UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.
_____/

RESPONDENT'S OPPOSITION TO JANE DOE #3 AND JANE DOE #4'S CORRECTED MOTION PURSUANT TO RULE 21 FOR JOINDER IN ACTION

Respondent United States, by and through its undersigned counsel, files its Opposition to Jane Doe #3 and Jane Doe #4's Correction Motion pursuant to Rule 21 for Joinder in Action (D.E. 280), and states:

I. PETITIONERS' MOTION TO ADD TWO ADDITIONAL PARTIES SHOULD BE DENIED AS UNTIMELY

This action was commenced by Jane Doe #1 on July 7, 2008 (D.E. 1). The Court ordered the Government to file a response by July 9, 2008, which was done. On July 11, 2008, the Court held a hearing on the emergency petition. At that hearing, Jane Doe #2 was added to the petition. Now, over six years into the litigation, petitioners want to add two new petitioners. Petitioners' motion should be denied because it is untimely.

Petitioners seek to add two new petitioners to the case, whom they claim are victims. D.E. 280 at 1. They incorrectly invoke Fed.R.Civ.P. 21 as the basis for their motion. The addition of new parties is governed by Fed.R.Civ.P. 15. Brainard v. American Skandia Life Assurance Corp., 432 F.3d 655, 666 (6th Cir. 2005); Bell v. City of Topeka, Kansas, 279

Fed.Appx. 689, 691-92 (10th Cir. 2008); and Hinson v. Norwest Financial South Carolina, Inc., 239 F.3d 611, 618 (4th Cir. 2001).

A. The CVRA Claims of Jane Doe #3 and Jane Doe #4 Are Barred by 18 U.S.C. § 3771(d)(3)

Section 3771(d) of Title 18, United States Code, provides that, "[t]he rights prescribed 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 district in which the crime occurred." Since no federal criminal charge was filed against Epstein, petitioners sought relief under the second clause, by filing their emergency petition in the Southern District of Florida on July 7, 2008. Petitioners were aware that Epstein had entered his plea of guilty in the Circuit Court, Palm Beach County, Florida, on June 30, 2008. D.E. 1 at 1, ¶ 2.

The Court held a hearing on July 11, 2008, in accordance with § 3771(d)(3)'s direction that, "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." The motion was not decided by the Court because petitioners' counsel did not request such action. Hearing Transcript at 25-27.

In section 3771(d)(5), entitled, "Limitation on relief," the CVRA provides that, "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." Jane Doe #3 and Jane Doe #4, as well as Jane Doe #1 and Jane Doe #2, seek to have the non-prosecution agreement set aside, and the plea negotiations reopened. Consequently, they are bound by § 3771(d)(5)'s limitations.

The extremely short time limits set out in § 3771(d)(3) -- the direction to district courts to "decide any motion asserting a victim's right forthwith;" the requirement that the courts of

appeal decide any petition for writ of mandamus within 72 hours after the petition has been filed; and the requirement that, "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter," – indicate that Congress intended persons claiming rights under the CVRA must move with dispatch.

The need to act expeditiously to enforce CVRA rights should be no less when a victim is proceeding under the second clause of § 3771(d)(3), by filing in the district court in the district where the crime occurred. On September 3, 2008, the U.S. Attorney's Office sent a letter to Jane Doe #3, notifying her that Epstein had entered guilty pleas to two violations of the Florida statutes, felony solicitation of prostitution and procurement of minors to engage in prostitution. Exhibit A. The sentenced adjudged was also included. Jane Doe #3 was advised that, "[i]n light of the entry of the guilty plea and sentence, the United States has agreed to defer federal prosecution in favor of this state plea and sentence, subject to certain conditions …" Exhibit A at 1. Three conditions were listed, including the availability of a cause of action under 18 U.S.C. § 2255 for money damages arising out of the sexual abuse; the selection of Robert Josefsberg, Podhurst Orseck, P.A., as an attorney who was available to represent Jane Doe #3. Significantly, Jane Doe #3 was notified of the instant litigation "between the United States and two other victims regarding the disclosure of the entire agreement between the United States and Mr. Epstein." Exhibit A at 3.

In January 2009, Jane Doe #3 received the letter from the U.S. Attorney's Office, notifying her that Epstein had entered a plea of guilty in state court, and the availability of a cause of action under 18 U.S.C. § 2255 to seek compensation for the sexual abuse. On May 1, 2009, Jane Doe #3 filed her civil action against Epstein, using the Podhurst Orseck, P.A. law firm, which had been suggested to her in the September 3, 2008 letter. Exhibit B, Jane Doe No.

102 v. Jeffrey Epstein, Case No. 09-80656-CIV-MARRA (S.D.Fla.).

In her complaint against Epstein, Jane Doe #3 stated that she received numerous phone calls from one of Epstein's agents in 2008, repeatedly asking her if she knew anything about the civil cases against Epstein, whether she knew any of the females who were proceeding with the civil suits, whether she was planning on filing suit, whether she was communicating and/or cooperating with anyone against Epstein; and whether she would return to the United States to testify. Exhibit B at 10-11.

Plainly, Jane Doe #3 was aware, as early as 2008, that civil actions were being filed against Epstein by young women, and Epstein was keenly interested in knowing whether she was going to file her own suit, and/or assist other young women who had filed their own actions. Instead of promptly asserting a claim that her rights under the CVRA were violated, she waited six years.

As for Jane Doe #4, the Government is aware that she has been represented by counsel for petitioners since as early as 2012. If indeed her CVRA claim is the same as Jane Doe #1 and Jane Doe #2, then no additional investigation was required to determine if there was a good faith basis supporting the claim. Yet she waited over two years before asserting her claim.

B. The CVRA Claims of Jane Doe #3 and Jane Doe #4 Are Barred by 28 U.S.C. § 2401(a)

If petitioners' CVRA action is viewed as a civil matter, the claims of Jane Doe #3 and Jane Doe #4 are barred by the statute of limitations in 28 U.S.C. § 2401. Section 2401(a) provides, in pertinent part:

> (a) Except as provided by chapter 71 of title 41, every 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.

The six-year limitations period in section 2401(a) "applies to all civil actions whether legal, equitable, or mixed." Spannaus v. U.S. Department of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987)(citations omitted). Moreover, the Eleventh Circuit has recognized that, "[u]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." Center for Biological Diversity v. Hamilton, 453 F.3d 1331, 1334 (11th Cir.2006), citing Spannaus, 824 F.2d at 55. Also, petitioners' contention that, because the CVRA contains no statute of limitations, no period of limitations applies, is refuted by Center for Biological Diversity. That case dealt with the interpretation of the Endangered Species Act, and in particular, 16 U.S.C. § 1540(g)(1)(C). 453 F.3d at 1334. The Eleventh Circuit held noted that, "[t]he Act prescribes no statute of limitations for suits against the United States, so the general six-year statute of limitations for suits against the United States applies." Id. citing 28 U.S.C. § 2401(a), and Edwards v. Shalala, 64 F.3d 601, 605 (11th Cir. 1995)(finding that section 2401(a) "sets an outside time limit on suits against the United States").

A "claim against [the] United States first accrues 'on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" Izaak Walton League of America, Inc. v. Kimbell, 558 F.3d 751, 759 (8th Cir. 2009)(citations omitted). A plaintiff's claim accrues, for purposes of § 2401(a), when the plaintiff "either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim." Loudner v. United States, 108 F.3d 896, 900 (8th Cir. 1997).

Jane Doe #3's claim under the CVRA accrued when she first became aware that a non-prosecution agreement between the U.S. Attorney's Office and Jeffrey Epstein had been

negotiated without her consultation. As early as 2008, Jane Doe #3 was called by Epstein's agents, asking whether she intended to file a civil action against Epstein; whether she knew if other young women were going to file lawsuits; and whether she was going to assist them. At this point, she knew that other sex abuse victims were filing lawsuits against Epstein, and Epstein's agents believed she might do the same. Exhibit A, Complaint at 10, ¶ 28. A reasonably diligent person would have investigated how and why, after a six year period, young women were suing Epstein, and Epstein and his agent believed she had the ability to sue Epstein also, and were concerned she might be cooperating with anyone against Epstein. Jane Doe #3 knew what Epstein had done to her, and other young girls. She knew the civil lawsuits had to be based on the sexual abuse by Epstein.

In a telephone interview conducted on April 7, 2011, by Jack Scarola, Esq., representing Brad Edwards, Esq. in Epstein v. Rothstein, Edwards, and L.M., Jane Doe #3 stated she was first contacted by the FBI "in 2007 sometime." Exhibit C at 18. She was contacted by telephone by the FBI, who told her that some girls had disclosed her name, and that was how the FBI knew to contact her. Exhibit C at 17. Jane Doe #3 stated she started to answer the FBI's questions, but then she became fearful. She told the FBI she had a young family she did not want to risk, and asked the FBI not to bother her again. Within one or two weeks after the FBI's phone call, Jane Doe #3 received a call from Epstein's attorney, and then one week later, from Epstein himself. Exhibit C at 17. This indicates Jane Doe #3 had knowledge of the criminal investigation as early as 2007.

Jane Doe #3's CVRA claim is barred by § 2401(a) because more than six years has elapsed since 2008, when she knew, or in the exercise of reasonable diligence should have known, that she had a claim against the United States for violations of the CVRA.

Under Fed.R.Civ.P. 15, although leave to amend shall be freely given when justice so requires, "a motion to amend may be denied on 'numerous grounds' such as 'undue delay, undue prejudice to the defendants, and futility of the amendment'" Maynard v. Board of Regents of the Division of Universities of the Florida Department of Education, 342 F.3d 1281, 1286-87 (11th Cir. 2003)(citation omitted). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." Galindo v. ARI Mutual Insurance Co., 203 F.3d 771, 777 n.10 (11th Cir. 2000), citing Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 859 (10th Cir. 1999). Jane Doe #3's CVRA claim would be subject to dismissal for lack of subject matter jurisdiction because it is barred by § 2401(a).

III. PETITIONERS' MOTION TO ADD SHOULD BE DENIED BECAUSE OF THEIR UNDUE DELAY

Petitioners have unduly delayed in seeking to amend their petition to add two new petitioners. As to Jane Doe #3, the Government is aware that petitioners' counsel have been representing her at least as early as March 2011, yet they have waited more than three years to attempt to add her as a party. If Jane Doe #3's claims are similar to those being asserted by the present petitioners, as petitioners maintain in support of their motion to amend, then there is no good explanation for the delay.[1] No additional time was needed to conduct an investigation to determine relevant facts, or legal research to satisfy themselves that a legitimate claim under the CVRA existed.

As an additional justification for adding the new victims, Jane Doe #3 and Jane Doe #4 contend that their "participation is also directly relevant to the discovery disputes pending in this case." D.E. 280 at 10. They claim that their participation "will help prove the relevancy of these [discovery] requests as well as the need for those requests." Id. This assertion is an

[1] "The new victims have suffered the same violations of their rights under the Crime Victims' Rights Act (CVRA) as the current victims." D.E. 280 at 1.

admission by petitioners that the objections lodged by the Government to their discovery requests are meritorious. Whether any particular discovery request is permitted under Rule 26 is measured by the issues raised by the parties in the litigation, not issues that could be raised by parties the petitioner wishes to add. Fed.R.Civ.P. 26(b)(1)("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of person who know of any discoverable matter.") Adding two new parties to help justify a pending discovery request is a poor reason to amend a petition that has been pending for over six years.

As to Jane Doe #4, the Government is aware that petitioners' counsel represented her as early as 2012. If Jane Doe #4 suffered the same alleged violations of her rights under the CVRA, as alleged by petitioners, then there is no good explanation for why they waited two years to attempt to add her to this lawsuit.

IV. THE ADDITION OF JANE DOE #3 AND JANE DOE #4 WILL PREJUDICE THE GOVERNMENT

The Government disagrees with petitioners' assertion that the addition of the two new victims will not prejudice the Government. D.E. 280 at 11. Petitioners contend that so far as Jane Doe #4 is aware, "the U.S. Attorney's Office made no serious effort to locate her." D.E. 280 at 8. Further, petitioners maintain that the Government identified approximately forty separate underage, sexually abused victims, and prepared a 53-page federal indictment, knowing of the existence of victims like Jane Doe #4, who were "unidentified and not interviewed," but nevertheless entered into a non-prosecution agreement with Epstein which barred prosecution of his crimes against these victims. Id.

Petitioners' admission that Jane Doe #4 was unidentified and not interviewed adds a new

and different claim to this lawsuit. Petitioners are contending that 18 U.S.C. § 3771(a)(5) imposes a duty on the attorney for the Government in the case to consult with a victim that is not even known to the Government. Their contentions that the U.S. Attorney's Office acted "contrary to the Government's normal approach in prosecuting federal sex offenses," and "made no serious effort to locate [Jane Doe #4]," D.E. 280 at 8, clearly indicate petitioners' intention to have this Court judicially review the reasonableness of the manner in which the U.S. Attorney's Office conducted its criminal investigation of Jeffrey Epstein, including the methods employed in identifying potential victims, and seeking them out for interviews.[2]

Any attempt to have this Court judicially review the manner in which the Epstein investigation was conducted by the U.S. Attorney's Office is precluded by 18 U.S.C. § 3771(d)(6), which provides that, "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." The Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. United States v. Nixon, 418 U.S. 683, 693 (1974). "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965)(en banc). Part of the prosecutorial discretion which is protected is deciding how a criminal investigation is to be conducted, including discretionary decisions such as the investigative leads to pursue, the victims to be interviewed, and which specific offense to charge, considering the strength of the evidence

[2] Petitioners make a similar claim as to Jane Doe #3, contending that "even a rudimentary investigation of Jane Doe #3's relationship to Epstein would have revealed the fact that she had been trafficked throughout the United States and internationally for sexual purposes." D.E. 280 at 6. While admitting that the Government listed Jane Doe #3 as a victim in the attachment to the non-prosecution agreement, petitioners still complain that a more thorough investigation should have been done. Petitioners fail to mention that Jane Doe #3 was contacted by the FBI in 2007, but declined to provide them any information. Exhibit C at 17..

supporting each individual charge. These decisions are all shielded from judicial review in general by the separation of powers doctrine, and in this specific context by 18 U.S.C. § 3771(d)(6).

A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss. Rose v. Hartford Underwriters Insurance Co., 203 F.3d 417, 420 (6th Cir. 2000)(citation omitted). Jane Doe #4's claim is subject to dismissal because it is barred by 18 U.S.C. § 3771(d)(6).

CONCLUSION

Petitioners' motion to amend their petition to add Jane Doe #3 and Jane Doe #4 should be denied. Neither has acted with the dispatch required by 18 U.S.C. § 3771(d)(3), by waiting years to assert their claims. Further, if their claims are considered to be arising in a civil action, they are barred by the six year statute of limitations in 28 U.S.C. § 2401(a). Further, there has been undue delay in adding the new victims, since petitioners' counsel have represented Jane Doe #3 since as early as March 2011, and Jane Doe #4 as early as 2012. No explanation is provided on why petitioners have waited until the end of 2014 to add the new victims. The addition of Jane Doe #4 will prejudice the Government because it injects a new claim – that the CVRA imposes a duty to consult with victims unknown to the Government. Moreover, this amendment to the petition is futile since the claim is subject to dismissal under Fed.R.Civ.P. 12(b)(6).