

From: Paul Cassell <cassellp@law.utah.edu>

To: "Lee, Dexter (USAFLS)" <Dexter.Lee@usdoj.gov>, Brad Edwards <bedwards@pathtojustice.com>

Cc: "Sanchez, Eduardo (USAFLS)" <Eduardo.I.Sanchez@usdoj.gov>, "Villafana, Ann Marie C. (USAFLS)" <Ann.Marie.C.Villafana@usdoj.gov>

Subject: RE: Are we being taken advantage of?

Date: Fri, 03 Feb 2012 16:48:22 +0000

Importance: Normal

Hey Dexter,

Maybe you can clarify a few points for me.

1. Your reply memorandum is filed entirely under seal. There are sentences (indeed multiple page after page) that do not raise confidentiality issues. One what possible basis is the Government sealing these sentences. As one example – on page 2 of your sealed reply, you state: “As a threshold matter, Petitioners have argued that this Court cannot dismiss these proceedings at this time for lack of standing because the standing issues raised by the government are intertwined with the ultimate merits of their CVRA claims. DE 127 at 7-8.” On what basis is the Government denying the public access to read that sentence in your brief. That clearly does not fall within Judge Middlebrook’s order, particularly since DE 127 is not under seal. Isn’t Justice Department policy to allow the public read sentences such as this one? More generally, isn’t the public entitled to know the Mr. Ferrer has filed a brief saying that even where the Government and a sex offender deliberately conspired to deny victims their promised CVRA rights, the federal courts are powerless to do anything about it?
2. You state that your reply brief does not raise new arguments. Yet (as one of a number of possible examples) at page 9 of the your reply brief, you have a multi-page argument that “The actions that Petitioner have taken since learning of the non-Prosecution Agreement legally preclude them for seeking rescission of the Non-Prosecution Agreement.” Please direct us to precisely where in your opening memorandum you advanced that specific argument.
3. As you know, in our earlier pleadings filed months and months ago, we had repeatedly relied on cases such as US █ Walker, 98 F.3d 944 (7th Cir. 1996). Yet in your 13 page motion to dismiss, you did not discuss US █ Walker or any of the case law that we had previously cited. In our response, we noted that we thought we are about to be “sandbagged” because the Government was reserving its arguments on cases like US █ Walker until its reply brief. Then in your **35 page reply brief**, you discuss Walker and related cases at length. Can you let us know why you did not cover this terrain in your initial (shorter) brief, reserving it instead for the reply brief? And can you further explain how it could possibly be fair for Judge Marra to rule what is one of the central issues in this case -- whether crime victims can rely on cases like US █ Walker – without even having heard the victims response to your attempt to distinguish the case?

If you detect that I’m a bit upset about this, it is because ... well, I am. With all due respect, Dexter, the practice of filing a 13 page opening brief, and then a 35 page reply brief with a host of new issues and arguments – and then fighting us on getting a sur-reply ... I just think that is wrong. As you know, we have afforded you every possible courtesy on this case. I have not had a chance to confer with Brad on this email – but I really believe that our courtesy to the Government here has been taken advantage of. We did not oppose your extra time. We did not oppose your extra pages. And now you are fighting us when all we want is to chance to give our position to Marra in a sur-reply?! I frankly don’t understand that.

Paul Cassell

Co-counsel for Jane Doe #1 and Jane Doe #2

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From: Lee, Dexter (USAFLS) [mailto:Dexter.Lee@usdoj.gov]
Sent: Friday, February 03, 2012 9:10 AM
To: Paul Cassell; Brad Edwards
Cc: Sanchez, Eduardo (USAFLS); Villafana, Ann Marie C. (USAFLS)
Subject: Government Position

Paul and Brad,

I am responding to your e-mail on February 1, 2012 regarding our filing the entire reply under seal. We respectfully disagree that such a filing was inappropriate, a violation of DOJ policy, and/or a violation of First Amendment principles. Our filing the entire reply under seal is based upon the November 7, 2011 Order from Judge Middlebrooks, permitting the government to make limited disclosure of Grand Jury matter. Judge Middlebrooks permitted disclosure under three conditions, including that "the disclosure of the aforementioned grand jury information shall be limited to filings made under seal in Case No. 08-80736-CIV-MARRA."

We understand your desire to share the government's filing with your colleagues in the victims' rights community. However, the November 7, 2011 Order also limits service of filings to counsel for petitioners Jane Doe No. 1 and Jane Doe No. 2. Distributing these government's filings, which were filed under seal, would not be permitted under the November 7, 2011 order.

While we appreciate all the courtesies both of you have extended to us over the course of this litigation, and particularly over the last two months, we would oppose a motion that the government file a redacted pleading in the open court file. I think we have a fundamental disagreement over the what constitutes protected Grand Jury material, and how readily such protected material can be segregated from non-protected information.

As far as the information at page 32 n.20, of the government's reply, the government would need to obtain additional authorization from the Court under Fed.R.Cr.P. 6(e) to disclose the information supporting jurisdiction and venue in the Southern District of New York and the District of New Jersey. When you refer to "unsealing of all information," if you mean that such information would be publicly disclosed, we would oppose such a motion. If authorization were obtained under Rule 6(e) for additional disclosures as to venue in those two jurisdictions, we would expect that such material would only be disclosed under the same conditions in the November 7, 2011 Order.

As far as your proposed motion for the court to deny the motion to dismiss without requiring additional pleadings from the victims, we don't see how such a motion is necessary. Since the motion is now fully briefed, the court can grant or deny the motion to dismiss without requiring additional pleadings from any party, unless the court believes it needs more briefing. Normally, sur-replies are not permitted unless the reply has gone beyond responding to the issues raised in the response. We don't believe our reply brought forward new issues not raised in our motion to dismiss.

I'll be here all day. Thanks.

