

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

JEFFREY EPSTEIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 4D09-2554
PALM BEACH COUNTY
L.T. CASE NO. 2008 CF 009381A

**RESPONSE TO MOTIONS FOR APPELLATE
ATTORNEY'S FEES AND COSTS**

Petitioner, JEFFREY EPSTEIN, responds to the Motions for Appellate Attorneys' Fees and Costs filed by respondents, E.W., B.B., and Palm Beach Newspapers d/b/a The Palm Beach Post ("the Post"). This Court should deny the motions for appellate fees and costs for the following reasons:

Respondents ask this Court to impose an award of attorney's fees and costs as a sanction under the authority of 15th Judicial Circuit Administrative Order 2.303-9/08 and Florida Rule of Appellate Procedure 9.410. Neither supports an award of appellate fees and costs.

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The circuit court's administrative order does not grant this Court the authority to award appellate fees as a sanction. The cited 15th Circuit Administrative Order provides that “[i]f a motion to seal is not made in good faith and is not supported by a sound legal and factual basis, the court may impose sanctions upon the movant.” (PA-2:3, ¶ 11).¹ Respondents cite no cases for the novel proposition that an administrative order in the circuit court constitutes a grant of authority to award **appellate fees**. See generally Boca Burger, Inc. v. Forum, 912 So. 2d 561, 569 & 573-74 (Fla. 2005) (holding that appellate courts have the power to sanction litigants for conduct in the appellate courts, but not for conduct in the trial courts).

Further, the cited circuit court administrative order does not apply. It was not adopted until September 29, 2008--months after Judge Pucillo sua sponte ordered the non-prosecution agreement and its addendum filed and sealed (PA-2:3; A-9). The Administrative Order in effect when Judge Pucillo sealed these documents was 2.032-10/06, which does not contain comparable language authorizing sanctions (PA-3). The new administrative order authorizing sanctions

¹ The symbol (A-____) refers to Mr. Epstein's Appendix to Emergency Petition for Writ of Certiorari filed July 1, 2009, and (PA-____) refers to the Supplemental Appendix to the Post's Response to Emergency Petition for Writ of Certiorari filed on July 10, 2009. All emphasis is supplied unless otherwise indicated.

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cannot be retroactively applied. See, e.g., Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985). And, as explained in Mr. Epstein's Emergency Petition for Certiorari, the new administrative order does not apply since Judge Pucillo filed and sealed the documents sua sponte, **not** by motion (Em. Pet. Certiorari at 12-13).

Respondents also fail to show that rule 9.410 authorizes a sanction of fees and costs. Rule 9.410 allows this Court to impose fees as a sanction for violations of the appellate rules or "the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith." Fla. R. App. P. 9.410.

Courts "should exercise great restraint in imposing appellate sanctions." Boca Burger, 912 So. 2d at 570-71. A petition is only "frivolous" if it "presents no justiciable question and is so devoid of merit on the face of the record there is little prospect it will ever succeed." Visoly v. Sec. Pac. Credit Corp., 768 So. 2d 482, 490-91 (Fla. 3d DCA 2000). In other words, appellate proceedings are only frivolous if: (1) "completely without merit in law" and not supported by a reasonable argument for an extension of the law; (2) "contradicted by overwhelming evidence"; (3) "undertaken primarily to delay or prolong the resolution of the litigation"; or (4) "asserting material statements that are false." Visoly, 768 So. 2d at 491.

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Respondents fail to meet this high showing. As discussed more fully in Mr. Epstein's Emergency Petition for Certiorari and Reply to the Responses to the Emergency Petition for Certiorari, incorporated herein, principles of supremacy and comity required the trial judge to defer to the federal court, which has, to date, denied disclosure of the confidential non-prosecution agreement and addendum between the U.S. government and Mr. Epstein to third parties. Under Florida Rule of Judicial Administration 2.420, which governs the disclosure of judicial records, documents that are confidential under federal law remain confidential when filed in a state court. See State v. Buenoano, 707 So. 2d 714, 717-18 (Fla. 1998). The federal non-prosecution agreement and addendum are confidential under federal law because they reveal information related to a federal grand jury investigation. See Fed. R. Crim. P. 6(e).

Mr. Epstein's arguments are supported by existing law and the record. On July 1, 2009, this Court entered a stay and ordered respondents to show cause why Mr. Epstein's Emergency Petition for Certiorari should not be granted. This order indicates that this Court has examined the petition and determined that Mr. Epstein has made a *prima facie* showing warranting certiorari relief. See Bared & Co. v. McGuire, 670 So. 2d 153, 157-58 (Fla. 4th DCA 1996); see also Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005) (explaining that a "principal consideration[]" for

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an appellate court reviewing a stay is “the likelihood of success on the merits”). While this Court may eventually disagree with Mr. Epstein’s arguments, they are by no means frivolous.

CONCLUSION

This Court should deny the Motions for Appellate Attorney’s Fees and Costs filed by E.W., B.B., and the Post.

I HEREBY CERTIFY that a copy of the foregoing has been sent by mail this 31st day of July, 2009, to:

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