

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

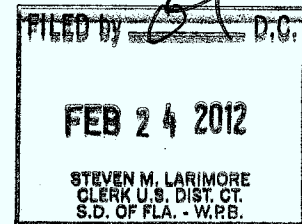
JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.



RESPONDENT'S SEALED OPPOSITION TO PETITIONERS' MOTION REQUESTING
AN ORDER DIRECTING THE GOVERNMENT TO FILE REDACTED
PLEADINGS IN THE PUBLIC COURT FILE

UNDER SEAL

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Respondent, by and through its undersigned counsel, files its Opposition to Petitioners' Motion Requesting an Order Directing the Government to File Redacted Pleadings in the Public Court file, and state:

- I. THE GOVERNMENT HAS COMPLIED WITH THE ORDER PERMITTING LIMITED DISCLOSURE OF GRAND JURY INFORMATION BY FILING THE REFERENCED MEMORANDUM, MOTION TO STAY DISCOVERY, AND REPLY, UNDER SEAL

Petitioners ask this Court to issue an order directing respondent to file redacted versions of its (1) Sealed Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction; (2) Sealed Motion to Stay Discovery; and (3) Sealed Reply in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction. Petitioners' motion should be denied because the government has filed these three documents under seal in compliance with the Order granting limited disclosure of grand jury information, entered on November 7, 2011.

On November 7, 2011, the government sought a Court order pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i), to permit limited disclosure of grand jury information which was relevant to whether this Court has subject matter jurisdiction. On the same day, the Honorable Donald M. Middlebrooks, United States District Judge, entered a **Sealed Order** granting the government's motion for limited disclosure of grand jury matter.¹ The disclosure was conditioned on the following:

(1) the disclosure of the aforementioned grand jury information should be limited to filings made under seal in Case No. 08-80726-CIV-MARRA;

(2) the service of filings containing the aforementioned grand jury information shall be limited to counsel for Petitioners Jane Doe No.1 and Jane Doe No. 2 and for the government in Case No. 08-80736-CIV-MARRA, and shall be accompanied by a copy of this Order; and

(3) further dissemination by any person or entity receiving disclosure of the grand jury information authorized to be disclosed by this Order shall be limited to the individual Petitioners in Case No. 08-80736-CIV-MARRA, and any dissemination of such grand jury information shall be accompanied by a copy of this Order.

Under Fed. R. Crim. P. 6(e)(2)(B), certain individuals, such as grand jurors, prosecutors, stenographers and others are forbidden from disclosing "matters occurring before the grand jury." "This phrase -- 'matters occurring before the grand jury' -- includes not only what has occurred and what is occurring, but also what is likely to occur." In re Motions of Dow Jones & Company, 142 F.3d 496, 500 (D.C. Cir. 1998). Further, "[e]ncompassed within the rule of secrecy are 'the identities of witnesses or jurors, the substance of testimony' as well as actual transcripts, 'the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'" Id. at 500, citing SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1382 (D.C. Cir.

¹ SDFL IOP 8.01.00 provides: "Grand jury matters, and all matters reasonably related to the original grand jury matter, will be handled by the district judge before whom the original matter was filed." Since Judge Middlebrooks swore in the grand jury in question and issued the Order granting the government limited authority to disclose grand jury material, any issue regarding the scope of the Order should be addressed to Judge Middlebrooks.

1980)(en banc). Plainly, the scope of what constitutes “matters occurring before the grand jury” is not as narrow as petitioners contend.

Petitioners rely upon United States v. Ignasiak, -- F.3d -- , 2012 WL 149314 (11th Cir. Jan. 19, 2012), and Romero v. Drummond Co., Inc., 480 F.3d 1234 (11th Cir. 2007). D.E. 150 at 2-3. Neither of these cases involve the sealing of matters occurring before the grand jury. In Ignasiak, the government filed under seal, a post-trial in camera notice to the court, containing impeachment information about Dr. Arthur Jordan, a key witness for the government. 2012 WL 149314 at *15. The defendant, Ignasiak, moved to unseal the notice, along with the accompanying affidavit from the trial prosecutor. The government opposed the motion, and the district court summarily denied the motion to unseal. On appeal, the Eleventh Circuit reversed the district court. Id. at 16. The appellate court noted there was a value of openness in criminal proceedings, where the public had a “right to know the extent of Dr. Jordan’s involvement with the government.” Id. Finding that the public’s right to know outweighed any privacy interest of Dr. Jordan, the appellate court found the district court had abused its discretion in denying the motion to unseal.

In Romero v. Drummond Company, Inc., 480 F.3d 1234 (11th Cir. 2007), the Eleventh Circuit found that a district court abused its discretion by refusing to unseal a motion for reconsideration and accompanying affidavits filed by the plaintiffs. The Court of Appeals recognized a common law right of access to judicial proceedings, and in particular, “[m]aterial filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access.” Id. at 1245 (citation omitted). The appellate court found the lower court had abused its discretion in refusing to unseal Romero’s Motion to Submit Pertinent Information to U.S. State & Justice Departments, with two attached declarations; Drummond’s

sealed motion to seal Romero's motion and two attached declarations; and Romero's motion for reconsideration. The sealing of these documents was not predicated in any way on the concept of grand jury secrecy.

The common law right of access to judicial proceedings, recognized in Ignasiak and Romero v. Drummond, does not apply in the instant case because grand jury secrecy is the basis for sealing the three documents referenced in petitioners' motion. In In re Motions of Dow Jones & Company, the Court of Appeals observed that the press had advanced a common law right of access to ancillary proceedings, based upon the Supreme Court's recognition of a common law right of access to inspect and copy judicial records. 142 F.3d at 504, citing Nixon v. Warner Communications, 435 U.S. 589, 598 (1978). The appellate court also observed that this common law right was not absolute:

Although some have identified a common law tradition of public access to criminal trials, this never extended to preindictment, pretrial proceedings involving a grand jury. *Gannett Co.* 443 U.S. 368, 99 S.Ct. 2898, indicates as much. In any event, even if there was once a common law right of access to materials of the sort at issue here, the common law has been supplanted by Rule 6(e)(5) and Rule 6(e)(6) of the Federal Rules of Criminal Procedure. These Rules, not the common law, now govern. See *In re Grand Jury Subpoena (John Doe No. 4)*, 103 F.3d at 237.

142 F.3d at 504. Additionally, a district court is not compelled to take the least restrictive means available to protect the secrecy of the grand jury proceedings during the pendency of those proceedings. In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1564 (11th Cir. 1989), and United States v. Smith, 123 F.3d 140, 152-54 (3d Cir. 1997)(refusing to require district court to redact briefs).

The government has acted with reasonable prudence and caution in filing the three referenced documents under seal. The November 7, 2011 Order granted the government limited authority to make disclosure of what would otherwise be information subject to grand

jury secrecy. The government's fidelity to the conditions placed by the Court on the disclosure should not be the basis for castigating the government.

Petitioners argue that keeping the pleadings under seal "unduly burdens counsel for the victims." D.E. 150 at 4. However, petitioners acknowledge that they filed lengthy responses to the sealed memorandum in support of motion to dismiss for lack of subject matter jurisdiction, and sealed motion to stay discovery, on December 5, 2011. D.E. 150 at 2. Further, petitioners stated they filed these responses in the public file, while filing short, sealed responses to what petitioners contend were issues "that touched on the confidential grand jury information." Id. It is difficult to understand how petitioners' ability to effectively respond to the government's sealed motions has been impeded in any meaningful way. Moreover, petitioners have made their own judgment as to what is covered by Fed. R. Crim. P. 6(e) by filing large portions of their responses in the public court file. Petitioners are free to make their own choices as to what is, and is not encompassed in the November 7, 2011 Order. At the same time, the government should not be faulted for choosing what it believes is a more prudent course.

Petitioners' motion requesting an order directing the government to file redacted pleadings in the public court file should be denied.

DATED: February 24, 2012

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By:


DEXTER A. LEE

Assistant U.S. Attorney

Fla. Bar No. 0936693

A. MARIE VILLAFANA

EDUARDO I. SANCHEZ

Assistant U.S. Attorneys

99 N.E. 4th Street

Miami, Florida 33132

(305) 961-9320


Fax: (305) 530-7139

E-mail: dexter.lee@usdoj.gov

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 24, 2012, I served the attorneys on the attached Service List by U.S. Mail.


DEXTER A. LEE
Assistant U.S. Attorney

SERVICE LIST

Jane Does 1 and 2 v. United States,
Case No. 08-80736-CIV-MARRA/JOHNSON
United States District Court, Southern District of Florida

Bradley J. Edwards, Esq.,
Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
(954) 524-2820
Fax: (954) 524-2822
E-mail: brad@pathtojustice.com

Paul G. Cassell
S.J. Quinney College of Law at the
University of Utah
332 S. 1400 E.
Salt Lake City, Utah 84112
(801) 585-5202
Fax: (801) 585-6833
E-mail: casselp@law.utah.edu

Attorneys for Jane Doe # 1 and Jane Doe # 2