



U.S. Department of Justice

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August 28, 2019

By ECF and E-Mail

Honorable Richard M. Berman
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Jeffrey Epstein*, 19 Cr. 490 (RMB)

Dear Judge Berman:

The Government respectfully writes in response to legal arguments raised by defense counsel at the August 27, 2019 hearing on the Government's *nolle prosequi* motion. As set forth below, the Court must dismiss the Indictment where, as here, the defendant has died prior to a conviction becoming final. Moreover, the Court does not have the authority, inherent or otherwise, to conduct its own inquiry into the circumstances of Jeffrey Epstein's suicide, or to supervise the ongoing Grand Jury investigation.

1. The Rule of Abatement Requires the Dismissal of the Indictment

As the Court is aware, clear Second Circuit precedent requires the dismissal of an indictment when a defendant dies before his conviction becomes final, under the "well-settled rule that actions upon penal statutes do not survive the death of the wrongdoer." *United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998) (internal citation omitted). This rule applies with full force here, and requires the dismissal of the Indictment. *See* Transcript of Aug. 27, 2019 Hearing ("Tr.") at 9 (Court noting that "it is appropriate to conclude that if the rule of abatement applies to a convicted defendant as in the *Wright* case, it should also apply *a fortiori* in the Epstein case, which was still in the pretrial phase when Mr. Epstein died, when there had been no conviction."); *see also United States v. Brooks*, 872 F.3d 78, 87 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 171, 202 L. Ed. 2d 37 (2018) ("This general rule, almost unanimously followed by the federal Courts of Appeals, has its roots in the common law doctrine of abatement *ab initio*: 'everything associated with the case is extinguished, leaving the defendant as if he had never been indicted or convicted.'") (collecting cases).

2. The Court Does Not Have the Authority to Conduct its Own Investigation

At yesterday's hearing, defense counsel posited that the "court has the inherent authority to find out what happened on its watch," and asked the Court to "supervis[e], or at least keep an

interest in these proceeding[s].” (Tr. 17-18). Defense counsel is wrong. The Court lacks the constitutional authority to supervise a grand jury investigation or to appoint an independent prosecutor to investigate the circumstances surrounding Epstein’s death. The only power the Constitution permits to be vested in federal judges is “[t]he judicial power of the United States,” Art. III, § 1, which is the power to decide, in accordance with law, who should prevail in a case or controversy, *see Art. III, § 2*. That power does not include “‘supervisory’ authority” over the grand jury—“an institution separate from the courts, over whose functioning the courts do not preside.” *United States v. Williams*, 504 U.S. 36, 45-46 (1992); *see also United States v. Dionisio*, 410 U.S. 1, 17-18 (1973) (holding that the grand jury must remain “free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.”). To allow a court to supervise a grand jury’s investigation would also likely conflict with the Fifth Amendment’s constitutional guarantee of “an investigative body acting independently of either prosecuting attorney *or judge*.¹⁰” *Williams*, 504 U.S. at 49 (quoting *Dionisio*, 410 U.S. at 16).

The court’s judicial power also “does not include the power to seek out law violators in order to punish them” and, accordingly, it is “well established that the judicial power does not generally include the power to prosecute crimes.” *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816-17 (1987) (Scalia, J., concurring) (citing *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), and *United States v. Thompson*, 251 U.S. 407, 413-17 (1920)). Rather, the Constitution vests the power to conduct investigations and prosecute violations of the laws in the Executive. *See Art. II, § 2, cl. 1; Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). Indeed, the Second Circuit has emphasized that judicial review and regulation of prosecutorial decisions would place courts in the “injudicious posture of becoming ‘superprosecutors,’” and would invite questions about “the judiciary’s role of supervision,” including “[a]t what point would the prosecutor be entitled to call a halt to further investigation,” “[w]hat evidentiary standard would be used.” *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) (discussing action to require federal officials to investigate and prosecute persons who had allegedly violated criminal statutes).

For those reasons, among many, a judge’s authority to initiate a proceeding and appoint an attorney to conduct an investigation has been circumscribed by Congress and the Supreme Court. Only when a court order has been disobeyed does a court “possess inherent authority to initiate contempt proceedings.” *Young*, 481 U.S. at 793. But, even in the unique context of criminal contempt—which is not at issue here—a court only has authority to appoint a private lawyer to prosecute the contempt where the United States Attorney has refused the prosecution. *See Fed. R. Crim. P. 42(a)(2)*.

The precedent cited by defense counsel—the special proceeding initiated by Judge Emmett Sullivan following the dismissal of the prosecution of Senator Ted Stevens—provides no authority for the exercise of the court’s power here. *See In re Special Proceeding*, Misc. No. 09-0198 (EGS). In that case, after the Department of Justice dismissed the charges against Senator Stevens for apparent *Brady* violations, Judge Sullivan, pursuant to Rule 42, appointed a special prosecutor to investigate the violations. *See United States v. Stevens*, No. 08 Cr. 231 (EGS) (Apr. 8, 2009) (Dkt. No. 375); Reporter’s Transcript of Proceedings, *United States v. Stevens*, No. 08 Cr. 231 (EGS),

at 46-47 (Apr. 7, 2009). But here, there is no allegation of disobedience of court order that would give the court authority to initiate a proceeding under Rule 42, or appoint a private attorney.

Finally, it bears noting that the United States Attorney's Office, Federal Bureau of Investigation, and Department of Justice – Office of Inspector General are conducting an ongoing Grand Jury investigation into the circumstances surrounding Epstein's August 10, 2019 suicide. A separate investigation would likely, at best, be redundant and may risk undermining the existing investigation.

Accordingly, for the foregoing reasons, we respectfully request that the Court grant Government's *nolle prosequi* motion.

Very truly yours,

GEOFFREY S. BERMAN
United States Attorney

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