IN THE SUPREME COURT OF FLORIDA

IN RE: SC07-2050
AMENDMENTS TO FLORIDA
RULE OF JUDICIAL
ADMINISTRATION 2.420
_____/

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 FPDA's interest in this issue peaked when The Miami Herald revealed that prosecutors had been removing the criminal records of defendants who had agreed to become confidential informants. *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 altering court documents had been an "established practice in this Circuit" for two decades.

This media discovery came after the separate media uncovering of "secret dockets" in civil cases, which led to this Court's "interim, emergency" adoption of the 2007 amendments to rule 2.420. *See In re Amendments to Florida Rule of Judicial Administration 2.420—Sealing of Court Records and Documents*, 954 So. 2d. 16, 17 (Fla. 2007). At the oral argument on that rule, the committee admitted the proposed rule had not been designed for criminal cases, and this Court modified the proposed language to make clear that it did not apply in criminal cases. *Id*. at 21.

The proposal before this Court now would modify the rules in civil cases to make them more applicable to criminal cases. The FPDA has no objection to the major modifications that make confidential the written request for confidentially, close the hearing on any such request, and prohibit the clerk from publishing any orders on these requests unless ordered by the trial court. The FPDA agrees that these are reasonable precautions to protect clients or sign substantial assistance agreements with the state.

The FPDA has two major concerns with the proposed rules: they do not address the altering of court documents, and they would allow criminal convictions to be kept secret from defendants in other cases. The FPDA would also suggest that the committee was too quick to jettison some of the protections applicable to civil cases that would have no impact on the safety of confidential informants.

ALTERING COURT DOCUMENTS SHOULD BE EXPLICITLY PROHIBITED.

The proposed amendments to the rule fail to address the situation that created this issue in the first place—the alteration of court records. Given that history, the failure to mention altering court documents could be read as an implicit permission for state attorneys to continue doing so.

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). Nevertheless, this statute did not deter the establishment of a long-standing practice of doing just that.

The FPDA respectfully suggests that this Court incorporate similar language into this Rule of Judicial Administration to remove any suggestion that altering court documents, as opposed to keeping them secret, is ever acceptable. This

Court has often promulgated rules that echo and even copy constitutional and statutory provisions.

Additionally, the proposed rules allow the trial courts to make confidential any court records, including records of criminal convictions. The rule defines "court records" very broadly to include everything "which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case." Fla. R. Judicial Admin. 2.420(b)(1)(A). That definition would include records showing that a trial court entered a criminal conviction against a person.

Criminal convictions are different from other court records because they can affect other cases, not just the case in which the record was created. The state sometime enters into substantial assistance agreements while the confidential informant's criminal case is still pending, but other times they are part of a plea the closes the case and results in a conviction. Florida Rule of Criminal Procedure 3.170(g) explicitly contemplates that these agreements will close cases with convictions and allows the state reopen them if the confidential informant does not fulfill the terms of the agreement.

Under the proposed rule, the state would then request that the trial court make confidential records of the substantial assistance agreement and the conviction. The confidential informant would presumably agree and the trial court

would enter the confidentiality order without a hearing. 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 and the confidential informant will want to keep the confidential informant's criminal conviction secret because of the potential for additional arrests. At this point, the confidentiality order creates constitutional, legal and ethical problems.

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. Even pretrial, an attorney needs to be able to investigate the potential witnesses against a client to assist the client in evaluating the strength of the state's case and, therefore, the advisability of entering into a plea.[1] The state or the court can make these plea offers as early as the twenty-first day arraignments, long before the 120-day (or longer)[2] confidentiality order expires. A

[1]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.

[2] The proposed rule limits any extensions of this 120-day period to 60 days each, but allows an *ad infinitum* number of extensions. Cookie-cutter requests for

defense attorney and the defendant have very strong interest in the court records being complete and accurate.

The due process clauses of the state and federal constitutions include "'what might loosely be called the area of constitutionally guaranteed access to evidence.'" Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *California v. Trombetta*, 467 U.S. 479, 485 (1984) (*quoting United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); s*ee also Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987).

Keeping the confidential informant's conviction secret after the institution of a criminal case against someone else violates that defendant's right to know the criminal histories of the witnesses in the case. Such action would also violate Florida law. Section 918.13, Florida Statutes, criminalizes the concealing 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

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extension, printed from a word processor, are not so taxing of resources as to ensure that these confidentiality orders will not continue for very long periods.

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. *See* § 918.13(2), Fla. Stat. (2006).

Maintaining confidentially of a confidential informant's conviction after an arrest and institution of criminal proceedings would 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. By the time a confidential informant assists in making an arrest, the state attorney and defense attorney for the confidential informant would know that the confidential informants conviction is relevant to this new criminal case.

The state, of course, can avoid all these problems if it simply makes substantial assistance agreements while the confidential informant's case is still pending. As long as the state does not conceal the existence of the pending case against the confidential informant, concealing the existence of the substantial assistance agreement would not result in any constitutional, legal or ethical violation.

Therefore, the FPDA proposes modifying the proposed rules specify that "court records" under proposed Florida Rule of Judicial 2.420 do not include records of criminal convictions.

CONCLUSION

This Court should modify the proposed rules to explicitly prohibit the alteration of court records. This Court should also modify the proposed rules to specify that "court records" that may be held confidential do not include criminal convictions.

Respectfully submitted,

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CERTIFICATES

I hereby certify that a copy of these comments were served by mail on Honorable Robert T. Benton II, First District Court of Appeal, 301 South Martin Luther King, Jr., Blvd., Tallahassee, FL 32399-6601,on this first day of April 2008.

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 any oral argument in this case.

Respectfully submitted,

_____
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