IN THE FLORIDA TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

In re JACKSON'S § 934.33
ORDERS AND APPLICATIONS,

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issued pursuant to § 934.33(4)(a), Fla. Stat., "be sealed," now that the targets have been apprehended and the criminal investigation completed, no necessity continues to justify secrecy. The § 934.33 orders and applications should be made available to the public so Floridians may "learn about police and prosecutorial conduct" involving the use of Stingrays.

orders and applications. However, instead of providing § 934.33 orders and applications to the ACLU as requested, Jackson alerted the U.S. Marshals Service, who took possession of them. The U.S. Marshals Services refuses to provide access to the § 934.33 orders and applications, claiming that Jackson acted as a federal agent in applying for and receiving the § 934.33 orders.

On June 3, 2014, the ACLU sued Jackson to obtain copies of the § 934.33 orders and applications. *See ACLU of Fla. v. City of Sarasota*, No. 2014 CA 003248 (Fla. 12th Cir., Sarasota Cnty.). On June 17, 2014, Circuit Judge Williams dismissed the ACLU's lawsuit, finding that the requested records were federal records and possibly court records and concluding the Florida Public Records Law applies to neither. After the case was dismissed in state court, the U.S. Marshals Service removed it to federal court, where the ACLU's motion for remand remains pending. *See ACLU of Fla. v. City of Sarasota*, No. 8:14-cv-1606 (M.D. Fla.). The ACLU sought discovery on the capacity Jackson sought and obtained the § 934.33 orders (either as a federal marshal or as a city detective), however, the government interposed an objection to providing the state Stingray orders and applications because of the state court seal. *See* § 934.33(4)(a), Fla. Stat.

On June 17, 2014, the U.S. Marshals Service filed with the Sarasota clerk the § 934.33 orders and applications that the ACLU sought in its public records

lawsuit. This is the first time the state court or the clerk had possession of them. On information and belief, the clerk segregated by year and filed them alongside other § 934.33 orders and applications filed in the same year. The ACLU unsuccessfully attempted to obtain from the U.S. Marshals Service further identifying information about the § 934.33 orders and applications, including the "Criminal Action Number" or docket number. The ACLU has identified the court records with "as much specificity as possible." *See* Rule 2.420(j)(2)(A).

ARGUMENT

"The Florida Constitution mandates that the public shall have access to court records, subject only to certain enumerated limitations . . . ." *In re Amendments to Fla. R. of Judicial Admin. 2.420-Sealing of Ct. Records & Dockets*, 954 So. 2d 16, 17 (Fla. 2007) (per curiam) (citing Art I, § 24, Fla. Const.); *see also Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988) (observing a "well established common law right of access to court proceedings and records"). Ensuring public access to court proceedings and records serves important values:

> Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. Such access gives the assurance that the proceedings were conducted fairly to all concerned. Aside from any beneficial consequences which flow from having open courts, the people have a right to know what occurs in the courts. The Supreme Court of the United States has noted repeatedly that a trial is a public event. What transpires in the courtroom is public property. Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny, and protects the

> rights of the accused to a fair trial. Finally, because participating lawyers, witnesses and judges know their conduct will be subject to public scrutiny, it is fair to conclude that they will be more conscientious in the performance of their roles.

Miami Herald Pub. Co. v. Lewis, 426 So. 2d 1, 6–7 (Fla. 1982) (citations omitted). For these reasons, judicial hearings and records are presumptively open to the public and may be sealed only as long as necessary to protect a public interest.

Here, where the fugitives have been apprehended and the criminal investigations conducted, no compelling reason continues to justify the sealing of the § 934.33 orders and applications made by Jackson in 2012 and 2013. These court records should be available to the public immediately.

The ACLU Has Standing to Challenge Continued Sealing of the Hearing Transcript

The ACLU is a nonprofit, nonpartisan organization with approximately 18,000 members in the state. It frequently litigates issues of judicial and governmental transparency in state and federal courts with the goal of making

have standing to challenge any closure order." *Barron*, 531 So. 2d at 118; *see also* Fla. R. Judicial Admin. 2.420(e)(5), (f)(1) (permitting motions by non-parties to unseal judicial records). The ACLU therefore has standing, as a member of the public and on behalf of the public, to challenge this Court's closure of proceedings and sealing of transcripts and other records.

Public Access to the § 934.33 orders and applications Serves Vital Interests

The Sarasota Police uses Stingray devices to locate and apprehend fugitives

subscriber's reasonable expectation of privacy"), *vacated and rehearing en banc granted*, Sept. 4, 2014; Peter Caldwell, *GPS Technology in Cellular Telephones: Does Florida's Constitutional Privacy Protect Against Electronic Locating Devices?*, 11 J. Tech. L. & Pol'y 39 (2006);

- Whether the government has and is following minimization rules and retention limitations to protect innocent third parties whose cell phone location information and other data is swept up by cell site simulators, *cf. In re Application of U.S. for an Order Pursuant to 18 U.S.C. § 2703(D) Directing Providers to Provide Historical Cell Site Location Records*, 930 F. Supp. 2d 698, 702 (S.D. Tex. 2012) (denying government application for "cell tower dump" in part because the government's application contained "no discussion about what the Government intends to do with all of the data related to innocent people who are not the target of the criminal investigation" and "in order to receive such data, the Government at a minimum should have a protocol to address how to handle this sensitive private information").

The continued sealing of the § 934.33 orders and applications deny the public vital information about all of these questions and how the government is using Stingrays in the public's name.

Continued Sealing of § 934.33 Orders and Applications is No Longer Justified

The Florida Supreme Court restricts the duration of a seal of a § 934.33 order and application to the time "necessary to protect the interests" at stake. Rule 2.420(e)(3)(G). The continued preservation of the seal on the § 934.33 orders and applications requested in 2012 and 2013 is no longer necessary and is against the public's interest in government transparency. *See Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984) (observing the purpose of public access to records "is to promote public awareness and knowledge of

governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.")

The Florida Supreme Court directs that information in a court record to be designated and maintained as confidential in two ways. Information described in Rule 2.420(c)(1-6) and itemized information deemed confidential pursuant to law are per se confidential in court records. Rule 2.420(d)(1). All other information may only be held confidential to the extent necessary for specific government necessity. Rule 2.420(e)(3) (requiring that a court order sealing court records (not already designated confidential) be narro

this information may only be accomplished through an independent court order. *See also* Rule 2.420(e)(4, 5) (exempting "orders determining that court records are confidential under subdivision (c)(7)" from two subsections of Rule 2.420(e), but not subsection Rule 2.420(e)(3), which requires narrow tailoring to a government necessity). Therefore, the § 934.33 order and application could only have been sealed lawfully for a "duration … no broader than necessary." Rule 2.420(e)(3)(G).[5]

The continued sealing of the § 934.33 orders and applications from 2012 and 2013 is no longer necessary. The fugitives have been long since been apprehended and the investigations have been completed. No further public necessity justifies the continued seal.

Even if Some Information in the § 934.33 Orders and Applications Remain Properly Confidential, the Court Must Narrowly Tailor the Sealing Order to Release Non-Confidential Information

Even if the § 934.33 orders and applications contained some information that is properly determined to be confidential, sealing the entire record would not be justified. In order to comport with the First Amendment, "a closure order must be drawn with particularity and narrowly applied," *Barron*, 531 So. 2d at 117, and

[5] Whether or not the order sealing the § 934.33 order and application in fact sealed the information for a definite time that was "no broader than necessary" is irrelevant. The sealing order must comply with Rule 2.420(e)(3)(G) to be lawful and those that did not are unlawful and therefore unenforceable.

there must be “no less restrictive alternative measures than closure,” *Lewis*, 426 So. 2d at 8. As the Rules of Judicial Administration explain, “[t]o the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record

C. For each § 934.33 order and application pair that remain sealed in their entirety, identify publically the "case number, docket number, or other number used by the clerk's office to identify the case file." Rule 2.420(e)(1).

D. To the extent necessary for the ACLU to request this relief and present arguments to the Court at any hearing, grant the ACLU permission to intervene in any in matter in which the requested judicial records were filed or are maintained.

CERTIFICATE OF FACTUAL AND LEGAL BASIS

Pursuant to Florida Rule of Judicial Administration 2.420(j)(2)(D), the undersigned certifies that this motion is made in good faith and is supported by a sound factual and legal basis.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the following by filing the document today through the e-Service system (Fla.R.Jud.Admin. 2.516(b)(1):

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Respectfully Submitted, **September 22, 2014**

s/Benjamin James Stevenson

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