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

JANE DOE #1 and  
JANE DOES #2,

Petitioners,

-vs-

UNITED STATES,

Respondent.

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HEARING BEFORE THE HONORABLE  
KENNETH A. MARRA

Friday, August 12, 2011  
United States Federal Courthouse  
West Palm Beach, Florida 33401  
2:00 - 4:19 p.m.

Reported By:  
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P R O C E E D I N G S

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THE COURT: Good afternoon. Please be seated. This is the case of Jane Doe No. 1 and Jane Doe No. 2, versus United States, Case No. 08-80736. Will counsel state their appearances, please.

MR. LEE: Good afternoon, Your Honor. May it please the Court. For the United States of America, Marie Villafana, Assistant United States Attorney, and Dexter Lee, Assistant United States Attorney. Good afternoon.

THE COURT: Good afternoon.

MR. EDWARDS: Good afternoon. On behalf of Jane Does 1 and 2, Brad Edwards, as well as my co-counsels, Paul Cassell and Jay Howell.

THE COURT: Good afternoon.

MR. BLACK: Your Honor, good afternoon. Roy Black appearing on behalf of the intervening lawyers, Black, Weinberg and Lefkowitz.

THE COURT: Good afternoon.

MR. REINHART: Good afternoon, Your Honor. Bruce Reinhart on behalf of myself.

THE COURT: Good afternoon. Anyone else that's going to be participating as an attorney?

All right. We have a number of matters to go

1 over today. I thought the first thing I should do is  
2 figure out who's going to be participating in the  
3 proceedings. So I think I should deal with the  
4 intervenors' motions first before we get to any of the  
5 substantive motions.

6 So, Mr. Reinhart, why don't I hear from you  
7 first.

8 MR. REINHART: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. REINHART: Let me start by saying I don't  
11 want to be here and I shouldn't be here but I feel  
12 like I have to be. What is pending before you  
13 today is a motion by the plaintiffs to address what  
14 they purport to be violations of the Crime Victims'  
15 Right Act by the government. However, buried in  
16 that motion, for reasons that escape me to this  
17 day, are allegations that I, who am not a party to  
18 this litigation, have never been counsel in this  
19 litigation and was minding my own business, have  
20 now been alleged to have violated the Department of  
21 Justice's regulations and the Florida Bar rules.

22 If you look at the face of the motion, it's  
23 clear that there's absolutely no reason for that to  
24 be in the motion other than it's a personal attack  
25 for the purpose of harassment and abuse. To my

1 knowledge, these allegations have never been sent  
2 to the Florida Bar, even though Mr. Edwards, as a  
3 member of the bar, would have an obligation to  
4 report them if he believed they were true. But he  
5 hasn't. They have never been reported to the  
6 Department of Justice, even though there are civil  
7 and criminal sanctions, if, in fact, they believed  
8 it was true and they believed I did what they said  
9 I did.

10 Rather than putting these allegations into  
11 that sort of a forum, where I would have a chance  
12 to respond and the investigation would be  
13 confidential and I could clear my name in private,  
14 they've thrown them into this litigation in a  
15 public pleading and now they say I shouldn't be  
16 allowed to respond to it.

17 THE COURT: Well, haven't you really responded  
18 to it?

19 MR. REINHART: Judge, I've said what I want to  
20 say but there's been no finding. There's been  
21 no -- frankly, there's been no inquiry why in the  
22 first place they did what they did, and I think  
23 that's really the issue before the Court today.  
24 It's not the merits of whether what they say is  
25 true or not true. It's not, but that's not the

1 issue for you today. The issue is whether the  
2 Court is going to sanction this sort of behavior  
3 and whether we're going to have a legal system  
4 where I could stand here in a commercial litigation  
5 case and put in a pleading that my neighbor is a  
6 tax evader or that the guy down the street is  
7 cheating on his wife. I mean, we have rules of  
8 court that are supposed to limit the facts at issue  
9 to the facts at issue. And if we start letting  
10 people simply make ad hominem attacks outside of  
11 the four corners of the case, the Court can't allow  
12 that.

13 So what the Court ought to do, most  
14 respectfully, in this case, is to -- whether you  
15 allow me to intervene and pursue it myself or  
16 whether you do it on your own, you ought to convene  
17 some sort of a proceeding and make the plaintiffs  
18 justify why they put these allegations in this  
19 pleading when they so clearly don't belong there  
20 and what, if any, investigation they did to support  
21 them. And that's what I'm asking you to do today  
22 is to simply convene that process, and if they  
23 complied with the rules of the court and they did  
24 their sufficient investigation, then the proceeding  
25 will show that. And if they were reckless and they

1 were malicious and they did it just because they  
2 could, they ought to be sanctioned for it, and the  
3 Court ought to send a message that you're not going  
4 to tolerate that sort of behavior.

5 So, Judge, in short, that's what I'm asking  
6 you to do, either exercise your discretion under  
7 Rule 24(b) to allow me to be a permissive  
8 intervenor and pursue those allegations myself, or  
9 to exercise your authority under Rule 11 to  
10 sua sponte issue an order to show cause and convene  
11 that proceeding.

12 THE COURT: If I let you intervene to try and  
13 clear your name from what you consider a slanderous  
14 or libelous attack, aren't I essentially inviting  
15 anyone who has a slanderous or libelous or  
16 defamatory statement made against them in  
17 litigation, inviting them to come in and intervene  
18 in a court and have the court conduct a mini-trial  
19 on whether or not the allegations are true and -- I  
20 mean, I'm basically going to open up the legal  
21 system to anyone who feels offended by something  
22 that's said in court to come in and start  
23 mini-lawsuits within a lawsuit.

24 I'm a little concerned about, you know,  
25 opening the door to that kind of a process.

1 MR. REINHART: And I understand that, and I  
2 agree. However, first of all, this is  
3 permissive -- I'm requesting permissive  
4 intervention under Rule 24. So in the first  
5 instance, you have the discretion to be the  
6 gatekeeper in that instance, not to let everybody  
7 in. I'm not saying I have an absolute right to be  
8 here. I'm saying you have the discretion to allow  
9 me to be here and to argue these points. So that's  
10 my first response, is the Court can act as a  
11 gatekeeper. And specific to the facts here, all  
12 you have to do is look at the face of the pleading  
13 to realize that these allegations have nothing to  
14 do with this cause of action. It's not even close.

15 I would think in another case when the Court  
16 might look at the face of the pleading and say,  
17 well, I can understand why this might be here, you  
18 can exercise that gatekeeping function. In the  
19 alternative, Judge, I'm not asking you to let  
20 everybody in. I'm asking you, as the Court, to  
21 police your own courtroom and issue an order to  
22 show cause for behavior that's occurred in front of  
23 you that at least on its face is improper. And  
24 that's certainly a proper function for the Court.  
25 Again, that doesn't set a precedent that anybody

1 who wants to complain can complain. It's the Court  
2 policing its own backyard.

3 THE COURT: All right. Thank you.

4 Who wants to respond? Mr. Edwards?

5 MR. EDWARDS: Thank you, Your Honor.

6 Your Honor, as you recognized from our pleadings,  
7 we feel that this particular motion serves no  
8 purpose but to delay and prejudice the plaintiffs  
9 from achieving justice. As you know, we represent  
10 two victims of many victims of molestation by  
11 Jeffrey Epstein, and there's one issue here and  
12 that's whether or not the Crime Victims' Rights Act  
13 and their rights under that act were violated.

14 First, we don't believe that Mr. Reinhart has  
15 standing to make the arguments or --

16 THE COURT: Well, who has standing to make the  
17 arguments other than the person that you attacked  
18 in your motion?

19 MR. EDWARDS: Well, a nonparty in this  
20 proceeding does not have standing to make a Rule 11  
21 sanction motion. So he's asking for --

22 THE COURT: He's asking to come into court so  
23 he can seek that kind of relief.

24 MR. EDWARDS: That's the kind of satellite  
25 litigation we think should be avoided here. In

1 fact, the case law is clear that permissive  
2 intervention, if denied, is virtually never  
3 overturned on appeal because we don't want to  
4 encourage this type of satellite litigation.

5 A Rule 11 standard, as we know, is an  
6 objective standard and the analysis is whether a  
7 reasonable attorney in like circumstances could  
8 believe that his actions were factually and legally  
9 justified.

10 We believe there was a bad deal that went  
11 down. We have circumstances here that we are still  
12 trying to figure out how it happened and why it  
13 happened, and the circumstances that we had before  
14 we put them into these pleadings is simply that  
15 Mr. Reinhart was a U.S. Attorney from 1996 through  
16 2008; yet on October 23rd, 2007 --

17 THE COURT: We don't need to go over all the  
18 facts again. I know what the facts are. I know  
19 what you said in your pleading. I know what  
20 Mr. Reinhart said in response. And I don't -- I'm  
21 not here to decide whether there was or was not a  
22 bad faith allegation. I'm here to decide whether  
23 or not I should allow Mr. Reinhart into the  
24 proceeding in order to litigate that whole issue.

25 MR. EDWARDS: And we're asking that you deny

1           that motion. If it's granted, we would like to  
2           take discovery on that matter, including his  
3           deposition.

4           THE COURT: All right. Thank you.

5           Mr. Lee, do you have anything you wanted to  
6           say?

7           MR. LEE: Yes. Thank you, Your Honor. We did  
8           not oppose Mr. Reinhart's motion. We basically  
9           view this as a matter between the petitioners'  
10          counsel and Mr. Reinhart.

11          THE COURT: All right. At this point, I'm  
12          going to reserve ruling. I'm not going to -- I'm  
13          kind of reluctant to grant the motion, but I'm  
14          going to give it some further thought. There's no  
15          need to have a ruling on that today for purposes of  
16          Mr. Reinhart's concerns. So I'll reserve ruling.

17          All right. Let me hear from Mr. Black on the  
18          intervention by the attorneys.

19          MR. BLACK: May it please the Court, and good  
20          afternoon.

21          THE COURT: Good afternoon.

22          MR. BLACK: We have filed -- the three lawyers  
23          who previously represented Mr. Epstein have filed  
24          for our right to intervene under Rule 24(a) as an  
25          intervention of right because our issue relates to

1 the property or the transaction.

2 THE COURT: Are you saying you have a -- is it  
3 as a matter of right or --

4 MR. BLACK: Yes.

5 THE COURT: -- permissive intervention?

6 MR. BLACK: No, as a matter of right. I just  
7 have a few cases to cite to the Court.

8 In Chiles versus Thornburgh, it's an Eleventh  
9 Circuit case, 1989, 865 F. 2d 1197, the court says,  
10 "The Supreme Court has held that an interest under  
11 Rule 24(a)(2) means a 'significantly protectable  
12 interest.'"

13 The Eleventh Circuit has gone on and In Re:  
14 Grand Jury Matter, which is 735 F. 2d 1330, to say  
15 that -- it was a motion to intervene. The district  
16 court disallowed it. It went up to the circuit.  
17 It was remanded, and the court says: We have  
18 recognized that a district court should allow  
19 intervention by a client in the first instance as  
20 soon as the attorney/client privilege issue is  
21 raised.

22 That was a grand jury proceeding dealing with  
23 a client seeking to protect his attorney/client  
24 privilege, and the court held that intervention was  
25 as a matter of right. Now, that obviously was a

1 criminal investigation.

2 In terms of the -- on the civil docket, this  
3 court decided in El-Al Residences v. Mt. Hawley  
4 Insurance, which is at 716 F. Supp. 2d 1257, an  
5 opinion by Magistrate Judge McAliley, in which he  
6 says that the law in this circuit and others is  
7 clear that this court must allow intervention by a  
8 client in the first instance as soon as the  
9 attorney/client privilege is raised, citing cases.  
10 Colorable claims of attorney/client and work  
11 product privilege are a textbook example of an  
12 entitlement to intervention as a matter of right,  
13 and citing particular cases.

14 THE COURT: Now, let me ask you about that  
15 question of privilege. As I understand your  
16 motion, you're claiming that documents that were  
17 exchanged between yourself and the other attorneys  
18 representing Mr. Epstein and the United States  
19 Attorney's Office and maybe the State of Florida --  
20 I don't remember if the --

21 MR. BLACK: It is just the United States  
22 Attorney, Your Honor.

23 THE COURT: Okay. The United States Attorney.  
24 During the negotiations that resulted in the  
25 non-prosecution agreement are somehow work product,

1 am I correct?

2 MR. BLACK: Yes, sir.

3 THE COURT: Okay. How can a letter between  
4 you and your co-counsel and an adversary in a  
5 criminal prosecution be considered work product, if  
6 it's given to the adversary?

7 MR. BLACK: Yes, sir, and I am happy to answer  
8 that question. In order to do so, I have to give  
9 the Court some background as to the duties and  
10 functions of lawyers as they are of this date in  
11 our sentencing system, under the guidelines system  
12 and under the particular rules, not only of the  
13 court but of the ethical rules of the ABA and the  
14 Florida Bar and rules issued by the courts.

15 To begin with, the Supreme Court has  
16 recognized for a long time that plea bargaining is  
17 an essential part of the administration of justice.  
18 It all goes back to the Santobello case. That was  
19 40 years ago. The world has changed significantly  
20 since then.

21 I just looked at the statistics. The last  
22 year I could find in 2005, 87 percent of all  
23 federal criminal cases were resolved by a guilty  
24 plea and 3.9 percent were resolved by a trial.  
25 We've turned into a system of guilty pleas rather

1 than a trial system. And because of that, the  
2 courts have put a lot of duties and obligations on  
3 lawyers dealing with this plea bargaining process.  
4 And as a result of that, the courts and the rules  
5 have added sanctions -- excuse me, safeguards to  
6 protect us because of communications made during  
7 the course of this plea bargaining process. And I  
8 think that is really what we trying to get to here.  
9 There are safeguards that have been in effect  
10 since -- for almost 80 years. And there's a case,  
11 United States v. Herman back in the seventies from  
12 the Fifth Circuit, saying that the -- the old Fifth  
13 Circuit, that we have recognized a type of immunity  
14 for any statements made during the course of plea  
15 bargaining. And then the Supreme Court and  
16 Congress enacted Rule 11(e)(6), which became Rule  
17 11(f), and, of course, now refers us to Rule 410.  
18 So those rules provide safeguards. What they do is  
19 they say if you engage in the plea bargaining  
20 process, there is an immunity for the statements  
21 that are made.

22 Any statements that relate to the plea  
23 bargaining process are immunized. They don't use  
24 the word "immunization" but they make it clear that  
25 that's the type of protection or cloak that's given

1 to these kind of communications.

2 THE COURT: You're talking about inculpatory  
3 statements, aren't you?

4 MR. BLACK: Any statement; any statement made  
5 during the course of plea bargaining. Rule 410  
6 speaks, by the way, of civil and criminal, and it  
7 says nothing about incriminating or inculpatory or  
8 admissions of guilt. Any statement made during the  
9 course of the plea negotiating process is given a  
10 type of immunity.

11 THE COURT: I thought that rule relates to  
12 admitting statements in evidence during the course  
13 of a trial; not that it's a privileged statement  
14 that can never be disclosed. Am I incorrect about  
15 that?

16 MR. BLACK: Well, I don't -- I'm not -- that's  
17 a very good question that we have struggled some  
18 with. What are the obligations of, for example,  
19 the United States Attorney when they receive  
20 communications from defense counsel under Rule 11  
21 and under Rule 410? Under Rule 11, they cannot  
22 even make derivative use of it so they couldn't  
23 take that information and give it to the FBI, for  
24 example, to continue investigating.

25 I don't believe that they could give to it

1 third parties. I think it would be a violation of  
2 the rule to use it in any way other than in  
3 determining the type of plea that they would offer  
4 to a defendant.

5 Beyond that, I do not believe that it can be  
6 used for any purpose by the government, and I don't  
7 believe that anybody could use it for any purpose.  
8 But even so, in this case, the purpose the  
9 plaintiffs want for this is to use it in  
10 litigation. So we don't have to worry about if  
11 they're going to disseminate it to the media or use  
12 it to write a book, or what have you. They intend  
13 to use it as evidence in this proceeding. So I  
14 don't know that we need to necessarily address any  
15 other kinds of uses of this material.

16 THE COURT: Is this material -- first of all,  
17 how does -- how do the plaintiffs in this case know  
18 about it? Don't they already have it in their  
19 possession?

20 MR. BLACK: No. They have obtained the  
21 government responses and communications to us. The  
22 courts have redacted -- or the government has  
23 redacted any of our communications to the  
24 government. Now, there are extensive  
25 communications. I don't have it here, but my

1 folder is about this thick and I have never been in  
2 a case that has had as much, particularly written  
3 communication, from defense counsel to the  
4 government as this case has.

5 We have discussed with them a panoply of  
6 things. It's the classic opinion work product that  
7 we talk about, what the statutes mean, what the  
8 import of the statutes are, what the cases are,  
9 what the discretion of the Attorney General is. We  
10 discuss federalism, the differences between state  
11 and federal law enforcement; whether or not the  
12 government should proceed with this case because of  
13 various policy reasons. This is classic opinion  
14 work product that we send to the government.

15 Now, I know what the Court's ultimate question  
16 is: Well, if you send it to the government, why  
17 should I give it any kind of confidentiality or  
18 privilege? The reason I'm going through this is  
19 that we criminal lawyers know that today anything  
20 that we send to the government is under this cloak  
21 of a type of immunity; that it cannot be used for  
22 anything. The government cannot use it in their  
23 case. They can't use it in their investigation.  
24 They can't use it for anything other than the  
25 purpose for which we give it to them, and that's to

1 determine whether or not we can come to a plea  
2 negotiation.

3 And one of the policy decisions here, and this  
4 is why I believe that a privilege applies, is that  
5 if the Court should say a civil plaintiff could  
6 obtain our communications with the government, in  
7 which we discuss everything in the world about this  
8 client, and use it in a civil case against the  
9 client, all this is going to do is to begin to  
10 prevent us from having those kind of  
11 communications. And all these cases about plea  
12 bargaining say that the most important thing is to  
13 have open, honest and frank discussions between the  
14 parties to see if any kind of agreement can be  
15 reached, and since you have these open and frank  
16 conversations you don't have to worry that these  
17 materials can in any way be used against your  
18 client.

19 THE COURT: All right. Do you have any cases  
20 that address this principle in the context of --  
21 similar to what we are doing, with where someone  
22 was trying to get this kind of information in a  
23 civil case?

24 MR. BLACK: I have never seen a case, a civil  
25 case, in which a third party plaintiff has been

1           able to obtain letters and communications and  
2           briefs of defense counsel sent to a prosecutor in  
3           order to seek a plea bargain. There is no such  
4           case.

5           THE COURT: And what cases are you relying on  
6           for the proposition that these are cloaked with  
7           some type of privilege of non-disclosure?

8           MR. BLACK: Yes, sir. I would rely on United  
9           States versus Herman, which is 544 F. 2d 791.  
10          That's a Fifth Circuit case of 1977. And, of  
11          course, the classic case is Santobello. For some  
12          reason I don't have it right here in my folder,  
13          although I've got it right here, I believe, which  
14          is United States Supreme Court at 404 U.S. 257.

15          So those talk about the safeguards. I just  
16          wanted to add two things to this, after I pick up  
17          my notes. The courts -- in addition to encouraging  
18          plea bargaining -- issued a series of opinions  
19          starting in the late 1990s, starting with the  
20          Second Circuit, moving to the Ninth Circuit, and  
21          now all the circuits do this, in which they say  
22          that defense lawyers are ineffective and commit  
23          malpractice if they do not communicate with the  
24          prosecutor in seeking a plea bargain.

25          There's one case, United States v. Leonti,

1           which is a Ninth Circuit case, which says that you  
2           not only have to communicate with the prosecutor,  
3           you have to go with your client during the  
4           briefings. You have to keep them advised as to  
5           what your client is doing and you have to follow  
6           this all the way through the end. So the courts  
7           put an obligation on us to follow through on this.

8                     Now, to get to the work product privilege --

9                     THE COURT: Before you move on --

10                    MR. BLACK: Yes, sir.

11                    THE COURT: -- I don't remember you citing  
12           these cases or making this argument in your brief.  
13           Did I miss it or is this a new twist on what  
14           you've -- based upon my question to you? Or is  
15           this a new argument that you're raising that you  
16           didn't raise before?

17                    MR. BLACK: Well, in our -- we filed a motion  
18           for intervention and generally set forth what we I  
19           intended to do, and the plaintiffs then responded  
20           saying that, we object to intervention but request  
21           the right to brief whether or not the work product  
22           privilege applies if we're granted intervention.

23                    So we're at the stage of intervention not at  
24           the time of developing the scope of what the  
25           privilege is, but the Court asked me, you know,

1 obviously what the bottom line is. But I think  
2 that the only real issue here is intervention. I'm  
3 happy to discuss, you know, the contours of the  
4 privilege and why it applies in this case.

5 THE COURT: So you're saying -- your position  
6 at this point is, I've made an assertion of  
7 privilege; I as -- just on that assertion alone,  
8 without regard to the merits of whether the  
9 documents are or are not privileged, your mere  
10 assertion of the privilege requires me to let you  
11 in in order to try and defend that claim?

12 MR. BLACK: Well, I don't think it's quite  
13 that cut and dry. I have made -- I have asserted  
14 the privilege. I have to have some basis for it.  
15 In other words, I couldn't just make some frivolous  
16 comment and say, you know, there's an  
17 attorney/client privilege or this or that. I think  
18 I have to make some statement that there is some  
19 good faith basis for saying this. And in our  
20 papers, we did this.

21 I'm happy to say more, but I think there's  
22 certainly enough here for the Court to say that it  
23 is a matter that is of serious concern and that we  
24 ought to be able to intervene in order to address  
25 it with the Court. Because if we don't address it,

1           it will be lost.

2           THE COURT: All right. So, again, I'm trying  
3           to make sure I didn't miss something in the papers.  
4           As I understood your moving papers, you claim that  
5           these are work product privileged documents or  
6           there was some grand jury material involved in  
7           this.

8           MR. BLACK: Yes. There is some 6(e) material  
9           as well.

10          THE COURT: All right. And, again, maybe I  
11          missed it in all the materials I had to go through  
12          for today, but did you make the claim in your  
13          papers that it's work product because part of the  
14          attorney -- criminal defense attorney's  
15          responsibility is getting into plea negotiations  
16          and there's this privilege of communications with  
17          the prosecutors in dealing with plea negotiations;  
18          was that line of --

19          MR. BLACK: Yes.

20          THE COURT: -- reasoning made?

21          MR. BLACK: Right, because that's all these  
22          papers are. We said it's privileged because of  
23          these communications, because of the importance of  
24          keeping open and frank communications, and that it  
25          fits under the privilege.

1           THE COURT: I'm sorry. I didn't mean to  
2 interrupt you. What else did you want to say?

3           MR. BLACK: All right. The other thing that I  
4 wanted to mention is that there are the restatement  
5 of the law regarding lawyers in the latest -- from  
6 the American Law Institute, used as an example  
7 under the purpose of 410, where a party actually  
8 sends documents to the government to examine under  
9 a limited -- under confidentiality and limited use,  
10 and the American Law Institute says that does not  
11 waive the work product privilege.

12           The difference -- I don't want to get too deep  
13 into it right now, but the difference between the  
14 two is you can give work product to other people  
15 and not waive its type of work product; whereas you  
16 do in the attorney/client privilege. As soon as  
17 you give anything under the attorney/client  
18 privilege to a third party, you waive it, but not  
19 under work product. If it still has some  
20 protection associated with it, the question is,  
21 under work product, did you give it to people just  
22 to use however they want or was there some  
23 limitation on it? And what's important here is the  
24 things that were sent to the government -- and  
25 while we were adversaries at the time, although we

1 no longer became adversaries -- it was under the  
2 protections that were given to these materials.

3 And I would -- there's one case I would  
4 analogize to, although it's not exactly, obviously,  
5 the same. Judge Marcus decided this case dealing  
6 with an American Airlines Crash near Cali, Colombia  
7 and American Airlines was part of a program where  
8 its pilots could report FAA violations to them and  
9 to the FAA and it was considered confidential.

10 Judge Marcus, while he was on this court, said  
11 that under Rule 501 -- even if you don't find any  
12 of these other privileges, under 501, where you can  
13 accept common law privileges, he said, I would find  
14 a limited common law privilege for a reporting  
15 function like this because it is so important to  
16 prevent airline disasters that I think that these  
17 things ought to be privileged to facilitate open  
18 and frank discussions between the pilots and the  
19 FAA, and what have you, because it's too important.  
20 And, certainly, this fits under that same type of a  
21 rubric.

22 If we have a problem with work product, I  
23 think that we can find a common law privilege of  
24 communication here because of the importance given  
25 to plea negotiations that would keep these out of

1 the hands of the plaintiffs who intend to use it  
2 against our clients.

3 So I think for a number of reasons this court  
4 should allow this intervention. I don't think now  
5 is the time to make the decision or the ultimate  
6 decision. But I would say this: If there's any  
7 kind of balancing here, the importance of  
8 protecting communications in plea bargaining today  
9 is very important. It's important to this court,  
10 to all the courts dealing with trying to resolve  
11 criminal cases. And all the cases say that's  
12 something that ought to be encouraged.

13 The plaintiffs, who have already filed for  
14 summary judgment, who have said numerous times they  
15 have all the evidence they need, certainly have a  
16 very low, if any, need for anything from us to try  
17 to prove their case. So if there's any kind of a  
18 balancing test here, I think that it certainly goes  
19 in favor of protecting these materials.

20 THE COURT: What do you think in these  
21 materials is protected under Rule 6?

22 MR. BLACK: I think that all the materials  
23 that the plaintiff is requiring are -- oh, under  
24 6(e)?

25 THE COURT: Yes.

1 MR. BLACK: Under 6(e), what happens is that  
2 in a number of the letters we discuss materials  
3 that we have been shown or know of, like names of  
4 witnesses, names of victims and what have you.  
5 That goes back and forth. That is obviously grand  
6 jury material. Now, I can't say that there's a  
7 large amount of that. There is some discussion of  
8 those things in these letters, but I wouldn't say  
9 that it's more than 10 percent of them. The rest  
10 of them are just all the lawyers talking about the  
11 law and that type of thing.

12 THE COURT: And what standing would you have  
13 to complain about grand jury material being  
14 released?

15 MR. BLACK: I think that any officer of the  
16 court has standing to complain about the  
17 dissemination and violation -- of grand jury  
18 materials in violation of 6(e). I don't know that  
19 anybody needs a particular standing for that.

20 THE COURT: I mean, if the government -- I  
21 don't know what the government's position on that  
22 is. But if the government isn't concerned, you  
23 think you can step in and say, hey, you're not  
24 honoring your obligations under 6(e); I'm going to  
25 step in?

1           MR. BLACK: Actually, there are times when we  
2 do that. For example, if a government agent should  
3 disseminate grand jury materials to the news media,  
4 there have been times when we have made complaints  
5 for violations of 6(e). And I've even -- I have  
6 filed letters with the Department of Justice to the  
7 Attorney General complaining about prosecutors, and  
8 I won't mention any names -- not in this case --  
9 who have disseminated 6(e) material in violation of  
10 the rules. So I think that any party can make a  
11 complaint.

12           THE COURT: I assume you've done that when it  
13 adversely affected one of your clients?

14           MR. BLACK: Well, obviously, because --

15           THE COURT: Not because it -- just to protect  
16 the system?

17           MR. BLACK: Your Honor is exactly right. This  
18 is a highly adversarial system and the only reason  
19 I'm objecting to it now is because it's beneficial  
20 to my client. I'm not doing it out of any  
21 eleemosynary intent.

22           THE COURT: Thank you, sir.

23           MR. BLACK: Thank you, Your Honor.

24           THE COURT: Mr. Edwards.

25           MR. EDWARDS: Your Honor, we are asking that

1 Your Honor deny the motion to intervene in this  
2 case. Mr. Black and these attorneys have not  
3 intervened on behalf of Mr. Epstein, who may  
4 actually have an interest. They have no stake in  
5 the outcome of this case. There is no case that  
6 stands for --

7 THE COURT: Well, I mean, if they are right  
8 that this is work product material -- and maybe  
9 that is not something that I can decide now, but to  
10 the extent that it might arguably be work product  
11 material, don't they have standing to protect their  
12 own work product?

13 MR. EDWARDS: The cases that Mr. Black cited  
14 indicated or held that they needed a colorable  
15 argument for work product. You can't just come in  
16 and claim work product. And there is a plethora of  
17 cases that stand for the proposition, and has only  
18 been followed everywhere throughout the country,  
19 that voluntary disclosure of work product  
20 information to an adversary waives work product.

21 The other rules of evidence that Mr. Black  
22 referred to, 410, don't apply to this case. That  
23 is a rule of admissibility rather than  
24 discoverability. They're not being entered against  
25 Mr. Epstein in this case. They are being entered,

1 if at all, against the government.

2 And just to correct the statement that he made  
3 that the government redacted the portions of the  
4 emails and correspondence from Mr. Epstein's  
5 attorneys to the government, that's not how this  
6 happened. In previous litigation, it was ordered  
7 that all of it be turned over to us from  
8 Mr. Epstein, and they unilaterally made the  
9 decision to redact the information from their  
10 attorneys going to the government. And prior to  
11 the order that granted us permission to receive  
12 this correspondence, all of these arguments, the  
13 work product, the 410 argument, all of them were  
14 before this court and all of them were overruled.  
15 We've been down this road before. We would argue  
16 that it's the law of the case at this point, since  
17 these are similar issues, and there is no colorable  
18 argument of work product at this point, and the  
19 intervention should be denied.

20 THE COURT: All right. The cases that you're  
21 relying on and that I, at least coming in here, was  
22 thinking about that when you disclose something to  
23 an adversary it's no longer a work product, are you  
24 familiar with the cases in the context of plea  
25 negotiations where there's an exception or there's

1 some different type of privilege that applies in  
2 plea negotiations between the government and a  
3 criminal defendant?

4 MR. EDWARDS: We have read every case in his  
5 brief, as well as any others on this subject, and  
6 can't find a single case out there that stands for  
7 that proposition. It just doesn't exist. So the  
8 cases that he's spoken about don't say that there  
9 is this automatic cloak of immunity between plea  
10 discussions. In fact, there are cases talking  
11 about plea discussions, and there isn't that.

12 This doesn't come up that much because this is  
13 a unique scenario where the best evidence of how  
14 the victims' rights were violated, when and by  
15 whom, is going to be found in the correspondence  
16 between the government and Mr. Epstein, as we have  
17 already seen from the half of the conversation that  
18 we've been able to see.

19 THE COURT: Let me ask you this, and this kind  
20 of gets to the merits of the argument, which I  
21 don't really want to discuss right now, but do you  
22 really need the defense lawyers' correspondence or  
23 statements to the government attorneys in proving  
24 up whether or not the government violated the  
25 Victims' Rights Act, assuming I'm going to find

1 that it's not -- it doesn't start from the point of  
2 indictment; the rights are triggered earlier than  
3 that? Don't you have enough information, without  
4 their comments in there, trial strategies that may  
5 have been revealed to the government -- it is  
6 really the government's actions or inactions that  
7 you're complaining about, not Epstein's lawyers'  
8 actions or inactions.

9 MR. EDWARDS: We have a lot of information but  
10 some of the information that we have are clearly  
11 responses by Assistant U.S. Attorneys, and the U.S.  
12 Attorney at the time, that is responding back to  
13 some letters or correspondence saying, I understand  
14 that you're urging us not to tell the victims  
15 certain information, but here's our problem with  
16 that, and there's a back and forth. And we can  
17 never gain the context of how it all came about and  
18 the rights were violated.

19 We additionally believe that this will go to  
20 the heart of the relief or remedy that we are able  
21 to seek when we learn the whole puzzle as to how  
22 this whole thing went on behind the victims' backs,  
23 how deliberate it was and which parties initiated  
24 it or caused the rights that we've claimed were  
25 violated to be violated.

1 THE COURT: Well, again, this is getting more  
2 to the merits. But it's the government's either  
3 actions or inactions that are at issue here and not  
4 what Mr. Epstein or any of his lawyers may have  
5 done either to induce or encourage or suggest that  
6 the -- again, hypothetically, that they violated  
7 the victims' rights under the Act. So aren't you  
8 really focusing on what the government did or  
9 didn't do regardless of what Mr. Epstein may have  
10 done, or his lawyers? Is that really relevant?

11 MR. EDWARDS: To prove violation, yes. But  
12 the scope of the remedy or relief that we are able  
13 to seek, if it is ultimately to invalidate this  
14 contract between the government and Mr. Epstein,  
15 and it is ultimately going to be detrimental at all  
16 to Mr. Epstein, then his deliberateness in the  
17 insistence that the rights of these victims were  
18 violated is going to be very important when we  
19 brief the issue on remedy and relief.

20 THE COURT: All right. Thank you. I want to  
21 see if the government has anything to say before I  
22 hear back from Mr. Black.

23 Mr. Lee, did you have anything to add on this?  
24 I'd be curious to know the government's position  
25 regarding Mr. Black's assertion that any plea

1 negotiations, statements made during the course of  
2 plea negotiations, are somehow privileged and  
3 protected and therefore can't be disclosed or  
4 disseminated.

5 MR. LEE: Your Honor, on that particular issue  
6 I am going to defer to my colleague, Ms. Villafana,  
7 but I would like to note -- to invite the Court's  
8 attention, in response to their motion to use  
9 correspondence and to unseal, we did raise the 6(e)  
10 issue and we also raised a due process issue about  
11 requiring the government to make a factual  
12 assertion that somebody was guilty of a certain  
13 crime without even being charged with a crime.  
14 That was raised independently of what Mr. Black was  
15 asserting. So we did raise that.

16 THE COURT: Okay. I'm not sure how that --  
17 explain to me how those tie together. Your  
18 statement that -- the government asserting someone  
19 may have been guilty of a crime might be a due  
20 process violation, how does that relate to  
21 statements made by the defense to you in the course  
22 of plea negotiations?

23 MR. LEE: That's actually a separate issue  
24 that was subsumed within the motion, Your Honor.  
25 The motion that they filed was a motion to unseal

1           correspondence and to file -- unseal pleadings and  
2           use correspondence in order to prove violations of  
3           the CVRA. Included in that were a number of  
4           factual assertions that the petitioners claimed  
5           that we are obligated to agree or disagree with in  
6           terms of presenting that issue for the Court to  
7           resolve. And some of those factual assertions that  
8           they suggested were true involved essentially  
9           assertions that Mr. Epstein was guilty of various  
10          crimes, crimes that he was not charged with.

11                 And so we noted that would be a violation of  
12          due process principles to name somebody in such a  
13          fashion or to agree to an assertion, which  
14          basically becomes our assertion. And secondly, we  
15          also mentioned the 6(e) issue in so far as some of  
16          these emails that were generated that touched upon  
17          matters occurring before the grand jury. That was  
18          in that motion regarding -- motion to unseal and  
19          use correspondence. If I could defer to my  
20          colleague to address the issue about the philosophy  
21          about the plea negotiations?

22                 THE COURT: All right. Thank you.

23                 MR. LEE: Thank you, Your Honor.

24                 MS. VILLAFANA: Thank you, Your Honor. I'm  
25          not certain that this was raised in the pleadings

1 so this is not something that I was necessarily  
2 prepared to address.

3 THE COURT: Well, if you're not prepared to  
4 address it, then I don't want to put you on the  
5 spot and bind you to anything you might say here,  
6 if you want some time to consider it. I am really  
7 going to have to look into this issue because I  
8 took it as a new -- a new angle.

9 MS. VILLAFANA: I think I would prefer to look  
10 into it a little bit and respond in writing, if  
11 that's all right with Your Honor.

12 THE COURT: All right.

13 MS. VILLAFANA: Thank you.

14 THE COURT: Mr. Black, did you want to say  
15 anything else?

16 MR. BLACK: Yes, Your Honor. At the beginning  
17 of their argument, the plaintiff tells you they do  
18 not want to use the statements in any way against  
19 Mr. Epstein. At the end of the argument, they say  
20 they want to use the statements as a remedy to  
21 vacate the non-prosecution agreement and try to  
22 have him sentenced to a longer sentence, I assume.  
23 Mr. Edwards has said that in previous times before  
24 this court. I think that's more than sufficient to  
25 meet the standard that they intend to use these 410

1 materials against Mr. Epstein to his detriment.

2 THE COURT: All right.

3 MR. BLACK: Thank you, sir.

4 THE COURT: That's a Mr. Epstein argument as  
5 opposed to a Roy Black attorney argument?

6 MR. BLACK: It -- hopefully, they can't use  
7 those statements against me but they certainly want  
8 to use it against the client. And when we wrote  
9 the letters, we are acting for the client.

10 And here is the problem, Your Honor, just to  
11 tell you practically what it's like out in the  
12 field practicing criminal law: If we believe that  
13 our statements in any way during this plea  
14 bargaining process would end up coming back to  
15 damage our clients in some way, why would we do  
16 this? Why would we go through this whole process  
17 of sending these briefs and letters and  
18 interpretations of the law and discussions of  
19 various offenses and how things could be arranged  
20 and the discretion between the federal and the  
21 state government and all those kind of things, even  
22 discussing proposed charges and all of that, why  
23 would we ever engage in that if we ever thought  
24 these things could come back to bite our clients?

25 All we're going to do here is going to, for no

1 good reason, put a damper on the ability of lawyers  
2 to negotiate and resolve criminal cases and I  
3 believe that is against the policy of these courts,  
4 and our system of justice.

5 THE COURT: All right. Thank you, Mr. Black.  
6 I'm going to reserve ruling. I guess I'm going to  
7 ask the government, or both sides to -- Mr. Black,  
8 did you want to -- an opportunity to further  
9 develop this privilege argument on plea  
10 negotiations in writing?

11 MR. BLACK: Yes, sir. I would also ask for  
12 whatever time you give the government. I'll make  
13 another submission.

14 THE COURT: Why don't you make an initial  
15 submission and then let the other side, both -- the  
16 other parties respond to that.

17 MR. BLACK: That's fair enough, Your Honor.

18 THE COURT: How much time do you want to do  
19 that?

20 MR. BLACK: Two weeks?

21 THE COURT: That's fine.

22 MR. BLACK: Thank you.

23 THE COURT: Thank you, Mr. Black.

24 How much time did you want, Ms. Villafana, or  
25 Mr. Edwards, to respond to whatever Mr. Black

1 submits?

2 MR. EDWARDS: Two weeks as well, Your Honor.

3 MS. VILLAFANA: Two weeks is fine.

4 MR. LEE: Two weeks would be fine, Your Honor.

5 MR. EDWARDS: Your Honor, we would ask that we  
6 be able to reply after the government?

7 THE COURT: Okay. So you want two weeks after  
8 Mr. Black and then after the government responds?

9 MR. EDWARDS: One week would be fine.

10 THE COURT: After?

11 MR. EDWARDS: The government responds.

12 THE COURT: Okay. Mr. Black, two weeks for  
13 the government and a week for you?

14 MR. EDWARDS: Sounds great.

15 THE COURT: Okay. Mr. Black, are you going to  
16 want to file a reply or are you going to wait and  
17 see?

18 MR. BLACK: I'll see. Why don't you give us  
19 three days for a reply.

20 THE COURT: Okay. How about a week, all  
21 right?

22 MR. BLACK: Thank you.

23 THE COURT: All right. Let's talk about some  
24 of these other procedural motions that don't delve  
25 into the real merits. Let's talk about the

1 plaintiffs' motion to have their facts accepted  
2 because of the government's failure to contest any  
3 of the facts. Who's going to argue that?

4 Mr. Edwards?

5 MR. EDWARDS: Yes, Your Honor.

6 THE COURT: All right. Now, let me kind of  
7 just start off and try and focus the inquiry here.

8 MR. EDWARDS: Okay.

9 THE COURT: I read your motion. The motion  
10 you filed, the ultimate motion on whether or not  
11 there's been a violation of your clients' rights,  
12 it's not labeled a summary judgment motion. It's  
13 not sworn to. It doesn't have any affidavits. It  
14 doesn't -- no depositions, request for admissions,  
15 nothing that you would ordinarily rely upon in the  
16 context of a case dispositive motion. As far as I  
17 know, there's been no attempt to conduct discovery;  
18 no request for admissions; no document production;  
19 nothing in the ordinary -- in an ordinary civil  
20 case that would be done in order to get the other  
21 side to admit to certain facts.

22 It seems like you're saying, well, we've  
23 talked to them back and forth. We've asked them to  
24 admit things. They haven't admitted anything.  
25 They refused or we can't come to some agreement, so

1 admit everything we say in our motion and use it  
2 against them. How does that work when there seems  
3 to me, whether you consider this an aspect of an  
4 offshoot of a criminal case or a separate civil  
5 case, that there is a means or a method by which  
6 you could have, if you wanted to, asked for the  
7 opportunity to conduct discovery or send out  
8 discovery requests and get them to either admit or  
9 deny certain things?

10 Can you just negotiate, they say, I'm sorry,  
11 we're not admitting anything, and come into court  
12 and say, we tried; they won't admit anything, so  
13 now you've got to -- everything is deemed admitted  
14 against them? I mean, how does that work?

15 MR. EDWARDS: Your Honor, let me confer with  
16 co-counsel for one second because I believe there  
17 was some attempt to do some discovery.

18 We made an initial disclosure under Rule 26,  
19 and the response back that we got from the  
20 government was that this is not a civil case  
21 because the Crime Victims' Rights Act is not a  
22 civil case. And we said, okay, well, then we get  
23 certain information from you if it's a criminal  
24 case. And they said, well, if it's a criminal  
25 case, it's United States versus somebody else. So

1           it's not a criminal case. So we are kind of stuck  
2           in this middle ground and we need -- similar to a  
3           summary judgment motion, we need an ultimate  
4           finding on a legal issue, which is a finding of  
5           violation of the Act. So we've been kind of stuck  
6           in limbo not knowing what's really available to us  
7           in terms of how we go about getting discovery.

8                        So we did negotiate with them for a long time  
9           over facts, and they finally said, all the facts  
10          are irrelevant. And if they're irrelevant, then  
11          what's the harm in accepting them as true? And if  
12          they want to insert the one fact that they believe  
13          is relevant, Jeffrey Epstein was not indicted, then  
14          we agree.

15                       THE COURT: Well, I presume their position is,  
16          the rights under the Act don't kick in or aren't  
17          triggered until there's an indictment, and if I  
18          accept that proposition then it doesn't make any  
19          difference what the facts are. But if I don't  
20          accept that proposition, then I have a feeling  
21          they're going to say that all the facts do make a  
22          difference. I don't want to speak for them but I  
23          presume that's going to be their approach.

24                       MR. EDWARDS: Well, there --

25                       THE COURT: If I rule against them on the

1 indictment is the triggering event, they're going  
2 to want to contest a lot of these facts.

3 MR. EDWARDS: Well, there are certain  
4 undeniable facts that are in the record that they  
5 will not contest, which based on those facts alone  
6 the -- the finding of a violation, we could reach  
7 that decision and it would be ripe for that  
8 finding. It's not ripe until we have all of the  
9 circumstances and all of the facts. But just given  
10 those -- the information that we have in the  
11 record, such as when the non-prosecution agreement  
12 was signed, the confidentiality provision, when the  
13 letters were sent to the clients, when the plea  
14 negotiation went down, the fact that it was a year  
15 after the non-prosecution agreement that disposed  
16 of the clients' rights before the clients knew  
17 about the non-prosecution agreement and were  
18 receiving letters telling them to be patient, this  
19 is a long process, after their rights were already  
20 gone, is enough. And those are not things that are  
21 being contested.

22 So we could at least have had a meaningful  
23 discussion as to which of these other facts, in  
24 addition to the fact that Mr. Epstein was not  
25 indicted, that they would agree upon. And if

1 they're saying that it's irrelevant, it goes back  
2 to my original argument, what's the harm then? We  
3 can get all the way to making the decisions if we  
4 have a bunch of -- and Your Honor can make the  
5 legal determination what weight to give various  
6 facts, whether they're relevant or not relevant.

7 THE COURT: But that's assuming they're all  
8 true for purposes of the proceeding. I guess my  
9 question to you is: If you are uncertain or the  
10 government is uncertain as to what kind of a case  
11 this is, is it an offshoot of a -- or ancillary to  
12 a criminal case or is it a separate and independent  
13 civil case or some hybrid, and you wanted to get  
14 them to admit certain facts, you could have filed a  
15 motion and asked for some assistance from me and  
16 said, hey, this is what we're trying to accomplish.  
17 They won't cooperate. Can we employ some discovery  
18 mechanisms in order to limit or narrow the disputed  
19 issues?

20 I think whether it's criminal or civil, I  
21 probably would have discretion to say, engage in  
22 some discovery if that's going to simplify things  
23 or bring this to a head. But you just filed a  
24 motion and say, they're stuck with everything we  
25 say in our motion.

1 MR. EDWARDS: Well, we believe that this did  
2 fall under local Rule 7.5, and assuming that it  
3 does, then any -- any facts that are uncontroverted  
4 would be deemed admitted and accepted as true.

5 THE COURT: So you're saying this is a summary  
6 judgment motion?

7 MR. EDWARDS: Yes.

8 THE COURT: You didn't call it a summary  
9 judgment motion.

10 MR. EDWARDS: I understand.

11 THE COURT: You didn't file -- you didn't file  
12 a statement of undisputed facts.

13 MR. EDWARDS: We did file a statement of  
14 undisputed facts. We filed 53 undisputed facts.

15 THE COURT: You did?

16 MR. EDWARDS: We filed -- within our motion  
17 for finding violations of the Crime Victims' Rights  
18 Act, we filed 53 undisputed facts and attached, as  
19 exhibits, A through K.

20 THE COURT: Okay. I see. Let me go to that  
21 section. Okay.

22 MR. EDWARDS: Various pieces of the record.  
23 And we have agreed with the government that we  
24 would agree to that additional fact that  
25 Mr. Epstein was not indicted, and then we would

1 start with various correspondence indicating that  
2 there was a 53-page indictment prepared against him  
3 and move on all the way through the plea agreement  
4 so that we could reach the determination on the  
5 violation.

6 THE COURT: All right. Well, I don't think I  
7 can just accept your version of the facts, some of  
8 which are not facts but are opinions and  
9 conclusions, just because the government didn't  
10 choose to sit down and work out an agreement with  
11 you. I think there are other ways of getting to  
12 the point where you want to get. I think a  
13 discovery process is probably the -- and you didn't  
14 label it a motion for summary judgment. It's kind  
15 of -- so I don't think they were on notice that you  
16 were intending to consider this a summary judgment  
17 motion and therefore had to respond under the local  
18 civil rule and file their statement of disputed  
19 material facts.

20 MR. EDWARDS: Okay. I could be incorrect but  
21 I believe in their response that they referred to  
22 it as a summary judgment motion.

23 THE COURT: All right.

24 MR. EDWARDS: But I could be wrong on that.  
25 Okay.

1 THE COURT: I'm going to deny that motion.  
2 Okay. I think there's another way of trying to get  
3 these facts narrowed and we can talk about how to  
4 do that after.

5 MR. EDWARDS: Okay. In terms of the motion  
6 for finding a violation, is at least the  
7 information that is already in the record and is  
8 stipulated to, meaning the exhibits that both  
9 parties agree were exhibits, is that something that  
10 we are going to be permitted to rely upon for that  
11 motion?

12 THE COURT: Well, let's wait until we get to  
13 that motion and then we'll talk about it.

14 MR. EDWARDS: Thank you, Your Honor.

15 THE COURT: Okay. How about the motion for  
16 the order directing the United States Attorney's  
17 Office not to withhold relevant evidence, who wants  
18 to talk about that? Mr. Cassell.

19 MR. CASSELL: Good afternoon, Your Honor. As  
20 the Court is aware, we've been trying to sort  
21 through some of these issues. The Court, I guess,  
22 is wondering about some of these things, and we've  
23 been wondering as well. The one thing we think is  
24 very clear is that the United States cannot sit on  
25 information that's highly relevant to the

1 plaintiffs' claims.

2 We've repeatedly asked the United States for  
3 information that would support our claim both that  
4 there were substantive violations of the Crime  
5 Victims' Rights Act and that the appropriate remedy  
6 for this violation would be setting aside the  
7 non-prosecution agreement. We've offered to  
8 provide them very narrow and specific documents  
9 that we're looking for. And in response, the  
10 United States Attorney's Office has taken the  
11 position that it can and will withhold this  
12 relevant and useful information from the victims.  
13 So we think the legal issue is starkly present:  
14 Can the United States withhold information from the  
15 victims that will help them establish a violation  
16 of congressionally-mandated crime victims' rights?  
17 And we submit that the answer to that question must  
18 be, no, for three reasons.

19 THE COURT: Why isn't this, again, sort of a  
20 discovery issue? We go through a discovery process  
21 and you submit specific requests for information.  
22 They either produce it or object to it, and if  
23 there's an objection and they say, we're not going  
24 to produce it, we have a hearing on whether or not  
25 it should be turned over.

1 MR. CASSELL: So that is our third argument.  
2 Let me jump right to that. The third argument we  
3 have made in our brief is that this is a civil case  
4 and so we should proceed under the ordinary civil  
5 rules. As Your Honor is well aware, the first step  
6 in the civil rules is to make initial disclosures.  
7 So we made all of our initial disclosures under  
8 Rule 26 and we asked the government then to make  
9 theirs. They refused. They said, sorry, we're not  
10 going to make any disclosures. So we were stopped  
11 at first base. We can't, of course, move to  
12 request for depositions, request for admissions  
13 because we haven't even had the initial disclosures  
14 that Rule 26 envisions. So basically --

15 THE COURT: But you could have asked me to  
16 intervene and make some preliminary determinations  
17 as to who's right or wrong about that process.

18 MR. CASSELL: And that's what we tried to do  
19 with this motion. We said there should be a motion  
20 for them, and we styled it, not to withhold  
21 evidence. And, of course, our third argument was  
22 that the civil rules apply and they should -- let  
23 me make clear, we're not trying to suggest that  
24 we're afraid of the civil rules. To the contrary,  
25 if the Court were to enter an order in a few

1 minutes saying the civil rules apply, simply  
2 proceed under the civil rules, we would be ecstatic  
3 about that. That would let us get to the bottom of  
4 this case and we would be happy to move forward on  
5 an expedited basis to produce some requests for  
6 admissions, maybe take a few depositions and do the  
7 ordinary thing that civil rules -- the civil rules  
8 require.

9 So we're certainly not opposed to that in any  
10 way. In fact, we proposed that to the government;  
11 again, only to be blocked at square one, to even go  
12 down that path. So we're happy to go down that  
13 path. We hope that the Court would go that way.

14 But there's one -- there are a couple of other  
15 things that I think above and beyond the ordinary  
16 civil rules that factor in here that are highly  
17 relevant. This is not an ordinary civil case where  
18 the victims and the government are supposed to be  
19 adversaries, where both sides duke it out. To the  
20 contrary, Congress has passed a specific provision  
21 that mandates that the government must use its best  
22 efforts to afford victims their rights. That best  
23 efforts clause then suggests that, well, the  
24 government isn't entitled to try to conceal things  
25 and withhold them. They have to undertake their

1 own affirmative search for information and provide  
2 it to us.

3 And here again, we think this is a very simple  
4 task. They've never argued that this is  
5 burdensome. They've never argued, we don't know  
6 what you're looking for. To the contrary, they  
7 have said, we have information and we're simply not  
8 going to produce it to you. That is simply not  
9 consistent with the Crime Victims' Rights Act,  
10 which obligates them to use their best efforts to  
11 help us. You shouldn't view this as an adversarial  
12 position. And this is, again, where we have come  
13 to the Court to request your assistance. We would  
14 like an order that says to the government, come on,  
15 comply with the Crime Victims' Rights Act; use your  
16 best efforts to assist the victims to receive the  
17 information that they're looking for.

18 And the last argument we make is, remember  
19 what the government has already done for the sex  
20 offender in this case. Our understanding is they  
21 have provided hundreds of pages of information to a  
22 child molester, but we're simply asking for a few  
23 documents that will now help us make our claim that  
24 there have been violations of the Crime Victims'  
25 Rights Act and that the appropriate remedy for that

1 is setting aside the non-prosecution agreement.  
2 We're entitled to that information no less than the  
3 defense was entitled to that information as a  
4 matter of fairness.

5 Now, they say fairness, due process, that's  
6 under the Constitution. We are not raising a  
7 constitutional claim. We are raising a statutory  
8 claim. The Crime Victims' Rights Act says that  
9 victims of crime must be treated with fairness.  
10 And, again, we think this is a very simple and very  
11 stark question that the Court can ask and should  
12 ask the government: How is it treating the victims  
13 with fairness to allow you, the government, to  
14 withhold information that will permit them to show,  
15 first, that there's been a violation of the Crime  
16 Victims' Rights Act and, secondly, that the  
17 appropriate remedy is the remedy they're seeking to  
18 set aside the non-prosecution agreement?

19 And, in fact, the cases that they cite even  
20 say that the victims should go and seek the  
21 assistance of the government when they run into  
22 situations where their rights are being violated.  
23 The very first case they cite, U.S. v. Rubin, says  
24 that the victims should go about conferring with  
25 the government if they're trying to obtain

1 information since, after all, it's the government  
2 who is supposed to be the ally of the victims in  
3 this process, not the adversaries.

4 And so for all of those reasons, the  
5 government's best efforts and obligations, our  
6 right to be treated with fairness, and the fact  
7 that this is a civil case and the ordinary civil  
8 rules apply, for all of those reasons, Your Honor,  
9 we think they are not entitled to withhold  
10 information from us that they well know is very  
11 helpful to us, both on the liability phase of this  
12 case and the ultimate remedy phase of this case.

13 THE COURT: All right. Thank you.

14 Mr. Lee.

15 MR. LEE: Thank you, Your Honor. May it  
16 please the Court. Let me address the first issue  
17 about the initial disclosures that the petitioners  
18 claim. Those initial disclosures were given to the  
19 government in March of 2011, probably about two  
20 weeks before they filed their series of four  
21 motions. This lawsuit commenced in July of 2008.  
22 So while these are disclosures, they certainly were  
23 initial disclosures which are typically done within  
24 a few weeks of the commencement of the lawsuit.

25 Your Honor, this is a case that is really kind

1 of a hybrid. It's not a criminal case in the sense  
2 that nobody is being charged with a crime. Nobody  
3 is in jeopardy of going to jail. But it's not  
4 completely a civil case, either. I believe that  
5 the CVRA intended that most of these actions where  
6 individual victims seek to have their rights  
7 enforced, they are usually done as an ancillary  
8 proceeding to an extant criminal proceeding.

9 In such proceedings, an individual victim  
10 would not necessarily have discovery rights that  
11 one would have under the Federal Rules of Civil  
12 Procedure. Not only that, not every civil action  
13 comes with it rights to conduct full discovery. If  
14 somebody files an agency APA action, Administrative  
15 Procedures Act, seeking to get judicial review of  
16 an agency action, those are record reviews and  
17 you're not entitled to discovery.

18 If somebody files a habeas, in order to get  
19 discovery in a habeas proceeding there must be a  
20 court order. And we believe that just because this  
21 is a civil action in the sense that it's not a  
22 criminal action, that they're not entitled to  
23 discovery. It can only be done pursuant to an  
24 order of this court.

25 THE COURT: All right. Well, do you believe I

1 don't have the discretion or do you believe or  
2 agree that regardless of whether it's an ancillary  
3 action to a criminal proceeding or it's a separate  
4 and independent civil proceeding, or it's some  
5 hybrid, wouldn't I have discretion to order  
6 discovery if I believed it was appropriate?

7 MR. LEE: Yes, you would, Your Honor.

8 THE COURT: Okay.

9 MR. LEE: Even in a habeas, the court has  
10 broad discretion. Your Honor, I would note for  
11 this, we believe that the first issue the Court  
12 must resolve is whether or not any legal rights  
13 under 3771(a) (1) through (8) accrued prior to the  
14 filing of a charge in the Southern District of  
15 Florida against Mr. Epstein. That can be resolved.  
16 That's a statutory interpretation question. It is  
17 a legal question.

18 The only predicate fact that is necessary for  
19 the Court to engage in this analysis is to have --  
20 to know that there was no charge filed against  
21 Mr. Epstein in the Southern District of Florida.  
22 There's no dispute as to that. I mean, for that  
23 very reason, we believe that the discovery that the  
24 petitioners claim that they need is unnecessary.

25 THE COURT: Well, I agree if I agree with you,

1 then that's the end of the case. But if I don't  
2 agree with you, I have to have some way of dealing  
3 with the issue of whether or not the plaintiffs'  
4 rights were violated and how we're going to come to  
5 a resolution of that. So I'm now in the posture  
6 of -- on the assumption, hypothetically, that I  
7 disagree with your legal position and feel that  
8 there is an issue of fact as to whether or not the  
9 rights were violated and how are we going to  
10 resolve that factual issue.

11 MR. LEE: Your Honor, the Court would at that  
12 point have the discretion, if there was good cause  
13 shown and the Court believed it necessary to the  
14 resolution of the dispute, to allow discovery.

15 THE COURT: All right. And I guess this is  
16 over and above just discovery obligations. The  
17 plaintiffs are claiming that you have some  
18 statutory obligation over and above a discovery  
19 obligation to produce information that would be  
20 what's in your possession, out of treating them  
21 fair under the statute. What's your position on  
22 that?

23 MR. LEE: We respectfully disagree. They cite  
24 Brady v. Maryland, which, of course, pertains to a  
25 criminal case. Brady v. Maryland is based on the

1 due process clause, because if the government is  
2 seeking to deprive somebody of their life, liberty  
3 or property, they have to accord them the process  
4 that is due. The process that is due to a criminal  
5 defendant is information that is exculpatory that  
6 is in the hands of the government. This is not a  
7 criminal case.

8 In order to invoke the due process clause,  
9 they have to establish that there's a protected  
10 life, liberty or property interest, outside of  
11 Brady versus Maryland. So in this case, they would  
12 have to demonstrate that some liberty or property  
13 interest is in jeopardy and the government is  
14 seeking to take it away from them and they are  
15 accorded a certain amount of process. In their  
16 view, that process is the right to have access to  
17 this information.

18 There is no protected liberty or property  
19 interest in the CVRA. And in so far as the right  
20 that they invoke under 3771(a)(8) about the right  
21 to be treated with fairness, there's no authority  
22 that fairness includes a discovery right to compel  
23 the government to produce information that might be  
24 of assistance to a victim in prosecuting his or her  
25 claim that their rights were violated. Thank you,

1 Your Honor.

2 THE COURT: Thank you.

3 MR. CASSELL: Thank you, Your Honor. Mr. Lee  
4 first talks about the timing of this case and the  
5 time line. Let me just touch on two things that I  
6 think are highly relevant. Back in July of 2008,  
7 when this case first began, you recall that  
8 Mr. Edwards and Mr. Lee said, Your Honor, we think  
9 we can work out a set of facts so that you can then  
10 decide the case. That was the agreement of Mr. Lee  
11 and Mr. Edwards. And so I assisted Mr. Edwards and  
12 worked with Mr. Lee to begin working on the facts,  
13 and after a few weeks we heard back from the  
14 government, we've changed our mind; we no longer  
15 want to work with you on the facts.

16 So at that point, as you know, we began  
17 working on the civil cases, got some additional  
18 information, prepared. And I have to confess maybe  
19 we didn't style it properly. Maybe we should have  
20 put "summary judgment" on it or something else. We  
21 weren't quite sure. But we put together 53 facts  
22 and we sent them to the government before we ever  
23 presented them to you and said, here are the facts.  
24 We would like to work with you because we don't  
25 want to get in a squabble in front of the judge

1 when we can work together. And Mr. Lee sent me an  
2 email saying, we will work with you and agree to  
3 any of the facts that we think are true.

4 So we thought, great, we will move forward  
5 with that process. And then in, I believe it was  
6 February of this year, we then got another about  
7 face from the government: No, we've changed our  
8 mind; we're not going to work with you to stipulate  
9 facts. And at that point, we were then forced to  
10 file this motion.

11 Now, Mr. Lee keeps calling it a discovery  
12 motion. I don't think that's the right term.  
13 Discovery motion means we would be fishing around  
14 trying to find something that's useful. We see the  
15 principle at stake here as being something quite  
16 different. The government admits -- and you notice  
17 Mr. Lee didn't deny this -- that they have  
18 information that they know will be helpful to us.  
19 We're asking you to order them to produce it to us.  
20 That's not discovery, let's fish around and see  
21 what we can find.

22 THE COURT: What does that mean? I guess, are  
23 you trying -- it seems like it's a Brady concept.

24 MR. CASSELL: Exactly.

25 THE COURT: So they're supposed to, in good

1 faith, I presume, look through their files and  
2 decide, you know, this looks like something that  
3 would be helpful to the plaintiffs to prove that we  
4 violated their rights, so here it is.

5 MR. CASSELL: Exactly. And let me just  
6 explain why -- and notice that the government has  
7 never raised the point that this is burdensome; we  
8 can't figure it out; oh, gosh, there are so many  
9 files we don't know what to look at. And let me  
10 explain to you why I think they are not making that  
11 representation. We went to the U.S. Attorney for  
12 the Southern District of Florida in December and  
13 raised a number of questions about this case. At  
14 that point, the U.S. Attorney for the Southern  
15 District of Florida referred the matter to OPR, the  
16 Office of Professional Responsibility in  
17 Washington, DC, for an investigation.

18 It's our understanding that for about five  
19 months there was an inquiry or an investigation  
20 into the nature of this case. And then in May, we  
21 received a letter that said, well, all these issues  
22 are being litigated in front of the court so we're  
23 not going to proceed any further with the  
24 investigation, or the inquiry, whatever you want to  
25 call it.

1           We think there is a collection of materials,  
2           sealed and wrapped in a ribbon, that they could  
3           simply hand to us right now that would have  
4           basically 90 percent of all the relevant  
5           information in the case. We further believe that  
6           they know darn well that that information is very,  
7           very helpful for us in proving that there were  
8           deliberate violations of the Crime Victims' Rights  
9           Act; second, that Mr. Epstein was involved in  
10          orchestrating those violations; and, third, that  
11          that would show that the appropriate remedy in this  
12          case is to invalidate the non-prosecution agreement  
13          because it is an illegal agreement. And yet  
14          they're refusing to provide that to us.

15                What is the basis that they say you shouldn't  
16                order that information provided to us? They say,  
17                well, you just need one fact to decide this case.  
18                As the Court, I think, is aware and we may be  
19                getting into shortly, when you look at the case  
20                laws you can't decide an issue like this based on  
21                just one fact. You have to have some context.

22                Let me give you an example of one additional  
23                fact that we think is highly relevant. The  
24                government prepared, as we understand it, a 53-page  
25                indictment against Epstein and presented that to

1 the defense attorneys. Well, we think that that is  
2 highly relevant information showing that they  
3 mistreated the victims in this case. Why didn't  
4 they share that with the victims? Why didn't they  
5 just share the discussions about that with the  
6 victims? They were obligated to do so. We think  
7 that's part of the context that the Court will  
8 need.

9 Now, you notice what Mr. -- what Mr. Lee did  
10 as well. He talks about the Brady principle.  
11 Let's think about what the Brady principle is and  
12 why it's so important in this case. The Brady  
13 principle is basically that the government wins  
14 when justice is done. And the government is asking  
15 you to take the position that even though it has  
16 information that's highly relevant to the crime  
17 victims, there's no one that can force them to turn  
18 it over to us. That is not justice. That is  
19 not --

20 THE COURT: I don't think -- I think Mr. Lee  
21 acknowledged that if I ordered discovery that they  
22 would be ordered to comply with --

23 MR. CASSELL: Right.

24 THE COURT: -- discovery requests.

25 MR. CASSELL: Well, maybe then -- maybe this

1 is, in essence, an unopposed motion. I mean, he  
2 said you have discretion to do it. And the only  
3 argument I heard him make against you exercising  
4 your discretion to do this is, Judge, you only need  
5 one fact. So I assume that if you disagree with  
6 Mr. Lee on that, that at that point I haven't heard  
7 any arguments from the government, either in the  
8 written pleadings they have filed or here this  
9 afternoon, that would suggest you shouldn't  
10 exercise your discretion to, first of all, order  
11 them to produce the information that we think that  
12 they have that is highly relevant to us and,  
13 second, allow us to do some discovery, take some  
14 depositions, get some requests for admissions, get  
15 some document production, which we would ordinarily  
16 get in a civil case.

17 The other thing Mr. Lee said is, they're not  
18 being deprived of any property here. The crime  
19 victims in this case, Jane Doe No. 1 and Jane Doe  
20 No. 2 have made a very powerful case that they are  
21 being deprived of congressionally-mandated rights:  
22 The right to confer with prosecutors; the right to  
23 be treated with fairness; and the right to accurate  
24 notice of court proceedings. That's the  
25 deprivation that's at issue. And as a result, it

1 is only fair, as it would be if this were under a  
2 due process situation, that they receive relevant  
3 information that the government has. And so for  
4 all of those reasons, we would ask you to order the  
5 government to produce information and allow us to  
6 do some discovery as well.

7 THE COURT: All right. Thank you. I think  
8 this is somewhat related to what we've been talking  
9 about, and this is the plaintiffs' motion to use  
10 correspondence to prove violations under the Crime  
11 Victims' Rights Act and to have unsealed -- have  
12 the unredacted pleadings unsealed. Have we already  
13 talked about this or is there some --

14 MR. CASSELL: I think this one is unopposed.  
15 Maybe you can just grant at least the first part of  
16 it, to use correspondence.

17 THE COURT: Well, exactly what are we talking  
18 about, I guess? I need to have a better  
19 understanding. What has been redacted and -- well,  
20 I guess, what is -- it is unredacted, material  
21 that's not redacted.

22 MR. CASSELL: We have material that was  
23 provided to us that was, for example, Mr. Lee or  
24 some of the other attorneys in the U.S. Attorney's  
25 Office talking about the plea discussion. We have

1           that information right now.

2           THE COURT: And that's the government's side  
3 of the discussion?

4           MR. CASSELL: That's the government's side.

5           THE COURT: Okay.

6           MR. CASSELL: And we simply want to use that.  
7 The government does not oppose that motion. We  
8 were obligated to provide notice to Mr. Epstein,  
9 which we did. There was the magistrate judge  
10 process. All of the work product and other  
11 objections that you've been hearing about today  
12 have been overruled. And then the magistrate judge  
13 said, simply go to the appropriate authority, which  
14 I assume is Your Honor, and have the -- you know,  
15 have a decision made about whether that information  
16 can be used.

17           THE COURT: Now, is this information -- is any  
18 of this information, the unredacted  
19 correspondence -- I guess I need to speak to  
20 Mr. Black about this. Is any of this information  
21 information that you're concerned about, Mr. Black?  
22 Or is this information that is not anything that  
23 you're concerned about?

24           MR. BLACK: It is none of our information.  
25 It's only the government's side of the

1 communication, Your Honor. That's what I  
2 understand.

3 THE COURT: So you don't have any concern  
4 about whether I allow the plaintiffs to use it or  
5 whether it's unsealed?

6 MR. BLACK: We have no position on that  
7 because that does not implicate our rights.

8 THE COURT: All right.

9 MR. CASSELL: So I think this motion may be  
10 unopposed, although the government, I think, is  
11 opposing unsealing of the information because they  
12 claim some of that is Rule 6(e) grand jury  
13 material.

14 I have the same question I think Your Honor  
15 does. For the life of me, I can't see how any of  
16 the emails we have could be Rule 6(e) material  
17 because they've been given to us. They've been  
18 given to Mr. Black. And, if so, that can't be  
19 confidential grand jury material because it  
20 shouldn't have been shared with anyone else.

21 None of the materials talk about what's going  
22 on inside the grand jury room, which is what  
23 Rule 6(e) covers. So we think any kind of argument  
24 that Rule 6(e) is implicated here is just frankly  
25 frivolous.

1 THE COURT: All right. Mr. Lee, or  
2 Ms. Villafana, do you want to be heard on this?

3 MR. LEE: Yes, Your Honor. Thank you. Very  
4 briefly, we raised two arguments in so far as  
5 unredacting these materials. 6(e) --

6 THE COURT: I don't think -- I don't think  
7 anybody is asking that they be unredacted. I think  
8 they're just -- they want to use it in the form  
9 that they have it right now.

10 MR. LEE: Okay. Let me address the 6(e)  
11 issue. As we stated in our pleadings, Your Honor,  
12 or our opposition to the motion, 6(e) is not a  
13 privilege like the attorney/client privilege or  
14 deliberative process that can be waived once the  
15 contents of the information that is protected is  
16 made known. Somebody can be served with a grand  
17 jury subpoena and the press may get ahold of it and  
18 say, ah, you're investigating so and so;  
19 government, you need to confirm with us whether or  
20 not you're investigating so and so.

21 Even though there is an existence of a grand  
22 jury subpoena which would seem to indicate that,  
23 that doesn't breach, if you will, Rule 6(e)  
24 obligations. The government is still obligated to  
25 neither confirm nor deny. So just because somebody

1 has this information doesn't mean that the 6(e)  
2 protections are gone and vitiated. So that's why  
3 we believe that this information should not be made  
4 public.

5 THE COURT: Well, are you talking about all of  
6 it or just a portion of it?

7 MR. LEE: There are certain portions that we  
8 redacted. We filed an actual document putting  
9 forth what we believe should be redacted; what the  
10 petitioners agreed was fine and where the areas of  
11 disagreement were. It was color coded.

12 THE COURT: Right. So some of the material --  
13 the copies I have, I lose the color in them. I  
14 just have black. Everything is black. So there's  
15 some material that you believe needs to be  
16 redacted?

17 MR. LEE: Correct.

18 THE COURT: And others that the plaintiffs say  
19 should be unsealed and unredacted?

20 MR. LEE: That's correct, Your Honor.

21 THE COURT: Okay. All right.

22 MR. LEE: Thank you, Your Honor.

23 THE COURT: You're welcome. All right. Let's  
24 talk about, I guess, the main issue of this case  
25 here. When do the victims' rights start to accrue?

1           Who's going to present that argument?

2           Mr. Cassell.

3           MR. CASSELL: Thank you, Your Honor. So I'll  
4           address what I think you've called the main event.  
5           The question is: When does the Crime Victims'  
6           Rights Act begin to apply? The government's  
7           position, as I understand it, is that unless it  
8           makes the decision to publicly file an indictment,  
9           crime victims have no rights in the criminal  
10          justice process. That's a very important issue for  
11          crime victims' rights in this country, and I think  
12          it's a very important question for the way in which  
13          this congressional statute is going to be put into  
14          effect.

15          The Crime Victims' Rights Act makes it quite  
16          clear that it wasn't designed to be so narrowly  
17          circumscribed. In fact, the rights apply  
18          throughout the criminal justice process. You need  
19          go no further than the plain language of the CVRA,  
20          which says that there is an obligation of, quote,  
21          officers and employees of the Department of  
22          Justice, and other departments and agencies of the  
23          United States, engaged in -- and here is the  
24          important part -- the detection, investigation or  
25          prosecution of crime. And those entities are

1 obligated to afford crime victims their rights.

2 If you take the position of the government and  
3 accept it, then that language in the CVRA simply  
4 because superfluous. It becomes meaningless. It  
5 would never apply. Agencies that are involved in  
6 the detection and investigation of crime, like the  
7 FBI and other agencies, would never have any  
8 obligations under the Crime Victims' Rights Act.

9 We have cited that language, as you know.  
10 Back in July of 2008, every single pleading we have  
11 filed in this case has led with that particular  
12 argument. And the government, despite having, I  
13 think, by this point, four separate pleadings has  
14 never discussed that language with you at all, and  
15 we think the answer -- the reason why they are not  
16 discussing that language is obvious. They have no  
17 answer for that.

18 If they were to look at that language -- if  
19 their position were to be accepted, that language  
20 would be written out of the statute. But that, of  
21 course, is not the only language we rely upon in  
22 the CVRA. The CVRA goes on to say that what should  
23 victims do if they are asserting rights and, quote,  
24 no charges are -- or no prosecution is underway,  
25 which is our situation here, no prosecution, at

1 least federal prosecution, is underway?

2 In that situation, a victim should assert her  
3 rights in the district court in which the defendant  
4 is being prosecuted, or if no prosecution is  
5 underway in the district court, in the district in  
6 which the crime occurred. That's here in the  
7 Southern District of Florida, which is why we  
8 proceeded here.

9 Now, the government says this is a venue  
10 provision. True, enough. But venue over what?  
11 The theory that we've given you is that that  
12 provides venue over cases that are in a  
13 pre-indictment situation. The government merely  
14 does not have a coherent theory on how that venue  
15 provision applies.

16 If you read through the footnotes in their  
17 brief, you discover that they say, well, if  
18 somebody is arrested, then at that point The Crime  
19 Victims' Rights Act is triggered. Of course, that  
20 footnote is inconsistent with the entire body of  
21 their brief, which says that the triggering event  
22 for the Crime Victims' Rights Act is the filing of  
23 an indictment.

24 So I'll be interested to hear from Mr. Lee,  
25 when he makes his presentation, exactly what point

1 in the process do rights apply? Is it the  
2 indictment? Is it the arrest? Or is it some  
3 earlier point, as we suggest?

4 Now, it's interesting, too, when you look at  
5 what Mr. Lee said back on July 11th, 2008, because  
6 Your Honor asked the same question that I think  
7 you're asking me and the government right now, are  
8 there rights that apply under the Crime Victims'  
9 Rights Act before the filing an indictment? And  
10 the answer that Mr. Lee gave on July 11, 2008, was,  
11 yes, there are rights that apply before the  
12 indictment. Quoting here: Now, there are certain  
13 of eight rights accorded in 3771(a) that could come  
14 up before any charges being filed. And he goes on  
15 to give the example of the right of a victim to be  
16 reasonably protected, and he conceded that those  
17 rights would apply before indictment.

18 I think the government, once again, is  
19 reversing a position that they took earlier in this  
20 litigation because they now find it convenient to  
21 do so.

22 The government has also cited remarks from  
23 Senator Kyl, saying if you look at Senator Kyl's  
24 legislative history you'll see that the Senate  
25 didn't want the rights to apply before the

1 indictment was filed. As you know, just a couple  
2 of weeks ago we provided supplemental authority to  
3 this court, which was a letter from Senator Kyl to  
4 Attorney General Eric Holder sent on June the --

5 THE COURT: Well, I'm not sure I should rely  
6 on his letter. I mean, I think you can rely on the  
7 full context of the legislative history and the  
8 full -- the complete statement that Senator Kyl  
9 made when this was being discussed, but I'm not  
10 sure a letter sent years after the fact, which is  
11 one person's statement of what he thinks now, I  
12 don't think that's -- I wouldn't want to rely on  
13 that.

14 MR. CASSELL: In the -- if I could just take a  
15 short moment then. Let me explain to you why you  
16 should rely on it. The government has said  
17 Senator Kyl would want you to rule in their favor  
18 in this case because he didn't want the Crime  
19 Victims' Rights Act to apply pre-indictment, and  
20 now we have a letter from Senator Kyl, just six  
21 weeks ago, saying, That is quoting my remarks out  
22 of context. We could not have been clearer when we  
23 drafted the Act, and he cited the same statutory  
24 provisions that I just mentioned to you. And he  
25 said, obviously we intended for the Act to apply

1 pre-indictment.

2 So at the very least, I think you have to  
3 disregard the government's position that  
4 Senator Kyl has certain remarks that they think  
5 ought to lead you to conclude that there's no  
6 pre-indictment rights under the CVRA.

7 The other point that we would press, of  
8 course, is that case law, in our view, all  
9 concludes that the Crime Victims' Rights Act  
10 applies before indictment. Of course, the lead  
11 Court of Appeals case on this is the Fifth Circuit  
12 case, In re: Dean. The government -- you've had a  
13 chance to read the government's briefing on that.  
14 Frankly, I don't think anything they say is  
15 persuasive.

16 In re: Dean very specifically holds -- and I'm  
17 quoting here -- quote, logically the rights that  
18 apply before any prosecution is underway included  
19 the CVRA's establishment of the victim's reasonable  
20 right to confer with the attorney for the  
21 government. That's the Fifth Circuit's holding.  
22 That is persuasive authority, we would suggest, and  
23 the government has no answer for that.

24 There are a number of district court cases  
25 that reach exactly the same conclusion that the

1 Crime Victims' Rights Act applies before any  
2 indictment is filed. And so for all of those  
3 reasons, Your Honor, we would ask you to conclude  
4 that the Crime Victims' Rights Act applies before  
5 an indictment.

6 THE COURT: I don't know if you're prepared to  
7 answer this question or whether you're going to  
8 say, well, the facts of this case don't require me  
9 to deal with it. But when is the earliest point  
10 when these rights trigger?

11 MR. CASSELL: And, you know, Your Honor, we  
12 believe that is a very difficult issue that courts  
13 will be wrestling with, how far back in the process  
14 does it go? And I think you anticipated part of  
15 our response, which is, look, there are going to be  
16 some line-drawing issues down the road. There are  
17 certainly going to be some close-call cases, but we  
18 are not anywhere near to a close-call case.

19 We are asking you for a very narrow holding in  
20 this case, and we have set forth in our brief five  
21 factors that we would ask you to rely upon in this  
22 case that will limit your holding to these  
23 particular facts and leave for another day some of  
24 the more theoretical questions.

25 Here are five factors that we think are

1 present in this case that make it clear the Crime  
2 Victims' Rights Act was triggered, that may cut off  
3 some of the more theoretical or preliminary stages  
4 that perhaps Your Honor is worried about.

5 The first fact is that prosecutors in this  
6 case identified specific federal offenses committed  
7 against specific victims, and that's one of the  
8 reasons we need the correspondence, to show that  
9 that fact exists.

10 Secondly, the prosecutors in this case  
11 determined that there was evidence which they could  
12 present at trial and prove beyond a reasonable  
13 doubt that those crimes had been committed.

14 The third fact is that in this case, the  
15 victims were given notices that their rights had  
16 attached under the Crime Victims' Right Act. You  
17 will recall in our exhibits, several notices that  
18 went to both Jane Doe No. 1 and Jane Doe No. 2  
19 saying, you have rights under the Crime Victims'  
20 Rights Act. At least in a situation where the  
21 government itself has said, we think at this point  
22 rights have attached, that's when rights should be  
23 deemed to have attached.

24 The fourth fact that's present here is that  
25 the prosecutor sat down with defense attorneys to

1 negotiate a non-prosecution agreement. So let's  
2 take a case where the bank robber runs out of the  
3 bank and he's on the front steps of the bank, do  
4 the rights attach then? Well, no, that's a very  
5 preliminary stage. But if they start negotiating  
6 with the bank robber's attorney saying, okay, we're  
7 looking at filing federal bank robbery charges,  
8 we're thinking of filing these counts, we would  
9 like to discuss with you plea options, at that  
10 point in the process that's when the rights attach.

11 That, by the way, I think is exactly what the  
12 Fifth Circuit did in the Dean case. There, the  
13 government had sat down with a company that was  
14 responsible for some deaths. They had  
15 negotiated -- they were contemplating filing  
16 specific federal charges, and at that point the  
17 Fifth Circuit said the rights attached.

18 And the last point is that there is at least  
19 the attachment of crime victims' rights when the  
20 government is prepared to execute an agreement that  
21 will abolish or extinguish the rights of crime  
22 victims, and that's exactly what happened here, of  
23 course. There was this non-prosecution agreement  
24 that was executed that's then eviscerated any  
25 possibility that Jane Doe No. 1 or Jane Doe No. 2

1 would have their day in this federal court and see  
2 the child molester that abused them brought to  
3 justice. Before that contract could be signed,  
4 sealed and delivered, the government had an  
5 obligation under the Crime Victims' Rights Act to  
6 confer with the victims. So this is a very narrow  
7 case.

8 So if you want to ask, you know, the kind of  
9 law professor's question, how far back, you know,  
10 do you go, I mean, are all five of those necessary,  
11 I mean, I think that's an interesting question. I  
12 would say, you really probably don't need all five  
13 of those to conclude that the Crime Victims' Rights  
14 Act applies. But I think at an absolute minimum,  
15 when you have the combination of those five  
16 factors, as you do in this case, it's quite clear  
17 that the Crime Victims' Rights Act applies here.

18 THE COURT: All right. Thank you.

19 Mr. Lee, I am -- Mr. Lee, before I hear from  
20 you, I want to -- I think I'm going to give the  
21 reporter a break because I think she has probably  
22 had a hard time keeping up with some of the  
23 participants this afternoon. Why don't we take a  
24 15-minute break and then we will hear from the  
25 government.

1 (Recess.)

2 THE COURT: Please be seated, everyone.

3 All right, Mr. Lee.

4 MR. LEE: Thank you very much, Your Honor.

5 Your Honor, the initial task before this court is  
6 to determine the legal issue of when a right would  
7 attach under any of the provisions in 3771(a) (1)  
8 through (8), and probably the most important and  
9 prominent one that the petitioners have alleged is  
10 3771(a) (5), which is a reasonable right to confer  
11 with the attorney for the government in the case.

12 Initially, this is a statutory interpretation  
13 task for the Court and, of course, the Court is  
14 guided by the words of the statute, simple enough.  
15 And there are various doctrines about plain meaning  
16 and the statutes say what they mean and mean what  
17 they say, and things like that.

18 Congress provided a very definitive guidepost  
19 for courts to interpret the various provisions of  
20 the CVRA, and that's contained in Section  
21 3771(d) (6). And if I could quote, and it's the  
22 last sentence, Your Honor, quote: Nothing in this  
23 chapter shall be construed to impair the  
24 prosecutorial discretion of the Attorney General or  
25 any officer under his direction, end quote.

1           So this is a guidepost to courts interpreting  
2 the CVRA. If there are two conflicting  
3 interpretations, perhaps equally reasonable and  
4 plausible under the statute -- under the terms of  
5 the reading of the statute, if one impairs the  
6 discretion of the Attorney General and one does  
7 not, then the one that does not impair the  
8 discretion of the Attorney General would be the one  
9 that would be correct.

10           THE COURT: Well, why does conferring have  
11 anything to do with exercising discretion? You can  
12 confer with a victim without infringing on your  
13 prosecutorial discretion, can't you?

14           MR. LEE: Yes, Your Honor, but here is what I  
15 mean: In terms of construing it to apply at a  
16 certain point, the Court needs to be mindful of  
17 whether this would impair the prosecutorial  
18 discretion of the Attorney General or those acting  
19 under him.

20           THE COURT: Well, why would conferring impinge  
21 on prosecutorial discretion? I mean, you're saying  
22 part of prosecutorial discretion is to decide  
23 whether or not to confer?

24           MR. LEE: No. What I'm saying is this: To  
25 the extent that the individual is given a right to

1 basically undermine or call into question otherwise  
2 lawful prerogatives of the Attorney General in  
3 deciding what to charge somebody with, when to  
4 charge somebody with this, this would constitute an  
5 impairment of the prosecutorial discretion and that  
6 would be a construction that would not be favored  
7 under this advice.

8 Your Honor, this is particularly compelling in  
9 this case, because what we are dealing with here is  
10 not an indictment that was ultimately returned or a  
11 plea agreement that came before this court. This  
12 was a non-prosecution agreement. It was a  
13 determination by the United States Attorney to  
14 engage in an agreement with Mr. Epstein that in  
15 consideration for him doing certain things that he  
16 would not be prosecuted in federal court for  
17 various things.

18 THE COURT: Well, but I think that we wouldn't  
19 be here if your office conferred with the victims,  
20 told them what you were contemplating, heard them  
21 out, and after hearing them out said, thank you  
22 very much for your input; we appreciate your  
23 position; we understand you'd rather we prosecute  
24 Mr. Epstein federally and send him to prison for 50  
25 years, but we, exercising our discretion under

1 (d) (6), have chosen to not prosecute him. And I  
2 think we wouldn't be here. I don't see how that  
3 would have been an infringement on prosecutorial  
4 discretion.

5 MR. LEE: Well, Your Honor, we respectfully  
6 believe that we probably still would be here,  
7 because -- for this reason: If all of that had  
8 been done in 2007, when the agreement was still in  
9 its initial stages and about to be executed, and  
10 all of these things were done to Jane Does 1 and 2,  
11 they were told this, this, this, and this, if they  
12 were dissatisfied with this agreement, they would  
13 forward and presumably invoke 3771(d)(3) and file  
14 an action just like they did in this case, and they  
15 would complain about this being improperly done.  
16 And this is something that this court would have no  
17 authority to render an opinion on because under the  
18 Separation of Powers Doctrine this is an exercise  
19 of discretion on the part of the Government of the  
20 United States to which prosecution functions are  
21 exclusively entrusted.

22 THE COURT: Well, they may have filed a  
23 proceeding even if they had been advised of what  
24 your intent was or what your thoughts were. But  
25 I'm -- it wouldn't be the same case. I don't know

1           what they would be complaining about, maybe that  
2           you didn't confer adequately enough, but I don't  
3           think they would be saying, you can't enter into  
4           the non-prosecution agreement because we object.

5           MR. LEE: Well, they seem to be suggesting  
6           that now, that it should be vacated because they  
7           weren't consulted on it. That's exactly what they  
8           are claiming.

9           THE COURT: Because they weren't consulted.  
10          But if they had been consulted, I don't know how  
11          they would have that same argument.

12          MR. LEE: Well, Your Honor, what I'm saying is  
13          that any interpretation has to be mindful of  
14          whether or not it would impair the prosecutorial  
15          discretion of the Attorney General. All right. So  
16          the issue of when rights attach does impair or  
17          could potentially impair the prosecutorial  
18          discretion.

19          THE COURT: Why?

20          MR. LEE: Well, because the government  
21          believes that these rights would only attach after  
22          a formal charge has been filed. All right? The  
23          government has exercised its discretion, and at  
24          that point these rights would attach. So if  
25          somebody is formally charged and the government

1 enters into negotiations to resolve the matter by a  
2 plea, then the individual victims who are  
3 identified can be notified, consulted, given a  
4 voice, not a veto, and those individuals can have  
5 their voice heard. If they're dissatisfied with  
6 what the government does -- we've decided to go  
7 ahead with the plea -- they can voice their  
8 objections anew before the court in a Rule 11 plea  
9 proceeding. So that is a construction that does  
10 not impair a prosecutorial discretion.

11 THE COURT: But why does it make any  
12 difference if the conferring or the expression or  
13 disapproval is done before indictment or after  
14 indictment? How does it impinge on your  
15 discretion? I don't follow.

16 MR. LEE: Well, Your Honor, what this would  
17 involve is involving the executive branch in  
18 litigation because the individual victims, after  
19 being consulted -- or after not being consulted --  
20 would basically try to assert rights and basically  
21 interfere with the process of returning the charge.

22 Let me give you an example, Your Honor. Let's  
23 say somebody is the victim of a crime of violence  
24 and the government is investigating it. It's the  
25 FBI. And the FBI has decided to refer it to the

1 U.S. Attorney's Office and the U.S. Attorney's  
2 Office decides, we don't think there's sufficient  
3 evidence to return an indictment in this case;  
4 we're not going to accept this for prosecution.

5 Well, there's an FBI case. Under petitioners'  
6 formulation, they would have rights to be consulted  
7 on the decision whether or not to accept the case  
8 for prosecution. And that, we believe, would be an  
9 improper interference with the discretion of the  
10 United States Attorney's Office. That's exactly  
11 what we're talking about, Your Honor.

12 THE COURT: But we're talking about  
13 consulting, not deciding whether to or not to  
14 prosecute.

15 MR. LEE: Yes, Your Honor.

16 THE COURT: So I'm trying to understand how  
17 the fact that you might -- if I accept the  
18 plaintiffs' position or interpretation, you might  
19 have to consult with the victim before you decide  
20 not to prosecute, how that impinges on your  
21 ultimate decision to or not to prosecute?

22 MR. LEE: Well, Your Honor, we believe that  
23 the proper construction of this thing is to allow  
24 the government to exercise its discretion in terms  
25 of whether to charge or not to charge. Once that

1 discretion is exercised and there's a charge filed,  
2 then these rights would come into play. To do  
3 otherwise, to create rights prior to any charging  
4 decision being made, would basically allow these  
5 individuals to essentially interfere with the  
6 exercise of discretion and basically hail the  
7 United States Government into court every time  
8 somebody is now dissatisfied with something that is  
9 being done.

10 The more orderly process is to have those  
11 rights attach after the filing of a formal charge,  
12 in which case there is an extant case; it is a  
13 matter before a judicial officer of the  
14 United States Federal Courts; and these things can  
15 be more orderly ironed out and these disputes can  
16 be aired out.

17 Your Honor, if I may, let me move on.

18 THE COURT: Hold on.

19 MR. LEE: Okay.

20 THE COURT: Would you or would you not agree  
21 that all of the rights that are set forth in  
22 3771(a), all of them have to do with an actual  
23 ongoing proceeding other than possibly the right to  
24 confer and the right to be treated with fairness?

25 MR. LEE: That's correct, and also --

1 THE COURT: Or the right to be protected  
2 from the accused.

3 MR. LEE: Yes, (a) (1). There are actually  
4 five of them, Your Honor, that specifically  
5 reference or -- arguably clearly suggest that it  
6 only applies to a proceeding that's in existence,  
7 yes.

8 THE COURT: All right. Well, if you -- if I  
9 agree with your interpretation of the case, meaning  
10 an actual filed case.

11 MR. LEE: Yes.

12 THE COURT: But the concern that you're having  
13 about if I interpret this act to create rights in a  
14 victim before indictment, somehow it's going to  
15 flood the court with lawsuits challenging the  
16 government's decision either to or not to  
17 prosecute, the only one that can possibly apply  
18 would be the right to confer. Everything else in  
19 there has nothing to do with that possibility.  
20 They couldn't come in under any of the other  
21 subsections based on a decision not to prosecute,  
22 correct?

23 MR. LEE: Well, perhaps (a) (8) might come into  
24 play because the individual could say that they  
25 weren't being treated with fairness.

1 THE COURT: All right. But if the government  
2 does confer, then that would be the only thing.  
3 They confer. They decide not to prosecute. Then a  
4 victim comes in and says, we're not being treated  
5 with fairness because they chose not to prosecute.  
6 Then you resort to (d) (6), which says they don't  
7 have to agree with you; they just have to confer.  
8 And fairness can't be telling them how to go  
9 forward with a case or not to go forward with a  
10 case, because of (d) (6).

11 So I'm trying to understand how your concern  
12 about creating a right to confer before indictment  
13 is going to upset your prosecutorial discretion.

14 MR. LEE: Your Honor, I'm not suggesting that  
15 any action to enjoin the failure to prosecute, an  
16 action to compel the government to prosecute or in  
17 this case an action to compel the government not to  
18 enter into a non-prosecution agreement would  
19 ultimately be successful. But to the extent that a  
20 court finds that these rights attach prior to the  
21 filing of a formal charging instrument already when  
22 the government has -- the United States Attorney's  
23 Office has exercised its discretion, to the extent  
24 that that right is deemed to exist prior, then it's  
25 going to encourage people to come forward and

1           assert what they believe to be their rights.

2           THE COURT: All right. Let me ask you about  
3 the provision that talks about when there's no  
4 ongoing proceeding. Where is that subsection?

5           MR. LEE: Yes. Well, the venue provision in  
6 (d) (3), Your Honor?

7           THE COURT: (d) (3), if no prosecution is  
8 underway in the district court in which the crime  
9 occurred. If there's no prosecution underway, yet  
10 they are recognizing a lawsuit can be filed in the  
11 district where the crime occurred, doesn't that  
12 suggest that the rights can be enforced before an  
13 indictment?

14           MR. LEE: Your Honor, we believe that this  
15 provision -- well, it's a venue provision, to tell  
16 the individual who seeks to enforce their rights  
17 where to file, and in so far as where the -- if no  
18 prosecution is underway in the district where the  
19 offense occurred, this would allow somebody to come  
20 in and essentially assert their rights for an  
21 individual who has been arrested and perhaps  
22 charged by a complaint but has not been formally  
23 indicted yet and the time limitation for a formal  
24 indictment has not lapsed.

25           THE COURT: But you said that the rights don't

1 begin to accrue until indictment. So how can it,  
2 you know, work both ways?

3 MR. LEE: Well, there's a right to a notice of  
4 public proceedings. So there is an intervening  
5 period between initial arrest and initial  
6 appearance in a bond hearing. And the individual,  
7 if they feared whether -- that the accused was  
8 going to harm them, should have the opportunity to  
9 attend and have their say in so far as whether  
10 somebody should be released and the conditions upon  
11 which he or she should be released.

12 THE COURT: All right. So let's assume that  
13 someone is arrested; a criminal complaint is filed;  
14 there's no indictment; there's a bond hearing; the  
15 victim is not notified; the accused is released on  
16 bond; attacks the victim; and the victim comes in  
17 and files a complaint or a lawsuit. Do they have  
18 rights?

19 MR. LEE: There's no cause of action for  
20 damages under the CVRA, Your Honor.

21 THE COURT: They file an action asking the  
22 court to conclude that their rights were violated  
23 under the Act and want the court to know about it,  
24 can they do that? Do they have standing to come in  
25 and file an action to make the court aware of the

1 fact that their rights were violated and you  
2 should, you know, take that into account with  
3 respect to these prosecutors and -- do they have  
4 standing to file a lawsuit and come into court and  
5 make the court aware of that?

6 MR. LEE: If they were somebody who was  
7 entitled to notice of a public proceeding, like a  
8 bond hearing, a pretrial detention hearing,  
9 et cetera, and the individual had been apprehended  
10 and was before the court, yes, they would have the  
11 ability to do that.

12 THE COURT: So they have rights  
13 pre-indictment?

14 MR. LEE: Yes, in this situation they would.

15 THE COURT: All right.

16 MR. LEE: We've already talked about  
17 3771(a)(1), Your Honor. The petitioners' counsel  
18 talked about what I said back on July the 11th,  
19 2008. There is a right to protection from the  
20 accused, and whether it springs from 3771(a)(1) or  
21 some other provision -- and we did note that there  
22 was another provision in the Victims' Rights Act to  
23 cover individuals who are entitled to protection,  
24 that would apply, yes.

25 THE COURT: So is your position then that only

1 with respect to 3771(a) (5), that's the only  
2 subsection and only right under this act that  
3 requires an indictment, but all the other rights  
4 accrue, at least at the filing of a criminal  
5 complaint or an arrest?

6 MR. LEE: Well, Your Honor, five of them  
7 reference a specific public -- a proceeding. Okay?  
8 So that, I think, we suggest assumes that there is  
9 a formal charge. So we're talking about the three  
10 remaining.

11 THE COURT: Well, why can't a bond hearing  
12 require a full -- you're talking about a criminal  
13 complaint is a formal charge?

14 MR. LEE: Well, a formal charge is actually an  
15 information or an indictment. A criminal  
16 complaint, however, brings the accused before the  
17 court for the purposes of detention and then  
18 subsequent charging pursuant to the running time  
19 that you have -- that the government has before  
20 they can return an indictment on the individual. A  
21 number of individuals, because of how the crime was  
22 discovered, are charged by complaint first, with an  
23 indictment to subsequently follow. This basically  
24 covers that period of time between the return of a  
25 formal indictment and the initial arrest of the

1 individual appearance, bond hearing, pretrial  
2 detention hearing.

3 THE COURT: All right. So does a person --  
4 does a victim of a crime, where the accused is  
5 arrested and had a criminal complaint filed against  
6 him or her, does that victim have a right to notice  
7 of the bond hearing?

8 MR. LEE: Yes, they would, Your Honor.

9 THE COURT: All right. Does that person have  
10 the right not to be excluded from the bond hearing?

11 MR. LEE: Yes, they would.

12 THE COURT: Does that person have the right to  
13 be heard at the bond hearing?

14 MR. LEE: Yes, they would.

15 THE COURT: Does that person have the right to  
16 have that bond hearing be conducted without  
17 unreasonable delay?

18 MR. LEE: Yes.

19 THE COURT: But that person doesn't have a  
20 right to confer with the attorney for the  
21 government because an indictment hasn't been filed  
22 yet?

23 MR. LEE: That is correct, because there is no  
24 attorney for the government in the case, and we  
25 believe that "in the case" is the relevant term

1           that is referenced.

2           THE COURT:   And the --

3           MR. LEE:   I'm sorry, sir?

4           THE COURT:   No, go ahead.

5           MR. LEE:   And "case" means, in our view,  
6 information or indictment, formal charge.

7           THE COURT:   So again, I think I asked you  
8 earlier, you're saying that the indictment as a  
9 triggering event only applies in subsection 5,  
10 because all the others can apply -- can occur  
11 before indictment.

12          MR. LEE:   It could, under the circumstances of  
13 an individual being charged by a complaint. For  
14 that period of time in between arrest -- the filing  
15 of the complaint, initial arrest and the return of  
16 the indictment, it could apply, yes. We believe  
17 the strongest case for not applying is 3771(a)(5)  
18 because there is no case.

19          THE COURT:   And so when a criminal complaint  
20 is filed, I think in the clerk's office they give  
21 it a case number.

22          MR. LEE:   I believe the Court is correct.

23          THE COURT:   That's not a case?

24          MR. LEE:   No. It would have to be an  
25 information or an indictment.

1 THE COURT: But as far as the clerk's office  
2 is concerned, there's a case?

3 MR. LEE: That is correct.

4 THE COURT: But that statute -- that word  
5 "case" there, even though in the ordinary course of  
6 events in every district of the United States they  
7 give a case number to a person who is arrested and  
8 a criminal complaint is filed, that understanding  
9 of the word "case" doesn't apply here; it's case  
10 meaning indictment or information?

11 MR. LEE: That is correct, Your Honor. We  
12 referenced Federal Rule of Criminal Procedure 7(c),  
13 which talks about indictments and information  
14 having to be signed by the attorney for the  
15 government, which is the same phrase that is used  
16 in 3771(a)(5).

17 THE COURT: Okay. And so I guess the  
18 subsection that talks about investigation --

19 MR. LEE: You're talking about (b)(1),  
20 Your Honor?

21 THE COURT: (b)(1)?

22 MR. LEE: Let's see. I'm sorry. You're  
23 talking about (c)(1), Your Honor, I think, best  
24 efforts, and the personnel who are responsible for  
25 assuring the individual was accorded their rights?

1 THE COURT: Yes. And the detection,  
2 investigation or prosecution of the crime.

3 MR. LEE: This is (c) (1), Your Honor.  
4 Your Honor, the last phrase in (c) (1) is the --  
5 shall be "notified of, and accorded, the rights  
6 described in subsection (a)." So this does not  
7 inform when those rights attached. It essentially  
8 says, these are the persons who are responsible for  
9 ensuring that best efforts are utilized to ensure  
10 these individuals have these rights once they  
11 attach under subsection (a).

12 If I may give an example, Your Honor, somebody  
13 is charged with a crime. Let's say it's a crime of  
14 violence. And the individual fears that they may  
15 be threatened by either the defendant, if the  
16 individual makes bond, or the defendant's  
17 relatives. This is a matter before the court  
18 because a formal charge has been filed, but the  
19 responsibility for ensuring reasonable protection  
20 under 3771(a) (1) would not be a responsibility of  
21 the prosecutor doing the case or the United States  
22 Attorney's Office, but it would also include those  
23 who investigated the case, the agency who has  
24 basically brought the case. So this would be the  
25 FBI, ATF, whatever law enforcement agency.

1           So this explains what individuals are  
2           responsible for ensuring that best efforts are used  
3           to afford these rights once those rights attach.  
4           But just because individuals who are described as  
5           having responsibilities are in the investigative  
6           process doesn't necessarily mean that in the  
7           investigative process, pre-charge, that such rights  
8           attach.

9           THE COURT: So, again, you just basically go  
10          back to -- or fall back on the argument that "case"  
11          means indictment or information, and whatever  
12          rights accrue under these subsections, those are  
13          the people that have to afford the rights?

14          MR. LEE: That is correct, Your Honor.

15          THE COURT: All right. What else did you want  
16          to argue?

17          MR. LEE: Your Honor, that was -- that  
18          basically is the argument. Again, we ask the Court  
19          to be mindful of the admonition about the  
20          prosecutorial discretion. The question of when  
21          these rights attached is extremely significant in  
22          so far as when people can go into court and invoke  
23          rights which they believe to exist, and to complain  
24          about things that happened which involved the  
25          exercise of the broad discretion of the executive

1 branch whether to charge somebody, how to charge  
2 them, who to charge, what to charge, and how to  
3 resolve the charges against an individual.

4 Thank you.

5 THE COURT: I'm --

6 MR. LEE: Yes, sir?

7 THE COURT: Let me ask you another question.  
8 Assume for the sake of argument, because the motion  
9 that -- the motion that the plaintiffs have filed  
10 have asked me to not only to make a determination  
11 as to when their rights accrued but also that -- to  
12 make a finding that the government has in fact  
13 violated their rights based upon the information  
14 contained in their motion. If I reject your  
15 argument and conclude that the plaintiffs did have  
16 rights as victims, that that were to be respected  
17 under the statute, do you agree or do you believe  
18 we need to resolve on another day whether or not  
19 their rights were, in fact, violated, based upon  
20 what has been presented to me thus far?

21 MR. LEE: Yes, Your Honor. Your Honor, if the  
22 Court finds that these rights did indeed attach  
23 prior to the filing of a formal charge, we have  
24 asserted a best efforts defense, if you will -- I  
25 will call it that -- that we did exert our best

1 efforts to notify individuals under these  
2 circumstances of what was going on in so far as the  
3 non-prosecution agreement. That, in our view,  
4 would require an evidentiary hearing and testimony  
5 and documents -- factual matters to be submitted  
6 for the Court to make a determination as to what  
7 occurred and whether this constituted best efforts  
8 or not.

9 THE COURT: All right. Thank you.

10 MR. LEE: Thank you, Your Honor.

11 MR. CASSELL: May I have just one moment?

12 THE COURT: Yes. I think Mr. Lee is  
13 conferring with Ms. Villafana so he may want to add  
14 something.

15 Did you have anything else you wanted to add,  
16 Mr. Lee?

17 MR. LEE: No, Your Honor.

18 THE COURT: Okay. Thank you.

19 MR. CASSELL: I think Mr. Lee is correct when  
20 he says this is at bottom an issue of statutory  
21 construction, and we think the cardinal rule of  
22 construction you should apply here is Congress  
23 passed the Crime Victims' Rights Act as a remedial  
24 statute to address a particular problem, the unfair  
25 treatment of crime victims throughout the criminal

1 justice process. And so the Act should be broadly  
2 construed to effectuate its remedial purposes, that  
3 is, to make sure that crime victims are treated  
4 fairly throughout the process.

5 The position they are staking out today is  
6 that they can simply make rights in the statute  
7 disappear through the simple device of not filing  
8 an indictment. And I think Your Honor has done a  
9 very nice job of walking through why that doesn't  
10 apply on a number of the different provisions that  
11 are in there, and it would be interesting to see.

12 I think the government is conceding that the  
13 right to fairness can apply even before an  
14 indictment is filed because that doesn't link to a  
15 court proceeding. And, of course, that's one of  
16 the rights we've alleged has been violated here,  
17 the right to fair treatment. So perhaps I  
18 misunderstood but I think the -- at least the  
19 effect of the government's position is that that  
20 particular right would apply, even though no  
21 indictment was applied in this case.

22 But let's look at the (a) (5) right then, the  
23 right to confer and whether there was a violation  
24 here. The main argument that Mr. Lee seems to be  
25 advancing is that while that would impair the

1 discretion of the Justice Department, the Justice  
2 Department advanced the same argument in the Fifth  
3 Circuit in the Dean case, and the Fifth Circuit  
4 rejected it. Here is what the Fifth Circuit said:  
5 Recognizing a right to confer about dispositions  
6 is, quote, not an infringement on the government's  
7 independent prosecutorial discretion. And instead,  
8 it is only a requirement that the government confer  
9 in some reasonable way with the victims before  
10 ultimately exercising its broad discretion.

11 We would ask you to take exactly the same  
12 position in this case. We simply believe that we  
13 had an -- we were entitled to an opportunity to  
14 confer with them before they decided to do what  
15 they did in this particular case.

16 Now he says, well, if you open up this  
17 particular case, rule in our favor, the flood gates  
18 will be open. We wouldn't be here if our clients  
19 had been given an opportunity to confer about the  
20 non-prosecution agreement and having made what we  
21 think would have been compelling arguments not to  
22 move forward in that direction. The government had  
23 nonetheless exercised its discretion to move  
24 forward. But our clients were denied that chance.  
25 They never got to make a presentation to the

1 government about why that was a bad resolution of  
2 the case. And we submit that the only remedy, if  
3 we get that far, is to therefore set aside the  
4 non-prosecution agreement and give them that  
5 opportunity. But certainly you shouldn't worry  
6 about frivolous claims being raised because those  
7 would be frivolous and would be routinely rejected.

8 In fact, it's interesting, let's look at what  
9 has happened in the Fifth Circuit since the Dean  
10 case three years ago, when the Fifth Circuit  
11 clearly recognized that there were rights before  
12 indictment. I don't think Mr. Lee can say in good  
13 faith there have been a flood of frivolous claims.  
14 I track crime victims' rights litigation. I don't  
15 think that there's been any sudden spurt of  
16 litigation down there.

17 Now, he also says that, well, this would lead  
18 to interference because people would object to  
19 whether we decided to accept a case or not. That's  
20 the question that you were raising with me earlier,  
21 how far back in the process do we go? We don't  
22 have to deal with those questions in this  
23 particular case. The government accepted this case  
24 for prosecution. They then did what? They sent  
25 CVRA notices to our clients saying, you have rights

1 under the Crime Victims' Rights Act. Then they sat  
2 down with Epstein's attorney to negotiate a very  
3 specific non-prosecution agreement which would make  
4 it impossible for any federal prosecutorial agency  
5 to prosecute the federal crimes that were committed  
6 against Jane Doe No. 1 and Jane Doe No. 2.

7 At least at that point, they had the right to  
8 say to the prosecutors, you are making a mistake,  
9 and that's the right that Congress gave them and  
10 that's the right that's being violated here.

11 Now, how far back in the process do we go? I  
12 think we got a little more specificity from the  
13 government today. We hear that it turns out it's  
14 not really the indictment that triggers the right.  
15 You go all the way back to a complaint. But then  
16 you pushed him a little bit more, what about an  
17 arrest? And if I understood Mr. Lee correctly,  
18 they agree that even an arrest would be enough to  
19 trigger that. But, of course, an arrest is not a  
20 formal charge. And why would we magically stop the  
21 Crime Victims' Rights Act at the point of arrest?  
22 The term "arrest" doesn't appear anywhere in the  
23 statute. Essentially, they are trying to stake out  
24 a litigating position that helps them in this case  
25 but it doesn't have any grounding at all in the

1 language of the statute. The language of the  
2 statute that's relevant here is that it applies to  
3 agencies that are involved in the detection and  
4 investigation of crimes. The words "investigation  
5 of crimes" will become completely meaningless in  
6 the statute if you agree with the government's  
7 position.

8 Now, the last thing that Mr. Lee says is,  
9 well, this right to confer applies only to cases,  
10 and obviously there's no case here. I don't think  
11 that point is obvious at all. And, in fact, I  
12 would simply use the words that the government used  
13 when they communicated with Jane Doe No. 1. Here  
14 is the letter that they sent to Jane Doe No. 1 on  
15 January 10th, 2008: Dear Ms. Jane Doe No. 1, this  
16 case is currently under investigation.

17 They told Jane Doe No. 1 that her case was  
18 under investigation, and they told her in  
19 communications like this that she had rights under  
20 the Crime Victims' Rights Act. And now they come  
21 into this court and ask you to find that even  
22 though that's exactly what they told Jane Doe  
23 No. 1, you should simply ignore what they said then  
24 and conclude that they had no rights.

25 Whatever else you might say about that, I

1 think that's clearly a violation of a right to  
2 confer but it's certainly a violation of their  
3 right to be treated with fairness. It is a  
4 violation of their right to accurate notice about  
5 what's going on in court proceedings.

6 And so how should you proceed at this point?  
7 Let me offer just one possible way out procedurally  
8 of where we are right now. I think the Court has  
9 plenty of information to rule today that the Crime  
10 Victims' Rights Act applied to the victims in this  
11 particular case and we would ask you to enter an  
12 order to that effect. If you're not prepared to do  
13 that, then at that point we would request full  
14 discovery in this case. Or if you enter an order  
15 saying it applies pre-indictment, we would also ask  
16 to move forward with full discovery. Simply to say  
17 that the civil rules apply, we're prepared to move  
18 forward on an expedited basis. We're prepared to  
19 move forward with narrowly tailored requests on the  
20 information that we need; recalling, though, that  
21 we're going to be asking for information not only  
22 to prove that the victims' rights were violated in  
23 this case but we are also going to be asking for  
24 information that we hope will ultimately convince  
25 you that the only just remedy in this case is to

1 take this illegal agreement that was reached by the  
2 government, in violation of the rights of Jane Doe  
3 No. 1 and Jane Doe No. 2, and to set that agreement  
4 aside.

5 THE COURT: I guess this is maybe getting  
6 ahead of ourselves. You call it an illegal  
7 agreement and you rely upon cases that basically  
8 set aside sentences or that are in fact beyond the  
9 statutory authority of the court to impose.  
10 There's nothing illegal about the substance of this  
11 agreement itself, as compared to a sentence which  
12 is, let's say, in excess of the statutory maximum.  
13 That is clearly an illegal sentence; it's beyond  
14 the power of the court to impose. This agreement  
15 is not outside of the U.S. Attorney's Office to  
16 enter into. The substance of it is not illegal.  
17 You're saying the manner in which it was entered  
18 into or the process --

19 MR. CASSELL: That's right.

20 THE COURT: So those cases -- do you think  
21 those cases really apply to this situation saying  
22 that it's illegal and therefore an unenforceable  
23 agreement?

24 MR. CASSELL: Yes, we do. I mean, the  
25 point -- the general proposition that those cases

1 stand for is that an illegal agreement can be set  
2 aside. And so the question then becomes, all  
3 right, does it have to be substantively illegal or  
4 is it enough to show that something is procedurally  
5 illegal?

6 Let me give you what I think is a very  
7 straightforward example of an illegal procedural  
8 agreement. Suppose this court were just to enter  
9 an order today saying, I know Smith is a criminal;  
10 I'm going to sentence Smith to two years in prison.  
11 Well, wait a minute. That would be within -- two  
12 years in prison for dealing drugs. Well, dealing  
13 drugs is a five-year maximum. Two years is within  
14 that. But that is a procedurally illegal sentence  
15 because Mr. Smith never had his right to a jury  
16 trial, his right to counsel, opportunity to  
17 confront. So you would -- that agreement or that  
18 sentence would be ultimately challenged as being  
19 procedurally illegal.

20 We think the same analysis applies here.  
21 There is a document, a non-prosecution agreement,  
22 that is void because it was entered into in a  
23 procedurally illegal way. It violated the rights  
24 of both Jane Doe No. 1 and Jane Doe No. 2 to have  
25 an opportunity to confer with the government and to

1 be treated with fairness. But, again, we have not  
2 had a full opportunity to brief that.

3 THE COURT: I understand that. I was just --

4 MR. CASSELL: But that's where we are going,  
5 and I want to be clear when we get into the  
6 discovery phase we think -- I mean, we think you  
7 could rule this afternoon that their rights were  
8 violated. We think it's patently obvious they  
9 weren't treated with fairness, patently obvious  
10 they did not give a right to confer. And if you  
11 say, hey, do you really need discovery to do that,  
12 we think you could rule on that today.

13 You have denied our motion to accept facts.  
14 I'm assuming that's without prejudice to give us  
15 the opportunity to deal with that in an appropriate  
16 way.

17 THE COURT: Of course.

18 MR. CASSELL: The trickier issue in the case,  
19 or at least the one we think requires some  
20 discovery, is how was that illegal agreement  
21 reached? We intend to produce -- or obtain  
22 information from the government which shows they  
23 deliberately violated the rights of the victims and  
24 they did so with the defendant, Mr. Epstein,  
25 engineering them. And for that reason, we are

1 going to ask for the agreement to be set aside.

2 THE COURT: To the extent you want to show  
3 that, and assuming I agree that you're entitled to  
4 show that, you would agree the government is  
5 entitled to show to the contrary and that they  
6 exercised best efforts, and they should be entitled  
7 to prove otherwise?

8 MR. CASSELL: We're not arguing for a  
9 one-sided affair here at all, no, Your Honor.

10 THE COURT: All right. Thank you.

11 MR. CASSELL: Thank you.

12 THE COURT: Mr. Lee, did you have something  
13 else?

14 MR. LEE: Your Honor, I have one procedural  
15 matter, if I may. Thank you, Your Honor.

16 Your Honor, in May of this year, the Office of  
17 Legal Counsel for the Department of Justice issued  
18 an opinion about the very issue that the Court is  
19 grappling with, and we would like to offer to the  
20 Court -- we will actually file it, but if I may  
21 approach and provide a copy, I've provided a copy  
22 to counsel. We believe that this is entitled to  
23 some deference in so far as this is the position of  
24 the Department of Justice. We're not suggesting  
25 that it's entitled to full deference under Chevron

1 versus Natural Resources Council, because this was  
2 not subject to notice and comment procedures. We  
3 are going to file it electronically and we wanted  
4 to provide a copy to the Court now, if we may.

5 THE COURT: Any objection?

6 MR. CASSELL: If I could just comment briefly  
7 on the substance that's in there?

8 THE COURT: Sure.

9 MR. CASSELL: This is a -- you will recall  
10 just a little bit ago we were discussing  
11 Senator Kyl's remarks. That's why Senator Kyl sent  
12 the letter to the Attorney General saying, how dare  
13 you put in this memorandum my remarks during the  
14 drafting of the CVRA as suggesting that the rights  
15 don't apply at the early stages of the criminal  
16 justice process. So if you're going to look at  
17 this, I think in fairness you need to look at  
18 Senator Kyl's rebuttal.

19 The other point that I would make is, we  
20 believe that this document was engineered precisely  
21 to help the government win, among other things,  
22 this particular case. And so we don't believe that  
23 it's entitled to the same kind of deference as you  
24 would ordinarily give to agency decisions that are  
25 decided without regard to pending litigation.

1 Perhaps Mr. Lee could acknowledge the fact, which I  
2 think is clear, that the Justice Department knew it  
3 had this very serious matter pending in this court,  
4 which is why it asked for this opinion. And so  
5 this opinion is, I think, simply like an extra  
6 brief coming in on their side.

7 THE COURT: And you didn't ask Senator Kyl to  
8 write the letter? You didn't ask Senator Kyl to  
9 write the letter?

10 MR. CASSELL: We keep Senator Kyl apprised of  
11 significant developments.

12 MR. LEE: Your Honor, we did not -- we, the  
13 United States Attorney's Office, did not request  
14 this. It was issued originally on December 17th  
15 but it was not made public. Essentially, this was  
16 a position taken by the Department of Justice.

17 THE COURT: Okay. Thank you.

18 MR. LEE: Thank you.

19 THE COURT: All right. Anything else we need  
20 or should talk about before we adjourn?

21 MR. EDWARDS: I don't think so, Your Honor.

22 THE COURT: All right. Thank you. Thank you  
23 all for coming. We will try and get some rulings  
24 out in the near future. Have a good afternoon.

25 (The hearing was concluded.)

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C E R T I F I C A T E

STATE OF FLORIDA  
COUNTY OF PALM BEACH

I, Melinda Colchico, Florida Professional Reporter, State of Florida at large, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 15th day of August, 2011.



\_\_\_\_\_  
MELINDA COLCHICO

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