IN THE CIRCUIT COURT OF TH E SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JAMES THOMAS,
Defendant.
_____/

CASE NO. 08 CF 03350
Division A
SPN 175470

ACLU'S MOTION FOR PUBLIC ACCESS TO SEALED JUDICIAL RECORDS

Pursuant to Florida Rule of Judicial Administration 2.420(j), the American Civil Liberties Union of Florida, Inc., ("ACLU") moves to unseal the transcript of the August 23, 2010, suppression hearing

issuing a publicly available opinion justifying closure, the Court closed that hearing and sealed the hearing transcript. In light of the strong presumption of public access to judicial proceedings under the state and federal constitutions and Florida law, that closure was in error. This Court should order the hearing transcript unsealed so that the public may learn about the "allegations of misconduct by police and prosecution that raise constitutional issues" in this case. *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1, 8 (Fla. 1982).

FACTS

1. On September 13, 2008, Tallahassee police responded to a woman's report that she had been raped and her cell phone stolen. *See Thomas v. State*, 127 So. 3d 658, 659–60 (Fla. 1st DCA 2013). Approximately 24 hours later, police tracked the cell phone to the "specific apartment" Mr. Thomas shared with his girlfriend, Deidre Simmons. *Id.*

2. The TPD did not seek a warrant or court order authorizing police to track the location of the phone.

3. Instead of applying for a warrant to search the apartSnr04T002 0 TD .001 xTh

the premises, and seized Mr. Thomas and a cell phone believed to have been stolen from the complainant. *Id.* at 660–61.

4.

7. This Court held a hearing on the motion on August 23, 2010. Although the Court ordered disclosure to defense counsel, it closed the hearing to the public. A docket entry dated January 14, 2011, states that the hearing transcript is sealed.

8. This Court orally denied Mr. Thomas's motion to suppress the fruits of the warrantless apartment search on grounds that police entry was justified by officer safety concerns, and that Ms. Simmons later provided valid consent to search. *See Thomas*, 127 So. 3d at 661; *see also* Case Comments from Court Event (docketed Aug. 23, 2010) ("MOTION TO SUPPRESS: DENIED."). On appeal, the First District Court of Appeal used the same rationale.

> with the technical operations unit of the Tallahassee Police Department testified: "[W]e prefer that alternate legal methods be used, so that we do not have to rely upon the equipment to establish probable cause, just for not wanting to reveal the nature and methods." He also testified: "We have not obtained a search warrant [in any case], based solely on the equipment."

Thomas, 127 So. 3d at 660 (alterations in original).

10. At oral argument for the appeal, Judge Makar further stated that "this record makes it very clear [TPD] were not going to get a search warrant because they had *never* gotten a search warrant for this technology." *See* Oral Arg. at 17:58, May 14, 2013, *Thomas v. State*, No. 1D11-6156.[1] Judge Benton added that "200 times they had not" gotten a warrant. *Id.* at 18:04.

11. Later during the same argument, counsel for the government provided a brief description of the device used to locate the phone: "this machine tracked, it detected, only the cell phone signals." *Id.* at 28:26.

12. Based on the foregoing information about TPD's investigation, it appears that police used a "cell site simulator" to track the phone to Mr. Thomas's apartment. Cell site simulators are sometimes called "digital analyzers" or "IMSI catchers," in reference to the unique identifier—or international mobile subscriber identity[,] we simu

given area, or to ascertain the location of a phone when the officers know the numbers associated with it but don’t know

mimicked a Verizon Wireless cell tower and sent signals to, and received signals from, the aircard."); *In re the Application of the U.S. for an Order Authorizing the Installation & Use of a Pen Register & Trap & Trace Device*, 890 F. Supp. 2d 747, 751–52 (S.D. Tex. 2012) (denying government application for order authorizing use of cell site simulator); *Application of U.S.A. for an Order Authorizing Use of a Cellular Tel. Digital Analyzer*, 885 F. Supp. 197, 198–99 (C.D. Cal. 1995) (government applied for an order permitting use of a digital analyzer, which "can detect the electronic serial number ("ESN") assigned to a particular cellular telephone, the telephone number of the cellular telephone itself, and the telephone numbers called by the cellular telephone").

16. The U.S. Department of Justice has also publicly released documents governing law enforcement use of cell site simulators and explaining the purported legal authority for their use.[9]

17. Florida law enforcement agencies

Florida Department of Law Enforcement has released records explaining that it "has spent more than $3 million buying a fleet of Stingrays," which it makes available to local law enforcement agencies.[10] The Miami Police Department has posted documents to its website detailing its communications with the Harris Corporation about purchase of equipment to augment its existing Stingray devices.[11] Likewise, the Sunrise Police Department posted documents to its website detailing its purchase of a Stingray and related equipment from the Harris Corporation last year for more than $143,000.[12] In a report based substantially on documents obtained through public records requests submitted by a consortium of Gannett newspapers, Florida Today recently explained that "[l]ocal and state police, from Florida to Alaska, are buying Stingrays with federal grants aimed at protecting cities from terror attacks, but using them for far broader police work."[13] The report cites Assistant State Attorney Wayne Holmes of Brevard and Seminole

[10] *Cell Tower Dumps Not Used Locally*, Fort Myers News-Press, Dec. 8, 2013, at A6.

[11] Letter from Lin Vinson, Harris Corporation, to

and records." *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988). Indeed, "[t]he Florida Constitution mandates that the public shall have access to court records, subject only to

In this case, the Court failed to observe the procedural requirements for

II. Public Access to the Suppression Hearing in This Case Serves Vital Interests

While public access to all stages of a criminal trial serves an essential function, there are particularly important reasons to preserve the public's right of access to pretrial suppression hearings. As the Florida Supreme Court has explained,

> The issues considered at such hearings are of great moment beyond their importance to the outcome of the prosecution. A motion to suppress involves allegations of misconduct by police and prosecution that raise constitutional issues. Such allegations, although they may prove to be unfounded, are of importance to the public as well as to the defendants. The searches and seizures that such hearings evaluate do not take place in public. The suppression hearing is the only opportunity that the public has to learn about police and prosecutorial conduct. It is important that a decision of the trial judge on a motion to suppress be made on the basis of evidence and argument offered in open court, so that all who care to see or read about the case may evaluate for themselves the propriety of the exclusion.

Lewis, 426 So. 2d at 8.

These reasons for openness resonate powerfully in this case. Without obtaining a warrant or court order, police apparently used powerful cell site simulator technology to track cell phone signals into a private home. Relying on the result of that search, and again without a warrant, police entered the home without consent, seized evidence, and arrested Mr. Thomas. These activities implicate core concerns of the Fourth Amendment, including:

Whether a warrant or other order is required for use of a cell site simulator, and whether law enforcement is obtaining such warrants or orders, *see In re the Application*, 890 F. Supp. 2d at 751–52 (denying government application for order authorizing use of cell site simulator);

Whether people have a reasonable expectation of privacy in their location information revealed by their cellphones, and whether the government respects that expectation of privacy in criminal investigations, *see Commonwealth v. Augustine*, __ N.E.3d __, 467 Mass. 230, at *1, *12 (2014) (holding that there is a reasonable expectation of privacy in cell site location information and requiring a warrant before police can obtain it from wireless carriers); *cf. United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of

"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");

Whether the government is being candid with courts about its use of cell site simulators and the capabilities of those devices (*see* Ellen Nakashima, *Little-Known Surveillance Tool Raises Concerns by Judges, Privacy Activists*, Wash. Post, Mar. 27, 2013[16] ("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 desire to conceal its use of cell site simulators from courts and the public is prompting it to conduct further searches of homes and other constitutionally protected areas without seeking warrants, in violation of the Fourth Amendment (*see Thomas*, 127 So. 3d at 660; and

Whether in cases where the government seeks search or arrest warrants based in whole or in part on information learned from use of cell site simulators, it is accurately describing the source of that information in its warrant applications (*cf.* John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, Reuters, Aug. 5, 2013[17] (describing law enforcement use of "parallel construction" in later stages of investigations and prosecutions to conceal investigative methods initially leading to suspects).

The closure of the August 23, 2010 hearing and the indefinite sealing of the hearing transcript deny the public vital information about all of these questions.

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[16] *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.

[17] *Available at* http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805.

III. The Closure of the Suppression Hearing and Sealing of the Transcript was Procedurally Improper

The Florida Supreme Court has repeatedly held that judicial hearings, including suppression hearings and other pretrial proceedings, are presumptively open to the public and may be closed only after the court makes specific findings based on record evidence and with an opportunity for public participation. *See Lewis*, 426 So. 2d at 8. Likewise, court records, including hearing transcripts, may be sealed only upon a written notice and motion, public hearing, and written ruling of the court. Fla. R. Judicial. Admin. 2.420(b)(1)(A) (defining "court records" to include "transcripts filed with the clerk"); *id.* 2.420(d)(2)–(4), (f)(1) (providing procedures for sealing of confidential court records). None of these requirements were observed here.

A party seeking to close hearings or records bears the burden of proving each element of the three-part test set out by the Florida Supreme Court:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
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> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis, 426 So. 2d at 6; *see also Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 35 (Fla. 1988) ("[T]he factors set out in *Lewis* are relevant to a

finding of cause and should be considered in determining whether public access to a judicial public record should be restricted or deferred."). The court must hold a hearing on the propriety of closure or sealing, and must make specific findings, based on the showing made by the moving party, that closure is necessary to prevent a serious and imminent threat to the administration of justice" and that "no less restrictive alternative means than closure are available." *Lewis*, 426 So. 2d at 7–8; *see also In re Amendments*, 954 So. 2d at 21 (discussing need for hearings on motions to seal judicial records). This high threshold for closure means that the parties' mere desire for secrecy, even if shared, does not absolve the court of the requirement to hold a hearing and issue an explanatory opinion before closing a hearing or sealing a record. *See Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462, 464 (Fla. 1st DCA 1987) (reversing trial court's closure order when based merely on the fact that "one of the parties wished to conduct the proceedings in private to prevent the disclosure of certain information the party would otherwise prefer not be made public"), *aff'd sub nom. Barron*, 531 So. 2d 113. Indeed, "judges frequently refuse to allow materials that both sides to a lawsuit wish sealed to be sealed, because of the presumption that judicial proceedings are public." *In re Cudahy*, 294 F.3d 947, 952 (7th Cir. 2002) (Posner, C.J.).

In order to serve the goal of judicial transparency and facilitate appellate review, a decision to close hearings or seal records must be explained in a written

opinion available to the public. *See Lewis*, 426 So. 2d at 8–9 ("The trial judge shall make findings of fact and conclusions of law so that the reviewing court will have the benefit of his reasoning in granting or denying closure."); *Carter v. Conde Nast Publ'ns*, 983 So. 2d 23, 25 (Fla. 5th DCA 2008) (explaining that Fla. R. Judicial Admin. 2.420 permits sealing of records only upon an order that contains "express findings" of "the particular grounds for making the court records confidential, that the closure is no broader than necessary, and that there are no less restrictive measures available."); Fla. R. Judicial Admin. 2.420(f)(1)(B) ("The Court shall issue a written ruling on a motion . . . within 10 days of the hearing on a contested motion or within 10 days of the filing of an agreed motion.").

Finally, to ensure that the public's interest in judicial access is considered, "[n]otice must be given to at least one representative of the local news media when a motion for closure is filed and when it is heard by the court." *Lewis*, 426 So. 2d at 8. Even if the parties do not request it, the court must hold "a hearing on the motion to restrict access in which the media has an opportunity to participate and present evidence. Only after such a hearing may the court enter an order limiting access to judicial public records." *WESH Television, Inc. v. Freeman*, 691 So. 2d 532, 535 (Fla. 5th DCA 1997).

Here, there was no written motion for closure or sealing and no public hearing on such motion. Although the parties apparently agreed to closure of the suppression hearing and sealing of the transcript, there is no record of any notice provided to the public or the press, nor of an opportunity for public or press participation. The Court's decision to close the hearing and seal the transcript was not memorialized in writing, and no explanation for the closure is available to the public. These deficiencies constitute a violation of procedural due process. *Sarasota Herald-Tribune v. J.T.J.*, 502 So. 2d 930, 931 (Fla. 2nd DCA 1987). It is too late to permit public access to the suppression hearing itself, but this Court must ameliorate the violation by permitti

closure of a suppression hearing is justified, the First Amendment requires subsequent release of the transcript so that the press and the public may have "'a full opportunity to scrutinize the suppression hearing.'" *Lewis*, 426 So. 2d at 5 (quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 393 (1979)). In such circumstances, "[t]he news media have no first amendment right to attend the pretrial hearing *as long as* when closure is ordered, the transcript of the hearing is made available to the news media at a specified future time, when the danger of prejudice will be dissipated." *Id.* at 8 (emphasis added).

Thus, even where a hearing is ordered closed, the hearing transcript is presumed to remain publicly accessible. "The Florida Constitution mandates that the public shall have access to court records, subject only to certain enumerated limitations." *In re Amendments*, 954 So. 2d at 17 (citing art. I, § 24, Fla. Const.). The Florida Supreme Court "has adopted rules of procedure recognizing this right of public access to court records." *Id.* (citing Fla. R. Jud. Admin. 2.420). "These rules identify a narrow category of court records where public access is automatically restricted by operation of state or federal law or court rule . . . [and otherwise] strongly disfavor court records that are hidden from public scrutiny." *Id.* Under the rules, records are deemed confidential if they are "made confidential under the Florida and United States Constitutions and Florida and federal law," "by court rule . . . , by Florida Statutes, [or] by prior case law of the State of Florida

. . . ." Fla. R. Judicial Admin. 2.420(c)(7)–(8). Otherwise, records may only be sealed if:

> (A) confidentiality is required to
>
> (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
>
> (ii) protect trade secrets;
>
> (iii) protect a compelling governmental interest;
>
> (iv) obtain evidence to determine legal issues in a case;
>
> (v) avoid substantial injury to innocent third parties;
>
> (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;
>
> (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;
>
> (B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A); and
>
> (C) no less restrictive measures are available to protect the interests set forth in subdivision (A).

Fla. R. Judicial Admin. 2.420(c)(9).[18]

Because there was no publicly available motion to seal the transcript, no public hearing on such a motion, and no written opinion or public explanation for

[18] These factors "are derived from the holding of *Barron*[, 531 So.2d at 118]." *In re Amendments*, 954 So. 2d at 20 n.8.

making the transcript confidential, it is impossible to know the grounds on which the Court sealed the transcript. Although two possible purported grounds for sealing are suggested in the public materials, neither meets the requirements of Rule 2.420 and the First Amendment. And even if these or another reason provided a colorable justification for sealing, continued sealing would require the Court to solicit briefing from the parties, hold a public hearing, and issue a public opinion and order.

One possible ground for the Court's decision to seal the transcript is that the Tallahassee Police Department signed a nondisclosure agreement with the private company that supplied the cell site simulator device to it. *See Thomas*, 127 So. 3d at 660. However, "[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1208 (Fla. 1st DCA 2009). Likewise, a secrecy agreement with a private corporation does not constitute a "compelling governmental interest" sufficient to justify sealing. Fla. R. Judicial Admin. 2.420(c)(9)(A)(iii). "What transpires in the courtroom is public property." *Lewis*

deems information filed or discussed in court to be confidential does not control the court's determination of what information may be withheld from the public. *See Carter*, 983 So. 2d at 26 (holding that documents alleged to be confidential by a party and filed with the court "would be treated as confidential [only] until the court could determine if the documents, or any of them, were entitled to be exempt from public disclosure"). The nondisclosure agreement may affect what the TPD says publicly about cell site simulators in the course of its procurement activities, but it has no bearing on what parts of the Court's official business may be hidden from public view.

A second possible ground for sealing is th

The transcript is also not properly sealed as containing "information revealing surveillance techniques or procedures." § 119.071(2)(d), Fla. Stat. To the extent this category of records falls within Florida Rule of Judicial Administration 2.420(c)(7)–(8), *see Buenoano*, 707 So. 2d at 718, it must be "construed narrowly and limited to [its] stated purpose." *Marino v. Univ. of Fla.*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013); *accord Times Publ'g Co. v. State*, 827 So. 2d 1040, 1042 (Fla. 2nd DCA 2002); *Christy v. Palm Beach Cnty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). The fact that the TPD's use of a cell site simulator does not in itself reveal "techniques or procedures." Rather, it reveals police investigatory conduct that may well be in violation of the Fourth Amendment to the U.S. Constitution and Art. I, Sec. 12 of the Florida Constitution. Moreover, even if some information about cell site simulator use could have been properly redacted in 2010, it no longer may be in 2014, when use of the technology by police has been widely reported in the press and acknowledged by law enforcement agencies across Florida and the country. *See supra* FACTS ¶¶ 12–17.[19]

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[19] To the extent this Court determines that § 119.071(2)(d), Fla. Stat., bars release of all or part of the transcript, such application of the statute violates the public's First Amendment right of access because the order sealing is not narrowly tailored to meet a compelling governmental interest. *See Richmond Newspapers, Inc.*, 448 U.S. at 582–84; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise II*, 478 U.S. at 13–14.

If the government sought to rely on these or other grounds to seal the transcript, it should have filed a motion to that effect. Fla. R. Judicial Admin. 2.420(f)(1). Nevertheless, in light of the instant motion to unseal the suppression transcript, this Court must either unseal the transcript directly or hold an open hearing on the motion "as soon as practicable but no later than 30 days" from this date to determine the propriety of continued sealing, and then must order the transcript unsealed as soon as possible thereafter. *Id.* 2.420(e)(5), (f)(1).

V. Even if Some Information in the Transcript were Properly Ruled Confidential, the Court Must Narrowly Tailor the Sealing Order to Release Non-Confidential Information

Even if the transcript contained some information that was properly determined to be confidential, sealing of the entire document 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 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 Publ'g Co.*, 827 So. 2d at 1042.

Accordingly, after redaction of any words or sentences that constitute confidential information, this Court must unseal the balance of the transcript and make it available to the public.

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

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

B. Grant public access to the transcript of the hearing held on August 23, 2010 in the above-captioned case, *State v. Thomas*, Case No. 08 CF 03350;

C. 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 this matter.