

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____ /

**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO
THEIR MOTION TO USE CORRESPONDENCE TO PROVE VIOLATIONS OF THE
CRIME VICTIMS' RIGHTS ACT AND TO HAVE THEIR UNREDACTED
PLEADINGS UNSEALED**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, reply to the Government's response (DE #60) to their motion to use correspondence to prove violations of the Crime Victims' Right Act and to Have Their Unredacted Pleadings Unsealed (DE #51). The Government does not contest the first part of the victims' motion – that they should be allowed to use the correspondence to prove CVRA violations – and that part of the victims' motion should therefore be granted. The Government does argue that some parts of the correspondence cannot be disclosed because of grand jury secrecy or constitutional requirements. The Court should reject these frivolous arguments. None of the materials disclose matters occurring before a grand jury; nor do any of them constitute a "public smear" of an "innocent" person that would violate the Constitution. Accordingly, the Court should grant the victims' motion.¹

¹ There are occasional references in the correspondence to internal phone numbers of the prosecutors and similar information. The victims have no objection to such information

I. THE GOVERNMENT DOES NOT DISPUTE THAT JANE DOE #1 AND JANE DOE #2 SHOULD BE PERMITTED TO USE THE CORRESPONDENCE TO PROVE THEIR CASE, AND ACCORDINGLY THE COURT SHOULD GRANT THIS PART OF THE VICTIMS' MOTION.

In their motion (at pp. 4-6), the victims explained how the correspondence between government prosecutors and Jeffrey Epstein's counsel is highly relevant to their CVRA case. For example, they explained that significant parts of the correspondence specifically discuss the CVRA and the rights of the victims in the Epstein case. The victims have therefore asked this Court to make a finding of "admissibility" regarding the correspondence, consistent with an earlier order of the magistrate judge.

In response, the Government "takes no position" on the motion. Gov't Resp. at 1. Accordingly, this part of the victims' motion should be granted.

II. NONE OF THE MATERIALS IN THE CORRESPONDENCE ARE BARRED FROM DISCLOSURE BY GRAND JURY SECRECY OR CONSTITUTIONAL PROHIBITIONS.

While the Government does not contest the relevance of the correspondence and the victims' right to use it, the Government does contest their right to do so in public pleadings. The Government first argues that to allow the public to see the correspondence would violate Fed. R. Crim. P. 6(e)(2)(B)'s prohibition against "disclos[ing] a matter occurring before the grand jury." The Government claims that "several of the 'facts' contained in Petitioners' submission contain allegations related to matters occurring before the jury." Gov't Resp. at 4. But the Government does not specifically identify which parts of the victims' summary judgment motion -- and which

remaining under seal. The Government's attachment to its response identifies this material that the victims have agreed to keep under seal.

parts of Exhibit A to their motion -- are protected grand jury matters. A Word search of the summary judgment motion produces only one instance of the phrase "grand jury" -- in paragraph 12 of the statement of facts. The paragraph reads:

In September 2007, the U.S. Attorney's Office, in an effort to avoid prosecuting Epstein for his numerous sexual offenses against children, proposed to Epstein's attorneys that rather than plead to any charges relating to him molesting children, Epstein should instead plead to a single assault charge involving a telephone call made by Epstein while he was on his private jet. During this telephone call, Epstein warned his personal assistant, Lesley Groff, against turning over documents and electronic evidence responsive to a subpoena issued by a federal grand jury in the Southern District of Florida investigating Epstein's sex offenses. U.S. Attorney's Correspondence at 49, 58.

The fact that Epstein warned his assistant against turning over materials in response to a grand jury subpoena is simply not a "grand jury matter" to which Rule 6(e) applies. The subpoena had been issued and its existence was known to Jeffrey Epstein -- what actions he himself took in response to the issuance of the subpoena obviously were not matters occurring before the grand jury; instead, they were matters occurring before Epstein and Groff that had nothing to do with the inner workings of the grand jury. There is abundant caselaw to that effect. *See, e.g., United States v. Frazier*, 944 F.2d 820, 825 (11th Cir. 1991) (even a witness who testifies before a grand jury is not required to keep his testimony secret); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988) ("Rule 6(e)(2) only protects information revealing what has occurred, or will occur, inside the grand jury room."); *see also Miller v. Mehlretter*, 478 F. Supp. 2d 415 (W.D. N.Y. 2007).

The fact that Epstein's actions are not protected grand jury matters is further proven by the fact that the Government has already made "disclosure" of these very same facts. The U.S. Attorney's correspondence found in Exhibit A to the victims' summary judgment motion

involves, obviously enough, communications that the U.S. Attorney's Office made to persons who are not entitled to receive protected grand jury materials -- namely, criminal defense attorneys representing Epstein. If it violates grand jury secrecy for Jane Doe #1 and Jane Doe #2 to make reference to these matters in their briefs because these matters were protected "grand jury matters" within the meaning of Rule 6(e), then it likewise violated grand jury secrecy for government attorneys to make such disclosures to (for example) Jay Lefkowitz. Disclosures of confidential grand jury matters can only be made upon court order. *See* Fed. R. Crim. P. 6(e)(3)(E). Everything the victims are disclosing in their pleadings has already been disclosed by attorneys in the U.S. Attorney's Office to persons not authorized to receive confidential grand jury matters (namely defense attorneys). It seems obvious that these government attorneys did not violate Rule 6(e) by making such disclosures; yet the Government is arguing that it would violate Rule 6(e) for the victims to do exactly the same thing.²

Nor would it violate the Constitution to unseal the victims' pleadings. The Government cites *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981), and follow-on cases for the proposition that it violates the Constitution for the *Government* to accuse an innocent person of committing a crime for no good reason when he cannot respond. But unsealing *the victims'* pleadings would not in any way implicate Constitutional concerns. Of course, the Constitution only constrains governmental actors -- not private parties. *See, e.g., United States v. Morrison*, 529 U.S. 598,

² Because of this inconsistency between what government lawyers have already disclosed and what the Government is now arguing that the victims can disclose, on April 13, 2011 the victims' counsel sent a request to the Government respectfully asking them to either explain the inconsistency or withdraw this part of their argument. The Government has not responded to this request.

624-26 (2000). It is the *victims'* pleadings that accuse Epstein of committing a crime, not the Government's – constitutional concerns are simply not implicated.

Moreover, *In re Smith* is easily distinguishable from this one. First, in *In re Smith*, an individual with an alleged privacy interest (i.e., Smith himself, as shown in the case caption) appeared directly before the Court to argue for keeping his name out of the public record. In clear contrast, in this case Epstein has refused to intervene to raise his own interests. The Government is therefore raising Epstein's interests as a surrogate -- as Epstein's "next friend."³ But "a 'next friend' must provide an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (citations omitted); see *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir.1992) (applying *Whitmore*). Obviously the real party in interest (Jeffrey Epstein) can fully protect his own interests in this case. The Government therefore lack "standing" to present arguments on Epstein's behalf.

Second *In re Smith* would stand for the proposition, at most, that the Government could not accuse Epstein of committing a crime. But of the victims' 53 proposed facts, only four (#1, #2, #4, and #5) allege that Epstein committed crimes. Thus, the other 49 proposed facts are not even arguably covered by *In re Smith*. Put another way, the Government's "due process" argument is only arguably applicable to fewer than 10% of the facts at issue in this case.

Third, *In re Smith* involved a situation where the Government had impugned the reputation of an actually *innocent* person by unnecessarily including his name in documents related to a

³ Why the Government would choose to zealously assert Epstein's rights, but not even honor its statutory requirement to use "best efforts" to protect the victims' rights, 18 U.S.C. §

guilty plea by a defendant in a criminal case where the innocent person was not a party. Later, that innocent party filed a motion stating his good name had been ruined and the allegation made not because he was guilty of the crime but rather “solely for publicity purposes.” 656 F.2d at 1104. The Fifth Circuit found that it violated due process for the Government to include his name “without further proof of wrongdoing on his part and giving him an opportunity to rebut any accusations of wrongdoing that might be made against him.” *Id.* at 1107.

Here, the situation is quite different. If Epstein had chosen to do so, he could have intervened in this case and declared his innocence. Instead, he has chosen to sit on the sidelines. Thus, in stark contrast to *In re Smith*, Epstein has never asserted that he is innocent of sexually abusing Jane Doe #1 and Jane Doe #2. For instance, Epstein has never filed an affidavit under oath declaring his innocence. In fact, Epstein pleaded guilty to committing felony sex offenses against several of the underage minor females identified by the Government as victims of Epstein’s abuse. And in parallel civil cases, Epstein has repeatedly taken the Fifth when asked about sexually abusing young girls, including Jane Doe #1 and Jane Doe #2, rather than assert his innocence. Accordingly, there is no due process violation for the Government to discuss what crimes Epstein has committed, where Epstein himself has decided not to dispute that he committed those crimes.

Fourth, *In re Smith* holds that there is “no legitimate governmental interest . . . served by an official public smear of an individual when that individual *has not been provided a forum* in which to vindicate his rights.” *Id.* at 1106 (emphasis added). Epstein has many fora in which he

3771(c)(1), is not immediately clear.

could proclaim his innocence of sexual abuse allegations – including this one. He has chosen instead to hide.

Fifth, *In re Smith* also involved a situation where it was not “necessary, material, or relevant,” *id.*, to include the name of the alleged criminal. Here, in contrast, at the center of this Crime Victims Rights Act case are the crimes committed by Epstein – and the Government’s response to them. Accordingly, *In re Smith* is not applicable – discussing Epstein’s crimes against Jane Doe #1 and Jane Doe #2 is obviously necessary, material, and relevant to this case. The correspondence is simply evidence of what the Government was doing, and the manner in which the Government was communicating, during its criminal investigation of Epstein.

Even if *In re Smith* is somehow applicable to limited parts of the victims’ pleadings here, the case itself makes clear that sealing of documents involves a “balancing [of] interests.” 656 F.3d at 1102. The Government’s constitutional analysis is completely one-sided. The Government does not consider the fact that the public has a great interest in knowing how federal prosecutors made such a shockingly lenient plea arrangement with Epstein. The public has a strong interest in learning the details of criminal cases. The Eleventh Circuit has accordingly instructed that the district courts must make substantial findings before sealing records in cases before it. For instance, in *United States v. Ochoa-Vasque*, 428 F.3d 1015 (11th Cir. 2005), it reversed an order from this Court that had sealed pleadings in a criminal case, emphasizing the importance of the public’s historic First Amendment right of access to the courts. To justify sealing, “a court must articulate the overriding interest along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 1030. The Government has not discussed the controlling court authority on sealing orders, much less attempted to prove that

there is an “overriding interest” justifying sealing. For this reason as well, the court should reject the Government’s attempt to keep secret what it has done in this case.

CONCLUSION

The Court should unseal the victims pleadings in this matter, except for the portions that the victims have agreed should remain under seal.

DATED: May 2, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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