

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.

HEARING BEFORE THE HONORABLE
KENNETH A. MARRA

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

Stenographically Reported By:
Melinda L. Colchico, FPR, RDR, CRR

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561-835-0220

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1 P R O C E E D I N G S

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

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

11 THE COURT: Good afternoon.

12 MR. EDWARDS: Good afternoon. On behalf of Jane Does
13 1 and 2, Brad Edwards, as well as my co-counsels, Paul Cassell
14 and Jay Howell.

15 THE COURT: Good afternoon.

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

19 THE COURT: Good afternoon.

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

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

24 All right. We have a number of matters to go over
25 today. I thought the first thing I should do is figure out

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1 who's going to be participating in the proceedings. So I think
2 I should deal with the intervenors' motions first before we get
3 to any of the substantive motions.

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

5 MR. REINHART: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

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

17 If you look at the face of the motion, it's clear
18 that there's absolutely no reason for that to be in the motion
19 other than it's a personal attack for the purpose of harassment
20 and abuse. To my knowledge, these allegations have never been
21 sent to the Florida Bar, even though Mr. Edwards, as a member
22 of the bar, would have an obligation to report them if he
23 believed they were true. But he hasn't. They have never been
24 reported to the Department of Justice, even though there are
25 civil and criminal sanctions, if, in fact, they believed it was

1 true and they believed I did what they said I did.

2 Rather than putting these allegations into that sort
3 of a forum, where I would have a chance to respond and the
4 investigation would be confidential and I could clear my name
5 in private, they've thrown them into this litigation in a
6 public pleading and now they say I shouldn't be allowed to
7 respond to it.

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

9 MR. REINHART: Judge, I've said what I want to say
10 but there's been no finding. There's been no -- frankly,
11 there's been no inquiry why in the first place they did what
12 they did, and I think that's really the issue before the Court
13 today. It's not the merits of whether what they say is true or
14 not true. It's not, but that's not the issue for you today.
15 The issue is whether the Court is going to sanction this sort
16 of behavior and whether we're going to have a legal system
17 where I could stand here in a commercial litigation case and
18 put in a pleading that my neighbor is a tax evader or that the
19 guy down the street is cheating on his wife. I mean, we have
20 rules of court that are supposed to limit the facts at issue to
21 the facts at issue. And if we start letting people simply make
22 ad hominem attacks outside of the four corners of the case, the
23 Court can't allow that.

24 So what the Court ought to do, most respectfully, in
25 this case, is to -- whether you allow me to intervene and

1 pursue it myself or whether you do it on your own, you ought to
2 convene some sort of a proceeding and make the plaintiffs
3 justify why they put these allegations in this pleading when
4 they so clearly don't belong there and what, if any,
5 investigation they did to support them. And that's what I'm
6 asking you to do today is to simply convene that process, and
7 if they complied with the rules of the court and they did their
8 sufficient investigation, then the proceeding will show that.
9 And if they were reckless and they were malicious and they did
10 it just because they could, they ought to be sanctioned for it,
11 and the Court ought to send a message that you're not going to
12 tolerate that sort of behavior.

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

19 THE COURT: If I let you intervene to try and clear
20 your name from what you consider a slanderous or libelous
21 attack, aren't I essentially inviting anyone who has a
22 slanderous or libelous or defamatory statement made against
23 them in litigation, inviting them to come in and intervene in a
24 court and have the court conduct a mini-trial on whether or not
25 the allegations are true and -- I mean, I'm basically going to

1 open up the legal system to anyone who feels offended by
2 something that's said in court to come in and start
3 mini-lawsuits within a lawsuit.

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

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

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

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

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

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

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

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

23 MR. EDWARDS: That's the kind of satellite litigation
24 we think should be avoided here. In fact, the case law is
25 clear that permissive intervention, if denied, is virtually

1 never overturned on appeal because we don't want to encourage
2 this type of satellite litigation.

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

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

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

20 MR. EDWARDS: And we're asking that you deny that
21 motion. If it's granted, we would like to take discovery on
22 that matter, including his deposition.

23 THE COURT: All right. Thank you.

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

25 MR. LEE: Yes. Thank you, Your Honor. We did not

1 oppose Mr. Reinhart's motion. We basically view this as a
2 matter between the petitioners' counsel and Mr. Reinhart.

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

8 All right. Let me hear from Mr. Black on the
9 intervention by the attorneys.

10 MR. BLACK: May it please the Court, and good
11 afternoon.

12 THE COURT: Good afternoon.

13 MR. BLACK: We have filed -- the three lawyers who
14 previously represented Mr. Epstein have filed for our right to
15 intervene under Rule 24(a) as an intervention of right because
16 our issue relates to the property or the transaction.

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

19 MR. BLACK: Yes.

20 THE COURT: -- permissive intervention?

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

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

1 'significantly protectable interest.'"

2 The Eleventh Circuit has gone on and In Re: Grand
3 Jury Matter, which is 735 F. 2d 1330, to say that -- it was a
4 motion to intervene. The district court disallowed it. It
5 went up to the circuit. It was remanded, and the court says:
6 We have recognized that a district court should allow
7 intervention by a client in the first instance as soon as the
8 attorney/client privilege issue is raised.

9 That was a grand jury proceeding dealing with a
10 client seeking to protect his attorney/client privilege, and
11 the court held that intervention was as a matter of right.
12 Now, that obviously was a criminal investigation.

13 In terms of the -- on the civil docket, this court
14 decided in El-Al Residences v. Mt. Hawley Insurance, which is
15 at 716 F. Supp. 2d 1257, an opinion by Magistrate Judge
16 McAliley, in which he says that the law in this circuit and
17 others is clear that this court must allow intervention by a
18 client in the first instance as soon as the attorney/client
19 privilege is raised, citing cases. Colorable claims of
20 attorney/client and work product privilege are a textbook
21 example of an entitlement to intervention as a matter of right,
22 and citing particular cases.

23 THE COURT: Now, let me ask you about that question
24 of privilege. As I understand your motion, you're claiming
25 that documents that were exchanged between yourself and the

1 other attorneys representing Mr. Epstein and the United States
2 Attorney's Office and maybe the State of Florida -- I don't
3 remember if the --

4 MR. BLACK: It is just the United States Attorney,
5 Your Honor.

6 THE COURT: Okay. The United States Attorney.
7 During the negotiations that resulted in the non-prosecution
8 agreement are somehow work product, am I correct?

9 MR. BLACK: Yes, sir.

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

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

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

25 I just looked at the statistics. The last year I

1 could find in 2005, 87 percent of all federal criminal cases
2 were resolved by a guilty plea and 3.9 percent were resolved by
3 a trial. We've turned into a system of guilty pleas rather
4 than a trial system. And because of that, the courts have put
5 a lot of duties and obligations on lawyers dealing with this
6 plea bargaining process. And as a result of that, the courts
7 and the rules have added sanctions -- excuse me, safeguards to
8 protect us because of communications made during the course of
9 this plea bargaining process. And I think that is really what
10 we trying to get to here. There are safeguards that have been
11 in effect since -- for almost 80 years. And there's a case,
12 United States v. Herman back in the seventies from the Fifth
13 Circuit, saying that the -- the old Fifth Circuit, that we have
14 recognized a type of immunity for any statements made during
15 the course of plea bargaining. And then the Supreme Court and
16 Congress enacted Rule 11(e)(6), which became Rule 11(f), and,
17 of course, now refers us to Rule 410. So those rules provide
18 safeguards. What they do is they say if you engage in the plea
19 bargaining process, there is an immunity for the statements
20 that are made.

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

25 THE COURT: You're talking about inculpatory

1 statements, aren't you?

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

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

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

19 I don't believe that they could give to it third
20 parties. I think it would be a violation of the rule to use it
21 in any way other than in determining the type of plea that they
22 would offer to a defendant.

23 Beyond that, I do not believe that it can be used for
24 any purpose by the government, and I don't believe that anybody
25 could use it for any purpose. But even so, in this case, the

1 purpose the plaintiffs want for this is to use it in
2 litigation. So we don't have to worry about if they're going
3 to disseminate it to the media or use it to write a book, or
4 what have you. They intend to use it as evidence in this
5 proceeding. So I don't know that we need to necessarily
6 address any other kinds of uses of this material.

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

10 MR. BLACK: No. They have obtained the government
11 responses and communications to us. The courts have
12 redacted -- or the government has redacted any of our
13 communications to the government. Now, there are extensive
14 communications. I don't have it here, but my folder is about
15 this thick and I have never been in a case that has had as
16 much, particularly written communication, from defense counsel
17 to the government as this case has.

18 We have discussed with them a panoply of things.
19 It's the classic opinion work product that we talk about, what
20 the statutes mean, what the import of the statutes are, what
21 the cases are, what the discretion of the Attorney General is.
22 We discuss federalism, the differences between state and
23 federal law enforcement; whether or not the government should
24 proceed with this case because of various policy reasons. This
25 is classic opinion work product that we send to the government.

1 Now, I know what the Court's ultimate question is:
2 Well, if you send it to the government, why should I give it
3 any kind of confidentiality or privilege? The reason I'm going
4 through this is that we criminal lawyers know that today
5 anything that we send to the government is under this cloak of
6 a type of immunity; that it cannot be used for anything. The
7 government cannot use it in their case. They can't use it in
8 their investigation. They can't use it for anything other than
9 the purpose for which we give it to them, and that's to
10 determine whether or not we can come to a plea negotiation.

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

23 THE COURT: All right. Do you have any cases that
24 address this principle in the context of -- similar to what we
25 are doing, with where someone was trying to get this kind of

1 information in a civil case?

2 MR. BLACK: I have never seen a case, a civil case,
3 in which a third party plaintiff has been able to obtain
4 letters and communications and briefs of defense counsel sent
5 to a prosecutor in order to seek a plea bargain. There is no
6 such case.

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

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

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

24 There's one case, United States v. Leonti, which is a
25 Ninth Circuit case, which says that you not only have to

1 communicate with the prosecutor, you have to go with your
2 client during the briefings. You have to keep them advised as
3 to what your client is doing and you have to follow this all
4 the way through the end. So the courts put an obligation on us
5 to follow through on this.

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

7 THE COURT: Before you move on --

8 MR. BLACK: Yes, sir.

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

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

19 So we're at the stage of intervention not at the time
20 of developing the scope of what the privilege is, but the Court
21 asked me, you know, obviously what the bottom line is. But I
22 think that the only real issue here is intervention. I'm happy
23 to discuss, you know, the contours of the privilege and why it
24 applies in this case.

25 THE COURT: So you're saying -- your position at this

1 point is, I've made an assertion of privilege; I as -- just on
2 that assertion alone, without regard to the merits of whether
3 the documents are or are not privileged, your mere assertion of
4 the privilege requires me to let you in in order to try and
5 defend that claim?

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

13 I'm happy to say more, but I think there's certainly
14 enough here for the Court to say that it is a matter that is of
15 serious concern and that we ought to be able to intervene in
16 order to address it with the Court. Because if we don't
17 address it, it will be lost.

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

23 MR. BLACK: Yes. There is some 6(e) material as
24 well.

25 THE COURT: All right. And, again, maybe I missed it

1 in all the materials I had to go through for today, but did you
2 make the claim in your papers that it's work product because
3 part of the attorney -- criminal defense attorney's
4 responsibility is getting into plea negotiations and there's
5 this privilege of communications with the prosecutors in
6 dealing with plea negotiations; was that line of --

7 MR. BLACK: Yes.

8 THE COURT: -- reasoning made?

9 MR. BLACK: Right, because that's all these papers
10 are. We said it's privileged because of these
11 communications, because of the importance of keeping open and
12 frank communications, and that it fits under the privilege.

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

15 MR. BLACK: All right. The other thing that I wanted
16 to mention is that there are the restatement of the law
17 regarding lawyers in the latest -- from the American Law
18 Institute, used as an example under the purpose of 410, where a
19 party actually sends documents to the government to examine
20 under a limited -- under confidentiality and limited use, and
21 the American Law Institute says that does not waive the work
22 product privilege.

23 The difference -- I don't want to get too deep into
24 it right now, but the difference between the two is you can
25 give work product to other people and not waive its type of

1 work product; whereas you do in the attorney/client privilege.
2 As soon as you give anything under the attorney/client
3 privilege to a third party, you waive it, but not under work
4 product. If it still has some protection associated with it,
5 the question is, under work product, did you give it to people
6 just to use however they want or was there some limitation on
7 it? And what's important here is the things that were sent to
8 the government -- and while we were adversaries at the time,
9 although we no longer became adversaries -- it was under the
10 protections that were given to these materials.

11 And I would -- there's one case I would analogize to,
12 although it's not exactly, obviously, the same. Judge Marcus
13 decided this case dealing with an American Airlines Crash near
14 Cali, Colombia and American Airlines was part of a program
15 where its pilots could report FAA violations to them and to the
16 FAA and it was considered confidential.

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

1 that same type of a rubric.

2 If we have a problem with work product, I think that
3 we can find a common law privilege of communication here
4 because of the importance given to plea negotiations that would
5 keep these out of the hands of the plaintiffs who intend to use
6 it against our clients.

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

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

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

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

25 THE COURT: Yes.

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

10 THE COURT: And what standing would you have to
11 complain about grand jury material being released?

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

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

21 MR. BLACK: Actually, there are times when we do
22 that. For example, if a government agent should disseminate
23 grand jury materials to the news media, there have been times
24 when we have made complaints for violations of 6(e). And I've
25 even -- I have filed letters with the Department of Justice to

1 the Attorney General complaining about prosecutors, and I won't
2 mention any names -- not in this case -- who have disseminated
3 6(e) material in violation of the rules. So I think that any
4 party can make a complaint.

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

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

8 THE COURT: Not because it -- just to protect the
9 system?

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

14 THE COURT: Thank you, sir.

15 MR. BLACK: Thank you, Your Honor.

16 THE COURT: Mr. Edwards.

17 MR. EDWARDS: Your Honor, we are asking that
18 Your Honor deny the motion to intervene in this case.
19 Mr. Black and these attorneys have not intervened on behalf of
20 Mr. Epstein, who may actually have an interest. They have no
21 stake in the outcome of this case. There is no case that
22 stands for --

23 THE COURT: Well, I mean, if they are right that this
24 is work product material -- and maybe that is not something
25 that I can decide now, but to the extent that it might arguably

1 be work product material, don't they have standing to protect
2 their own work product?

3 MR. EDWARDS: The cases that Mr. Black cited
4 indicated or held that they needed a colorable argument for
5 work product. You can't just come in and claim work product.
6 And there is a plethora of cases that stand for the
7 proposition, and has only been followed everywhere throughout
8 the country, that voluntary disclosure of work product
9 information to an adversary waives work product.

10 The other rules of evidence that Mr. Black referred
11 to, 410, don't apply to this case. That is a rule of
12 admissibility rather than discoverability. They're not being
13 entered against Mr. Epstein in this case. They are being
14 entered, if at all, against the government.

15 And just to correct the statement that he made that
16 the government redacted the portions of the emails and
17 correspondence from Mr. Epstein's attorneys to the government,
18 that's not how this happened. In previous litigation, it was
19 ordered that all of it be turned over to us from Mr. Epstein,
20 and they unilaterally made the decision to redact the
21 information from their attorneys going to the government. And
22 prior to the order that granted us permission to receive this
23 correspondence, all of these arguments, the work product, the
24 410 argument, all of them were before this court and all of
25 them were overruled. We've been down this road before. We

1 would argue that it's the law of the case at this point, since
2 these are similar issues, and there is no colorable argument of
3 work product at this point, and the intervention should be
4 denied.

5 THE COURT: All right. The cases that you're relying
6 on and that I, at least coming in here, was thinking about that
7 when you disclose something to an adversary it's no longer a
8 work product, are you familiar with the cases in the context of
9 plea negotiations where there's an exception or there's some
10 different type of privilege that applies in plea negotiations
11 between the government and a criminal defendant?

12 MR. EDWARDS: We have read every case in his brief,
13 as well as any others on this subject, and can't find a single
14 case out there that stands for that proposition. It just
15 doesn't exist. So the cases that he's spoken about don't say
16 that there is this automatic cloak of immunity between plea
17 discussions. In fact, there are cases talking about plea
18 discussions, and there isn't that.

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

25 THE COURT: Let me ask you this, and this kind of

1 gets to the merits of the argument, which I don't really want
2 to discuss right now, but do you really need the defense
3 lawyers' correspondence or statements to the government
4 attorneys in proving up whether or not the government violated
5 the Victims' Rights Act, assuming I'm going to find that it's
6 not -- it doesn't start from the point of indictment; the
7 rights are triggered earlier than that? Don't you have enough
8 information, without their comments in there, trial strategies
9 that may have been revealed to the government -- it is really
10 the government's actions or inactions that you're complaining
11 about, not Epstein's lawyers' actions or inactions.

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

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

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

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

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

21 Mr. Lee, did you have anything to add on this? I'd
22 be curious to know the government's position regarding
23 Mr. Black's assertion that any plea negotiations, statements
24 made during the course of plea negotiations, are somehow
25 privileged and protected and therefore can't be disclosed or

1 disseminated.

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

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

17 MR. LEE: That's actually a separate issue that was
18 subsumed within the motion, Your Honor. The motion that they
19 filed was a motion to unseal correspondence and to file --
20 unseal pleadings and use correspondence in order to prove
21 violations of the CVRA. Included in that were a number of
22 factual assertions that the petitioners claimed that we are
23 obligated to agree or disagree with in terms of presenting that
24 issue for the Court to resolve. And some of those factual
25 assertions that they suggested were true involved essentially

1 assertions that Mr. Epstein was guilty of various crimes,
2 crimes that he was not charged with.

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

12 THE COURT: All right. Thank you.

13 MR. LEE: Thank you, Your Honor.

14 MS. VILLAFANA: Thank you, Your Honor. I'm not
15 certain that this was raised in the pleadings so this is not
16 something that I was necessarily prepared to address.

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

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

25 THE COURT: All right.

1 MS. VILLAFANA: Thank you.

2 THE COURT: Mr. Black, did you want to say anything
3 else?

4 MR. BLACK: Yes, Your Honor. At the beginning of
5 their argument, the plaintiff tells you they do not want to use
6 the statements in any way against Mr. Epstein. At the end of
7 the argument, they say they want to use the statements as a
8 remedy to vacate the non-prosecution agreement and try to have
9 him sentenced to a longer sentence, I assume. Mr. Edwards has
10 said that in previous times before this court. I think that's
11 more than sufficient to meet the standard that they intend to
12 use these 410 materials against Mr. Epstein to his detriment.

13 THE COURT: All right.

14 MR. BLACK: Thank you, sir.

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

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

21 And here is the problem, Your Honor, just to tell you
22 practically what it's like out in the field practicing criminal
23 law: If we believe that our statements in any way during this
24 plea bargaining process would end up coming back to damage our
25 clients in some way, why would we do this? Why would we go

1 through this whole process of sending these briefs and letters
2 and interpretations of the law and discussions of various
3 offenses and how things could be arranged and the discretion
4 between the federal and the state government and all those kind
5 of things, even discussing proposed charges and all of that,
6 why would we ever engage in that if we ever thought these
7 things could come back to bite our clients?

8 All we're going to do here is going to, for no good
9 reason, put a damper on the ability of lawyers to negotiate and
10 resolve criminal cases and I believe that is against the policy
11 of these courts, and our system of justice.

12 THE COURT: All right. Thank you, Mr. Black. I'm
13 going to reserve ruling. I guess I'm going to ask the
14 government, or both sides to -- Mr. Black, did you want to --
15 an opportunity to further develop this privilege argument on
16 plea negotiations in writing?

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

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

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

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

24 MR. BLACK: Two weeks?

25 THE COURT: That's fine.

1 MR. BLACK: Thank you.

2 THE COURT: Thank you, Mr. Black.

3 How much time did you want, Ms. Villafana, or Mr.
4 Edwards, to respond to whatever Mr. Black submits?

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

6 MS. VILLAFANA: Two weeks is fine.

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

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

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

12 MR. EDWARDS: One week would be fine.

13 THE COURT: After?

14 MR. EDWARDS: The government responds.

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

17 MR. EDWARDS: Sounds great.

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

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

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

23 MR. BLACK: Thank you.

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

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

4 MR. EDWARDS: Yes, Your Honor.

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

7 MR. EDWARDS: Okay.

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

19 It seems like you're saying, well, we've talked to
20 them back and forth. We've asked them to admit things. They
21 haven't admitted anything. They refused or we can't come to
22 some agreement, so admit everything we say in our motion and
23 use it against them. How does that work when there seems to
24 me, whether you consider this an aspect of an offshoot of a
25 criminal case or a separate civil case, that there is a means

1 or a method by which you could have, if you wanted to, asked
2 for the opportunity to conduct discovery or send out discovery
3 requests and get them to either admit or deny certain things?

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

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

11 We made an initial disclosure under Rule 26, and the
12 response back that we got from the government was that this is
13 not a civil case because the Crime Victims' Rights Act is not a
14 civil case. And we said, okay, well, then we get certain
15 information from you if it's a criminal case. And they said,
16 well, if it's a criminal case, it's United States versus
17 somebody else. So it's not a criminal case. So we are kind of
18 stuck in this middle ground and we need -- similar to a summary
19 judgment motion, we need an ultimate finding on a legal issue,
20 which is a finding of violation of the Act. So we've been kind
21 of stuck in limbo not knowing what's really available to us in
22 terms of how we go about getting discovery.

23 So we did negotiate with them for a long time over
24 facts, and they finally said, all the facts are irrelevant.
25 And if they're irrelevant, then what's the harm in accepting

1 them as true? And if they want to insert the one fact that
2 they believe is relevant, Jeffrey Epstein was not indicted,
3 then we agree.

4 THE COURT: Well, I presume their position is, the
5 rights under the Act don't kick in or aren't triggered until
6 there's an indictment, and if I accept that proposition then it
7 doesn't make any difference what the facts are. But if I don't
8 accept that proposition, then I have a feeling they're going to
9 say that all the facts do make a difference. I don't want to
10 speak for them but I presume that's going to be their approach.

11 MR. EDWARDS: Well, there --

12 THE COURT: If I rule against them on the indictment
13 is the triggering event, they're going to want to contest a lot
14 of these facts.

15 MR. EDWARDS: Well, there are certain undeniable
16 facts that are in the record that they will not contest, which
17 based on those facts alone the -- the finding of a violation,
18 we could reach that decision and it would be ripe for that
19 finding. It's not ripe until we have all of the circumstances
20 and all of the facts. But just given those -- the information
21 that we have in the record, such as when the non-prosecution
22 agreement was signed, the confidentiality provision, when the
23 letters were sent to the clients, when the plea negotiation
24 went down, the fact that it was a year after the
25 non-prosecution agreement that disposed of the clients' rights

1 before the clients knew about the non-prosecution agreement and
2 were receiving letters telling them to be patient, this is a
3 long process, after their rights were already gone, is enough.
4 And those are not things that are being contested.

5 So we could at least have had a meaningful discussion
6 as to which of these other facts, in addition to the fact that
7 Mr. Epstein was not indicted, that they would agree upon. And
8 if they're saying that it's irrelevant, it goes back to my
9 original argument, what's the harm then? We can get all the
10 way to making the decisions if we have a bunch of -- and
11 Your Honor can make the legal determination what weight to give
12 various facts, whether they're relevant or not relevant.

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

24 I think whether it's criminal or civil, I probably
25 would have discretion to say, engage in some discovery if

1 that's going to simplify things or bring this to a head. But
2 you just filed a motion and say, they're stuck with everything
3 we say in our motion.

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

8 THE COURT: So you're saying this is a summary
9 judgment motion?

10 MR. EDWARDS: Yes.

11 THE COURT: You didn't call it a summary judgment
12 motion.

13 MR. EDWARDS: I understand.

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

16 MR. EDWARDS: We did file a statement of undisputed
17 facts. We filed 53 undisputed facts.

18 THE COURT: You did?

19 MR. EDWARDS: We filed -- within our motion for
20 finding violations of the Crime Victims' Rights Act, we filed
21 53 undisputed facts and attached, as exhibits, A through K.

22 THE COURT: Okay. I see. Let me go to that section.
23 Okay.

24 MR. EDWARDS: Various pieces of the record. And we
25 have agreed with the government that we would agree to that

1 additional fact that Mr. Epstein was not indicted, and then we
2 would start with various correspondence indicating that there
3 was a 53-page indictment prepared against him and move on all
4 the way through the plea agreement so that we could reach the
5 determination on the violation.

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

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

20 THE COURT: All right.

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

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

25 MR. EDWARDS: Okay. In terms of the motion for

1 finding a violation, is at least the information that is
2 already in the record and is stipulated to, meaning the
3 exhibits that both parties agree were exhibits, is that
4 something that we are going to be permitted to rely upon for
5 that motion?

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

8 MR. EDWARDS: Thank you, Your Honor.

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

12 MR. CASSELL: Good afternoon, Your Honor. As the
13 Court is aware, we've been trying to sort through some of these
14 issues. The Court, I guess, is wondering about some of these
15 things, and we've been wondering as well. The one thing we
16 think is very clear is that the United States cannot sit on
17 information that's highly relevant to the plaintiffs' claims.

18 We've repeatedly asked the United States for
19 information that would support our claim both that there were
20 substantive violations of the Crime Victims' Rights Act and
21 that the appropriate remedy for this violation would be setting
22 aside the non-prosecution agreement. We've offered to provide
23 them very narrow and specific documents that we're looking for.
24 And in response, the United States Attorney's Office has taken
25 the position that it can and will withhold this relevant and

1 useful information from the victims. So we think the legal
2 issue is starkly present: Can the United States withhold
3 information from the victims that will help them establish a
4 violation of congressionally-mandated crime victims' rights?
5 And we submit that the answer to that question must be, no, for
6 three reasons.

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

13 MR. CASSELL: So that is our third argument. Let me
14 jump right to that. The third argument we have made in our
15 brief is that this is a civil case and so we should proceed
16 under the ordinary civil rules. As Your Honor is well aware,
17 the first step in the civil rules is to make initial
18 disclosures. So we made all of our initial disclosures under
19 Rule 26 and we asked the government then to make theirs. They
20 refused. They said, sorry, we're not going to make any
21 disclosures. So we were stopped at first base. We can't, of
22 course, move to request for depositions, request for admissions
23 because we haven't even had the initial disclosures that Rule
24 26 envisions. So basically --

25 THE COURT: But you could have asked me to intervene

1 and make some preliminary determinations as to who's right or
2 wrong about that process.

3 MR. CASSELL: And that's what we tried to do with
4 this motion. We said there should be a motion for them, and we
5 styled it, not to withhold evidence. And, of course, our third
6 argument was that the civil rules apply and they should -- let
7 me make clear, we're not trying to suggest that we're afraid of
8 the civil rules. To the contrary, if the Court were to enter
9 an order in a few minutes saying the civil rules apply, simply
10 proceed under the civil rules, we would be ecstatic about that.
11 That would let us get to the bottom of this case and we would
12 be happy to move forward on an expedited basis to produce some
13 requests for admissions, maybe take a few depositions and do
14 the ordinary thing that civil rules -- the civil rules require.

15 So we're certainly not opposed to that in any way.
16 In fact, we proposed that to the government; again, only to be
17 blocked at square one, to even go down that path. So we're
18 happy to go down that path. We hope that the Court would go
19 that way.

20 But there's one -- there are a couple of other things
21 that I think above and beyond the ordinary civil rules that
22 factor in here that are highly relevant. This is not an
23 ordinary civil case where the victims and the government are
24 supposed to be adversaries, where both sides duke it out. To
25 the contrary, Congress has passed a specific provision that

1 mandates that the government must use its best efforts to
2 afford victims their rights. That best efforts clause then
3 suggests that, well, the government isn't entitled to try to
4 conceal things and withhold them. They have to undertake their
5 own affirmative search for information and provide it to us.

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

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

1 no less than the defense was entitled to that information as a
2 matter of fairness.

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

15 And, in fact, the cases that they cite even say that
16 the victims should go and seek the assistance of the government
17 when they run into situations where their rights are being
18 violated. The very first case they cite, U.S. v. Rubin, says
19 that the victims should go about conferring with the government
20 if they're trying to obtain information since, after all, it's
21 the government who is supposed to be the ally of the victims in
22 this process, not the adversaries.

23 And so for all of those reasons, the government's
24 best efforts and obligations, our right to be treated with
25 fairness, and the fact that this is a civil case and the

1 ordinary civil rules apply, for all of those reasons,
2 Your Honor, we think they are not entitled to withhold
3 information from us that they well know is very helpful to us,
4 both on the liability phase of this case and the ultimate
5 remedy phase of this case.

6 THE COURT: All right. Thank you.

7 Mr. Lee.

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

17 Your Honor, this is a case that is really kind of a
18 hybrid. It's not a criminal case in the sense that nobody is
19 being charged with a crime. Nobody is in jeopardy of going to
20 jail. But it's not completely a civil case, either. I believe
21 that the CVRA intended that most of these actions where
22 individual victims seek to have their rights enforced, they are
23 usually done as an ancillary proceeding to an extant criminal
24 proceeding.

25 In such proceedings, an individual victim would not

1 necessarily have discovery rights that one would have under the
2 Federal Rules of Civil Procedure. Not only that, not every
3 civil action comes with it rights to conduct full discovery.
4 If somebody files an agency APA action, Administrative
5 Procedures Act, seeking to get judicial review of an agency
6 action, those are record reviews and you're not entitled to
7 discovery.

8 If somebody files a habeas, in order to get discovery
9 in a habeas proceeding there must be a court order. And we
10 believe that just because this is a civil action in the sense
11 that it's not a criminal action, that they're not entitled to
12 discovery. It can only be done pursuant to an order of this
13 court.

14 THE COURT: All right. Well, do you believe I don't
15 have the discretion or do you believe or agree that regardless
16 of whether it's an ancillary action to a criminal proceeding or
17 it's a separate and independent civil proceeding, or it's some
18 hybrid, wouldn't I have discretion to order discovery if I
19 believed it was appropriate?

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

21 THE COURT: Okay.

22 MR. LEE: Even in a habeas, the court has broad
23 discretion. Your Honor, I would note for this, we believe that
24 the first issue the Court must resolve is whether or not any
25 legal rights under 3771(a)(1) through (8) accrued prior to the

1 filing of a charge in the Southern District of Florida against
2 Mr. Epstein. That can be resolved. That's a statutory
3 interpretation question. It is a legal question.

4 The only predicate fact that is necessary for the
5 Court to engage in this analysis is to have -- to know that
6 there was no charge filed against Mr. Epstein in the Southern
7 District of Florida. There's no dispute as to that. I mean,
8 for that very reason, we believe that the discovery that the
9 petitioners claim that they need is unnecessary.

10 THE COURT: Well, I agree if I agree with you, then
11 that's the end of the case. But if I don't agree with you, I
12 have to have some way of dealing with the issue of whether or
13 not the plaintiffs' rights were violated and how we're going to
14 come to a resolution of that. So I'm now in the posture of --
15 on the assumption, hypothetically, that I disagree with your
16 legal position and feel that there is an issue of fact as to
17 whether or not the rights were violated and how are we going to
18 resolve that factual issue.

19 MR. LEE: Your Honor, the Court would at that point
20 have the discretion, if there was good cause shown and the
21 Court believed it necessary to the resolution of the dispute,
22 to allow discovery.

23 THE COURT: All right. And I guess this is over and
24 above just discovery obligations. The plaintiffs are claiming
25 that you have some statutory obligation over and above a

1 discovery obligation to produce information that would be
2 what's in your possession, out of treating them fair under the
3 statute. What's your position on that?

4 MR. LEE: We respectfully disagree. They cite Brady
5 v. Maryland, which, of course, pertains to a criminal case.
6 Brady v. Maryland is based on the due process clause, because
7 if the government is seeking to deprive somebody of their life,
8 liberty or property, they have to accord them the process that
9 is due. The process that is due to a criminal defendant is
10 information that is exculpatory that is in the hands of the
11 government. This is not a criminal case.

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

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

1 their rights were violated. Thank you, Your Honor.

2 THE COURT: Thank you.

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

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

25 So we thought, great, we will move forward with that

1 process. And then in, I believe it was February of this year,
2 we then got another about face from the government: No, we've
3 changed our mind; we're not going to work with you to stipulate
4 facts. And at that point, we were then forced to file this
5 motion.

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

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

17 MR. CASSELL: Exactly.

18 THE COURT: So they're supposed to, in good faith, I
19 presume, look through their files and decide, you know, this
20 looks like something that would be helpful to the plaintiffs to
21 prove that we violated their rights, so here it is.

22 MR. CASSELL: Exactly. And let me just explain
23 why -- and notice that the government has never raised the
24 point that this is burdensome; we can't figure it out; oh,
25 gosh, there are so many files we don't know what to look at.

1 And let me explain to you why I think they are not making that
2 representation. We went to the U.S. Attorney for the Southern
3 District of Florida in December and raised a number of
4 questions about this case. At that point, the U.S. Attorney
5 for the Southern District of Florida referred the matter to
6 OPR, the Office of Professional Responsibility in Washington,
7 DC, for an investigation.

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

14 We think there is a collection of materials, sealed
15 and wrapped in a ribbon, that they could simply hand to us
16 right now that would have basically 90 percent of all the
17 relevant information in the case. We further believe that they
18 know darn well that that information is very, very helpful for
19 us in proving that there were deliberate violations of the
20 Crime Victims' Rights Act; second, that Mr. Epstein was
21 involved in orchestrating those violations; and, third, that
22 that would show that the appropriate remedy in this case is to
23 invalidate the non-prosecution agreement because it is an
24 illegal agreement. And yet they're refusing to provide that to
25 us.

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

7 Let me give you an example of one additional fact
8 that we think is highly relevant. The government prepared, as
9 we understand it, a 53-page indictment against Epstein and
10 presented that to the defense attorneys. Well, we think that
11 that is highly relevant information showing that they
12 mistreated the victims in this case. Why didn't they share
13 that with the victims? Why didn't they just share the
14 discussions about that with the victims? They were obligated
15 to do so. We think that's part of the context that the Court
16 will need.

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

1 THE COURT: I don't think -- I think Mr. Lee
2 acknowledged that if I ordered discovery that they would be
3 ordered to comply with --

4 MR. CASSELL: Right.

5 THE COURT: -- discovery requests.

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

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

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

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

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

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

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

24 THE COURT: And that's the government's side of the
25 discussion?

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

2 THE COURT: Okay.

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

12 THE COURT: Now, is this information -- is any of
13 this information, the unredacted correspondence -- I guess I
14 need to speak to Mr. Black about this. Is any of this
15 information information that you're concerned about, Mr. Black?
16 Or is this information that is not anything that you're
17 concerned about?

18 MR. BLACK: It is none of our information. It's only
19 the government's side of the communication, Your Honor. That's
20 what I understand.

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

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

1 THE COURT: All right.

2 MR. CASSELL: So I think this motion may be
3 unopposed, although the government, I think, is opposing
4 unsealing of the information because they claim some of that is
5 Rule 6(e) grand jury material.

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

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

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

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

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

24 MR. LEE: Okay. Let me address the 6(e) issue. As
25 we stated in our pleadings, Your Honor, or our opposition to

1 the motion, 6(e) is not a privilege like the attorney/client
2 privilege or deliberative process that can be waived once the
3 contents of the information that is protected is made known.
4 Somebody can be served with a grand jury subpoena and the press
5 may get ahold of it and say, ah, you're investigating so and
6 so; government, you need to confirm with us whether or not
7 you're investigating so and so.

8 Even though there is an existence of a grand jury
9 subpoena which would seem to indicate that, that doesn't
10 breach, if you will, Rule 6(e) obligations. The government is
11 still obligated to neither confirm nor deny. So just because
12 somebody has this information doesn't mean that the 6(e)
13 protections are gone and vitiated. So that's why we believe
14 that this information should not be made public.

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

17 MR. LEE: There are certain portions that we
18 redacted. We filed an actual document putting forth what we
19 believe should be redacted; what the petitioners agreed was
20 fine and where the areas of disagreement were. It was color
21 coded.

22 THE COURT: Right. So some of the material -- the
23 copies I have, I lose the color in them. I just have black.
24 Everything is black. So there's some material that you believe
25 needs to be redacted?

1 MR. LEE: Correct.

2 THE COURT: And others that the plaintiffs say should
3 be unsealed and unredacted?

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

5 THE COURT: Okay. All right.

6 MR. LEE: Thank you, Your Honor.

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

10 Who's going to present that argument? Mr. Cassell.

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

21 The Crime Victims' Rights Act makes it quite clear
22 that it wasn't designed to be so narrowly circumscribed. In
23 fact, the rights apply throughout the criminal justice process.
24 You need go no further than the plain language of the CVRA,
25 which says that there is an obligation of, quote, officers and

1 employees of the Department of Justice, and other departments
2 and agencies of the United States, engaged in -- and here is
3 the important part -- the detection, investigation or
4 prosecution of crime. And those entities are obligated to
5 afford crime victims their rights.

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

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

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

1 prosecution, is underway?

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

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

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

19 So I'll be interested to hear from Mr. Lee, when he
20 makes his presentation, exactly what point in the process do
21 rights apply? Is it the indictment? Is it the arrest? Or is
22 it some earlier point, as we suggest?

23 Now, it's interesting, too, when you look at what
24 Mr. Lee said back on July 11th, 2008, because Your Honor asked
25 the same question that I think you're asking me and the

1 government right now, are there rights that apply under the
2 Crime Victims' Rights Act before the filing an indictment? And
3 the answer that Mr. Lee gave on July 11, 2008, was, yes, there
4 are rights that apply before the indictment. Quoting here:
5 Now, there are certain of eight rights accorded in 3771(a) that
6 could come up before any charges being filed. And he goes on
7 to give the example of the right of a victim to be reasonably
8 protected, and he conceded that those rights would apply before
9 indictment.

10 I think the government, once again, is reversing a
11 position that they took earlier in this litigation because they
12 now find it convenient to do so.

13 The government has also cited remarks from Senator
14 Kyl, saying if you look at Senator Kyl's legislative history
15 you'll see that the Senate didn't want the rights to apply
16 before the indictment was filed. As you know, just a couple of
17 weeks ago we provided supplemental authority to this court,
18 which was a letter from Senator Kyl to Attorney General Eric
19 Holder sent on June the --

20 THE COURT: Well, I'm not sure I should rely on his
21 letter. I mean, I think you can rely on the full context of
22 the legislative history and the full -- the complete statement
23 that Senator Kyl made when this was being discussed, but I'm
24 not sure a letter sent years after the fact, which is one
25 person's statement of what he thinks now, I don't think

1 that's -- I wouldn't want to rely on that.

2 MR. CASSELL: In the -- if I could just take a short
3 moment then. Let me explain to you why you should rely on it.
4 The government has said Senator Kyl would want you to rule in
5 their favor in this case because he didn't want the Crime
6 Victims' Rights Act to apply pre-indictment, and now we have a
7 letter from Senator Kyl, just six weeks ago, saying, That is
8 quoting my remarks out of context. We could not have been
9 clearer when we drafted the Act, and he cited the same
10 statutory provisions that I just mentioned to you. And he
11 said, obviously we intended for the Act to apply
12 pre-indictment.

13 So at the very least, I think you have to disregard
14 the government's position that Senator Kyl has certain remarks
15 that they think ought to lead you to conclude that there's no
16 pre-indictment rights under the CVRA.

17 The other point that we would press, of course, is
18 that case law, in our view, all concludes that the Crime
19 Victims' Rights Act applies before indictment. Of course, the
20 lead Court of Appeals case on this is the Fifth Circuit case,
21 In re: Dean. The government -- you've had a chance to read the
22 government's briefing on that. Frankly, I don't think anything
23 they say is persuasive.

24 In re: Dean very specifically holds -- and I'm
25 quoting here -- quote, logically the rights that apply before

1 any prosecution is underway included the CVRA's establishment
2 of the victim's reasonable right to confer with the attorney
3 for the government. That's the Fifth Circuit's holding. That
4 is persuasive authority, we would suggest, and the government
5 has no answer for that.

6 There are a number of district court cases that reach
7 exactly the same conclusion that the Crime Victims' Rights Act
8 applies before any indictment is filed. And so for all of
9 those reasons, Your Honor, we would ask you to conclude that
10 the Crime Victims' Rights Act applies before an indictment.

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

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

22 We are asking you for a very narrow holding in this
23 case, and we have set forth in our brief five factors that we
24 would ask you to rely upon in this case that will limit your
25 holding to these particular facts and leave for another day

1 some of the more theoretical questions.

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

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

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

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

22 The fourth fact that's present here is that the
23 prosecutor sat down with defense attorneys to negotiate a
24 non-prosecution agreement. So let's take a case where the bank
25 robber runs out of the bank and he's on the front steps of the

1 bank, do the rights attach then? Well, no, that's a very
2 preliminary stage. But if they start negotiating with the bank
3 robber's attorney saying, okay, we're looking at filing federal
4 bank robbery charges, we're thinking of filing these counts, we
5 would like to discuss with you plea options, at that point in
6 the process that's when the rights attach.

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

13 And the last point is that there is at least the
14 attachment of crime victims' rights when the government is
15 prepared to execute an agreement that will abolish or
16 extinguish the rights of crime victims, and that's exactly what
17 happened here, of course. There was this non-prosecution
18 agreement that was executed that's then eviscerated any
19 possibility that Jane Doe No. 1 or Jane Doe No. 2 would have
20 their day in this federal court and see the child molester that
21 abused them brought to justice. Before that contract could be
22 signed, sealed and delivered, the government had an obligation
23 under the Crime Victims' Rights Act to confer with the victims.
24 So this is a very narrow case.

25 So if you want to ask, you know, the kind of law

1 professor's question, how far back, you know, do you go, I
2 mean, are all five of those necessary, I mean, I think that's
3 an interesting question. I would say, you really probably
4 don't need all five of those to conclude that the Crime
5 Victims' Rights Act applies. But I think at an absolute
6 minimum, when you have the combination of those five factors,
7 as you do in this case, it's quite clear that the Crime
8 Victims' Rights Act applies here.

9 THE COURT: All right. Thank you.

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

16 (Recess.)

17 THE COURT: Please be seated, everyone. All right,
18 Mr. Lee.

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

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

1 Initially, this is a statutory interpretation task
2 for the Court and, of course, the Court is guided by the words
3 of the statute, simple enough. And there are various doctrines
4 about plain meaning and the statutes say what they mean and
5 mean what they say, and things like that.

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

13 So this is a guidepost to courts interpreting the
14 CVRA. If there are two conflicting interpretations, perhaps
15 equally reasonable and plausible under the statute -- under the
16 terms of the reading of the statute, if one impairs the
17 discretion of the Attorney General and one does not, then the
18 one that does not impair the discretion of the Attorney General
19 would be the one that would be correct.

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

23 MR. LEE: Yes, Your Honor, but here is what I mean:
24 In terms of construing it to apply at a certain point, the
25 Court needs to be mindful of whether this would impair the

1 prosecutorial discretion of the Attorney General or those
2 acting under him.

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

6 MR. LEE: No. What I'm saying is this: To the
7 extent that the individual is given a right to basically
8 undermine or call into question otherwise lawful prerogatives
9 of the Attorney General in deciding what to charge somebody
10 with, when to charge somebody with this, this would constitute
11 an impairment of the prosecutorial discretion and that would be
12 a construction that would not be favored under this advice.

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

21 THE COURT: Well, but I think that we wouldn't be
22 here if your office conferred with the victims, told them what
23 you were contemplating, heard them out, and after hearing them
24 out said, thank you very much for your input; we appreciate
25 your position; we understand you'd rather we prosecute

1 Mr. Epstein federally and send him to prison for 50 years, but
2 we, exercising our discretion under (d)(6), have chosen to not
3 prosecute him. And I think we wouldn't be here. I don't see
4 how that would have been an infringement on prosecutorial
5 discretion.

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

20 THE COURT: Well, they may have filed a proceeding
21 even if they had been advised of what your intent was or what
22 your thoughts were. But I'm -- it wouldn't be the same case.
23 I don't know what they would be complaining about, maybe that
24 you didn't confer adequately enough, but I don't think they
25 would be saying, you can't enter into the non-prosecution

1 agreement because we object.

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

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

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

13 THE COURT: Why?

14 MR. LEE: Well, because the government believes that
15 these rights would only attach after a formal charge has been
16 filed. All right? The government has exercised its
17 discretion, and at that point these rights would attach. So if
18 somebody is formally charged and the government enters into
19 negotiations to resolve the matter by a plea, then the
20 individual victims who are identified can be notified,
21 consulted, given a voice, not a veto, and those individuals can
22 have their voice heard. If they're dissatisfied with what the
23 government does -- we've decided to go ahead with the plea --
24 they can voice their objections anew before the court in a Rule
25 11 plea proceeding. So that is a construction that does not

1 impair a prosecutorial discretion.

2 THE COURT: But why does it make any difference if
3 the conferring or the expression or disapproval is done before
4 indictment or after indictment? How does it impinge on your
5 discretion? I don't follow.

6 MR. LEE: Well, Your Honor, what this would involve
7 is involving the executive branch in litigation because the
8 individual victims, after being consulted -- or after not being
9 consulted -- would basically try to assert rights and basically
10 interfere with the process of returning the charge.

11 Let me give you an example, Your Honor. Let's say
12 somebody is the victim of a crime of violence and the
13 government is investigating it. It's the FBI. And the FBI has
14 decided to refer it to the U.S. Attorney's Office and the U.S.
15 Attorney's Office decides, we don't think there's sufficient
16 evidence to return an indictment in this case; we're not going
17 to accept this for prosecution.

18 Well, there's an FBI case. Under petitioners'
19 formulation, they would have rights to be consulted on the
20 decision whether or not to accept the case for prosecution.
21 And that, we believe, would be an improper interference with
22 the discretion of the United States Attorney's Office. That's
23 exactly what we're talking about, Your Honor.

24 THE COURT: But we're talking about consulting, not
25 deciding whether to or not to prosecute.

1 MR. LEE: Yes, Your Honor.

2 THE COURT: So I'm trying to understand how the fact
3 that you might -- if I accept the plaintiffs' position or
4 interpretation, you might have to consult with the victim
5 before you decide not to prosecute, how that impinges on your
6 ultimate decision to or not to prosecute?

7 MR. LEE: Well, Your Honor, we believe that the
8 proper construction of this thing is to allow the government to
9 exercise its discretion in terms of whether to charge or not to
10 charge. Once that discretion is exercised and there's a charge
11 filed, then these rights would come into play. To do
12 otherwise, to create rights prior to any charging decision
13 being made, would basically allow these individuals to
14 essentially interfere with the exercise of discretion and
15 basically hail the United States Government into court every
16 time somebody is now dissatisfied with something that is being
17 done.

18 The more orderly process is to have those rights
19 attach after the filing of a formal charge, in which case there
20 is an extant case; it is a matter before a judicial officer of
21 the United States Federal Courts; and these things can be more
22 orderly ironed out and these disputes can be aired out.

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

24 THE COURT: Hold on.

25 MR. LEE: Okay.

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

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

6 THE COURT: Or the right to be protected from the
7 accused.

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

12 THE COURT: All right. Well, if you -- if I agree
13 with your interpretation of the case, meaning an actual filed
14 case.

15 MR. LEE: Yes.

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

25 MR. LEE: Well, perhaps (a)(8) might come into play

1 because the individual could say that they weren't being
2 treated with fairness.

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

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

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

25 THE COURT: All right. Let me ask you about the

1 provision that talks about when there's no ongoing proceeding.
2 Where is that subsection?

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

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

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

19 THE COURT: But you said that the rights don't begin
20 to accrue until indictment. So how can it, you know, work both
21 ways?

22 MR. LEE: Well, there's a right to a notice of public
23 proceedings. So there is an intervening period between initial
24 arrest and initial appearance in a bond hearing. And the
25 individual, if they feared whether -- that the accused was

1 going to harm them, should have the opportunity to attend and
2 have their say in so far as whether somebody should be released
3 and the conditions upon which he or she should be released.

4 THE COURT: All right. So let's assume that someone
5 is arrested; a criminal complaint is filed; there's no
6 indictment; there's a bond hearing; the victim is not notified;
7 the accused is released on bond; attacks the victim; and the
8 victim comes in and files a complaint or a lawsuit. Do they
9 have rights?

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

12 THE COURT: They file an action asking the court to
13 conclude that their rights were violated under the Act and want
14 the court to know about it, can they do that? Do they have
15 standing to come in and file an action to make the court aware
16 of the fact that their rights were violated and you should, you
17 know, take that into account with respect to these prosecutors
18 and -- do they have standing to file a lawsuit and come into
19 court and make the court aware of that?

20 MR. LEE: If they were somebody who was entitled to
21 notice of a public proceeding, like a bond hearing, a pretrial
22 detention hearing, et cetera, and the individual had been
23 apprehended and was before the court, yes, they would have the
24 ability to do that.

25 THE COURT: So they have rights pre-indictment?

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

2 THE COURT: All right.

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

10 THE COURT: So is your position then that only with
11 respect to 3771(a)(5), that's the only subsection and only
12 right under this act that requires an indictment, but all the
13 other rights accrue, at least at the filing of a criminal
14 complaint or an arrest?

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

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

22 MR. LEE: Well, a formal charge is actually an
23 information or an indictment. A criminal complaint, however,
24 brings the accused before the court for the purposes of
25 detention and then subsequent charging pursuant to the running

1 time that you have -- that the government has before they can
2 return an indictment on the individual. A number of
3 individuals, because of how the crime was discovered, are
4 charged by complaint first, with an indictment to subsequently
5 follow. This basically covers that period of time between the
6 return of a formal indictment and the initial arrest of the
7 individual appearance, bond hearing, pretrial detention
8 hearing.

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

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

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

16 MR. LEE: Yes, they would.

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

19 MR. LEE: Yes, they would.

20 THE COURT: Does that person have the right to have
21 that bond hearing be conducted without unreasonable delay?

22 MR. LEE: Yes.

23 THE COURT: But that person doesn't have a right to
24 confer with the attorney for the government because an
25 indictment hasn't been filed yet?

1 MR. LEE: That is correct, because there is no
2 attorney for the government in the case, and we believe that
3 "in the case" is the relevant term that is referenced.

4 THE COURT: And the --

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

6 THE COURT: No, go ahead.

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

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

13 MR. LEE: It could, under the circumstances of an
14 individual being charged by a complaint. For that period of
15 time in between arrest -- the filing of the complaint, initial
16 arrest and the return of the indictment, it could apply, yes.
17 We believe 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 is
20 filed, I think in the clerk's office they give it a case
21 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 information or
25 an indictment.

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

3 MR. LEE: That is correct.

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

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

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

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

18 THE COURT: (b)(1)?

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

23 THE COURT: Yes. And the detection, investigation or
24 prosecution of the crime.

25 MR. LEE: This is (c)(1), Your Honor. Your Honor,

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

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

19 So this explains what individuals are responsible for
20 ensuring that best efforts are used to afford these rights once
21 those rights attach. But just because individuals who are
22 described as having responsibilities are in the investigative
23 process doesn't necessarily mean that in the investigative
24 process, pre-charge, that such rights attach.

25 THE COURT: So, again, you just basically go back

1 to -- or fall back on the argument that "case" means indictment
2 or information, and whatever rights accrue under these
3 subsections, those are the people that have to afford the
4 rights?

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

6 THE COURT: All right. What else did you want to
7 argue?

8 MR. LEE: Your Honor, that was -- that basically is
9 the argument. Again, we ask the Court to be mindful of the
10 admonition about the prosecutorial discretion. The question of
11 when these rights attached is extremely significant in so far
12 as when people can go into court and invoke rights which they
13 believe to exist, and to complain about things that happened
14 which involved the exercise of the broad discretion of the
15 executive branch whether to charge somebody, how to charge
16 them, who to charge, what to charge, and how to resolve the
17 charges against an individual. Thank you.

18 THE COURT: I'm --

19 MR. LEE: Yes, sir?

20 THE COURT: Let me ask you another question. Assume
21 for the sake of argument, because the motion that -- the motion
22 that the plaintiffs have filed have asked me to not only to
23 make a determination as to when their rights accrued but also
24 that -- to make a finding that the government has in fact
25 violated their rights based upon the information contained in

1 their motion. If I reject your argument and conclude that the
2 plaintiffs did have rights as victims, that that were to be
3 respected under the statute, do you agree or do you believe we
4 need to resolve on another day whether or not their rights
5 were, in fact, violated, based upon what has been presented to
6 me thus far?

7 MR. LEE: Yes, Your Honor. Your Honor, if the Court
8 finds that these rights did indeed attach prior to the filing
9 of a formal charge, we have asserted a best efforts defense, if
10 you will -- I will call it that -- that we did exert our best
11 efforts to notify individuals under these circumstances of what
12 was going on in so far as the non-prosecution agreement. That,
13 in our view, would require an evidentiary hearing and testimony
14 and documents -- factual matters to be submitted for the Court
15 to make a determination as to what occurred and whether this
16 constituted best efforts or not.

17 THE COURT: All right. Thank you.

18 MR. LEE: Thank you, Your Honor.

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

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

22 Did you have anything else you wanted to add,
23 Mr. Lee?

24 MR. LEE: No, Your Honor.

25 THE COURT: Okay. Thank you.

1 MR. CASSELL: I think Mr. Lee is correct when he says
2 this is at bottom an issue of statutory construction, and we
3 think the cardinal rule of construction you should apply here
4 is Congress passed the Crime Victims' Rights Act as a remedial
5 statute to address a particular problem, the unfair treatment
6 of crime victims throughout the criminal justice process. And
7 so the Act should be broadly construed to effectuate its
8 remedial purposes, that is, to make sure that crime victims are
9 treated fairly throughout the process.

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

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

24 But let's look at the (a)(5) right then, the right to
25 confer and whether there was a violation here. The main

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

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

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

1 that opportunity. But certainly you shouldn't worry about
2 frivolous claims being raised because those would be frivolous
3 and would be routinely rejected.

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

11 Now, he also says that, well, this would lead to
12 interference because people would object to whether we decided
13 to accept a case or not. That's the question that you were
14 raising with me earlier, how far back in the process do we go?
15 We don't have to deal with those questions in this particular
16 case. The government accepted this case for prosecution. They
17 then did what? They sent CVRA notices to our clients saying,
18 you have rights under the Crime Victims' Rights Act. Then they
19 sat down with Epstein's attorney to negotiate a very specific
20 non-prosecution agreement which would make it impossible for
21 any federal prosecutorial agency to prosecute the federal
22 crimes that were committed against Jane Doe No. 1 and Jane Doe
23 No. 2.

24 At least at that point, they had the right to say to
25 the prosecutors, you are making a mistake, and that's the right

1 that Congress gave them and that's the right that's being
2 violated here.

3 Now, how far back in the process do we go? I think
4 we got a little more specificity from the government today. We
5 hear that it turns out it's not really the indictment that
6 triggers the right. You go all the way back to a complaint.
7 But then you pushed him a little bit more, what about an
8 arrest? And if I understood Mr. Lee correctly, they agree that
9 even an arrest would be enough to trigger that. But, of
10 course, an arrest is not a formal charge. And why would we
11 magically stop the Crime Victims' Rights Act at the point of
12 arrest? The term "arrest" doesn't appear anywhere in the
13 statute. Essentially, they are trying to stake out a
14 litigating position that helps them in this case but it doesn't
15 have any grounding at all in the language of the statute. The
16 language of the statute that's relevant here is that it applies
17 to agencies that are involved in the detection and
18 investigation of crimes. The words "investigation of crimes"
19 will become completely meaningless in the statute if you agree
20 with the government's position.

21 Now, the last thing that Mr. Lee says is, well, this
22 right to confer applies only to cases, and obviously there's no
23 case here. I don't think that point is obvious at all. And,
24 in fact, I would simply use the words that the government used
25 when they communicated with Jane Doe No. 1. Here is the letter

1 that they sent to Jane Doe No. 1 on January 10th, 2008: Dear
2 Ms. Jane Doe No. 1, this case is currently under investigation.

3 They told Jane Doe No. 1 that her case was under
4 investigation, and they told her in communications like this
5 that she had rights under the Crime Victims' Rights Act. And
6 now they come into this court and ask you to find that even
7 though that's exactly what they told Jane Doe No. 1, you should
8 simply ignore what they said then and conclude that they had no
9 rights.

10 Whatever else you might say about that, I think
11 that's clearly a violation of a right to confer but it's
12 certainly a violation of their right to be treated with
13 fairness. It is a violation of their right to accurate notice
14 about what's going on in court proceedings.

15 And so how should you proceed at this point? Let me
16 offer just one possible way out procedurally of where we are
17 right now. I think the Court has plenty of information to rule
18 today that the Crime Victims' Rights Act applied to the victims
19 in this particular case and we would ask you to enter an order
20 to that effect. If you're not prepared to do that, then at
21 that point we would request full discovery in this case. Or if
22 you enter an order saying it applies pre-indictment, we would
23 also ask to move forward with full discovery. Simply to say
24 that the civil rules apply, we're prepared to move forward on
25 an expedited basis. We're prepared to move forward with

1 narrowly tailored requests on the information that we need;
2 recalling, though, that we're going to be asking for
3 information not only to prove that the victims' rights were
4 violated in this case but we are also going to be asking for
5 information that we hope will ultimately convince you that the
6 only just remedy in this case is to take this illegal agreement
7 that was reached by the government, in violation of the rights
8 of Jane Doe No. 1 and Jane Doe No. 2, and to set that agreement
9 aside.

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

21 MR. CASSELL: That's right.

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

25 MR. CASSELL: Yes, we do. I mean, the point -- the

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

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

16 We think the same analysis applies here. There is a
17 document, a non-prosecution agreement, that is void because it
18 was entered into in a procedurally illegal way. It violated
19 the rights of both Jane Doe No. 1 and Jane Doe No. 2 to have an
20 opportunity to confer with the government and to be treated
21 with fairness. But, again, we have not had a full opportunity
22 to brief that.

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

24 MR. CASSELL: But that's where we are going, and I
25 want to be clear when we get into the discovery phase we

1 think -- I mean, we think you could rule this afternoon that
2 their rights were violated. We think it's patently obvious
3 they weren't treated with fairness, patently obvious they did
4 not give a right to confer. And if you say, hey, do you really
5 need discovery to do that, we think you could rule on that
6 today.

7 You have denied our motion to accept facts. I'm
8 assuming that's without prejudice to give us the opportunity to
9 deal with that in an appropriate way.

10 THE COURT: Of course.

11 MR. CASSELL: The trickier issue in the case, or at
12 least the one we think requires some discovery, is how was that
13 illegal agreement reached? We intend to produce -- or obtain
14 information from the government which shows they deliberately
15 violated the rights of the victims and they did so with the
16 defendant, Mr. Epstein, engineering them. And for that reason,
17 we are going to ask for the agreement to be set aside.

18 THE COURT: To the extent you want to show that, and
19 assuming I agree that you're entitled to show that, you would
20 agree the government is entitled to show to the contrary and
21 that they exercised best efforts, and they should be entitled
22 to prove otherwise?

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

25 THE COURT: All right. Thank you.

1 MR. CASSELL: Thank you.

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

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

5 Your Honor, in May of this year, the Office of Legal
6 Counsel for the Department of Justice issued an opinion about
7 the very issue that the Court is grappling with, and we would
8 like to offer to the Court -- we will actually file it, but if
9 I may approach and provide a copy, I've provided a copy to
10 counsel. We believe that this is entitled to some deference in
11 so far as this is the position of the Department of Justice.
12 We're not suggesting that it's entitled to full deference under
13 Chevron versus Natural Resources Council, because this was not
14 subject to notice and comment procedures. We are going to file
15 it electronically and we wanted to provide a copy to the Court
16 now, if we may.

17 THE COURT: Any objection?

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

20 THE COURT: Sure.

21 MR. CASSELL: This is a -- you will recall just a
22 little bit ago we were discussing Senator Kyl's remarks.
23 That's why Senator Kyl sent the letter to the Attorney General
24 saying, how dare you put in this memorandum my remarks during
25 the drafting of the CVRA as suggesting that the rights don't

1 apply at the early stages of the criminal justice process. So
2 if you're going to look at this, I think in fairness you need
3 to look at Senator Kyl's rebuttal.

4 The other point that I would make is, we believe that
5 this document was engineered precisely to help the government
6 win, among other things, this particular case. And so we don't
7 believe that it's entitled to the same kind of deference as you
8 would ordinarily give to agency decisions that are decided
9 without regard to pending litigation. Perhaps Mr. Lee could
10 acknowledge the fact, which I think is clear, that the Justice
11 Department knew it had this very serious matter pending in this
12 court, which is why it asked for this opinion. And so this
13 opinion is, I think, simply like an extra brief coming in on
14 their side.

15 THE COURT: And you didn't ask Senator Kyl to write
16 the letter? You didn't ask Senator Kyl to write the letter?

17 MR. CASSELL: We keep Senator Kyl apprised of
18 significant developments.

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

24 THE COURT: Okay. Thank you.

25 MR. LEE: Thank you.

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

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

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

7 (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
MELINDA COLCHICO



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