

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

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

**JANE DOE #1 and JANE DOE #2**

v.

**UNITED STATES**  
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**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO  
THEIR 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 reply to the Government's Response (DE #57) to their Motion for Finding of Violations of the Crime Victims Rights Act and Request for a Hearing on Appropriate Remedies (DE #48).

The Government argues that because it chose not to formally file an indictment in this case, the victims had (for example) no CVRA right to confer with prosecutors about a secret non-prosecution agreement barring federal prosecution of Epstein for crimes committed against the victims. This position contravenes the CVRA's plain language. The CVRA covers agencies involved in the "detection" and "investigation" of federal crimes, 18 U.S.C. § 3771(c)(1), and allows victims to file for protection of CVRA rights even when "no prosecution is underway," 18 U.S.C. § 3771(d)(3). Moreover, a number of courts have ruled that the CVRA extends victims rights even before an indictment is filed. This Court should at least enter a narrow ruling that, on the facts of this case, the CVRA extends rights to Jane Doe #1 and Jane Doe #2 because the

government concluded that they were victims of specific federal offenses, sent them notices to that effect, and then negotiated with defense attorneys an agreement not to prosecute the specific offenses that were committed against these victims.

The Government violated the rights that the CVRA extended to Jane Doe #1 and Jane Doe #2. The Government did not afford the victims their right to confer about the non-prosecution agreement (NPA) it negotiated with Jeffrey Epstein – an agreement that blocked federal prosecution of Epstein for the multitude of sex offenses he committed against the victims. And equally troublingly, the Government did not treat the victims with fairness when it concealed the existence of this agreement from the victims for many months. Accordingly, the Court should hold that the Government violated the victims' rights. The Court should then establish a briefing schedule and hold a hearing on the appropriate remedy for this deliberate violation of the victims' rights.

**I. THE CVRA'S PLAIN LANGUAGE DEMONSTRATES THAT CONGRESS EXTENDED RIGHTS TO VICTIMS IN THE CRIMINAL JUSTICE PROCESS BEFORE A FORMAL INDICTMENT IS FILED.**

Congress clearly extended crime victims' rights in the criminal justice process even before the formal filing of an indictment. The CVRA plainly provides 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). The victims have cited this provision prominently and repeatedly in their pleadings. *See, e.g.*, Victims' Initial Petition at 4; Victims Summary

Judgment Motion<sup>1</sup> at 26. Yet the Government's 53-page response does not even cite -- much less discuss -- this important provision.

The Government instead boldly stakes out the broad claim that because it choose (for reasons that have never been explained) not to file "federal criminal charges . . . against Jeffrey Epstein in the U.S. District Court, Southern District of Florida, . . . [the victims] cannot invoke any protections under the CVRA." Gov't Resp. at 8. This sweeping position is simply irreconcilable with § 3771(c)(1) of the CVRA. If an indictment is a prerequisite to CVRA rights, then departments and agencies of the United States "engaged in the detection [and] investigation . . . of crime," 18 U.S.C. § 3771(c)(1) would never have any rights to "accord[]" to crime victims. Of course, an indictment takes place after detection and investigation of the crime. Thus, under the Government's construction of the CVRA, the provision covering agencies detecting and investigating crimes would be rendered a nullity, contrary to "the well-established rule of statutory construction that [courts] must give effect to every word of a statute when possible." *Accardo v. U.S. Attorney General*, 634 F.3d 1333, 1337 (11th Cir. 2011). The victims have made this point repeatedly in their pleadings. The Government responds with nothing but silence.

The Government's position flounders on other CVRA language as well. The CVRA provides that victims should "assert[]" their 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.*" 18 U.S.C. § 3771(d)(3) (emphasis added). Of course, the

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<sup>1</sup> For clarity, the victims will refer to their Motion for Finding of Violations of the Crime victims' Rights Act and Request for a Hearing on Appropriate Remedies (doc. #48) as their "summary judgment" motion.

victims did precisely what the statute commands: since “no prosecution is underway” against Epstein, they asserted their rights “in the district court in the district in which the crime occurred” – i.e., the U.S. District Court for the Southern District of Florida.

The Government does find room in its pleading to analyze this provision, calling it a mere “venue provision.” Gov’t Resp. at 13. But even assuming this a venue provision, the question remains what is the provision’s purpose. Under the victims’ interpretation of the CVRA, the provision logically explains where victims should assert their rights before an indictment is filed. Under the Government’s interpretation of the CVRA, the provision is rendered a nullity – as soon as an indictment is filed, a prosecution is already underway, and there is no need to consider where victims would file if “no prosecution is underway.”

Buried in a footnote, the Government struggles to offer some coherent meaning to the venue provision. The Government concedes that the language in the provision should not be read to be “superfluous” and gamely argues that the provision covers “the time between arrest and indictment.” *Id.* at 13 n.9. This concession gives away the game. Either CVRA rights attach at the point of indictment (as the Government claims throughout its brief) or at some earlier point in the process. Yet buried in this footnote is the Government’s contradictory admission that an indictment is not necessary to “trigger” the CVRA, as a mere arrest is sufficient. *Id.* But the Government does not offer any reason for believing that rights have to be triggered by a formal arrest of the defendant, rather than other similar events (such as the extensive plea discussions with Epstein’s defense attorneys that took place in this case).

This footnote is not the only time that the Government has conceded that the CVRA extends right to victims before the filing of an indictment. Surprisingly, the Government itself

has previously explained directly to the Court in this very case that some CVRA rights apply before the formal filing of charges. In the first hearing held in this case, the Government offered the example of the victim's right "to be reasonably protected from the accused," 18 U.S.C. § 3771(a)(1), as a right that applies before the filing of charges:

*Now, there are certain of the eight rights accorded in 3771(a) that could come up before any charge is filed. For instance, let's say somebody believes that the perpetrator of the crime is going to try to harm them or threaten[] them or intimidate[] them into not testifying or cooperating with the government and, of course, no indictment has been returned. If an individual went to the government and believed that the individual had not acted appropriately, they can go to the district court and say I need to have my rights under 3771(a)(1) enforced because those people are threatening me, and the government hasn't done enough. That would be a situation.*

July 11, 2008 Tr. at 10-11 (emphasis added). Of course, if the right to be reasonably protected applies before an indictment, there is no reason other rights should have the same scope.

One more statutory provision makes clear that the CVRA extends rights to victims even before an indictment is filed. The CVRA defines that a "victim" is entitled to rights as "a person directly and proximately harmed as a result of *the commission* of a federal offense . . . ." 18 U.S.C. § 3771(e) (emphasis added). Obviously, the "commission" of a federal offense takes place well before an indictment charging that particular offense, meaning that a "victim" with protected rights under the CVRA can come into existence earlier in the process. Indeed, in this case the Government has already conceded that Jane Doe #1 and Jane Doe #2 have been harmed by the commission of federal offenses, as the Government has stipulated that they are "victims"

under the CVRA. *See, e.g.*, July 11, 2008 Tr. at 14 (Government stipulation that Jane Doe #1 and #2 are “victims within the meaning of the Act”).<sup>2</sup>

In sum, the CVRA’s plain language extends rights to crime victims before the filing of any indictment – as even the Government has, at times, conceded.

## **II. CASELAW RECOGNIZES THAT VICTIMS HAVE RIGHTS BEFORE AN INDICTMENT IS FILED.**

All of the courts who have examined the CVRA have agreed with the victims’ position here and concluded that the CVRA extends rights even before the formal filing of an indictment. The most prominent example is the Fifth Circuit’s decision in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), a case that is remarkably similar to the present case. In that case, prosecutors and defense attorneys for a major corporation secretly negotiated a plea agreement to resolve the corporation’s criminal liability for an explosion at an oil refinery. They obtained an order from the district court allowing them to keep the agreement secret until it was presented in court. The plea agreement was later presented in court, and victims objected. 527 F.3d at 393. The victims argued that their CVRA right to confer with the prosecutors during the negotiation of the plea agreement had been violated. When the district court rejected their claims, the victims filed for mandamus review in the Fifth Circuit.

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<sup>2</sup> The Government claims that Congress “maintained separate legislation aimed at rights governing pre-charging protections,” Gov’t Resp. at 19, supposedly found in 42 U.S.C. § 10607. No court has cited § 10607 has bearing on construction of the CVRA. And, in any event, it was clearly the intent of Congress to put in place a new law that would “correct, not continue, the legacy of the poor treatment of crime victims in the criminal process.” 150 CONG. REC. S10910, S10911 (Oct. 9, 2004) (statement of Sen. Kyl). Accordingly, they adopted a new law to supersede “the former victims’ law [i.e. § 10607] that this bill [the CVRA] replaces.” *Id.*

The Fifth Circuit agreed with the victims that the Government violated their right to confer during the plea negotiations. The Fifth Circuit began its analysis by rejecting the very same claim that the Government advances here: that the CVRA only applies after an indictment is filed. Instead, the Fifth Circuit agreed with the victims that “*there are clearly rights under the CVRA that apply before any prosecution is underway.*” 527 F.3d at 394 (quoting *BP Products*, 2008 WL 501321 at \*11, 2008 U.S. Dist. LEXIS 12893, at \*36) (emphasis added). The Fifth Circuit then agreed with the victims that “[l]ogically, [the rights that apply before any prosecution is underway] include[] the CVRA’s establishment of victims’ ‘reasonable right to confer with the attorney for the Government.’” 527 F.3d at 394 (quoting 18 U.S.C. § 3771(a)(5)) (emphasis added). The Fifth Circuit then held that “[a]t 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.” 527 F.3d at 394.

The Government seeks to deflect the force of *Dean* by arguing that a federal criminal charge was ultimately filed in that case. Gov’t Resp. at 29. But this misses the central holding of *Dean*. While it is true that prosecutors ultimately lodged charges in *Dean*, the Fifth Circuit specifically held that the victims’ CVRA rights attached *before* the decision to file charges had been made. The Fifth Circuit concluded that “logically” the “rights under that CVRA that apply before any prosecution is underway . . . include[]” the right to confer with the prosecutor. 527 F.3d at 394. The Fifth Circuit went on to clearly explain that the CVRA “gives the right to confer. . . . [T]he victims should have been notified of the ongoing plea discussions and should

have been allowed to communicate meaningfully with the government, personally or through counsel, *before a deal was struck.*" *Id.* (emphasis added).

The Government next tries to distinguish *Dean* based on the fact that the prosecutors in the Fifth Circuit had sought a court order trying to dispense with notice to victims under the "multiple victim" exception to the CVRA, 18 U.S.C. § 3771(d)(2). Gov't Resp. at 29-30. But here again, this was not the basis for the Fifth Circuit's holding. Instead, the Fifth Circuit reasoned that the prosecutors and the district court "missed the purpose of the CVRA's right to confer. 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.*" 527 F.3d at 394 (emphasis added).

The Fifth Circuit's decision *In re Dean* is but one of a series of cases that hold that the CVRA extends rights to victims before the formal filing of charges. The district court decision in that case also reached the same conclusion. The district court in *Dean* noted that "the 'reasonable right to confer' under subsection (a)(5) [of the CVRA] is tied to the 'case.' A threshold issue is the relationship of this right . . . to the period before a charging instrument is filed." *United States v. BP*, 2008 WL 501321 at \*11 (S.D. Tex. Feb. 21, 2008). The district court then recognized that "[t]he CVRA states that the '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 which the crime occurred." *Id.* (quoting 18 U.S.C. § 3771(d)(3) (emphasis in original). The district court then firmly rejected the Government's argument (advanced both in *Dean* and here) that the CVRA only extends rights after charges are filed:

*There are clearly rights under the CVRA that apply before any prosecution is underway. For example, the right to be “reasonably protected from the accused” is not tied to a “proceeding” or “case.” The right to reasonable notice of “any release or escape of the accused” is not tied to a “proceeding” or “case.” The right to be treated with fairness and with respect for the victim’s dignity and privacy may apply with great force during an investigation, before any charging instrument has been filed.*<sup>3</sup> The government’s obligation to give victims notice of their rights under subsection (a) can apply before any charging instrument is filed, depending on which subsection (a) right is at issue and the circumstances involved.

2008 WL 501321 at \*11 (emphases added).

The district court then went on to analyze whether the right to confer applied before charges were filed. The district court explained “[t]he legislative history makes clear that, like other CVRA rights, the right to confer was intended to be broad. In a floor statement relating specifically to the right to confer, Senator Feinstein, one of the CVRA’s sponsors, stated that the right to confer was ‘intended to be expansive,’ applying to ‘any critical stage or disposition of the case.’” 2008 WL 501321 at \*11 (citing 150 CONG. REC. S4260, S4268 (daily ed. Apr. 22, 2004)). Ultimately, after reviewing various authorities, the district court concluded that the Government acted properly under the CVRA in seeking district court permission to keep the plea agreement secret until after the parties had reached an agreement. 2008 WL 501321 at \*17. Of course, if the CVRA’s right to confer did not apply before the filing of charges, there would have been no need for the Government to seek the court’s permission. And, in any event, the Fifth Circuit ultimately ruled that the victims in that case had a right to confer with prosecutors.

Another district court has also rejected the Government’s position that CVRA rights only

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<sup>3</sup> In a later part of its decision, the district court explained that the “right to fairness” is a very broad right and was designed “to promote a liberal reading of the statute in favor of interpretations that promote victims’ interest in fairness, respect, and dignity.” 2008 WL 501321 at \*15; accord *United States v. Heaton*, 458 F.Supp.2d 1271, 1272 (D. Utah 2006).

attach after an indictment. The U.S. District Court for the Eastern District of Virginia has agreed with the Fifth Circuit's ruling in *Dean*: "[T]he 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)." *United States v. Okun*, 2009 WL 790042 at \*2 (E.D.Va. 2009).

Still another decision at odds with the Government's position is *United States v. Rubin*, 2008 WL 2358591 (E.D.N.Y. 2008). This decision is instructive because it not only explains that victims have rights before the formal filing of charges, but that recognizing such rights does not create limitless obligations. *Rubin* involved victims of a fraud scheme who sought to exercise CVRA rights, including the right to confer. After discussing *Dean*, the district court explained that rights attach after an investigation has gone beyond a nascent or theoretical stage:

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. In this case, the criminal investigation of Epstein went far beyond the "nascent or theoretical stage" when the Government began negotiating a plea agreement with him. In fact, we now know that the Government was well beyond theory, having prepared a 53-page federal indictment, accompanied by an extensive "pros memo" (i.e., prosecution memorandum), consisting of more than 80 pages detailing the numerous felony sex offenses that Epstein had

committed against at least 40 young female victims over many years. The Government then negotiated extensively with defense attorneys over these charges. It was at that point (at a minimum) that the Government should have extended to the victims their right to confer.

To the same effect is *In re Peterson*, 2010 WL 5108692 (N.D. Ind. 2010), a case that the Government cites as supporting its position. Gov't Resp. at 21-22. But *Peterson* squarely rejects the Government's legal position that the CVRA only extends rights after the filing of formal criminal charges. In particular, *Peterson* held that "a victim's 'right to be treated with fairness and with respect for [his or her] dignity and privacy,' 18 U.S.C. § 3771(a)(8), may apply before any prosecution is underway and isn't necessarily tied to a 'court proceeding' or 'case' . . . ." 2010 WL 5108692 at \*2 (citing *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *United States v. BP Products North American, Inc.*, 2008 WL 501321 (S.D. Tex. 2008)). *Peterson*, however, found that on its particular facts the "conclusory allegations" in the victims' petition there did not "create a plausible claim for relief under the CVRA." *Id.* In this case, the victims have advanced far more than conclusory allegations and have a very specific claim for relief.

*Peterson* does hold that the right to confer only applies after charges have been filed. *Id.* But the authorities *Peterson* cites for that proposition prove no such thing. Confusingly, *Peterson* cited the Fifth Circuit's ruling in *Dean*, for support, 2010 WL 5108692 at \*2; but (as just explained) *Dean* held exactly the opposite. Similarly, *Peterson* cites other cases involving the right to confer after charges had been filed. But none of these cases actually presented the

issue of the CVRA's application to pre-indictment situations, since charges had already been filed in each of these cases. *See, e.g., In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008).<sup>4</sup>

*Peterson* also argues that the right to confer is limited to post-indictment situations because a victim has “[t]he reasonable right to confer with the attorney for the Government *in the case.*” 18 U.S.C. § 3771(a)(8) (emphasis added). Building on that point, the Government cites *Black's Law Dictionary* for claim that a “case” about which the victims can confer must be limited to “a suit instituted according to the regular course of judicial procedure.” Gov't Resp. at 10 (*quoting Black's Law Dictionary*). But the Government does not disclose that *Black's Law Dictionary* also clearly defines a “case” as “[a] criminal investigation” as in “the Manson case.” BLACK'S LAW DICTIONARY 228 (8th ed. 2004). *Accord* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 345 (1993) (defining “case” as “a circumstance or situation (as a crime) requiring investigation or action by the police or other agency”). Given two possible interpretations of the word “case” – one confining victims' rights to judicially-filed cases and the other extending rights more broadly – the Court should choose the more expansive interpretation. Not only is the CVRA “remedial legislation” that should be broadly construed to achieve its purposes, *Edwards v. Kia Motors of America, Inc.*, 554 F.3d 943, 948 (11th Cir 2008), but the sponsors of the CVRA stated that the right to confer was “intended to be expansive. For

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<sup>4</sup> Interestingly, in *In re Stewart*, the Eleventh Circuit stated that the CVRA “does not limit the class of victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document.” 552 F.3d at 1289. Instead, the determination is made by looking to those who suffer “harmful effects” from a crime. *Id.*

Of course, *In re Stewart* simply does not speak to what kinds of rights crime victims have before a charging document is filed, because that issue was not before Eleventh Circuit on the facts of that case. But the “harmful effects” test is easy to apply in cases such as this one. Obviously, Jane Doe #1 and Jane Doe #2 directly suffered harmful effects when Jeffrey Epstein repeatedly sexually abused them.

example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case.” 150 CONG. REC. S4260, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).<sup>5</sup> Clearly, the drafters of the CVRA would not have wanted the victims to be deprived of the opportunity to confer with prosecutors about critically important dispositions of their case. Indeed, in a later law review article about the CVRA, Senator Kyl stated emphatically that “[w]hen a case is resolved through a plea bargain without the victim’s knowledge or participation, a grave injustice has been committed by the authorities.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 602 (2005). Such a “grave injustice” is what the Government has caused the victims here to suffer.

If there were any doubt about what a “case” means, the Court need look no further than the Government’s own CVRA notices to the victims. In these notices the Government told the victims that they had rights under the CVRA, including the right to confer with prosecutors about their “case.” See Victims’ Summary Judgment Motion, Exhibits C & D. The notices also concluded: “At this time, your *case* is under investigation.” *Id.* (emphasis added). Obviously,

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<sup>5</sup> The Government extracts from this same colloquy a statement from Senator Kyl that victims have a right “to confer with the Government’s attorney about *proceedings after charging*.” Gov’t Resp. at 54 (*quoting* 150 CONG. REC. S4260, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). But read in context, it is quite clear that Senator Kyl was simply offering one illustration of the circumstances in which victims could confer with prosecutors, such as when they had questions about proceedings. Indeed, just a few sentences before the sentence quoted by the Government in this colloquy, Senator Feinstein gives examples and states that the right to confer “is not limited to these examples. I ask the Senator [i.e., Senator Kyl] if he concurs in this intent.” *Id.* (statement of Sen. Feinstein). Senator Kyl then answers “yes” and proceeds to give his own examples, including the example quoted by the Government.

the plain language of the word “case” extended more broadly than than the Government is now willing to admit in its pleadings. The Court should reject the Government’s newly-contrived limiting construction.

**III. THE GOVERNMENT IS ESTOPPED FROM ARGUING THAT THE CVRA DOES NOT EXTEND RIGHTS TO THESE VICTIMS BECAUSE THE U.S. ATTORNEY TOLD THEM THEY HAD CVRA RIGHTS.**

Not only does the CVRA extend rights to the victims for the reasons just explained, but the Government is estopped from arguing otherwise in this case. The U.S. Attorney for the Southern District of Florida has already sent official letters to Jane Doe #1 and Jane Doe #2 (and their attorney) informing them that they have CVRA rights in this case. *See* Victims’ Summary Judgment Mot. at 33-34. And the victims detrimentally relied on this information. *Id.* The Government is accordingly now estopped from taking a different position.

In response to the victims’ estoppel argument, the Government does not dispute that the victims relied on the Government’s promises. Indeed, the Government does not even challenge the victims’ point that “the U.S. Attorney’s Office engaged in affirmative misconduct.” *Id.* at 34. Instead, the Government raises a technical objection that because it was acting in a “sovereign capacity,” estoppel will not lie. Gov’t Resp. at 43-44 (*citing FDIC v. Harrison*, 735 F.2d 408 (11th Cir. 1984)). But the asserted “sovereign capacity” exception to estoppel against the Government no longer exists in the Eleventh Circuit. Instead, the Circuit has now made clear that estoppel will apply against the Government, provided affirmative misconduct is shown. For example, in *Tefel v. Reno*, 180 F.3d 1286, 1303 (11th Cir. 1999) – a more recent case than any cited by the Government – the Eleventh Circuit applied the four-factor test cited by the victims

as applicable to a claim of estoppel against the government in a deportation situation – an obvious example of the Government acting in its sovereign capacity.

Moreover, the cases that the Government cites as dealing with sovereign capacity dealt with a different subject entirely: when an *agent* of the Government can bind the Government. For instance, *United States v. Vondereau*, 837 F.2d 1540 (11th Cir. 1988), held that a government loan officer had no authority to waive payment on a government loan. The reason was that agent had no authority “to waive the debt owed or decide that the Government would not proceed against [the debtor].” *Id.* at 1541. Here, in contrast, the CVRA letters on which the victims relied were sent by the United States Attorney for the Southern District of Florida (signed “by” the Assistant U.S. Attorney prosecuting the case). *See* Victims’ Summary Judgment Motion, Exhibits C & D. The letters began: “Pursuant to the [CVRA], as a victim and/or witness of a federal offense, you have a number of rights. Those rights are: . . . (5) The reasonable right to confer with the attorney for the United States in this case; . . . (8) The right to be treated with fairness and respect for the victim’s dignity and privacy.” Exhibits C & D. Accordingly, the Government, cannot now take a new position in this litigation.

#### **IV. THE GOVERNMENT VIOLATED JANE DOE #1 AND JANE DOE #2’S CVRA RIGHTS.**

As just explained, the structure of the CVRA, court cases interpreting the Act, and the Government’s promises to the victims make clear that crime victims had rights under the CVRA in this case even though the Government ultimately decided not to indict Epstein. The Government violated these CVRA rights of Jane Doe #1 and Jane Doe #2 by deliberately concealing from them its negotiation and agreement to a non-prosecution agreement barring the

prosecution of Jeffrey Epstein for the federal offenses he committed against them. In particular, the Government violated the victims' rights to confer with prosecutors, to be treated with fairness during the criminal justice process, and to accurate notice of court hearings.

**A. The Government Violated the Victims' Right to Confer.**

The Government's almost exclusive argument is that, as a matter of law, the CVRA does not extend crime victims' rights before charging. As a result, the Government does not seem to seriously contest that, if the Court rejects its legal contention, the facts prove it did not confer with the victims. For example, the Government does not dispute the victims' proposed fact #18 that it entered into a confidentiality provision with Epstein that 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" the confidentiality provision. Nor does the Government dispute the victims' proposed fact #25 that "[a]t 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."<sup>6</sup> Many other similar facts show a clear violation of the right to confer. *See, e.g.*, Victims' Proposed Facts #7 (Jane Doe #1 told by the Government she has a right to confer), #8 (Jane Doe #2 told the same thing), #19 (Government wanted to conceal non-prosecution agreement to avoid public

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<sup>6</sup> The Government asserts that the victims only "became interested in seeing Epstein prosecuted in January 2008, [when] he had already signed the NPA." Gov't Resp. at 37. The victims strenuously dispute this assertion and request an evidentiary hearing on this point if it is important to the Court's resolution of this case.

criticism), #20 (Government failure to confer about modifications of NPA), #21 (deceptive description of case given to Jane Doe #1); #33 (false notices sent to victims).

The Government also seeks to persuade the Court not to find a violation of the right to confer by misconstruing what is at stake. Thus, the Government erects a huge strawman when it argues that the victims are asking to “open the inner workings of prosecutorial discretion” to judicial review, Gov’t Resp. at 21, and to challenge a prosecutor’s “choice of the charges to bring” and “who . . . to charge,” *id.* The victims are asking for no such thing. The victims are simply asking for a finding that the prosecutors in this case did not afford them the congressionally-protected “right to confer” about the non-prosecution agreement that the prosecutors negotiated with Epstein. The NPA barred prosecution of the federal sexual offenses that Epstein had committed *against Jane Doe #1 and Jane Doe #2*, and as such Epstein was completely unpunished for the many serious felony sexual crimes he committed against them. Under the CVRA, the victims were entitled to confer about this disposition and attempt to persuade prosecutors not to give Epstein this shockingly lenient disposition. Recognizing a right to confer about such dispositions is “not an infringement . . . on the government’s independent prosecutorial discretion; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.” *In re Dean*, 527 F.3d at 395 (internal citations omitted).

The victims fully understand that if they had conferred with the Government, the prosecutors could possibly have ultimately reached the same kind of agreement. But there is good reason to believe that if the prosecutors had exposed their dealings to scrutiny by Jane Doe #1 and Jane Doe #2, they would not have reached such a sweetheart deal. Remarkably, despite

spending 53 pages to justify what happened in this case, the Government does not write even a single sentence explaining why it entered into an NPA barring federal prosecution of a sex offender who had committed hundreds of federal sex crimes against young girls. Perhaps there is some reason for this extraordinary leniency. But if so, the Government has yet to offer it. The Government's silence fully supports the victims' proposed fact (not contested by the Government) 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." Victims' Proposed Fact #19. In any event, regardless of the ultimate consequences of conferring, Congress promised to all crime victims – including Jane Doe #1 and Jane Doe #2 – that they would be able to confer with prosecutors before a disposition was reached in their case. The prosecutors here simply violated that right.

**B. The Government Violated the Victims Right to Be Treated With Fairness.**

The Government also violated the victims "right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). Entirely apart from whether the victims had any right to confer with prosecutors, at a bare minimum they had a right to be treated fairly and not be deceived by the Government. Instead, the Government deliberately misled the victims about what was happening in their case, concealing from them the negotiation of a non-prosecution agreement and the true impact of that agreement, and sending them and their attorney false information that the case "is currently under investigation" and that "[t]his can be a lengthy process and we request your continued patience while we

conduct a thorough investigation.” Victims’ Proposed Fact #33. Obviously, a victim of crime is not treated fairly if prosecutors are deceiving them about what is going on in their case. Whatever else “fairness” might mean, it has to at least mean that they not misled. The Government violated this right too.

**C. The Government Violated the Victims’ Right to Accurate Notice.**

The Government also violated the victims’ “right to *reasonable, accurate* and timely notice of any public court proceedings . . . involving the crime . . . .” 18 U.S.C. § 3771(a)(2) (emphasis added). The Government claims that it complied with this right by giving the victims’ notice of the state court proceeding in which Epstein pled guilty to sex offenses involving other girls. Gov’t Resp. at 35.<sup>7</sup> But the Government violated the victims’ right to “reasonable” and “accurate” notice about this hearing. The Government concealed from Jane Doe #1 and Jane Doe #2 the fact that the NPA barring prosecution against them was going to be presented at the hearing. As a result, the victims thought that the hearing had nothing to do with their cases and did not attend. *See* Victims’ Proposed Fact #41. Indeed, shortly before the hearing, the Government continued to conceal what was happening with regard to the non-prosecution agreement. *See* Victims’ Proposed Fact #42. The Government misled the victims and thus simply failed in its duty to provide “reasonable” and “accurate” notice.

**V. THE GOVERNMENT’S PARADE OF HORRIBLES WILL NOT MATERIALIZE IF THE COURT RULES IN THE VICTIMS’ FAVOR.**

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<sup>7</sup> The Government also seems to argue that the CVRA did not apply to this hearing because it was held in state court. But the hearing was one “involving the crime” committed against the victims, 18 U.S.C. § 3771(a)(2), because the NPA was involved in the proceedings in state court.

The Government also tries to persuade the Court not to enforce the CVRA rights of Jane Doe #1 and Jane Doe #2 through a standard rhetorical device: the parade of horrors. Thus, the Government warns this Court that to accept the victims' position will somehow lead to an array of challenges to discretionary prosecutorial decisions. Gov't Resp. at 21 And prisoners in particular, the Government claims, will be able to tie up prosecutorial resources. *Id.*

A ruling in the victims' favor will not create any such problems. For example, nothing suggests that prosecutors in the Fifth Circuit have had difficulty implementing the *In re Dean* decision requiring pre-indictment conferring with victims in Texas, Louisiana, and Mississippi. The simple fact is that affording crime victims their rights is not complicated. For example, treating victims with "fairness" simply requires that prosecutors not conceal relevant facts from victims – something far simpler than deliberate acts of concealment. *Cf.* Sir Walter Scott ("Oh, what a tangled web we weave, when first we practice to deceive.").

The Government seems to be arguing that conferring with victims about non-prosecution agreements will be burdensome. But the Government does not explain how often it even enters into such agreements. Presumably this is because only a tiny handful of cases are resolved in this way, and the Government would be hard-pressed to find even a single one where it caused numerous felony criminal charges to simply evaporate without the dozens of victims even knowing it.

More important, the victims here are not proposing that the Court hold that prosecutors must drop everything and rush to confer with all possible victims whenever a conceivable federal crime can be hypothesized. The narrow facts of this case do not present any such need for broad holding. *Cf. In re Dean*, 527 F.3d at 394 (finding CVRA violation "on the specific facts and

circumstances of this case"). Instead, the victims here ask the Court to issue a limiting ruling, that prosecutors must confer at least when:

1. They have identified a specific federal offense(s) committed against a specific victim by a specific individual;
2. They have determined that there is sufficient evidence to support a federal criminal prosecution;
3. They have notified that specific victim that she has rights under the CVRA;
4. They then negotiate a non-prosecution agreement or plea agreement with that individual through his attorney; *and*
5. They are attempting to reach a tentative arrangement with that individual and his attorney resolving the federal criminal liability for crimes committed against the specific victim.

Of course, all of these five facts are present here. *See, e.g.,* Victims' Proposed Facts #4, #5, #6, #7, #9, #17. It is hard to imagine that such a limited holding will create difficulties for prosecutors in future cases. And, on the facts of this case, it clear both that the CVRA applied and the Government violated the victims' rights by concealing what was happening regarding the prosecution of sex offenses Epstein committed against the victims.

Proof positive that such a limited holding will create no difficulties for the Government comes from the internal e-mails cited by the victims in their opening memorandum. As these e-mails make abundantly clear, high level prosecutors in the U.S. Attorney's Office fully understood in 2007 that the CVRA already required them to notify victims about the NPA. *See, e.g.,* Victims' Proposed Facts #26, 27. Nothing in these e-mails suggests that it would have been

burdensome to notify the victims and confer with them.<sup>8</sup> And the Government has not disputed that “[a]t all times . . . 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.” Victims’ Proposed Fact #51.

A final “horrible” suggested by the Government is that adopting the victims’ position would mean that AUSAs would have “to meet and confer with each and every prisoner who alleged that he or she was the victim of an assault from another prisoner” – even if the U.S. Attorney’s Office determined that there was insufficient evidence to prosecute. Gov’t Resp. at 22-23. The Government distorts the victims’ position. The victims are not arguing for a right to confer whenever a crime *might* have been committed. Instead, the victims are urging (as senior prosecutors in the U.S. Attorney’s Office themselves recognized) that when federal prosecutors have concluded that they have sufficient evidence to charge a crime and are negotiating with defense attorneys about that crime, then they should confer with the victims as well. That rule already applies in (for example) the Fifth Circuit, and does not appear to have created any problems for the Government, in cases both inside and outside of federal prisons.

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<sup>8</sup> To be sure, there were more than 30 victims of the Epstein crimes that prosecutors would have needed to confer with. But this would not have been difficult to accomplish. Prosecutors, for example, could have held a single mass meeting for all the victims on one evening and obtained their views on the proposed non-prosecution agreement. Federal prosecutors have used such group meetings in cases involving far larger numbers of victims, such as the Oklahoma City bombing case and the W.R. Grace case. *See, e.g., United States v. W.R. Grace*, 408 F.Supp.2d 998, 1016 (D. Mont. 2005) (Community Advisory Group set up in the town of Libby, Montana to ensure compliance with the CVRA during criminal prosecution for mass environmental crime involving hundreds of community members).

**VI. THE COURT SHOULD FIND THAT THE GOVERNMENT HAS VIOLATED THE VICTIMS' RIGHTS AND SCHEDULE BRIEFING SCHEDULE AND HEARING ON THE APPROPRIATE REMEDIES.**

For all the reasons just explained, the Court should find that the Government has violated Jane Doe #1 and Jane Doe #2's rights under the CVRA. At the tail end of its brief, however, the Government briefly raises a flurry of desperate arguments to avoid such a finding. All these arguments are meritless.

The Government first claims that the victims have failed to pursue this case expeditiously. The Government does not deny that the victims timely filed their petition with this Court,<sup>9</sup> focusing instead on what has happened since then. But the Court has already ruled on whether the victims have been proceeding in a timely manner – a ruling that the Government studiously ignores. On September 8, 2010, the Court entered an order administratively closing this case (doc. #38), and just five days later the victims explained in detail the reasons for the delay in moving forward with their CVRA case, including the fact that they had been diligently pursuing vital information to prove their claims (doc. #41).<sup>10</sup> On October 28, 2010, this Court entered an order finding that the victims had shown “good cause” for the delay. That ruling is now the law of the case, and the Government fails to even discuss it – much less, offer some reason for overturning the Court's earlier finding. The Government also candidly admits that since then “the delay from October 28, 2010 through early March 2011 was due to the United States' efforts to reach [an] amicable resolution of the case . . . .” Gov't Resp. at 46 n.22.

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<sup>9</sup> The CVRA does not appear to impose specific timelines for victims to act, other than requiring the victim proceed to the court of appeals (in certain situations) within 14 days after the denial of their rights in the district court. *See* 18 U.S.C. § 3771(d)(5)(B).

<sup>10</sup> Rather than repeat all of the information in this pleading, the victims simply adopt the information therein by reference.

During those more than four months, the Government never asked the victims to move their case along more quickly. To the contrary, it was the victims who were ultimately forced to set a deadline for the Government to respond. In short, there is simply no undue delay by the victims in this case, much less a sufficient basis for denying the victims their day in court by dismissing their case.<sup>11</sup>

The Government further raises a “standing” argument. Gov’t Resp. at 50. This is nothing more than a repackaging of the Government’s (meritless) argument that the victims have no rights in this case. In any event, the Government confuses the merits of the victims’ claims with their ability to have them adjudicated. It is well-settled that “[s]tanding in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal; it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286 (11th Cir. 2010) (internal quotation omitted). The Government here has already stipulated that Jane Doe #1 and Jane Doe #2 are “victims” in this case. And Congress has specifically conferred standing on crime victims to have their CVRA claims adjudicated. *See* 18 U.S.C. § 3771(d)(1) (“The crime victim . . . may assert the rights described in subsection (a).”); *see also* 150 CONG. REC. S4260, S4269 (statement of Sen. Feinstein) (discussing § 3771(d)(1) and explaining “[t]his provision

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<sup>11</sup> The Government also attempts to raise Jeffrey Epstein’s “rights to Due Process.” Gov’t Resp. at 46. The victims are mystified as to why the Government would want to assert the rights of the criminal who sexually abused them, even at the same time as it is trying to defeat their CVRA rights. *Cf.* 18 U.S.C. § 3771(c)(1) (government attorney’s “shall make their best efforts to see that crime victims are . . . accorded” their CVRA rights). In any event, the Government obviously lacks “standing” to assert someone else’s rights – particularly where that person has already hired legions of attorneys who can speak for him. Jeffrey Epstein has deliberately chosen not to intervene in this case, and accordingly any issues regarding his rights are simply not before the Court.

ensures that crime victims have standing to be heard in trial courts . . . .”). The victims have standing to move forward with their case.

The final argument the Government raises concerns the remedy that the victims are seeking. Perhaps anticipating that the Court will be unwilling to bless its deliberate and egregious CVRA violations, the Government tries to stake out the preemptive position that this Court would be powerless to respond. This argument contradicts fundamental American jurisprudence, which holds 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).

The victims have deferred full briefing on the remedy issue because they understand it is possible that the Court may not agree that their rights have been violated. If so, extensive briefing on remedial questions would be a waste of time. Moreover, generally “the nature of the remedy is to be determined by the nature and scope of the . . . violation.” *Nichols v. Hopper*, 173 F.3d 820, 824 (11th Cir. 1999) (internal quotation omitted). Until the Court identifies the scope of the Government’s violations, it will be difficult to craft an appropriate remedy. The victims, therefore, specifically continue to request (as they did in their opening pleading at p. 37) an opportunity for full briefing and argument on the remedy question once the Court rules on whether their rights have been violated.

But while the victims are reserving full briefing, a few words in response to the Government may be useful. The Government does not dispute the victims’ overarching point that illegal plea arrangements are subject to judicial review and invalidation, even in situations where defendants may have relied on those arrangements. *See* Victims’ Summary Judgment Mot. at 37-39 (citing, e.g., *United States v. Walker*, 98 F.3d 944 (7th Cir. 1996); *United States v.*

*Cooper*, 70 F.3d 563, 567 (10<sup>th</sup> Cir. 1995); *Craig v. People*, 986 P.2d 951, 959-60 (Colo. 1999)). The Government, however, seeks to escape from the general rule that illegal plea arrangements can be invalidated on the ground that the non-prosecution agreement is somehow different. The Government claims that because a NPA would not normally be subject to “judicial scrutiny and approval,” Gov’t Resp. at 51, then the victims cannot have it invalidated under the CVRA.

The victims are not asking for “judicial scrutiny and approval” of the NPA. The victims fully understand that the ultimate decision whether to enter into such an agreement is to be made by the U.S. Attorney. But in passing the CVRA, Congress determined that federal prosecutors have to respect certain rights of crime victims’, including their right to confer and to be treated fairly. The Government is not free to violate the CVRA simply because the fruits of that violation are embodied in an NPA. The mere fact that something is covered in an NPA does not block judicial review. *See, e.g., United States v. Castaneda*, 162 F.3d 832, 834-35 (5th Cir. 1998) (reviewing issue of government’s obligations under a NPA); *United States v. Hyles*, 521 F.3d 946, 952 (8th Cir. 2008) (reviewing existence and scope of alleged NPA); *United States v. Wood*, 780 F.2d 929, 931-32 (11th Cir. 1986) (reviewing and relieving government of its obligations under a NPA).

The CVRA also commands that courts have their own obligation to protect victims’ rights. 18 U.S.C. § 3771(b)(1). Congress expected that the courts would ensure victims’ rights were respected, because “without the ability to enforce the rights in the criminal trial . . . courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims’ rights is acceptable. The enforcement provisions of [the CVRA] ensure that

never again are victim's rights provided in word but not in reality." 150 CONG. REC. S10910, S10911 (statement of Sen. Kyl) (Oct. 9, 2004).

If the Court agrees with the victims that the Government has violated their rights, it will then be appropriate for the Court to consider how to ensure that those rights are translated into a "reality" for Jane Doe #1 and Jane Doe #2. One possible remedy is invalidation of the entire NPA, since it was negotiated in clear violation of the CVRA. But more limited remedies are available as well. For example, the Court could simply remove Jane Doe #1 from the operation of the NPA, since it was her rights the Government violated. This remedy would leave the NPA in effect as to other victims, thereby eliminating any concern about their situations.

Other remedies may also exist – a subject that the Court should explore at a full hearing on the matter. But what should not be an option is what the Government seems to propose: that the Court would do *nothing* to respond to clear, deliberate, and serious violations of the CVRA. Congress expected that the courts would enforce the rights created in the CVRA. The victims request an opportunity to ask this Court to do exactly that.

#### CONCLUSION

The Court should rule that the Government has violated the victims' rights under the CVRA. The Court should then establish an appropriate briefing schedule and hold a hearing on the appropriate remedy for those violations.

DATED: May 2, 2011

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The foregoing document was served on May 2, 2011, on the following using the Court's

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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**

**v.**

**UNITED STATES**  
\_\_\_\_\_ /

**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO  
THEIR 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 reply to the Government's Response (DE #58) to their Motion to Have Their Facts Accepted Because of the Government's Failure to Contest Any of the Facts (DE #49). The victims' proffered facts should all be accepted by the Court. The Government claims that it can prevail regardless of what the true facts are, so the Court should take the Government at its word and evaluate the case on the facts presented (without contradiction) by the Government. Moreover, the Government has refused to confer in good faith with the victims about the facts, further indicating the accuracy of what the victims propose. Finally, in any event, the central facts in this case are simply not disputed – i.e., the Government does not contest that it deliberately concealed from the victims the existence of a non-prosecution agreement with Epstein. Accordingly, the Court should proceed on at least that basis.

### FACTUAL BACKGROUND

While the Government begins its response with a lengthy “background” section, it does not acknowledge that for 30 months the victims have been trying to narrow the range of disputes in this case and reach stipulated undisputed facts. In an effort to deflect attention from this main point, the Government tries to create the impression that the victims’ counsel previously agreed that no additional facts were required to resolve their petition. But the quotation from victims’ counsel is wrenched out of context. As explained in the victims’ motion, the Government first agreed to review facts, then reversed course and said no facts were needed. On August 14, 2008, a hearing was held, during which a stipulated set of facts was discussed:

THE COURT: So if I can hear from Mr. Edwards or Mr. Cassell first what the Plaintiffs' position [is] as far as where we stand on the record in terms of whether I need additional facts, evidence, or *there's going to be a stipulation submitted to me upon which I can rely.*

MR. EDWARDS: Sure.

Your Honor, this is Brad Edwards. *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.* We have actually met with the U.S. Attorney, and we've had meaningful discussions in an attempt to resolve our issues. I think the only issue, we can probably agree to this right now, is that the victims are unable at this point in time to go any further with requesting a remedy from the Court without the full and complete plea agreement being produced to us from the U.S. Government, and the U.S. Government's hands are tied in that there's a confidentiality agreement within that plea agreement that prohibits them from turning that over.

So at this point in time, we would be asking Your Honor to enter an order compelling them to turn over that. So at this point in time, we would be asking Your Honor to enter an order compelling them to turn over that agreement, and *at that point in time I think we can meet again and probably resolve our disputes amongst ourselves.*

August 14, 2008, Tr. at 3-4 (emphases added). As this full passage makes clear, victims’ counsel believed that no more evidence would be needed, because they envisioned a process under which

the non-prosecution agreement (NPA) would be produced and then the parties would negotiate in good faith to submit a stipulated set of facts to the Court. Unfortunately, after victims' counsel received the NPA, the Government refused to provide any further information about how the NPA had been concealed from the victims. That forced the victims to learn the facts surrounding their case in other ways.

In the fall of 2010, victims' counsel renewed their efforts to reach a stipulated set of facts in this case, as the Court and the parties had plainly envisioned in the August 14, 2008, hearing. Indeed, last October victims counsel went so far as to provide to the U.S. Attorney's Office a very detailed set of proposed facts essentially tracking those in the "summary judgment" motion. At first the Government promised that it would "agree[] that a factual assertion is correct if we agree that is what occurred" (doc. #41 at 2). But then, after some brief initial discussions,<sup>1</sup> the Government did not provide any more information about proposed facts for months. Then, when the victims said that they were preparing to file their motion with the Court, the Government abruptly terminated any further discussions on the facts. In sum, it should be clear that the Government has refused to negotiate with victims' counsel to arrive at a stipulated set of facts and has not contested the material facts that the victims believe to be accurate.

### DISCUSSION

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<sup>1</sup> During one telephone conference call in October 2010, attorneys for the U.S. Attorney's Office mentioned that they believed that Epstein lived in Palm Beach, rather than West Palm Beach. At the conclusion of that conference call, victims counsel understood that Government counsel would be providing a comprehensive response to all of the victims' proposed facts. But then, after several months, on March 15, 2011, the Government abruptly said that it would not be discussing the facts any more. Accordingly, victims' counsel simply filed their proposed facts. Victims' counsel, of course, remains happy to discuss the correct mailing address of Epstein with the Government and did not "ignore" this issue, as claimed by the Government (Resp. at 3 n.3).

**I. BECAUSE THE GOVERNMENT TAKES THE POSITION THAT THE FACTS ARE IRRELEVANT, THE COURT SHOULD PROCEED ON THE BASIS OF THE VICTIMS' FACTS.**

The simplest way for the Court to proceed is to simply take the victims' facts as undisputed. After all, it is the Government which has now – twice – entered into discussions about the facts, only to later reverse course and claim discussion of the facts was not needed. Since the Government believes it can win this case under any set of facts, then they should be required to proceed on the basis of the facts that the victims have offered.

In any event, the Court need not embark on any kind of complicated fact-finding inquiry to rule in the victims' favor. Reading through all of the Government's pleadings, it is clear that the Government is not contesting that it entered into a non-prosecution agreement with Epstein barring his prosecution for various crimes (including, for example, all crimes committed against Jane Doe #1). Nor is the Government contesting that it concealed the existence of the NPA from the victims and their legal counsel for eight months. The Court can easily find – and should find – that the Government deliberately concealed the NPA from the victims and proceed to consider whether this affirmative concealment was consistent with the Crime Victims Rights Act.<sup>2</sup>

**II. THE GOVERNMENT HAS VIOLATED ITS OBLIGATIONS TO DISCUSS THE FACTS WITH THE VICTIMS.**

The Court should accept the victims' facts for the additional reason that the Government has violated its obligation to confer with the victims about which facts are undisputed. At the conclusion of the July 11, 2008, hearing, the Court directed that the parties were to confer on additional facts. *See* Victims' Motion to Have Their Facts Accepted at 2 (recounting hearing).

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<sup>2</sup> The victims explain why concealing the agreement violated the CVRA in their pleadings on their summary judgment motion.

And then, at the August 14, 2008, hearing, the Court gave the victims' counsel access to the NPA with the understanding that negotiations would continue with an eye to reaching undisputed facts. Since then, the Government has simply not negotiated in good faith, as the Court directed at the end of the July 11, 2008 hearing.

In addition to the Court's direction, Local Rule 88.10(O) contains a broad provision, containing the commonsense directive that "[t]he 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." The Government claims that this provision is not in play because there is no pending criminal proceeding.<sup>3</sup> But if this case is not covered by the rules applicable to *criminal* cases, then it should be covered by the rules applicable to *civil* cases. Indeed, when it seemed convenient for it to do so, the Government previously took the position that this case was "civil" litigation. *See* Doc. #41 at 3. But, not surprisingly, just as the criminal rules contain provisions for narrowing disputes, the civil rules do so as well. Notably, Fed. R. Civ. P. 26(a)(1), requires both sides in civil litigation to make "initial disclosures" of various specified information so that the case can proceed rapidly. The victims have made the initial disclosures required by Civil Rule 26(a)(1), but the U.S. Attorney's Office has refused to do so. Thus, the Government has taken a "heads we win, tails you lose" approach to reaching agreement on the facts: The victims cannot use the provisions in the criminal rules for narrowing

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<sup>3</sup> The Government cites *In re Amy Unknown*, \_\_\_ F.3d \_\_\_, 2011 WL 988882 at \*2 (5th Cir. Mar. 22, 2011), for the proposition that crime victims are not "parties" to the criminal case. But as *In re Amy* clearly holds, crime victims can have protected rights within a criminal case and can assert those rights in the case. Thus, in that case, a crime victim – Amy – was allowed to enforce her "right" to "restitution" provided in the CVRA. 18 U.S.C. § 3771(a)(6). Of course, in this case, two crime victims are likewise seeking to enforce their rights provided in the CVRA.

factual disagreements because this case is not a criminal case; but the victims cannot use the provisions in the civil rules to narrow disputes, because the case relates to a criminal non-prosecution agreement.

The Court should not allow such sophistry. This case is either a civil case or a criminal case, and either way the Government has an obligation to try and narrow the disputed factual questions. The Government has failed to do so, and the Court should accordingly accept the facts proffered by the victims.

**III. ALL OF THE VICTIMS' FACTS ARE DEEMED ADMITTED BY VIRTUE OF LOCAL RULE 7.5(D).**

Not only has the Government failed to discharge its obligations to narrow the range of disputes, but it has also failed to controvert *any* of the victims' proposed material facts presented in their summary judgment motion as directed by the local rules. Accordingly, by operation of the local rules, all the victims' facts are deemed admitted.

The Court's local rules make quite clear the well-understood procedure on summary judgment motions. Initially, the proposed facts of the moving party must "[b]e supported by specific references to pleadings . . . and affidavits on file with the Court . . . ." Local Rule 7.5(C)(2). The victims' summary judgment motion carefully and precisely complied with the local rule – each and every fact was supported by evidence.

Because the victims properly asserted proposed material facts, the local rules then required the Government to follow the same "paragraph numbering scheme used by the movant," Local Rule 7.5(C)(3), and to support opposing facts with record evidence, Local Rule 7.5(C) ("statement of material facts submitted *either* in support of or *in opposition to* a motion for

summary judgment shall . . . [b]e supported by specific references to pleadings . . . and affidavits on file with the Court.” (emphases added)). The Government, however, has simply not complied with this requirement for the great bulk of the victims’ facts. Therefore, they are all deemed admitted by operation of the local rules: “All material facts set forth in the movant’s statement filed and supported as required by Local Rule 7.5.C will be deemed admitted unless controverted by the opposing party’s statement, provided that the Court finds that the movant’s statement is supported by evidence in the record.”

The Government has briefly recounted a few facts in opposition to a small sliver of the victims’ proposed facts. *See* Gov’t Resp. to Victims’ Motion to Have Facts Accepted at 11-13. But none of these facts are supported by any evidence at all. The Government should have at least filed an affidavit in support of these proposed facts. Its reluctance to do so suggests that it is not confident it can really prove its assertions. In any event, the Government’s failure to properly support its proposed facts as required by the local rules means that the Court should not accept any of the Government’s assertions.

**IV. RULE 6(E) AND THE CONSTITUTION DO NOT PREVENT THE GOVERNMENT FROM DISCUSSING THE FACTS IN THIS CASE.**

Perhaps recognizing that its failure to discuss the facts with the victims is starkly at odds with conventional lawyering, the Government finally tries to claim that it is somehow forbidden from doing so by Rule 6(e) of the Federal Rules of Criminal Procedure and even the United States Constitution. These arguments are frivolous.

With regard to Rule 6(e), the rule creates secrecy only for grand jury proceedings. The Government does not explain which parts of the victims’ summary judgment motion -- and

which parts of Exhibit A to their motion -- are protected grand jury matters. A Word search of the summary judgment motion produces only one instance of the phrase "grand jury" -- in paragraph 12 of the statement of facts. The paragraph reads:

In September 2007, the U.S. Attorney's Office, in an effort to avoid prosecuting Epstein for his numerous sexual offenses against children, proposed to Epstein's attorneys that rather than plead to any charges relating to him molesting children, Epstein should instead plead to a single assault charge involving a telephone call made by Epstein while he was on his private jet. During this telephone call, Epstein warned [REDACTED], against turning over documents and electronic evidence responsive to a subpoena issued by a federal grand jury in the Southern District of Florida investigating Epstein's sex offenses. U.S. Attorney's Correspondence at 49, 58.

The fact that Epstein warned his assistant against turning over materials in response to a grand jury subpoena is simply not a "grand jury matter" to which Rule 6(e) applies. The subpoena had been issued and its existence was known to Jeffrey Epstein -- what actions he himself took in response to the issuance of the subpoena obviously were not matters occurring before the grand jury; instead, they were matters occurring before Epstein and Groff that had nothing to do with the inner workings of the grand jury. There is abundant caselaw to that effect. *See, e.g., United States v. Frazier*, 944 F.2d 820, 825 (11th Cir. 1991) (even a witness who testifies before a grand jury is not required to keep his testimony secret); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988) ("Rule 6(e)(2) only protects information revealing what has occurred, or will occur, inside the grand jury room."); *see also Miller v. Mehlretter*, 478 F. Supp. 2d 415 (W.D. N.Y. 2007).

The fact that Epstein's actions are not protected grand jury matters is further proven by the fact that the Government has already made "disclosure" of these very same facts. The U.S. Attorney's correspondence found in Exhibit A to the victims' summary judgment motion

involves, obviously enough, communications that the U.S. Attorney's Office made to persons who are not entitled to receive protected grand jury materials -- namely, criminal defense attorneys representing Epstein. If it violates grand jury secrecy for Jane Doe #1 and Jane Doe #2 to make reference to these matters in their briefs because these matters were protected "grand jury matters" within the meaning of Rule 6(e), then it likewise violated grand jury secrecy for government attorneys to make such disclosures to (for example) Jay Lefkowitz. Disclosures of confidential grand jury matters can only be made upon court order. *See* Fed. R. Crim. P. 6(e)(3)(E). Everything the victims are disclosing in their pleadings has already been disclosed by attorneys in the U.S. Attorney's Office to persons not authorized to receive confidential grand jury matters (namely Epstein's defense attorneys). It seems obvious that these government attorneys did not violate Rule 6(e) by making such disclosures; yet the Government is arguing that it would violate Rule 6(e) for the victims to do exactly the same thing.<sup>4</sup>

Nor does the Constitution somehow prevent the Government from negotiating in good faith regarding the facts of the case. The Government cites *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981), and follow-on cases for the proposition that it violates the Constitution for the Government to accuse an innocent person of committing a crime for no good reason when he cannot respond. But *In re Smith* is easily distinguishable from this one for five reasons -- as explained at greater length in the victims' Reply to the Government's Response to Use Correspondence to Prove CVRA Violations at pp. 5-7. The victims specifically incorporate

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<sup>4</sup> Because of this inconsistency between what government lawyers have already disclosed and what the Government is now arguing that the victims can disclose, on April 13, 2011 the victims' counsel sent an e-mail to the Government respectfully asking them to either explain the inconsistency or withdraw this part of their argument. The Government has not responded to this e-mail.

those five arguments by reference here. First, unlike *In re Smith*, Jeffrey Epstein has not appeared to assert his own claims. The Government lacks standing to assert his claims for him. Second, only a small fraction of the proposed facts involve allegations that Epstein committed a crime (as opposed to the Government violating victims' rights). Third, Epstein has not alleged that he is in fact innocent of sexually abusing the victims. Fourth, Epstein has a forum in which he can assert claims of innocence if he would like (namely this lawsuit). Fifth, *In re Smith* involved a situation where it was not "necessary, material, or relevant," to discuss an innocent person's involvement in a crime, in stark contrast to the situation here where discussion of Epstein's criminal conduct is obviously central to this case. Accordingly, there is no constitutional barrier to the Government responding to the victims' facts.

**IV. THE CENTRAL FACTS DEMONSTRATING THAT THE GOVERNMENT DELIBERATELY CONCEALED THE NON-PROSECUTION AGREEMENT ARE UNDISPUTED.**

Finally, it is worth noting that the Government has not specifically rebutted the central allegations made by the victims. For example, Proposed Fact #18 alleges that the Government deliberately concealed the non-prosecution agreement from the victims' for many months. Nothing in this paragraph is covered by grand jury secrecy rules or constitutional due process limitations. The Court can draw the obvious conclusion that the reason that Government is avoiding discussing the facts is that it fully realizes that acknowledging this fact will lead swiftly to a finding that it failed to discharge its duties under the CVRA. The Government should not be permitted to hide what it has done by failing to create a record in the case.

**CONCLUSION**

The Court should accept all the facts proffered by the victims.

DATED: May 2, 2011

Respectfully Submitted,

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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**

**v.**

**UNITED STATES**  
\_\_\_\_\_ /

**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO  
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 reply to the Government's response (DE #59) to their Motion for Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence (DE #50). The Government does not dispute that it possesses easily-identifiable and easily-retrievable information that would help the victims prove that their CVRA rights have been violated. Nor does the Government deny that it is obligated to use its "best efforts" to insure that victims are accorded their rights, 18 U.S.C. § 3771(c)(1). For this reason alone, the Court should order the Government to provide this information to the victims. The Court should also order the Government to provide this information as part of the victims' right to be "treated with fairness," 18 U.S.C. § 3771(a)(8). The Government offers no convincing reasoning as to how it could possibly be treating the victims fairly to allow the Government to withhold material information concerning their case. The Court should therefore enter an order, as it would in any other

criminal or civil case, requiring the Government to make appropriate production of such evidence to the victims.

**I. THE GOVERNMENT IS VIOLATING ITS “BEST EFFORTS” OBLIGATIONS BY CONTINUING TO WITHOLD EVIDENCE FAVORABLE TO THE VICTIMS.**

In their motion, the victims explained that the CVRA obligates government prosecutors to “make their *best efforts* to see that crime victims are . . . accorded[] their rights” under the CVRA. 18 U.S.C. § 3771(c)(1) (emphasis added). The victims also noted that “best efforts” are usually understood as requiring “[d]iligent attempts to carry out an obligation.” Victims’ Mot. at 4 (*citing* BLACK’S LAW DICTIONARY 169 (8<sup>th</sup> ed. 2004)). The victims accordingly argued that the Government was obligated to produce the information for the victims.

In response, the Government attempts to recast the victims’ motion as one seeking some kind of right of discovery. But the victims are not urging that they themselves have the right to rummage through the government’s files on the chance that they might turn up something useful for their case. Instead, the victims are simply asking the Court to order the Government to fulfill its *own* obligations to produce to the victims information that is highly relevant to this action. The “best efforts” requirement cannot possibly be understood as allowing the Government to simply suppress material information regarding this case.

The authorities that the Government cites do not support its far-fetched claim it can withhold relevant documents. For starters, it does not appear that any of these cases involve prosecutors’ “best efforts” obligations under the CVRA, as it is not clear whether the facts of these cases (or the victims’ attorneys) presented the “best efforts” issue with regard to the Government withholding material evidence.

Moreover, the first CVRA case cited by the Government – *United States v. Rubin*, 558 F.Supp.2d 411 (E.D.N.Y. 2008) – specifically contradicts the Government’s position that victims are not entitled to obtain information from the Government. In *Rubin*, crime victims argued that “the government has not provided information with which to pursue restitution in this case.” *Id.* at 425. The district court agreed that the CVRA “does not authorize an unbridled gallop to any and all information in the Government files,” *id.* – a point that Jane Doe #1 and Jane Doe #2 readily concede. But the district court went on to state that “[c]onferring with and *seeking information from the government in connection with restitution to be sought in an actual criminal proceeding, by contrast, would appear to be well within these bounds.*” *Id.* (emphasis added). The district court then went on to note that, because the Government believed some of the restitution information it possessed was secret grand jury material, it had provided the victims “with schedules setting forth information based on the grand jury materials that may, along with continued efforts to obtain the remainder of the grand jury material, fulfill [the victims’] request.” *Id.* The court went on to note that “[a]t oral argument, moreover, the government pledged to continue such efforts, to [the victims’] apparent satisfaction.” *Id.* The court accordingly found it unnecessary to rule further on the victims’ motion for production of information, because the necessary information had apparently been produced.

The Government actions in this case are a far cry from those in *Rubin*. Rather than providing the victims with material information (or even summaries of that information), the Government has simply stonewalled. The Court should accordingly order the Government to produce the victims what is “well within the bounds” of the CVRA – that is, material information about their claims.

The Government also cites several cases in which district courts have declined to turn over to crime victims their own confidential pre-sentencing reports. Gov't Resp. at 3-4. These cases about *judicial* obligations say nothing about *prosecutorial* obligations under the CVRA "best efforts" provision. It is unsurprising that the provision does not obligate judges to take sides in a case and help crime victims obtain their rights; instead, that requirement extends to "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, and prosecution of crime." 18 U.S.C. § 3771(c)(1). Thus, while the "best efforts" requirement does not obligate judges to turn over their own confidential materials (PSRs prepared by the court's probation officers), prosecutors must provide evidence that would help victims. Indeed, in one of the cases cited by the Government – *United States v. Sacane*, 2007 WL 951666 (D. Conn. Mar. 28, 2007) – the Court specifically stated that the victims should not try to obtain relevant information from the courts but instead should get it from prosecutors: "If the [victims] believe additional . . . disclosures are necessary, then pursuant to the CVRA they may enlist the assistance of the government; but they are not permitted to bypass the government and discover information directly from [the defendant]." *Id.* at \*2 (citing the "best efforts" provision of the CVRA).

In addition, these cases involving PSRs hardly support the Government's position that relevant evidence can simply be concealed from crime victims – and from the Court. To the contrary, one of the rationales for these cases holding that victims cannot review the PSR is that the PSR is already reviewed by the Court. Thus, in the first PSR case cited by the Government, *United States v. Coxton*, 598 F.Supp.2d 737 (W.D.N.C. 2009), the Court declined to disclose PSR information to the victims because "[n]othing in the PSR enhances or changes [the victims']

restitution] claims. The Court will review the information in the PSR along with the victims' claims and other factors relevant to restitution, and will make its decision." *Id.* at 740. Here, of course, the Court cannot review material information that the Government has decided to withhold – and victims are deprived of the chance to place that information before the Court.

The Government also cites *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007). *Moussaoui* is completely irrelevant to this case, as it involved efforts by *civil* litigants to intervene in a criminal case and obtain discovery for *civil litigation*. *See id.* at 224 (plaintiffs identified as civil tort plaintiffs). Indeed, before the Fourth Circuit, the civil litigants “abandoned” any claim that the CVRA even applied. *Id.* at 234. The Fourth Circuit commented in dicta that the CVRA rights “are limited to *criminal* justice process; the Act is therefore silent and concerned with victims’ rights to file *civil* claims against their assailants.” *Id.* at 234-35 (emphases added). *Moussaoui* says nothing about the rights of Jane Doe #1 and Jane Doe #2, who are seeking to vindicate their CVRA rights in the criminal justice process.

Finally, it is useful to recall that the Government does not deny that it is concealing relevant information that will help the victims prove their case. Nor does the Government claim it would be burdensome to produce this information. Instead, the Government simply takes that position that there is nothing in the CVRA which obligates it to take even the smallest steps to help the victims. If accepted, this position would eviscerate the CVRA command that prosecutors must use their “best efforts” to afford victims their rights. As the victims explained in their motion (at p. 4), “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 v. Stabile*, 774 N.E.2d

673, 676 (Mass. App. Ct. 2002). This Court should order the prosecutors to put their muscles to work to protect the rights of the victims in this case.

**II. THE VICTIMS HAVE A DUE PROCESS RIGHT 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: the fundamental dictates of fairness require that the Government not deliberately withhold relevant information contrary to its position in court. In their motion (at pp. 5-9), the victims explained why fairness entitles them to “*Brady*” information (i.e., information contradicting the Government’s position) no less than criminal defendants. In response, the Government does not even pretend to argue that it is somehow fair for it to suppress this information. Instead, the Government raises the technical claim that in the absence of any “protected life, liberty, or property interest,” the Due Process Clause is not triggered. Gov’t Resp. at 5.

The Government completely misapprehends the victims’ position. The victims are not arguing that they have a right under the Due Process Clause of the United States Constitution to receive favorable information.<sup>1</sup> Instead, they are arguing that they possess such a right under the CVRA’s right to be “treated with fairness.” 18 U.S.C. § 3771(a)(8). That right has already been triggered in this litigation, as the victims are asserting this right. Being treated with fairness means (at a minimum) receiving due process. 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

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<sup>1</sup> The Government’s distortion of the victims’ position is hard to understand in view of the fact that the victims’ specifically stated in their motion that they were *not* raising a constitutional argument. *See* Victims’ Motion at 6 (“To be sure, the victims in this case do not rely on a federal *constitutional* right to due process.” (emphasis in original).

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).

It is simply not treating the victims with “the respect they deserve” to withhold from them relevant evidence that will help prove their case. The courts have repeatedly recognized that, once criminal defendants request favorable information from the government “the prosecution’s suppression of such evidence, whether in good or bad faith, violates due process.” *Ward v. Hall*, 592 F.3d 1144 (11th Cir. 2010). For the same reasons, the prosecution’s suppression of favorable evidence from the victims violates that their right to be treated with fairness. The *Brady* decision explains that “[s]ociety 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.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). So too here – our system of administering justice will suffer if Jane Doe #1 and Jane Doe #2 are treated unfairly. The Court should therefore order that the Government give the victims of a sex offender the same kind of information that they would give to the sex offender himself – e.g., favorable information in the Government’s possession that will support the victims’ claims.

**III. THE VICTIMS ARE ALSO ENTITLED TO DISCLOSURE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.**

The victims are also entitled to receive information favorable to them under the rules civil procedure. As explained at greater length in their motion (at pp. 9-10), the Court opened the victims' CVRA case as a civil case (i.e., as case no. 08-80736-Civ-Marra/Johnson) and the case would therefore presumptively appear to be governed by the Federal Rules of Civil Procedure. Accordingly, the victims have fully made their initial disclosures to the Government required by Fed. R. Civ. P. 26(a)(1)(A). The Government, however, has refused to reciprocate any such disclosures to the victims.

In response to victims' point about the apparently applicability of the rules of civil procedure, the Government takes a new position. It had previously told the victims that it would not confer with them about this CVRA case because it was "civil" litigation rather than criminal litigation. *See* Victims' Mot. at 9 (*citing* Doc. #41 at 1-2). Now, the Government finds it convenient to disavow that earlier position and instead says that it is "happenstance" that this case is opened as a civil matter. Gov't Resp. at 7. But the Government cannot deny that Rule 1 of the Federal Rules of Civil Procedure makes the civil rules applicable to what is undeniably currently a civil case. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . ."). If the Government wanted to be relieved from the obligations of the civil rules or have this case moved to the Court's criminal docket, it could have filed a motion to that effect. Instead, it has done nothing. Accordingly, the Government must make the ordinary initial disclosures that it makes in other civil cases.

The Government does not argue that making such disclosures would be burdensome, unfair, or expensive. Presumably, then, the only reason the Government does not to disclose the information in its possession is that the materials are somehow embarrassing to the

Government's position. This hardly provides a legitimate basis for refusing to make common litigation disclosures – particularly in light of Congress' command to the Government that it must make its "best efforts" to protect victims' rights. 18 U.S.C. § 3771(c)(1).

The victims do not wish to engage in a metaphysical debate about whether this case is more accurately characterized as a "civil" case or a "criminal" case. To the contrary, the victims are simply trying to get the same kind of information that the Government routinely provides in *all* cases. Thus, as the victims explained in their motion (at p. 8), ordinarily in a criminal case the Court enters a "Standing Discovery Order" that requires the Government to "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 issue of guilt or punishment within the scope of *Brady v. Maryland* . . . ." Moreover, for criminal cases local rule 88.10(O) requires the government to "make every possible effort in good faith to stipulate to all facts . . . the truth or existence of which is not contested and the early resolution of which will expedite the trial." The Government is basically trying to have this case viewed as neither fish nor fowl: even though the case has been opened as a civil case, the rules of civil procedure do not apply; but even though the rules of civil procedure don't apply, the Government is not obligated to provide the disclosures ordinarily made in criminal cases. The Court should not allow this kind of gamesmanship. The Government knows full well that it has material information supporting the victims' case.<sup>2</sup> The Court should require the Government to produce it. Accordingly, the Court should enter the proposed order that the victims submitted with their original motion.

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<sup>2</sup> If the Government did not have any such information, it could have simply filed an affidavit to that effect and the victims' motion would have been moot. Moreover, in

**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 was attached with the victims' original motion, which the Court should enter.

DATED: May 2, 2011

Respectfully Submitted,

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Attorneys for Jane Doe #1 and Jane Doe #2

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conversations with the Government, it has been made clear to victims' counsel that the Government will not produce favorable information that it possesses.

**CERTIFICATE OF SERVICE**

The foregoing document was served on May 2, 2011, on the following using the Court's

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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**

**v.**

**UNITED STATES**  
\_\_\_\_\_ /

**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO  
THEIR MOTION TO USE CORRESPONDENCE TO PROVE VIOLATIONS OF THE  
CRIME VICTIMS' RIGHTS 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, reply to the Government's response (DE #60) to their motion to use correspondence to prove violations of the Crime Victims' Right Act and to Have Their Unredacted Pleadings Unsealed (DE #51). The Government does not contest the first part of the victims' motion – that they should be allowed to use the correspondence to prove CVRA violations – and that part of the victims' motion should therefore be granted. The Government does argue that some parts of the correspondence cannot be disclosed because of grand jury secrecy or constitutional requirements. The Court should reject these frivolous arguments. None of the materials disclose matters occurring before a grand jury; nor do any of them constitute a "public smear" of an "innocent" person that would violate the Constitution. Accordingly, the Court should grant the victims' motion.<sup>1</sup>

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<sup>1</sup> There are occasional references in the correspondence to internal phone numbers of the prosecutors and similar information. The victims have no objection to such information



**I. THE GOVERNMENT DOES NOT DISPUTE THAT JANE DOE #1 AND JANE DOE #2 SHOULD BE PERMITTED TO USE THE CORRESPONDENCE TO PROVE THEIR CASE, AND ACCORDINGLY THE COURT SHOULD GRANT THIS PART OF THE VICTIMS' MOTION.**

In their motion (at pp. 4-6), the victims explained how the correspondence between government prosecutors and Jeffrey Epstein's counsel is highly relevant to their CVRA case. For example, they explained that significant parts of the correspondence specifically discuss the CVRA and the rights of the victims in the Epstein case. The victims have therefore asked this Court to make a finding of "admissibility" regarding the correspondence, consistent with an earlier order of the magistrate judge.

In response, the Government "takes no position" on the motion. Gov't Resp. at 1. Accordingly, this part of the victims' motion should be granted.

**II. NONE OF THE MATERIALS IN THE CORRESPONDENCE ARE BARRED FROM DISCLOSURE BY GRAND JURY SECRECY OR CONSTITUTIONAL PROHIBITIONS.**

While the Government does not contest the relevance of the correspondence and the victims' right to use it, the Government does contest their right to do so in public pleadings. The Government first argues that to allow the public to see the correspondence would violate Fed. R. Crim. P. 6(e)(2)(B)'s prohibition against "disclos[ing] a matter occurring before the grand jury." The Government claims that "several of the 'facts' contained in Petitioners' submission contain allegations related to matters occurring before the jury." Gov't Resp. at 4. But the Government does not specifically identify which parts of the victims' summary judgment motion -- and which

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remaining under seal. The Government's attachment to its response identifies this material that the victims have agreed to keep under seal.



parts of Exhibit A to their motion -- are protected grand jury matters. A Word search of the summary judgment motion produces only one instance of the phrase "grand jury" -- in paragraph 12 of the statement of facts. The paragraph reads:

In September 2007, the U.S. Attorney's Office, in an effort to avoid prosecuting Epstein for his numerous sexual offenses against children, proposed to Epstein's attorneys that rather than plead to any charges relating to him molesting children, Epstein should instead plead to a single assault charge involving a telephone call made by Epstein while he was on his private jet. During this telephone call, Epstein warned [REDACTED], against turning over documents and electronic evidence responsive to a subpoena issued by a federal grand jury in the Southern District of Florida investigating Epstein's sex offenses. U.S. Attorney's Correspondence at 49, 58.

The fact that Epstein warned his assistant against turning over materials in response to a grand jury subpoena is simply not a "grand jury matter" to which Rule 6(e) applies. The subpoena had been issued and its existence was known to Jeffrey Epstein -- what actions he himself took in response to the issuance of the subpoena obviously were not matters occurring before the grand jury; instead, they were matters occurring before Epstein and Groff that had nothing to do with the inner workings of the grand jury. There is abundant caselaw to that effect. *See, e.g., United States v. Frazier*, 944 F.2d 820, 825 (11th Cir. 1991) (even a witness who testifies before a grand jury is not required to keep his testimony secret); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988) ("Rule 6(e)(2) only protects information revealing what has occurred, or will occur, inside the grand jury room."); *see also Miller v. Mehlretter*, 478 F. Supp. 2d 415 (W.D. N.Y. 2007).

The fact that Epstein's actions are not protected grand jury matters is further proven by the fact that the Government has already made "disclosure" of these very same facts. The U.S. Attorney's correspondence found in Exhibit A to the victims' summary judgment motion



involves, obviously enough, communications that the U.S. Attorney's Office made to persons who are not entitled to receive protected grand jury materials -- namely, criminal defense attorneys representing Epstein. If it violates grand jury secrecy for Jane Doe #1 and Jane Doe #2 to make reference to these matters in their briefs because these matters were protected "grand jury matters" within the meaning of Rule 6(e), then it likewise violated grand jury secrecy for government attorneys to make such disclosures to (for example) Jay Lefkowitz. Disclosures of confidential grand jury matters can only be made upon court order. *See* Fed. R. Crim. P. 6(e)(3)(E). Everything the victims are disclosing in their pleadings has already been disclosed by attorneys in the U.S. Attorney's Office to persons not authorized to receive confidential grand jury matters (namely defense attorneys). It seems obvious that these government attorneys did not violate Rule 6(e) by making such disclosures; yet the Government is arguing that it would violate Rule 6(e) for the victims to do exactly the same thing.<sup>2</sup>

Nor would it violate the Constitution to unseal the victims' pleadings. The Government cites *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981), and follow-on cases for the proposition that it violates the Constitution for the *Government* to accuse an innocent person of committing a crime for no good reason when he cannot respond. But unsealing *the victims'* pleadings would not in any way implicate Constitutional concerns. Of course, the Constitution only constrains governmental actors -- not private parties. *See, e.g., United States v. Morrison*, 529 U.S. 598,

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<sup>2</sup> Because of this inconsistency between what government lawyers have already disclosed and what the Government is now arguing that the victims can disclose, on April 13, 2011 the victims' counsel sent a request to the Government respectfully asking them to either explain the inconsistency or withdraw this part of their argument. The Government has not responded to this request.



624-26 (2000). It is the *victims'* pleadings that accuse Epstein of committing a crime, not the Government's – constitutional concerns are simply not implicated.

Moreover, *In re Smith* is easily distinguishable from this one. First, in *In re Smith*, an individual with an alleged privacy interest (i.e., Smith himself, as shown in the case caption) appeared directly before the Court to argue for keeping his name out of the public record. In clear contrast, in this case Epstein has refused to intervene to raise his own interests. The Government is therefore raising Epstein's interests as a surrogate -- as Epstein's "next friend."<sup>3</sup> But "a 'next friend' must provide an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (citations omitted); see *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir.1992) (applying *Whitmore*). Obviously the real party in interest (Jeffrey Epstein) can fully protect his own interests in this case. The Government therefore lack "standing" to present arguments on Epstein's behalf.

Second *In re Smith* would stand for the proposition, at most, that the Government could not accuse Epstein of committing a crime. But of the victims' 53 proposed facts, only four (#1, #2, #4, and #5) allege that Epstein committed crimes. Thus, the other 49 proposed facts are not even arguably covered by *In re Smith*. Put another way, the Government's "due process" argument is only arguably applicable to fewer than 10% of the facts at issue in this case.

Third, *In re Smith* involved a situation where the Government had impugned the reputation of an actually *innocent* person by unnecessarily including his name in documents related to a

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<sup>3</sup> Why the Government would choose to zealously assert Epstein's rights, but not even honor its statutory requirement to use "best efforts" to protect the victims' rights, 18 U.S.C. §



guilty plea by a defendant in a criminal case where the innocent person was not a party. Later, that innocent party filed a motion stating his good name had been ruined and the allegation made not because he was guilty of the crime but rather “solely for publicity purposes.” 656 F.2d at 1104. The Fifth Circuit found that it violated due process for the Government to include his name “without further proof of wrongdoing on his part and giving him an opportunity to rebut any accusations of wrongdoing that might be made against him.” *Id.* at 1107.

Here, the situation is quite different. If Epstein had chosen to do so, he could have intervened in this case and declared his innocence. Instead, he has chosen to sit on the sidelines. Thus, in stark contrast to *In re Smith*, Epstein has never asserted that he is innocent of sexually abusing Jane Doe #1 and Jane Doe #2. For instance, Epstein has never filed an affidavit under oath declaring his innocence. In fact, Epstein pleaded guilty to committing felony sex offenses against several of the underage minor females identified by the Government as victims of Epstein’s abuse. And in parallel civil cases, Epstein has repeatedly taken the Fifth when asked about sexually abusing young girls, including Jane Doe #1 and Jane Doe #2, rather than assert his innocence. Accordingly, there is no due process violation for the Government to discuss what crimes Epstein has committed, where Epstein himself has decided not to dispute that he committed those crimes.

Fourth, *In re Smith* holds that there is “no legitimate governmental interest . . . served by an official public smear of an individual when that individual *has not been provided a forum* in which to vindicate his rights.” *Id.* at 1106 (emphasis added). Epstein has many fora in which he

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3771(c)(1), is not immediately clear.



could proclaim his innocence of sexual abuse allegations – including this one. He has chosen instead to hide.

Fifth, *In re Smith* also involved a situation where it was not “necessary, material, or relevant,” *id.*, to include the name of the alleged criminal. Here, in contrast, at the center of this Crime Victims Rights Act case are the crimes committed by Epstein – and the Government’s response to them. Accordingly, *In re Smith* is not applicable – discussing Epstein’s crimes against Jane Doe #1 and Jane Doe #2 is obviously necessary, material, and relevant to this case. The correspondence is simply evidence of what the Government was doing, and the manner in which the Government was communicating, during its criminal investigation of Epstein.

Even if *In re Smith* is somehow applicable to limited parts of the victims’ pleadings here, the case itself makes clear that sealing of documents involves a “balancing [of] interests.” 656 F.3d at 1102. The Government’s constitutional analysis is completely one-sided. The Government does not consider the fact that the public has a great interest in knowing how federal prosecutors made such a shockingly lenient plea arrangement with Epstein. The public has a strong interest in learning the details of criminal cases. The Eleventh Circuit has accordingly 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 (11<sup>th</sup> 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. The Government has not discussed the controlling court authority on sealing orders, much less attempted to prove that



there is an "overriding interest" justifying sealing. For this reason as well, the court should reject the Government's attempt to keep secret what it has done in this case.

**CONCLUSION**

The Court should unseal the victims pleadings in this matter, except for the portions that the victims have agreed should remain under seal.

DATED: May 2, 2011

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The foregoing document was served on May 2, 2011, on the following using the Court's

CM/ECF system:

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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 DOE #1 and JANE DOE #2**

**v.**

**UNITED STATES**

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**JANE DOE #1 AND JANE DOE #2'S RESPONSE TO MOTION TO INTERVENE OF  
ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to oppose the motion of attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz (hereinafter referred to as "defense attorneys") to intervene in this case under Fed. R. Civ. P. 24(a) (DE #56).

The motion to intervene should be denied for three separate reasons. First, the defense attorneys have not shown that they have an "interest" in the "transaction" at issue in this case, as required by Rule 24(a). This case involves crime victims' efforts to enforce their rights under the Crime Victims Rights Act – an issue of no concern to the defense attorneys.

Second, the defense attorneys have no "confidential" material is at issue in this case. All of the correspondence involved has already been disclosed to the government – and to the victims.

Third, the work product issues the defense attorneys seek to present to this Court were decided long ago. Their effort to relitigate these issues is simply untimely. The defense attorneys' motion to intervene should accordingly be denied.

**I. THE DEFENSE ATTORNEYS LACK ANY INTEREST IN THE “PROPERTY OR TRANSACTION” THAT IS THE SUBJECT OF THE CRIME VICTIMS RIGHTS ACT ENFORCEMENT ACTION.**

The defense attorneys cite Fed. R. Civ. P. 24(a) as their basis for intervention. Mot. to Intervene at 3.<sup>1</sup> That rule provides for intervention as a matter of right where the party seeking to intervene can establish that “the party has an *interest* relating to the *property or transaction* which is the subject of the action.” See *Davis v. Butts*, 290 F.3d 1297, 1300 (11th Cir. 2002) (emphases added). There is no “property” at issue in this case. And the only “transaction” that is at issue is the Government’s failure to afford the victims’ their rights under the CVRA. The defense attorneys have no interest in that “transaction” – it concerns only the crime victims, the Government, and Jeffrey Epstein. Simply put, Roy Black et al. have no recognized “interest” in whether or not the Court finds that the Government failed (for example) to confer with Jane Doe #1 and Jane Doe #2 about their rights as sexual assault victims.

The controlling Eleventh Circuit case law on intervention (not cited by the defense attorneys) requires that a putative intervenor be the equivalent of a real party in interest: “In determining sufficiency of interest [under Rule 24(a)(2)], this circuit requires that the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. This interest has also been described as a direct, substantial, legally protectable interest in the proceedings.” *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996); accord *Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308 (11th Cir. 2005). The

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<sup>1</sup> The defense attorneys have not claimed that they should be permitted to intervene under Rule 24(b) dealing with permissive intervention. Indeed, they have not even cited that rule. Accordingly, the victims have not discussed permissive intervention.

defense attorneys have no “direct, substantial, and legally protected interest” in the enforcement of the Crime Victims Rights Act.

The defense attorneys attempt to manufacture an interest by claiming that they have *confidential* “work product” as issue. Mot. to Intervene at 3-4. This argument is rebutted below, as the materials in question are simply not confidential. But in any event, Rule 24(a) requires that a proposed intervenor must have an interest in the “*transaction which is the subject of action.*” Fed. R. 24(a)(2) (emphasis added). The defense attorneys cannot bootstrap their way into this CVRA case by asserting confidentiality, and then arguing that this assertion of confidentiality permits them to intervene as of right in the law suit. An intervenor must show that it “has an interest in the subject matter *of the suit.*” *Georgia v. United States Army Corp of Eng’rs*, 302 F.3d 1242, 1250 (11th Cir. 2002) (emphasis added). The defense attorneys have no such interest here. And the cases that they cite are all readily distinguishable, as they involved lawsuits that were themselves about confidential materials – not (as in this case) a lawsuit about an entirely different transaction. *See, e.g., In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001) (grand jury subpoena issued to a corporation, seeking records of its subsidiary; subsidiary’s former attorney allowed to intervene to challenge that subpoena issued in that case); *In re Grand Jury Investigation*, 445 F.3d 266, 269 (3rd Cir. 2006) (grand jury subpoena issued directly to attorney in a case; attorney allowed to litigate scope of that subpoena in that case).

The defense attorneys also include in their motion briefing on the subject of whether the victims can obtain a court order setting aside the non-prosecution agreement. This transparent effort to smuggle into the briefing on a motion to intervene some briefing on the ultimate remedy in this case is improper. While the victims will respond to these arguments in due course, for

present purposes it is obvious that whatever happens to the non-prosecution agreement barring the prosecution of Jeffrey Epstein cannot affect the defense attorneys' interests. The victims' challenge to the legality of the non-prosecution agreement therefore cannot create a sufficient interest for *the defense attorneys* to intervene. Only Epstein has an interest in the validity of the non-prosecution agreement, and he has deliberately chosen not to intervene in this case.<sup>2</sup>

## II. THE DEFENSE ATTORNEYS HAVE NO *CONFIDENTIAL* MATERIALS AT ISSUE IN THIS CASE.

The defense attorneys lack an interest in this case for a second reason: there are no confidential materials of theirs at stake here. The defense attorneys argue that there are “confidential” work product materials involved. But, by definition, anything that the defense attorneys have seen fit to disclose in correspondence to the government is no longer confidential – and therefore no longer protected by the work-product doctrine. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2005) (“any work product objection was waived by [party] via production” of the documents in question). Because no confidential

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<sup>2</sup> The defense attorneys also report that their client, Jeffrey Epstein, “does not seek to intervene at this time because the issue of whether the Crime Victims’ Right Act even applies in this case is a matter between the government and Jane Doe 1 and Jane Doe 2 . . . .” Mot. at 5. By conceding this point on behalf of Jeffrey Epstein, the defense attorneys have conceded that Epstein knows that he has an opportunity to challenge all factual findings that the Court may make regarding the circumstances surrounding the concealment of the non-prosecution agreement from the victims, but is simply declining to exercise that opportunity. The defense attorneys also state that “[t]o the extent the Court were to consider invalidating the Non-Prosecution Agreement as a remedy, Jeffrey Epstein reserves the right to intervene at that time.” *Id.* The victims disagree that Epstein can simply stand on the sidelines now and jump into the fray later. They will accordingly oppose any later – untimely – effort on his part to intervene in this suit. *See, e.g.,* Fed. R. Civ. P. 24(a) (requiring “timely” motion to intervene); *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999) (district court properly acted within its discretion in denying motion to intervene when the case had progressed substantially with substantive and procedural issues settled by the time putative intervener sought intervention).

materials are at issue in correspondence the defense attorneys voluntarily sent to the Government, the attorneys lack any personal interest in this case and their motion to intervene should be denied.

The defense attorneys also appear to briefly claim that some of the correspondence involves grand jury material protected by Fed. R. Crim. P. 6(e). They do not cite any particular correspondence to prove their assertion -- much less how they became familiar with these purportedly secret grand jury matters<sup>3</sup> -- and the motion should be summarily denied for their failure to provide proof the rule even applies. In any event, it is obvious that grand jury secrecy only extends to matters that occurred in secret before the grand jury. *See, e.g., Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988) (“Rule 6(e)(2) only protects information revealing what has occurred, or will occur, inside the grand jury room.”). Nothing in the correspondence refers to events “inside the grand jury room” and therefore grand jury secrecy rules are not in place.

Finally, even if the defense attorneys could somehow prove that somewhere in the correspondence is something mentioning some secret grand jury matter, *the defense attorneys* would suffer no harm from release of the materials. Essentially what the defense attorneys are doing is appearing as Jeffrey Epstein’s “next friend” to litigate issues on his behalf. But “a ‘next friend’ must provide an adequate explanation -- such as inaccessibility, mental incompetence, or

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<sup>3</sup> The victims do not believe that anything in the correspondence is covered by the grand jury secrecy provided in Fed. R. Crim. P. 6(e). If, however, the Court were to conclude that the correspondence is somehow covered by grand jury secrecy requirements, then it would appear that either the prosecutors improperly disclosed it to the defense attorneys or the defense attorneys improperly obtained that information. Under the terms of Rule 6(e), disclosure of grand jury material to a defendant can only be upon court order after indictment. *See* Fed. R. Crim. P. 6(e)(3)(E)(ii). So far as the victims are aware, no such court order exists here.

other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action.” *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (citations omitted) (addressing an individual's “next friend” status in the context of an appeal); see *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir.1992) (applying *Whitmore*). Harm from the release of the materials (if any) could be only to Jeffrey Epstein. He is the real party in interest – but he has made the tactical decision not to intervene in this case. See Mot. to Intervene at 5. Accordingly, his interests are not at stake, and defense attorneys have no right to intervene to object to alleged release of grand jury materials concerning him.

**III. THE DEFENSE ATTORNEYS’ EFFORT TO RELITIGATE WORK PRODUCT ISSUES IS TOO LATE, AS THIS COURT HAS ALREADY RULE ON THE QUESTION.**

A final, independent reason for rejecting the defense attorney’s motion to intervene is that they propose to relitigate issues that this Court has already decided. As the Court is well aware, not only has all the information in the correspondence been disclosed to the Government, it has also been disclosed to the victims. The issue of whether the correspondence was somehow protected was thoroughly litigated by the defense attorneys’ client (Jeffrey Epstein) more than a year ago. After this Court rejected Epstein’s arguments against disclosure, see, e.g., *Jane Doe v. Epstein*, doc. #462, Case No. 9:08-CV-80119-KAM (Feb. 4, 2010), Epstein turned the materials over to the victims. The defense attorneys now propose to relitigate these very same issues. Their effort to do so is obviously untimely and should therefore be rejected on that basis alone. See Fed. R. Civ. P. 24(a) (requiring “timely” motion to intervene).

**CONCLUSION**

For all the foregoing reasons, the Court should deny the defense attorneys' motion to intervene in this Crime Victims' Rights Act case.<sup>4</sup>

DATED: May 2, 2011

Respectfully Submitted,

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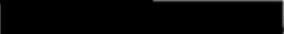
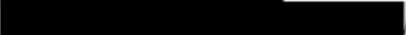
<sup>4</sup> The defense attorneys' also propose to file a motion for a protective order if their motion to intervene is granted. The victims will file a timely response to that particular motion if the Court grants leave to file the motion.

**CERTIFICATE OF SERVICE**

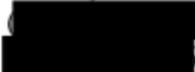
The foregoing document was served on May 2, 2011, on the following using the Court's

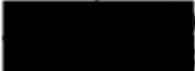
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(courtesy copy of pleading via U.S. mail)

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

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

**JANE DOE #1 and JANE DOE #2**

**v.**

**UNITED STATES**  
\_\_\_\_\_ /

**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO  
THEIR MOTION TO USE CORRESPONDENCE TO PROVE VIOLATIONS OF THE  
CRIME VICTIMS' RIGHTS 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, reply to the Government's response (DE #60) to their motion to use correspondence to prove violations of the Crime Victims' Right Act and to Have Their Unredacted Pleadings Unsealed (DE #51). The Government does not contest the first part of the victims' motion – that they should be allowed to use the correspondence to prove CVRA violations – and that part of the victims' motion should therefore be granted. The Government does argue that some parts of the correspondence cannot be disclosed because of grand jury secrecy or constitutional requirements. The Court should reject these frivolous arguments. None of the materials disclose matters occurring before a grand jury; nor do any of them constitute a "public smear" of an "innocent" person that would violate the Constitution. Accordingly, the Court should grant the victims' motion.<sup>1</sup>

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<sup>1</sup> There are occasional references in the correspondence to internal phone numbers of the prosecutors and similar information. The victims have no objection to such information

**I. THE GOVERNMENT DOES NOT DISPUTE THAT JANE DOE #1 AND JANE DOE #2 SHOULD BE PERMITTED TO USE THE CORRESPONDENCE TO PROVE THEIR CASE, AND ACCORDINGLY THE COURT SHOULD GRANT THIS PART OF THE VICTIMS' MOTION.**

In their motion (at pp. 4-6), the victims explained how the correspondence between government prosecutors and Jeffrey Epstein's counsel is highly relevant to their CVRA case. For example, they explained that significant parts of the correspondence specifically discuss the CVRA and the rights of the victims in the Epstein case. The victims have therefore asked this Court to make a finding of "admissibility" regarding the correspondence, consistent with an earlier order of the magistrate judge.

In response, the Government "takes no position" on the motion. Gov't Resp. at 1. Accordingly, this part of the victims' motion should be granted.

**II. NONE OF THE MATERIALS IN THE CORRESPONDENCE ARE BARRED FROM DISCLOSURE BY GRAND JURY SECRECY OR CONSTITUTIONAL PROHIBITIONS.**

While the Government does not contest the relevance of the correspondence and the victims' right to use it, the Government does contest their right to do so in public pleadings. The Government first argues that to allow the public to see the correspondence would violate Fed. R. Crim. P. 6(e)(2)(B)'s prohibition against "disclos[ing] a matter occurring before the grand jury." The Government claims that "several of the 'facts' contained in Petitioners' submission contain allegations related to matters occurring before the jury." Gov't Resp. at 4. But the Government does not specifically identify which parts of the victims' summary judgment motion -- and which

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remaining under seal. The Government's attachment to its response identifies this material that the victims have agreed to keep under seal.

parts of Exhibit A to their motion -- are protected grand jury matters. A Word search of the summary judgment motion produces only one instance of the phrase "grand jury" -- in paragraph 12 of the statement of facts. The paragraph reads:

In September 2007, the U.S. Attorney's Office, in an effort to avoid prosecuting Epstein for his numerous sexual offenses against children, proposed to Epstein's attorneys that rather than plead to any charges relating to him molesting children, Epstein should instead plead to a single assault charge involving a telephone call made by Epstein while he was on his private jet. During this telephone call, Epstein warned [REDACTED], against turning over documents and electronic evidence responsive to a subpoena issued by a federal grand jury in the Southern District of Florida investigating Epstein's sex offenses. U.S. Attorney's Correspondence at 49, 58.

The fact that Epstein warned his assistant against turning over materials in response to a grand jury subpoena is simply not a "grand jury matter" to which Rule 6(e) applies. The subpoena had been issued and its existence was known to Jeffrey Epstein -- what actions he himself took in response to the issuance of the subpoena obviously were not matters occurring before the grand jury; instead, they were matters occurring before Epstein and Groff that had nothing to do with the inner workings of the grand jury. There is abundant caselaw to that effect. *See, e.g., United States v. Frazier*, 944 F.2d 820, 825 (11th Cir. 1991) (even a witness who testifies before a grand jury is not required to keep his testimony secret); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988) ("Rule 6(e)(2) only protects information revealing what has occurred, or will occur, inside the grand jury room."); *see also Miller v. Mehlretter*, 478 F. Supp. 2d 415 (W.D. N.Y. 2007).

The fact that Epstein's actions are not protected grand jury matters is further proven by the fact that the Government has already made "disclosure" of these very same facts. The U.S. Attorney's correspondence found in Exhibit A to the victims' summary judgment motion

involves, obviously enough, communications that the U.S. Attorney's Office made to persons who are not entitled to receive protected grand jury materials -- namely, criminal defense attorneys representing Epstein. If it violates grand jury secrecy for Jane Doe #1 and Jane Doe #2 to make reference to these matters in their briefs because these matters were protected "grand jury matters" within the meaning of Rule 6(e), then it likewise violated grand jury secrecy for government attorneys to make such disclosures to (for example) Jay Lefkowitz. Disclosures of confidential grand jury matters can only be made upon court order. *See* Fed. R. Crim. P. 6(e)(3)(E). Everything the victims are disclosing in their pleadings has already been disclosed by attorneys in the U.S. Attorney's Office to persons not authorized to receive confidential grand jury matters (namely defense attorneys). It seems obvious that these government attorneys did not violate Rule 6(e) by making such disclosures; yet the Government is arguing that it would violate Rule 6(e) for the victims to do exactly the same thing.<sup>2</sup>

Nor would it violate the Constitution to unseal the victims' pleadings. The Government cites *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981), and follow-on cases for the proposition that it violates the Constitution for the *Government* to accuse an innocent person of committing a crime for no good reason when he cannot respond. But unsealing *the victims'* pleadings would not in any way implicate Constitutional concerns. Of course, the Constitution only constrains governmental actors -- not private parties. *See, e.g., United States v. Morrison*, 529 U.S. 598,

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<sup>2</sup> Because of this inconsistency between what government lawyers have already disclosed and what the Government is now arguing that the victims can disclose, on April 13, 2011 the victims' counsel sent a request to the Government respectfully asking them to either explain the inconsistency or withdraw this part of their argument. The Government has not responded to this request.

624-26 (2000). It is the *victims'* pleadings that accuse Epstein of committing a crime, not the Government's – constitutional concerns are simply not implicated.

Moreover, *In re Smith* is easily distinguishable from this one. First, in *In re Smith*, an individual with an alleged privacy interest (i.e., Smith himself, as shown in the case caption) appeared directly before the Court to argue for keeping his name out of the public record. In clear contrast, in this case Epstein has refused to intervene to raise his own interests. The Government is therefore raising Epstein's interests as a surrogate -- as Epstein's "next friend."<sup>3</sup> But "a 'next friend' must provide an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (citations omitted); see *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir.1992) (applying *Whitmore*). Obviously the real party in interest (Jeffrey Epstein) can fully protect his own interests in this case. The Government therefore lack "standing" to present arguments on Epstein's behalf.

Second *In re Smith* would stand for the proposition, at most, that the Government could not accuse Epstein of committing a crime. But of the victims' 53 proposed facts, only four (#1, #2, #4, and #5) allege that Epstein committed crimes. Thus, the other 49 proposed facts are not even arguably covered by *In re Smith*. Put another way, the Government's "due process" argument is only arguably applicable to fewer than 10% of the facts at issue in this case.

Third, *In re Smith* involved a situation where the Government had impugned the reputation of an actually *innocent* person by unnecessarily including his name in documents related to a

---

<sup>3</sup> Why the Government would choose to zealously assert Epstein's rights, but not even honor its statutory requirement to use "best efforts" to protect the victims' rights, 18 U.S.C. §

guilty plea by a defendant in a criminal case where the innocent person was not a party. Later, that innocent party filed a motion stating his good name had been ruined and the allegation made not because he was guilty of the crime but rather “solely for publicity purposes.” 656 F.2d at 1104. The Fifth Circuit found that it violated due process for the Government to include his name “without further proof of wrongdoing on his part and giving him an opportunity to rebut any accusations of wrongdoing that might be made against him.” *Id.* at 1107.

Here, the situation is quite different. If Epstein had chosen to do so, he could have intervened in this case and declared his innocence. Instead, he has chosen to sit on the sidelines. Thus, in stark contrast to *In re Smith*, Epstein has never asserted that he is innocent of sexually abusing Jane Doe #1 and Jane Doe #2. For instance, Epstein has never filed an affidavit under oath declaring his innocence. In fact, Epstein pleaded guilty to committing felony sex offenses against several of the underage minor females identified by the Government as victims of Epstein’s abuse. And in parallel civil cases, Epstein has repeatedly taken the Fifth when asked about sexually abusing young girls, including Jane Doe #1 and Jane Doe #2, rather than assert his innocence. Accordingly, there is no due process violation for the Government to discuss what crimes Epstein has committed, where Epstein himself has decided not to dispute that he committed those crimes.

Fourth, *In re Smith* holds that there is “no legitimate governmental interest . . . served by an official public smear of an individual when that individual *has not been provided a forum* in which to vindicate his rights.” *Id.* at 1106 (emphasis added). Epstein has many fora in which he

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3771(c)(1), is not immediately clear.

could proclaim his innocence of sexual abuse allegations – including this one. He has chosen instead to hide.

Fifth, *In re Smith* also involved a situation where it was not “necessary, material, or relevant,” *id.*, to include the name of the alleged criminal. Here, in contrast, at the center of this Crime Victims Rights Act case are the crimes committed by Epstein – and the Government’s response to them. Accordingly, *In re Smith* is not applicable – discussing Epstein’s crimes against Jane Doe #1 and Jane Doe #2 is obviously necessary, material, and relevant to this case. The correspondence is simply evidence of what the Government was doing, and the manner in which the Government was communicating, during its criminal investigation of Epstein.

Even if *In re Smith* is somehow applicable to limited parts of the victims’ pleadings here, the case itself makes clear that sealing of documents involves a “balancing [of] interests.” 656 F.3d at 1102. The Government’s constitutional analysis is completely one-sided. The Government does not consider the fact that the public has a great interest in knowing how federal prosecutors made such a shockingly lenient plea arrangement with Epstein. The public has a strong interest in learning the details of criminal cases. The Eleventh Circuit has accordingly 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 (11<sup>th</sup> 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. The Government has not discussed the controlling court authority on sealing orders, much less attempted to prove that

there is an "overriding interest" justifying sealing. For this reason as well, the court should reject the Government's attempt to keep secret what it has done in this case.

**CONCLUSION**

The Court should unseal the victims pleadings in this matter, except for the portions that the victims have agreed should remain under seal.

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Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The foregoing document was served on May 2, 2011, on the following using the Court's CM/ECF system:

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