

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

CASE NO: 4D09-2554
L.T. No. 2008 CF 9381

JEFFREY EPSTEIN,
Petitioner,

STATE OF FLORIDA,
et. al,

Respondents.

E.W.'S MOTION TO FILE PORTION OF RESPONSE UNDER SEAL

Respondent, E.W., moves to file under seal a portion of her response (dealing with this Court's lack of jurisdiction) to the petition for writ of certiorari, on the following grounds:

In a portion of her response, attached hereto in the sealed envelope, E.W. discusses page-by-page the sealed document, the Non-Prosecution Agreement. Public disclosure of this portion of E.W.'s response would violate this Court's order staying disclosure of the NPA.

For this reason, E.W. moves to file the attached under seal. Copies of the sealed portion have been served only on the attorneys for petitioner and the U.S. Attorney.

The undersigned counsel spoke with Jane Kreusler-Walsh, attorney for petitioner, and represents that she does not oppose this motion to file under seal.

I HEREBY CERTIFY that a correct copy of the foregoing has been served by mail this 13 day of July, 2009, on the parties listed below.

ROTHSTEIN ROSENFELDT ADLER
Attorneys for E.W.
401 East Las Olas Blvd., Suite 1650
Fort Lauderdale, Florida 33301
Telephone [REDACTED]
Telecopier [REDACTED]

By: _____

William J. Berger
Florida Bar [REDACTED]
[REDACTED]

SERVICE LIST

Jane Kreusler-Walsh
Kreusler-Walsh, Compiani & Vargas, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, Fl 33401-5913

Deanna K. Shullman
400 North Ashley Drive, Suite 1100
P.O. Box 2602
Tampa, Fl 33602

Spencer T. Kuvin
Leopold- Kuvin, P.A.
2925 PGA Boulevard, Suite 200
Palm Beach Gardens, FL 33410

Robert D. Critton of
Burman, Critton, Luttier & Coleman
515 North Flagler Drive, Suite 400
West Palm Beach, Fl 33401

Jack A. Goldberger of
Atterbury, Goldberger, & Weiss, P.A.
250 Australian Avenue South, Suite 1400
West Palm Beach, Fl 33401

Jeffrey H. Sloman
U.S. Attorney's Office-Southern District
500 South Australian Avenue, Suite 400
West Palm Beach, Fl 33401

Judith Stevenson Arco
State Attorney's Office- West Palm Beach
401 North Dixie Highway
West Palm Beach, Fl 33401

Honorable Jeffrey Colbath
Palm Beach County Courthouse
205 North Dixie Highway
Room 11F
West Palm Beach. Fl 33401

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

CASE NO: 4D09-2554
L.T. No. 2008 CF 9381

JEFFREY EPSTEIN,
Petitioner,

STATE OF FLORIDA,
E.W., THE PALM BEACH POST,
B.B,

Respondents.

E.W.'S RESPONSE TO PETITION FOR CERTIORARI¹

Respondent, E.W., would show this Court as follows:

1. Introduction:

In an unprecedented request that should shock the conscience of this Court, a convicted child sex offender seeks to conceal from the public the details of his deal with the U.S. Attorney (filed in the lower court) that led him to plead guilty to state charges of procuring a minor to engage in prostitution (a 2nd degree felony) and felony solicitation of prostitution (a 3rd degree felony). His request would make a sham of the public's state

¹ E.W. has also filed herewith under seal a request to dismiss the petition for lack of jurisdiction. That response is filed under seal because it discusses page-by-page the sealed document.

constitutional right to open government. The lower court properly denied this attempt. This Court, it is respectfully submitted, should deny the petition for certiorari and vacate the order staying disclosure of the sealed documents.

E.W. is one of three respondents to the petition for writ of certiorari. The other two, The Palm Beach Post and B.B., are filing their own responses. The respondents have tried not to repeat the arguments of each other.

E.W. limits her response here to arguments in the petition based on certain federal court rulings. E.W. incorporates by reference the other responses.

The proceedings that have led to the petition for writ of certiorari before this Court began with E.W.'s May 12, 2009 motion below to vacate the Agreed Order Sealing Document entered by the trial court on July 2, 2008 at the plea and sentencing hearing in the state court criminal proceedings against petitioner. The Agreed Order authorized the filing under seal of the Non-Prosecution Agreement ("NPA") between petitioner and the United States. E.W. also moved to unseal an Addendum to the NPA that was sealed on August 23, 2008 without any hearing or court order whatsoever.

The Palm Beach Post and B.B. were granted leave to intervene and file their own motions similar to E.W.'s.

The lower court, after two hearings, granted the motions and ordered the NPA and Addendum to be unsealed. Petitioner seeks review of that order and the order denying his motion to stay pending appellate review. For the reasons stated below and in the other responses, it is submitted his requests should be denied.

2. Judge Marra expressly authorized the lower court to resolve the issue of whether the state court records should be unsealed.

Petitioner places great emphasis on rulings entered by United States District Judge Kenneth Marra, asserting that the order under review here “violated” those rulings.

In fact, at a June 12, 2009 hearing² attended by petitioner’s counsel, Judge Marra expressly authorized the lower court, the Honorable Judge Jeffrey Colbath, to resolve the issue of whether the state court records should be unsealed.

Responding to a request that he look at the NPA in camera, Judge Marra stated:

THE COURT: Maybe Judge Colvat [sic] will resolve this issue for me.

² The hearing was in the federal civil lawsuits against petitioner.

MR. JOSEFSBERG: Even if he doesn't, Your Honor, I believe we are allowed to show it to you.

THE COURT: I'll tell you what: **I'll wait for Judge Colvat [sic] to rule**, and then if he rules that it should remain sealed, then I'll consider whether or not I want to have it submitted to me in camera.

(E.W.-1³, page 42, lines 8-15(emphasis added).)

All of petitioner's assertions that Judge Colbath's order under review here "violated" Judge Marra's orders, that the lower court gave only "lip service" to Judge Marra, that the supremacy clause and the doctrine of federal grand jury secrecy are violated, are all shown by the above quotes to be false assertions. Judge Marra looked forward to a resolution by the lower court of what is purely a state law issue: should these state court records be unsealed?

3. The federal court orders do not support the petition and in fact undermine it.

Even if we were to ignore Judge Marra's quotes above, his written orders do not support the petition and in fact undermine it.

The first federal order petitioner relies on is an "Order To Compel Production And Protective Order" dated August 21, 2008. The second is an "Order" dated February 12, 2009. (Copies, respectively, are A-2 and A-6 in petitioner's Appendix.⁴)

³ Reference to E.W.'s Appendix is by "(E.W.-__)."

These orders were entered in a proceeding brought by two of petitioner's victims, Jane Does 1 and 2,⁵ against the United States under the federal Crime Victim's Rights Act, 18 U.S.C. sec. 3771. Petitioner was not a party to the proceeding. (A-1.) That proceeding is separate from the federal damages actions brought by petitioner's victims. It should also be noted that there has never been a federal court prosecution of petitioner. There was no federal indictment or information filed.

In the proceeding where Judge Marra entered the two orders relied on by petitioner, the Jane Does sought to obtain production **directly from the files of the U.S. Attorney** of a copy of the NPA. They were not asking Judge Marra to "unseal" a state court record.

Thus, the context of Judge Marra's two orders was a proceeding by two private citizens solely against the United States to get a federal judge to order the federal prosecutor to produce a document **directly from the federal prosecutor's files**, not to unseal state court records. The factors going into this extraordinary request—to order the federal prosecutor to turn over documents directly from the files of the prosecutor—are not at all relevant to the purely state law issues before this Court on whether a

⁴ Reference to petitioner's Appendix is by: "(A-__)."

⁵ Undersigned's firm represents both Jane Does, filed the papers giving rise to the orders and attended the hearings referenced therein.

document was improperly sealed by a state court and should be unsealed by that court.

The issues before this Court must be resolved by interpreting and applying the state constitution, state open government policies, state rules of judicial administration and the administrative orders of the state circuit court below. They have nothing whatsoever to do with the federal government.

In the August 21, 2008 order, Judge Marra granted the Jane Does' *ore tenus* motion seeking production of the NPA directly from the U.S. Attorney, but with restrictions. He ordered the U.S. Attorney to produce a copy of the NPA to Jane Does' attorneys under a nondisclosure restriction. Notably, the order makes no reference whatsoever to the state court order sealing the NPA in the state court record (even though the state court order (A-9) had already been entered on July 2, 2008) or to the fact that the NPA was already sealed in the state court file (at the plea colloquy on June 30, 2008). That is because the dispute before Judge Marra solely involved two crime victims seeking a document directly from the files of the U.S. Attorney, not from the state court file, and had nothing to do with unsealing state court records.

The second order entered on February 12, 2009 was on the Jane Does' written motion to remove any restrictions on disclosure so their attorneys

could discuss the NPA with third parties. Again, the context was two crime victims trying to publicly disclose a document directly from the files of the U.S. Attorney. Judge Marra denied the motion because the Jane Does had not shown that they should be able to publicly disclose a document they got directly from the U.S. Attorney's files. This issue, again, has nothing to do with whether the lower court should unseal the state court records.

But in so ruling, Judge Marra indirectly acknowledged the state trial court's jurisdiction to unseal its own records. Judge Marra stated: "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, page 2.)

Judge Marra's orders were entered **after** the NPA was sealed by the lower court; they can have nothing whatsoever to do with whether the NPA was properly sealed.

Neither federal order, by their express terms, precludes the lower court from unsealing its own court records. Judge Marra did not enjoin and does not have jurisdiction to enjoin the lower court from unsealing its own records. *Younger v. Harris*, 401 U.S. 37 (1971). As Judge Marra noted, "the [NPA] was not filed in this case [the federal proceeding], under seal or

otherwise.” (A-6, page 1.) The copy of the NPA in the file of the lower court is a state court record, not a federal court record. Playing Judge Marra off on the lower court is a red herring.

CONCLUSION

For the foregoing reasons, the petition should be denied and the stay on disclosure vacated.

I HEREBY CERTIFY that a copy of the foregoing has been served by mail on the parties listed below this 13 day of July, 2009.

I HEREBY CERTIFY that the foregoing is submitted in Times New Roman 14-point font and complies with the font requirement of Rule 9.100.

ROTHSTEIN ROSENFELDT ADLER
Attorneys for E.W.
401 East Las Olas Blvd., Suite 1650
Fort Lauderdale, Florida 33301
Telephone [REDACTED]
Telecopier [REDACTED]

By: 

William J. Berger


SERVICE LIST

Jane Kreusler-Walsh
Kreusler-Walsh, Compiani & Vargas, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, Fl 33401-5913

Deanna K. Shullman
400 North Ashley Drive, Suite 1100
P.O. Box 2602
Tampa, Fl 33602

Spencer T. Kuvin
Leopold- Kuvin, P.A.
2925 PGA Boulevard, Suite 200
Palm Beach Gardens, FL 33410

Robert D. Critton of
Burman, Critton, Luttier & Coleman
515 North Flagler Drive, Suite 400
West Palm Beach, Fl 33401

Jack A. Goldberger of
Atterbury, Goldberger, & Weiss, P.A.
250 Australian Avenue South, Suite 1400
West Palm Beach, Fl 33401

Jeffrey H. Sloman
U.S. Attorney's Office-Southern District
500 South Australian Avenue, Suite 400
West Palm Beach, Fl 33401

Judith Stevenson Arco
State Attorney's Office- West Palm Beach
401 North Dixie Highway
West Palm Beach, Fl 33401

Honorable Jeffrey Colbath
Palm Beach County Courthouse
205 North Dixie Highway
Room 11F
West Palm Beach, FL 33401

CONFIDENTIAL