Memorandum

Subject	Date
Jane Does Nos. 1 and 2. v. United States, Case No. 08-80736-CIV-MARRA (S.D.Fla.)	April 26, 2011

To

[redacted]
Assistant Counsel
Office of Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

From

[redacted]
99 N.E. 4th Street
Miami, Florida 33132

VIA FEDERAL EXPRESS

Attached please find a CD-ROM containing the victims' Motion for Finding of Violations of the Crime Victims Rights Act and Request for a Hearing on Appropriate Remedies (unredacted), and a complete set of exhibits, including the e-mails in Exhibit A. The e-mails in Exhibit A are between Epstein's defense attorney and AUSA [redacted]. They were produced in civil litigation between Epstein and some of his victims. Epstein's attorneys redacted their side of the e-mail transmission. I will attempt to obtain a complete set, which includes the transmission from Epstein's attorneys.

If you have any questions, please call me at [redacted] Thank you.

Enclosure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2

[redacted]

UNITED STATES

_____/

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to move for a finding from this Court that the victims' rights under the Crime Victims Rights Act (CVRA), 18 U.S.C. § 3771, have been violated by the U.S. Attorney's Office, and to request a hearing on the appropriate remedies for these violations.

The victims have proffered a series of facts to the Government, which they have failed to contest. Proceeding on the basis of these facts,[1] it is clear that the U.S. Attorney's Office has repeatedly violated the victims' protected CVRA rights, including their right to confer with prosecutors generally about the case and specifically about a non-prosecution agreement the Office signed with the defendant, as well as their right to fair treatment. *See* 18 U.S.C. 3771(a)(5) & (8).

It is now beyond dispute, for example, that in September 2007, the U.S. Attorney's Office formally signed a non-prosecution agreement with Jeffrey Epstein that barred his

[1] The victims are contemporaneously filing a motion to have their facts accepted by the Court.

prosecution for numerous federal sex offenses he committed against the victims (as well as against many other minor girls). Rather than confer with the victims about this non-prosecution agreement, however, the U.S. Attorney's Office and Jeffrey Epstein agreed to a "confidentiality" provision in the agreement barring its disclosure to anyone – including the victims. For the next nine months, as Epstein was well aware, the U.S. Attorney's Office assiduously concealed from the victims the existence of this signed non-prosecution agreement. Indeed, the Office went so far as to send (in January 2008) a false victim notification letter to the victims informing them that the "case is currently under investigation." In fact, the U.S. Attorney's Office had already resolved the case three months earlier by signing the non-prosecution agreement. Again on May 30, 2008, the U.S. Attorney's Office sent yet another victim notification letter to a recognized victim informing her that the "case is currently under investigation" and that it "can be a lengthy process and we request your continued patience while we conduct a thorough investigation." Then in June 2008, on the eve of consummating Epstein's state guilty plea that was part of the non-prosecution agreement, the U.S. Attorney's Office asked legal counsel for the victims to send a letter expressing the victims' views on why federal charges should be filed – not disclosing to the victims' legal counsel that this was a pointless exercise because the non-prosecution agreement had already been signed some nine months earlier.

These actions and many more like them constitute clear violations of Jane Doe #1 and Jane Doe #2's rights under the Crime Victims Rights Act, including the right to confer with prosecutors and the right to fair treament. The only argument that the U.S. Attorney's Office advances is that the CVRA does not apply because no indictment was formally filed in this case. But this position is inconsistent with both the CVRA's plain language, *see, e.g.*, 18 U.S.C. §

3771(c)(1) (Justice Department agencies involved in the "detection" and "investigation" of federal crimes covered by CVRA), and with persuasive case law, *see, e.g., In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (victims should have been notified before pre-indictment plea reached). Moreover, the U.S. Attorney's Office itself was fully aware of its obligations to notify the victims in this case, as e-mails from the Office and other evidence make perfectly clear. The only reason that the Office concealed the existence of the non-prosecution agreement from the victims was not to comply with some legal restriction, but rather to avoid a firestorm of public controversy that would have erupted if the sweetheart plea deal with a politically-connected billionaire had been revealed.

The Court should accordingly find that the U.S. Attorney's Office -- in coordination with Jeffrey Epstein -- has violated the Act and set a briefing schedule and hearing on the proper remedy for those violations.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Jane Doe #1 and Jane Doe #2 offer the following statement of undisputed material facts. If the Government disputes any of these facts, the victims request an evidentiary hearing to prove each and every one of them:[2]

1. Between about 2001 and 2007, defendant Jeffrey Epstein (a billionaire with significant political connections) sexually abused more than 30 minor girls at his mansion in West Palm

[2] The Court should accept all these facts as true for reasons the victims explain in their contemporaneously-filed Jane Doe #1 and Jane Doe #2's Motion to Have Their Facts Accepted Because of the Government's Failure to Contest Any of The Facts. The Court should also direct the Government to produce all evidence that it possesses supporting these facts, for reasons the victims explain in their contemporaneously-filed Jane Doe #1 and Jane Doe #2's Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence.

Beach, Florida, and elsewhere. Among the girls he sexually abused were Jane Doe #1 and Jane Doe #2. Epstein performed repeated lewd, lascivious, and sexual acts on them, including (but not limited to) masturbation, touching of their sexual organs, using vibrators or sexual toys on them, coercing them into sexual acts, and digitally penetrating them. Because Epstein used a means of interstate commerce and knowingly traveled in interstate commerce to engage in abuse of Jane Doe #1 and Jane Doe #2 (and the other victims), he committed violations of federal law, including repeated violations of 18 U.S.C. § 2422. *See, e.g.*, Complaint, E.W. v. Epstein, Case No. 50 2008 CA 028058 XXXXMB AB (15th Cir. Palm Beach County, Florida); Complaint, L.M. v. Epstein, Case No 50 2008 CA 028051 XXXXMB AB (15th Cir. Palm Beach Count, Florida).

2. Jeffrey Epstein flew at least one underage girl on his private jet for the purpose of forcing her to have sex with him and others. Epstein forced this underage girl to be sexually exploited by his adult male peers, including royalty, politicians, businessmen, and professional and personal acquaintances. Complaint, Jane Doe No. 102 v. Epstein, No. 9:09-CV-80656-KAM (S.D. Fla. May 1, 2009).

3. In 2006, at the request of the Palm Beach Police Department, the Federal Bureau of Investigation opened an investigation 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, among other offenses. The case was presented to the United States Attorney's Office for the Southern District of Florida, which accepted the case for investigation. The Palm Beach County State Attorney's Office was also investigating

the case. *See generally* U.S. Attorney's Correspondence, Exhibit "A" to this filing (hereinafter cited as "U.S. Attorney's Correspondence" and referenced by Bates page number stamp).

4. The FBI soon determined that both Jane Doe #1 and Jane Doe #2 were victims of sexual assaults by Epstein while they were minors beginning when they were approximately fourteen years of age and approximately thirteen years of age respectively. Jane Doe #1, for example, provided detailed information about her abuse (and the abuse of Jane Doe #2) to the FBI on August 7, 2007. Exhibit "B."

5. More generally, the FBI through diligent investigation established that Epstein operated a large criminal enterprise that used paid employees and underlings to repeatedly find and bring minor girls to him. Epstein worked in concert as part of the enterprise with others, including Ghislane Maxwell and Jean Luc Brunel, to obtain minor girls not only for his own sexual gratification, but also for the sexual gratification of others. The FBI determined that Epstein had committed dozens and dozens of federal sex crimes against dozens of minor girls between 2001 and 2007. They presented information to the U.S. Attorney's Office for criminal prosecution, *See* Exhibit "B"; U.S. Attorney's Correspondence at 47-55.

6. On about June 7, 2007, FBI agents hand-delivered to Jane Doe #1 a standard CVRA victim notification letter. The notification promised that the Justice Department would makes its "best efforts" to protect Jane Doe #1's rights, including "[t]he reasonable right to confer with the attorney for the United States in the case" and "to be reasonably heard at any public proceeding in the district court involving . . . plea . . . ." The notification further explained that "[a]t this time, your case is under investigation." That notification meant that the FBI had identified Jane Doe #1 as a victim of a federal offense and as someone protected by the CVRA. Jane Doe #1

relied on these representations and believed that the Justice Department would protect these rights and keep her informed about the progress of her case. *See* Exhibit "C."

7. On about August 11, 2007, Jane Doe #2 received a standard CVRA victim notification letter. The notification promised that the Justice Department would makes its "best efforts" to protect Jane Doe #2's rights, including "[t]he reasonable right to confer with the attorney for the United States in the case" and "to be reasonably heard at any public proceeding in the district court involving . . . plea . . . ." The notification further explained that "[a]t this time, your case is under investigation." That notification meant that the FBI had identified Jane Doe #2 as a victim of a federal offense and as someone protected by the CVRA. Jane Doe #2 relied on these representations and believed that the Justice Department would protect these rights and keep her informed about the progress of her case. *See* Exhibit "D."

8. Early in the investigation, the FBI agents and an Assistant U.S. Attorney had several meetings with Jane Doe #1. Jane Doe #2 was represented by counsel that was paid for by the criminal target Epstein and, accordingly, all contact was made through that attorney.

9. In and around September 2007, plea discussions took place between Jeffrey Epstein, represented by numerous attorneys (including lead criminal defense counsel Jay Lefkowitz), and the U.S. Attorney's Office for the Southern District of Florida, represented by Assistant U.S. Attorney A. Marie Villafaña and others. The plea discussions generally began from the premise that Epstein would plead guilty to at least one federal felony offense surrounding his sexual assaults of more than 30 minor girls. From there, the numerous defense attorneys progressively negotiated more favorable terms so that Epstein would ultimately plead to only two state court

felony offenses and would serve only county jail time. Many of the negotiations are reflected in e-mails between Lefkowitz and the U.S. Attorney's Office. *See generally* Exhibit "A."

10. [redacted] The evidence supporting these charges was overwhelming, including the interlocking consistent testimony of several dozen minor girls, all made automatically admissible in a federal criminal sexual assault prosecution by operation of Fed. R. Evid. 414. U.S. Attorney's Correspondence at 4.

11. [redacted]

12. The correspondence also shows that the U.S. Attorney's Office was interested in finding a place to conclude a plea bargain that would effectively keep the victims from learning what was happening through the press. The Office wrote in an e-mail to defense counsel: "[redacted] The

U.S. Attorney's Office was aware that most of the victims of Epstein, including Jane Doe #1 and Jane Doe #2, resided well outside the Miami area in the West Palm Beach area. The Office was also aware that the chances of press coverage of a case filed in Miami would be significantly less likely to reach the Palm Beach area. U.S. Attorney's Correspondence at 29.

13. On about September 24, 2007, the U.S. Attorney's Office sent an e-mail to Jay Lefkowitz, criminal defense counsel for Epstein, regarding the agreement. The e-mail stated that the Government and Epstein's counsel [redacted]

U.S. Attorney's Correspondence at 153 (emphases added).

14. On about September 25, 2007, the U.S. Attorney's Office sent an e-mail to Lefkowitz stating: [redacted] U.S. Attorney's Correspondence at 156.

15. On about September 26, 2007, the U.S. Attorney's Office sent an e-mail to Lefkowitz in which she stated: [redacted]

[redacted] Apparently the '[redacted]agreed to between the Government and Epstein's defense counsel was that no mention would be made of the non-prosecution agreement between the U.S. Attorney's Office and Epstein, as no subsequent mention was made to the victims of the non-prosecution agreement and a confidentiality provision was made part of that agreement (as discussed below). U.S. Attorney's Correspondence at 359.

16. On about September 25, 2007, the U.S. Attorney's Office sent a letter to Jay Jefkowitz in which it suggested that the victims should be represented in civil cases against Epstein by someone who was not an experienced [redacted]

[redacted] U.S. Attorney's Correspondence at 157. The U.S. Attorney's Office continued to push a different attorney in part because it would reduce publicity, explaining that [redacted]

Id.

17. On about September 24, 2007, Epstein and the U.S. Attorney's Office formally reached an agreement whereby the United States would defer federal prosecution in favor of prosecution by the State of Florida. Epstein and the U.S. Attorney's Office accordingly entered into a "Non-Prosecution Agreement" (NPA) reflecting their agreement. Most significantly, the NPA gave Epstein a promise that he would not be prosecuted for a series of federal felony offenses involving his sexual abuse of more than 30 minor girls. The NPA instead allowed Epstein to plead guilty to two state felony offenses for solicitation of prostitution and

procurement of minors for prostitution. The NPA also set up a procedure whereby a victim of Epstein's sexual abuse could obtain an attorney to proceed with a civil claim against Epstein, provided that the victim agreed to limit damages sought from Epstein. To obtain an attorney paid for by Epstein, the victim would have to agree to proceed exclusively under 18 U.S.C. § 2255 (i.e., under a law that provided presumed damages of $150,000 against Epstein – an amount that Epstein argued later was limited to $50,000). The agreement was signed by Epstein and his legal counsel, as well as the U.S. Attorney's Office, on about September 24, 2007. Non-Prosecution Agreement, Exhibit "E."

18. Epstein insisted on, and the U.S. Attorney's Office agreed to, a provision in the non-prosecution agreement that made the agreement secret. In particular, the agreement stated: "The parties anticipate that this agreement will not be made part of any public record. If the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making the disclosure." By entering into such a confidentiality agreement, the U.S. Attorney's Office put itself in a position that conferring with the crime victims (including Jane Doe #1 and Jane Doe #2) about the non-prosecution agreement would violate terms of the agreement – specifically the confidentiality provision. Indeed, even notifying the victims about the agreement would presumably have violated the provision. Accordingly, from September 24, 2007 through at least June 2008 – a period of more than nine months -- the U.S Attorney's Office did not notify any of the victims of the existence of the non-prosecution agreement. Epstein was well aware of this failure to notify the victims and, indeed, arranged for this failure to notify the victims. *Id.*; U.S.

Attorney's Correspondence at 270; Transcript of Hearing in this case on July 11, 2008, at 4-6, 18-19, 22-23, 28-29 (hereinafter cited as "Tr. July 11, 2008").

19. A reasonable inference from the evidence is that the U.S. Attorney's Office – pushed by Epstein – wanted the non-prosecution agreement kept from public view because of the intense public criticism that would have resulted from allowing a politically-connected billionaire who had sexually abused more than 30 minor girls to escape from federal prosecution with only a county court jail sentence. Another reasonable inference is that the Office wanted the agreement concealed at this time because of the possibility that the victims could have objected to the agreement in court and perhaps convinced the judge reviewing the agreement not to accept it.

20. The Non-Prosecution Agreement that had been entered into between the U.S. Attorney's Office and Epstein was subsequently modified by an October 2007 Addendum and a December 19, 2007, letter from the U.S. Attorney to Attorney Lilly Ann Sanchez. The U.S. Attorney's Office did not confer with any of the victims about these modifications of the agreement (or even notify them of the existence of these modifications) through at least June 2008 – a period of more than six months. *See* Supplemental Declaration of A. Marie Villafaña (doc. #35, at 1); U.S. Attorney's Correspondence at 234-37; Tr. July 11, 2008, 18-19, 22-23, 28-29.[3]

21. In October 2007, shortly after the initial plea agreement was signed, FBI agents contacted Jane Doe #1. On October 26, 2007, Special Agents E. Nesbitt Kuyrkendall and Jason Richards met in person with Jane Doe #1. The Special Agents explained that Epstein would

[3] On about August 14, 2008, Epstein's defense counsel told the U.S. Attorney's Office that they did not consider the December 19, 2007, letter to be operative.

plead guilty to state charges involving another victim, he would be required to register as a sex offender for life, and he had made certain concessions related to the payment of damages to the victims, including Jane Doe #1. During this meeting, the Special Agents did not explain that an agreement had already been signed that precluded any prosecution of Epstein for federal charges against Jane Doe #1. The agents could not have revealed this part of the non-prosecution agreement without violating the terms of the non-prosecution agreement. Whether the agents themselves had been informed of the existence of the non-prosecution agreement by the U.S. Attorney's Office is not certain. Because the plea agreement had already been reached with Epstein, the agents made no attempt to secure Jane Doe #1's view on the proposed resolution of the case. Exhibit "E," Tr. July 11, 2008 at 4-6, 18-19, 22-23.

22. Jane Doe #1's (quite reasonable) understanding of the Special Agent's explanation was that only the State part of the Epstein investigation had been resolved, and that the federal investigation would continue, possibly leading to a federal prosecution. Jane Doe #1 also understood her own case was move forward towards possible prosecution. Tr. July 11, 2008, at 4-6, 18-19, 22-23, 28-29.

23. On about November 27, 2007, Assistant U.S. Attorney Jeff Sloman sent an e-mail to Jay Lefkowitz, defense counsel for Epstein. The e-mail stated that the U.S. Attorney's Office had an obligation to notify the victims [redacted]

[redacted]

[redacted]

U.S. Attorney's Correspondence at 255 (emphasis rearranged).

24. On about November 29, 2007, the U.S. Attorney's Office sent a draft of a crime victim notification letter to Jay Lefkowitz, defense counsel for Jeffrey Epstein. The notification letter would have explained: [redacted] The letter then would have gone on to explain that Epstein would [redacted] The letter would not have explained that, as part of the agreement with Epstein, the Justice Department had previously agreed not to prosecute Epstein for any of the numerous federal offenses that had been committed. U.S. Attorney's Correspondence at 256-59.

25. Because of concerns from Epstein's attorneys, the U.S. Attorney's Office never sent the proposed victim notification letter discussed in the previous paragraph to the victims. Instead, a misleading letter stating that the case was "currently under investigation" (described below) was sent in January 2008 and May 2008. At no time before reaching the non-prosecution agreement did the Justice Department notify any victims, including for example Jane Doe #1, about the non-prosecution agreement. The victims were therefore prevented from exercising their CVRA right to confer with prosecutors about the case and about the agreement. Epstein

was aware of these violations of the CVRA and, indeed, pressured the U.S. Attorney's Office to commit these violations. Tr. July 11, 2008, at 9.

26. On about December 6, 2007, Jeffrey H. Sloman, First Assistant U.S. Attorney sent a letter to Jay Lefkowitz, noting the U.S. Attorney's Office's legal obligations to keep victims informed of the [redacted] The letter stated:

[redacted]

U.S. Attorney's Correspondence at 191-92 (emphasis added).

27. Despite this recognition of its obligation to keep victims [redacted] about the non-prosecution agreement, the U.S. Attorney's Office did not follow through and inform the victims of the non-prosecution agreement. To the contrary, as discussed below, it continued to tell the victims that the case was "under investigation." Tr. July 11, 2008, at 4-5, 18-19, 22-29.

28. On December 13, 2007, the U.S. Attorney's Office sent a letter to Jay Lefkowitz, defense counsel for Epstein, rebutting allegations that had apparently been made against the

AUSA handling the case by the Epstein defense team. (The Justice Department concluded the allegations were meritless.) The letter stated that a federal indictment against Epstein [redacted] The letter also recounted that [redacted] U.S. Attorney's Correspondence at 269.

29. The December 13, 2007, letter also reveals that the Justice Department stopped making victim notifications because of [redacted] U.S. Attorney's Correspondence at 270 (emphasis added). It was a deviation from the Justice Department's standard practice to negotiate with defense counsel about the extent of crime victim notifications.

30. The December 13, 2007, letter also demonstrates that the Justice Department was well aware of who the victims of Epstein's sexual offenses were. The Justice Department was prepared to make notifications to the victims, but suspended those notifications only because objections from defense counsel. *Id.*

31. The December 13, 2007, letter reveals it would have been possible to confer with the victims about the Non-Prosecution Agreement. The U.S. Attorney's Office was fully able to

confer with Epstein's counsel about the parameters of the Non-Prosecution Agreement, but refused to confer with Epstein's victims about the Agreement. *Id.*

32. Following the signing of the Agreement and the modifications thereto, Epstein's performance was delayed while he sought higher level review within the Department of Justice. *See* U.S. Attorney's Correspondence *passim*. A reasonable inference from the evidence is that Epstein used his significant political and social connections to lobby the Justice Department to avoid significant federal prosecution. The Justice Department has in its possession internal documents (i.e., phone logs, emails, etc.) that would reveal the event of those lobbying efforts. The Justice Department, however, has refused to make these materials available to the victims.

33. On January 10, 2008, Jane Doe #1 and Jane Doe #2 received letters from the FBI advising them that *"[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." Exhibits "F" & "G." The statement in the notification letter was misleading and, in fact, false. The case was not currently "under investigation." To the contrary, the federal cases involving Jane Doe #1 and Jane Doe #2 had been resolved by the non-prosecution agreement entered into by Epstein and the U.S. Attorney's Office discussed previously. Moreover, the FBI did not notify Jane Doe #1 or Jane Doe #2 that a plea agreement had been reached previously, and that part of the agreement was a non-prosecution agreement with the U.S. Attorney's Office for the Southern District of Florida. Exhibit "E." Whether the FBI was aware of this fact at this time is unclear. In any event, the FBI was acting at the direction of the U.S. Attorney's Office, which clearly did not confer with Jane Doe #1 and Jane Doe #2 about the case and, by concealing the true state of affairs, and failed to treat Jane Doe #1 and Jane Doe #2 with fairness. Epstein was aware of

these actions of the U.S. Attorney's Office and, indeed, solicited these actions of the U.S. Attorney's Office. U.S. Attorney's Correspondence at 191-92, 270.

34. Jane Doe #1 and Jane Doe #2 relied on the representations of the U.S. Attorney's Office to their detriment. Had they known the true facts of the case – i.e., that Epstein had negotiated a non-prosecution agreement – they would have taken steps to object to that agreement. Tr. July 11, 2008 at 4-6, 18-19, 28-29.

35. Undersigned counsel believes that the FBI was lead to believe that their investigation of Epstein was going to lead to a federal criminal prosecution and that the FBI was also mislead by the U.S. Attorney's office about the status of the case.

36. In early 2008, Jane Doe #1 and Jane Doe #2 believed that criminal prosecution of Epstein was extremely important. They also desired to be consulted by the FBI and/or other representatives of the federal government about the prosecution of Epstein. In light of the letters that they had received around January 10, they believed that a criminal investigation of Epstein was on-going – including investigation into Epstein's crimes against them -- and that they would be contacted before the federal government reached any final resolution of that investigation. Tr. July 11, 2008, at 4-6, 18-19, 22-23, 28-29.

37. On January 31, 2008, Jane Doe #1 met with FBI Agents and AUSA's from the U.S. Attorney's Office. She provided additional details of Epstein's sexual abuse of her. The AUSA's did not disclose to Jane Doe #1 at this meeting (or any other meeting) that they had already negotiated a non-prosecution agreement with Epstein. Exhibit "H."

38. On about February 25, 2008, Assistant U.S. Attorney [redacted] sent an e-mail to Jay Lefkowitz, Epstein's criminal defense counsel, explaining that the Justice Department's Child

Exploitation Obscenity Section (CEOS) had agreed to review Epstein's objections to the proposed plea agreement that had been reached with the U.S. Attorney's Office for the Southern District of Florida. The letter indicated that, should CEOS reject Epstein's objections to the agreement, then [redacted] U.S. Attorneys Correspondence at 290-91.

39. On May 30, 2008, another of Mr. Edwards's clients who was recognized as an Epstein victim by the U.S. Attorney's Office, received a letter from the FBI advising her that *"[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." Exhibit "I." The statement in the notification letter was misleading and, in fact, false. The case was not currently "under investigation." To the contrary, the case had been resolved by the non-prosecution agreement entered into by Epstein and the U.S. Attorney's Office discussed previously. Exhibit "E."

40. In mid-June 2008, Mr. Edwards contacted the AUSA handling the case to inform her that he represented Jane Doe #1 and, later, Jane Doe #2. Mr. Edwards asked to meet to provide information about the federal crimes committed by Epstein against these victims, hoping to secure a significant federal indictment against Epstein. The AUSA and Mr. Edwards discussed the possibility of federal charges being filed. At the end of the call, the AUSA asked Mr. Edwards to send any information that he wanted considered by the U.S. Attorney's Office in determining whether to file federal charges. Because of the confidentiality provision that existed in the plea agreement, Mr. Edwards was not informed that previously, in September 2007, the U.S. Attorney's Office had reached an agreement not to file federal charges. Mr. Edwards was

also not informed that resolution of the criminal matter was imminent. This concealment prevented Edwards from (among other things) exercising his client's CVRA right to confer with the prosecutors about the case. Epstein was aware of this concealment – and, indeed, sought this concealment. Tr. July 11, 2008, at 4-6, 18-19, 22-23, 28-29.

41. On Friday, June 27, 2008, at approximately 4:15 p.m., the U.S. Attorney's Office received a copy of Epstein's proposed state plea agreement and learned that the plea was scheduled for 8:30 a.m., on Monday, June 30, 2008. The U.S. Attorney's Office and the Palm Beach Police Department attempted to provide notification to victims in the short time that Epstein's counsel had provided. The U.S. Attorney's Office called attorney Edwards to provide notice to his clients regarding the hearing. The notice, however, was only that Epstein was pleading guilty to state solicitation of prostitution charges involving another victim. The U.S. Attorney's Office did not tell Edwards that the guilty pleas in state court would bring an end to the possibility of federal prosecution pursuant to the plea agreement. Thus, there was no reason for attorney Edwards to believe that the guilty pleas in state court had any bearing on the cases of Jane Doe #1 and Jane Doe #2. As a result, Jane Doe #1 and Jane Doe #2 did not attend the plea hearing, as they did not think that it was pertinent to their particular cases. Had they known that the plea agreement made it impossible to prosecute Epstein federally for his crimes against them, they would have objected to this resolution. Jane Doe #1 and Jane Doe #2 thus detrimentally relied on the inaccurate representations of the U.S. Attorney's Office that their cases were still under investigation. Tr. July 11, 2008 at 4-6, 18-19, 22-23.

42. On June 30, 2008, the U.S. Attorney's Office sent an e-mail to Jack Goldberger, criminal defense counsel for Epstein, reflecting continuing efforts to keep the NPA secret: [redacted]

[redacted] U.S. Attorney's Correspondence at 321.

43. On July 3, 2008, as requested, Mr. Edwards sent to the U.S. Attorney's Office a letter. In the letter, Mr. Edwards indicated his client's desire that federal charges be filed against defendant Epstein. In particular, he wrote on behalf of his clients: "We urge the Attorney General and our United States Attorney to consider the fundamental import of the vigorous enforcement of our Federal laws. We urge you to move forward with the traditional indictments and criminal prosecution commensurate with the crimes Mr. Epstein has committed, and we further urge you to take the steps necessary to protect our children from this very dangerous sexual predator." *See* Exhibit "J."

44. When Mr. Edwards wrote his July 3, 2008 letter, he was still unaware that a non-prosecution agreement had been reached with Epstein – a fact that continued to be concealed from him (and the victims) by the U.S. Attorney's Office. Mr. Edwards first saw a reference to the NPA on or after July 9, 2008, when the Government filed its responsive pleading to Jane Doe's emergency petition. That pleading was the first public mention of the non-prosecution agreement and the first disclosure to Mr. Edwards (and thus to Jane Doe #1 and Jane Doe #2) of the possible existence of a non-prosecution agreement. Tr. July 11, 2008 at 4-6, 18-19, 22-23, 28-29.

45. Mr. Edwards detrimentally relied on the misleading representations made by the U.S. Attorney's Office that the case was still under investigation when he was writing this letter. He would not have wasted his time undertaking a pointless exercise had he known that the U.S.

Attorney's Office had previously negotiated a non-prosecution agreement. *See* Exhibits "E" & "J."

46. On July 7, 2008, Jane Doe #1 filed a petition for enforcement of her rights under the CVRA. At the time, Jane Doe #1 was not aware of the non-prosecution agreement, so she sought a court order directing the Justice Department to confer with her before reaching any such agreement. Epstein quickly became aware of this petition. Doc. #1 at 1-2.

47. On July 9, 2008, the U.S. Attorney's Office sent a victim notification to Jane Doe #1 via her attorney, Bradley Edwards. That notification contains a written explanation of some of the terms of the agreement between Epstein and the U.S. Attorney's Office. A full copy of the terms was not provided. A notification was not provided to Jane Doe #2 because the agreement limited Epstein's liability to victims whom the United States was prepared to name in an indictment. As a result, Jane Doe #2 never received a notification letter about the agreement. The notification did not mention the non-prosecution agreement with the U.S. Attorney's Office. Exhibits "E" & "K."

48. The notification that the U.S. Attorney's Office sent to Jane Doe #1 and other victims contained false and inaccurate information about the terms of the non-prosecution agreement. The false information was specifically approved by Epstein's attorneys. Supplemental Declaration of A. Marie Villafana, Dec. 22, 2008, doc. #35 at 2-3.

49. On July 11, 2008, the Court held a hearing on Jane Doe #1 and Jane Doe #2's Emergency Petition for Enforcement of Rights. During the hearing, the Government conceded that Jane Doe #1 and Jane Doe #2 were "victims" within the meaning of the Crime Victim's

Rights Act. Epstein was aware of these and subsequent proceedings involving the CVRA. Tr. July 11, 2008, at 14-15.

50. During the July 11, 2008 hearing, the Government conceded that its agreement had been concluded months before the victims were notified about it. *See id.* at 12 (". . . the agreement was consummated by the parties in December of 2007.").

51. At all times material to this statement of facts, it would have been practical and feasible for the federal government to inform Jane Doe #1 and Jane Doe #2 of the details of the proposed non-prosecution agreement with Epstein, including in particular the fact that the agreement barred any federal criminal prosecution. *See* U.S. Attorney's Correspondence at 191-92.

52. One of the senior prosecutors in the U.S. Attorney's Office joined Epstein's payroll shortly after important decisions were made limiting Epstein's criminal liability – and improperly represented people close to Epstein. During the federal investigation of Epstein, Bruce Reinhart was a senior Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of Florida. Within months after the non-prosecution agreement was signed, Reinhart left the Office and immediately went into private practice as a "white collar" criminal defense attorney. His office coincidentally happened to be not only in the same building (and on the same floor) as Epstein's lead criminal defense counsel, Jack Goldberger, but it was actually located right next door to the Florida Science Foundation – an Epstein-owned and -run company where Epstein spent his "work release." *See* http://www.brucereinhartlaw.com.

53. While working in this Office adjacent to Epstein's, Reinhart undertook the representation of numerous Epstein employees and pilots during the civil cases filed against

Epstein by the victims – cases that involved the exact same crimes and same evidence being reviewed by the U.S. Attorney's office when he was employed there. Specifically, he represented [redacted] (Epstein's number one co-conspirator who was actually named as such in the NPA), his [redacted]), his pilots Larry Morrison, Larry Visoski, David Rogers, William Hammond and Robert Roxburgh. (Hammond and Roxburgh were not deposed, but the others were.) *See* depositions of these individuals in various Epstein civil cases. On information and belief, Reinhart's representation of these individuals was paid, directly or indirectly, by Epstein. Such representations are in contravention of Justice Department regulations and Florida bar rules. Such representations also give, at least, the improper appearance that Reinhart may have attempted to curry with Epstein and then reap his reward through favorable employment.

LEGAL MEMORANDUM

The victims have previously briefed the issues of why they are entitled to entry of an order by this Court finding that the U.S. Attorney's Office violated their rights under the CVRA. *See* doc. #1; doc #9 at 3-11; doc. #19 at 3-9, 14. The victims specifically incorporate those pleadings by reference here. In short, as explained in the victims' earlier pleadings, the Office violated the victims' right to confer before reaching the non-prosecution agreement and also failed to use its best efforts to comply with the CVRA. The victims now provide additional briefing on two issues: (1) the CVRA applies to Jane Doe #1 and Jane Doe #2 even though no indictment was filed in their case; and (2) the Court should find that the government has clearly violated the CVRA in this case and set up a briefing schedule and hearing on the appropriate remedy.

I. THE CVRA PROTECTS JANE DOE #1 AND JANE DOE #2 EVEN THOUGH THIS CASE WAS RESOLVED BY A NON-PROSECUTION AGREEMENT RATHER THAN INDICTMENT.

In this litigation, the Government is apparently taking the position that the Crime Victims' Rights Act does not extend rights to Jane Doe #1 and Jane Doe #2 because no indictment was ever filed in federal court and thus no federal court proceedings were ever held. This crabbed litigation position about the breadth of the CVRA cannot be sustained. Indeed, neither the FBI nor the U.S. Attorney's Office itself took this position during the Epstein investigation – until the victims in this case filed their petition requesting enforcement of their rights. Instead, both the FBI and the U.S. Attorney's Office recognized that because the U.S. Attorney's Office was negotiating a non-prosecution agreement that affected the rights of specifically identified victims, the CVRA was applicable. The Court should reject the Government's newly-contrived position.

A. The Plain Language of the CVRA Makes Clear that Victims Have Rights Before an Indictment is Filed.

The CVRA promises crime victims that they will have various rights, including "[t]he reasonable right to confer with the attorney for the Government *in the case*," 18 U.S.C. § 3771(a)(5) (emphasis added), and "the right to be treated with fairness," 18 U.S.C. § 3771(a)(8).. In earlier pleadings filed in this action, the Government has tried to narrowly construe the CVRA so that it applies only to a "court proceeding." *See* Gov't Response to Victim's Emergency Petition (doc. #13) at 1-2.

The Government's position contravenes the plain language of the CVRA. The CVRA guarantees to Jane Doe #1 and Jane Doe #2 the right to confer with prosecutors "in the case,"

not in a "court proceeding." And the CVRA broadly extends a right to them "to be treated with fairness" -- a right that is not circumscribed to just court proceedings. Indeed, the fact that (as the Government notes) the drafters of the CVRA used the term "court proceeding" elsewhere in the statute (i.e., 18 U.S.C. § 3771(a)(2) (victim's right to notice "of any public court proceeding")) makes it obvious that they intended to give victims a right to confer that extended beyond simple court proceedings -- that is, the right to confer about "the case" -- as well as a broad right to be treated fairly throughout the process.

Moreover, it is patently obvious that a criminal "case" against Epstein had been going on for months before the victims learned about the non-prosecution agreement. As recounted in the statement of facts above, both the FBI and the U.S. Attorney's Office for the Southern District of Florida had opened a "case" involving Epstein's sexual abuse of the victims well before they entered into plea negotiations with Epstein. Indeed, as early as June 7, 2007 -- more than three months before they concluded the NPA with Epstein – the U.S. Attorney's Office sent a notice to Jane Doe #1 stating "your *case* is under investigation." *See* Exhibit "C" (emphasis added). The notice went on to tell Jane Doe #1 that "as a victim and/or witness of a federal offense, you have a number of rights." *Id.* at 1. Among the rights that the U.S. Attorney's Office itself told Jane Doe that she possessed was "[t]he right to confer with the attorney for the United States in the case." Of course, she would not have had those rights if she was not covered by the CVRA. Interestingly, the letter also advised Jane Doe #1 that "if you believe that the rights set forth above [e.g., the right to confer and other CVRA rights] are being violated, you have the right to petition the Court for relief." *Id.* at 1.

The plain language of the CVRA makes clear that crime victims have rights even before the filing of any indictment. The CVRA's instructs that crime victims who seeks to assert rights in pre-indictment situations should proceed in the court where the crime was committed: "The rights described in subsection (a) [of the CVRA] shall be asserted in the district in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). The victims have relied on this language through their pleadings, but the Government has not offered any response.

The CVRA also directs that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the *detection, investigation*, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1) (emphasis added). Of course, there would be no reason to direct that agencies involved in the "detection" and "investigation" of crime have CVRA obligations if the Government's construction of the Act were correct. Plainly, Congress envisioned the victims' rights law applying during the "detection" and "investigation" phases of criminal cases.

For all these reasons, the Court need look no further than the language of the CVRA to conclude that the victims in this case had protected rights under the Act.

B. Other Courts Have Recognized That Crime Victims Have Rights Before An Indictment is Filed.

In its briefing to date, the Government has yet to cite a single case that has accepted its sweeping position that the CVRA only extends rights to victims after the formal filing of an

indictment. This is because the case law all cuts the opposite way and recognizes that the CVRA does protect victims during the investigation of federal criminal cases.

In a case remarkably similar to this one, the Fifth Circuit has held that victims have a right to confer with federal prosecutors even before any charges are filed. In *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008), a wealthy corporate defendant reached a generous plea deal with the Government – a deal that the Government concluded and filed for approval with the district court without conferring with the victims. When challenged on a mandamus petition by the victims, the Fifth Circuit held:

> The district court acknowledged that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway." *BP Prods.*, 2008 WL 501321 at *11, 2008 U.S. Dist. LEXIS 12893, at *36. Logically, this includes the CVRA's establishment of victims' "reasonable right to confer with the attorney for the Government." 18 U.S.C. § 3771(a)(5). At least in the posture of this case (and we do not speculate on the applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain.

Id.

As we understand the Government's attempt to distinguish *Dean*, it asks this Court to decline to follow the Fifth Circuit's holding and create a split of authority on this important issue. See Gov't Response to Emergency Petn. at 2-3. Instead, the Government would have this Court deviate from the Fifth Circuit's well-reasoned opinion because the Circuit's "discussion of the scope of the right to confer was unnecessary because the court ultimately declined to issue mandamus relief." Gov't Response at 2 (citing *Dean*, 527 F.3d at 395). This is simply untrue. The Fifth Circuit faced a petition for mandamus relief from the victims in that case, asking the

Court to reject a proposed "binding" plea agreement negotiated under Fed. R. Crim. P. 11(c)(1)(C) (i.e., a plea agreement obligating the judge to impose a specific sentence). The victims asked for that relief because of the Government's failure to confer with them before the charges and accompanying plea agreement were filed. The Fifth Circuit held that the victims' rights had been violated in the passages quoted above. It then went on to remand the matter to district court for further consideration of the effect of the violations of the victims' rights:

> We are confident, however, that the conscientious district court will fully consider the victims' objections and concerns in deciding whether the plea agreement should be accepted.
>
> The decision whether to grant mandamus is largely prudential. We conclude that the better course is to deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds.

In re Dean, 527 F.3d at 396. Obviously, the Fifth Circuit could not have instructed the District Court to "take heed" of the violations of victims' rights unless it has specifically held, as a matter of law, that the victims' rights had been violated.

The Government's next effort to deflect the force of the Fifth Circuit's decision is that the Circuit did not directly quote three words found in the CVRA's right to confer – the words "in the case." *See* Gov't Response to Emergency Petn. at 2. But the Fifth Circuit had received briefs totaling close to 100 pages in that case and was obviously well aware of the statute at hand. Indeed, in the very paragraph the Government claims is troublesome, the Fifth Circuit cited to the district court opinion under review, which had quoted all the words in the statute. *See United States v. BP Products*, 2008 WL 501321 at *7 (noting victims right to confer "in the case"), *cited in In re Dean*, 527 F.3d at 394.

The Government finally notes that the Fifth Circuit stated that its ruling about the Government violating the right to confer applied "in the posture of this case." *In re Dean*, 527 F.3d at 394. But the posture of the case involving Epstein here – at least in its relevant aspects – is virtually identical to the posture there. The Fifth Circuit held that the Government had an obligation to confer with the victims *before charges were filed and before a final plea arrangement was reached.* Without giving the victims a chance to confer before hand, the plea agreement might be fatally flawed because it did not consider the concerns of the victims. Thus, the Fifth Circuit emphasized the need to confer with victims before any disposition was finally decided: "The victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal. As we have explained, that is why we conclude that these victims should have been heard at an earlier stage." *Id.* at 395. The posture in this case is exactly the same – the Government should have conferred before the parties "reached a tentative deal." The fact that the deal reached here is slightly different than the deal reached in the *Dean* case (a non-prosecution agreement versus a plea agreement) is truly a distinction without a difference. If anything, the facts here cry out for conferral even more than in that case. At least the defendant there agreed to plead guilty to a federal felony. Here, the wealthy defendant has escaped all federal punishment – a plea deal that Jane Doe #1 and Jane Doe #2 would have strenuously objected to . . . if the Government had given them the chance.

The Fifth Circuit's decision in *Dean* has been cited favorably in two recent District Court decisions, which provides further support for Petitioner's position here. In *United States v. Rubin*, 2008 WL 2358591 (E.D.N.Y. 2008), the victims argued for extremely broad rights under

the CVRA. After citing *Dean*, the District Court agreed that the rights were expansive and could apply before indictment, but subject to the outer limit that the Government be at least "contemplating" charges:

> Quite understandably, movants perceive their victimization as having begun long before the government got around to filing the superseding indictment. They also believe their rights under the CVRA ripened at the moment of actual victimization, or at least at the point when they first contacted the government. Movants rely on a decision from the Southern District of Texas for the notion that CVRA rights apply prior to any prosecution. In *United States v. BP Products North America, Inc.*, the district court reasoned that because § 3771(d)(3) provided for the assertion of CVRA rights "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred," the CVRA clearly provided for "rights . . . that apply before any prosecution is underway." (United States v. BP Products North America, Inc., Criminal No. H-07-434, 2008 WL 501321 at *11 (S.D.Tex. Feb.21, 2008) (emphasis in original), mandamus denied in part, *In re Dean*, No. 08-20125, 2008 WL 1960245 (5th Cir. May 7, 2008). But, assuming that it was within the contemplation and intendment of the CVRA to guarantee certain victim's rights prior to formal commencement of a criminal proceeding, the universe of such rights clearly has its logical limits. For example, the realm of cases in which the CVRA might apply despite no prosecution being "underway," cannot be read to include the victims of uncharged crimes that the government has not even contemplated. It is impossible to expect the government, much less a court, to notify crime victims of their rights if the government has not verified to at least an elementary degree that a crime has actually taken place, given that a corresponding investigation is at a nascent or theoretical stage.

Id. at *6. Here, of course, the criminal investigation went far beyond the "nascent or theoretical stage" – to a point where the Government determined that crimes had been committed and that the defendant should plead guilty to either a state or federal offense.

Similarly, at least one other district court has reviewed the issue and agreed with the victims' position that crime victims can have rights before charges are filed. In rejecting an argument that the CVRA should be limited to cases in which a defendant has been convicted, *United States v. Okun*, explained: "Furthermore, the Fifth Circuit has noted that victims acquire

rights under the CVRA even before prosecution. *See In re Dean*, 527 F.3d 391, 394 (5th Cir.2008). This view is supported by the statutory language, which gives the victims rights before the accepting of plea agreements and, therefore, before adjudication of guilt. *See* 18 U.S.C. § 3771(a)(4)." 2009 WL 790042 at *2 (E.D.Va. 2009).

Accordingly, rather than create a split of authority, this Court should follow the Fifth Circuit's holding in *Dean* (and the view of the U.S. District Courts for the Eastern District of New York and the Eastern District of Virginia) and conclude that the CVRA extends rights to Jane Doe #1 and Jane Doe #2 under the facts of this case.

C. The U.S. Attorney's Office Has Previously Recognized that Jane Doe #1 and Jane Doe #2 Have Rights Under the CVRA.

A final reason for concluding that Jane Doe #1 and Jane Doe #2 are protected by the CVRA is that the U.S. Attorney's Office itself reached that conclusion – well before the victims filed this petition. The U.S. Attorney's Office arranged to have the FBI send a notice to, for example, Jane Doe #1 informing her that she had rights under the CVRA. Later, in discussions with defendant Epstein, the Office explained to Epstein their obligations to the victims under the CVRA. Indeed, it was only *after* Jane Doe #1 and Jane Doe #2 filed a petition with this Court seeking protection of their rights that the U.S. Attorney's Office reversed its position. The Court should reject this remarkable about-face.

As recounted in more detail above, the U.S. Attorney's Office made clear to both the victims and to Epstein that the victims had rights under the CVRA. For example, on about June 7, 2007, FBI agents hand-delivered to Jane Doe #1 a standard CVRA victim notification letter, promising that the Justice Department would makes its "best efforts" to protect Jane Doe #1's

rights, including "[t]he reasonable right to confer with the attorney for the United States in the case" and "to be reasonably heard at any public proceeding in the district court involving . . . plea . . . ." Exhibit "C." Similarly, on about November 27, 2007, then First Assistant U.S. Attorney [redacted] sent an e-mail to Jay Lefkowitz, defense counsel for Epstein stating: [redacted] U.S. Attorney's Correspondence at 255 (emphasis rearranged). Apparently, this assertion produced some sort of objection from defendant Epstein. The U.S. Attorney's Office, however, rejected those objections In a letter on about December 6, 2007, [redacted], First Assistant U.S. Attorney again sent a letter to Jay Lefkowitz, reiterating the U.S. Attorney's Office's legal obligations to keep victims informed of the status of [redacted] The letter stated:

[redacted]

U.S. Attorney's Correspondence at 191-92 (emphasis added). What this correspondence shows is that the U.S. Attorney's Office quite clearly took the position with defendant Epstein that the CVRA extended rights to Epstein's victims. Yet when the victims in this case filed a petition in this Court asking those rights to be respected, the Government simply reversed course. The U.S. Attorney's Office had it right the first time – the CVRA does extend rights to Jane Doe #1 and Jane Doe #2 in this case.

D. The U.S. Attorney's Office Is Estopped From Arguing that the CVRA Does Not Apply in this Case.

For all the reasons just explained, it is clear that the CVRA applies to this case and the Jane Doe #1 and Jane Doe #2 had rights under the Act. In addition, however, the Government is simply stopped from arguing otherwise. *The Government told the victims that they had rights under the CVRA and would keep them informed about the progress of the case.* Exhibits "C," "D," "F," & "G." Having made those representations to the victims – and having induced reliance by the victims – the Government is stopped from taking a different position now.

As explained by the Eleventh Circuit, to make out a claim of estoppel against the Government, a party must adduce evidence of the following:

(1) words, conduct, or acquiescence that induces reliance;
(2) willfulness or negligence with regard to the acts, conduct, or acquiescence;
(3) detrimental reliance; and
(4) affirmative misconduct by the Government.

United States v. McCorkle, 321 F.3d 1292 (11th Cir. 2003). Each of these four factors is easily met here.

First, the Government made statements to the victims that induced reliance. The victims received an official notice on Justice Department letterhead that they were crime victims in the Epstein case and that the Justice Department would use its "best efforts" to protect their rights.

Second, these statements were obviously not accidental -- to the contrary, the Government specifically and deliberately sent these notices to the victims.

Third, the victims detrimentally relied on these statements. As explained at greater length in the victims proposed facts, the victims were lead to believe that their case was "under investigation." As a result, they did not take steps to object to Epstein's plea agreement and, indeed, did not even attend the court hearing where Epstein pled guilty. Similarly, their attorney (Mr. Edwards) was induced to spend an afternoon writing a letter to the U.S Attorney's Office about why Epstein should be federally prosecuted – time that was taken away from other matters at his busy law practice. This was a complete wild goose chase, as the U.S. Attorney's Office was concealing from Mr. Edwards at the time that a federal non-prosecution agreement had already been reached with Epstein.

Fourth, the U.S. Attorney's Office engaged in affirmative misconduct. We do not make this allegation lightly. But the facts recounted above demonstrate the following chain of events. The U.S. Attorney's Office first reached a non-prosecution agreement with Epstein, in which it agreed not to prosecute him for numerous crimes (including, for example, sex offenses committed by Epstein against Jane Doe #1). As part of that agreement, the U.S. Attorney's Office agreed to a "confidentiality" provision that forbade publicly disclosing the existence of the agreement. As a result, the U.S. Attorney's Office (and FBI agents acting under its

direction[4]) kept the existence of the non-prosecution agreement secret from the victims and the public. The reasonable inference from the evidence is that the U.S. Attorney's Office wanted to keep the agreement a secret to avoid intense criticism that would have surely ensued had the victims and the public learned that a billionaire sex offender with political connections had arranged to avoid federal prosecution for numerous felony sex offenses against minor girls.

As part of this pattern of deception, the U.S. Attorney's Office discussed victim notification with the defendant sex offender and, after he raised objections, stopped making notifications. Then later in January 2008, the U.S. Attorney's Office arranged for letters to be sent to the victims – including Jane Doe #1 and Jane Doe #2 – that falsely stated that to each that your "case is currently under investigation." This was untrue, as the U.S. Attorney's Office had already resolved the federal case by signing a non-prosecution agreement with Epstein. Indeed, the pattern of deception continued even after Jane Doe #1 and Jane Doe #2 were represented by legal counsel. In May 2008, the Office sent a similar letter stating "your case is currently investigation" to another victim (represented by attorney Bradley J. Edwards). As late as the middle of June 2008 – more than eight months after the non-prosecution agreement had been signed -- the Assistant U.S. Attorney handling the case told Edwards to send information that he wanted the Office to consider in determining whether to file federal charges. The Office concealed from him that it had already made the determination not to file federal charges and that the Office had in fact signed a non-prosecution agreement long ago. The Office also concealed from him the fact that guilty pleas in state court were imminent. The Office disclosed

[4] It is unknown whether the U.S. Attorney's Office even made the FBI aware of the NPA in a timely fashion.

the non-prosecution agreement only after Epstein had entered his guilty pleas in state court – in other words, only after the time for the victims to be able to object to the non-prosecution agreement during the plea process had come and gone. Even at that time, the Office did not disclose the provisions in the agreement. In short, the victims never learned about the non-prosecution agreement barring federal prosecution of their cases because of a deliberate decisions by the U.S. Attorney's Office, not mere "negligence or inaction." *McCorkle*, 321 F.3d at 1297. Accordingly, the Government is stopped from arguing that the Crime Victims' Rights Act does not apply to this case.

II. THE COURT SHOULD FIND THAT THE VICTIMS' RIGHTS HAVE BEEN VIOLATED AND THEN SET UP A BRIEFING SCHEDULE AND HEARING ON THE APPROPRIATE REMEDY.

This U.S. Attorney's Office's behavior in this case does not satisfy the Office's obligations under the CVRA to use its "best efforts" to insure that victims receive protection of their rights. 18 U.S.C. § 3771(c)(1). In particular, the undeniable chain of events makes clear that the victims were not afforded their right "to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(5). Whatever else may be said about the deception, it also starkly violates the victims' right "to be treated with fairness and with respect for the victim's dignity . . . ." 18 U.S.C. § 3771(a)(8). The pattern also denied the victims of timely notice of court proceedings, 18 U.S.C. § 3771(a)(3), including in particular the state court guilty plea.

As we understand the position of the Government, it does not truly contest that – if the CVRA applied – it managed to discharge its various obligations under the Act. Instead, the Government relies solely on a technical argument to reach the conclusion that it discharged its obligations – namely, the argument that the CVRA does not apply until a formal indictment is

filed. As just explained, however, that technical argument must be rejected as inconsistent with the CVRA's plain language and interpretation by other courts. Accordingly, this Court should find that the Government has violated its CVRA obligations.

Once the Court finds such a violation, the next issue becomes what remedy should apply. Since the earliest days of our nation, it has been settled law that "where there is a legal right, there is also a legal remedy . . . .." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (internal quotation omitted). Moreover, "[i]f the right is created by a federal statute, the federal courts have the power to fashion an appropriate remedy." *Intracoastal Transp., Inc. v. Decatur County, Georgia* 482 F.2d 361, 371 (5th Cir. 1973). As we understand the Government's position in this case, however, they believe that this Court is powerless to do anything to correct the palpable violation of victims' rights documented in this case.

Jane Doe #1 and Jane Doe #2 respectfully request that the Court set up a briefing schedule and a hearing on this important issue. The victims believe that they can establish that the appropriate remedy for the clear violations of their rights is to invalidate the Non-Prosecution Agreement. While the victims request an opportunity to provide more extensive briefing on this subject, they provide a few citations in support of their position here.

When other plea arrangements have been negotiated in violation of federal law, they have been stricken by the courts. For example, *United States v. Walker*, 98 F.3d 944 (7th Cir. 1996), held that where a sentence on a new crime could not run concurrently with a probation revocation the defendant was then serving – contrary to the assumption of the parties to the plea agreement – the defendant was not entitled to specific performance of the plea agreement. The Court explained that the case was one "in which the bargain is vitiated by illegality . . . ." *Id.* at

947. Here, of course, exactly the same is true: the non-prosecution agreement is vitiated by illegality – namely, the fact that it was negotiated in violation of the victims' rights. Other cases reach similar conclusions. *See, e.g., United States v. Cooper*, 70 F.3d 563, 567 (10th Cir. 1995) (prosecutor agreed to recommend probation, but it later appeared that would be an illegal sentence in this case, and thus only adequate remedy is to allow defendant to withdraw plea); *Craig v. People*, 986 P.2d 951, 959-60 (Colo. 1999) (because "neither the prosecutor nor the trial court have authority to modify or waive the mandatory parole period," such "is not a permissible subject of plea negotiations," and thus, even if "the trial court erroneously approves of such an illegal bargain" such plea is "invalid" and thus will not be specifically enforced). Nor can the defendant claim some right to specific performance of an illegal non-prosecution agreement. *See State v. Garcia*, 582 N.W.2d 879, 881-82 (Minn. 1998) (plea agreement for 81 months sentence, but court added 10-year conditional release term because, under facts of case, sentence without such release term "plainly illegal," and thus remedy of specific performance not available); *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585, 588 (1998) (plea agreement was for sentence to be concurrent with one not yet completed, but state statute mandates consecutive sentence on facts of this case; "defendant is not entitled to specific performance in this case because such action would violate the laws of this state"); *Ex parte Rich*, 194 S.W.3d 508, 515 (Tex. Crim. App. 2006); (where "the plea bargain seemed fair on its face when executed, it has become unenforceable due to circumstances beyond the control of [the parties], namely the fact that one of the enhancement paragraphs was mischaracterized in the indictment, resulting in an illegal sentence far outside the statutory range," proper remedy is plea withdrawal, as "there is no way of knowing whether the State would have offered a plea bargain within the proper range of

punishment that he deemed acceptable"); *State v. Mazzone*, 212 W.Va. 368, 572 S.E.2d 891, 897 (2002) (where plea agreement was that defendant would plead guilty to 2 felony counts of felon in possession of firearm and prosecutor would dismiss remaining 6 counts re other offenses with prejudice, and all parties erroneously believed these 2 crimes were felonies, lower court "correctly resolved this unfortunate predicament by holding that a plea agreement which cannot be fulfilled based upon legal impossibility must be vacated in its entirety, and the parties must be placed, as nearly as possible, in the positions they occupied prior to the entry of the plea agreement").

The Non-Prosecution Agreement that the Government entered into in this case was simply illegal. The Government did not protect the congressionally-mandated rights of victims before it entered into this Agreement. Perhaps it is for this reason that the Agreement is so shockingly lenient – blocking prosecution for dozens and dozens of federal felony sex offenses against several dozen minor girls. But regardless of the leniency, the only issue for the Court is whether the Agreement was lawful. It was not, and so the Court invalidate it.[5] The victims respectfully ask for a full briefing schedule and a hearing on this important issue.

---

[5] Defendant Jeffrey Epstein was notified about this case long ago, and was notified on August 26, 2010, that the victims would be filing correspondence in support of their motions. He has not chosen to intervene in this action, and so he should not be heard to complain about remedy the Court might impose.

In any event, there are no double jeopardy barriers to invalidating the plea. As explained in a leading criminal procedure treatise:

> The review of defendant's sentence is also provided in federal cases upon application of a victim. The Crime Victim's Rights Act allows a victim to seek to reopen a sentence through a writ of mandamus, if the victim has asserted and been denied the right to be heard at sentencing. Like the prosecution's statutory right to appeal, the victim's statutory remedy should pose no double jeopardy

CERTIFICATE OF CONFERENCE

As recounted above, counsel for Jane Doe #1 and Jane Doe #2 have approached the U.S. Attorney's Office for more than two and a half years in an effort to reach stipulated facts. The U.S. Attorney's Office ultimately terminated those efforts on March 15, 2011, taking the position that the facts of the case are irrelevant and that, on any set of facts, it did not violate the CVRA.

CONCLUSION

For all the foregoing reasons, the Court should find the U.S. Attorney's Office violated Jane Doe #1 and Jane Doe #2's rights under the Crime Victims Rights Act and then schedule an appropriate hearing on the remedy for these violations. The scope of the remedy that is appropriate may depend in part of the scope of the violations that the Court finds. For this reason, it makes sense for the Court to bifurcate the process and determine, first, the extent of the violations and then, second, the remedy appropriate for those violations. If the Court would prefer to see more immediate briefing on remedy issues, the victims stand prepared to provide that briefing at the Court's direction.

> difficulties if as the [*DiFrancesco*] Court explained . . . the defendant is 'charged with knowledge of the statute and its . . . provisions, and has no expectation of finality in his sentence until the [review by writ] is concluded . . . .'"

LAFAVE ET AL., CRIMINAL Procedure § 26.7(b) (Nov. 2010) (*quoting United States v. DiFrancesco*, 449 U.S. 117, 146 (1980)).

DATED: March 21, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on March 21, 2011, on the following using the Court's CM/ECF system:

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West Palm Beach, FL 33401
Criminal Defense Counsel for Jeffrey Epstein
(courtesy copy of pleading via U.S. mail)

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT B

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 08/14/2007

C[redacted] W[redacted] was interviewed in West Palm Beach, Florida, regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agents and the nature of the interview, W[redacted] provided the following information:

In 2003 or 2004 W[redacted] was introduced to JEFFREY EPSTEIN for the purpose of providing him with personal massages. W[redacted] was approached at a party by a female she believed was named CHARLISE. She described the female as having brown hair and taller. The female was later identified as [redacted]. [redacted] told W[redacted] and W[redacted]'s friend, T[redacted] M[redacted], that they could make money by providing massages to EPSTEIN. [redacted] told W[redacted] that she could provide the massages with her clothes on or off. W[redacted], who was fifteen years old, believed that she was close to turning sixteen when she first met EPSTEIN. However, during W[redacted]s first contact with EPSTEIN, she told him that she had just turned eighteen.

[redacted] and W[redacted] traveled to EPSTEIN's residence in Palm Beach by taxi. [redacted] was pregnant at the time. Once at the residence, [redacted] took W[redacted] upstairs. EPSTEIN entered the room wearing only a robe. Once EPSTEIN had removed the robe, both [redacted] and W[redacted] provided EPSTEIN with a massage. Both [redacted] and W[redacted] had removed their clothing and remained only in their underwear. EPSTEIN asked [redacted] to leave. Once alone with W[redacted] EPSTEIN began to masturbate. W[redacted] was uncomfortable. After EPSTEIN climaxed the massage was over. W[redacted] believed that [redacted] had mentioned EPSTEIN might masturbate during the massage but she was still very surprised when he masturbated. EPSTEIN paid W[redacted] $200.00. EPSTEIN did not touch W[redacted] during that massage. W[redacted] departed EPSTEIN's residence with two men that worked for EPSTEIN. They drove W[redacted] to a Shell Gas Station located near Okeechobee Boulevard and the Florida Turnpike.

Prior to departing the residence, W[redacted] provided her telephone number to one of EPSTEIN's assistants, [redacted] (PHONETIC). W[redacted] described her as a very pretty Hispanic female in her early twenties, with long brown hair, and approximately 5'5" to 5'6" tall. W[redacted] stated that [redacted], another of EPSTEIN's assistants, or EPSTEIN would usually contact her. [redacted] would telephone and ask if she was available or if she had any other

Investigation on 08/07/2007 at West Palm Beach, Florida

File # 31E-MM-108062 Date dictated 08/07/2007

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

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girls she could bring. When EPSTEIN telephoned, he usually asked for [redacted] to come over. According to W[redacted], EPSTEIN's house telephone number began with the digits 655. She would call sometimes and leave a message. W[redacted] stated that when they telephoned her they would inform her of when they would be coming back to town and if she might have anyone new. W[redacted] did not believe that EPSTEIN ever really liked her.

W[redacted] traveled to the EPSTEIN's residence during 2003 and 2004 over twenty five times. W[redacted] believed that she provided EPSTEIN with approximately 10-15 massages. EPSTEIN initially started out touching W[redacted]s breasts but gradually the massages became more sexual. EPSTEIN would instruct W[redacted] on how and what to do during the massages. He would request W[redacted] to rub his chest and nipples. W[redacted] stated that on approximately two occasions, EPSTEIN asked that W[redacted] remove her underwear and provide the massage nude. W[redacted] complied. W[redacted] stated that EPSTEIN would make her feel that she had the option to do what she wanted.

During one massage, W[redacted] stated that she had been giving EPSTEIN a massage for approximately 30-40 minutes when instead of EPSTEIN turning over to masturbate, EPSTEIN brought another female into the massage area. W[redacted] described the female as a beautiful blonde girl, a "Cameron Diaz" type, 19 years of age, bright blue eyes, and speaking with an accent. EPSTEIN had W[redacted] straddle the female on the massage table. EPSTEIN wanted W[redacted] to touch the females breast. According to W[redacted], EPSTEIN "pleasured" the female while W[redacted] was straddled on top of the female. W[redacted] stated she could hear what she believed to be a vibrator. W[redacted] said for EPSTEIN it was all about pleasuring the female. After the female climaxed, EPSTEIN patted W[redacted] on the shoulder and she removed herself from the table. The female got up from the table and went into the spa/sauna. EPSTEIN commented to W[redacted] that in a few minutes the female would realize what had just happened to her. W[redacted] received $200.00.

W[redacted] advised the interviewing agents that EPSTEIN had used a back massager on her vagina. EPSTEIN asked her first if he could use the massager on her. W[redacted] stated that she had held her breath when EPSTEIN used the back massager on her. W[redacted] stated that at no time during any of the massages had EPSTEIN caused her to climax.

During another massage, W[redacted] believed by this time she was seventeen, EPSTEIN placed his hand on W[redacted] vagina, touching

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[redacted] clitoris. [redacted] was uncomfortable and told him to stop. EPSTEIN complied. [redacted] stated that the incident freaked her out. [redacted] stated that EPSTEIN was upset because she was upset. [redacted] never return to the residence. [redacted] stated that she did not deal with EPSTEIN anymore after that incident.

EPSTEIN gave both [redacted] and [redacted] each a book entitled "Massage for Dummies". They received the books on the same visit. EPSTEIN also commented how strong [redacted]s hands were when it came to her providing his massages.

On another occasion, [redacted] mentioned to EPSTEIN that she was looking at a car, a Toyota Corolla. EPSTEIN provided [redacted] with $600.00 - $700.00. [redacted] stated that EPSTEIN gave her the money after the incident with the other female.

According to [redacted] EPSTEIN would ask her to bring him other girls. [redacted] who started dancing at strip clubs when she was 16, brought girls from the club as well as from other sources. WILD stated she brought girls from fifteen years of age to twenty-five years of age. [redacted] stated that EPSTEIN would get frustrated with her if she did not have new females for him. On one instance, EPSTEIN hung up on her because she could not provide him with anyone new. [redacted] stated that EPSTEIN's preference was short, little, white girls. [redacted] stated that EPSTEIN was upset when one of the other girls brought a black girl. [redacted] stated that EPSTEIN did not want black girls or girls with tatoos.

[redacted] stated that one of the girls she stayed with on occasion, [redacted], also started providing EPSTEIN with massages. A telephone number for [redacted] was [redacted]. [redacted] said that her family resides in [redacted], Florida, possibly [redacted] [redacted] also stayed with [redacted] during this same time period. However, [redacted] never went to EPSTEIN's house or provided him with massages. [redacted] has a Yacht Club address.

Another girl that [redacted] had taken to EPSTEIN's residence was [redacted] Last Name Unknown(LNU). According to [redacted] EPSTEIN liked [redacted] LNU a lot. [redacted] said that she was never a favorite of EPSTEIN. EPSTEIN offered [redacted] $300.00 to bring [redacted] LNU. [redacted] LNU was a couple years younger than [redacted] [redacted] believed that she was either 16 or 17 when she first went to EPSTEIN's residence. [redacted] said that [redacted] LNU went 2-3 times but that she did not want any part of it after that. [redacted] believes she could identify [redacted] LNU if she saw her photograph. [redacted] also stated that [redacted] LNU at

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one time attended [redacted] HIGH SCHOOL. W[redacted] also believed that they had met through a group of friends while attending [redacted] - a dropout prevention school.

W[redacted] mentioned another girl by the name of C[redacted]. EPSTEIN distinguished the two "[redacted]" by referring to [redacted] as [redacted]. I[redacted] worked at an ice cream shop. W[redacted] stated that she did not like L[redacted] and that L[redacted] was a storyteller and a bad liar. W[redacted] stated that L[redacted] never really wanted to go to EPSTEIN's residence but she went anyway.

W[redacted] said that she had not taken a good look at EPSTEIN's penis. W[redacted] explained that it seemed like he would always try and hide his penis. W[redacted] stated that EPSTEIN never asked her for sex.

W[redacted] started dancing when she was sixteen at [redacted]. The owner, [redacted] let her dance. W[redacted] has also worked at [redacted] located [redacted] in Boynton Beach, Florida.

W[redacted] used illegal drugs during the years she provided EPSTEIN with massages. W[redacted] said that EPSTEIN tried to provide her with advice regarding controlled substances.

W[redacted] stated that she met with EPSTEIN's attorneys, [redacted] and a unidentified female(UF), at the ALE HOUSE RESTAURANT. W[redacted] met with them after she contacted [redacted], who confirmed that they were really working for EPSTEIN. W[redacted] stated that [redacted] also talked of her twin boys and stated that she was living in Manhattan. W[redacted] found out that [redacted] and the UF are employed by [redacted]. They asked a lot of questions. They specifically asked about L[redacted] and a [redacted] LNU. W[redacted] reiterated her dislike for L[redacted]

W[redacted] also informed the interviewing agents that she had spoken to M[redacted] she believed before the fourth of July. M[redacted] told W[redacted] that she had met with investigators and that they had videoed her.

W[redacted] confirmed her association to the following telephone numbers:

Old cellular number - [redacted]
Possibly an old cellular number - [redacted]
[redacted]'s telephone number - [redacted]

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CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT C

U.S. Department of Justice

United States Attorney
Southern District of Florida

[redacted]

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.

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: [redacted]
Assistant United States Attorney

cc: Special Agent [redacted], F.B.I.

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT D

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.
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In addition to these rights, you are entitled to counseling and medical services, and pr[illegible] from intimidation and harassment. If the Court determines that you are a victim, you also [illegible] entitled to restitution from the perpetrator. A list of counseling and medical service pro[illegible] be provided to you, if you so desire. If you or your family is subjected to any intimi[illegible] 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 the p[illegible] 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: [redacted]
Assistant United States Attorney

cc: Special Agent [redacted], F.B.I.

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT E

IN RE:
INVESTIGATION OF
JEFFREY EPSTEIN
_____/

NON-PROSECUTION AGREEMENT

IT APPEARING that the City of Palm Beach Police Department and the State Attorney's Office for the 15th Judicial Circuit in and for Palm Beach County (hereinafter, the "State Attorney's Office") have conducted an investigation into the conduct of Jeffrey Epstein (hereinafter "Epstein");

IT APPEARING that the State Attorney's Office has charged Epstein by indictment with solicitation of prostitution, in violation of Florida Statutes Section 796.07;

IT APPEARING that the United States Attorney's Office and the Federal Bureau of Investigation have conducted their own investigation into Epstein's background and any offenses that may have been committed by Epstein against the United States from in or around 2001 through in or around September 2007, including:

(1) knowingly and willfully conspiring with others known and unknown to commit an offense against the United States, that is, to use a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females to engage in prostitution, in violation of Title 18, United States Code, Section 2422(b); all in violation of Title 18, United States Code, Section 371;

(2) knowingly and willfully conspiring with others known and unknown to travel in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with minor females, in violation of Title 18, United States Code, Section 2423(b); all in violation of Title 18, United States Code, Section 2423(e);

(3) using a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2;

(4) traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with minor females; in violation

of Title 18, United States Code, Section 2423(b); and

(5) knowingly, in and affecting interstate and foreign commerce, recruiting, enticing, and obtaining by any means a person, knowing that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act as defined in 18 U.S.C. § 1591(c)(1); in violation of Title 18, United States Code, Sections 1591(a)(1) and 2; and

IT APPEARING that Epstein seeks to resolve globally his state and federal criminal liability and Epstein understands and acknowledges that, in exchange for the benefits provided by this agreement, he agrees to comply with its terms, including undertaking certain actions with the State Attorney's Office;

IT APPEARING, after an investigation of the offenses and Epstein's background by both State and Federal law enforcement agencies, and after due consultation with the State Attorney's Office, that the interests of the United States, the State of Florida, and the Defendant will be served by the following procedure;

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 set forth below.

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 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.

Terms of the Agreement:

1. Epstein shall plead guilty (not nolo contendere) to the Indictment as currently pending against him in the 15th Judicial Circuit in and for Palm Beach County (Case No. 2006-cf-009495AXXXMB) charging one (1) count of solicitation of prostitution, in violation of Fl. Stat. § 796.07. In addition, Epstein shall plead guilty to an Information filed by the State Attorney's Office charging Epstein with an offense that requires him to register as a sex offender, that is, the solicitation of minors to engage in prostitution, in violation of Florida Statutes Section 796.03;

2. Epstein shall make a binding recommendation that the Court impose a thirty (30) month sentence to be divided as follows:

   (a) Epstein shall be sentenced to consecutive terms of twelve (12) months and six (6) months in county jail for all charges, without any opportunity for withholding adjudication or sentencing, and without probation or community control in lieu of imprisonment; and

   (b) Epstein shall be sentenced to a term of twelve (12) months of community control consecutive to his two terms in county jail as described in Term 2(a), *supra*.

3. This agreement is contingent upon a Judge of the 15th Judicial Circuit accepting and executing the sentence agreed upon between the State Attorney's Office and Epstein, the details of which are set forth in this agreement.

4. The terms contained in paragraphs 1 and 2, *supra*, do not foreclose Epstein and the State Attorney's Office from agreeing to recommend any additional charge(s) or any additional term(s) of probation and/or incarceration.

5. Epstein shall waive all challenges to the Information filed by the State Attorney's Office and shall waive the right to appeal his conviction and sentence, except a sentence that exceeds what is set forth in paragraph (2), *supra*.

6. Epstein shall provide to the U.S. Attorney's Office copies of all

proposed agreements with the State Attorney's Office prior to entering into those agreements.

7. The United States shall provide Epstein's attorneys with a list of individuals whom it has identified as victims, as defined in 18 U.S.C. § 2255, after Epstein has signed this agreement and been sentenced. Upon the execution of this agreement, the United States, in consultation with and subject to the good faith approval of Epstein's counsel, shall select an attorney representative for these persons, who shall be paid for by Epstein. Epstein's counsel may contact the identified individuals through that representative.

8. If any of the individuals referred to in paragraph (7), *supra*, elects to file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the United States District Court for the Southern District of Florida over his person and/or the subject matter, and Epstein waives his right to contest liability and also waives his right to contest damages up to an amount as agreed to between the identified individual and Epstein, so long as the identified individual elects to proceed exclusively under 18 U.S.C. § 2255, and agrees to waive any other claim for damages, whether pursuant to state, federal, or common law. Notwithstanding this waiver, as to those individuals whose names appear on the list provided by the United States, Epstein's signature on this agreement, his waivers and failures to contest liability and such damages in any suit are not to be construed as an admission of any criminal or civil liability.

9. Epstein's signature on this agreement also is not to be construed as an admission of civil or criminal liability or a waiver of any jurisdictional or other defense as to any person whose name does not appear on the list provided by the United States.

10. Except as to those individuals who elect to proceed exclusively under 18 U.S.C. § 2255, as set forth in paragraph (8), *supra*, neither Epstein's signature on this agreement, nor its terms, nor any resulting waivers or settlements by Epstein are to be construed as admissions or evidence of civil or criminal liability or a waiver of any jurisdictional or other defense as to any person, whether or not her name appears on the list provided by the United States.

11. Epstein shall use his best efforts to enter his guilty plea and be

sentenced not later than October 26, 2007. The United States has no objection to Epstein self-reporting to begin serving his sentence not later than January 4, 2008.

12. Epstein agrees that he will not be afforded any benefits with respect to gain time, other than the rights, opportunities, and benefits as any other inmate, including but not limited to, eligibility for gain time credit based on standard rules and regulations that apply in the State of Florida. At the United States' request, Epstein agrees to provide an accounting of the gain time he earned during his period of incarceration.

13. The parties anticipate that this agreement will not be made part of any public record. If the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure.

Epstein understands that the United States Attorney has no authority to require the State Attorney's Office to abide by any terms of this agreement. Epstein understands that it is his obligation to undertake discussions with the State Attorney's Office and to use his best efforts to ensure compliance with these procedures, which compliance will be necessary to satisfy the United States' interest. Epstein also understands that it is his obligation to use his best efforts to convince the Judge of the 15th Judicial Circuit to accept Epstein's binding recommendation regarding the sentence to be imposed, and understands that the failure to do so will be a breach of the agreement.

In consideration of Epstein's agreement to plead guilty and to provide compensation in the manner described above, if Epstein successfully fulfills all of the terms and conditions of this agreement, the United States also agrees that it will not institute any criminal charges against any potential co-conspirators of Epstein, including but not limited to [redacted], [redacted], Lesley Groff, or [redacted]. Further, upon execution of this agreement and a plea agreement with the State Attorney's Office, the federal Grand Jury investigation will be suspended, and all pending federal Grand Jury subpoenas will be held in abeyance unless and until the defendant violates any term of this agreement. The defendant likewise agrees to withdraw his pending motion to intervene and to quash certain grand jury subpoenas. Both parties agree to maintain their evidence, specifically evidence requested by or directly related to the grand jury subpoenas that have been issued, and including certain computer equipment, inviolate until all of the terms of this agreement have been satisfied. Upon the successful completion of the terms of this agreement, all outstanding grand jury subpoenas shall be deemed withdrawn.

By signing this agreement, Epstein asserts and certifies that each of these terms is material to this agreement and is supported by independent consideration and that a breach of any one of these conditions allows the United States to elect to terminate the agreement and to investigate and prosecute Epstein and any other individual or entity for any and all federal offenses.

By signing this agreement, Epstein asserts and certifies that he is aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. Epstein further is aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information, or in bringing a defendant to trial. Epstein hereby requests that the United States Attorney for the Southern District of Florida defer such prosecution. Epstein agrees and consents that any delay from the date of this Agreement to the date of initiation of prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at his own request, and he hereby waives any defense to such prosecution on the ground that such delay operated to deny him rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of months equal to the period between the signing of this agreement and the breach of this agreement as to those offenses that were the subject of the grand jury's investigation. Epstein further asserts and certifies that he understands that the Fifth Amendment and Rule 7(a) of the Federal Rules of Criminal Procedure provide that all felonies must be charged in an indictment presented to a grand jury. Epstein hereby agrees and consents that, if a prosecution against him is instituted for any offense that was the subject of the grand jury's investigation, it may be by way of an Information signed and filed by the United States Attorney, and hereby waives his right to be indicted by a grand jury as to any such offense.

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By signing this agreement, Epstein asserts and certifies that the above has been read and explained to him. Epstein hereby states that he understands the conditions of this Non-Prosecution Agreement and agrees to comply with them.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____ By: [redacted]
ASSISTANT U.S. ATTORNEY

Dated: 9/24/07
JEFFREY EPSTEIN

Dated: _____
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: _____
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

By signing this agreement, Epstein asserts and certifies that the above has been read and explained to him. Epstein hereby states that he understands the conditions of this Non-Prosecution Agreement and agrees to comply with them.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____ By: [redacted]
ASSISTANT U.S. ATTORNEY

Dated: _____
JEFFREY EPSTEIN

Dated: 9/24/07
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: _____
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

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R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____ By: [redacted]
ASSISTANT U.S. ATTORNEY

Dated: _____
JEFFREY EPSTEIN

Dated: _____
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: 9-24-07
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

IN RE:

INVESTIGATION OF

JEFFREY EPSTEIN

_____/

ADDENDUM TO THE NON-PROSECUTION AGREEMENT

IT APPEARING that the parties seek to clarify certain provisions of page 4, paragraph 7 of the Non-Prosecution Agreement (hereinafter "paragraph 7"), that agreement is modified as follows:

7A. The United States has the right to assign to an independent third-party the responsibility for consulting with and, subject to the good faith approval of Epstein's counsel, selecting the attorney representative for the individuals identified under the Agreement. If the United States elects to assign this responsibility to an independent third-party, both the United States and Epstein retain the right to make good faith objections to the attorney representative suggested by the independent third-party prior to the final designation of the attorney representative.

7B. The parties will jointly prepare a short written submission to the independent third-party regarding the role of the attorney representative and regarding Epstein's Agreement to pay such attorney representative his or her regular customary hourly rate for representing such victims subject to the provisions of paragraph C, infra.

7C. Pursuant to additional paragraph 7A, Epstein has agreed to pay the fees of the attorney representative selected by the independent third party. This provision, however, shall not obligate Epstein to pay the fees and costs of contested litigation filed against him. Thus, if after consideration of potential settlements, an attorney representative elects to file a contested lawsuit pursuant to 18 U.S.C. s 2255 or elects to pursue any other contested remedy, the paragraph 7 obligation of the Agreement to pay the costs of the attorney representative, as opposed to any statutory or other obligations to pay reasonable attorneys fees and costs such as those contained in s 2255 to bear the costs of the attorney representative, shall cease.

By signing this Addendum, Epstein asserts and certifies that the above has been read and explained to him. Epstein hereby states that he understands the clarifications to the Non-Prosecution Agreement and agrees to comply with them.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____

By: [redacted]
ASSISTANT U.S. ATTORNEY

Dated: 1/29/07

JEFFREY EPSTEIN

Dated: _____

GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: _____

LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

By signing this Addendum, Epstein asserts and certifies that the above has been read and explained to him. Epstein hereby states that he understands the clarifications to the Non-Prosecution Agreement and agrees to comply with them.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____ By: [redacted]
ASSISTANT U.S. ATTORNEY

Dated: _____
JEFFREY EPSTEIN

Dated: 10/29/07
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: _____
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

By signing this Addendum, Epstein asserts and certifies that the above has been read and explained to him. Epstein hereby states that he understands the clarifications to the Non-Prosecution Agreement and agrees to comply with them.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____ By: [redacted]
ASSISTANT U.S. ATTORNEY

Dated: _____
JEFFREY EPSTEIN

Dated: _____
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: 10-29-07
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

Affirmation

I, Jeffrey E. Epstein do hereby re-affirm the Non-Prosecution Agreement and Addendum to same dated October 30, 2007.

Jeffrey E. Epstein

12/7/07
Date

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT F

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) '1941737' and Personal Identification Number (PIN) '5502' 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 W[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

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT G

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:

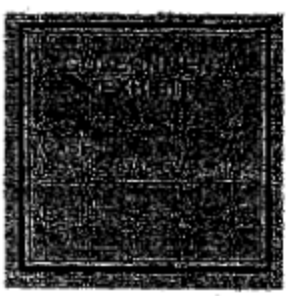
You have requested to receive notifications for [redacted]

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) '1941741' and Personal Identification Number (PIN) '7760' 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

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT H

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/08/2008

On Thursday, January 31, 2008, [redacted] met with Assistant United States Attorney [redacted], UNITED STATES ATTORNEY'S OFFICE (USAO) and Attorney [redacted], UNITED STATES DEPARTMENT OF JUSTICE(DOJ), CRIMINAL DIVISION. Also present at the meeting were Special Agents E. [redacted] and [redacted], FEDERAL BUREAU OF INVESTIGATION. The meeting was arranged pursuant to a federal investigation regarding the sexual exploitation of minors. During the course of the meeting, W[redacted] provided the following additional or clarifying information not previously documented in earlier FD-302s:

JEFFREY EPSTEIN and his assistants, SARAH and [redacted](identified as [redacted] and [redacted]) would contact [redacted] to set up appointments for EPSTEIN's massages. According to [redacted], [redacted] would call and say that EPSTEIN was on a flight and inquire about scheduling work for [redacted]

Life was not going well for [redacted] during the time she was providing EPSTEIN with massages. [redacted] was buying and taking drugs, i.e. Xanax, Lorcets, and Percosets. W[redacted] said that she stayed on pills. [redacted] explained that she wanted to feel numb. [redacted] stopped attending school at age fifteen. Her parents were addicted to crack and cocaine. Prior to her parent's drug use, [redacted] was in the band, a cheerleader, and a straight "A" student. [redacted] played the trumpet for the school band. When her parent's drug habits got bad, things went downhill, they lost everything.

[redacted] became a dancer the day before her sixteenth birthday at [redacted] She worked there for six months, up until the employer found out she was underage. Later, [redacted] worked for [redacted] which she did for 6 months. W[redacted] stopped seeing EPSTEIN during that time.

[redacted] stated that she brought up to twenty, twenty-five, or thirty different girls. [redacted] said all of the girls but maybe ten of them were underage. Some of the females [redacted] brought for EPSTEIN were dancers. [redacted] said that EPSTEIN did not care for all of the girls she brought to him. [redacted] explained that EPSTEIN did not care for some of the dancers, the older females, and the females with tattoos.

Investigation on 01/31/2008 at West Palm Beach, Florida

File # 31E-MM-108062 Date dictated 01/31/2008

by SA [redacted]
SA

FD-302a (Rev. 10-6-95)

31E-MM-108062

Continuation of FD-302 of [redacted], On 01/31/2008, Page 2

[redacted] said that during the massages EPSTEIN would push further and further regarding the sexual activity. According to [redacted] EPSTEIN never asked, "is this okay," he would just see how far one would let him go.

[redacted] recalled seeing sculptures of naked women and lots of pictures of kids in the library.

[redacted] stated that everybody thought Epstein was a neurologist.

[redacted] also stated that [redacted] has twin boys.

JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

CASE NO: **08-80736-Civ-Marra/Johnson**

EXHIBIT 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

[redacted]

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

TOTAL P.07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-Civ-Marra/Johnson

JANE DOE #1 AND JANE DOE #2,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

_____/

MOTION TO INTERVENE
OR IN THE ALTERNATIVE FOR A *SUA SPONTE* RULE 11 ORDER

Comes now, Movant Bruce E. Reinhart, pursuant to Federal Rule of Civil Procedure 24(b), and seeks leave to intervene as a party-in-interest in this matter. Movant seeks to intervene to file a Motion for Sanctions based on unfounded factual and legal accusations made about Movant in Plaintiff's Motion for Finding of Violations of the Crime Victims' Rights Act (the "Motion") [DE 48].[1] In the context of a motion alleging that the U.S. Department of Justice violated Plaintiff's rights under the Crime Victims Rights Act, Plaintiffs make irrelevant and gratuitous accusations that Movant violated unspecified Florida Bar rules and Department of Justice regulations. Movant should be granted leave to intervene to rebut these false allegations, and to seek sanctions. Alternatively, the Court on its own initiative should require Plaintiffs and their counsel to show their compliance with Federal Rule of Civil Procedure 11.

Without any attempt to tie the allegations to the asserted violation of the CVRA, Paragraphs 52 and 53 of the Motion falsely allege that Movant, a non-party to this matter,

[1] Movant was not served with a copy of the pleading. Movant first saw the pleading on April 20, 2011.

violated Florida Bar rules and Department of Justice regulations by representing employees of Jeffrey Epstein ("Epstein") in civil litigation after the undersigned retired from the United States Attorney's Office for the Southern District of Florida (the "Office"). They also falsely allege that Movant, while still employed by the Office engaged in improper conduct relating to Epstein. The Motion does not make any effort to connect these allegations to the relief it seeks. It does not explain how the accusations against Movant are relevant to its claims under the CVRA, nor does it explain how Movant's alleged conduct can be imputed to any party in the action. Because there is no proper purpose for these allegations, they are made in bad faith, unreasonably, vexatiously, and for the improper purpose of harassing Movant.

Plaintiff has injected into this action questions of law and fact relating to Movant's alleged conduct. Movant now seeks to assert a claim under Fed. Rule Civ. P. 11 and 28 U.S.C. §1927 arising from the same questions of law and fact that Plaintiff raised. Movant's claim shares with the main action common questions of law and fact. *See New York News, Inc. v. Newspaper and Mail Deliverer's Union*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991)(for purposes of Rule 24(b), claim that falsities in pleading impugned movant's reputation created a question of fact in common with underlying cause of action). Therefore, the Court has discretion to permit intervention. *C.f. Id.* (permissive intervention denied because it would unduly delay and prejudice imminent settlement of the original claims), *aff'd sub nom New York News v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992). Here, the proposed intervention does not create a risk of undue delay or prejudice to the adjudication of the underlying claims. *See* Fed. R. Civ. P. 24(b)(3). Movant should be permitted to intervene under Fed. R. Civ. P. 24(b)(1)(B).

Unless Movant is permitted to intervene, he cannot remedy the false accusations in Paragraphs 52 and 53. The Department of Justice has responded to the Motion. It declined to respond on the merits to the allegations in Paragraphs 52 and 53 because they are so obviously

irrelevant to the Government's alleged violation of the CVRA. As such, Movant's interest is not adequately protected by the existing parties.

Alternatively, Movant asks the Court *sua sponte* to issue an Order to Show Cause under Rule 11(c)(3)("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)"). This Court should not countenance a party making irrelevant, slanderous accusations against a non-party. On the face of Plaintiffs' Motion, it is clear that the allegations in Paragraphs 52 and 53 are irrelevant to whether the CVRA was violated, and therefore are not being presented for a proper purpose. The Court should require Plaintiffs and their counsel to show what legal and factual inquiry they undertook to comply with Rule 11(b) before making the allegations in Paragraphs 52 and 53, and to articulate the proper purpose for which these allegations were included in their Motion.

As required by Fed. R. Civ. P. 24(c), attached to this motion is a proposed Motion for Sanctions. If leave to intervene is granted, the Motion for Sanctions which will be served on Plaintiffs' counsel under Fed. R. Civ. P. 5, but not filed for 21 days thereafter. *See* Fed. R. Civ. P. 11(c)(2).

Pursuant to Local Rule 7.1(a)(3), undersigned counsel contacted counsel for Plaintiffs and counsel for the United States. Assistant United States Attorney Dexter Lee reported that the United States does not oppose the Motion to Intervene. Bradley Edwards, Esq., counsel for Plaintiffs reported that they oppose the Motion to Intervene.

Respectfully submitted,

/s/ Bruce E. Reinhart
BRUCE E. REINHART,P.A.
Florida Bar # 10762
250 S. Australian Avenue, Suite 1400
West Palm Beach, Florida 33401
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Intervene or in the Alternative for a *Sua Sponte* Rule 11 Order was served on all counsel of record by CM/ECF on May 3, 2011.

/s/Bruce Reinhart
BRUCE REINHART

ATTACHMENT TO MOTION TO INTERVENE OR IN THE ALTERNATIVE FOR A SUA SPONTE RULE 11 ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-Civ-Marra/Johnson

JANE DOE #1 AND JANE DOE #2,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

BRUCE E. REINHART,

Intervenor

_____/

INTERVENOR'S MOTION FOR SANCTIONS

Comes now, Bruce E. Reinhart, intervenor and party in interest (hereinafter "Movant"), and moves this Honorable Court to impose sanctions under Federal Rule of Civil Procedure 11(b) and 28 U.S.C. 1927 based on intentional or reckless false, bad faith, vexatious factual and legal assertions made about Movant in Paragraphs 52 and 53 of Plaintiff's Motion for Finding of Violations of the Crime Victims' Rights Act (the "Motion") [DE 48].

BACKGROUND

The instant cause of action involves claims by Plaintiffs that Defendant violated the Crime Victims Rights Act (CVRA), 18 U.S.C. §3771, in its handling of a criminal investigation of Jeffrey Epstein ("Epstein") and others. The investigation ultimately resulted in a non-prosecution agreement between the United States and Epstein. On

March 21, 2011, Plaintiffs filed their Motion.[1] Numbered paragraphs 1-50 of the Motion are a chronological review of the background of the Epstein investigation, including the interactions among the victims' counsel, counsel for Epstein, the Government and the FBI. Paragraph 51 asserts that at all relevant times it was feasible for the Government to provide certain notifications to Plaintiffs.

Without attempting to make any connection to the asserted violation of the CVRA, Paragraphs 52 and 53 falsely allege that Movant violated Florida Bar rules and Department of Justice regulations by representing Epstein's employees in civil litigation after Movant retired from the United States Attorney's Office for the Southern District of Florida ("Office"). They also falsely allege that Movant, while still employed by the Office engaged in improper conduct relating to Epstein. These allegations are made in bad faith, unreasonably, without reasonable inquiry into the law and facts, vexatiously, and for the improper purpose of gratuitously harassing Movant.

LEGAL STANDARDS

Federal Rule of Criminal Procedure 11

Federal Rule of Civil Procedure 11 states that a lawyer signing any pleading in federal court is certifying that:

> [T]to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

[1] Movant was not served with a copy of the pleading. Movant first saw the pleading on April 20, 2011.

> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b). Rule 11 uses an objective standard. *Kaplan* [redacted] *DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003). The analysis is whether "a reasonable attorney in like circumstances could believe that his actions were factually and legally justified." *Id.* (*citing Riccard* [redacted] *Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002)). Violations of Rule 11 are punishable by monetary and non-monetary sanctions against both the lawyer filing the pleading and the lawyer's client. Fed. R. Civ. P. 11(c).

28 U.S.C. §1927

Title 28, United States Code, Section 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.

To impose sanctions under § 1927, the Court must find that the attorney's conduct is "'tantamount to bad faith.'" *Amlong & Amlong,* 500 F.3d 1230, 1239 (11th Cir. 2007) (*quoting Avirgan* [redacted] *Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991)). "[T]he attorney must knowingly or recklessly pursue a frivolous claim." *Id.* at 1242. The finding of bad faith does not turn on "the attorney's subjective intent, but on the attorney's objective conduct." *Id.* at 1239. The standard is "whether, regardless of the attorney's subjective intentions, the conduct was unreasonable and vexatious when measured against an objective standard." *Hudson* [redacted] *Int'l Comp. Negotiations, Inc.*, 499 F.3d 1252, 1262 (11th Cir. 2007).

DISCUSSION

Paragraphs 52 and 53 contain inflammatory claims that are false, misleading, and irrelevant to the relief sought in the Motion. *See generally* Declaration of Bruce E. Reinhart (attached as Exhibit 1 and incorporated by reference). They ultimately allege, "[Movant's] representations [of Epstein's employees] are in contravention of Justice Department regulations and Florida bar rules. Such representations also give, at least, the improper appearance that Reinhart may have attempted to curry [sic] with Epstein and then reap his reward through favorable representation." Plaintiff's Motion at ¶53. They do not cite to any particular bar rule or regulation that they believe was violated. They do not explain how the alleged conduct contributed to the Department of Justice's alleged violation of the CVRA. Nor do they explain how the alleged conduct is imputable to the Department of Justice. These otherwise slanderous accusations against a non-party are false. They were made in bad faith, without a factual inquiry reasonable under the circumstances, or elementary research into the legal basis for the allegations.

Paragraphs 52 and 53 omit the following true facts, which Plaintiffs should have investigated before making their allegations: (1) Movant did not participate in any way in the Office's investigation of Epstein, (2) after leaving government employment, Movant did not represent Epstein before the Department of Justice, nor did Movant communicate with the Department of Justice about Epstein, and (3) Movant did not use confidential information obtained during his Government employment to the detriment of the United States. *See* Declaration of Bruce E. Reinhart at ¶¶11-12, 17.

Rather than conducting the required inquiry, Plaintiffs simply make two irresponsible and unsupported leaps. First, they incorrectly conclude that merely because

Movant worked in the Office at the time of the Epstein case, Movant must have been involved in the internal decisionmaking at the Office about Epstein. Second, they incorrectly conclude that because Movant later represented Epstein's employees in private civil litigation, Movant must have used confidential Government information improperly in his representation of Epstein's employees, and for his own financial gain.

It is apparent that Plaintiffs conducted no factual inquiry to substantiate their accusations before making them. They never contacted Movant. On information and belief, they did not speak to any current or former personnel from the Office or the FBI who were familiar with the structure of the West Palm Beach Office or with Movant's role (or lack thereof) in the Epstein investigation. Had they done so, they would have learned that there were approximately 20 Assistant United States Attorneys in the West Palm Beach Office during the relevant time period. *See* Declaration of Bruce E. Reinhart at ¶10. They would have learned that Movant was not assigned to the same section as the prosecutor handling the Epstein matter. *Id.* They would have learned that Movant had a different chain of supervision from the prosecutor assigned to the Epstein matter. *Id.* They would have learned that Movant had no involvement in the Epstein investigation. *See* Declaration of Bruce E. Reinhart at ¶¶11-12.

Further, Plaintiffs did not conduct an adequate inquiry into the applicable Department of Justice regulations. As discussed below, to violate the relevant regulations, a former employee must appear before, or communicate with, the Department of Justice, about a particular matter in which the former employee participated personally and substantially while employed at the Department of Justice. *See* 5 C.F.R. §2641.201(a). The Motion contains approximately 50 paragraphs of a

detailed historical litany of the interactions among the parties to the Epstein matter. The Motion does not allege that Movant participated at all, let alone personally and substantially, as a government employee in the Epstein investigation. The Motion does not allege that that Movant subsequently appeared before, or communicated with, the Department of Justice about Epstein. To the contrary, the Motion alleges only that, after leaving the Office, Movant represented Epstein's employees in litigation with non-Governmental third parties. Had Plaintiffs conducted rudimentary research into the applicable regulations, they would have known that any allegation that Movant violated these regulations was frivolous.

Movant Did Not Violate Any Florida Bar Rule

Relevant Florida Bar Rules

The potentially applicable Florida Bar rules are Rule 4-1.6(a) (Confidentiality of Information), Rule 4-1.9 (Conflict of Interest; Former Clients), and Rule 4-1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees). For purposes of these rules, the U.S. Department of Justice was Movant's client during his employment in the Office. Movant did not violate any of the bar rules.

Rule 4-1.6(a) states:

> A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

Rule 4-1.6 was not violated because Movant did not know any confidential information about the Epstein matter, so none could be revealed.

Rule 4-1.9 states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or,

(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Rule 4-1.9 was not violated because Movant never represented the United States in the Epstein matter.

Rule 4-1.11 states in pertinent parts:

(a) A lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to rule 4-1.9(b); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

. . .

(c) A lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

(d) A lawyer currently serving as a public officer or employee:

(1) is subject to rules 4-1.7 and 4-1.9; and

> (2) shall not:
>
> (A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent; or
>
> (B) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

Rule 4-1.11(a) was not violated because Movant did not participate personally and substantially in the Epstein matter. Rule 4-1.11(c) was not violated because Movant did not have any confidential Government information within the meaning of the rule, so he did he use any confidential Government information about a third party to the detriment of that third party. Rule 4-1.11(d) was not violated because Movant did not participate personally and substantially in the Epstein matter.

Movant Did Not Violate Department of Justice Regulations

Department of Justice Regulations

The Department of Justice regulation containing post-employment restrictions, 5 C.F.R. §2641.201, states in most pertinent part:

> (a) Basic prohibition of 18 U.S.C. 207(a)(1). No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.
>
> . . .
>
> (i) Participate: To "participate" means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter . . . An employee does not participate in a matter

> merely because he had knowledge of its existence or because it was pending under his official responsibility.[2]

Movant did not violate 5 C.F.R. §2641.201 because he did not participate personally and substantially in the Epstein matter as a Government employee. He did not appear before the United States on behalf of Epstein after leaving Government employment. He did not communicate with the United States on behalf of Epstein after leaving Government employment. He represented Epstein's employees in civil cases in which the Government was not a party.

It is clear from the face of the regulations that Movant's representing Epstein's employees in civil matters not involving the Government did not violate §2641(a). In fact, had Plaintiffs and their counsel properly investigated the facts and law, they would have seen that §2641(a) would have permitted Movant to represent Epstein, himself, openly against the Department of Justice. Movant did not. The allegation that Movant violated Department of Justice regulations is frivolous.

[2] A complete copy of this regulation is attached to this Motion as Exhibit 2.

CONCLUSION

The allegations in Paragraph 52 and 53 of the Motion are false, made in bad faith, and made without sufficient inquiry into the law and facts. They are irrelevant to whether the United States Attorney complied with the CVRA. Notably, the Motion does not attempt to tie the allegations against Movant to the alleged violation of the CVRA. The allegations are included gratuitously in the Motion solely to harass Movant in a forum where the accusations are not legally slanderous. The allegations are made without reasonable pre-filing inquiry into the facts or law. This Court should issue an Order to Show Cause why sanctions should not be imposed under Rule 11 or 28 U.S.C. §1927.

Respectfully submitted,

/s/ Bruce E. Reinhart
BRUCE E. REINHART,P.A.
Florida Bar # 10762
250 S. Australian Avenue, Suite 1400
West Palm Beach, Florida 33401
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Intervenor's Motion For Sanctions was served on all counsel of record by CM/ECF on _____, 2011.

/s/Bruce Reinhart
BRUCE REINHART

EXHIBIT 1

DECLARATION OF BRUCE E. REINHART

I, Bruce E. Reinhart, make the following declaration pursuant to 28 U.S.C. §1746.

1. I am a licensed attorney in solo practice as Bruce E. Reinhart, P.A. My office is located at 250 S. Australian Avenue, Suite 1400, West Palm Beach, Florida, 33401.

2. I am a member in good standing of the bars of the states of Florida, Pennsylvania, and New Jersey. I am also admitted to the practice in the United States District Court for the Southern District of Florida, the U.S. Court of Appeals for the Eleventh Circuit, the U.S. Supreme Court, and several other federal courts.

3. I graduated from Princeton University in 1984 with a B.S.E. in civil engineering *cum laude*. I graduated from the University of Pennsylvania Law School in 1987, *cum laude*. I also served as an Editor of the University of Pennsylvania Law School.

4. After graduating from law school, I served as judicial law clerk to the Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania.

5. In 1988, I began working at the Criminal Division of the United States Department of Justice in Washington, D.C., through the Attorney General's Honors Program. From 1988-1994, I worked in the Public Integrity Section of the Criminal Division. While working there, I received two Special Achievement Awards for Meritorious Acts and Service from the Department of Justice.

6. While at the Public Integrity Section, I was involved in investigating and prosecuting people who violated federal conflict of interest and post-employment statutes. I attended multiple training conferences where federal conflicts of interest laws and regulations were discussed.

7. From in or about July 1994 to on or about May 1, 1996, I served as Senior Policy Advisor to the Undersecretary of the Treasury for Enforcement at the United States Department of the Treasury. In that position, I helped the Undersecretary, the Deputy Secretary, and the Secretary of the Treasury to develop law enforcement policies for U.S. Customs, ATF, Secret Service, and IRS Criminal Investigations. I also acted as principal staff liaison to the Deputy Attorney General, the FBI and the other Department of Justice law enforcement agencies. For my service, I was awarded the Undersecretary for Enforcement's Award for Exceptional Service.

8. I am the former Vice Chair of the Palm Beach County Bar's Professionalism Committee. I am the former President of the Palm Beach County Chapter of the Federal Bar Association. I currently serve as an Ethics Commissioner on the Palm Beach County Commission on Ethics.

9. From May 1, 1996 to January 1, 2008, I served as an Assistant United States Attorney in the Southern District of Florida, assigned to the West Palm Beach office. From in or about July 1998 to in or about October 2002, I was a Supervisory Assistant United States Attorney. From October 2002 to January 2008, I was a non-supervisory Assistant United States Attorney handling my own docket of cases.

10. At all relevant times, the Office had approximately 20 Assistant U.S. Attorneys assigned to the West Palm Beach location. The prosecutor assigned to the Epstein case, [redacted] and I were assigned to different sections within the Office. We reported to different supervisors.

11. I did not participate in any way in the Office's investigation of Epstein. I was not involved in any of the Office's decisionmaking with regard to the Epstein matter.

12. I never learned any confidential, non-public information about the Epstein matter.

13. In late December 2007, I had an "exit meeting" with [redacted], the Office's ethics officer. As part of that meeting, [redacted] reviewed with me the Department of Justice's post-employment restrictions. Based on our conversation, it was my understanding that I could work on any matter so long as I had not participated in it personally and substantially as a Government employee. I also understood that I could not use non-public Government information for any purpose.

14. After opening my private practice on January 2, 2008, I was retained to represent [redacted] for purposes of civil depositions in causes of action to which the United States was not a party. At a later time, I was retained to represent several other members of Mr. Epstein's staff in their civil depositions.

15. After leaving the Office, I did not participate in any of the negotiations over Mr. Epstein's non-prosecution agreement.

16. After leaving the Office, I did not communicate with the Office, in person or in writing, about any matters relating to possible criminal charges against Mr. Epstein.

17. Because I did not have any, I did not share non-public confidential information about the Epstein investigation with any of Epstein's attorneys.

18. Prior to the filing of Plaintiff's Motion for Finding of Violations of the Crime Victims' Rights Act, neither Mr. Edwards, nor Judge Cassell, nor anyone on their behalf contacted me to determine if the allegations in Paragraphs 52 and 53 of that Motion were true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 2011.

Bruce E. Reinhart

EXHIBIT 2

Code of Federal Regulations
Title 5. Administrative Personnel
Chapter XVI. Office of Government Ethics
Subchapter B. Government Ethics
Part 2641. Post-Employment Conflict of Interest Restrictions (Refs & Annos)
Subpart B. Prohibitions

5 C.F.R. § 2641.201

§ 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially.

Effective: July 25, 2008
Currentness

(a) Basic prohibition of 18 U.S.C. 207(a)(1). No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

(b) Exceptions and waivers. The prohibition of 18 U.S.C. 207(a)(1) does not apply to a former employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).

(4) Testifying under oath. See § 2641.301(f). (Note that this exception from § 2641.201 is generally not available for expert testimony. See § 2641.301(f)(2).)

(5) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(6) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(c) Commencement and length of restriction. 18 U.S.C. 207(a)(1) is a permanent restriction that commences upon an employee's termination from Government service. The restriction lasts for the life of the particular matter involving specific parties in which the employee participated personally and substantially.

(d) Communication or appearance--

(1) Communication. A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) Appearance. A former employee makes an appearance when he is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) Behind-the-scenes assistance. Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

Example 1 to paragraph (d): A former employee of the Federal Bureau of Investigation makes a brief telephone call to a colleague in her former office concerning an ongoing investigation. She has made a communication. If she personally attends an informal meeting with agency personnel concerning the matter, she will have made an appearance.

Example 2 to paragraph (d): A former employee of the National Endowment for the Humanities (NEH) accompanies other representatives of an NEH grantee to a meeting with the agency. Even if the former employee does not say anything at the meeting, he has made an appearance (although that appearance may or may not have been made with the intent to influence, depending on the circumstances).

Example 3 to paragraph (d): A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

Example 4 to paragraph (d): A former employee of the National Institutes of Health (NIH) prepares an application for an NIH research grant on behalf of her university employer. The application is signed and submitted by another university officer, but it lists the former employee as the principal investigator who will be responsible for the substantive work under the grant. She has not made a communication. She also may sign an assurance to the agency that she will be personally responsible for the direction and conduct of the research under the grant, pursuant to § 2641.201(e)(2)(iv). Moreover, she may personally communicate scientific or technological information to NIH concerning the application, provided that she does so under circumstances indicating no intent to influence the Government pursuant to § 2641.201(e)(2) or she makes the communication in accordance with the exception for scientific or technological information in § 2641.301(e).

Example 5 to paragraph (d): A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate that she intended the information to be attributed to herself.

(e) With the intent to influence--

(1) Basic concept. The prohibition applies only to communications or appearances made by a former Government employee with the intent to influence the United States. A communication or appearance is made with the intent to influence when made for the purpose of:

(i) Seeking a Government ruling, benefit, approval, or other discretionary Government action; or

(ii) Affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.

Example 1 to paragraph (e)(1): A former employee of the Administration on Children and Families (ACF) signs a grant application and submits it to ACF on behalf of a nonprofit organization for which she now works. She has made a communication with the intent to influence an employee of the United States because her communication was made for the purpose of seeking a Government benefit.

Example 2 to paragraph (e)(1): A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

(2) Intent to influence not present. Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

(i) Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;

(ii) Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;

(iii) Signing and filing the tax return of another person as preparer;

(iv) Signing an assurance that one will be responsible as principal investigator for the direction and conduct of research under a Federal grant (see example 4 to paragraph (d) of this section);

(v) Filing a Securities and Exchange Commission (SEC) Form 10-K or similar disclosure forms required by the SEC;

(vi) Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or

(vii) Purely social contacts (see example 4 to paragraph (f) of this section).

Example 1 to paragraph (e)(2): A former Government employee calls an agency to ask for the date of a scheduled public hearing on her client's license application. This is a routine request not involving a potential controversy and is not made with the intent to influence.

Example 2 to paragraph (e)(2): In the previous example, the agency's hearing calendar is quite full, as the agency has a significant backlog of license applications. The former employee calls a former colleague at the agency to ask if the hearing date for her client could be moved up on the schedule, so that her client can move forward with its business plans more quickly. This is a communication made with the intent to influence.

Example 3 to paragraph (e)(2): A former employee of the Department of Defense (DOD) now works for a firm that has a DOD contract to produce an operator's manual for a radar device used by DOD. In the course of developing a chapter about certain technical features of the device, the former employee asks a DOD official certain factual questions about the device and its properties. The discussion does not concern any matter that is known to involve a potential controversy between the agency and the contractor. The former employee has not made a communication with the intent to influence.

Example 4 to paragraph (e)(2): A former medical officer of the Food and Drug Administration (FDA) sends a letter to the agency in which he sets out certain data from safety and efficacy tests on a new drug for which his employer, ABC Drug Co., is seeking FDA approval. Even if the letter is confined to arguably "factual" matters, such as synopses of data from clinical trials, the communication is made for the purpose of obtaining a discretionary Government action, i.e., approval of a new drug. Therefore, this is a communication made with the intent to influence.

Example 5 to paragraph (e)(2): A former Government employee now works for a management consulting firm, which has a Government contract to produce a study on the efficiency of certain agency operations. Among other things, the contract calls

for the contractor to develop a range of alternative options for potential restructuring of certain internal Government procedures. The former employee would like to meet with agency representatives to present a tentative list of options developed by the contractor. She may not do so. There is a potential for controversy between the Government and the contractor concerning the extent and adequacy of any options presented, and, moreover, the contractor may have its own interest in emphasizing certain options as opposed to others because some options may be more difficult and expensive for the contractor to develop fully than others.

Example 6 to paragraph (e)(2): A former employee of the Internal Revenue Service (IRS) prepares his client's tax return, signs it as preparer, and mails it to the IRS. He has not made a communication with the intent to influence. In the event that any controversy should arise concerning the return, the former employee may not represent the client in the proceeding, although he may answer direct factual questions about the records he used to compile figures for the return, provided that he does not argue any theories or positions to justify the use of one figure rather than another.

Example 7 to paragraph (e)(2): An agency official visits the premises of a prospective contractor to evaluate the testing procedure being proposed by the contractor for a research contract on which it has bid. A former employee of the agency, now employed by the contractor, is the person most familiar with the technical aspects of the proposed testing procedure. The agency official asks the former employee about certain technical features of the equipment used in connection with the testing procedure. The former employee may provide factual information that is responsive to the questions posed by the agency official, as such information is requested by the Government under circumstances for its convenience in reviewing the bid. However, the former employee may not argue for the appropriateness of the proposed testing procedure or otherwise advocate any position on behalf of the contractor.

(3) Change in circumstances. If, at any time during the course of a communication or appearance otherwise permissible under paragraph (e)(2) of this section, it becomes apparent that circumstances have changed which would indicate that any further communication or appearance would be made with the intent to influence, the former employee must refrain from such further communication or appearance.

Example 1 to paragraph (e)(3): A former Government employee accompanies another employee of a contractor to a routine meeting with agency officials to deliver technical data called for under a Government contract. During the course of the meeting, an unexpected dispute arises concerning certain terms of the contract. The former employee may not participate in any discussion of this issue. Moreover, if the circumstances clearly indicate that even her continued presence during this discussion would be an appearance made with the intent to influence, she should excuse herself from the meeting.

(4) Mere physical presence intended to influence. Under some circumstances, a former employee's mere physical presence, without any communication by the employee concerning any material issue or otherwise, may constitute an appearance with the intent to influence an employee of the United States. Relevant considerations include such factors as whether:

(i) The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;

(ii) The Government employee before whom the appearance is made has substantive responsibility for the matter and does not simply perform ministerial functions, such as the acceptance of paperwork;

(iii) The former employee's presence is relatively prominent;

(iv) The former employee is paid for making the appearance;

(v) It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee;

(vi) Circumstances do not indicate that the former employee is present merely for informational purposes, for example, merely to listen and record information for later use;

(vii) The former employee has entered a formal appearance in connection with a legal proceeding at which he is present; and

(viii) The appearance is before former subordinates or others in the same chain of command as the former employee.

Example 1 to paragraph (e)(4): A former Regional Administrator of the Occupational Safety and Health Administration (OSHA) becomes a consultant for a company being investigated for possible enforcement action by the regional OSHA office. She is hired by the company to coordinate and guide its response to the OSHA investigation. She accompanies company officers to an informal meeting with OSHA, which is held for the purpose of airing the company's explanation of certain findings in an adverse inspection report. The former employee is introduced at the meeting as the company's compliance and governmental affairs adviser, but she does not make any statements during the meeting concerning the investigation. She is paid a fee for attending this meeting. She has made an appearance with the intent to influence.

Example 2 to paragraph (e)(4): A former employee of an agency now works for a manufacturer that seeks agency approval for a new product. The agency convenes a public advisory committee meeting for the purpose of receiving expert advice concerning the product. Representatives of the manufacturer will make an extended presentation of the data supporting the application for approval, and a special table has been reserved for them in the meeting room for this purpose. The former employee does not participate in the manufacturer's presentation to the advisory committee and does not even sit in the section designated for the manufacturer. Rather, he sits in the back of the room in a large area reserved for the public and the media. The manufacturer's speakers make no reference to the involvement or views of the former employee with respect to the matter. Even though the former employee may be recognized in the audience by certain agency employees, he has not made an appearance with the intent to influence because his presence is relatively inconspicuous and there is little to identify him with the manufacturer or the advocacy of its representatives at the meeting.

(f) To or before an employee of the United States--

(1) Employee of the United States. For purposes of this paragraph, an "employee of the United States" means the President, the Vice President, and any current Federal employee (including an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376)) who is detailed to or employed by any:

(i) Agency (including a Government corporation);

(ii) Independent agency in the executive, legislative, or judicial branch;

(iii) Federal court; or

(iv) Court-martial.

(2) To or before. Except as provided in paragraph (f)(3) of this section, a communication "to" or appearance "before" an employee of the United States is one:

(i) Directed to and received by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section even though not addressed to a particular employee, e.g., as when a former employee mails correspondence to an agency but not to any named employee; or

(ii) Directed to and received by an employee in his capacity as an employee of an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section, e.g., as when a former employee directs remarks to an employee representing the United States as a party or intervenor in a Federal or non-Federal judicial proceeding. A former employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(3) Public commentary.

(i) A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the United States.

(ii) In the circumstances described in paragraph (f)(3)(i) of this section, a former employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication.

Example 1 to paragraph (f): A Federal Trade Commission (FTC) employee participated in the FTC's decision to initiate an enforcement proceeding against a particular company. After terminating Government service, the former employee is hired by the company to lobby key Members of Congress concerning the necessity of the proceeding. He may contact Members of Congress or their staff since a communication to or appearance before such persons is not made to or before an "employee of the United States" as that term is defined in paragraph (f)(1) of this section.

Example 2 to paragraph (f): In the previous example, the former FTC employee arranges to meet with a Congressional staff member to discuss the necessity of the proceeding. A current FTC employee is invited by the staff member to attend and is authorized by the FTC to do so in order to present the agency's views. The former employee may not argue his new employer's position at that meeting since his arguments would unavoidably be directed to the FTC employee in his capacity as an employee of the FTC.

Example 3 to paragraph (f): The Department of State granted a waiver pursuant to 18 U.S.C. 208(b)(1) to permit one of its employees to serve in his official capacity on the Board of Directors of a private association. The employee participates in a Board meeting to discuss what position the association should take concerning the award of a recent contract by the Department of Energy (DOE). When a former DOE employee addresses the Board to argue that the association should object to the award of the contract, she is directing her communication to a Department of State employee in his capacity as an employee of the Department of State.

Example 4 to paragraph (f): A Federal Communications Commission (FCC) employee participated in a proceeding to review the renewal of a license for a television station. After terminating Government service, he is hired by the company that holds the license. At a cocktail party, the former employee meets his former supervisor who is still employed by the FCC and begins to discuss the specifics of the license renewal case with him. The former employee is directing his communication to an FCC employee in his capacity as an employee of the FCC. Moreover, as the conversation concerns the license renewal matter, it is not a purely social contact and satisfies the element of the intent to influence the Government within the meaning of paragraph (e) of this section.

Example 5 to paragraph (f): A Federal Trade Commission economist participated in her agency's review of a proposed merger between two companies. After terminating Government service, she goes to work for a trade association that is interested in the proposed merger. She would like to speak about the proposed merger at a conference sponsored by the trade association. The conference is attended by 100 individuals, 50 of whom are employees of entities specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section. The former employee may speak at the conference and may engage in a discussion of the merits of the proposed merger in response to a question posed by a Department of Justice employee in attendance.

Example 6 to paragraph (f): The former employee in the previous example may, on behalf of her employer, write and permit publication of an op-ed piece in a metropolitan newspaper in support of a particular resolution of the merger proposal.

Example 7 to paragraph (f): ABC Company has a contract with the Department of Energy which requires that contractor personnel work closely with agency employees in adjoining offices and work stations in the same building. After leaving the Department, a former employee goes to work for another corporation that has an interest in performing certain work related to the same contract, and he arranges a meeting with certain ABC employees at the building where he previously worked on the project. At the meeting, he asks the ABC employees to mention the interest of his new employer to the project supervisor, who is an agency employee. Moreover, he tells the ABC employees that they can say that he was the source of this information. The ABC employees in turn convey this information to the project supervisor. The former employee has made a communication to an employee of the Department of Energy. His communication is directed to an agency employee because he intended that the information be conveyed to an agency employee with the intent that it be attributed to himself, and the circumstances indicate such a close working relationship between contractor personnel and agency employees that it was likely that the information conveyed to contractor personnel would be received by the agency.

(g) On behalf of any other person--

(1) On behalf of.

(i) A former employee makes a communication or appearance on behalf of another person if the former employee is acting as the other person's agent or attorney or if:

(A) The former employee is acting with the consent of the other person, whether express or implied; and

(B) The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

(ii) A former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee's activity.

(2) Any other person. The term "person" is defined in § 2641.104. For purposes of this paragraph, the term excludes the former employee himself or any sole proprietorship owned by the former employee.

Example 1 to paragraph (g): An employee of the Bureau of Land Management (BLM) participated in the decision to grant a private company the right to explore for minerals on certain Federal lands. After retiring from Federal service to pursue her hobbies, the former employee becomes concerned that BLM is misinterpreting a particular provision of the lease. The former employee may contact a current BLM employee on her own behalf in order to argue that her interpretation is correct.

Example 2 to paragraph (g): The former BLM employee from the previous example later joins an environmental organization as an uncompensated volunteer. The leadership of the organization authorizes the former employee to engage in any activity that she believes will advance the interests of the organization. She makes a communication on behalf of the organization when, pursuant to this authority, she writes to BLM on the organization's letterhead in order to present an additional argument concerning the interpretation of the lease provision. Although the organization did not direct her to send the specific communication to BLM, the circumstances establish that she made the communication with the consent of the organization and subject to a degree of control or direction by the organization.

Example 3 to paragraph (g): An employee of the Administration for Children and Families wrote the statement of work for a cooperative agreement to be issued to study alternative workplace arrangements. After terminating Government service, the former employee joins a nonprofit group formed to promote family togetherness. He is asked by his former agency to attend a meeting in order to offer his recommendations concerning the ranking of the grant applications he had reviewed while still a Government employee. The management of the nonprofit group agrees to permit him to take leave to attend the meeting in order to present his personal views concerning the ranking of the applications. Although the former employee is a salaried employee of the non-profit group and his recommendations may be consistent with the group's interests, the circumstances establish that he did not make the communication subject to the control of the group.

Example 4 to paragraph (g): An Assistant Secretary of Defense participated in a meeting at which a defense contractor pressed Department of Defense (DOD) officials to continue funding the contractor's sole source contract to develop the prototype of a specialized robot. After terminating Government service, the former Assistant Secretary approaches the contractor and suggests that she can convince her former DOD colleagues to pursue development of the prototype robot. The contractor agrees that the former Assistant Secretary's proposed efforts could be useful and asks her to set up a meeting with key DOD officials for the following week. Although the former Assistant Secretary is not an employee of the contractor, the circumstances establish that she is acting subject to some degree of control or direction by the contractor.

(h) Particular matter involving a specific party or parties--

(1) Basic concept. The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

Example 1 to paragraph (h)(1): An employee of the Department of Housing and Urban Development approved a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that application as it is a particular matter involving specific parties in which she participated personally and substantially as a Government employee.

Example 2 to paragraph (h)(1): An attorney in the Department of Justice drafted provisions of a civil complaint that is filed in Federal court alleging violations of certain environmental laws by ABC Company. The attorney may not subsequently represent ABC before the Government in connection with the lawsuit, which is a particular matter involving specific parties.

(2) Matters of general applicability not covered. Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. International agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests.

Example 1 to paragraph (h)(2): A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

Example 2 to paragraph (h)(2): The former employee in the previous example also assisted MSHA in its defense of a lawsuit brought by a trade association challenging the same regulation. This lawsuit is a particular matter involving specific parties, and the former MSHA employee would be prohibited from representing the trade association or anyone else in connection with the case.

Example 3 to paragraph (h)(2): An employee of the National Science Foundation formulated policies for a grant program for organizations nationwide to produce science education programs targeting elementary school age children. She is not prohibited from later representing a specific organization in connection with its application for assistance under the program.

Example 4 to paragraph (h)(2): An employee in the legislative affairs office of the Department of Homeland Security (DHS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts DHS on behalf of a private organization seeking to influence the Administration to insist on certain amendments to the bill. This is not prohibited. Generally, legislation is not a particular matter involving specific parties. However, if the same employee had participated as a DHS employee in formulating the agency's position on proposed private relief legislation granting citizenship to a specific individual, this matter would involve specific parties, and the employee would be prohibited from later making representational contacts in connection with this matter.

Example 5 to paragraph (h)(2): An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.

Example 6 to paragraph (h)(2): A former agency attorney participated in drafting a standard form contract and certain standard terms and clauses for use in all future contracts. The adoption of a standard form and language for all contracts is a matter of general applicability, not a particular matter involving specific parties. Therefore, the attorney would not be prohibited from representing another person in a dispute involving the application of one of the standard terms or clauses in a specific contract in which he did not participate as a Government employee.

Example 7 to paragraph (h)(2): An employee of the Department of State participated in the development of the United States' position with respect to a proposed treaty with a foreign government concerning transfer of ownership with respect to a parcel of real property and certain operations there. After terminating Government employment, this individual seeks to represent the foreign government before the Department with respect to certain issues arising in the final stage of the treaty negotiations. This bilateral treaty is a particular matter involving specific parties, and the former employee had participated personally and substantially in this matter. Note also that certain employees may be subject to additional restrictions with respect to trade and treaty negotiations or representation of a foreign entity, pursuant to 18 U.S.C. 207(b) and (f).

Example 8 to paragraph (h)(2): The employee in the previous example participated for the Department in negotiations with respect to a multilateral trade agreement concerning tariffs and other trade practices in regard to various industries in 50 countries. The proposed agreement would provide various stages of implementation, with benchmarks for certain legislative enactments by signatory countries. These negotiations do not concern a particular matter involving specific parties. Even though the former employee would not be prohibited under section 207(a)(1) from representing another person in connection with this matter, she must comply with any applicable restrictions in 18 U.S.C. 207(b) and (f).

(3) Specific parties at all relevant times. The particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, although the parties need not be identical at both times.

Example 1 to paragraph (h)(3): An employee of the Department of Defense (DOD) performed certain feasibility studies and other basic conceptual work for a possible innovation to a missile system. At the time she was involved in the matter, DOD had not identified any prospective contractors who might perform the work on the project. After she left Government, DOD issued a request for proposals to construct the new system, and she now seeks to represent one of the bidders in connection with this procurement. She may do so. Even though the procurement is a particular matter involving specific parties at the time of her proposed representation, no parties to the matter had been identified at the time she participated in the project as a Government employee.

Example 2 to paragraph (h)(3): A former employee in an agency inspector general's office conducted the first investigation of its kind concerning a particular fraudulent accounting practice by a grantee. This investigation resulted in a significant monetary recovery for the Government, as well as a settlement agreement in which the grantee agreed to use only certain specified accounting methods in the future. As a result of this case, the agency decided to issue a proposed rule expressly prohibiting the fraudulent accounting practice and requiring all grantees to use the same accounting methods that had been developed in connection with the settlement agreement. The former employee may represent a group of grantees submitting comments critical of the proposed regulation. Although the proposed regulation in some respects evolved from the earlier fraud case, which did involve specific parties, the subsequent rulemaking proceeding does not involve specific parties.

(4) Preliminary or informal stages in a matter. When a particular matter involving specific parties begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest.

Example 1 to paragraph (h)(4): A Government employee participated in internal agency deliberations concerning the merits of taking enforcement action against a company for certain trade practices. He left the Government before any charges were filed against the company. He has participated in a particular matter involving specific parties and may not represent another person in connection with the ensuing administrative or judicial proceedings against the company.

Example 2 to paragraph (h)(4): A former special Government employee (SGE) of the Agency for Health Care Policy and Research served, before leaving the agency, on a "peer review" committee that made a recommendation to the agency concerning the technical merits of a specific grant proposal submitted by a university. The committee's recommendations are nonbinding and constitute only the first of several levels of review within the agency. Nevertheless, the SGE participated in a particular matter involving specific parties and may not represent the university in subsequent efforts to obtain the same grant.

Example 3 to paragraph (h)(4): Prior to filing a product approval application with a regulatory agency, a company sought guidance from the agency. The company provided specific information concerning the product, including its composition and intended uses, safety and efficacy data, and the results and designs of prior studies on the product. After a series of meetings, the agency advised the company concerning the design of additional studies that it should perform in order to address those issues that the agency still believed were unresolved. Even though no formal application had been filed, this was a particular matter involving specific parties. The agency guidance was sufficiently specific, and it was clearly intended to address the substance of a prospective application and to guide the prospective applicant in preparing an application that would meet approval requirements. An agency employee who was substantially involved in developing this guidance could not leave the Government and represent the company when it submits its formal product approval application.

Example 4 to paragraph (h)(4): A Government scientist participated in preliminary, internal deliberations about her agency's need for additional laboratory facilities. After she terminated Government service, the General Services Administration issued a request for proposals (RFP) seeking private architectural services to design the new laboratory space for the agency. The former employee may represent an architectural firm in connection with its response to the RFP. During the preliminary stage in which the former employee participated, no specific architectural firms had been identified for the proposed work.

Example 5 to paragraph (h)(4): In the previous example, the proposed laboratory was to be an extension of a recently completed laboratory designed by XYZ Architectural Associates, and the Government had determined to pursue a sole

source contract with that same firm for the new work. Even before the firm was contacted or expressed any interest concerning the sole source contract, the former employee participated in meetings in which specifications for a potential sole source contract with the firm were discussed. The former employee may not represent XYZ before the Government in connection with this matter.

(5) Same particular matter--

(i) General. The prohibition applies only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a Government employee. The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.

(ii) Considerations in the case of contracts, grants, and other agreements. With respect to matters such as contracts, grants or other agreements:

(A) A new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract (or other agreement), unless there are fundamental changes in objectives or the nature of the matter;

(B) Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding;

(C) A contract is almost always a single particular matter involving specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if an agency determines that articulated lines of division exist. In making this determination, an agency should consider the relevant factors as described above. No single factor should be determinative, and any divisions must be based on the contract's characteristics, which may include, among other things, performance at different geographical locations, separate and distinct subject matters, the separate negotiation or competition of individual task or delivery orders, and the involvement of different program offices or even different agencies.

Example 1 to paragraph (h)(5): An employee drafted one provision of an agency contract to procure new software. After she left Government, a dispute arose under the same contract concerning a provision that she did not draft. She may not represent the contractor in this dispute. The contract as a whole is the particular matter involving specific parties and may not be fractionalized into separate clauses for purposes of avoiding the prohibition of 18 U.S.C. 207(a)(1).

Example 2 to paragraph (h)(5): In the previous example, a new software contract was awarded to the same contractor through a full and open competition, following the employee's departure from the agency. Although no major changes were made in the contract terms, the new contract is a different particular matter involving specific parties.

Example 3 to paragraph (h)(5): A former special Government employee (SGE) recommended that his agency approve a new food additive made by Good Foods, Inc., on the grounds that it was proven safe for human consumption. The Healthy Food Alliance (HFA) sued the agency in Federal court to challenge the decision to approve the product. After leaving Government service, the former SGE may not serve as an expert witness on behalf of HFA in this litigation because it is a continuation of the same product approval matter in which he participated personally and substantially.

Example 4 to paragraph (h)(5): An employee of the Department of the Army negotiated and supervised a contract with Munitions, Inc. for four million mortar shells meeting certain specifications. After the employee left Government, the Army sought a contract modification to add another one million shells. All specifications and contractual terms except price, quantity and delivery dates were identical to those in the original contract. The former Army employee may not represent Munitions in connection with this modification, because it is part of the same particular matter involving specific parties as the original contract.

Example 5 to the paragraph (h)(5): In the previous example, certain changes in technology occurred since the date of the original contract, and the proposed contract modifications would require the additional shells to incorporate new design features. Moreover, because of changes in the Army's internal system for storing and distributing shells to various locations, the modifications would require Munitions to deliver its product to several de-centralized destination points, thus requiring Munitions to develop novel delivery and handling systems and incur new transportation costs. The Army considers these modifications to be fundamental changes in the approach and objectives of the contract and may determine that these changes constitute a new particular matter.

Example 6 to paragraph (h)(5): A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the original wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

Example 7 to paragraph (h)(5): The Navy awards an indefinite delivery contract for environmental remediation services in the northeastern U.S. A Navy engineer is assigned as the Navy's technical representative on a task order for remediation of an oil spill at a Navy activity in Maine. The Navy engineer is personally and substantially involved in the task order (e.g., he negotiates the scope of work, the labor hours required, and monitors the contractor's performance). Following successful completion of the remediation of the oil spill in Maine, the Navy engineer leaves Government service and goes to work for the Navy's remediation contractor. In year two of the contract, the Navy issues a task order for the remediation of lead-based paint at a Navy housing complex in Connecticut. The contractor assigns the former Navy engineer to be its project manager for this task order, which will require him to negotiate with the Navy about the scope of work and the labor hours under the task order. Although the task order is placed under the same indefinite delivery contract (the terms of which remain unchanged), the Navy would be justified in determining that the lead-based paint task order is a separate particular matter as it involves a different type of remediation, at a different location, and at a different time. Note, however, that the engineer in this example had not participated personally and substantially in the overall contract. Any former employee who had--for example, by participating personally and substantially in the initial award or subsequent oversight of the umbrella contract--will be deemed to have also participated personally and substantially in any individual particular matters resulting from the agency's determination that such contract is divisible.

Example 8 to paragraph (h)(5): An agency contracts with Company A to install a satellite system connecting the headquarters office to each of its twenty field offices. Although the field offices are located at various locations throughout the country, each installation is essentially identical, with the terms of each negotiated in the main contract. Therefore, this contract should not be divided into separate particular matters involving specific parties.

(i) Participated personally and substantially--

(1) Participate. To "participate" means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter. An employee can participate in particular matters that are pending other than in his own agency. An employee does not participate in a matter merely because he had knowledge of its existence or because it was pending under his official responsibility. An employee does not participate in a matter within the meaning of this section unless he does so in his official capacity.

(2) Personally. To participate "personally" means to participate:

(i) Directly, either individually or in combination with other persons; or

(ii) Through direct and active supervision of the participation of any person he supervises, including a subordinate.

(3) Substantially. To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or

peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial.

Example 1 to paragraph (i): A General Services Administration (GSA) attorney drafted a standard form contract and certain standard terms and clauses for use in future contracts. A contracting officer uses one of the standard clauses in a subsequent contract without consulting the GSA attorney. The attorney did not participate personally in the subsequent contract.

Example 2 to paragraph (i): An Internal Revenue Service (IRS) attorney is neither in charge of nor does she have official responsibility for litigation involving a particular delinquent taxpayer. At the request of a co-worker who is assigned responsibility for the litigation, the lawyer provides advice concerning strategy during the discovery stage of the litigation. The IRS attorney participated personally in the litigation.

Example 3 to paragraph (i): The IRS attorney in the previous example had no further involvement in the litigation. She participated substantially in the litigation notwithstanding that the post-discovery stages of the litigation lasted for ten years after the day she offered her advice.

Example 4 to paragraph (i): The General Counsel of the Office of Government Ethics (OGE) contacts the OGE attorney who is assigned to evaluate all requests for "certificates of divestiture" to check on the status of the attorney's work with respect to all pending requests. The General Counsel makes no comment concerning the merits or relative importance of any particular request. The General Counsel did not participate substantially in any particular request when she checked on the status of all pending requests.

Example 5 to paragraph (i): The OGE attorney in the previous example completes his evaluation of a particular certificate of divestiture request and forwards his recommendation to the General Counsel. The General Counsel forwards the package to the Director of OGE with a note indicating her concurrence with the attorney's recommendation. The General Counsel participated substantially in the request.

Example 6 to paragraph (i): An International Trade Commission (ITC) computer programmer developed software designed to analyze data related to unfair trade practice complaints. At the request of an ITC employee who is considering the merits of a particular complaint, the programmer enters all the data supplied to her, runs the computer program, and forwards the results to the employee who will make a recommendation to an ITC Commissioner concerning the disposition of the complaint. The programmer did not participate substantially in the complaint.

Example 7 to paragraph (i): The director of an agency office must concur in any decision to grant an application for technical assistance to certain nonprofit entities. When a particular application for assistance comes into her office and is presented to her for decision, she intentionally takes no action on it because she believes the application will raise difficult policy questions for her agency at this time. As a consequence of her inaction, the resolution of the application is deferred indefinitely. She has participated personally and substantially in the matter.

(j) United States is a party or has a direct and substantial interest--

(1) United States. For purposes of this paragraph, the "United States" means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) Party or direct and substantial interest. The United States may be a party to or have a direct and substantial interest in a particular matter even though it is pending in a non-Federal forum, such as a State court. The United States is neither a party to nor does it have a direct and substantial interest in a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter. When it is not clear whether the United States is a party to or has a direct and substantial interest in a particular matter, this determination shall be made in accordance with the following procedure:

(i) Coordination by designated agency ethics official. The designated agency ethics official (DAEO) for the former employee's agency shall have the primary responsibility for coordinating this determination. When it appears likely that a component of the United States Government other than the former employee's former agency may be a party to or have a direct and substantial interest in the particular matter, the DAEO shall coordinate with agency ethics officials serving in those components.

(ii) Agency determination. A component of the United States Government shall determine if it is a party to or has a direct and substantial interest in a matter in accordance with its own internal procedures. It shall consider all relevant factors, including whether:

(A) The component has a financial interest in the matter;

(B) The matter is likely to have an effect on the policies, programs, or operations of the component;

(C) The component is involved in any proceeding associated with the matter, e.g., as by having provided witnesses or documentary evidence; and

(D) The component has more than an academic interest in the outcome of the matter.

Example 1 to paragraph (j): An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

SOURCE: 73 FR 36186, June 25, 2008, unless otherwise noted.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Current through April 21, 2011; 76 FR 22602

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-Civ-Marra/Johnson

JANE DOE #1 AND JANE DOE #2,

Plaintiffs,

[redacted]

UNITED STATES OF AMERICA,

Defendant.

_____/

MOTION TO INTERVENE
OR IN THE ALTERNATIVE FOR A *SUA SPONTE* RULE 11 ORDER

Comes now, Movant Bruce E. Reinhart, pursuant to Federal Rule of Civil Procedure 24(b), and seeks leave to intervene as a party-in-interest in this matter. Movant seeks to intervene to file a Motion for Sanctions based on unfounded factual and legal accusations made about Movant in Plaintiff's Motion for Finding of Violations of the Crime Victims' Rights Act (the "Motion") [DE 48].[1] In the context of a motion alleging that the U.S. Department of Justice violated Plaintiff's rights under the Crime Victims Rights Act, Plaintiffs make irrelevant and gratuitous accusations that Movant violated unspecified Florida Bar rules and Department of Justice regulations. Movant should be granted leave to intervene to rebut these false allegations, and to seek sanctions. Alternatively, the Court on its own initiative should require Plaintiffs and their counsel to show their compliance with Federal Rule of Civil Procedure 11.

Without any attempt to tie the allegations to the asserted violation of the CVRA, Paragraphs 52 and 53 of the Motion falsely allege that Movant, a non-party to this matter,

[1] Movant was not served with a copy of the pleading. Movant first saw the pleading on April 20, 2011.

violated Florida Bar rules and Department of Justice regulations by representing employees of Jeffrey Epstein ("Epstein") in civil litigation after the undersigned retired from the United States Attorney's Office for the Southern District of Florida (the "Office"). They also falsely allege that Movant, while still employed by the Office engaged in improper conduct relating to Epstein. The Motion does not make any effort to connect these allegations to the relief it seeks. It does not explain how the accusations against Movant are relevant to its claims under the CVRA, nor does it explain how Movant's alleged conduct can be imputed to any party in the action. Because there is no proper purpose for these allegations, they are made in bad faith, unreasonably, vexatiously, and for the improper purpose of harassing Movant.

Plaintiff has injected into this action questions of law and fact relating to Movant's alleged conduct. Movant now seeks to assert a claim under Fed. Rule Civ. P. 11 and 28 U.S.C. §1927 arising from the same questions of law and fact that Plaintiff raised. Movant's claim shares with the main action common questions of law and fact. *See New York News, Inc.* [redacted]. *Newspaper and Mail Deliverer's Union*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991)(for purposes of Rule 24(b), claim that falsities in pleading impugned movant's reputation created a question of fact in common with underlying cause of action). Therefore, the Court has discretion to permit intervention. *C.f. Id.* (permissive intervention denied because it would unduly delay and prejudice imminent settlement of the original claims), *aff'd sub nom New York News* [redacted]. *Kheel,* 972 F.2d 482, 487 (2d Cir. 1992). Here, the proposed intervention does not create a risk of undue delay or prejudice to the adjudication of the underlying claims. *See* Fed. R. Civ. P. 24(b)(3). Movant should be permitted to intervene under Fed. R. Civ. P. 24(b)(1)(B).

Unless Movant is permitted to intervene, he cannot remedy the false accusations in Paragraphs 52 and 53. The Department of Justice has responded to the Motion. It declined to respond on the merits to the allegations in Paragraphs 52 and 53 because they are so obviously

irrelevant to the Government's alleged violation of the CVRA. As such, Movant's interest is not adequately protected by the existing parties.

Alternatively, Movant asks the Court *sua sponte* to issue an Order to Show Cause under Rule 11(c)(3)("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)"). This Court should not countenance a party making irrelevant, slanderous accusations against a non-party. On the face of Plaintiffs' Motion, it is clear that the allegations in Paragraphs 52 and 53 are irrelevant to whether the CVRA was violated, and therefore are not being presented for a proper purpose. The Court should require Plaintiffs and their counsel to show what legal and factual inquiry they undertook to comply with Rule 11(b) before making the allegations in Paragraphs 52 and 53, and to articulate the proper purpose for which these allegations were included in their Motion.

As required by Fed. R. Civ. P. 24(c), attached to this motion is a proposed Motion for Sanctions. If leave to intervene is granted, the Motion for Sanctions which will be served on Plaintiffs' counsel under Fed. R. Civ. P. 5, but not filed for 21 days thereafter. *See* Fed. R. Civ. P. 11(c)(2).

Pursuant to Local Rule 7.1(a)(3), undersigned counsel contacted counsel for Plaintiffs and counsel for the United States. Assistant United States Attorney Dexter Lee reported that the United States does not oppose the Motion to Intervene. Bradley Edwards, Esq., counsel for Plaintiffs reported that they oppose the Motion to Intervene.

Respectfully submitted,

/s/ Bruce E. Reinhart
BRUCE E. REINHART,P.A.
Florida Bar # 10762
250 S. Australian Avenue, Suite 1400
West Palm Beach, Florida 33401
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Intervene or in the Alternative for a *Sua Sponte* Rule 11 Order was served on all counsel of record by CM/ECF on May 3, 2011.

/s/Bruce Reinhart
BRUCE REINHART

ATTACHMENT TO MOTION TO INTERVENE OR IN THE ALTERNATIVE FOR A SUA SPONTE RULE 11 ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-Civ-Marra/Johnson

JANE DOE #1 AND JANE DOE #2,

Plaintiffs,

[redacted]

UNITED STATES OF AMERICA,

Defendant.

BRUCE E. REINHART,

Intervenor

_____/

INTERVENOR'S MOTION FOR SANCTIONS

Comes now, Bruce E. Reinhart, intervenor and party in interest (hereinafter "Movant"), and moves this Honorable Court to impose sanctions under Federal Rule of Civil Procedure 11(b) and 28 U.S.C. 1927 based on intentional or reckless false, bad faith, vexatious factual and legal assertions made about Movant in Paragraphs 52 and 53 of Plaintiff's Motion for Finding of Violations of the Crime Victims' Rights Act (the "Motion") [DE 48].

BACKGROUND

The instant cause of action involves claims by Plaintiffs that Defendant violated the Crime Victims Rights Act (CVRA), 18 U.S.C. §3771, in its handling of a criminal investigation of Jeffrey Epstein ("Epstein") and others. The investigation ultimately resulted in a non-prosecution agreement between the United States and Epstein. On

March 21, 2011, Plaintiffs filed their Motion.[1] Numbered paragraphs 1-50 of the Motion are a chronological review of the background of the Epstein investigation, including the interactions among the victims' counsel, counsel for Epstein, the Government and the FBI. Paragraph 51 asserts that at all relevant times it was feasible for the Government to provide certain notifications to Plaintiffs.

Without attempting to make any connection to the asserted violation of the CVRA, Paragraphs 52 and 53 falsely allege that Movant violated Florida Bar rules and Department of Justice regulations by representing Epstein's employees in civil litigation after Movant retired from the United States Attorney's Office for the Southern District of Florida ("Office"). They also falsely allege that Movant, while still employed by the Office engaged in improper conduct relating to Epstein. These allegations are made in bad faith, unreasonably, without reasonable inquiry into the law and facts, vexatiously, and for the improper purpose of gratuitously harassing Movant.

LEGAL STANDARDS

Federal Rule of Criminal Procedure 11

Federal Rule of Civil Procedure 11 states that a lawyer signing any pleading in federal court is certifying that:

> [T]to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

[1] Movant was not served with a copy of the pleading. Movant first saw the pleading on April 20, 2011.

> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b). Rule 11 uses an objective standard. *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003). The analysis is whether "a reasonable attorney in like circumstances could believe that his actions were factually and legally justified." *Id.* (*citing Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002)). Violations of Rule 11 are punishable by monetary and non-monetary sanctions against both the lawyer filing the pleading and the lawyer's client. Fed. R. Civ. P. 11(c).

28 U.S.C. §1927

Title 28, United States Code, Section 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.

To impose sanctions under § 1927, the Court must find that the attorney's conduct is "'tantamount to bad faith.'" *Amlong & Amlong*, 500 F.3d 1230, 1239 (11th Cir. 2007) (*quoting Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991)). "[T]he attorney must knowingly or recklessly pursue a frivolous claim." *Id.* at 1242. The finding of bad faith does not turn on "the attorney's subjective intent, but on the attorney's objective conduct." *Id.* at 1239. The standard is "whether, regardless of the attorney's subjective intentions, the conduct was unreasonable and vexatious when measured against an objective standard." *Hudson v. Int'l Comp. Negotiations, Inc.*, 499 F.3d 1252, 1262 (11th Cir. 2007).

DISCUSSION

Paragraphs 52 and 53 contain inflammatory claims that are false, misleading, and irrelevant to the relief sought in the Motion. *See generally* Declaration of Bruce E. Reinhart (attached as Exhibit 1 and incorporated by reference). They ultimately allege, "[Movant's] representations [of Epstein's employees] are in contravention of Justice Department regulations and Florida bar rules. Such representations also give, at least, the improper appearance that Reinhart may have attempted to curry [sic] with Epstein and then reap his reward through favorable representation." Plaintiff's Motion at ¶53. They do not cite to any particular bar rule or regulation that they believe was violated. They do not explain how the alleged conduct contributed to the Department of Justice's alleged violation of the CVRA. Nor do they explain how the alleged conduct is imputable to the Department of Justice. These otherwise slanderous accusations against a non-party are false. They were made in bad faith, without a factual inquiry reasonable under the circumstances, or elementary research into the legal basis for the allegations.

Paragraphs 52 and 53 omit the following true facts, which Plaintiffs should have investigated before making their allegations: (1) Movant did not participate in any way in the Office's investigation of Epstein, (2) after leaving government employment, Movant did not represent Epstein before the Department of Justice, nor did Movant communicate with the Department of Justice about Epstein, and (3) Movant did not use confidential information obtained during his Government employment to the detriment of the United States. *See* Declaration of Bruce E. Reinhart at ¶¶11-12, 17.

Rather than conducting the required inquiry, Plaintiffs simply make two irresponsible and unsupported leaps. First, they incorrectly conclude that merely because

Movant worked in the Office at the time of the Epstein case, Movant must have been involved in the internal decisionmaking at the Office about Epstein. Second, they incorrectly conclude that because Movant later represented Epstein's employees in private civil litigation, Movant must have used confidential Government information improperly in his representation of Epstein's employees, and for his own financial gain.

It is apparent that Plaintiffs conducted no factual inquiry to substantiate their accusations before making them. They never contacted Movant. On information and belief, they did not speak to any current or former personnel from the Office or the FBI who were familiar with the structure of the West Palm Beach Office or with Movant's role (or lack thereof) in the Epstein investigation. Had they done so, they would have learned that there were approximately 20 Assistant United States Attorneys in the West Palm Beach Office during the relevant time period. *See* Declaration of Bruce E. Reinhart at ¶10. They would have learned that Movant was not assigned to the same section as the prosecutor handling the Epstein matter. *Id.* They would have learned that Movant had a different chain of supervision from the prosecutor assigned to the Epstein matter. *Id.* They would have learned that Movant had no involvement in the Epstein investigation. *See* Declaration of Bruce E. Reinhart at ¶¶11-12.

Further, Plaintiffs did not conduct an adequate inquiry into the applicable Department of Justice regulations. As discussed below, to violate the relevant regulations, a former employee must appear before, or communicate with, the Department of Justice, about a particular matter in which the former employee participated personally and substantially while employed at the Department of Justice. *See* 5 C.F.R. §2641.201(a). The Motion contains approximately 50 paragraphs of a

detailed historical litany of the interactions among the parties to the Epstein matter. The Motion does not allege that Movant participated at all, let alone personally and substantially, as a government employee in the Epstein investigation. The Motion does not allege that that Movant subsequently appeared before, or communicated with, the Department of Justice about Epstein. To the contrary, the Motion alleges only that, after leaving the Office, Movant represented Epstein's employees in litigation with non-Governmental third parties. Had Plaintiffs conducted rudimentary research into the applicable regulations, they would have known that any allegation that Movant violated these regulations was frivolous.

Movant Did Not Violate Any Florida Bar Rule

Relevant Florida Bar Rules

The potentially applicable Florida Bar rules are Rule 4-1.6(a) (Confidentiality of Information), Rule 4-1.9 (Conflict of Interest; Former Clients), and Rule 4-1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees). For purposes of these rules, the U.S. Department of Justice was Movant's client during his employment in the Office. Movant did not violate any of the bar rules.

Rule 4-1.6(a) states:

> A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

Rule 4-1.6 was not violated because Movant did not know any confidential information about the Epstein matter, so none could be revealed.

Rule 4-1.9 states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or,

(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Rule 4-1.9 was not violated because Movant never represented the United States in the Epstein matter.

Rule 4-1.11 states in pertinent parts:

(a) A lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to rule 4-1.9(b); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

. . .

(c) A lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

(d) A lawyer currently serving as a public officer or employee:

(1) is subject to rules 4-1.7 and 4-1.9; and

> (2) shall not:
>
> (A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent; or
>
> (B) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

Rule 4-1.11(a) was not violated because Movant did not participate personally and substantially in the Epstein matter. Rule 4-1.11(c) was not violated because Movant did not have any confidential Government information within the meaning of the rule, so he did he use any confidential Government information about a third party to the detriment of that third party. Rule 4-1.11(d) was not violated because Movant did not participate personally and substantially in the Epstein matter.

Movant Did Not Violate Department of Justice Regulations

Department of Justice Regulations

The Department of Justice regulation containing post-employment restrictions, 5 C.F.R. §2641.201, states in most pertinent part:

> (a) Basic prohibition of 18 U.S.C. 207(a)(1). No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.
>
> . . .
>
> (i) Participate: To "participate" means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter . . . An employee does not participate in a matter

> merely because he had knowledge of its existence or because it was pending under his official responsibility.[2]

Movant did not violate 5 C.F.R. §2641.201 because he did not participate personally and substantially in the Epstein matter as a Government employee. He did not appear before the United States on behalf of Epstein after leaving Government employment. He did not communicate with the United States on behalf of Epstein after leaving Government employment. He represented Epstein's employees in civil cases in which the Government was not a party.

It is clear from the face of the regulations that Movant's representing Epstein's employees in civil matters not involving the Government did not violate §2641(a). In fact, had Plaintiffs and their counsel properly investigated the facts and law, they would have seen that §2641(a) would have permitted Movant to represent Epstein, himself, openly against the Department of Justice. Movant did not. The allegation that Movant violated Department of Justice regulations is frivolous.

[2] A complete copy of this regulation is attached to this Motion as Exhibit 2.

CONCLUSION

The allegations in Paragraph 52 and 53 of the Motion are false, made in bad faith, and made without sufficient inquiry into the law and facts. They are irrelevant to whether the United States Attorney complied with the CVRA. Notably, the Motion does not attempt to tie the allegations against Movant to the alleged violation of the CVRA. The allegations are included gratuitously in the Motion solely to harass Movant in a forum where the accusations are not legally slanderous. The allegations are made without reasonable pre-filing inquiry into the facts or law. This Court should issue an Order to Show Cause why sanctions should not be imposed under Rule 11 or 28 U.S.C. §1927.

Respectfully submitted,

/s/ Bruce E. Reinhart
BRUCE E. REINHART,P.A.
Florida Bar # 10762
250 S. Australian Avenue, Suite 1400
West Palm Beach, Florida 33401
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Intervenor's Motion For Sanctions was served on all counsel of record by CM/ECF on _____, 2011.

/s/Bruce Reinhart
BRUCE REINHART

EXHIBIT 1

DECLARATION OF BRUCE E. REINHART

I, Bruce E. Reinhart, make the following declaration pursuant to 28 U.S.C. §1746.

1. I am a licensed attorney in solo practice as Bruce E. Reinhart, P.A. My office is located at 250 S. Australian Avenue, Suite 1400, West Palm Beach, Florida, 33401.

2. I am a member in good standing of the bars of the states of Florida, Pennsylvania, and New Jersey. I am also admitted to the practice in the United States District Court for the Southern District of Florida, the U.S. Court of Appeals for the Eleventh Circuit, the U.S. Supreme Court, and several other federal courts.

3. I graduated from Princeton University in 1984 with a B.S.E. in civil engineering *cum laude*. I graduated from the University of Pennsylvania Law School in 1987, *cum laude*. I also served as an Editor of the University of Pennsylvania Law School.

4. After graduating from law school, I served as judicial law clerk to the Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania.

5. In 1988, I began working at the Criminal Division of the United States Department of Justice in Washington, D.C., through the Attorney General's Honors Program. From 1988-1994, I worked in the Public Integrity Section of the Criminal Division. While working there, I received two Special Achievement Awards for Meritorious Acts and Service from the Department of Justice.

6. While at the Public Integrity Section, I was involved in investigating and prosecuting people who violated federal conflict of interest and post-employment statutes. I attended multiple training conferences where federal conflicts of interest laws and regulations were discussed.

7. From in or about July 1994 to on or about May 1, 1996, I served as Senior Policy Advisor to the Undersecretary of the Treasury for Enforcement at the United States Department of the Treasury. In that position, I helped the Undersecretary, the Deputy Secretary, and the Secretary of the Treasury to develop law enforcement policies for U.S. Customs, ATF, Secret Service, and IRS Criminal Investigations. I also acted as principal staff liaison to the Deputy Attorney General, the FBI and the other Department of Justice law enforcement agencies. For my service, I was awarded the Undersecretary for Enforcement's Award for Exceptional Service.

8. I am the former Vice Chair of the Palm Beach County Bar's Professionalism Committee. I am the former President of the Palm Beach County Chapter of the Federal Bar Association. I currently serve as an Ethics Commissioner on the Palm Beach County Commission on Ethics.

9. From May 1, 1996 to January 1, 2008, I served as an Assistant United States Attorney in the Southern District of Florida, assigned to the West Palm Beach office. From in or about July 1998 to in or about October 2002, I was a Supervisory Assistant United States Attorney. From October 2002 to January 2008, I was a non-supervisory Assistant United States Attorney handling my own docket of cases.

10. At all relevant times, the Office had approximately 20 Assistant U.S. Attorneys assigned to the West Palm Beach location. The prosecutor assigned to the Epstein case, [redacted], and I were assigned to different sections within the Office. We reported to different supervisors.

11. I did not participate in any way in the Office's investigation of Epstein. I was not involved in any of the Office's decisionmaking with regard to the Epstein matter.

12. I never learned any confidential, non-public information about the Epstein matter.

13. In late December 2007, I had an "exit meeting" with [redacted], the Office's ethics officer. As part of that meeting, [redacted] reviewed with me the Department of Justice's post-employment restrictions. Based on our conversation, it was my understanding that I could work on any matter so long as I had not participated in it personally and substantially as a Government employee. I also understood that I could not use non-public Government information for any purpose.

14. After opening my private practice on January 2, 2008, I was retained to represent [redacted] for purposes of civil depositions in causes of action to which the United States was not a party. At a later time, I was retained to represent several other members of Mr. Epstein's staff in their civil depositions.

15. After leaving the Office, I did not participate in any of the negotiations over Mr. Epstein's non-prosecution agreement.

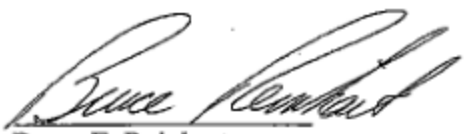
16. After leaving the Office, I did not communicate with the Office, in person or in writing, about any matters relating to possible criminal charges against Mr. Epstein.

17. Because I did not have any, I did not share non-public confidential information about the Epstein investigation with any of Epstein's attorneys.

18. Prior to the filing of Plaintiff's Motion for Finding of Violations of the Crime Victims' Rights Act, neither Mr. Edwards, nor Judge Cassell, nor anyone on their behalf contacted me to determine if the allegations in Paragraphs 52 and 53 of that Motion were true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 2011.



Bruce E. Reinhart

EXHIBIT 2

Code of Federal Regulations
Title 5. Administrative Personnel
Chapter XVI. Office of Government Ethics
Subchapter B. Government Ethics
Part 2641. Post-Employment Conflict of Interest Restrictions (Refs & Annos)
Subpart B. Prohibitions

5 C.F.R. § 2641.201

§ 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially.

Effective: July 25, 2008
Currentness

(a) Basic prohibition of 18 U.S.C. 207(a)(1). No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

(b) Exceptions and waivers. The prohibition of 18 U.S.C. 207(a)(1) does not apply to a former employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).

(4) Testifying under oath. See § 2641.301(f). (Note that this exception from § 2641.201 is generally not available for expert testimony. See § 2641.301(f)(2).)

(5) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(6) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(c) Commencement and length of restriction. 18 U.S.C. 207(a)(1) is a permanent restriction that commences upon an employee's termination from Government service. The restriction lasts for the life of the particular matter involving specific parties in which the employee participated personally and substantially.

(d) Communication or appearance--

(1) Communication. A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) Appearance. A former employee makes an appearance when he is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) Behind-the-scenes assistance. Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

Example 1 to paragraph (d): A former employee of the Federal Bureau of Investigation makes a brief telephone call to a colleague in her former office concerning an ongoing investigation. She has made a communication. If she personally attends an informal meeting with agency personnel concerning the matter, she will have made an appearance.

Example 2 to paragraph (d): A former employee of the National Endowment for the Humanities (NEH) accompanies other representatives of an NEH grantee to a meeting with the agency. Even if the former employee does not say anything at the meeting, he has made an appearance (although that appearance may or may not have been made with the intent to influence, depending on the circumstances).

Example 3 to paragraph (d): A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

Example 4 to paragraph (d): A former employee of the National Institutes of Health (NIH) prepares an application for an NIH research grant on behalf of her university employer. The application is signed and submitted by another university officer, but it lists the former employee as the principal investigator who will be responsible for the substantive work under the grant. She has not made a communication. She also may sign an assurance to the agency that she will be personally responsible for the direction and conduct of the research under the grant, pursuant to § 2641.201(e)(2)(iv). Moreover, she may personally communicate scientific or technological information to NIH concerning the application, provided that she does so under circumstances indicating no intent to influence the Government pursuant to § 2641.201(c)(2) or she makes the communication in accordance with the exception for scientific or technological information in § 2641.301(c).

Example 5 to paragraph (d): A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate that she intended the information to be attributed to herself.

(e) With the intent to influence--

(1) Basic concept. The prohibition applies only to communications or appearances made by a former Government employee with the intent to influence the United States. A communication or appearance is made with the intent to influence when made for the purpose of:

(i) Seeking a Government ruling, benefit, approval, or other discretionary Government action; or

(ii) Affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.

Example 1 to paragraph (e)(1): A former employee of the Administration on Children and Families (ACF) signs a grant application and submits it to ACF on behalf of a nonprofit organization for which she now works. She has made a communication with the intent to influence an employee of the United States because her communication was made for the purpose of seeking a Government benefit.

Example 2 to paragraph (e)(1): A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

(2) Intent to influence not present. Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

(i) Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;

(ii) Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;

(iii) Signing and filing the tax return of another person as preparer;

(iv) Signing an assurance that one will be responsible as principal investigator for the direction and conduct of research under a Federal grant (see example 4 to paragraph (d) of this section);

(v) Filing a Securities and Exchange Commission (SEC) Form 10-K or similar disclosure forms required by the SEC;

(vi) Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or

(vii) Purely social contacts (see example 4 to paragraph (f) of this section).

Example 1 to paragraph (e)(2): A former Government employee calls an agency to ask for the date of a scheduled public hearing on her client's license application. This is a routine request not involving a potential controversy and is not made with the intent to influence.

Example 2 to paragraph (e)(2): In the previous example, the agency's hearing calendar is quite full, as the agency has a significant backlog of license applications. The former employee calls a former colleague at the agency to ask if the hearing date for her client could be moved up on the schedule, so that her client can move forward with its business plans more quickly. This is a communication made with the intent to influence.

Example 3 to paragraph (e)(2): A former employee of the Department of Defense (DOD) now works for a firm that has a DOD contract to produce an operator's manual for a radar device used by DOD. In the course of developing a chapter about certain technical features of the device, the former employee asks a DOD official certain factual questions about the device and its properties. The discussion does not concern any matter that is known to involve a potential controversy between the agency and the contractor. The former employee has not made a communication with the intent to influence.

Example 4 to paragraph (e)(2): A former medical officer of the Food and Drug Administration (FDA) sends a letter to the agency in which he sets out certain data from safety and efficacy tests on a new drug for which his employer, ABC Drug Co., is seeking FDA approval. Even if the letter is confined to arguably "factual" matters, such as synopses of data from clinical trials, the communication is made for the purpose of obtaining a discretionary Government action, i.e., approval of a new drug. Therefore, this is a communication made with the intent to influence.

Example 5 to paragraph (e)(2): A former Government employee now works for a management consulting firm, which has a Government contract to produce a study on the efficiency of certain agency operations. Among other things, the contract calls

for the contractor to develop a range of alternative options for potential restructuring of certain internal Government procedures. The former employee would like to meet with agency representatives to present a tentative list of options developed by the contractor. She may not do so. There is a potential for controversy between the Government and the contractor concerning the extent and adequacy of any options presented, and, moreover, the contractor may have its own interest in emphasizing certain options as opposed to others because some options may be more difficult and expensive for the contractor to develop fully than others.

Example 6 to paragraph (e)(2): A former employee of the Internal Revenue Service (IRS) prepares his client's tax return, signs it as preparer, and mails it to the IRS. He has not made a communication with the intent to influence. In the event that any controversy should arise concerning the return, the former employee may not represent the client in the proceeding, although he may answer direct factual questions about the records he used to compile figures for the return, provided that he does not argue any theories or positions to justify the use of one figure rather than another.

Example 7 to paragraph (e)(2): An agency official visits the premises of a prospective contractor to evaluate the testing procedure being proposed by the contractor for a research contract on which it has bid. A former employee of the agency, now employed by the contractor, is the person most familiar with the technical aspects of the proposed testing procedure. The agency official asks the former employee about certain technical features of the equipment used in connection with the testing procedure. The former employee may provide factual information that is responsive to the questions posed by the agency official, as such information is requested by the Government under circumstances for its convenience in reviewing the bid. However, the former employee may not argue for the appropriateness of the proposed testing procedure or otherwise advocate any position on behalf of the contractor.

(3) Change in circumstances. If, at any time during the course of a communication or appearance otherwise permissible under paragraph (e)(2) of this section, it becomes apparent that circumstances have changed which would indicate that any further communication or appearance would be made with the intent to influence, the former employee must refrain from such further communication or appearance.

Example 1 to paragraph (e)(3): A former Government employee accompanies another employee of a contractor to a routine meeting with agency officials to deliver technical data called for under a Government contract. During the course of the meeting, an unexpected dispute arises concerning certain terms of the contract. The former employee may not participate in any discussion of this issue. Moreover, if the circumstances clearly indicate that even her continued presence during this discussion would be an appearance made with the intent to influence, she should excuse herself from the meeting.

(4) Mere physical presence intended to influence. Under some circumstances, a former employee's mere physical presence, without any communication by the employee concerning any material issue or otherwise, may constitute an appearance with the intent to influence an employee of the United States. Relevant considerations include such factors as whether:

(i) The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;

(ii) The Government employee before whom the appearance is made has substantive responsibility for the matter and does not simply perform ministerial functions, such as the acceptance of paperwork;

(iii) The former employee's presence is relatively prominent;

(iv) The former employee is paid for making the appearance;

(v) It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee;

(vi) Circumstances do not indicate that the former employee is present merely for informational purposes, for example, merely to listen and record information for later use;

(vii) The former employee has entered a formal appearance in connection with a legal proceeding at which he is present; and

(viii) The appearance is before former subordinates or others in the same chain of command as the former employee.
Example 1 to paragraph (e)(4): A former Regional Administrator of the Occupational Safety and Health Administration (OSHA) becomes a consultant for a company being investigated for possible enforcement action by the regional OSHA office. She is hired by the company to coordinate and guide its response to the OSHA investigation. She accompanies company officers to an informal meeting with OSHA, which is held for the purpose of airing the company's explanation of certain findings in an adverse inspection report. The former employee is introduced at the meeting as the company's compliance and governmental affairs adviser, but she does not make any statements during the meeting concerning the investigation. She is paid a fee for attending this meeting. She has made an appearance with the intent to influence.

Example 2 to paragraph (e)(4): A former employee of an agency now works for a manufacturer that seeks agency approval for a new product. The agency convenes a public advisory committee meeting for the purpose of receiving expert advice concerning the product. Representatives of the manufacturer will make an extended presentation of the data supporting the application for approval, and a special table has been reserved for them in the meeting room for this purpose. The former employee does not participate in the manufacturer's presentation to the advisory committee and does not even sit in the section designated for the manufacturer. Rather, he sits in the back of the room in a large area reserved for the public and the media. The manufacturer's speakers make no reference to the involvement or views of the former employee with respect to the matter. Even though the former employee may be recognized in the audience by certain agency employees, he has not made an appearance with the intent to influence because his presence is relatively inconspicuous and there is little to identify him with the manufacturer or the advocacy of its representatives at the meeting.

(f) To or before an employee of the United States--

(1) Employee of the United States. For purposes of this paragraph, an "employee of the United States" means the President, the Vice President, and any current Federal employee (including an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376)) who is detailed to or employed by any:

(i) Agency (including a Government corporation);

(ii) Independent agency in the executive, legislative, or judicial branch;

(iii) Federal court; or

(iv) Court-martial.

(2) To or before. Except as provided in paragraph (f)(3) of this section, a communication "to" or appearance "before" an employee of the United States is one:

(i) Directed to and received by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section even though not addressed to a particular employee, e.g., as when a former employee mails correspondence to an agency but not to any named employee; or

(ii) Directed to and received by an employee in his capacity as an employee of an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section, e.g., as when a former employee directs remarks to an employee representing the United States as a party or intervenor in a Federal or non-Federal judicial proceeding. A former employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(3) Public commentary.

(i) A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the United States.

(ii) In the circumstances described in paragraph (f)(3)(i) of this section, a former employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication.

Example 1 to paragraph (f): A Federal Trade Commission (FTC) employee participated in the FTC's decision to initiate an enforcement proceeding against a particular company. After terminating Government service, the former employee is hired by the company to lobby key Members of Congress concerning the necessity of the proceeding. He may contact Members of Congress or their staff since a communication to or appearance before such persons is not made to or before an "employee of the United States" as that term is defined in paragraph (f)(1) of this section.

Example 2 to paragraph (f): In the previous example, the former FTC employee arranges to meet with a Congressional staff member to discuss the necessity of the proceeding. A current FTC employee is invited by the staff member to attend and is authorized by the FTC to do so in order to present the agency's views. The former employee may not argue his new employer's position at that meeting since his arguments would unavoidably be directed to the FTC employee in his capacity as an employee of the FTC.

Example 3 to paragraph (f): The Department of State granted a waiver pursuant to 18 U.S.C. 208(b)(1) to permit one of its employees to serve in his official capacity on the Board of Directors of a private association. The employee participates in a Board meeting to discuss what position the association should take concerning the award of a recent contract by the Department of Energy (DOE). When a former DOE employee addresses the Board to argue that the association should object to the award of the contract, she is directing her communication to a Department of State employee in his capacity as an employee of the Department of State.

Example 4 to paragraph (f): A Federal Communications Commission (FCC) employee participated in a proceeding to review the renewal of a license for a television station. After terminating Government service, he is hired by the company that holds the license. At a cocktail party, the former employee meets his former supervisor who is still employed by the FCC and begins to discuss the specifics of the license renewal case with him. The former employee is directing his communication to an FCC employee in his capacity as an employee of the FCC. Moreover, as the conversation concerns the license renewal matter, it is not a purely social contact and satisfies the element of the intent to influence the Government within the meaning of paragraph (e) of this section.

Example 5 to paragraph (f): A Federal Trade Commission economist participated in her agency's review of a proposed merger between two companies. After terminating Government service, she goes to work for a trade association that is interested in the proposed merger. She would like to speak about the proposed merger at a conference sponsored by the trade association. The conference is attended by 100 individuals, 50 of whom are employees of entities specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section. The former employee may speak at the conference and may engage in a discussion of the merits of the proposed merger in response to a question posed by a Department of Justice employee in attendance.

Example 6 to paragraph (f): The former employee in the previous example may, on behalf of her employer, write and permit publication of an op-ed piece in a metropolitan newspaper in support of a particular resolution of the merger proposal.

Example 7 to paragraph (f): ABC Company has a contract with the Department of Energy which requires that contractor personnel work closely with agency employees in adjoining offices and work stations in the same building. After leaving the Department, a former employee goes to work for another corporation that has an interest in performing certain work related to the same contract, and he arranges a meeting with certain ABC employees at the building where he previously worked on the project. At the meeting, he asks the ABC employees to mention the interest of his new employer to the project supervisor, who is an agency employee. Moreover, he tells the ABC employees that they can say that he was the source of this information. The ABC employees in turn convey this information to the project supervisor. The former employee has made a communication to an employee of the Department of Energy. His communication is directed to an agency employee because he intended that the information be conveyed to an agency employee with the intent that it be attributed to himself, and the circumstances indicate such a close working relationship between contractor personnel and agency employees that it was likely that the information conveyed to contractor personnel would be received by the agency.

(g) On behalf of any other person--

(1) On behalf of.

(i) A former employee makes a communication or appearance on behalf of another person if the former employee is acting as the other person's agent or attorney or if:

(A) The former employee is acting with the consent of the other person, whether express or implied; and

(B) The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

(ii) A former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee's activity.

(2) Any other person. The term "person" is defined in § 2641.104. For purposes of this paragraph, the term excludes the former employee himself or any sole proprietorship owned by the former employee.

Example 1 to paragraph (g): An employee of the Bureau of Land Management (BLM) participated in the decision to grant a private company the right to explore for minerals on certain Federal lands. After retiring from Federal service to pursue her hobbies, the former employee becomes concerned that BLM is misinterpreting a particular provision of the lease. The former employee may contact a current BLM employee on her own behalf in order to argue that her interpretation is correct.

Example 2 to paragraph (g): The former BLM employee from the previous example later joins an environmental organization as an uncompensated volunteer. The leadership of the organization authorizes the former employee to engage in any activity that she believes will advance the interests of the organization. She makes a communication on behalf of the organization when, pursuant to this authority, she writes to BLM on the organization's letterhead in order to present an additional argument concerning the interpretation of the lease provision. Although the organization did not direct her to send the specific communication to BLM, the circumstances establish that she made the communication with the consent of the organization and subject to a degree of control or direction by the organization.

Example 3 to paragraph (g): An employee of the Administration for Children and Families wrote the statement of work for a cooperative agreement to be issued to study alternative workplace arrangements. After terminating Government service, the former employee joins a nonprofit group formed to promote family togetherness. He is asked by his former agency to attend a meeting in order to offer his recommendations concerning the ranking of the grant applications he had reviewed while still a Government employee. The management of the nonprofit group agrees to permit him to take leave to attend the meeting in order to present his personal views concerning the ranking of the applications. Although the former employee is a salaried employee of the non-profit group and his recommendations may be consistent with the group's interests, the circumstances establish that he did not make the communication subject to the control of the group.

Example 4 to paragraph (g): An Assistant Secretary of Defense participated in a meeting at which a defense contractor pressed Department of Defense (DOD) officials to continue funding the contractor's sole source contract to develop the prototype of a specialized robot. After terminating Government service, the former Assistant Secretary approaches the contractor and suggests that she can convince her former DOD colleagues to pursue development of the prototype robot. The contractor agrees that the former Assistant Secretary's proposed efforts could be useful and asks her to set up a meeting with key DOD officials for the following week. Although the former Assistant Secretary is not an employee of the contractor, the circumstances establish that she is acting subject to some degree of control or direction by the contractor.

(h) Particular matter involving a specific party or parties--

(1) Basic concept. The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

Example 1 to paragraph (h)(1): An employee of the Department of Housing and Urban Development approved a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that application as it is a particular matter involving specific parties in which she participated personally and substantially as a Government employee.

Example 2 to paragraph (h)(1): An attorney in the Department of Justice drafted provisions of a civil complaint that is filed in Federal court alleging violations of certain environmental laws by ABC Company. The attorney may not subsequently represent ABC before the Government in connection with the lawsuit, which is a particular matter involving specific parties.

(2) Matters of general applicability not covered. Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. International agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests.

Example 1 to paragraph (h)(2): A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

Example 2 to paragraph (h)(2): The former employee in the previous example also assisted MSHA in its defense of a lawsuit brought by a trade association challenging the same regulation. This lawsuit is a particular matter involving specific parties, and the former MSHA employee would be prohibited from representing the trade association or anyone else in connection with the case.

Example 3 to paragraph (h)(2): An employee of the National Science Foundation formulated policies for a grant program for organizations nationwide to produce science education programs targeting elementary school age children. She is not prohibited from later representing a specific organization in connection with its application for assistance under the program.

Example 4 to paragraph (h)(2): An employee in the legislative affairs office of the Department of Homeland Security (DHS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts DHS on behalf of a private organization seeking to influence the Administration to insist on certain amendments to the bill. This is not prohibited. Generally, legislation is not a particular matter involving specific parties. However, if the same employee had participated as a DHS employee in formulating the agency's position on proposed private relief legislation granting citizenship to a specific individual, this matter would involve specific parties, and the employee would be prohibited from later making representational contacts in connection with this matter.

Example 5 to paragraph (h)(2): An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.

Example 6 to paragraph (h)(2): A former agency attorney participated in drafting a standard form contract and certain standard terms and clauses for use in all future contracts. The adoption of a standard form and language for all contracts is a matter of general applicability, not a particular matter involving specific parties. Therefore, the attorney would not be prohibited from representing another person in a dispute involving the application of one of the standard terms or clauses in a specific contract in which he did not participate as a Government employee.

Example 7 to paragraph (h)(2): An employee of the Department of State participated in the development of the United States' position with respect to a proposed treaty with a foreign government concerning transfer of ownership with respect to a parcel of real property and certain operations there. After terminating Government employment, this individual seeks to represent the foreign government before the Department with respect to certain issues arising in the final stage of the treaty negotiations. This bilateral treaty is a particular matter involving specific parties, and the former employee had participated personally and substantially in this matter. Note also that certain employees may be subject to additional restrictions with respect to trade and treaty negotiations or representation of a foreign entity, pursuant to 18 U.S.C. 207(b) and (f).

Example 8 to paragraph (h)(2): The employee in the previous example participated for the Department in negotiations with respect to a multilateral trade agreement concerning tariffs and other trade practices in regard to various industries in 50 countries. The proposed agreement would provide various stages of implementation, with benchmarks for certain legislative enactments by signatory countries. These negotiations do not concern a particular matter involving specific parties. Even though the former employee would not be prohibited under section 207(a)(1) from representing another person in connection with this matter, she must comply with any applicable restrictions in 18 U.S.C. 207(b) and (f).

(3) Specific parties at all relevant times. The particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, although the parties need not be identical at both times.

Example 1 to paragraph (h)(3): An employee of the Department of Defense (DOD) performed certain feasibility studies and other basic conceptual work for a possible innovation to a missile system. At the time she was involved in the matter, DOD had not identified any prospective contractors who might perform the work on the project. After she left Government, DOD issued a request for proposals to construct the new system, and she now seeks to represent one of the bidders in connection with this procurement. She may do so. Even though the procurement is a particular matter involving specific parties at the time of her proposed representation, no parties to the matter had been identified at the time she participated in the project as a Government employee.

Example 2 to paragraph (h)(3): A former employee in an agency inspector general's office conducted the first investigation of its kind concerning a particular fraudulent accounting practice by a grantee. This investigation resulted in a significant monetary recovery for the Government, as well as a settlement agreement in which the grantee agreed to use only certain specified accounting methods in the future. As a result of this case, the agency decided to issue a proposed rule expressly prohibiting the fraudulent accounting practice and requiring all grantees to use the same accounting methods that had been developed in connection with the settlement agreement. The former employee may represent a group of grantees submitting comments critical of the proposed regulation. Although the proposed regulation in some respects evolved from the earlier fraud case, which did involve specific parties, the subsequent rulemaking proceeding does not involve specific parties.

(4) Preliminary or informal stages in a matter. When a particular matter involving specific parties begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest.

Example 1 to paragraph (h)(4): A Government employee participated in internal agency deliberations concerning the merits of taking enforcement action against a company for certain trade practices. He left the Government before any charges were filed against the company. He has participated in a particular matter involving specific parties and may not represent another person in connection with the ensuing administrative or judicial proceedings against the company.

Example 2 to paragraph (h)(4): A former special Government employee (SGE) of the Agency for Health Care Policy and Research served, before leaving the agency, on a "peer review" committee that made a recommendation to the agency concerning the technical merits of a specific grant proposal submitted by a university. The committee's recommendations are nonbinding and constitute only the first of several levels of review within the agency. Nevertheless, the SGE participated in a particular matter involving specific parties and may not represent the university in subsequent efforts to obtain the same grant.

Example 3 to paragraph (h)(4): Prior to filing a product approval application with a regulatory agency, a company sought guidance from the agency. The company provided specific information concerning the product, including its composition and intended uses, safety and efficacy data, and the results and designs of prior studies on the product. After a series of meetings, the agency advised the company concerning the design of additional studies that it should perform in order to address those issues that the agency still believed were unresolved. Even though no formal application had been filed, this was a particular matter involving specific parties. The agency guidance was sufficiently specific, and it was clearly intended to address the substance of a prospective application and to guide the prospective applicant in preparing an application that would meet approval requirements. An agency employee who was substantially involved in developing this guidance could not leave the Government and represent the company when it submits its formal product approval application.

Example 4 to paragraph (h)(4): A Government scientist participated in preliminary, internal deliberations about her agency's need for additional laboratory facilities. After she terminated Government service, the General Services Administration issued a request for proposals (RFP) seeking private architectural services to design the new laboratory space for the agency. The former employee may represent an architectural firm in connection with its response to the RFP. During the preliminary stage in which the former employee participated, no specific architectural firms had been identified for the proposed work.

Example 5 to paragraph (h)(4): In the previous example, the proposed laboratory was to be an extension of a recently completed laboratory designed by XYZ Architectural Associates, and the Government had determined to pursue a sole

source contract with that same firm for the new work. Even before the firm was contacted or expressed any interest concerning the sole source contract, the former employee participated in meetings in which specifications for a potential sole source contract with the firm were discussed. The former employee may not represent XYZ before the Government in connection with this matter.

(5) Same particular matter--

(i) General. The prohibition applies only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a Government employee. The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.

(ii) Considerations in the case of contracts, grants, and other agreements. With respect to matters such as contracts, grants or other agreements:

(A) A new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract (or other agreement), unless there are fundamental changes in objectives or the nature of the matter;

(B) Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding;

(C) A contract is almost always a single particular matter involving specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if an agency determines that articulated lines of division exist. In making this determination, an agency should consider the relevant factors as described above. No single factor should be determinative, and any divisions must be based on the contract's characteristics, which may include, among other things, performance at different geographical locations, separate and distinct subject matters, the separate negotiation or competition of individual task or delivery orders, and the involvement of different program offices or even different agencies.

Example 1 to paragraph (h)(5): An employee drafted one provision of an agency contract to procure new software. After she left Government, a dispute arose under the same contract concerning a provision that she did not draft. She may not represent the contractor in this dispute. The contract as a whole is the particular matter involving specific parties and may not be fractionalized into separate clauses for purposes of avoiding the prohibition of 18 U.S.C. 207(a)(1).

Example 2 to paragraph (h)(5): In the previous example, a new software contract was awarded to the same contractor through a full and open competition, following the employee's departure from the agency. Although no major changes were made in the contract terms, the new contract is a different particular matter involving specific parties.

Example 3 to paragraph (h)(5): A former special Government employee (SGE) recommended that his agency approve a new food additive made by Good Foods, Inc., on the grounds that it was proven safe for human consumption. The Healthy Food Alliance (HFA) sued the agency in Federal court to challenge the decision to approve the product. After leaving Government service, the former SGE may not serve as an expert witness on behalf of HFA in this litigation because it is a continuation of the same product approval matter in which he participated personally and substantially.

Example 4 to paragraph (h)(5): An employee of the Department of the Army negotiated and supervised a contract with Munitions, Inc. for four million mortar shells meeting certain specifications. After the employee left Government, the Army sought a contract modification to add another one million shells. All specifications and contractual terms except price, quantity and delivery dates were identical to those in the original contract. The former Army employee may not represent Munitions in connection with this modification, because it is part of the same particular matter involving specific parties as the original contract.

Example 5 to the paragraph (h)(5): In the previous example, certain changes in technology occurred since the date of the original contract, and the proposed contract modifications would require the additional shells to incorporate new design features. Moreover, because of changes in the Army's internal system for storing and distributing shells to various locations, the modifications would require Munitions to deliver its product to several de-centralized destination points, thus requiring Munitions to develop novel delivery and handling systems and incur new transportation costs. The Army considers these modifications to be fundamental changes in the approach and objectives of the contract and may determine that these changes constitute a new particular matter.

Example 6 to paragraph (h)(5): A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the original wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

Example 7 to paragraph (h)(5): The Navy awards an indefinite delivery contract for environmental remediation services in the northeastern U.S. A Navy engineer is assigned as the Navy's technical representative on a task order for remediation of an oil spill at a Navy activity in Maine. The Navy engineer is personally and substantially involved in the task order (e.g., he negotiates the scope of work, the labor hours required, and monitors the contractor's performance). Following successful completion of the remediation of the oil spill in Maine, the Navy engineer leaves Government service and goes to work for the Navy's remediation contractor. In year two of the contract, the Navy issues a task order for the remediation of lead-based paint at a Navy housing complex in Connecticut. The contractor assigns the former Navy engineer to be its project manager for this task order, which will require him to negotiate with the Navy about the scope of work and the labor hours under the task order. Although the task order is placed under the same indefinite delivery contract (the terms of which remain unchanged), the Navy would be justified in determining that the lead-based paint task order is a separate particular matter as it involves a different type of remediation, at a different location, and at a different time. Note, however, that the engineer in this example had not participated personally and substantially in the overall contract. Any former employee who had--for example, by participating personally and substantially in the initial award or subsequent oversight of the umbrella contract--will be deemed to have also participated personally and substantially in any individual particular matters resulting from the agency's determination that such contract is divisible.

Example 8 to paragraph (h)(5): An agency contracts with Company A to install a satellite system connecting the headquarters office to each of its twenty field offices. Although the field offices are located at various locations throughout the country, each installation is essentially identical, with the terms of each negotiated in the main contract. Therefore, this contract should not be divided into separate particular matters involving specific parties.

(i) Participated personally and substantially--

(1) Participate. To "participate" means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter. An employee can participate in particular matters that are pending other than in his own agency. An employee does not participate in a matter merely because he had knowledge of its existence or because it was pending under his official responsibility. An employee does not participate in a matter within the meaning of this section unless he does so in his official capacity.

(2) Personally. To participate "personally" means to participate:

(i) Directly, either individually or in combination with other persons; or

(ii) Through direct and active supervision of the participation of any person he supervises, including a subordinate.

(3) Substantially. To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or

peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial.

Example 1 to paragraph (i): A General Services Administration (GSA) attorney drafted a standard form contract and certain standard terms and clauses for use in future contracts. A contracting officer uses one of the standard clauses in a subsequent contract without consulting the GSA attorney. The attorney did not participate personally in the subsequent contract.

Example 2 to paragraph (i): An Internal Revenue Service (IRS) attorney is neither in charge of nor does she have official responsibility for litigation involving a particular delinquent taxpayer. At the request of a co-worker who is assigned responsibility for the litigation, the lawyer provides advice concerning strategy during the discovery stage of the litigation. The IRS attorney participated personally in the litigation.

Example 3 to paragraph (i): The IRS attorney in the previous example had no further involvement in the litigation. She participated substantially in the litigation notwithstanding that the post-discovery stages of the litigation lasted for ten years after the day she offered her advice.

Example 4 to paragraph (i): The General Counsel of the Office of Government Ethics (OGE) contacts the OGE attorney who is assigned to evaluate all requests for "certificates of divestiture" to check on the status of the attorney's work with respect to all pending requests. The General Counsel makes no comment concerning the merits or relative importance of any particular request. The General Counsel did not participate substantially in any particular request when she checked on the status of all pending requests.

Example 5 to paragraph (i): The OGE attorney in the previous example completes his evaluation of a particular certificate of divestiture request and forwards his recommendation to the General Counsel. The General Counsel forwards the package to the Director of OGE with a note indicating her concurrence with the attorney's recommendation. The General Counsel participated substantially in the request.

Example 6 to paragraph (i): An International Trade Commission (ITC) computer programmer developed software designed to analyze data related to unfair trade practice complaints. At the request of an ITC employee who is considering the merits of a particular complaint, the programmer enters all the data supplied to her, runs the computer program, and forwards the results to the employee who will make a recommendation to an ITC Commissioner concerning the disposition of the complaint. The programmer did not participate substantially in the complaint.

Example 7 to paragraph (i): The director of an agency office must concur in any decision to grant an application for technical assistance to certain nonprofit entities. When a particular application for assistance comes into her office and is presented to her for decision, she intentionally takes no action on it because she believes the application will raise difficult policy questions for her agency at this time. As a consequence of her inaction, the resolution of the application is deferred indefinitely. She has participated personally and substantially in the matter.

(j) United States is a party or has a direct and substantial interest--

(1) United States. For purposes of this paragraph, the "United States" means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) Party or direct and substantial interest. The United States may be a party to or have a direct and substantial interest in a particular matter even though it is pending in a non-Federal forum, such as a State court. The United States is neither a party to nor does it have a direct and substantial interest in a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter. When it is not clear whether the United States is a party to or has a direct and substantial interest in a particular matter, this determination shall be made in accordance with the following procedure:

(i) Coordination by designated agency ethics official. The designated agency ethics official (DAEO) for the former employee's agency shall have the primary responsibility for coordinating this determination. When it appears likely that a component of the United States Government other than the former employee's former agency may be a party to or have a direct and substantial interest in the particular matter, the DAEO shall coordinate with agency ethics officials serving in those components.

(ii) Agency determination. A component of the United States Government shall determine if it is a party to or has a direct and substantial interest in a matter in accordance with its own internal procedures. It shall consider all relevant factors, including whether:

(A) The component has a financial interest in the matter;

(B) The matter is likely to have an effect on the policies, programs, or operations of the component;

(C) The component is involved in any proceeding associated with the matter, e.g., as by having provided witnesses or documentary evidence; and

(D) The component has more than an academic interest in the outcome of the matter.

Example 1 to paragraph (j): An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

SOURCE: 73 FR 36186, June 25, 2008, unless otherwise noted.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Current through April 21, 2011; 76 FR 22602

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

UNITED STATES' RESPONSE TO JANE DOE #1 AND JANE DOE #2'S MOTION FOR FINDING OF VIOLATIONS OF THE CRIME VICTIM RIGHTS ACT AND REQUEST FOR A HEARING ON APPROPRIATE REMEDIES

Respondent, United States of America, by and through its undersigned counsel, files its Response to Jane Doe #1 and Jane Doe #2's Motion for Finding of Violations of the Crime Victims Rights Act and Request for a Hearing on Appropriate Remedies, and states:

I. INTRODUCTION

The issue before this Court is whether the petitioners, Jane Doe #1 and Jane Doe #2, had any rights under 18 U.S.C. § 3771(a), in the absence of a criminal charge being filed in the Southern District of Florida, charging someone with the commission of a federal crime in which petitioners were victims. Resolution of this issue is a matter of statutory interpretation of the language of the Crime Victims Rights Act (CVRA). Whether the government had a legal duty under § 3771(a) is not resolved with reference to the position taken by employees of the Department of Justice (DOJ) in letters to the petitioners, or the defense attorneys representing Jeffrey Epstein. Nor are the subjective beliefs of DOJ employees relevant to the issue of whether a duty existed under § 3771(a)(5) to consult with petitioners prior to entering into a Non-

treated with fairness and with respect for her dignity and privacy.

5. The Petitioner has been denied her rights in that she has received no consultation with the attorney for the government regarding the possible disposition of the charges, no notice of any public court proceedings, no information regarding her right to restitution, and no notice of rights under the CVRA, as required under law.

6. The Petitioner is in jeopardy of losing her rights, as described above, if the government is able to negotiate a plea or agreement with the Defendant without her participation and knowledge.

WHEREFORE, for the reasons outlined above, the Petitioner respectfully requests this Court to grant her Petition, and to order the United States Attorney to comply with the provisions of the CVRA prior to and including any plea or other agreement with the Defendant and any attendant proceedings.

(DE1 at 1-2.)

On the same day, the government was ordered by the Court to respond. (DE3). Two days later, on July 9, 2008, the Government filed its Response and an accompanying Declaration, establishing that (1) no federal criminal case charging Epstein had ever been filed and that a non-prosecution agreement ("NPA") had been signed and (2) despite this, the U.S. Attorney's Office had used its best efforts to comply with the CVRA. (DE 6-8, 12-14.)

On July 10, 2008, the Court set the matter for a hearing on July 11, 2008. (DE 5.) At the hearing, Jane Doe #2 was added as a Petitioner. (DE15 at 14.) The Court inquired of Petitioners what remedy they sought, and Petitioners made clear that they wanted to invalidate the Non-Prosecution Agreement with Epstein. (*Id.* at 12.). The Court recognized that Epstein had entered his State court guilty plea in reliance on the NPA (*id.* at 20), and the Petitioners concurred (*id.* at 20-21). Nonetheless, the Petitioners asked the Court "to vacate the agreement." (*Id.* at 21.)

The Court asked the Petitioners whether there was "any need to rush to a decision in this

matter?" (*Id.* at 24.) The Petitioners said that there was not – "Your Honor is correct in stating that it is not an emergency and it doesn't need to happen today. . . . It doesn't seem like there will be any prejudice to any party." (*Id.* at 26.)[3]

Two weeks later, on July 29, 2008, the government filed a notice informing the Court of its position that there was no need for an evidentiary hearing and that the matter was ready for ruling. (DE17.)

A few days later, Petitioners filed a response to the government's notice, arguing that the documents submitted by the government in its attachments to the Declarations it had filed showed that violations of the CVRA had occurred and demanding the production of the NPA and the report of an interview with Jane Doe #1.[4] (DE19.) In that "Response," the Petitioners asked the Court to enter "judgment in their favor that their rights under the CVRA have been violated." (*Id.* at 11.)

On August 14, 2008, the Court held a status conference. (DE25.) The parties discussed two matters. First, there was a discussion of the status of the litigation. Second, there was a discussion of the Petitioners' request to have access to the NPA. With regard to the second topic, the Court decided to order the government to make the NPA available to any and all identified victims, so long as they agreed to abide by the terms of a Protective Order, and ordered the parties to work out the terms of such a Protective Order. (DE27 at 22-24.)

As to the first topic, the Court inquired of the Petitioners whether there was a sufficient

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[3]The Court also heard argument on whether the government's filings needed to remain under seal. (*Id.* at 27-32.)

[4]With regard to the report of the meeting with Jane Doe #1, the government informed the Court that no report was ever prepared. (DE22.)

factual record for the Court to make its determination. Petitioners responded: "I believe that you *do* have a sufficient record, in that I don't think that – I think that we're in agreement that additional evidence does *not* need to be taken in the case for Your Honor to make a ruling." (DE27 at 4 (emphasis added).) Petitioners also stated that, "because of the legal consequences of invalidating the current agreement, it is likely not in my clients' best interest to ask for the relief that we initially asked for. So in order to effectively evaluate the situation and ask for the appropriate relief, we would just be asking Your Honor at this point in time to allow us to see the full entire plea agreement . . ." (*Id.*)

The Court enquired, "All right. And then if I grant that relief, you will evaluate the agreement and then decide whether to either dismiss your case or go forward and ask for some additional relief?" (*Id.*)

Petitioners responded, "That's correct, Your Honor." (*Id.* at 5.)

One week after the status conference, on August 21, 2008, the Court entered the agreed Protective Order, (DE26,) and the Petitioners were provided with a copy of the NPA. More than a month later, on September 25, 2008, Petitioners did not dismiss their action, but, rather, asked for additional relief – that is, they filed a motion to unseal the NPA. (DE28.) On October 8, 2008, the government responded (DE29), stating that the NPA was never filed with the Court and there was no reason to unseal the document. Petitioners filed a Reply on October 16, 2008, (DE30,) asserting, in part, that the failure to unseal the NPA allowed the government to file factually inaccurate Declarations. In the Reply, Petitioners again did not ask for any additional relief, now that they had the NPA in their possession, other than their renewed request to unseal the NPA. (*See* DE30.)

Rights Act." (DE48, 49, 50, 51.) This response follows.

ARGUMENT

Petitioners are not entitled to any relief in this case for several reasons. First, as stated in the government's response to Petitioners' Emergency Petition, CVRA rights do not attach in the absence of federal criminal charges filed by a federal prosecutor. And crime victims cannot file a stand-alone suit to enforce those rights. This conclusion is required by the CVRA itself and separation of powers principles. Second, despite owing no legal duty, the U.S. Attorney's Office used its best efforts to treat both Petitioners fairly as set forth in the original response to the Emergency Petition, and as further explained herein. Third, Petitioners' failure to prosecute this case in a timely fashion has extinguished their desired remedy under Due Process principles.

III. PETITIONERS HAD NO RIGHTS UNDER 18 U.S.C. § 3771(a) BECAUSE CRIMINAL CHARGES WERE NEVER FILED AGAINST EPSTEIN IN THE SOUTHERN DISTRICT OF FLORIDA

The CVRA appears in Title 18, "Crimes and Criminal Procedure," and the procedures for enforcing the CVRA were implemented in the Federal Rules of *Criminal* Procedure. *See* 18 U.S.C. § 3771; Fed. R. Crim. P. 60.[6] The CVRA clearly states that it creates no civil "cause of action for damages" for victims and that it does not "impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). "Crime victims have not been recognized as parties, and the Federal Rules of Criminal Procedure do not allow them to intervene as parties to a prosecution." *In re Amy Unknown*, ___ F.3d ___, 2011 WL 988882 at *2 (5th Cir. Mar. 22, 2011). *See also United States* [redacted]. *Aguirre-Gonzalez*, 597 F.3d 46,

[6]Fed. R. Crim. P. 60 was adopted on April 23, 2008 and made effective on December 1, 2008. While this was after most of the relevant events in this case, it reenforces the CVRA's clear directive that it was not meant to create a civil cause of action.

53 (1st Cir. 2010) ("Notwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding. . . . Thus the baseline rule is that crime victims, as non-parties, may not appeal a defendant's criminal sentence.")

While the CVRA provides specific procedures for what should occur if a victim is not accorded rights in "any *court proceeding* involving any offense against a crime victim," in a federal criminal case, such as a change of plea or sentencing, *see* 18 U.S.C. §§ 3771(b)(1), (d)(3), no mandates are provided in instances where no federal criminal charges are ever filed.

Of the eight victims' rights set forth in 18 U.S.C. § 3771(a), the petition alleges a violation of § 3771(a)(5), the right to consult with the attorney for the Government; § 3771(a)(2), the right to reasonable, accurate, and timely notice of any public court proceeding; § 3771(a)(6), the right to full and timely restitution as provided in law; and notice of their rights under the CVRA.

It is undisputed that no federal criminal charges have been filed against Jeffrey Epstein, in the U.S. District Court, Southern District of Florida, pertaining to the sexual abuse of minors.[7] The United States submits that, since there was no "case" pending in the Southern District of Florida against Epstein, or any "court proceeding" involving an offense against Jane Doe #1 and Jane Doe# 2, they cannot invoke any protections under the CVRA.

Title 18, United States Code, § 3771(a)(5), provides that a "crime victim" has "[t]he reasonable right to confer with the attorney for the Government in the case." (emphasis supplied). In its interpretation of a federal statute, the court assumes that "Congress used words in a statute

[7] "A district court may take judicial notice of public records within its files relating to the particular case before it or other related cases." *Cash Inn of Dade, Inc.* [redacted] *Metropolitan Dade County*, 932 F.2d 1239, 1243 (11th Cir. 1991)(citations omitted).

as they are commonly and ordinarily understood," and reads the statute to give full effect to each of its provisions. *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999), *citing United States v. McLymont*, 45 F3d 400, 401 (11th Cir. 1995). Section 3771(a)(5) grants a crime victim the reasonable right to confer with the attorney for the Government "in the case." The phrase "in the case" must be considered since there is a canon of statutory construction that "discourages courts from adopting a reading of a statute that renders any part of the statute mere surplusage." *Bailey v. United States*, 516 U.S. 137, 146 (1995)(noting that each word in a statute is intended to have "particular, nonsuperfluous meaning").

Congress intended the phrase "in the case" to mean a case filed in a federal court. Federal criminal cases are filed in the United States district courts through the filing of a criminal complaint, Fed.R.Crim.P. 3, or indictment, Fed.R.Crim.P. 7. In each instance, an attorney representing the United States Government is required to sign the complaint or indictment. Fed.R.Crim.P. 7(c)(1) provides that "[the] indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government." Interestingly, section 3771(a)(5) provides that a crime victim has "[t]he reasonable right to confer with the attorney for the Government in the case." The exact phrase "attorney for the government" is used in both Fed.R.Crim.P. 7(c)(1) and 18 U.S.C. § 3771(a)(5), with the addition of the term, "in the case," in latter provision. Thus, each criminal case filed in the district court has an "attorney for the Government" representing the sovereign United States.

Petitioners attempt to distort the meaning of "case" by arguing that a case existed in June 2007, when the FBI began investigating the allegations against Epstein. DE 48 at 25-26. In their

view, a case commences when a law enforcement agency begins its investigation of a potential crime. This interpretation is completely contrary to the text of section 3771(a)(5), since there is no "attorney for the government" when a crime is first reported to a law enforcement agency. In most instances, the law enforcement agency begins its preliminary investigation without consulting the U.S. Attorney's Office. Only when it appears the investigation may generate a potential for an indictment does the investigative agency refer the matter to the U.S. Attorney's Office. An "attorney for the government" appears only when a complaint or indictment is filed in the district court.

Further, as used in legal documents, the word "case" is a term of art that has long been understood to mean "a suit instituted according to the regular course of judicial procedure." *Muskrat* [redacted]. *United States*, 219 U.S. 346, 356 (1911) (Article III "case" or controversy); see also Black's Law Dictionary (6th ed.) 215 ("case" is a "general term for an action, cause, suit or controversy at law or in equity"). "Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case." *Muskrat*, 219 U.S. at 356. A "case," in other words, is an adversarial dispute where one party purposefully invokes the judicial power seeking an adjudication of their rights and obligations. Id.; see also Black's at 215 (defining "case" as "a question contested before a court of justice"). This general understanding is equally applicable to criminal proceedings. In *Chavez* [redacted]. *Martinez*, 538 U.S. 760 (2005), the Supreme Court held that a criminal "case" – as distinct from an investigation – "at the very least requires the initiation of legal proceedings." *Id.* at 766 (holding that police questioning during the course of a criminal investigation "does not constitute a 'case'" within the meaning of the Fifth Amendment's Self-

Incrimination Clause) (citing *Blyew* [redacted] *United States*, 80 U.S. (13 Wall.) 581, 595 (1871), and Black's Law Dictionary).

Finally, Congress's use of the definite article "the" in reference to the word "case" supports respondent's view that "the case" implies a specific adversary proceeding rather than an indefinite ongoing investigation. Cf. *Rumsfeld* [redacted] *Padilla*, 542 U.S. 426, 434 (2004) (use of definite article "the person" in 28 U.S.C. 2241's provision regarding a habeas custodian signifies that there is usually only one proper custodian, and not several different ones).

Because there was not and is not any case against Epstein in the Southern District of Florida, petitioners have no rights under § 3771(a)(5) to consult with the attorney for the Government. The United States Attorney's Office was under no obligation to consult with petitioners prior to concluding its Non-Prosecution Agreement with Epstein. For the same reason, petitioners' claim under § 3771(a)(2) also fails. There has been no "public court proceeding" against Epstein in the U.S. District Court, Southern District of Florida, since no criminal case has been filed against him in the federal court. Consequently, there has been nothing for which the U.S. Attorney's Office was required to give notice to petitioners.

A different provision in the CVRA, 18 U.S.C. § 3771(b), also supports the Government's interpretation of § 3771(a)(5). Section 3771(b)(1) provides as follows:

> In 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). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

There is no "court proceeding" in this case because no federal criminal charges have been lodged against Jeffrey Epstein. Section 3771(b)(1) envisions that a district court presiding over a criminal trial will be responsible for ensuring that a crime victim will be afforded rights granted in § 3771(a). Section 3771(a)(3), which is expressly referenced in § 3771(b)(1), provides that a crime victim has

> 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.

This provision contemplates that, in the event a defendant invokes the rule of sequestration in Fed.R.Evid. 615, the court must consider the crime victim's rights under § 3771(a)(3), and can only exclude the victim from the proceeding if the court finds there is clear and convincing evidence that the victim's testimony would be materially altered if the victim was allowed to hear other testimony at the proceeding. By providing a difficult evidentiary standard which must be met before a victim's right to be present in the court proceeding can be denied, Congress was purposefully limiting a court's discretion in sequestering trial witnesses, when the witness is a crime victim.

In the instant case, there is no "court proceeding" since no federal criminal charges have been brought against Epstein. Therefore, § 3771(b)(1) is inapplicable. There is no role for this Court to fulfill under § 3771(b)(1).[8]

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[8]As discussed, *infra*, this interpretation is buttressed by the Federal Rules Committee's decision to incorporate the CVRA into the Federal Rules of Criminal Procedure at Fed. R. Crim. P. 60.

A. The Venue Provision, Section 3771(d)(3), Does Not Support Petitioners' Argument That CVRA Rights Attach Prior to Formal Charges Being Filed

Petitioners also attempt to buttress their argument by claiming that section 3771(d)((3), which sets forth the venue where a victim can seek relief, supports their view that the rights in section 3771(a) attach before any criminal charges are filed. DE 48 at 26. Section 3771(d)(3) provides, in pertinent part, that "[t]he rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." As the respondent explained at the July 11, 2008 hearing, section 3771(d)(3) is a venue provision, which provides for where a motion under that section shall be filed. Congress' provision of a location where a motion can be filed does not lead to the conclusion that Congress also intended rights in section 3771(a) to exist even if no federal criminal charges are ever filed.

The venue language in the CVRA states that rights "shall be asserted . . . *if no prosecution is underway*, in the district court in the district in which the crime occurred," 18 U.S.C. § 3771(c)(3). Petitioners maintain that this provision establishes that the CVRA contemplated a case such as this where no charges were ever filed. To the contrary, the Separation of Powers doctrine and the full context of the CVRA counsel otherwise.[9] Here,

[9] By making this suggestion, the government is not suggesting that this language is superfluous. Rather the period referred to in 18 U.S.C. § 3771(d)(3) is the time between arrest and indictment. As stated by the Supreme Court, for purposes of the Sixth Amendment right to counsel, "criminal prosecution" does not commence with the filing of a complaint and issuance of an arrest warrant, but only upon the return of an indictment. *Kirby* [redacted]. *Illinois*, 406 U.S. 682, 688-690 (1972). *See also United States* [redacted]. *Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987) (filing of complaint and issuance of arrest warrant do not commence criminal *prosecution* for Sixth Amendment purposes, but rather, based on Fed. R. Crim. P. 7, "*prosecution* commenced when the indictment was handed down") (emphasis added).

Petitioners have not articulated what they are seeking. As set forth above in the Procedural History, originally, Petitioners sought to have the NPA set aside.[10] (DE15 at 12, 21.) They later explicitly denied that they were seeking that remedy. (DE27 at 4.) The Court asked Petitioners to review the NPA and either dismiss their case or advise the Court promptly what remedy they were seeking. (*Id.*) Thereafter, Petitioners asked only to have the NPA unsealed and made

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> The filing of a federal criminal complaint does not commence a formal *prosecution*. Rather, the main reason a law enforcement officer files such a complaint is to establish probable cause for an arrest warrant. *See* Fed. R. Crim. P. 3, 4(a); *United States* v. *Moore*, 122 F.3d 1154, 1156 (8th Cir.1997). The criminal process is still in the investigative stage, and "the adverse positions of government and defendant" have yet to solidify. The filing of the federal complaint, therefore, can no more be characterized as "the initiation of adversary judicial proceedings against the defendant," than can the filing of an affidavit in support of a search warrant.

United States v. *Alvarado*, 440 F.3d 191, 200 (4th Cir. 2006) (quoting *United States* v. *Gouveia*, 467 U.S. 180, 187, 189) (emphasis added). *See also United States* v. *Langley*, 848 F.2d 152 (11th Cir. 1988) (formal criminal *prosecution* does not commence upon issuance of arrest warrant).

During the period between the filing of a Criminal Complaint or a defendant's arrest (whichever occurs first), and the filing of an Indictment or an Information, several important events will occur, including his initial appearance and bond hearing. There also may be pre-indictment plea negotiations. Also, if the defendant is arrested outside of the district where he was charged, i.e., outside the district where the criminal activity occurred, the defendant may ask for permission to plead guilty in the arresting district – away from where the victims are located. Section 3771(d)(3) makes certain that the victims can be heard in their "home" district to object to the Rule 20 procedure for transferring the case so that they can more easily exercise their right to appear at court proceedings.

Importantly, when incorporated into the Federal Rules of Criminal Procedure, this language became: "**Where Rights May Be Asserted.** A victim's rights described in these rules must be asserted in the district where a defendant *is being prosecuted for the crime*." Fed. R. Crim. P. 60(b)(4) (emphasis added).

[10]As explained below, to the extent that they are still asserting the right to that relief, they are not entitled to it.

public. (DE28.) The Court denied that motion. (DE36.) Now, more than two years later, they have asked the Court only to make a finding of a violation of the CVRA, asking that the issue of remedy be saved for a later date.

The fundamental rationale of the separation of powers doctrine is particularly compelling in the context of this case, the handling of criminal prosecutions. "The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985); quoting U.S. Const., Art. II § 3; citing 28 U.S.C. §§ 516, 547).

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte v. *United States*, 470 U.S.598, 607-08 (1985). *See also Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987) ("[C]ourts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities.

Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge."). In the Epstein case, the U.S. Attorney's Office also had to balance its federal prosecutorial discretion with its relationship with the Palm Beach County State Attorney's Office in light of the pre-existing state investigation.

In addition to the authorities cited above, the Supreme Court's decision in *Heckler* [redacted] *Chaney*, 470 U.S. 821 (1985), further supports the interpretation that the CVRA does not provide for judicial intervention in a case where no criminal charges were ever filed against a defendant. In *Chaney*, the Supreme Court held that an agency's decision to *refuse* enforcement of one of its regulations is unsuitable for judicial review, despite the existence of the Administrative Procedures Act ("APA"), like, in this case, the Justice Department's regulations on victim consultations.[11] *See id* at 831; *see also American Disabled for Attendant Programs Today* [redacted] *United States Dep't of Housing and Urban Dev.*, 170 F.3d 381, 384 (3d Cir. 1999 (citing

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[11]The reasons are identical to those that disfavor judicial intervention into prosecutorial discretion:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation had occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variable involved in the proper ordering of its priorities.

Id. at 831-32

Chaney) ("Agency actions are typically presumed to be reviewable under the APA.[12] Importantly however, the Supreme Court has established a presumption *against* judicial review of agency decisions that involve whether to undertake investigative or enforcement actions."). Thus, as explained in *Chaney*, the existence of the APA and an agency's refusal to act, without more, will not create a "case or controversy." *Chaney* explained that, the agency's refusal is "only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Chaney* at 833.

The CVRA reiterates the presumption created by the language contained in 3771(d)(6) – that there is no "cause of action" – and in 3771(f)(2)(D) -- that there shall be no "judicial review of the final decision of the Attorney General" of any complaints of violations of the CVRA. *Block v. Securities and Exchange Comm'n*, 50 F.3d 1078 (D.C. Cir. 1995), is instructive. In *Block*, petitioners filed a petition asking the Court to find that the SEC had failed to fulfill its obligation to hold a hearing and determine whether petitioners were "interested persons" under the Investment Advisers Act. *Id.* at 1080. The SEC responded that its decision not to act upon petitioners' application was a decision not to enforce that is committed to the agency's discretion and, therefore, was not subject to judicial review under *Chaney*. *Block* at 1081. The D.C. Circuit found that the *Chaney* rule applied:

> The Supreme Court in *Chaney* provided no formula by which to determine whether agency decisions of a particular type are "decisions to refuse enforcement." The Court clearly included within that set, however, not only an agency's determination not to proceed against a recognized violation, but also its antecedent judgment upon the question "whether a violation has occurred."

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[12]Of course, Petitioners have not invoked the APA as a basis for jurisdiction.

Block, 50 F.3d at 1081 (quoting *Chaney*, 470 U.S. at 831).

That type of inquiry is exactly the one requested by Jane Does #1 and #2 – did the U.S. Attorney's Office for the Southern District of Florida violate the CVRA. Here, Petitioners' request should be examined with even greater caution than the average agency decision because it involves a decision regarding a *criminal* prosecution.

At least one district court has also recognized that finding a CVRA violation, especially of the right to be treated with dignity and respect – the right that is the primary focus of Petitioners' Motion for Finding of Violations – does not always provide a remedy, even when a federal criminal case exists. In *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), the district court treated the victims with a fair amount of skepticism, and noted that the government believed that the victims were trying to use the CVRA as a mechanism to "undo Rubin's guilty plea in exchange for a favorable settlement of their ongoing civil suit in California state court. Movants take vigorous exception to any [such] suggestion . . ." although the Court later noted that the victims were attempting to use the CVRA to obtain discovery from the defendant. *Id.* at 416, 425. With respect to certain CVRA rights, the *Rubin* court noted the lack of a remedy:

> The CVRA also lists among the rights secured to a victim the right to "be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). As Magistrate Judge Orenstein observed in *Turner*: "Neither the text of the statute nor its legislative history provides guidance as to what specific procedures or substantive relief, if any, Congress intended this provision to require or prohibit." [*United States v. Turner*, 367 F. Supp. 2d 319, 335 (E.D.N.Y 2005).] While this provision must be read liberally as giving courts and the government the mission to do all that they can to vindicate a victim's legitimate requests for fairness, respect and dignity, the Court doubts, strongly, that the authors of the statute succeeded in doing more. It is hard to comprehend, in any case, how a court presiding over the prosecution of a defendant could engage in sidebar dispute resolution between a victim and the government regarding the strategic decisions of the government about the very prosecution the Court is to

> try impartially. . . . the Court refuses to adopt an interpretation of (a)(8) that prohibits the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation. More pointedly, such a dispute is precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to the government and defendant, the only true parties to the trial of the indictment.

Id. at 428. *Cf. Cole* [redacted]. *Federal Bureau of Investigation*, 719 F. Supp. 2d 1229, 1245 n.4 (D. Mont. 2010) (Purported crime victims brought class action claim against FBI and U.S. Attorney's Office for repeated failures to investigate and prosecute crimes involved Native American victims asserting, *inter alia*, violations of the CVRA. District court dismissed most claims, including CVRA claims, noting that the alleged CVRA injury "does not meet the requirements for an injury-in-fact for standing purposes. The lost opportunities to receive benefits under the crime victims statutes are too speculative to give rise to an Article III injury.")

B. Construing the CVRA to Apply Before a Decision to Prosecute Federally Is Made Will Improperly Impair the Decision-Making Authority of the Executive Branch, in Contravention of the Legislative History of the CVRA

The ramifications of the position espoused by the Petitioners in this case are significant. And those ramifications were understood by Congress. Thus, Congress maintained separate legislation aimed at rights governing pre-charging protections, *see* 42 U.S.C. § 10607, and legislation aimed at rights governing post-charging protections, that is, the CVRA. Senator Kyl noted that the right to confer with the "attorney for the Government in the case" only applied post charging:

> This right to confer does not give the crime victims any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able

> to confer with the Government's attorney about proceedings after charging.

150 Cong.Rec. S4260, S4268 (daily ed. Apr. 22, 2004)(statement of Sen. Kyl)(emphasis added).

In addition to issues of prosecutorial discretion described above, additional considerations prior to filing criminal charges include grand jury secrecy, *see* Fed. R. Crim. P. 6(e), and due process rights of persons under investigation.

Petitioners' argument fails to take into account the admonition of Congress in section 3771(d)(6) that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." It is well-settled that "the decision of whether or not to prosecute ... is a decision firmly committed by the [C]onstitution to the executive branch of the government." *United States* [redacted]. *Renfro*, 620 F.2d 569, 574 (6th Cir. 1980). Further, "intervention by the court in the internal affairs of the Justice Department would clearly constitute a violation of the Separation of Powers doctrine." Id. In *Dresser Industries, Inc.* [redacted]. *United States*, 596 F.2d 1231, 1237 (5th Cir. 1979), the court of appeals observed that "[t]he decision to prosecute is largely unreviewable by the courts." *citing United States* [redacted]. *Cox*, 342 F.2d 167 (5th Cir. 1965). The logical corollary to this proposition is that, the decision not to prosecute, or to dispose of a matter by entering into a non-prosecution agreement, is also largely unreviewable by the courts.

An interpretation that the rights enumerated in section 3771(a) do not attach until formal charges are filed in a district court comports with the notion of giving broad deference to the prosecutorial discretion of the Attorney General. Under petitioners' interpretation, a case is commenced when a law enforcement agency begins to investigate to determine if a crime was

committed. Under their view of section 3771(a)(5), a putative victim could file a motion with the district court, in the district where the crime occurred, to complain that a law enforcement agency declined to refer a case for prosecution to the U.S. Attorney's Office, and the law enforcement agency did not afford him or her "the reasonable right to confer with the attorney for the Government in the case," prior to making its decision not to refer the case. It is only a small step to the next phase, a motion to challenge the U.S. Attorney's Office's decision to decline prosecution, without having conferred with the putative victim prior to making the decision.

Even if the U.S. Attorney's Office decided to seek a grand jury indictment, under petitioners' interpretation, a dissatisfied victim could file a motion challenging the Attorney General's choice of the charges to bring, or who it chose to charge, by arguing the U.S. Attorney's Office did not confer with the victim prior to drafting the indictment. Of course, such judicial scrutiny is not available since "[d]ecisions on whether to charge, who to charge, and what to charge, are all in the prosecutor's discretion." *United States v. BP Products North America, Inc.*, 2008 WL 501321 at *11, *citing United States v. Armstrong*, 517 U.S. 456, 464 (1996)(*quoting Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Allowing claims like Petitioners' to proceed would open the inner workings of that prosecutorial discretion and the grand jury to judicial scrutiny – exactly the outcome that the CVRA states is disallowed.

For example, in *In re Petersen*, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010), an individual and a corporation filed an emergency petition for enforcement of the CVRA, "seeking an order compelling the Department of Justice and United States Attorney General Eric Holder, Jr. to comply with the CVRA and to accord them various rights conferred upon crime victims under

the Act, 18 U.S.C. § 3771(a)," in a case where no charges were ever filed against the putative defendants. *Id.* at *1. The petitioners claimed that they were victims of various federal crimes related to fraud, securities crimes, and money laundering, among others, and that the U.S. Attorney's Office for the Northern District of Indiana had "refused to confer with them, denied them their right to full and timely restitution, . . . and demonstrated 'a total indifference and lack of respect to the victims of real estate and mortgage fraud crimes,' in violation of 18 U.S.C. § 3771(a)(5)-(8).'" *Id.*

Citing the CVRA's express prohibition on impairing prosecutorial discretion, *id.* at *2, and noting that the court had "no authority under the CVRA to compel the Attorney General to promulgate regulations, 'meaningful' or otherwise," *id.* at *3, the *Petersen* court dismissed the CVRA petition. Simply, "the U.S. Attorney didn't have an obligation under the CVRA to confer with the petitioners until after a charge was filed and a case opened, and the decision not to bring charges against the alleged perpetrators was a matter of prosecutorial discretion, not subject to review under the CVRA." *Id.* at *2.

Petersen previews the reasons for limiting CVRA actions to cases where criminal charges have already been filed. Failure to do so could divert limited prosecutorial and judicial resources to dealing with numerous frivolous claims. For example, any assault that occurs in a federal prison could be charged as a federal offense.[13] The Bureau of Prisons also has its own administrative remedies for resolving prisoner disputes. Construing the CVRA in the way that

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[13] *See* 18 U.S.C. § 113 (assault within territorial jurisdiction of the United States); *United States* [redacted]. *Anderson*, 528 F.2d 590, 591 (5th Cir. 1976) (in prosecution for assault with intent to commit murder within territorial jurisdiction of United States, district court could properly take judicial notice of fact that FCI Tallahassee was within special territorial jurisdiction of United States).

Petitioners urge would require AUSAs to meet and confer with *each and every* prisoner who alleged that he or she was the victim of an assault from another prisoner. If the U.S. Attorney's Office determined that there was insufficient evidence to prosecute, or exercised its discretion to decline prosecution in favor of administrative remedies, the prisoner could, according to Petitioners, file a CVRA claim, and then a petition for mandamus that would have to be heard within 72 hours.[14] At least one prisoner has filed exactly this type of suit, not once, but twice. *See Searcy* [redacted]. *NFN Paletz*, 2007 WL 1875802 (D.S.C. June 27, 2007) (prisoner who alleged he was victim of assault filed suit under CVRA attempting to force U.S. Attorney's Office, FBI, and BOP to prosecute alleged perpetrator); *Searcy* [redacted]. *NFN Skinner*, 2006 WL 1677177 (D.S.C. June 16, 2006) (same).

These fears are not imagined – several individuals have tried to use the CVRA to force the United States – via the federal courts – to act in ways never contemplated by the CVRA's drafters. For example, a prisoner filed a writ of mandamus asking the Third Circuit Court of Appeals to find that the United States had violated his victims' rights under the CVRA by failing to file a Rule 35 motion to reduce his sentence after he provided information against another prisoner who had committed theft from the prison. *See In re Dawalibi*, 338 Fed. Appx. 112, 2009 WL 2186517 (3d Cir. 2009). The other prisoner had assaulted Dawalibi when he learned that Dawalibi had provided information against him, and Dawalibi asserted that the failure to award a Rule 35(b) sentence reduction violated his right under the CVRA to be treated with fairness. *See id.*, 338 Fed. Appx. at 113-14.

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[14]Pursuant to 18 U.S.C. § 3771(c)(3), "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed."

In *Sieverding* [redacted] *United States Dep't of Justice*, 693 F. Supp. 2d 93 (D.D.C. 2010), the district court discussed a series of claims brought by the Sieverdings, a husband and wife so well known to the court for their "abusive litigation practices" that the district court "imposed filing restrictions" on them and "arrested and jailed [Mrs. Sieverding] for civil contempt several times between 2005 and 2007." *Id.* at 99 (citations omitted). Thereafter, the Sieverdings alleged dozens of Privacy Act and other violations stemming from these arrests and incarcerations. The allegations by Mrs. Sieverding included that:

> DOJ was required to meet with her and investigate (if not prosecute) her various allegations of criminal behavior [by FBI agents and Deputy U.S. Marshals in connection with the court-ordered arrests]. She argues that the Justice for All Act of 2004[15] "gives her the right to discuss her allegation of criminal acts and DOJ's decisions to prosecute or not prosecute with a U.S. Attorney." . . . Ms. Sieverding also alleges that the Justice for All Act and the Mandatory Victim's Restitution Act require DOJ to "subpoena the parties whom she alleges committed federal crimes that injured her." Similarly she contends that DOJ had "a specific statutory mandate to investigate alleged crimes and they chose not to."

Id. at 110. Just as in *Petersen*, the *Sieverding* court dismissed these claims, relying on 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."). The Court should do the same in this case.

C. Analysis of Whether an Individual is a Victim Entitled to Protections under § 3771(a) Is Based Upon the Criminal Charge Lodged By the United States Government in the United States District Court

Federal court decisions construing the CVRA have focused upon the charges formally lodged against an accused, in determining whether an individual was covered by the CVRA. In *In Re Stewart*, 552 F.3d 1285 (11th Cir. 2008), the Eleventh Circuit observed, in the opening

[15]The Justice for All Act included the CVRA and several other criminal laws.

sentence of its opinion, that "[t]he Crime Victim Rights Act ("CVRA"), 18 U.S.C. § 3771, provides that victims of a federal crime may appear and be heard during some phases *of the prosecution of the person charged with the crime.*" *Id.* at 1285-86 (footnote omitted and emphasis added). In *Stewart*, the issue was whether individuals who had purchased houses from various real estate developers were victims under the CVRA, when the purchasers were required to pay a two percent mortgage origination fee, instead of the one percent fee which Coast Bank of Florida and American Mortgage Link, the mortgage origination firm, had agreed would be paid by a purchaser. The additional one percent was pocketed by defendant Phillip Coon, an Executive Vice-President of Coast Bank, and defendant John Miller, president of American Mortgage Link.

Coon and Miller were charged in a one-count Information on October 15, 2008, with conspiracy to deprive the bank of honest services in violation of the wire fraud statute. *Id.* at 1287. On November 5, 2008, Coon and Miller entered into a plea agreement with the government. On the same day, Coon and Miller appeared before a Magistrate Judge to tender their pleas of guilty. The petitioners appeared and asked to be heard. *Id.* The government objected, arguing that the petitioners were not victims of the offense charged in the information. The Magistrate Judge agreed and denied the petitioners the right to be heard. *Id.*

On appeal, the Eleventh Circuit noted that, "[t]he question the petition presents is whether petitioners are victims of the criminal conduct as described in the information pending in the district court." *Id.* at 1288. Referencing the definition of victim in 18 U.S.C. § 3771(c), the Eleventh Circuit noted that, to determine a crime victim, first, the court identifies the behavior constituting "commission of a federal offense," and second, identifies the direct and proximate

effects of that behavior on parties other than the United States. *Id.* If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA.

The Eleventh Circuit ultimately found that the petitioners had been harmed because they had to pay the extra one percent. In doing so, the appellate court examined the relevant criminal behavior which formed the basis for the criminal violation charged in the information. Id. at 1288-89.

Similarly, in *United States* [redacted] *Turner*, 367 F.Supp.2d 319 (E.D.N.Y. 2005), the district court analyzed the means by which a court would identify the victims in a criminal case, when applying the definition in § 3771(e).[16] Noting the presumption of innocence that a defendant enjoys, the court observed that it could presume no person would meet the definition of victim unless and until the defendant was proved guilty beyond a reasonable doubt. *Id.* at 326. This approach was rejected because it would produce an absurd result that the court assumed Congress did not intend. Next, the court found that, while the CVRA does not include an express provision preserving the presumption of a defendant's innocence, such a reasonable limitation must be inferred as a matter of due process and to avoid an interpretation that would render the statute unconstitutional. *Id.* at 326(citations omitted). The district court then concluded:

> Accordingly, I interpret the definition in § 3771(e) to include any person who would be considered a "crime victim" if the government were to establish the truth of the factual allegations in its charging instrument.

[16] 18 U.S.C. § 3771(e) defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Id. (emphasis added).

In *In Re McNulty*, 597 F.3d 344 (6th Cir. 2010), the petitioner claimed he was a victim under the CVRA in a prosecution of Arctic Glacier International, Inc., for participating in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, Michigan, metropolitan area. McNulty had been an employee of Arctic Glacier, and was told of the conspiracy. *Id.* at 346-47. When he refused to participate in the conspiracy, he was fired by Arctic Glacier.

On September 29, 2009, the United States government charged Arctic Glacier, in a sealed information, with violating 15 U.S.C. § 1. *Id.* at 347. Arctic Glacier and the government entered into a plea agreement on October 13, 2009, in which Arctic Glacier agreed to plead guilty to the charge; the parties agreed to recommend a fine of $9 million; and the government agreed not to seek restitution. *Id.*

At the sentencing hearing held on February 22, 2010, the district court found that the victims in the case were the customers of Arctic Glacier, and that McNulty was an employee of the defendant, not a customer. *Id.* at 348. The court further found that there was no evidence McNulty was directly or proximately harmed by the conspiracy for which Arctic Glacier was convicted. Accordingly, the district court held McNulty was not a "victim of the offense charged in this case." *Id.*

McNulty sought mandamus relief in the court of appeals under 18 U.S.C. § 3771(d)(3). Relying upon appellate court decisions from other circuits, including *Stewart*, the Sixth Circuit found that § 3771(e)'s definitional requirement that a victim be "directly and proximately harmed" encompassed the traditional "but for" and proximate cause analyses. *Id.* at 350, *citing*

In Re Rendon Galvis, 564 F.3d 170, 175 (2nd Cir. 2009). As applied to McNulty, the issue was whether he was directly and proximately harmed by criminal conduct in the course of the conspiracy or if the actions taken by defendants in the underlying case which allegedly harmed McNulty were merely ancillary to the conspiracy. The Sixth Circuit stated:

> In making this determination, we must (1) look to the offense of conviction, based solely on the facts reflected in the jury verdict or admitted by defendant; and then (2) determine, based on those facts, whether any person or persons were "directly and proximately harmed as a result of the commission of [that] Federal offense. *Id.* at 351, *citing United States v. Atl. States Cast Iron Pipe Co.*, 612 F.Supp.2d 453, 536 (D.N.J. 2009).

Again, in determining whether an individual qualified as a victim, the appellate court looked to the charging document, and the crime charged, to decide whether the individual had been directly and proximately harmed. In *McNulty*, the Sixth Circuit ultimately agreed with the district court's conclusion that McNulty was not a victim. 597 F.3d at 351-52. The appellate court found that the alleged harm to McNulty stemmed from his firing for refusing to participate in the conspiracy, and his "blackballing" from future employment with packaged-ice companies until he stopped working with the government in exposing the conspiracy. "If proven, these would indeed be harms to McNulty, but they are not criminal in nature, nor is there any evidence that they are normally associated with the crime of antitrust conspiracy." *Id.* at 352.

Interestingly, the Sixth Circuit observed that McNulty's firing and subsequent blackballing in the packaged-ice industry may have supported a charge of obstruction of justice. *Id.* at 352 n.9. Nonetheless, the court found this to be irrelevant because, "for purposes of the CVRA definition of 'crime victim,' the only material federal offenses are those for which there is a conviction or plea." *Id., citing Hughey v. United States*, 495 U.S. 411, 418 (1979), and *In Re*

Rendon Galvis, 64 F.3d at 175.

Plainly, the analysis of whether an individual is entitled to invoke rights provided in § 3771(a) is based upon an examination of the criminal charge in the charging instrument. It follows, therefore, that in the absence of any charging instrument, there are no rights under § 3771(a).

D. *In re Dean* Is Inapplicable to this Case

Petitioners rely heavily upon *In re Dean*, 527 F.3d 391 (5th Cir. 2008). DE 48 at 27-31. They argue Dean is "remarkably similar" to their case (DE 48 at 27), but close examination demonstrates there are major differences which render Dean inapplicable.

First, unlike here, a criminal charge was actually filed in *Dean*. The government in *Dean* filed its criminal information on October 22, 2007, and defendant BP signed the plea agreement two days later. *Id.* The information was unsealed, and notices sent to the victims in November 2007 and January 2008, advising of scheduled proceedings and their right to be heard. On February 4, 2008, BP plead guilty at a hearing, and all victims who wished to be heard were permitted to speak.

Second, "[b]efore bringing any charges, the government, on October 18, 2007, filed a sealed *ex parte* motion for 'an order outlining the procedures to be followed under the [CVRA].'" *Id.* at 392. The government invoked 18 U.S.C. § 3771(d)(2), applicable to cases involving multiple crime victims, and sought judicial review and approval of what the government deemed was a "reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *United States v. BP Products North America, Inc.*, 2008 WL 501321 (S.D.Tex. Feb. 21, 2008) at * 2. The government announced to the court

that a plea agreement was expected to be signed in about a week, and that because of the number of victims, consulting all the victims would not be practicable, and notifying the victims would result in media coverage that could impair the plea negotiation process and might prejudice the case in the event no plea was reached. *Dean*, 572 F.3d at 392. The district court granted the government's *ex parte* motion, finding that notifying all the victims was impracticable due to their large number, and that extensive media coverage could prejudice the plea negotiation process or prejudice the case if no plea was reached. The court directed that, once an agreement was signed, the government should provide reasonable notice to all identifiable victims and afford the victims of the rights set forth in the CVRA, prior to the actual entry of the guilty plea. *Id.* at 393.

Ultimately, the Fifth Circuit found the district court erred in entering its *ex parte* order because the fewer than 200 victims "could be easily reached." *Id.* at 394-95. Additionally, the Fifth Circuit assailed the district court's reasoning that any public notification of a potential criminal disposition of the case, due to extensive media coverage of the explosion, would prejudice BP and could impair the plea negotiation process and could prejudice the case in the event that no plea was reached. *Id.* at 395. The Fifth Circuit observed:

> In passing the Act, Congress made the policy decision – which we are bound to enforce – that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached. *Id.*

In the instant case, the U.S. Attorney's Office never invoked the Court's authority to obtain a dispensation on the application of the CVRA. Since no filing of federal charges was contemplated, there was no need to seek Court approval of the manner in which the CVRA would be implemented, as in *Dean*. In *Dean*, the U.S. Attorney's Office knew that it would be

filing criminal charges against BP, and the provisions in 18 U.S.C. § 3771(a) would become applicable. Since it expected to formally file the criminal charges after a plea agreement had been concluded, it needed to consult the Court to obtain judicial approval of what it deemed would satisfy the CVRA.

In contrast, the U.S. Attorney's disposition of the Epstein matter was to enter into a non-prosecution agreement with him. Unlike a plea agreement, non-prosecution agreements are not subject to judicial pre-approval. *United States v. Dorsett*, 2009 WL 2386070 at *4 (D.Neb. Jul. 23, 2009)("Non-prosecution agreements are similar to plea agreements, except adherence to a non-prosecution agreement is the responsibility of the prosecutor alone while a plea agreement is subject to the approval of the court."), and *United States v. Minnesota Mining & Mfg. Co.*, 551 F.2d 1106, 1112 (8th Cir. 1977)("This was not a traditional plea bargain arrangement in which the trial judge was a participant. Rather, it was a prosecutorial agreement, the inviolability of which rested completely in the province of the government prosecutors, who have sole power and responsibility to institute criminal proceedings"). Consequently, the U.S. Attorney's Office did not invoke the authority of the Court, or file a formal charge against Epstein. These two key distinctions, the absence of any invocation of the Court's authority and the absence of any formal charge being filed, render *Dean* inapplicable to the instant case.

IV. THE SUBJECTIVE BELIEFS OF UNITED STATES ATTORNEY'S OFFICE OFFICIALS, THAT PETITIONERS WERE COVERED BY THE CVRA, ARE IRRELEVANT

Petitioners next argue they are protected by the CVRA because the U.S. Attorney's Office took that position in letters to Jane Doe #1 and to Epstein's attorneys. DE 48 at 31-33. Further, petitioners have assembled a list of purportedly uncontroverted facts, based mainly upon e-mail

messages and correspondence between U.S. Attorney's Office officials and the legal representatives of Jeffrey Epstein, in the time surrounding the execution of the Non-Prosecution Agreement. In several of the e-mails, U.S. Attorney's Office personnel express the view that the CVRA applied to petitioners, or that the CVRA obligated the U.S. Attorney's Office to take certain actions with regard to the victims.

Petitioners argue that the Government is somehow bound by the position taken in these e-mails and letters. This assertion is plainly incorrect. These e-mails authored by members of the U.S. Attorney's Office are "merely a statement of assertion or concession made for some independent purpose," and may be controverted or explained by the party who made it. *Martinez* [redacted]. *Bally's Louisiana, Inc.*, 244 F.3d 474, 476-77 (5th Cir. 2001), *citing McNamara* [redacted]. *Miller*, 269 F.2d 511, 515 (D.C. Cir. 1959). In contrast, a judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them. *Martinez*, 244 F.3d at 476.

Significantly, an admission is binding as a judicial admission only if it pertains to a fact, not a legal conclusion. *McCaskill* [redacted]. *SCI Mgmt. Corp.*, 298 F.3d 677, 681-82 (7th Cir. 2002)(Rovner, J., concurring). In *Sulkoff* [redacted]. *United States*, 2003 WL 1903349 (S.D. Ind. 2003), the United States filed its answer in a Federal Tort Claims Act case, in which it admitted that a physician, Dr. Jackson, was an employee of the Veterans Administration at the time he treated the plaintiff Sulkoff. Subsequently, the United States Attorney's Office became aware that Dr. Jackson was not an employee of the United States. When the United States sought to amend its answer, Sulkoff claimed the government was bound by its judicial admission that Dr. Jackson was an employee of the United States. *Id.* at *5.

The district court found that the United States' admission that Dr. Jackson was an employee was not a judicial admission, because "[w]hether Dr. Jackson was a federal employee under the FTCA appears to be a question of law." *Id.*(citations omitted). The court also observed that, "[f]actual admissions can be binding as judicial admissions; admissions of legal conclusions cannot." *Id.*(citations omitted). *See also Dabertin v. HCR Manor Care, Inc.*, 68 F.Supp.2d 998, 1000 (N.D. Ill. 1999)("It is well established that judicial admissions on questions of law have no legal effect.")(citation omitted).

Inasmuch as judicial admissions, which are formally made in pleadings or stipulation by a party or its counsel, cannot extend to legal conclusions, it follows that evidentiary admissions, which are not made in the course of the litigation itself, also cannot bind a party on a question of law. Simply stated, the subjective beliefs of some U.S. Attorney's Office officials that the CVRA applied to petitioners does not make it so.

Whether any of the rights in 18 U.S.C. § 3771(a) applied to petitioners is a question of law, to be decided by this Court. Under petitioners' argument, the pre-litigation position taken by the U.S. Attorney's Office should be binding. Of course, if the same e-mails and letters expressed the view that 18 U.S.C. § 3771(a) did not apply until a formal charge was filed, the government doubts petitioners would be withdrawing their motion. If petitioners' argument is correct, then the resolution of whether rights accorded in § 3771(a) apply would depend upon the position asserted by the government, prior to the litigation. Court decisions would be based upon what position the DOJ took prior to the inception of the litigation, what could lead to conflicting decisions, based not upon statutory interpretation, but the pre-litigation position taken by the Government. Simply stated, the positions taken by the government in the e-mails and

letters are irrelevant to the resolution of the legal question of whether § 3771(a) applies prior to the filing of a formal charge.

[redacted]. CONSIDERING EACH OF THE CVRA RIGHTS SEPARATELY, THERE WAS NO CVRA VIOLATION

As set forth above, the CVRA did not apply because the U.S. Attorney's Office ultimately exercised its discretion to defer prosecution in favor of prosecution by the State of Florida. Nonetheless, during its investigation, the agents and AUSA, in compliance with the Justice Department's guidelines on working with victims and witnesses, went above and beyond the legal minimum requirements and provided information and assistance prior to the decision to decline prosecution and even afterwards. Those guidelines encourage Justice Department employees to do more than the legal minimum when possible and to treat victims and witnesses with courtesy and respect. In doing so, the Court will see that, even if the CVRA had applied, there was compliance.

1. The right to be reasonably protected from the accused

The first CVRA right is to be "reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). As explained in *Rubin*, some victims have fastened "on this first enumerated right as a wellhead of boundless authority to fashion protection for victims in the guise of 'protecting them from the accused.' . . . Simply put, the 'accused' must be accused by the government, not just be someone complaining to the government that they have been the victim of a crime. The CVRA cannot realistically be read to create upon mere citizen complaint a self effectuating right to protection from the one accused, regardless of its impact on resources, any pending investigation or prosecutorial discretion." *Rubin*, 558 F. Supp. 2d at 420. Thus, according to the

statute's language, this first right only applies following a formal charge filed via a Criminal Complaint or Indictment.[17] Nonetheless, it is undisputed that Petitioners were given letters in approximately June 2007 [Jane Doe #1] and August 2006 [Jane Doe #2] wherein they were advised of this right and given the phone numbers of AUSA [redacted], FBI Special Agent [redacted], and the Justice Department's Office for Victims of Crime. The letters specifically advised that if the Petitioners felt that they were "being threatened or harassed, then please contact Special Agent [redacted] or [AUSA [redacted]]. (*See* DE14, Exs. 1 and 2.)

It is further undisputed that Jane Doe #1 actually took advantage of the offer of protection when Epstein's counsel began harassing her to take her deposition. Although not required to do so, the AUSA and agents handling the investigation went above and beyond the minimum required by law and secured legal representation for Jane Doe #1 in connection with that deposition. (*See* DE14 ¶ 9.)

2. The right to notice of any public court proceeding, or release of the accused

Again, by definition, a "public court proceeding" requires the existence of a federal case. Nonetheless, it is undisputed that the Petitioners were advised, through counsel, of the *state* court proceeding by the AUSA who conducted the federal investigation, so that the Petitioners, or their counsel, could attend if they desired and could address the Court, either in person or via letters to

[17] The Victims Rights and Restitution Act (VRRA), 42 U.S.C. § 10607(c)(2), provides for a crime victim to have "reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender." Congress's use of the term "suspected offender" in the VRRA, and "the accused" in section 3771(a)(1) of the CVRA, demonstrates the intent to have the right to reasonable protection attach at different times, depending on which statute applies. The right to reasonable protection, from a suspected offender, applies prior to the lodging of formal criminal charges. In contrast, "the right to be reasonably protected from the accused," arises only when there is an "accused," which occurs when formal charges are filed.

the judge. They elected not to do so.[18]

Although not required to do so, the AUSA who conducted the federal investigation also attempted to keep the victims apprised of Epstein's release. These attempts were met with resistance from Epstein's counsel, who took the position that the CVRA required no such notification and were evidence of overreaching by the AUSA conducting the investigation. Nonetheless, the AUSA and agents attempted to go above and beyond on behalf of these victims. A request was made to the Palm Beach County Sheriff's Office ("PBSO") that it notify the U.S. Attorney's Office of Epstein's release so that further release notification could be made, but PBSO did not honor that request.

3. The right not to be excluded from public court proceeding

There is no dispute that the Petitioners have never been excluded from a public court proceeding.

4. The right to be reasonably heard at a public proceeding in the district court

There was no proceeding in the District Court, and there is no allegation that Petitioners were ever kept from being heard at a public proceeding in the District Court.[19]

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[18]In the "statement of undisputed fact," Petitioners suggest that, during negotiations for a possible plea to a federal charge, discussions of "avoiding the press" and handling the case in Miami were done so that the victims would not be informed of the case. This is directly contradicted by the fact that, as shown, there was no obligation to inform the victims of the state court plea but, instead, the AUSA and agents who handled the federal investigation worked to contact the identified federal victims to personally inform them of the state court hearing so that they could attend. Instead, as will be explained, *infra*, as part of the duty to respect the victims' privacy, the AUSA and agents sought a venue where the victims could participate in the process without fearing exposure of their identities due to excess press coverage.

[19]While this is not in dispute, it is worth noting, that "[i]t is, perhaps, with this enumerated CVRA right, though that it is most important to underline what the CVRA does not empower victims to do. The right does not give the victims of crime veto power over any

5. The reasonable right to confer with the government in the case

Again, the use of the words "in the case," as opposed to "in the investigation" or otherwise, by definition requires that a *case* – i.e., a filed federal criminal charging instrument – exist. Thus, because no federal criminal case was ever filed against Epstein, this statutory right to confer never ripened.

Nonetheless, AUSA [redacted] and the agents who conducted the federal investigation went above and beyond the minimum statutory requirements. For example, it is undisputed that: (1) Petitioners were both advised of their right to consult with AUSA [redacted] in August 2006 and June 2007 and were given her telephone number; (2) Petitioners both met with AUSA [redacted] and the agents before the NPA was signed in the context of witness interviews; (3) neither of them contacted AUSA [redacted] prior to the NPA being signed to discuss plea negotiations or asked to be consulted regarding a plea;[20] (4) there was never a time when Petitioners asked to consult with AUSA [redacted] when she refused to meet with Petitioners; (5) when counsel for Petitioners contacted AUSA [redacted] to ask her to consider certain evidence, she encouraged counsel to send the evidence to her to review; and (6) at the time the Petitioners became interested in seeing Epstein prosecuted in January 2008, he had already signed the NPA. Thus, by the time the Petitioners were interested in urging individuals at the U.S. Attorney's Office to seek harsher punishment for Epstein, the decision to decline prosecution in favor of the state's prosecution had already been made.

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prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole." *Rubin*, 558 F. Supp. 2d at 424 (citation omitted).

[20]As is discussed in the Response to DE49, Jane Doe #2's position at the time of her interview was that Epstein should not be prosecuted.

6. The right to full and timely restitution as provided in law

With respect to restitution, the "CVRA does not grant victims any rights against individuals who have not been convicted of a crime. Concomitantly, neither the Government nor the sentencing court are restricted by the CVRA from effecting reasonable settlement or restitution measures against *nonconvicted* defendants." *In re W.R. Huff Asset Mgt. Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (emphasis added). In *W.R. Huff*, petitioners filed two writs of mandamus seeking to vacate settlement agreements of forfeiture actions between the United States and members of the Rigas family. Two members of the Rigas family were convicted of securities fraud. A third was acquitted. Adelphia Communications Corporation (a company founded by the Rigas family) entered into a *non-prosecution agreement* with the Government, pursuant to which it paid the Government $715 million for a Victim Compensation Fund. The Rigas family members signed a proposed Settlement Agreement with the government consenting to forfeitures. As part of the Settlement Agreement, any victim who agreed to receive restitution from the Victim Compensation Fund had to agree to a release of all civil and other claims, including claims in bankruptcy court, against the Rigas family, Adelphia, and other conspirators. The district court approved the Settlement Agreement over the objection of the victims and the victims filed the petitions for mandamus.

On appeal, the Second Circuit disagreed with the victims:

> To the extent that the Government recognizes that victims would have difficulty in effecting any recoveries from the Rigas family members because of difficulties in proof of culpability and because of security interests affecting the family's assets, petitioners cannot meet their burden in showing that the Government or the district court acted unreasonably in entering the Settlement Agreement or approving it. Additionally, the district court in no way treated the victims unfairly or without "respect for [their] dignity and privacy," 18 U.S.C. § 3771(a)(8), but

> rather took into consideration the numerosity of victims, the uncertainty of recovery, and the prospect of unduly prolonging the sentencing proceedings when adopting the settlement, factors which Congress has required the court to consider. *See* 18 U.S.C. § 3771(d)(2).

W.R. Huff, 409 F.3d at 564.

In this instance, as in *W.R. Huff*, there was an un-convicted defendant, Epstein. Unlike in *W.R. Huff*, here Epstein was the *only* defendant. Nonetheless, the AUSA who investigated Epstein developed a procedure to provide for restitution, despite the fact that the "CVRA does not grant victims any rights against individuals who have not been convicted of a crime." *Id.* That procedure not only provided for funds and attorney representation, it also provided for privacy and discretion, again to protect the victims' dignity. (*See* discussion, *infra*.)

7. The right to proceedings free from unreasonable delay

The use of the term "proceedings" again refers to a federal court proceeding. Accordingly, Petitioners have not alleged a violation of this right. Nonetheless, Petitioners do complain about the delay in notification between the time of signing the NPA and the notification of its existence at the time of Epstein's state court plea. As has been explained at hearings in this matter, the delay stemmed from Epstein's appeal to higher authority within the Department of Justice. As will be further explained in the response to DE49, one of the bases for Epstein's counsel to appeal to the Department of Justice – which has been explained to Petitioners' counsel – was the inclusion of Jane Doe #2 among the list of identified victims. The efforts of the AUSA and the agents to treat Jane Doe #2 with respect, despite her own insistence at the time that she was not a victim – resulted in allegations of overreaching and prosecutorial misconduct. After several levels of review, the Senior Associate Deputy Attorney General concluded that there was

no misconduct.

8. The right to be treated with fairness and with respect for the victim's dignity and privacy

The Petitioners maintain that this right has been violated. Because there has been no "court proceeding involving an offense against a crime victim [where] the court shall ensure that the crime victim is afforded the rights described in subsection (a)," Petitioners are alleging that the "employees of the Department of Justice . . . [failed to] make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." 18 U.S.C. §§ 3771(b)(1), (c)(1). It is undisputed that Jane Does #1 and #2 were notified of this right in August 2006 and June 2007. (DE14 Exs. 1 and 2.) Thus the allegation is that best efforts weren't used to accord them these rights. Since this right is the only one that does not mention the existence of a court proceeding or an accusation, Petitioners are trying to assert through this right everything from the right to be advised of and veto pre-indictment plea negotiations, to a demand that the prosecutor disregard her ethical obligation to treat opposing counsel and the putative defendant politely.

So, for example, Petitioners make numerous allegations regarding efforts to minimize press coverage, for example, "the U.S. Attorney's Office was interested in finding a place to conclude a plea bargain that would effectively keep the victims from learning what was happening through the press." (DE48 at 7.) Yet Petitioners admit that they were notified regarding the change of plea in state court. Petitioners also neglect to mention that numerous other victims were *not* willing to give up their privacy and were very concerned about family members learning that they were even *connected* to the Epstein case, much less that they were

victims. To allow them to participate in court proceedings, while maintaining their dignity and privacy, the AUSA handling the case thought it was, balancing the competing interests of several different girls, best to consider a venue outside of Palm Beach County.

Petitioners also allege that they were not treated with respect when they received letters stating that the case was "still under investigation" after the NPA was signed. As noted above and in earlier presentations, after the NPA was signed, Epstein's counsel sought higher-level review in the Department of Justice seeking to set aside the NPA. The U.S. Attorney's Office determined that, if Epstein were not to abide by the terms of the NPA, then it wanted to be prepared to go forward with charges. Accordingly, the investigation of Epstein had to continue. Thus, the letters sent to Jane Does #1 and #2 were not false. In fact, as set forth in Petitioners' "Undisputed Facts," on "January 31, 2008, Jane Doe #1 met with FBI Agents and AUSA's from the U.S. Attorney's Office. She provided additional details of Epstein's sexual abuse of her." (DE48 at 17.) And, one of Petitioners' counsel's other clients, S.R., was originally interviewed in October 2007 and refused to provide information regarding Epstein. (DE14 at ¶ 7.) During the time that Epstein was challenging the NPA, the investigation continued and agents were able to conduct a more thorough interview of S.R. in May 2008, such that she was identified as a victim who could benefit under the NPA. Thus, the "undisputed facts" themselves show that the investigation was ongoing.

Petitioners also argue that "[a]t all times material to this statement of facts, it would have been practical and feasible for the federal government to inform Jane Doe #1 and Jane Doe #2 of the details of the proposed non-prosecution agreement with Epstein . . ."

First, Jane Doe #1 *was* informed of the details, including the fact that Epstein would not

be prosecuted federally, shortly after the NPA was signed. (*See* DE14 at ¶ 8.) In Petitioners' "Undisputed Facts," Petitioners allege that Jane Doe #1 was told that Epstein would enter a guilty plea to state charges, would register as a sex offender for life, and "he had made certain concessions related to the payment of damages to the victims, including Jane Doe #1." (DE48 at 12.) Despite this, Petitioners suggest that it was "quite reasonable" for Jane Doe #1 to believe that "Jane Doe #1 also understood her own case was move [*sic*] forward towards possible prosecution." (*Id.*) It was not "quite reasonable" for Jane Doe #1 to believe that Epstein would pay damages to Jane Doe #1 while still being exposed to criminal penalties for his conduct towards Jane Doe #1. While Jane Doe #1 may not have understood this, it was not due to any misleading behavior by the agents; it was simply a misunderstanding on Jane Doe #1's part. And that misunderstanding was not a reasonable one.

Second, after Jane Doe #1 was notified about the NPA, Epstein's attorneys began their appeal to the Justice Department. Hence, there was a situation where there was a signed NPA that provided, amongst other things, that the victim-witnesses would receive compensation from Epstein as a result of his resolution of the matter, but there also was a possibility that Epstein would not perform the NPA. A determination was made to cease notifications for the simple reason that, if Epstein did not perform, and there was a trial, on cross-examination of the victim-witnesses, Epstein would claim that the victims had been told, by the United States, that Epstein would pay them if he were convicted. This concern was not an unfounded one. Epstein's attorneys actually made these baseless allegations in depositions and other court filings. (*See, e.g., Jane Doe* [redacted]*, Jeffrey Epstein,* [redacted]*, and* [redacted] Court File No. [redacted] Civ-Marra/Johnson, DE1 at 44-52.)

Petitioners' allegations provide further examples of why the CVRA contains the caveat that nothing within the statute is meant to "impair the prosecutorial discretion of the Attorney General or any officer under this direction." 18 U.S.C. § 3771(d)(6). Petitioners simply cannot understand how their demands and allegations would have impacted the plan to prosecute Epstein. The AUSA and agents did use their "best efforts" to accord all of the rights to these and all of the identified victims. They also needed to preserve the possibility of prosecuting Epstein should he violate or not perform the NPA.

These Petitioners' interests are adverse to several of the other victims. For example, they neglect to mention that several other victims obtained counseling services during the investigation through the efforts of the AUSA and agents. If the Petitioners succeed in using these "above and beyond" efforts as proof of violations of the CVRA, it will preclude AUSAs and agents from offering such services in the future.

Finally, if Petitioners succeed in convincing the Court to set aside the NPA, all of the victims who obtained counsel and damages paid for by Epstein through the NPA will be adversely affected.

VI. UNDER ELEVENTH CIRCUIT LAW, ESTOPPEL WILL NOT LIE AGAINST THE GOVERNMENT WHEN IT ACTS IN ITS SOVEREIGN CAPACITY

Petitioners argue the government should be estopped from denying that they had right under the CVRA, due to its representations in letters to Jane Doe #1 and Jane Doe #2 that they did have rights under § 3771(a). DE 48 at 33-36. This argument should be rejected because the government, under Eleventh Circuit law, cannot be estopped when it is acting in its sovereign capacity.

In *FDIC* v. *Harrison*, 735 F.2d 408 (11th Cir. 1984), the Eleventh Circuit found that, "[a]ctivities undertaken by the government primarily for the commercial benefit of the government or an individual agency are subject to estoppel while actions involving the exercise of exclusively governmental or sovereign powers are not." *Id.* at 411. In a subsequent case, *United States* v. *Vondereau*, 837 F.2d 1540 (11th Cir. 1988), the Eleventh Circuit observed:

> This Court has held that for estoppel to apply against the Government (1) the traditional private law elements of estoppel must have been present; (2) the Government must have been acting in its private or proprietary capacity as opposed to its public or sovereign capacity; and (3) the Government's agent must have been acting within the scope of his or her authority.

Id. at 1541, *citing FDIC* v. *Harrison*, 735 F.2d at 410.

In this case, the Government was acting in its sovereign capacity when it investigated whether Epstein had committed any federal crimes, and entered into the non-prosecution agreement with Epstein, which was an exercise of its prosecutorial discretion. *Nixon* v. *United States*, 418 U.S. 683, 693 (1974)("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). Therefore, estoppel will not lie against the Government.

Estoppel will also not lie in this case because this Court's authority is limited by what legal duties are created by section 3771(a). "The proposition that the law alone defines the limits of a court's power to enter a judgment can be traced to this Court's early precedents." *Libretti* v. *United States*, 116 S.Ct. 356, 371 (1995)(Stevens, J., dissenting). Just as a court's subject matter jurisdiction cannot be conferred by estoppel, *Mickler* v. *Nimishillen and Tuscarawas Railway Co.*, 13 F.3d 184, 189 (6th Cir. 1993), and *Intercontinental Travel*

Marketing, Inc. [redacted] *FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994)("Estoppel may not prevent an objection to subject matter jurisdiction, because such an objection to subject matter jurisdiction may be raised at any time, by any party or the court."), estoppel cannot prevent the Government from contending it owed no duty to petitioners under section 3771(a). This Court's authority to enter a judgment is based on its determination whether any legal duties were owed to petitioners under section 3771(a) in the absence of a formal charge being filed against Epstein. The Government cannot be estopped from maintaining that such duties did not exist.

VII. PETITIONERS' CASE SHOULD BE DISMISSED DUE TO THEIR FAILURE TO PROSECUTE THEIR CASE EXPEDITIOUSLY AS REQUIRED BY THE CVRA

As explained above, at the initial hearing on the Emergency Petition, Petitioners stated that their desired result was the setting aside of the NPA and the prosecution of Epstein. At the second hearing on the matter, counsel stated that they no longer wanted that remedy and stated that they would inform the Court of their desired remedy upon reviewing the full NPA. However, after reviewing the NPA, no such notification was provided, other than filing a motion to unseal the NPA. And, although the most recent motion (DE48) contains no demand for a remedy, the clear suggestion is that Petitioners are seeking to set aside the NPA.[21]

Epstein entered his guilty plea to state charges on June 30, 2008. At the time that Petitioners filed the Emergency Petition on July 7, 2008, Epstein had been imprisoned for seven

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[21] *See* Jon Swaine, *Duke of York to Face Fresh Questions as Epstein Case Takes New Twist*, TELEGRAPH (London), Mar. 11, 2011 ("Several women who claim they were sexually abused by Epstein are challenging a plea bargain deal that enabled the billionaire to avoid being tried for offences that carried a possible life sentence. They say the deal with prosecutors was unlawful because under US law they should have been consulted, and want Epstein's convictions for lesser offences to be set aside so he can face a fresh trial. . . . One lawyer said the plea bargain deal 'stinks to high heaven' . . .")

(7) days. At the time of the first hearing on the matter on July 11th, when the Petitioners made clear that they wanted to invalidate the NPA, Epstein had been imprisoned for eleven (11) days. At that hearing, the Petitioners again stated that they wanted to invalidate the NPA, even though Epstein had entered his state court guilty plea in reliance on the NPA. (DE15 at 20-21.) The Court asked Petitioners about whether the Court needed to rule on the Emergency Petition quickly, and the Petitioners said that the Court did not need to do so. (*Id.* at 26.)

Briefing on the "Emergency Petition" was completed by August 1st, and the second hearing on the Petition was completed on August 14, 2008, wherein the Petitioners admitted that the Court had a sufficient record and did not need to take any additional evidence in the matter. (DE19; DE27 at 4-5.) By this point, Epstein had served 49 days of his 18-month term of imprisonment.

Thereafter, other than Petitioners' motion to unseal the NPA, there was no further action on the matter until the Court's Order to administratively close the case. Epstein was released from prison in July 2009 and his term of probation ended in July 2010.[22]

The CVRA's drafters understood that victims' rights of access needed to be balanced against defendants' rights to Due Process. Unlike victims' rights, which are only statutory constructs, defendants' rights are guaranteed in the Constitution. Accordingly, the CVRA contains strict time constraints. First, a "district court shall take up and decide any motion

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[22]To be clear, the delay from October 28, 2010 through early March 2011 was due to the United States' efforts to reach amicable resolution of the case and the need to obtain an opinion from the Justice Department as set forth in the Status Report filed by the United States. (DE45.) That additional delay is irrelevant to the analysis under the CVRA and the Due Process clause.

asserting a victim's right forthwith." 18 U.S.C. § 3771(d)(3).[23] Second, if the district court denies the victim's motion, the victim may petition the court of appeal for a writ of mandamus and the "court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." *Id.* Third, in "no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." *Id.* Fourth, the CVRA specifies that "[i]n no case shall failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if . . . (B) the victim petitions the court of appeals for a writ of mandamus within 14 days . . ." 18 U.S.C. § 3771(d)(5).

The First Circuit addressed how the conflict between the rights of victims and defendants is exacerbated by the passage of time in *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010). In *Aguirre-Gonzalez*, a group of victims appealed an order of restitution, asserting that they were improperly excluded from the restitution award. However, rather than seeking a writ of mandamus under the expedited procedure in the CVRA, the victims filed a "regular" appeal. The Court of Appeals began by deciding that "crime victims are not parties to a criminal sentencing proceeding [and] the baseline rule is that crime victims, as non-parties, may not [directly] appeal a defendant's criminal sentence;" *id.* at 53 (extensive citations omitted); thus, crime victims are limited to proceeding via mandamus. *Id.* at 54-55.

Next, the First Circuit considered whether it could convert the crime victims' direct appeal into a petition for writ of mandamus. Although the parties agreed that the court had the

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[23]The Federal Rules Committee interpreted this as: "The court must promptly decide any motion asserting a victim's rights described in these rules." Fed. R. Crim. P. 60(b)(1).

authority to do so, the First Circuit declined because of its effect on the Due Process rights of the defendant:

> The CVRA plainly envisions that crime victims' petitions challenging a denial of their rights will be taken up and decided in short order. It requires expeditious consideration by the district court, quick appellate review, and provides that a victim may not move to disturb a defendant's plea or sentence unless, among other things, "the victim petitions the court of appeals for a writ of mandamus within 14 days" of the denial of the victim's motion in the district court. 18 U.S.C. §§ 37771(d)(3), 3771(d)(5). We are mindful that the federal restitution statutes are intended to protect victims, not defendants. *See, e.g., United States* [redacted]. *Rostoff*, 164 F.3d 63, 66 (1st Cir. 1999) (applying VWPA). However, the criminal justice system also has a strong interest in the finality of criminal sentences. *Olsen* [redacted]. *Correiro*, 189 F.3d 52, 69 (1st Cir. 1999) (noting society's "interest in the integrity of the system of compromise resolution of criminal charges"); *see Blackledge* [redacted]. *Allison*, 431 U.S. 63, 71 (1977) ("The guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system . . . The advantages can be secured, however, only if dispotision by guilty plea are accorded a great measure of finality."); *see also Teague* [redacted]. *Lane*, 489 U.S. 288, 309 (1989) ("The principle of finality . . . is essential to the operation of our criminal justice system.") These finality concerns animate the CVRA's procedural mechanisms.
>
> The CVRA was in force when appellants elected to pursue a direct appeal rather than petition for the writ as provided by statute and more than two years have passed since the district court sentenced Aguirre. Under these circumstances, we conclude that appellants would not be entitled to mandamus relief . . .

Id. at 55-56 (brackets in original removed).

In this case, the CVRA was in force when Petitioners elected to tell the Court that there was no longer any "Emergency." It was in effect during the second hearing when Petitioners announced that they were no longer seeking to have the NPA set aside, but, instead, would review the NPA and then advise the Court of the remedy they were seeking. It was in effect throughout the years thereafter when there was no activity on the case. Petitioners' counsel is well acquainted with the CVRA and Rule 60, as he is credited with being the source of the initial

draft of Rule 60. *See* 153 Cong. Rec. S8742, S8746 (June 29, 2007) ("Federal district court judge Paul Cassell initiated the process [of incorporating the CVRA into the Federal Rules] by recommending rule changes to the Advisory Committee on Criminal Rules.") And Petitioners were also well aware that Epstein was serving his prison sentence for his state court guilty plea, as administered by the Palm Beach County Sheriff's Office, in accordance with the terms of the NPA.

Against this backdrop, the Petitioners elected to focus on exercising their right to collect damages from Epstein, and filed civil suits against him. Through those civil suits, they had the opportunity to have a public trial where they could have held him publicly accountable for the harms they alleged he caused them. Instead, they chose to enter into confidential settlement agreements with him. Only after those confidential settlement agreements were signed, and after Epstein completed his term of imprisonment and his term of community control, did the Court file its administrative order closing the case, which prompted Petitioners to file their notice that they intended to continue litigating this claim.

Petitioners bear the burden of proof as to all stages of their claim, that is, (1) that there is a justiciable case or controversy; (2) that there was any violation of the CVRA in this case where no federal charges were ever filed; and (3) that there is still a remedy available for the harm that was alleged to have occurred and that Petitioners are entitled to that remedy despite their failure to proceed promptly. The remedy that is sought is an equitable one, because the CVRA clearly states that no claim for damages is allowed, *see* 18 U.S.C. § 3771(d)(6), and that remedy will impact a non-party to this suit – Epstein. In deciding whether the Petitioners have shown that they are entitled to the remedy that they at one time disavowed – setting aside the NPA – the

Court should consider a comment from Washington Supreme Court Justice James M. Dolliver: "[E]mphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel . . . represents a dangerous return to the private blood feud mentality." Dolliver, James, "Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come," 34 Wayne L. Rev. 87, 90 (1987) (quoted in Levine, Danielle, "Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution," 104 Nw. U. L. Rev. 335, 353 (2010)).

Everyone who has encountered the Epstein case has an opinion regarding the NPA, the state court plea, the sentence imposed, and the way the sentence was served. If the civil settlement agreements were made public, people would doubtless have differences of opinion on those, as well. Nonetheless, the facts remain that Epstein entered his state court guilty plea in reliance on the NPA and he served his sentence. The Petitioners knew these facts and could have sought expedited review of their claim. They elected not to do so. As in *Aguirre*, the Petitioners' election not to seek expedited resolution should not be used to violate a criminal defendant's Due Process rights.

VIII. PETITIONERS LACK STANDING TO SEEK RELIEF UNDER SECTION 3771(d)(3)

Based on the foregoing, it is apparent that petitioners have no enforceable rights under section 3371(a) because no charges were filed in the district court. Petitioners invoked section 3771(d)(3) in seeking relief, but they lack standing to seek such relief since the rights provided in section 3771(a) have not attached. In *Baloco* [redacted] *Drummond Company, Inc.*, 631 F.3d 1350 (11th Cir. 2011), the Eleventh Circuit observed that the Supreme Court discussed the standing inquiry

as asking two questions, whether Article III standing exists, and whether the statute at issue grants the purported plaintiff a means to seek relief under the applicable statute. *Id.* at 1355.

Respondents believe petitioners cannot seek relief under section 3771(d)(3) because they cannot establish that the rights enumerated in section 3771(a) attached, in the absence of a formal charge being filed. Consequently, petitioners lack standing.

IX. PETITIONERS' MOTION FOR ENFORCEMENT, AND REQUEST FOR HEARING, SHOULD BE DENIED

The statutory text, legislative history, and case authority support the view that the right to confer enumerated in section 3771(a)(5) does not attach until a formal charge is filed in the district court. Therefore, petitioners' motion for enforcement should be denied.

The remedy petitioners seek is to have this Court set aside the non-prosecution agreement. DE 48 at 36-40. Assuming arguendo that the Court finds the right to confer did arise in the absence of a formal charge being filed, respondents respectfully submit the Court would lack the authority to set aside the non-prosecution agreement. As stated previously, a non-prosecution agreement, unlike a plea agreement, is not subject to judicial pre-approval. It is an exercise of prosecutorial discretion that is "largely unreviewable."

Inasmuch as a non-prosecution agreement would not normally come before the Court for judicial scrutiny and approval, it should not come before the Court in the guise of a motion to enforce the CVRA. This would be contrary to section 3771(d)(6)'s clear intention that nothing in the CVRA should be construed to impair the prosecutorial discretion of the Attorney General.

Petitioners contend that a violation of a right must have a remedy. However, this is not always the case. Indeed, courts have recognized that a controversy is moot if effective relief

cannot be granted. *Continental Casualty Co.* [redacted] *Fibreboard Corp.*, 4 F.3d 777, 778 (9th Cir. 1993). The non-prosecution agreement in this case was signed in 2007, and Epstein entered his pleas of guilty in July 2008, in Florida circuit court. He was sentenced by the state court, and has served his sentence. Individuals who were sexually abused by Epstein have filed civil actions against him, relying upon certain provisions of the non-prosecution agreement.

Any failure to confer under section 3771(a)(5) does not render the non-prosecution agreement illegal, as petitioners suggest. A plea agreement that was entered into by the government without having conferred with a victim can be disapproved by the district court, since all plea agreements are subject to judicial scrutiny and approval. A non-prosecution agreement is an exercise of prosecutorial discretion, not subject to judicial pre-approval. While petitioners may assail the government's exercise of its discretion in this case, the exercise of that discretion is not subject to judicial review, either independent of a CVRA motion, or in conjunction with such a motion.

CONCLUSION

Petitioners' motion for finding of violations of the Crime Victim Rights Act and request for a hearing on appropriate remedies should be denied.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: s/ [redacted]
Assistant U.S. Attorney
[redacted]

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

[redacted]
Assistant U.S. Attorney

SERVICE LIST

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Case No. 08-80736-CIV-MARRA/JOHNSON
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2

[redacted]

UNITED STATES
_____/

JANE DOE #1 AND JANE DOE #2'S MOTION TO HAVE THEIR FACTS ACCEPTED BECAUSE OF THE GOVERNMENT'S FAILURE TO CONTEST ANY OF THE FACTS

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to move this Court to accept all of their facts in their Motion for Finding of Violations of the Crime Victims' Rights Act. The victims have been attempting to negotiate with the Government for more than 30 months on a stipulated set of facts. Despite repeated opportunities to advise the victims of what facts they are contesting, the Government in the last few days has flatly declared that it will not discuss the facts in this case. This is violation of the Court's direction to the parties as well as the local rule on the subject. Accordingly, the Government should be deemed to have failed to contest the victims' facts and the Court should proceed to resolve this case on the basis of the victims' proffered facts.

FACTUAL BACKGROUND

The victims have been attempting to reach an agreement on the facts surrounding this case since filing their petition on June 7, 2008. In that petition, the victims[1] recited the facts as

[1] The petition was initially filed on behalf of Jane Doe #1. Jane Doe #2 was quickly added into the case. For simplicity, we will refer to the pleadings as having been filed by "the

they understood them at the time – i.e., the victim asserted "upon information and belief" that they understood that Epstein was involved in on-going plea negotiations with the U.S. Attorney's Office for the Southern District of Florida. Victims' Petition (doc. #1) at 1. On July 9, 2008, the Government responded with a sealed response (quickly unsealed by the Court), that stated that an agreement had already been reached with Epstein. Government's Response to Victims' Emergency Petition (doc. #13). Two days later, the victims replied, explaining that they were just learning these facts from the Government's pleading. *See, e.g.,* Victims' Reply to Government's Response (doc. #9) at 8.

The Court quickly scheduled a hearing on the victims' petition, held on July 11, 2008. The Court discussed a need to "hav[e] a complete record, and this is going to be an issue that's ... going to go to the Eleventh Circuit, [so it] may be better to have a complete record as to what your position is and the government's is as to what actions were taken." Tr. at 25-26. Counsel for the victims explained: " . . . I will confer with the government on this and if evidence needs to be taken, it [can] be taken at a later date." Tr. at 26. The Court concluded the hearing with the following instructions: "So I'll let both of you confer about whether there is a need for any additional evidence to be presented. Let me know one way or the other. If there is, we'll schedule a hearing. If there isn't and you want to submit some additional stipulated information, do that, and then I'll take care of this in due course." Tr. at 32.

The victims and the U.S. Attorney's Office then attempted to reach a stipulated set of facts underlying the case. The U.S. Attorney's Office offered a very abbreviated set of proposed facts, and the victims responded with a detailed set of proposed facts. Rather than respond to the

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victims."

victims' specific facts, however, the U.S. Attorney's Office suddenly reversed course. On July 29, 2008, it filed a Notice to Court Regarding Absence of Need for Evidentiary Hearing (doc. #17). The U.S. Attorney's Office took the following position: "After consideration, the Government believes that an evidentiary hearing is not necessary" (doc. #17 at 1). The Office asserted that the Court need only take judicial notice of the fact that no indictment had been filed against Epstein to resolve the case.

On August 1, 2008, the victims filed a response to the Government's "Notice" (doc. #19), giving a proposed statement of facts surrounding the case. The proposed statement of facts highlighted the fact that the Government had signed a non-prosecution agreement containing an express confidentiality provision, which prevented the Government from disclosing the agreement to them and other victims. *Id.* at 5. The victims response also requested that the Court direct the Government to confer with the victims regarding the undisputed facts of the case, produce the non-prosecution agreement and other information about the case. *Id.* at 14.

On August 14, 2008, the Court held a hearing on the case regarding the confidentiality of the non-prosecution agreement. The Court ultimately ordered production of the agreement to the victims.

After the U.S. Attorney's Office made the non-prosecution agreement available to the victims, the victims reviewed it and pursued further discussions with the U.S. Attorney's Office. Ultimately, however, the U.S. Attorney's Office declined to reach a stipulated set of facts with the victims and declined to provide further information about the case.

With negotiations at an impasse, the victims attempted to learn the facts of the case in other ways. In approximately May 2009, counsel for the victims propounded discovery requests

in both state and federal civil cases against Epstein, seeking to obtain correspondence between Epstein and prosecutors regarding his plea agreement – information that the U.S. Attorney's Office was unwilling to provide to the victims. Epstein refused to produce that information, and (as the Court is aware) extended litigation to obtain the materials followed. The Court rejected all of Epstein's objections to producing the materials.

On June 30, 2010, counsel for Epstein sent to counsel for the victims approximately 358 pages of e-mail correspondence between criminal defense counsel and the U.S. Attorney's Office regarding the plea agreement that had been negotiated between them. *See* Jane Doe #1 and Jane Doe #2's Motion for Finding of Violations of the Crime Victims' Rights Act and Request for a Hearing on Appropriate Remedies, Attachment "A." These e-mails fully disclosed for the first time the extreme steps that had been taken by the U.S. Attorney's Office to avoid prosecuting Epstein and to avoid having the victims in the case learn about the non-prosecution agreement that had been reached between Epstein and the Government.

In mid-July 2010, Jane Doe #1 and Jane Doe #2 settled their civil lawsuits against Epstein. Then, armed with the new information, they turned to moving forward in the CVRA case. On September 13, 2010, the victims informed the Court that they were preparing new filings in the case.

On October 12, 2010, the Court entered an order directing the victims to provide a status report on the case by October 27, 2010. That same day, counsel for the victims again contacted the U.S. Attorney's Office about the possibility of reaching a stipulated set of facts in the case. That same day, the U.S. Attorney's Office responded: "*We don't have any problem with agreeing that a factual assertion is correct if we agree that is what occurred*" (doc. #41 at 2).

On October 23, 2010, the victims e-mailed to the U.S. Attorney's Office a detailed proposed statement of facts, with many of the facts now documented by the correspondence between the U.S. Attorney's Office and Epstein's counsel. The victims requested that the U.S. Attorney's Office identify which facts it would agree to. In a letter to the U.S. Attorney's Office, the victims stated:

> If you believe that any of the facts they propose are incorrect, Jane Doe #1 and Jane Doe #2 would reiterate their long-standing request that you work with us to arrive at a mutually-agreed statement of facts. As you know, in the summer of 2008 Jane Doe #1 and Jane Doe #2 were working with you on a stipulation of facts when you reversed course and took that position that no recitation of the facts was necessary (*see* doc. #19 at 2). . . . I hope that your e-mail means that you will at least look at our facts and propose any modifications that you deem appropriate. Having that evidence quickly available to the Court could well help move this case to a conclusion.

That same day, the U.S. Attorney's Office agreed to forward the proposed statement of facts to the appropriate Assistant U.S. Attorney for review (doc. #41 at 2-3).

On October 26, 2010, rather than stipulate to undisputed facts, the U.S. Attorney's Office contacted the victims' attorneys and asked them to delay the filing of their motion for a two-week period of time so that negotiations could be held between the Office and the victims in an attempt to narrow the range of disputes in the case and to hopefully reach a settlement resolution without the need for further litigation. Negotiations between the victims and the U.S. Attorney's Office then followed over the next two days. However, at 6:11 p.m. on October 27, 2010 – the date on which the victims' pleading was due – the U.S. Attorney's Office informed the victims that it did not believe that it had time to review the victims' proposed statement of facts and advise which were accurate and which were inaccurate. The Office further advised the victims that it believed that the victims did not have a right to confer with their Office under the CVRA in this case because in its view the case is "civil" litigation rather than the "criminal" litigation (doc. #41 at 3). [2]

[2] In seeming contradiction to this position, on March 17, 2011, the U.S. Attorney's Office

As a result, purely as an accommodation to the U.S. Attorney's Office, on October 27, 2010, the victims filed a report with the Court in which they agreed to delay filing their motion and accompanying facts for up to two-weeks to see if negotiations can resolve (or narrow) the disputes with the U.S. Attorney's Office (doc. #41 at 4). Discussions with the U.S. Attorney's Office dragged on, including a meeting between Jane Doe #1 and the U.S. Attorney in December 2010.

After further discussions failed to produce any agreement or other visible progress, the victims informed the U.S. Attorney's Office that they would file their "summary judgment" motion with the Court on March 18, 2011 and requested further cooperation from the Office on the facts.

Ultimately, after months of discussion, the U.S. Attorney's Office informed counsel for the victims that – contrary to promises made earlier to stipulate to undisputed facts – no such stipulation would be forthcoming. Instead, on March 15, 2011, the U.S. Attorney for the Southern District of Florida, Wifredo A. Ferrer, sent a letter to the victims declining to reach any agreement on the facts:

> Because, as a matter of law, the CVRA is inapplicable to this matter in which no federal criminal charges were ever filed, your requests for the government's agreement on a set of proposed stipulated facts is unnecessary and premature. That is, because whether the rights in 18 U.S.C. § 3771(a) attach prior to the filing of a charge in a federal court is a matter of statutory interpretation, resolution of that question is not dependent upon the existence of any certain set of facts, other than whether a charging document was ever filed against Jeffrey Epstein in the United States District Court for the Southern District of Florida. And while this Office remains willing to cooperate, cooperation does not mean agreeing to facts that are not relevant to the resolution of the legal dispute at issue . . . .

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informed the victims that it would not be making any initial disclosures to the victims as required for civil cases by Fed. R. Civ. P. 26(a)(1). The U.S. Attorney's Office did not explain why they believe that this rule of civil procedure is inapplicable if they think this case is properly viewed as a "civil" case.

Letter from Wifredo A. Ferrer to Paul G. Cassell (March 15, 2011).[3]

Accordingly, the victims were left with no choice but to file a motion without stipulated facts. Contemporaneously with the filing of this motion, the victims are filing a comprehensive Motion for Finding of Violations of the Crime Victims' Rights Act and Request for a Hearing on Appropriate Remedies. The motion contains the detailed set of facts which the victims have long been attempting to discuss with the government.

THE COURT SHOULD RESOLVE THE CASE ON THE BASIS OF THE VICTIMS' PROFFERED FACTS.

In view of the deliberate decision by the U.S. Attorney's Office not to discuss with the victims which facts they are disputing, the Court should resolve this case on the basis of facts that the victims offer in their motion seeking a finding of violations of the CVRA. For more than 30 months, the victims have given the U.S. Attorney's Office repeated opportunities contest their facts, only to see the Office first commit to reviewing the facts, then later claim they did not have sufficient time to review the facts, and then ultimately renege on that commitment to review the facts. Indeed, the U.S. Attorney's Office now argues that the facts are "not relevant" to the court's determination. If so, the Court should take up the U.S. Attorney's Office's position and simply accept the facts that the victims proffer. If the U.S. Attorney's Office is correct that the facts are irrelevant, they should not be heard to object when the victims propose a specific set of facts for resolving this case.

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[3] To avoid any suggestion that the victims are disclosing confidential settlement discussions, we are not attaching a copy of this letter to this pleading. We believe, however, that this paragraph is relevant to the issue before the Court and have accordingly reproduced it. *See* Fed. R. Evid. 408(b) (while settlement discussions are generally inadmissible, they are permissible for purposes other than proving the validity of a claim).

The Court should also accept the victims' facts because the U.S. Attorney's Office has violated the local rules regarding stipulating to facts. Local Rule 88.10(O) contains a broad, commonsense provision requiring the parties to work together to reduce disputes over the facts: The Local Rule provides: "The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth or existence of which is not contested and the early resolution of which will expedite the trial." For more than two-and-a-half years, the victims have been trying to get the U.S. Attorney's Office to stipulate to uncontested facts. The U.S. Attorney's Office, however, promised to do so, then refused to do so, then promised to do so, and now finally is refusing to do so. Because its failure to try and reach a stipulation is a clear violation of the local rule, the Court should simply adopt the victims' facts.

The Court should also accept the victims' facts because the Government has failed in its duty to confer with the victims. Not only did this Court order counsel for the Government and the victims to confer at the conclusion of the July 11, 2008 hearing, but the Crime Victims' Rights Act specific afford to victims "[t]he reasonable right to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(5). A fundamental part of conferring about a case would at least be learning what the Government agrees were the facts in the case. But the Government is apparently unwilling to do even that. Accordingly, the Court should simply find that the victims' understanding of the facts is correct and proceed to resolve this case on that basis.

CERTIFICATE OF CONFERENCE

As recounted above, the victims have repeated sought to learn which facts the Government is disputing, but the Government has declined to review the facts with the victims.

CONCLUSION

For all the foregoing reasons, the Court should resolve this case on the basis of the facts that the victims have offered.

DATED: March 21, 2011

Respectfully Submitted,

s/ Bradley J. Edwards
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Attorneys for Jane Doe #1 and Jane Doe #2

CERTIFICATE OF SERVICE

The foregoing document was served on March 21, 2011, on the following using the Court's CM/ECF system:

[redacted]
Assistant U.S. Attorney
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West Palm Beach, FL 33401
[redacted]
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Joseph L. Ackerman, Jr.
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Criminal Defense Counsel for Jeffrey Epstei
(courtesy copy of pleading via U.S. mail)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOES #1 AND #2,

Petitioners,

[redacted].

UNITED STATES OF AMERICA,

Respondent.
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO JANE DOES #1 AND #2'S MOTION TO HAVE THEIR FACTS ACCEPTED BECAUSE OF THE GOVERNMENT'S FAILURE TO CONTEST ANY OF THE FACTS [DE49]

The United States, by and through the undersigned, hereby opposes Petitioners' Motion to have their "Statement of Undisputed Material Facts" accepted as true [DE49]. Petitioners argue that the Court should accept their Statement as true, despite its conclusory allegations and internal inconsistencies, solely because of the United States' failure to stipulate to the Statement. The Court should deny the motion because: (1) Petitioners have misstated that United States' efforts at reaching agreement on the Statement; (2) the "Undisputed Material Facts" are irrelevant, as Petitioners have previously acknowledged; (3) agreeing to the "Undisputed Material Facts" demanded by Petitioners would have required the United States to violated Federal Rule of Criminal Procedure 6(e) and/or constitutional and ethical mandates; and (4) the United States is not obligated to agree to any "facts," especially those that are incomplete or false.

BACKGROUND

In DE 49, Petitioners ask the Court to accept as true their proposed "Statement of Undisputed Material Facts" contained in DE48 because they claim that the United States has failed "to advise the victims of what facts they are contesting." Petitioners then spend several pages making unsupported assertions and reciting from letters and email correspondence in an attempt to persuade the Court to adopt as true the Petitioners' averments even when the falsity of some of those "facts" is apparent from the text itself.

Contrary to their assertions, the Petitioners have *not* been attempting to negotiate with the government for more than 30 months. As set forth in the Procedural History Section of the United States' Opposition to Jane Doe #1 and Jane Doe #2's Motion for Finding of Violations of the Crime Victim Rights Act ("CVRA"), at the last hearing on the Petitioners' Emergency Petition, on August 14, 2008, counsel for Petitioners stated to the Court, "I believe that you *do* have a sufficient record, in that I don't think that – I think that we're in agreement that additional evidence does *not* need to be taken in the case for Your Honor to make a ruling." (DE27 at 4 (emphasis added).)

Thereafter, there was no contact regarding the CVRA petitioner for years – until the Court issued its administrative order closing the case. A flurry of activity ensued. Efforts were made to resolve the matter amicably, without success, including allowing the Petitioners, that is Jane Does #1 and #2, and their counsel, the opportunity to meet with the U.S. Attorney, as Jeffrey Epstein's attorneys did.[1]

Despite the Petitioners' earlier statement to the Court that no additional facts were needed, many hours were spent trying to revise the Petitioners' proposed statement of facts so that it would

[1]Only Jane Doe #1 and her counsel elected to attend a meeting with the U.S. Attorney.

contain only *facts*, not argument, not inferences, not incorrect innuendos.[2] Even after the U.S. Attorney's Office advised Petitioners that the Justice Department's position was that the CVRA's rights only attached upon the filing of federal criminal charges and, hence, that none of the Petitioners' proposed facts were relevant, further attempts were made. Petitioners' counsel, however, demonstrated no interest in proposed compromises. Specific factual corrections also were suggested and rejected.[3] Thus, counsel for Petitioners know that some of the proposed "undisputed material facts" are in fact disputed and, in many cases, wrong.

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[2]The U.S. Attorney's Office also repeatedly reminded Mr. Cassell of the Justice Department's policy not to comment on the guilt or innocence of an unconvicted person. The ABA's Model Rule of Professional Conduct on the Special Responsibilities of a Prosecutor contains similar guidance. For example, there has been no civil or criminal finding by any judge or jury that:

> defendant Jeffrey Epstein (a billionaire with significant with significant political connections) sexually abused more than 30 minor girls at his mansion in West Palm Beach (*sic*), Florida, and elsewhere. Epstein performed repeated lewd, lascivious, and sexual acts on them, including (but not limited to) masturbation, touching of their sexual organs, using vibrators or sexual toys on them, coercing them into sexual acts, and digitally penetrating them. Because Epstein used a means of interstate commerce and knowingly traveled in interstate commerce to engage in abuse of Jane Doe #1 and Jane Doe #2 (and the other victims), he committed violations of federal law, including repeated violations of 18 U.S.C. § 2422.

(DE48 at 3-4 ¶ 1.) Jane Does No. 1 and No. 2 had the opportunity to prove these allegations at trial but elected to sign confidential settlement agreements where, presumably, there was no acknowledgement of criminal or civil liability. Respectfully, the U.S. Attorney's Office cannot express a factual position, immaterial to the present litigation, on whether Jeffrey Epstein ("Epstein") committed crimes (other than those to which he pled guilty in Palm Beach County Circuit Court).

[3]For example, Petitioners were repeatedly advised the Epstein lived in Palm Beach, not West Palm Beach. Even this simple correction was ignored. (*See* DE48 at 3-4.)

ARGUMENT

I. ALL OF THE "UNDISPUTED FACTS" ARE IRRELEVANT.

In their motion asking the Court to accept as true all of their purported "undisputed *material* facts," Petitioners rely on only two citations, the CVRA's "right to confer with the attorney *in the case*"[4] and Local Rule 88.10(O), which governs discovery in criminal cases.

Local Rule 88.10(O) reads: "The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and *the early resolution of which will expedite the trial*." (Emphasis added.) Contrary to Petitioners' suggestion, reaching agreement on Petitioners' "Statement of Undisputed Material Facts" would not expedite the resolution of this matter. As the United States has explained since August 1, 2008, at the very start of the litigation, (*see* DE19,) – and as *admitted by Petitioners* during the hearing on August 14, 2008, (*see* DE27 at 3) – no additional facts are needed for the Court to resolve the Emergency Petition and Petitioners' Motion seeking a finding that the CVRA was violated. The only material fact is that the United States Attorney's Office for the Southern District of Florida never filed federal

[4]Whether or not the CVRA applies is the central question in dispute in this matter because no federal criminal case was ever filed against Jeffrey Epstein and one is certainly not pending now. The undersigned knows of no case where the "right to confer with the attorney in the case" has been interpreted to allow victims to demand that the Government confer repeatedly -- even after good faith efforts at reaching compromise have failed – in a case filed by victims against the Government pursuant to the CVRA. Nonetheless, Petitioners' argument seems to be that, because they aver that the CVRA applies, the Government's failure to accord them their very expansive reading of the CVRA's "right to confer" is a further violation of the CVRA. At least one court has noted and rejected this Catch-22: "the Court refuses to adopt an interpretation of [the CVRA] that prohibits the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments in support of its opposition to a motion may hurt a victim's feeling or reputation. More pointedly, such a dispute is precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to the government and defendant, the only true parties to the trial of the indictment." *United States v. Rubin*, 558 F. Supp. 2d 411, 428 (E.D.N.Y. 2008).

criminal charges against Jeffrey Epstein. That fact is undisputed.

Accordingly, all of the "facts" contained in Petitioners' statement are not "material" and the resolution of those "facts" will not "expedite the trial." Quite simply, all of the allegations, inferences, and innuendos contained in Petitioners' statement serve no purpose relevant to this litigation.

II. AGREEING WITH MANY OF PETITIONERS' "FACTS" WOULD HAVE VIOLATED FED. R. CRIM. P. 6(e) AND/OR CONSTITUTIONAL MANDATES.

Several of the "facts" that Petitioners include allege that Epstein and others have committed crimes for which they were never charged or convicted. Others refer to matters that were occurring before the grand jury. The Federal Rules of Criminal Procedure, constitutional mandates, and the ABA Model Rules on the Special Responsibilities of a Prosecutor address several of the items to which the Petitioners asked the Government to agree. The Government correctly refused to agree to those "facts," and the Petitioners cannot now use that refusal to ask the Court to adopt those "facts" as true.

A. Federal Rule of Criminal Procedure 6(e)

Rule 6(e) states that "an attorney for the government" "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B).[5] Courts have construed "a matter occurring before the grand jury" to include "events which have already occurred before the grand jury, such as a witness's testimony, [and] matters which will occur, such as statements which reveal the identity of persons who will be called to testify or which report when the grand jury will return an

[5]Petitioners have no similar obligation. *See* Fed. R. Crim. P. 6(e)(2)(A).

indictment."[6] *In re Grand Jury Investigation*, 610 F.2d 202, 216-17 (5th Cir. 1980).

While Petitioners were merely asking the Government to agree with their assertions of "fact" based upon materials Petitioners had received from counsel for Epstein, rather than asking the Government to make affirmative disclosures of grand jury material, "Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (quoting *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994)). "[E]ven if material concerning the grand jury investigation had been disclosed to the public, the Government attorney . . . had a duty to maintain grand jury secrecy. This attorney could neither confirm nor deny the information presented by the 'external party.'" *Senate of the Commonwealth of Puerto Rico* [redacted]. *United States Dep't of Justice*, 1992 WL 119127 at *3 (D.D.C. May 13, 1992) (citing *Barry* [redacted]. *United States*, 740 F. Supp. 888, 891 (D.D.C. 1990) ("Rule 6(e) does not create a type of secrecy

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[6]It is worth noting that, within the same case, a court can take differing positions on this. Compare:

> [T]he disclosure of information obtained from a source independent of the grand jury proceedings, such as a prior government investigation, does not violate Rule 6(e). A discussion of actions taken by government attorneys or officials, e.g., a recommendation by the Justice Department attorneys to department officials that an indictment be sought against an individual does not reveal any information about matters occurring before the grand jury. Nor does a statement of opinion as to an individual's potential criminal liability violate the dictates of Rule 6(e).

With:

> Disclosures which expressly identify when an indictment would be presented to the grand jury, the nature of the crimes which would be charged, and the number of persons who would be charged run afoul of the secrecy requirements codified in Rule 6(e).

In re Grand Jury Investigation, 610 F.2d at 217, 218. In light of such conflicting directives, the government must err, if at all, on the side of treating all information related to grand jury proceedings as "matters occurring before the grand jury."

which is waived once public disclosure occurs. The Government is obligated to stand silent regardless of what is reported, accurate or not, by the press.").)

The reasons for Rule 6(e) are multiple:

> In addition to preventing adverse pretrial publicity about a person who may be indicted and subsequently tried, secrecy protects the reputation of a person under investigation who is not indicted. The secrecy requirement also encourages reluctant witnesses to testify without fear of reprisals from those against whom testimony is given, prevents tampering with grand jury witnesses in an effort to alter their trial testimony, and permits the grand jury to deliberate free from the influence of publicity. Finally, secrecy prevents disclosures to persons who may be interested in the investigation if the facts are known or might attempt to escape if they have reason to believe certain indictments will issue.

United States [redacted]. *Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983) (citing *United States* [redacted]. *Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958)).

Several of the "facts" contained in Petitioners' submission contain allegations related to matters occurring before the grand jury. Pursuant to Fed. R. Crim. P. 6(e), the Government cannot confirm or deny the accuracy of those allegations.

B. Due Process and the ABA Rule for Prosecutors

As noted above, one of the reasons behind 6(e) is to protect the reputations of persons who are under investigation but not indicted. This is a corollary to what the Court of Appeals found to be a due process protection afforded by the Fifth Amendment of the United States Constitution – namely, "that the liberty and property concepts of the Fifth Amendment protect an individual from being publicly and officially accused of having committed a serious crime, particularly where the accusations gain wide notoriety." *See In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981) (citation

omitted).[7] In *Smith*, the petitioner filed a motion seeking to have his name stricken from the factual proffers of two criminal defendants. Smith had not been criminally charged or convicted. The Court of Appeals agreed with Smith, castigating the Government:

> no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights. . . .
>
> [W]e completely fail to perceive how the interests of criminal justice were advanced at the time of the plea hearings by such an attack on the Petitioner's character. The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct without affording him a forum for vindication.

Id. at 1106, 1107. The Court of Appeals ordered the District Court Clerk's Office to "completely and permanently obliterate and strike from the records of the pleas of guilty . . . any and all identifying reference to or name of Mr. Smith, the Petitioner, so that such references may not be used as a public record to impugn the reputation of Petitioner." *Id.* at 1107. The Court further ordered that all of the pleadings in the case be sealed. *Id.*

Courts have interpreted *Smith* to apply not only to references to unindicted co-conspirators in indictments and factual proffers, but also to motion papers. *See, e.g., United States* [redacted]. *Anderson*, 55 F. Supp. 2d 1163, 1168 (D. Kan. 1999) ("After carefully reviewing the government's moving papers on the conflict of interest issue, the court can find no reason why the government might have 'forgotten' the presumption of innocence in such a public pleading . . .") (citing *Smith*, 656 F.2d at 1107); *United States* [redacted]. *Holy Land Foundation*, 624 F.3d 685 (5th Cir. 2010) (Fifth Amendment rights of organization were violated when its name was listed among 246 unindicted coconspirators

[7]This opinion of the Fifth Circuit was made binding precedent in the Eleventh Circuit pursuant to *Bonner* [redacted]. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

in pre-trial brief).

The Model Rules further advise prosecutors not to engage in comments that "have a substantial likelihood of heightening public condemnation of the accused." (ABA Model Rule 3.8.)

In Petitioners' "Statement of Undisputed Material Facts," they included allegations related to crimes for which Epstein and several other individuals were neither charged nor convicted. Pursuant to *Smith* and its progeny, and as previously explained to Petitioners' counsel, the Government denies all such allegations, including but not limited to the allegations contained in paragraphs 1, 2, 4, 5, 10, 11, 17, 37, 52, and 53.[8]

III. THERE IS NO LEGAL OBLIGATION THAT THE UNITED STATES ADMIT OR DENY THE PETITIONERS' "FACTS," MANY OF WHICH ARE FALSE.

Although docketed as a Civil Case, the CVRA does not provide for a civil cause of action. *See*, e.g., 18 U.S.C. § 3771(d)(6). Rather, the CVRA creates rights for victims in federal criminal cases where criminal charges have already been filed. 18 U.S.C. § 3771(b)(1) ("In 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)."); *see also* Fed. R. Crim. P. 60 (incorporating CVRA into Federal Rules of Criminal Procedure). Thus, there is no obligation in this case, as there might be in a case governed by the Federal Rules of Civil Procedure where sovereign immunity was waived, that requires the United States to make any evidentiary disclosures.

Petitioners next rely on Local Rule 88.10(O), which governs discovery in criminal cases. First, no standing discovery order has been entered because no criminal proceedings are pending.

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[8]It should be noted that Petitioners preface many of these allegations with a *false* imprimatur of FBI findings. Compare, for example, paragraph 5 with the pages cited in support thereof.

Second, victims are not "parties" to criminal proceedings. *See, e.g., In re Amy Unknown*, ___ F.3d ___, 2011 WL 988882 at *2 (5th Cir. Mar. 22, 2011). ("Crime victims have not been recognized as parties, and the Federal Rules of Criminal Procedure do not allow them to intervene as parties to a prosecution.); *United States* [redacted] *Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010) ("Notwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding.). Third, many of Petitioners' asserted "facts" are not facts at all, but instead are inferences, legal conclusions, or innuendos. And, most importantly, many are plainly false.

As stated above, the United States does not believe that any of these issues are material to the resolution of the Emergency Petition or Jane Does #1 and #2's Motion for Finding of Violation of the CVRA [DE1 and DE48]. Nonetheless, to correct misstatements in the record, the United States points out the following examples of areas where Petitioners have included "undisputed facts" that are known to them to be in dispute.

Prior to Epstein's state court plea, Jane Doe #2 was represented by counsel for Epstein, was adverse to any investigation of Epstein, and contacted other potential victim-witnesses and advised them not to speak to investigators. When interviewed by the FBI and the U.S. Attorney's Office, Jane Doe #2 denied any sexual abuse by Epstein and said that Epstein was an "awesome man" and that she would marry him. Jane Doe #2 further expressed a belief to the government that Epstein should not be prosecuted.

Jane Doe #2 not only made the government's investigative efforts more difficult, she also made the victim notification process more difficult. A great deal of the complaints made by the Petitioners come from the delay between the time that Epstein signed the NPA on September 24,

2007, and when he actually entered his guilty plea on June 30, 2008. (*See* DE 48 at ¶¶ 25, 32, *et seq.*) As set forth in their "Statement of Undisputed Facts," this was the period when Epstein "sought higher level review within the Department of Justice." (*Id.* at ¶ 32.) As is known to Petitioners, but as they neglected to mention in their "Statement of Undisputed Material Facts," one of the unfounded allegations made against AUSA [redacted] by Epstein's counsel during the "higher level review" was that she "wrongfully" tried to include Jane Doe #2 among the list of Epstein's victims. Ironically, these same attempts to protect Jane Doe #2's rights are now being used by Jane Doe #2 to allege violations of the CVRA.

Petitioners also allege that the letters sent to Jane Doe #1 and Jane Doe #2 during the period when Epstein was pursuing Justice Department review, which stated that their cases were still under investigation, were false. Yet Petitioners know that the investigation was ongoing because, as stated in their own "Statement of Undisputed Material Facts," on "January 31, 2008, Jane Doe #1 met with FBI Agents and AUSA's from the U.S. Attorney's Office." (DE48 at 17.) And another individual represented by Petitioners' counsel was interviewed on May 28, 2008. These and other interviews were conducted so that, if Epstein did not follow through with the NPA, the Office would be ready to address that situation as appropriate. Thus, the investigation was, in fact, continuing.

The Petitioners also know that the terms of the NPA were disclosed to Jane Doe #1 shortly after the NPA was signed. Jane Doe #1 avers that she believed that Epstein agreed to pay damages to her, but agreed that he would still be federally prosecuted for criminal charges based on crimes allegedly committed against her. Petitioners aver that it is a "fact" that this was a "quite reasonable understanding." (DE48 at 12.) The Government denies that this is what Jane Doe #1 was told (*see* DE14), although there could have been an honest misunderstanding. The Government denies,

however, that it was "quite reasonable" to believe that a criminal defendant would agree to pay damages to Jane Doe #1 as part of his resolution of a criminal case involving another victim while still agreeing that he could be criminally charged for acts involving Jane Doe #1.

Furthermore, Petitioners know well that one of the reasons why the terms of the NPA were not disclosed to additional victims when Epstein began appealing to the Justice Department was because of concerns that, if Epstein did not follow through with the NPA and federal criminal charges were thereafter filed against him, Epstein's counsel would argue at trial that the victims had been told, *by the prosecution team*, that they would receive money if they claimed that they had been victimized by Epstein. This was not a frivolous concern; such allegations actually were raised by Epstein's counsel in depositions of some of the identified victims that were filed before this Court.

Petitioners also suggest that efforts were made to move proceedings to Miami to keep these Petitioners from learning of court proceedings. Yet, it is undisputed that Petitioners were notified, through counsel, of the only public court proceeding – Epstein's state court plea and sentencing – and were specifically invited to attend. The Petitioners also know that some of the victims in the case were terrified that their family members might learn of their connection to the investigation and that other victims had privacy concerns that were very different than those of Petitioners. Having the proceedings outside the glare of the victims' hometown press would have allowed those other victims to participate while maintaining some semblance of privacy.

Petitioners also reiterate baseless allegations made against AUSA Villafaña regarding the choice of the attorney-representative for the victims, despite knowing that: (1) the issue of the attorney-representative arose *after* the NPA was already negotiated; (2) the Justice Department investigated these allegations and found them to be meritless; and (3) the U.S. Attorney's Office

elected to use a Special Master (retired U.S. District Court Judge Edward Davis) to make the final selection.

The Petitioners also know that the AUSA, the agents, and the FBI's victim-witness coordinator obtained counseling services for some of the identified victims. And Petitioners are well aware that the AUSA even provided notifications of Epstein's work release status.

Paragraph 17 of Petitioners' filing also misstates a provision of the NPA. Petitioners stated that "[t]o obtain an attorney paid for by Epstein, the victim would have to agree to proceed exclusively under 18 U.S.C. § 2255 (i.e., under a law that provided presumed damages of $150,000 against Epstein[.]" Section 2255 actually provides *minimum* presumed damages of $150,000, not a "cap" of $150,000.

There are a number of additional inferences and legal conclusions interspersed in the "Statement of Undisputed Material Facts," which the Government denies. For example, contrary to Petitioners' contentions, the Government denies that notifying the victims about the NPA would have violated the NPA (DE48 at 10, ¶ 18); and that the U.S. Attorney's Office wanted the NPA to be kept confidential to avoid public criticism or to avoid victims from convincing "the judge reviewing the agreement not to accept it" (DE48 at 11, ¶ 19). The Government denies these and all other unsupported innuendos advanced by Petitioners.

CONCLUSION

For the reasons set forth herein and in the United States' Response to Jane Does #1 and #2's Motion for Finding of Violations of the Crime Victims Rights Act and Request for a Hearing on Appropriate Remedies, the Petitioners' "Statement of Undisputed Facts" is completely irrelevant to the Court's determination of the merits of this case. As both of the parties agreed shortly after the

filing of the Emergency Petition, the Court had all of the relevant facts back in August 2008 and the matter was ready to be decided.

Petitioners cannot demand that the Government agree to their allegations, innuendos, and legal conclusions, especially when many of them would run afoul of Rule 6(e) and the Fifth Amendment and others are clearly false. Accordingly, Petitioners' Motion to Have Their Facts Accepted should be denied.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: [redacted]
Assistant U.S. Attorney
[redacted]

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

[redacted]
Assistant U.S. Attorney

SERVICE LIST

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

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Attorneys for Jane Doe # 1 and Jane Doe # 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2

[redacted].

UNITED STATES

_____/

JANE DOE #1 AND JANE DOE #2'S MOTION FOR ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE NOT TO WITHHOLD RELEVANT EVIDENCE

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to move for an order from this Court directing the U.S. Attorney's Office not to suppress material evidence relevant to this case. The Court should enter an order, as it would in other criminal or civil cases, requiring the Government to make appropriate production of such evidence to the victims.

BACKGROUND

In discussions with the U.S. Attorney's Office about this case, counsel for Jane Doe #1 and Jane Doe #2 inquired about whether the Office would voluntarily provide to the victims information in its possession that was material and favorable to the victims' case. Victims' counsel pointed out that, if they were criminal defense attorneys representing criminals, the Office would promptly turn over all information in its possession that was helpful to these criminals under *Brady* [redacted]. *Maryland*, 373 U.S. 83 (1963), and related decisions. Victims' counsel asked the Office to extend to the victims the same assistance that it would provide to criminal

defendants – i.e., to voluntarily provide to the victims information in its possession that was favorable to the victims' CVRA case.

In response, victims' counsel were informed by the Office that it could – and would -- withhold from the victims such information, apparently on the theory that the CVRA does not apply to these case or on the theory victims lack due process rights under the CVRA. The victims accordingly have been forced to file this motion, seeking an order from the Court directing the U.S. Attorney's Office to produce to the victims favorable information.

The victims are entitled to such information for four separate reasons. First, the U.S. Attorney's Office is statutorily-obligated to use it "*best efforts* to see that crime victims are . . . accorded[] the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1) (emphasis added). The Office flouts this best efforts obligation when it deliberately withholds favorable information from the victims.

Second, just as criminal defendants are entitled to receive favorable information in the Government's possession under due process rights, *see, e.g., Brady* [redacted] *Maryland*, 373 U.S. 83 (1963), victims are entitled to receive favorable information under their CVRA "right to be treated with fairness," 18 U.S.C. § 3771(a)(8) – a right that clearly includes due process considerations. The U.S. Attorney's Office is not treating the victims with fairness if it withholds the very information that might enable them to prove their case.

Third, the U.S. Attorney's Office has obligations under the civil discovery rules to voluntarily provide information to the victims. *See* Fed. R. Civ. P. 26(a)(1) (initial disclosures in civil cases). The victims' action has been opened as a civil case, and the U.S. Attorney's Office has previously argued that it should be treated as a civil case. Proceeding on this basis, the

ordinary civil discovery rules apply and the U.S. Attorney's Office should disclose relevant documents "without awaiting a discovery request." Fed. R. Civ. P. 26(a)(1)(A).

Finally, a decision by the U.S. Attorney's Office to withhold information relevant to this case has serious ethical ramifications. The attorneys have a duty of candor to the Court. It is not immediately clear how the U.S. Attorney's Office can satisfy those obligations while concealing information that might enable the victims to prove their case.

For all these reasons, the Court should enter an order directing the U.S. Attorney's Office to produce to the victims all information in its possession favorable to the victims. A proposed order to that effect is attached to this pleading, largely tracking the standard discovery order that this Court routinely enters in criminal cases.

DISCUSSION

I. THE GOVERNMENT VIOLATES ITS "BEST EFFORTS" OBLIGATIONS IF IT WITHOLDS EVIDENCE FAVORABLE TO THE VICTIMS.

The U.S. Attorney's Office is obliged to produce favorable information to the victims because of the CVRA's requirement that prosecutor use their "best efforts" to protect crime victims' rights. The CVRA directs that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall *make their best efforts* to see that crime victims are notified of, and accorded, the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1) (emphasis added). It is hard to understand how the Government can argue with a straight face that it is using its "best efforts" to protect victims' rights while simultaneously withholding readily-identifiable documents from the victims that might allow them to protect those very rights. If a best efforts

obligation means anything, it must mean that the U.S. Attorney's Office cannot suppress favorable information.

This understanding of the best efforts obligation is confirmed by the plain meaning of the phrase "best efforts." That phrase is generally understood as requiring "[d]iligent attempts to carry out an obligation." BLACK'S LAW DICTIONARY 169 (8th ed. 2004). *See generally* E. Allen Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 8 (1984). As a result, "[b]est efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take." BLACK'S LAW DICTIONARY 169 (8th ed. 2004). A reasonable prosecutor who is obligated to work to "accord" crime victims their rights, 18 U.S.C. § 3771(c)(1), would not simultaneously deny victims access to the very evidence that could help them protect their rights. Put another way, an obligation to use "best efforts" is usually understood "in the natural sense of the words as requiring that the party puts its muscles to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom." *Stabile* [redacted] *Stabile*, 774 N.E.2d 673, 676 (Mass. App. Ct. 2002). Here, far from putting its full energies towards protecting victims' their rights, the U.S. Attorney's Office is devoting its energies to blocking those rights. The cases construing "best efforts" language have routinely recognized that this language can create affirmative obligations to act. *See, e.g., Hughes Communications Galaxy, Inc.* [redacted] *United States*, 26 Cl. Ct. 123, 135 (1992) ("A best efforts clause . . . can also affirmatively obligate."). Here, the action that is affirmatively required by the U.S. Attorney's Office is to produce readily-identifiable information that will assist the victims.

It is also important to recognize that the victims here are not seeking to force some kind of burdensome wild goose chase on the U.S. Attorney's Office. In their letter to the U.S. Attorney requesting relevant evidence, the victims offered to provide a list of specific items they were seeking: "To avoid burdening your Office, we would be happy to provide a specific list of the information that we believe is material to the victims' CVRA case – a limited amount of information that could be swiftly located by your Office." Letter from Bradley J. Edwards & Paul G. Cassell to Wifredo A. Ferrer, Mar. 1, 2011. The victims have, for example, requested that the U.S. Attorney's Office provide to them unredacted copies of correspondence between the U.S. Attorney's Office and Jeffrey Epstein. Through civil discovery from Epstein, the victims have obtained half of that correspondence – the words written by the U.S. Attorney's Office – but are lacking the other half – the words written in reply by Epstein's counsel. This correspondence specifically discusses crime victims' rights, so it is obviously quite material to the victims' case. The U.S. Attorney's Office could obviously provide this information without much difficulty. But instead, the Office has refused to provide to the victims *any* of the correspondence – or, indeed, any other similar information that might assist the victims.

For all these reasons, the Court should find that the Department's "best efforts" obligations require it to produce to the victims information favorable to the victims' case.

II. THE VICTIMS HAVE A DUE PROCESS RIGHT TO ACCESS TO FAVORABLE EVIDENCE UNDER THEIR CVRA "RIGHT TO BE TREATED WITH FAIRNESS."

The victims are also entitled to receive favorable evidence in the Government's possession for the same reason that criminal defendants receive such information: fundamental considerations of fairness require that the Government not deliberately withhold relevant

information contrary to its position in court. For criminal defendants, this principle traces back to the landmark decision of *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), in which the Court explained the production of exculpatory evidence is a principle designed for

> avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecutor that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Id. at 87-88. Of course, precisely the same points can be made here about production of evidence to crime victims. The Justice Department will "win its point if justice is done" to crime victims in this case – but justice can be done only if these proceedings are fair, in the sense that all relevant information is provided to the court. To have this case move forward with the prosecutors withholding material information is to truly cast them "in the role of an architect of a proceeding that does not comport with standards of justice."

To be sure, the victims in this case do not rely on a federal *constitutional* right to due process. But they have a parallel *statutory* right under the CVRA, which promises victims of crime that they will be "treated with fairness." 18 U.S.C. § 3771(a)(8). The clear intent of Congress in passing this provision was to provide a substantive "due process" right to crime victims. As one of the CVRA's co-sponsors (Senator Kyl) explained, "The broad rights articulated in this section [§ 3771(a)(8)] are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of *due process*. Too often victims of crime experience a secondary

victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judiciary branches, to treat victims of crime with the respect they deserve." 150 CONG. REC. S4269 (Apr. 22, 2004) (emphasis added).

Because the CVRA extends a "due process" right to crime victims like Jane Doe #1 and Jane Doe #2, victims have a right to fair access to evidence to prove their case. The very foundation of the *Brady* obligation is such a notion of due process: "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady* [redacted] *Maryland*, 373 U.S. 83, 87 (1963). It would similarly violate due process – and thus not treat victims with "fairness" -- for the prosecution to suppress evidence favorable to a crime victim where the evidence is material either to proving a CVRA violation or to the remedy for a violation.

The *Brady* principles are well understood, and the Government does not have difficulty in providing favorable information to criminal defendants. For example, it is our understanding that such discovery was provided by the government to Jeffrey Epstein during the course of negotiations that led to the non-prosecution agreement in this case. If the Government's obligations to see "that justice is done," *Brady*, 373 U.S. at 87, requires it to produce helpful information to a sex offender, surely principles of fairness require the same kind of production to the sex offender's victims when they are properly pursuing a contested case against the Government before this Court.

The familiar *Brady* principles are so commonplace that this Court routinely enters a "Standing Discovery Order" in criminal cases directing the Government to provide favorable

evidence to the defendant. The Order typically provides: "The government shall reveal to the defendant(s) and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilty or punishment within the scope of *Brady* [redacted]. *Maryland*, 373 U.S. 83 (1963), and *United States* [redacted]. *Agurs*, 427 U.S. 97 (1976)." *See, e.g.*, Standing Discovery Order, *United States* [redacted]. *Enriquez*, No. 1:10-CR-20488-MGC (July 9, 2010) (doc. #115). These Standing Discovery Orders follow from identical language in the local rule on these issues. *See* Local Rule 88.10.

Interesting, the Standing Discovery Order – and associated local rule 88.10(O) – contains a broad, commonsense provision which the Government has plainly violated in this case. The Order provides: "The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth or existence of which is not contested and the early resolution of which will expedite the trial." For more than two-and-a-half years, the victims have been trying to get the Government to stipulate to undisputed facts, precisely as the Court's rules envision. The Government, however, has refused to do so.

It is a simple matter to tailor the Standing Discovery Order from a situation involving a criminal defendant's need for information to the current situation of a crime victim's need for information. A proposed order to that effect is attached to this pleading, largely tracking the language of the Standing Discovery Order. The Court should enter that order. The Court has its own obligations to ensure that victims' rights are protected. The CVRA directs 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 the CVRA]" – rights that include a right to "be

treated with fairness." *See* 18 U.S.C. § 3771(b)(1), (a)(8). The Court should ensure fair treatment for the victims by directing the Government to produce relevant evidence.

III. THE VICTIMS ARE ENTITLED TO DISCLOSURE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

The victims are further entitled to receive information favorable to them under the rules civil procedure. The victims' petition seeking to set aside the non-prosecution agreement has been opened as a civil case – as reflected in the case number the matter has borne for the last two-and-a-half years: 9:08-CV-80736-Marra/Johnson. Indeed, the Government has seized on this point to deny the victims rights that they would otherwise enjoy in a criminal case. For example, on October 27, 2010, the U.S. Attorney's Office advised Jane Doe #1 and Jane Doe #2 that the Office was taking the position that they did not enjoy a right "to confer" with the Office under the CVRA, 18 U.S.C. § 3771(a)(5), in this enforcement action because the action was "civil" litigation rather than criminal litigation. *See* Doc. #41 at 1-2.

If the U.S. Attorney's Office is correct that this matter is "civil" litigation, then the Federal Rules of Civil Procedure govern discovery. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceeding in the United States district courts . . . .").[1] Under those Rules, generous discovery is provided. Of particular relevance to this motion is the requirement under Fed. R. Civ. P. 26(a)(1)(A) that parties are automatically required produce relevant information to a case without waiting for a discovery request. In light of the Government's position that this case is civil litigation, the victims have been making (and are

[1] Rule 1 note that there are certain limitations to application of the Civil Rules, found in Fed. R. Civ. P. 81. None of the limitations in Rule 81 (e.g., for bankruptcy and citizenship proceedings) apply in this case.

continuing to make) initial disclosures consistent with Rule 26(a)(1)(A). But the U.S. Attorney's Office has recently informed the victims that they do not believe that this Rule applies to their case and that they will not be making any such disclosures. Accordingly, the victims seek an order from the Court requiring the ordinary kinds of document production that are made in civil cases.

To order the Government to make such production, the Court need not engage in metaphysical ruminations about whether this CVRA enforcement action is ultimately a "civil" case or a "criminal" case. For purposes of this motion, it is enough to say that the Government has taken the position that it is a civil action and therefore the Government must at least carry through on the discovery obligations that attend civil cases.

Moreover, Congress clearly allowed the filing of this action in this Court. *See* 18 U.S.C. § 3771(d)(3) (allowing assertion of CVRA rights "in the district court in which a defendant is being prosecuted or, *if no prosecution is underway, in the district court in the district in which the crime occurred.*"). Congress did not specify whether such actions would be civil or criminal in nature. But Congress no doubt envisioned at least a minimum level of cooperation with victims by the Government. Congress, in fact, mandated prosecutors to make their "best efforts" to afford victims their rights. In a case such as this one where there is a dispute about the factual events surrounding, it makes sense to read the CVRA has at least giving victims access to information that might prove their case rather than permitting the Government to suppress such evidence. The Court should accordingly require the Government to make the disclosures that it would ordinarily make in a civil case. The proposed order attached to this pleading includes a provision to that effect.

IV. ALLOWING THE GOVERNMENT TO WITHHOLD RELEVANT EVIDENCE WOULD RAISE SERIOUS ETHICAL ISSUES.

On a final note, it is worth considering the ethical ramifications of the Government's stark position that it can withhold even relevant and material evidence from the victims in this case. Prosecutors, no less than other attorneys, have duties of candor to the Court that would not permit them to present evidence or testimony to the Court that is known to be false. Fla. Bar Rule 4-3.3(a)(4). Allowing the victims access to evidence favorable to their claim will insure compliance with this rule. Similarly, in an ex parte proceeding, a lawyer must inform the court of all material facts known to the lawyer that will enable the court to make an informed decision "whether or not the facts are adverse." Fla. Bar. Rule 4-3.3(d). If the U.S. Attorney's Office is correct that the victims are not entitled to access to favorable evidence, then the proceedings involving that evidence are essentially ex parte – requiring the Office to make disclosures to the Court with notice to the victims.

An illustration of this problem comes from the sworn declaration filed by one of the AUSA's in this case in support of the Government's response to the victims' petition. This sworn affidavit recounts a provision in the non-prosecution agreement that would have placed victims of Epstein's sexual abuse in "the same position as they would have been had Mr. Epstein been convicted at trial." Declaration of [redacted], July 9, 2008 (doc. #14) at 3-4. The affidavit also goes on to say that "these provisions were discussed," *id.* at 4, apparently referring to this provision. *Id.* (noting that "as explained above" there was a remedy for crime victims). And the declaration notes that on July 9, 2008, the victims in this case (including Jane Doe #1) were notified about the existence of this provision.

On October 9, 2008, victims' counsel wrote to government counsel, pointing out that this declaration appeared to be (albeit inadvertently) false in two important respects. First, the quoted provision was not actually in the non-prosecution agreement. And second, if it was discussed with Jane Doe #1, for example, then that would have created false impression. Victims' counsel asked for a clarification to be filed with the Court about these two points. *See* Exhibit "A."

In response, on December 22, 2008, the government filed a supplemental declaration. Doc. #35. The corrective supplemental declaration addressed the first point, agreeing that the information was false. The supplemental declaration, however, did not address the second question of whether this false information had previously been discussed with the crime victims. Moreover, the supplemental declaration raised additional question about Epstein's role in the false information. The supplemental declaration states the Epstein's attorney's approved the transmission of false information to the victims on and about July 9, 2008. Doc. #35 at 2. But none of the underlying information regarding the approval of that false information is included in the supplemental declaration.

Rather than have the government serving as the exclusive conduit for information to the Court about these subjects, it seem more consistent with the spirit of the ethical rules – and with the general obligations of disclosure discussed previously in this pleading – for the Government to make available to the victims all material and favorable information. For example, the Government could provide to the victim the underlying correspondence with Epstein's attorneys approving the transmission of this false information. This information will be highly relevant to the victims' position that the non-prosecution agreement should be set aside in view of violations

of the victims' rights. The Court should accordingly order production of this and other similar favorable evidence to the victims.

CERTIFICATE OF CONFERENCE

As recounted above, counsel for Jane Doe #1 and Jane Doe #2 have repeatedly requested that the U.S. Attorney's Office voluntarily stipulate to undisputed facts in this case and provide material information favorable to the victims case for more than two and a half years. The U.S. Attorney's Office, however, takes the position that the victims are not entitled to any such information.

CONCLUSION

For all the foregoing reasons, the Court should order the U.S. Attorney's Office to produce information favorable to the victims. A proposed order to that effect is attached.

DATED: March 21, 2011

Respectfully Submitted,

s/ Bradley J. Edwards
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[redacted]

Attorneys for Jane Doe #1 and Jane Doe #2

CERTIFICATE OF SERVICE

The foregoing document was served on March 21, 2011, on the following using the Court's CM/ECF system:

[redacted]
Assistant U.S. Attorney
500 S. Australian Ave., Suite 400
West Palm Beach, FL 33401
[redacted]
Attorney for the Government

Joseph L. Ackerman, Jr.
Joseph Ackerman, Jr.
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Criminal Defense Counsel for Jeffrey Epstein
(courtesy copy of pleading via U.S. mail)

LAW OFFICE

Brad Edwards

AND ASSOCIATES

October 9, 2008

[redacted]
United States Attorney's Office
99 N.E. 4th Street
Miami, Florida 33132

Re: Jane Doe # and Jane Doe #2 [redacted]. United States of America
Case No.: 08-80736-CIV-MARRA/JOHNSON

Dear [redacted]:

I am writing to call to your attention two potentially false statements that the Government made, albeit inadvertently, in a sworn declaration submitted to the Court in connection with the above-captioned case. I request that your office file a corrected declaration and accompanying explanation.

The first statement is found at page 3 to 4 of the July 9th, 2008 declaration of [redacted]. There a provision in a plea agreement with Mr. Jeffrey Epstein is recounted. As we understand the Government's current position in this case, it is that this provision is not in fact part of the plea agreement in this case. If our understanding is correct, then Ms. [redacted] has filed a false affidavit with the court, albeit inadvertently. We respectfully request that she file a new affidavit that corrects this false information, along with all other information relevant to understanding how the false information came to be provided to the court – and to the victims in this case. This correction should, in my view, include more details about how Epstein and his attorneys approved a submission of false information to the victims as you stated on Page 5, n.2 in your October 8, 2008 filing "Respondent's Opposition to Victims' Motion to Unseal Non-Prosecution Agreement" – presumably knowing that litigation surrounding the victims' rights issues was on-going and that such false information might be ultimately presented to the court. Such information is highly relevant to what remedy the victims might ultimately choose to seek for violations of their rights in this case.

The second statement may or may not be false, but may need some clarification. At page 4 of Ms. [redacted] declaration, she states that "[i]n October 2007, shortly after the agreement was signed, four victims [including C.W.] were contacted and *these provisions were discussed*" (emphasis added). Similarly at page 5, the declaration states: "After C.W. had been notified of the *terms of the agreement* ….." (emphasis added). I write to inquire whether, in view of the fact that the provision noted above is not in fact (according to the Government's current view) part of the plea agreement, whether this was the provision that the government (inaccurately) discussed with the victims. Put another way, I am wondering whether the Government will now stipulate that it, at most, discussed with the victims a provision in the plea agreement that never was actually part of the plea agreement.

2028 HARRISON STREET, SUITE 202, HOLLYWOOD, FLORIDA 33020

[redacted]

I continue to be interested in working out a joint stipulation of proposed facts in this case with the Government. If you would like to proceed in that direction, please give me a call. If, however, the Government is not willing to work out a joint stipulation of facts, then I need to have the record be as clear as possible, and at a minimum would request that the Government correct the inaccurate information it has provided to the court and clarify precisely how such inaccurate information came to be made a part of the record and the extent to which Mr. Epstein, through his attorneys, was culpable.

Sincerely,

BE/sg

Brad Edwards

2028 HARRISON STREET, SUITE 202, HOLLYWOOD, FLORIDA 33020

[redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2

[redacted].

UNITED STATES
_____/

[PROPOSED] ORDER GRANTING JANE DOE #1 AND JANE DOE #2'S MOTION FOR ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE NOT TO WITHHOLD RELEVANT EVIDENCE

THIS CAUSE comes before the Court on Jane Doe #1 and Jane Doe #2's Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence, filed March 21, 2011.

It is ORDERED AND ADJUDGED that the Motion is GRANTED.

1. The government shall reveal to the victims and permit inspection and copying of all information and material known to the government which may be "favorable" to the victims, *see Brady* [redacted]. *Maryland*, 373 U.S. 83 (1963) (discussing evidence "favorable" to defendants); *United States* [redacted]. *Agurs*, 427 U.S. 97 (1976) (same), on issue of possible violations of their rights under CVRA and remedy for such violations, including any impeachment information under *Giglio* [redacted]. *United States*, 405 U.S. 150 (1972).

2. The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the proceedings.

3. The parties shall make to each other the disclosures required under Fed. R. Civ. P. 26(a)(1)(A).

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this ___ day of March, 2011.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

UNITED STATES' RESPONSE TO JANE DOE #1 AND JANE DOE #2'S MOTION FOR ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE NOT TO WITHHOLD RELEVANT EVIDENCE

Respondent, United States of America, by and through its undersigned counsel, files its Response to Jane Doe #1 and Jane Doe #2's Motion for Order Directing The U.S. Attorney's Office Not to Withhold Relevant Evidence, and states:

I. THE CRIME VICTIMS RIGHTS ACT CREATES NO LEGAL DUTY UPON THE U.S. ATTORNEY'S OFFICE TO PROVIDE RELEVANT EVIDENCE

Petitioners maintain the U.S. Attorney's Office is "withholding" relevant evidence, which suggests there is a legal obligation to disclose such information to them. Petitioners contend the government has an obligation under 18 U.S.C. § 3771(c)(1) "to make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)."

Section 3771(c)(1) is no authority to impose a duty upon the U.S. Attorney's Office to provide evidence to petitioners, or allow them a right of access to records maintained by the U.S. Attorney's Office. Petitioners do not point to any of the eight rights enumerated in section

3771(a) that provides a right to access to information in the government's possession, either in the context of the criminal case in which the requesting individual is a crime victim under section 3771(e), or in a motion for relief filed under section 3771(d)(3).

Petitioners' attempt to engraft a right of access to government information to section 3771(c)(1) should be rejected. In Pennsylvania [redacted]. Ritchie, 480 U.S. 39 (1987), the Supreme Court recognized that the Confrontation Clause grants a criminal defendant a trial right to cross-examine a witness. It hastened to add, "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Id. at 52(footnote omitted). In the same vein, the obligation of the government to use its best efforts "to see that crime victims are notified of, and accorded, the rights described in subsection (a)," does not include a duty to provide information supporting whatever claim a victim may wish to assert in a motion for relief under section 3771(d)(3).

In United States [redacted]. Rubin, 558 F.Supp.2d 411 (E.D.N.Y. 2008), an alleged victim of a stock swindle claimed the right to confer in section 3771(a)(5) included a right to obtain information to base his views to express to the court. This argument was rejected by the district court, which noted that "[a]ny information-gathering aspect of the right to confer is necessarily circumscribed, in the first instance, by its relevance to a victim's right to participate in the federal criminal proceedings at hand and to do so within the bounds demarked by the CVRA." Id. at 425(citation omitted). The court found the CVRA no more requires disclosure of the pre-sentence report to meet its remedial goal of giving crime victims a voice in sentencing than it does disclosure of all discovery in a criminal case to promote the goal of giving victims a voice at

plea proceedings. Id., citing United States v. Ingrassia, 2005 WL 2875220 at *17 (E.D.N.Y. Sep. 7, 2005). The district court concluded, "[t]he CVRA, therefore, does not authorize an unbridled gallop to any and all information in the government's files." 558 F.Supp.2d at 425.

Similarly, in United States v. Coxton, 598 F.Supp.2d 737 (W.D.N.C. 2009), several crime victims invoked the CVRA in at attempt to obtain portions of the pre-sentence investigation report (PSR). The victims argued that the CVRA granted them the implicit right to access to the request portions of the PSR in order to prepare for sentencing. Id. at 739. The district court rejected the victims' argument. The court first noted the confidential nature of a PSR, Id. at 738-39, and then found that a victim's right to be reasonably heard at sentencing did not grant a right of access to the PSR. The court relied upon In re Brock, 262 Fed.Appx. 510 (4th Cir. 2008), which held that a victim's right to be heard does not afford access to a PSR, since the victim had been provided ample information concerning the applicable Sentencing Guidelines and other issues related to the defendants' sentencing. The district court in Coxton found that the victims in that case were present during trial and continued to enjoy access to the United States Attorney's Office. Id. at 740.

The district court also rejected the victim's argument that their right to restitution granted a right of access to the PSR. Id. The Coxton court relied upon United States v. Sacane, 2007 WL 951666 (D.Conn. Mar. 28, 2007), where the victim of a fraud sought access to the convicted defendant's financial status by invoking the CVRA. The Sacane court relied upon the caselaw finding a victim had no right to the defendant's PSR, and found that, "if the CVRA does not provide crime victims with a right to disclosure of the presentence report, that *a fortiori* it would not provide crime victims with a right to obtain such disclosures directly from a defendant."

2007 WL 951666 at *1.

Other attempts to engraft discovery rights onto the CVRA have also been rejected. In United States v. Moussaoui, 483 F.3d 220 (4th Cir. 2007), several victims in the September 11, 2001 terrorist attacks sought access to files and records provided by the government to defendant Moussaoui, in satisfaction of the government's criminal discovery obligations. The victims were plaintiffs in civil actions filed in the Southern District of New York, against private airlines, airports, and security services. Id. at 224. The victims sought non-public criminal discovery materials for use in their civil actions.

In its opinion, the Fourth Circuit noted the victims had relied heavily upon the CVRA and the Air Transportation Safety and Stabilization Act (ATSSSA) in the district court, to support their claim of a right to access the criminal discovery information. Id. at 234. On appeal, however, the civil plaintiffs abandoned the argument that those two statutes provided the district court the authority to enter an order compelling the government to provide to the civil plaintiffs certain categories of information. The appellate court observed that, "[t]his was wise strategy, as nothing in those two statutes supports the district court's exercise of power." Id.

As to the CVRA, the Fourth Circuit found "[t]he rights codified by the CVRA, however, are limited to the criminal justice process; the Act is therefore silent and unconcerned with victims' rights to file civil claims against their assailants." Id. at 234-35, citing In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006). There is no criminal justice process in the instant case since no criminal charges have been filed. Even if the criminal justice process has been initiated by the filing of charges, courts have rejected claims by victims that one or more of the rights in section 3771(a) create a right of access to information in the government's possession; Coxton (no right

to PSR); Kenna (same); and Sacane (no right to financial information from defendant). The CVRA imposes no duty on the U.S. Attorney's Office to provide evidence to petitioners to assist them in presenting their claims under the CVRA.

II. PETITIONERS HAVE NO DUE PROCESS RIGHTS UNDER THE CVRA

Petitioners also contend they have a right to due process under the CVRA, and liken their situation to the rights enjoyed by criminal defendants. DE 50 at 5-9. This argument suffers from a fundamental defect, the absence of any protected life, liberty, or property interest, which would trigger the due process clause.

"The necessary first step in evaluating any procedural due process claim is determining whether a constitutionally protected interest has been implicated." Tefel [redacted]. Reno, 180 F.3d 1286, 1299 (11th Cir. 1999), citing Economic Dev. Corp. [redacted]. Stierheim, 782 F.2d 952, 954-55 (11th Cir. 1986)("In assessing a claim based on an alleged denial of procedural due process a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process."). Petitioners concede that "the victims in this case do not rely on a federal *constitutional* right to due process." DE 50 at 6(emphasis in original).

However, they contend that section 3771(a)(8), which provides that a crime victim should be treated with fairness and with respect for the victim's dignity and privacy, creates a statutory right. Petitioners argue that Congress intended to provide a substantive due process right to crime victims. DE 50 at 6. This argument is plainly incorrect. There is no life, liberty, or property interest implicated in the CVRA, and courts are hesitant to find that a substantive due process right has been created. See Collins [redacted]. City of Harker Heights, Texas, 503 U.S. 115,

125 (1992)("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open ended. (citation omitted). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."). This judicial reluctance would be particularly well-founded in the instant case, where petitioners are maintaining that Congress's use of the amorphous terms "fairness" and "respect for the victim's dignity and privacy" have created a substantive due process right.

Similarly unavailing is petitioners' reliance upon Brady [redacted]. Maryland, 373 U.S. 83 (1963), and other criminal law cases finding a due process obligation on the government's part to disclose exculpatory and impeachment information. Petitioners are charged with no crime, and they are in no jeopardy of losing their liberty. Consequently, the government has no due process obligation to provide information to petitioners.

III. PETITIONERS HAVE NO RIGHT TO DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioners argue they are entitled to discovery under the Federal Rules of Civil Procedure, but they point to no particular rule, or case, which provides that such a discovery rights exists. Instead, petitioners seize upon the government's assertion that the right to confer under section 3771(a)(5) only applied to the criminal case, not to a civil action filed to attempt to enforce rights under the CVRA.

Petitioners filed their motion for relief under section 3771(d)(3). Such motions for relief are filed in the district court "in which a defendant is being prosecuted for the crime," or "if no prosecution is underway, in the district court in which the crime occurred." If a motion under

section 3371(d)(3) is filed in the district court in which the defendant is being prosecuted, the motion is being entertained as part of the criminal case, not a civil action. In the instant case, petitioners filed their motion under the second provision. Presumably, because there was no criminal case, the Clerk's Office assigned the motion a civil case number.

Congress created a procedure by which a putative victim could seek relief for alleged violations of CVRA rights. If a section 3771(d)(3) motion were filed in an existing criminal case, the Federal Rules of Civil Procedure would not apply, since it is not a civil case. Under petitioners' theory, because of the happenstance that no criminal case was pending, and the Clerk's Office assigned the motion a civil case number, they are entitled to full discovery under the Federal Rules of Civil Procedure.

Petitioner's theory is illogical because there is no basis for believing that Congress intended individuals seeking relief under section 3771(d)(3) to enjoy widely differing procedural rights, depending on whether there was a criminal case pending. If a putative victim filing a motion in an existing criminal case would be entitled to no discovery under the Federal Rules of Civil Procedure, then none should exist where there is no existing criminal case.

IV. THE GOVERNMENT ATTORNEYS' DUTY OF CANDOR DOES NOT CREATE A RIGHT OF ACCESS TO INFORMATION

Petitioners argue that, because the government's attorneys owe a duty of candor to the Court, they are entitled to have access to government records in order to ensure the government attorneys are honoring their ethical obligations. DE 50 at 11-13.

The government's attorneys are well-aware of their obligations of candor to the Court. If the Court believes any attorney in the instant case has breached that ethical duty, it has the

authority to take remedial action to factually determine whether the duty has been breached. However, the mere existence of an attorney's duty of candor to a court does not a right of access to information in the opposing party, to ensure the ethical duty is being met.

CONCLUSION

Petitioners' motion for order directing the U.S. Attorney's Office not to withhold relevant evidence should be denied.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: [redacted]
Assistant U.S. Attorney

[redacted]

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

[redacted]
Assistant U.S. Attorney

SERVICE LIST

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANDE DOE #2

[redacted]

UNITED STATES

_____/

JANE DOE #1 AND JANE DOE #2'S MOTION TO USE CORRESPONDENCE TO PROVE VIOLATIONS OF THE CRIME VICTIMS' RIGHT ACT AND TO HAVE THEIR UNREDACTED PLEADINGS UNSEALED

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to move this Court to allow use of correspondence between the U.S. Attorney's Office and counsel for Jeffrey Epstein to prove violations of the Crime Victims' Rights Act. Because this Court has already ruled that the correspondence is not privileged – and because it is highly relevant to the victims' case – the motion should be granted. The victims' unredacted pleading quoting the correspondence should also be unsealed, particularly in light of the intense, international public interest in Epstein's controversial plea deal.

BACKGROUND

As the Court is aware, beginning 2008, Jane Doe #1 and Jane Doe #2 pursued civil litigation against Jeffrey Epstein for sexually abusing them. During the course of that litigation, in June 2001, they obtained correspondence between the U.S. Attorney's Office and Jeffrey Epstein's legal counsel. Jane Doe #1 and Jane Doe #2 ultimately settled their civil suits in July 2010. During the settlement discussions, they informed Epstein's legal counsel that they would

be using the correspondence in this CVRA action. Epstein requested advance notice of such filing. Jane Doe #1 and Jane Doe #2 saw no basis for any objection to their using the materials, but agreed to give advance notice to Epstein so that he could make whatever arguments he wished. Accordingly, as part of their settlement, the victims agreed with Epstein that they would file under seal the correspondence so that Epstein would have an opportunity to object if he so desired:

> Counsel for [Jane Doe #1 and Jane Doe #2] have received, as part of discovery in this lawsuit, certain correspondence between Epstein's agents and federal prosecutors. [Jane Doe #1 and Jane Doe #2] may desire to use this correspondence to prove a violation of [their] right to notice by the government and to be treated with fairness, dignity, and respect during criminal investigations and prosecutions under the Crime Victims' Rights Act (CVRA), 18 U.S.C. section 3771, and to seek remedies for any violation that [they] may prove. The parties agree that Epstein will receive at least seven days advance notice, in writing, of intent to so use the correspondence in any CVRA case . . . [Jane Doe #1 and Jane Doe #2] agree to . . . file the documents . . . under seal until a judge has ruled on any objection that Epstein may file."

On August 26, 2010, Jane Doe #1 and Jane Doe #2 provided the specified advance notice to Epstein of their intent to use the correspondence. The notice specifically covered this CVRA action:

> [A]s you know, there is currently pending before Judge Marra a case filed under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, in which two victims of sexual assault by [you] allege they were deprived of their rights under the Act. For example, the victims allege that there were deprived of notice of pending plea bargain arrangements and an opportunity to be heard as well as the right to meaningfully confer with prosecutors. The correspondence provided to us is compelling evidence in support of their claims, as it demonstrates that federal prosecutors were conducting plea discussions with Epstein months before they alerted the victims to any possible plea bargain. The correspondence also demonstrates a willful plan to keep the victims in the dark about the plea discussions. In light of these facts, we intend to make use of this correspondence in the [CVRA] . . . lawsuit[] . . . .

(6)

Letter from Bradley J. Edwards to Robert D. Critton, Jr., Case No. 9:08-CV-80893, Doc. #214 (attachment 2).

On September 2, 2010, Epstein filed a motion for a protective order, seeking to bar disclosure of the U.S. Attorney's correspondence in both a pending state court case and the CVRA case. Case No. 9:08-CV-80893, Doc. #214.

On September 13, 2010, Jane Doe #1 and Jane Doe #2's responded, explaining that Epstein had already litigated – and lost – the claim that the information was somehow protected. They also explained that Epstein could not object to use of the information in the CVRA case unless he intervened in the CVRA case. Doc. #217.

One day later, on September 14, 2010, the Court (Magistrate Judge Johnson) denied the motion for a protective order. Doc. #218. The Court explained that "[t]he Court agrees with [Jane Doe] . . . that if [Epstein] believes he has a valid basis for preventing disclosure of the subject documents in the subject state court proceeding, he should file a motion to that effect in the appropriate state court."

On September 28, 2010, Epstein filed an appeal of the Magistrate Judge's order. Epstein argued that because the Magistrate Judge had ruled so rapidly, he had been precluded from filing a reply brief.

On October 7, 2010, Jane Does' legal counsel filed a response (Doc. #221), explaining that no basis existed for barring use of the documents and that, in any event, Epstein needed to intervene in the CVRA case if he was going to have standing to object to use of the documents there.

On October 20, 2010, this Court (Marra, J.), entered an order (Doc. #222) remanding to the magistrate judge to give Epstein an opportunity to file a reply brief.

On November 1, 2010, Epstein filed a reply to the response to his motion for protective order. Doc. #223.

On January 5, 2011, this Court (Johnson, J.) entered an order (Doc. #226) resolving Epstein's objection. The Order began by stating: "To the extent Epstein's Counsel ask the Court to find the subject correspondence privileged and on that basis prohibiting Plaintiffs' Counsel from disclosing it in either of the two proceedings, said request is denied." *Id.* at 3. The Order, however, indicated that Jane Does' counsel should file the correspondence under seal with "the appropriate institution" so that the institution could "make the determination of admissibility as it relates to their respective cases." *Id.* at 3.[1]

DISCUSSION

I. JANE DOE #1 AND JANE DOE #2 SHOULD BE PERMITTED TO USE THE CORRESPONDENCE, AS IT IS HIGHLY RELEVANT TO THEIR CASE.

Under the Magistrate Judge's Order, Jane Doe #1 and Jane Doe #2 are directed to submit the correspondence to "the appropriate institute" for a "determination of admissibility." The victims have done that, filing only a redacted version of their pleading in the public court file,

[1] At one point, the Magistrate Judge appeared to think that the "appropriate institution" for the CVRA was the Justice Department, as the Magistrate Judge thought that Jane Doe was proceeding by way of an "*internal* Justice Department Complaint procedure." Of course, Jane Doe is not proceeding here by way of the internal Justice Department procedure, but rather the statutorily authorized procedure for filing a motion in the district court. *See* 18 U.S.C. § 3771(d)(3).

submitting an unredacted version to the Court. The victims have also submitted all of the correspondence to the Court under seal as well.

The only remaining issue for the Court under the Magistrate Judge's Order is a "determination of admissibility as it relates" to the CVRA case. The correspondence is plainly admissible, as it is highly relevant to the victims' argument that the Justice Department has intentionally concealed the existence of the non-prosecution agreement from them. The correspondence specifically shows that the U.S. Attorney's Office reached a firm non-prosecution agreement with Epstein in September 2007, but subsequently deliberately decided to conceal the existence of that agreement from the victims. The correspondence further shows that the U.S. Attorney's Office was aware of its statutory obligation to inform the victims of the non-prosecution agreement. Indeed, some of the correspondence involves specific discussion of the CVRA and victim notices.

All relevant evidence is admissible. *See* Fed. R. Evid. 402. Relevant evidence is "broadly defined," *United States v. Glasser*, 773 F.2d 1553, 1560 (11th Cir. 1985), as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Fed. R. Evid. 401. Much of the correspondence bears directly on points that the U.S. Attorney's Office has already discussed in its pleadings. The Government's Response to the Victim's Petition, for example, contains an extensive discussion of the background of the investigation, the plea negotiations, and the U.S. Attorney's Office's understanding of its obligations under the CVRA. *See* Government's Resp. to Victim's Emergency Petition for Enforcement of Crime Victims Rights Act at 3-6 (doc. #13) (citing Declaration of Asst. U.S.

Attorney Marie Villafaña). These same subjects were also discussed at length at the Court's July 11, 2008, hearing on the matter. *See, e.g.*, Tr. July 11, 2008, at 3-4, 18-19, 22-29. The correspondence provides far more detailed information on this subject than was previously available to the victims. More important, the correspondence also shows a concerted effort by the U.S. Attorney's Office and Epstein to conceal the non-prosecution agreement from the victims.

The victims should therefore be allowed to use the correspondence, as it sheds important light on the events surrounding the non-prosecution agreement, which are central to the victims' arguments that the U.S. Attorney's Office violated their rights.

II. THE VICTIMS' PLEADINGS SHOULD BE UNSEALED.

The victims' pleadings should also be unsealed. The victims have, of course, filed only a redacted version of their pleading in the court public file, thereby ensuring full compliance with the Court's order that they give Epstein a chance to object. But there is no underlying reason for sealing of these documents. The Court has already ruled that the correspondence is not privileged. Accordingly, no good reason exists for keeping the pleadings confidential, and accordingly they should be made part of the Court's public file.

In addition, no sealing order could be justified in this case. The Eleventh Circuit has instructed that the district courts must make substantial findings before sealing records in cases before it. For instance, in *United States v. Ochoa-Vasque*, 428 F.3d 1015 (11th Cir. 2005), it reversed an order from this Court that had sealed pleadings in a criminal case, emphasizing the importance of the public's historic First Amendment right of access to the courts. To justify

sealing, "a court must articulate the overriding interest along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 1030.

Here there is no overriding interest in keeping the pleadings secret. To the contrary, there is an overriding interest in having these matters exposed to public light. There is considerable public interest in the question of how a serial pedophile could arrange such a lenient plea agreement with the U.S. Attorney's Office. There has long been suspicion that Jeffrey Epstein was receiving favorable treatment in the criminal investigation because of his wealth and power. *See, e.g.,* Abby Goodnough, *Questions of Preferential Treatment Are Raised in Florida Sex* Case, N.Y. TIMES, Sept. 3, 2006, at 19 (noting questions that the public had been left "to wonder whether the system tilted in favor of a wealthy, well-connected alleged perpetrator and against very young girls who are alleged victims of sex crimes"). Indeed, the interest in the matter is strong enough that the widely-viewed television program *Law and Order: Special Victim Unit* devoted an episode to it last month, suggesting in its plot that federal government had intervened improperly to prevent effective prosecution. *See* Law & Order *Commemorates Jeffrey Epstein's Taste for Teen Hookers,* http://gawker.com/#!5751094/law--order-commemorates-jeffrey-epsteins-taste-for-teen-hookers. Also, there is strong current media interest in the case. "British tabloids have gone berserk the past two weeks with the growing scandal over the friendship that Prince Andrew, 51, fourth in line for the throne, has maintained with the multimillionaire, a registered sex offender [Jeffrey Epstein]." Jose Lambiet, *Prince's Friendship with Pedophile Causes Furor Across the Pond,* PALM BEACH POST, Mar. 9, 2011, at 2B. There are also current reports that the FBI is reopening its investigation into the matter. *See* Sharon Churcher, *FBI Will Reopen Case Against Prince's Friend,* SUNDAY MAIL (UK), Mar. 6, 2011.

Of course, the Court is not being asked in this pleading to decide the wisdom of the non-prosecution agreement entered into by the U.S. Attorney's Office. The public can make up its own mind on that subject – but only if it is allowed to review the facts surrounding the negotiation of the agreement and the treatment of crime victims during the negotiation process. The Court should accordingly unseal the victims' pleading.

III. EPSTEIN HAS NO "STANDING" TO RAISE ANY OBJECTIONS WITHOUT INTERVENING IN THE CVERA CASE.

As a courtesy to Epstein, we have provided copies of all these pleadings to defendant Epstein. It should be noted, however, that while Epstein is well aware of this CVRA action, he has chosen not to intervene. *Cf.* Fed. R. Civ. P. 24 (providing procedures for intervention). Without intervening in the case, he cannot raise any objections to use of the correspondence in this case – or to any relief that the Court might grant to the victims.

The victims have no objection to Epstein intervening in this case – at this time. If, however, Epstein delays intervention until after a reasonable period of time, the victims will argue that his motion to intervene is untimely. The victims will argue that any attempted intervention by Epstein after the date on which the Government must respond to the victims' motion for a finding of violation of the CVRA is untimely, as that is when the victims must begin drafting reply pleadings. *See United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983) (listing factors to be considered in determining whether motion to intervene is timely).

CERTIFICATE OF CONFERENCE

The Government has no objection to the motion to unseal. On August 26, 2010, Epstein was given notice of the victims' intent to use these materials in this case. He has yet to intervene in this case, let alone interpose any objection in this case.

CONCLUSION

For all the foregoing reasons, the Court should allow Jane Doe #1 and Jane Doe #2 to use the U.S. Attorney's correspondence in this CVRA action. The Court should therefore unseal the victims redacted pleading, entering the full pleading – and the attached correspondence – as publicly accessible records.

DATED: March 21, 2011

Respectfully Submitted,

s/ Bradley J. Edwards
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CERTIFICATE OF SERVICE

The foregoing document was served on March 21, 2011, on the following using the Court's CM/ECF system:

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Assistant U.S. Attorney
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Attorney for the Government

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Criminal Defense Counsel for Jeffrey Epstein
(courtesy copy of pleading via U.S. mail)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOES #1 AND #2,

Petitioners,

[redacted]

UNITED STATES OF AMERICA,

Respondent.
_____/

UNITED STATES' RESPONSE TO PETITIONERS' MOTION TO USE CORRESPONDENCE TO PROVE VIOLATIONS OF THE CRIME VICTIMS' RIGHTS ACT AND TO HAVE THEIR UNREDACTED PLEADINGS UNSEALED [DE51]

The United States of America, by and through the undersigned, hereby files this Response in partial opposition to Petitioners' Motion to Use Correspondence to Prove Violations of the Crime Victims' Rights Act and to Have Their Unredacted Pleadings Unsealed (DE51). As explained in the United States' Response to Petitioners' Motion for Finding of Violations of the Crime Victims Rights Act (DE48), and Petitioners' Motion to Have Their Facts Accepted (DE49), it is the position of the United States that this case presents a straightforward legal issue and no additional facts or evidence are necessary for the resolution of the matter. The United States also was not a party to the action wherein Petitioners were ordered to obtain court approval prior to using the correspondence as evidence.[1] Accordingly, the United States takes no position as to that portion of Petitioners'

[1]The Government does note, however, that Petitioners have filed the Non-Prosecution Agreement ("NPA") in the public portion of the Court file. (DE48, Ex. E.) That document is the subject of a Protective Order in the instant suit. (*See* DE26.) Petitioners have previously moved to

Motion, although it notes that merely attaching the correspondence to a motion without authenticating it does not make it admissible evidence.

With regard to Petitioners' Motion to Unseal, when Petitioners' originally conferred with the government, the undersigned stated that there was no objection to the motion to unseal. However, a copy of what Petitioners intended to file was not provided. Also, upon undertaking some research in preparation for a response to DE49, it was determined that the Government could not, in accordance with our legal obligations, agree to unsealing the documents referenced herein. Accordingly, for the reasons set forth herein, the United States opposes, in part, Petitioners' Motion to Unseal. Instead, the United States has filed herewith, under seal, a redacted version of DE48 and the relevant portions of Exhibit A, and asks the Court to unseal only redacted versions, if the Court decides to grant Petitioners' Motion to Unseal.

CERTAIN PORTIONS OF PETITIONERS' PLEADINGS RUN AFOUL OF FED. R. CRIM. P. 6(e) AND/OR CONSTITUTIONAL MANDATES.

Several of the "facts" that Petitioners include in their Statement of Undisputed Facts allege that Jeffrey Epstein ("Epstein") and others have committed crimes for which they were never charged or convicted. Others refer to matters that were occurring before the grand jury. The documents contained in Exhibit A to their pleading contain similar materials. The Federal Rules of Criminal Procedure and constitutional mandates dictate that these should be kept sealed.

A. Federal Rule of Criminal Procedure 6(e)

Rule 6(e) states that "an attorney for the government" "must not disclose a matter occurring

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unseal the NPA in this action, (*see* DE28,) which the Court has denied. (DE36.) Although the Government acknowledges that the NPA is a matter of public record in other courts, it is *not* a public record here. As discussed below, its disclosure, which includes names of uncharged persons, implicates Due Process.

before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). Furthermore, court hearings and court records and orders must be sealed "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(5) & (6).

Courts have construed "a matter occurring before the grand jury" to include "events which have already occurred before the grand jury, such as a witness's testimony, [and] matters which will occur, such as statements which reveal the identity of persons who will be called to testify or which report when the grand jury will return an indictment."[2] *In re Grand Jury Investigation*, 610 F.2d 202, 216-17 (5th Cir. 1980).

While Petitioners were merely asking the Government to agree with their assertions of "fact" based upon materials Petitioners had received from counsel for Epstein, rather than asking the Government to make affirmative disclosures of grand jury material, "Rule 6(e) does not create a type

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[2]It is worth noting that, within the same case, a court can take differing positions on this. Compare:

> [T]he disclosure of information obtained from a source independent of the grand jury proceedings, such as a prior government investigation, does not violate Rule 6(e). A discussion of actions taken by government attorneys or officials, e.g., a recommendation by the Justice Department attorneys to department officials that an indictment be sought against an individual does not reveal any information about matters occurring before the grand jury. Nor does a statement of opinion as to an individual's potential criminal liability violate the dictates of Rule 6(e).

With:

> Disclosures which expressly identify when an indictment would be presented to the grand jury, the nature of the crimes which would be charged, and the number of persons who would be charged run afoul of the secrecy requirements codified in Rule 6(e).

In re Grand Jury Investigation, 610 F.2d at 217, 218. In light of these conflicting directives, the government must err, if at all, on the side of treating all information related to grand jury proceedings as "matters occurring before the grand jury."

of secrecy which is waived once public disclosure occurs." *In re Motions of Dow Jones & Co., Inc.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (quoting *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994)). "[E]ven if material concerning the grand jury investigation had been disclosed to the public, the Government attorney . . . had a duty to maintain grand jury secrecy. This attorney could neither confirm nor deny the information presented by the 'external party.'" *Senate of the Commonwealth of Puerto Rico* [redacted] *United States Dep't of Justice*, 1992 WL 119127 at *3 (D.D.C. May 13, 1992) (citing *Barry* [redacted] *United States*, 740 F. Supp. 888, 891 (D.D.C. 1990) ("Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs. The Government is obligated to stand silent regardless of what is reported, accurate or not, by the press.").

The reasons for Rule 6(e) are multiple:

> In addition to preventing adverse pretrial publicity about a person who may be indicted and subsequently tried, secrecy protects the reputation of a person under investigation who is not indicted. The secrecy requirement also encourages reluctant witnesses to testify without fear of reprisals from those against whom testimony is given, prevents tampering with grand jury witnesses in an effort to alter their trial testimony, and permits the grand jury to deliberate free from the influence of publicity. Finally, secrecy prevents disclosures to persons who may be interested in the investigation if the facts are known or might attempt to escape if they have reason to believe certain indictments will issue.

United States [redacted] *Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983) (citing *United States* [redacted] *Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958)).

Several of the "facts" contained in Petitioners' submission contain allegations related to matters occurring before the grand jury. Pursuant to Fed. R. Crim. P. 6(e), the Government cannot confirm or deny the accuracy of those allegations. Likewise, portions of Exhibit A to Docket Entry 48 refer to matters occurring before the Grand Jury. Notwithstanding Petitioners' citations to the First Amendment and the interest of the press and the public in this case, the First Amendment right

of access is not absolute and sealing is appropriate in connection with grand jury proceedings. As explained by Judge Jordan in *United States v. Steinger*, 626 F. Supp. 2d 1231 (S.D. Fl. 2009):

> "The proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979), and this expectation of privacy is generally codified in Rule 6(e) of the Federal Rules of Criminal Procedure. . . . .
>
> There is a second reason why sealing is currently appropriate. As noted above, the Public Integrity Section has determined that six former or present public officials had no knowledge of, or involvement in, the alleged wrongdoing, and its probe continues against others who have yet to be indicted or cleared. The sealed documents and transcripts refer to many of those individuals by name. Disclosure of those names, and the matters being investigated, could have devastating consequences for those persons who have been cleared of any misconduct, as well as for those still under investigation. As William Shakespeare put it centuries ago, "the purest treasure mortal times afford is spotless reputation; that away, men are but guilded loam, or painted clay." W. Shakespeare, RICHARD II, ACT 1, SCENE 1, lines 177-78 (1597). And if it is true that "at every word a reputation dies," A. Pope, THE RAPE OF THE LOCK, CANTO III, line 16 (1712), then public access to the sealed documents and transcripts here could easily kill many reputations. This overriding interest is, I believe, of a higher value under [*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)] so as to warrant sealing, and provides good cause under the common-law access balancing test to preclude disclosure.

Steinger, 626 F. Supp. 2d at 1235-36 (brackets in original omitted). *See also In re Petition of American Historical Ass'n*, 62 F. Supp. 2d 1100, 1103 (S.D.N.Y. 1999) ("A cornerstone of the grand jury secrecy rule is the protection of the reputations and well-being of individuals who are subjects of grand jury proceedings, but are never indicted . . . [T]he rule of secrecy seeks to protect . . . unindicted individuals from the anxiety, embarrassment, and public castigation that may result from disclosure.") (cited in *Steinger*).

B. Due Process

As noted above, one of the reasons behind 6(e) is to protect the reputations of persons who are under investigation but not indicted. This is a corollary to what the Court of Appeals found to be a due process protection afforded by the Fifth Amendment of the United States Constitution – namely, "that the liberty and property concepts of the Fifth Amendment protect an individual from being publicly and officially accused of having committed a serious crime, particularly where the accusations gain wide notoriety." *See In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981) (citation omitted).[3] In *Smith*, the petitioner filed a motion seeking to have his name stricken from the factual proffers of two criminal defendants. Smith had not been criminally charged or convicted. The Court of Appeals agreed with Smith, castigating the Government:

> no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights. . . .
>
> [W]e completely fail to perceive how the interests of criminal justice were advanced at the time of the plea hearings by such an attack on the Petitioner's character. The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct without affording him a forum for vindication.

Id. at 1106, 1107. The Court of Appeals ordered the District Court Clerk's Office to "completely and permanently obliterate and strike from the records of the pleas of guilty . . . any and all identifying reference to or name of Mr. Smith, the Petitioner, so that such references may not be used as a public record to impugn the reputation of Petitioner." *Id.* at 1107. The Court further ordered that all of the pleadings in the case be sealed. *Id.*

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[3]This opinion of the Fifth Circuit was made binding precedent in the Eleventh Circuit pursuant to *Bonner* [redacted]. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

Courts have interpreted *Smith* to apply not only to references to unindicted co-conspirators in indictments and factual proffers, but also to motion papers. *See, e.g., United States v. Anderson*, 55 F. Supp. 2d 1163, 1168 (D. Kan. 1999) ("After carefully reviewing the government's moving papers on the conflict of interest issue, the court can find no reason why the government might have 'forgotten' the presumption of innocence in such a public pleading . . .") (citing *Smith*, 656 F.2d at 1107); *United States v. Holy Land Foundation*, 624 F.3d 685 (5th Cir. 2010) (Fifth Amendment rights of organization were violated when its name was listed among 246 unindicted coconspirators in pre-trial brief).

Petitioners' "Statement of Undisputed Material Facts," and Exhibit A to DE48 contain allegations related to uncharged crimes against not only Epstein but several other individuals.[4] In keeping with the First Amendment's limited right of access, the United States does not oppose the motion to unseal in full, rather, pursuant to *Smith* and its progeny, the relevant allegations should be redacted. *See, e.g., Smith*, 656 F.2d at 1107 (ordering Clerk's Office to "completely and permanently obliterate and strike from the records . . . any and all identifying reference to or name of Mr. Smith" and sealing all other related records); *United States v. Anderson*, 55 F. Supp. 2d 1163, 1170 (D. Kan. 1999) (ordering Clerk's Office to "completely and permanently strike" all references to petitioners); *Steinger*, 626 F. Supp. 2d at 1237 (concluding that documents must be kept fully sealed because "redactions would be so heavy as to make the released versions incomprehensible and unintelligible").

Filed herewith, under seal in accordance with Rule 6(e), is a proposed redacted copy of DE48 and the relevant pages of Exhibit A. With respect to DE48 itself, the Government has only redacted

[4]The NPA also contains such references.

language that in some way suggests that the Government (including the FBI) is the source of the allegation. However, the Government reiterates, as it has stated in its opposition to "Petitioners' Motion to Have Their Statement of Undisputed Material Facts Accepted" that it denies all of the allegations contained in Petitioners' Statement that aver violations of law by Epstein or others that have not resulted in a conviction, including but not limited to paragraphs 1, 2, 4, 5, 10, 11, 17, 37, 52, and 53. With respect to Exhibit A, out of 359 pages, the United States only seeks to redact 40 full pages, and seeks to redact individual words or sentences on an additional 20 pages.

The United States further respectfully requests that the Court allow it to redact the personal telephone number and email address of its personnel, that appears on eighteen pages in Exhibit A to DE48. The information serves no evidentiary purpose.

The United States has conferred with counsel for Petitioners on these matters. Petitioners have no objection to the redaction of the personal telephone number and email address of government personnel and to the redaction of individual statutory references in Exhibit A. Petitioners object to redactions of DE48 and to further redactions of Exhibit A. For ease of reference by the Court, the redactions that are agreed to are marked in blue; those that are in dispute are marked in red. Redactions that appear in plain black are pre-existing (i.e., they are redactions done either by Petitioners or by Epstein's counsel).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny, in part, Petitioners' Motion to Unseal its Motion for Finding of Violations of Crime Victim's Rights Act and Request for Hearing on Appropriate Remedies [DE48] and Exhibit A thereto and, instead, that the Court unseal only a redacted version of those pleadings, that is, the redacted documents filed

herewith.

Respectfully submitted,

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UNITED STATES ATTORNEY

By: [redacted]
Assistant U.S. Attorney

[redacted]

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

[redacted]
Assistant U.S. Attorney

SERVICE LIST

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Case No. 08-80736-CIV-MARRA/JOHNSON
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