

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

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to oppose the motion of attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz (hereinafter referred to as "defense attorneys") to intervene in this case under Fed. R. Civ. P. 24(a) (DE #56).

The motion to intervene should be denied for three separate reasons. First, the defense attorneys have not shown that they have an "interest" in the "transaction" at issue in this case, as required by Rule 24(a). This case involves crime victims' efforts to enforce their rights under the Crime Victims Rights Act – an issue of no concern to the defense attorneys.

Second, the defense attorneys have no "confidential" material is at issue in this case. All of the correspondence involved has already been disclosed to the government – and to the victims.

Third, the work product issues the defense attorneys seek to present to this Court were decided long ago. Their effort to relitigate these issues is simply untimely. The defense attorneys' motion to intervene should accordingly be denied.

I. THE DEFENSE ATTORNEYS LACK ANY INTEREST IN THE “PROPERTY OR TRANSACTION” THAT IS THE SUBJECT OF THE CRIME VICTIMS RIGHTS ACT ENFORCEMENT ACTION.

The defense attorneys cite Fed. R. Civ. P. 24(a) as their basis for intervention. Mot. to Intervene at 3.¹ That rule provides for intervention as a matter of right where the party seeking to intervene can establish that “the party has an *interest* relating to the *property or transaction* which is the subject of the action.” See *Davis v. Butts*, 290 F.3d 1297, 1300 (11th Cir. 2002) (emphases added). There is no “property” at issue in this case. And the only “transaction” that is at issue is the Government’s failure to afford the victims’ their rights under the CVRA. The defense attorneys have no interest in that “transaction” – it concerns only the crime victims, the Government, and Jeffrey Epstein. Simply put, Roy Black et al. have no recognized “interest” in whether or not the Court finds that the Government failed (for example) to confer with Jane Doe #1 and Jane Doe #2 about their rights as sexual assault victims.

The controlling Eleventh Circuit case law on intervention (not cited by the defense attorneys) requires that a putative intervenor be the equivalent of a real party in interest: “In determining sufficiency of interest [under Rule 24(a)(2)], this circuit requires that the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. This interest has also been described as a direct, substantial, legally protectable interest in the proceedings.” *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996); accord *Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308 (11th Cir. 2005). The

¹ The defense attorneys have not claimed that they should be permitted to intervene under Rule 24(b) dealing with permissive intervention. Indeed, they have not even cited that rule. Accordingly, the victims have not discussed permissive intervention.

defense attorneys have no “direct, substantial, and legally protected interest” in the enforcement of the Crime Victims Rights Act.

The defense attorneys attempt to manufacture an interest by claiming that they have *confidential* “work product” as issue. Mot. to Intervene at 3-4. This argument is rebutted below, as the materials in question are simply not confidential. But in any event, Rule 24(a) requires that a proposed intervenor must have an interest in the “*transaction which is the subject of action.*” Fed. R. 24(a)(2) (emphasis added). The defense attorneys cannot bootstrap their way into this CVRA case by asserting confidentiality, and then arguing that this assertion of confidentiality permits them to intervene as of right in the law suit. An intervenor must show that it “has an interest in the subject matter *of the suit.*” *Georgia v. United States Army Corp of Eng’rs*, 302 F.3d 1242, 1250 (11th Cir. 2002) (emphasis added). The defense attorneys have no such interest here. And the cases that they cite are all readily distinguishable, as they involved lawsuits that were themselves about confidential materials – not (as in this case) a lawsuit about an entirely different transaction. *See, e.g., In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001) (grand jury subpoena issued to a corporation, seeking records of its subsidiary; subsidiary’s former attorney allowed to intervene to challenge that subpoena issued in that case); *In re Grand Jury Investigation*, 445 F.3d 266, 269 (3rd Cir. 2006) (grand jury subpoena issued directly to attorney in a case; attorney allowed to litigate scope of that subpoena in that case).

The defense attorneys also include in their motion briefing on the subject of whether the victims can obtain a court order setting aside the non-prosecution agreement. This transparent effort to smuggle into the briefing on a motion to intervene some briefing on the ultimate remedy in this case is improper. While the victims will respond to these arguments in due course, for

present purposes it is obvious that whatever happens to the non-prosecution agreement barring the prosecution of Jeffrey Epstein cannot affect the defense attorneys' interests. The victims' challenge to the legality of the non-prosecution agreement therefore cannot create a sufficient interest for *the defense attorneys* to intervene. Only Epstein has an interest in the validity of the non-prosecution agreement, and he has deliberately chosen not to intervene in this case.²

II. THE DEFENSE ATTORNEYS HAVE NO *CONFIDENTIAL* MATERIALS AT ISSUE IN THIS CASE.

The defense attorneys lack an interest in this case for a second reason: there are no confidential materials of theirs at stake here. The defense attorneys argue that there are “confidential” work product materials involved. But, by definition, anything that the defense attorneys have seen fit to disclose in correspondence to the government is no longer confidential – and therefore no longer protected by the work-product doctrine. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2005) (“any work product objection was waived by [party] via production” of the documents in question). Because no confidential

² The defense attorneys also report that their client, Jeffrey Epstein, “does not seek to intervene at this time because the issue of whether the Crime Victims’ Right Act even applies in this case is a matter between the government and Jane Doe 1 and Jane Doe 2” Mot. at 5. By conceding this point on behalf of Jeffrey Epstein, the defense attorneys have conceded that Epstein knows that he has an opportunity to challenge all factual findings that the Court may make regarding the circumstances surrounding the concealment of the non-prosecution agreement from the victims, but is simply declining to exercise that opportunity. The defense attorneys also state that “[t]o the extent the Court were to consider invalidating the Non-Prosecution Agreement as a remedy, Jeffrey Epstein reserves the right to intervene at that time.” *Id.* The victims disagree that Epstein can simply stand on the sidelines now and jump into the fray later. They will accordingly oppose any later – untimely – effort on his part to intervene in this suit. *See, e.g.,* Fed. R. Civ. P. 24(a) (requiring “timely” motion to intervene); *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999) (district court properly acted within its discretion in denying motion to intervene when the case had progressed substantially with substantive and procedural issues settled by the time putative intervener sought intervention).

materials are at issue in correspondence the defense attorneys voluntarily sent to the Government, the attorneys lack any personal interest in this case and their motion to intervene should be denied.

The defense attorneys also appear to briefly claim that some of the correspondence involves grand jury material protected by Fed. R. Crim. P. 6(e). They do not cite any particular correspondence to prove their assertion – much less how they became familiar with these purportedly secret grand jury matters³ -- and the motion should be summarily denied for their failure to provide proof the rule even applies. In any event, it is obvious that grand jury secrecy only extends to matters that occurred in secret before the grand jury. *See, e.g., 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.”). Nothing in the correspondence refers to events “inside the grand jury room” and therefore grand jury secrecy rules are not in place.

Finally, even if the defense attorneys could somehow prove that somewhere in the correspondence is something mentioning some secret grand jury matter, *the defense attorneys* would suffer no harm from release of the materials. Essentially what the defense attorneys are doing is appearing as Jeffrey Epstein’s “next friend” to litigate issues on his behalf. But “a ‘next friend’ must provide an adequate explanation -- such as inaccessibility, mental incompetence, or

³ The victims do not believe that anything in the correspondence is covered by the grand jury secrecy provided in Fed. R. Crim. P. 6(e). If, however, the Court were to conclude that the correspondence is somehow covered by grand jury secrecy requirements, then it would appear that either the prosecutors improperly disclosed it to the defense attorneys or the defense attorneys improperly obtained that information. Under the terms of Rule 6(e), disclosure of grand jury material to a defendant can only be upon court order after indictment. *See* Fed. R. Crim. P. 6(e)(3)(E)(ii). So far as the victims are aware, no such court order exists here.

other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action.” *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (citations omitted) (addressing an individual's “next friend” status in the context of an appeal); see *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir.1992) (applying *Whitmore*). Harm from the release of the materials (if any) could be only to Jeffrey Epstein. He is the real party in interest – but he has made the tactical decision not to intervene in this case. See Mot. to Intervene at 5. Accordingly, his interests are not at stake, and defense attorneys have no right to intervene to object to alleged release of grand jury materials concerning him.

III. THE DEFENSE ATTORNEYS’ EFFORT TO RELITIGATE WORK PRODUCT ISSUES IS TOO LATE, AS THIS COURT HAS ALREADY RULE ON THE QUESTION.

A final, independent reason for rejecting the defense attorney’s motion to intervene is that they propose to relitigate issues that this Court has already decided. As the Court is well aware, not only has all the information in the correspondence been disclosed to the Government, it has also been disclosed to the victims. The issue of whether the correspondence was somehow protected was thoroughly litigated by the defense attorneys’ client (Jeffrey Epstein) more than a year ago. After this Court rejected Epstein’s arguments against disclosure, see, e.g., *Jane Doe v. Epstein*, doc. #462, Case No. 9:08-CV-80119-KAM (Feb. 4, 2010), Epstein turned the materials over to the victims. The defense attorneys now propose to relitigate these very same issues. Their effort to do so is obviously untimely and should therefore be rejected on that basis alone. See Fed. R. Civ. P. 24(a) (requiring “timely” motion to intervene).

CONCLUSION

For all the foregoing reasons, the Court should deny the defense attorneys' motion to intervene in this Crime Victims' Rights Act case.⁴

DATED: May 2, 2011

Respectfully Submitted,

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⁴ The defense attorneys' also propose to file a motion for a protective order if their motion to intervene is granted. The victims will file a timely response to that particular motion if the Court grants leave to file the motion.

CERTIFICATE OF SERVICE

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

CM/ECF system:

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