IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D09-2554

JEFFREY EPSTEIN,

Petitioner,

vs.

STATE OF FLORIDA, PALM BEACH NEWSPAPERS, INC., [redacted], and [redacted]

Respondents.

Pending in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case Nos. 2006 CF 9454AMB, 2008 CF 9381AMB

PALM BEACH NEWSPAPERS, INC. d/b/a *THE PALM BEACH POST*'S RESPONSE TO EMERGENCY PETITION FOR WRIT OF CERTIORARI

THOMAS, LoCICERO & BRALOW PL
Deanna K. Shullman
James B. Lake
101 N.E. 3rd Avenue, Suite 1500
Ft. Lauderdale, Florida 33301

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

INTRODUCTION

This appeal concerns attempts to thwart public scrutiny of how government responded to the prostitution of children in Palm Beach County. In the order at issue below, the trial court correctly unsealed a non-prosecution agreement and its addendum. A predecessor judge found that the agreement significantly induced Petitioner to accept a plea agreement that allowed him to serve 18 months in jail for luring children to his Palm Beach mansion for "massages" or sexual activity. At the time that the non-prosecution agreement and its addendum (collectively "the NPA") were accepted for filing, no basis for closure was asserted or found. Thus, the NPA was not properly sealed, and the prior closure order was properly vacated. Moreover, no basis currently exists for closure, and the pending petition – like Petitioner's filings below – contain nothing more than unsubstantiated assertions that confidentiality is required. Thus, continued closure is not warranted. Certainly unsealing the documents was not such a clear departure from the essential requirements of law as to warrant certiorari relief. Consequently, the pending petition must be denied.

In addition, this Court should exercise its inherent authority under Rule 9.410 of the Florida Rules of Appellate Procedure to sanction Petitioner for his frivolous and bad faith attempts to cloak the resolution of the criminal charges

against him in secrecy by awarding to Respondent, Palm Beach Newspapers, Inc. d/b/a *The Palm Beach Post* ("the Post") its attorneys' fees and costs in responding to this petition.

JURISDICTION

The Post adopts Respondent [redacted] statement concerning jurisdiction. Insofar as this Court finds jurisdiction, the Post requests that this Court expedite its consideration of this matter, so as to remedy the denial to date of the public's and press's constitutional and common law rights of access. Art. I, § 24, Fla. Const.; Fla. R. App. P. 9.100(d); Sarasota-Herald Tribune v. State, 924 So. 2d 8, 11 (Fla. 2d DCA 2006) (rule 9.100(d) permits "expedited" review of orders excluding the press).

NATURE OF THE RELIEF SOUGHT

The Post asks this Court to deny the pending petition and to let stand the circuit court's Orders dated June 25, 2009 and June 26, 2009, which unsealed the NPA, and directed the Clerk of Court in and for the Fifteenth Judicial Circuit of Florida to release these records to the public.[1]

[1] Petitioner has sought review of the June 26, 2009 Order by motion rather than by petition for writ of certiorari. Though the June 26 Order does address the matter of Petitioner's request for stay, the order also directs the Clerk of Courts to release the records, review of which should have been sought by certiorari.

STATEMENT OF THE CASE AND FACTS

This proceeding concerns the public's constitutional and common law rights of access to records crucial to the disposition of criminal charges against Petitioner Jeffrey Epstein. Specifically, Petitioner seeks review of two orders unsealing a non-prosecution agreement and its addendum (collectively the "NPA"), which are records of the trial court below. State v. Epstein, Case Nos. 06 CF9454AMB, 08 CF9381AMB.

Petitioner was investigated by the State of Florida for felony solicitation of children for prostitution. (A-7 at p. 3, l. 15 – p. 4, l. 4; A-8.) The victims allege Epstein brought and paid teenage girls to come to his home for sex and/or "massages." (A-11 at ¶ 6 and n. 1.) Epstein's minor victims are numerous (A-7 at p. 20, ll. 13-18) and the case drew attention of the highest-ranking law enforcement officials in Palm Beach County. Frustrated during the course of the investigation, Police Chief Michael Reiter even penned a letter to State Attorney Barry Krischer, calling his office's handling of the investigation "highly unusual" and suggesting that he disqualify himself from the case if the state would not act (A-11 at ¶ 6; A-18 at p. 36, ll. 7-14[2].) A federal investigation of Epstein's conduct as it relates to soliciting children for prostitution ensued.

[2] References to "A-" are to Petitioner's Appendix.

Then abruptly, in June 2008, Epstein pleaded guilty in the trial court below to felony solicitation of minors for prostitution, was designated a Sexual Offender pursuant to Florida law, and was sentenced to 18-months jail and community control. (A-8.) Before accepting the terms of his state plea, Epstein entered into a non-prosecution agreement with federal prosecutors. (A-7 at p. 38, ll. 9-18.) The non-prosecution agreement and its addendum were filed under seal in the lower court on July 2, 2008 and August 25, 2008, respectively.[3]

According to Epstein's lawyers (and presumably the NPA itself[4]), taking the state plea was a condition of the NPA. (A-7 at p. 38, ll. 13-18.) The NPA is invalidated if Epstein fails to fulfill the obligations of the state plea deal (A-7 at p. 38, 11. 22 – 25.) In accepting the state plea, the trial court viewed the NPA a "significant inducement in accepting" the plea and recognized that the NPA influenced the defendant to make the state plea. (A-7 at p. 39, ll. 19-21; p. 40, ll. 10-13.)

In considering the plea at the hearing, the court requested a sealed copy of the non-prosecution agreement and asked whether Petitioner had signed it. (A-7 at

[3] The NPA and its addendum were filed under seal in this Court on July 1, 2009.

[4] The Post and its lawyers have not seen the NPA, though it was reviewed, *in camera*, by the trial court (A-19).

p. 40, ll. 4-6.) Epstein's lawyer indicated it was signed and interjected that he "would like to seal the copy." (A-7 at p. 40, ll. 7-9.) Representatives from the U.S. Attorneys' Office were present at the hearing (A-7 at p. 39, ll. 22-23) but stated no objection to filing the non-prosecution agreement in the state court file. Thereupon, without any further consideration, the trial court requested a sealed copy of the non-prosecution agreement. (A-7 at p. 40, ll. 9-10.) On July 2, 2008, without any further proceedings on the issue, the court entered an Agreed Order Sealing Document in Court File, which allowed Epstein to file the non-prosecution agreement that was attached to the Agreed Order under seal. (A-9.) By its terms, the closure order was limited to the non-prosecution agreement and did not include its addendum. The order makes no findings with respect to closure and never expires. (A-9.) The addendum was filed six weeks later, on August 25, 2008, without any further order of the Court with respect to closure.

Since Epstein pleaded guilty to soliciting a minor for prostitution, he has been named in at least 12 civil lawsuits that – like the charges in this case – allege Epstein lured teenage girls to his Palm Beach mansion for sex and/or "massages." (A-1)[5] At least 11 cases are pending. In another lawsuit, one of the Epstein's

[5] See also A-11 at ¶ 6 (citing Doe v. Epstein, Case No. 08-80069 (S.D. Fla. 2008); Doe No. 2 v. Epstein, Case No. 08-80119 (S.D. Fla. 2008); Doe No. 3. v. Epstein, Case No. 08-80232 (S.D. Fla. 2008); Doe No. 4. v. Epstein, Case No. 08-

(Footnote continued on next page)

accusers has alleged that federal prosecutors failed to consult with her regarding the disposition of possible charges against Epstein. (A-1; A-18 at p. 22, l. 20 – p. 23, l. 15.)[6]

Given the important public interest in this matter, on June 1, 2009, the Post moved to intervene below for the purpose of obtaining access to the NPA. The Court granted the Post's motion to intervene on June 10, 2009 (Supp.A.-1 at 1.)[7] The trial court granted the Post's petition for access on June 25, 2009 (A-16, A-18) and on June 26, 2009 denied Epstein's motion for stay and directed the clerk to release the records at noon on Thursday, July 2, 2009. (A-17, A-19.) Epstein's emergency petition for writ of certiorari regarding the June 25, 2009 order and his emergency motion to review the June 26, 2009 order followed.

80380 (S.D. Fla. 2008); Doe No. 5 v. Epstein, Case No. 08-80381 (S.D. Fla. 2008); C.M.A. v. Epstein, Case No. 08-80811 (S.D. Fla. 2008); Doe v. Epstein, Case No. 08-80893 (S.D. Fla. 2008); Doe No. 7 v. Epstein, Case No. 08-80993 (S.D. Fla. 2008); Doe No. 6 v. Epstein, Case No. 08-80994 (S.D. Fla. 2008); Doe II v. Epstein, Case No. 09-80469 (S.D. Fla. 2009); Doe No. 101 v. Epstein, Case No. 09-80591 (S.D. Fla. 2009); Doe No. 102 v. Epstein, Case No. 09-80656 (S.D. Fla. 2009); Doe No. 8 v. Epstein, Case No. 09-80802 (S.D. Fla. 2009)).

[6] See also (A-11 at ¶ 6) (citing In re: Jane Doe, Case No. 08-80736 (S.D. Fla. 2008)).

[7] References to "Supp.A." correspond to the supplemental appendix filed by the Post simultaneous with this brief.

SUMMARY OF THE ARGUMENT

Petitioner's initial filing of the NPA under seal was achieved without any regard for the public's constitutional, statutory and common law rights of access. Florida law flatly prohibits the standardless permanent closure that was achieved in this case. The public has a right to know what transpires in its courtrooms generally and in particular has an interest in understanding how the resolution of this highly unusual prosecution occurred.

Moreover, no present basis for closure exists. Petitioner has not shown – and cannot show – that continued closure is proper. Instead, he has made conclusory assertions and relied on red herrings in attempting to keep the public from understanding how government responded to his solicitation of children to perform sex acts.

The trial court, having reviewed the records *in camera*, saw through Petitioner's flimsy arguments. The trial court did not depart from the essential requirements of law in ordering the records unsealed.

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review for a petition for writ of certiorari is whether the trial court departed from the essential requirements of law. See Combs v. State, 436 So. 2d 93, 95 (Fla. 1983); Anderson v. E.T., 862 So. 2d 839, 840 (Fla. 4th DCA 2003).

II. THE TRIAL COURT CORRECTLY UNSEALED THE NPA.

The NPA was neither properly sealed in the first instance nor is properly sealed at present. The trial court did not depart from the essential requirements of law in unsealing the records.

A. The NPA was not Properly Sealed in the First Instance.

The NPA – a significant inducement to Petitioner's acceptance of the plea – was accepted for filing under seal without any deference to the public's right of access to court records. Such standardless closure cannot withstand scrutiny.

Florida has traditionally served as a model for open government and courts. It is well-settled in Florida that "[a] trial is a public event [and] [w]hat transpires in the court room is public property." Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 7 (Fla. 1982) (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)). When considering a request to seal judicial records, this Court's "analysis must begin

with the proposition that all civil and criminal court proceedings are public events, records of court proceedings are public records and there is a strong presumption in favor of public access to such matters." Sentinel Communications Co. v. Watson, 615 So. 2d 768, 770 (Fla. 5th DCA 1993). Indeed, the people of this State added Article I, Section 24 to the Declaration of Rights in the Florida Constitution to make clear that the right of access to the records of all three branches of government is of constitutional magnitude. All citizens possess the right to "inspect or copy" such records.

Plea agreements and related documents typically are public record. See Oregonian Publishing Co. v. United States District Court, 920 F.2d 1462, 1465 (9th Cir. 1990) ("plea agreements have typically been open to the public"); United States v. Kooistra, 796 F.3d 1390, 1390-91 (11th Cir. 1986) (documents relating to defendant's change of plea and sentencing could be sealed only upon finding of a compelling interest that justified denial of public access). Florida law likewise recognizes a strong public right of access to documents a court considers in connection with sentencing. See Sarasota Herald Tribune, Div. of the New York Times Co. v. Holtzendorf, 507 So. 2d 667, 668 (Fla. 2d DCA 1987) ("While a judge may impose whatever legal sentence he chooses, if such sentence is based on a tangible proceeding or document, it is within the public domain unless otherwise

privileged.").

Under Florida law, closure of judicial records is warranted only under very limited circumstances. In particular, the party seeking closure must demonstrate that:

1. restricting public access is necessary to prevent a serious and imminent threat to the administration of justice;

2. no alternatives, other than a change of venue, would protect the defendant's right to a fair trial; and

3. closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982). This test, as well as the standard announced in Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988), was essentially codified in former Rule of Judicial Administration 2.051, now 2.420, which was applicable in both criminal and civil cases. Sarasota-Herald Tribune, 924 So. 2d at 11.

In April 2007, the Florida Supreme Court adopted emergency amendments to Rule 2.420 in response to Florida media reports of hidden cases and secret dockets, a process that has come to be known as "super-sealing." In re Amendments to Florida Rule of Judicial Administration 2.420, 954 So. 2d 16 (Fla. 2007). In adopting the interim rule, the Florida Supreme Court confirmed its commitment to safeguarding the public's constitutional right of access to court

records, which the Court held "must remain inviolate." Id. at 17. By its terms, Rule 2.420 does not apply to criminal cases; however, later this year the Supreme Court will consider amendments to the rule that essentially seek to apply the standards applicable in civil cases to criminal ones. See In re Amendments to Florida Rule of Judicial Administration 2.420, Case No. 07-2050 (Fla. 2007). In the circuit below, however, the new Rule 2.420 procedures have been in effect since September 29, 2008. (Supp.A.-2.) In addition, the sealing of the NPA violated principles of Florida law established long before the amendments to Rule 2.420. Consequently, the unsealing of these documents was proper.

1. Closure of the Non-Prosecution Agreement Improperly Occurred without a Motion, Notice, Hearing, or a Proper Order.

The non-prosecution agreement was sealed pursuant to an agreed order dated July 2, 2008 (A-9.) At the time, Fifteenth Judicial Circuit Administrative Order 2.032 applied to requests for closure of court records in the lower court. (Supp.A.-3.) The order requires a motion, notice, and a hearing, none of which occurred in this case. (Id. at ¶¶ 1 – 3.) The order further provides that closure is proper only upon showing that the factors set forth in Lewis have been met (Id. at ¶ 4) and that "[t]he reasons supporting sealing the file must be stated with specificity in the order sealing the court record" (Id. at ¶ 5), neither of which occurred in this

case.

Contrary to Petitioner's assertion (Petition at 13) neither this rule, nor the common law of Florida, nor the Florida constitution contemplates *sua sponte* closure of court records upon simple request of the Court or any party. Nor was the closure, in fact, *sua sponte*, as Epstein himself requested closure (A-7 at p. 40, ll. 7-9.) and admittedly filed the NPA in the court file under seal pursuant to an agreed order (A-18 at p. 11, ll. 22-23). The agreed order (A-9) contains none of the findings required by Lewis or paragraph 5 of the Administrative Order. The closure order is invalid and was properly vacated.

2. Closure of the Addendum Improperly Occurred without any Procedures to Protect the Right of Access at all.

With respect to the sealing of the addendum to the non-prosecution agreement, no procedures were put in place at all. The original non-prosecution agreement was attached to the July 2, 2008 agreed order, which allowed to be filed under seal the "attached document" only. (A-9.) It appears from the record that the addendum – which was not attached to the July 2, 2008 order but was filed six weeks later – was simply filed and accepted under seal without any order allowing for closure. Closure of the addendum was thus improper on that basis as well. The trial court properly unsealed these documents.

B. No Basis Exists for Current Closure of the Non-prosecution Agreement or Its Addendum.

After the Post intervened, at a June 10, 2009 hearing on the issue of closure, the trial court asked Epstein's counsel about the Post's motion (A-11) specifically. Epstein's counsel replied:

> If the Post's position is the public has a right to acc – access this then there is a procedure in place and ultimately the Court has to conduct a hearing and do a balancing test where you look at whether there is some compelling government interest and that's going to require an evidentiary hearing. So I have no great objection to filing the Request for Closure and then having a hearing in front of the Court.

(Supp.A.-1 at p. 3, l. 22 – p. 4, l. 5.) Importantly, Petitioner's counsel did not assert that he had complied with these requirements, but that he would. The Court reset the hearing for June 25, 2009.

Petitioner filed a Motion to Make Court Records Confidential (A-13) on June 11, 2009. In it, Epstein cited four reasons the NPA should remain under seal: 1. to prevent a serious and imminent threat to the administration of justice[8]; 2. to protect a compelling government interest; 3. to avoid substantial injury to innocent

[8] This assertion apparently has been abandoned by Petitioner, because his petition asserts that he has asserted three bases for confidentiality, and does not include this basis. Accordingly, it will not be addressed, except to make note of the fact that Epstein has not at any point in this proceeding identified a threat to the administration of justice, much less a serious and imminent threat.

third parties; and 4. to avoid substantial injury to a party by disclosure of matters protected by a common law and privacy right, not generally inherent in these specific type of proceedings sought to be closed. (A-13 at ¶ 5.) The motion failed to explain how these interests were implicated, failed to address alternatives to closure, and failed to explain how closure would protect the interests. (A-13.)

The lower court heard argument on June 25, 2009. The United States Attorneys' Office was provided notice of the hearing, but chose not to appear. (A-18 at p. 7, ll. 10-14.) In fact, the U.S. Attorney's Office has taken no position on this matter throughout the lower court proceedings and specifically informed counsel for [redacted] that it had no position (A-18 at p. 7, ll. 10-14.) At that hearing, the Court found that the proper procedures to initially seal the records were not followed and then heard argument from Epstein's counsel on his June 11, 2009 motion (A-13). Epstein's counsel consented to that procedure. (A-18 at p. 9, ll. 16 -18.) The Judge held that neither the State, nor the U.S. Government, nor Epstein had shown why the NPA ought to remain confidential and ordered the records unsealed.[9] (A-16.)

[9] It is important to note that the State Attorney's Office appeared at the hearing for the limited purpose of objecting to the release of minor victim's names, which turned out to be a non-issue because the Court, having reviewed the documents *in camera*, determined that no victim's names were included in the documents (A-19 at p. 21, ll. 14-19.) The federal government, as mentioned above, took no position

(Footnote continued on next page)

The trial court did not depart from the essential requirements of law in unsealing the NPA. Administrative Order of the Fifteenth Judicial Circuit 2.303 applies to Petitioner's June 11, 2009 request to seal the records in this case. (Supp.A.-2.) That administrative order – consistent with Lewis and its progeny – applies Rule 2.420's standards to requests for closure of records in criminal proceedings in the Fifteenth Judicial Circuit. Any order authorizing closure must contain findings that one of the interests set forth in Rule of Judicial Administration 2.420(c)(9)(A) is met and that closure is no broader than necessary to protect that interest. (Supp.A.-2 at ¶ 4.); see also Lewis, 426 So. 2d at 3. Motions seeking closure must include a "signed certification by the party making the request that the motion is being made in good faith and is supported by a sound factual and legal basis." (Supp.A.-2 at ¶ 1.) Epstein's initial oral request for closure failed to comply with the requirements of then-applicable law, and he has never presented a sound factual or legal basis for present closure. Consequently, unsealing the documents was fully consistent with the essential requirements of law.

---

and did not appear at any of the hearings on this matter. Nor has either agency appealed the lower court's decision.

1. Petitioner Cannot Identify a Rule 2.420(c)(9) Interest that Warrants Closure.

Though Epstein's belated written motion identified four interests set forth in Rule 2.420(c)(9) that purportedly warrant closure, he failed to explain – either in his motion or at the hearing – how any of them applied. Instead, Petitioner asserted closure was proper because these broad interests would be served by closure, principles of comity require closure, and because the records contain information protected from disclosure by Federal Rule of Criminal Procedure 6. Even though Petitioner now attempts to craft his arguments around the interests set forth in Rule 2.420(c)(9), the trial court cannot be said to have departed from the essential requirements of the law in holding that Epstein's burden had not been met.

Epstein's petition asserts that closure is necessary to protect a compelling government interest because, he claims, the U.S. Attorneys' Office – who has been notified of these proceedings and has taken no position whatsoever – has a compelling interest in having the confidentiality provision of its contract with Mr. Epstein honored. See Petition at 15. Assuming such a provision exists (the Post has not seen the document), Petitioner is in no position to assert a compelling interest on the government's behalf, given its decision to take no position on the matter. If such an interest exists, the U.S. government is the party to assert it, and

it has specifically failed to do so. The trial court did not depart from the essential requirements of law in holding that Petitioner failed to demonstrate a compelling interest in closure.

Epstein next asserts that closure is warranted to protect the interest of "innocent third parties" and identifies those third parties as Mr. Epstein's co-conspirators. (Petition at 15). Again, Mr. Epstein lacks standing to assert the interests of third parties. Doe v. Museum of Science and History of Jacksonville, Inc., Case No. 92-32567, 1994 WL 741009 (Fla. 7th Jud. Cir. June 8, 1994) (plaintiff lacks standing to assert privacy interest of third party, minor victims of sexual assault by defendant's former employee, who had been convicted) (copy attached at Supp.A.-4). In addition, even if the third parties Mr. Epstein identifies – his purported co-conspirators – were before the Court, they would have no privacy interest in matters pertaining to their criminal conduct. Post-Newsweek Stations, Florida, Inc. v. Doe, 612 So. 2d 549 (Fla. 1992) (Does, whose names were implicated in criminal prostitution scheme, had no right to privacy by virtue of their participation in a crime and thus their names could not be redacted from records provided to the public). Thus, the trial judge did not depart from the essential requirements of law in finding insufficient third-party interests to justify closure.

The third interest Epstein seeks to invoke is his own right to privacy. See Petition at 15. While Epstein actually does have standing to assert his own right to privacy, Florida law is clear that closure is only proper to protect a "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)(A)(vi) (emphasis added). Epstein argues disclosure of a plea agreement is not generally inherent in a state court plea hearing See Petition at 16. That argument is absurd. Of course Epstein's plea agreement is generally inherent in his criminal prosecution. It is the very reason that prosecution ended, and as the lower court recognized in accepting the plea, it was a "significant inducement" to Petitioner to take the state's deal. (A-7 at p. 39, ll. 19-21.; p. 40, ll. 10-13.)

Moreover, Florida's constitutional right to privacy is expressly subordinate to the rights of Floridians to access the records of their government. To wit, Article I, § 23, which sets forth the right to privacy, further provides: "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Fla. Const. Art. I, § 23. As the Florida Supreme Court has recognized, the privacy amendment has not been construed to protect names and addresses contained in public records. Post Newsweek, 612 So.

2d at 552. The trial court, having reviewed the NPA *in camera*, certainly had an opportunity to assess whether a privacy interest not inherent in his criminal prosecution for felony solicitation of children for prostitution is implicated by the NPA. It cannot in good faith be argued that the trial court departed from the essential requirements of law in determining that no such privacy interest was implicated.

2. The Federal Court's Decisions in Case No. 08-80736 (S.D. Fla. 2008) Did Not Preclude the Lower Court's Orders Unsealing the NPA.[10]

Nor did the trial court's rejection of Petitioner's comity argument depart from the essential requirements of law. In the Southern District of Florida, one of the minor victims of Epstein filed a Petition for Enforcement of Crime Victim's Rights Acts (A-1).[11] The victim also asked the federal court to allow her to share the NPA with third parties (A-3). Judge Marra denied the motion, finding – as the U.S. Government had argued (A-4) – that *the NPA was not a record of the federal court*. (A-6) ("First, as respondent points out, the Agreement was not filed in this

[10] The Post adopts and incorporates [redacted] arguments and analysis on this issue in addition to the arguments it sets forth herein.

[11] The Post notes that A-3 through A-5 were not part of the record below. If the Court is inclined to consider these federal court pleadings, then in fairness it must consider those related pleadings which are attached hereto as Supp.A.-5 through Supp.A.-7 of the Post's Supplemental Appendix.

case, under seal or otherwise."). The federal court also declined to provide any relief from restrictions on the parties' use and dissemination of the discovery document without prejudice. (A-6 at p.2.)

Petitioner argues that the Post should be required to seek relief in Judge Marra's court. He mischaracterizes the nature of the proceedings there. There is no document to unseal in Judge Marra's court. The NPA is not a record of that court, and thus any effort by the Post to obtain access to the NPA there would be futile, and any order requiring it be unsealed by the lower court herein does not conflict with any decision of the federal court. (A-16 at p.3.)

In fact, when Judge Marra has been asked to seal records of his court that quote the NPA, he has refused to do so, and has required such records to be filed in the public court file (Supp.A.-5 through Supp.A.-7)[12] Thus, though the NPA is not a record of the federal court, the federal court has rejected attempts to file portions of it under seal. As a result, portions of the NPA appear in the public court file in

[12] Page 4 of Supp.A.-5 and paragraph 5 of Supp.A.-6, both publicly on file in the federal court, quote from the NPA. In addition, Epstein's own lawyers quoted extensively from the NPA in seeking to stay one of the civil suits against him. (A-11 at ¶ 6; A-18, p. 35, l. 18 – p. 36, l. 1 (incorporating by reference Supp.A.-5 through Supp.A-6 and Supp.A.-7 (C.M.A. v. Epstein, Case No. 08-cv-80811 (S.D. Fla. 2008) at Dkt. 33 pp. 2-5)).)

the federal civil litigation against Epstein. (Supp.A-5 at p. 4; Supp.A.-6 at ¶ 5; Supp.A.-7 at pp. 2-5.) The proverbial cat is already out of the bag.

Notwithstanding, the NPA is a record of this lower court. The lower court did not enter an order conflicting with Judge Marra's rulings (A-16 at p. 3 – expressly noting lack of conflict with Judge Marra's orders) and did not depart from the essential requirements of law in unsealing the NPA.

3. Federal Rule of Criminal Procedure 6 Did Not Preclude the Lower Court's Orders Unsealing the NPA.[13]

Finally, unsealing the NPA did not conflict with federal law. Records available under state law are sealed by federal law only when federal law absolutely conflicts with state law and requires confidentiality of the records. The Supremacy Clause of the United States Constitution, Art. VI, U.S. Const., comes into play only when federal law clearly requires the records to be closed, and the state is clearly subject to its provisions. E.g., Wallace v. Guzman, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) (exemptions to federal Freedom of Information Act do not apply to state agencies); Hous. Auth. of the City of Daytona Beach v. Gomillion, 639 So. 2d 117 (Fla. 5th DCA 1994) (Federal Privacy Act does not exempt from disclosure records of housing authority which are open for inspection

[13] The Post adopts and incorporates [redacted] arguments and analysis on this issue in addition to the arguments it sets forth herein.

under Florida Public Records Act); Fla. Sugar Cane League, Inc. v. Fla. Dept. of Envtl. Reg., Case No. 91-2108 (Fla. 2d Jud. Cir. Sept. 20, 1991), per curiam affirmed, 606 So. 2d 1267 (Fla. 1st DCA 1992 (documents received by state agency in course of settlement negotiations to resolve federal lawsuit and confidential settlement agreement with U.S. Department of Justice open to inspection because federal law did not clearly require confidentiality) (Supp.A.-8.) Federal law imposes no such preemption of the Florida constitution and common law in this case.

In particular, Federal Rule of Criminal Procedure 6(e) does not restrict access to the NPA. Federal Rule 6(e) restrains grand jurors, court reporters, government attorneys, interpreters and the like from disclosing matters occurring before the grand jury. Petitioner – apparently the former target of the grand jury – is none of these persons. His actions in filing the NPA under seal do not implicate Rule 6(e) no matter what information the NPA contains. The lower court's actions in unsealing the NPA likewise do not implicate Rule 6, because the lower court also is not restrained by Rule 6(e).

Moreover, the information contained in the NPA 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).

Disclosure of details of a government investigation that is independent of a parallel grand jury proceeding does not violate Rule 6. Id. Statements by a prosecutor's office about its own investigation, therefore, are not covered by the secrecy rule. Id. at 655. Likewise, the mere mention of other targets of an investigation does not implicate the grand jury secrecy rule. E.g., In re Interested Party, 530 F. Supp. 2d 136,140-42 (D.D.C. 2008) (government not prohibited by

Rule 6 from disclosing plea agreement and other materials); Doe v. Hammond, 502 F. Supp. 2d 94, 99-101(D.D.C. 2007) (same). Moreover, "when the fact or document is sought for itself, independently, rather than because it was stated before or displayed to the grand jury, there is no bar of secrecy." In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. at 1304. Here, the Post seeks to review the NPA for its own intrinsic value, and not for the purpose of discerning what transpired before the grand jury now more than a year ago. It is clearly well within the public's right and interest to review the NPA, given the circumstances surrounding the investigation and prosecution of Petitioner as well as the civil claims by women who say Epstein sought to make them his child prostitutes. These facts clearly constitute a proper basis for unsealing these improperly sealed documents.

Finally, and even assuming for a moment that the NPA contains grand jury information – which the Post doubts – when the grand jury's work has concluded, and the accused apprehended, the veil of secrecy no longer is necessary and safely may be lifted. In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. at 1303. Here, Petitioner 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 trial court was correct in unsealing the non-prosecution agreement and its addendum. These materials were not properly sealed in the first instance. Moreover, Epstein has not and cannot provide any basis for closure at this juncture. The trial court did not depart from the essential requirements of law in unsealing the NPA. Its order should be affirmed, and the Post should be awarded its fees and costs and such other further relief as this Court deems proper.

Respectfully submitted,

THOMAS, LoCICERO & BRALOW, PL

Deanna K. Shullman
Florida Bar No.: 0514462
James B. Lake
Florida Bar No.: 0023477
101 N.E. Third Avenue, Suite 1500
Fort Lauderdale, FL 33301
Telephone: (813) 984-3060
Facsimile: (813) 984-3070

Attorneys for The Palm Beach Post

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: **Hon. Jeffrey Colbath**, Palm Beach County Courthouse, 205 N. Dixie Highway, Room 11F, West Palm Beach, FL 33401; **R. Alexander Acosta**, United States Attorney's Office - Southern District, 500 S. Australian Ave., Ste. 400, West Palm Beach, FL 33401; **Barbara Burns, Esq.**, State Attorney's Office - West Palm Beach, 401 North Dixie Highway, West Palm Beach, FL 33401; **Jack Alan Goldberger, Esq.**, Atterbury Goldberger, et al., 250 S. Australian Ave., Ste. 1400, West Palm Beach, FL 33401; **Robert D. Critton, Esq.**, Burman, Critton, Luttier & Coleman, 515 N. Flagler Drive, Suite 400, West Palm Beach, FL 33401; **Jane Kreusler-Walsh, Esq.**, 501 S. Flagler Drive, Suite 503, West Palm Beach, FL 33401-5913; **Spencer T. Kuvin, Esq.**, Leopold-Kuvin, P.A., 2925 PGA Boulevard, Suite 200, Palm Beach Gardens, FL 33410; and **Bradley J. Edwards, Esq. and William J. Berger, Esq.**, Rothstein Rosenfeldt Adler, 401 East Las Olas Blvd., Suite 1650, Fort Lauderdale, FL 33394 on this 10th day of July, 2009.

Attorney

CERTIFICATE OF TYPE, SIZE AND STYLE

Counsel for Petitioners certifies that this Petition is typed in 14 point (proportionately spaced) Times New Roman.

Attorney