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 MOTION FOR ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE NOT TO WITHHOLD RELEVANT EVIDENCE

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to move for an order from this Court directing the U.S. Attorney's Office not to suppress material evidence relevant to this case. The Court should enter an order, as it would in other criminal or civil cases, requiring the Government to make appropriate production of such evidence to the victims.

BACKGROUND

In discussions with the U.S. Attorney's Office about this case, counsel for Jane Doe #1 and Jane Doe #2 inquired about whether the Office would voluntarily provide to the victims information in its possession that was material and favorable to the victims' case. Victims' counsel pointed out that, if they were criminal defense attorneys representing criminals, the Office would promptly turn over all information in its possession that was helpful to these criminals under *Brady v. Maryland*, 373 U.S. 83 (1963), and related decisions. Victims' counsel asked the Office to extend to the victims the same assistance that it would provide to criminal

defendants – i.e., to voluntarily provide to the victims information in its possession that was favorable to the victims' CVRA case.

In response, victims' counsel were informed by the Office that it could – and would -- withhold from the victims such information, apparently on the theory that the CVRA does not apply to these case or on the theory victims lack due process rights under the CVRA. The victims accordingly have been forced to file this motion, seeking an order from the Court directing the U.S. Attorney's Office to produce to the victims favorable information.

The victims are entitled to such information for four separate reasons. First, the U.S. Attorney's Office is statutorily-obligated to use it "*best efforts* to see that crime victims are . . . accorded[] the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1) (emphasis added). The Office flouts this best efforts obligation when it deliberately withholds favorable information from the victims.

Second, just as criminal defendants are entitled to receive favorable information in the Government's possession under due process rights, *see, e.g., Brady v. Maryland*, 373 U.S. 83 (1963), victims are entitled to receive favorable information under their CVRA "right to be treated with fairness," 18 U.S.C. § 3771(a)(8) – a right that clearly includes due process considerations. The U.S. Attorney's Office is not treating the victims with fairness if it withholds the very information that might enable them to prove their case.

Third, the U.S. Attorney's Office has obligations under the civil discovery rules to voluntarily provide information to the victims. *See* Fed. R. Civ. P. 26(a)(1) (initial disclosures in civil cases). The victims' action has been opened as a civil case, and the U.S. Attorney's Office has previously argued that it should be treated as a civil case. Proceeding on this basis, the

ordinary civil discovery rules apply and the U.S. Attorney's Office should disclose relevant documents "without awaiting a discovery request." Fed. R. Civ. P. 26(a)(1)(A).

Finally, a decision by the U.S. Attorney's Office to withhold information relevant to this case has serious ethical ramifications. The attorneys have a duty of candor to the Court. It is not immediately clear how the U.S. Attorney's Office can satisfy those obligations while concealing information that might enable the victims to prove their case.

For all these reasons, the Court should enter an order directing the U.S. Attorney's Office to produce to the victims all information in its possession favorable to the victims. A proposed order to that effect is attached to this pleading, largely tracking the standard discovery order that this Court routinely enters in criminal cases.

DISCUSSION

I. THE GOVERNMENT VIOLATES ITS "BEST EFFORTS" OBLIGATIONS IF IT WITHOLDS EVIDENCE FAVORABLE TO THE VICTIMS.

The U.S. Attorney's Office is obliged to produce favorable information to the victims because of the CVRA's requirement that prosecutor use their "best efforts" to protect crime victims' rights. The CVRA directs that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall *make their best efforts* to see that crime victims are notified of, and accorded, the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1) (emphasis added). It is hard to understand how the Government can argue with a straight face that it is using its "best efforts" to protect victims' rights while simultaneously withholding readily-identifiable documents from the victims that might allow them to protect those very rights. If a best efforts

obligation means anything, it must mean that the U.S. Attorney's Office cannot suppress favorable information.

This understanding of the best efforts obligation is confirmed by the plain meaning of the phrase "best efforts." That phrase is generally understood as requiring "[d]iligent attempts to carry out an obligation." BLACK'S LAW DICTIONARY 169 (8th ed. 2004). *See generally* E. Allen Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 8 (1984). As a result, "[b]est efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take." BLACK'S LAW DICTIONARY 169 (8th ed. 2004). A reasonable prosecutor who is obligated to work to "accord" crime victims their rights, 18 U.S.C. § 3771(c)(1), would not simultaneously deny victims access to the very evidence that could help them protect their rights. Put another way, an obligation to use "best efforts" is usually understood "in the natural sense of the words as requiring that the party puts its muscles to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom." *Stabile v. Stabile*, 774 N.E.2d 673, 676 (Mass. App. Ct. 2002). Here, far from putting its full energies towards protecting victims' their rights, the U.S. Attorney's Office is devoting its energies to blocking those rights. The cases construing "best efforts" language have routinely recognized that this language can create affirmative obligations to act. *See, e.g., Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 135 (1992) ("A best efforts clause . . . can also affirmatively obligate."). Here, the action that is affirmatively required by the U.S. Attorney's Office is to produce readily-identifiable information that will assist the victims.

It is also important to recognize that the victims here are not seeking to force some kind of burdensome wild goose chase on the U.S. Attorney's Office. In their letter to the U.S. Attorney requesting relevant evidence, the victims offered to provide a list of specific items they were seeking: "To avoid burdening your Office, we would be happy to provide a specific list of the information that we believe is material to the victims' CVRA case – a limited amount of information that could be swiftly located by your Office." Letter from Bradley J. Edwards & Paul G. Cassell to Wifredo A. Ferrer, Mar. 1, 2011. The victims have, for example, requested that the U.S. Attorney's Office provide to them unredacted copies of correspondence between the U.S. Attorney's Office and Jeffrey Epstein. Through civil discovery from Epstein, the victims have obtained half of that correspondence – the words written by the U.S. Attorney's Office – but are lacking the other half – the words written in reply by Epstein's counsel. This correspondence specifically discusses crime victims' rights, so it is obviously quite material to the victims' case. The U.S. Attorney's Office could obviously provide this information without much difficulty. But instead, the Office has refused to provide to the victims *any* of the correspondence – or, indeed, any other similar information that might assist the victims.

For all these reasons, the Court should find that the Department's "best efforts" obligations require it to produce to the victims information favorable to the victims' case.

II. THE VICTIMS HAVE A DUE PROCESS RIGHT TO ACCESS TO FAVORABLE EVIDENCE UNDER THEIR CVRA "RIGHT TO BE TREATED WITH FAIRNESS."

The victims are also entitled to receive favorable evidence in the Government's possession for the same reason that criminal defendants receive such information: fundamental considerations of fairness require that the Government not deliberately withhold relevant

information contrary to its position in court. For criminal defendants, this principle traces back to the landmark decision of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), in which the Court explained the production of exculpatory evidence is a principle designed for

> avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecutor that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Id. at 87-88. Of course, precisely the same points can be made here about production of evidence to crime victims. The Justice Department will "win its point if justice is done" to crime victims in this case – but justice can be done only if these proceedings are fair, in the sense that all relevant information is provided to the court. To have this case move forward with the prosecutors withholding material information is to truly cast them "in the role of an architect of a proceeding that does not comport with standards of justice."

To be sure, the victims in this case do not rely on a federal *constitutional* right to due process. But they have a parallel *statutory* right under the CVRA, which promises victims of crime that they will be "treated with fairness." 18 U.S.C. § 3771(a)(8). The clear intent of Congress in passing this provision was to provide a substantive "due process" right to crime victims. As one of the CVRA's co-sponsors (Senator Kyl) explained, "The broad rights articulated in this section [§ 3771(a)(8)] are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of *due process*. Too often victims of crime experience a secondary

victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judiciary branches, to treat victims of crime with the respect they deserve." 150 CONG. REC. S4269 (Apr. 22, 2004) (emphasis added).

Because the CVRA extends a "due process" right to crime victims like Jane Doe #1 and Jane Doe #2, victims have a right to fair access to evidence to prove their case. The very foundation of the *Brady* obligation is such a notion of due process: "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It would similarly violate due process – and thus not treat victims with "fairness" -- for the prosecution to suppress evidence favorable to a crime victim where the evidence is material either to proving a CVRA violation or to the remedy for a violation.

The *Brady* principles are well understood, and the Government does not have difficulty in providing favorable information to criminal defendants. For example, it is our understanding that such discovery was provided by the government to Jeffrey Epstein during the course of negotiations that led to the non-prosecution agreement in this case. If the Government's obligations to see "that justice is done," *Brady*, 373 U.S. at 87, requires it to produce helpful information to a sex offender, surely principles of fairness require the same kind of production to the sex offender's victims when they are properly pursuing a contested case against the Government before this Court.

The familiar *Brady* principles are so commonplace that this Court routinely enters a "Standing Discovery Order" in criminal cases directing the Government to provide favorable

evidence to the defendant. The Order typically provides: "The government shall reveal to the defendant(s) and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilty or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976)." *See, e.g.,* Standing Discovery Order, *United States v. Enriquez*, No. 1:10-CR-20488-MGC (July 9, 2010) (doc. #115). These Standing Discovery Orders follow from identical language in the local rule on these issues. *See* Local Rule 88.10.

Interesting, the Standing Discovery Order – and associated local rule 88.10(O) – contains a broad, commonsense provision which the Government has plainly violated in this case. The Order provides: "The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth or existence of which is not contested and the early resolution of which will expedite the trial." For more than two-and-a-half years, the victims have been trying to get the Government to stipulate to undisputed facts, precisely as the Court's rules envision. The Government, however, has refused to do so.

It is a simple matter to tailor the Standing Discovery Order from a situation involving a criminal defendant's need for information to the current situation of a crime victim's need for information. A proposed order to that effect is attached to this pleading, largely tracking the language of the Standing Discovery Order. The Court should enter that order. The Court has its own obligations to ensure that victims' rights are protected. The CVRA directs that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights [described in the CVRA]" – rights that include a right to "be

treated with fairness." *See* 18 U.S.C. § 3771(b)(1), (a)(8). The Court should ensure fair treatment for the victims by directing the Government to produce relevant evidence.

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

The victims are further entitled to receive information favorable to them under the rules civil procedure. The victims' petition seeking to set aside the non-prosecution agreement has been opened as a civil case – as reflected in the case number the matter has borne for the last two-and-a-half years: 9:08-CV-80736-Marra/Johnson. Indeed, the Government has seized on this point to deny the victims rights that they would otherwise enjoy in a criminal case. For example, on October 27, 2010, the U.S. Attorney's Office advised Jane Doe #1 and Jane Doe #2 that the Office was taking the position that they did not enjoy a right "to confer" with the Office under the CVRA, 18 U.S.C. § 3771(a)(5), in this enforcement action because the action was "civil" litigation rather than criminal litigation. *See* Doc. #41 at 1-2.

If the U.S. Attorney's Office is correct that this matter is "civil" litigation, then the Federal Rules of Civil Procedure govern discovery. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceeding in the United States district courts . . . .").[1] Under those Rules, generous discovery is provided. Of particular relevance to this motion is the requirement under Fed. R. Civ. P. 26(a)(1)(A) that parties are automatically required produce relevant information to a case without waiting for a discovery request. In light of the Government's position that this case is civil litigation, the victims have been making (and are

[1] Rule 1 note that there are certain limitations to application of the Civil Rules, found in Fed. R. Civ. P. 81. None of the limitations in Rule 81 (e.g., for bankruptcy and citizenship proceedings) apply in this case.

continuing to make) initial disclosures consistent with Rule 26(a)(1)(A). But the U.S. Attorney's Office has recently informed the victims that they do not believe that this Rule applies to their case and that they will not be making any such disclosures. Accordingly, the victims seek an order from the Court requiring the ordinary kinds of document production that are made in civil cases.

To order the Government to make such production, the Court need not engage in metaphysical ruminations about whether this CVRA enforcement action is ultimately a "civil" case or a "criminal" case. For purposes of this motion, it is enough to say that the Government has taken the position that it is a civil action and therefore the Government must at least carry through on the discovery obligations that attend civil cases.

Moreover, Congress clearly allowed the filing of this action in this Court. *See* 18 U.S.C. § 3771(d)(3) (allowing assertion of CVRA rights "in the district court in which a defendant is being prosecuted or, *if no prosecution is underway, in the district court in the district in which the crime occurred.*"). Congress did not specify whether such actions would be civil or criminal in nature. But Congress no doubt envisioned at least a minimum level of cooperation with victims by the Government. Congress, in fact, mandated prosecutors to make their "best efforts" to afford victims their rights. In a case such as this one where there is a dispute about the factual events surrounding, it makes sense to read the CVRA has at least giving victims access to information that might prove their case rather than permitting the Government to suppress such evidence. The Court should accordingly require the Government to make the disclosures that it would ordinarily make in a civil case. The proposed order attached to this pleading includes a provision to that effect.

IV. ALLOWING THE GOVERNMENT TO WITHHOLD RELEVANT EVIDENCE WOULD RAISE SERIOUS ETHICAL ISSUES.

On a final note, it is worth considering the ethical ramifications of the Government's stark position that it can withhold even relevant and material evidence from the victims in this case. Prosecutors, no less than other attorneys, have duties of candor to the Court that would not permit them to present evidence or testimony to the Court that is known to be false. Fla. Bar Rule 4-3.3(a)(4). Allowing the victims access to evidence favorable to their claim will insure compliance with this rule. Similarly, in an ex parte proceeding, a lawyer must inform the court of all material facts known to the lawyer that will enable the court to make an informed decision "whether or not the facts are adverse." Fla. Bar. Rule 4-3.3(d). If the U.S. Attorney's Office is correct that the victims are not entitled to access to favorable evidence, then the proceedings involving that evidence are essentially ex parte – requiring the Office to make disclosures to the Court with notice to the victims.

An illustration of this problem comes from the sworn declaration filed by one of the AUSA's in this case in support of the Government's response to the victims' petition. This sworn affidavit recounts a provision in the non-prosecution agreement that would have placed victims of Epstein's sexual abuse in "the same position as they would have been had Mr. Epstein been convicted at trial." [redacted] The affidavit also goes on to say that "these provisions were discussed," *id.* at 4, apparently referring to this provision. *Id.* (noting that "as explained above" there was a remedy for crime victims). And the declaration notes that on July 9, 2008, the victims in this case (including Jane Doe #1) were notified about the existence of this provision.

On October 9, 2008, victims' counsel wrote to government counsel, pointing out that this declaration appeared to be (albeit inadvertently) false in two important respects. First, the quoted provision was not actually in the non-prosecution agreement. And second, if it was discussed with Jane Doe #1, for example, then that would have created false impression. Victims' counsel asked for a clarification to be filed with the Court about these two points. *See* Exhibit "A."

In response, on December 22, 2008, the government filed a supplemental declaration. Doc. #35. The corrective supplemental declaration addressed the first point, agreeing that the information was false. The supplemental declaration, however, did not address the second question of whether this false information had previously been discussed with the crime victims. Moreover, the supplemental declaration raised additional question about Epstein's role in the false information. The supplemental declaration states the Epstein's attorney's approved the transmission of false information to the victims on and about July 9, 2008. Doc. #35 at 2. But none of the underlying information regarding the approval of that false information is included in the supplemental declaration.

Rather than have the government serving as the exclusive conduit for information to the Court about these subjects, it seem more consistent with the spirit of the ethical rules – and with the general obligations of disclosure discussed previously in this pleading – for the Government to make available to the victims all material and favorable information. For example, the Government could provide to the victim the underlying correspondence with Epstein's attorneys approving the transmission of this false information. This information will be highly relevant to the victims' position that the non-prosecution agreement should be set aside in view of violations

of the victims' rights. The Court should accordingly order production of this and other similar favorable evidence to the victims.

CERTIFICATE OF CONFERENCE

As recounted above, counsel for Jane Doe #1 and Jane Doe #2 have repeatedly requested that the U.S. Attorney's Office voluntarily stipulate to undisputed facts in this case and provide material information favorable to the victims case for more than two and a half years. The U.S. Attorney's Office, however, takes the position that the victims are not entitled to any such information.

CONCLUSION

For all the foregoing reasons, the Court should order the U.S. Attorney's Office to produce information favorable to the victims. A proposed order to that effect is attached.

DATED: March 21, 2011

Respectfully Submitted,

s/ Bradley J. Edwards
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CERTIFICATE OF SERVICE

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

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