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May 16, 2016

Honorable Dave Lee Brannon
United States Magistrate Judge
701 Clematis Street, Room 438
West Palm Beach, Florida 33301

RE: Settlement Conference Summary
Jane Doe 1 and Jane Doe 2 v. United States,
Case No. 08-80736-CIV-MARRA

Dear Judge Brannon:

A settlement conference in this case is scheduled for Monday, May 23, 2016, at 9:30 a.m. The respondent in this case, the United States, provides this Settlement Conference Summary, to set out the Government's position in this litigation. The government requests this Summary be kept confidential.

FACTUAL BACKGROUND

In 2006, the Federal Bureau of Investigation (FBI) in West Palm Beach, Florida, was asked by the Palm Beach Police Department to initiate an investigation into allegations that Jeffrey Epstein, and his personal assistants, had induced young girls between the ages of 13 and 17 to engage in prostitution. The FBI opened an investigation, and the matter was assigned to Assistant U.S. Attorney Marie Villafaña. Grand Jury subpoenas were issued, witnesses were interviewed, and records were gathered as part of the Grand Jury investigation.

As the investigation progressed, Jane Doe 2's identity became known as a possible victim of Epstein. Jane Doe 2 was openly hostile to the idea of a criminal prosecution of Epstein. Through her attorney, James Eisenberg, Esq., Jane Doe 2 declined to be interviewed without a grant of use immunity. Mr. Eisenberg was retained and paid by Epstein to provide representation to Jane Doe 2. The Government applied for and received immunity for Jane Doe 2 under 18 U.S.C. § 6001. On April 24, 2007, Jane Doe 2, with her attorney present, was interviewed under oath by FBI Special Agent [REDACTED] and AUSA [REDACTED], under that grant of immunity. At the time of the interview, Jane Doe 2 was an adult. She provided details on how she was paid by Epstein to provide massages to him, and she would take off her top at Epstein's request. Jane Doe 2 would be paid \$200 for a thirty minute massage. She further related that she would be paid \$200 by Epstein for each additional young girl she brought to him to provide him with a topless massage. During the interview, Jane Doe 2 repeatedly referred to

Epstein as “an awesome man.” She stated she hoped nothing would happen to Epstein, and “[i]t’s a shame that he has to go through this because he’s an awesome guy and he didn’t do nothing wrong, nothing.”

At approximately the same time, Jeffrey Epstein had been charged by the State of Florida with solicitation of prostitution, a violation of Fla. Stat. § 796.07. State of Florida v. Jeffrey Epstein, Case No. 2006-CF-009495AXXXMB (Palm Beach Cty, Fla.).

In the summer of 2007, Epstein’s attorneys approached the U.S. Attorney’s Office, seeking a resolution of both the state charge, and federal criminal investigation. After several months of negotiation, the U.S. Attorney’s Office and Epstein agreed to enter into a non-prosecution agreement (NPA). The NPA provided that the United States would defer federal prosecution, so that Epstein could plead guilty to the pending charge of solicitation of prostitution, as well as an additional charge of solicitation of minors to engage in prostitution, in violation of Fla. Stat. § 796.03. Further, the NPA contemplated that Epstein would be required to register as a sex offender, due to the plea of guilty to the latter charge. A critical portion of the NPA was a provision which provided financial compensation to individuals identified as victims of Epstein, pursuant to actions filed under 18 U.S.C. § 2255. This provision obligated Epstein not to contest the Court’s subject matter jurisdiction over him, not to contest liability, and not to contest damages up to an amount as agreed between the individual victim and Epstein.

At the time these negotiations were on-going, the Attorney General Guidelines for Victim and Witness Assistance (May 2005), provided that for purposes of enforcing crime victims rights in 18 U.S.C. § 3771(a)(1) – (8), “a victim is ‘a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia’ (18 U.S.C. § 3771(e)) if the offense is charged in Federal district court.” At no time was Epstein ever charged with an offense in Federal district court. Under these Attorney General Guidelines, rights under the CVRA did not attach until after an offense was charged in Federal district court.

The NPA was executed on September 24, 2007. In October 2007, four victims were contacted, including Jane Doe 1, and the provisions of the NPA were discussed. When Epstein’s attorneys learned that some of the victims had been notified, they complained that the victims were receiving an incentive to overstate their involvement with Epstein in order to increase their claims for damages.

At that point, the Government decided not to notify any additional victims so as not to compromise their credibility, should Epstein ultimately be charged and prosecuted in Federal court. Even though Epstein and his attorneys had signed the NPA, Epstein sought further review at the Department of Justice, claiming the U.S. Attorney had abused his discretion by conducting a federal criminal investigation and negotiating the NPA.

Epstein first presented his appeal to the DOJ’s Child Exploitation and Obscenity Section, part of the Criminal Division. They met with the Chief and Deputy Chief of the Child Exploitation and Obscenity Section, and presented written arguments. On May 15, 2008, [REDACTED], Chief, Child Exploitation and Obscenity Section, sent a five-page letter

to Epstein's attorney, Jay Lefkowitz, Esq., in which he reviewed the factual and legal issues raised by Epstein. Mr. ██████████ concluded that federal prosecution of Epstein "would not be improper or inappropriate." Consequently, United States Attorney Acosta "would not be abusing his prosecutorial discretion should he authorize federal prosecution of Mr. Epstein."

Epstein's attorneys then sought additional review with the Deputy Attorney General, Mark Filip. Written submissions were made to the Deputy Attorney General, in support of Epstein's claims that the U.S. Attorney had abused his prosecutorial discretion. On June 23, 2008, John Roth, Senior Associate Deputy Attorney General, sent a letter to Mr. Lefkowitz, advising him that the Deputy Attorney General did not believe intervention in the considerable discretion of U.S. Attorneys was warranted in Epstein's case. Mr. Roth stated that, "[e]ven if we were to substitute our judgment for that of the U.S. Attorney, we believe that federal prosecution of this case is appropriate."

On Friday, June 27, 2008, AUSA ██████████ was contacted by one of Epstein's attorneys, and provided with a copy of the state court plea agreement. She was also told that Epstein's plea was scheduled for Monday, June 30, 2008, at 8:30 a.m. AUSA ██████████ telephoned Mr. Edwards to notify his two clients of the plea hearing scheduled on June 30, 2008. During this call, Mr. Edwards stated he also represented Jane Doe 2. Edwards stated he could not attend the hearing, but someone else would be present.

Petitioners, Jane Doe 1 and Jane Doe 2, commenced this case on July 7, 2008, when they filed their Emergency Petition for Victim's Enforcement of Crime Victims Rights Act. The petitioners claimed they had been denied their rights under the Crime Victims Rights Act, 18 U.S.C. § 3771, et. seq. On the same date, the district court ordered the Government to respond to the emergency petition by 5:00 p.m., on July 9, 2008. A hearing was held on July 11, 2008, at which time petitioners' counsel stated there was no emergency.

GOVERNMENT'S POSITION

(1) Statutory Interpretation. The Government submits that the rights in 18 U.S.C. § 3771(a)(1) – (8) did not attach in 2007, when there was no federal charge lodged against Epstein, and the U.S. Attorney's Office was negotiating the NPA with Epstein's attorneys. Thus, there was no obligation under section 3771(a)(5) to consult with petitioners regarding the negotiation of the NPA. In its September 26, 2011 Order (D.E. 99), the Court rejected the Government's position, finding that the CVRA does apply in the absence of an indictment or other formal charge pending in Federal court. While the Government respectfully disagrees with the Court's finding, it nonetheless believes that the negotiation of a NPA with an uncharged individual would require no consultation under section 3771(a)(5), even if the Court's interpretation is correct.

"Non-prosecution agreements are similar to plea agreements, except adherence to a non-prosecution agreement is the responsibility of the prosecutor alone while a plea agreement is subject to the approval of the court." United States v. Dorsett, 2009 WL 2386070 at *4 (D.Neb. Jul. 23, 2009), citing United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106, 1112 (8th Cir. 1977). Since the negotiation of an NPA is a pure exercise of prosecutorial discretion, not

requiring approval by the Judicial Branch, there was no obligation to consult under section 3771(a)(5). Further, on May 29, 2015, Congress enacted the Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (May 29, 2015). Section 113(a) added a new subsection (9) to 18 U.S.C. § 3771(a), which provided for, “[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.” It is well settled that, “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995). Thus, Congress’s inclusion of deferred prosecution agreements in the May 2015 amendment to the CVRA strongly suggests that it did not view such agreements to be within the coverage of the CVRA previously.

(2) Estoppel. Jane Doe 1 filed an action under 18 U.S.C. § 2255 against Epstein, seeking damages for her sexual abuse. She was represented by the same attorneys in that action as the attorneys representing her in this CVRA action. Jane Doe 1 invoked provisions of the NPA in maintaining her civil damages cases, and was able to successfully conclude her case by obtaining money damages from Epstein. “Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.” *Blinco v. Green Tree Servicing, LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005)(citations omitted). The same agreement that Jane Doe 1 now condemns was exploited by her in maintaining her civil lawsuit against Epstein. She cannot garner benefits under the NPA on the one hand, and then later claim the NPA was entered into in violation of their rights.

(3) Prosecutorial Discretion. When the NPA was signed on September 24, 2007, it was far from assured that the agreement would obviate the need to prepare for a potential criminal prosecution. Almost immediately, Epstein’s attorneys began challenging various provisions in the NPA, and sought higher review within the DOJ, hoping to have the agreement rescinded. Initial notifications to some of the victims of the NPA’s provisions brought a howl of protest from Epstein’s attorneys, who claimed the compensation provision would be an incentive for the victims to exaggerate their claims for damages. Faced with the prospect of the prosecution of Epstein, where underage girls would be the key witnesses for the government, the government decided to delay the victim notifications, so as not to create additional bases for impeachment in any future trial. Section 3771(d)(6) provides, in relevant part that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” It is plainly within the discretion of a prosecutor to limit the potential for a defense lawyer’s impeachment of key government witnesses. Section 3771(c)(1) directs government employees to “make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” The Government believes these “best efforts” must take into account the potential for going to trial, and the need to present less impeachable witnesses against what was sure to be a full-scale attack on the underage girls’ credibility.

(4) Due Process. The stated objective of petitioners has been to have the NPA set aside by the district court, so the U.S. Attorney’s Office can confer with them regarding entering into an NPA with Epstein. The district court acknowledges that, “[w]hat the government chooses to do after a conferral with the victims is a matter outside the reach of the CVRA, which reserves absolute prosecutorial discretion to the government.” D.E. 189 at 10, citing 18 U.S.C. § 3771(d)(6). The government respectfully disagrees with the district court’s view that the NPA, which has been fully performed by Epstein, and utilized by Epstein’s victims to secure monetary

settlements, can be set aside as a remedy for any government failure to confer under the CVRA. Epstein entered pleas of guilty in state court, and served a state sentence of incarceration, pursuant to the NPA. He registered as a sex offender, as provided for in the NPA. Finally, he paid money to the victims who filed civil actions against him, as he agreed to do in the NPA. Since Epstein has relied upon the NPA, and performed his obligations under that agreement, due process would prevent setting aside the NPA.

From the government's viewpoint, the ultimate objective being sought by petitioners is unclear. There is no dispute that the Court cannot compel the government to prosecute Jeffrey Epstein, or that the government, after conferring with the petitioners and other victims, could in the exercise of its broad prosecutorial discretion, decide – and indeed must under the Due Process Clause – ratify the NPA with Epstein. Whether the government made a wise choice when it negotiated the NPA is not a proper subject for judicial review under the CVRA, or any other cause of action. The government looks forward to the settlement conference so the Court can assist the parties in identifying each party's objectives, and reaching a just resolution of this case.

Pre-Conference Settlement Efforts

Over the past month, the parties have been engaged in settlement negotiations. Proposals discussed include a public hearing so petitioners and other victims can address the Court, if they wish; amendments to the Attorney General Guidelines for Victim and Witness Assistance and the U.S. Attorney's Manual; government segregation of the evidence against Epstein, so such evidence can be accessed through official means; and a meeting with the U.S. Attorney.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By:



Assistant U.S. Attorney