IN THE SUPREME COURT OF FLORIDA

NO. SC07-2050

IN RE: AMENDMENT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420

COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION TO THE FLORIDA SUPREME COURT'S COMMITTEE ON ACCESS TO COURT RECORDS PROPOSED AMENDMENTS TO RULE 2.420

COMES NOW, THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION (hereinafter "FPAA"), representing the elected State Attorneys for the twenty judicial circuits of Florida, and files these comments to the Florida Supreme Court's Committee on Access to Court Records' Proposed Amendments to Florida Rule Of Judicial Administration 2.420 as published on this Court's website on September 2, 2008, stating as follows:

1. The issue of protecting confidential informants, and the propriety of the procedure that has been utilized in the Eleventh Judicial Circuit, was first referred on December 6, 2006, to the Criminal Procedure Rules Committee (hereinafter "CPRC") by Chief Justice Lewis in a letter to William Vose, Esquire, the then-Chair of that Committee. After this Court reviewed the Comments and heard oral argument on the amendments to Rule 2.420 of the Rules of Judicial Administration, this Court determined that the rule as proposed should not apply to criminal cases, and sent the issue back to the Florida Bar's Rules of Judicial Administration Committee)(hereinafter "RJA") in

conjunction with the CPRC to draft a rule which would apply to criminal cases. See In re Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Documents, 954 So. 2d 16 (Fla. 2007). This Court sent a formal referral letter to both Committee chairs on April 19, 2007. Numerous subcommittee and committee meetings were held on this issue. On October 25, 2007, the CPRC voted 24-0 to endorse the amendments to subdivision (e) submitted with the RJA's report on the proposed amendments.

2. On October 31, 2007, the RJA submitted its proposed amendments to Rule 2.420, and incorporated subdivision (e) as recommended by the CPRC, which states as follows in the pertinent part:

> **(e) Request to Make Circuit and County Court Records in Criminal Cases Confidential.**
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> (2) Any request to make court records confidential that may jeopardize either the safety of a person or an active criminal investigation may be made in the form of a written motion captioned "Restricted Motion to Make Court Records Confidential." As to any motion made pursuant to this subdivision (e)(2), the following procedures shall apply:

On February 8, 2008, this Court published the amendments for comments. Three comments were filed on behalf of the media, one by the Florida Media Organizations, one by The Reporters Committee for Freedom of the Press, and the other by the First Amendment Foundation. Two of the comments expressed concern that the language in

the proposed amendment that a request could be made to make court records confidential that "may jeopardize either the safety of a person or an active criminal investigation" was too permissive because it allowed a party to assert a "potential rather than an actual threat of harm." Comment by First Amendment Foundation, at p. 3. The Florida Media Organizations proposed that there could be closure only "when an actual and imminent threat to human life exists, " Comment of Florida Media Organizations at pp. 7-8, and that there should be no special procedure at all for situations involving active criminal investigations. Id. at pp. 8-9.

3. Subsequently, the Florida Supreme Court's Committee on Access to Court Records (hereinafter "CACR") sent an Invitation to Comment on Preliminary Proposal: Revisions to Rule of Judicial Administration 2.420 – Public Access to Judicial Branch Records. (See App. A to Comments of RJA filed on September 2, 2008). In the preliminary proposals, there was no provision concerning confidential informants or ongoing criminal investigations.

4. On February 8, 2008, this Court issued its "Publication Notice" which included this Court's alternative proposed amendments to Rule 2.420. Those proposed amendments as they pertained to confidential informants and active criminal investigations contained the exact same language as that proposed by the CPRC.

5. On September 2, 2008, CACR filed a Petition that proposed changes to Rule 2.420. Among those changes was an amendment to what was proposed Rule 2.420(e)(2) and was now (f)(2) and states as follows:

> (f) Request to Determine the Confidentiality of Circuit and County Court Records in Criminal Cases.
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> * * *
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> (2) Any motion to determine whether a circuit or county court record is confidential pursuant to subdivision (c)(9)(A)(i) or (c)(9)(A)(v) of this rule that **pertains to a plea agreement, substantial assistance agreement, or similar court record, and that constitutes a serious and imminent threat** to either the safety of a person or an active criminal investigation, may be in the form of a written motion captioned "Restricted Motion to Determine Whether a Court Record is Confidential." As to any motion made under this subdivision, the following procedure shall apply:

(Emphasis added). CACR stated that its "alternative describes the kinds of records subject to this subdivision and creates a higher and more specific threshold using language that mirrors existing language in subdivision 2.420(c)(9)(A)." Petition at p. 10.

6. On September 2, 2008, separate comments were filed by the RJA and the Special Joint Committee (hereinafter "SJC"). The RJA filed its Comments regarding the changes to Rule 2.420 proposed by CACR. In its Comment the RJA recognized that there were two camps concerning the proposed sealing of criminal records, finding that the concerns of interfering with the constitutionally protected public access to the courts and those concerns involving the physical safety of confidential informants to be "simply, incompatible." Comment at pp. 14-15. The RJA stated that it believed that the "proposed

Rule 2.420(e) addressed the concerns raised by this Court in a fair and balanced fashion." Comment at p. 16.

7. However, the SJC's (which RJA is a member) comment adopted the changes as suggested by the CACR, but with no explanation as to why it there needed to be a more specific and higher standard for confidentiality of the motions requesting that the records involving confidential informants or active criminal investigations be deemed confidential.

8. On September 2, 2008, this Court invited comments to CACR's proposed revisions. This is the first time that the FPAA has had the opportunity to express its deep concerns with the emphasized portion of CACR's proposed revisions.

9. The standard set forth by CACR for the motion to determine if the records are to be confidential, i.e., they must constitute "a serious and imminent threat to either the safety of a person or an active criminal investigation" places a burden on the parties that is not presently required by any law and is not reflected in long standing public policy concerns for the safety of persons or active criminal investigations. The standard assumes that the targets of the investigation always make their desire to retaliate against an informant or to disrupt an ongoing criminal investigation immediately known to others, who then somehow inform law enforcement. That is simply not realistic.

10. CACR in its petition stated that it viewed its mission when determining if statutory exemptions to public records should be included in judicial records, to

incorporate some, but not all statutory exemptions, as a concept that CACR referred to as "'soft' absorption." Petition at p. 6. As such, the standard set forth in the proposed rule by CACR is deliberately higher and more specific than required by statutes, rules or case law. CACR stated it was adopting the existing language in subdivision 2.420(c)(9)(A). However, what CACR did was adopt only a portion of the language in that subdivision – that of (A)(i), which states that confidentiality is "required to prevent a serious and imminent thereat to fair, impartial, and orderly administration of justice." By adopting this standard CACR has made it possible for a party to have records determined to be confidential under Rule 2.420(c)(9)(A) "(iii) protect a governmental interest;" "(iv) obtain evidence to determine legal issues in a case;" "(v) avoid substantial injury to innocent third parties;" or "(vii) comply with established public policy set forth in Florida or United States Constitution or statutes or Florida rules or case law," but because the party cannot meet the higher standard of (A)(i), the motion requesting that the records be confidential pertaining to confidential informants or active criminal investigations will become public, eviscerating the reason for making the records confidential in the first place.

11. For purposes of this rule, this Court cannot equate threats to the administration of justice to threats against persons and active criminal investigations. The FPAA recognizes that under Ch. 119, active criminal investigations and identities of confidential informants are not confidential but rather exempt from the public records law. That means that a state agency is not required to keep that information confidential, but

can determine if it wants to release that information to the public. Certainly that is done very often in active criminal investigations by law enforcement agencies as a way to obtain information from the public about a crime or a suspect. However, that does not in anyway diminish the established public policy set by the legislature in finding the necessity for keeping information about active criminal investigations non-public at the discretion of the law enforcement agency.

12. The need for protecting the confidentiality of informants has been recognized by the United States Supreme Court as early as 1938. Scher v. United States, 305 U.S. 251, 59 S.Ct. 174 (1938) (unless an informer's identity is essential in defending charges, public policy prohibits identifying a confidential informant). "[T]he informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief." McCray v. Illinois, 386 U.S. 300, 307, 87 S.Ct. 1056 (1967); Snepp v. United States, 444 U.S. 507, 512, 100 S.Ct. 763 (1980) (availability of confidential informants "depends upon [law enforcement's] ability to guarantee the security of information that might compromise them."). This public policy is recognized as well in Florida case law. For example, the Third District in State v. Zamora, 534 So.2d 864, 868 (Fla. 3d DCA 1988), set forth very succinctly this policy quoting Harrington v. State, 110 So.2d 495, 497 (Fla. 1st DCA 1959): "It is common knowledge that without the aid of confidential informants the discovery and prevention of crime would present such a formidable task as practically to render hopeless the efforts of those charged with law enforcement. And the

alarming fact that the underworld often wreaks vengeance upon informers would unquestionably deter the giving of such information if the identity of the informer should be required to be disclosed in all instances."

13. Florida's criminal rules and statutes also recognize this compelling government interest. In particular, Florida Rule of Criminal Procedure 3.220(g)(2) protects the disclosure of confidential informants unless the informant is to be produced at a hearing or trial or the failure to disclose will infringe upon the constitutional rights of the defendant. Section 119.071(2)(f), Florida Statutes (2008), provides for the identity of confidential informants to be exempt from the public records law, and that exemption can remain even after a case is closed or the criminal investigation becomes inactive. Section 119.071(2)(c)(1), Florida Statutes (2008), provides that active criminal intelligence and investigative information is likewise exempt from the public records law.

14. CACR's proposal as presently written would not only impede the compelling government interest as set forth above, but would actively jeopardize the lives of confidential informants and their families, as well as the undercover law enforcement officers who may be working with the informants in active investigations. The courts have recognized that there are "some kinds of government operations that would be totally frustrated if conducted openly." Press-Enterprise Co. v. Superior Ct. of California for Riverside County, 478 U.S. 1, 9, 106 S.Ct. 2735, 2740 (1986). See, e.g., United States v. Brown, 447 F. Supp.2d 666 (W.D. Tex. 2006) (recognizing the two compelling

government interests of protecting an on going law-enforcement investigation and protecting the safety of those cooperating with the investigation to justify sealing of transcript from closed hearing during a criminal trial).

15. CACR's use of the standard for general threats to the administration of justice is not appropriate for protecting the lives of informants, their families, police officers or others who may be involved, as well as the active criminal investigation itself. CACR's proposal places a burden on the parties who want to protect the confidential informant to prove that there is a serious and imminent threat to the safety of a person or an active criminal investigation that is contrary to established case law. It is the government that has a limited privilege to withhold the identity of individuals who provide police with information regarding criminal activity. As stated by the United States Supreme Court in Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627 (1957), "the purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Thus, although it is often the case, see e.g., Novicki v. State, 604 So. 2d 571 (Fla. 4th DCA 1992), there is no requirement that there be any kind of threat to a person in order for the privilege to apply unless the informant is going to testify at trial and government wants the witness' true identity to be kept secret. See State v. Hassberger, 350 So. 2d 1 (Fla. 1977).

The burden is on the party who wants information concerning the confidential informant's identity revealed to prove that the failure to disclose the informant's identity would infringe on the constitutional rights of a defendant, not the public in general. Treverrow v. State, 194 So. 2d 250, 252 (Fla. 1967); State v. Zamora, 534 So. 2d 864 (Fla. 3d DCA 1988).

16. An additional concern is that the specific enumeration by CACR limiting the confidentiality of motions requesting a determination of confidential court records to only those records which "pertain to a plea agreement, substantial assistance agreement, or similar court record, and that constitute a serious and imminent threat to either the safety of a person or an active criminal investigation," is confusing. The language of the proposed rule appears to limit the types of court records to only those that concern plea agreements. It should be noted that a substantial assistance agreement is a type of plea agreement. The use of the words "similar court record" after specifically listing plea agreements and substantial assistance agreements, appear to limit the word "similar" to a court record which is similar to a plea agreement. However, there may be other court records that do not involve plea agreements, but do involve active criminal investigations. For example, there may be an investigation by a state attorney that entails the issuance of subpoenas that requires court enforcement of the subpoenas. Public knowledge that the state attorney is attempting to enforce a subpoena could jeopardize the investigation.

Thus, limiting confidential court records to only plea agreements would have a chilling effect on other criminal investigations that do not involve confidential informants.

17. The FPAA submits that the amendments to Florida Rule of Judicial Administration 2.420 previously proposed by RJA on October 31, 2007, addressed the concerns expressed by this Court in the prior proceedings, and balanced the need to protect confidential informants and ongoing criminal investigations, with a criminal defendant's constitutional rights, as well as the public's right to have access to judicial records. These proposed amendments recognized the significant difference between civil cases and criminal cases when there is an issue of confidentiality of court records. The additional language suggested by the ACRC does not adequately do so.

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court adopt the proposed amendments to Florida Rule of Judicial Administration 2.420 of October 31, 2007, and reject the proposed amendment of the Supreme Court's Committee on Access to Court Records to Rule 2.420(f)(2) as set forth above.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been served on the Honorable Judith Kreeger c/o Steve Henley, Office of the State Court Administrator, Supreme Court Building, 500 Duval Street, Tallahassee, Fl 32399-1900; John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; Scott M. Dimond, Esquire, Chair, Rules of Judicial Administration Committee, Dimond, Kaplan & Rothstein P.A., 2665 S. Bayshore Dr. # PH-2B, Miami, Florida 33133-5448; John S. Mills, Esquire, Chair, Appellate Rules Committee, Mills, Creed & Gowdy, P.A., 865 May Street, Jacksonville, Florida 32204-3310; Stanford R. Solomon, Esquire, Chair, Special Joint Committee Workgroup, The Solomon Law Group, P.A., 1881 West Kennedy Boulevard, Tampa, Florida 33606-1606; J. Craig Shaw, Bar Staff Liason, Rules of Judicial Administration Committee, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; Krys Godwin, Bar Staff Liason, Appellate Rules Committee, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Fl 32399; Carol Jean LoCicero, Esquire, and Deanna K. Shullman, Esquire, Thomas & LoCicero, PL, Counsel for Florida Media Organizations, 400 N. Ashley Drive, Suite 1100, Tampa, Fl 33602; Barbra A. Peterson, Esquire and Adria E. Harper, Esquire, First Amendment Foundation, 335 East College Avenue, Suite 101, Tallahassee, Fl 32301; Lucy A. Daglish, Esquire, Gregg P. Leslie, Esquire, and Matthew B. Polack, Esquire, The Reporters Committee for Freedom of the Press, 1101 Wilson Boulevard, Suite 1100, Arlington, Va 22209; the Honorable Thomas

H. Bateman, III, Chair, Criminal Procedure Rules Committee, Gadsden County Courthouse Annex, 24 N. Adams Street, Quincy, Florida 32351-2402; Carol M. Touhy, Esquire, Counsel for Diane M. Matousek, Clerk of the Circuit Court, Volusia County Courthouse, 101 N. Alabama Avenue, DeLand, Fl 32724; and Robert DeWitt Trammell, General Counsel for the Florida Public Defender Association, Inc., Post Office Box 1799, Tallahassee, Fl 32302, on this the 14th day of January, 2009.

By: _____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Comment complies with the font requirements of Fla.R.App.P. 9.210(c)(2).

By: _____
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