

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE NEW YORK TIMES COMPANY,

Plaintiff,

v.

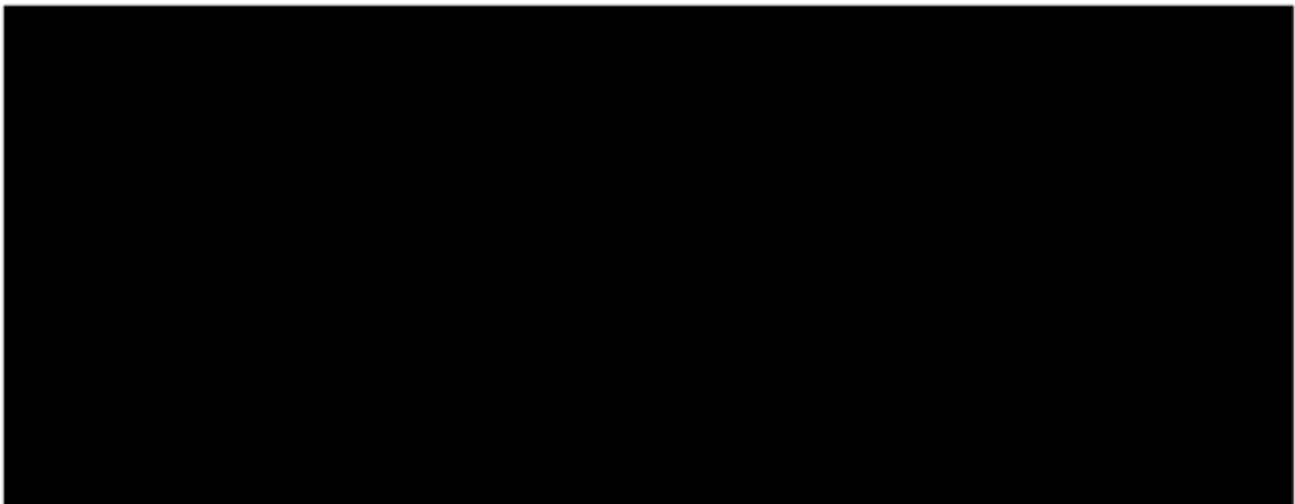
FEDERAL BUREAU OF PRISONS,

Defendant.

No. 20-CV-833(PAE)

DECLARATION OF RUSSELL CAPONE

I, [REDACTED], hereby declare as follows:



2. I am familiar with the Freedom of Information Act requests filed by the New York Times Company (the “FOIA Requests”) that are the subject of this case, which seek records related to the incarceration of Jeffrey Epstein at the Metropolitan Correctional Center (“MCC”). I am also familiar with the responsive records that defendant the Federal Bureau of Prisons (“BOP”) has withheld pursuant to exemptions 5, 6, 7(A), 7(C), 7(E), and 7(F) of FOIA, 5 U.S.C. § 552(b)(5)-(7). In addition, I am familiar with the proceedings in *United States of*

America v. Noel, 19-CR-830 (AT), and *United States of America v. Tartaglione*, 16-CR-832 (KMK). True and correct copies of the Indictment filed in *Noel* on November 19, 2019 (the “Noel Indictment”), and the Superseding Indictment filed in *Tartaglione* on April 16, 2019 (the “Tartaglione Indictment”), are attached hereto as Exhibits A and B, respectively. The statements contained in this declaration are based on my personal knowledge, documents maintained in the files of the USAO-SDNY, conversations with members of the *Noel* and *Tartaglione* prosecution teams at the USAO-SDNY, public court filings, and conclusions made in accordance therewith.

3. I submit this declaration in support of BOP’s motion for summary judgment in this case.

The Prosecution of Jeffrey Epstein

4. On July 2, 2019, Jeffrey Epstein was charged with one count of conspiracy to commit sex trafficking, in violation of 18 U.S.C. § 371, and one count of sex trafficking, in violation of 18 U.S.C. §§ 1591(a), (b)(2), and 2. On July 6, 2019, Epstein was arrested and thereafter incarcerated at the MCC until his death.

5. On July 10, 2019, Epstein was assigned to the Special Housing Unit (“SHU”) at the MCC due to, among other things, a risk of suicidality and safety concerns relating to housing him with the MCC’s general population. On July 18, 2019, a bond hearing as to Epstein was held before the Honorable Richard M. Berman, after which the Court granted the government’s motion for remand and denied Epstein’s motion for pretrial release. *See Noel Indictment* ¶ 10.

6. On July 23, 2019, MCC officers responded to an emergency call and found Epstein on the floor of his cell with a strip of bedsheet around his neck. *See Noel Indictment* ¶ 11. Michael Thomas, a correctional officer at the MCC and one of the defendants in the *Noel* case, was one of the MCC officials who responded to this incident. *See id.* Epstein was subsequently transferred out of the SHU, placed on suicide watch for 24 hours, and then

transferred to psychological observation, a different status in a different location within MCC's hospital ward, until July 30, 2019. On July 30, 2019, Epstein was transferred back to the SHU. *See id.* ¶¶ 11-13.

7. On August 10, 2019, Epstein was found in his cell, not responsive and with a noose around his neck. *See id.* ¶ 26. He was transferred to a local hospital where he was declared dead shortly thereafter. *See id.* ¶ 27. The Office of the Chief Medical Examiner of the City of New York conducted an autopsy and determined that Epstein had committed suicide by hanging himself. *See id.*

8. On August 29, 2019, following a public hearing on August 27, 2019, Judge Berman entered an order of *nolle prosequi* against Epstein. *See Nolle Prosequi*, Dkt. No. 52, *United States v. Epstein*, No. 19 Cr. 490 (RMB) (S.D.N.Y.).

The Prosecution of Tova Noel and Michael Thomas

9. As alleged in the Noel Indictment, Thomas and Tova Noel were correctional officers on duty at the SHU on August 9-10, 2019, the night of Epstein's death. *See Noel Indictment* ¶¶ 3-4. On that night, Noel and Thomas repeatedly failed to perform mandated counts of prisoners under their watch, including Epstein. To conceal this failure, they repeatedly signed false certifications attesting to having conducted multiple counts of inmates, when, in truth, they had not conducted such counts. *See id.* ¶¶ 15-24. On November 19, 2019, Noel and Thomas were charged in the Noel Indictment with one count of conspiring to defraud the United States and to make or use a false writing or document, in violation of Title 18, United States Code, Section 371; and five counts as to Noel and three counts as to Thomas of making or using a false writing or document, in violation of Title 18, United States Code, Sections 1001(a)(3) and (2). Noel Indictment ¶¶ 28-40. The *Noel* case is pending before the Honorable Analisa Torres. Trial has been scheduled to begin on January 4, 2021.

The Prosecution and Incarceration of Nicholas Tartaglione

10. In a superseding indictment filed on April 16, 2019, Nicholas Tartaglione was charged with one count of conspiracy to distribute narcotics, in violation of Title 21, United States Code, Section 846; four counts of intentional killing in furtherance of a drug trafficking crime, in violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2; three counts of murder through the use of a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Sections 924(j) and 2; one count of conspiracy to commit kidnapping, in violation of Title 18, United State Code, Section 1201; four counts of kidnapping resulting in death, in violation of Title 18, United States Code, Sections 1201(a)(1) and 2; and four counts of using a facility of interstate commerce to commit a crime of violence in violation of Title 18, United States Code, Sections 1952 and 2. These charges arise from the April 2016 murders of Martin Luna, Miguel Luna, Urbano Santiago, and Hector Gutierrez. On April 19, 2019, USAO-SDNY filed a Notice of Intent to Seek the Death Penalty against Tartaglione. The *Tartaglione* case is pending before the Honorable Kenneth M. Karas. No trial date has been set.

11. Tartaglione has been detained since he was arrested on December 19, 2016. For certain periods of his detention, including in July 2019, Tartaglione was housed at the MCC. In early July 2019, Tartaglione was transferred to the MCC's SHU. For a time, including on July 23, 2019, Tartaglione was housed in the same SHU cell as Jeffrey Epstein.

Records Withheld from Disclosure Pursuant to FOIA Exemption 7(A) on

Account of Likely Interference with *Noel*

12. 5 U.S.C. § 522 (b)(7)(A) ("Exemption 7(A)") exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production

of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings”

13. I and the prosecutors responsible for the *Noel* prosecution have reviewed each of the records responsive to the FOIA requests withheld in full or in part under Exemption 7(A), including those reflected on the index prepared by BOP and attached to the declaration of Kara Christenson (the “BOP index”). All of these records fall within the scope of Exemption 7(A).

14. Public disclosure of the records withheld under Exemption 7(A) could reasonably be expected to interfere with the pending prosecutions of Noel and Thomas. These records include information about which numerous witnesses are expected to testify at trial, include details that are not publicly known or known to other witnesses, and include information and documents authored by potential trial witnesses. These records also include potential trial exhibits, which some or all potential trial witnesses have not seen, and premature disclosure of those materials could influence witness testimony at trial, or enable witnesses to change or shape their testimony. Premature disclosure of these records and/or the information contained therein could reasonably be expected to influence witnesses’ potential testimony at trial and/or allow witnesses to alter their testimony to conform to other evidence.

15. Further, premature public disclosure of the records withheld under Exemption 7(A) could reasonably be expected to impair the government’s (and the defendants’) ability to seat a fair and impartial jury in *Noel*. The government anticipates that some of the records withheld under Exemption 7(A) will be entered into evidence as exhibits at trial, and other records that may not be trial exhibits bear on the contents of potential trial exhibits. Premature disclosure of these records, or the information contained therein, could influence potential jurors’ understanding of the evidence at trial and the case overall. Similarly, premature disclosure of the records could prejudice potential jurors for or against the defendants in the *Noel* action, which

would also impair the government's (and the defendants') ability to seat a fair and impartial jury. In addition, as noted above, these records include specific information about which witnesses are expected to testify at trial, as well as information and documents authored by potential trial witnesses, such that premature public disclosure could reasonably be expected to influence potential jurors' perception of the witnesses and the evidence to be presented at trial.

16. The risks of interference with the *Noel* proceedings are heightened by the media coverage of speculation and theories about Epstein's death. Many publicly-discussed theories of Epstein's death are unfounded. Premature release of the withheld records, particularly if the records are released in part or without full context, may influence the perception of jurors who have been exposed to such media coverage of speculation and theories.

Non-Email Records Withheld Pursuant to Exemption 7(A) on

Account of Likely Interference with Noel

17. The considerations discussed above apply to each of the categories of responsive non-email records withheld in full or in part by BOP under Exemption 7(A).

18. First, the government anticipates that MCC staffing records, including overtime logs and daily assignment rosters for the MCC on July 22, July 23 August 9, and 10, 2019 and some of the dates in between, will be the subject of witness testimony at the *Noel* trial. In addition, the government anticipates that some of these documents will be trial exhibits. Releasing these materials prematurely could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter their testimony to conform to other evidence, or influence potential jurors' perceptions of witness testimony or evidence.

19. Second, the government anticipates that reports and memoranda prepared by BOP, such as the reports, memoranda, photographs, and evidence of Epstein's July 23, 2019 apparent suicide attempt; reports, memoranda, and letters concerning Epstein's August 10, 2019

suicide and surrounding events; documents in BOP's possession from the New York City Office of Chief Medical Examiner; and reports and letters concerning MCC's and BOP's response to Epstein's death, may be trial exhibits, the subject of witness testimony, or were prepared by witnesses who will testify at trial. Premature disclosure of these materials could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter their testimony to conform to other evidence, or influence potential jurors' perceptions of witness testimony or evidence. Alternatively, if evidence of Epstein's July 23, 2019 suicide attempt or August 10, 2019 suicide and surrounding events is excluded from evidence at trial, pre-trial publication of these materials would risk exposing potential jurors for or against the defendants in the *Noel* action on the basis of material they would otherwise not be shown during trial, which would impair the government's (and the defendants') ability to seat a fair and impartial jury.

20. Third, the government anticipates that certain medical and psychological records of Epstein prepared by BOP may be trial exhibits, the subject of witness testimony, and/or were prepared by witnesses who will testify at trial. Premature disclosure of these records could influence the testimony of potential witnesses, including by potentially causing them to alter or confirm their testimony. In addition, premature disclosure of these records could reasonably be expected to prejudice potential jurors for or against the defendants in the *Noel* action, which would impair the government's (and the defendants') ability to seat a fair and impartial jury.

21. Fourth, the government anticipates that documents related to counts of inmates, including logs, count slips, and rosters, and other entries in BOP logs for August 9 and 10 may be trial exhibits, the subject of witness testimony, and/or were prepared by witnesses who will testify at trial. Premature disclosure of these materials could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter their testimony to conform to other evidence, and/or influence potential jurors' perceptions of witness testimony or evidence.

22. Fifth, the government anticipates that an August 8, 2019, review of inmates in the SHU prepared by BOP may be a trial exhibit, the subject of witness testimony, and/or was prepared by witnesses who will testify at trial. Premature disclosure of this record could reasonably be expected to influence witnesses' potential testimony at trial and/or allow witnesses to alter their testimony to conform to other evidence.

Email Records Withheld Pursuant to Exemption 7(A) on

Account of Likely Interference with Noel

23. The considerations discussed above also apply to each of the categories of responsive email documents withheld in full or in part by BOP under Exemption 7(A).

24. First, emails pertaining to Epstein's July 23, 2019 apparent suicide attempt, his incarceration prior to his suicide, and his mental health, including emails written by BOP's Psychology Services, discuss topics and information that the government anticipates may be the subject of witness testimony at the *Noel* trial. Their disclosure could influence witness testimony, including by allowing witnesses to alter their testimony to conform to other evidence, or influence potential jurors' perceptions of witness testimony or evidence. Alternatively, as described above, if evidence of Epstein's July 23, 2019 suicide attempt or is excluded from evidence at trial, pre-trial publication of these materials would risk exposing potential jurors for or against the defendants in the *Noel* action on the basis of material they would otherwise not be shown during trial, which would impair the government's (and the defendants') ability to seat a fair and impartial jury.

25. Second, emails relating to Epstein's death, investigations into Epstein's death, the circumstances of his suicide, and the BOP's response to Epstein's death discuss topics and information that the government anticipates will be relevant to and/or the subject of witness testimony at the *Noel* trial. Their disclosure could influence witness testimony, including by

allowing witnesses to alter their testimony to conform to other evidence, or influence potential jurors' perceptions of witness testimony or evidence. Alternatively, as described above, if evidence of Epstein's suicide is excluded from evidence at trial, pre-trial publication of these materials would risk exposing potential jurors for or against the defendants in the *Noel* action on the basis of material they would otherwise not be shown during trial, which would impair the government's (and the defendants') ability to seat a fair and impartial jury.

26. Providing more detailed public descriptions of the withheld documents and how their release would interfere with the *Noel* prosecution would itself risk interfering with the *Noel* prosecution. For example, public disclosure of more detailed descriptions of the documents anticipated to be proffered as exhibits at trial, or that bear on other trial exhibits, would disclose elements of the Government's trial strategy in *Noel*, including its selection of trial exhibits and the anticipated content of witness testimony. More detailed public descriptions could also prematurely disclose how the prosecution team expects the trial to proceed.

Records Withheld Pursuant to Exemption 7(A) on
Account of Likely Interference With Tartaglione

27. In the course of reviewing the responsive records that BOP has withheld pursuant to Exemption 7(A), prosecutors in the Criminal Division of the USAO-SDNY determined that certain of the records refer to or discuss Tartaglione (the "Tartaglione Records"). Upon determining that some of the records withheld by BOP refer to or discuss Tartaglione, USAO-SDNY reviewed these records to determine whether their release would interfere with the pending criminal action against Tartaglione. USAO-SDNY has concluded that release of certain of the withheld records could reasonably be expected to interfere with the prosecution of Tartaglione. This constitutes a basis to withhold these records under Exemption 7(A), independent from the likely interference with the *Noel* prosecution discussed above.

28. The Tartaglione Records fall within several categories of responsive documents withheld by BOP and include reports and evidence of Epstein's July 23, 2019 apparent suicide attempt; reports and evidence of Epstein's death on August 10, 2019; email correspondence between Tartaglione's attorneys and legal counsel at the MCC; and medical and psychological records of Epstein prepared by BOP. The Tartaglione Records also include emails pertaining to Epstein's July 23, 2019 apparent suicide attempt, Epstein's mental and physical health, and Epstein's incarceration prior to his suicide.

29. The Tartaglione Records fall within the scope of 7(A) because their disclosure could reasonably be expected to interfere with the prosecution of Tartaglione. The Tartaglione Records contain, among other things, information about Tartaglione's incarceration, including the period of time during which Tartaglione was Epstein's cellmate at the MCC, which includes the date of Epstein's apparent suicide attempt on July 23, 2019. The conditions of Tartaglione's confinement at the MCC, as well as his interactions with Epstein in July 2019, have been put directly at issue by Tartaglione's defense counsel, specifically in connection with the potential penalty phase of the case against Tartaglione. *See* Letter dated January 13, 2010, Dkt. No. 186, *United States v. Tartaglione*, No. 16 Cr. 832 (KMK); Letter dated January 21, 2020, Dkt. No. 193, *United States v. Tartaglione*, No. 16 Cr. 832 (KMK). In light of defense counsel's position, information contained in the Tartaglione Records may be relevant evidence in any possible penalty phase of the case against Tartaglione, and as a result, premature public disclosure of the Tartaglione Records could reasonably be expected to influence witness testimony and/or potential jurors' perceptions of witness testimony or evidence.

30. Moreover, the nature of the charges against Epstein and the circumstances of his apparent suicide attempt and death create a risk that premature public disclosure of the Tartaglione Records could reasonably be expected to impair the government's (and the

defendants') ability to seat a fair and impartial jury in *Tartaglione*, particularly for purposes of a potential penalty-phase hearing required by 18 U.S.C. § 3593, by influencing potential juror perceptions of any interactions between Epstein and Tartaglione.

31. The risks of interference with the *Tartaglione* proceedings are heightened by the media coverage of speculation and theories about Epstein's death. As noted previously, many publicly-discussed theories of Epstein's death are unfounded. The public dissemination of these theories increases the risk that premature release of the Tartaglione Records could influence witness testimony or jurors' perceptions, if records are released in part or without full context.

32. The Tartaglione Records include several categories of records withheld by BOP. Specifically, the government anticipates that premature disclosure of the reports and evidence of Epstein's July 23, 2019 apparent suicide attempt; an inmate investigative report prepared prior to Epstein's death; reports and evidence of Epstein's death on August 10, 2019; email correspondence between Tartaglione's attorneys and legal counsel at the MCC; the August 8, 2019 review of inmates in the SHU at MCC; and the medical and psychological records of Epstein prepared by BOP, including documents pertaining to his mental health, could reasonably be expected to adversely affect the *Tartaglione* proceedings and influence potential jurors' perceptions of Tartaglione, thereby impairing the district court's ability to seat a fair and impartial jury. In addition, emails pertaining to Epstein's July 23, 2019 apparent suicide attempt, Epstein's mental health, and Epstein's incarceration prior to his suicide, including emails that involve members of the defense or prosecution teams in *Tartaglione*, discuss topics and information that could adversely affect the *Tartaglione* proceedings and influence potential juror's perceptions of Tartaglione. These records likewise could reasonably be expected to impair the district court's ability to seat a fair and impartial jury.

33. Providing more detailed public descriptions of the withheld documents and how their release would affect the *Tartaglione* prosecution would itself risk interfering with the *Tartaglione* prosecution. For example, public disclosure of more detailed descriptions would potentially implicate and publicize associations, interactions, or perceptions of associations or interactions between Tartaglione and Epstein, thereby risking influencing potential jurors in proceedings against Tartaglione, including for any sentencing hearing required by 18 U.S.C. § 3593.

Segregability

34. The records withheld in full under Exemption 7(A) are exempt from disclosure in their entirety under Exemption 7(A). To the extent the records contain any non-exempt information, such information is inextricably intertwined with information that could reasonably be expected to interfere with the *Noel* and/or *Tartaglione* prosecutions for the reasons discussed above. The media coverage of speculation and theories about Epstein's death makes the segregation of any possibly non-exempt information particularly difficult because providing information pertaining to Epstein (or Tartaglione and Epstein) without complete context can reasonably be expected to contribute to the dissemination of speculation and theories about his death. This, in turn, could reasonably be expected to interfere with the district court's ability to seat a fair and impartial jury in proceedings against Noel, Thomas, and/or Tartaglione, including for any sentencing hearing required by 18 U.S.C. § 3593, for the reasons discussed above.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 5 day of August 2020.

