047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,688

IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE--CAPITAL POSTCONVICTION PUBLIC RECORDS PRODUCTION

RESPONSE OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT TO THE COURT'S INVITATION FOR COMMENTS TO PROPOSED RULE

The Florida Department of Law Enforcement, an agency of the State of Florida, by and through its undersigned General Counsel, responds to the Notice inviting Comments in the above-styled case as follows:

I. SUMMARY OF SUGGESTIONS

The Department of Law Enforcement submits that the proposed rule be modified as follows. Since these proposals are based on the actual experience of FDLE in dealing with capital postconviction appeal public records issues, a more detailed explanation of each suggestion follows:

- The 30-day period in which to produce all records requested does not provide enough time to secure records, review them for exempted information, and to respond to the requests in a thoughtful and thorough manner. The time period should be increased from 30 days to 90 days.
- The proposed rule should indicate that, absent a finding of agency bad faith, the attorney's fee provisions of Section 119.12(1), Florida Statutes, shall not to be applied.
- The rule should specifically authorize an objection to a request for records based on relevance.

- The rule should clarify that an agency with statewide offices should be served any request under the proposed rule only at the agency's principal headquarters and upon the entity within the agency designated to receive such requests.
- The "review" of records as contemplated by the rule should be modified to provide that, when exemptions are claimed, edited copies of the records are to be provided, with an option for judicial review of any challenges of editing or cost assessment.
- General suggestions should be considered by this Court as noted in III.

II. DETAILED SUGGESTIONS, COMMENTS AND ANALYSIS

A. THE RULE SHOULD BE MODIFIED TO INCREASE RESPONSE TIME FROM THIRTY (30) TO NINETY (90) DAYS.

Comment: With respect to proposed Florida Rule of Criminal Procedure 3.852(e)(1), the 30-day period in which to produce the documents or file an objection is unworkable for statewide agencies such as the Florida Department of Law Enforcement (hereafter FDLE). FDLE does not maintain its records in a central location, because its mission and efforts are statewide. Investigative files may be at any one or more of FDLE's over twenty statewide office locations. Multi-office FDLE involvement and effort is not uncommon the cases which are frequently the subject of capital postconviction appeal records requests. For example, FDLE's forensic labs are located in Jacksonville, Tallahassee, Tampa, Orlando, Ft. Myers, Daytona Beach, Pensacola, and Key West. Evidence turned in at one lab may be processed at various lab locations because of the expertise and personnel involved. Records related to the processed evidence will be located at each lab site involved in the analysis.

While the proposed rule makes needed improvement by requiring requests upon agencies to be more specific, it has been FDLE's experience that capital postconviction appeal requests

are usually very broad in nature, with an often-admitted intent being to reveal as little background information regarding the request to FDLE as possible. A typical request would be similar to a request for "all records maintained by FDLE" regarding a person with a common surname, with little or no further information. Even with the greater degree of specificity of information required by the proposed rule, the commonly-encountered scope of a request ("all records") means the time spent in attempting to comply with such requests being substantial. Simply determining whether FDLE has records, and where those records may be found at its numerous statewide sites is a time-consuming process.

Each request for "all FDLE records" requires FDLE to seek to determine whether it maintains records at all its statewide locations as well as FDLE's Tallahassee headquarters locations. From FDLE's perspective, the search must occur *whether FDLE actually has records or not,* in order to determine whether FDLE does in fact retain records of interest. Even if records are in FDLE's possession, they may not be readily identified as pertaining to a request until after labor-intensive steps have been taken. For example, records requests are usually made by a defendant or other subject's name rather than by reference to an FDLE case number. When FDLE forensic analysis has been performed, the evidence may have been classified by the victim's name rather than by a suspect's name, since often at the time evidence is submitted, a suspect has not yet been identified. The time-consuming cross-matching of indexes often must occur before FDLE can appropriately respond to a request.

Many FDLE records are archived off-site and must be retrieved manually before they can be reviewed and made available. Thus the process of simply locating records can be time-consuming on a regular basis.

Capital appeals cases are sometimes based on homicides occurring in the context of drug trafficking operations, or are somehow related to such cases. Often information in such

investigations has been obtained through confidential sources, with information that might identify such sources being exempted from disclosure by law. The safety of those who have provided confidential information resulting in the conviction of others for serious crimes is a primary concern and requires FDLE records to be carefully reviewed prior to disclosure under a public records request. Federal and out of state agencies often provide information under the condition that it not be made public and such information is exempted from disclosure by law. The identities of certain victims are confidential under provisions of law. Because of the inherent nature of FDLE's law enforcement mission, its records must be reviewed more often than not on a page-by-page basis to determine if information exempted from the Public Records law or otherwise exempt or confidential by law is contained within them. *These same concerns must generally apply to any law enforcement agency responding to a records request.* As with any governmental agency, personnel resources are limited, and the number of FDLE members trained and able to review records for exemptions is not great. Accordingly, the process of FDLE review prior to revealing its records is inherently very time-consuming.

A 30-day production deadline will, from FDLE's experience in dealing with public records requests related to capital postconviction appeals, be virtually impossible to consistently meet. It will place FDLE in the "Hobson's choice" of revealing records that have not been adequately reviewed or routinely failing to meet this Court's deadline imposed by Rule. This could lead to objections being filed only because a thorough statewide search has not, despite FDLE's good faith efforts, been completed and certified within 30 days.

FDLE acknowledges this Court's concern that capital postconviction public records requests be handled promptly and that issues derived from an agency's response to such a request be resolved expeditiously by the trial court. However, by increasing the response deadline to 90 days, the Court can give FDLE and other law enforcement agencies a realistic window of

opportunity to identify, secure, review, and respond to capital postconviction appeal public records requests. This will help prevent erroneous disclosures that might have serious ramifications, while also serving to avoid challenges derived from the inability to respond appropriately within the now-proposed time frame.

Recommendation:: Proposed Florida Rule of Criminal Procedure 3.852(e)(1) and (2) should be amended to allow response and/or objections to be made within 90 days of receipt of the request for production. Rule 3.852(e)(3) should be amended to allow production no later than 90 days from receipt of the request.

B. THE RULE SHOULD CLARIFY THAT ABSENT A FINDING OF BAD FAITH ON THE PART OF AN AGENCY, NO ATTORNEYS FEES WILL BE IMPOSED SHOULD THE AGENCY'S CLAIM OF EXEMPTION OR OTHER OBJECTION TO PRODUCTION BE OVERRULED.

Comment: With respect to proposed Florida Rule of Criminal Procedure 3.852(j)(1), any objection filed or exemption claimed by an agency under Fla. R. Crim. P. 3.852(e)(1) that is later overruled by the trial court, absent a showing of bad faith, should not authorize attorney's fees as contemplated by the provisions of section 119.12(1), Florida Statutes. Otherwise there will be a chilling effect upon an agency's ability to make good faith objections or good faith claims of exemptions.

Under the rule, the determination of whether information is exempt or confidential is ultimately to be made by the court in which the proceeding has been filed. A judge reviewing an agency's good faith claim of exemptions may agree to none or only some of the exemptions, *but still recognize that all the exemptions were claimed in good faith by the agency.* FDLE submits that such a determination ought not be considered a determination that an agency "unlawfully refused to permit a public record to be inspected, examined, or copied..." as utilized

in Section 119.12(1), Florida Statutes. Under News and Sun-Sentinel Co. v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987), and absent clarification by this Court, it could be argued that an award of fees and costs against the non-prevailing agency is mandated even if the judge found the agency's claims to be made in good faith.

Failure by this Court to limit award of fees and costs will undercut this Court's intent to focus judicial review on true public records issues and expedite the resolution of those concerns.

Recommendation: Proposed Florida Rule of Criminal Procedure 3.852(j)(4) should be amended to add the following sentence: "Absent a showing of bad faith on the part of the agency, attorney's fees and costs shall not be awarded under this rule."

C. THE RULE SHOULD SPECIFICALLY AUTHORIZE AN OBJECTION BASED ON RELEVANCE IN ORDER TO PROMOTE AN ORDERLY, FOCUSED, AND TIMELY RESOLUTION OF RECORDS-RELATED ISSUES IN CAPITAL POSTCONVICTION APPEALS.

Comment: FDLE submits that with respect to proposed Florida Rule of Criminal Procedure 3.852(c)(5), an agency should be authorized to raise an objection based on relevance. This would be in the spirit of, and for the same reasons as an objection upon relevance is authorized under Fla. R. Crim. P. 3.852 (e)(1). Requests for agency records that do not appear relevant to the capital postconviction appeal or reasonably likely to lead to information relevant to any issue properly considered in the postconviction proceeding, should be subject to an objection, as is now the case with other discovery methods. However, the proposed rule does not clarify whether a relevance objection is authorized.

This Court *should* specifically authorize such objections. It has been the experience of FDLE that capital postconviction appeal public records requests are often very broad, resulting in delays while FDLE attempts to respond to them, and requiring the expenditure of time and

effort on "fishing expeditions" that have been discouraged by Florida courts. See, for example, Johnson v. State, 427 So.2d 1029, 1032 (Fla. 1st DCA 1983): "...prosecution is not required to 'comb its files for bits and pieces of evidence which conceivably could be favorable to the defense.'"). Frequently, the records a capital postconviction appeal request seeks from FDLE have already been made available through the original trial court discovery process.

In order to better promote this Court's intent that capital postconviction appeals become more focused and less prone to interminable delays, FDLE submits that agencies should be specifically authorized to object to demands on the basis of relevance, with that concept including an objection that a request seeks duplicate copies of records already in the possession of the requester. The resulting scrutiny will allow capital postconviction appeal records requests (and the time and effort devoted to complying with those requests) to be more focused, and truly relevant to resolving the crucial issues on appeal.

Recommendation: The proposed Florida Rule of Criminal Procedure 3.852(c)(5) should be amended to change the first sentence to read, "Objection to the request for production, including any objection based on a lack of relevance or based upon a belief that the request seeks records already in the possession of the requester, shall be filed ...."

D. THE RULE SHOULD SPECIFICALLY REQUIRE AN AGENCY WITH STATEWIDE OFFICES TO BE SERVED AT THE AGENCY'S PRINCIPAL HEADQUARTERS AND UPON A DESIGNATED AGENCY ENTITY.

Comment: With respect to proposed Florida Rule of Criminal Procedure 3.852(d)(2)(A), an agency with statewide offices should be served with any request under this rule at one location only: its principal headquarters office. The request should be made upon the Custodian of Records for that agency or other specifically-designated entity. The Florida

Department of Law Enforcement should be among those agencies listed under Fla. R. Crim. P. 3.852(d)(2)(A) for purposes of this rule.

It has been FDLE's experience that capital postconviction appeal records requests have been made at FDLE field offices, upon individual members of FDLE and in a manner that has resulted in delay in responding to the requests. Because the rule will impose time deadlines upon agencies for responding to requests, it should assure that requests made upon agencies are directed to a central location for response. Otherwise the intent of the rule to promote focused and orderly resolution of public records requests will not be effected.

Recommendation: Proposed Florida Rule of Criminal Procedure 3.852(d)(2)(A) should be amended to omit the "and" before (v), and to insert a new (vi) as follows: and (vi) any state agency with permanent offices in multiple circuits within the state.

Then add the following sentence at the end of (2)(A): "Any of the above described agencies shall be served by the capital postconviction defendant or the defendant's counsel at the agency's principal headquarters and upon its Custodian of Records or specified designee."

E. THE "REVIEW" OF RECORDS AS CONTEMPLATED BY THE RULE SHOULD BE REVISED TO ALLOW PROVIDING EDITED COPIES OF RECORDS WHEN AN AGENCY IS CLAIMING THAT THE REQUESTED RECORDS CONTAIN EXEMPT OR CONFIDENTIAL INFORMATION.

Comment: Virtually every public records request for FDLE records results in FDLE claiming a portion of the records as exempt from public disclosure or confidential under law. Proposed rule 3.852(e)(4) does not provide a workable manner in which records containing exempt or confidential material can be "reviewed."

As currently proposed, the rule indicates that copies of records are to be requested "Within ten days of review of the records..." (emphasis supplied.) There is no practical or efficient method

by which *original* records containing exempt or confidential text can be revealed to a requesting entity and the exempt or confidential material protected from disclosure. This precludes the "review, then request copies" option. In practice, the only efficient method of providing access to records containing exemptions or confidential material is to make an *edited photocopy* of those records available to the requester. To allow a "review" of such records would require an agency representative to monitor the review on a page-by-page basis, and somehow temporarily edit exempted material as the material is encountered. This would be very time consuming, as the agency representative would have to review the page, place editing material over the page, monitor the "review" to assure the editing is not removed, and repeat the process on a page-by-page basis.

The concerns over protecting exemptions and confidential information are not unique to FDLE. While not all agency records regularly contain exempt materials, *the vast majority of law enforcement agency records will regularly contain exempt or confidential materials throughout.* These records simply cannot be laid before a requesting entity for review.

It is submitted that what would be more efficient is to allow an agency to copy its records, and provide those records *in edited form* to the requester, with the agency providing specifics as to the grounds for editing information.

When this method is utilized, the requester should be obligated to, at the time the edited records are requested, pay the statutory copying costs, and any costs assessed under the authority of Section 119.07(1)(b), Florida Statutes (costs incurred when the nature or volume of public records requested to be inspected, examined, or copied...is such as to require extensive use of...resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both..."), as such costs may be incurred by an agency in preparing the copies for transmittal.

The requester can then file any objections to the response, including to the claimed exemptions or confidential information, as well as any objections to the costs assessed for producing the copies. The reviewing court could resolve any such challenges or objections. The rule's timelines promote expeditious review of any such complaints.

Recommendation: Although the following suggestion involves a substantial rewrite of a portion of the proposed rule, FDLE proposes that the following be substituted for the currently proposed (e)(4):

> If an agency determines that records in its possession do not include information that may be exempt or confidential, it shall make such records available for review. Within ten days of review of such records, all requests for copies of any of the records shall be made by any counsel who desires copies. Copies shall be furnished by the agency within ten days of the receipt of the request for copies. Copies shall be provided by the agency for the usual fee as charged by the agency for copies or such fee as prescribed by statute, if any. Payment shall be tendered at the time copies are requested.
>
> If an agency determines that all or a portion of its records contain information that it believes in good faith to be exempt or confidential, the agency shall notify the requesting counsel in writing that review of unedited records cannot occur and that a copy of the records, edited to preserve the exempt or confidential status of information believed in good faith by the agency to apply will, upon the requesting counsel's authorization, be made available. Within ten days of receipt of the notification by the agency, the requesting counsel must make written authorization for the copies to be prepared. In making the authorization, the requesting counsel becomes obligated to pay the copy costs and any special service charge as authorized by s. 119.07(1)(a) or (b), Florida Statutes, or any other provision of law. Payment shall be made before or at the time the copies are transmitted. If estimated copying costs and/or special service charges are in excess of $100, a responding agency may require payment of all or a portion of estimated copying costs and special service charges prior to expending resources to review and edit copies for transmittal. Any overpayment by requesting counsel shall be refunded at time of actual transmittal of the copies. If no written authorization to provide edited copies is received by an agency after it has provided notice to the requesting counsel, the request for records shall be deemed withdrawn.

Upon receipt of a request for edited copies of records, the agency shall have 90 days in which to provide the edited copies to the requesting counsel. An agency providing edited copies must specify to the requesting counsel the grounds supporting the editing, consistent with the requirements found in Section 119.07(2)(a), Florida Statutes.

Should the requesting counsel object to the editing of copies tendered or to the costs or charges assessed by the agency, the requesting counsel shall file a complaint as to production as provided by subparagraph (f) of this Rule. Any complaint so filed shall be served as provided by subparagraph (f) with a copy served upon counsel for the agency that is the subject of any such complaint. The reviewing court shall, in addition to resolving whether materials in the copies are exempt or confidential as authorized by law, resolve whether charges assessed by the agency for compliance with the request are authorized by Section 119.07(1)(a) or (b), Florida Statutes.

III. GENERAL RECOMMENDATIONS:

FDLE OFFERS THESE GENERAL SUGGESTIONS IN THE BELIEF THAT THEY WILL FURTHER CLARIFY THE PROPOSED RULE AND PROMOTE THIS COURT'S INTENT:

1. The last sentence of subsection 3.852(e)(1) should have the reference to "subdivision (d)(4)(B)" renumbered or deleted, since there is no (d)(4)(B) in the proposed rule.

2. References to "counsel of record" should also include "counsel for any agency complained about or included within the scope of any motion made." This will help assure that affected agencies are put on notice when their actions are being made subject to court review.

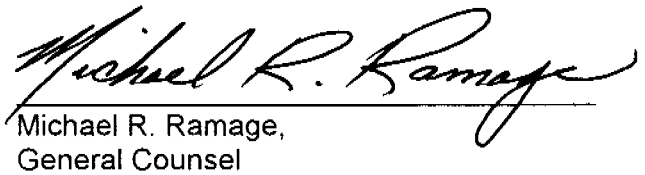
3. To promote accountability and compliance, it is suggested that this Court require all demands, complaints, and communications as contemplated by this rule to be made by a member of The Florida Bar.

4. This Court should clarify whether FDLE will either be listed as one of the specified agencies in (2)(A) or always considered an agency referred to in (2)(B). Otherwise, the time frame in which a public records request could be made upon FDLE could vary from 30

or 120 days. FDLE is always one of the "law enforcement agencies in the circuit where the conviction occurred." However, it may not be involved in the particular case being appealed. Clarification will assure consistency in how FDLE is to be served.

5. Add to (j)(2), the following: "or conduct in camera questioning of witnesses". This would allow agency witnesses to testify before a reviewing judge in specific detail as may be required by the judge in determining whether an agency has validly claimed information exempt or Such detailed testimony could not occur in open court, and the in camera portion of the transcript could be kept under seal for appellate review.

Respectfully Submitted on this 13th Day of June, 1996.



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