# IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2466

IN RE: AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420,

**PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS**

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## COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

### *Introduction*

The Florida Public Defender Association, Inc., ("FPDA") objects only to the sub-section of the proposed amendment to the rule relating to the confidentiality of psychological records in criminal cases and suggests that this proposal neither protects the defendants' interests nor the State's interest in safeguarding very personal information about the witnesses and victims who are occasionally the subject of, but very often discussed in, these psychological records.

For decades the practice in Florida courts has been to seal and clearly label all psychological evaluation and treatment records – a practice that was agreed to by all the parties and seldom, if ever, objected to by the press or public. Recently, this Court has suggested that it is dissatisfied with this long-standing practice. Because sensitive personal information relating to the defendant, the defendant's family and

even witnesses and victims of crime are routinely contained in these documents, meaningful protections should be accorded to them. Unfortunately, the proposed amendment does not do that, but this Court should adopt a simple rule that will.

***Statement of Identity and Interest***

The FPDA consists of nineteen elected public defenders who set policy for over a thousand assistant public defenders. As appointed counsel for tens of thousands of indigent criminal defendants, a growing number of whom are alleged to suffer from mental illness, the FPDA has tremendous practical experience with the use of mental health information in the courts of Florida. The FPDA and its members and affiliates are deeply committed to promoting the interests of fairness, integrity, and accuracy in the criminal justice system. The FPDA has an abiding interest in protecting the confidentiality of defendants' medical information as well as that of family members, witnesses and victims.

***Background***

First adopted in 1992 in the wake of the Florida Constitution's "Sunshine Amendment," the judicial branch public records rule has grown exponentially in its length and complexity.[1] This is its third proposed revision since March 2010.

[1] See, Fla. R. Jud. Admin. 2.420, Committee Note, 1995 Amendment.

Both before and after the Sunshine Amendment, Florida's trial courts routinely protected the medical and personal privacy of those who were the subject of, or mentioned in, psychological and psychiatric evaluation and treatment records. The FPDA is not aware of any historical dissatisfaction expressed by the parties, the public or the press. In a simpler time, the universal practice did not require the authority of a rule. Indeed, the practice has continued long after the first iteration of the judicial branch public records rule was adopted.

The long-standing practice has only recently been called into question by this Court's comments in which it "decline[d] to authorize clerks of court to continue to seal mental health evaluations filed in criminal cases, pending a judicial determination, on the authority of administrative orders issued in the various circuits, as also urged here." *In re Amendments to Florida Rule of Judicial Admin. 2.420*, 68 So. 3d 228, 230 (2011).

The amendment currently proposed for rule 2.420(d)(1) provides:

> The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. The following information shall be maintained as confidential:
>
> * * *
>
> (x) ~~Identifying information in~~ ~~c~~C linical records of ~~detained~~ criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

This iteration is obviously an improvement because it extends the protection of the rule to all of the sensitive information (not just "identifying information") contained in the files of non-detained criminal defendants as well as those who are detained; but even as improved, this rule has serious shortcomings – shortcomings that can be overcome with a straightforward rule.

***Problems with current proposal***

Temporarily putting aside the technicalities of public records law, it is clear that public release of the contents of psychological evaluations and treatment records is harmful to the defendants who are the subjects of the records as well as those who are mentioned therein. Those people include parents of the defendants, spouses and significant others, extended family members, witnesses and victims. For all of these folks, public access – including internet access – to this very sensitive information can be devastating, even dangerous.

Clearly, the current proposal would protect the foregoing class of people if, and only if, the criminal defendant is actually adjudicated incompetent or not guilty by reason of insanity. Mental health documents filed in advance of the hearing, or with the court when an adjudication is not made by the judge or jury, would be public. Moreover, competency is often a transitory status. Ironically, under this rule,

after a defendant strives to regain competency, and is so adjudicated, the defendant's personal medical and psychological records again become public.

Also, this rule only applies to clinical records. "Clinical" generally refers to medical treatment, as opposed to evaluation;[2] but there other problems as well. Presumably, the advocates of this iteration of the rule provide for this limited exemption because of the limited statutory authority that is cited in the rule, Fla. Stat. § 916.107(8); but that section, if strictly construed, provides only scant support.

Entitled "Rights of Forensic Clients," the section specifically says that "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." Unfortunately, "forensic clients" is defined by statute in a way that excludes most defendants: "'Forensic client' or 'client' means any defendant who has been committed to the department or agency pursuant to s. 916.13, s. 916.15, or s. 916.302." *See*, Fla. Stat. 916.106(9). Of course, the long-standing public policy of Florida is to use the least-restrictive mental health treatment available. Thus many, if not most, incompetent criminal defendants are not committed to a state facility. Instead, they are sent home "in lieu of an involuntary commitment" on conditional release. *See,* Fla. Stat. § 916.17 (regarding mental illness) and Fla. Stat. § 916.304 (regarding retardation or autism). Thus, this Court is

[2] "Pertaining to direct bedside medical care," *Mosby's Medical Dictionary, 5th ed.* p. 350, Mosby (1998); "Of or for the treatment of patients," *The Oxford American Desk Dictionary*, Oxford University Press, 2001. From the Greek word for bedside, *The New Oxford American Dictionary, 2 ed.*

being asked to enact a rule that, if literally applied, provides authority to treat similarly situated defendants (and their families) unequally. Unfortunately, this rule would put everyone's most private information squarely in the public domain, unless that information belongs to defendants who are eligible for commitment and who are actually adjudicated incompetent or not guilty and who are committed to a state facility because of their dangerousness. *See*, Fla. Stat. §§ 916.13(1)(a) and 916.302.

***A fairer and more workable alternative***

Most would agree that if this Court could write on a blank slate it should adopt a rule that protects all defendants, witnesses and victims from having their most intensely private mental health information spread in public view on the internet. There is solid legal authority for a rule that simply makes confidential:

> (x) Psychological or psychiatric evaluations and treatment records filed in a criminal case.

As this Court's opinion in *In Re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So.3d 228, 229 (2011) teaches, the starting place is the Sunshine Amendment's grandfather provision, which provides that "all laws that are in effect on July 1, 1993 that limit access to records . . . shall remain in force." Fla. Const. Art. I, § 24(d). This Court, "prompted by a proposed amendment to the Florida Constitution," established the first public records rule, Fla. R. Jud. Admin.

2.051. *In re Amendments to the Florida Rules of Judicial Administration – Public Access to Judicial Records,* 608 So.2d 472 (Fla. 1992) (decided Oct. 29, 1992).

Then, as now, the rule allows confidentiality to attach to "[a]ny court record determined to be confidential in case decision or court rule on grounds (enumerated)" (Emphasis added). *See* current rule 2.420(c)(9), formerly rule 2.051(a)(9). Then as now, the rule provides seven grounds for this Court in its rulemaking capacity to use in deciding whether a record should be deemed confidential. Three of these grounds are clearly applicable: "where confidentiality is required to … (v) avoid substantial injury to innocent third parties; (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; [and] (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law." Rule 2.420(c)(9)(A).

Many state and federal provisions bearing on the types of information contained in competency evaluations demonstrate that keeping these documents confidential will serve a "common law or privacy right" or "established public policy" pursuant to subsections (vi) and (vii). First, the information contained in competency evaluations emanates from doctors appointed and paid for by the courts, and would clearly be considered protected health information if provided by or to

healthcare or drug treatment providers as stipulated by federal and state medical privacy laws. *See, e. g.,* 45 CFR 164.500 *Et seq.* (HIPAA); Fla. Stat. § 456.057(7)(a) (as to doctors' records); Fla. Stat. § 395.3025 (as to hospital records); Fla. Stat. § 394.4614 (as to mental health records under the Baker Act); Fla. Stat. § 393.13(3) (as to developmental disabilities); Fla. Stat. § 397.501 and 42 USC § 290dd-2 (as to state and federal drug treatment records). Second, the information contained in these evaluations often relates to victims, including victims of domestic and sexual crimes, even child victims. This information is considered confidential under federal and state domestic violence and victim-protection privacy laws that are too numerous to cite.

Of course, not every evaluation or treatment record contains every kind of (otherwise) confidential information, but these records contain confidential information about defendants or victims often enough to justify protection. This Court should find as part of its rule-making authority that protection of the privacy interests that are involved is necessary to "avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed" or to "comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law."

Moreover, the alternative to this Court making its own reasonable findings in service of these public policy goals in this rule-making proceeding is to concede that only a super-majority of the legislature can authorize the confidentiality of a judicial branch record. Certainly the enactment of Art. I, § 24 was not intended to destroy the autonomy of a co-equal branch of government or to authorize the abdication of this Court's rule-making authority exclusively to the Florida legislature.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine copies of these Comments were filed with the clerk and copies furnished to Mr. Keith H. Park, Esq., Chair, Rules of Judicial Administration Committee, Post Office Box 3563, West Palm Beach, FL 33402-3563, on this ___ day of February 2012.

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