

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Case No. 08-80736-Civ-Marra/Johnson

JANE DOES #1 and #2  
Petitioners,

UNITED STATES  
Respondent.

RESPONDENT'S MOTION TO DISMISS

Respondent, United States of America, by and through its undersigned counsel, files its Motion to Dismiss, pursuant to Rules 12(b)(6) and 41(b), Federal Rules of Civil Procedure, and states:

I. LITIGATION HISTORY

On July 7, 2008, plaintiff Jane Doe filed her "Emergency Victim's Petition for Enforcement of Crime Victim's Rights Act, 18 U.S.C. Section 3771." (D.E. 1). On the same day, this Court issued an Order directing the United States Attorney to file a response to the petition by 5:00 p.m., Wednesday, July 9, 2008. (D.E. 3).

On July 9, 2008, the United States Attorney filed the "Government's Response to Victim's Emergency Petition for Enforcement of Crime Victim Rights Act, 18 U.S.C. § 3771." (D.E. 7). The Court held a hearing on July 11, 2008.

On August 18, 2008, the Court held a status conference. On August 21, 2008, the Court ordered the Government to produce a copy of the Non-Prosecution Agreement between the United States Attorney and Jeffrey Epstein, and simultaneously entered a protective order prohibiting petitioners from disseminating the Non-Prosecution Agreement beyond designated individuals. (D.E. 26).

On September 25, 2008, petitioners filed their motion to unseal document. (D.E. 28). On October 8, 2008, the Government filed its response in opposition to petitioners' motion. (D.E. 29). Petitioners filed their reply on October 16, 2008. (D.E. 30). On February 12, 2009, the Court denied petitioners' motion to unseal document. (D.E. 36).

Since February 12, 2009, there has been no activity in this case, other than the filing of a notice by petitioners' counsel of his change in firm affiliation. (D.E. 37).

II. THIS CASE SHOULD BE DISMISSED FOR LACK OF PROSECUTION

Under Fed.R.Civ.P. 41(b), "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." In Goforth v. Owens, 766 F.2d 1533 (11<sup>th</sup> Cir. 1985), the Eleventh Circuit observed that "[a] district court is authorized, on defendant's motion, to dismiss an action for failure to prosecute or to obey a court order or federal rule." Id. at 1535. A court's

power to dismiss is an inherent aspect of its authority to enforce its orders and insure prompt disposition of lawsuits. Id., citing Link ■ Wabash Railroad Co., 370 U.S. 626, 630-31 (1962), and Jones ■ Graham, 709 F.2d 1457, 1458 (11<sup>th</sup> Cir. 1983). Under Rule 41(b), the legal standard to be applied is “whether there is a clear record of delay or willful contempt and a finding that lesser sanctions would not suffice.” 766 F.3d at 1535.

Dismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances. Id.

The Government believes the instant case should be dismissed because of the clear record of delay.

After the initial filing on July 7, 2008, and the emergency hearing on July 11, 2008, the only notable activity in the case was petitioners’ invocation of this Court’s authority to obtain a copy of the Non-Prosecution Agreement. D.E. 19. The Government, pursuant to the Court’s Order to Compel Production and Protective Order (D.E. 26), provided a copy of the Agreement to petitioners. On September 25, 2008, petitioners attempted to have the Court “unseal” the Non-Prosecution Agreement (D.E. 28). The Government opposed the motion because the Non-Prosecution Agreement had never been filed with the Court, under seal or otherwise. D.E. 29. On February 12, 2009, the Court denied petitioners’ motion (D.E. 36). The Court specifically addressed petitioners’ claim that the Non-Prosecution Agreement should be unsealed because the government had mischaracterized some of its provisions:

If and when such alleged mischaracterizations become relevant to an issue to be decided by the Court, the parties will be given an opportunity to advance their positions and the Court will resolve the issue. If disclosure of the Agreement will be required for the Court to resolve the issue, appropriate disclosure will be ordered (D.E. 36 at 1-2).

Since nothing has occurred in the instant case since the February 12, 2009 Order, presumably petitioners did not believe the mischaracterizations they claimed were made by the Government became relevant to any issue to be decided by the Court.

On September 8, 2010, this Court entered its Order Closing Case (D.E. 38). The Court noted that “[a]n examination of the docket reveals that no activity has taken place in this case since April of 2009. In light of the underlying settlements between the victims and Mr. Epstein, it is hereby **ORDERED AND ADJUDGED** that this case is **CLOSED**.” (D.E. 38)(emphasis in original). It is not unreasonable to believe that the instant action under the Crime Victims Rights Act was auxiliary litigation to support petitioners’ claims against Jeffrey Epstein for money damages, particularly with regard to obtaining documents and information from the United States Attorney. Once petitioners’ damage claims against Mr. Epstein had been resolved, there would be no

need for this auxiliary litigation. The absence of any activity in the case since April 2009 supports the conclusion that vindicating the petitioners' rights under the CVRA was not the primary purpose of this case.

“A district court has inherent authority to manage its own docket ‘so as to achieve the orderly and expeditious disposition of cases.’” Equity Lifestyle Properties, Inc. v. Florida Mowing and Landscape Service, Inc., 556 F.3d 1232, 1240 (11<sup>th</sup> Cir. 2009)(citation omitted). Under Rule 41(b), the court may dismiss a claim if the plaintiff fails to prosecute it or comply with a court order. Id. “The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Court.” Id., citing Durham v. Fla. East Coast Ry. Co., 385 F.2d 366, 367 (5<sup>th</sup> Cir. 1967). The instant case was filed as an emergency matter on July 7, 2008. Within two days, the government filed a written response to the emergency petition, and the Court held an emergency hearing four days after the emergency petition was filed. After this initial flurry of activity, predicated on petitioners' claim of an emergency, petitioners have done little to advance the litigation and seek resolution of their claims. <sup>Fl</sup> This clear record of delay provides ample basis for this Court to exercise its discretion and dismiss this case for lack of prosecution under Rule 41(b).

### III. PETITIONERS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER 18 U.S.C. § 3771(a)(5)

The heart of petitioners' claim under the Crime Victims Rights Act (CVRA) is that the United States Attorney was legally obligated, under 18 U.S.C. § 3771(a)(5), to consult with them prior to entering into the Non-prosecution Agreement with Jeffrey Epstein. D.E. 1, ¶ 5. This claim should be dismissed under Rule 12(b)(6) because it fails to state a claim upon which relief can be granted.

In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007), the Supreme Court observed that a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Id. at 1964-65. Instead, factual allegations must be enough to raise a right to relief above the speculative level. “The standard is one of ‘plausible grounds to infer.’” Id. In Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), the Supreme Court noted that two working principles underlay its decision in Twombly: (1) the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions; and (2) only a complaint that states a plausible claim for relief survives a motion to dismiss. Id. at 1949-50.

The rights of crime victims are set forth in 18 U.S.C. § 3771(a), and include eight (8) specific rights. The petition alleges a violation of § 3771(a)(5), the right to consult with the attorney for the Government; §

3771(a)(2), the right to reasonable, accurate, and timely notice of any public court proceeding; § 3771(a)(6), the right to full and timely restitution as provided in law; and notice of her rights under the CVRA.

It is undisputed that no federal criminal charges have been filed against Jeffrey Epstein, in the U.S. District Court, Southern District of Florida, pertaining to the sexual abuse of minors. [F2](#) The United States submits that, since there is no “case” pending in the Southern District of Florida against Epstein, or any “court proceeding” involving an offense against Jane Does 1 and 2, they cannot invoke any protections under 18 U.S.C. § 3771(a)(2) and (5).

Title 18, United States Code, § 3771(a)(5), provides that a crime victim has “[t]he reasonable right to confer with the attorney for the Government in the case.” In its interpretation of a federal statute, the court assumes that “Congress used words in a statute as they are commonly and ordinarily understood,” and reads the statute to give full effect to each of its provisions. United States v. DBB, Inc., 180 F.3d 1277, 1281 (11<sup>th</sup> Cir. 1999), citing United States v. McLymont, 45 F.3d 400, 401 (11<sup>th</sup> Cir. 1995). Section 3771(a)(5) grants a crime victim the reasonable right to confer with the attorney for the Government “in the case.” The phrase “in the case” must be considered since there is a canon of statutory construction that “discourages courts from adopting a reading of a statute that renders any part of the statute mere surplusage.” Bailey v. United States, 516 U.S. 137, 146 (1995)(noting that each word in a statute is intended to have “particular, nonsuperfluous meaning”).

Respondents submit that Congress intended the phrase “in the case” to mean a case filed in the district court. Federal criminal cases are filed in the United States district courts through the filing of a criminal complaint, Fed.R.Crim.P. 3, or indictment, Fed.R.Crim.P. 7. In each instance, an attorney representing the United States Government is required to sign the complaint or indictment. Thus, each criminal case filed in the district court has an attorney for the Government representing the sovereign United States.

In contrast, § 3771(a)(1) provides that a crime victim “has the right to be reasonably protected from the accused.” No mention is made about a case or court proceeding. Thus, Congress intended that this right attaches even before a case is filed in the district court. The absence of any mention of the attorney for the Government is also telling, since the case may still be in the investigative stage, and not yet been assigned an attorney. In such a case, the federal law enforcement agency would be responsible for providing the reasonable protection from the accused.

Because there is not any case against Epstein in the Southern District of Florida, Jane Does 1 and 2 have no rights under § 3771(a)(5) to consult with the attorney for the Government. The United States Attorney’s

Office was under no obligation to consult with Jane Does 1 and 2 prior to concluding its Non-Prosecution Agreement with Epstein. For the same reason, Jane Doe's claim under § 3771(a)(2) also fails. There has been no "public court proceeding" against Epstein in the U.S. District Court, Southern District of Florida, since no criminal case has been filed against him in the federal court. Consequently, there has been nothing for which the U.S. Attorney's Office was required to give notice to Jane Doe.

A different provision in the CVRA, 18 U.S.C. § 3771(b), also supports the Government's interpretation of § 3771(a)(5). Section 3771(b)(1) provides as follows:

In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

There is no "court proceeding" in this case because no federal criminal charges have been lodged against Jeffrey Epstein. Section 3771(b)(1) envisions that a district court presiding over a criminal trial will be responsible for ensuring that a crime victim will be afforded rights granted in § 3771(a). Section 3771(a)(3), which is expressly referenced in § 3771(b)(1), provides that a crime victim has

The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

This provision contemplates that, in the event a defendant invokes the rule of sequestration in Fed.R.Evid. 615, the court must consider the crime victim's rights under § 3771(a)(3), and can only exclude the victim from the proceeding if the court finds there is clear and convincing evidence that the victim's testimony would be materially altered if the victim was allowed to hear other testimony at the proceeding. By providing a difficult evidentiary standard which must be met before a victim's right to be present in the court proceeding can be denied, Congress was purposefully limiting a court's discretion in sequestering trial witnesses.

In the instant case, there is no "court proceeding" since no federal criminal charges have been brought against Epstein. Therefore, § 3771(b)(1) is inapplicable. There is no role for this Court to fulfill under § 3771(b)(1).

The petition fails to state facts upon which the Court can find a plausible claim for relief exists.

Accordingly, the petition should be dismissed for failure to state a claim upon which relief can be granted.

**IV. SEPARATION OF POWERS PRINCIPLES PRECLUDE THE COURT FROM GRANTING ANY RELIEF REGARDING THE NON-PROSECUTION AGREEMENT**

In the instant case, the Non-Prosecution Agreement between the Government and Jeffrey Epstein was concluded in September and October 2007, months before petitioners instituted their action. By entering into the Non-Prosecution Agreement, the United States was exercising its prosecutorial discretion as to the best means to resolve the allegations that Epstein had violated federal law by engaging in criminal sexual misconduct with minors.

The Executive Branch enjoys exceedingly broad discretion in deciding how, or whether, to charge an individual. Bordenkircher v. Hayes, 434 U.S. 357, 668 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion”) (footnote omitted), and Nixon v. United States, 418 U.S. 683, 693 (1974) (Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case). Mindful of that principle, Congress expressly provided in the CVRA that, “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” 18 U.S.C. § 3771(d)(6).

Petitioners had no right under the CVRA to confer with the attorney for the Government, prior to the entry into the Non-Prosecution Agreement, because there was no existing case in the U.S. District Court.

Moreover, even if they had the right to confer, they had no legal means to prevent the United States from negotiating the Agreement it ultimately entered into with Epstein. Unlike the situation in In Re Dean, 527 F.3d 391 (5<sup>th</sup> Cir. 2008), the Non-Prosecution Agreement did not come before any federal court for review and approval, nor was such action required. In Dean, if the district court believed that the victims had been denied their right to consult under § 3771(a)(5), it could reject the plea agreement and direct that the required consultation occur prior to the negotiation of any new plea agreement. In contrast, the Non-Prosecution Agreement never came before this court. Therefore, this Court is without authority to provide a remedy under § 3771(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October \_\_\_\_, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

\_\_\_\_\_  
[REDACTED]

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<sup>F1</sup> The emergency was based upon petitioners' belief that Jeffrey Epstein was engaged in plea negotiations with the United States Attorney's Office and that such negotiations would likely result in a disposition of the charges within the "next several days." D.E. 1, ¶ 3. The petitioner noted that Epstein had already entered a plea of guilty on June 30, 2008, in the Circuit Court for Palm Beach County, Florida, to similar state offenses including solicitation of minors for prostitution. D.E. 1, ¶ 2.

<sup>F2</sup> "A district court may take judicial notice of public records within its files relating to the particular case before it or other related cases." Cash Inn of Dade, Inc. v. Metropolitan Dade County, 932 F.2d 1239, 1243 (11<sup>th</sup> Cir. 1991)(citations omitted). Additionally, in a Rule 12(b)(6) motion, a court may properly consider materials of which it has taken judicial notice.