UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

MOTION TO INTERVENE OF ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ

This is a motion pursuant to Federal Rule of Civil Procedure 24(a) by attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz, to intervene for the purpose of seeking a protective order and responding to the motions of Jane Doe 1 and Jane Doe 2 for disclosure and widespread dissemination of letters written between these attorneys and federal prosecutors to settle a federal criminal investigation of their client.

Jane Doe 1 and Jane Doe 2 claim that the U.S. Attorney's Office did not treat them fairly and did not give them an opportunity to confer with prosecutors before the Office settled its federal criminal investigation of Jeffrey Epstein three years ago. Mr. Epstein has fully performed under the terms of the settlement, which are set out in detail in a Non-Prosecution Agreement and Addendum. Mr. Epstein has served a prison sentence pursuant to a guilty plea and has paid substantial sums of money in settlement of civil actions, including to Jane Doe 1 and Jane Doe 2.

Jane Doe 1 and Jane Doe 2 now take issue with the government's resolution of the Epstein investigation. They have invoked the Crime Victims' Right Act to ask this Court to invalidate the Non-Prosecution Agreement reached between the U.S. Attorney's Office and Mr.

Epstein. Jane Doe 1 and Jane Doe 2 also seek other unspecified relief, which they call "appropriate remedies," for the government's purported failure to keep them involved in the settlement negotiations. Jane Doe 1 and Jane Doe 2 have never articulated what these other remedies may be.

Invalidating the Non-Prosecution Agreement is expressly *not* a remedy under the Crime Victims' Rights Act: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

Seeking damages is also not a remedy under the Act: "Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages." *Id.*

As a matter of law, Jane Doe 1 and Jane Doe 2 are not entitled to invalidate a prosecutor's decision to settle a federal criminal investigation by way of a non-prosecution agreement. The Act plainly recognizes this, and expressly protects the prosecutorial discretion of the Attorney General and his Assistants.

The decision whether to seek federal criminal charges rests exclusively with the Attorney General and the Department of Justice. Neither Jane Doe 1, Jane Doe 2, nor the Court can force a federal prosecutor to seek an indictment where none has been sought, or to take back an agreement not to prosecute. 18 U.S.C. § 3771(d)(6); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (the decision whether to prosecute is "particularly ill-suited to judicial review," and "not readily susceptible to the kind of analysis the courts are competent to undertake"). This case illustrates the wisdom of that policy: Jane Doe 1 and Jane Doe 2 would have the Court invalidate the Non-Prosecution Agreement years after both parties have fully performed and

where, in reliance on that agreement, Mr. Epstein pleaded guilty, served a prison sentence, and settled many civil actions, including actions by Jane Doe 1 and Jane Doe 2.

Proposed intervenors are some of the lawyers who represented Mr. Epstein during the federal investigation and who negotiated the settlement and Non-Prosecution Agreement with the U. S. Attorney's Office. We seek to intervene in this litigation because Jane Doe 1 and Jane Doe 2 – despite having no right to invalidate the Non-Prosecution Agreement – have latched on to the Crime Victims' Rights Act to seek disclosure of all the negotiation letters between Mr. Epstein's defense lawyers and the U. S. Attorney's Office.

The letters prepared by Mr. Epstein's lawyers contain the opinions, strategies, and thought processes of the defense team concerning the matters under investigation. The letters written by the prosecutors respond to these opinions, strategies, and thought processes. All the letters were written in furtherance of settlement, encouraged by the broad protections of Federal Rules of Evidence 410 and 408, Federal Rule of Criminal Procedure 11(f), and the constitutional right to effective assistance of counsel. Jane Doe 1 and Jane Doe 2 not only seek discovery of these letters, but they also seek to disseminate them to the international media [DE 51 at 1, 7].

Intervention is proper under Federal Rule of Civil Procedure 24(a) because the lawyers have an independent right to protect their letters containing their opinion work product, and the interests of the lawyers are not adequately represented by the only other party in this case, the government. *See In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994) ("[T]he work product privilege belongs to both the client and the attorney, either one of whom may assert it"). "Colorable claims of . . . work product privilege qualify as sufficient interests to grant intervention as of right." *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001); *accord In re Grand Jury Investigation*, 445 F.3d 266, 269 (3d Cir. 2006).

Equally important, the release of these letters – and the precedent it would establish – would have a severe chilling effect on the lawyers' ability to engage in candid settlement discussions with the government in future cases. Indeed, to the extent such written correspondence is deemed discoverable by third parties, criminal defense attorneys and the government's lawyers alike would lose the ability to negotiate such agreements – and to provide the most vigorous defense of their respective clients' interests – without being inhibited by the possible disclosure of their correspondence in meritless lawsuits like this one. Given the lawyers' powerful interest in maintaining their ability to vigorously represent their clients' interests without such barriers, they surely have a right to intervene.

Intervention is also appropriate to invoke Federal Rule of Criminal Procedure 6(e), because the letters discuss matters occurring before the grand jury during its investigation. This grand jury information is strictly confidential under Rule 6(e), and disseminating it to the media for gossip and ridicule, as Jane Doe 1 and Jane Doe 2 intend to do [DE 51 at 7], is decidedly contrary to the historical protections Courts have afforded to the grand jury process.

If allowed to intervene, the defense lawyers would file the attached motion for a protective order in response to the motion of Jane Doe 1 and Jane Doe 2 for disclosure of the defense settlement letters [DE 50 at 5], their motion to use these settlement letters as substantive evidence in their quest to invalidate the Non-Prosecution Agreement [DE 51], and their motion to disseminate these letters to the international media [DE 51 at 7].

Undersigned counsel Roy Black has requested the admission *pro hac vice* of proposed intervenor attorney Martin Weinberg [DE 55]. We will be requesting the admission *pro hac vice* of proposed intervenor attorney Jay Lefkowitz within the next few days, as soon as a certificate of good standing from the New York Bar arrives.

Attorneys Black, Weinberg and Lefkowitz do not seek intervention to litigate whether the Crime Victims' Rights Act was violated and if so, against whom a remedy is appropriate. Instead, the attorneys seek a limited intervention as parties in their own right, for the limited purposes of protecting against the dissemination of clearly protected correspondence exchanged with the government during plea negotiations. As the lawyers representing Mr. Epstein, these attorneys have an independent right to intervene and seek protection of their correspondence. *See In re Grand Jury Proceedings*, 43 F.3d at 972 ("work product privilege belongs to both the client and the attorney, either one of whom may assert it"). The intervention of these attorneys is limited and only for the purpose of advancing their interests in the confidentiality of the correspondence.

Jeffrey Epstein does not seek to intervene at this time because the issue of whether the Crime Victims' Rights Act even applies in this case is a matter between the government and Jane Doe 1 and Jane Doe 2, and because the Non-Prosecution Agreement is not subject to invalidation under the terms of the Crime Victims' Rights Act and well-established case law. To the extent the Court ever was to consider invalidating the Non-Prosecution Agreement as a remedy, Jeffrey Epstein reserves the right to intervene at that time.

I certify that on April 7, 2011, my office electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system.

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SOUTHERN DISTRICT OF FLORIDA

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INTERVENORS' MOTION FOR A PROTECTIVE ORDER AND OPPOSITION TO MOTIONS OF JANE DOE 1 AND JANE DOE 2 FOR PRODUCTION, USE, AND DISCLOSURE OF SETTLEMENT NEGOTIATIONS

Jane Doe 1 and Jane Doe 2 complain that the government treated them unfairly by not keeping them involved in the government's settlement negotiations with Jeffrey Epstein. They seek to invalidate the Non-Prosecution Agreement between Mr. Epstein and the government, claiming that the agreement violates the Crime Victims's Rights Act.

Jane Doe 1 and Jane Doe 2 seek disclosure of all the letters between the lawyers defending Mr. Epstein and federal prosecutors during the criminal investigation. They claim that the letters are relevant and admissible to show that the government did not live up to its obligations under the Crime Victims' Rights Act. Jane Doe 1 and Jane Doe 2 have copies of the letters and emails the government wrote to the defense team, and now seek copies of the letters the defense wrote to the prosecutors. [DE 50 at 5].

The letters and emails prepared by the government are subject to a protective order

prohibiting their disclosure. In the related case 9:08-CV-80893 (the case where Jane Doe 1 and Jane Doe 2 sued Mr. Epstein for money), the Magistrate Judge prohibited Jane Doe 1 and Jane Doe 2 from making "the subject correspondence public by either filing the correspondence in a court file, attaching it to a deposition, *releasing it to the media*, or publically disseminating it in any other fashion, before allowing Epstein an opportunity to object to its disclosure . . . ." [DE 226 at 4]. The order is dated January 5, 2011.

Established case law as well as sound and substantial policy considerations prohibit disclosure of the defense settlement letters written to the government, and require that the letters and emails that Jane Doe 1 and Jane Doe 2 already have remain confidential. The release of these letters, and the precedent it would establish, would have a severe chilling effect on the lawyers' ability to engage in candid settlement discussions with the government in future cases. Indeed, to the extent such written correspondence is deemed discoverable by third parties, criminal defense attorneys and the government's lawyers alike would lose the ability to negotiate such agreements, and to provide the most vigorous defense of their respective clients' interests, without being inhibited by the possible disclosure of their correspondence in meritless lawsuits like this one.

The Court should decline the invitation to kick off a media campaign against Mr. Epstein and should deny the motions by Jane Doe 1 and Jane Doe 2 to release materials that are plainly the privileged opinion work-product of the attorneys, that constitute settlement negotiations under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11, and that contain information about matters occurring before the grand jury, which are strictly confidential under Federal Rule of Criminal Procedure 6(e).

There is no question that Jane Doe 1 and Jane Doe 2 intend to disseminate these

confidential communications to the media to ridicule and prejudice Mr. Epstein. And currying favor with the media at Mr. Epstein's expense is not new to Bradley Edwards, the lawyer who represents Jane Doe 1 and Jane Doe 2. He and his own lawyer in a related state case, Jack Scarola, have been widely quoted by local and British press, making prejudicial and inflammatory statements about Mr. Epstein. If the correspondence between the defense team and the government is not kept confidential, attorneys Scarola and Edwards could reasonably be expected to continue disseminating out-of-court publicity and making extrajudicial statements and commentary to the media to prejudice Mr. Epstein.

I.
THE LETTERS ARE THE PRIVILEGED OPINION WORK-PRODUCT OF THE ATTORNEYS

The correspondence with the government contains the opinions, strategies, and thought processes of the defense team concerning the matters under investigation. The letters were obviously written in furtherance of settlement, and constitute the privileged opinion work-product of the lawyers. The Court should deny the motion by Jane Doe 1 and Jane Doe 2 for their production [DE 50 at 5].

A. THE CONTOURS OF THE PRIVILEGE

The United States Supreme Court has recognized "a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'" *United States v. Nobles*, 422 U.S. 225, 238 (1975). The work-product doctrine applies in civil and criminal litigation. *Id.* at 236.

In *Hickman v. Taylor*, the Supreme Court described the policy behind the doctrine protecting the opinion work-product of lawyers. The Court explained that a lawyer is bound "to work for the advancement of justice while faithfully protecting the rightful interests of his

clients." 329 U.S. at 510-11. To perform his duties, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* Properly preparing a client's case demands that the lawyer "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference." *Id.*

The lawyer's work is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . ." *Id.* If such materials were open to adverse parties "on mere demand," then "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own." *Id.* Inevitably, "[i]nefficiency, unfairness and sharp practices would . . . develop in the giving of legal advice and in the preparation of cases for trial." *Id.* Ultimately, "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*

For these reasons, the opinion work-product of the lawyers is afforded the most comprehensive protection under the law. "[A] highly particularized showing," as well as "rare and extraordinary circumstances" are required to overcome such a claim of privilege. *In re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529, 1536-37 (S.D. Fla. 1997) ("a highly particularized showing" is required to overcome a claim of privilege); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994) ("Opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances").

B. JANE DOE 1 AND JANE DOE 2 HAVE NOT MADE A HIGHLY PARTICULARIZED SHOWING OF NEED OR OF RARE AND EXCEPTIONAL CIRCUMSTANCES

There are no rare or exceptional circumstances in this case. Jane Doe 1 and Jane Doe 2 assert only that the defense team correspondence is "highly relevant" and "discusses" their rights as "crime victims[,] so it is obviously quite material." [DE 50 at 5]. These are just conclusions, neither rare nor exceptional, and they are not supported by any factual allegations in the pleadings. Indeed, nothing in the motion explains how the opinions of *the defense lawyers* would add to the claim that *the government* did not live up to the Crime Victims' Rights Act.

Jane Doe 1 and Jane Doe 2 have not made a "highly particularized showing" of their need for these letters. On the contrary, their pleadings show conclusively that they do not need the letters to establish their claims. Jane Doe 1 and Jane Doe 2 have moved for summary judgment [DE 48]. By submitting this motion, Jane Doe 1 and Jane Doe 2 admit that they do not require additional discovery, and obviously do not need the settlement letters to substantiate their claims under the Crime Victims' Rights Act.

As a matter of law, Jane Doe 1 and Jane Doe 2 cannot show a highly particularized *valid* need for the correspondence for two additional reasons: First, they seek the letters to invalidate the Non-Prosecution Agreement, which is expressly prohibited by the Crime Victims' Rights Act. Second, they seek the letters to use them as evidence, which is expressly prohibited by the Rules of Evidence.

(i) There Is No Valid Need When The Goal Is To Use The Letters To Invalidate The Non-Prosecution Agreement: Under the Crime Victims' Rights Act, neither Jane Doe 1, Jane Doe 2, nor the Court can invalidate the Non-Prosecution Agreement. The Act expressly prohibits it: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of

the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

The Act codifies the long-standing principle that "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). This is due in large part to the separation of powers doctrine – prosecutors are delegates of the President, helping him discharge his constitutional obligation "to take Care that the Laws be faithfully executed." *Id.*; U.S. CONST. art. II, § 3. Whether to investigate possible criminal conduct, grant immunity, negotiate a plea, or dismiss charges, are all central to the prosecutor's executive function. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000). "The judiciary cannot interfere with a prosecutor's charging discretion, except in narrow circumstances where it is necessary to do so in order to discharge the judicial function of interpreting the Constitution." *Id.* And this Court has not been called upon to interpret the Constitution.

The most recent and compelling precedent illustrate the complete absence of case support for the proposition advanced by Jane Doe 1 and Jane Doe 2 – that after a Non-Prosecution Agreement is final and its terms and burdens have been fully met, a Court can invalidate that agreement because a third party was not given an opportunity to express an opinion about its terms. Jane Doe 1 and Jane Doe 2 rely on *In re Dean*, 527 F.3d 391 (5th Cir. 2008), to support invalidation of the Non-Prosecution Agreement. *In re Dean* was litigated by one of the lawyers who also represents Jane Doe 1 and Jane Doe 2 here. Despite citing and quoting from *In re Dean* throughout his papers in this litigation, the lawyer skips over what is arguably the most important part of the *In re Dean* litigation as it pertains to the relief sought here: Following remand from the Fifth Circuit, the district court *denied* the motion of the victims to invalidate the defendant's plea agreement as a remedy for the claimed violation of the Crime Victims' Rights

Act.

The district court expressly noted on remand that "[t]he purpose of the conferral right is not to give the victims a right to approve or disapprove a proposed plea in advance or to participate in plea negotiations." *In re Dean* on remand *sub nom. United States v. BP Products North America, Inc.*, 610 F. Supp. 2d 655, 727 (S.D.Tex. 2009). Instead, "[t]he purpose of the reasonable right to confer is for victims to provide information to the government, obtain information from the government, and to form and express their views to the government and court." *Id.* The district court concluded that the violations alleged by the victims did not provide a basis for rejecting the plea agreement, noting specifically that there was no basis to conclude that, had the government conferred with the victims before entering into the plea agreement with the defendant, a different agreement, or perhaps no agreement at all, would have been reached. *Id.* at 726-27; *see In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (denying mandamus where petitioners sought to vacate plea agreement which made no provision for restitution in deference to pending civil litigation); *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010) (relying on the "strong interest in the finality of criminal sentences" to reject mandamus under the Act where a defendant had plead guilty and had been sentenced more than two years earlier); *see also United States v. Bedonie*, 413 F.3d 1126, 1129-30 (10th Cir. 2005) (district court had no authority under mandatory restitution act to reopen restitution proceedings after sentencing).

More recently in the case of *In re Peterson*, 2010 WL 5108692 (N.D.Ind. Dec. 8, 2010), the district court denied relief under the Crime Victims' Restitution Act before any charges were filed. The court recognized that the Act "guarantees crime victims a range of substantive and participatory rights," but that "[w]hether charges might be filed and proceedings initiated in the

future is a matter of prosecutorial discretion, and the [Act] expressly provides that '[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any office under his direction.'" *Id.* at *2 (quoting 18 U.S.C. § 3771(d)(6)).

Jane Doe 1 and Jane Doe 2 have not identified what relief they seek other than invalidation of the Non-Prosecution Agreement. They obviously cannot seek money damages under the Act. 18 U.S.C. § 3771(d)(6). They have requested a hearing so that *the court* can pick some form of "appropriate relief" for them. Under these circumstances, Jane Doe 1 and Jane Doe 2 have failed to establish any valid need, or a rare and extraordinary circumstance, to overcome "the nearly absolute immunity" given to attorney opinion work-product.

(ii) There Is No Valid Need When The Goal Is To Use The Letters As Evidence: Jane Doe 1 and Jane Doe 2 have moved for admission of the settlement letters in evidence. This is plainly contrary to Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11.

The letters exchanged between the government and defense counsel contain the legal discussions and analyses prepared by attorneys for both sides, in an effort to reach the best possible result for their clients. The letters were classic settlement discussions, written with the intention that they remain confidential and protected by Rules 410 and 408, Federal Rule of Criminal Procedure 11, and the constitutional right to effective assistance of counsel. Under the express language of Rule 410, these letters are "not, in *any civil or criminal proceeding,* admissible against the defendant who . . . was a participant in the plea discussions . . . ." FED. R. EVID. 410 (emphasis added).

Of course, Jane Doe 1 and Jane Doe 2 seek to use the correspondence "against" Mr. Epstein, even though he is not a party to this civil action. The words "*not . . . admissible*

against the defendant" refer to "***the purpose*** for which [the evidence] is offered" and not "to the kind of proceeding in which the evidence is offered." FED. R. CRIM. PRO. 11 advisory committee note 1979 amendment (emphasis added). And the stated purpose of Jane Doe 1 and Jane Doe 2 is to invalidate the government's Non-Prosecution Agreement with Mr. Epstein.

The purpose of Rule 11 and Rule 410 is to permit "the unrestrained candor which produces effective plea discussions." *Id.* Disposition of cases following plea discussions "is not only an essential part of the process but a highly desirable part for many reasons." *Santobello v. New York*, 404 U.S. 257, 261 (1971). Among them is the obvious fact that these negotiations "lead to prompt and largely final disposition of most criminal cases . . . ." *Id.*

The law favors plea negotiations and the resolution of criminal matters. But "for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him." *United States v. Herman*, 544 F.2d 791, 796 (5th Cir. 1977). The candor and meaningful dialogue that bring about settlements would be impossible if either party risked having their statements used against them.

The Court should deny the motion of Jane Doe 1 and Jane Doe 2 to use the letters as evidence. Their claim that "the correspondence is plainly admissible as it is highly relevant" [DE 51 at 5] misses the point and ignores the purpose and policy of Rule 410. It is precisely because plea negotiations may be relevant in a subsequent civil action that Rule 410 expressly excludes them.

II.
THE LETTERS ARE CONFIDENTIAL UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 6(E) BECAUSE THEY DISCUSS MATTERS OCCURRING BEFORE THE GRAND JURY

The settlement letters prepared by the government and those prepared by the defense

should remain confidential and subject to a protective order because they contain grand jury information.

Federal Rule of Criminal Procedure 6(e)(2) prohibits disclosure of "a matter occurring before the grand jury." FED. R. CRIM. P. 6(e)(2). This prohibition has been read broadly to include all matters taking place before the grand jury and not just testimony. Thus, even though the negotiation letters between the lawyers and the government are not themselves "a matter occurring before the grand jury," they are properly confidential under Rule 6(e) because they would reveal grand jury information. The letters discuss the government's investigative and law enforcement strategy as well as the direction of the federal investigation, all matters that are properly protected as occurring before the grand jury. *See Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 869 (D.C.Cir. 1981) (identities of witnesses, substance of testimony, strategy, and direction of the investigation are properly protected by Rule 6(e)).

Jane Doe 1 and Jane Doe 2 have not articulated any legitimate, particularized need for grand jury information. *First*, their stated strategy is to spread these letters among media outlets such as the television show Law and Order, gossip columnist Jose Lambiet of the Palm Beach Post, and the British media, which Jane Doe 1 and Jane Doe 2 state has "gone berserk" with gossip about Mr. Epstein. [DE 51 at 7]. Kicking off a media campaign against Mr. Epstein is decidedly *not* a valid basis for releasing grand jury information. To be sure, the press has no First Amendment right of access to matters occurring before a grand jury. *In re Subpoena To Testify Before Grand Jury*, 864 F.2d 1559, 1562 (11th Cir. 1989).[1]

[1] And any hearing or proceeding where grand jury material may be revealed would have to be closed to the public, including the press. *In re Newark Morning Ledger Co.*, 260 F.3d 217, 226 (3d Cir. 2001) (secrecy afforded grand jury materials extends to hearings where grand jury

Second, Jane Doe 1 and Jane Doe 2 have moved for summary judgment, claiming that the facts are not in dispute and that they are entitled to judgment in their favor as a matter of law. [DE 48]. By their own admission, Jane Doe 1 and Jane Doe 2 require no additional discovery, and obviously do not need the settlement letters to substantiate their claims under the Crime Victims' Rights Act. The motion for summary judgement, by definition, establishes that Jane Doe 1 and Jane Doe 2 have no particularized need for the letters. *See SEC v. Merrill Scott & Assocs., Ltd.,* 600 F.3d 1262, 1271 (10th Cir. 2010) (affirming order limiting discovery where movant did not "show any need for further discovery in light of the limited nature of the relief he has requested").

Third, Jane Doe 1 and Jane Doe 2 seek disclosure of the letters so they can use them as evidence against Mr. Epstein, contrary to Federal Rule of Evidence 410. Under Rule 6(e), Jane Doe 1 and Jane Doe 2 can have no legitimate particularized need for grand jury materials that they intend to use in violation of the rules of evidence. *See United States v. Capozzi*, 486 F.3d 711, 727 (1st Cir. 2007) (no right to grand jury transcripts established by defendant who sought them to substantiate an appeal of a non-justiciable issue); *see also United States v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997) (there is no constitutional right to access inadmissible evidence).

Finally, as argued earlier, there can be no valid particularized need when Jane Doe 1 and Jane Doe 2 seek relief that is expressly prohibited by the Act and by established case law. 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction"); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (the decision whether to prosecute is "particularly ill-suited to judicial review," and "not readily susceptible to the kind of analysis the courts are competent to

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information may be revealed).

undertake").

The letters between counsel and the government contain information of matters occurring before the grand jury, and are confidential under Federal Rule of Criminal Procedure 6(e).

III.
CONCLUSION

Whether to resolve a criminal investigation or contest a criminal charge is one of the most important decisions a client can make in a criminal case. Defense lawyers have a responsibility to make every possible inquiry to determine all valid defenses, to examine the facts, the circumstances and the law, and to provide clients with the best informed opinion as to what pleas to enter. If the decision is made to resolve a criminal case or investigation, defense lawyers have the added responsibility of mitigating their client's liability and negotiating the best possible agreement. These are solemn responsibilities, grounded on the client's constitutional right to effective representation of counsel.

Defense lawyers are encouraged by Federal Rule of Criminal Procedure 11(f), Federal Rule of Evidence 410, and their constitutional obligations, to negotiate with the government candidly and in a meaningful way, without fear or risk that what they say will later be used against their clients in a civil proceeding. Relying on these protections and on the opinion work-product doctrine, defense lawyers openly explore alternative pleas with the government, propose different strategies, and divulge defenses and information that they would otherwise maintain confidential. This is precisely the type of open dialogue that the Rules envision because it results in a settlement – as this case illustrates.

Intervenors who represented Mr. Epstein during the criminal investigation oppose disclosure of the settlement correspondence and its dissemination to the public. We request that the protective order issued by the Magistrate Judge in the related case remain in place, and that a

similar order issue in this case.

I certify that on April 7, 2011, my office electronically filed the foregoing via the CM/ECF system.

Respectfully submitted,

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