IN THE SUPREME COURT OF FLORIDA

NO. SC07-2050

IN RE: AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

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 (RJA) Committee's Proposed Amendments to Florida Rule Of Judicial Administration 2.420 as published on this Court's website on February 8, 2008, stating as follows:

1. The issue of protecting confidential informants, and the propriety of the procedure that has been utilized in the Eleventh Judicial Circuit, was first referred on December 6, 2006, to the Criminal Procedure Rules Committee (CPRC) by Chief Justice Wells in a letter to William Vose, Esquire, the then-Chair of that Committee. After this Court reviewed the Comments and heard oral argument on the amendments to Rule 2.420 of the Rules of Judicial Administration, this Court determined that the rule as proposed should not apply to criminal cases, and sent the issue back to the Florida Bar's Rules of Judicial Administration Committee in conjunction

with the Criminal Procedure Rules Committee to draft a rule which would apply to criminal cases. See In re Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Documents, 954 So. 2d 16 (Fla. 2007). This Court sent a formal referral letter to both Committee chairs on April 19, 2007. Numerous subcommittee and committee meetings were held on this issue. On October 25, 2007, the Criminal Procedure Rules Committee voted 24-0 to endorse the amendments to subdivision (e) submitted with the RJA's report on the proposed amendments. Among, the members of the CPRC are sixteen (16) criminal defense attorneys, including one elected Public Defender and three Assistant Public Defenders and one Assistant Capital Collateral Regional Counsel. Only eight (8) members are prosecutors. At no time did any member of the CPRC raise the issues as set forth in the FPDA's Comment.

2. The concerns expressed in the FPDA's present Comment are similar to those raised by the FPDA in their prior Comment filed in Case No. 06-2136. The FPDA's concerns that judges, clerks, prosecutors, and defense attorneys who participate in proceeding involving cooperating criminal defendants would be acting criminally and unethically are unfounded. The FPDA asserts that there is a prohibition in section 839.13, Florida Statutes (2007), that was ignored by the state attorneys, against altering or falsifying

any court record. However, the FPDA left out a critical requirement of the statute, i.e., that the falsification of the court records must be done with a "corrupt" intent. Such an intent requires that the act be done "dishonestly for a wrongful purpose." See s. 838.014(4), Fla. Stat. (2007). This is precisely why neither the state attorney nor this Court committed any crime when it approved the creation of false court records in two criminal investigations involving members of the judiciary in the Eleventh Judicial Circuit (Operation Court Broom and State v. Howard Gross).[1] Similarly because there was no criminal intent, any temporary alterations of the court record was not illegal. See, e.g., United States v. Murphy, 768 F. 2d 1518, 1528-29 (7th Cir. 1985). Thus, there is no reason to include any prohibition in Rule 2.420, which tracks the language of section 838.13(1).

3. The FPDA's Comment attempts to show that the practice of having the docket entries of defendants who agree to act as confidential informants reflect that the case is not closed,[2] as opposed to showing that the defendant was convicted of a crime, during the limited period of cooperation

[1] The facts of Operation Court Broom can be found in United States v. Shenberg, 89 F. 3d 1461 (11th Cir. 1996) (of interest is the fact that Judge Shenberg was willing to provide the identity of an alleged confidential informant who he was told would be killed). The arrest of Judge Gross is mentioned in Maharaj v. State, 778 So. 2d 944, 950 (Fla. 2000).

[2] In the Eleventh Judicial Circuit, the cases would show an open Status.

is also criminal and unethical. The FPDA's Comment concerning the need for defense attorneys to know about the convictions of the cooperating defendant is based on a false assumption that the prosecutors involved in these pleas will act unethically and criminally in that the FPDA states that the prosecutor will continue to conceal the existence of convictions and substantial assistance agreements of a cooperating defendant who is a confidential informant, after arrests have been made based on the assistance of the cooperating defendant. The FPDA also suggests that the prosecutors will not provide defense attorneys with accurate criminal history records for witnesses or prevent them from having access to such evidence.

4. There is no basis to assume that prosecutors are unaware of their discovery obligations under Florida Rule of Criminal Procedure 3.220, as well their duty to provide favorable evidence under Brady v. Maryland, 373 U.S. 83 (1963). There may have been rare cases in which a prosecutor has failed to abide by that obligation. However, those infrequent failures do not allow the FPDA to paint all prosecutors with the same broad brush, any more than one could claim that because some assistant public defenders or defense attorneys have been found to provide ineffective assistance to their clients, that all assistant public defenders or defense attorneys are ineffective.

5. The FPDA's Comment asking that this Court require the conviction of the cooperating defendant, who is a confidential informant, to not be sealed, even during the time the defendant is still acting as a confidential informant, puts the cart before the horse and would endanger the informant's life. It should be noted that just because a cooperating defendant, acting as a confidential informant, provides assistance or information that resulted in an arrest, does not automatically require that such person's identity be disclosed to the arrested defendant, such that it would be necessary to reveal the confidential informant's prior convictions. Under Rule 3.220(b)(1)(G) of the Florida Rules of Criminal Procedure, the State is required to inform a defendant if it has "any material or information that has been provided by a confidential informant." Thus, defense counsel will know during his or her investigation of the case whether a confidential informant was involved in the case.

6. Under Rule 3.220(g)(2) of the Florida Rules of Criminal Procedure, the State is not required to disclose the identify of the confidential informant unless "the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe on the constitutional rights of the defendant." Thus, if the confidential informant is to be a "produced" witness, i.e., a witness who

testifies in the case, then the State would be required to disclose the identity, and with that disclosure, any Brady material, which would include the informant's prior convictions and any plea agreements or other benefits given to the informant.

7. If a defendant thinks he or she knows the identity of the confidential informant, that does not automatically mean that the State has to confirm such knowledge with the revelation of the informant's identity. See State v. Angeloff, 474 So. 2d 13 (Fla. 1st DCA 1985). Rather, the defendant must ask the court to order the disclosure of the identity of confidential informant because the failure to disclose the informant's identity would infringe on the constitutional rights of the defendant. In making the determination that disclosure of the confidential informant's identity is required, the courts looks to such factors as whether it is necessary for the prosecution to refer to the informer in the presentation of the case, whether the informer was an "active participant" in the offense with which the defendant is charged or is a "mere informer" who supplies a "lead;" or whether the informant is a material witness to a specific defense alleged by the defendant. See Treverrow v. State, 194 So. 2d 250, 252 (Fla. 1967); State v. Zamora, 534 So. 2d 864 (Fla. 3d DCA 1988). If the court orders the revelation of the informant's identity, then the State would be obligated to

provide to the defendant any Brady material, which would include the informant's prior convictions and any plea agreements or other benefits given to the informant.

8. The fact that the defendant gives his or her attorney the names of persons who are witnesses, even if the defendant does not know the witness is a confidential informant, is not a reason to place the confidential informant in danger by revealing the conviction so that defense counsel can "investigate" it. This is precisely why the conviction needs to remain sealed during the pendency of the cooperation (unless otherwise required by law to be revealed).[3] Criminal organizations have become much more savvy and finding out who among them are cooperating with law enforcement has become a top priority. Websites are now devoted to uncovering confidential informants. It does not take much imagination to envision the circumstance where a defendant tells his attorney that John Doe is a witness to his drug trafficking. The attorney investigates John Doe and finds out that he has a conviction for drug trafficking, but he has not yet been sentenced. The

[3] The FPDA's statement that proposed rule's allowance for extension for the sealing orders would allow an "ad infinitum" number of extensions because it would be easy for prosecutors to "cookie-cut" the requests on their word processors, is a not only a slap to the prosecutors, but to the judiciary, as it implies that the judges will not perform their obligations under the proposed rule to determine if the requests should be granted.

defense attorney will discern that the reason for John Doe not being sentenced is due to the fact that he is probably a cooperating confidential informant. In fact, the defendant does not even have to involve his defense attorney – he could get other persons to get that information for him and he could come to that same conclusion, which would not only endanger the life of the confidential informant, but those of law enforcement officers who are involved in the ongoing criminal investigation.

9. The FPAA submits that the proposed amendments of Florida Rules of Judicial Administration 2.420 address what is literally a matter of life or death. The proposed amendments 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 proposed amendments 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, which has to also include the conviction, 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.

10. The proposed amendments of Florida Rules of Judicial Administration 2.420, address the concerns expressed by this Court in the prior proceedings, and balanced the need to protect confidential informants and ongoing criminal investigations, with a criminal defendant's constitutional rights, as well as the public's right to have access to judicial records.

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court adopt the proposed amendments of Florida Rules of Judicial Administration 2.420.

Respectfully submitted,

By:_____

ARTHUR I. JACOBS
General Counsel
Florida Prosecuting Attorneys Association
Florida Bar No. 108249
401 Center Street 2d Floor
P.O. Box 1110
Fernandina Beach, Fl 32035-1110
(904) 261-3693

By: _____

PENNY H. BRILL
Assistant State Attorney
Eleventh Judicial Circuit
Florida Bar No. 305073
1350 N.W. 12th Avenue
Miami, Fl 33136
(305) 547-0666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; The Honorable Robert T. Benton II, Chair, Rules of Judicial Administration Committee, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, Fl 32399; J. Craig Shaw, Bar Staff Liason, Rules of Judicial Administration Committee, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; Carol Jean LoCicero, Esquire, and Deanna K. Shullman, Esquire, Thomas & LoCicero, PL, Counsel for Florida Media Organizations, 400 N. Ashley Drive, Suite 1100, Tampa, Fl 33602; Barbra A. Peterson, Esquire and Adria E. Harper, Esquire, First Amendment Foundation, 335 East College Avenue, Suite 101, Tallahassee, Fl 32301; Lucy A. Daglish, Esquire, Gregg P. Leslie, Esquire, and Matthew B. Polack, Esquire, The Reporters Committee for Freedom of the Press, 1101 Wilson Boulevard, Suite 1100, Arlington, Va 22209; H. Scott Fingerhut, Esquire, Chair, Criminal Procedure Rules Committee, 2400 S. Dixie Highway, Fl.2, Miami, Fl 33133; 1104; Carol M. Touhy, Esquire, Counsel for Diane M. Matousek, Clerk of the Circuit Court, Volusia County Courthouse, 101 N. Alabama Avenue, DeLand, Fl 32724; and Robert DeWitt Trammell, General Counsel for the Florida Public Defender

Association, Inc., Post Office Box 1799, Tallahassee, Fl 32302, on this the ___ day of April, 2008.

By: _____
ARTHUR I. JACOBS
General Counsel

CERTIFICATE OF COMPLIANCE

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

By: _____
ARTHUR I. JACOBS
General Counsel