FIRST AMENDMENT FOUNDATION
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April 1, 2008

VIA E-Mail and Hand-Delivery

The Honorable Thomas D. Hall
Clerk of Court
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Proposed Amendments to the Florida Rule of Judicial Administration 2.420, Case No. SC07-2050

Dear Mr. Hall:

In response to this Court's invitation to comment upon the Proposed Amendments to the Florida Rule of Judicial Administration 2.420, Case No. SC07-2050, we file this comment on behalf of the First Amendment Foundation (FAF), a Florida not-for-profit corporation. The FAF is a public interest organization formed for the purpose of helping preserve and advance freedom of speech and of the press as provided in the United States Constitution and the Florida Constitution, and acting as an advocate and defender of the public's right of access to the records and meetings of its government. The Foundation represents more than 200 members, including most of Florida's daily and weekly newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens, and public interest organizations. *See* http://www.floridafaf.org.

Florida has a long, rich history guaranteeing the public's right of access to government records. In 1992, the Florida voters overwhelmingly – 87% of the voters, the largest margin of approval ever given to effect a constitutional change – passed a constitutional amendment, Article I, Section 24, guaranteeing the public's right of access to government records and meetings.

Efforts were also made by this Court to preserve the public right of access to records in order to advance the public's right of governmental oversight. In response to press investigations uncovering the "supersealing" of hundreds of court records, the Florida Supreme Court recently ruled that state courts may not keep the existence of civil and divorce cases off public dockets. [In re Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Dockets, Apr. 5, 2007] In addition to the revision of Rule 2.420, the Court adopted a related amendment making it more difficult for parties to seal records. The Court explicitly banned the practice of keeping a civil case completely off the public docket and asserted, "the public's constitutional right of access to court records must remain inviolate," in an effort to eliminate supersealing and to preserve the public's rights of access to court records.

Most recently, however, the Rules of Judicial Administration Committee (RJAC) filed a report and proposed amendments to Rule 2.420, to address sealing of criminal records. In addition to the RJAC's proposed revision, the Court has proposed amendments to Rule 2.420. The First Amendment Foundation believes the Court's proposed rule amendment stands in direct conflict with its recent strides to enhance transparency in Florida courts, and we believe the proposed amendments to the rule raise serious constitutional issues.

This comment addresses the sealing process of criminal records at the trial court level. While we have concerns pertaining to the proposed rule's revisions relating to sealing criminal records at the appellate level, we believe our concerns are inherently similar in regards to records at the trial and appellate court level. We will not, therefore, comment on the appellate court records provisions except to ask the Court to consider the application of the concerns raised in the following comments when considering the revisions to the provisions for appellate records.

I. The Proposed Rule Amendment Creates an Exemption in Direct Conflict with Article I, section 24, Florida Constitution

The Court's recommendations and proposed revisions to Rule 2.420 allow a party to seal criminal records when such records contain information that "*may* jeopardize either the safety of a person or an active criminal investigation." [Proposed Rule Amendment 2.420 (e)(2)] The effect of the proposed rule amendment is to create an exemption to public records requirements by allowing for automatic closure of criminal records pending a court ruling or order.[1] The result is a shifting of the burden of accessing records from the party requesting confidentiality to the person requesting to view the records, a shift which is contrary to the public interest and the constitutional right of access guaranteed under Article I, section 24, Fla. Con.

II. The Standard Created by the Proposed Rule Amendment is Unconstitutionally Vague

While we understand the need to protect certain information contained in criminal records, the Foundation believes it is critically important that the Court strike the appropriate balance between protecting the safety of persons involved in a criminal case and the public's overriding interest in accessing court records as articulated in Article I, section 24, of the Florida Constitution. We believe the standard for closure as provided by the proposed rule amendment does not adequately afford protection of individuals nor does it allow sufficient opportunity for the constitutionally-protected right of access to court records. The proposed rule amendment provides for confidentiality – and closure – of records that "*may* jeopardize either the safety of a

[1] Of equal concern is the proposed change to section (d)(1)(C) which would make *any* motion and *all* court records in non-criminal cases confidential and thus exempt from public disclosure. It is our position that the proposed rule amendment allowing closure of both criminal and non-criminal records is an unwarranted expansion of current rule and policy, and runs contrary to the constitutional standard for creation of new exemptions under Article I, section 24.

Constitution. We believe the standard for closure as provided by the proposed rule amendment does not adequately afford protection of individuals nor does it allow sufficient opportunity for the constitutionally-protected right of access to court records. The proposed rule amendment provides for confidentiality – and closure – of records that "*may* jeopardize either the safety of a person or an active criminal investigation" pending the court's ruling upon a motion for closure. The phrase "*may* jeopardize" is too permissive, allowing any party to assert a potential rather than an actual threat of harm. It allows virtually any party involved in a criminal matter to assert that closure is necessary and all motions relating to criminal matters would be closed to the public. The effect of the proposed rule amendment precludes public oversight of the criminal process.

Additionally, the proposed rule amendment provides that motions to make criminal records confidential "*may* be made in the form of a written motion," which lessens the requirement for a written motion and presumably allows a party the *option* of making a written motion rather requiring that all such motions be made in writing. This is extremely problematic in terms of public notice – if the rule change is adopted, the public would not have the opportunity to view a motion for oversight purposes. The permissive "may" renders the standard for closure vague and ambiguous. This not only presents a constitutional flaw in terms of Article I, section 24, it also thwarts the intent of the proposed rule amendment – to provide for the safety of individuals.

III. The Proposed Rule Amendment Does Not Afford Public Notice or Public Oversight

The First Amendment Foundation takes exception to the notice provisions of the proposed rule amendment. Under section 2.420(e)(2)(B) of the amendment, hearings on motions to seal a criminal record are closed to the public. In addition, section 2.420(e)(2)(C) provides that an order granting a motion to seal a record can be closed for up to 120 days and at the end of the initial 120-day period, allows for extensions of up to 60 days. Additionally, the proposed rule amendment does not limit the number of extensions which can be sought and granted. Without limiting the number of extensions that can be filed, criminal court records could be closed in perpetuity, thereby precluding any meaningful opportunity for public oversight of the criminal process.[2]

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[2] It's important to note that the current version of Rule 2.420 provides a higher standard for sealing *non-criminal* records than the proposed rule amendment would provide for sealing criminal records. As it relates to motions to make non-criminal court record confidential, Rule 2.420 currently allows for an opportunity for motions to be heard in open proceedings, provides for a copy of an order granting a motion to seal to be posted for public notice, and provides non-parties the opportunity to challenge an order to seal. [*See* Fla. R. Jud. Admin. 2.420 (d)(1) - (5)]

faith by a party requesting the closure; the opportunity for a hearing on a motion to seal criminal records; the requirement to post the order for public notice; and the opportunity for a nonparty to request to vacate a court's order. The proposed rule amendment thus effectively eliminates any and all opportunity for public notice.

IV. The Construction of the Proposed Rule Amendment is Confusing

Finally, we would like to express our concerns regarding the overall structure of the proposed rule amendment. By referencing back to the current rule for sealing noncrimnal records rather than specifically restating the standards and criteria that are meant to be applied to requests to seal criminal records, the amended version of the rule is extremely difficult to follow. The result will be confusion and frustration among those who must refer to the rule, most particularly Florida citizens who such rules are meant to serve.

V. Conclusion

The First Amendment Foundation is grateful for the opportunity to comment on the Court's recommendations, Mr. Hall. We would greatly appreciate the Court's consideration of our concerns and suggestions. If we can answer any questions or provide additional information, please don't hesitate to contact us.

Sincerely,

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Adria E. Harper, Director
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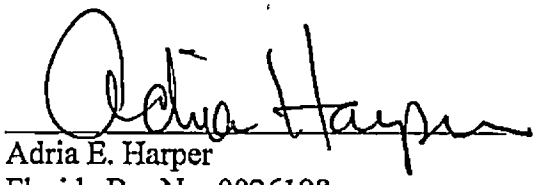
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Comment has been hand-delivered on this, the first day of April, 2008, to:

Rules of Judicial Administration Committee
c/o The Honorable R.T. Benton II
First District Court of Appeal
301 South Martin Luther King, Jr., Blvd.
Tallahassee, FL 32399-6607



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