IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

JEFFREY EPSTEIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO: 4D09-2554

L.T. No. 20098CF009381A (Palm Beach)

RESPONSE OF B.B., NON-PARTY INTERVENER, IN OPPOSITION TO EMERGENCY PETITION FOR WRIT OF CERTIORARI

Spencer T. Kuvin
Florida Bar No. 89737
Diana L. Martin
Florida Bar No. 624489
dmartin@leopoldkuvin.com
LEOPOLD~KUVIN, P.A.
2925 PGA Blvd., Ste. 200
Palm Beach Gardens, FL 33410
(561) 515-1400

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STATEMENT OF FACTS

Petitioner Jeffrey Epstein committed criminal acts in Florida that led to his prosecution for felony solicitation of prostitution and procuring persons under 18 for prostitution. (A-8). Epstein pled guilty to both felonies. (A-8). During his plea colloquy, Epstein advised the trial court that his plea was a condition of a confidential nonprosecution agreement that he entered with the United States and that such agreement would be invalidated if he violated the terms of his plea, which included community control. (A-7, pp. 37-38). The judge found the federal nonprosecution agreement to be a significant inducement to Epstein accepting the plea in Florida state court and requested that a sealed copy of the agreement be entered in the criminal state court case. (A-7, pp. 39-40). The trial court did not review the document when determining that it should be sealed, but apparently based this decision on defense counsel's representation that the document was "confidential." The nonprosecution agreement was subsequently filed under an agreed order sealing the document. (A-9).

Many of the victims of Epstein's crimes have sued him civilly, some in Florida state court and some in federal court. Two victims filed a federal action in the Southern District of Florida for enforcement of the Crime Victim's Rights Act. (A-1). In that federal case, the victims' motion to compel production of the nonprosecution agreement was granted, but the court entered a protective order

preventing disclosure of the agreement to any third-parties or to any victims that refused to follow the protective order. (A-2). The victims then moved to unseal the nonprosecution agreement. (A-3). The court denied this motion because, *inter alia*, the agreement had never been filed in the federal case, under seal or otherwise. (A-6). The court further advised the parties that if they developed a need for the nonprosecution agreement in another case, that "relief should be sought in that case, with notice to the United States, the other party to the Agreement." (A-6, p. 2). Clearly the federal court did not want to be the final arbiter of determining who was entitled to see the nonprosecution agreement in cases other than the one immediately before it.

Back in state court, one of Epstein's victims, E.W., intervened in the criminal case and moved to vacate the order sealing the nonprosecution agreement. (A-10). E.W. argued that the agreement was improperly sealed because the trial judge failed to follow Florida Rule of Judicial Administration 2.420(d)(5), failed to follow Administrative Orders 2.104, 2.032, 2.303, and 11.046 of the Fifteenth Judicial Circuit Court, and failed to follow Florida's public policy by sealing the agreement. (A-10, pp. 1-2). The Palm Beach Post intervened and petitioned for access to the nonprosecution agreement, arguing that such documents are generally public records, are constitutionally required to be open for public inspection, and that the procedure for sealing the agreement was improper. (A-11, pp. 1-3). The

Post also argued that because Epstein quoted portions of the agreement in pleadings that have been made public in other cases, that it is pointless to keep the document sealed in state court. (A-11, p. 4).

The trial court held a hearing on the motions to intervene filed by E.W. and the Post. (Respondent B.B.'s Appendix ("RA")). The judge advised the parties that it did not appear the proper procedures were followed with regard to sealing the agreement. (RA 4:13-20). Rather than unsealing the document at that time, the court advised that it would give Epstein and the State the opportunity to file a motion to seal the documents and demonstrate that sealing is warranted under Federal Rule of Judicial Administration 2.420(d) and Administrative Order 2.303 at a later hearing. (RA 8:9-22; 13:25-14:12).

Respondent, B.B., one of Epstein's many victims, also intervened and asked the court to unseal the nonprosecution agreement. (A-12; A-18, pp. 28-30). In compliance with the court's earlier ruling, Epstein filed a separate motion to make the agreement confidential in which he claimed, quite cursorily, that granting his motion would protect the orderly administration of justice; protect a compelling government interest; avoid substantial injury to innocent third parties; and avoid substantial injury to a party, presumably himself. (A-13). Thus, rather than attempting to persuade the court that the nonprosecution agreement should be

confidential under Florida law, Epstein gave the court a rote recitation of Florida Rule of Judicial Administration 2.420(c)(9)(A).

At the hearing on these motions, Epstein failed to elaborate how he might be injured by disclosure of the nonprosecution agreement. (A-18). Instead he focused his argument in opposition to disclosure of the agreement on concepts of comity and federal supremacy and the need to protect the secrecy of grand jury matters. (A-18, pp. 17-21, 40-41). The United States did not appear or file an opposition to the motions to unseal the nonprosecution agreement it entered with Petitioner Epstein. (A-18, p. 6:22-8:14; 39:24-25).

The trial court denied Epstein's motion, finding neither he nor the State or federal governments "presented sufficient evidence to warrant the sealing" of the agreement, even though it held the hearing to give them an opportunity to "comply with the well-defined and narrow parameters for sealing such documents." (A-16, p. 2). The court granted the motion to unseal the documents, finding the proper procedure for sealing the agreement had not been followed. (A-16, p. 2; A-18, pp. 42-43).

The trial court's order unsealing the nonprosecution agreement has been stayed by this Court pending resolution of Petitioner Epstein's Emergency Petition for Writ of Certiorari.

ARGUMENT

Respondent B.B., one of Petitioner Epstein's victims and a non-party intervener in the trial court proceedings, respectfully requests the Court dismiss for lack of jurisdiction the petition for writ of certiorari because Petitioner Epstein will not suffer any harm, much less irreparable harm, due to the trial court's order unsealing the nonprosecution agreement. Alternatively, Respondent B.B. respectfully requests the Court deny the petition for writ of certiorari because the trial court's order did not depart from the essential requirements of law because the court correctly determined the document should not have been sealed in the first place.

I. Standard

"A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited circumstances. The order must depart from the essential requirements of law and thus cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987) (citing *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957); *Kilgore v. Bird*, 6 So. 2d 541 (Fla. 1942)). The latter requirement is jurisdictional—a "'petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before [a district] court has power to determine

whether the order departs from the essential requirements of the law.'" *Sabol v. Bennett*, 672 So. 2d 93, 94 (Fla. 3d DCA 1996) (quoting *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995)). A petitioner's failure to demonstrate satisfaction of this jurisdictional element should result in dismissal, rather than denial, of the petition for writ of certiorari. *Parkway Bank*, 658 So. 2d at 649.

II. The Court should dismiss this petition for writ of certiorari because Petitioner Epstein will not suffer any harm upon the unsealing of the nonprosecution agreement.

Petitioner Epstein will not suffer any harm, much less irreparable harm, upon the unsealing of the nonprosecution agreement. Epstein argued to the contrary below in only the most cursory way. Although he asserted that the agreement should remain confidential "[t]o avoid substantial injury to a party by disclosure of matters protected by a common law and privacy right" (A-13, p. 2), which is a mere recitation of Florida Rule of Judicial Administration 2.420(c)(9)(A)(vi), he failed to demonstrate that disclosure of the agreement will actually cause him any harm. Epstein is, after all, a convicted felon at this point, with a reduced expectation of privacy. *See, e.g., L.S. v. State*, 805 So. 2d 1004 (Fla. 1st DCA 2001) (holding state's interest in identifying convicted felons outweighs diminished privacy interest of convicted felon with respect to taking of blood sample for DNA testing).

Although B.B. has not had the opportunity to review the sealed nonprosecution agreement, she adopts the argument of E.W., who has had such opportunity, that there is nothing in the agreement that will harm Petitioner Epstein if disclosed. Without a threat of irreparable harm to Petitioner Epstein, this Court lacks jurisdiction over Epstein's petition for writ of certiorari and should, therefore, dismiss the action. *See Brown Distributing Co. of West Palm Beach v. Marcel*, 866 So. 2d 160, 161 (Fla. 4th DCA 2004) (dismissing petition for lack of jurisdiction where petitioner failed to demonstrate production of information would cause irreparable injury).

III. The Court should deny this petition for writ of certiorari because the trial court's order unsealing the nonprosecution agreement did not depart from the essential requirements of law.

In the event the Court determines that it has jurisdiction over Epstein's petition for writ of certiorari, it should deny the petition because the trial court did not depart from the essential requirements of law when granting the motion to unseal the nonprosecution agreement. By unsealing the agreement, the trial court actually corrected an earlier error that was committed when the document was filed under seal in violation of Florida law.

"In Florida, access to public records is a matter of such importance that it is constitutionally guaranteed." *Board of County Com'rs of Highlands County v. Colby*, 976 So. 2d 31, 35 (Fla. 2d DCA 2008) (citing Art. I, §24(a), Fla. Const.).

For this reason, the Florida Supreme Court has established a Rule of Judicial Administration setting forth a general rule that the "public shall have access to all records of the judicial branch" with limited exceptions. *See* Fla. R. Jud. Admin. 2.420. The exception argued by Epstein to be applicable here provides the following records of the judicial branch shall be confidential:

> Any court record determined to be confidential in case decision or court rule on the grounds that
>
> (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).

R. 2.420(c)(9). The supreme court also created a procedure to be followed when making a request to make court records confidential in a *noncriminal* case, which

requires a detailed motion, an open hearing, and a detailed court order. *See* R. 2.420(d).

It is undisputed that the procedure in 2.420 was not followed by the trial court when sealing the nonprosecution agreement. The trial court gave Petitioner Epstein the opportunity to satisfy the requirements of the rule, as well as Administrative Order 2.303-9/08 of the Fifteenth Judicial Circuit, by holding a second hearing after Epstein filed his motion to make the agreement confidential, (RA 8:9-22; 13:25-14:12), but Epstein failed to do anything other than quote the rule in his motion (A-13). And he failed to demonstrate at the second hearing that sealing the agreement is necessary to accomplish any of the items enumerated in 2.420(c)(9)(A).

Epstein argues in his petition that he should not have been required to satisfy the requirements of 2.420(d) because the document was sealed in a *criminal* case and that subsection of the rule specifically applies to only *noncriminal* cases. Even if that is the case, Epstein still had to demonstrate that a compelling interest, one that outweighs the public's constitutional right to access, justified sealing the agreement. Epstein failed to do this when the document was initially sealed because his counsel did no more than represent the document was confidential. (A-7, pp. 37-38). Thus, while the trial court was correct to require the nonprosecution agreement be entered into the court record because it constituted a

significant inducement to Epstein taking the plea, (A-7, pp. 39-40), the court erred in making the document confidential without determining whether confidentiality was required under 2.420(c)(9)(A). It was therefore not error for the trial court to unseal the nonprosecution agreement after Epstein failed to demonstrate that confidentiality is required under the rule.

Petitioner Epstein argues that the trial court's decision to unseal the nonprosecution agreement somehow violates principles of comity and supremacy because a district court judge in a separate federal proceeding has refused to disclose the nonprosecution agreement. There, the federal judge ordered the document be disclosed to Epstein's victims, but under the terms of a protective order prohibiting disclosure to third-parties. (A-2). The federal judge did not consider Florida law and the constitutional right of access Florida citizens have to court records when it entered this protective order, nor did it consider the issue of whether the confidentiality provision in the agreement is void for violating Florida's public policy.[1] The federal court's ruling should not, therefore, be

[1] This public policy is demonstrated, for instance, in section 69.081(4), Florida Statutes, which voids as contrary to public policy "[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard." One can certainly draw the analogy here between a public hazard and Petitioner Epstein, who has been convicted of two felonies, one involving minors, resulting in his classification as a sex offender and a prohibition against him having any "unsupervised contact with minors." (A-8).

binding on Florida courts. Nor should its ruling be binding on Respondent B.B. who was not a party to the federal proceeding and has not subjected herself to the jurisdiction of the federal court. Furthermore, the federal court clearly indicated that it had no intention that its ruling apply in other cases, much less state court cases, because it advised the parties that if they developed a need for the nonprosecution agreement in another case, that "relief should be sought in that case, with notice to the United States, the other party to the Agreement." (A-6, p. 2).

Defendant Epstein also argues the trial court departed with the essential requirements of law when unsealing the nonprosecution agreement because the agreement references federal grand jury proceedings, which are protected under Federal Rule of Criminal Procedure 6(e)(2). Epstein failed to raise this argument in his motion to make the agreement confidential, (A-13), and he did not demonstrate at the hearing that the agreement actually contains matters that must remain secret under the federal rule. But that would have been an impossible burden to meet because Rule 6(e) restrains only grand jurors, court reporters, government attorneys, interpreters and the like from disclosing matters occurring before the grand jury. Epstein – apparently the *former* target of the grand jury – does not fall under this prohibition and his actions in filing the agreement under seal do not implicate Rule 6(e), no matter what information the agreement

contains. The trial court's actions in unsealing the agreement likewise do not implicate Rule 6, because the trial court likewise is not restrained by Rule 6(e).

Moreover, the information contained in the agreement does not constitute "matters occurring before the grand jury" within the meaning of Rule 6. The secrecy rule is limited to such matters for the purpose of "preventing targets of an investigation from fleeing or tampering with witnesses or grand jurors, encouraging witnesses to appear voluntarily and speak fully and frankly, avoiding damage to the reputation of subjects or targets of the investigation who are not indicted, and encouraging grand jurors to investigate suspected crimes without inhibition and engage in unrestricted deliberations." *Lockhead Martin Corp. v. Boeing Co.*, 393 F. Supp. 2d 1276, 1279 (M.D. Fla. 2005). The rule aims to "prevent disclosure of the way in which information was presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury's suspicion focuses, and specific details of what took place before the grand jury." *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1302-03 (M.D. Fla. 1977). In other words, Rule 6 is implicated if disclosure would reveal secret inner workings of the grand jury. *U.S. v. Rosen*, 471 F. Supp. 2d 651, 654 (E.D. Va. 2007).

Petitioner Epstein has not demonstrated that the secret inner workings of the grand jury will be revealed by disclosure of the nonprosecution agreement.

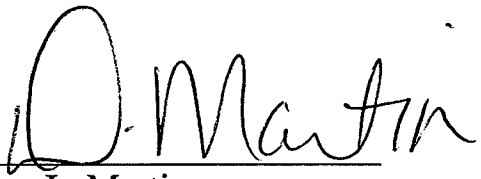
Respondent B.B. is entitled to this document as both a victim of Epstein and as a citizen of Florida. This agreement will be significant to B.B. in the discovery process of her civil case because a litigant in a civil case may assert the Fifth Amendment privilege only when the "litigant has reasonable grounds to believe that the response to a discovery request would furnish a link in the chain of evidence needed to prove a crime against the litigant." *Pisciotti v. Stephens*, 940 So. 2d 1217, 1220 (Fla. 4th DCA 2006) (quoting *Boyle v. Buck*, 858 So. 2d 391, 392 (Fla. 4th DCA 2003)). Thus, B.B. needs the agreement to demonstrate Epstein lacks a valid basis to plead the Fifth Amendment during the discovery phase of her civil case. And, as a Florida citizen, it is within B.B.'s right and interest to review the nonprosecution agreement.

Finally, even if Epstein had demonstrated that the nonprosecution agreement contains grand jury information, when the grand jury's work has concluded, and the accused is apprehended, the veil of secrecy is no longer necessary and may safely be lifted. *See In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. at 1303. Here, Petitioner Epstein has been convicted, and nothing in the record suggests the grand jury's work is ongoing. Consequently, no basis exists for finding that the trial court departed from the essential requirements of law.

CONCLUSION

The Court should dismiss the petition for writ of certiorari for lack of jurisdiction because Petitioner Epstein will not suffer any harm, much less irreparable harm, as a result of the trial court's order unsealing the nonprosecution agreement. Alternatively, the Court should deny the petition for writ of certiorari because the trial court did not depart from the essential requirements of law when unsealing the agreement as the court correctly determined the document should not have been sealed in the first place.

Dated: July 13, 2009

By: 

Diana L. Martin
Florida Bar No. 624489
LEOPOLD~KUVIN, P.A.
2925 PGA Blvd., Suite 200
Palm Beach Gardens, FL 33410
Telephone: 561-515-1400
Facsimile: 561-515-1401
dmartin@leopoldkuvin.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail on Monday, July 13, 2009, on the following:

Jack A. Goldberger, Esq.
Attorney For: Jeffrey Epstein
250 Australian Avenue
Suite 1400
West Palm Beach, FL 334101
Phone: (561) 659-8300
Fax: (561) 835-8691

Jane Kreusler-Walsh, Esq.
Barbara J. Compiani, Esq.
Attorneys For: Jeffrey Epstein
Kreusler-Walsh, Compiani & Vargas, P.A.
501 S. Flagler Drive, Suite 503
West Palm Beach, FL 33401-5913
Phone: (561) 659-5455

Robert D. Critton, Jr., Michael J. Pike
Attorney For: Jeffrey Epstein
515 North Flagler Drive
Suite 400
West Palm Beach, FL 33401
Phone: (561) 842-2820
Fax: (561) 844-6929

Jeffrey H. Sloman, Esq.
U.S. Attorney's Office-Southern District
500 S. Australian Ave., Suite 400
West Palm Beach, FL 33401

Judith Stevenson Arco, Esq.
State Attorney's Office-West Palm Beach
401 N. Dixie Highway
West Palm Beach, FL 33401

William Berger, Esq.
Attorney For: E.W.
Rothstein Rosenfeldt Adler
401 E. Las Olas Blvd., Suite 1650
Ft. Lauderdale, FL 33394

Deanna K. Shullman
Attorney For: Palm Beach Post
400 N. Ashley Dr., Suite 1100
P.O. Box 2602 (33601)
Tampa, FL 33602

Diana L. Martin, Esq.
Florida Bar No. 624489

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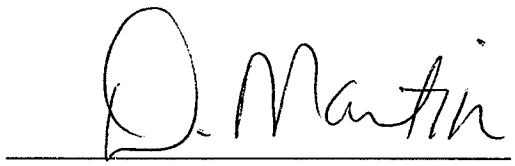

Diana L. Martin, Esq.
Florida Bar No. 624489