UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____/

CONFIDENTIAL MEMORANDUM ON BEHALF OF JANE DOE NO. 1 AND JANE DOE NO. 2 REGARDING MEDIATION

COME NOW Jane Doe No. 1 and Jane Doe No. 2 (the "victims"), by and through undersigned counsel, to provide this confidential memorandum, intended to be reviewed solely by mediator U.S. Magistrate Judge Dave Lee Brannon and his supporting staff.

The victims believe that they have an extremely strong case for establishing that the Government violated their rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. They have recently filed a sixty-page summary judgment motion (DE 361), supported by more than one hundred exhibits, primarily incontestable emails between the Government and Jeffrey Epstein's defense counsel. These emails establish incontrovertibly that the Government did not confer with the victims when it reached a deal with politically-connected billionaire Jeffrey Epstein that allowed him to escape any federal prosecution through a non-prosecution agreement (NPA). The victims believe that their summary judgment motion has a high likelihood of success. Nonetheless, in the interest of facilitating a possible resolution, they are willing to see what the Government might be willing to agree to as part of a resolution.

The remainder of this memorandum will review some of the factual background relevant to the case – background that establishes that the Government has been stalling any exploration of the facts for nearly eight years. (This case was filed on a pro bono basis in early July 2008.) Now that the Government faces the obligation to respond to a lengthy and well-supported summary judgment motion, it has for the first time expressed a willingness to discuss a resolution. The Government, however, has refused to concede that it has violated the victims' rights or to consider issuing an apology, which is a minimum first step for our clients. Until the Government is ready to take such steps, it appears that a negotiated resolution of the case is unlikely.

FACTUAL BACKGROUND

To facilitate this mediation, it may be useful to review the Government's intransigence about discussing the facts that lead to the victims' current summary judgment motion. The Court can also find some of the details regarding the case in the victims' summary judgment motion – DE 361 – which may be useful to review before the mediation. Boiling things down to a quick summary, between about 1999 and 2007, Jeffrey Epstein sexually abused more than 30 minor girls, including Jane Doe 1 and Jane Doe 2, at his mansion in Palm Beach, Florida, located in the Southern District of Florida. Epstein also abused some of the girls elsewhere in the United States and overseas. Because Epstein and his co-conspirators knowingly traveled in interstate and international commerce to sexually abuse Jane Doe 1, Jane Doe 2, and other similarly situated victims, they committed violations of not only Florida law (*see, e,g.*, Fla. Stat. §§ 794.05, 796.04, 796.045, 39.201 & 777.04), but also federal law, including repeated violations of 18 U.S.C. §§ 1591, 2421, 2422, 2423, & 371).

In 2005, the Town of Palm Beach Police Department received a complaint from the parents of a 14-year-old girl about her sexual abuse by Jeffrey Epstein. The PBPD then capably conducted a thorough investigation and ultimately identified approximately 20 girls between the ages of 14 and 17 whom Epstein sexually abused. In 2006, at the request of the PBPD, the FBI opened a federal investigation into allegations that Epstein and his personal assistants had used facilities of interstate commerce to induce girls between the ages of 14 and 17 to engage in illegal sexual activities. The FBI ultimately determined that both Jane Doe 1 and Jane Doe 2 (among many others) were victims of sexual abuse by Epstein while they were minors.

The victims also received notification from the Government that they were regarded as victims of Epstein's sexual abuse. For example, on about August 11, 2006, Jane Doe 2 received a standard CVRA victim notification letter. The notification promised that the Justice Department would make its "best efforts" to protect Jane Doe 2's rights, including "[t]he reasonable right to confer with the attorney for the Government in the case" and "to be reasonably heard at any public proceeding in the district court involving … plea." The notification further explained that "[a]t this time, your case is under investigation." Similarly, on about June 7, 2007, FBI agents hand delivered to Jane Doe 1 a standard CVRA victim notification letter. The notification promised that the Justice Department would make its "best efforts" to protect Jane Doe 1's rights, including "[t]he reasonable right to confer with the attorney for the United States in the case" and "to be reasonably heard at any public proceeding in the district court involving [a]…plea." The notification further stated that, "[a]t this time, your case is under investigation." The notifications meant that the Government had itself identified

Jane Doe 1 and Jane Doe 2 (as well as many other similarly-situated persons) as victims of federal offenses and as persons protected by the CVRA.

Beginning in 2006, Epstein (represented by seemingly countless lawyers) and the Government discussed a plea bargain. The victims have since obtained the correspondence surrounding those discussions, which makes it quite clear that Epstein and the Government (i.e., the U.S. Attorney's Office for the Southern District of Florida) agreed to conceal what they were doing from the victims. *See generally* Summary Judgment Motion, DE 361 at pp. 10-19. To provide just one small example that may be useful during the mediation, the correspondence specifically demonstrates the Government was discussing a possible plea disposition that would make it hard for a judge to see what was happening:

> [redacted] [i.e., AUSA [redacted]] recommended that some of the timing issues be addressed only in the state agreement, so that it isn't obvious to the judge that we are trying to create federal jurisdiction for prison purposes.
> I will include our standard language regarding resolving all criminal liability and I will mention 'co-conspirators,' but I would prefer not to highlight for the judge all of the other crimes and all of the other persons that we could charge.[1]

In the same email, the line prosecutor handling the case wrote to defense counsel about a meeting outside the U.S. Attorney's Office: "Maybe we can set a time to meet. If you want to meet 'off campus' somewhere, that is fine." Other emails shows the Office working to keep the agreement secret. For example in a September 18, 2007, email, the Office responded to Epstein's lawyers: "A non-prosecution agreement would not be made public or filed with the Court, but it would remain part of our case file. It probably would be subject to a FOIA request, but it is not something that we would distribute without compulsory process."

[1] Exhibit 7 to Summary Judgment Motion, discussed at Undisputed Fact #26 of DE 361.

Ultimately, on about September 24, 2007, Epstein and the U.S. Attorney's Office formally reached an agreement whereby the Office would defer federal prosecution in favor of prosecution by the State of Florida. Epstein and the Office accordingly entered into a NPA reflecting such agreement. Most significantly, the NPA gave Epstein a promise that he would not be prosecuted in the Southern District of Florida for a series of federal felony offenses involving his sexual abuse of more than 30 known minor girls and countless other unknown minors. The NPA instead allowed Epstein to plead guilty to state felony offenses for solicitation of prostitution and procurement of minors for prostitution. The parties also agreed to conceal what they were doing from everyone – including the victims. NPA specifically provided that it was confidential: "The parties anticipate that this agreement will not be made part of any public record. If the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure."[2]

After the agreement was signed, the Government deviated from its standard practice to negotiate with defense counsel about the extent of crime victim notifications. At the same time, to pressure the Office to agree to positions Epstein wanted, Epstein's counsel began "a year-long assault on the prosecution and the prosecutors" (in the words of then-U.S. Attorney Alex Acosta). While Epstein sought to challenge his agreement at higher levels of the U.S. Department of Justice, the U.S. Attorney's Office continued to conceal what was happening from the victims. Even though an agreement had been formally signed, many of the victims received letters from the FBI advising them that "[t]his case is currently under investigation. This can be

[2] Exhibit 62 to Summary Judgment Motion (discussed at undisputed fact #41 in DE 361).

a lengthy process and we request your continued *patience while we conduct a thorough investigation*."[3] The statement in the notification letters was, of course, incomplete and misleading. The letter did not disclose the NPA already entered into by Epstein and the Office, and instead implied that the Office was still investigating Epstein and had not decided how to proceed with the case, neither of which was accurate.

Ultimately, the Justice Department rejected Epstein's appeals and he pled to two state felony charges of soliciting prostitution from a minor – as provided in the NPA. The Government concealed from the victims the fact that this triggered the NPA. Nonetheless, word began to leak out and, concerned that some broader deal was afoot, on July 7, 2008, one of undersigned counsel (Mr. Edwards) filed a petition to enforce the CVRA rights of Jane Doe No. 1 and Jane Doe No. 2 with regard to sex offenses committed against them by Jeffrey Epstein. Acting rapidly, Judge Marra first held a hearing on victims' petition on July 11, 2008. Judge Marra recognized the importance of the case and discussed a need to "hav[e] a complete record, and this is going to be an issue that's … going to go to the Eleventh Circuit, [so it] may be better to have a complete record as to what [the victims'] position is and the government's is as to what actions were taken." Tr. at 25-26.

The victims and the U.S. Attorney's Office then attempted to reach a stipulated set of facts underlying the case. The U.S. Attorney's Office offered a very abbreviated set of proposed facts, and the victims responded with a detailed set of proposed facts. Rather than respond to the victims' specific facts, however, the U.S. Attorney's Office suddenly reversed course. On July 29, 2008, it filed a Notice to Court Regarding Absence of Need for Evidentiary Hearing. DE 17.

[3] Exhibit 29 to the pending summary judgment motion.

The U.S. Attorney's Office asserted that the Court need only take judicial notice of the fact that no indictment had been filed against Epstein to resolve the case, and therefore the victims never had any rights under the CVRA. DE 17 at 1.

On August 1, 2008, the victims filed a response to the Government's "Notice," giving a proposed statement of facts surrounding the case. DE 19 at 5. The victims' response also requested that the Court direct the Government to confer with the victims regarding the undisputed facts of the case, and produce the non-prosecution agreement and other information about the case. *Id.* at 14. The Court later ordered production of the agreement to the victims.

After the U.S. Attorney's Office first made the non-prosecution agreement available to the victims, the victims reviewed it and pursued further discussions with the U.S. Attorney's Office. Ultimately, however, the U.S. Attorney's Office declined to reach a stipulated set of facts with the victims and declined to provide any further information about the case.

With negotiations at an impasse, the victims attempted to learn the facts of the case in other ways. In approximately May 2009, counsel for the victims propounded discovery requests in both state and federal civil cases against Epstein, seeking to obtain correspondence between Epstein and prosecutors regarding his plea agreement – information that the U.S. Attorney's Office was unwilling to provide to the victims and information that was highly relevant both to the victims' civil suit and their CVRA enforcement action. Epstein refused to produce that information, and extended litigation to obtain the materials followed. The Court rejected all of Epstein's objections to producing the materials.

Ultimately, on June 30, 2010, counsel for Epstein sent to counsel for the victims approximately 358 pages of e-mail correspondence between criminal defense counsel and the

U.S. Attorney's Office regarding the plea agreement that had been negotiated between them. *See* DE48-Attachment 1/Exhibit A. These e-mails began to disclose for the first time the extreme steps that had been taken by the U.S. Attorney's Office to avoid prosecuting Epstein and to avoid having the victims in the case learn about the non-prosecution agreement that had been reached between Epstein and the Government.

In mid-July 2010, Jane Doe No. 1 and Jane Doe No. 2 settled their civil lawsuits against Epstein. Then, armed with the new information, they turned to moving forward in the CVRA case. On September 13, 2010, the victims informed the Court that they were preparing new filings in the case.

On October 12, 2010, the Court entered an order directing the victims to provide a status report on the case by October 27, 2010. That same day, counsel for the victims again contacted the U.S. Attorney's Office about the possibility of reaching a stipulated set of facts in the case. That same day, the U.S. Attorney's Office responded: "We don't have any problem with agreeing that a factual assertion is correct if we agree that is what occurred." DE 41 at 2.

On October 23, 2010, the victims e-mailed to the U.S. Attorney's Office a detailed proposed statement of facts, with many of the facts now documented by the correspondence between the U.S. Attorney's Office and Epstein's counsel. The victims requested that the U.S. Attorney's Office identify which facts it would agree to. That same day, the U.S. Attorney's Office agreed to forward the proposed statement of facts to the appropriate Assistant U.S. Attorney for review. DE 41 at 2-3.

On October 26, 2010, rather than stipulate to undisputed facts, the U.S. Attorney's Office contacted the victims' attorneys and asked them to delay the filing of their motion for a two-

week period of time so that negotiations could be held between the Office and the victims in an attempt to narrow the range of disputes in the case and to hopefully reach a settlement resolution without the need for further litigation. Very limited negotiations between the victims and the U.S. Attorney's Office then followed over the next two days. However, at 6:11 p.m. on October 27, 2010 – the date on which the victims' pleading was due – the U.S. Attorney's Office informed the victims that it did not believe that it had time to review the victims' proposed statement of facts and advise which facts were accurate and which were inaccurate.

As a result, purely as an accommodation to the U.S. Attorney's Office, on October 27, 2010, the victims filed a report with the Court in which they agreed to delay filing their motion and accompanying facts for up to two-weeks to see if negotiations can resolve (or narrow) the disputes with the U.S. Attorney's Office. DE 41 at 4. Discussions with the U.S. Attorney's Office dragged on, including a personal meeting between Jane Doe No. 1 and the U.S. Attorney in December 2010.

After further discussions failed to produce any agreement or other visible progress, the victims informed the U.S. Attorney's Office that they would file their "summary judgment" motion with the Court on March 18, 2011, and requested further cooperation from the Office on the facts. Eventually, after months of discussion, the U.S. Attorney's Office informed counsel for the victims that – contrary to promises made earlier to stipulate to undisputed facts – no such stipulation would be forthcoming. Instead, on March 15, 2011, the U.S. Attorney for the Southern District of Florida, Wifredo A. Ferrer, sent a letter to the victims declining to reach any agreement on the facts, arguing that the victims had no rights whatsoever under federal law because federal charges were never filed.

Accordingly, unable to work with the Government to reach a resolution of the facts, on March 21, 2011, the victims filed a Motion for Summary Judgment, alleging 53 undisputed facts along with some evidentiary support for each of the facts. DE 48. Following a hearing on the motion, on September 26, 2011, the Court squarely rejected the Government's argument that the CVRA was inapplicable in this case because the Government had never filed charges against Epstein. DE 99.[4] The Court also directed that discovery could proceed in the form of requests for admission and document production requests. *Id.* at 11.

In light of the Court's order, on October 3, 2011, the victims filed requests for production with the Government. On November 7, 2011, the day when the Government's responses were due, rather than produce even a single page of discovery, the Government filed a motion to dismiss the victims' petitions. DE 119. The Government claimed that the victims could not obtain any remedy, even if they proved that their rights had been violated. On that same day, the Government filed a motion to stay discovery. DE 121. The victims filed a response, arguing that the Government's motion was a stall tactic. DE 129.

Ultimately, on June 19, 2013, the Court denied the Government's motion to dismiss. DE 189. The Court ruled that, based on a proper showing, the victims could obtain the relief of re-opening the case: "[T]he court concludes that the statue [i.e., the CVRA] is properly interpreted impliedly to authorize a 're-opening' or setting aside of pre-charge prosecutorial agreements made in derogation of the government's CVRA conferral obligations …." DE 189 at 8. The

[4] The Court's ruling was well supported. *See generally* Paul G. Cassell, Bradly J. Edwards, & Nathanael James Mitchell, *Protecting Crime Victims' Rights Before Charges Are Filed: The Need for Expansive Interpretation of the Crime Victims' Rights Act and Similar State Statutes,* 104 J. Crim. L. & Criminology 59 (2014).

Court also lifted the stay of discovery. DE 189. That same day, the Court entered an order granting the victims' motion to compel and directing the Government to produce (1) all correspondence between it and Epstein; (2) all communications between the Government and outside entities; and (3) every other document requested by the victims. DE 190 at 2. With respect to the third item, the Court allowed the Government to assert privilege by producing the items in question for in camera inspection and filing a contemporaneous privilege log. *Id.*

On July 19 and July 27, 2013, the Government made its production. With regard to item (1) – correspondence with Epstein, the Government withheld the correspondence pending a ruling from the Eleventh Circuit on Epstein's motion to stay production of these materials. (The Eleventh Circuit later ruled in the victims' favor on this issue. *See Jane Doe 1 and 2 v. United* States, 749 F.3d 999 (11th Cir. 2014) (plea negotiations were not protected from disclosure by federal rule of evidence or common law privilege barring admission of plea negotiations).) With regard to the other items, the Government produced 14,825 pages of documents to the Court for in camera inspection, but turned over only 1,357 pages of essentially useless information to the victims. Thus, the Government asserted privilege to more than 90% of the documents in question, including the most important documents. Several years of additional litigation followed regarding the privilege issues and related concerns. Ultimately, the victims received a few of the documents they requested, but most of the Government's documents were kept from the victims. *See* DE 330 (July 6, 2015).

One other development may be relevant to this mediation: On December 30, 2014, Jane Doe 3 and Jane Doe 4, represented by undersigned counsel, filed a motion for joinder in this case. DE 279. The two new victims explained that they had been sexually trafficked by Jeffrey

Epstein to some of his high-profile friends, including Prince Andrew and Alan Dershowitz. This produced additional litigation, and ultimately the Court concluded that the motion to join should be denied. DE 324. The Court concluded that "[t]he necessary "participation" of Jane Doe 3 and Jane Doe 4 in this case can be satisfied by offering their properly supported—and relevant, admissible, and non-cumulative—testimony as needed, whether through testimony at trial . . . or affidavits submitted to support the relevancy of discovery." DE 324 at 9. Since then, additional discovery requests have been made related to these issues, although those discovery requests are under temporary seal.

As the victims prepared to file a new summary judgment motion regarding the Government's violation of their rights under the CVRA, Judge Marra held a status conference on November 23, 2015. During that status conference, the Government suggested – for the first time in more than seven years of litigation – that it would argue in response to the summary judgment motion that Jane Doe 1 and Jane Doe 2 were not "victims" under the CVRA, but rather were somehow "complicit" (while they were minors) in their own sexual abuse. This position contradicted long-held views of the Justice Department (not to mention common sense) that minor victims of sex trafficking and other crimes are not complicit in their own abuse but an adult abuser. Jane Doe 1 and Jane Doe 2 sent a letter to the U.S. Attorney, asking him to disavow this position. *See* Attachment A. The Government ultimately backed off of this claim.

Finally, on February 10, 2016, the victims filed their sixty-page summary judgment motion with 140 exhibits. DE 361. The motion sought summary judgment on this issue of whether the Government had violated the victims' rights under the CVRA. The motion argued that the undisputed facts plainly established that the Government — with the knowledge of, and

at the urging of Epstein — violated the CVRA rights of Jane Doe 1, Jane Doe 2, and other similarly-situated victims, by deliberately concealing from them the NPA barring the prosecution of Epstein and his co-conspirators for the federal sex crimes and related offenses. In particular, the motion explained how the Government violated the victims' right to confer with prosecutors, right to accurate notice, and right to be treated with fairness. 18 U.S.C. § 3771(a)(5), (2), & (8).

Facing the prospect of responding to this detailed summary judgment motion, the Government then suggested that a mediation might be useful. The victims agreed to participate in a mediation – without prejudice, of course, to their right to move forward on summary judgment. Judge Marra then referred this matter for mediation.

CURRENT SITUATION

The victims believe that their pending summary judgment motion incontrovertibly establishes that the Government committed multiple violations of the Crime Victims' Rights Act. Indeed, the victims believe that the only reason that the Government is now seeking a mediation is that a day of reckoning has arrived. Finally, after the victims have overcome years delay and stall tactics by the Government, the Government is going to have to respond to the well-supported summary judgment motion. That response must contain specific factual support justifying keeping the plea deal it reached with Epstein secret from the multiple girls he sexually abused. Put simply, the Government is now going to have to defend the indefensible – and rather than do that, the Government has asked for a mediation.

The victims have tried to be reasonable throughout these proceedings. Indeed, the victims have repeatedly sought to meet with the U.S. Attorney for the last five years to discuss a resolution, only to be rebuffed. The victims' goals in this case are both retrospective and

prospective. Looking back, the victims want to overturn the "sweetheart" plea deal that the Government entered into with Epstein, which would then permit his prosecution for the sex crimes committed against them. Judge Marra, of course, has already ruled that this is a possible remedy. *See* DE 189 at 8 (ruling that the CVRA authorizes "'re-opening' or setting aside of pre-charge prosecutorial agreements made in derogation of the government's CVRA conferral obligations …."). Looking forward, the victims want to insure that the mistreatment they suffered never happens to any other victim, both in this District and elsewhere.

As the Court may be aware, this case has received national (and, indeed, international) attention as an example of the mistreatment of victims in the criminal justice process. It has already led to congressional legislation to amend the CVRA. *See* 18 U.S.C. § 3771(a)(9) (newly added provision in 2015 that guarantees victims of crime "[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement."). The victims are looking forward to proving in open court what happened to them – with the goal of making sure it never happens to any other victims in the future. The victims want a published ruling on their summary judgment motion, which would establish an important precedent with far-reaching ramifications for the national crime victims' rights movement. And, if for any reason the summary judgment motion were to be denied, the victims relish the opportunity to go to "trial" – i.e., to move forward with a public evidentiary hearing where they would have the opportunity to present testimony about the violations of their rights.

To facilitate a possible resolution of this case, victims' counsel have sent to the Government a list of possible concessions that the Government could make to help resolve the

case. *See* Attachment B.[5] Perhaps the most important of the concessions was that the Government agree that it violated the CVRA and apologize publicly for doing so. When the victims began entertaining the Government's proposal to mediate, victims' counsel assumed this simple request was a no-brainer and easily accomplishable for the Government. Sadly, since then, the Government has responded, in so many words, that this "ain't happening." And now, from the victims' perspective, that essentially ends the need for any further discussion. If the Government believes that what it did in this case complies with the CVRA, then the victims have no chance of obtaining any retrospective relief that would hold Epstein accountable, both for his sexual abuse and later for helping to orchestrate violations of the CVRA. And if the Government is permitted to escape from responsibility for its CVRA violations in this case, then the same thing that happened to the victims here in the past could happen to others in the future.

The victims respectfully submit to the Court that, in order to have any prospect of a successful mediated agreement, the Court should press the Government to concede the obvious – that it violated the CVRA. If the U.S. Attorney's Office is willing to make that concession publicly and apologize, then it would be possible to begin discussing other aspects of the case. But without that basic first step, the victims have no choice but to litigate and prove to the world what should be obvious to everyone by now: That the Government cannot secret negotiate a plea deal with a sex abuser while concealing that fact from his victims.

The victims look forward to working with the Court during the upcoming mediation session. The victims would be willing to have this memorandum shared in its entirety with the Government, but would respectfully request notice of that disclosure in advance.

[5] Attachment B will serve as the victims' proposed settlement agreement.

DATED: May 19, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This document has not been served on opposing counsel because, pursuant to direction of the Court, it is a confidential mediation position.

/s/ Bradley J. Edwards