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Executive Director

April 1, 2008

VIA E-MAIL

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

Re: Rule of Judicial Administration 2,420
Case No. SC07-2050
Comments on behalf of the Reporters Committee for Freedom of the Press

FILED
THOMAS D. HALL

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CLERK, SUPREME COURT

BY *[Signature]*

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The Reporters Committee submits these comments in response to the Court's invitation to comment on the proposed revisions to Rule 2.420 of the Florida Rules of Judicial Administration. We thank the Court for this opportunity to comment and take the occasion to urge the state to continue to provide public access to important court records.

General Interest of Signatory

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970, and frequently files amicus curiae briefs in significant media law cases.

The Reporters Committee also serves as a First Amendment clearinghouse, monitoring and compiling information about significant legal and statutory developments affecting journalists and the public's right to know and produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, a bi-weekly newsletter and podcast, and a web log, which is updated several times daily.

The Reporters Committee also operates a hotline to assist journalists with legal problems as they arise in their work. Often, these legal defense requests come from journalists who seek access to court records and information. This contact with reporters, editors and media lawyers around the country drives home the importance that court access plays in the everyday performance of journalism.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing the rights of reporters to maintain access to court records. It is through this dual role that the Reporters Committee can offer a unique prospective on the need for access to the judicial system.

The Court should not accept a rule that provides for the automatic closure of all motions to make criminal court records confidential.

The Court's sua sponte proposed amendments to rule 2.420(e)(2)(A) require that all motions to seal and any and all court records subject to such motions be treated as confidential by the court clerk. Because this change would run afoul of the U.S. Constitution, established court precedent and the state constitution, the Court should strongly consider abandoning these proposed changes.

Notably, the proposed rule violates established procedures mandated by the First Amendment of the United States Constitution. The Supreme Court has long held that there is a First Amendment right of access to a criminal trial, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), a right that extends to documents submitted in the course of a trial as well as other pretrial proceedings and filings. See *In re Washington Post Co.*, 807 F.2d 383, 388-390 (4th Cir.1986). Because that constitutional right of access attaches, "a court *must assess* whether sealing documents is 'necessitated by a compelling government interest, and ... narrowly tailored to serve that interest.'" *In re Time Inc.* 182 F.3d 270, 271 (4th Cir. 1999) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984) (emphasis added). These procedures require a court – prior to sealing criminal court records – to "(1) provide public notice that the sealing of documents may be ordered; (2) provide interested persons an opportunity to object before sealing is ordered; (3) state the reasons, supported with specific findings, for its decision if it decides to seal documents; and (4) state why it rejected alternatives to sealing." *Id.* By automatically sealing both the motion to seal and any additional records implicated by the motion to seal, the proposed rule blatantly ignores these constitutionally mandated procedures.

These procedures are supported by valuable public policy that has already been recognized by Florida's courts. This Court has long identified its commitment to open government, see *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.1979), and has long noted that public access to the criminal justice system promotes confidence in the system, assures the fairness of the proceedings, encourages participants to be conscientious in the performance of their roles and serves as a check on corrupt practices by exposing the process to public scrutiny. *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982). It is on these grounds that this Court has held that "the public should generally have unrestricted access to all judicial proceedings," *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla.1977), and that "all trials, civil and criminal, are public events" that feature "a strong presumption of public access .

to these proceedings and their records." *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 114 (Fla.1988).

Beyond violating recognized public policy though, the proposed rule contravenes precedent established by this Court. In considering the proposed rule, the Court should look to its own pronouncements in cases that addressed restricting the public's access to other pretrial records and proceedings. Specifically, this Court noted that, as the public's surrogate on issues of access, the media "must be given an opportunity to be heard on the question of closure prior to the court's decision," and that implicit in that role is media's "right to be notified that a motion for closure is under consideration." *Lewis*, 426 So. 2d at 7. Moreover, the Court held that before ordering a closure, the "trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose." *Barron*, 531 So. 2d at 118. The procedures outlined in the proposed rule again ignore these procedures; presumptively closing all motions to seal without making any such determinations.

Rather than seal these records as a matter of rule, the Court should continue to allow for members of the press and the public to intervene upon a motion to seal criminal court records. Such a procedure allows the court to continue to protect the potentially sensitive materials found within those court records while giving due diligence to the due process rights of the intervenors. The constitutionally mandated procedures provide ample room to allow those drafting the motion to protect the contents of the records that they hope to seal and, when necessary and appropriate, the Court can review the records *in camera* to determine the whether the situation demands keeping the records from public view.

Finally, the judicial rule violates the separation of powers among the three government branches as dictated by the state constitution. The state constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." F.S.A. Const. Art. 1 § 24(a). The only public records outside its reach are those that the legislature "by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a)." *Id.* at § 24(c). Exempting an entire class of records by judicial rule would stand in violation of the constitutional demand that any exemptions be made by the state's legislative body.

We thank you for the opportunity to provide comments on this important matter. The Reporters Committee strongly urges Florida to continue to provide the public as much information as possible regarding sealed court records. We urge the Court to adopt a rule that will allow more open access to its judicial system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Comment has been sent via U.S. Mail on this 1st day of April, 2008 to:

Rules of Judicial Administration Committee
c/o Honorable Robert T. Benton, II
First District Court of Appeal
301 South Martin Luther King, Jr. Boulevard
Tallahassee, FL 32399-6601

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BY 


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