UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2

[redacted].

UNITED STATES
_____/

JANE DOE #1 AND JANE DOE #2'S 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 again 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[1] 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* [redacted]. *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

[1] 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 the 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).[2]

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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[2] 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.*[3] 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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[3] 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* [redacted]. *Okun,* 2009 WL 790042 at *2 (E.D.Va. 2009).

Still another decision at odds with the Government's position is *United States* [redacted]. *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* [redacted] *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).[4]

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* [redacted] *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

[4] 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).[5] 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,

[5] 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 then 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* [redacted]. *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* [redacted]. *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* [redacted] *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 again 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."[6] 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

[6] 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 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.[7] 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.

[redacted]. THE GOVERNMENT'S PARADE OF HORRIBLES WILL NOT MATERIALIZE IF THE COURT RULES IN THE VICTIMS' FAVOR.

[7] 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 horribles. 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.[8] 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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[8] 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,[9] 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).[10] 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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[9] 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).

[10] 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.[11]

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* [redacted] *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

[11] 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 (10th Cir. 1995); *Craig* [redacted]. *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* [redacted]. *Castaneda*, 162 F.3d 832, 834-35 (5th Cir. 1998) (reviewing issue of government's obligations under a NPA); *United States* [redacted]. *Hyles*, 521 F.3d 946, 952 (8th Cir. 2008) (reviewing existence and scope of alleged NPA); *United States* [redacted]. *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,

s/ Bradley J. Edwards
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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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