

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.

RESPONDENT'S REPLY TO PETITIONERS' RESPONSE TO GOVERNMENT'S
MOTION FOR LEAVE TO FILE RELEVANCE OBJECTIONS TO PETITIONERS'
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Respondent, by and through its undersigned counsel, files its Reply to Petitioners' Response to Government's Motion for Leave to File Relevance Objections to Petitioners' First Request for Production of Documents, and states:

I. A CATEGORICAL RELEVANCE OBJECTION TO SEVERAL OF
PETITIONERS' REQUESTS FOR PRODUCTION IS PERMITTED

Petitioners argue that the government may not raise a relevance objection to their production requests since this case is in the discovery phase. D.E. 266 at 2-3. They are incorrect since the relevance objections raised to Request for Production Nos. 1, 10, 16, 18, 19, and 25 are appropriate because petitioners seek categories of documents that fall outside the permitted scope of discovery in Fed.R.Civ.P. 26(b)(1). The scope of discovery permitted in Rule 26(b)(1) is broad, however, "[t]here is no presumption in the Federal Rules of Civil Procedure that a discovery request is relevant." Presbyterian Manors, Inc. v. Simplexgrinnell, L.P., 2010 WL 3880027 at *7 (D.Kan. Sep. 10, 2010)(footnote omitted). Further, discovery should ordinarily be allowed "unless it is clear that the information sought can have no possible

bearing on a claim or defense of a party.” Id. (internal quotation marks and footnote omitted).

A party should not be required to expend time and expense to collect documents which it believes have no possible bearing on a claim or defense of a party, nor should it be required to assert an objection as to each separate document. If an entire class of documents sought by a party is not relevant to any party’s claim or defense, the party from whom the production is sought should not be required to state the same objection for each document, as petitioners contend. D.E. 266 at 3-4.

Petitioners use as an example Request for Production No. 10, which seeks documents supporting their contention that the FBI had been led to believe that their investigation of Epstein was going to produce a federal criminal prosecution, and that the FBI was misled by the U.S. Attorney’s Office about the status of the case. Petitioners’ main contention is that their right to confer with the attorney for the Government in the case, 18 U.S.C. § 3771(a)(5), was violated because they were not notified of the government’s intention to enter into a non-prosecution agreement with Epstein. Whether the FBI believed that its investigation would lead to a federal prosecution is irrelevant to the issue of whether there was consultation with the victims prior to entering into the non-prosecution agreement.

The United States Attorney has exclusive authority, under 28 U.S.C. § 547(1), “to prosecute for all offenses against the United States,” within his district. Whether the FBI was in agreement with the U.S. Attorney’s decision, or was unaware of the U.S. Attorney’s decision to enter into the non-prosecution agreement, is irrelevant to the whether a violation of the CVRA occurred. Liability for a CVRA violation does not turn on whether the FBI was misled about the prospect of entering into the non-prosecution agreement, was in complete agreement with such a course of action, or something in between. The government is not obligated to identify

each piece of correspondence between federal prosecutors and the FBI, and argue that each separate document has no possible bearing on a claim or defense of the petitioners or the government.

II. PETITIONERS SEEK DOCUMENTS WHICH HAVE NO BEARING ON ANY PARTY'S CLAIMS OR DEFENSES

A. Request for Production No. 1

Petitioners claim that Request for Production No. 1, which seeks, among other documents, the entire FBI file on the Epstein investigation; the 82 page prosecution memorandum; and the 53 page draft indictment. They claim this information “goes directly to what the Government knew at the time that it was failing to communicate with the victims.” D.E. 266 at 8. Petitioners maintain that, because the government had an extremely strong case against Epstein, the government had a motive “for needing to keep the victims in the dark about the plea deal.” Id. They further reason that, with such a strong case, the Government would not have been able to answer the simplest of questions from the victims about why they were dropping all federal charges against Epstein, or explain to the victims why it was not pursuing additional investigative leads against Epstein.

The fallacy in petitioners’ reasoning is that, if the Government truly wanted to conceal information from a crime victim, the strength or weakness of the underlying criminal case is irrelevant. A crime victim is entitled to a voice, not a veto, under 18 U.S.C. § 3771(a)(5). United States v. Rubin, 558 F.Supp.2d 411, 418 (E.D.N.Y. 2008). “Although the CVRA is meant to be liberally construed within the confines of the rights guaranteed, there is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine ordered entered by the Court whether they be upon consent of or over the objection of the government.” Id. In this

case, the Court has observed that, “[t]he victims’ CVRA injury is *not* the government’s failure to prosecute Epstein federally – an end within the sole control of the government.” D.E. 189 at 10 (emphasis in original).

Section 3371(a)(5) obligates the attorney for the government to consult with a victim, not obtain an informed consent to the disposition of the case being sought by the government. Thus, petitioners’ suggestion that they could have queried the government about the reasons supporting its decision to enter into a non prosecution agreement, which the government would not be able to answer, is a non-sequitur. The Government is not required to secure the consent of the crime victim to its intended disposition of the criminal case. It is not required to satisfy the crime victim as to the soundness of its reasoning.

Petitioners also chide the Government for being “cagey” in its response to Request for Admission No. 1. D.E. 266 at 8. In its response, the Government admitted “that the FBI and the U.S. Attorney’s Office for the Southern District of Florida (“USAO”) conducted an investigation into Jeffrey Epstein (“Epstein”) and developed evidence and information in contemplation of a potential federal prosecution against Epstein for many federal sex offenses. Except as otherwise admitted above, the government denies Request No. 1.” D.E. 213-1 at 1. Petitioners’ Request for Admission No. 1 sought an admission to the following: “The FBI and the U.S. Attorney’s Office for the Southern District of Florida’s investigation into Jeffrey Epstein developed a case for a federal prosecution against Epstein for many federal sex offenses.” Other than accusing the government of being cagey, petitioners provide no argument as to how the government’s response was inadequate under Fed.R.Civ.P. 36.

B. Request for Production No. 10

Petitioners’ contend that, if there are no documents tending to show that the FBI was

misled about the status of the case, “then the Government should simply state that fact, and the request for production becomes moot.” D.E. 266 at 9. This is an oversimplification of the issue since Request for Production No. 10 does not only ask for documents tending to show that the FBI was misled about the status of the case, but seeks three broad categories of documents, including, “[a]ll documents, correspondence, and other information relating to discussions between the U.S. Attorney’s Office and the FBI concerning the status of the investigation and the plea discussions with Epstein, as well as what kind of charges would appropriately be filed against Epstein;” Request for Production 10(a), and “[a]ll documents, correspondence, and other information relating to the U.S. Attorney’s Office’s representations to the FBI and any other state or local law enforcement agency about how this case was being handled ...” Request for Production 10(b).

Whether the FBI was misled by the U.S. Attorney’s Office is irrelevant, since the decision to prosecute is vested exclusively in the United States Attorney under 28 U.S.C. § 547(1). What the FBI believed regarding the status of the case against Epstein, and how it would be resolved has no relevance as to whether the CVRA was violated. Doubtless the petitioners would not be withdrawing their claim that the U.S. Attorney’s Office failed to consult with them about the non-prosecution agreement, if they believed the FBI did not tell them anything because it believed the prosecution was going forward.

Additionally, petitioners claim that, if sophisticated FBI agents had been misled by the U.S. Attorney’s Office, it would be reasonable to infer that young, sexual assault victims might have been misled as well. D.E. 266 at 10. In order to justify this Request, petitioners seem to be suggesting that a young, sexual assault victim would be easily susceptible to being misled, yet these same victims would be able to engage in a searching inquiry of the U.S. Attorney’s Office

as to its rationale for entering into a non-prosecution agreement, in lieu of a federal prosecution, which was petitioners' justification for Request for Production No. 1.

C. Request for Production No. 16

Request for Production No. 16 seeks seven categories of documents pertaining to a former AUSA who worked in the West Palm Beach Office. Petitioners claim this former AUSA improperly represented persons close to Epstein, after his departure from the U.S. Attorney's Office. Petitioners seize upon the government's affirmative response to Request for Admission No. 15(a) and (b), which admits that former AUSA Reinhart learned confidential, non-public information about the Epstein matter, and he discussed the Epstein matter with another Assistant U.S. Attorney working on the Epstein matter. D.E. 266 at 11. However, they completely ignore the government's response to Request for Admission No. 15(c), which denies that Mr. Reinhart was involved in decision-making with regard to the Epstein matter.

Petitioners have no basis for believing that Mr. Reinhart did not always work for the best interests of the United States during his tenure as an Assistant U.S. Attorney. Their opinion that Mr. Reinhart improperly represented individuals associated with Epstein, after his departure from the U.S. Attorney's Office, is no reason to believe that he improperly influenced how the Epstein case was handled while he was in the U.S. Attorney's Office.¹

D. Request for Production No. 18

This request seeks documents pertaining to a potential conflict of interest determination made by the Department of Justice, in December 2010 and August 2011, well after the instant lawsuit was initiated by petitioners. Petitioners maintain that, "[i]t appears that the conflict of

¹ There is no conflicting position on whether any documents exist, as petitioners maintain. D.E. 266 at 11. The Government argued that petitioners were incorrectly assuming that its admission that Mr. Reinhart learned confidential, non-public information about the Epstein matter, was based upon a document, when it was not. Request for Production No. 16 is not limited to documents supporting the government's response to Request for Admission No. 15, but is far more extensive.

interest that has been recognized may have to do with the Office's treatment of the victims."

D.E. 266 at 11-12. Other than this conclusion, there are no facts asserted to support this opinion as to the rationale for any conflict of interest determination made by the Department of Justice. Whether there is an appearance of a conflict of interest in December 2010, or August 2011, has no relevance to whether a CVRA violation occurred in 2006-2008.

E. Request for Production No. 19

Petitioners argue that information pertaining to the allegations of misconduct mentioned in former U.S. Attorney R. Alexander Acosta's letter to the news media, in March 2011, is needed to explain why the U.S. Attorney's Office would have withheld notifications from the victims about the non-prosecution agreement. However, Request for Production No. 19 actually seeks documents, correspondence and other information that supports or contradicts Mr. Acosta's allegations, and also seeks the same type of information about misconduct and over-reaching that was mentioned in attorney Roy Black's response letter.

Petitioners contend the requested information is relevant because, "if the prosecutors were being assaulted, as Acosta has said they were, then they would have reason to disregard their obligations to crime victims." D.E. 266 at 12. Unfortunately, being subjected to personal attack by litigants and their attorneys is nothing new for most Assistant U.S. Attorneys; that is simply part of their job. Such personal attacks do not cause AUSAs to avoid duties imposed upon them by law.

F. Request for Production No. 25

The CVRA plainly contemplates that the rights provided in section 3771(a) "shall be asserted in the district court in which a defendant is being prosecuted for the crime, or, if no prosecution is underway, in the district court in the district in which the crime occurred." 18

U.S.C. § 3771(d)(3). If there is a criminal prosecution where a crime victim is asserting rights under section 3771(a), Fed.R.Civ.P. 26(a)(1) would be inapplicable since the claim is being asserted in a criminal case, as contemplated in section 3771(d)(3). A crime victim should not be entitled to more because of the happenstance that no criminal prosecution is underway. Therefore, the government should not be required to make initial disclosures under the Federal Rules of Civil Procedure.

III. PETITIONERS HAVE NO RIGHT TO ACCESS GOVERNMENT DOCUMENTS THAT ARE IRRELEVANT

Petitioners maintain that the government's relevance objections will create the need for a potential second-round of litigation over which documents are or are not, relevant, which will waste time. Petitioners cannot reasonably expect that the Government will simply stand by and expend time, effort, and expense to search for documents which it believes are not relevant to this case, and not within the ambit of permissible discovery under Rule 26(b)(1). Indeed, they even argue that, because the government has already gone through the effort of producing these documents to the Court for *in camera* review, then it might as well turn them over to the petitioners. D.E. 266 at 14-15.

The government is not obligated to demonstrate harm or prejudice from producing a document to petitioners, in order to prevent disclosure. Petitioners are only entitled to access documents that are within the scope of Rule 26(b)(1). The government submits petitioners are not entitled to access any of the documents encompassed within Request for Production Nos. 1,

10, 16, 18, 19, and 25.

DATED: November 6, 2014

Respectfully submitted,

WILFREDO A. FERRER
UNITED STATES ATTORNEY

By: s/ Dexter A. Lee
DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street, Suite 300
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139
E-mail: dexter.lee@usdoj.gov

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 6, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Dexter A. Lee
DEXTER A. LEE
Assistant U.S. Attorney

SERVICE LIST

Jane Does 1 and 2 v. United States,
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Bradley J. Edwards, Esq.,
Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
(954) 524-2820
Fax: (954) 524-2822
E-mail: brad@pathtojustice.com

Paul G. Cassell

S.J. Quinney College of Law at the
University of Utah
332 S. 1400 E.
Salt Lake City, Utah 84112
(801) 585-5202
Fax: (801) 585-6833
E-mail: casselp@law.utah.edu

Attorneys for Jane Doe # 1 and Jane Doe # 2

Roy Black
Jackie Perczek
Black, Srebnick, Kornspan & Stumpf, P.A.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421
Fax: (305) 358-2006
E-mail: rblack@royblack.com
jperczek@royblack.com

Attorneys for Intervenors