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April 27, 2011

Florida Supreme Court
Attn.: Thomas D. Hall, Clerk
500 South Duval Street
Tallahassee, FL 32399-1927

Re: SC11-399: Proposed rule amendments to implement electronic filing of documents.

Dear Tom:

I appreciate the opportunity to submit this comment in opposition to the Rules of Criminal Procedure Committee's proposed change to Rule 3.030. I oppose the proposal because it effectively eviscerates e-filing for the majority of documents filed in criminal cases without any reasonable explanation.

Last year, this Court asked the ten court rules committees to "propose rule amendments necessary to implement recent recommendations of the Appellate Court Technology Committee concerning electronic appellate court records and filings and further to accommodate the advent of electronic court records and filings in Florida courts." [Letter from Tom Hall, Clerk of the Court, dated August 4, 2010] In other words, the committees were directed to fix their rules to make sure the court system can operate paperless.

In response, the rules committees filed a joint petition making recommended changes to accommodate this Court's request. The primary rule changes are in the Rules of Judicial Administration ("RJA"). Although the RJA proposals do contain exceptions stating that certain documents "may" be manually submitted to a clerk for filing, those exceptions are limited. Most of the other rules committees simply referenced the RJA rules in stating e-filing requirements.

But not the Rules of Criminal Procedure Committee ("the Committee"). In line with the Committee's continued attempts to exempt the state attorneys and public defenders from moving to electronic records and electronic filing, the proposed change to the criminal rules requires a tremendous number of documents be filed in paper—without any reasonable justification.

The Committee proposes adding the following new subsection to Rule 3.030:

> (c) **Submitting Originals**. Originals which must be filed in paper format with the clerk include: charging documents, indictments, informations, petitions, affidavits, plea agreements, documents filed under seal, ex parte documents, and any documents which are required to be sworn or notarized. Original charging documents must be kept by the clerk in

> accordance with the Florida Rules of Judicial Administration. All other original documents filed in paper format must be scanned by the clerk and provided to the prosecuting authority to determine whether or not the original is kept. If permitted by approved statewide or local ECF procedures, original documents may be submitted electronically for purposes of a filing date; however, the original document must also be filed in paper format in accordance with this rule. All original documents under this rule must certify that they were filed in paper format to the clerk.

The Committee stated the following as the only justifications for its proposed change:

> The proposed amendments are to make the rule consistent with the proposed amendments to Rule 2.525, which requires all court records to be e-filed, but then allows certain documents to be filed in paper form. While certain documents are allowed to be filed with the clerks in paper format, it is not mandatory. In reviewing the federal criminal rules for the Middle and Southern Districts of Florida, it was determined that certain documents are required to be filed with the federal clerks in paper format and not electronically. The committee determined that the criminal rules should likewise require certain documents to be filed on the conventional fort. Following the discretion that Rule 2.525 allows for filing "original documents," the proposed amendments to Rule 3.030(c) define "original documents" and requires them to be filed in paper format with the clerk.
>
> Because e-filing has not been tested and challenged, and because original documents must be retained to defend against future challenges, such as authenticity, it seems prudent to require certain documents to be preserved in paper format. It is possible that this will no longer be necessary in the future. Charging documents should be retained by the clerks as they are a neutral party to any future challenges.

[Out-of-Cycle Report on Proposed Rule Amendments, at 10-11]

The Committee's proposed change to Rule 3.030 should be rejected for the following reasons: (**1**) it does not comport with this Court's clear directives on e-filing; (**2**) the asserted justifications for the rule are unsupported in practice; (**3**) it places an undue burden on the clerks of court; and (**4**) it is inconsistent with existing Florida law and contrary to pending legislation that is set to pass in the Florida Legislature.

First, the Committee's proposed rule change is essentially an end run around this Court's repeated clear directives to move Florida courts to an entirely paperless system.

As this Court has stated:

> The clear policy of the Florida Supreme Court is that advances in technology should benefit the people whenever possible by lowering financial and physical barriers to public record inspection.

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> Florida's court system as a whole is working toward the day when electronic filing of all court documents will be an everyday reality.

Rule 9.210, Ct. Comm., 2000 (emphasis added). In its letter prompting the proposed rule changes at issue, the Court requested that "all the Florida rules of court be reviewed to determine what rules need to be changed to accommodate electronic records and filings throughout Florida's court system," noting that "time is of the essence" in light of the "current reality" of the rapid move of Florida's courts to fully-electronic systems. [Letter from Tom Hall, Clerk of the Court, dated August 4, 2010] Indeed, this Court's administrative orders have authorized me and 20 other clerks of court to operate paperless.[1] These orders permit the elimination of follow-up paper filings once a clerk's electronic filing system is operational for 90 days and Supreme Court approval is obtained. This use of electronic versions of all documents is an integral part of these programs.

Second, the asserted justifications for the proposed rule change are simply unsupported in practice.

The Committee essentially relies on three primary justifications for its proposed rule change: (**1**) original documents must be preserved in paper format to defend against future challenges such as authenticity; (**2**) e-filing has not been tested and challenged; and (**3**) the federal criminal rules for the Middle and Southern Districts of Florida require certain documents to be filed in paper format and not electronically. These justifications are unsupported in practice.

No need to preserve paper format to defend against future challenges. In practice, preserving original documents in paper format does no more to "defend against future challenges" than does preserving original documents in electronic format. Indeed, electronically-filed documents are more reliable than documents filed in paper because the clerks of court are able to determine and track exactly where the electronically-filed documents originated from. When a document is electronically filed, you can easily determine the identity of the sender because there is an electronic audit trail. This is far more effective than paper filing at ensuring no fraudulent criminal pleadings are filed. With paper filings, anyone can simply mail a document to the clerk's or drop a document in the clerk's inbox. There is no way to verify the identity the sender of the document filed in paper. In an e-filing system, the electronically filed document is the original. Thus, there is simply no valid reason to require paper originals of any of the documents listed in proposed Rule 3.030(c).

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[1] Since 2007, this Court has issued 23 orders permitting at least 20 additional clerks of court to operate electronic document transmission and filing systems.

E- Filing is reliable. The Committee's claim that "e-filing has not been tested and challenged" is entirely unsupported. My office has operated electronically for years pursuant to permission from this Court and that operation has proven entirely safe. Indeed, we are currently working with the Manatee County Sheriff's Office to electronically receive warrants in criminal cases. We have worked with the Manatee County Public Defender's Office, as well as the Manatee County State Attorney's Office, and they have since 2009 been filing a quantity of their documents with us electronically without incident. This has proven to result in better accuracy, with the added benefits of improved efficiency and communication between agencies.

Even Federal Rules allow charging documents to be filed electronically. The Committee's reliance on the federal criminal rules for the Middle District of Florida is misplaced. Although the "CM/ECF Rule for the Federal Middle District of Florida" includes an exception from mandatory e-filing for charging documents in a criminal case, the rule specifically provides in part, "A charging document in a criminal case (*e.g.*, indictment, superseding indictment, complaint, information) <u>may be submitted in paper format or in .pdf format on a disk or CD. The Clerk will file electronically such document and retain the original document</u>." CM/ECF Rule for Federal Middle District of Florida, Section II, 3. Though the rule gives the filer a choice, the rule specifically acknowledges that it can be alternatively submitted electronically. Given the state of technology, no need exists now to give any such choice—electronic filing should be mandatory.

Third, the proposed rule change places undue and unnecessary burdens on the clerks. Requiring that "[a]ll other original documents filed in paper format must be scanned by the clerk and provided to the prosecuting authority to determine whether or not the original is kept" would negatively impact efficiency and result in increased cost to the clerks. In fact, not accepting proposed Rule 3.030(c) would save Manatee County alone, by audited figures, a total approaching $517,000.00 dollars which would help Manatee to balance their court budget.

Additionally, systems currently being implemented in this State and Manatee County absolutely require electronic filing of all documents. For example, the statewide e-portal requires that everything be done electronically, including service of those documents to opposing counsel.

Importantly, the proposed version of Rule 3.030 submitted by the Committee in the e- service case, Case No. SC10- 2101, still pending before this Court, is far different than the version submitted in this case. The Committee's proposed changes in the e- service petition mostly deleted Rule 3.030, whereas that <u>same</u> Committee's proposed changes to the <u>same</u> rule in this case greatly expand Rule 3.030 to exempt most documents in criminal cases from electronic filing. Thus, the Committee is taking inconsistent positions before this Court. Further, Manatee County judges will soon be using aiSmartBench, a system that provides on the bench access to cases to be heard. aiSmartBench uses case data that is contained in the clerk's case management system and imaged documents from the electronic case files. aiSmartBench, which will function with the e-portal, could be a prototype for the state and for maximum cost savings necessitates that everything be electronically filed.

The Electronic Filing Standards Subcommittee of the National Consortium for State Court Automation Standards has proposed an alternative to exclusion of documents from electronic filing process—an alternative that makes more practical sense in light of the clerk's procedures and the number of criminal cases that ultimately go to trial. Standard 1.3A of the Consortium's "Standards for Electronic Filing Processes" provides in its entirety:

> The ultimate objective of an electronic filing process is to have all court records maintained in electronic form. That requires that courts accept all documents – those that initiate a case as well as those filed in an existing case, those that require filing fees as well those that do not, those with attachments as well as those without – in all types of cases. Electronic filing processes are always introduced initially for specific case types. The case types chosen vary from court to court – criminal, civil, domestic relations. However, the goal must remain to include all case types in the process eventually. Some courts may choose to maintain some specific exceptions to electronic filing processes. Some courts exclude the filing of original wills in electronic form because images of those documents may not disclose possible alterations of the original document. Another exception might be for documents signed under penalty of perjury. As noted above (Standard 1.1H, integrity of Transmitted and Filed Documents and Data), it is not clear that electronic signatures will support prosecutions in such cases. <u>An alternative to exclusion of such documents from electronic filing processes may be to adopt a rule requiring the submitting party to retain physical custody of the original signed version and to make it available for inspection by the court or any party upon request</u>.

[Emphasis added].

The solution for what happens to original documents is easy. Rather than requiring that "[a]ll other original documents filed in paper format must be scanned by the clerk and provided to the prosecuting authority to determine whether or not the original is kept," as the proposed rule change requires, **<u>the state attorneys should keep the original paper documents unless and until they are requested by the court or a party</u>**. This makes practical sense when you consider that over a 3-year period in Manatee County (from 2008-2010), only <u>1%</u> of all of the criminal cases filed actually went to trial, potentially necessitating authentication of the documents in question. Further, when cases are concluded, if clerks have original documents or exhibits filed, the clerks ask the parties if they want the items back and the items are then sent back to the parties. If the parties submit these "original" items pre-trial, then it is a waste of time at the end of trial to ask the parties if they want them back.

It is inappropriate and an inordinate burden to require original documents be filed with the clerk, and then require the clerk to ASK the prosecuting authority whether the original should be maintained.

Fourth, the Committee's proposed rule change is inconsistent with existing Florida law and contrary to pending legislation that is set to pass in the Florida Legislature.

The Uniform Electronic Transaction Act ("**the Act**") promotes the use of electronic records in a variety of transactions including those involving individuals, businesses, and governmental agencies, among others. Section 668.50(7)(c) of the Act states: "If a provision of law requires a record to be in writing, an electronic record satisfies such provision." Although the Act does not override rules of procedure, this Court should strive to have rules that are consistent with the procedures followed every day by business and governmental agencies. Moreover, the Act supports a conclusion that electronic records are reliable.

The Act also addresses electronic notarization and provides that if a record must be notarized, such as the affidavits at issue here, "the requirement is satisfied if the electronic signature of the person authorized by applicable law to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record." § 668.50(11)(a), Fla. Stat. Section 117.021, Florida Statutes, governing electronic notarization provides that "any document requiring notarization may be notarized electronically" and sets forth more specific requirements for an electronic signature. If Florida law allows for electronic notarization, there is no reason why the documents listed in proposed Rule 3.030(c) cannot be electronically filed, or why those electronically filed documents cannot be considered originals.

Further, section 668.50(12) of the Act provides that, if a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which accurately reflects the information set forth in the record after the record was first generated in final form as an electronic record or otherwise. Subsection (12) goes on to provide that, if a provision of law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with other provisions of the statute. § 668.50(12)(d).

The Committee's proposed change to Rule 3.030 is also contrary to legislation that is set to pass in the Florida Legislature any day now—S.B. 170 and H.B. 443. These bills require the state attorneys and public defenders to electronically file and receive documents to and from the clerks. If these bills pass, and it appears very likely that they will, they will moot the Committee's proposal.

Based on the above, I urge this Court to reject the Committee's proposed change to Rule 3.030. Thank you for your consideration of these comments.

Sincerely,

Hon. R.B. "Chips" Shore

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Robert M. Eschenfelder, Chair, Code and Rules of Evidence Committee, 1112 Manatee Avenue W., Suite 969, Bradenton 34205-7804; John Granville Crabtree, Chair, Appellate Court Rules Committee, 240 Crandon Boulevard, Suite 234, Key Biscayne 33149-1624; Robert T. Strain, Chair, Criminal Procedure Rules Committee, 3801 Corporex Park Drive, Suite 210, Tampa 33619-1136; Donald E. Christopher, Chair, Civil Procedure Rules Committee, P.O. Box 1549, Orlando 32802-1549; Steven P. Combs, Chair, Family Law Rules Committee, 3217 Atlantic Boulevard, Jacksonville 32207-8901; William W. Booth, Chair, Juvenile Court Rules Committee, 423 Fern Street, Suite 200, West Palm Beach 33401-5839; Michele A. Cavallaro, Chair, Small Claims Rules Committee, 6600 N. Andrews Avenue, Suite 300, Ft. Lauderdale 33309-2189; Jeffrey S. Goethe, Chair, Probate Rules Committee, 3119 Manatee Avenue W., Bradenton 34205-3350; John J. Anastasio, Chair, Traffic Court Rules Committee, 3601 S.E. Ocean Boulevard, Suite 203, Stuart 34996-6737; and Katherine E. Giddings, Chair, Rules of Judicial Administration Committee, 106 E. College Avenue, Suite 1200, Tallahassee 32301-7741 by U.S. Mail this 27th day of April, 2011.

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Hon. R.B. "Chips" Shore