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

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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, ll. 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

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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.

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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

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D09-2554

2006CF009454AXX, 2008CF009381AXX

JEFFREY EPSTEIN,

Petitioner,

vs.

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

Respondents.

SUPPLEMENTAL APPENDIX TO 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, FL 33301

Document	Tab

09-22784

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NOs.: 2006-CF9454 AXX and 2008-CF9381 AXX

STATE OF FLORIDA,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

_____/

PROCEEDINGS HELD BEFORE

THE HONORABLE JEFFREY J. COLBATH

JUNE 10, 2009

11:08 A.M. - 11:25 A.M.

PALM BEACH COUNTY COURTHOUSE

WEST PALM BEACH, FLORIDA

Reported by Louanne Rawls

Notary Public, State of Florida

West Palm Beach Office #100578

APPEARANCES:

On behalf of the Defendant
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Atterbury, Goldberger, et al.
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West Palm Beach, FL 33401

On behalf of the Defendant
ROBERT CRITTON, JR., ESQUIRE
Burman, Critton, et al.
515 N. Flagler Drive, Ste. 400
West Palm Beach, FL 33401-4349

On behalf of Third Party [redacted]
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BRADLEY J. EDWARDS, ESQUIRE
Rothstein Rosenfeldt Adler
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Fort Lauderdale, FL 33394

On behalf of Third Party, The Post
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Suite 1500
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P R O C E E D I N G S

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MR. BERGER: Your Honor, William J. Berger and Bradley Edwards for non-party [redacted]

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THE COURT: Let me slow down a little bit. On behalf of The Post is?

MS. SHULLMAN: Deanna Shullman.

THE COURT: S-H-U-L --

MS. SHULLMAN: S-H-U-L-L-M-A-N.

THE COURT: Ms. Shullman, good morning. Mr. Berger, good morning. And Mr. Berger, your client is [redacted]

MR. BBRGER: [redacted], yes.

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MR. EDWARDS: Brad Edwards on behalf of [redacted] as well, Judge. Thanks.

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a hearing and do the 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 have a hearing in front of the Court.

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MR. BERGER: Judge, with all due respect I completely disagree with counsel's characterization of

those two Orders. I don't know if he handed up both to you?

THE COURT: I do.

MR. BERGER: They simply do not say what he tells you they say.

THE COURT: I'll read them --

MR. BERGER: All right.

THE COURT: -- and I'll allow you to make that argument --

MR. BERGER: And -- and --

THE COURT: -- at the time of the Renewed Motion to Seal.

MR. BERGER: All right. And, also, I don't think the Court -- I think the Court needs to deal with this immediately, expeditiously. This is a matter that the Supreme Court has placed incredible scrutiny over. And the Rule that we are traveling under -- we're not only traveling under a Rule of Judicial Administration that applies to criminal and civil cases, we're applying to an Administrative Order of this Court that was in place when the sealing was done and that superseded the sealing.

THE COURT: I --

MR. BERGER: I'm just saying, I respectfully request that the Court not delay this one minute.

THE COURT: You've got the agreements.

MR. BERGER: Pardon me?

THE COURT: You've got the agreements anyway. You've got what's under seal.

MR. BERGER: Judge, we cannot do anything with them.

THE COURT: Take that up with Judge Marra.

MR. BERGER: No, sir. That is not what the Order says. May I quote Judge Marra. "If a specific tangible need arises in a civil case the relief should be sought in that case." In other words, the civil cases which are in front of Judge Hafele is one forum that Judge Marra said go to it. Judge Marra did not say that this Court does not have jurisdiction to unseal its own sealed records or to vacate its own Order sealing. And any characterization is -- is false.

THE COURT: I'll take a look at it and I'll draw from it what it says -- what I think it says. I appreciate your zealous representation of your client. Please, it appears as though you're yelling at me.

MS. SHULLMAN: Your Honor?

THE COURT: Ms. Shullman?

MR. BERGER: Judge, this happens to be a very serious matter and every day of delay delays our discovery.

THE COURT: Ms. Shullman?

MS. SHULLMAN: Your Honor, if I may be heard on the

issue as well. As a representative of the public's right of access --

THE COURT: Right.

MS. SHULLMAN: -- here essentially, I would agree with Mr. Berger that we need an immediate hearing on this issue. That's what we're here to do today. I think I heard Your Honor say that he's not clear that the procedures were applied. My review of the record does not reveal that the procedures were complied with. My review is similar to Your Honor's. It looks like sort of everybody approached the bench and Judge Pucillo said let's take it under seal. If Mr. Epstein's counsel is not prepared to go forward today and meet his burden, then I would ask that this Court set a hearing as soon as practical because the right solution here should be to unseal the records and then, you know --

THE COURT: I've gotcha.

MS. SHULLMAN: -- and they have to make a motion.

THE COURT: Well, what house is on fire? I mean, what is the -- I think what they have to do is they've got to give ten days notice pursuant to the Rule -- the Administrative Order, Rules of Judicial Administration, to go through that process. What -- what prejudice is there? What house is burning down if I say okay. State and defense, go ahead and expeditiously move through the

process and let's get this back on my docket as quickly as possible and give them until Friday to file their notice and ten days after that we have an evidentiary hearing. I go through the process then. What bad thing is going to happen by waiting these extra twelve to fifteen days?

MS. SHULLMAN: The bad thing that's going to happen, Your Honor, is that the status quo in Florida is that the constitutional right of access is openness.

THE COURT: Right.

MS. SHULLMAN: You know, certainly if Your Honor is inclined to postpone this hearing I would ask that it be done expeditiously as you suggest.

THE COURT: Yeah.

MS. SHULLMAN: You know, Friday and then ten days thereafter, it just delays access for another two weeks and it infringes on our rights.

THE COURT: I agree. Mr. Berger, I will let you answer that same question.

MR. BERGER: I don't think --

THE COURT: Anything specific rather than --

MR. BERGER: Yes.

THE COURT: You know, anything closed that the people are allowed to look at is a transgression and any transgression is bad, but anything unique beyond that?

MR. BERGER: Your Honor -- Your Honor, I do not

believe that this Court has the jurisdiction to revisit the propriety of the sealing of these records and give the Defendant or the State, for that matter, a second bite at the apple. If the records are sealed improperly, which the Court has said on its face that appears to have occurred, I do not believe that this Court has jurisdiction to allow them a second bite at the apple to go through with the notice requirements. They should have done that in front of Judge Pucillo a year ago and they did not do it. The Rule of Judicial Administration 2.420 simply does not give this Court the right to reactivate the procedure that you outlined.

THE COURT: Okay.

MR. BERGER: Thank you.

THE COURT: Anything further, Mr. Goldberger or Mr. Critton?

MR. GOLDBERGER: Just note, Your Honor, as far as the timing of this and we want to do this expeditiously, of course, this sealing occurred not last week, not two weeks ago, not four months ago but eleven and one half months ago. The Post reported this last July. So, I understand the right for the pubic to have access and we want to do this as quickly as possible but there is no fire here. There is no house burning.

THE COURT: Then I'll go ahead and enter an Order as

I've indicated, that is that I'll grant the Intervener's Motion to Intervene. You have standing. I will order that the State and/or the defense by noon Friday file a Notice of -- comply with the Administrative Order 2.303 and the Judicial Rule -- the Rule of Judicial Administration 2.420, paragraph d, that outlines the procedures to seal files in these types of cases and then we'll get a hearing scheduled for argument on whether or not they will be sealed. Until that time they will remain sealed because Judge Pucillo signed off on the Order and I'm not inclined to disturb that until I find more about the merits of the movant's position.

MR. GOLDBERGER: Thank you.

THE COURT: Anybody want to reduce any of that mess to a written Order?

MR. EDWARDS: I'd like to Your Honor. I'd like to know if you're going to give us a hearing date today.

THE COURT: I'll deal with that. Yeah. Let me give you some time. How much time do you think it's going to take? I don't think I'm going to have any surprises. How much time do you think we need? A half hour?

MR. EDWARDS: Not more. I'd say an hour at the longest.

THE COURT: I'm not taking evidence or anything like that. In the meantime, do you agree it would be prudent

for me to take a look and see what the content of these things are so I can be articulate on what -- their know about? I didn't do that for today's hearing?

MR. GOLDBERGER: The defense --

MR. EDWARDS: The non-prosecution agreement?

THE COURT: Right. Whatever is under seal. Whatever it is that's under seal I'll take a look at it so that I can at least have a feel for apparently what you all know and I don't.

MR. GOLDBERGER: The defense has no objection.

THE COURT: Okay. I'll go ahead and read those two sealed documents and I'll see you back here, assuming that Mr. Goldberger and Mr. Critton get that done between now and Friday. Ten days from this Friday is the 22nd. How about we do this on the 25th at 1:30?

MR. GOLDBERGER: One moment, Your Honor. That's fine with me.

MR. BERGER: Thank you.

THE COURT: All right. Great. Thank you so much.

MR. GOLDBERGER: Thank you, Judge.

(PROCEEDINGS CONCLUDED)

C E R T I F I C A T E

I, LOUANNE RAWLS, certify that I was authorized to and did digitally report the foregoing proceedings and that the transcript is a true and complete record of my notes.

Dated this 10th day of June, 2009.

_____

LOUANNE RAWLS, #100578

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs. JEFFREY EPSTEIN,

Defendant.

PROCEEDINGS HELD BEFORE THE HONORABLE JEFFREY J. COLBATH

JUNE 10, 2009 11:08 A.M. - 11:25 A.M. PALM BEACH COUNTY COURTHOUSE

WEST PALM BEACH, FLORIDA

Reported by Louanne Rawls Notary Public, State of Florida West Palm Beach Office #100578

APPEARANCES:

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JACK ALAN GOLDBERGER, ESQUIRE Atterbury, Goldberger, et al.
250 Australian Ave. South, Suite 1400 West Palm Beach, FL 33401

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MR. BERGER: And -- and -

THE COURT: -- at the time of the Renewed Motion to Seal.

MR. BERGER: All right. And, also, I don't think the Court -- I think the Court needs to deal with this immediately, expeditiously. This is a matter that the Supreme Court has placed incredible scrutiny over. And the Rule that we are traveling under -- we're not only traveling under a Rule of Judicial Administration that applies to criminal and civil cases, we're applying to an Administrative Order of this Court that was in place when the sealing was done and that superseded the sealing.

THE COURT: I -

MR. BERGER: I'm just saying, I respectfully request that the Court not delay this one minute.

THE COURT: You've got the agreements.

MR. BERGER: Pardon me?

THE COURT: You've got the agreements anyway. You've got what's under seal.

MR. BERGER: Judge, we cannot do anything with them. THE COURT: Take that up with Judge Marra.

MR. BERGER: No, sir. That is not what the Order says. May I quote Judge Marra. "If a specific tangible need arises in a civil case the relief should be sought in that case." In other words, the civil cases which are in front of Judge Hafele is one forum that Judge Marra said go to it. Judge Marra did not say that this Court does not have jurisdiction to unseal its own sealed records or to vacate its own Order sealing. And any characterization is -- is false.

THE COURT: I'll take a look at it and I'll draw from it what it says -- what I think it says. I appreciate your zealous representation of your client. Please, it appears as though you're yelling at me.

MS. SHULLMAN: Your Honor? THE COURT: Ms. Shullman?

MR. BERGER: Judge, this happens to be a very serious matter and every day of delay delays our discovery.

THE COURT: Ms. Shullman?

MS. SHULLMAN: Your Honor, if I may be heard on the

issue as well. As a representative of the public's right of access -

THE COURT: Right.

MS. SHULLMAN: -- here essentially, I would agree with Mr. Berger that we need an immediate hearing on this issue. That's what we're here to do today. I think I heard Your Honor say that he's not clear that the procedures were applied. My review of the record does not reveal that the procedures were complied with. My review is similar to Your Honor's. It looks like sort of everybody approached the bench and Judge Pucillo said let's take it under seal. If Mr. Epstein's counsel is not prepared to go forward today and meet his burden, then I would ask that this Court set a hearing as soon as practical because the right solution here should be to unseal the records and then, you know -

THE COURT: I've gotcha.

MS. SHULLMAN: -- and they have to make a motion. THE COURT: Well, what house is on fire? I mean, what is the -- I think what they have to do is they've got to give ten days notice pursuant to the Rule -- the Administrative Order, Rules of Judicial Administration, to go through that process. What -- what prejudice is there? What house is burning down if I say okay. State and defense, go ahead and expeditiously move through the

process and let's get this back on my docket as quickly as possible and give them until Friday to file their notice and ten days after that we have an evidentiary hearing. I go through the process then. What bad thing is going to happen by waiting these extra twelve to fifteen days?

MS. SHULLMAN: The bad thing that's going to happen, Your Honor, is that the status quo in Florida is that the constitutional right of access is openness.

THE COURT: Right.

MS. SHULLMAN: You know, certainly if Your Honor is inclined to postpone this hearing I would ask that it be done expeditiously as you suggest.

THE COURT: Yeah.

MS. SHULLMAN: You know, Friday and then ten days thereafter, it just delays access for another two weeks and it infringes on our rights.

THE COURT: I agree. Mr. Berger, I will let you answer that same question.

MR. BERGER: I don't think -

THE COURT: Anything specific rather than -MR. BERGER: Yes.

THE COURT: You know, anything closed that the people are allowed to look at is a transgression and any transgression is bad, but anything unique beyond that?

MR. BERGER: Your Honor -- Your Honor, I do not

believe that this Court has the jurisdiction to revisit the propriety of the sealing of these records and give the Defendant or the State, for that matter, a second bite at the apple. If the records are sealed improperly, which the Court has said on its face that appears to have occurred, I do not believe that this Court has jurisdiction to allow them a second bite at the apple to go through with the notice requirements. They should have done that in front of Judge Pucillo a year ago and they did not do it. The Rule of Judicial Administration 2.420 simply does not give this Court the right to reactivate the procedure that you outlined.

THE COURT: Okay.

MR. BERGER: Thank you.

THE COURT: Anything further, Mr. Goldberger or Mr. Critton?

MR. GOLDBERGER: Just note, Your Honor, as far as the timing of this and we want to do this expeditiously, of course, this sealing occurred not last week, not two weeks ago, not four months ago but eleven and one half months ago. The Post reported this last July. So, I

understand the right for the pubic to have access and we want to do this as quickly as possible but there is no fire here. There is no house burning.

THE COURT: Then I'll go ahead and enter an Order as

I've indicated, that is that I'll grant the Intervener's Motion to Intervene. You have standing. I will order that the State and/or the defense by noon Friday file a Notice of -- comply with the Administrative Order 2.303 and the Judicial Rule -- the Rule of Judicial Administration

2.420, paragraph d, that outlines the procedures to seal files in these types of cases and then we'll get a hearing scheduled for argument on whether or not they will be sealed. Until that time they will remain sealed because Judge Pucillo signed off on the order and I'm not inclined

to disturb that until I find more about the merits of the movant's position.

MR. GOLDBERGER: Thank you.

THE COURT: Anybody want to reduce any of that mess to a written Order?

MR. EDWARDS: I'd like to Your Honor. I'd like to know if you're going to give us a hearing date today. THE COURT: I'll deal with that. Yeah. Let me give

you some time. How much time do you think it's going to take? I don't think I'm going to have any surprises. How much time do you think we need? A half hour?

MR. EDWARDS: Not more. I'd say an hour at the longest.

THE COURT: I'm not taking evidence or anything like that. In the meantime, do you agree it would be prudent

for me to take a look and see what the content of these things are so I can be articulate on what -- their know about? I didn't do that for today's hearing?

MR. GOLDBERGER: The defense -

MR. EDWARDS: The non-prosecution agreement?

THE COURT: Right. Whatever is under seal. Whatever it is that's under seal I'll take a look at it so that I can at least have a feel for apparently what you all know and I don't.

MR. GOLDBERGER: The defense has no objection.

THE COURT: Okay. I'll go ahead and read those two sealed documents and I'll see you back here, assuming that Mr. Goldberger and Mr. Critton get that done between now and Friday. Ten days from this Friday is the 22nd. How about we do this on the 25th at 1:30?

MR. GOLDBERGER: One moment, Your Honor. That's fine with me.

MR. BERGER: Thank you.

THE COURT: All right. Great. Thank you so much. MR. GOLDBERGER: Thank you, Judge.

(PROCEEDINGS CONCLUDED)

C E R T I F I C A T E

I, LOUANNE RAWLS, certify that I was authorized to and did digitally report the foregoing proceedings and that the transcript is a true and complete record of my notes.

Dated this 10th day of June, 2009.

LOUANNE RAWLS, #100578

IN THE CIRCUIT OCURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ADMINISTRATIVE ORDER NO. 2.303-9/08

IN RE: SEALING OF COURT HEARINGS
AND RECORDS
_____:

The Florida constitution mandates that the public shall have access to court records, subject only to certain enumerated limitations which are restricted by operation of state law, federal law, or court rule. In re Amendments to Florida Rule of Judicial Admin. 2.420 – Sealing of Court Records, 954 So.2d 16 (Fla. 2007). The Rules of the Supreme Court strongly disfavor court records that are hidden from public scrutiny. The Florida Supreme Court recently adopted Interim Rule 2.420 of the Florida Rules of Judicial Administration which addresses the procedures for sealing noncriminal court records. In order to ensure that both criminal and noncriminal court records are sealed properly it is

NOW, THEREFORE, pursuant to the authority conferred by Florida Rule of Judicial Administration 2.215, it is **ORDERED** as follows:

1. A request to make court records or a court hearing confidential in any type of case must be made by written motion. Parties cannot submit an agreed-upon order. The Motion must be captioned "Motion to Make Court Records Confidential" or "Motion to Make Court Hearing Confidential". The Motion must identify with particularity the records or hearing to be made confidential and the grounds upon which it is based. The Motion 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.

2. The records that are the subject of a Motion to Make Court Records Confidential will be treated as confidential pending resolution of the motion. The case number, docket number, or other identifying number of a case will remain public. Pseudonyms may be used as permitted by the court. Court records made confidential under this rule must be treated as confidential during any appellate proceeding in this Circuit.

3. A public hearing on any motion to seal a court record or court hearing will be held as soon as practicable but no less than ten (10) days prior to the notice being given to the public and the press and no later than 30 days after the filing of the motion. A party may seek to hold all or

a portion of the hearing on a Motion to Make Court Records Confidential *in camera* if necessary to protect any of the interests listed in Interim Rule of Judicial Administration 2.420(c)(9)(A). The moving party will be responsible for ensuring that a complete record of any hearing be created either by use of a court reporter or by any recording device that is provided as a matter of right by the court.

4. A sealing order issued by a court must state with specificity the grounds for sealing and the findings of the court that justify sealing. The order granting the sealing request must contain as much detail as possible including the parties' names or pseudonyms, whether the progress docket is to be confidential, the court records that are to be confidential and the names of persons who are permitted access. The order must contain specific findings that the degree, duration, and manner of confidentiality are no broader than necessary to protect the interests listed in Interim Rule of Judicial Administration 2.420(c)(9)(A). The order will not reveal the information that is to be made confidential. The order will direct whether the progress docket is to be sealed.

5. If an order sealing a court file is silent as to whether the progress docket is to be sealed, the clerk shall seal the court file but maintain a public docket with no alternation of the parties' names. In accordance with Interim Rule of Judicial Administration 2.420(c)(9) the Clerk shall NOT seal the case number, docket number, or any other identifying number of a case that is sealed by court order.

6. The Court will direct the Clerk to post the order sealing the court file on the Clerk's website as well as on the bulletin board located at the Main Courthouse within ten (10) days following the entry of the order and must remain posted in both locations for at least 30 days.

7. A nonparty may file a written motion to vacate a sealing order in accordance with Florida Rule of Judicial Administration 2.420 (2007); In re Amendments to Florida Rule of Judicial Admin. 2.420 – Sealing of Court Records, 954 So.2d 16 (Fla. 2007).

8. A public hearing must be held on any contested motion to vacate a sealing order. The court, in its discretion, may hold a hearing on an uncontested motion. While challenge hearings must be open to the public, a party may seek to hold a portion or all of the hearing *in camera* if necessary to protect the interests listed in Interim Rule of Judicial Administration 2.420(c)(9)(A). The movant must ensure that a record of the hearing is made. The movant seeking to vacate an order bears the burden of showing that the order is unsound.

9. If the identity of a party is to remain confidential, all applicable pleadings will be filed with the following designation on the front of the pleading: "Confidential Party – Court Service Requested". The judicial assistant for the division in which the pleading is filed is responsible for providing such notice to the applicable parties. The judicial assistant is to provide such notice so as not to inadvertently reveal the identity of the confidential party.

10. This administrative rule does NOT address the confidentiality of records admitted into evidence and it does NOT pertain to the statutory process for sealing or expunging criminal history records. Motions to Seal pleadings or court records filed in a criminal case must, however, comply with this Administrative Order. This administrative order also does NOT pertain to court records that are confidential pursuant to statute, rule or other legal authority.

11. If 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.

12. The Clerk of Court, or a deputy clerk, is hereby authorized to open any court file sealed by operation of law or court order for the purpose of filing documents pertinent to the particular file, as well as for microfilming or imaging files, and for preparing a record on appeal. The Clerk, or deputy clerk, shall reseal the file immediately upon completion of the task, with the date and time of the unsealing clearly marked on the outside of the file along with the initials of the deputy clerk.

13. In all matters except adoption and surrogacy cases, the Clerk of Court will make the contents of a sealed file available to adult parties and their attorneys of record. The contents of adoption and surrogacy files shall not be made available to any person absent a court order.

DONE AND SIGNED in Chambers in West Palm Beach, Palm Beach County, Florida this 29 day of September, 2008.

Kathleen J. Kroll
Chief Judge

supersedes admin. order 2.032 10/06

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY FLORIDA

ADMINISTRATIVE ORDER NO. 2.032 - 10/06*

IN RE: SEALING COURT HEARINGS
AND RECORDS
_____/

WHEREAS all court proceedings are public events and a strong presumption of public access attaches to all proceedings and their records; and

WHEREAS records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business are subject to public disclosure; and

WHEREAS privacy rights of litigants may in certain circumstances require that court records or documents in the record should be sealed.

NOW, THEREFORE, it is **ORDERED** that to balance the competing interests of litigants' privacy interests and the public's right to access to court records, the following procedures are established for sealing court records:

1. When a Motion is received for the sealing of a hearing or all or part of a court record, the Court will direct a hearing be held on same. The Court will give notice of the hearing by posting same on the electronic bulletin board established by the Clerk of Court expressly for this purpose. Unless otherwise ordered with a reason given by the Court, notice should include enough disclosure to identify the case, the movant, the respondent, and a brief, generic description of the matters sealed or sought to be sealed.

2. The Court will not set a hearing less than ten (10) days prior to the notice being given to the public and the press.

3. Where prior notice to the public and press regarding the sealing of a record is not practicable, the Court will address such Motion, and if granted, provide notice of any decision to seal on the Clerk's electronic bulletin board. Unless otherwise ordered with a reason given by the Court, notice should include enough disclosure to identify the case, the movant, the respondent, and a brief, generic description of the matters sealed or sought to be sealed.

4. Access to court proceedings and records may be restricted to protect the interests of litigants only after a showing that the following has been met:

(i) the measure limiting or denying access, closure or sealing of records or both, is necessary to prevent a serious and imminent threat to the administration of justice;

(ii) no less restrictive alternative measures are available which would mitigate the danger; and

(iii) the measure being considered will in fact achieve the court's protective purpose.

5. The reasons supporting sealing the file must be stated with specificity in the order sealing the court record or hearing. The Case number should remain accessible on banner** regardless of whether the case has been sealed.

DONE and **ORDERED**, in Chambers, at West Palm Beach, Florida this 13th day of October, 2006.

/S/
Judge Kathleen J. Kroll, Chief Judge

* supersedes administrative order no. 2.032 - 7/04

** The Court recognizes the present technology (as of October 10, 2006) used by the Clerk supports this, however it can not happen without a system modification which shall be completed by December 31, 2006.

C

Florida Circuit Court, Seventh Judicial Circuit, Volusia County.

JOHN DOE-1 THROUGH JOHN DOE-4 and Parents of John Doe-1 through John Doe-4, Plaintiffs,

v.

MUSEUM OF SCIENCE AND HISTORY OF JACKSONVILLE, INC., Defendant.

Nos. 92-32567-CI-CI, Div. 32.

June 8, 1994.

William H. Ogle, Ormond Beach, FL.

W. Douglas Childs, Jacksonville, FL.

Jonathan D. Kaney Jr., Daytona Beach, FL.

OPINION AND ORDER ON MOTION TO CLOSE TRIAL

RICHARD B. ORFINGER, Circuit Judge.

*1 THIS MATTER is before the Court on the plaintiffs' motion to exclude the public from the trial of this case. Notice of hearing was given to representatives of the media as required by law. News-Journal Corporation, publisher of *The News-Journal,* filed a response and appeared in opposition to the motion. Defendant took no position.

According to the complaint, a man who worked at the local museum sexually abused the minor plaintiffs. He had first come into contact with three of the minors as they served as volunteers under his supervision. More than four years ago, the abuser was prosecuted and sentenced to prison. Since then the plaintiffs have settled suits for damages resulting from this abuse against the Daytona Beach Museum of Arts and Sciences, the Volusia County School Board, and the Florida Department of Health and Rehabilitative Services. As a previous employer of the abuser, plaintiffs allege this defendant failed to disclose information about the abuser's record of sexual abuse when it received an inquiry related to his employment in this community.

Although so many persons have become familiar with the case that defendant has listed eighty-one potential fact witnesses, no victim has yet been identified in the media.

Relying on a privacy interest in the facts relating to the sexual abuse, plaintiffs argue that closure is necessary to prevent the substantial harm that likely would result from revelation of these facts and identification as the victims.[FN1] Thus the motion calls upon the court to decide whether a privacy interest in the facts relating to sexual abuse suffered by the minors provides a proper basis for closure of the trial of the minors' suit for damages arising out of this abuse. For the reasons that follow, the court concludes that this is not a proper basis for closure and denies the motion.

FN1. Previously, plaintiffs moved for an order restraining anyone, including the media, from publishing information disclosed during the trial that would identify the minor victims. The court denied this motion. *See: Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976) and *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989).

Whenever other interests compete with the public interest in open judicial proceedings, "[o]ur 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) (citing *Barron v. Florida Freedom Newspapers, Inc.,* 531 So.2d 113 (Fla.1988)). This presumption rests on the most fundamental values of American government.

"[T]he people have a right to know what is done in their courts.... [T]he greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare." *Barron,* 531 So.2d at 116-7 (citing *In re Shortridge,* 34 P. 227, 228-29 (Cal.1893)). Openness in courts has a salutary effect on the propensity of witnesses to tell the truth and of judicial officers to perform their duties conscientiously. It informs persons affected by litigation of its effect upon them and fosters "respect for the law[,] intelligent acquaintance ... with the methods of government[, and] a strong confidence in judicial remedies ... which could never be inspired by a system of secrecy...." *Id.,* (citing 6 WIGMORE, EVIDENCE § 1834 (Chadbourn rev.1976)). These fundamental values come into play whenever the court is in session, and the presumption of openness applies in hard cases as well as easy cases. "The reason for openness is basic to our form of government." *Id.*

*2 This motion is opposed by various news organizations, but the presumption of openness is of larger importance than the immediate interest of the press in the case of the moment. To be sure, the press has a cognizable interest in maintaining open courts "because its ability to gather news is directly impaired or curtailed" by restrictions on access. Moreover, the press is assigned a fiduciary role in enforcing public rights of access because the press "may be properly considered as a representative of the public [for] enforcement of public right of access." Nevertheless, the values of openness in courts transcend the interests of the press because "[f]reedom of the press is not, and has never been a private property right granted to those who own the news media. It is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people, and the Nation." *State ex rel. Miami Herald Pub. Co. v. McIntosh,* 340 So.2d 904, 908 (Fla.1977). In serving the right of each citizen to be informed, judicial openness, of which the press is an instrument, sustains public confidence in the judiciary and thus serves the ultimate value of popular sovereignty.

This higher purpose of openness is not always apparent in the public scrutiny of the daily business of the courts. Depending on the definition of newsworthiness, it may be possible to dismiss as unworthy much that transpires in civil courts. Here, it is easy to ask what public interest is served by subjecting these minor victims to the risk of public identification. However, *Barron* teaches that this is the wrong question because it overlooks the higher purpose of openness in the courts.

In *Barron,* a case involving privacy concerns inherent in a divorce case, the court strongly reaffirmed the presumption that Florida civil courts are open. In dissent, Justice McDonald saw the question in case-specific terms. He would have closed the proceeding because "the rights of the public to information contained in a domestic relations lawsuit is minimal, if existent at all." 531 So.2d at 121. Implicitly, this approach would have required the proponent of openness to show a particular need to know facts of the specific case in order to gain access. The majority rejected this approach because it saw the conflicting interests in broader terms. "The parties seeking a dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system." 531 So.2d at 119.

A closure request implicates the integrity and credibility of the judicial system itself and not just the immediate concerns of the parties. The balance to be struck is not between the people's need to know the particular facts of the case versus the parties' need to keep these facts private but between the public interest in open courts versus the personal desire for a private forum. "Public trials are essential to the judicial system's credibility in a free society." *Barron* at 116.

*3 Although the Florida Supreme Court holds that

"the public and the press have a fundamental right of access to all judicial proceedings," however, this right is not absolute. *State ex rel. Miami Herald Pub. Co. v. McIntosh,* 340 So.2d at 908-9. In *Barron,* the court took the occasion to establish the standards upon which the presumption of openness may be overcome when necessary "to protect competing interests." The court wrote a "definitive statement ... to assist judicial officers in this sensitive area." 531 So.2d at 117-8.

Barron establishes a strong presumption of openness for all court proceedings and records, places the burden on the proponent of closure, and grants standing to the public and media to challenge closure orders. Before a court may enter any order of closure it must determine there are no reasonable alternatives to closure and must order the least restrictive closure necessary to accomplish the purpose of closure. 531 So.2d at 118-9. A closure order should be "drawn with particularity and narrowly applied." 531 So.2d at 117.

Barron specifies an exclusive listing of those competing interests that may under appropriate circumstances be sufficiently weighty to justify closure. Closure may be ordered "only when necessary" to serve one of six competing interests:

(a) to comply with established public policy set forth in the constitution, statutes, rules, or case law;

(b) to protect trade secrets;

(c) to protect a compelling governmental interest [e.g., national security; confidential informants];

(d) to obtain evidence to properly determine legal issues in a case;

(e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or

(f) 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 civil proceeding sought to be closed....

At the outset, the proponent of closure must identify one or more of such interests that is implicated in the proposed closure. Here it is not necessary to go beyond this first level of analysis because plaintiffs have not connected their motion to a valid interest that would justify closure.

This motion poses a direct confrontation between the individual interest in privacy and the public interest in open courts. Because there is inherent in the case sensitive, intimate, and embarrassing private facts, plaintiffs seek to litigate their claim in a closed proceeding. They argue "[t]hat revelation of [the identities of the minor plaintiffs] has the potential to inflict substantial harm upon them [as] a matter of common sense."

There is no question there are strong reasons to keep private the facts surrounding the abuse practiced on the minors by the now-imprisoned abuser. The question this court must decide, however, is whether these are reasons to secure the courtroom. The question is not whether to afford privacy to the plaintiffs but whether to afford plaintiffs a closed forum in which to disclose these facts.

*4 Although there is no case directly on this point, the present question comes fully within the holding of *Barron,* which thoroughly considered the competition between the people's interest in public courts and the personal interest in private facts. In effect, *Barron* raised the question of the role to be assigned to privacy in a system of public courts, and the majority resolved the issue by granting a narrow role to privacy based on considerations relating to the legitimate expectations of privacy.

In the Florida Supreme Court's well-developed privacy jurisprudence, the fundamental basis of the right of privacy is a legitimate expectation of privacy. Not every fact in every circumstance is private, and not every act of government violates

the right to be let alone. The concept by which the court separates the appropriate from the inappropriate instance for invoking the privacy right is this expectation. *Stall v. State,* 570 So.2d 257, 261 (Fla.1990). In order to establish a right of privacy, the individual must establish that "a reasonable expectation of privacy ... exist[s]." *Winfield v. Division of Pari-Mutuel Wagering,* 477 So.2d 544, 547 (Fla.1985).

A right of privacy cannot attach when there is no expectation of privacy. Under our historic tradition of public courts, what reasonable expectation of privacy could a litigant possibly entertain? Concurring in *Barron,* Justice Erhlich would have conceded the litigant no reasonable expectation of privacy. He pointed out, "we have ... recognized that '[t]he potential for invasion of privacy is inherent in the litigation process.' *Rasmussen v. South Florida Blood Service,* 500 So.2d 533, 535 (Fla.1987). While civil litigants may have a legitimate expectation of privacy in pretrial depositions and interrogatories which are not filed with the court (citations omitted), no such expectation exists in connection with civil proceedings and court files which historically have been open to the public. *See Forsberg v. Housing Authority,* 455 So.2d 373, 375 (Fla.1984) (Overton, J., concurring) (there is traditionally no expectation of privacy in court files)." 531 So.2d at 120. Justice Erhlich shows the conflict between privacy and publicness. If the privacy interest were allowed unbounded scope, it would overcome the public nature of trials. Thus a system of public trials must insist that litigants abandon qualms about disclosure of private facts when they place them in contest in the court.

Without rejecting this view entirely, the majority nevertheless identified a limited scope of privacy within civil litigation. "We find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f)." 531 So.2d at 118. The majority thus conceived of two instances in which a reasonable expectation of privacy might be found.

*5 First, there is the privacy expectation of persons who are not parties to the case. Involuntary participants may have a reasonable claim of privacy. Thus under item (g), *Barron* recognizes that closure may be justified if the proponent carries the heavy burden of showing closure is necessary "to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]." 531 So.2d at 118.

Second, there is the more limited privacy expectation of a party. Again, the doctrine of legitimate expectation is applicable. Although a litigant has no right to expect privacy in matters involved in the case litigated in a public court, there may be matters extrinsic to the case with respect to which a litigant has a reasonable privacy claim. Under *Barron's* item (f), a proponent may be entitled to closure if he or she carries the burden of showing that closure 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 civil proceeding sought to be closed." 531 So.2d at 118.

Barron rules out closure based on privacy interests of parties in the subject matter of the case itself. In recognizing a peripheral role for the privacy claims of civil litigants, the majority held there can be no privacy interest in that which is inherent in the case. Because litigation in a public court system involves an inherent tendency to invade privacy, a litigant has no reasonable expectation of privacy in the subject matter of a case. This must be so if, as *Barron* soundly affirms, there is to be a system of open courts in Florida.

Applying this standard in *Barron,* the court determined the medical history in question should not be sealed because it was inherent in the case. "Although generally protected by one's privacy right, medical reports and history are no longer protected when the medical condition becomes an integral part of the civil proceeding, particularly

when the condition is asserted as an issue by the party seeking closure.... [M]edical information is an inherent part of these proceedings and cannot be utilized as a proper basis for closure." 531 So.2d at 119.

The same is true in this case. Those private facts which form the basis of the motion for closure are the facts inherent in the plaintiffs' case. Nevertheless, plaintiffs argue their request implicates the competing interests *Barron* listed in item (a) dealing with public policy, item (e), dealing with privacy of third party, and item (f), dealing with privacy of a party.

Plaintiffs first argue that closure of the trial is necessary under item (a) "to comply with established public policy set forth in the constitution, statutes, rules, or case law." 531 So.2d at 118. Plaintiffs rightly contend "[t]he State of Florida has long recognized, as a matter of public policy, the need to protect minors who come into contact with the justice system," and cite statutory provisions exempting records of sex crimes and child abuse from public records disclosure and providing for closure of adoption and dependency proceedings. See *Fla.Stat.* §§ 119.07(h); 63.162; 39.408(c).

***6** To be sure, it is public policy to protect minor victims of sex crimes from unnecessary public exposure. The cited exceptions to public records laws illustrate this as does the practice of anonymous pleading.

However, state policy neither requires nor permits closure of public trials on the basis of the privacy interests of minor victims of sex crimes. The trial of the perpetrator of a sex crime against a minor must be conducted in public as a matter of Florida common law.[FN2] Under *Fla.Stat.*, § 918.16, the court has a certain ability to clear the courtroom during testimony of a person under the age of 16, but the press specifically may not be excluded.[FN3] A recent statute protecting minor witnesses does not purport to authorize closure of the trial to protect minor witnesses.[FN4] When the state prosecutes the parent of a minor child for sexual abuses practiced on the child, the trial is not closed nor is there suppression of the identity of the parent from which, as plaintiffs argue here, the identity of the child is readily inferred.[FN5] Indeed, from the reports of tort suits by minor victims of sexual crimes seeking damages from the perpetrator or those vicariously liable, it can be seen that the courts of this state conduct cases like the present as open public trials in the name of the party.[FN6]

FN2. *Bundy v. State,* 455 So.2d 330 (Fla.1984), *cert. denied,* 476 U.S. 1109 (1986). *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.1982). See also *Globe Newspaper Company v. Superior Court,* 102 S.Ct. 2613 (1982) (Same under First Amendment).

FN3. *See Palm Beach Newspapers v. Nourse,* 413 So.2d 467 (Fla. 4th DCA 1982) (Error to summarily exclude press from arraignment of defendant charge with lewd and lascivious act on child under age 14); *News-Press Pub. v. Shearer,* 5 Med.L.Rptr. 1272 (Fla. 2d DCA 1979) (Error to exclude press from courtroom while juvenile witness in sex crime testifies and error to seal record from press). *Compare Miami Herald Pub. Co. v. Morphonios,* 467 So.2d 1026 (Fla.1985) (Error to gag press from publishing testimony of minor witness via prerecorded video) and *Thornton v. State,* 585 So.2d 1189 (Fla. 2d DCA 1991) (Statute cannot override defendant's Sixth Amendment right to public trial without case-by-case balancing test). *See also Doe v. Doe,* 567 So.2d 1002 (Fla. 4th DCA 1990) (Affirming denial of motion to close proceedings in which mother seeks authority for surgical sterilization of mentally handicapped daughter).

FN4. Fla.Stat. § 92.55 (Authorizing the court to permit or prohibit "the attendance

of any *person* at the proceeding") (emphasis supplied).

FN5. See, e.g., Schmidt v. State, 590 So.2d 404 (Fla.1991) (Father prosecuted for crime of video recording of minor daughter in violation of statute concerning depiction of sex acts); *Sanders v. State,* 568 So.2d 1014 (Fla. 3d DCA 1990) (Father prosecuted for lewd and lascivious acts against minor daughter).

FN6. See, e.g., Zordan v. Page, 500 So.2d 608 (Fla. 2d DCA 1987) (Suit by minor and parents against carrier for damages incurred when insured fondled private parts of minor plaintiff); *Hennagan v. Department of Highway Safety and Motor Vehicles,* 467 So.2d 748 (Fla. 1st DCA 1985) (suit by minor and parents against FHP for damages when minor driver was allegedly sexually abused by patrolmen after being stopped on pretext of suspicion); *Drake v. Island Community Church, Inc.,* 462 So.2d 1142 (Fla. 3d DCA 1985) (Suit by minor and parents for damages from sexual abuse by teacher on minor pupil). *Compare Freehauf v. School Board of Seminole County,* 623 So.2d 761 (Fla. 5th DCA)*cause dismissed,* 629 So.2d 132 (Fla.1994) (Suit for abuse inflicted on son by stepmother; failure to report suspected abuse by school); *Fischer v. Metcalf,* 543 So.2d 785 (Fla. 3d DCA 1989) (Suit by minors against psychologist for damages from abusive father when suspicion of abuse was not reported).

The court concludes that it is not necessary to close this trial in order to comply with any public policy of the State of Florida.

The plaintiffs next argue that closure is necessary to serve the interest of innocent third parties whose privacy warrants closure under item (e) of *Barron.* The plaintiffs assert that each minor in this consolidated cause is a third party as to the other three actions and thus the trial should be closed to protect them as third parties in the consolidated cases. Having voluntarily joined to bring the action, they cannot claim to be third parties to the action nor assert a legitimate expectation of privacy in the disclosures that necessarily follow from their decision to act in concert.

Plaintiffs also assert the privacy interest of other minors who were victims of this same abuse but who have not joined in this suit. There is no evidence that trial of this case would implicate these third parties. In any event, plaintiffs lack standing to assert the interest of these third parties, and the Court will not decide any issue affecting their rights unless a party with standing raises the issue.

Finally, plaintiffs attempt to bring their motion under item (f) relating to the privacy interest of a party. To be entitled to an order of closure under this item, however, plaintiffs must show that closure 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 civil proceeding* sought to be closed." 531 So.2d at 119.(emphasis added). Plaintiffs argue their identities are not inherent facts in the case and thus the trial should be closed to prevent revelation of the identity. However, plaintiffs also contend it will be impossible to try the case without revelation of their names. Their argument refutes itself. The identity of a party is inherent in the case, and that concern alone could not justify total closure. This argument is a proxy for the ineffective argument that the sensitive nature of inherent private facts should justify a private forum. Facts regarding abuse form the core of their case, and thus it "is an inherent part of these proceedings and cannot be utilized as a proper basis for closure." 531 So.2d at 119. The decision to litigate this issue is tantamount to a decision to place the information before the public.

*7 As sympathetic as their claim is, it fails to state a cognizable reason for closure under the law. The

request to close a civil trial because of a party's disclosural concerns with facts inherent in the cause cannot be reconciled with *Barron.* Facts generally protected by a party's privacy right are no longer protected from disclosure when they become an integral part of a civil proceeding. Indeed, plaintiffs' argument for a private forum could be asserted as the basis for a wide array of exceptions that would swallow up the presumption of openness. "The ... argument based on this interest therefore proves too much. [T]hat same interest could be relied upon to support an array of mandatory closure rules ... proves too much, and runs contrary to the very foundation of the right of access...." *Globe Newspaper Company v. Superior Court,* 102 S.Ct. 2613, 2622 (1982).

Accordingly, having considered the briefs and arguments of counsel for the reasons set forth in this opinion, it is ORDERED that the Motion to Close Trial be denied.

DONE AND ORDERED.

Fla.Cir.Ct.,1994.
John Doe-1 Through John Doe-4 v. Museum of Science and History of Jacksonville, Inc.
Not Reported in So.2d, 1994 WL 741009 (Fla.Cir.Ct.), 22 Media L. Rep. 2497

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

IN RE: JANE DOE,

Petitioner.

_____/

GOVERNMENT'S RESPONSE TO VICTIM'S EMERGENCY PETITION FOR ENFORCEMENT OF CRIME VICTIM RIGHTS ACT, 18 U.S.C. § 3771

The United States of America, by and through its undersigned counsel, files its Response to Victim's Emergency Petition for Enforcement of Victim Rights Act, 18 U.S.C. § 3771, and states:

I. THERE IS NO "COURT PROCEEDING" UNDER 18 U.S.C. § 3771(b)

Petitioner complains that she has been denied her rights under the Crime Victims Rights Act, 18 U.S.C. § 3771. In the emergency petition filed by the victim, she alleges the Government has denied her rights since she has received no consultation with the attorney for the government regarding possible disposition of the charges (18 U.S.C. § 3771(a)(5)); no notice of any public court proceedings (18 U.S.C. § 3771(a)(2)); no information regarding her right to restitution (18 U.S.C. § 3771(a)(6)); and no notice of rights under the Crime Victim Rights Act (CVRA). Emergency Petition, ¶ 5.

The instant case is unique in several respects. First, in 2006, Jeffrey Epstein was charged with felony solicitation of prostitution in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida. This charge was based upon the offenses alleged in paragraph 1 of the petition. Second, while Epstein has been under federal investigation, he has not been charged in

7/RB

the Southern District of Florida.

Title 18, U.S.C., Section 3771(b)(1) provides in pertinent part that, "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." There is no "court proceeding" in the instant case since Epstein has not been charged with violation of any federal statute. No federal grand jury indictment has been returned, nor has any criminal information been filed. There can thus be no failure of a right to notice of a public court proceeding or the right to restitution.

In her memorandum, petitioner relies upon In Re Dean, 527 F.3d 391 (5th Cir. 2008), where the Fifth Circuit held that the CVRA required the government to "confer in some reasonable way with the victims before ultimately exercising its broad discretion." Id. at 395. In Dean, the government sought and obtained an ex parte order permitting it to negotiate a plea agreement with BP Products North America, without first consulting with the victims, individuals injured and survivors of those killed in a refinery explosion. A plea agreement was ultimately negotiated and the victims objected. The appellate court found that the CVRA granted a right to confer. However, the court declined to grant mandamus relief for prudential reasons, finding that the district court had the benefit of the views of the victims who chose to participate at the hearing held on whether the plea agreement should be accepted. Id. at 396.

Dean is legally distinguishable in several respects. For one thing, the court's discussion of the scope of the right to confer was unnecessary because the court ultimately declined to issue mandamus relief. Dean, 527 F.3d at 395. Also, in offering its view that this right applies pre-charge, it is noteworthy that the court, in purporting to quote the statute, omitted the last three words of section 3771(a)(5)("in the case"), words that arguably point in the opposite direction by

suggesting that the right applies post-charge. Further, the court went to great lengths to emphasize that its holding was limited to the particular circumstances presented in that case (i.e., the simultaneous filing of a plea agreement and formal charges), which of course, is not the case here. No federal charges have been filed in the instant case, and this case, unlike Dean, involves an agreement to defer federal prosecution in favor of prosecution by the State of Florida and not a guilty plea. Id. at 394. Finally, the Dean court expressly declined to "speculate on the [right to confer's] applicability to other situations." Id. Nothing in § 3771(a)(5) supports the petitioner's claim that she had a right to be consulted before the Government could enter into a non-prosecution agreement which defers federal prosecution in exchange for state court resolution of criminal liability, and a significant concession on an element of a claim for compensation under 18 U.S.C. § 2255.

II. THE GOVERNMENT HAS USED ITS BEST EFFORTS TO COMPLY WITH 18 U.S.C. § 3771(a)

The Epstein case was investigated initially by the Palm Beach Police Department in 2006. Exhibit A, Declaration of Assistant United States Attorney A. Marie Villafaña, ¶ 2. Subsequently, the Palm Beach Police Department sought the assistance of the Federal Bureau of Investigation (FBI). Id. Throughout the investigation, when a victim was identified, victim notification letters were provided to the victim by both the FBI Victim-Witness Specialist and AUSA Villafaña. Id., ¶ 3. Petitioner's counsel, Brad Edwards, Esq., currently represents [redacted], [redacted], and [redacted]. The U.S. Attorney's Office victim notification letter to [redacted] was provided by the FBI, and the letter to [redacted] was hand-delivered by AUSA Villafaña to her when she was interviewed in April 2007. FBI victim notification letters were mailed to [redacted] and [redacted] on

January 10, 2008, and to [redacted] on May 30, 2008. Villafaña Decl., ¶ 3.

Throughout the investigation, AUSA Villafaña and the FBI's Victim-Witness Specialist had contact with [redacted] Villafaña Decl., ¶ 4. Earlier in the investigation [redacted] was represented by James Eisenberg, Esq. Consequently, all contact with [redacted] was made through Mr. Eisenberg.

In mid-2007, Epstein's attorneys approached the U.S. Attorney's Office in an effort to resolve the federal investigation. Id., ¶ 5. At that time, Mr. Epstein had been charged by the State of Florida with solicitation of prostitution, in violation of Florida Statutes § 796.07. Mr. Epstein's attorneys sought a global resolution of this matter. The United States subsequently agreed to defer federal prosecution in favor of prosecution by the State of Florida, so long as certain basic preconditions were met. One of the key objectives for the Government was to preserve a federal remedy for the young girls whom Epstein had sexually exploited. Thus, one condition of that agreement, notice of which was provided to the victims on July 9, 2008, is the following:

> "Any person, who while a minor, was a victim of a violation of an offense enumerated in Title 18, United States Code, Section 2255, will have the same rights to proceed under Section 2255 as she would have had, if Mr. Epstein had been tried federally and convicted of an enumerated offense. For purposes of implementing this paragraph, the United States shall provide Mr. Epstein's attorneys with a list of individuals whom it was prepared to name in an Indictment as victims of an enumerated offense by Mr. Epstein. Any judicial authority interpreting this provision, including any authority determining which evidentiary burdens if any a plaintiff must meet, shall consider that it is the intent of the parties to place these identified victims in the same position as they would have been had Mr. Epstein been convicted at trial. No more; no less."

The Attorney General Guidelines for Victim and Witness Assistance (May 2005), Article

IV, Services to Victims and Witnesses, provides the following guidance for proposed plea agreements:

> (3) Proposed Plea Agreements. Responsible officials should make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations. In determining what is reasonable, the responsible official should consider factors relevant to the wisdom and practicality of giving notice and considering views in the context of the particular case, including, but not limited to, the following factors:
>
> (a) The impact on public safety and risks to personal safety.
>
> (b) The number of victims.
>
> (c) Whether time is of the essence in negotiating or entering a proposed plea.
>
> (d) Whether the proposed plea involves confidential information or conditions.
>
> (e) Whether there is another need for confidentiality.
>
> (f) Whether the victim is a possible witness in the case and the effect that relaying any information may have on the defendant's right to a fair trial.

Throughout negotiations, Epstein's attorneys claimed that one reason victims came forward and pressed their claims was their desire for money. They argued that victims might have an inducement to fabricate or enhance their testimony, in order to maximize their opportunities to obtain financial recompense. Villafaña Decl., ¶ 8. The Government was extremely concerned that disclosure of the proposed terms would compromise the investigation by providing Epstein the means of impeaching the victim witnesses, should the parties fail to reach an agreement. In light of the fact (i) that the United States agreed to defer prosecution to a previously filed state criminal case; (ii) that as a result sentencing would take place in state court before a state judge; (iii) that if the state resolution failed to meet minimum standards such that a federal prosecution was warranted, the victims would be witnesses and thus potential

impeachment issues were of concern; and (iv) the United States was already making efforts to secure for victims the right to proceed federally under 18 U.S.C. § 2255 even if prosecution took place in state court, the Government determined that its actions in proceeding with this agreement best balanced the dual position of the Jane Does as both victims and potential witnesses in a criminal proceeding.

On Friday, June 27, 2008, at approximately 4:15 p.m., AUSA Villafaña received a copy of the proposed state plea agreement, and learned that Epstein's state plea hearing was scheduled for Monday, June 30, 2008, at 8:30 a.m. Villafaña Decl., ¶ 10. AUSA Villafaña and the Palm Beach Police Department attempted to provide notification to victims in the short time that they had. Id. Although all known victims were not notified, AUSA Villafaña did call attorney Edwards to provide notice to his clients regarding the hearing. AUSA Villafaña did this, even though she had no obligation to provide notice of a state court hearing. Mr. Edwards advised that he could not attend but that someone would be present at the hearing. Id.

The Government has complied with 18 U.S.C. § 3771(c)(1) by using its best efforts to "see that crime victims are notified of, and accorded, the rights described in subsection (a)." Specifically, petitioner was afforded the reasonable right to confer with the attorney for the Government under 18 U.S.C. § 3771(a)(5). Disclosure of the specific terms of the negotiation were not disclosed prior to a final agreement being reached because the Government believed doing so would jeopardize and prejudice the prosecution in the event an agreement could not be made. Further, although 18 U.S.C. § 3771(a)(2) does not apply to state court proceedings, the government nonetheless notified petitioner's counsel on June 27, 2008, of the plea hearing in state court on June 30, 2008.

Section 3771(d)(6) provides, in relevant part, that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." The Government exercised its judgment and discretion in determining that there was a need for confidentiality in the negotiations with Epstein. The significant benefit of obtaining Epstein's concession that victims suing him under 18 U.S.C. § 2255(a) were "victims" of the enumerated offenses, despite the fact he has not been convicted in federal court, was of sufficient importance to justify confidentiality of the negotiations.

III. THE GOVERNMENT'S DISCUSSIONS WITH [redacted] AND [redacted]

Attorney Brad Edwards has advised the Government that he represents [redacted], and [redacted] Victim letters were provided to all three individuals. The letters to [redacted] and [redacted] were forwarded on January 10, 2008. Villafaña Decl., ¶ 3. On May 28, 2008, [redacted] status as a victim was confirmed when she was interviewed by federal agents. Id. The FBI Victim Witness specialist sent her a letter on May 30, 2008. Id.

When the agreement was signed in September 2007, [redacted] was openly hostile to a prosecution of Epstein, and [redacted] had refused to speak with federal investigators. Id., ¶ 7. While individual victims were not consulted regarding the agreement, none of Mr. Edwards' clients had expressed a desire to be consulted prior to the resolution of the federal investigation. Id.

In October 2007 [redacted] was not represented by counsel. Id., ¶ 8. She was given telephonic notice of the agreement, as were three other victims. Id. These four individuals were also given notice of an expected change of plea, in state court, in October 2007.

In mid-June 2008, Mr. Edwards contacted AUSA Villafaña to advise that he represented [redacted] and [redacted] and requested a meeting. Id., ¶ 9. AUSA Villafaña asked Mr. Edwards to send

to her any information that he wished her to consider. Nothing was provided. Id. AUSA Villafaña also told Mr. Edwards he could contact the State Attorney's Office, if he wished. To her knowledge, Mr. Edwards did not make the contact.

The Government has acted reasonably in keeping [redacted], and [redacted] informed. Petitioner's rights under the CVRA have not been violated. Therefore, her emergency petition should be denied.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: [signature] for

DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139
E-mail: dexter.lee@usdoj.gov
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via facsimile transmission and U.S. Mail, this 7th day of July, 2008, to: Brad Edwards, Esq., The Law Offices of Brad Edwards & Associates, LLC, (954) 924-1530, 2028 Harrison Street, Suite 202, Hollywood, Florida 33020.

[signature] for
DEXTER A. LEE
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/Johnson

IN RE: JANE DOE,

Petitioner.
_____/

DECLARATION OF A. MARIE VILLAFAÑA IN SUPPORT OF UNITED STATES' RESPONSE TO VICTIM'S EMERGENCY PETITION FOR ENFORCEMENT OF CRIME VICTIM RIGHTS ACT, 18 U.S.C. § 3771

1. I, A. Marie Villafaña, do hereby declare that I am a member in good standing of the Bar of the State of Florida. I graduated from the University of California at Berkeley School of Law (Boalt Hall) in 1993. After serving as a judicial clerk to the Hon. David F. Levi in Sacramento, California, I was admitted to practice in California in 1995. I also am admitted to practice in all courts of the states of Minnesota and Florida, the Eighth, Eleventh, and Federal Circuit Courts of Appeals, and the U.S. District Courts for the Southern District of Florida, the District of Minnesota, and the Northern District of California. My bar admission status in California and Minnesota is currently inactive. I am currently employed as an Assistant United States Attorney in the Southern District of Florida and was so employed during all of the events described herein.

S/AB

2. I am the Assistant United States Attorney assigned to the investigation of Jeffrey Epstein. The case was investigated by the Federal Bureau of Investigation ("FBI"). The federal investigation was initiated in 2006 at the request of the Palm Beach Police Department ("PBPD") into allegations that Jeffrey Epstein and his personal assistants had used facilities of interstate commerce to induce young girls between the ages of thirteen and seventeen to engage in prostitution, amongst other offenses.

3. Throughout the investigation, when a victim was identified, victim notification letters were provided to her both from your Affiant and from the FBI's Victim-Witness Specialist. Attached hereto are copies of the letters provided to Bradley Edwards' three clients, [redacted] and [redacted] Your Affiant's letter to [redacted] was provided by the FBI. (Ex. 1). Your Affiant's letter to [redacted] was hand-delivered by myself to [redacted] at the time that she was interviewed (Ex. 2).[2] Both [redacted] and [redacted] also received letters from the FBI's Victim-Witness Specialist, which were sent on January 10, 2008 (Exs. 3 & 4). [redacted] was identified via the FBI's investigation in 2007, but she initially refused to speak with investigators. [redacted] status as a victim of a federal offense was confirmed when she was interviewed by

[1]Attorney Edwards filed his Motion on behalf of "Jane Doe," without identifying which of his clients is the purported victim. Accordingly, I will address facts related to [redacted] and [redacted] All three of those clients were victims of Jeffrey Epstein's while they were minors beginning when they were fifteen years old.

[2]Please note that the dates on the U.S. Attorney's Office letters to [redacted] and [redacted] are not the dates that the letters were actually delivered. Letters to all known victims were prepared early in the investigation and delivered as each victim was contacted.

federal agents on May 28, 2008. The FBI's Victim-Witness Specialist sent a letter to [redacted] on May 30, 2008 (Ex. 5).

4. Throughout the investigation, the FBI agents, the FBI's Victim-Witness Specialist, and your Affiant had contact with [redacted] and [redacted] Attorney Edwards' other client, [redacted] was represented by counsel and, accordingly, all contact with [redacted] was made through that attorney. That attorney was James Eisenberg, and his fees were paid by Jeffrey Epstein, the target of the investigation.[3]

5. In the summer of 2007, Mr. Epstein and the U.S. Attorney's Office for the Southern District of Florida ("the Office") entered into negotiations to resolve the investigation. At that time, Mr. Epstein had been charged by the State of Florida with solicitation of prostitution, in violation of Florida Statutes § 796.07. Mr. Epstein's attorneys sought a global resolution of the matter. The United States subsequently agreed to defer federal prosecution in favor of prosecution by the State of Florida, so long as certain basic preconditions were met. One of the key objectives for the Government was to preserve a federal remedy for the young girls whom Epstein had sexually exploited. Thus, one condition of that agreement, notice of which was provided to the victims on July 9, 2008, is the following:

> "Any person, who while a minor, was a victim of a violation of an offense enumerated in Title 18, United States Code, Section 2255, will have the same rights to proceed under Section 2255 as she would have had, if Mr. Epstein

[3]The undersigned does not know when Mr. Edwards began representing [redacted] or whether [redacted] ver formally terminated Mr. Eisenberg's representation.

had been tried federally and convicted of an enumerated offense. For purposes of implementing this paragraph, the United States shall provide Mr. Epstein's attorneys with a list of individuals whom it was prepared to name in an Indictment as victims of an enumerated offense by Mr. Epstein. Any judicial authority interpreting this provision, including any authority determining which evidentiary burdens if any a plaintiff must meet, shall consider that it is the intent of the parties to place these identified victims in the same position as they would have been had Mr. Epstein been convicted at trial. No more; no less."

6. An agreement was reached in September 2007. The Agreement contained an express confidentiality provision.

7. Although individual victims were not consulted regarding the agreement, several had expressed concerns regarding the exposure of their identities at trial and they desired a prompt resolution of the matter. At the time the agreement was signed in September 2007, [redacted] was openly hostile to the prosecution of Epstein. The FBI attempted to interview [redacted] in October 2007, at which time she refused to provide any information regarding Jeffrey Epstein. None of Attorney Edwards' clients had expressed a desire to be consulted prior to the resolution of the federal investigation.

8. As explained above, one of the terms of the agreement deferring prosecution to the State of Florida was securing a federal remedy for the victims. In October 2007, shortly after the agreement was signed, four victims were contacted and these provisions were discussed. One of those victims was [redacted] who at the time was not represented, and she was given notice of the agreement. Notice was also provided of an expected change of plea in October 2007. When Epstein's attorneys learned that some of the victims had been

notified, they complained that the victims were receiving an incentive to overstate their involvement with Mr. Epstein in order to increase their damages claims. While your Affiant knew that the victims' statements had been taken and corroborated with independent evidence well before they were informed of the potential for damages, the agents and I concluded that informing additional victims could compromise the witnesses' credibility at trial if Epstein reneged on the agreement.

9. After [redacted] had been notified of the terms of the agreement, but before Epstein performed his obligations, [redacted] contacted the FBI because Epstein's counsel was attempting to take her deposition and private investigators were harassing her. Your Affiant secured pro bono counsel to represent [redacted] and several other identified victims. Pro bono counsel was able to assist [redacted] in avoiding the improper deposition. That pro bono counsel did not express to your Affiant that [redacted] was dissatisfied with the resolution of the matter.

10. In mid-June 2008, Attorney Edwards contacted your Affiant to inform me that he represented [redacted]. and [redacted] and asked to meet to provide me with information regarding Epstein. I invited Attorney Edwards to send to me any information that he wanted me to consider. Nothing was provided. I also advised Attorney Edwards that he should consider contacting the State Attorney's Office, if he so wished. I understand that no contact with that office was made. Attorney Edwards had alluded to [redacted] so I advised him that, to my knowledge, [redacted] was still represented by Attorney James Eisenberg.

11. On Friday, June 27, 2008, at approximate 4:15 p.m., your Affiant received a copy of the proposed state plea agreement and learned that the plea was scheduled for 8:30 a.m., Monday, June 30, 2008. Your Affiant and the Palm Beach Police Department attempted to provide notification to victims in the short time that Epstein's counsel had given us. Although all known victims were not notified, your Affiant specifically called attorney Edwards to provide notice to his clients regarding the hearing. Your Affiant believes that it was during this conversation that Attorney Edwards notified me that he represented [redacted] and I assumed that he would pass on the notice to her, as well. Attorney Edwards informed your Affiant that he could not attend but that someone would be present at the hearing. Your Affiant attended the hearing, but none of Attorney Edwards' clients was present.

12. On today's date, your Affiant provided the attached victim notifications to [redacted] and [redacted] via their attorney, Bradley Edwards (Exs. 6 & 7). A notification was not provided to [redacted] because the U.S. Attorney's modification limited Epstein's liability to victims whom the United States was prepared to name in an indictment. In light of [redacted] prior statements to law enforcement, your Affiant could not in good faith include [redacted] as a victim in an indictment and, accordingly, could not include her in the list provided to Epstein's counsel.

13. Furthermore, with respect to the Certification of Emergency, Attorney Edwards did not ever contact me prior to the filing of that Certification to demand the relief that he requests in his Emergency Petition. On the afternoon of July 7, 2008, after your Affiant had

already received the Certification of Emergency and Emergency Petition, I received a letter from Attorney Edwards that had been sent, via Certified Mail, on July 3, 2008. While that letter urges the Attorney General and the United States Attorney to consider "vigorous enforcement" of federal laws with respect to Jeffrey Epstein, it contains no demand for the relief requested in the Emergency Petition.

14. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 9th day of July, 2008.

A. Marie Villafaña, Esq.

[redacted]

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

June 7, 2007

DELIVERY BY HAND
Miss [redacted]

Re: Crime Victims' and Witnesses' Rights

Dear Miss [redacted]

Pursuant to the Justice for All Act of 2004, as a victim and/or witness of a federal offense, you have a number of rights. Those rights are:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any public court proceeding, unless the court determines that your testimony may be materially altered if you are present for other portions of a proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing.
(5) The reasonable right to confer with the attorney for the United States in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Members of the U.S. Department of Justice and other federal investigative agencies, including the Federal Bureau of Investigation, must use their best efforts to make sure that these rights are protected. If you have any concerns in this regard, please feel free to contact me at 561 209-1047, or Special Agent Nesbitt Kuyrkendall from the Federal Bureau of Investigation at 561 822-5946. You also can contact the Justice Department's Office for Victims of Crime in Washington, D.C. at 202-307-5983. That Office has a website at www.ovc.gov.

You can seek the advice of an attorney with respect to the rights listed above and, if you believe that the rights set forth above are being violated, you have the right to petition the Court for relief.

[redacted]
JUNE 7, 2007
PAGE 2

In addition to these rights, you are entitled to counseling and medical services, and protection from intimidation and harassment. If the Court determines that you are a victim, you also may be entitled to restitution from the perpetrator. A list of counseling and medical service providers can be provided to you, if you so desire. If you or your family is subjected to any intimidation or harassment, please contact Special Agent Kuyrkendall or myself immediately. It is possible that someone working on behalf of the targets of the investigation may contact you. Such contact does not violate the law. However, if you are contacted, you have the choice of speaking to that person or refusing to do so. If you refuse and feel that you are being threatened or harassed, then please contact Special Agent Kuyrkendall or myself.

You also are entitled to notification of upcoming case events. At this time, your case is under investigation. If anyone is charged in connection with the investigation, you will be notified.

Sincerely,

R. Alexander Acosta
United States Attorney

By: A. Marie Villafaña
A. Marie Villafaña
Assistant United States Attorney

cc: Special Agent Nesbitt Kuyrkendall, F.B.I.

U.S. Department of Justice

United States Attorney
Southern District of Florida

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West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

August 11, 2006

DELIVERY BY HAND
[redacted]

Re: Crime Victims' and Witnesses' Rights

Dear Miss [redacted]

Pursuant to the Justice for All Act of 2004, as a victim and/or witness of a federal offense, you have a number of rights. Those rights are:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any public court proceeding, unless the court determines that your testimony may be materially altered if you are present for other portions of a proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing.
(5) The reasonable right to confer with the attorney for the United States in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Members of the U.S. Department of Justice and other federal investigative agencies, including the Federal Bureau of Investigation, must use their best efforts to make sure that these rights are protected. If you have any concerns in this regard, please feel free to contact me at 561 209-1047, or Special Agent Nesbitt Kuyrkendall from the Federal Bureau of Investigation at 561 822-5946. You also can contact the Justice Department's Office for Victims of Crime in Washington, D.C. at 202-307-5983. That Office has a website at www.ovc.gov.

You can seek the advice of an attorney with respect to the rights listed above and, if you believe that the rights set forth above are being violated, you have the right to petition the Court for relief.

In addition to these rights, you are entitled to counseling and medical services, and p... from intimidation and harassment. If the Court determines that you are a victim, you al... entitled to restitution from the perpetrator. A list of counseling and medical service pro... be provided to you, if you so desire. If you or your family is subjected to any intim... harassment, please contact Special Agent Kuyrkendall or myself immediately. It is p... someone working on behalf of the targets of the investigation may contact you. Such co... not violate the law. However, if you are contacted, you have the choice of speaking to th... or refusing to do so. If you refuse and feel that you are being threatened or harassed, th... contact Special Agent Kuyrkendall or myself.

You also are entitled to notification of upcoming case events. At this time, your c... investigation. If anyone is charged in connection with the investigation, you will be no...

Sincerely,

R. Alexander Acosta
United States Attorney

By: A. Marie Villafaña
Assistant United States Attorney

cc: Special Agent Nesbitt Kuyrkendall, F.B.I.

U.S. Department of Justice
Federal Bureau of Investigation
FBI - West Palm Beach
Suite 500
505 South Flagler Drive
West Palm Beach, FL 33401
Phone: (561) 833-7517
Fax: (561) 833-7970

January 10, 2008

[redacted]

Re: Case Number: [redacted]

Dea[redacted]

This case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation.

As a crime victim, you have the following rights under 18 United States Code § 3771: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are accorded the rights described. Most of these rights pertain to events occurring after the arrest or indictment of an individual for the crime, and it will become the responsibility of the prosecuting United States Attorney's Office to ensure you are accorded those rights. You may also seek the advice of a private attorney with respect to these rights.

The Victim Notification System (VNS) is designed to provide you with direct information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this matter on the Internet at WWW.Notify.USDOJ.GOV or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. You will need the following Victim Identification Number (VIN) [redacted] and Personal Identification Number (PIN [redacted] anytime you contact the Call Center and the first time you log on to VNS on the Internet. In addition, the first time you access the VNS Internet site, you will be prompted to enter your last name (or business name) as currently contained in VNS. The name you should enter is [redacted]

If you have additional questions which involve this matter, please contact the office listed above. When you call, please provide the file number located at the top of this letter. Please remember, your participation in the notification part of this program is voluntary. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

Sincerely,

Twiler Smith

Twiler Smith
Victim Specialist

U.S. Department of Justice
Federal Bureau of Investigation
FBI - West Palm Beach
Suite 500
505 South Flagler Drive
West Palm Beach, FL 33401
Phone: (561) 833-7517
Fax: (561) 833-7970

January 10, 2008

James Elsenberg
One Clearlake Center Ste 704 Australian South
West Palm Beach, FL 33401

Re: [redacted]

Dear James Elsenberg:

You have requested to receive notifications for [redacted]

This case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation.

As a crime victim, you have the following rights under 18 United States Code § 3771: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are accorded the rights described. Most of these rights pertain to events occurring after the arrest or indictment of an individual for the crime, and it will become the responsibility of the prosecuting United States Attorney's Office to ensure you are accorded those rights. You may also seek the advice of a private attorney with respect to these rights.

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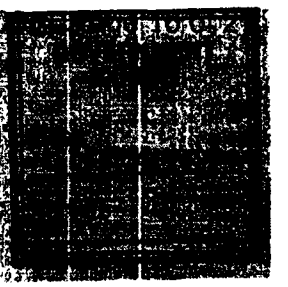
Sincerely,

Twiler Smith

Twiler Smith
Victim Specialist



U.S. Department of Justice
Federal Bureau of Investigation
FBI - West Palm Beach
Suite 500
505 South Flagler Drive
West Palm Beach, FL 33401
Phone: (561) 833-7517
Fax: (561) 833-7970

May 30, 2008

[redacted]

Re: [redacted]

Dear [redacted]

Your name was referred to the FBI's Victim Assistance Program as being a possible victim of a federal crime. We appreciate your assistance and cooperation while we are investigating this case. We would like to make you aware of the victim services that may be available to you and to answer any questions you may have regarding the criminal justice process throughout the investigation. Our program is part of the FBI's effort to ensure the victims are treated with respect and are provided information about their rights under federal law. These rights include notification of the status of the case. The enclosed brochures provide information about the FBI's Victim Assistance Program, resources and instructions for accessing the Victim Notification System (VNS). VNS is designed to provide you with information regarding the status of your case.

This case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation.

As a crime victim, you have the following rights under 18 United States Code § 3771: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are accorded the rights described. Most of these rights pertain to events occurring after the arrest or indictment of an individual for the crime, and it will become the responsibility of the prosecuting United States Attorney's Office to ensure you are accorded those rights. You may also seek the advice of a private attorney with respect to these rights.

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[redacted]

[redacted]

If you have additional questions which involve this matter, please contact the office listed above. When you call, please provide the file number located at the top of this letter. Please remember, your participation in the notification part of this program is voluntary. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

Sincerely,

Twiler Smith

Twiler Smith
Victim Specialist

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

July 9, 2008

VIA FACSIMILE
Brad Edwards, Esq.
The Law Offices of Brad Edwards & Associates, LLC
2028 Harrison Street, Suite 202
Hollywood, Florida 33020.

Re: **Jeffrey Epstein [redacted] NOTIFICATION OF IDENTIFIED VICTIM**

Dear Mr. Edwards:

By virtue of this letter, the United States Attorney's Office for the Southern District of Florida asks that you provide the following notice to your client, [redacted]

On June 30, 2008, Jeffrey Epstein (hereinafter referred to as "Epstein) entered a plea of guilty to violations of Florida Statutes Sections 796.07 (felony solicitation of prostitution) and 796.03 (procurement of minors to engage in prostitution), in the 15th Judicial Circuit in and for Palm Beach County (Case Nos. 2006-cf-009454AXXXMB and 2008-cf-009381AXXXMB) and was sentenced to a term of twelve months' imprisonment to be followed by an additional six months' imprisonment, followed by twelve months of Community Control I, with conditions of community confinement imposed by the Court.

In light of the entry of the guilty plea and sentence, the United States has agreed to defer federal prosecution in favor of this state plea and sentence, subject to certain conditions.

One such condition to which Epstein has agreed is the following:

"Any person, who while a minor, was a victim of a violation of an offense enumerated in Title 18, United States Code, Section 2255, will have the same rights to proceed under Section 2255 as she would have had, if Mr. Epstein

had been tried federally and convicted of an enumerated offense. For purposes of implementing this paragraph, the United States shall provide Mr. Epstein's attorneys with a list of individuals whom it was prepared to name in an Indictment as victims of an enumerated offense by Mr. Epstein. Any judicial authority interpreting this provision, including any authority determining which evidentiary burdens if any a plaintiff must meet, shall consider that it is the intent of the parties to place these identified victims in the same position as they would have been had Mr. Epstein been convicted at trial. No more; no less."

Through this letter, this Office hereby provides Notice that your client, [redacted] is an individual whom the United States was prepared to name as a victim of an enumerated offense.

Should your client decide to file a claim against Jeffrey Epstein, his attorney, Jack Goldberger, asks that you contact him at Atterbury Goldberger and Weiss, 250 Australian Avenue South, Suite 1400, West Palm Beach, FL 33401, (561) 659-8300.

Please understand that neither the U.S. Attorney's Office nor the Federal Bureau of Investigation can take part in or otherwise assist in civil litigation; however, if you do file a claim under 18 U.S.C. § 2255 and Mr. Epstein denies that your client is a victim of an enumerated offense, please provide notice of that denial to the undersigned.

Please thank your client for all of her assistance during the course of this examination and express the heartfelt regards of myself and Special Agents Kuyrkendall and Richards for the health and well-being of Ms. [redacted]

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: [signature]
A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

cc: Jack Goldberger, Esq.

U.S. Department of Justice

United States Attorney
Southern District of Florida

GOVERNMENT EXHIBIT
CASE NO. 08-80736-CV-MARRA
EXHIBIT NO. 7

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

July 9, 2008

VIA FACSIMILE
Brad Edwards, Esq.
The Law Offices of Brad Edwards & Associates, LLC
2028 Harrison Street, Suite 202
Hollywood, Florida 33020.

Re: **Jeffrey Epstein/[redacted] NOTIFICATION OF IDENTIFIED VICTIM**

Dear Mr. Edwards:

By virtue of this letter, the United States Attorney's Office for the Southern District of Florida asks that you provide the following notice to your client, [redacted]

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R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: [signature]
A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

cc: Jack Goldberger, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-80811-CIV-ZLOCH/SNOW

[redacted]

Plaintiff,

vs.

JEFFREY EPSTEIN and
SARAH KELLEN,

Defendants.
_____/

FILED UNDER SEAL*

Sealed

FILED by _____ D.C.
JUL 25 2008
STEVEN M. LARIMORE
CLERK U.S. DIST. CT
S.D. OF FLA. MIAMI

DEFENDANTS JEFFREY EPSTEIN AND SARAH KELLEN'S MOTION FOR STAY

* This motion is filed under seal because the deferred-prosecution agreement between the United States Attorney's Office (by Assistant U.S. Attorney Marie C. Villafana, Esq.) and Mr. Epstein, discussed herein, contains a confidentiality clause.

1/7

Defendants Jeffrey Epstein and Sarah Kellen respectfully move for a mandatory stay of this action under Title 18, United States Code, Section 3509(k), Section 1595(b)(1), and alternatively, under this Court's discretionary authority to stay civil litigation, based on the existence of a pending federal criminal action.

Introduction

This lawsuit arises from a pending federal criminal action concerning, among other things, an alleged assault of the plaintiff Jane Doe, who, according to her complaint, on "numerous occasions" provided "massages" to Epstein with "no credentials to provide massage therapy" and was "sometimes paid . . . for the 'sessions'." Compl., ¶¶ 6, 11. A federal statute directly on point provides that when a civil suit alleging damages to a minor victim arises out of the same occurrence as a "criminal action," the civil suit "***shall be stayed*** until the end of ***all*** phases of the criminal action." 18 U.S.C. § 3509(k) (emphasis added).[1]

[1] The full text of the mandatory-stay provision reads:

> If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

18 U.S.C. § 3509(k).

Accordingly, a stay of this case is mandatory until the criminal action arising from the same allegations is no longer pending.

The Pending Federal Criminal Action

In 2006, a Florida state grand jury indicted Jeffrey Epstein on allegations similar to those in the instant action (*State of Florida v. Jeffrey Epstein*, Case No. 2006 CF 09454A, Fifteenth Judicial Circuit, Palm Beach County) (the "Florida Criminal Action"). Shortly thereafter, the United States Attorney's Office for the Southern District of Florida (the "USAO") began a federal grand-jury investigation into allegations arising out of the same incidents alleged in the instant action (Grand Jury No. 07-103 (WPB), United States District Court for the Southern District of Florida) ("the Federal Criminal Action").

In September 2007, the USAO and Mr. Epstein entered into a highly unusual and unprecedented deferred-prosecution agreement (the "Agreement"), in which the USAO agreed to ***defer*** (not dismiss or close) the Federal Criminal Action ***on the condition that*** Mr. Epstein continue to comply with numerous obligations, the first of which was pleading guilty to certain state charges in the Florida Criminal Action. The Agreement itself uses the term "***deferred***" (rather than "dismissed" or "closed") to describe the status of the Federal Criminal Action:

> THEREFORE, on the authority of R. Alexander Acosta, United States Attorney for the Southern District of Florida prosecution in this District, for these offenses shall be deferred in favor of prosecution by

> the State of Florida, provided that Epstein abides by the following conditions and the requirements of this Agreement . . . .

Agreement, at 2.

By no stretch did the USAO finalize, close, complete, dismiss or abandon the Federal Criminal Action. Indeed, as the lead federal prosecutor recently explained, the USAO merely "agreed to ***defer*** federal prosecution in favor of prosecution by the State of Florida . . . ." *See In re: Jane Doe*, Case No. 08-80736-CIV-Marra/Johnson (S.D. Fla.) (D.E. 14), Decl. of AUSA Villafana, 07/09/08, ¶ 5, attached hereto as Exhibit "A" (emphasis added). Under the Agreement, the USAO presently retains the continuing right to indict Mr. Epstein -- or to unseal "any" already-existing federal "charges" that may already have been handed up by the federal grand jury and sealed - - should he breach any of its provisions. Agreement, at 2.

The period of the deferral continues until three months after Mr. Epstein completes service of his sentence in the Florida Criminal Action. *Id.* Indeed, the final three months of the Agreement's term constitute an extended period during which the USAO expressly retains the ability to evaluate whether Epstein committed any breaches of his numerous obligations under the agreement while he was serving his state sentence, and, if it so determines, reserves the right to indict

(or unseal an existing indictment against) Mr. Epstein - - even after he has completed serving his entire state sentence.

The Agreement further provides that upon Epstein's execution of a plea agreement in the State Criminal Case, the Federal Criminal Action "will be suspended" and all pending grand-jury subpoenas "***will be held in abeyance*** unless and until the defendant violates any term of this agreement." Agreement, at 5 (emphasis added). The Agreement directs the USAO and Epstein to "***maintain their evidence***, specifically evidence requested by or directly related to the grand jury subpoenas that have been issued," and to maintain such evidence "inviolate." *Id.* (emphasis added). It also expressly provides that the grand-jury subpoenas continue to remain "***outstanding***" ***until "the successful completion*** of the terms of this agreement." *Id.* (emphasis added).

Further, it includes a promise not to prosecute movant/defendant Sarah Kellen, only if "Epstein successfully fulfills all of the terms and conditions of th[e] agreement." *Id.*

Finally, the Agreement provides that the USAO's declination of prosecution for certain enumerated offenses and dismissal of any existing (sealed) charges ***will not occur until 90 days following the completion of his state sentence***:

> If the United States Attorney should determine, based on reliable evidence, that, during the period of the Agreement, Epstein willfully violated any of the conditions of this Agreement, then the

> United States Attorney may, within ninety (90) days following the expiration of the term of home confinement discussed below, provide Epstein with timely notice specifying the condition(s) of the Agreement that he has violated, and shall initiate its prosecution on any offense within sixty (60) days' of [sic] giving notice of the violation. Any notice provided to Epstein pursuant to this paragraph shall be provided within 60 days of the United States learning of facts which may provide a basis for a determination of a breach of the Agreement.
>
> After timely fulfilling all the terms and conditions of the Agreement, no prosecution for the offenses set out on pages 1 and 2 of this Agreement, nor any other offenses that have been the subject of the joint investigation by the Federal Bureau of Investigation and the United States Attorney's Office, nor any offenses that arose from the Federal Grand Jury investigation will be instituted in this District, and the charges against Epstein, if any, will be dismissed.

Agreement, at 2.

Consistent with the Agreement and its position that the Federal Criminal Action continues to remain pending, the USAO recently sent letters to attorneys for people that the USAO has designated as "victims." In those letters, the USAO asked, "[I]f you do file a claim under 18 U.S.C. § 2255 and Mr. Epstein denies that your client is a victim of an enumerated offense, please provide notice of that denial to the undersigned [AUSA]." *See* Decl. of AUSA Villafana, Exhs. 6 & 7, at 2 (July 9, 2008). The clear implication of the USAO's request (by which the USAO appears to involve itself in the instant litigation, despite advising the recipients that it cannot "take part in or otherwise assist in civil litigation," *id.* at 2), is that the USAO believes that such denial might breach the Agreement.

Accordingly, the Federal Criminal Action remains "pending."

Discussion

I. Section 3509(k) Imposes a Mandatory Stay.

The language of Title 18, United States Code, Section 3509(k) is clear and mandatory: a parallel "civil action ***shall be stayed*** until the end of all phases of the criminal action." 18 U.S.C. § 3509(k) (emphasis added). The word "***shall***" means that the statute's command is mandatory and not subject to a Court's discretion. *See, e.g., Lopez v. Davis,* 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' to impose ***discretionless obligations***") (emphasis added); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) (explaining that "the mandatory 'shall' . . . normally creates an obligation ***impervious to judicial discretion***") (emphasis added). *Cf. Miller v. French*, 530 U.S. 327, 350 (2000) (construing the litigation-stay provision of the Prison Litigation Reform Act, holding, "Through the PLRA, Congress clearly intended to make operation of the automatic stay ***mandatory***, precluding courts from exercising their equitable powers to enjoin the stay. And we conclude that this provision does not violate separation of powers principles.") (emphasis added).

One District Court within the Eleventh Circuit recently construed "the plain language of § 3509(k)" as "***requir[ing] a stay*** in a case . . . where . . . a parallel criminal action [is] pending." *Doe v. Francis*, No. 5:03 CV 260, 2005 WL 950623,

at *2 (N.D. Fla. Apr. 20, 2005) (*Francis II*) (emphasis added). *Accord Doe v. Francis*, No. 5:03 CV 260, 2005 WL 517847, at *1–2 (N.D. Fla. Feb. 10, 2005) (*Francis I*) (staying federal civil action in favor of "a criminal case currently pending in state court in Bay County, Florida, arising from the same facts and involving the same parties as the Instant action," noting that "the language of 18 U.S.C. § 3509(k) is clear that ***a stay is required*** in a case such as this where a parallel criminal action is pending which arises from the same occurrence involving minor victims") (emphasis added). There is no contrary opinion from any court.

In determining that the federal stay provision is mandatory, the *Francis II* court expressed that there was apparently no case law supporting, or even "discussing the [avoidance] of a stay [under the command of] § 3509(k)." *Francis II*, 2005 WL 950623, at *2. Deferring to the statute as written, the *Francis II* court rejected the plaintiffs' argument that some of the alleged victims had already reached their majority. *See id.* The court similarly rejected the plaintiffs' argument that it would be in the victims' best interests to avoid a stay so as to counteract the victims' "ongoing and increasing mental harm due to the 'frustrating delay in both the criminal case and [the civil] case.'" *Id.*

II. Section 3509(k) Applies to Investigations, Not Just Indictments.

While there is no unsealed indicted criminal case against Mr. Epstein, the government's criminal investigation against him remains open. Section 3509(k) clearly applies to stay civil cases during the pendency, not only of indicted criminal cases, but also of pre-indictment criminal investigations.

The term "criminal action" is not expressly defined in § 3509(k). It is defined, however, by a closely related statute. Title 18, U.S.C. § 1595 provides a civil remedy for "forced labor" and "sex trafficking" violations, but stays such actions "during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."[2] In enacting § 1595, Congress

[2] The full text of that statute provides:

> § 1595. Civil remedy
>
> (a) An individual who is a victim of a violation of section 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.
>
> (b) (1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.
>
> (2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

18 U.S.C. § 1595.

specifically intended that the term "criminal action" would be applied extremely broadly. Accordingly, Congress took pains to ensure that courts would give it the broadest possible construction and, for that reason, specified in the definition provision that "criminal action" also "includes investigation." 18 U.S.C. § 1595(b)(2). The only reported decision addressing this provision interpreted it according to its plain language. *See Ara v. Khan*, No. CV 07-1251, 2007 WL 1726456, *2 (E.D.N.Y. June 14, 2007) (ordering "all proceedings in this case stayed pending the conclusion of the government's criminal investigation of the defendants and of ***any*** resulting criminal prosecution") (emphasis added).

Given that the USAO's Agreement with Epstein indicates that:

- the grand-jury's subpoenas remain "outstanding" (Agreement, at 5);
- the subpoenas are "h[e]ld . . . in abeyance" (*id.*);
- the subpoenas are not "withdrawn" (*id.*);
- the parties must "maintain their evidence" (*id.*) (which would be entirely unnecessary if the investigation against Epstein were closed);
- "any" existing "charges" will ***not "be dismissed" until after*** Epstein has "timely fulfill[ed] all the terms and conditions of the Agreement" (*id.* at 2) (emphasis added); and
- "prosecution in this District . . . shall be ***deferred***" (*id.*) (but not closed or dismissed) - -

then the only reasonable conclusion is that the Federal Criminal Action remains "pending."

The ordinary meaning of the adjective "pending" is "[r]emaining undecided; awaiting decision . . . ." *Black's Law Dictionary* 1154 (8th ed. 2004).[3] *See also White v. Klitzkie*, 281 F.3d 920, 928 (9th Cir. 2002) (relying on *Black's Law Dictionary*, in the context of a criminal case, for the definition of "pending" as "awaiting decision"); *Swartz v. Meyers*, 204 F.3d 417, 421 (3d Cir. 2000) (relying on *Black's Law Dictionary* for the definition of "pending," expressly because "'pending' is not defined in the statute"). Any common-sense reading of the Agreement and the USAO's recent sworn construction of it, is consonant with the Federal Criminal Action's "remaining undecided" and "awaiting decision." *See Unified Gov't of Athens-Clarke County v. Athens Newspapers, LLC*, No. S07G1133, __S.E.2d __, 2008 WL 2579238, *3 (Ga. June 30, 2008) (reviewing a public-records request against Georgia's "pending investigation" exception to its open-records law, and holding that "a seemingly inactive investigation which has not yet resulted in a prosecution logically "remains undecided," and is therefore "pending," until it "is concluded and the file ***closed***") (emphasis added).

[3] The United States Court of Appeals for the Eleventh Circuit routinely relies on *Black's Law Dictionary* for the definition of statutory terms, including in criminal cases. *See e.g., United States v. Young*, 528 F.3d 1294, 1297 n.3 (11th Cir. 2008) (definitions of criminal "complaint" and "indictment"); *United States v. Brown*, 526 F.3d 691, 705 (11th Cir. 2008) (definition of "knowingly" in criminal statute).

III. Section 3509(k) Applies Even After a Plaintiff Turns 18.

The parallel stay provision in § 1595, discussed *supra* at 8-9, mandates, without exception, that any civil action brought under that section for violation of § 1591 (prohibiting transportation of minors for prostitution) "shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim." 18 U.S.C. § 1591(b)(1). Whether the § 1595 plaintiff has turned 18 does not vitiate the efficacy of this mandatory stay.

An example illustrates why the stay provided in § 3509(k) has the same broad scope as the stay provided in § 1591(b)(1). As discussed above, § 3509(k) stays any civil suit for injury to a minor, arising out of the same occurrence as a pending criminal action. One type of civil suit falling within § 3509(k)'s ambit is a suit seeking redress for a violation of 18 U.S.C. § 2423(a). Section 2423(a) - - just like § 1591 - - prohibits transportation of minors for prostitution. The elements of both statutes are identical. There would simply be no legitimate basis for Congress to differentiate between the consequences attached to violating these two sections. Thus, just as Congress mandated under § 1595(b)(1) that civil discovery shall be stayed when there is an ongoing federal investigation under § 1591 (even after the victim turns 18), the identical treatment should apply under § 3509(k) to civil actions brought for the identical violation of § 2423(a).

Logic compels a rule requiring continued application of the § 3509(k) stay to a putative victim who has since turned 18. Consider again the example of § 2243(a). Assume that the USAO is investigating a § 2243(a) violator with two alleged victims; one who is now 17, and one who has turned 19. Assume further that both decide to sue the alleged offender while the USAO is still in the process of conducting its criminal investigation. Why would Congress enact § 3509(k) to prohibit the defendant from conducting civil discovery in the 17-year-old's lawsuit, but permit him to conduct full discovery in the 19-year-old's lawsuit, including taking the depositions of both the 19- and the 17-year-old, the federal investigating agents and all the grand-jury witnesses? This could not have been Congress' intent.

The legislative history to a statute resembling § 1595 is also instructive. When Congress enacted 18 U.S.C. § 2255, it provided a civil remedy to any "minor . . . victim" of enumerated federal sex offenses. *See* Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783, § 703 (1986). In 2006, Congress amended the statute to clarify that the civil cause of action was available not just while the victim was a minor, but even after she or he turned 18. *See* Pub. L. 109-248, 120 Stat. 650, § 707 (b)(1)(A) (amending § 2255 to permit suit by adults who were victims of enumerated federal offenses when they were minors, by deleting "Any minor who is [a victim]" and adding "Any person, who, while a

completion of a criminal action. *See also* 18 USC § 3509(k).

H.R. Rep. 108-264(II), 108th Cong., 1st Sess. (2003), *reprinted at* 2003 WL 22272907, at *16-17 ("agency view" by the Department of Justice on bill later codified at 18 U.S.C. § 1595).

The Department specifically argued to Congress in the clearest terms: "We believe that prosecutions should take priority over civil redress and that ***prosecutions should be complete*** prior to going forward with civil suits." *Id.* at 17 (emphasis added). Nowhere did the Department suggest that pending prosecutions warrant ***less*** protection (*i.e.*, should be "hinder[ed]") simply because a particular civil plaintiff happens to reach his or her 18th birthday.

IV. A Stay is Mandatory Despite Resulting "Delay" to Civil Lawsuits.

Inherent in any § 3509(k) stay is delay to the progress (discovery, trial, appeal) of ***all*** related civil lawsuits. Congress recognized this in enacting the stay provision, which necessarily prioritized the interests of completing a criminal investigation and prosecution over the interests of a particular plaintiff in seeking personal pecuniary damages. Based on this reasoning, the *Francis II* court specifically refused to provide any relief to plaintiffs "simply because the state [criminal] matter is not progressing as fast as they would hope." The court made this determination despite the plaintiffs' complaints about the "frustrating delay" and that "the state criminal case 'has languished for almost two years with no end

in sight,'" finding that this "is a matter to be addressed in state [criminal] court." *Id.* Accordingly, the anticipated delay in this case, attendant to the term of the deferred-prosecution agreement, does not change the clear command of § 3509(k).

According to her own pleadings, the plaintiff waited seven years before filing this lawsuit, Compl. ¶¶ 2,6, and so cannot rightfully claim prejudice from additional temporary delay.

V. Section 3509 Aside, a Discretionary Stay is Warranted.

Even, *arguendo*, were this Court not to apply the mandate of § 3509, a discretionary stay should still be entered during the pendency of the Federal Criminal Action. *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003) ("No question exists that this court has the power to stay a civil proceeding due to an active, parallel criminal investigation."). Other federal statutes support such a stay -- particularly when the criminal action may be adversely affected by the civil litigation. For example, under 18 U.S.C. § 2712(e)(1), "the court shall stay any action commenced [against the United States] if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related investigation or prosecution of a related criminal case." Allowing this lawsuit to progress while Epstein remains subject to the Federal Criminal Action will prejudice him irrevocably and irreparably. As

provided below, there are several adverse effects to allowing this case to proceed while the Federal Criminal Action remains pending.

In this lawsuit, Epstein has a right to defend himself. In the Federal Criminal Action, Epstein has a right against self-incrimination.[4] Without a stay, Epstein will be immediately forced to abandon one of these rights.

Should he choose his Fifth Amendment rights, he will expose himself to an adverse inference at the summary-judgment stage and at trial. *See generally, Wehling v. Columbia Broad. Sys*, 611 F.2d 1026, 1027 (5th Cir. 1980) (observing that "invocation of the privilege would be subject to the drawing of an adverse inference by the trier of fact"). On the other hand, should Epstein choose his right to defend himself in this lawsuit, the USAO will be able to use his responses at every stage of the discovery and trial process (*e.g.*, his Answer, responses to document requests, responses to requests for admissions, sworn answers to interrogatories, answers to deposition questions, and trial testimony) to his detriment in the Federal Criminal Action.[5]

[4] The privilege applies in "instances where the witness has reasonable cause to apprehend danger" of criminal liability. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

[5] This could give the USAO a tremendous advantage in prosecuting Epstein in the Federal Criminal Action. *See* Comment, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 Harv. L. Rev. 1023, 1026 (1985) (observing that "the prosecutor may have access to detailed civil depositions of the accused witnesses, while the rules of criminal procedure bar the accused from deposing the prosecutor's witnesses").

In this lawsuit, even before civil discovery begins, under the Initial Disclosures required by Fed. R. Civ. P. 26 and S.D. Fla. Local Rule 26.1, Epstein "must" disclose the identities of all the witnesses he would call in his defense to the Federal Criminal Action (Rule 26(a)(1)(A)(i)), copies of "all documents" he "may use to support [his] defenses" (Rule 26(a)(1)(A)(ii)), as well as the identity of "any" expert witness he "may use at trial," along with mandatory disclosure of "a written report" containing "a complete statement of all opinions the [expert] will express and the basis and reasons for them" (Rule 26(a)(2)(A) and (B)(i)).

In contrast, in the pending Federal Criminal Action, which is governed exclusively by the Federal Rules of Criminal Procedure, the USAO would not be entitled to compel pre-trial production of ***any*** of this information. *See* Fed. R. Cr. P. 16(b)(1)(A), (C), and 16(b)(2); *United States v. Argomaniz*, 925 F.2d 1349, 1355-56 (11th Cir. 1991) (explaining act-of-production privilege).

Thus, absent a stay of this civil action, the USAO would receive fundamentally unfair access to defense information and highly prejudicial advance insight into criminal defense strategy. *See* Comment, 98 Harv. L. Rev. at 1030 ("To the extent that a prosecutor acquires evidence that was elicited from the accused in a parallel civil proceeding, the criminal process becomes less adversarial.").

Without a stay in place, discovery will proceed, including against third parties. Mr. Epstein will have no alternative but to issue subpoenas seeking evidence from state and federal law-enforcement officers. For example, Epstein is clearly entitled to discover evidence of prior statements (including inconsistent statements) given by witnesses whom law-enforcement has previously interviewed. *See, e.g., Cox v. Treadway,* 75 F.3d 230 (6th Cir. 1996) (holding that district court properly admitted testimony of prosecutor about prior inconsistent statements that witness made to the prosecutor). Likewise, Epstein may be entitled to discovery of relevant evidence that is in the present possession of the grand jury or other law-enforcement agencies. *See, e.g., Simpson v. Hines*, 729 F. Supp. 526, 527 (E.D. Tex. 1989) ("The grand jury has concluded its deliberations . . . . The need for secrecy of these specific tapes no longer outweighs other concerns."); *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 59 (E.D. Pa. 1980) ("[W]here, as here, the grand jury has completed its work and all that is sought are those documents turned over to the grand jury by the corporations which are defendants in the civil case, the considerations . . . militating against disclosure are beside the point.") (*citing Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211 (1979)).

In response to such third-party subpoenas to law-enforcement witnesses, we anticipate that it will be the government, not Mr. Epstein, who will object to

discovery in this civil case, until the final conclusion of the Federal Criminal Action.

Conclusion

Because this lawsuit arises from the same allegations as the Federal Criminal Action, this Court should stay this lawsuit until that action is no longer pending.

Respectfully submitted,

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Attorneys for Defendant Jeffrey Epstein

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/Johnson

IN RE: JANE DOE,

Petitioner.
_____/

DECLARATION OF A. MARIE VILLAFAÑA IN SUPPORT OF UNITED STATES' RESPONSE TO VICTIM'S EMERGENCY PETITION FOR ENFORCEMENT OF CRIME VICTIM RIGHTS ACT, 18 U.S.C. § 3771

1. I, A. Marie Villafaña, do hereby declare that I am a member in good standing of the Bar of the State of Florida. I graduated from the University of California at Berkeley School of Law (Boalt Hall) in 1993. After serving as a judicial clerk to the Hon. David F. Levi in Sacramento, California, I was admitted to practice in California in 1995. I also am admitted to practice in all courts of the states of Minnesota and Florida, the Eighth, Eleventh, and Federal Circuit Courts of Appeals, and the U.S. District Courts for the Southern District of Florida, the District of Minnesota, and the Northern District of California. My bar admission status in California and Minnesota is currently inactive. I am currently employed as an Assistant United States Attorney in the Southern District of Florida and was so employed during all of the events described herein.

S/AMB

2. I am the Assistant United States Attorney assigned to the investigation of Jeffrey Epstein. The case was investigated by the Federal Bureau of Investigation ("FBI"). The federal investigation was initiated in 2006 at the request of the Palm Beach Police Department ("PBPD") into allegations that Jeffrey Epstein and his personal assistants had used facilities of interstate commerce to induce young girls between the ages of thirteen and seventeen to engage in prostitution, amongst other offenses.

3. Throughout the investigation, when a victim was identified, victim notification letters were provided to her both from your Affiant and from the FBI's Victim-Witness Specialist. Attached hereto are copies of the letters provided to Bradley Edwards' three clients, [redacted], [redacted], and [redacted].[1] Your Affiant's letter to [redacted] was provided by the FBI. (Ex. 1). Your Affiant's letter to [redacted] was hand-delivered by myself to [redacted] at the time that she was interviewed (Ex. 2).[2] Both [redacted] and [redacted] also received letters from the FBI's Victim-Witness Specialist, which were sent on January 10, 2008 (Exs. 3 & 4). [redacted] was identified via the FBI's investigation in 2007, but she initially refused to speak with investigators. [redacted] status as a victim of a federal offense was confirmed when she was interviewed by

[1]Attorney Edwards filed his Motion on behalf of "Jane Doe," without identifying which of his clients is the purported victim. Accordingly, I will address facts related to [redacted], and [redacted]. All three of those clients were victims of Jeffrey Epstein's while they were minors beginning when they were fifteen years old.

[2]Please note that the dates on the U.S. Attorney's Office letters to [redacted] and [redacted] are not the dates that the letters were actually delivered. Letters to all known victims were prepared early in the investigation and delivered as each victim was contacted.

federal agents on May 28, 2008. The FBI's Victim-Witness Specialist sent a letter to [redacted] on May 30, 2008 (Ex. 5).

4. Throughout the investigation, the FBI agents, the FBI's Victim-Witness Specialist, and your Affiant had contact with [redacted] and [redacted] Attorney Edwards' other client, [redacted] was represented by counsel and, accordingly, all contact with [redacted] was made through that attorney. That attorney was James Eisenberg, and his fees were paid by Jeffrey Epstein, the target of the investigation.[3]

5. In the summer of 2007, Mr. Epstein and the U.S. Attorney's Office for the Southern District of Florida ("the Office") entered into negotiations to resolve the investigation. At that time, Mr. Epstein had been charged by the State of Florida with solicitation of prostitution, in violation of Florida Statutes § 796.07. Mr. Epstein's attorneys sought a global resolution of the matter. The United States subsequently agreed to defer federal prosecution in favor of prosecution by the State of Florida, so long as certain basic preconditions were met. One of the key objectives for the Government was to preserve a federal remedy for the young girls whom Epstein had sexually exploited. Thus, one condition of that agreement, notice of which was provided to the victims on July 9, 2008, is the following:

> "Any person, who while a minor, was a victim of a violation of an offense enumerated in Title 18, United States Code, Section 2255, will have the same rights to proceed under Section 2255 as she would have had, if Mr. Epstein

[3]The undersigned does not know when Mr. Edwards began representing [redacted] or whether [redacted] ever formally terminated Mr. Eisenberg's representation.

had been tried federally and convicted of an enumerated offense. For purposes of implementing this paragraph, the United States shall provide Mr. Epstein's attorneys with a list of individuals whom it was prepared to name in an Indictment as victims of an enumerated offense by Mr. Epstein. Any judicial authority interpreting this provision, including any authority determining which evidentiary burdens if any a plaintiff must meet, shall consider that it is the intent of the parties to place these identified victims in the same position as they would have been had Mr. Epstein been convicted at trial. No more; no less."

6. An agreement was reached in September 2007. The Agreement contained an express confidentiality provision.

7. Although individual victims were not consulted regarding the agreement, several had expressed concerns regarding the exposure of their identities at trial and they desired a prompt resolution of the matter. At the time the agreement was signed in September 2007, [redacted] was openly hostile to the prosecution of Epstein. The FBI attempted to interview [redacted] in October 2007, at which time she refused to provide any information regarding Jeffrey Epstein. None of Attorney Edwards' clients had expressed a desire to be consulted prior to the resolution of the federal investigation.

8. As explained above, one of the terms of the agreement deferring prosecution to the State of Florida was securing a federal remedy for the victims. In October 2007, shortly after the agreement was signed, four victims were contacted and these provisions were discussed. One of those victims was [redacted] who at the time was not represented, and she was given notice of the agreement. Notice was also provided of an expected change of plea in October 2007. When Epstein's attorneys learned that some of the victims had been

notified, they complained that the victims were receiving an incentive to overstate their involvement with Mr. Epstein in order to increase their damages claims. While your Affiant knew that the victims' statements had been taken and corroborated with independent evidence well before they were informed of the potential for damages, the agents and I concluded that informing additional victims could compromise the witnesses' credibility at trial if Epstein reneged on the agreement.

9. After [redacted] had been notified of the terms of the agreement, but before Epstein performed his obligations, [redacted] contacted the FBI because Epstein's counsel was attempting to take her deposition and private investigators were harassing her. Your Affiant secured pro bono counsel to represent [redacted] and several other identified victims. Pro bono counsel was able to assist [redacted] in avoiding the improper deposition. That pro bono counsel did not express to your Affiant that [redacted] was dissatisfied with the resolution of the matter.

10. In mid-June 2008, Attorney Edwards contacted your Affiant to inform me that he represented [redacted]. and [redacted] and asked to meet to provide me with information regarding Epstein. I invited Attorney Edwards to send to me any information that he wanted me to consider. Nothing was provided. I also advised Attorney Edwards that he should consider contacting the State Attorney's Office, if he so wished. I understand that no contact with that office was made. Attorney Edwards had alluded to [redacted] so I advised him that, to my knowledge, [redacted] was still represented by Attorney James Eisenberg.

11. On Friday, June 27, 2008, at approximate 4:15 p.m., your Affiant received a copy of the proposed state plea agreement and learned that the plea was scheduled for 8:30 a.m., Monday, June 30, 2008. Your Affiant and the Palm Beach Police Department attempted to provide notification to victims in the short time that Epstein's counsel had given us. Although all known victims were not notified, your Affiant specifically called attorney Edwards to provide notice to his clients regarding the hearing. Your Affiant believes that it was during this conversation that Attorney Edwards notified me that he represented [redacted] and I assumed that he would pass on the notice to her, as well. Attorney Edwards informed your Affiant that he could not attend but that someone would be present at the hearing. Your Affiant attended the hearing, but none of Attorney Edwards' clients was present.

12. On today's date, your Affiant provided the attached victim notifications to [redacted] and [redacted] via their attorney, Bradley Edwards (Exs. 6 & 7). A notification was not provided to [redacted] because the U.S. Attorney's modification limited Epstein's liability to victims whom the United States was prepared to name in an indictment. In light of [redacted]s prior statements to law enforcement, your Affiant could not in good faith include [redacted] as a victim in an indictment and, accordingly, could not include her in the list provided to Epstein's counsel.

13. Furthermore, with respect to the Certification of Emergency, Attorney Edwards did not ever contact me prior to the filing of that Certification to demand the relief that he requests in his Emergency Petition. On the afternoon of July 7, 2008, after your Affiant had

already received the Certification of Emergency and Emergency Petition, I received a letter from Attorney Edwards that had been sent, via Certified Mail, on July 3, 2008. While that letter urges the Attorney General and the United States Attorney to consider "vigorous enforcement" of federal laws with respect to Jeffrey Epstein, it contains no demand for the relief requested in the Emergency Petition.

14. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 9th day of July, 2008.

A. Marie Villafaña, Esq.

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

June 7, 2007

DELIVERY BY HAND
Mi[redacted]

Re: Crime Victims' and Witnesses' Rights

Dear Miss [redacted]

Pursuant to the Justice for All Act of 2004, as a victim and/or witness of a federal offense, you have a number of rights. Those rights are:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any public court proceeding, unless the court determines that your testimony may be materially altered if you are present for other portions of a proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing.
(5) The reasonable right to confer with the attorney for the United States in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Members of the U.S. Department of Justice and other federal investigative agencies, including the Federal Bureau of Investigation, must use their best efforts to make sure that these rights are protected. If you have any concerns in this regard, please feel free to contact me at 561 209-1047, or Special Agent Nesbitt Kuyrkendall from the Federal Bureau of Investigation at 561 822-5946. You also can contact the Justice Department's Office for Victims of Crime in Washington, D.C. at 202-307-5983. That Office has a website at www.ovc.gov.

You can seek the advice of an attorney with respect to the rights listed above and, if you believe that the rights set forth above are being violated, you have the right to petition the Court for relief.

In addition to these rights, you are entitled to counseling and medical services, and protection from intimidation and harassment. If the Court determines that you are a victim, you also may be entitled to restitution from the perpetrator. A list of counseling and medical service providers can be provided to you, if you so desire. If you or your family is subjected to any intimidation or harassment, please contact Special Agent Kuyrkendall or myself immediately. It is possible that someone working on behalf of the targets of the investigation may contact you. Such contact does not violate the law. However, if you are contacted, you have the choice of speaking to that person or refusing to do so. If you refuse and feel that you are being threatened or harassed, then please contact Special Agent Kuyrkendall or myself.

You also are entitled to notification of upcoming case events. At this time, your case is under investigation. If anyone is charged in connection with the investigation, you will be notified.

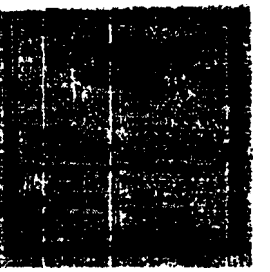
Sincerely,

R. Alexander Acosta
United States Attorney

By: A. Marie Villafaña

A. Marie Villafaña
Assistant United States Attorney

cc: Special Agent Nesbitt Kuyrkendall, F.B.I.



U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile (561) 820-8777

August 11, 2006

DELIVERY BY HAND
Miss [redacted]

Re: Crime Victims' and Witnesses' Rights

Dear Miss [redacted]

Pursuant to the Justice for All Act of 2004, as a victim and/or witness of a federal offense, you have a number of rights. Those rights are:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any public court proceeding, unless the court determines that your testimony may be materially altered if you are present for other portions of a proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing.
(5) The reasonable right to confer with the attorney for the United States in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Members of the U.S. Department of Justice and other federal investigative agencies, including the Federal Bureau of Investigation, must use their best efforts to make sure that these rights are protected. If you have any concerns in this regard, please feel free to contact me at 561 209-1047, or Special Agent Nesbitt Kuyrkendall from the Federal Bureau of Investigation at 561 822-5946. You also can contact the Justice Department's Office for Victims of Crime in Washington, D.C. at 202-307-5983. That Office has a website at www.ovc.gov.

You can seek the advice of an attorney with respect to the rights listed above and, if you believe that the rights set forth above are being violated, you have the right to petition the Court for relief.

In addition to these rights, you are entitled to counseling and medical services, and p... from intimidation and harassment. If the Court determines that you are a victim, you ... entitled to restitution from the perpetrator. A list of counseling and medical service pro... be provided to you, if you so desire. If you or your family is subjected to any intim... harassment, please contact Special Agent Kuyrkendall or myself immediately. It is p... someone working on behalf of the targets of the investigation may contact you. Such co... not violate the law. However, if you are contacted, you have the choice of speaking to th... or refusing to do so. If you refuse and feel that you are being threatened or harassed, the... contact Special Agent Kuyrkendall or myself.

You also are entitled to notification of upcoming case events. At this time, your c... investigation. If anyone is charged in connection with the investigation, you will be no...

Sincerely,

R. Alexander Acosta
United States Attorney

By: [signature]
A. Marie Villafaña
Assistant United States Attorney

cc: Special Agent Nesbitt Kuyrkendall, F.B.I.

U.S. Department of Justice
Federal Bureau of Investigation
FBI - West Palm Beach
Suite 500
505 South Flagler Drive
West Palm Beach, FL 33401
Phone: (561) 833-7517
Fax: (561) 833-7970

January 10, 2008

[redacted]

Re: Case Number: [redacted]

Dear [redacted]

This case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation.

As a crime victim, you have the following rights under 18 United States Code § 3771: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are accorded the rights described. Most of these rights pertain to events occurring after the arrest or indictment of an individual for the crime, and it will become the responsibility of the prosecuting United States Attorney's Office to ensure you are accorded those rights. You may also seek the advice of a private attorney with respect to these rights.

The Victim Notification System (VNS) is designed to provide you with direct information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this matter on the Internet at WWW.Notify.USDOJ.GOV or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. You will need the following Victim Identification Number (VIN) [redacted] and Personal Identification Number (PIN) [redacted] anytime you contact the Call Center and the first time you log on to VNS on the Internet. In addition, the first time you access the VNS Internet site, you will be prompted to enter your last name (or business name) as currently contained in VNS. The name you should enter is [redacted]

If you have additional questions which involve this matter, please contact the office listed above. When you call, please provide the file number located at the top of this letter. Please remember, your participation in the notification part of this program is voluntary. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

Sincerely,

Twiler Smith

Twiler Smith
Victim Specialist

U.S. Department of Justice
Federal Bureau of Investigation
FBI - West Palm Beach
Suite 500
505 South Flagler Drive
West Palm Beach, FL 33401
Phone: (561) 833-7517
Fax: (561) 833-7970

January 10, 2008

James Elsenberg
One Clearlake Center Ste 704 Australian South
West Palm Beach, FL 33401

Re: [redacted]

Dear James Elsenberg:

You have requested to receive notifications for [redacted]

This case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation.

As a crime victim, you have the following rights under 18 United States Code § 3771: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are accorded the rights described. Most of these rights pertain to events occurring after the arrest or indictment of an individual for the crime, and it will become the responsibility of the prosecuting United States Attorney's Office to ensure you are accorded those rights. You may also seek the advice of a private attorney with respect to these rights.

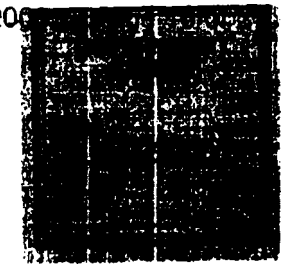
The Victim Notification System (VNS) is designed to provide you with direct information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this matter on the Internet at WWW.Notify.USDOJ.GOV or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. You will need the following Victim Identification Number (VIN) [redacted] and Personal Identification Number (PIN) [redacted] anytime you contact the Call Center and the first time you log on to VNS on the Internet. In addition, the first time you access the VNS Internet site, you will be prompted to enter your last name (or business name) as currently contained in VNS. The name you should enter is Elsenberg.

If you have additional questions which involve this matter, please contact the office listed above. When you call, please provide the file number located at the top of this letter. Please remember, your participation in the notification part of this program is voluntary. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

Sincerely,

Twiler Smith

Twiler Smith
Victim Specialist



U.S. Department of Justice
Federal Bureau of Investigation
FBI - West Palm Beach
Suite 500
505 South Flagler Drive
West Palm Beach, FL 33401
Phone: (561) 833-7517
Fax: (561) 833-7970

May 30, 2008

[redacted]

Re: [redacted]

Dear [redacted]

Your name was referred to the FBI's Victim Assistance Program as being a possible victim of a federal crime. We appreciate your assistance and cooperation while we are investigating this case. We would like to make you aware of the victim services that may be available to you and to answer any questions you may have regarding the criminal justice process throughout the investigation. Our program is part of the FBI's effort to ensure the victims are treated with respect and are provided information about their rights under federal law. These rights include notification of the status of the case. The enclosed brochures provide information about the FBI's Victim Assistance Program, resources and instructions for accessing the Victim Notification System (VNS). VNS is designed to provide you with information regarding the status of your case.

This case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation.

As a crime victim, you have the following rights under 18 United States Code § 3771: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

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[redacted]

[redacted]

If you have additional questions which involve this matter, please contact the office listed above. When you call, please provide the file number located at the top of this letter. Please remember, your participation in the notification part of this program is voluntary. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

Sincerely,

Twiler Smith
Victim Specialist

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

July 9, 2008

VIA FACSIMILE
Brad Edwards, Esq.
The Law Offices of Brad Edwards & Associates, LLC
2028 Harrison Street, Suite 202
Hollywood, Florida 33020.

Re: **Jeffrey Epstein/[redacted] NOTIFICATION OF IDENTIFIED VICTIM**

Dear Mr. Edwards:

By virtue of this letter, the United States Attorney's Office for the Southern District of Florida asks that you provide the following notice to your client, [redacted].

On June 30, 2008, Jeffrey Epstein (hereinafter referred to as "Epstein) entered a plea of guilty to violations of Florida Statutes Sections 796.07 (felony solicitation of prostitution) and 796.03 (procurement of minors to engage in prostitution), in the 15th Judicial Circuit in and for Palm Beach County (Case Nos. 2006-cf-009454AXXXMB and 2008-cf-009381AXXXMB) and was sentenced to a term of twelve months' imprisonment to be followed by an additional six months' imprisonment, followed by twelve months of Community Control 1, with conditions of community confinement imposed by the Court.

In light of the entry of the guilty plea and sentence, the United States has agreed to defer federal prosecution in favor of this state plea and sentence, subject to certain conditions.

One such condition to which Epstein has agreed is the following:

"Any person, who while a minor, was a victim of a violation of an offense enumerated in Title 18, United States Code, Section 2255, will have the same rights to proceed under Section 2255 as she would have had, if Mr. Epstein

had been tried federally and convicted of an enumerated offense. For purposes of implementing this paragraph, the United States shall provide Mr. Epstein's attorneys with a list of individuals whom it was prepared to name in an Indictment as victims of an enumerated offense by Mr. Epstein. Any judicial authority interpreting this provision, including any authority determining which evidentiary burdens if any a plaintiff must meet, shall consider that it is the intent of the parties to place these identified victims in the same position as they would have been had Mr. Epstein been convicted at trial. No more; no less."

Through this letter, this Office hereby provides Notice that your client, [redacted] is an individual whom the United States was prepared to name as a victim of an enumerated offense.

Should your client decide to file a claim against Jeffrey Epstein, his attorney, Jack Goldberger, asks that you contact him at Atterbury Goldberger and Weiss, 250 Australian Avenue South, Suite 1400, West Palm Beach, FL 33401, (561) 659-8300.

Please understand that neither the U.S. Attorney's Office nor the Federal Bureau of Investigation can take part in or otherwise assist in civil litigation; however, if you do file a claim under 18 U.S.C. § 2255 and Mr. Epstein denies that your client is a victim of an enumerated offense, please provide notice of that denial to the undersigned.

Please thank your client for all of her assistance during the course of this examination and express the heartfelt regards of myself and Special Agents Kuyrkendall and Richards for the health and well-being of [redacted]

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: [signature]
A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

cc: Jack Goldberger, Esq.

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

July 9, 2008

VIA FACSIMILE
Brad Edwards, Esq.
The Law Offices of Brad Edwards & Associates, LLC
2028 Harrison Street, Suite 202
Hollywood, Florida 33020.

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Please thank your client for all of her assistance during the course of this examination and express the heartfelt regards of myself and Special Agents Kuyrkendall and Richards for the health and well-being of [redacted]

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: [signature]
A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

cc: Jack Goldberger, Esq.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

IN COMPUTER QUD

OR1517PG0554

FLORIDA SUGAR CANE LEAGUE, INC.	
Plaintiff,	Case Number: 91-2108
vs.	
FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,	
Defendant.	

SEP 20 2 10 PM '91

CLERK OF CIRCUIT COURT

RECORDED IN THE PUBLIC RECORDS OF LEON CO. FLA

100057

ORDER

This cause is before the Court on the Complaint of the Florida Sugar Cane League, Inc. ("League"). The League seeks an order requiring a state agency, the Florida Department of Environmental Regulation ("DER"), to release certain documents under its custody and control, pursuant to the Florida Public Records Act, Chapter 119, Florida Statutes. The facts in this case are as follows:

DER is a Defendant in the case styled United States v. South Florida Water Management District, et al., Case No. 88-1886-CIV-Hoeveler, United States District Court, Southern District of Florida ("U.S. v. SFWMD"). DER, as a Defendant in that case, entered into settlement negotiations with the plaintiff as represented by the United States Department of Justice ("DOJ"). During the negotiations, drafts of proposed settlement agreements and other information relating to the settlement proposal were made, sent or received by DER to and from federal agencies and representatives, including DOJ. DER also entered into an agreement with DOJ to keep all documents it received during the settlement negotiations confidential.

On May 21, 1991, the League made a public records request for a draft of the Settlement Agreement which the Secretary of DER had publicly stated as having been received by DER. On May 28, 1991, DER responded to the League's request by refusing to disclose the requested document claiming the document was privileged and immune to discovery. On May 31, 1991, the League filed this action, pursuant to Chapter 119, Florida Statutes. A hearing was originally scheduled before this Court for June 5, 1991, but DER removed the case to federal district court, where it was ultimately transferred to the Southern District of Florida. The League filed a Motion to Quash DER's Notice of Removal, which motion was argued before Judge William Hoeveler on July 10, 1991, and was granted on September 10, 1991. The federal court held that there was no federal jurisdiction over the matter as the League's claim arises purely under state law, and Judge Hoeveler remanded the case back to this Court. A hearing was held before this Court on September 16, 1991. Attorneys for the parties appeared and argued their respective positions. DOJ also appeared, pursuant to title 28, United States Codes, section 517, to argue in support of DER and to advise the Court of the United States' asserted interest in keeping the documents from public disclosure. DER asserts that Florida's Public Records Act is not applicable in this matter because it has been preempted by "federal immunities and privileges." DER further claims that it has contractually vowed to the United States to withhold requested documents under the confidentiality agreement

into which it entered with DOJ, and that DER is acting as DOJ's agent in withholding the documents from public disclosure.

This Court rejects these arguments. Florida's public records law is sweeping in its breadth and requires virtually unfettered public access to records in the custody of state agencies. Unless a statutorily provided exemption permits nondisclosure of public records, Florida law requires that all such records in the custody of state agencies be open and available for public inspection. The parties agreed that there is no statutory exemption in the Florida Public Records Act which would prevent disclosure of public records received by state agencies during settlement negotiations in U.S. v. SFWMD, including the records sought by the League in this case. DER has cited no applicable statutory exemption in the Florida Public Records Act, and the judiciary is without any authority to expand or create an exemption to Florida's public records law. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979); Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990).

Principles of federal preemption under the Supremacy Clause may, in limited circumstances, act to prevent application of Florida's public records law where there is a clear conflict with an express requirement of confidentiality provided in a federal statute. See Cummer v. Pace, 159 So. 2d 679, 681-82 (Fla. 1935); see generally, pp. 81-82, Florida's Government-in-the-Sunshine Manual, Office of the Attorney General (1991). In this case, although DER claims preemption under federal law of privileges and

immunities, it has cited no specific federal statute which clearly requires that the documents in question be kept confidential.

DER also relies on DOJ's assertion that the documents would not be "discoverable" from DOJ in the pending case, and that documents are exempt from disclosure by DOJ under FOIA. Even assuming that were true, it is irrelevant to the application of Florida's public records law to documents in the custody of Florida's state agencies. As stated by Judge Hoeveler in remanding this action:

> Thus, while FOIA may provide an independent cause of action insofar as the document in dispute is also in the custody of a federal agency, i.e., the Department of Justice, it cannot be said to displace and supplant a state statute directed at state agencies and state records. (Hoeveler Order at p. 12.)

DER's reliance on its confidentiality agreement with DOJ is equally misplaced. A state agency cannot bargain away its Public Records Act duties or create a "self-exemption" with a promise to third parties to keep records from disclosure to the public. Tribune Co. v. Hardee Memorial Hospital, Case No. CA-91-370, Tenth Judicial Circuit in and for Hardee County, Florida. See also Browning v. Walton, 351 So. 2d 380 (Fla. 4th DCA 1977).

THEREFORE, it is hereby ORDERED and ADJUDGED that:

1. Settlement agreements made or received at any time by DER in connection with U.S. v. SFWMD are hereby declared to be public records subject to disclosure under the Public Records Act, Chapter 119, Florida Statutes.

2. The Federal Freedom of Information Act, title 5, United States Code, section 552, does not preempt Chapter 119, Florida

Statutes, to exempt from public disclosure public records in the custody of Florida state agencies, including DER;

3. DER shall provide access to the League, within forty-eight hours of rendition of this Order, to inspect and examine any and all draft settlement agreements DER has withheld from public disclosure based on a claim of federal preemption;

4. If DER desires to appeal this Order, DER shall prepare and deliver to the clerk of this Court, for inclusion in the record under seal, at the time it files its notice of appeal, all draft settlement agreements exchanged with the DOJ relating to U.S. v. SFWMD which it asserts are exempt from Florida's public records law based on a claim of federal preemption. Such documents shall be held under seal pending final disposition of the appeal; and

5. As the parties have not yet agreed to a stipulation as to an appropriate award of attorneys' fees, the Court retains jurisdiction to determine the award of attorneys' fees pursuant to section 119.12, Florida Statutes.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of September, 1991.

P. Kevin Davey
Circuit Court Judge

Copies furnished to
counsel of record

FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,
Appellant,
v.
FLORIDA SUGAR CANE LEAGUE, INC.,
Appellee.

No. 91-3128.

District Court of Appeal of Florida,
First District.

Oct. 29, 1992.

*1267 An appeal from the Leon County Circuit Court; P. Kevin Davey, Judge.

Robert G. Gough, Asst. Gen. Counsel, Florida Dept. of Environmental Regulation, Tallahassee, for appellant.

Judith S. Kavanaugh, William L. Hyde and Richard A. Russell of Peeples, Earl & Blank, P.A., Miami, for appellee.

Barry M. Hartman, Acting Asst. Atty. Gen., Dexter W. Lehtinen, U.S. Atty., and Susan Hill Ponzoli, Asst. U.S. Atty., Miami, Keith E. Saxe, David C. Shilton and Ellen J. Durkee, Dept. of Justice, Washington, D.C., for amicus/ U.S.

PER CURIAM.

AFFIRMED. Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla.1979).

MINER, ALLEN and KAHN, JJ., concur.

END OF DOCUMENT