UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/[redacted]

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____/

JANE DOE #1 AND JANE DOE #2'S NOTICE OF NEWLY-AVAILABLE SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR MOTION FOR FINDING OF VIOLATIONS OF THE CRIMES VICTIMS RIGHTS ACT

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to provide notice of newly-available supplemental authority in support of their Motion for Finding of Violations of the Crime Victim Rights Act and Request for a Hearing on Appropriate Remedies (DE #48).

As the Court is aware, the victims and the Government disagree over whether Congress designed the Crime Victims' Rights Act (CVRA) to extend right to victims during the investigative phase of a criminal case. In March and April, the parties filed briefs on their respective positions.

On June 6, 2011, Senator Jon Kyl – the co-sponsor of the CVRA – sent a letter to Attorney General Eric Holder directly stating that he had drafted the CVRA to extend rights to crime victims during the investigative process and expressing his concern that the Government was not doing everything it could to protect crime victims during the investigative phases of criminal cases. On June 8, 2011, Senator Kyl inserted his letter into the *Congressional Record.*

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The letter directly supports the victims' position in this case, as Senator Kyl states: "When Congress enacted the CVRA, it intended to protect crime victims throughout the criminal justice process – from the investigative phases to the final conclusion of a case." Letter from Senator Jon Kyl to Attorney General Eric Holder, June 6, 2011, *reprinted in* 157 CONG. REC. S3608 (June 8, 2011).

Of additional relevance to the briefing in this case, Senator Kyl also wrote to General Holder to explain that he believed that crime victims had the right to confer during the investigative process. Senator Kyl also asked why federal prosecutors were quoting his remarks regarding the CVRA out of context to suggest otherwise. As the Court is aware, in this case the Government has quoted legislative history from Senator Kyl as supporting its position that the CVRA applies only after formal criminal charges have been filed. *See* United States' Response to Jane Doe #1 and Jane Doe #2's Motion for Findings of Violations of the Crime Victim Rights Act (DE #57) at 19-20 (quoting Senator Kyl as believing that the right to confer with prosecutors only applies "after charging"). Senator Kyl had seen his remarks (mis)quoted by the Government to that same effect elsewhere in Justice Department opinion, and clearly thought this use was inappropriate:

> I did want to express my surprise that your prosecutors are so clearly quoting my remarks out of context. Here is the full passage of my remarks, which were part of a colloquy with my co-sponsor on the CVRA, Senator Feinstein:
>
> > Senator Feinstein: Section . . . (a)(5) provides a right to confer with the attorney for the Government in the case. *This right is intended to be expansive.* For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case. *The right, however, is not limited to these examples.* I ask the Senator if he concurs in this intent.

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> Senator Kyl: Yes. The intent of this section is just as the Senator says. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or disposition. Under this provision, *victims are able to confer with the Government's attorney about proceedings after charging.*
>
> 150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statements of Sens. Feinstein & Kyl) (emphases added). Read in context, it is obvious that the main point of my remarks was that a victim's right to confer was "intended to be expansive." Senator Feinstein and I then gave various examples of situations in which victims could confer with prosecutors, with the note that the right to confer was "not limited to these examples." It is therefore troubling to me that in this opinion the Justice Department is quoting only a limited portion of my remarks and wrenching them out of context to suggest that I think that crime victims do not have any right to confer (or to be treated with fairness) until after charging.

157 CONG. REC. S3608 (June 8, 2011) (statement of Sen. Kyl). For all the reasons that Senator Kyl gave for believing that his remarks were being "wrench[ed] . . . out of context" there, the prosecutors in this case are likewise wrenching them out of context here.

Senator Kyl – one of two Senate co-sponsors of the CVRA – clearly agrees with the victims' position in this case that the CVRA protect victims even before charges are filed. Senator Kyl explained in his recent letter that the CVRA gives to crime victims the right to consult with prosecutors "how the case was being handled *before being filed in court* . . . ." *Id.* (emphasis added). Senator Kyl then went on to explain how the Fifth Circuit had extended rights to crime victims before the formal filing of charges in *In re* [redacted], 527 F.3d 391 (5th Cir. 2008) – a case the victims cite in this case. Senator Kyl then specifically disagreed with the Justice Department's assumption "that it has no obligations to treat victims fairly or to confer with them until after charges are formally filed." *Id.*

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Senator Kyl concluded his letter to the Attorney General with a very pointed question discussing non-prosecution agreements: "My first question: What is the Justice Department doing to extend to victims their right to fair treatment and their right to confer with prosecutors when the Justice Department is negotiating pre-indictment plea agreements and *non-prosecution agreements* with defense attorneys . . . ." *Id.* Along with the rest of Senator Kyl's letter, this question makes clear that one of the principal drafters of the CVRA fully agrees with the victims' interpretation of the CVRA in this case – i.e., that specifically-identified crime victims have rights during the negotiation of pre-indictment non-prosecution agreements.

For the benefit of the Court, the full text of Senator Kyl's letter is attached to this notice. (Exhibit A). The victims respectfully request that the Court consider this letter when reaching a decision on how to interpret the CVRA in this case.

DATED: June 17, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on June 17, 2011, on the following using the Court's CM/ECF system:

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