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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
Lower Ct. Case No: 3D14-227

MICHAEL POOLE,

Petitioner,

-VS-

**SOUTH DADE NURSING & REHABILITATION CENTER
AND THE STATE OF FLORIDA**

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

The Third DCA refused to apply either the plain language of Rule 3.211(d) or this Court's holding in *Caraballo v. State*, 39 So. 3d 1234, 1252-53 (Fla. 2010), in part because it thought this Court's subsequent promulgation of Florida Rule of Judicial Administration 2.420(d)(1)(B) creating a procedure to handling confidential documents. This Court should accept jurisdiction in this case to further educate the bench and bar about Rule 2.420(d)(1)(B). More specifically, this Court should make clear that Rule 2.420 is not a list of what court records are and are not confidential in Florida—it is merely a procedure for judges to make that determination.

This Court should also accept jurisdiction in this case to resolve a conflict between the DCAs on whether reports generated by compulsory medical examinations are protected by the constitutional and statutory right to privacy in medical records. Florida's citizens already subjected to compulsory medical examinations should not suffer the further indignity of having the reports of those examinations available to the world at large.

STATEMENT OF THE FACTS AND CASE

Michael Poole was charged with murder for allegedly beating to death his roommate in an assisted living facility, South Dade Nursing & Rehabilitation Center (“SDNRC”). (A. 2).¹ Mr. Poole was evaluated for competency and found incompetent to stand trial. (A. 2-3). The evaluations were automatically sealed by the clerk. (A. 2-3).

As part of a pre-suit notice of claim from the family of the alleged victim, SDNRC, moved to unseal those evaluations, to which Mr. Poole objected and filed a motion to determine their confidentiality. (A. 3). The trial court held that competency evaluations were not confidential because this Court has refused to put them on the short list of information automatically confidential under Rule of Judicial Administration 2.420(d)(1)(B).

Mr. Poole sought certiorari review in the Third DCA. Mr. Poole based his claim to confidentiality on Florida Rule of Criminal Procedure 3.211(d) and this Court’s opinion interpreting that rule in *Caraballo v. State*, 39 So. 3d 1234, 1252-53 (Fla. 2010). The Third DCA did not follow either the plain language of that rule nor this Court’s language in *Caraballo*, but limited that rule to protection of

¹ The decision of the District Court of Appeal, Third District is included in an appendix to this brief filed pursuant to Florida Rule of Appellate Procedure 9.220. References to pages numbers in the appendix will be abbreviated “A.” followed by a numeral indicating the page number in that opinion.

the right against self-incrimination and held that: “We doubt the drafters had in mind the use of the reports outside of the criminal arena.” (A. 6). The Third DCA then added: “If there was any doubt in our minds about this conclusion, it was resolved in 2011 when, post-Caraballo, the Florida Supreme Court Rule [sic] amended rule 3.211 and other closely related rules to provide ‘The procedure for determinations of the confidential status of reports is governed by Rule of Judicial Administration 2.420.’” (A. 6-7).

Mr. Poole also asserted his right to “confidentiality under Article I, section 23 of the Florida Constitution, commonly referred to as Florida’s Right to Privacy Law, and Chapter 456 of the Florida Statutes.” (A. 10-11). The Third DCA denied both of those claims on the same ground, claiming that: Mr. Poole was not a “patient” because being a “‘patient’ generally involve[s] the act to submitting to care and treatment rather than simply evaluation.” (A. 11). The opinion noted that compulsory medical examination are not limited to criminal cases and that “the Florida Rules of Civil Procedure provide for a party to submit to examination by qualified experts, with a report of the examination made available to the other party notwithstanding any issue of confidentiality.” (A. 12). Of course, the issue here was not disclosure to the opposing party (here, the state), but to a third-party (here, SDNRC). The Third DCA’s conclusion applies to any person forced to undergo a medical examination as part of any court case, civil or criminal:

In the instant case, the physicians were consulted for purposes of examinations only, not for treatment. The purpose behind the examinations was to assist the court in determining whether the defendant was capable of participating in the criminal process. Any reports resulting from such an examination are intended to be communicated outside the patient-physician relationship. Thus, they are not the type of patient's medical record generally entitled to confidentiality protection.

(A. 12).

SUMMARY OF THE ARGUMENT

The Third DCA held that the competency evaluations was not confidential under Rule 3.211, directly conflicting with this Court's holding in *Caraballo v. State*, 39 So. 3d 1234, 1252-53 (Fla. 2010). The Third DCA apparently did this based, in part, on its belief that *Caraballo* has been overruled *sub silentio* by this Court's adoption of Rule of Judicial Administration 2.420. Thus, the opinion also conflicts with the long line of cases holding that this Court does not overrule itself *sub silentio*.

In the opinion below, the District Court of Appeal ("DCA"), Third District, also held that compulsory medical examinations are not protected by either the privacy protections in section 456.057(7), Florida Statutes, nor Florida's constitutional right to privacy. That decision both conflicts with a line of cases from the Second DCA, and also expressly construes a provision of the state constitution, both grounds for this Court to take jurisdiction. Compulsory medical

examinations are invasive enough. This Court should accept jurisdiction to determine whether the results of those examinations should be available to any third-party, which is to say, the world at large.

ARGUMENT

I.

THE THIRD DCA'S OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH THIS COURT'S DECISION IN *CARABALLO*.

The Third DCA's opinion construed Florida Rule of Criminal Procedure 3.211(d) to provide only a bar against the prosecution using competency evaluations in criminal cases, but held that rule did not make such evaluations confidential. (A. 6).

That opinion conflicts with this Court's holding in *Caraballo v. State*, 39 So. 3d 1234, 1252-53 (Fla. 2010), that the same rule (slightly renumbered) made those evaluations confidential. The Third DCA's opinion quoted only the sentence before this Court stated its conclusion (A . 5):

It is for this reason that the protection of confidentiality is afforded to the substance of a defendant's competency evaluation. Under rule 3.211(e), except in certain limited circumstances, the information obtained during the course of a competency evaluation must remain confidential. Adopted in 1980, rule 3.211(e) provides: [quotation of rule omitted]
Moreover, a committee note relating to rule 3.211(e)

states: “This subdivision provides for the confidentiality of the information obtained by virtue of an examination of the defendant pursuant to this subdivision.” Fla. R. Crim. P. 3.211(e) cmt. (1980).

Caraballo v. State, 39 So. 3d 1234, 1252-53 (Fla. 2010) (emphasis supplied).

The Third DCA’s opinion suggests that *Caraballo* has been overruled *sub silencio* by this Court’s subsequent adoption of Rule 2.420. (A. 6-7). The Third DCA then turned to that procedural rule to help it in its determination of the substantive confidentiality issue. (A. 7). Thus, this portion of the opinion also expressly and directly conflicts with this Court’s admonition in *Puryear v. State*, 810 So. 2d 901 (Fla. 2002): “We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silencio*.” *Id.* at 905.

Rule 2.420 is a relatively new rule in Florida, and this Court should accept jurisdiction in this case to further educate the bench and bar. Specifically, this Court needs to instruct that omission from the list of now-21 specific types of information in Rule 2.420(d)(1)(B) does not mean that the information is not confidential—it just means that a motion to determine confidentiality is required. The trial court below believed this Court’s refusal to add competency evaluations to that list meant that they were not confidential.

II.
THE THIRD DCA’S OPINION CONFLICTS WITH
OTHER DCAs ON WHETHER COMPULSORY
MEDICAL EXAMINATIONS ARE PROTECTED BY
SECTION 456.057(7), FLORIDA STATUTES.

The Third DCA held that medical records resulting from compulsory medical examinations are not protected by section 456.057(7), Florida Statutes, precisely because they are compulsory and the person is not seeking treatment.

(A. 11-12)

In a series of three decisions, the Second DCA has held that such records are protected under that same statute. In those cases, a plaintiff in a civil action wanted production of the insurance company’s doctor’s previous compulsory medical examinations, in an attempt to show that the doctor was biased. *Crowley v. Lamming*, 66 So. 3d 355, 357 (Fla. 2d DCA 2011); *USAA Casualty Ins. Co. v. Callery*, 66 So. 3d 315, 316 (Fla. 2d DCA 2011); *Graham v. Dacheikh*, 991 So. 2d 932, 932-33 (Fla. 2d DCA 2008). The Second DCA held that section 456.057(7) made those records confidential, before then discussing whether an exception involving notice applied. *Crowley*, 66 So. 3d at 359 (After quoting the statute: “These clear terms therefore prohibit more than the production of a nonparty patient’s medical records without notice; they also prohibit discussion about a nonparty patient’s medical condition without prior notice to that nonparty.”); *USAA*, 66 So. 3d at 317; *Graham*, 991 So. 2d at 934 (“[W]e grant the petition

solely on the ground that it departs from the essential requirements of the law in requiring the disclosure of confidential medical information of nonparties without notice to those parties as required by section 456.057(7), Florida Statutes (2006), and without adequate protections to protect the privacy rights of those nonparties under the Florida Constitution.”).

The Fourth DCA has aligned itself with the Second DCA. *Coopersmith v. Perrine*, 91 So. 3d 246, 246-47 (Fla. 4th DCA 2012).

The situation in all those cases was the same as here: a party in a civil action wanted the records of a compulsory medical examination created in another case to which it was not a party. In neither case was the party undergoing the examination looking for treatment—it was just an evaluation. The only difference was that the other case for which the compulsory medical evaluation was created was a civil, rather than criminal, case. No reasoning by any court suggests this makes a difference, and in fact the Third DCA noted that the issue also arises in civil cases. (A. 12).

III. THE THIRD DCA’S OPINION EXPRESSLY CONSTRUES THE FLORIDA CONSTITUTIONAL RIGHT TO PRIVACY.

The Third DCA acknowledged that Mr. Poole’s claim was also under Article I, section 23 of the Florida Constitution and held that “[b]oth the constitutional right to privacy and section 456.057” (A. 11) do not apply because the examination

was compulsory and Mr. Poole was not receive treatment. (A. 11).

This holding is an express construction of the state constitution with enormous implications for every Florida citizen who submits to a compulsory medical examination as part of any court case, civil or criminal. Under the Third DCA's opinion, not only must they endure the examination by a doctor not of their choosing, but the report of that examination is no longer confidential as to third parties, which is to say, the world at large.

CONCLUSION

The Third DCA denied Mr. Poole's petition for certiorari three months before issuing its opinion. (A. 3). As a result, SDNRC has long-since received copies of Mr. Poole's competency evaluations. Nevertheless, this Court still has jurisdiction because the issues in this case are of great public interest and capable of repetition yet evading review. *State v. Blair*, 39 So. 3d 1190, 1191 n.1 (Fla. 2010); *Gregory v. Rice*, 727 So. 2d 251, 252 n.1 (Fla. 1999).

The issue of the confidentiality of competency evaluations is of enormous practical importance to the trial judges, clerks, prosecutors and defense attorneys who handle many thousands of these every year. There is very little law to guide all of these people in how to handle these documents, and appellate review is virtually non-existent. This Court should grant review to address the important

issues regarding confidentiality, privacy, and Rule 2.420 raised by this case.

Respectfully submitted,

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CERTIFICATES

I hereby certify that a copy of the foregoing was delivered by email to counsel for SDNRC, Antwon E. Emery, Esq., Quintairos, Priet, Wood & Boyer, P.A., 9300 S. Dadeland Boulevard, 4th Floor, Miami, Florida 33156 at aemery@qpwbllaw.com, and counsel for the State of Florida, 444 Brickell Ave., Suite 650, Miami, Florida 33131, at CrimAppMIA@myfloridalegal.com, this first day of July 2014.

I hereby certify that this brief is printed in 14-point Times New Roman.

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