From: "[redacted]. (USAFLS)" <[redacted]>
To: "[redacted] (CRM)" <[redacted]>, <[redacted]>, at 2: <00.p.m.@hp-s0-71-2.usa.doj.gov>;
Subject: RE: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.
Date: Tue, 16 Aug 2011 23:02:58 +0000
Importance: Normal

Thank you, Mike. I really appreciate it.

[redacted]
Assistant U.S. Attorney
[redacted]
Fax [redacted]

From: [redacted] (CRM)
Sent: Tuesday, August 16, 2011 6:38 PM
To: [redacted]. (USAFLS)
Subject: Re: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

I admire you for how hard you've fought this case. Stay strong.

From: [redacted]. (USAFLS) <[redacted]>
To: [redacted]
Sent: Tue Aug 16 17:39:59 2011
Subject: FW: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

Hi Mike – Can you start with [redacted] email down at the bottom and then read mine? Also, I was reading 3771(d)(3) [the venue provision] for the 1000th time, and I wonder – could it refer to habeas proceedings?????

[redacted]
Assistant U.S. Attorney
[redacted]
Fax [redacted]

From: [redacted]. (USAFLS)
Sent: Tuesday, August 16, 2011 5:32 PM
To: Lee, [redacted] (USAFLS)
Cc: [redacted], [redacted] (USAFLS)
Subject: RE: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

Hi [redacted] – [redacted] and I have been bouncing some ideas around and wanted to share them with you before we shared them with the whole group.

It seems that there were two points that were left hanging that were not completely answered during the argument. One was Judge Marra's repeated questions about "how would this really impact the government's discretion," alternatively phrased as, "couldn't you just have picked up the phone and called them?" The second was Cassell's claim that "the floodgates hadn't opened" since the decision in In re Dean.

As to the first, I don't think that Judge Marra truly grasped the magnitude of what he was suggesting and certain examples would seem to bring the issue into clearer focus. For example, the position of the movants would require AUSAs (not agents, not victim-witness coordinators, not secretaries), to personally "consult" with every victim in advance of declining a case **or deferring to a state prosecution**. Imagine how burdensome this would be in cases like these:

- A credit card "skimmer" case, where the defendant may have "skimmed" the credit card numbers of hundreds of victims.
- A child pornography case, where the defendant may have up to a million images of child pornography on his computer.
- A theft of mail case where the defendant may have stolen dozens or hundreds of pieces of mail.
- A white collar fraud case with a large number of victims.

The court also should consider a situation, like the one here, where one of the "victims" is essentially in the defense camp. By consulting with him/her, especially in a case where we plan to defer to the State, we would be disclosing what could be a confidential investigation.

The Court asked Cassell "how far back does it go?" The distinction between pre-charge and post-charge is the clearest line, and a line is necessary. It also is an appropriate line for two reasons. First, as I mentioned during the hearing, the United States has sovereign immunity from suit. We waive that immunity when we submit to the court's jurisdiction – via the filing of a criminal complaint or an indictment. Thus, drawing the line at the point of filing a charge is consistent with separation of powers principles. Second, prior to the filing of a public charge, there are constitutional due process principles (as incorporated in part in Rule 6(e)) governing the defendant's right not to be publicly accused of a crime without the opportunity to defend himself. By waiting until there is a public charge, there can be no claim of violation of grand jury secrecy. Also by waiting until there is a public charge, there can be no claim of the type of "conflict of interest" that has arisen in this case – where Epstein could manufacture a claim that we are investigating him due to pressure brought to bear by the victims' suit.

As to the second point, Cassell's claim that the "floodgates hadn't opened," I beg to differ. I spent about 4 hours yesterday going through district court filings on Lexis Courtlink, and although I wasn't able to review each and every one, I did find several good examples:

- Thibeaux [redacted] Doherty, 08-CV-61848, S.D. Fla. (Judge Cohn). Plaintiff sued 2 U.S. District Judges, several AUSAs, the clerk of court, and 2 U.S. Magistrate Judges claiming that they committed the crime of obstruction of justice in connection with his 2255 Petition. The plaintiff asked for relief pursuant to 3771(d)(3).
- Piskanin [redacted] Cameron, 11-CV-76 (W.D. Pa.) Plaintiff sued the Superintendent and Warden of the Prison along with the Pennsylvania Board of Probation and Parole. Plaintiff asked the court to order the USAO to "meet and confer with this crime victim to determine the procedure and need to initial Federal Criminal Prosecutions against petitioner's retaliators."
- Hentges [redacted] State of Minnesota, et al., 10-CV-4081 (D. Minn.) Plaintiff sued State of Minnesota, Minnesota Attorney General, 2 Minnesota trial court judges, 1 Minnesota appellate judges, the child support enforcement unit officers in Colorado and Minnesota, and various County Attorneys. Plaintiff demanded immediate "federal protection, including restraining orders" and issuance of arrest warrants, and crime victim compensation. Plaintiff claimed that the defendants violated 18 USC 514 "Presentation of Fictitious Obligations" by forcing him to pay child support that he claimed he had previously paid. Plaintiff demanded the issuance of arrest warrants and charges based on 3771.

Do you think it is worth asking Judge Marra for permission to file supplemental briefing addressing these two discrete issues?

[redacted]
Assistant U.S. Attorney
[redacted]
Fax [redacted]

From: Lee, [redacted] (USAFLS)
Sent: Tuesday, August 16, 2011 9:39 AM
To: [redacted]. (USAFLS); [redacted] (USAFLS); [redacted] (USAFLS); [redacted] (USAFLS)
Cc: [redacted]. (USAFLS); [redacted], [redacted] (USAFLS)
Subject: RE: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

[redacted]

The hearing last 2.5 hours. Judge Marra first heard from the proposed intervenors, Bruce Reinhart and Roy Black. Bruce seeks to intervene to move for sanctions against the victims' attorneys for making baseless allegations against Reinhart for purported violations of DOJ and Florida Bar rules. Black seeks to intervene to prevent the unsealing and use of Epstein's defense attorneys' work product, as referenced in the series of one-sided e-mails provided to the victims' attorneys in the civil litigation against Epstein. Judge Marra gave Black and the government two weeks to submit additional briefing on the issue, with an opportunity for the victims to respond. Marra questioned how a matter could still be protected attorney work-product if it had been revealed to the government, the opposing side, in the Epstein criminal investigation. Black argued that criminal defense attorneys should be allowed to be candid and frank with prosecutors, free from any fear that their thoughts and impressions will be made public at some future time.

The court denied the victims' motion to accept facts. Judge Marra said the victims had not denominated their motion as one for summary judgment, recognized that many of the alleged "facts" were opinions and conclusions, and said it was unfair to make the government stipulate or disagree with those "facts." The Court heard argument on the motion to compel the government to provide relevant information helpful to their case, and the motion for a finding that the CVRA had been violated.

During our portion of the argument, I emphasized section 3771(d)(6)'s admonition that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." I suggested that, if the court was faced with two possible interpretations of a provision, and one would impair the A/G's prosecutorial discretion and one would not, the court was obligated to choose the one that would not.

Judge Marra was skeptical that applying 3771(a)(5), the right to reasonably consult with the attorney for the government in the case, would really impair prosecutorial discretion. At one point, he stated that, if the government had consulted with the victims prior to entering into the non-prosecution agreement, while the victims may not have agreed with that course of action, there was nothing they could do. He asked how that would impair prosecutorial discretion. I argued that U.S. Attorney's Offices decline prosecutions frequently, and that construing 3771(a)(5) to apply prior to the filing of a formal charge, would require the government to consult with identified victims prior to declining a case for prosecution. Additionally, I expressed pessimism that victims would not try to seek court intervention in the event an unfavorable decision had been made by the U.S. Attorney's Office.

The Court inquired about an evidentiary hearing. I told the Court that the government had asserted a 'best efforts" defense, and that the resolution of that issue would require an evidentiary hearing. On the issue of discovery, the Court asked me if it had the authority to permit discovery. I said yes, if the court believed discovery was necessary to resolve disputed factual issues in the case.

I do not expect the court to rule until the round of briefing on the work-product issue is completed. I have included Marie and [redacted] on this e-mail. They both attended the hearing and I welcome any comments they might want to add.

[redacted]

From: [redacted]. (USAFLS)
Sent: Tuesday, August 16, 2011 9:02 AM
To: [redacted] (USAFLS); [redacted] (USAFLS); Lee, [redacted] (USAFLS); [redacted] (USAFLS)
Subject: RE: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

What happened at the hearing?

From: [redacted] (USAFLS)
Sent: Friday, August 12, 2011 9:16 AM
To: [redacted]. (USAFLS); [redacted] (USAFLS); Lee, [redacted] (USAFLS); [redacted] (USAFLS); [redacted]. (USAFLS)
Cc: [redacted], [redacted] (USAFLS); [redacted] (USAFLS); [redacted] (USAFLS)
Subject: RE: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

Good luck. Let me know what happens after the hearing. Sure to get press calls.
Alicia

From: [redacted]. (USAFLS)
Sent: Friday, August 12, 2011 9:07 AM
To: [redacted] (USAFLS); Lee, [redacted] (USAFLS); [redacted] (USAFLS); [redacted]. (USAFLS)
Cc: [redacted], [redacted] (USAFLS); [redacted] (USAFLS); [redacted] (USAFLS)
Subject: Re: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

Best of luck, [redacted]. We're in good hands with you there. Thanks for all your hard work in this difficult matter.

From: [redacted] (USAFLS)
Sent: Friday, August 12, 2011 12:06 AM
To: Lee, [redacted] (USAFLS); [redacted]. (USAFLS); [redacted] (USAFLS); [redacted]. (USAFLS)
Cc: [redacted], [redacted] (USAFLS); [redacted] (USAFLS); [redacted] (USAFLS)
Subject: Re: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

I agree that we should go forward with our best efforts defense, at least at this point.

Good luck tomorrow, [redacted]. Hopefully, the judge will realize that he never needs to get to the best efforts defense or to any evidentiary hearing.

From: Lee, [redacted] (USAFLS)
Sent: Thursday, August 11, 2011 07:38 PM
To: [redacted]. (USAFLS); [redacted] (USAFLS); [redacted]. (USAFLS)
Cc: [redacted] (USAFLS); [redacted], [redacted] (USAFLS); [redacted] (USAFLS); [redacted] (USAFLS)
Subject: Jane Does 1 and 2 [redacted]. United States - Hearing on Friday, August 12, 2011, at 2:00 p.m.

Colleagues,

Judge Marra will be holding a hearing tomorrow, August 12, at 2:00 p.m., on the victims four (4) motions. In the court's order, he stated he would be asking for the parties' positions on whether an evidentiary hearing is necessary. For our part, on the legal issue of whether rights under the Crime Victims Rights Act attached prior to the filing of a formal charge, the government does not believe any evidentiary hearing is necessary. The only two facts which are relevant are not disputed by the victims: (1) no formal charge was ever filed against Epstein in the S.D.Fla.; and (2) Epstein entered pleas of guilty to state charges on June 30, 2008, in Palm Beach County Circuit Court.

If the court were to find that CVRA rights did attach in the absence of a formal charge against Epstein, the government has asserted that it used its "best efforts" to comply with the CVRA. In October 2007, after the non-prosecution agreement was signed, FBI agents met with four victims and advised them of the agreement. There is a dispute over what was told to these individuals, and the reasons why notifications to other victims did not occur. The victims also claim that CVRA letters sent to them by the FBI in January 2008 and May 2008 were deceptive, since an agreement with Epstein had already been reached (although not fully approved by Main Justice).

I believe an evidentiary hearing would be necessary for the government to present its "best efforts" defense. This would involve the government calling witnesses, including Marie, the FBI agents, and other current and former DOJ employees with relevant knowledge of our efforts to comply with the CVRA.

We need to decide whether to maintain our best efforts defense, since it exposes us to an opportunity for the victims to probe what we did, and why we did it, and provide a platform for making us look bad. One consideration is whether our chances of prevailing, e.g. convincing the Court that we did use our best efforts, is sufficiently great to justify the effort and ordeal.

I believe we should go forward with our best efforts defense. Our office did its best to ensure the victims were apprised of events in the matter involving Epstein, despite howls of protest coming from Epstein's attorneys. Our office had to walk a narrow path between perceived CVRA responsibilities, the incessant complaining from Epstein's legal camp, and preserving what might still have been a federal prosecution of Epstein had he gotten the agreement overturned at DOJ, or reneged on it completely. Giving up on the best efforts defense would be conceding too much.

Alicia: We will call you tomorrow after the hearing, to let you know about what went on, and the press coverage.

I will be leaving here at 9:00 a.m. and hope to be at the West Palm Beach office by 11:00 a.m. Thanks.

[redacted]