BRIEF SUMMARY OF THE COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE ON PROPOSED AMENDMENTS TO THE JUVENILE RULES

The Section on Courts, Lawyers and the Administration of Justice, and its Committee on Court Rules, comment on certain proposed amendments to the Juvenile Rules of the Superior Court.

General Comment

The amendments would substitute "judicial officer" in place of references to the Family Division or the judge in the present rules, presumably to conform the Rules to the practice of assigning hearing commissioners to perform judicial functions in juvenile proceedings with the consent of the parties. The Section suggests that the rule should require notice to the parties, a written consent form, and a straightforward procedure to have the case called before a judge in the event either side does not consent before commissioners take on an expended role in juvenile cases. In addition, because juvenile proceedings are intended to be expedited, and the current rules governing reconsideration of detention orders and the statute governing detention appeals contemplate quick review, the Section suggests that the rule spell out the procedure for seeking review of a hearing commissioner's order, and providing for prompt review of any detention order.

Rule 4(a)

The amendment changes the standard for issuing custody orders based upon a showing of probable cause from permissive "may" to mandatory "shall." This change is inconsistent with the language of the applicable statute, D.C. Code § 16-2306(c), and conflicts with the policies of the juvenile court. Judges should not be deprived by rule of discretion they are given by statute.

Rule 106

This rule is intended to serve a critical function within the District's juvenile detention scheme to guide judicial discretion in detention matters. Congress deliberately left statutory standard for detention in juvenile cases very general, but provided that individual judges would make decisions according to a rule established by the court. Proposed Rule 106 fails to constrain the court's discretion as Congress apparently intended, and leaves judges with little guidance towards making consistent and appropriate detention rulings. Moreover, the proposed rule would make non-exclusive the factors listed as relevant to the detention decision.

The Section suggests that the rule require the court to find, by clear and convincing evidence, that no less restrictive combination of conditions will protect the safety of the community or the child before a child may be detained. This standard would focus the court on the availability of less restrictive alternatives to secure detention, and would prevent the court from detaining just because a single listed factor, or an unlisted factor, has been established. The Section also suggests modifying the Rule to allow judges to consider information in addition to listed factors, but to limit detention to circumstances in which a listed factor is established by clear and convincing evidence.

SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE JUVENILE RULES

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COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE JUVENILE RULES

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, submit these comments concerning certain proposed amendments to the Juvenile Rules of the Superior Court.

The District of Columbia Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers and the Administration of Justice. The Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

General Comment

The amendments substitute "judicial officer" in place of references to the Family Division or the judge in the present rules. Presumably, this change is intended to conform the Rules to the practice of assigning hearing commissioners to perform judicial functions in juvenile proceedings. The authority of commissioners is governed by D.C. Code § 11-1732, and specifically subsection (j). Until recently, the role of hearing commissioners in juvenile cases was limited to uncontested proceedings. Commissioners presided over initial appearances in community release cases,

where there was no issue of detention, and the commissioner's function was to advise the respondent of the nature of the proceedings and to schedule a status hearing. Commissioners also entered consent decrees, by which the respondent agreed to certain conditions in exchange for the prosecutions's promise to dismiss the proceedings after six months. More recently, however, hearing commissioners have presided over contested detention hearings.

The Section is concerned that the juvenile rules do not establish a procedure to obtain the consent of the parties to the participation of a commissioner rather than a judge, or to delineate the procedure for seeking review of a commissioner's order. A number of criminal appeals have been dismissed because of confusion about the proper course of action when a commissioner has rendered a decision, and there is a substantial risk that juvenile respondents and their counsel will not be aware of the consent requirement or the opportunity for review of the commissioner's order. Moreover, unless the procedure for review of a commissioner's order is spelled out clearly, there is a risk that review by a judge might delay appellate consideration of a detention order, despite the clear statutory requirement of expedited appellate review. D.C. Code § 16-2328.

D.C. Code § 11-1732 authorizes the appointment of commissioners by the Superior Court, and sets out their jurisdiction. Commissioners may perform a number of functions by designation by the Chief Judge. None of these

functions, however, applies to juvenile proceedings. Consequently, commissioners may preside over juvenile delinquency proceedings only with the consent of the parties. D.C. Code § 11-1732(j)(5).

As a practical matter, a child appearing before a hearing commissioner for an initial hearing may have little meaningful opportunity to grant or withhold consent. There is little or no warning of the issue, and the likelihood is that a child who refuses consent will have to wait in custody while a judge is found to conduct the initial hearing. The general Family Division Rule, Rule D(c), simply restates the statute, and does not establish a procedure for providing notice or obtaining consent. Accordingly, the Section suggests that the rule require notice to the parties, a written consent form, and a straightforward procedure to have the case called before a judge in the event either side does not consent before commissioners take on an expanded role in juvenile cases.

Similarly, because juvenile proceedings are intended to be expedited, and the current rules governing reconsideration of detention orders and the statute governing detention appeals contemplate quick review, D.C. Code § 16-2328 (Court of Appeals must hear appeal within three days); Juvenile Rule 107(c), (d) (expedited review of motions to reconsider and expedited appeal), the Section suggests that the rule spell out the procedure for seeking review of a hearing commissioner's order, and providing for prompt review

of any detention order. Such a rule is necessary to avoid delay and confusion. The current general Family Division rule, Rule D(e), does not provide for expedited review in detention proceedings. Experience in criminal cases suggests also that some lawyers may erroneously appeal commissioners' rulings directly to the Court of Appeals. See Dorms v. United States, 559 A.2d 1317 (D.C. 1989); Arlt v. United States, 562 A.2d 633 (D.C. 1989). Since the Court of Appeals has ruled these are not final orders, the result will be dismissal of the appeals and the loss of an opportunity for review.

Rule 4(a)

Among other things, the amendment changes the standard for issuing custody orders based upon a showing of probable cause from permissive "may" to mandatory "shall." This change is inconsistent with the language of the applicable statute, D.C. Code § 16-2306(c), and conflicts with the policies of the juvenile court. "Social factors" enter into the decision whether a child should be charged with a juvenile offense, regardless of the strength of the evidence. Juv. R. 103. D.C. § 16-2305(a). It makes little sense to forbid consideration of these factors in deciding whether a child should be placed under arrest before the charging decision is made. As the statute recognizes, the ordinary procedure for bringing a child before the court is the issuance of a summons, which informs the child and his or her

family of the proceeding and the obligation to attend. Custody orders are needlessly intrusive when there is no reason to believe the child will flee or present a danger if not immediately apprehended. Moreover, the experience of arrest maybe unnecessarily traumatic for some children, especially very young children and first offenders. Judges should not be deprived by rule of discretion they are given by statute. The Section therefore suggests substituting "may" for "shall" in the amendment.

Rule 106

This rule is intended to serve a critical function within the District's juvenile detention scheme. Congress deliberately left the statutory standard for detention in juvenile cases very general, but provided that individual judges would make decisions according to a rule established by the court. D.C. Code § 16-2310(c). Since the detention statute applies to all juvenile offenses, serious felonies and petty misdemeanors alike, and to all juvenile offenders, chronic violent offenders to neophytes alike, it is important for the rule to guide judicial discretion in a meaningful way. This is particularly important because the District of columbia Court of Appeals has decided many juvenile detention appeals, but has done so for the most part in summary orders which offer little assistance to trial court judges in search of standards for detention.

Furthermore, a structured process for making detention decisions is important because the detention statute itself contains few procedural safeguards. Unlike the New York juvenile detention statute upheld in Schall v. Martin, 467 U.S. 253 (1984), which involved a maximum of only seventeen days of detention before trial, 467 U.S. at 270, the D.C. statute contains no time limits, and detention typically last several times longer than the New York maximum. The length of detention, and the existence of statutory time limits, has been an important factor in other decisions concerning preventive detention, including United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (en banc) (detention is "closely circumscribed"), cert. denied, 455 U.S. 1022 (1982), and Salerno v. United States, 481 U.S. 739 (1987). The risk of longer detention requires greater procedural safeguards on the initial decision. FDIC v. Mallen, 108 S. Ct. 1780, 1788 (1988); Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Barry v. Barchi, 443 U.S. 55 (1979).

Unlike the adult preventive detention statutes in the District and elsewhere, D.C. Code § 23-1322; 18 U.S.C. § 3142, the D.C. juvenile statute also contains few safeguards to assure accurate factfinding. A judge must make a probable cause determination at the initial hearing before ordering detention, but this may be based on hearsay, in contrast to the New York statute in Schall which required direct testimony. Both the D.C. and federal detention laws require a high standard of certainty for detention orders;

clear and convincing evidence. Under the federal statute, this standard explicitly applies to each fact underlying the detention decision, 18 U.S.C. § 3142(e), while under the D.C. statute it governs the court's ultimate determination that no less intrusive means will protect the safety of the community. D.C. Code § 23-1322(b)(2). The juvenile statute has no standard of proof for detention orders. Consequently, a judge has the power to order detention even if the basis for detention is very uncertain.

Proposed Rule 106 fails to constrain the court's discretion as Congress apparently intended, and leaves judges with little guidance towards making consistent and appropriate detention rulings. The rule lists factors the court may consider, but fails to direct judges in how to use these factors in making decisions. It is particularly critical that judges determine whether out of home placement is needed, because federal reimbursement for children placed out of their homes by court order is contingent upon efforts to avoid out of home placement. If the detention procedure does not require judges to make appropriate factual determinations about the need for detention, federal funding, as well as liberty, may be lost. The proposed amendments make matters worse, because they expand the court's detention authority, without any guidelines. Since there are no standards for determining the sufficiency of a detention finding, basically any detention order checking one of the statutory "factors" appears to satisfy the rule.

Drug Use. For example, as amended, the Rule would allow a child to be detained, in the name of self-protection, on the basis of "indications of illegal drug use," which could be a positive drug test for marijuana, even if there is no evidence of a serious drug problem or any other signs of self-injurious behavior. Currently, detention to protect the child is authorized if the court finds severe or chronic drug abuse. Obviously, "indications of illegal drug use," are relevant to proving this factor. But the amended rule would pre-empt any judicial inquiry into whether the child needs to be protected from him or herself, because an "indication" of drug use would be enough. Secure detention is far too restrictive to be appropriate in these circumstances.

Absence of a Suitable Custodian. The amendments could also allow a judge to detain a child because of "the absence of a suitable custodian," in effect penalizing the child for the failings of his or her parents. While it may be appropriate to remove a child without a suitable custodian from the home, placements for this reason should be in a shelter house or foster home, not in a secure institution. Whether or not these outcomes were intended by the authors of the rule, such inappropriate placements should not be authorized. Currently, the presence or absence of a suitable custodian is a factor to be considered in deciding whether to release a child for whom there is an independent basis for detention, Rule 106(a)(5), not a basis for detention in itself.

The other important change in the rule is that the factors are no longer exclusive. This means, in effect, that the only substantive standards for detention decisions are those in the statute, which Congress recognized were too vague. Judges could, under the amended rule, base detention orders on anything the judge deemed relevant to protecting the child or the community. Since the Court of Appeals has not afforded meaningful guidance on appeal, the amendments create a potential for wildly disparate detention rulings.

The Section therefore suggests that the rule require the court to find, by clear and convincing evidence, that no less restrictive combination of conditions will protect the safety of the community or the child before a child may be detained. This standard would focus the court on the availability of less restrictive alternatives to secure detention, and would prevent the court from detaining just because a single listed factor, or an unlisted factor, has been established. The Section also suggests modifying the Rule to allow judges to consider information in addition to listed factors, but to limit detention to circumstances in which a listed factor is established by clear and convincing evidence.