IN THE SUPREME COURT OF FLORIDA

IN RE: SC06-2136
SEALING OF COURT RECORDS
AND DOCKETS
_____/

COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Florida Rules of Administrative Procedure 2.420. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of procedure designed to ensure the integrity and accessibility of court records.

The FDPA is concerned about comments made by the State Attorney for the Eleventh Judicial Circuit of Florida (SAO 11) in a letter to Chief Justice Lewis dated November 27, 2006. The timing of SAO 11's letter was not accidental. Three working days earlier, a front-page, above the fold investigative report by The Miami Herald revealed that SAO 11 had been falsifying the criminal records of defendants who had agreed to cooperate with the state. *See* Dan Christensen & Patrick Danner, *Bogus Dockets Shield Informants*, The Miami Herald, Nov. 18, 2006, at A1.

The specific case that led to this discovery was a federal criminal prosecution in which federal prosecutors had revealed that a witness had a state criminal conviction. The circuit court's computer records, however, showed that the state had entered a *nolle prosequi* in the case. The physical court file had also disappeared. When questioned by the newspaper, a high-level assistant state attorney admitted that falsifying court documents had been an "established practice in this Circuit" for two decades.

The SAO 11's letter states, "it is sometimes necessary to seal or otherwise alter portions of a criminal court file to protect cooperating defendants." This sentence seeks to excuse falsifying records as if it were merely another form of sealing those records. The difference between telling a lie and keeping a secret should be evident to anyone.

The structure of the Florida Statutes recognizes this point. The statutes allow sealing or expunging of criminal records in certain circumstances. *See* §§ 943.0585 & 943.059, Fla Stat. (2006). The statutes also shield from public records requests certain public information, including "[a]ny information revealing the identity of a confidential informant or a confidential source." § 119.071(2)(f), Fla. Stat. (2006). Thus, the statutes allow the state to keep records secret in certain circumstances.

Altering or falsifying court records, however, is a crime. Section 839.13, Florida Statutes, provides that if any "judge . . . clerk . . . or any person whatsoever, shall . . . alter . . .[or] falsify . . . any record . . . or any paper filed in any judicial proceeding in any court of this state," "the person so offending shall be guilty of a misdemeanor of the first degree." § 838.13(1), Fla. Stat. (2006). SAO 11's practice of altering court records was illegal.

That practice may also be unethical. The ethical rules provide that: "A lawyer shall not: **(a)** unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act." R. Regulating Fla. Bar 4-3.4. Criminal history records are important evidence because convictions for prior felonies and crimes involving dishonesty or a false statement are admissible as impeachment evidence. *See* § 90.610, Fla. Stat. (2006). Experienced trial attorneys know the effect that a prior felony conviction can have on a jury's evaluation of a witness.

The state need not always reveal the names of their confidential informants. *See Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Often, however, a defendant will know the identities of other persons who are witnesses, even if the person does not know the witness is a confidential informant. Therefore, defense

attorneys need to investigate the prior conviction of not just confidential informants the state lists, but also the persons their clients tell them have information. Those clients have a very strong interest in the public information being accurate.

The office of the Public Defender for the Eleventh Judicial Circuit (PDO 11) and the defense bar as a whole had no idea this practice existed and that, therefore, the computer records were unreliable. A deputy clerk sitting in court creates those computer records by making contemporaneous entries as cases come before the Circuit Court. Assistant public defenders in that circuit have access to the computer records from their desktop computers, and often use that system to find the criminal histories of witnesses in a case. Until the story broke in The Miami Herald, those attorneys had no reason to suspect those records were falsifiable.

In fact, the computer records were often seen as more reliable because the physical papers in a file can be lost or (worse yet) misfiled. The same is true of the entire physical file. Everyone who attempts to retrieve physical court files with any regularity has experienced court files that cannot be found. In a very large clerk's office with an uncountable number of files, no attorney looking into a witness's priors would realize that a missing court file might mean that SAO 11 falsified the computer records. Instead, that attorney would have to trust the computer records to be accurate.

SAO 11 now claims that "in a recent meeting as a circuit, my Office, along with the Chief Judge and other officials from the Eleventh Judicial Circuit" agreed to a three-point plan: 1) any future practice will not include affirmatively falsifying docket entries; 2) any proceedings involving defendants who become confidential informants will be kept confidential for "the limited period of cooperation;" and 3) the docket entries for those cases will reflect that that case is scheduled for "status."[1]

PDO 11 was not invited to that meeting and never agreed to any such plan. The public defender could never have agreed to this plan because it still involves falsification of records. In the Eleventh Judicial Circuit, substantial assistance agreements are part of a plea agreement. Circuit court judges often accept these plea agreements and enter or withhold a judgment of conviction as appropriate under the agreement. The case is then closed. Therefore, the case is not pending "status"—the case is closed and the conviction is final.

[1]In its letter to Chief Justice Lewis, SAO 11 cites the creation of false cases in the investigation of corrupt judges. That situation is wholly different because it involves creation of a fake case, not alterations to the record in a real one. Such a fake case is unlikely to mislead anyone (except the target of the investigation). No one else would be investigating the priors of a non-existent witness.

Additionally, seeking judicial approval from higher courts is appropriate in such situations not only out of respect for the autonomy of the judicial branch, but also because the creation of false cases is ethically problematic. A different subsection of the ethical rules forbids attorneys to "fabricate evidence." R. Regulating Fla. Bar. 4-3.4(b). Creating the documentation necessary to create a fake case does not risk concealing evidence from an opposing party, however. As soon as an indictment is handed down, the ruse will be revealed.

If the state believes that a defendant turned confidential informant has not lived up to the obligations in the plea agreement, SAO 11 files a motion to vacate the plea agreement pursuant to Florida Rule of Criminal Procedure 3.170(g). The possibility that SAO 11 could file a motion to vacate does not mean the conviction is not final anymore than the possibility that the defendant could file a motion to vacate under Florida Rule of Criminal Procedure 3.850. Thus, SAO 11's letter demonstrates that it will to continue to falsify court records even as it claims that it no longer does so. The need for strict judicial oversight and rules of procedure is self-evident.

Additionally, SAO 11's newly-announced practice of altering the criminal history records "for the limited period of cooperation" may also be illegal and unethical. A confidential informant's substantial assistance agreement will often require the person to take actions resulting in a certain number of arrests. When the first arrests are made, the state may be unwilling to correct the confidential informant's falsified criminal history because of the potential for additional arrests. Therefore, even if SAO 11 later corrects the falsified records, that point may be after a resulting criminal case has begun (or even concluded). Section 918.13, Florida Statutes, criminalizes the falsification of court documents to keep them from being used in a court case: "No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority . . . is

about to be instituted, shall: (a) Alter, destroy, conceal or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation." § 918.13(1), Fla. Stat. (2006). Violation of this statute is a third degree felony. § 918.13(2), Fla. Stat. (2006).

This delay in correcting the criminal history records also may result in the same ethical violation discussed above. The false records creates obvious problems preparing for trial and can lead attorneys to provide incorrect advice to clients, especially regarding whether to accept or reject plea offers. Accordingly, if the "limited period of cooperation" extends beyond the filing of the first resulting criminal charge, the falsification obstructs another attorney's access to evidence and alters documents that are relevant to a pending proceeding. *See* R. Regulating Fla. Bar 4-3.4(a).

The FPDA does not oppose temporary sealing of criminal records to help protect confidential informants. After all, many of those confidential informants are public defender clients and it is in their interest. The FPDA, however, cannot endorse falsifying court records, even on a temporary basis. Additionally, a procedure needs to be in place to ensure that an attorney's investigation of potential witnesses is not obstructed and that the attorney receives accurate information about that person's prior convictions.

The Rules of Judicial Administration Committee has not studied this issue because SAO 11 did not timely raise it before that committee. Chief Justice Lewis also asked the Criminal Procedure Rules Committee to consider the issue, but what happened in that committee is unclear. Judge Morgan from that committee participated in the Sealed Docket and Records Subcommittee meetings that drafted the proposed rules. The minutes of the subcommittee meetings do not reflect that anyone ever considered this issue, perhaps because the media had not yet revealed it.

The proposed rule would require public hearings on motions to make court records confidential. The proposed rule would also require the clerk to post a copy of the order granting such a motion on the clerk's website and in the courthouse. Anyone could compile a complete list of confidential informants in the circuit by simply calling up that website and looking for cases with a criminal case numbers (case numbers are not confidential under the proposed rule). As written, these rules would make "confidential informant" an oxymoron.

The proposed rules are an improvement over the present system, which has allowed existence of "secret dockets." The committee has come forward with a comprehensive proposal to solve that problem and has done so very quickly. The FPDA commends the committee for its thoughtful and prompt action. Nevertheless, because of the profound issues that were not considered, this Court

should not adopt the proposed rules, but should instead ask the Sealed Docket and Records Subcommittee to amend them to address the situation of confidential informants.

CONCLUSION

This Court should not adopt the proposed rules until the Sealed Docket and Records Subcommittee revises the proposed amendments to the Rules of Judicial Administration to address the criminal records of confidential informants.

Respectfully submitted,

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General Counsel for
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CERTIFICATES

I hereby certify that a copy of these comments were served by mail on Gary D. Fox, Suntrust International Center, One S.E. 3rd Avenue, Suite 3000, Miami, Florida 33131-1711; William C. Vose, 1104 Bahama Drive, Orlando, FL 32806-1440; and on The Honorable Katherine Fernandez Rundle, 1350 N.W. 12th Avenue, Miami, Florida 33136-2111, on this sixteenth day of January 2007.

I hereby certify that these comments were printed in 14-point Times New Roman.

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Robert Dewitt Trammell

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REQUEST FOR ORAL ARGUMENT

The Florida Public Defender Association hereby requests to participate in the oral argument in this case, which is currently scheduled for March 5, 2007.

Respectfully submitted,

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