IN THE SUPREME COURT OF FLORIDA

NO. SC06-2136

IN RE: AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420 – SEALING OF COURT RECORDS AND DOCKETS

COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

COMES NOW, THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION [FPAA], representing the elected State Attorneys for the twenty judicial circuits of Florida, and files these comments to the Florida Bar's Rules of Judicial Administration Committee's (Committee) Amendment to Florida Rule Of Judicial Administration 2.420 – Sealing of Court Records and Dockets as published on this Court's website on November 17, 2006, stating as follows:

1. On October 3, 2006, Chief Justice R. Fred Lewis in a letter to the Committee requested the Committee to "consider and make recommendations as to all the suggested amendments to Florida Rules of Judicial Administration 2.420 (renumbered from 2.051, effective September 21, 2006) as proposed by the Florida Association of Court Clerks and Comptrollers [FACCC] which came as a result of a series of newspaper articles concerning "super-sealed cases" and non-public "secret dockets" in the Seventeenth, Fifteenth, Thirteenth, and Sixth judicial circuits. These media reports involved civil cases. In a well meaning

attempt to address the concerns presented by these media reports as well as the FACCC's proposals, the Committee filed the present amendment to Rule 2.420. However, these amendments, although providing for the ability of parties to obtain an order to keep court records confidential, do not address the unique issues that confront law enforcement when there is a criminal court file that involves a defendant who is to become a confidential informant in a proactive criminal investigation.

2. The present Rule 2.420(c)(7) & (8) provides for records of the judicial branch to be confidential when the records are made confidential under Florida law or when they are deemed to be confidential by court rule, by Florida Statutes, or by prior case law of the State of Florida. Furthermore, under the present Rule 2.420(c)(9)(A) a court may determine that a court record may become confidential where that confidentiality is required to (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice, (iii) protect a compelling government interest, (iv) obtain evidence to determine legal issues in a case, (v) avoid substantial injury to innocent third parties, or (vii) comply with established public policy set forth in the Florida statutes, rules or case law. In addition to these requirements, under Rule 2.420(c)(9)(B) & (C) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to

protect the interests set forth above and there must be no less restrictive measure available to protect those interests.

3. The FPAA submits that the need for the protection of confidential informants would provide a clear basis to allow the courts to enter orders of confidentiality as they apply to court records which involve confidential informants. The need for protecting the confidentiality of informants has been recognized by the United States Supreme Court as early as 1938. Scher v. United States, 305 U.S. 251, 59 S.Ct. 174 (1938) (unless an informer's identity is essential in defending charges, public policy prohibits identifying a confidential informant). "[T]he informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief." McCray v. Illinois, 386 U.S. 300, 307, 87 S.Ct. 1056 (1967); Snepp v. United States, 444 U.S. 507, 512, 100 S.Ct. 763 (1980) (availability of confidential informants "depends upon [law enforcement's] ability to guarantee the security of information that might compromise them."). This public policy is recognized as well in Florida case law. For example, the Third District in State v. Zamora, 534 So.2d 864, 868 (Fla. 3d DCA 1988), set forth very succinctly this policy quoting Harrington v. State, 110 So.2d 495, 497 (Fla. 1st DCA 1959): "It is common knowledge that without the aid of confidential informants the discovery and prevention of crime would present such a formidable task as

practically to render hopeless the efforts of those charged with law enforcement. And the alarming fact that the underworld often wreaks vengeance upon informers would unquestionably deter the giving of such information if the identity of the informer should be required to be disclosed in all instances."

4. Florida's criminal rules and statutes also recognize this compelling government interest. In particular, Florida Rule of Criminal Procedure 3.220(g)(2) protects the disclosure of confidential informants unless the informant is to be produced at a hearing or trial or the failure to disclose will infringe upon the constitutional rights of the defendant. Section 119.071(2)(d), Florida Statutes (2006), provides for the identity of confidential informants to be exempt from the public records law, and that exemption can remain even after a case is closed or the criminal investigation becomes inactive.

5. The FPAA submits that the amendment to Rule 2.420 as provided in Rule 2.420(d) entitled Request to Make Circuit and County Court Records Confidential, as presently written would not only not further the compelling government interest as set forth above, but would actively jeopardize the lives of confidential informants and their families, as well as the undercover law enforcement officers who may be working with the informants. The courts have recognized that there are "some kinds of government operations that

would be totally frustrated if conducted openly." Press-Enterprise Co. v. Superior Ct. of California for Riverside County, 478 U.S. 1, 9, 106 S.Ct. 2735, 2740 (1986). See, e.g., United States v. Brown, 447 F. Supp.2d 666 (W.D. Tex. 2006) (recognizing the two compelling government interests of protecting an on going law-enforcement investigation and protecting the safety of those cooperating with the investigation to justify sealing of transcript from closed hearing during a criminal trial). Subdivision (d)(1) as amended requires that a request to make the court records confidential must be in writing and identify with particularity the court records that the party is seeking to make confidential without revealing the information to be made confidential and the bases for making the request. Subdivision (d)(1) provides that the records that are subject to the motion are to be treated as confidential by the clerk pending the court's ruling on the motion. Subdivision (3)(H) requires that the clerk of the court publish the order in accordance with subdivision (d)(4). Subdivision (d)(4) provides that except as provided by law or rule of court, within 10 days of the order, the clerk of the court must post a copy of the order on the clerk's website and in a prominent location in the courthouse, which must remain posted for at least 15 days.

6. The problem with these proposed amendments is that in cases involving criminal defendants who agree to work proactively for law

enforcement as part of a plea agreement, any motion in writing that requests that records be made confidential which is open to the public view becomes a red flag to those persons who may want to harm the cooperating defendant. Posting the order on the clerk's website and in a prominent place in the courthouse is akin to painting a "bull's eye" on the cooperating defendant's head.

7. In order to protect the cooperating defendant or confidential informant, the FPAA suggests that the rule be further amended as follows:

> **(d) Request to Make Circuit and County Court Records Confidential.**
> (1) A request to make circuit and county court records confidential under subdivision (c)(9) must be made in the form of a written motion captioned "Motion to Make Court Records Confidential." A motion made under this subdivision must:
>
> (A) identify the particular court records the movant seeks to make confidential with as much specificity as possible without revealing the information to be made confidential; and
>
> (B) specify the bases for making such court records confidential.
>
> Any motion made under this subdivision must include a signed certification by the party making the request that the motion is being made in good faith. The court records that are subject to a motion made under this subdivision must be treated as confidential by the clerk pending the court's ruling on the motion. <u>If any motion made under this subdivision is made as part of a criminal proceeding, the motion and the records must be treated as confidential by the clerk</u>

pending the court's ruling on the motion.
Notwithstanding any of the foregoing, the court may not make confidential the case number, docket number, or other number used by the clerk's office to identify the case file.

(2) Except when a motion filed under subdivision (d)(1) represents that all parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing before ruling on the motion. Whether or not any motion filed under subdivision (d)(1) is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any party may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A). The moving party shall be responsible for ensuring that a complete record of any hearing held pursuant to this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. The court may in its discretion require prior public notice of the hearing on such a motion in accordance with the procedure for providing public notice of court orders set forth in subdivision (d)(4) or by providing such other public notice as the court deems appropriate.

(3) Any order granting in whole or in part a motion filed under subdivision (d)(1) must state the following with as much specificity as possible without revealing information made confidential:

(A) The type of case in which the order is being entered;

(B) The particular grounds under subdivision (c)(9)(A) for making the court records confidential;

(C) Whether any party's name is to be made confidential and, if so, the particular pseudonym or other term to be substituted for the party's name;

(D) Whether the progress docket or similar records generated to document activity in the case are to be made confidential;

(E) The particular court records that are to be made confidential;

(F) The names of those persons who are permitted to view the confidential court records;

(G) That the court finds that: (i) the degree, duration, and manner of confidentiality ordered by the court is no broader than necessary to protect the interests set forth in subdivision (c)(9)(A); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c)(9)(A); and

(H) That the clerk of the court is directed to publish the order in accordance with subdivision (d)(4).

(4) Except as provided by law or rule of court, or if the order arises from a criminal proceeding, notice must be given of any order granting a motion made under subdivision (d)(1) as follows. Within 10 days following the entry of the order, the clerk of court must post a copy of the order on the clerk's website and in a prominent, public location in the courthouse. The order must remain posted for no less than 15 days.

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (d)(3), the request must be made in the form of a written motion that states with as much specificity as possible the bases for the request. The movant must serve all parties in the action with a copy of the motion. In the event that the subject order specifies

that the names or addresses of one or more parties are to be made confidential, the movant must state prominently in the caption of the motion "Confidential Party — Court Service Requested." When a motion so designated is filed, the court shall be responsible for providing a copy of the motion to the parties in such a way as to not reveal the confidential information to the movant. Except when a motion filed under this subdivision represents that all parties agree to all of the relief requested, the court must hold a hearing before ruling on the motion. Whether or not any motion filed under this subdivision is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any party may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A). The movant shall be responsible for ensuring that a complete record of any hearing held under this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court.

(6) If the court determines that a motion made under subdivision (d)(1) was not made in good faith, the court may impose sanctions upon the movant.

(7) Court records made confidential under this rule must be treated as confidential during any appellate proceedings. In any case where an order making court records confidential remains in effect as of the time of an appeal, the clerk's index must include a statement that an order making court records confidential has been entered in the matter and must identify such order by date or docket number.

(8) Requests to seal or expunge criminal history records must be made in accordance with Florida Rule of Criminal Procedure 3.692.

8. The FPAA submits that the changes that it has requested are literally a matter of life or death. The Rules of Judicial Administration must recognize the significant difference between civil cases and criminal cases when there is an issue of confidentiality of court records. The FPAA believes that with the amendments that it has requested along with the amended rule as proposed by the Committee, the lives of cooperating defendants or confidential informants, as well as their families and the law enforcement officers who work with them will be saved. These amendments would permit the state attorneys, along with counsel for the cooperating defendants, to request that the plea agreement as well as the progress docket or similar records generated to document activity in the case are to be made confidential for the relatively short duration that it would take for the cooperating defendant to comply [or in some cases, not comply] with the plea agreement. Once there is a determination that the plea agreement has been or has not been complied with, such that there is no longer a need for the court records to be confidential, the records, which will include the plea agreement and the order which granted the motion to have the court records be kept confidential, would be open for public review.

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court consider and adopt the Comments set forth

herein.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the Gary D. Fox, Esquire, Suntrust International Center, One S.E. 3rd Avenue, Suite 3000, Miami, Fl 33131-1711, on this the 12th day of January, 2007.

By: _____
ARTHUR I. JACOBS
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Comment complies with the font requirements of Fla.R.App.P. 9.210(c)(2).

By: _____
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