

**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 SUPPLEMENTAL AUTHORITY IN SUPPORT OF
MOTION FOR COURT TO DENY THE GOVERNMENT'S MOTION TO DISMISS
BASED ON EXISTING PLEADINGS OR, AT A MINIMUM, ALLOW LEAVE TO FILE
A SUR-REPLY**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to file this supplemental authority in support of their Motion for the Court to Deny the Government's Motion to Dismiss Based on the Existing Pleadings or, at a Minimum, Allow Leave to File a Sur-Reply. As the Court is aware, the victims argued in that motion that their existing pleadings provide ample grounds for denying the Government's motion to dismiss, as the Government has not proven that this Court stands powerless to craft a remedy for deliberate violations of the CVRA. The motion further explained, however, that if the Court would like further information on the new issues and new legal authorities the Government advances in its 35-page "reply" memorandum, the Court should provide the victims with a fair opportunity to file a sur-reply. The victims now file supplemental authorities in support of these arguments.

BACKGROUND

As the Court knows, on November 7, 2011 – more than three years after this case began¹ -- the Government filed a sealed motion to dismiss, alleging essentially that the victims lack standing to pursue this case and therefore that the Court somehow does not possess “jurisdiction” over the matter. For example, the Government argued in its 13-page pleading that the Constitution does not allow this Court to set aside even an illegal plea agreement. Mot. to Dismiss at 3. Indeed, the Government even argued that the Court could not provide any remedy to the victims whatsoever. *Id.*

On December 5, 2011, the victims responded with a 25-page pleading addressing the Government’s arguments.² The victims provided numerous remedies that they were seeking which were within the court’s power in this case, including an open-ended request for any remedy that might be just and proper. Victims’ Resp. to Government’s Sealed Mot. to Dismiss (DE #127) at 14-15 (listing 19 separate remedies that are possible in this case).³ The victims also explained that they had already filed extensive case law supporting one particular remedy -- the remedy that illegal plea agreements were unenforceable and could be set aside. *Id.* at 8-9 (collecting cases). The victims also observed that the Government appeared to be deliberately refusing to respond to these cases and raised a concern that they were about to be “sandbagged”:

¹ And, apparently not coincidentally, the same day that the Government was obligated to begin producing discovery to the victims that was ordered by this Court.

² The victims also filed a brief sealed response touching on the sealed aspects of their requests for relief.

³ Additional remedies are listed in the victims’ parallel, sealed pleading responding to the Government’s motion to dismiss.

As the victims have previously explained, however, ample precedent supports the power of this Court to set aside the agreement if it was arrived at illegally. *See* Victim's Motion for Finding of Violation of Rights (DE #48) at 37-39 (collecting case law on setting aside illegal plea agreements). The Government studiously ignores these arguments in its newly-filed motion to dismiss. Should the Government attempt to "sandbag" the victims by raising new arguments for the first time in its reply brief, the victims would then respectfully seek leave to file a sur-reply to these new arguments.

Victims' Resp. to Government's Sealed Mot. to Dismiss (DE #127) at 8 & n.1.

Sure enough, the sandbagging the victims feared came to pass. After three extensions (all of which the victims consented to), seven weeks later on January 26, 2012 the Government filed a 35-page "reply" memorandum. Many of the arguments advanced in the memorandum did not in fact reply to anything that the victims had said in their response, but were instead entirely new, affirmative arguments by the Government. For example, the Government argued – for the first time – that "actions that Petitioners have taken since learning of the Non-Prosecution Agreement legally preclude them for seeking rescission of the Non-Prosecution Agreement." Gov't Reply in Support of Mot. to Dismiss for Lack of Subject Matter Jurisdiction at 9-12.⁴ In addition, the reply contained eleven pages of detailed discussion of the case law surrounding setting aside plea agreements – including the cases that the victims noted were being studiously ignored in the Government's opening pleading. *See* Gov't Reply in Support of Mot. to Dismiss for Lack of Subject Matter Jurisdiction at 4-14. The "reply" pleading also raised a host of new issues and

⁴ Of course, this is not a "jurisdictional" argument and thus has nothing to do with the other alleged "jurisdictional" arguments raised in the Government's initial pleading. And, of course, this argument is a factual argument, for which the Government did not provide any proper factual record – much less give the victims an opportunity to provide their own facts on the question.

new arguments that the victims had not seen before in the three-and-a-half years that this case has been litigated.

The victims then filed under seal a Motion for Court to Deny the Motion to Dismiss Based on Existing Pleadings or, at a Minimum, Allow Leave to File a Sur-Reply. That motion explained that the Government was raising frivolous new arguments in support of its motion to dismiss. The victims asked that the Government's motion to dismiss be summarily denied or, in the alternative, that they be allowed to file a reply brief. The victims also asked that the time for filing any sur-reply not begin to run until the Court had granted the victims' motion to unseal the Government's pleadings, so that they could consult with other experts on victims' rights regarding the pleadings. This victims' motion has now been pending for more than a year.

Also relevant is the fact that on December 6, 2012, the victims filed a Motion for Prompt Ruling Denying the Government's Motion to Stay (DE #179). On March 14, 2013, the victims filed a Motion to Compel Production of Court-Ordered Discovery and for a Prompt Ruling on the Motion (DE #183). The Government did not respond to this later motion, and thus it continues to stand in an unopposed posture. In addition to ignoring the victims' motion to compel, more generally the Government has also refused to comply with Court-ordered discovery for more than 18 months, even though its motion for a stay of discovery obligations has never been granted.

On March 29, 2013, the Court entered an order *granting* both of the victims' motions – i.e., DE #179 and DE #183 -- “to the extent the Court hopes and intends to resolve these matters in the relatively near future.” DE #184.

DISCUSSION

For all the reasons that the victims have previously explained, the Court should summarily deny the Government's frivolous and belatedly-raised argument that this Court somehow "lacks jurisdiction" over a case that has been before it for nearly five years. As the Court is aware, the victims have raised serious, supported, and substantial arguments that the Government and a convicted sex offender agreed to a secret non-prosecution agreement and then contrived to keep the victims from learning about it – all in violation of the CVRA. If the Court simply denies the Government's motion to dismiss, then the case can move forward with discovery and a factual record properly developed and available to the public in this case.⁵ Likewise, for all the reasons the victims have previously explained, in the alternative, the Court should deny the Government's motion to dismiss based on the fact that the bulk of the arguments for dismissal were raised by the Government for the first time in its reply brief.

In addition to the authorities that the victims previously filed on this point, the victims now proffer supplemental authorities supporting their position.

The Court should reject all of the new arguments raised by the Government in its reply memorandum. This Court has recently explained the proper approach for this Court to take with arguments raised for the first time in a reply memorandum is to "reject[] those arguments out of

⁵ The victims would also note that they long ago filed a motion explaining why the Government refusal to provide *any* discovery to them – including information that is highly relevant to their motions – violates its obligations under the CVRA, including the Government's obligation to treat the victim with fairness. Doc. #50. The victims also argued that the Government has "*Brady*" obligations to crime victims not less than criminal defendants that apply regardless of any discovery obligations. *Id.* This Court has reserved ruling on this motion. Doc. #99 at 11. By simply denying the Government's motion to dismiss, the Court could continue to reserve ruling on this motion.

hand.” *Guest v. Carnival Corp.*, ---F.Supp.2d---, ---, 2012 WL 6879069 at *6 (S.D. Fla. Nov. 7, 2012) (opinion of Torres, M.J.) (citing *Fromm–Vane v. Lawnwood Med. Ctr., Inc.*, 995 F.Supp. 1471, 1475 (S.D.Fla.1997)). Supplemental authority from this Court in the last few months confirms that “[j]udges in this district have repeatedly rejected attempts by parties to raise new arguments in reply memoranda. See, e.g., *Flamenbaum v. Orient Lines, Inc.*, No. 03–22549–Civ, 2004 WL 1773207, at *14 (S.D.Fla. July 20, 2004); *Plante v. USF & G Speciality Ins. Co.*, No. 03–23517–Civ, 2004 WL 741382, at *5 n. 3 (S.D. Fla. 2004); *Martinez v. Weyerhaeuser Mortgage Co.*, 959 F.Supp. 1511, 1515–16 (S.D.Fla.1996).” *Felicia v. Celebrity Cruises, Inc.*, 2012 WL 6869829 at *2 (S.D. Fla. Nov. 30, 2012) (opinion of Snow, M.J.). Quite recent authority from the Eleventh Circuit also confirms that a party who fails to address an issue in an opening brief has “abandoned” it. *Topping v. U.S. Dept. of Education*, 2013 WL 656786 at *2 (11th Cir. Feb. 22, 2013) (citing *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir.2008)).

As the Court is aware, this case presents important issues about whether crime victims whose CVRA rights have been deliberately violated will be able to obtain an effective remedy. The straightforward way for the Court to proceed is to deny the Government’s motion to dismiss and allow the victims limited discovery to develop the fact surrounding this case. These supplemental authorities support that conclusion.

CONCLUSION

In light of these supplemental authorities, the Court should simply deny the Government’s pending motion to dismiss.

DATED: June 12, 2013

Respectfully Submitted,

s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

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CM/ECF system:

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