ORIGINAL

IN THE SUPREME COURT OF FLORIDA

2009 NOV 20 A 10: 24

CLERK, SUPREME COURT

BY

IN RE:
AMENDMENTS TO FLORIDA
RULE OF JUDICIAL
ADMINISTRATION 2.420

SC07-2050

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COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully files these comments on the proposed amendments to Florida Rules of Administrative Procedure 2.420. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of procedure designed to ensure the integrity and accessibility of court records as well as the safety of any clients who enter into substantial assistance agreements with the State.

I.
THE ADDITION OF PROPOSED RULE 2.420(f)(4) IS WELCOME AND NECESSARY.

The FPDA welcomes the proposed amendment stating: "This subdivision does not authorize the falsification of court records or progress dockets." This sentence confirms the basic principle that keeping secrets is perfectly permissible,

while telling lies is not. This sentence solves the problem of false judicial records uncovered by The Miami Herald's investigative reporting. *See* Dan Christensen & Patrick Danner, *Bogus Dockets Shield Informants*, The Miami Herald, Nov. 18, 2006, at A1.

II.
THE FPDA AGREES WITH THE CRIMINAL RULES COMMITTEE'S SUGGESTED AMENDMENTS TO THIS COURT'S PROPOSED LANGUAGE FOR RULE 2.420(f)(3).

The FPDA understands that the Criminal Rules Committee will propose the following amendments to this Court's proposed language:

> (f)(3) Any motion to determine whether a court record that pertains to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information is confidential under subdivision (c)(9)A)(i), (c)(9)(A)(iii), (c)(9)(A)(v), or (c)(9)(A)(vii) of this rule may be made in the form of a written motion captioned "Restricted Motion to Determine Whether a Court Record is Confidential." ~~If the motion reveals the identity of a confidential informant or active criminal investigative information, the movant may request that the motion also be determined to be confidential.~~ <u>Any motion made pursuant to this subdivision and all court records that are the subject of such a motion must be treated as confidential and not placed on the docket by the clerk pending a ruling on the motion or further order of the court.</u>

The FPDA agrees that the second sentence in this Court's proposed language is redundant with the first sentence and should be stricken to avoid confusion.

The FPDA further agrees that motions to seal records must themselves be confidential and should not be noted on progress dockets. Substantial assistance agreements are one of only two types of documents that are ever likely to be subject to a motion to seal in a criminal case.[1] Any notation of the existence of such a motion would be a strong indication that a person has become a confidential informant, rendering ineffective the sealing of the actual substantial assistance agreement.

The FPDA's agreement with this language, however, comes with the caveat that proposed Rule 2.420(f)(3) should specify the procedure for courts to handle substantial assistance agreements, as discussed below. Otherwise, the Criminal Rules Committee's proposed language, "all court records that are the subject of such a motion," is too broad because it would allow the sealing of final judgments of conviction.

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[1] The only other records that normally might be sealed in a criminal case are mental health evaluations conducted to determine competency to stand trial or sanity.

III.
IN RESPONSE TO THIS COURT'S QUESTIONS AT ORAL ARGUMENT, THE PRESENT PRACTICE IN MIAMI-DADE COUNTY VARIES WIDELY FROM COURT TO COURT. THIS DISPARITY IS NOT SOLVED BY PROPOSED RULE 2.420(f)(3).

At oral argument on September, 2, 2009, this Court asked undersigned counsel how substantial assistance agreements are currently being handled in the Eleventh Judicial Circuit (Miami-Dade County) in the absence of any governing procedural rule. After surveying assistant public defenders in the Eleventh Judicial Circuit, the answer is what one might expect: the procedure varies depending on the judge. There are 23 judges handling felony criminal cases in that circuit. Some judges accept pleas, but do not enter judgments until after completion of the substantial assistance agreement. The case appears as open and has a trial date set. Other judges enter final judgments, but no sentences. In some cases, the state files motions to seal these documents; in other cases they do not.

This disparity is not solved by this Court's proposed amendments to Rule 2.420(f)(3). Even with these proposals, some judges will continue to enter final judgments of conviction and then seal those convictions, while others will accept the pleas but not enter the judgments. The FPDA knows that there is no perfect way to handle these substantial assistance agreements because of the conflict between the interests of having open, accurate and reliable judicial records and the safety of confidential informants. The FPDA feels this conflict quite acutely

because some public defender clients become confidential informants, and other public defender clients have a constitutional right to truthful information when they investigate the case against them.

Nevertheless, the best compromise would be for Rule 2.420(f)(3) to specify that the court should accept the plea and plea agreements, but not enter judgments of conviction until after the substantial assistance agreement is completed. Using that procedure, the court is not in the position of having ordered the sealing of a final conviction that would be relevant and admissible impeachment evidence in another criminal case. Likewise, the assistant state attorneys and defense counsel would be able to comply with their ethical duty to not conceal evidence. The FPDA's previous comments in this case addressed the constitutional, legal and ethical issues in detail, and pursuant to this Court's September 9, 2009, order those comments will not be repeated and instead are hereby incorporated by reference.

Thus, this Court's amendment to the proposed language of Rule 2.420(f)(3) should be revised to explicitly state how trial courts are to handle substantial assistance agreements to avoid the situation where a final judgment of conviction must be sealed.

CONCLUSION

The FPDA welcomes this Court's language in proposed Rule 2.420(f)(4) specifying that this procedure is to keep records secrets, but not falsify them. The FPDA agrees with the Criminal Rules Committee's proposed amendments to this Court's proposed language in Rule 2.420(f)(3). The FPDA further urges this Court to amend that section to specify the procedure for handling substantial assistance agreements so that final judgments of conviction are not sealed.

Respectfully submitted on behalf of the
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CERTIFICATES

I hereby certify that a copy of these comments were served by mail on the Honorable Judith Kreeger, Chair, Committee on Access to Court Records, 175 N.W. 1st Ave., Suite 2114, Miami, FL 33128-1845; Steve Henley, Office of the State Court Administrator, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1900; Carol Touhy 1714 Lime Tree Dr., Edgewater, FL 32132-3200; Laura E. Roth, 101 N. Alabama Ave., DeLand, FL 32724-4316; Barbara A. Petersen and Adria E. Harper, 336 E. College Ave., Suite 101, Tallahassee, FL 32301; Carol Jean LoCicero, 400 N. Ashley Dr., Tampa, FL 33602; Deanna K. Shullman, 101 N.E. 3rd Ave., Suite 1500; Fort Lauderdale, FL 33301-1181; Ireme Plank, P.O. Box 3079, Sarasota, FL 34230-3079; Lucy A. Dalglish, Gregg P. Leslie, and Matthew B. Pollack, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; Arthur I. Jacobs, 961687 Gateway Blvd., Suite 2011, Fernandina Beach, FL 32034-1609; Penny H. Brill, 1350 N.W. 12th Ave., Miami, FL 33136; and Jodi B. Jennings and Krys Godwin, 651 East Jefferson St., Tallahassee, FL 32399-2300 on this 19th day of November 2009.

I hereby certify that these comments were printed in 14-point Times New Roman.

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