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

In re JACKSON'S § 934.33
ORDERS AND APPLICATIONS,

2012 Misc. File (trap and trace Orders)
2013 Misc. File (trap and trace Orders)

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ACLU'S MOTION FOR PUBLIC ACCESS TO SEALED JUDICIAL RECORDS

Pursuant to Fla.R.Jud.Admin. ("Rule") 2.420(j), the American Civil Liberties Union of Florida, Inc. ("ACLU"), moves the Court to (a) to unseal and grant public access to all applications made by Michael Jackson in 2012 and 2013 for an order issued pursuant to § 934.33, Fla. Stat., and any resulting orders ("§ 934.33 orders") and (b) permit intervention, as necessary, to move for this relief. The ACLU states as follows in support of this motion:

Introduction

The ACLU seeks public access to the § 934.33 orders and applications made by Sarasota Police Detective Michael Jackson in 2012 or 2013, including those that authorize the use of Stingray[1] devices. Although Florida law directs that orders

[1] A "Stingray" is a cell site simulator that impersonates a wireless provider's cell tower. It broadcasts electronic signals that cause cell phones in the area to register their identifying information and location. Cell site simulators can identify the telephone numbers, unique identifying numbers, and locations of all cell phones in range, and can log the phone numbers called and texted by a connected phone. They are commonly used both to collect unique numeric identifiers associated with all phones in a given area and to ascertain the location of a

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. *See Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1, 8 (Fla. 1982).

Factual Background

Michael Jackson is a Sarasota Police Detective. From time to time, he assists the U.S. Marshals Service as a cross-sworn special deputy. From time to time, U.S. Marshals Service allows Det. Jackson to use its Stingray device to locate a person by tracking the person's cellular telephone.

On numerous occasions in 2012 and 2013, to investigate a crime or apprehend a fugitive, Jackson sought judicial oversight for the use of a Stingray by applying for an order authorizing a pen register and/or use of trap and trace device

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phone when the officers know the numbers associated with it, but do not know precisely where it is. Consequently, Stingrays collect information not only about specific targets of investigations, but also about hundreds or thousands of innocent third parties. The devices are small enough to fit in a police vehicle or even to be carried by hand. *See* John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA Today (Dec. 8, 2013), http://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/.

Although there are various models of the technology, cell site simulators are generally known as "Stingrays," after the leading model produced by the Melbourne, Florida-based Harris Corporation. This motion will refer to these devices as "Stingrays."

("§ 934.33 order"). *See* § 934.32, Fla. Stat. (application); § 934.33, Fla. Stat. (order).

Many times, the court issued the requested § 934.33 order. On information and belief, when the court granted an application from Jackson, it sealed the § 934.33 order and application upon its own *sua sponte* motion for an indefinite duration "until otherwise ordered by the court." The court ordered the § 934.33 order and application sealed in the § 934.33 order itself, instead of entering a separate, public order sealing the § 934.33 order and application. Accordingly, no publicly assessable record reveals the existence of the sealed § 934.33 order and application.

Neither the applications nor orders were immediately filed with the clerk or provided to the issuing judge. Instead, Jackson alone retained the original and any copies of the applications and orders. Accordingly, the ACLU's first attempted to obtain these records from Jackson.

On May 19, 2014, the ACLU requested that Defendants Detective Michael Jackson and his employer Sarasota Police Department (City of Sarasota) produce public records pursuant to the Florida Public Records Law, Chapter 119, Florida Statutes. The ACLU sought records relating to Sarasota Police's use of cell phone tracking equipment like Stingrays, including, but not limited to, any § 934.33

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 information and records available to its membership and the broader public.[2] The Florida Supreme Court has made clear that "both the public and news media shall

[2] For example, the ACLU was an amicus curiae in *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), a case involving access to judicial proceedings and a secret docketing system employed by a federal district court. The ACLU sought and received public access to the previously sealed suppression hearing transcript discussing the Tallahassee Police's use of Stingrays in *State v. Thomas*, No. 08 CF 03350 (Fla. 2nd Cir., Leon Cnty.) The ACLU was also an amicus in *State v. Womack*, 127 So. 3d 839 (Fla. 2d DCA 2013), a case involving sealing of judicial dockets and records.

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 and to investigate crimes. Jackson requested judicial oversight of its use of Stingrays by applying for and receiving § 934.33 orders. These activities implicate core concerns of the Fourth Amendment to the U.S. Constitution, including:

- Whether the § 934.33 orders and applications describe specifically the use of Stingrays so that the judicial oversight is constitutionally meaningful and whether the government has been candid about the capacities of these devices, *see* Ellen Nakashima, *Little-Known Surveillance Tool Raises Concerns by Judges, Privacy Activists*, Wash. Post, Mar. 27, 2013[3] ("Federal investigators in Northern California routinely used a sophisticated surveillance system to scoop up data from cellphones and other wireless devices in an effort to track criminal suspects — but failed to detail the practice to judges authorizing the probes.");
- Whether the government's practices respect the Florida Constitution and the reasonable expectation of privacy in persons' location information revealed by their cell phones, *see, e.g., United States v. Davis*, 754 F.3d 1205, 1217 (11th Cir. 2014) (holding "that cell site location information is within the

[3] *Available at* http://www.washingtonpost.com/world/national-security/little-known-surveillance-tool-raises-concerns-by-judges-privacy-activists/2013/03/27/8b60e906-9712-11e2-97cd-3d8c1afe4f0f_story.html.

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 narrowly tailored to particular government interest); *see also* Rule 2.420(f)(1) (adopting the procedure in Rule 2.420(e) for criminal cases).[4]

The ACLU anticipates that any opposition to public access will justify the continued seal pursuant to Rule 2.420(c)(7) because some portion of the records are confidential under Florida or federal law. However, because none of the likely statutory provisions is included in the list of information in Rule 2.420(d)(1)(B) as eligible for per se automatic and indefinite designation by the clerk, the sealing of

[4] Alternatively, Rule 2.420(f)(3) prescribes an independent procedure for designating "active criminal investigative information" as confidential. However, the order sealing this information or court records must still include a finding that the sealing is narrowly tailored and least restrictive required by Rule 2.420(e)(3)(G). Rule 2.420(f)(3)(B) (requiring the order to include findings required by Rule 2.420(e)(3)(G)). Therefore, the court must find a necessity under either procedure.

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 that is not confidential." Fla. R. Judicial Admin. 2.420(b)(4). Although information properly determined to be confidential may be redacted, those redactions must be no broader than necessary, and the remainder of the record must be released to the public. *Times Pub. Co. v. State*, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002).

Accordingly, after redaction of any words or sentences that constitute confidential information, this Court must unseal the balance of the § 934.33 orders and applications and make them available to the public.

WHEREFORE, for the foregoing reasons, the ACLU respectfully requests the following relief:

A. Conduct a hearing at which the ACLU, any parties, and affected non-parties may present arguments, pursuant to Rule 2.420(j)(3);

B. Grant public access to all applications made by Michael Jackson in 2012 and 2013 for an orders issued pursuant to § 934.33, Fla. Stat., and any resulting orders;

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**

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