UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FGJ 07-103(WPB)
U.S. District Judge Donald M. Middlebrooks

IN RE:

GRAND JURY PROCEEDINGS
_____/

SEALED APPLICATION FOR PERMISSION TO DISCLOSE GRAND JURY MATERIAL AND FOR ENTRY OF A PROTECTIVE ORDER

COMES NOW THE UNITED STATES, by and through the undersigned Assistant United States Attorney, an attorney for the government as defined by Rule 1(b)(1)(B) of the Federal Rules of Criminal Procedure, and applies to the Court for an order authorizing:

(1) the disclosure of matters occurring before the grand jury to attorney Jonathan Biran of the firm Baker Donelson to allow him to fulfill his obligations in representing Assistant United States Attorney [redacted] ([redacted] Villafaña) in connection with an investigation conducted by the Justice Department's Office of Professional Responsibility;

(2) the entry of a Protective Order; and

(3) the sealing of this Application, and the accompanying Orders.

BACKGROUND

1. From 2006 to 2008, the undersigned (hereinafter [redacted] Villafaña) was the lead prosecutor on the investigation of Jeffrey Epstein, known as Operation Leap Year.

2. That matter involved the issuance of subpoenas on behalf of and the presentation of testimony to Federal Grand Jury No. 07-103 (WPB), which was empaneled by U.S. District Judge

Donald M. Middlebrooks on January 19, 2007.[1]

3. In 2007, the U.S. Attorney's Office (USAO) elected to enter into a Non-Prosecution Agreement (NPA) with Jeffrey Epstein, which allowed him to avoid federal prosecution by: (a) pleading guilty to two state charges, (b) registering as a sex offender, and (c) paying civil damages as a substitute for restitution to the victims identified during the federal investigation. The USAO also decided to enter into this NPA without first conferring with those victims.

4. After signing the NPA, Epstein delayed performing its terms, and began raising arguments to various officials within the Justice Department challenging both the legality of the NPA and the validity of the investigation. In addition to responding to Epstein's arguments, the USAO offered to allow Epstein to rescind the Agreement so that the parties could proceed to trial.

5. On June 30, 2008, Epstein entered a guilty plea to violations of Florida state law in Palm Beach County.

6. After Epstein's state guilty plea, two of Epstein's victims filed suit against the United States alleging violations of the Crime Victim's Rights Act (CVRA). *Jane Doe 1 and Jane Doe 2 v. United States*, S.D. Fla. Case No. 08-80736-CV-KAM. The CVRA requires members of the Justice Department to use their "best efforts" to confer with victims regarding the course of proceedings, to treat them with respect, to protect their privacy, and to notify them of court proceedings. After many years of litigation, news articles, and Congressional calls for investigation, on February 21, 2019, U.S. District Judge Kenneth A. Marra issued an order granting partial summary judgment in favor of petitioners (DE 435). In his Order, Judge Marra referenced a letter sent by the FBI's victim-witness specialist to Jane Does 1 and 2 on January 10, 2008 that

[1] Early subpoenas were issued on behalf of Federal Grand Jury No. 05-02 (WPB). That grand jury expired before the investigation was completed, so the matter was transferred to FGJ 07-103.

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read "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation" (DE 435 at 16). The FBI sent the same letter to another victim in May 2008 (*id.* at 17). The Court later referred to these FBI letters when concluding:

> Particularly problematic was the Government's decision to conceal the existence of the NPA and mislead the victims to believe that the federal prosecution was still a possibility.[] When the Government gives information to victims, it cannot be misleading. While the Government spent untold hours negotiating the terms and implications of the NPA with Epstein's attorneys, scant information was shared with victims. Instead, the victims were told to be "patient" while the investigation proceeded (*id.* at 28).

7. In his Order, Judge Marra made several references to communications between [redacted] Villafaña and Epstein's counsel. The USAO asserted executive privilege, deliberative process, attorney-client privilege, work product, and 6(e), which kept the petitioners and the Court from seeing internal communications.

8. In accordance with Justice Department policy, on February 21 and 22, 2019, [redacted] Villafaña notified her supervisor, the First Assistant U.S. Attorney, the Office's District Ethics Officer, and OPR of a judicial finding of a violation of law, providing them with a copy of Judge Marra's February 21, 2019 Order, noting that the Order referred to [redacted] Villafaña as the "Line Prosecutor."

9. The Justice Department's Office of Professional Responsibility (OPR) has opened an investigation into allegations that one or more federal prosecutors in the USAO committed professional misconduct by entering into the NPA and into Judge Marra's adverse finding against the government in his February 21, 2019 order. According to the Justice Department's Policies and Procedures, "OPR has jurisdiction to investigate allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice . . ." (U.S. Dep't of Justice, Off. of Prof. Resp., Policies and Procedures at 1

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(5/21/2015)). With the exception of [redacted] Villafaña, all of the supervisors and individuals who substantially participated in the Epstein case no longer work for the Justice Department. The Policies and Procedures state that "[e]ven if the subject attorney resigns or retires from the Department during the course of an investigation, OPR ordinarily completes the investigation in order to better assess the litigation impact of the alleged misconduct and to permit the Attorney General[2] and Deputy Attorney General to assess the need for changes in Department policies or practices" (*id.* at 3).

10. The Policies and Procedures further instruct that "[a]ll Department employees have an obligation to cooperate with OPR investigations and must respond to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding. Employees who refuse to cooperate with OPR investigations may be subject to formal discipline, including removal" (*id.* at 4). At the completion of the investigation, "OPR prepares a report of investigation in which it makes findings of fact and reaches conclusions as to whether the subject attorney committed professional misconduct" (*id.*). Depending on the conclusion, a range of discipline can be recommended, including a referral to state bar authorities; and disclosures are authorized to other government agencies for law enforcement purposes, to a court, to a grand jury, to other federal agencies in connection with the hiring/retention of an employee, the employee's security clearance, or the investigation of the employee (*id.* at 5-6).

11. Despite the significance of these repercussions, the Justice Department Policies and Procedures state: "[t]he majority of OPR investigations are administrative in nature, and

[2] Attorney General Barr is recused from this matter because his former law firm represented Mr. Epstein during the course of the investigation and negotiated the NPA.

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employees are not entitled to counsel as a matter of law.[3] However, counsel may be permitted if counsel does not interfere with or delay the interview. Counsel must be actually retained by the employee as a legal representative, not as an observer. Counsel is not permitted access to certain confidential criminal investigative information and may not be permitted access to grand jury information" (*id.* at 4).

12. To assist in responding to the OPR investigation, [redacted] Villafaña secured the representation of Jonathan Biran, a partner at Baker Donelson in Washington, DC. Mr. Biran graduated from Stanford Law School in 1993 and clerked for the Hon. David F. Levi at the U.S. District Court for the Eastern District of California. Following his clerkship, Mr. Biran was an associate in the white collar practice group at Skadden Arps Slate Meagher & Flom in Washington, DC. In 1995, he joined the Office of Independent Counsel Daniel S. Pearson, who conducted the investigation of then-Commerce Secretary Ronald H. Brown. After Secretary Brown died and Independent Counsel Pearson closed his investigation, Mr. Biran became a Trial Attorney in the Public Integrity Section at the Justice Department's Criminal Division. He worked in the Public Integrity Section from 1996 to 2000, investigating and prosecuting corruption cases throughout the United States. On occasion, as part of his duties as a Trial Attorney in the Public Integrity Section, Mr. Biran led investigations of suspected grand jury secrecy violations by federal prosecutors and law enforcement agents. From 2000 to 2013 [redacted] an Assistant United States Attorney, first in the District of Connecticut (2000-2006), and then in the District of Maryland (2006-2013). Among other duties during his 17 years as a prosecutor, Mr. Biran led hundreds of grand jury investigations. For his last three years as an Assistant United States

[3] The Policies and Procedures do not describe that portion of OPR investigations that are not administrative.

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Attorney, Mr. Biran served as the Appellate Chief of the U.S. Attorney's Office for the District of Maryland. After leaving government service, Mr. Biran co-founded the law firm of Biran Kelly LLC, and subsequently joined Baker Donelson as a shareholder in December 2018.

13. On April 2, 2019, Mr. Biran received a five-page letter from [redacted] Principal Deputy Director of OPR, describing the scope of OPR's investigation and its view of [redacted] Villafaña's role:

> [OPR] has initiated an investigation into certain aspects of the U.S. Attorney's Office for the Southern District of Florida's (USAO) criminal investigation of Jeffrey Epstein, which began in 2006. Specifically, OPR is investigating the circumstances under which the USAO entered into a non-prosecution agreement with Mr. Epstein in 2007, the terms of the agreement, and the government's efforts to ensure compliance with the agreement. OPR is also investigating allegations stemming from the February 21, 2019 order issued by U.S. District Judge Kenneth A. Marra, in *Jane Doe 1 and Jane Doe 2 v. United States*, 9:08-80736-CIV-MARRA (S.D. Fla.), in which Judge Marra concluded that the USAO violated the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA) by failing to notify the victims of Mr. Epstein's alleged criminal conduct that the government intended to enter [redacted] agreement. Your client, Assistant U.S. Attorney [redacted], was the lead prosecutor in the Epstein case, and she partici[redacted] of the non-prosecution agreement, efforts to ensure compliance with it, and decisions concerning victim notifications (4/2/2019 Ragsdale ltr to Biran at 1).

14. [redacted] was then instructed, through counsel, to answer a total of 17 questions, with an additional six subparts, on a number of topics (*id.*). Some of the questions called for information about the grand jury investigation, for example, "[e]xplain why the USAO decided to initiate a federal grand jury investigation" (*id.* at 2).

15. [redacted] prepared a 58-page response to Mr. Ragsdale's letter ("Response"), along with a 51-page timeline ("Timeline"), a 14-page chart summarizing victim notifications ("Chart"), a 10-page exhibit list ("Exhibit List"), and collected 234 exhibits ("Exhibits"). These were all provided to OPR on May 10, 2019. Mr. Biran was provided a copy

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of the Response and a redacted version of the Chart.[4] He was not provided the other items, that is, the Timeline, the Exhibit List, or the Exhibits.

16. After OPR received the materials [redacted] received communications from an attorney at OPR stating that she believed that [redacted] had disclosed material covered by Fed. R. Crim. P. 6(e) to Mr. Biran. OPR believed that grand jury material had been disclosed in two ways. First, that disclosure had taken place because Mr. Biran had been provided with the Timeline, Exhibit List, and the Exhibits.[5] With regard to this issue, [redacted] Villafaña clarified for OPR that Mr. Biran was not provided with any of those materials and was only given drafts of the 58-page Response for his review and the final version upon its completion.

17. The second way in which OPR thought that grand jury material had been divulged was that OPR took the position that since the Response dealt "with matters occurring before the grand jury," disclosure had occurred. Regardless of whether this position is correct or not,[6] in an

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[redacted] redacted all victim identifying information from [redacted] of the Chart. There is no assertion that the Chart contained any 6(e) information.

[5] The Exhibits included 6(e) materials, including grand jury transcripts.

[6] *See, e.g., United States* [redacted]. *Phillips*, 843 F.2d 438, 441 (11th Cir. 1988) ("The term 'matters occurring before the grand jury' has been defined to include anything that will reveal what transpired during the grand jury proceedings. Therefore, only documents that reveal some secret aspect of the grand jury investigation should be subject to the restrictions of rule 6(e). In this case, the subpoenaed documents were never seen by the grand jury. . . . The documents in question were not 'matters occurring before the grand jury' and are not subject to the secrecy provisions of rule 6(e)."); *Anaya* [redacted]. *United States*, 815 F.2d 1373, 1379-80 (10th Cir. 1987) ("When documents or other material will not reveal what actually has transpired before a grand jury, their disclosure is not an invasion of the protective secrecy of its proceedings . . . . Indeed, the test of whether disclosure of information will violate Rule 6(e) depends upon whether revelation in the particular context would in fact reveal what was before the grand jury. As we perceive the proper inquiry, a reviewing court must find that disclosure is certain to destroy the protection of Rule 6(e) before it finds a violation of the rule. In contrast, revelation of information that has not been submitted to the grand jury does not vitiate those protections for the simple reason that the information was not part of what transpired in the grand jury room.") (internal quotation omitted).

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abundance of caution, it is now requested that this Court grant permission *nunc pro tunc* to disclose to Mr. Biran matters occurring before the grand jury, and enter a protective order.

18. In addition to the issue of the Response, during the OPR interview, [redacted] Villafaña must be able to explain the origins of the grand jury investigation, how it progressed, and how it continued even after the NPA was signed (i.e, to address Judge Marra's finding that victims were misled). [redacted]ust be able to explain that all of the members of the supervisory chain – up to and including the U.S. Attorney – were aware of the existence of the continuing grand jury investigation and the planned indictment of Mr. Epstein. Given the significance of the potential penalties, the ability to share these materials with counsel during preparation sessions is necessary to avoid injustice. Also, if OPR uses any grand jury materials during the interview, the Court's Order is needed to avoid having Mr. Biran excluded from the interview on the basis of Rule 6(e).

19. Accordingly, the United States hereby applies for permission to disclose grand jury matters to Mr. Biran *nunc pro tunc* subject to the following limitations, which are included in the protective order attached hereto.

a. Disclosure shall be limited to grand jury material relevant to Mr. Biran's representation of Assistant U.S. Attorney A. Marie Villafaña that are necessary to: (a) allow [redacted] Villafaña to respond to OPR's written questions; (b) prepare for OPR's interview of [redacted] Villafaña; and (c) participate fully in OPR's interview of [redacted] Villafaña.

b. The government and Mr. Biran will undertake efforts to minimize the amount of grand jury material produced to or maintained by Mr. Biran. Mr. Biran will not

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A copy of the 58-page Response is not attached because OPR proceedings are confidential. If the Court would like to see a copy of the Response, [redacted] Villafaña can ask OPR for permission to submit the Response under seal. No one within the USAO has reviewed it.

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be given copies of subpoenas, documents produced in response to subpoenas, transcripts, proposed or completed indictments, prosecution memoranda, or items prepared for use in front of the grand jury, but these items may be shown to Mr. Biran and discussed in preparation sessions and during interviews.

c. Any hard copies of grand jury material provided to Mr. Biran will not be photocopied and Mr. Biran will securely maintain any materials that he receives.

d. Any digital copies of grand jury material provided to Mr. Biran will be encrypted.

e. Any grand jury material provided to Mr. Biran will only be reviewed by him and not by anyone else in his firm.

f. At the conclusion of the OPR proceedings and any related proceedings wherein Mr. Biran represents [redacted] Villafaña, all grand jury material in Mr. Biran's possession will be destroyed. Mr. Biran will shred hard copy documents and will delete and purge electronic documents.

LEGAL BASIS FOR DISCLOSURE

20. Under Fed. R. Crim. P. 6(e)(2)(B)(vi), an attorney for the government "must not disclose a matter occurring before the grand jury." An exception exists in Fed. R. Crim. P. 6(e)(3)(E), wherein the "court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand jury matter: (i) preliminarily to or in connection with a judicial proceeding[.]" As noted above, OPR is investigating the conduct of members of the USAO underlying Judge Marra's Order in the matter of *Jane Doe 1 and Jane Doe 2* [redacted] *United States*. The Supreme Court has interpreted Rule 6(e)(3)(E)(i) broadly, that is, for uses that are "related fairly directly to some identifiable litigation, pending or anticipated." *United States* [redacted].

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Baggot, 463 U.S. 476, 480 (1983). OPR's investigation of the facts underlying Judge Marra's Order is "related fairly directly to some identifiable litigation," that is *Jane Doe 1 and Jane Doe 2* [redacted] *United States*.

21. The Supreme Court has held that in order to obtain disclosure and use of grand jury materials covered by the secrecy provisions of Rule 6(e), the petitioner must show a "particularized need." *Douglas Oil Co.* [redacted] *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). The *Douglas Oil* Court explained that in order to pierce the veil of Rule 6(e) secrecy,

> [p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Id. at 222.

22. As set forth above, the "particularized need" is for Mr. Biran to adequately prepare to represent [redacted] Villafaña in connection with the OPR proceeding. While the OPR proceeding is an "administrative proceeding," rather than a "judicial proceeding," as noted above, OPR has jurisdiction to refer its findings to state bar authorities, other government agencies for law enforcement purposes, courts, and grand juries (U.S. Dep't of Justice, Off. of Prof. Resp., Policies and Procedures at 5-6).

23. In balancing the need for disclosure against the need for continued secrecy, the Court can consider that the Epstein investigation concluded in 2008 and that, pursuant to the terms of the Non-Prosecution Agreement, Epstein entered into civil settlements with all of the federal victims who sought damages from him.

24. The Court also can consider that the United States is seeking only a very limited disclosure, to allow Mr. Biran to fulfill his obligations for representation in connection with the Justice Department's internal OPR proceedings. For example, in *United States* [redacted] *Sells*

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Engineering, Inc., 463 U.S. 418, 444 (1983), the Supreme Court "emphasize[d] that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion," *Douglas Oil*, 441 U.S. at 223. The Supreme Court has "made it clear that the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys." *United States* [redacted]. *John Doe, Inc. I*, 481 U.S. 102, 112 (1987).

> Nothing in *Douglas Oil,* however, requires a district court to pretend that there are no differences between governmental bodies and private parties. The *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. Hence, although *Abbott* and the legislative history foreclose any special dispensation from the *Douglas Oil* standard for government agencies, the standard itself accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public.

Sells Engineering, 463 U.S. at 445. While Mr. Biran is not a "government attorney," he will be representing a "government attorney" in connection with a mandatory internal administrative proceeding.

25. Thus, in the context of the OPR matter, the disclosure to Mr. Biran will be within the attorney-client relationship, and the proposed Protective Order requires that Mr. Biran receive no copies of grand jury transcripts; that he make no copies of any materials; and that he destroy all materials at the end of the representation. Mr. Biran is conducting this representation *pro bono*, and, hence, is not undertaking this case for financial gain. As in *John Doe I*, "the threat to grand jury secrecy [is] minimal in this context." *John Doe I,* 481 U.S. at 116. The Court should consider whether, given the administrative and confidential nature of OPR proceedings – confined as they are within the Justice Department, the proposed disclosure "poses less risk of further leakage or

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improper use than would disclosure to private parties or the general public." *Sells Engineering*, 463 U.S. at 445; *see In re Request for Access to Grand Jury Materials Grand Jury No. 81-1 (Hastings)*, 833 F.2d 1438, 1441 (11th Cir. 1987) ("the interests that underlie the policy of grand jury secrecy are implicated to a lesser degree when disclosure to a government body is requested.").

CONCURRENCE REGARDING THE FILING OF THIS MOTION

26. The filing of this application has been approved by the U.S. Attorney for the Southern District of Florida and the Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of Florida.

27. The Criminal Chief also has conferred with the First Assistant United States Attorney of the U.S. Attorney's Office for the Middle District of Florida, to which the Epstein criminal matter was referred after the Southern District of Florida was recused, and the Middle District has no objection to the filing of this motion.

28. The Criminal Chief also has conferred with the General Counsel's Office of the Executive Office of U.S. Attorneys (EOUSA) who has no objection to the filing of this motion.

29. OPR has advised that it takes no position on the filing of this motion.

CONCLUSION

WHEREFORE, the United States respectfully requests that the Court enter:

1. an Order authorizing the disclosure *nunc pro tunc* of matters occurring before the grand jury to attorney Jonathan Biran of the firm Baker Donelson to allow him to fulfill his obligations in representing Assistant U.S. Attorney A. Marie Villafaña in connection with an investigation conducted by the Justice Department's Office of Professional Responsibility;

2. a Protective Order; and

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3. an Order sealing this Application and the accompanying Orders.

Respectfully submitted,

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

Dated: May _____, 2019 By: _____

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