

A Victory For Crime Victims In Eleventh Circuit

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In a decision that will surely have implications for criminal defendants and victims of crimes, on April 18, 2014, the Eleventh Circuit ordered federal authorities to disclose correspondence that took place between Palm Beach billionaire Jeffrey Epstein's attorneys and federal prosecutors when they were negotiating a plea agreement in 2007.

The FBI began investigating allegations that Jeffrey Epstein had sexually abused several minor girls in 2006. The United States Attorney's Office for the Southern District of Florida accepted Epstein's case for prosecution, and the FBI issued victim notification letters to two minors identified as Jane Doe 1 and Jane Doe 2. Extensive plea negotiations ensued between the United States and Epstein. On Sept. 24, 2007, the United States entered into a nonprosecution agreement with Epstein in which the United States agreed not to file any federal charges against Epstein in exchange for his offer to plead guilty to the Florida offenses of solicitation of prostitution and procurement of minors to engage in prostitution.

The United States never conferred with the victim before entering into an agreement with Epstein, it also failed to notify them of the existence of the agreement for at least nine months. Worse, the United States went so far as to send letters to the victims advising that the case was under investigation and sent a letter in June 2008 asking the victims to explain why federal charges should be brought against Epstein.

The Crime Victims' Rights Act, 18 U.S.C. § 3771 provides that victims have a right to be heard with respect to a defendant's plea. The Crime Victims' Rights Act further provides that victims have a right to be reasonably heard at a plea hearing and during plea discussions. This includes the right to object, to file papers, and speak at any hearing. Additionally, the United States Attorney's Manual provides that the United States should make reasonable efforts to notify identified victims of, and consider victims' views about, any proposed or contemplated plea negotiations.

The United States failed to give the victims here notice, and instead waited until June 27, 2008, to inform victims that Epstein planned to plead guilty to violations of state law on June 30, 2008. The United States failed to disclose that Epstein's plea to state charges arose from his federal nonprosecution agreement and that the pleas would bar a federal prosecution. The victims did not attend the state court proceedings.

On July 7, 2008, Jane Doe No. 1 filed a petition alleging that she was a victim of federal crimes committed by Epstein involving sex trafficking of children by fraud and enticing a minor to commit prosecution. The petition further alleged that the United States had wrongfully excluded her from plea negotiations and violated the Crime Victims' Rights Act. The United States answered that it used its best efforts to comply, but that the act did not apply to pre-indictment negotiations. Jane Doe No. 2 later joined in the petition. The case was dormant for several years while the victims pursued a civil suit against Epstein.

In 2011, the victims renewed prosecution of their petition against the United States when they could not get correspondence between the United States and Epstein's attorneys during the plea negotiations. The victims later moved to compel the United States to produce all the requested discovery about the plea negotiations. At that point, Epstein's attorneys moved to intervene for the limited purpose of challenging the disclosure and use of the correspondence they wrote during plea negotiations. The district court granted the motion to intervene and Epstein's counsel filed motions for protective order. Epstein's attorneys argued that the correspondence was protected by the work product privilege and the grand jury privilege. Epstein's attorneys also argued the district court should recognize a common law privilege for plea negotiations.

The district court denied the Epstein's attorneys' motions for protective orders and granted the victims the right to proffer the correspondence between the United States and Epstein's attorneys, but the district court reserved ruling on the relevance or admissibility of any of the correspondence to prove violations of the act. The district court also required the United States to file answers to all outstanding requests for admissions and to produce documents in response to the requests for production by the victims, including any documentary material exchanged by or between the federal government and persons or entities outside the federal government (including without limitation all correspondence generated by or between the federal government and Epstein's attorneys).

Following the district court's ruling, Epstein's attorneys filed for interlocutory appeal. Immediately, the victims moved to dismiss the appeal for lack of jurisdiction.

The Eleventh Circuit held that it did have jurisdiction to hear the appeal. More importantly, the Eleventh Circuit held that plea negotiations are not privileged from disclosure. Particularly, the Eleventh Circuit held that Federal Rule of Evidence 410 provides no privilege for plea negotiations. The Eleventh Circuit also held that Epstein's attorneys waived any work product privilege when they

voluntarily sent the correspondence at issue to the United States. Finally, the Eleventh Circuit declined to recognize a common law privilege for plea negotiations.

This decision is of paramount importance to victims of crimes and defendants. First, the decision reinforces the right of victims to participate in criminal proceedings, including any discussions pre-indictment. Prosecutors will need to involve victims in any pre-indictment settlement discussions. Attorneys representing victims should immediately inform the government that the victims want to be involved in any plea negotiations.

Moreover, the decision will certainly impact the ability of defense attorneys and prosecutors to have confidential communications, which could hinder plea negotiations in future cases. Defense attorneys need to proceed with caution and be aware that all written communications with the government in relation to plea negotiations can be shared with victims. It may be prudent to limit written communications even though oral discussions can also be shared with victims.

Clearly, the Eleventh Circuit believes that victims have rights and those rights should and will be enforced even if it chills plea negotiations.

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