

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

JEFFREY EPSTEIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. _____
PALM BEACH
LT. CASE NO. 2008 CF 009381A

**PETITIONER'S EMERGENCY MOTION TO REVIEW
ORDER DENYING STAY OF DISCLOSURE OF FEDERAL
NON-PROSECUTION AGREEMENT AND ADDENDUM**

Petitioner, JEFFREY EPSTEIN, pursuant to Florida Rule of Appellate Procedure 9.310(f), requests this Court review the order denying his Motion to Stay Disclosure of Federal Non-Prosecution Agreement and Addendum pending his contemporaneously filed petition for certiorari and grant the stay.¹ Mr. Epstein seeks review of the stay denial on emergency basis. The court stayed disclosure until noon on Thursday, July 2, 2009 so Mr. Epstein could seek review in this Court. Absent a stay by this Court, the documents will be disclosed and there will be no adequate remedy.

¹ Petitioner, Jeffrey Epstein is referred to by proper name. Non-party interveners, E.W., B.B. and The Post are referred to as E.W., B.B. and The Post. All emphasis is supplied unless indicated otherwise. The following symbol is used: A – Petitioner's appendix.

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FACTUAL BACKGROUND

In 2006, a Florida state grand jury indicted Jeffrey Epstein for felony solicitation of prostitution. He was also charged by information with procuring persons under 18 for prostitution. The United States Attorney's Office for the Southern District of Florida began a federal grand jury investigation into allegations arising out of the same conduct.

In September 2007, the United States Attorney's Office and Mr. Epstein negotiated and signed a non-prosecution agreement (A-7:38).² The non-prosecution agreement contains an express confidentiality provision and makes specific reference to a grand jury investigation of Mr. Epstein (A-7:38). The United States Attorney's Office agreed to defer the federal criminal action on the condition that Mr. Epstein comply with many obligations, beginning with his pleading guilty to certain state charges in the Florida criminal action (A-7:38). A breach of any condition violates the non-prosecution agreement and criminal charges will resume (A-7:39-40).

On June 30, 2008, Mr. Epstein pled guilty to felony solicitation of prostitution and procuring a minor under 18 for prostitution in the Florida criminal action (A-7; A-

² The non-prosecution agreement and addendum are separately filed with a motion to seal.

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8). Judge Deborah Dale Pucillo, sitting for the Fifteenth Judicial Circuit, accepted the plea (A-7).

During the plea conference, Judge Pucillo asked Mr. Epstein whether any promises had been made to him besides the terms of the state plea (A-7:37-38). Mr. Epstein's attorney advised the court of the "confidential [non-prosecution agreement with the United States Attorney's Office] that the parties have agreed to." (A-7:38). He informed the court that Mr. Epstein's failure to comply with the terms of the state plea would violate the non-prosecution agreement (A-7:39-40).

Judge Pucillo then instructed Mr. Epstein's attorney that she wanted "a sealed copy of that filed in this case." (A-7:40). When Mr. Epstein's attorney tried to comply and file the non-prosecution agreement with the court, the clerk advised him an order was necessary. On July 2, 2008, the court entered an "Agreed Order Sealing Document in Court File" (A-9). An addendum to the non-prosecution agreement was filed under seal on August 25, 2008.

On July 7, 2008, Jane Doe 1 and Jane Doe 2 filed an independent action in the federal court to compel production of the non-prosecution agreement (A-1). Mr. Epstein was not a party to the proceeding, but the United States Attorney's Office

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opposed disclosure (A-2). On August 16, 2008, Judge Marra of the Southern District ordered the United States Attorney's Office to produce the non-prosecution agreement to the Does' attorneys and to any other victims and their counsel, provided they not disclose the terms to anyone else (A-2). As a result of this order, all victims, including those with civil suits against Mr. Epstein, have access to the non-prosecution agreement and addendum. They just cannot share it with others.

In September 2008, Jane Doe 1 and Jane Doe 2 filed motions in the federal action to unseal the non-prosecution agreement and addendum (A-3). The United States Attorney's Office opposed disclosure noting its confidentiality provision, the movant's right to access the agreement, and Judge Marra's protective order to which the movants voiced no objection (A-4). On February 12, 2009,³ Judge Marra denied the motion, stating in pertinent part:

Petitioners' mere desire to discuss the Agreement with third parties is insufficient, in and of itself, to warrant the granting of such relief. If and when Petitioners have a specific tangible need to be relieved of the restrictions, they should file an appropriate motion. If a specific tangible need arises in a civil case Petitioners or other alleged victims are pursuing against Epstein, relief should be sought in that case, with notice to the United States, the other party to the Agreement.

(A-6).

³ The order is mistakenly dated February 12, 2008 (A-6).

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Rather than seeking relief from Judge Marra in federal court, non-party E.W., a victim of Mr. Epstein, filed a motion in the state criminal action on May 12, 2009, seeking to intervene and unseal the non-prosecution agreement and addendum pursuant to Florida Rule of Judicial Administration 2.420(d)(5) (A-10). E.W. alleged that the proper procedures had not been followed in sealing the documents (A-10). E.W. claimed these documents are relevant to her civil action against Mr. Epstein; that she, as a member of the public, has a right to have them unsealed; and that continued sealing violates public policy (A-10).

On June 1, 2009, Palm Beach Newspapers d/b/a The Palm Beach Post ("The Post") moved in the state criminal action to intervene and access the non-prosecution agreement and addendum (A-11). The Post alleged that the procedures for sealing had not been followed and that "good cause exists for unsealing the documents because of their public significance." (A-11:3).

Fifteenth Judicial Circuit Judge Jeffrey Colbath heard E.W.'s and The Post's motions in the state criminal action on June 10, 2009 (A-13). The court granted both motions to intervene, but deferred ruling on the motions to unseal pending a later hearing (A-13).

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The next day, June 11, 2009, Mr. Epstein filed a Motion to Make Court Records Confidential (A-13). Mr. Epstein alleged that the documents should remain confidential to prevent a serious imminent threat to the fair, impartial, and orderly administration of justice; to protect a compelling government interest; to avoid substantial injury to innocent third parties; and to avoid substantial injury to a party by disclosure of matters protected by a common law and privacy right, not generally inherent in the specific type of proceeding sought to be closed (A-13).

Also on June 11, non-party B.B. filed motions to intervene and for an order unsealing the records, alleging grounds similar to non-parties E.W. and The Palm Beach Post (A-12).

Judge Colbath heard E.W.'s, The Post's, and B.B.'s motions to unseal and Mr. Epstein's motion for confidentiality on June 25, 2009 (A-16). The court granted E.W.'s, The Post's, and B.B.'s motions and denied Mr. Epstein's (A-16:2). The court concluded:

At the time the State court took these matters under seal, the proper procedure for sealing such documents had not been followed. Neither the State of Florida nor the U.S. Government nor Mr. Epstein have [sic] presented sufficient evidence to warrant the sealing of documents currently held by the Court.

(A-16:2; A-18:43). The court ruled that "[t]his Order is in no way to be interpreted as

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permission to not comply with U.S. District Court Kenneth Marra's previous Orders." (A-16:3). Subsequent to this oral ruling, Mr. Epstein provided the court with a Motion to Stay (A-14). The court stayed disclosure until it could hear Mr. Epstein's motion to stay, scheduled for the next day (A-16:3).

The court heard Mr. Epstein's stay motion on June 26, 2009 (A-19). Mr. Epstein alleged that he will be irreparably harmed by disclosure of the non-prosecution agreement and addendum (A-14). No harm will be done if the documents remain under seal pending review by this Court (A-14). The court denied the motion, but stayed disclosure until noon on Thursday, July 2, so Mr. Epstein could seek emergency review of the denial in this Court (A-17).

ARGUMENT

Whether to grant a stay is discretionary with the trial court. See Pabian v. Pabian, 469 So. 2d 189, 191 (Fla. 4th DCA 1985). Factors courts consider in deciding whether to grant a stay pending appellate proceedings include the likelihood of success on the merits, the likelihood of harm if not stay is granted, and the remedial quality of any such harm. See Perez v. Perez, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999); see also State ex rel. Price v. McCord, 380 So. 2d 1037, 1038 n.3 (Fla. 1980). The trial court agreed that Mr. Epstein had established irreparable harm (A-17:16), denied a

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stay.

The trial court abused its discretion by denying a stay. As set forth in the contemporaneously filed petition for certiorari, Mr. Epstein will likely succeed on the merits. The trial court departed from the essential requirements of law in granting the motions to unseal the confidential federal non-prosecution agreement and addendum between the United States Attorney's Office and Mr. Epstein.

These documents are subject to confidentiality provisions, which the federal court recognized and enforced when it permitted disclosure to the attorneys for Jane Doe 1 and Jane Doe 2 and to any other victims and their counsel, provided they not disclose the terms to anyone else. Disclosure violates a condition of the agreement, thereby vitiating the agreement between Mr. Epstein and the United States Attorney. Disclosure also violates Judge Marra's two orders in the federal district court, denying disclosure to the parties. Judge Colbath paid lip service to this principle in stating that his "Order is in no way to be interpreted as permission to not comply with U.S. District Court Kenneth Marra's previous Orders." (A-16:3). But there is no way disclosure does not inherently violate Judge Marra's orders.

The principle of supremacy required that the state court defer to the federal court

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on this issue. U.S. Const. Art. I § 8. These documents reference federal grand jury proceedings, which are protected under Federal Rule of Criminal Procedure 6(e)(2)--an attorney for the government “must not disclose a matter occurring before the grand jury.” As a consequence of the confidentiality provisions of the non-prosecution agreement, information that disclosed the existence and the subject matter of a federal grand jury proceeding which itself is protected by Federal Rule of Criminal Procedure 6(e) remains non-public, thus effectuating the privacy concerns addressed by the United States Supreme Court in Douglas and other cases. See e.g. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 228-30 (1979). Under Rule 6(e), only a federal court can, absent findings, order the unsealing of federal grand jury proceedings. See Fed. R. Crim. P. 6(e)(3)(F), (G). Judge Colbath did not address this principle. Nor did Judge Colbath address the principle of comity, which required that the state court defer to the federal court, which has twice denied disclosure to third parties, on this issue.

The court erred in concluding that the non-prosecution and agreement were not properly sealed. The non-parties filed their motions to unseal pursuant to Florida Rule of Judicial Administration 2.420(d) (A-10, A-11, A-12). They alleged that Judge Pucillo failed to properly seal the documents under the procedure set forth in that rule (*Id.*). By its terms, however, the procedures for sealing in Rule 2.420(d) (titled, “Request to Make Circuit and County Court Records in Non-Criminal Cases

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Confidential") do **not** apply to criminal cases. See Fla. R. Jud. Admin. 2.420, 2007 Court Commentary ("New subdivision (d) applies to motions that seek to make court records in non-criminal cases confidential in accordance with subdivision (c)(9)."); see also In re Amendments to Fla. R. Jud. Admin. 2.420--Sealing of Court Records & Dockets, 954 So. 2d 16, 17 & 23 (Fla. 2007) (declining to adopt specific procedure regarding the sealing of court records in criminal cases and referring the matter to rules committees for further study). Under the version of rule 2.420 in effect when the documents were sealed, there is no procedure for criminal proceedings.

Even under the prior version of rule 2.420, Judge Pucillo was not required to give prior notice of her intent to seal documents during the plea hearing. Committee Notes on the 1995 amendments discussing a prior version of Rule 2.420(c)(9)(D), make clear that advance notice is not always required:

Unlike the closure of court proceedings, which has been held to require notice and hearing prior to closure, *see Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), **the closure of court records has not required prior notice. Requiring prior notice of closure of a court record may be impractical and burdensome in emergency circumstances or when closure of a court record requiring confidentiality is requested during a judicial proceeding.**

The local administrative rule the non-parties cite, 15th Judicial Circuit

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Administrative Order 2.303, is not applicable either. This Administrative Order addresses the procedures for sealing criminal and non-criminal court records, but was not adopted until September 29, 2008--months after Judge Pucillo sua sponte ordered the non-prosecution agreement and its addendum filed and sealed. The Administrative Order in effect when Judge Pucillo sealed these documents was 2.032-10/06. As explained above, the procedures designated therein would not apply since Judge Pucillo filed and sealed the documents sua sponte, not by motion. To the extent that the Administrative Order conflicts with the version of rule 2.420 then in effect, the rule prevails. Judge Pucillo was not required to follow Administrative Order 2.032 when she sealed the documents in June 2008.

Assuming compliance with procedures for confidentiality was required, Mr. Epstein met them. At all times, the rules of judicial administration provided that court records “**shall be confidential**” if a court has determined that confidentiality is required. Fla. R. Jud. Admin. 2.420(c)(9). Rule 2.420(c)(9) provides:

(c) Exemptions. The following records of the judicial branch shall be confidential:

....

(9) 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;

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- (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. Jud. Admin. 2.420(c)(9). Thus, courts are required to seal court records upon a finding that closure is need to “**prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice**,” to “avoid substantial injury to innocent third parties” or to “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.” Fla. R. Jud. Admin. 2.420(c)(9)(i), (v), (vi).

Mr. Epstein’s Motion to Make Court Records Confidential satisfied these requirements; thus, the court erred in denying it. Mr. Epstein alleged three separate grounds for confidentiality. He first argued that confidentiality is necessary to protect

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a compelling government interest. He satisfied this prong since the United States Attorney's Office has a compelling interest in having the confidentiality provision of its contract with Mr. Epstein honored. Judge Marra already balanced that interest against arguments for disclosure and struck a balance by requiring disclosure to plaintiffs and their lawyers, but not to third parties. Secondly, Mr. Epstein contended that maintaining confidentiality will avoid injury to innocent third parties, *i.e.*, the other persons the United States Attorney's Office agreed not to prosecute who will be harmed if the documents are unsealed. Thirdly, Mr. Epstein demonstrated that confidentiality is necessary to 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. Disclosure of these documents is not generally inherent in a state court plea hearing and will violate Mr. Epstein's common law right to confidentiality.

Granting a stay would vindicate the values and purposes of grand jury secrecy which will be implicated, if a stay is denied, by the public disclosure of a confidential agreement that references matters related to a federal grand jury investigation. There is no prejudice to non-parties/interveners E.W., B.B. and The Post, if disclosure is stayed pending the outcome of Mr. Epstein's emergency petition for certiorari. Mr. Epstein, on the other hand, will suffer irreparable harm once the documents are produced--a fact

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the trial court recognized (A-19:16).

CONCLUSION

This Court should grant review and order the trial court to stay the order unsealing the non-prosecution agreement and addendum pending certiorari review.

CERTIFICATION OF EXISTENCE OF EMERGENCY

Undersigned counsel certifies that the subject of this motion constitutes an emergency. The trial court's order at **noon on July 2, 2009**, provides that the confidential federal non-prosecution agreement and addendum will be disclosed. Once these documents are disclosed, irreparable harm will result.

I HEREBY CERTIFY that a copy of the foregoing has been sent by E-Mail and Federal Express this 30th day of June, 2009, to:

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