

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

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

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____ /

**JANE DOE #1 AND JANE DOE #2'S REPLY TO GOVERNMENT'S RESPONSE TO
THEIR MOTION TO HAVE THEIR FACTS ACCEPTED BECAUSE OF THE
GOVERNMENT'S FAILURE TO CONTEST ANY OF THE FACTS**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to reply to the Government's Response (DE #58) to their Motion to Have Their Facts Accepted Because of the Government's Failure to Contest Any of the Facts (DE #49). The victims' proffered facts should all be accepted by the Court. The Government claims that it can prevail regardless of what the true facts are, so the Court should take the Government at its word and evaluate the case on the facts presented (without contradiction) by the Government. Moreover, the Government has refused to confer in good faith with the victims about the facts, further indicating the accuracy of what the victims propose. Finally, in any event, the central facts in this case are simply not disputed – i.e., the Government does not contest that it deliberately concealed from the victims the existence of a non-prosecution agreement with Epstein. Accordingly, the Court should proceed on at least that basis.

FACTUAL BACKGROUND

While the Government begins its response with a lengthy “background” section, it does not acknowledge that for 30 months the victims have been trying to narrow the range of disputes in this case and reach stipulated undisputed facts. In an effort to deflect attention from this main point, the Government tries to create the impression that the victims’ counsel previously agreed that no additional facts were required to resolve their petition. But the quotation from victims’ counsel is wrenched out of context. As explained in the victims’ motion, the Government first agreed to review facts, then reversed course and said no facts were needed. On August 14, 2008, a hearing was held, during which a stipulated set of facts was discussed:

THE COURT: So if I can hear from Mr. Edwards or Mr. Cassell first what the Plaintiffs' position [is] as far as where we stand on the record in terms of whether I need additional facts, evidence, or *there's going to be a stipulation submitted to me upon which I can rely.*

MR. EDWARDS: Sure.

Your Honor, this is Brad Edwards. *I believe that you do have a sufficient record, in that I don't think that -- I think that we're in agreement that additional evidence does not need to be taken in the case for Your Honor to make a ruling.* We have actually met with the U.S. Attorney, and we’ve had meaningful discussions in an attempt to resolve our issues. I think the only issue, we can probably agree to this right now, is that the victims are unable at this point in time to go any further with requesting a remedy from the Court without the full and complete plea agreement being produced to us from the U.S. Government, and the U.S. Government's hands are tied in that there's a confidentiality agreement within that plea agreement that prohibits them from turning that over.

So at this point in time, we would be asking Your Honor to enter an order compelling them to turn over that. So at this point in time, we would be asking Your Honor to enter an order compelling them to turn over that agreement, and *at that point in time I think we can meet again and probably resolve our disputes amongst ourselves.*

August 14, 2008, Tr. at 3-4 (emphases added). As this full passage makes clear, victims’ counsel believed that no more evidence would be needed, because they envisioned a process under which

the non-prosecution agreement (NPA) would be produced and then the parties would negotiate in good faith to submit a stipulated set of facts to the Court. Unfortunately, after victims' counsel received the NPA, the Government refused to provide any further information about how the NPA had been concealed from the victims. That forced the victims to learn the facts surrounding their case in other ways.

In the fall of 2010, victims' counsel renewed their efforts to reach a stipulated set of facts in this case, as the Court and the parties had plainly envisioned in the August 14, 2008, hearing. Indeed, last October victims counsel went so far as to provide to the U.S. Attorney's Office a very detailed set of proposed facts essentially tracking those in the "summary judgment" motion. At first the Government promised that it would "agree[] that a factual assertion is correct if we agree that is what occurred" (doc. #41 at 2). But then, after some brief initial discussions,¹ the Government did not provide any more information about proposed facts for months. Then, when the victims said that they were preparing to file their motion with the Court, the Government abruptly terminated any further discussions on the facts. In sum, it should be clear that the Government has refused to negotiate with victims' counsel to arrive at a stipulated set of facts and has not contested the material facts that the victims believe to be accurate.

DISCUSSION

¹ During one telephone conference call in October 2010, attorneys for the U.S. Attorney's Office mentioned that they believed that Epstein lived in Palm Beach, rather than West Palm Beach. At the conclusion of that conference call, victims counsel understood that Government counsel would be providing a comprehensive response to all of the victims' proposed facts. But then, after several months, on March 15, 2011, the Government abruptly said that it would not be discussing the facts any more. Accordingly, victims' counsel simply filed their proposed facts. Victims' counsel, of course, remains happy to discuss the correct mailing address of Epstein with the Government and did not "ignore" this issue, as claimed by the Government (Resp. at 3 n.3).

I. BECAUSE THE GOVERNMENT TAKES THE POSITION THAT THE FACTS ARE IRRLEVANT, THE COURT SHOULD PROCEED ON THE BASIS OF THE VICTIMS' FACTS.

The simplest way for the Court to proceed is to simply take the victims' facts as undisputed. After all, it is the Government which has now – twice – entered into discussions about the facts, only to later reverse course and claim discussion of the facts was not needed. Since the Government believes it can win this case under any set of facts, then they should be required to proceed on the basis of the facts that the victims have offered.

In any event, the Court need not embark on any kind of complicated fact-finding inquiry to rule in the victims' favor. Reading through all of the Government's pleadings, it is clear that the Government is not contesting that it entered into a non-prosecution agreement with Epstein barring his prosecution for various crimes (including, for example, all crimes committed against Jane Doe #1). Nor is the Government contesting that it concealed the existence of the NPA from the victims and their legal counsel for eight months. The Court can easily find – and should find – that the Government deliberately concealed the NPA from the victims and proceed to consider whether this affirmative concealment was consistent with the Crime Victims Rights Act.²

II. THE GOVERNMENT HAS VIOLATED ITS OBLIGATIONS TO DISCUSS THE FACTS WITH THE VICTMS.

The Court should accept the victims' facts for the additional reason that the Government has violated its obligation to confer with the victims about which facts are undisputed. At the conclusion of the July 11, 2008, hearing, the Court directed that the parties were to confer on additional facts. See Victims' Motion to Have Their Facts Accepted at 2 (recounting hearing).

² The victims explain why concealing the agreement violated the CVRA in their pleadings on their summary judgment motion.

And then, at the August 14, 2008, hearing, the Court gave the victims' counsel access to the NPA with the understanding that negotiations would continue with an eye to reaching undisputed facts. Since then, the Government has simply not negotiated in good faith, as the Court directed at the end of the July 11, 2008 hearing.

In addition to the Court's direction, Local Rule 88.10(O) contains a broad provision, containing the commonsense directive that "[t]he parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth or existence of which is not contested and the early resolution of which will expedite the trial." The Government claims that this provision is not in play because there is no pending criminal proceeding.³ But if this case is not covered by the rules applicable to *criminal* cases, then it should be covered by the rules applicable to *civil* cases. Indeed, when it seemed convenient for it to do so, the Government previously took the position that this case was "civil" litigation. See Doc. #41 at 3. But, not surprisingly, just as the criminal rules contain provisions for narrowing disputes, the civil rules do so as well. Notably, Fed. R. Civ. P. 26(a)(1), requires both sides in civil litigation to make "initial disclosures" of various specified information so that the case can proceed rapidly. The victims have made the initial disclosures required by Civil Rule 26(a)(1), but the U.S. Attorney's Office has refused to do so. Thus, the Government has taken a "heads we win, tails you lose" approach to reaching agreement on the facts: The victims cannot use the provisions in the criminal rules for narrowing

³ The Government cites *In re Amy Unknown*, __ F.3d __, 2011 WL 988882 at *2 (5th Cir. Mar. 22, 2011), for the proposition that crime victims are not "parties" to the criminal case. But as *In re Amy* clearly holds, crime victims can have protected rights within a criminal case and can assert those rights in the case. Thus, in that case, a crime victim – Amy – was allowed to enforce her "right" to "restitution" provided in the CVRA. 18 U.S.C. § 3771(a)(6). Of course, in this case, two crime victims are likewise seeking to enforce their rights provided in the CVRA.

factual disagreements because this case is not a criminal case; but the victims cannot use the provisions in the civil rules to narrow disputes, because the case relates to a criminal non-prosecution agreement.

The Court should not allow such sophistry. This case is either a civil case or a criminal case, and either way the Government has an obligation to try and narrow the disputed factual questions. The Government has failed to do so, and the Court should accordingly accept the facts proffered by the victims.

III. ALL OF THE VICTIMS' FACTS ARE DEEMED ADMITTED BY VIRTUE OF LOCAL RULE 7.5(D).

Not only has the Government failed to discharge its obligations to narrow the range of disputes, but it has also failed to controvert *any* of the victims' proposed material facts presented in their summary judgment motion as directed by the local rules. Accordingly, by operation of the local rules, all the victims' facts are deemed admitted.

The Court's local rules make quite clear the well-understood procedure on summary judgment motions. Initially, the proposed facts of the moving party must "[b]e supported by specific references to pleadings . . . and affidavits on file with the Court" Local Rule 7.5(C)(2). The victims' summary judgment motion carefully and precisely complied with the local rule – each and every fact was supported by evidence.

Because the victims properly asserted proposed material facts, the local rules then required the Government to follow the same "paragraph numbering scheme used by the movant," Local Rule 7.5(C)(3), and to support opposing facts with record evidence, Local Rule 7.5(C) ("statement of material facts submitted *either* in support of or *in opposition to* a motion for

summary judgment shall . . . [b]e supported by specific references to pleadings . . . and affidavits on file with the Court.” (emphases added)). The Government, however, has simply not complied with this requirement for the great bulk of the victims’ facts. Therefore, they are all deemed admitted by operation of the local rules: “All material facts set forth in the movant’s statement filed and supported as required by Local Rule 7.5.C will be deemed admitted unless controverted by the opposing party’s statement, provided that the Court finds that the movant’s statement is supported by evidence in the record.”

The Government has briefly recounted a few facts in opposition to a small sliver of the victims’ proposed facts. *See Gov’t Resp. to Victims’ Motion to Have Facts Accepted* at 11-13. But none of these facts are supported by any evidence at all. The Government should have at least filed an affidavit in support of these proposed facts. Its reluctance to do so suggests that it is not confident it can really prove its assertions. In any event, the Government’s failure to properly support its proposed facts as required by the local rules means that the Court should not accept any of the Government’s assertions.

IV. RULE 6(E) AND THE CONSTITUTION DO NOT PREVENT THE GOVERNMENT FROM DISCUSSING THE FACTS IN THIS CASE.

Perhaps recognizing that its failure to discuss the facts with the victims is starkly at odds with conventional lawyering, the Government finally tries to claim that it is somehow forbidden from doing so by Rule 6(e) of the Federal Rules of Criminal Procedure and even the United States Constitution. These arguments are frivolous.

With regard to Rule 6(e), the rule creates secrecy only for grand jury proceedings. The Government does not explain which parts of the victims’ summary judgment motion -- and

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

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

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

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

involves, obviously enough, communications that the U.S. Attorney's Office made to persons who are not entitled to receive protected grand jury materials -- namely, criminal defense attorneys representing Epstein. If it violates grand jury secrecy for Jane Doe #1 and Jane Doe #2 to make reference to these matters in their briefs because these matters were protected "grand jury matters" within the meaning of Rule 6(e), then it likewise violated grand jury secrecy for government attorneys to make such disclosures to (for example) Jay Lefkowitz. Disclosures of confidential grand jury matters can only be made upon court order. See Fed. R. Crim. P. 6(e)(3)(E). Everything the victims are disclosing in their pleadings has already been disclosed by attorneys in the U.S. Attorney's Office to persons not authorized to receive confidential grand jury matters (namely Epstein's defense attorneys). It seems obvious that these government attorneys did not violate Rule 6(e) by making such disclosures; yet the Government is arguing that it would violate Rule 6(e) for the victims to do exactly the same thing.⁴

Nor does the Constitution somehow prevent the Government from negotiating in good faith regarding the facts of the case. The Government cites *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981), and follow-on cases for the proposition that it violates the Constitution for the Government to accuse an innocent person of committing a crime for no good reason when he cannot respond. But *In re Smith* is easily distinguishable from this one for five reasons -- as explained at greater length in the victims' Reply to the Government's Response to Use Correspondence to Prove CVRA Violations at pp. 5-7. The victims specifically incorporate

⁴ Because of this inconsistency between what government lawyers have already disclosed and what the Government is now arguing that the victims can disclose, on April 13, 2011 the victims' counsel sent an e-mail to the Government respectfully asking them to either explain the inconsistency or withdraw this part of their argument. The Government has not responded to this e-mail.

those five arguments by reference here. First, unlike *In re Smith*, Jeffrey Epstein has not appeared to assert his own claims. The Government lacks standing to assert his claims for him. Second, only a small fraction of the proposed facts involve allegations that Epstein committed a crime (as opposed to the Government violating victims' rights). Third, Epstein has not alleged that he is in fact innocent of sexually abusing the victims. Fourth, Epstein has a forum in which he can assert claims of innocence if he would like (namely this lawsuit). Fifth, *In re Smith* involved a situation where it was not "necessary, material, or relevant," to discuss an innocent person's involvement in a crime, in stark contrast to the situation here where discussion of Epstein's criminal conduct is obviously central to this case. Accordingly, there is no constitutional barrier to the Government responding to the victims' facts.

IV. THE CENTRAL FACTS DEMONSTRATING THAT THE GOVERNMENT DELIBERATELY CONCEALED THE NON-PROSECUTION AGREEMENT ARE UNDISPUTED.

Finally, it is worth noting that the Government has not specifically rebutted the central allegations made by the victims. For example, Proposed Fact #18 alleges that the Government deliberately concealed the non-prosecution agreement from the victims' for many months. Nothing in this paragraph is covered by grand jury secrecy rules or constitutional due process limitations. The Court can draw the obvious conclusion that the reason that Government is avoiding discussing the facts is that it fully realizes that acknowledging this fact will lead swiftly to a finding that it failed to discharge its duties under the CVRA. The Government should not be permitted to hide what it has done by failing to create a record in the case.

CONCLUSION

The Court should accept all the facts proffered by the victims.

DATED: May 2, 2011

Respectfully Submitted,

s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

The foregoing document was served on May 2, 2011, on the following using the Court's

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