IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-2443

IN RE: IMPLEMENTATION OF COMMITTEE ON PRIVACY AND COURT RECORDS RECOMMENDATIONS – AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE; THE FLORIDA RULES OF CRIMINAL PROCEDURE; THE FLORIDA PROBTE RULES; THE FLORIDA SMALL CLAIMS RULES; THE FLORIDA RULES OF APPELLATE PROCEDURE; AND THE FLORIDA FAMILY LAW RULES

RESPONSE OF SUBCOMMITTEE ON ACCESS TO COURT RECORDS TO COMMENT OF CRIMINAL PROCEDURE RULES COMMITTEE MINORITY REPORT

The Criminal Procedures Rules Committee filed a Comment to this Court's order of April 1, 2010. The Comment highlights statutes, rules, and well-established local administrative rules and practices that protect the privacy of mental health evaluations, records, and reports, and which have done so prior to November, 1992. When the Access to Court Records Committee developed the exemptions found in Rule 2.420(d)(1)(B) of the Florida Rules of Judicial Administration, it restricted its consideration of automatically exempt records to those articulated in general law or statute existing prior to November, 1992. In doing so, it did not include presentence investigations, pursuant to Rule 3.712 of the Florida Rules of Criminal Procedure and section 921.107(8), Florida Statutes (2009), which have been exempt from public records long before the establishment of section 24, article I, of the Florida Constitution.

I join the majority view of the Access Subcommittee in recommending that rule 2.420 be amended to include pre-sentence investigations. I also agree that the "medical history and, as appropriate, a psychological or psychiatric evaluation" that may be included be subject to automatic exemption. *See* Access Subcommittee's Comment at page 4. I further agree with the majority's view concerning administrative orders and the modification of proposed amendments to Rules 3.211(d), 3.212(d), 3.218(a), and 3.219(a) of the Florida Rules of Criminal Procedure. I part company with the majority, however, in its unwillingness to recommend inclusion of pretrial mental health evaluations.

In the initial creation of rule 2.420(d)(1)(B), the Access Committee did not include sections 456.057, 456.059, or 90.503, Florida Statutes, which, although not as clearly expressed, have historically protected mental health evaluations, records, and reports for decades. These protections have been subject to opinions of this Court and other District Courts of Appeal. *See, e.g., Caraballo v. State*, 39 So. 3d 1234 (Fla. 2010); *State v. Johnson*, 814 So. 2d 390 (Fla. 2002); *Hunter v. State*, 639 So. 2d 72 (Fla. 5th DCA 1994); *Ussery v. State*, 654 So. 2d 561 (Fla. 4th DCA 1995); *Attorney Ad Litem For D.K. v. The Parents of D.K.*, 780 So. 2d 301 (Fla. 4th DCA 2001).

As I wrote in my dissent in *Limbaugh v. State*, 887 So. 2d 387, 399 (Fla. 4th DCA 2004): "The special nature of the doctor-patient relationship dates back 2400

years to the age of Hippocrates. From that point forward, medical records have been the focus of constitutional, statutory, and regulatory protections." This Court recognized the privacy afforded medical records under section 23 of the Florida Constitution in *State v. Johnson*, 814 So. 2d 390 (Fla. 2002). Most recently, this Court again emphasized the need for keeping this information confidential in the context of a competency issue in *Caraballo*.

> As a result of the court's obligation to ensure that the material stages of a prosecution not proceed against a criminal defendant while the defendant is mentally incompetent, any defendant may be subjected to a mandatory competency evaluation and, consequently, subjected to the risk of saying something or responding in a manner that is detrimental to or incriminates the defendant. It is for this reason that the protection of confidentiality is afforded to the substance of a defendant's competency evaluation. Under rule 3.211(e), except in certain limited circumstances, the information obtained during the course of a competency evaluation must remain confidential.

39 So. 3d at 1252-53. And, the United States Congress reminded us of the importance of a person's right to privacy in medical records in amending HIPAA. *See* Health Insurance Portability and Accountability Act [HIPAA], 42 U.S.C.A. § 210 (1996).

Section 456.057(1) defines "records owner" as "any health care practitioner who generates a medical record after making a physical or **mental** examination of, or administering treatment or dispensing legend drugs to, any person . . . ." (Emphasis added). Subsection (7)(a) provides:

> Except as otherwise provided in this section and in s. 440.13(4)(c), such records may **not** be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.
>
> However, such records may be furnished without written authorization under the following circumstances:
>
> . . .
>
> 3. In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

§ 456.057, Fla. Stat. (2009) (emphasis added).

Section 456.059 provides that "[c]ommunications between a patient and a psychiatrist . . . **shall be held confidential and shall not be disclosed** except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 456.057." (Emphasis added). And section 916.107(8) provides in part: "Unless waived by express and informed consent of the client or the client's legal guardian . . . the clinical record is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution."

These statutes have been on Florida's books since 1976, and clearly articulate that communications between a patient and psychotherapist are privileged and confidential unless the party's mental condition is put in issue, at

which point the privilege is waived. Just because those communications become part of an evaluation or report, they do not lose the confidentiality otherwise provided by section 456.059.

Because psychiatric records are privileged and exempted from both public records under section 119.07(1) and article I, section 24 of the Florida Constitution, they, along with evaluations and reports, should be included in rule 2.420(d)(1)(B)'s automatic exemptions. The clerks already know the nature of these documents and have been responsible for keeping the records confidential for decades. What the clerks don't know is whether one of the exceptions to confidentiality applies. By keeping the records confidential, the trial court can then determine if the privilege has been waived or whether some exception to confidentiality exists. *See* § 456.057(7)(a), Fla. Stat. (2009).

Even the Evidence Code addresses the confidential nature of communications between a psychotherapist and patient.[1] § 90.503, Fla. Stat.

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[1] Section 90.503(2), Fla. Stat. (2009) provides:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

(2009). This privilege also existed prior to the creation of section 24 of the Florida Constitution. "It is fairly well settled that confidentiality is essential to the conduct of successful psychiatric care." *Attorney Ad Litem For D.K.,* 780 So. 2d at 306 (quoting Law Revision Council Note to section 90.503 (1976)).

While section 90.503(4) provides exceptions to confidentiality, whose responsibility should it be to determine whether the evaluation, report, or record is subject to an exception to that privilege? Should a clerk be making the decision of whether an exception to the privilege applies? *See* 90.503(4), Fla. Stat. (2009).[2]

As the Criminal Procedure Rules Committee articulated in its Response, "psychological and psychiatric reports are commonly filed in criminal cases by

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[2] Section 90.503(4), Florida Statutes (2009) provides:

> There is no privilege under this section:
>
> (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
>
> (b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient
>
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

experts or agencies that are not parties to the action." They are filed when competency and insanity are considered, or other mental health evaluations undertaken with regard to sentencing. To further the goal of protecting confidential information, these records, evaluations, and reports should be automatically exempted until a trial court determines that the privilege of confidentiality does not apply under sections 456.057(7) and 90.503(4), Florida Statutes (2009).

As noted by the Subcommittee's Majority Response, one of the Access Committee's "essential tasks has been to narrow the scope of subdivision (c)(8) to a finite set of public records exemptions that are both appropriate in the context of court records and readily identifiable by the clerks of court." *See* Subcommittee Response at page 3. The concern is that clerks will not have the expertise to discern whether a report is confidential. However, for decades Florida's clerks have recognized and kept confidential psychological and psychiatric evaluations, reports and records. This has been in part the result of long-standing recognition of the confidentiality of such evaluations, reports and records and because most jurisdictions have administrative orders pre-dating 1992 that keep those evaluations, reports, and records confidential. For this reason, psychological and psychiatric evaluations, reports, and records should be deemed automatically exempted as confidential, pursuant to rule 2.420(d)(1)(B) of the Florida Rules of Judicial Administration.

Alternatively, I respectfully recommend that the Court order that rule 2.420 is suspended as to criminal proceedings until the Legislature can address the issue. This would also allow the Legislature to address issues that are arising in Drug and Mental Health Courts throughout the State.[3]

Respectfully submitted this _____ day of November 2010.

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[3] *See generally* Adolfo Pesquera, *Prosecutor, Defender Spar Over Scope of Confidentiality Rules*, DAILY BUSI. REV., Oct. 27, 2010, at A2, *available at* http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202473950030&hbxlogin=1

CERTIFICATE OF SERVICE

I HEREBY CERTFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this ____ day of November 2010:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify this response has been prepared in MS Word using Times New Roman 14-point font which complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

____
The Honorable Melanie G. May