400 SOUTH STREET
TITUSVILLE, FLORIDA 32780
TELEPHONE: (407) 264-6749

1018-C S. FLORIDA AVENUE
ROCKLEDGE, FLORIDA 32955
TELEPHONE: (407) 631-3406

1515 SARNO ROAD
MELBOURNE, FLORIDA 32935
TELEPHONE: (407) 255-4375

OFFICE OF
PUBLIC DEFENDER
EIGHTEENTH JUDICIAL CIRCUIT
BREVARD & SEMINOLE COUNTIES

JAMES RUSSO
PUBLIC DEFENDER

GENE STEVANUS
EXECUTIVE DIRECTOR

BLAISE TRETTIS
EXECUTIVE ASSISTANT

J. RANDALL MOORE
CHIEF ASSISTANT

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Tallahassee, Florida 32399-1927

Comments Regarding Amendment to Florida Rules of Judicial Administration 2.070(a) - Court Reporting, Case No. 84,572

The Florida Supreme Court should enact a modified version of the proposed amendment to Florida Rule of Judicial Administration 2.070(a) that would require the recording of grand jury proceedings. The Florida Supreme Court should enact the proposed amendment but should delete that portion of the amendment that would allow the recording of grand jury proceedings by electronic recording device.

In Anderson v. State, 574 So.2d 87 (Fla. 1991), the Court held that the state violates Article I, section 9 of the Florida Constitution when it requires a person to stand trial and defend himself or herself against charges that it knows are based on perjured, material evidence. In Anderson, the Court concluded that this principle was unavailing to the appellant because the grand jury testimony of the witness, although false in part, was not false in any material respect that would have affected the indictment. Anderson at 92.

As it stands now, proceedings before a grand jury need not be recorded notwithstanding statutes providing that a stenographer may be present and prohibiting disclosure of testimony. State v. McCarthur, 296 So.2d 97 (Fla. 4th DCA 1974). Although the Anderson decision provides the accused with the remedy of dismissal of an indictment because of a violation of due process, the rule of law enunciated in Anderson has vitality and meaning only when the state chooses to have a stenographer present before the grand jury. It would seem extremely difficult, it not impossible, for a person accused of a crime to establish a due process violation under Anderson without a record of the testimony of the witness or witnesses who testified before the grand jury. One could argue that the current state of the law results in a denial of due process because the state can choose to not preserve potentially exculpatory evidence (grand jury testimony) even though the state could preserve the testimony with a minimum of inconvenience by arranging the presence of a stenographer. See State v. Hills, 467 So.2d 845, 849 (Fla. 4th DCA 1985) ("We fail to see any material difference between the destruction of evidence by the state's affirmative act and its destruction by the state' failure to act where it had a ready means

of preserving the evidence with a minimum of inconvenience."); United State v. Agurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S. Ct. 2392 (1976) (fundamental fairness, as an element of due process, requires the state's failure to preserve evidence that could be favorable to the defendant to be evaluated in the context of the entire record.)

The proposed amendment to Fla. R. Jud. Admin. 2.070(a) is an improvement over the current version of the rule because it eliminates the discretion given to the chief judge of a circuit to decide whether or not to order the recording of grand jury proceedings. It is unknown to undersigned counsel why the chief judge is given this discretion by the current version of rule 2.070(a). In those circuits where the chief judge has not ordered the recording of grand jury proceedings pursuant to Fla. R. Jud. Admin. 2.070(a), the state attorney alone decides if grand jury proceedings will be reported. The state attorney may decide to have a court reporter present in those grand jury proceedings where the state attorney believes that a reluctant witness might suffer a "memory lapse" at trial. Moore v. State 452 So.2d 559, 562 (Fla. 1984) ("We therefore hold that under section 90.801(2)(a), Florida Statutes (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact.") However, because of the Court's holding in Anderson, supra, the state attorney may decide to not have a court reporter present for grand jury testimony when the witness is of questionable veracity or under pressures and influences to testify favorably for the state at the time of the grand jury testimony. The state attorney should not be allowed to exercise discretion in this area. The proposed amendment to Fla. R. Jud. Admin. 2.070(a) eliminates this discretion by making the reporting of grand jury proceedings uniform throughout the state.

The proposed amendment to rule 2.070(a) should be modified by deleting that portion of the amendment that would allow grand jury proceedings to be reported by an electronic recording device. In Brevard County, the grand jury room is not in a courtroom that has been "wired" to make electronic recordings of proceedings as are the courtrooms where the county court judges preside over misdemeanor cases. Court reporters record all felony cases in the circuit court in Brevard County. Undersigned counsel believes that grand jury proceedings in Brevard County are conducted away from the courtrooms to ensure privacy and secrecy and also for the reason that there are simply no available courtrooms because of the crowded conditions that now exist. It is reasonable to believe that grand jury proceedings across the state are also conducted in private rooms away from courtrooms that are wired to electronically record the proceedings. If the amendment to rule 2.070(a) were enacted as proposed, there will undoubtedly be electronic recordings of grand jury proceedings by rudimentary tape recorders placed on tables that will not enable the preparation of a complete and accurate transcript. This procedure is fraught with problems. In Brevard County, for example,

attorneys and judges routinely encounter problems with the appellate record of misdemeanor appeals because the courtroom tape is not audible or intelligible or, even worse, there is no tape recording at all because the court clerk in charge of the tape while court is in session lets the tape run-out during the proceedings. These problems occur regularly even though the courtrooms are wired to make electronic recordings and procedures are in place for the court clerk to ensure that all proceedings are recorded. These problems will only be worse during grand jury proceedings where the state is responsible for making the recording in a room that is not even wired to make electronic recordings. The lack of a complete transcript invariably causes appellate litigation and reconstruction of records in the trial court that could have been prevented. Delap v. State, 350 So.2d 462 (Fla. 1977); Velez v. State, 19 Fla. L. Weekly D 2274 (Fla. 4th DCA, October 26, 1994).

Other problems with electronic recordings of court proceedings is the inaccuracy of transcripts that are prepared from the recordings and the length of time it takes to prepare a transcript. It is likely that a trial judge may be confronted with a case where the court needs a transcript of grand jury testimony overnight. For example, I was recently in the first degree murder trial of State v. Robinson, 92-6576-CFA, when the state's key witness recanted her previous testimony and explained why she had given perjured testimony before the grand jury. During the trial, I filed a motion to dismiss the indictment based on Anderson, supra. The court could have ordered that a transcript of the witness grand jury testimony be prepared overnight because, to undersigned counsel's knowledge, in Brevard County court reporters record grand jury proceedings even though there is not an order by the chief judge requiring them to do so. The issue became moot, however, when the jury returned a not guilty verdict. If the testimony had been electronically recorded, it probably would have taken weeks for a transcript to be prepared and the transcript would very likely not be accurate. In Brevard County, it takes weeks for an employee at the clerk's office to prepare misdemeanor appellate transcripts. The clerk's employee has no specialized training to make a transcript from a tape recording if, indeed, there is any specialized training of this nature that exists.

The presence of a court reporter at grand jury proceedings would eliminate the problems discussed above. The additional cost to those counties where court reporters do not now attend grand jury proceedings would be minimal. For example, in Brevard County the official court reporters are appointed by the county to provide their services to the county at the rate of $16.00 an hour. The county is able to obtain this low rate because of the volume of the work. Whatever the minimal additional costs amount to, it is a small price to pay for an accurate and timely record of legal proceedings of the utmost importance and consequence. Even when the grand jury considers testimony and evidence in cases where the death penalty may not be imposed, the matters before the grand jury are usually very important to the public.

For the reasons discussed above, undersigned counsel respectfully submits that the Florida Supreme Court should enact the following modified version of the proposed amendment to Florida Rule of Judicial Administration 2.070(a):

Rule 2.070 COURT REPORTING

(a) When Reporting Required. All criminal and juvenile proceedings, and any other judicial proceedings required by law or court rule to be reported at public expense, shall be reported. Any proceeding shall be reported on the request of any party. The party so requesting shall pay the reporting fees, but this requirement shall not preclude the taxation of costs as authorized by law. Grand jury proceedings, ~~upon order of the chief judge of the circuit~~, except deliberation and voting, shall be reported stenographically, however, no transcription may be made unless required by an order of a court of competent jurisdiction. The stenographic records, and transcripts of grand jury proceedings shall be filed with the clerk of the court who shall keep them in a sealed container not subject to public inspection.

Respectfully Submitted,

Blaise Trettis
Executive Assistant Public Defender
Fla. Bar No. 0748099
1018-C South Florida Avenue
Rockledge, Florida 32955
(407) 631-3406

cc: The Honorable James Russo,
Public Defender for the Eighteenth Judicial Circuit