plain Language of the Statute:

Ignoring the plain meaning of the statute, the trial court relied almost exclusively upon section 985.02, Florida Statutes (1997) (formerly § 39.002, Fla. Stat. (1995)), wherein the legislature describes in general terms its intent for the juvenile justice system. Specifically, the court cited subsection (1) of the statute concerning "general protections for children," which includes protection from abuse, and the provision of adequate nutrition and shelter, effective treatment and education, and a safe, nurturing environment. Subsection (3), addressing the legislature's intent for "juvenile justice and delinquency prevention" is also cited, though it is not clear why; much of this concerns the development of prevention programs and detention care. More pertinent to residential commitment facilities is subsection (6), cited by the appellees, where the legislature states its intent that the "rehabilitative treatment, and punitive efforts of the juvenile justice system should avoid the inappropriate use of correctional programs and large institutions."

On the basis of these rather vague prescriptions, the lower court concluded:

> 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. . . . 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.

(R.119). With the plain language of section 985.03(45) a distant memory, the lower court appears thus to have begged the question completely. To the extent the undersigned is able to follow the court's reasoning, it may be summarized as follows: Since the legislature expressed its desire for "the right kind of programming," and such can only be attained if moderate-risk children are placed in moderate-risk programs, there can be no overlap between the restrictiveness levels, and Pahokee must be something other than moderate-risk.

Of course, the initial flaw in the lower court's analysis is its reliance upon expressions of legislative intent to alter the clear language of a substantive enactment. It is true that legislative intent controls the construction of statutes in Florida, but it is the plain meaning of the statutory language that is the first determinant of intent. The legislature is not presumed to have changed its otherwise clear substantive enactments merely by an expression of its general intent. See Vegas v. Globe Security, 627 So.2d 76, 84 (Fla. 1st DCA 1993) (en banc), rev. denied, 637 So.2d 234 (Fla. 1994). Yet this is

precisely what the lower court endeavored to accomplish in the challenged order.

Furthermore, the expression of intent relied upon by the lower court and the appellees is highly suspect. The cited provisions in section 985.02 have not been significantly amended since 1990. In 1994 and 1995, however, the legislature added language to the definition of moderate-risk which permits facilities in this restrictiveness level to have a security fence, and to be hardware or staff-secure. Ch. 94-209, § 11, at 1183, Laws of Fla. (security fence); Ch. 95-212, § 1, at 1920, Laws of Fla. (hardware-secure or staff-secure). Since much of the disputed overlap was introduced with these subsequent additions to the statute, it is inconceivable how an earlier, general expression of legislative intent should be used to negate these substantive amendments.

A more fundamental problem is that the stated intent, and its implications vis-à-vis "the right kind of programming," has little or nothing to do with the levels of custody permitted in the statute. The restrictiveness levels described in section 985.03(45), of which moderate-risk is one, only govern ***"the level of custody"*** found at the Department's commitment programs. § 985.03(45), Fla. Stat. (1997) ("'Restrictiveness level' means the level of custody provided by programs"); J.E. v. State, 676 So.2d 39 (Fla. 3d DCA 1996). The statute does not speak to the nature or quality of the treatment or programming provided at any

particular level. (See, T-IV:624-25; T-VIII:1332). In short, to the extent the lower court concluded that the Pahokee facility's programming was inadequate, inappropriate, or otherwise not in keeping with the cited expressions of legislative intent, the court's impressions had nothing whatsoever to do with the Department's properly designating the facility at moderate-risk restrictiveness under the applicable statutory definition.

4. The Court Rejected the Department's Reasonable Interpretation of a Statute Without Articulating an Alternative Construction:

When it designated Pahokee a moderate-risk facility, the Department was construing a statute (§ 985.03(45)(c)) which it was charged to administer. As such, the Department's construction was entitled to great weight and persuasive force, and should only be overturned if clearly erroneous. See Department of Health and Rehabilitative Services v. A.S., 648 So.2d 128, 132 (Fla. 1995); Department of Health and Rehabilitative Services v. Cox, 627 So.2d 1210, 1214 (Fla. 2d DCA 1993), quashed in part on other grounds, 656 So.2d 902 (Fla. 1995); Gershanik v. Department of Professional Regulation, 458 So.2d 302 (Fla. 3d DCA 1984), rev. denied, 462 So.2d 1106 (Fla. 1985); Cohen v. School Bd. of Dade County, 450 So.2d 1238 (Fla. 3d DCA 1984). The Department's construction of the statute was not clearly erroneous, and in fact comported with the plain language of the provision.

In rejecting the reasonable interpretation of the statute offered by the Department, the lower court has failed to articulate a reasonable or even a cognizable interpretation of its own. It is clear from the challenged order that the court will not permit any degree of overlap between the moderate- and high-risk restrictiveness levels. Yet, having made this determination, the court fails to explain how this should be accomplished; no mention is made of those specific portions of the moderate-risk definition which must be excised or interpreted differently. On a more basic level, neither the court nor the appellees have ever demonstrated what specific attributes of the Pahokee facility preclude its being designated at moderate-risk restrictiveness ***according to the criteria enunciated in section 985.03(45)(c)***.

At the end of the day, the Department is left with a definitional statute that is critical to carrying out its commitment responsibilities, but on which it can no longer rely. For reasons either not articulated or irrelevant to the plain language of the statute, a court has determined that a facility otherwise meeting the definition of "moderate-risk" could not be so designated by the Department. As a result, the Department is left to wonder which of its existing or future moderate-risk facilities will next be deemed to have been improperly designated according to the court's new, unarticulated criteria.

CONCLUSION

The lower court exceeded its authority in entering the challenged orders, and, in doing so, the court misinterpreted the relevant provisions of chapter 985. Accordingly, the Department urges this Court to vacate the lower court's orders of November 20 and December 10, 1997.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appellant's Initial Brief" has been furnished by U.S. Mail this 19th day of May, 1998, to the following: BRUCE A. ROSENTHAL, Assistant Public Defender, Juvenile Justice Center, 3300 N.W. 27th Avenue, Miami, FL 33142; LEON BOTKIN, Chief Assistant State Attorney, Juvenile Justice Center, 3300 N.W. 27th Avenue, Miami, FL 33142; and to MICHAEL J. NEIMAND, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131.

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