

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

**Case No. 9:08-cv-80736-KAM**

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

**I.**

**UNITED STATES**  
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**JANE DOE NO. 3 AND JANE DOE NO. 4'S REPLY IN SUPPORT OF MOTION  
PURSUANT TO RULE 21 FOR JOINDER IN ACTION**

COME NOW Jane Doe No. 3 and Jane Doe No. 4 (also referred to as “the new victims”), by and through undersigned counsel, to file this reply in support of their motion pursuant to Federal Rule of Civil Procedure 21 to join this action (DE 280), on the condition that they not relitigate any issues already litigated by Jane Doe No. 1 and Jane Doe No. 2 (also referred to as “the current victims”). The Government’s response (DE 290) fails to contest the new victims’ specific argument that good cause exists for allowing them to join. Instead, the Government raises technical arguments about allegedly applicable statutes of limitations found in the CVRA or in 28 U.S.C. § 2401(a). But the CVRA does not contain the time limit that the Government reads into the Act. And § 2401(a) does not bar the action here. The Court should accordingly allow joinder of the new victims.<sup>1</sup>

**I. THE GOVERNMENT HAS NOT CONTESTED THE VICTIMS’ POSITION THAT GOOD CAUSE EXISTS FOR ALLOWING THEM TO JOIN THIS ACTION UNDER RULE 21.**

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<sup>1</sup> To be clear, this motion is brought on behalf of all four victims – Jane Does No. 1, 2, 3 and 4. As indicated throughout their pleadings, the victims do not seek to duplicate effort but rather (represented through the same legal counsel) to pursue a single, consolidated approach.

In their motion for joinder, the new victims advanced several specific reasons why joinder was appropriate under Fed. R. Civ. P. 21, including the facts that their participation would prove a consistent pattern of failing to notify victims, reinforce the relevancy of several document production requests currently pending before the Court, and elucidate the interface between the Government and the victims. DE 280 at 8-10. In a later pleading (responding to arguments from putative intervenor Alan Dershowitz), the new victims also advanced eight specific reasons why their allegations related specifically to current issues in the case, including issues of motive, the scope of any remedy that might be awarded, and the crime/fraud exception to the attorney-client privilege. DE 291 at 17-26.

Tellingly, the Government does not directly contest *any* of these assertions. Instead, the Government raises several technical objections as to why joinder is not possible. The victims respond to each and every objection in the pages that follow. But to the extent the question before the Court is one calling for an exercise of discretion, the Court should act against a backdrop of uncontested reasons demonstrating that joinder of the new victims would be useful.

## **II. THE CVRA DOES NOT CONTAIN A TIME LIMIT APPLICABLE TO THIS ENFORCEMENT ACTION.**

Rather than contest the reasons for allowing two new crime victims to join this CVRA action, the Government attempts to manufacture a time limit out of the CVRA itself. The Government contends that the new victims' motion for joinder is "barred" by 18 U.S.C. § 3771(d)(5), which provides:

A victim may make a motion to *re-open a plea or sentence* only if—  
(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

- (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and
- (C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

The Government's argument fails for the simple reason that the time limit applies only to a motion to "re-open a plea or sentence." The victims are seeking (among other things) rescission of an illegal non-prosecution agreement, not reopening of a "plea or sentence" – two different things. The Court has previously ruled to this effect, specifically discussing § 3771(d)(5). The Court held that "[a]lthough this particular statutory enforcement provision expressly refers to the re-opening of a 'plea' or 'sentence' – events falling in the post-charge stage of criminal proceedings – the court concludes that the statute is properly interpreted impliedly to authorize a 're-opening' or setting aside of pre-charge prosecutorial agreements made in derogations of the government's CRA conferral obligations as well." *See* DE 189 at 8.

Moreover, on the facts of this case, the Government's construction leads to an absurd result. As the Court is aware, the Government arranged for Epstein to execute his NPA on about September 24, 2007 – in secret. At that time, the victims could not "assert[] the right to be heard *before or during the proceeding*," 18 U.S.C. § 3771(d)(5) (emphasis added), because no "proceeding" was held and the Government concealed what it was doing from the victims. And, of course, the victims could not have then filed for mandamus appellate review "within 14 days" because the Government did not reveal the NPA until almost a year later, and only then after being compelled to do so. Section 3771(d)(5) should not be construed to demand the impossible of crime victims.

The CVRA's legislative history makes clear Congress did not intend for courts to construe § 3771(d)(5) in the perverse fashion advocated by the Government. Senator Kyl, one of the two co-sponsors of the Act, explained that “[t]his provision [§ 3771(d)(5)] is *not intended to prevent courts from vacating decisions in non-trial proceedings*, such as proceedings involving release, delay, plea, or sentencing, in which victims’ rights were not protected, and ordering those proceedings to be redone.” 150 CONG. REC. 22954 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). He went on to emphasize that “[i]t is important for victims’ rights to be asserted and protected throughout the criminal justice process, and for courts to have the authority to redo proceedings such as release, delay, pleas, and sentencings, where victims’ rights are abridged.” *Id.*<sup>2</sup>

The Government also half-heartedly refers to various time limits in 18 U.S.C. § 3771(d)(3). *See* DE 290 at 3. But the only time limits applicable to the victims in that provision concern appellate relief *after* a district court has denied relief. Of course, proceedings before this Court are still continuing – no denial of relief has occurred to trigger any obligation by the victims.<sup>3</sup> Simply put, nothing in the CVRA contains any limit that bars Jane Doe No. 3 and Jane

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<sup>2</sup> Section 3771(d)(5) also does not bar *all* of the new victims’ claims. By its plain terms, the provision is inapplicable to a request for restitution. The current victims have sought restitution, among other forms of relief, *see* DE 127 at 15, and the new victims seek to simply join in that claim.

<sup>3</sup> The Government also argues that victims’ counsel did not request “forthwith” action at the July 11, 2008, hearing in this case. DE 290 at 2 (*citing* DE 15 (tr. July 11, 2008) at 25-27). Of course, at that time the action had been pending for just four days. The Government had not provided the NPA to victims’ counsel, and victims’ counsel was only learning about broad outlines of the agreement during the hearing. *See* DE 15 (tr. July 11, 2008) at 24 (court notes that victims’ counsel “learned today . . . that the agreement was signed . . . in October”). In such circumstances, victims’ counsel’s decision to seek release of the NPA’s text instead of precipitously committing his clients to invalidating an agreement he had not even read yet was

Doe No. 4's motion for joinder in this case. And reading any such limitation into the Act would clearly contravene the obvious congressional purpose of giving victims the "right to participate in the system." 150 CONG. REC. S4263 (Apr. 22, 2004) (statement of Sen. Feinstein),

**III. THE STATUTE OF LIMITATIONS FOUND IN 28 U.S.C. § 2401(A) DOES NOT APPLY TO THIS CVRA ENFORCEMENT ACTION.**

The Government next resorts to a civil statute of limitation as a barrier to the new victims protecting their rights. This effort, too, is unavailing.

**A. A CVRA Enforcement Action is not a "Civil Action" Against the United States.**

The Government contends that the six-year statute of limitations contained in 28 U.S.C. § 2401(a) bars the new victims' entry into this case. The statute covers "civil actions," providing:

[E]very *civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

This provision does not apply to this CVRA enforcement proceeding because it is not a "civil action" against the Government. To be sure, this Court has determined that convenience dictates that the Federal Rules of Civil Procedure "govern the general course of this proceeding." *See* DE 257 at 3. But that procedural determination does not alter the substance of this case. Indeed, the Government itself takes the position that this CVRA enforcement action is *not* a civil action, but rather is an "ancillary criminal proceeding[]." DE 290 at 2.<sup>4</sup> The victims' all agree. Given

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entirely reasonable. Indeed, any other course would have been foolhardy.

<sup>4</sup> The Government's concession readily distinguishes *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006), which is clearly not an "ancillary criminal proceeding," but rather a civil enforcement action of the Endangered Species Act.

the agreement of both sides that this case is a “criminal” proceeding, it is hard to understand how there can even be any argument that § 2401(a)’s limitation for “civil actions” is applicable.

Confirming this conclusion is the standard definition of a “civil action,” which is commonly defined as “*a noncriminal litigation.*” *Black’s Law Dictionary* 34 (9th ed. 2009) (emphasis added). Indeed, as the case law interpreting § 2401(a) makes clear, the phrase “‘civil action’ as used in § 2401(a) is a term of art judicially and statutorily defined as one ‘commenced by filing a complaint with (a) court.’” *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978) (quoting Fed. R. Civ. P. 3). In this case, the victims never filed a “complaint.” Instead, they filed a “Petition for Enforcement of Crime Victim’s Rights Act,” DE 1 – as language in the CVRA itself suggests was the proper procedure. *See* 18 U.S.C. § 3771(d)(3) (providing that crime victims’ rights “shall be asserted in the district court” and referring to a “motion” to protect rights).

The federal courts – including the Eleventh Circuit – have been unwilling to stretch the meaning of the phrase “civil action” so far as to cover proceedings ancillary to a criminal case. *See, e.g., In re Grand Jury Proceedings*, 832 F.2d 554, 557 (11th Cir. 1987) (“Just in terms of the plain meaning of words, it seems self-evident that an order denying a motion to quash a subpoena issued by a grand jury investigating possible criminal violations is not part of a ‘civil action.’”); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039 (D.C. Cir.) (D.C. Cir. 1998) (“the courts have uniformly concluded that habeas corpus proceedings – and their cousins, section 2255 proceedings – are not ‘civil actions’”); *United States v. Soueiti*, 154 F.3d 1018, 1019 (9th Cir.) (finding deportation proceeding conducted as part of a criminal sentencing not a “civil action” because “one definition that is always correct is that civil actions are those that are not

criminal”); *In re Apr. 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1368 (6th Cir. 1978) (“From a simple reading of the statute itself, it seems self-evident that a grand jury investigation of possible criminal tax violations should not be characterized as a ‘civil action’”); *United States v. Wade*, 93 F. Supp. 2d 19, 21 (D.D.C. 2000), *aff’d*, 255 F.3d 833 (D.C. Cir. 2001) (third party intervention in criminal proceeding to oppose abatement order was not a “civil action” because “as the statute’s plain language excludes criminal cases, the Court will not parse criminal cases into criminal and ‘civil-like’ proceedings”); *Quinn v. Book Named “Sixty Erotic Drawings From Juliett,”* 316 F. Supp. 289, 292 (D. Mass. 1970) (where a proceeding to determine whether book is obscene is ancillary to a criminal prosecution and serves to aid in the enforcement of criminal law, such a proceeding does not come within the term ‘civil action’”).

A crime victim’s petition to enforce CVRA rights looks nothing like a conventional civil action against the Government. A CVRA enforcement proceeding does not grant any monetary relief to a victim. The CVRA directly bars a victim from “pursuing a damages action against the government for violation of the [CVRA], and there is no implied private right of action under the [CVRA].” 3B Wright & Miller, *Fed. Prac. & Proc. Crim.* § 932 (4th ed. 2014); *see* 18 U.S.C. § 3771(d)(6) (“Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States . . . could be held liable in damages.”); *Cunningham v. U.S. Dept. of Justice*, 961 F. Supp. 2d. 226 (D.D.C. 2013) (“[The] CVRA expressly disallows a suit for damages against the federal government or its officials . . . and Mr. Cunningham has failed to carry his ‘heavy burden’ of demonstrating the requisite congressional intent necessary to establish an implied private right of action.”); *200,000 Towers Investors Restitution Victims v. U.S. Dept. of Justice*, 2013 WL 5831117 (D.D.C. 2013) (“The CVRA expressly disallows a suit for damages against the federal government or its officials . . . and Mr. Cunningham has failed to carry his ‘heavy burden’ of demonstrating the requisite congressional intent necessary to establish an implied private right of action.”).

*U.S. ex rel. U.S. Prob. Office New York City Staff Breach of Crime Victims Act*, 2013 WL 6673612, at \*2 (S.D.N.Y. 2013) (“This petition is brought pursuant to the CVRA, which does not provide for a private right of action.”). Rather, the CVRA provides crime victims certain rights that are related to the prosecution of the accused and sentencing of the guilty. These rights are not civil, but criminal in nature. *See In re McNulty*, 597 F.3d 344, 352 n.8 (6th Cir. 2010) (“The CVRA was not enacted to short circuit civil litigation to those with valid civil remedies available.”).

Jane Doe No. 3 and Jane Doe No. 4 are seeking to enforce their rights as crime victims under the CVRA – rights that the Government should have provided to them during its criminal investigation. They are not seeking monetary damages from the government for the violation of their CVRA rights, but rather invalidation of an illegal non-prosecution agreement that bars criminal prosecution of Epstein and his potential co-conspirators. The victims’ rights are ultimately enforceable in, and inseparable from, a criminal proceeding. Their action is simply not the type of action covered by § 2401(a)’s six-year statute of limitations for “civil actions” against the Government.

The Government complains that the victims’ position means that no statute of limitations applies to CVRA cases. DE 290 at 506. Not true. The applicable statute of limitations in this “ancillary criminal proceeding” is to be found (appropriately enough) in the criminal code – i.e., Title 18 – not in the judicial code – Title 28, as the Government’s position would have it. Of course, the CVRA itself is found in Title 18. And for most crimes, the applicable statute of limitations will be the general five-year statute for filing criminal actions, 18 U.S.C. § 3282 – shorter than the six-year civil tort statute the Government points to. This case, however, involves

sexual offenses against children, and the Court should therefore look to the specific statute of limitations covering such crimes. *See Edwards v. Shalala*, 64 F.3d 601, 605 (11th Cir. 1995) (“[I]t appears contrary to the Supreme Court’s directives . . . to apply a statute [of limitations] of general applicability when there are other more relevant statutory provisions.”). In 18 U.S.C. § 3283, Congress has decreed that “[n]o statute of limitations that would otherwise preclude prosecution of an offense involving the sexual or physical abuse . . . of a child under the age of 18 shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.”<sup>5</sup> This statute of limitations governs the underlying criminal prosecution and thus this related CVRA case. Because this limitation period has not expired, Jane Doe No. 3 and 4’s motion to join is timely. Indeed, the Government’s position would create an absurd result – i.e., that even though the statute of limitations for prosecuting crimes against Jane Doe No. 3 and No. 4 has not yet expired, their ability to protect their CVRA rights in the investigative process of those crimes has somehow expired! Surely Congress did not intend such a bizarre result that would limit the CVRA’s effectiveness.

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<sup>5</sup> In 1994, this statute allowed prosecution of an offense against a child up until the child reached the age of 25. *See* 18 U.S.C. § 3283 (1994). In 2003, Congress passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (the “PROTECT Act”), which further extended the statute of limitations for offenses involving the sexual or physical abuse of a child from when the child reaches the age of 25 years to “during the life of the child.” Pub. L. 108-21, Title II, § 202, 117 Stat. 660 (Apr. 30, 2003). *See* Joint Explanatory Statement of the Committee of Conference, 149 Cong. Rec. H2950-01 (2003) (Conf. Rep.), 2003 WL 1832092 (while the 25-year age limit “is better than a flat five-year rule, it remains inadequate in many cases”).

Because the crimes against Jane Doe No. 3 were committed while she was a minor between around 1999 to 2001 (*see* DE 291-1 at 1-12), the statute of limitations had not yet expired as to crimes against her in 2003 and therefore the PROTECT Act’s extension of the statute of limitations applies in this case. *See United States v. Vickers*, 2014 WL 1838255, at \*9 (W.D.N.Y. 2014).

**B. Because Jane Doe No. 3 Was “Beyond the Seas” When Her Action First Accrued, She Has Timely Filed Her Motion.**

Even if 28 U.S.C. § 2401(a) applies to the new victims’ claims, Jane Doe No. 3’s claim is still timely. Congress has written an express tolling provision into the statute: “The action of any person . . . *beyond the seas* at the time the claim accrues may be commenced within three years after the disability ceases.” 28 U.S.C. § 2401(a) (2012) (emphasis added). In this case, Jane Doe No. 3 was hiding from Jeffrey Epstein and his co-conspirators in Australia from the time her claim accrued until October 2013, when she returned to the United States. *See* Ex. 1 at 3 (“I was in Australia from late 2002 to October 2013. To be clear, I was never in the United States during these years, not even for a short trip to visit my mother.”). The Court can take judicial notice that the distance from West Palm Beach, Florida, to Sydney, Australia, is 9,364 miles – and that travel between the two points would involve passing over the Pacific Ocean. Therefore, Jane Doe 3 was plainly “beyond the seas” when the events giving rise to her claim occurred, and the running of the limitations period, if applicable, did not begin until she returned to Florida about 16 months ago, in October 2013. Jane Doe 3 has therefore filed her action within the three-year time period specified by § 2401(a) for persons returning to this country from beyond the seas.

Confirming the commonsense conclusion that Jane Doe No. 3 was beyond the seas, *Black’s Law Dictionary* (9<sup>th</sup> ed. 2009) defines “beyond [the] seas” as: “(Of a person) Being absent from a jurisdiction or nation; out of the country, esp. across the ocean.”<sup>6</sup> Moreover, Congress first crafted the “beyond the seas” language in 1911, when it plainly referred to persons living outside the United States. The original tolling provision provided:

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<sup>6</sup> *Black’s Dictionary* gives the above-quoted definition for the phrase “beyond seas,” but

Provided, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and *persons beyond the seas* at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought with three years after the disability has ceased. . . .

Act of Mar. 3, 1911, ch. 231, § 24, para. 20, 36 Stat. 1093 (emphasis added). The decisive question when construing a statute is what did the words mean “at the time of the statute’s enactment.” *Taniguchi* ■ *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2003 (2012). In 1911, the phrase “beyond the seas” clearly embraced persons who were outside the United States, as previous court decisions had held. *See, e.g., Murray’s Lessee* ■ *Baker*, 16 U.S. 541, 545 (1818) (concluding that “the words ‘beyond [the] seas’ must be held to the equivalent to ‘without the limits of the state’”).

In 1948, Congress saw fit to re-codify this provision into Title 28 of the United States Code and replaced the statutory references to minors and mentally disabled persons with the consolidated term “under a legal disability.” *See* Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 971 (codified as amended at 28 U.S.C § 2401(a)). But Congress chose to leave the words “beyond the seas” unaltered – with the result that they continue to have the same meaning as they had in 1911. *See* 1A SUTHERLAND STATUTORY CONSTRUCTION § 22:33 (7th ed.) (“Provisions of the original act or section which are repeated in the body of an amendment, either in the same or equivalent words, are a continuation of the original law”).

Congress knows how to write statutes of limitations that do not toll the limitations period for persons “beyond the seas.” *Cf.* 18 U.S.C. 2255(b) (containing a tolling provision for crime victims “under a legal disability,” but not containing a tolling provision any other persons).

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notes that the phrase “beyond the seas” is an equivalent. *Id.*

Where Congress has deliberately chosen to toll the running of the limitations period while a claimant is “beyond the seas,” as in 28 U.S.C. 2401(a), a court lacks the power to narrow the scope of the plain meaning of that phrase. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001) (cautioning against allowing “clearly expressed legislative decisions. . . [to] be subject to the policy predilections of judges.”).

The Government may try to argue that, in its view, this tolling provision is now somehow outdated, given the arrival of technology permitting less expensive international telephone calls and the like. But the Government’s opinion about whether this tolling provision remains sound public policy is beside the point. Courts do not exist to “update” statutes in light of the latest technological developments. *See Myers v. TooJay’s Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011) (courts “are not licensed to practice statutory remodeling”); *Wright v. Sec’y for Dep’t of Corrs.*, 278 F.3d 1245, 1255 (11th Cir.2002) (“Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to ‘improve’ statutes by altering them.”); *see also Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1351-52 (11th Cir. 1999) (Edmonson, J., dissenting) (“it is the qualities of the text when it was written – and not our response to it as modern readers – that must be our guide. . . . [W]hat we personally might like this statute to mean . . . in the light of current circumstances . . . has no rightful place in our work . . .”). Whether to modernize a statute is Congress’ decision. *See City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 834 (1966) (“[I]f changes are to be made in the long-settled interpretation of the provisions of this century-old . . . statute, it is for Congress and not for this Court to make them.”). Put simply, while Jane Doe No. 3 was living in Australia, she was

“beyond the seas” – i.e., outside of the borders of the United States – and section 2401(a)’s statute of limitations was tolled.<sup>7</sup>

**C. Because Jane Doe No. 3 and Jane Doe No. 4 Were Unaware of Their Ability to File a CVRA Action Until Recently, They Timely Filed Their Motions.**

In arguing that the statute of limitation has lapsed in this case for Jane Doe No. 3, the Government apparently starts the six-year clock running on September 3, 2008, when the U.S. Attorney’s Office sent a letter to her in Australia. *See* DE 290 at 3 (*citing* letter attached as DE 290-1).<sup>8</sup> But that letter did not clearly communicate that a CVRA cause of action existed. To the contrary, the letter was quite misleading about what was happening. The Government told Jane Doe No. 3 only that “there has been litigation between the United States and two other victims regarding the *disclosure* of the entire agreement between the United States and Mr. Epstein.” DE 290-1 at 3 (*emphasis added*). But the litigation did not involve *disclosing* the agreement; rather the goal was *invalidating* the agreement. The Government’s intentionally deceptive description confused Jane Doe No. 3, who states that “[u]nderstanding more about that [CVRA] case now, I realize that the letter did not explain that the real purpose of that litigation was not to get ‘disclosure of the entire agreement’ but instead to get criminal charges filed against Epstein and to uphold the rights of Epstein’s victims. I wish that the Government had

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<sup>7</sup> This case does not present any occasion for the Court to consider how § 2401(a)’s statute of limitations applies when a person is voluntarily absent from the United States. As Jane Doe No. 3 attests in her affidavit, she was involuntarily outside of the United States because she was concealing herself from Epstein. *See* Ex. 1 at 3 (“my absence from the United States was not voluntary – I was hiding from Epstein out of fear of what he would do to me if I returned to the United States.”).

<sup>8</sup> The Government also refers briefly to earlier events in the case. *See* DE 290 at 6-7. But clearly those earlier events did disclose to Jane Doe No. 3 the existence of a secret non-prosecution agreement. She first became aware of the existence of such an agreement through the Government’s letter on September 3, 2008.

told me that was what was really going on.” Ex. 1 at 5-6. Given this deception, the Court should not conclude – on the basis of mere pleadings – that Jane Doe No. 3’s obligation to file began on September 3, 2008. Finally, the September letter informed Doe 3 to call an attorney in Miami who was assigned her representation by the Government through the NPA. That firm had to work within the confines of that Government assignment and direction and therefore could not, and did not, inform Jane Doe No. 3 of a right to participate in this CVRA case which was aimed at invalidating the very agreement through which this law firm was mandated to operate.

The Government’s position regarding Jane Doe No. 4 is also mystifying. The Government asserts that she had legal representation “as early as 2012.” DE 290 at 9. Of course, that date falls well inside the six-year period of limitations, so her claim would not be time barred in any event.

#### **IV. THE GOVERNMENT PROVIDES NO PERSUASIVE ARGUMENT AGAINST RULE 21 JOINDER.**

For the reasons just explained, neither the CVRA nor 28 U.S.C. § 2401(a) provides any barrier to Jane Doe No. 3 and Jane Doe No. 4 joining this case. As a result, the path would seem to be clear for the Court to simply grant the current victims’ motion for joining the new victims under Fed. R. Civ. P. 21. The Government, however, has several other arguments that it throws out. None of them is persuasive.

Perhaps recognizing that Rule 21 broadly allows for the addition of new parties, the Government contends that the Rules of Civil Procedure do not even govern this action. Proceeding from the premise that this case is an “ancillary criminal proceeding” (DE 290 at 2),

the Government points out that the Rules of Criminal Procedure lack a provision for adding new parties. Thus, the Government concludes, that no parties can be added here. *Id.*

The Government's hyper-technical argument suffers from two clear flaws. First, the Court has already ruled that, as to procedural matters in this case, the civil rules govern. *See* DE 257 at 3 ("As this Court has previously indicated, see DE 190, the Federal Rules of Civil Procedure govern the general course of this proceeding."); *see also* Local Rule 88.9 (motions in criminal cases governed by Local Rule 7.1, which parallels Fed. R. Civ. P. 7). Second and more fundamentally, the Government's crabbed interpretation of the CVRA would mean that a new victim should never be allowed to join a previously-filed CVRA action. This position is belied not only by the clear intent of Congress to create enforceable rights for crime victims, but also by the Government's own action in previously agreeing to Jane Doe No. 2's motion to join the case. *See* DE 15 (tr. July 11, 2008) at 14 (Court: "[D]o you have any objection to Jane Doe 2 being added as a petitioner in this case?" Government counsel: "No, I don't."). Clearly, as the Government's own previous agreement demonstrates, some procedural device should allow a new victim to be added to a previously-filed CVRA case, as otherwise the court's docket could be unnecessarily cluttered with separate actions.

As a fallback, the Government advances the claim that the rule of civil procedure controlling the pending motion is not Rule 21 (regarding joinder of parties), but rather Rule 15 (regarding amendments to pleadings). *See* DE 290 at 2. The Government's argument does not square with the plain language of the two provisions. While Rule 15 deals with amending pleadings, Rule 21 specifically indicates that, upon motion, the Court has power to "*add . . . a party.*" Of course, since the current motion involves an effort to add new parties, it is

appropriate for the Court to resolve the issue under Rule 21. As one court has explained, “Any conflict or ambiguity which results from a comparison of [Rule 15(a) and Rule 21] ... must be resolved in favor of the specific and against the general. Thus, when a proposed amendment to a complaint seeks to effect a change in the parties to the action, Rule 21 ... controls and, to that extent, limits Rule 15(a).” *Int’l Broth. of Teamsters* ■ *AFL-CIO*, 32 F.R.D. 441, 442 (E.D. Mich. 1963). While the Government cites three cases allowing the addition of new parties through Rule 15 (DE 290 at 102), none of these cases address the issue of whether Rule 15 or Rule 21 is the proper vehicle to do so. Most cases that have discussed directly which of the two rules applies have concluded that Rule 21 is the appropriate vehicle for adding a party. *See, e.g., South Dakota ex rel. S. Dakota R.R. Auth.* ■ *Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 924 (D.S.D. 2003) (“Pleadings and Motions are dealt with under Part III of the Rules [i.e., Rules 8 to 16]. Parties are dealt with under Part IV of the Rules [i.e., Rules 17-25]. If a plaintiff could simply add a party by amending the complaint, there would be no purpose for Rule 19 . . . .”); *Joseph* ■ *House*, 353 F. Supp. 367, 371 (E.D. Va.), *aff’d sub nom. Joseph* ■ *Blair*, 482 F.2d 575 (4th Cir. 1973) (“Rule 21 . . . provides that parties to an action may be added by order of the Court at any stage of the proceedings. This rule precludes the plaintiffs from being able to file their amended complaint as of right, which they seek to do. The plaintiffs would ordinarily be able to do so under Rule 15(a).”).

Because the Government has refused to stipulate to Jane Doe No. 3’s and Jane Doe No. 4’s entry into the case, the victims are contemporaneously filing with this reply a protective motion for amendment under Rule 15 to add the new victims. But the new victims continue to rely on Rule 21’s plain language as their primary argument to join this case.

The Court should apply Rule 21 and allow Jane Doe No. 3 and Jane Doe No. 4 to be added to this case at this time. It is well-settled that “[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of Am.* █ *Gibbs*, 383 U.S. 715, 724 (1966). As discussed in Part I, above, the Government had not contested the reasons that support joining the new victims into this case. Instead, the Government’s only arguments pertain to the timing of the motion. But Rule 21 itself makes clear that new parties can be added “at any time.” Fed. R. Civ. P. 21. And the cases clearly demonstrate the joinder is appropriate, even at very late stages of a proceeding, if justice will be served. *See, e.g., Data General Corp.* █ *Grumman Sys. Support Corp.*, 825 F. Supp. 340, 344 (D. Mass. 1993) (where common question of fact existed about plaintiff student suing under the Civil Rights and two other students who were not parties to the suit, it was appropriate for the court to join the two other students at the conclusion of the trial when a portion of the relief request was granted). Of course, this case is not at a late stage, but is still in a discovery phase.

The Government’s arguments about undue delay and prejudice are meritless, as the victims discuss in their concurrently-filed motion for amendment under Rule 15.<sup>9</sup> But for purposes of this Rule 21 motion, one point is decisive. If the Court does not allow the new victims to join this CVRA enforcement action, then they intend to file their own, separate enforcement actions. Because there is no statute of limitations for doing so, the separate actions would be proper. But the separate actions would produce entirely duplicative litigation over the

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<sup>9</sup> The victims specifically adopt and incorporate by reference here the arguments against undue delay and prejudice that they make in their Rule 15 pleading.

same set of facts. This reality should be the decisive factor in favor of allowing joinder here. *See Hawkins v. Fulton Cnty.*, 95 F.R.D. 88, 91 (N.D. Ga. 1982) (allowing new parties to be added under Rule 21 because denying motion “would only result in the filing of a second, possibly duplicative suit. This Court is duty bound to prevent that sort of duplication of effort which is a waste of judicial resources.”). Indeed, allowing joinder will clearly reduce litigation burdens – on both the Court and the Government. The motion seeks to have the new victims added into this action, conditioned on the requirement that they not re-litigate any issues previously litigated. Of course, if Jane Doe No. 3 and Jane Doe No. 4 were to file new lawsuits, they would not be subject to any such restriction.

Allowing joinder in this action is clearly consistent with the Crime Victims’ Rights Act. The CVRA – the most specific directive to this Court – commands that the Court “*shall ensure* that the crime victim is afforded the rights described [in the CVRA].” 18 U.S.C. § 3771(b)(1) (emphasis added). Congress intended that “the courts of this country . . . will be responsible for enforcing” victims’ rights provided in the CVRA. 150 CONG. REC. 22953 (Oct. 9, 2004) (statement of Sen. Kyl). The best way the Court can “ensure” that Jane Doe No. 3 and Jane Doe No. 4’s rights are afforded is by allowing them to join this enforcement action. The Court should accordingly allow them to join.

### CONCLUSION

Jane Doe No. 3 and Jane Doe No. 4 should be allowed to join Jane Doe No. 1 and Jane Doe No. 2 in this action, pursuant to Rule 21 of the Federal Rules of Civil Procedure. The joinder should be conditioned on the requirement that Jane Doe No. 3 and Jane Doe No. 4 not re-litigate any issues previously litigated by Jane Doe No. 1 and Jane Doe No. 2.

DATED: February 6, 2015

Respectfully Submitted,

/s/ Bradley J. Edwards

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FARMER, JAFFE, WEISSING,

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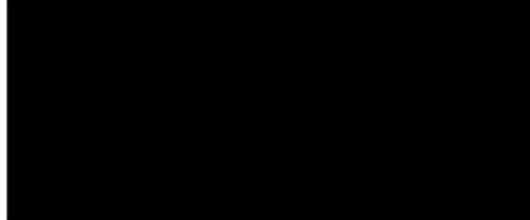


*and*

Paul G. Cassell

*Pro Hac Vice*

S.J. Quinney College of Law at the



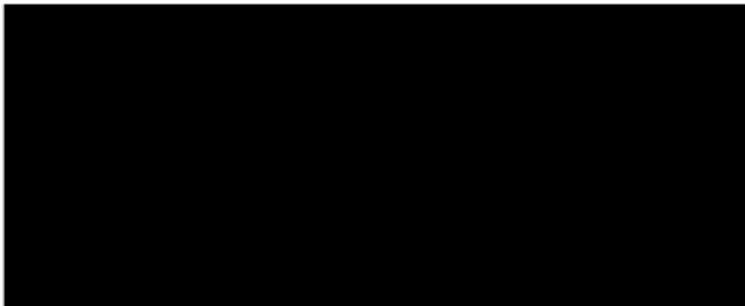
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\* This daytime business address is provided for identification and correspondence purposes only and is not intended to imply institutional endorsement by the University of Utah

**CERTIFICATE OF SERVICE**

I certify that the foregoing document was served on February 6, 2015, on the following using the Court's CM/ECF system:



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