


IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC07-2050

FILED
THOMAS D. HALL
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BY 

**COMMENT OF THE CRIMINAL PROCEDURE
RULES COMMITTEE**

The Honorable Thomas H. Bateman III, Senior Judge, Second Judicial Circuit, Chair, Florida Criminal Procedure Rules Committee (CPRC), and John F. Harkness, Jr., Executive Director, The Florida Bar, file this comment to a petition filed by the Supreme Court Committee on Access to Court Records (Access Committee) in the above-referenced matter.

As an initial matter, the CPRC is grateful to the Court for allowing it additional time in which to file its comments. While members of the CPRC participated in the Special Joint Committee's discussions and commend its members for its thoughtful consideration, there are matters relating to the criminal court case that the CPRC felt should it should address and file directly with the Court.

The Access Committee filed the above-referenced petition on September 2, 2008, and this Court issued a Publication Notice on October 13, 2008, inviting comments on the Access Committee's petition to be filed by January 15, 2009. On January 12, 2009, the CPRC moved for an extension of time to file comments so that the full committee could discuss

this matter at its January 16, 2009, meeting. The Court entered an order extending the CPRC's response time until January 30, 2009.

This matter was assigned to a subcommittee, which met and made its recommendation to the full committee. The full committee voted unanimously to submit this comment. The Board of Governors voted 32-0 in favor of the comment.

This comment concerns the proposed amendment to new subdivision (f)(2), pursuant to which substantial assistance agreements (and other similar agreements) would be maintained as public records unless the movant demonstrates a "serious and imminent threat to either the safety of the person or an active criminal investigation." The CPRC strongly opposes this change, believing that this provision is contrary to the presumptions existing in settled substantive law. As explained in *State v. Burgos*, 985 So. 2d 642 (Fla. 2d DCA 2008):

The State has a limited privilege to withhold the identity of persons who provide law enforcement officers with information about criminal activity. *See Roviario v. United States*, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Because the State has the privilege of nondisclosure, the burden is on the defendant claiming an exception to the rule to show why he is entitled to disclosure. *Treverrow v. State*, 194 So. 2d 250, 252 (Fla.1967). The State's privilege of nondisclosure may be overcome when an informant's identity or the content of the

informant's communication would be relevant and helpful to a specific defense or when disclosure is "essential to a fair determination of the cause at issue." *McCray v. State*, 730 So.2d 817, 817 (Fla. 2d DCA 1999); see Fla. R.Crim. P. 3.220(g)(2).

When asserting that disclosure of information is necessary to establish a specific defense, "[t]he defendant must make a preliminary showing of the colorability of the defense prior to disclosure." *State v. Hernandez*, 546 So. 2d 761, 762 (Fla. 2d DCA 1989); see *Harris v. State*, 939 So. 2d 338 (Fla. 4th DCA 2006), review dismissed, 946 So. 2d 1070 (Fla.2006). The defendant must not only allege a legally cognizable defense, but he or she must also support the defense with sworn evidence. *State v. Davila*, 570 So. 2d 1035, 1038 (Fla. 2d DCA 1990) (holding that the defendant failed to establish by sworn proof that disclosure of the confidential informant's identity was necessary to a legally recognized defense). "A bare allegation that the defendant cannot prepare his case without disclosure is insufficient." *State v. Mashke*, 577 So.2d 610, 612 (Fla. 2d DCA 1991).

Id. at 644 (quoting *State v. Borrego*, 970 So. 2d 465, 467 (Fla. 2d DCA 2007)).

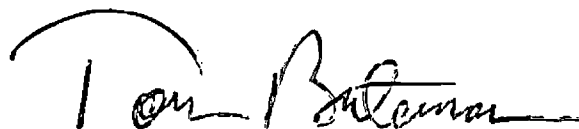
The policy reasons for not disclosing as public record the identity of confidential informants are obvious. Even when a defendant makes a sufficient showing to require the state to name the informant in discovery, and even if the person is not assisting law enforcement at the time of the discovery disclosure, the person may well act on behalf of law enforcement with respect to other, future matters. Once the name of the person is revealed

for all to see in the public record, that person could be at risk of harm, and future criminal investigations could be compromised. Yet, the state may not be able to meet the high burden of showing that those risks are “imminent.” For these reasons, the CPRC believes that the limited privilege of nondisclosure that currently applies to the identity of confidential informants, and similar information, should translate into a limited or initial presumption of confidentiality in criminal court records. If a member of the public wants access to this identifying information, he or she should be required to make some showing of need.

The committee also notes that section 119.071(2)(f), Florida Statutes, expressly exempts “[a]ny information revealing the identity of a confidential informant or a confidential source” from public record disclosure. Therefore, the draft rule change, in its current form, is also clearly inconsistent with Florida statutory law.

For the foregoing reasons, the Criminal Procedure Rules Committee respectfully requests that the Court delete the proposed amendment to Rule 2.420(f)(2) as outlined above.

Respectfully submitted January 30, 2009.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to The Honorable Judith Kreeger, Chair, Commission on Access to Court Records, c/o Office of the State Court Administrator, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1900; Steve Henley, Office of the State Court Administrator, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1900; Carol M. Touhy, Volusia County Courthouse, 101 N. Alabama Ave., DeLand, FL 32724; Barbara A. Petersen and Adria E. Harper, 336 E. College Ave. Ste. 1, Tallahassee, FL 32301; Carol Jean LoCicero and Deanna K. Shullman, 400 N. Ashley Dr., Tampa, FL 33602; Lucy A. Dalglish, Gregg P. Leslie, and Matthew B. Pollack, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; Robert Dewitt Trammell, P.O. Box 1799, Tallahassee, FL 32302; Arthur I. Jacobs, Jacobs & Associates, P.A., 961687 Gateway Blvd. Ste 201I Fernandina Beach, Florida 32034-9159, Scott M. Dimond, Chair, Rules of Judicial Administration Committee, 2665 S. Bayshore Dr. #PH-2, Miami, Florida 33133-5448; and Penny H. Brill, 1350 N.W. 12th Ave., Miami, FL 33136, on January 30, 2009.



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