IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420
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Case No. SC10-2242

RESPONSE OF SUBCOMMITTEE ON ACCESS TO COURT RECORDS TO COMMENTS OF THE TASK FORCE ON SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES IN THE COURT AND COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Courts Technology Commission and its Subcommittee on Access to Court Records (hereinafter collectively the "Access Committee"), by and through the Commission's Chair, the Honorable Judge Judith L. Kreeger, Senior Judge in the Eleventh Judicial Circuit, and Paul R. Regensdorf, Esq., Chair of the Access Committee, acting pursuant to this Court's publication notice issued November 19, 2010, submits this response to the above described comments. The Access Subcommittee is authorized by the Administrative Order AOSC 09-3, In Re: Florida Courts Technology Commission, Subcommittee on Access to Court Records, Jan. 27, 2009, to act as successor to the Committee on Access to Court Records for purposes of responding to comments filed in this and other related matters.

Procedural Background

The specific subject matter of this rules case, Case No. SC10-2242, arose out of a comment by the Criminal Procedure Rules Committee in Case No. SC08-2443. In its comment, that Committee requested that this Court implement a broad automatic exemption under Rule of Judicial Administration 2.420 for a variety of mental health reports, psychiatric evaluations, and psychological evaluations of various types (hereinafter referred to as "mental health evaluations") filed with Florida courts. A copy of that comment is attached hereto as Exhibit "A".

In response to that comment requesting a broader exemption for mental health evaluations, both the Access Committee response and a minority report from the Access Committee were filed in Case No. SC08-2443. Copies of these filings in Case No. SC08-2443 are attached hereto as Exhibits "B" and "C".

In response to these filings, the Court stated that it would not consider any new or broader exemptions to Rule 2.420(d) in Case No. SC08-2443, and directed interested persons to comment in this case, SC10-2242. A copy of the Court's November 19, 2010 order opening SC10-2242 and publication notice, together with proposed rule language, are attached hereto as Exhibit "D".

Accordingly, the Task Force on Substance Abuse and Mental Health Issues in the Court and the Florida Public Defender Association filed "comments" in this case. There is, however, no initiating document, petition or report that reflects the

position of the Access Committee about this requested expansion of the automatic exemptions specified in Rule of Judicial Administration 2.420(d). Consequently this response serves as both the explication of the Access Committee's work on this topic and the specific response to the two comments.

The Difference Between the Wisdom of Taking This Action and the Authority to Take This Action

To properly understand the position of the majority of the Access Committee about this precise question concerning access to mental health evaluations and similar documents in court files, it is essential to separate the **wisdom** of allowing the filing of mental health evaluations into a court file in a manner that preserves their confidentiality from public access until the law requires them to be available to the public, from the **authority** of the Access Committee to recommend, or this Court to create, such an automatic exemption without further action by the Legislature of the State of Florida.

The Agreed Wisdom Behind this Proposal

The Access Committee agrees that there are excellent policy reasons why there should be a method to protect certain mental health evaluations from unwarranted public access. It takes no issue with the fact that a properly run criminal justice system would benefit substantially from having such documents placed in the court file under certain circumstances and kept confidential from public access when so filed until such time as the substantive law requires that

those documents be released to public access. The Access Committee also readily accepts the fact that many clerk's offices in various counties in the State of Florida have historically and routinely kept such documents "confidential" pending either further determination by the court, or action by counsel which makes those mental health evaluations "public" and available for review by the public.

But the accepted "wisdom" behind trying to find a way to keep certain mental health evaluations "confidential" and away from public access and the generally accepted historical practice of clerks in keeping them confidential are not in themselves sufficient to create an automatic exception to Rule 2.420(d) or to the public's constitutional right to public access to court records.

The Access Committee suggests to this Court that for there to be an appropriate legal analysis and discussion of this very important issue, certain terminology should be understood and be more precisely utilized. The only issue to which the Access Committee has addressed these remarks is whether mental health evaluations are or should be "confidential" as that term is used in a public access context and defined in Rule 2.420(b)(4).

The definitional use of the word "confidential" is important in this context because, from time to time, Florida courts, the Legislature, and court rules in discussing mental health information utilize terms such as "private", "privileged," "confidential," or similar terms to define different relationships between the mental

health evaluations, testimony, or information, and certain procedural aspects of our court system **other** than questions of public access to court records. These different contexts include such things as the discoverability of mental health evaluations, the ability of certain parties to a criminal proceeding to utilize mental health evaluations in evidence in proceedings, the ability of a mental health practitioner to testify about an evaluation and the like. These statutes and cases demonstrate the importance that the justice system places on mental health information, but they do not necessarily address the question of public access.

The sole issue before this Court, however, is whether it has the authority or power to determine that mental health evaluations, without more, will be automatically exempt from public access, and thereby "confidential" pursuant to the meaning of Rule 2.420(b)(4). And it is through that analysis that this Court will resolve the question of public access to mental health evaluations.

The question of the authority of this Court to now add a broad exemption for all mental health evaluations is the crux of this rules case and has been the subject of extensive discussions on the Access Committee. Respectfully, the Access Committee suggests that this Court has no authority to add any new automatic exemption to Rule 2.420(d) that would restrict access to mental health evaluations based on the statutory, constitutional, and other authority that exists in Florida law today. The remedies that exist today for those who agree with the Access

Committee that these evaluations **should** be exempt from public access are two: (1) file a Motion to Determine Confidentiality of Court Records under Rule 2.420(e) [an admittedly cumbersome process due to the volume of mental health evaluations present in court files throughout Florida courts], or (2) have the Legislature create an exemption for mental health records in the court record context.

As the Access Committee has discussed with this Court in the past, its mission in proposing the 19 automatic exemptions in Rule 2.420(d) that were previously accepted by this Court was to identify those which, based on controlling law, are confidential in the context of court records, and which are also readily identifiable by the Clerks of Court. The fact that Clerks of Court may have been protecting these matters from public access in the recent past may speak to the wisdom of keeping them confidential, but it does not establish any legal authority therefor.

The Legal Authority for this Court to Create or Recognize a New Exception to Public Access to Court Records

The Access Committee's starting point for its analysis of mental health evaluations begins with Article I, Sections 24(c) and (d) of the Florida Constitution as adopted by the citizens of Florida in November 1992. Those sections clearly and explicitly provide that only "Rules of Court that are in effect on the date of adoption of this Section which limit access to records shall remain in effect until

they are repealed." Thus, from and after the effective date of Article I, Section 24, this Court lost any future authority to create, by court rule, new exemptions to public access to court records…or in fact to any public records.[1] See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 380 (Fla. 1995); Wait v. Florida Power & Light Co., 372 So. 2d 420, 429 (Fla. 1979). (It is only because a Rule of Criminal Procedure [Rule 3.712] predated the adoption of Article I, Section 24 and provided for the confidentiality in court records of presentence investigations with included mental health evaluations that the Access Committee has acknowledged and agreed that a 20th exception should be added to Rule 2.420(d). No other Rule of Criminal Procedure that addresses the mental status of a defendant– not 3.202. 3.203, 3.204, 3.210, 3.211, 3.212, 3.213, 3.214, 3.215, 3.216, 3.217, or 3.218, or any other – both predates 1992 and provides that any mental health evaluation in a court file will be exempt from public access.

Other than the clear exception set forth in Rule 3.712 of the Rules of Criminal Procedure with respect to pre-sentence investigations, there is no rule of procedure in effect at the time of the enactment of Article I., Section 24, that would create an across the board exception for mental health evaluations. Accordingly, any newly created exception in Rule 2.420(d) for mental health evaluations must be based upon a law passed by the Legislature that restricts the right of access to

[1] The Supreme Court adopted Rule 2.051, Florida Rules of Judicial Administration (precursor to Rule 2.420) in October 1992, just prior to the adoption of Article I, Section 24.

such documents in a court file. Such a law would either have to have been enacted prior to July 1, 1993 [See Article I, Section 24(d)] or passed since that date in an act stating clearly why there was a need for such an exemption and defining the exemption no more broadly than necessary (and passed by 2/3 vote of each house if enacted since 2002). While it is the opinion of the Access Committee that there **should** be such a law, there simply is none.

Review of each statute cited by the proponents of a broad exception for mental health evaluations as authority for the creation of this new exception shows that none creates a blanket exception – or confidentiality – with respect to public access to mental health evaluations when placed in a court record. The various statutes discussed below do recognize the general wisdom of keeping such reports private, or inadmissible in evidence or non-discoverable, but none speaks to or creates a broad or automatic exemption to public access. The case law cited to this Court is similarly constitutionally insufficient.

The first statutory provision -- section 456.057, Florida Statutes – is found in the chapter regulating health care providers, and on its face it does not purport to deal broadly with court records, the right of the public to access to court records, or exceptions to the public's right. Rather, it deals with health care providers who may be deemed the owners of their patients' records. It careful excludes from its application even the peripheral health care specialists who are regulated under

different chapters of the statutes. It regulates the circumstances under which a heath care practitioner may disclose general medical [including mental health] information, but does not speak at all to the automatic confidentiality of mental health evaluations when placed in a court file. The health care practitioner might run afoul of this statute if she or he published them in a court file, but there is no way a clerk could know whether this statute applied more broadly.

Interestingly, section 456.057 does contain in subsections (9) and (10) more particularized and focused descriptions of medical records obtained by the Department of Health, and specifically excepts such records in the Department's hands from being public records under section 119.07(1), although that statute relates to matters contained in an investigation, and not to their presence in a public court record.

Simply stated, section 456.057, Florida Statutes, provides no support for the requested exception.

The second statute cited for support is section 456.059, Florida Statutes. This section recognizes the general patient-psychiatrist privilege and, found in the same chapter, limits a psychiatrist from disclosing information about the relationship without the patient's permission. While the statute uses the word "confidential," there is no hint or suggestion that this "confidentiality" applies or extends to court records or to the public's right to access. As a clerk could not

possibly know whether a patient or the patient's representative had approved or requested the disclosure.

Again, this statute recognizes the importance that the law places upon "communications" between a patient and a psychiatrist, but it provides no support to the suggestion that there be an automatic exception to such "communications" in court files. [Actually, mental health evaluators in a criminal context are quite frequently not health care practitioners who establish a doctor/psychiatrist – patient privilege with the defendant.]

The final statute explicitly offered in support of the automatic exception is section 90.503, Florida Statues, the portion of the Evidence Code that applies to the psychotherapist-patient privilege.[2] Like section 456.059, this statute identifies in an evidentiary sense the obligation of a psychotherapist to keep communications with a patient "confidential." It does purport to have broad application to the public's access to information placed into a court file. In fact, this statute explicitly provides in subsection (4) that there **is no privilege** in proceedings to compel hospitalization, in the course of a court-ordered examination, or in any proceeding in which the patient relies upon the psychiatric condition as part of a

[2] Although not offered in explicit support for this proposed exception, reference is made in the Access Committee's Minority Report at 4 to § 916.107(8). This statute does state that an incarcerated defendant's clinical **records** are "confidential and exempt from the provisions of s. 119.07(1) and s. 24(a) Art .I of the State Constitution," it is important to note that that section does not refer to confidentiality in a **court context**, nor does it create any confidentiality for **mental health evaluations.** The statute protects the medical chart of a defendant from public information requests.

claim or defense. All of these factors make it impossible for a clerk to be able to discern whether any information given to the clerk for filing is "confidential" in any sense…let alone in a public access sense.

The fact that these statutes do not speak to or support public access "confidentiality" under Rule 2.420 does not negate the power of a judicial officer from finding information contained in a document, or an entire document, confidential, after a hearing. However, under today's laws, the decision must be made by a judge on a Motion to Determine Confidentiality of Court Records, and not by a clerk as an automatic exception under Rule 2.420(d).

The Access Committee very much appreciates both the substance and the tone of the many discussions and submittals that occurred on this topic over the last year. The professionalism demonstrated by prosecutors and defense attorneys, and other interested groups alike, has been impressive. The fact that, in the main, these groups recognize the **wisdom** of this proposed exception is correct and laudatory. The candor they employ is no less commendable. When the Task Force on Substance Abuse and Mental Issues in the Court states that the claimed statutory basis for this exception is "not as clearly expressed as the other cited statutes in Rule 2.420(d)(1)(B)," they are quite correct. Actually, the cited statutes do not even approach the necessary level of clarity. The Access Committee is significantly concerned that the carefully constructed balance between privacy

interests and public access interests inherent in Rule 2.420 would dissolve if automatic exceptions were created based solely on the public policy **wisdom** of a proposal, and not on the statutory and constitutional **authority** for the proposed exception.

The case law cited in support of the proposed mental health evaluation exception cannot legally provide authority for an exception to the constitutional right of the public to access court records, but even if it could, no case recognizes anything like a broad exception to public access for mental health evaluations.

The two cases cited most vociferously in support – Caraballo v. State, 39 So. 3d 1234 (Fla. 2010) and State v. Johnson, 814 So. 2d 390 (Fla. 2002) – demonstrate why there may be wisdom in protecting mental health information appropriately in a court context, but they do not provide the legal authority for the automatic exception sought.

Carraballo did not involve any issue of public access to any court record, but instead dealt with whether the State could use the testimony of a court-appointed mental health expert who conducted a competency examination of the defendant. After being excluded as a witness in the mental retardation hearing pursuant to Rule 3.211(e), Fla, R. Crim. P., the court allowed the State to use his testimony in the penalty phase of the trial. Finding that the trial court had erred by allowing the competency expert to testify other than in a competency hearing, this Court held

that Rule 3.211(e) explicitly provides that such an examining expert's testimony or report, "*shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.*" 39 So. 3d at 1253 (emphasis in original). Although this Court stated in Carraballo that the information in the evaluation "must remain confidential," *id.*, the terminology had nothing whatsoever to do with public access to the report. In fact there could have already been an open competency hearing, and the report would have been fully available to the state. Rather, it is clear in context that this Court that the testimony or mental health information had to be kept [confidential] **from the jury sentencing Mr. Carraballo.** A new sentencing hearing was the result. Any suggestion that this report or evaluation would have been shielded from public view by this analysis is quite misplaced. The defendant, having been compelled to submit to a court-ordered competency exam, is protected from having any fact-finder learn of that evaluation **other than in a competency hearing.** Caraballo provides no factual support and cannot provide any legal authority, for a blanket automatic exception to the public access guaranteed by Article I, Section 24.

Johnson similarly provides no support for an automatic exception under Rule 2.420. Johnson dealt with an exclusionary rule case involving a driver's medical records [including blood tests] obtained by the State using the State Attorney's subpoena power, rather than a subpoena from a court of competent

jurisdiction. Since the State had been unable to comply with a court's requirements for the patient consent, or unavailability, the records were obtained by its own subpoena. This Court rejected the end run on section 396.3025(4)(d) by noting that the:

> patient's medical records enjoy a confidential status by virtue of the right of privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster.

814 So. 2d at 393. Johnson had nothing to do with public access to records contained in a court file, but rather dealt with the constitutional limitations on the government's ability to grab a citizen's medical records. Clearly, the "confidentiality" was not that of a public record, but rather that of a citizen's right to keep her records "confidential" from an over-reaching and unauthorized subpoena by the state. Johnson provides no support for a blanket automatic exception for mental health evaluations placed into a court file.

The other cases may use the word confidential or address aspects of a person's private health records, but none addresses the issue of authority that is the crux of this issue before the Court.

The Access Committee accepts that many if not all clerks may well have been keeping these mental health evaluation documents "confidential" in the past, and the Committee does not doubt the benefit to the system that action may

provide. In our constitutional system, however, the way to enshrine that result properly for the future is not to press for an unauthorized exception to Rule 2.420. In the long run, the solution rests with the Legislature. Until that action can be obtained, however, Rule 2.420(d) provides short-term protection through a Motion to Determine Confidentiality of Court Records.

Respectfully submitted this 8th day of February 2011.

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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 8th day of February 2011:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I CERTIFY the foregoing 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).

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