12-2020

Circumventing the Crime Victims' Rights Act: A Critical Analysis of the Eleventh Circuit's Decision Upholding Jeffrey Epstein's Secret Non-Prosecution Agreement

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FORTHCOMING IN 2021 MICHIGAN ST. L. REV. ___

CIRCUMVENTING THE CRIME VICTIMS' RIGHTS ACT: A CRITICAL ANALYSIS OF THE ELEVENTH CIRCUIT'S DECISION UPHOLDING JEFFREY EPSTEIN'S SECRET NON-PROSECUTION AGREEMENT

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Whether crime victims have rights before formal criminal charges are filed has recently come to the fore in one of the most publicized criminal cases in recent memory. For more than twelve years, victims of Jeffrey Epstein's sex trafficking organization have attempted to invalidate a non-prosecution agreement (NPA) entered between Epstein and federal prosecutors. The victims have argued that because prosecutors deliberately concealed the NPA from them, the prosecutors violated the federal Crime Victim's Rights Act (CVRA). On April 14, 2020, a divided panel of the Eleventh Circuit entered a surprising ruling, rejecting the victims' argument. The panel refused to find a CVRA violation, reasoning that because the Government never filed federal charges, the CVRA was never triggered.

On August 7, 2020, the full Eleventh Circuit vacated the earlier panel decision and agreed to rehear the case en banc. This article critiques the earlier panel decision and explains why the Eleventh Circuit en banc should proceed in the opposite direction. Under the now-vacated panel decision, "secret" justice was permitted, depriving crime victims in the Eleventh Circuit of any CVRA rights until the Government formally files charges. This would have created perverse incentives for the Government to negotiate secret agreements within the Eleventh Circuit rather than elsewhere, such as in the adjoining Fifth Circuit. This article concludes that the Eleventh Circuit en banc should recognize that the CVRA extends rights to crime victims even before charges are filed. The article also urges Congress to clarify and amend the CVRA to ensure that secret NPAs are not permitted in future federal criminal cases and, more broadly, to protect crime victims during federal criminal investigations.

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Paul G. Cassell,[*] Jordan Peck,[**] and Bradley J. Edwards[***]

As crime victims' rights enactments spread around the country,[1] an important question is whether they apply before prosecutors file criminal charges. Many rights in those enactments can apply only after the filing of criminal charges, such as the victim's right to be heard during court proceedings. But other rights clearly could extend pre-charging. For example, a crime victim could be given a right to confer with prosecutors while prosecutors are considering what charges to file. Or a victim's right to be treated with fairness could apply during investigations.

Whether victims have rights pre-charging is a vital issue for making crime victims' protections effectives. In many cases, prosecutors may enter into plea negotiations well before drafting any charges. In some cases, prosecutors may even enter non-prosecution agreements (NPAs) with defendants, agreeing never to lodge any charges. If crime victims' protections do not come into play until the formal filing of charges, then crime victims can be effectively excluded from any role regarding whether charges are filed or, if so, what those charges might be.

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The authors thank Steve Twist, Meg Garvin, Jay Howell, Brittany J. Henderson, and Patricia Cassell for helpful comments.

In the interests of full disclosure, two of the authors of this article (Cassell and Edwards) have represented numerous Jeffrey Epstein sex abuse victims in various cases, including the Eleventh Circuit case that is the centerpiece of this article.

[1] *See* Paul G. Cassell, *The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1 (2015). *See generally* DOUGLAS EVAN BELOOF, PAUL G. CASSELL, MEG GARVIN & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (4th ed. 2018).

This issue has recently come to the fore in one of the nation's most publicized criminal cases in recent memory. For more than twelve years, victims of Jeffrey Epstein's sex trafficking organization have attempted to invalidate an NPA entered between federal prosecutors and Epstein.[2] The victims have argued that because the prosecutors deliberately concealed the NPA, the prosecutors violated their right to confer under the federal Crime Victim's Rights Act (CVRA).[3] In 2011, the federal district court presiding over the case agreed with the victims, concluding that the CVRA protected Epstein's victims even though the prosecutors had never formally filed federal criminal charges in that case.

Following years of litigation, however, the case went up on appeal to the Eleventh Circuit. On April 14, 2020, a divided panel entered a surprising ruling.[4] The panel recognized that victims (such as lead petitioner Courtney Wild) and more than thirty other girls "suffered unspeakable horror" at the hands of Epstein's international sex trafficking organization.[5] And the panel agreed that the prosecutors' concealment of the deal was "beyond scandalous" and produced "a tale of national disgrace."[6] Indeed, the panel explained that after the victims reported Epstein's sex abuse, they were "left in the dark—and, so it seems, *affirmatively misled*—by government lawyers" about a secret non-prosecution agreement that the prosecutors negotiated with Epstein.[7]

Yet on these egregious facts, a divided panel (in three separate opinions spanning 120 pages) refused to find any violation of the CVRA. The panel reasoned that because the prosecutors—working closely with Epstein's battery of high-powered lawyers—maneuvered to avoid lodging federal criminal charges, the CVRA was never "trigger[ed]."[8] The panel admitted that under its narrow reading, "[T]he CVRA will not prevent federal prosecutors from negotiating 'secret' plea and non-prosecution agreements, without ever notifying or conferring with victims, provided that they do so

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[2] *See generally* BRADLEY J. EDWARDS, RELENTLESS PURSUIT: MY FIGHT FOR THE VICTIMS OF JEFFREY EPSTEIN (2020).

[3] Pub. L. 108-405, Title I, § 101, Oct. 30, 2004, 118 Stat. 2261, codified in 18 U.S.C. § 3771 (2006).

[4] *In re* Wild, 955 F.3d 1196, 1198 (11th Cir. 2020), *rehearing en banc granted, opinion vacated by In re* Wild, 2020 WL 4557083.

[5] *Id.*

[6] *Id.*

[7] *Id.* (emphasis added).

[8] *Id.*

before instituting criminal proceedings."[9] Judge Hull's sixty-page dissent put the matter more plainly: "[T]he [m]ajority's contorted statutory interpretation materially revises the statute's plain text and guts victims' rights under the CVRA."[10]

On August 7, 2020, the full Eleventh Circuit vacated the panel decision and ordered rehearing en banc. This Article critiques the earlier panel decision and explains why the Eleventh Circuit en banc should proceed in the opposite direction and recognize that the CVRA extends some rights to crime victims before charges are filed. Under the panel's ruling, "secret" justice would have been permitted, circumventing the CVRA and depriving crime victims in the Eleventh Circuit of any CVRA rights until the Government formally files charges. The decision should be overturned by the full Court acting en banc, and Congress should also step in and amend the CVRA to protect victims in the Eleventh Circuit and elsewhere.

This Article proceeds in four parts. Part I provides the procedural background from the Epstein case, which lead to the issue of the CVRA's pre-charging application being addressed by the Eleventh Circuit.

Part II then closely reviews the CVRA's text and structure. This review establishes that, contrary to the Eleventh Circuit panel's holding, the CVRA extends some rights to crime victims before prosecutors file criminal charges. In particular, the CVRA's scope and venue provisions provide clear textual commands from Congress that victims can exercise certain CVRA rights while prosecutors are considering whether to institute charges.

Part III then dissects the panel's conclusion that applying the CVRA before charges are instituted would have no "logical stopping point"[11] and would thus interfere with federal criminal investigations. Contrary to the panel's position, the CVRA can easily be interpreted as extending rights to victims when the case has crystalized to the point that specific crimes and victims are identified. Indeed, the Fifth Circuit has long taken such a view[12] without any apparent difficulties.

Given the Eleventh Circuit's hostility to broadly construing the CVRA to achieve its purposes, Part IV briefly sketches out what a congressional

[9] *Id*. at 1221.
[10] *Id.* at 1225 (Hull, J., dissenting).
[11] *Id.* at 1213.
[12] *In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008).

amendment to the CVRA would look like to clarify the Act's coverage and ensure that crime victims in the federal criminal justice system have protected rights before charging. Congress could specifically guarantee that victims have the right to confer with prosecutors before any NPA is finalized. And, more broadly, Congress could guarantee that victims have CVRA rights during criminal investigations, such as the right to be treated fairly.

A brief conclusion to this Article explains how the issues presented in the Epstein case under the CVRA may be litigated under similar state crime victims' rights provisions. The same approach urged in this Article as a matter of federal law should also be applied to those state provisions to ensure fair treatment of crime victims throughout our nation's criminal justice processes.

I. THE CVRA'S PRE-CHARGING APPLICATION DURING THE JEFFREY EPSTEIN CASE

A. Epstein Obtains Immunity for Himself and His Co-conspirators for Federal Sex Trafficking Charges

It appears to be generally agreed that the facts underlying the Jeffrey Epstein case are, as the Eleventh Circuit's panel decision put it, "beyond scandalous—they tell a tale of national disgrace."[13] Between 1999 and 2007, well-heeled and well-connected financier Jeffrey Epstein and multiple co-conspirators sexually abused more than thirty girls—some as young as fourteen—in Palm Beach, Florida, and other locations in the United States, England, and elsewhere.[14] After Epstein's employees would deliver the girls to him, Epstein would either sexually abuse them himself, give them to others to abuse, or both.[15]

Following a tip in 2005, the Palm Beach Police Department and FBI spent two years investigating Epstein's child sex abuse crimes.[16] After collecting compelling evidence against Epstein, the FBI referred the case for prosecution to the U.S. Attorney's Office for the Southern District of Florida.[17] While the federal prosecutors were evaluating the case, they

[13] 955 F.3d at 1198.

[14] *Id.*

[15] *Id.*

[16] Epstein's actions violated both state and federal laws involving child sex abuse. *See, e.g.*, 18 U.S.C. §§ 2422, 2243, & 1591.

[17] 955 F.3d at 1198-99.

advised Epstein's victims, via letter, that "as a victim and/or witness of a federal offense, you have a number of rights."[18] These letters from the Office then enumerated the eight CVRA rights then in force,[19] including notably "[t]he reasonable right to confer with the attorney for the Government in the case" and "the right to be treated with fairness and with respect for the victim's dignity and privacy."[20]

In May 2007, the federal prosecutors drafted a fifty-three-page indictment charging Epstein with numerous federal sex offenses.[21] The prosecutors then began contentious negotiations with Epstein's team of high-powered lawyers. The prosecutors initially sought an agreement requiring Epstein to plead to at least one felony sex offense. But after considerable pressure from Epstein's lawyers,[22] the U.S. Attorney's Office agreed to a far more lenient non-prosecution agreement with Epstein for reasons that have never been clearly explained. Under the NPA, Epstein agreed to plead guilty only to two state felonies for soliciting prostitution with a minor.[23] In exchange, the U.S. Attorney's Office extended immunity to Epstein and all his co-conspirators on the more serious federal charges.[24] After entering the state guilty pleas, Epstein was sentenced to only eighteen months in state jail.[25] During his jail term, Epstein was afforded "work release" to his luxurious office for twelve hours per day, six days per week. And, of course,

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[18] *Id.* at 1199.

[19] In 2015, Congress amended the CVRA to add two additional rights. *See infra* note 153 and accompanying text. For general background about the enactment of the CVRA, see Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 850-52.

[20] 955 F.3d at 1199 (*quoting* letters to victims, which in turn quoted 18 U.S.C. § 3771(a)(5) and (8)).

[21] 955 F.3d at 1199.

[22] The U.S. Attorney responsible for the plea deal later revealed that after negotiations started, "[w]hat followed was a year-long assault on the prosecution and the prosecutors" by Epstein. Letter from Alex Acosta to Whom It May Concern, Mar. 20, 2011, reprinted in http://www.thedailybeast.com/articles/2011/03/25/jeffrey-epstein-how-the-billionaire-pedophile-got-off-easy.html. Acosta, however, (implausibly) claimed that the pressure did not influence the ultimate disposition of the case. *Id.*

[23] This agreement had the effect of labelling Epstein's child victims, who could not lawfully consent to sexual activity with adults, as "prostitutes."

[24] *Id.* at 1199.

[25] *See* Landon Thomas, *Financier Starts Sentence in Prostitution Case*, N.Y. TIMES, July 1, 2008,
http://www.nytimes.com/2008/07/01/business/01epstein.html?_r=1&ref=jeffrey_e_epstein

pursuant to the NPA, Epstein (and his co-conspirators) escaped the filing of any federal charges.

While the U.S. Attorney's Office was negotiating and entering into the NPA with Epstein, it kept Epstein's victims in the dark about what was happening. Indeed, the prosecutor's efforts graduated from passive nondisclosure to active misrepresentation.[26] For example, even after signing the non-prosecution agreement, the Office sent letters to the victims telling them that the case was "still under investigation" and that they should be "patient."[27]

B. The District Court Holds that CVRA Rights Apply Pre-Charge

After finally learning about the NPA, in July 2008 two of the victims ("Jane Doe Number One"[28] and "Jane Doe Number Two") filed suit in the U.S. District Court for the Southern District of Florida under the Crime Victims' Rights Act. The victims argued that the prosecutors had violated their CVRA right to confer as well as their right to be treated with fairness.[29] The victims contended that prosecutors should have conferred with them about the NPA before it became final.

In response, the U.S. Attorney's Office argued initially that it was under no obligation to extend the victims any rights under the CVRA, because "CVRA rights do not attach in the absence of federal criminal charges filed by a federal prosecutor."[30] After briefing and argument, in 2011 the district court rejected the government's claim in a carefully reasoned published decision.[31] The district court held that the victims' rights "to confer with the attorney for the Government in the case"[32] and "to be treated with

[26] 955 F.3d at 1199; *see also* Doe 1 v. U.S., 359 F.Supp.3d 1201, 1219 (S.D. Fla. 2019) ("Particularly problematic was the Government's decision to conceal the existence of the NPA and mislead the victims to believe that federal prosecution was still a possibility.").

[27] 955 F.3d at 1199-1200.

[28] Jane Doe 1 has since chosen to reveal that her name is Courtney Wild. *See* note 181 *infra* (providing further biographical information about Ms. Wild).

[29] *See* Emergency Petition for Victim's Enforcement of Crime Victim's Rights Act, dkt. entry 1, Doe v. United States, No. 9:08-cv-80736 (S.D. Fla. July 7, 2008).

[30] Gov't Resp. in Opposition to Victims' Mot. for Summary Judgment, Does v. U.S., No. 9:08-cv-80736, dkt. entry #62 at 7 (S.D. Fla. Apr. 8, 2011).

[31] Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).

[32] 18 U.S.C. § 3771(a)(5).

fairness with respect for [their] dignity and privacy"[33] apply before charges are filed.[34]

In reaching its conclusion, the district court pointed to two CVRA provisions. First, the court relied on the CVRA's "coverage" provision, which provides that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the *detection, investigation,* or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA]."[35] The district court reasoned that this provision "contemplates pre-charge application of the CVRA" because it requires officers who are involved in the "detection" and "investigation" of federal crimes to afford victims their rights.[36] Second, the district court pointed to the CVRA's "venue" provision,[37] which states that a victim can assert its CVRA rights "in the district court in which a defendant is being prosecuted or, *if no prosecution is underway,* in the district court in the district in which the crime occurred."[38] The court determined that the plain reading of "no prosecution is underway" indicates that the CVRA rights apply pre-charge—i.e., before any prosecution is "underway."[39]

C. The District Court Finds the Government Violated the Victim's Rights but Ultimately Dismisses the Case as Moot

Following its ruling that the CVRA applied, the district court allowed the victims to obtain discovery on the government's plea negotiations with Epstein. After many years of hard-fought litigation over how the NPA had been concocted, in February 2019, the District Court granted summary judgment in favor of the victims.[40] Specifically, the District Court found that the federal prosecutors violated the victims' CVRA rights by entering into the secret NPA with Epstein "without conferring with [the victims] during its negotiation and signing."[41] The district court then directed the victims and the government (and Epstein, who had intervened in the case) to brief "the

[33] 18 U.S.C. § 3771(a)(8).
[34] Does v. United States, 817 F. Supp. 2d at 1341.
[35] *Id.* (quoting 18 U.S.C. § 3771 (c)(1)) (emphasis added).
[36] *Id.*
[37] *Id.*
[38] 18 U.S.C. § 3771(d)(3) (emphasis added).
[39] Does v. United States, 817 F. Supp. 2d at 1342.
[40] Doe 1 v. United States, 359 F. Supp. 3d 1201, 1222 (S.D. Fla. 2019).
[41] *Id.* at 1218.

issue of what remedy, if any, should be applied in view of the [CVRA] violation."[42]

In May 2019, the victims proposed multiple remedies for the proven CVRA violations. Of particular relevance to this Article, the victims sought recission of the immunity provisions in the NPA.[43] The victims argued that they were entitled to rescission of the immunity provisions so that they could use "the full unfettered exercise of their [CVRA] conferral rights at a time that [would] enable [them] to exercise those rights meaningfully."[44] The victims argued that, when other plea arrangements had been found to violate the law, they had been stricken by the courts.[45] Only if the NPA's immunity provision was voided could the victims exercise their right to confer with federal prosecutors about having charges filed against Epstein and his co-conspirators. The victims also sought a bevy of other remedies, including a victim-impact hearing and a meeting between the victims and Alexander Acosta, the former United States Attorney for the Southern District of Florida who had secretly entered into the NPA.[46] The victims also sought discovery of certain grand-jury materials and other materials regarding prosecutors' decision to enter into the NPA, as well as sanctions, attorneys' fees, and restitution.[47]

While the remedy issue was under consideration by the district court, in August 2019, Epstein was found dead from apparent suicide in a New York correctional facility.[48] In light of Epstein's death, in September 2019, the district court dismissed the victims' suit, thereby denying the victims any remedies.[49] The court reasoned that the victims' claims regarding rescission of the NPA's immunity provisions had become moot. As to Epstein, he was no longer subject to prosecution due to his death; and as to Epstein's co-

[42] *Id*. at 1222.

[43] Jane Doe 1 and 2's Submission on Proposed Remedies, Does v. U.S., No. 9:08-cv-80736, dkt. entry #458 at 12-21 (S.D. Fla. Apr. 8, 2011).

[44] *Id.* at 15 (quoting *U.S. v. BP Products North America, Inc.*, 2008 WL 501321 at *14 (S.D. Tex. 2008)).

[45] Submission on Proposed Remedies, *supra* note 43, at 15 (citing U.S. v. Walker, 98 F.3d 944 (7th Cir. 1996)).

[46] *Id.* at 22–24.

[47] *Id.* at 24–33.

[48] Doe 1 v. United States, 411 F. Supp. 3d 1321, 1325–26 (S.D. Fla. 2019).

[49] *Id*. at 1326–31.

conspirators, the court lacked jurisdiction to consider any application of the NPA to them because they had not been joined as parties to the action.[50]

The district court also denied the victims' requests for a meeting with former-U.S. Attorney Acosta because the court found it did not have jurisdiction over him.[51] The court also noted that the government had agreed to "arrange a meeting with government representatives" for the victims, the victims already had the opportunity for a hearing in the Southern District of New York, and the Epstein investigation ended upon his death.[52] Finally, for similar reasons, the court denied the victims' requests for monetary sanctions, restitution, and attorneys' fees.[53] The district court ended its opinion with a note of condolence for the victims. The court explained that

> despite the victims "having demonstrated the Government violated their rights under the CVRA, in the end they are not receiving much, if any, of the relief they sought. They may take solace, however, in the fact that this litigation has brought national attention to the Crime Victims' Rights Act and the importance of victims in the criminal justice system. It has also resulted in the United States Department of Justice acknowledging its shortcomings in dealing with crime victims, and its promise to better train its prosecutors regarding the rights of victims under the CVRA in the future. And rulings which were rendered during the course of this litigation likely played some role, however small it may have been, in the initiation of criminal charges against Mr. Epstein in the Southern District of New York and that office's continuing investigation of others who may have been complicit with him."[54]

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[50] *Id.* at 1326–28 (holding that "[s]ince the alleged co-conspirators are not parties to the case, any ruling this Court makes that purports to affect their rights under the NPA would merely be advisory and is thus beyond this Court's jurisdiction to issue.").

[51] After orchestrating the Epstein NPA in 2007 and 2008, Acosta had left the U.S. Attorney's Office and then reentered federal government service in 2016 as the Secretary of Labor. When Epstein was arrested, a firestorm of controversy broke out over his role in the NPA, leading to his resignation. *See* Annie Karni et al., *Acosta to Resign as Labor Secretary Over Jeffrey Epstein Plea Deal*, N.Y. TIMES, July 12, 2019, available at https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html.

[52] *See* 411 F. Supp. 3d at 1328–29.

[53] *See id.* at 1330–31.

[54] *Id.* at 1331–32.

D. An Eleventh Circuit Panel Reverses the District Court's Holding that CVRA Rights Apply Pre-Charge—and the Circuit Agrees to Rehear the Case En Banc

Following the district court's mootness ruling and denial of the victims' remedial requests, in September 2019, the victims[55] filed a petition for a writ of mandamus with the Eleventh Circuit Court of Appeals, "seeking reversal of the district court's decision denying [their] request for a remedy for the Government's violations of [their] CVRA rights."[56] The victims gave multiple reasons why, contrary to the ruling of the district court, the case was not moot, focusing in particular on the immunizing effects of the NPA on Epstein's co-conspirators. The victims noted that, under Federal Rule of Civil Procedure 19, the remedy for a failure to join a necessary party is not dismissal of an action, but rather an order directing that the necessary party be joined.[57] The victims argued that the case was not moot because, if the district court had invalidated the NPA's immunity provision, the action would have permitted the victims to confer with prosecutors about prosecuting Epstein's co-conspirators in Florida.[58]

Following oral argument, in April 2020 a divided (2-1) panel decision denied the petition for a surprising reason. Rather than reach the mootness issue presented by the victims' petition, the panel (in an opinion written by Judge Newsom and joined by Judge Tjoflat) overturned the district court's

[55] The petition to the Eleventh Circuit was filed by a single victim, Courtney Wild. Because Ms. Wild also sought to assert the rights of other Epstein victims, we will refer to the petition as having been filed by "the victims."

[56] Petition for Writ of Mandamus at 1, *In re* Wild, 955 F.3d 1196 (11th Cir. 2019) (No. 19-13843).

[57] *Id.* at 22–32.

[58] *Id.* at 32–36.

The validity of the victims' position that their case is not moot has only been reinforced by recent events. In July 2020, Epstein's main (alleged) co-conspirator, Ghislaine Maxwell, was arrested and charged in the Southern District of New York with conspiring with Epstein in sexually traffic minor girls. *See* Nicole Hong et al., *Ghislaine Maxwell, Associate of Jeffrey Epstein, is Arrested*, N.Y. TIMES, July 2, 2020, available at https://www.nytimes.com/2020/07/02/nyregion/ghislaine-maxwell-arrest-jeffrey-epstein.html. Defense attorneys for Maxwell have since made clear that they intend to argue that the Epstein NPA blocks prosecution of Ms. Maxwell. *See* Thom Hals et al., *Long Legal Battle by Jeffrey Epstein Victims Could Sink Maxwell's Defense,* Reuters, July 14, 2020, available at https://www.reuters.com/article/us-people-ghislaine-maxwell-plea/long-legal-battle-by-jeffrey-epstein-victims-could-sink-maxwells-defense-idUSKCN24F19A.

previous holding from nine years earlier that CVRA rights apply before the government files formal criminal charges against a defendant.[59]

The panel conceded that the facts of the case were "beyond scandalous" and told "a tale of national disgrace," but concluded it was "constrained" to deny Ms. Wild's petition.[60] As the panel saw things, CVRA rights "do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment."[61] While the panel recognized the plausibility of the district court's broader interpretation of the CVRA, the panel "reluctantly" concluded that the "best" and "most

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[59] *In re* Wild, 955 F.3d at 1198.

The jurisdiction of the Circuit to have reached this issue is questionable. After the district dismissed their case as moot, the victims sought review of that mootness determination in the Eleventh Circuit. The Government did not file any cross-appeal raising the issue of the CVRA's pre-charging application, instead presenting that issue (among others) only in its response brief. Ordinarily, without a cross-appeal, the Government could not enlarge the issues presented on appeal. *See* Greenlaw v. U.S., 554 U.S. 237, 244-45 (2008). However, because the victims has used the appellate procedural vehicle specified in the CVRA (an "application" for a writ of mandamus, 18 U.S.C. § 3771(d)(3)), the panel concluded that the Government was entitled to raise "any argument it likes" against granting the victims' application. 955 F.3d at 1204 n.6. But this position failed to give full effect to the fact that, in 2015, Congress amended the CVRA's appellate provisions, providing that "[i]n deciding such [CVRA] application, the court of appeals shall apply *ordinary standards of appellate review*." 18 U.S.C. § 3771(d)(3) (emphasis added). The clear rationale for Congress' amendment was the urging of crime victims' rights advocates that "'when victims of crime are denied [CVRA] relief in the district court, they should receive the same sort of appellate protections as other litigants.'" Catherine M. Goodwin, FEDERAL CRIMINAL RESTITUTION § 12:17 (2019) (*quoting* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599, 599 (2010)). Accordingly, in its 2015 amendment, Congress essentially codified the Second Circuit's holding that Congress has "chosen a petition for mandamus as a mechanism by which a crime victim may *appeal* a district court's decision denying relief sought under the provisions of the CVRA." *In re W.R. Huff Asset Management Company*, 409 F.3d 555, 562 (2d Cir. 2005) (emphasis added). Rather than straightforwardly apply the amendment to simply give crime victims "ordinary standards of appellate review," the panel artificially and improperly gave crime victims only *ordinary substantive (but not procedural) standards* of appellate review. This approach very much deviated from "ordinary standards" of appellate review that Congress created, because it meant that the victims must confront arguments and obstacles that other appellate litigants do not face. As a result, the Eleventh Circuit should never have reached the issue of the CVRA's pre-charging application, because it was never properly presented through a Government appeal.

[60] 955 F.3d at 1198.

[61] *Id.*

natural" reading was that the Act was not triggered until the Government formally filed federal charges.[62]

Examining the CVRA's text, the panel looked to the eight enumerated victims' rights in statute, noting that most of them seemed to "focus on the post-charge phase of criminal prosecution," such as the right to speak at certain court hearings.[63] The victim had conceded that many of the rights the CVRA applied after the filing of criminal charges, but argued that (at least) two rights applied during earlier phases of the process.[64] One right was the "reasonable right to confer with the attorney for the Government in the case."[65] The panel rejected the victims' argument that the word "case" referred to both criminal investigations and judicial proceedings.[66] Instead, quoting several dictionaries and two Supreme Court cases, the panel held that "case" primarily refers to judicial proceedings, and the criminal investigation meaning" is secondary.[67] Additionally, the panel focused on the specific reference to the right to confer for the "attorney for the Government."[68]

The victims also relied on the CVRA right "to be treated with fairness and with respect for [his or her] dignity and privacy."[69] The panel recognized that this right does not contain any express temporal limitation to after the filing of charges.[70] However, applying the statutory interpretation maxim, *noscitur a sociis*—"words are often known by the company they keep"—the panel determined that this right only applied post-charging because Congress grouped with the rights with the other, earlier-listed rights that did apply post-charging.[71]

The panel summed up its decision by explaining it was "not a result we like, but it's the result we think the law requires."[72] The panel ruefully observed that "[i]t isn't lost on us that our decision leaves . . . [the victims] largely emptyhanded, and we sincerely regret that. Under our reading, the CVRA will not prevent federal prosecutors from negotiating 'secret' plea and

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[62] *Id*. at 1220.
[63] *Id*. at 1206.
[64] *See id*. at 1207.
[65] 18 U.S.C. § 3771(a)(5).
[66] *See In re* Wild, 955 F.3d at 1207.
[67] *Id.*
[68] *Id*.
[69] 18 U.S.C. § 3771(a)(8).
[70] *In re* Wild, 955 F.3d at 1208.
[71] *Id*.
[72] *Id.* at 1198.

non-prosecution agreements, without ever notifying or conferring with victims, provided that they do so before instituting criminal proceedings."[73]

The panel majority's holding leaving Epstein's victims "emptyhanded" provoked a strenuous dissent from Judge Hull. She argued that the majority "patently err[ed]" in giving the CVRA such a narrow reading.[74] In Judge Hull's view, the panel's "regrettable" interpretation of the CVRA could be avoided simply by "enforc[ing] the plain and unambiguous text of the CVRA."[75] Judge Hull concluded that the panel's "contorted statutory interpretation materially revises the statute's plain text and guts victims' rights under the CVRA."[76] In Judge Hull's view, "In addition to ruminating in sincere regret and sympathy, we, as federal judges, should also enforce the plain text of the CVRA—which we are bound to do—and ensure that these crime victims have the CVRA rights that Congress has granted them."[77]

Following the Eleventh Circuit panel's ruling, in May 2020, the victims filed a petition for rehearing en banc.[78] The victims' petition was quickly supported by amicus briefs from CVRA co-sponsors Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch[79] and from the National Crime Victim Law Institute.[80]

On August 7, 2020, the Eleventh Circuit, acting en banc, vacated the panel's earlier decision and set the case for rehearing before the full Court.[81]

II. THE CVRA'S TEXT MAKES CLEAR THAT ACT APPLIES BEFORE CRIMINAL CHARGES ARE FORMALLY FILED

[73] *Id.* at 1221.

[74] *See id.* at 1224 (Hull, J., dissenting).

[75] *Id.* (Hull, J., dissenting).

[76] *Id.* at 1225 (Hull, J., dissenting).

[77] *Id.* at 1226 (Hull, J., dissenting).

[78] Petition for Rehearing En Banc, *In re*: Courtney Wild, No. 19-13843 (11th Cir. filed May 5, 2020).

[79] Amicus brief of Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch in Support of Rehearing En Banc, *In re* Wild, No. 19-13843 (11th Cir. filed May 12, 2020). The brief argues that "[w]hen Congress enacted the CVRA, it intended 'to protect crime victims. . . from the investigative phases to the final conclusion of a case.'" *Id.* at 3 (quoting Letter from Sen. Jon Kyl to Att'y Gen. Eric H. Holder Jr. (June 6, 2011), *reprinted in* 157 CONG. REC. 8854, 8854 (2011)).

[80] Amicus brief of the National Crime Victim Law Institute in Support of Rehearing En Banc, *In re* Wild, No. 19-13843 (11th Cir. filed May 12, 2020).

[81] *In re Wild*, ---F.3d---, 2020 WL 4557083 (11th Cir. Aug. 7, 2020).

Simply put, the Eleventh Circuit panel got this one wrong. The panel decision conflicts with the CVRA's clear text, specifically the provisions extending rights, defining the Act's coverage, and providing venue for enforcement. The Eleventh Circuit en banc should recognize that the CVRA extends crime victims' rights before prosecutors formally file charges.

A. The CVRA's Rights Are Not Tied to the Filing of Criminal Charges

As enacted in 2004, the CVRA enumerates eight specific rights for crime victims.[82] Some of those rights are explicitly tied to public court proceedings—but others plainly are not. For instance, victims have the right "not to [be] excluded for any . . . public court proceeding" and "to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing . . . ."[83] Obviously, because no public court proceedings can take place without the filing of formal criminal charges, these rights only attach after prosecutors have made a formal filing.

But other CVRA rights are clearly not linked to court proceedings. Arguably the most expansive of these rights is a victim's "right to be treated with fairness and with respect for [her] dignity and privacy."[84] A right to "fairness" can logically and easily apply not only to judicial proceedings after the filing of an indictment, but earlier, such as when prosecutors are considering whether and how to file charges. If Congress wanted to limit this overarching right to fairness to matters connected with formal charges, it easily could have said so—but did not.

Similarly, the CVRA grants victims the "reasonable right to confer with the attorney for the Government *in the case*."[85] As with the right to fairness, the CVRA's drafters eschewed any reference to court proceedings, opting for the more expansive term "case." Of course, "case" is commonly used to refer not only to a judicial proceeding before a court, but also to an investigation pursued by law enforcement. For example, while *Black's Law Dictionary* offers as the first definition of "case" a "civil or criminal proceeding, action, suit or controversy at law or equity," the second definition is a "criminal investigation" as in "the Manson case."[86] Indeed, the Eleventh

[82] 18 U.S.C. § 3771(a) (2004) (enumerating eight rights).
[83] *See* 18 U.S.C. § 3771(a)(3) & (4).
[84] 18 U.S.C. § 3771(a)(8).
[85] 18 U.S.C. § 3771(a)(5) (emphasis added).
[86] BRYAN A. GARNER, BLACK'S LAW DICTIONARY 258 (10th ed. 2009).

Circuit itself has frequently used the word "case" to describe criminal investigations.[87]

The panel apparently determined that this usage by the CVRA's drafters was inapplicable, arguing that while "it's true . . . that the term 'case' *can* mean either thing, in legal parlance the judicial-case connotation is undoubtedly primary."[88] In so holding, as Judge Hull persuasively argued, the panel violated "conventional rules of statutory construction."[89] For example, "where Congress has used a more limited term in one part of a statute, but left it out of other parts, courts should *not* imply the term where it has been excluded,"[90] and "where a document has used one term in one place, and a materially different term in another, the presumption is that the different term denoted a different idea."[91] In the CVRA, Congress expressly limited some rights to court proceedings—but not others. Therefore, under conventional interpretive rules, the panel should have concluded that Congress meant what it said in using the expansive term "case" rather than a narrow formulation such as "case in the District Court."

B. The CVRA's Coverage Provision Makes Clear That the Act Applies Before Charges Are Filed

The CVRA's "coverage" provision also indicates that the Act applies during criminal investigations. The coverage provision states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the *detection*, *investigation*, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA]."[92] The district court had relied heavily on the coverage provision, reasoning that the

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[87] *See, e.g.*, *United States v. Ronda*, 455 F.3d 1273, 1281 (11th Cir. 2006) (noting "the FBI requested and received from the Miami Police Department the entire *case* files from the Department's investigations of all four shooting incidents"); *United States v. Vinales*, 564 F. App'x 518, 527–28 (11th Cir. 2014) (referring to DEA agent's "perceptions gleaned from his investigation of this *case"), cert. granted, judgment vacated,* 135 S. Ct. 2928 (2015); *United States v. Houltin*, 566 F.2d 1027, 1029 (5th Cir. 1978) (stating law enforcement "violated the fourth amendment by using illegal wiretaps during the investigation phase of the *case*").

[88] *In re* Wild, 955 F.3d at 123 at 1207 (relying primarily on which definition appears first in dictionaries).

[89] *See id*. at 1236–37 (Hull, J., dissenting).

[90] *Id*. at 1236 (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993).

[91] *Id*. at 1236–37 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012)).

[92] 18 U.S.C. § 3771(c)(1) (emphasis added).

CVRA's inclusion of agencies handling the "detection" or "investigation" of crimes indicates that the drafters "surely contemplate[d] pre-charge application of the CVRA."[93]

The panel, however, read the coverage provision as "a 'to whom' provision, not a 'when' provision," because it does not "expressly speak to when CVRA rights attach," and "[g]overnment employees who are involved in all three of the referenced phases are necessarily involved post charge."[94] Judge Hull persuasively contested the panel's reasoning, explaining that "[l]ogically, there would be no reason to mandate that federal agencies involved in crime 'detection' or 'investigation' see that victims are accorded their CVRA rights if those rights did not exist pre-charge. Indeed, the use of disjunctive wording—the 'or'—indicates agencies that fit either description must comply . . . ."[95]

The panel, while not disputing that the dissent's interpretation was a natural and straightforward reading of the CVRA, disagreed that the language of the coverage provision "clearly demonstrates that the rights specified in the Act attach during the pre-charge, investigative phase."[96] In its attempt to explain why Congress found it necessary to break out three separate phases of the criminal justice process, the panel was forced to retreat to the position that Congress was somehow "attempting to broadly cover (perhaps using a *belt-and-suspenders approach*) all necessary government-employee participants . . . ."[97] The panel's concession gives away the game. Reading the CVRA as containing "belt-and-suspenders" language renders an important part of the statute superfluous. This interpretation thus violates a cardinal rule of statutory construction that, "whenever possible," statutes should be read to give meaning to each word that Congress has selected.[98] In covering federal agencies involved in the "detection" and "investigation" of crime, Congress clearly had in mind . . . well . . . agencies involved in detecting and investigating crime—steps in the criminal justice process that obviously come before the filing of criminal charges. The panel's interpretation improperly deprives those words of any meaningful role in the statute.

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[93] *In re* Wild, 955 F.3d at 1210 (quoting Does, 817 F. Supp. 2d at 1342).

[94] *Id*. at 1210–11.

[95] *In re* Wild, 955 F.3d at 1237 (Hull, J., dissenting).

[96] *Id*. at 1210.

[97] *Id*. at 1211 n.15 (emphasis added).

[98] *See, e.g.*, TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (an Act of Congress should be construed whenever possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).

C. The CVRA's Venue Provision Extends CVRA Rights Pre-Charging

The CVRA's "venue" provision also plainly indicates that the Act applies before charges are filed. The provision states: "The rights described in [the CVRA] 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 which the crime occurred."[99] The victims argued that the "no prosecution is underway" language demonstrates that a victim's CVRA rights may be enforced before a prosecution begins, and thus "must attach before a complaint or indictment formally charges the defendant with the crime."[100] It is hard to see why Congress would include this provision unless the CVRA applies before the formal filing of charges. Indeed, the dissent concludes that this provision "conclusively demonstrates that the Act gives crime victims rights pre-charge . . . ."[101] Read most naturally, the dissent explains that "this venue provision provides that, if a prosecution is underway, victims may assert their rights in the ongoing criminal action. If, however, 'no prosecution is underway,' victims may assert their rights in the district court in which the crime occurred."[102]

The panel grudgingly conceded that the victims' interpretation was "not implausible."[103] But the panel refused to adopt it, holding that there are "at least two alternative ways of understanding" the venue provision.[104] First, the panel argued that because a "prosecution" is not commenced by the filing of a formal complaint, but rather begins upon "a suspect's 'initial appearance before a judicial officer,'" the "venue" provision "could be read to apply to the period of time between the initiation of criminal proceedings . . . and the

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[99] 18 U.S.C. § 3771(d)(3) (emphasis added).

[100] *In re* Wild, 955 F.3d at 1212 (quoting Does, 817 F. Supp. 2d at 1342).

[101] *In re* Wild, 955 F.3d at 1237 (Hull, J., dissenting).

[102] *Id*. at 1237–38; *see also* Frank v. United States, No. 19-10151, 789 Fed. App. 177 (unpublished 11th Cir. 2019) (apparently reading this provision the same way as the dissent); Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 594 (2005) ("While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself.… [T]he CVRA sweeps … away [any doubts on this point] with its proviso that the rights established by the Act may be asserted 'if no prosecution is underway, in the district court in the district in which the crime occurred.'").

[103] 955 F.3d at 1212.

[104] *Id*.

levying of formal charges in an indictment."[105] Second, the panel contended that "no prosecution is underway" could also "refer to the period *after* a 'prosecution' has run its course . . . ."[106]

The panel's first reading is strained. The panel believes that the phrase "no prosecution is underway" could hypertechnically refer only to the mere hours "between the filing of the criminal complaint and the suspect's initial appearance before a judge . . . ."[107] The panel's reading is anything but the "most obvious" interpretation, since victims' interests are not often implicated during these hours.[108] In fact, no other court has ever given the venue provision such a narrow construction. Perhaps this is because, in many federal criminal cases, no complaint is *ever* filed; many federal criminal cases proceed by way of formal indictment.

The panel's reading of the "no prosecution underway" language hinges on the counterintuitive idea that even the formal filing of a federal criminal complaint does not trigger a "prosecution"—and thus the CVRA's no-prosecution-underway language refers to at least a few hours during the criminal justice process. However, several sources commonly use the term "prosecution" to refer to events that happen after the filing of a complaint. The nation's leading criminal procedure hornbook states that "[w]ith the filing of the complaint, the arrestee officially becomes a 'defendant' in a criminal prosecution."[109] Additionally, multiple Federal Rules of Criminal Procedure use the term "prosecution" in this way.[110] For example, under Rule 20(a) of the Federal Rules of Criminal Procedure, "a prosecution" may be transferred from the judicial district "from which a warrant on a complaint has been issued."[111] Under Rule 20(c), if the transfer on a complaint ultimately leads to a not guilty plea, then the "clerk must return the papers to the court where the prosecution began . . . ."[112] As these sources illustrate, the common-sense meaning of the term "prosecution" is that, when the Government has filed a sworn compliant—i.e., a "written statement of the essential facts constituting the offense charged,"[113]—a "prosecution" has

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[105] *Id*.
[106] *Id*. at 1213.
[107] *Id*. at 1213.
[108] *Id*. at 1212 n.18.
[109] WAYNE R. LAFAVE ET AL, CRIMINAL PROCEDURE § 1.2(g), at 11 (5th ed. 2009) (emphases added).
[110] *See* Fed. R. Crim. P. 20(a) & (c); *see also* Fed. R. Crim. P. 58(b) & (c).
[111] Fed. R. Crim. P. 20(a) (emphasis added).
[112] Fed. R. Crim. P. 20(c) (emphasis added).
[113] Fed. R. Crim. P. 3.

begun. Before then, no prosecution is "underway," and under the CVRA's venue provision, victims assert their CVRA rights in the district where the crime was committed.

Rather than adopting this uncomplicated reading of the statute, the panel resorted to a different body of law, citing various cases regarding when the Sixth Amendment right to counsel attaches.[114] These constitutional rulings hold that, in the context of the Sixth Amendment, no right to counsel attaches until the defendant physically appears in Court—and thus no "prosecution" begins until that time.[115] However, the panel's cited caselaw is inapposite on this issue. First, Congress enacted the CVRA in 2004. The panel's caselaw is all post-CVRA enactment and directly conflicts with substantial pre-enactment Court of Appeals authority, which holds that the filing of a complaint *is* sufficient to trigger the Sixth Amendment's right to counsel.[116] Second, as the dissent pointed out, it is unclear why the panel believed that the time frame for the attachment of the right to counsel under the Sixth Amendment is dispositive for determining when a "prosecution" typically begins.[117] In fact, if the panel had looked to the caselaw for the attachment of the right to a speedy trial under the Sixth Amendment, then it would have found that a "prosecution" begins "as early as the time of arrest and holding to answer a criminal charge."[118]

Moreover, the panel's interpretation of when no "prosecution is underway" gives a decidedly technical interpretation of the CVRA, counterintuitively construing it as employing "legal term[s] of art."[119] A reading that employs the common meaning of the CVRA's language makes more sense, as most crime victims (unlike criminal defendants) will lack legal

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[114] *In re* Wild, 955 F.3d at 1212.

[115] *See id*. at 1212 (citing United States v. Alvarado, 440 F.3d 191, 199–200 (4th Cir. 2006); United States v. States, 652 F.3d 734, 741–42 (7th Cir. 2011); United States v. Boskic, 545 F.3d 69, 82–84 (1st Cir. 2008); Rothgery v. Gillespie County, Tex., 554 U.S. 191, 199 (2008)).

[116] *See, e.g.,* Manning v. Bowersox, 310 F.3d 571, 575 (8th Cir. 2002); Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir.1991); Hanrahan v. United States, 348 F.2d 363, 366 n.6 (D.C. Cir. 1965).

[117] *In re* Wild, 955 F.3d at 1238 n.17. (Hull, J., dissenting).

[118] *Id*. (citing United States v. Gouveia, 467 U.S. 180, 190 (1984)).

[119] *See id*. at 1212 (quoting *Prosecution*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1944) (defining "prosecution" as "[t]he institution and continuance of a criminal suit [and] the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information."))).

counsel to help them navigate the criminal justice process.[120] Thus, when unrepresented crime victims are reading the venue provision in the CVRA to determine where to assert their rights, they should not be expected to have mastered a subtext of Sixth Amendment right-attachment jurisprudence upon which the panel's strained reading necessarily relies.

After the panel gave its first interpretation of the venue provision as applying during the hours after the filing of a criminal complaint, without any sense of apparent irony the panel offered an alternative interpretation—that clause might also be read to somehow refer not to the very beginning of the process, but to its very end. The panel's puzzling interpretation of the clause reasoned that the no-prosecution-underway language might refer to the time "period *after* a 'prosecution' has run its course and resulted in a final judgment of conviction."[121] The dissent correctly pointed out that the panel's alternative interpretation "does not comport with how the word 'underway' is ordinarily or commonly understood."[122] Indeed, "it is a stretch to say that when something is not 'underway,' it is commonly or ordinarily understood to mean that the something is completed."[123]

This alternative reading is also curious because, if a *final* judgment exists, then it is hard to understand how any victims' rights could still be at stake. But in an attempt to defend its reading, the panel noted that the CVRA permits a victim to "re-open a plea or sentence."[124] Then, recognizing a problem, the panel immediately dropped a footnote, conceding that this reading "isn't perfectly seamless, in that it would require the victim to file her post-judgment motion 'in the district in which the crime occurred' rather than, as one might expect, in the district in which the prosecution occurred and the conviction was entered."[125] Not "perfectly seamless" indeed! For example, under the panel's reading, the CVRA could require a victim to file a post-judgment motion to re-open a defendant's criminal sentence in a court that lacks any jurisdiction to do so. It is unclear why the panel prefers this fallback reading of the no-prosecution-underway clause over the dissent's

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[120] *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 77 (2015).

[121] *In re* Wild, 955 F.3d at 1213.

[122] *Id*. at 1238 (Hull, J., dissenting) (reasoning that "[i]n everyday parlance, if 'a process, project [or] activity' is not 'underway,' we generally understand that to mean it has not yet begun.").

[123] *Id*. (Hull, J., dissenting).

[124] *Id*. at 1213 (citing 18 U.S.C. § 3771(d)(5)).

[125] *Id*. at 1213 n.19.

"seamless" reading, especially after recognizing the plausibility of the dissent's interpretation.

In sum, the panel's interpretation of the CVRA does not give the statutory language its most straightforward reading. Perhaps recognizing the problems with its textual approach, the panel also relied on policy arguments against giving the statute its most natural interpretation. We turn to these policy arguments in the next Part.

III. READING THE CVRA AS EXTENDING SOME PRE-CHARGING RIGHTS DOES NOT UNDULY BURDEN LAW ENFORCEMENT

In an attempt to support its strained reading of the CVRA, the panel argued that adopting the victims' interpretation would burden law enforcement. In the panel's view, if the CVRA applies before charges are filed, then there would be no logical stopping point"—and the Government would be required to consult with victims "before raids, warrant applications, arrests, witness interviews, lineups, and interrogations."[126] This Part responds to the panel's far-fetched "slippery slope" argument. In fact, as experience demonstrates, applying CVRA rights pre-charge will not interfere with criminal investigations.

A. CVRA Rights Can Apply Before Charging Without Interfering with the Proper Functioning of the Criminal Justice System

The panel reasoned that reading the CVRA as applying before charges are filed would "open[] the floodgates" to the possibility of prosecutors being required to confer with victims "before law-enforcement officers conduct a raid, seek a warrant, or conduct an investigation."[127] While the victims had suggested that the CVRA rights would only attach once the investigation had matured to a certain point, the panel rejected such a logical approach by reasoning that it "has no basis in the CVRA's text."[128] As the panel saw things, if CVRA rights were to "apply during the 'detection' and 'investigation' of [a] crime, then there is no meaningful basis—at least no meaningful *textual* basis—for limiting the Act's pre-charge application to the NPA context."[129] Concluding that the victims' reading extending rights before charging "provides no logical stopping point," the panel held that "the

[126] *In re* Wild, 955 F.3d at 1218.
[127] *Id*.
[128] *Id.* at 1213.
[129] *Id*. at 1211.

CVRA's text is best read as applying only after the commencement of criminal proceedings, whether by complaint, information, or indictment."[130]

The panel's argument about untoward consequences is unconvincing. The CVRA's right to confer is, in fact, limited to the "*reasonable* right to confer."[131] The panel recognized that reasonableness limitation, but held that it was a "squishy" limitation that could be overlooked to "require law-enforcement officers to 'confer' with victims . . . before conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation."[132] The panel refused to "assume that Congress intended such a jarring result."[133]

It is unclear why the panel did not simply hold that a "jarring result" would be an "unreasonable" result—i.e., something that the CVRA did not require. Judge Hull's dissent quite properly focused on this contradiction. She explained that "a victim's 'reasonable right to confer' is a forceful limiting principle and embodies a common, workable legal standard that is sufficient to stave off the majority's speculations about 'enterprising' crime victims and 'innovative' judges" applying the CVRA to inappropriate circumstances.[134] Presumably, the reasonableness limitation to the CVRA's right to confer explains why the panel's conjectured problems have never occurred anywhere in the country, even though (as discussed below) the CVRA has been applied pre-charging by other courts—such as the Fifth Circuit.[135]

The panel opinion's recurring concern was that applying the CVRA pre-charging, while "not implausible" as a matter of text,[136] somehow produced a result that the panel disagreed with—i.e., a requirement that law enforcement officials will too often be forced to "reasonably" confer with crime victims before charges are filed. As an empirical matter, the panel's concerns are overblown (as we discuss in the next Section). But as a jurisprudential matter, the panel opinion is curious. The Eleventh Circuit has repeatedly endorsed a textual approach to statutory construction, holding that when the statutory "language at issue has a plain and unambiguous meaning,"

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[130] *Id*.

[131] 18 U.S.C. § 3771(a)(5) (giving victims "the *reasonable* right to confer with the attorney for the Government in the case" (emphasis added)).

[132] *Id*.

[133] *Id*.

[134] *Id*. at 1245 (Hull, J., dissenting).

[135] *See* Section III.B, *infra*.

[136] 955 F.3d at 1212.

the court "need go no further."[137] Judge Hull put the point incisively, observing that "[g]iven this is a plain-text case, the [m]ajority curiously carries on at length about slippery slopes and bad policy implications . . . ."[138]

Ultimately, it is for Congress to decide what kinds of rights crime victims deserve at various points in the federal criminal justice process. It is hard to comprehend how the panel concluded that Congress did not intend to cover cases such as the Epstein case, especially given that the panel "regret[ed]" its ruling[139] and that it seemed "obvious" that prosecutors should have conferred with Epstein's victims.[140] Instead of adopting a less "regrettable" reading of the CVRA, the panel essentially determined that Congress drafted the Act—essentially a broad bill of rights for crime victims—in a way that could be easily circumvented by prosecutors through "negotiating 'secret' plea and non-prosecution agreements . . . before instituting criminal proceedings."[141] Surely a more desirable reading of the Act is one that blocks such deceitful maneuvers.

The panel did not doubt that avoiding "secret" plea deals was desirable, but eschewed such a reading based on its prediction that it would produce intractable administrative problems in other areas.[142] However, the panel's sky-will-fall prediction is belied by the Justice Department's demonstrated ability to provide pre-charging rights to victims—including during the Epstein case that was before the Court! For example, the Justice Department had no difficulty determining that, as of 2006, when its "attorney for the Government in the case"[143] was actively negotiating with Epstein's defense team, the case had matured to the point where Epstein's victims possessed CVRA rights. Indeed, the Government's lead prosecutor mailed more than thirty Epstein victims "*standard* CVRA victim notification letters"[144] telling Ms. Wild and other victims that, "as a victim . . . of a federal offense you have a number of [CVRA] rights."[145] Thereafter, the Government sent notices about the progress of the case to Epstein's victims (although the

[137] United States v. St. Amour, 886 F.3d 1009, 1013 (11th Cir. 2018).
[138] 955 F.3d at 1226 (Hull, J., dissenting).
[139] *Id.* at 1221.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 1220.
[143] 18 U.S.C. § 3771(a)(5).
[144] Doe 1 v. United States, 359 F.Supp.3d at 1208 (emphasis added).
[145] Petition for Rehearing en Banc at Ex. 1, *In re* Wild, 955 F.3d 1196 (11th Cir. 2020) (No. 19-13843).

candor of those notices was dubious).[146] Thus, the Government itself initially took the position that the victims had "statutory rights to 'confer with the attorney for the Government in the case,' 'to be treated with fairness,' and to petition the district court if [their] CVRA rights were being violated"[147]—which belies the idea that extending rights before charges would be impractical. Indeed, as Judge Hull explained, "this initial position of the U.S. Attorney's Office . . . is not surprising," because "[t]he [CVRA] was enacted to make crime victims full participants in the criminal justice system."[148]

Additionally, in 2011, the District Court gave the same reading to the CVRA that the U.S. Attorney's Office had previously—that is, that the CVRA applied before charges were filed[149]—and the sky did not fall in the Southern District of Florida for the more than eight years when this ruling was in effect. Surely if the panel's concerns were real, it would have been possible to find a concrete example to illustrate the point during the many hundreds of federal criminal prosecutions that moved forward in that court.

In its briefing before the Eleventh Circuit, the Justice Department did not argue—much less provide evidence—that it would be unduly burdened by affording pre-charging rights to victims of federal crimes. Its silence on this point is likely because federal agencies have long been required to provide victims rights before charging. Long before it enacted the CVRA in 2004, Congress enacted the Victims' Rights and Restitution Act of 1990 ("VRRA"). In that statute, Congress mandated that all federal agencies engaged in "the detection, investigation, or prosecution of crime" must "[i]dentify the victim or victims of a crime" at "the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation . . . ."[150] The VRRA further requires federal agencies to provide the identified victims with "the earliest possible notice of . . . the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation."[151] In light of these provisions, the Justice Department's investigative agencies have long "provide[d] [service referrals, reasonable protection, and notice concerning the status of the investigation] to thousands of victims every year, whether or

[146] *See supra* note 27 and accompanying text.
[147] *In re* Wild, 955 F.3d at 1227 (Hull, J., dissenting).
[148] *Id*. at 1227 (quoting Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006)).
[149] Does, 817 F.Supp.2d at 1341.
[150] 42 U.S.C. § 10606 et seq. (currently codified as 34 U.S.C. § 20141 et seq.).
[151] *Id*. § 20141(c)(3).

not the investigation results in a federal prosecution."[152] Thus, when Congress was crafting the CVRA in 2004, it presumably understood that the Justice Department was already providing pre-charging notifications to crime victims because of the VRRA's requirements.

Additionally, in 2015, Congress added a new right to the CVRA that indisputably applies pre-charging—specifically, "the right to be informed of . . . the services described in [the VRRA] . . . ."[153] This 2015 amendment confirms that Congress understood the CVRA as applying pre-charging, because the amendment requires notice to victims about VRRA "services" provided well before charges are filed.[154] For example, the VRRA states that rape victims should be provided with notice of medical services available to them.[155] But victims seeking to enforce their (2015) CVRA right to notice about VRRA services must rely on the CVRA's pre-existing (2004) enforcement mechanisms—including the venue provision discussed in Part II of this Article.[156] The fact that, in 2015, Congress added a right that undeniably applies before charges are formally filed—and simply relied on the existing (2004) venue provision—confirms that Congress thought that it already enacted a statute that applied before formal charging. Put another way, given that Congress thought it could "plug-and-play" a new CVRA provision providing notice about certain pre-charging services into the then-existing CVRA enforcement mechanisms, those mechanisms must have already applied pre-charging. And the broader point remains: The Justice Department has been able to provide victims rights before the filing of criminal charges without any demonstrated administrative problems.

B. The Fifth Circuit's Long-Standing Application of the CVRA Before Charging Refutes the Eleventh Circuit Panel's Policy Concerns About Pre-Charging Rights

If the panel were correct that applying the CVRA pre-charging application would produce a parade of horribles, then those horribles should have already materialized in the Fifth Circuit.[157] That Circuit, large and

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[152] Letter from Ronald Weich, Asst. Attorney General to Jon Kyl, U.S. Senator (Nov. 3, 2011).

[153] 18 U.S.C. § 3771(a)(10).

[154] *See In re* Wild, 955 F.3d at 1214–15.

[155] *Id.* at 1214.

[156] *See* 18 U.S.C. § 3771(d)(3).

[157] They should also have occurred in some states, where victims' rights attach before the formal filing of criminal cases. *See* Paul G. Cassell et al., *Crime Victims' Rights During*

populous and adjacent to the Eleventh Circuit, has long applied the CVRA before formal charges are filed—without any reported problems.

In 2008, the Fifth Circuit decided *In re Dean.* [158] That case arose out of a federal criminal investigation for an explosion at a refinery operated by BP Products North America (BP), which killed fifteen and injured more than 170.[159] Suspecting that the explosion may have been due to BP's corporate malfeasance, the Justice Department investigated possible federal criminal violations. As the case progressed, the federal prosecutors entered into plea negotiations with BP. But (as in the Epstein case), the defense attorneys for BP pushed the government to keep its negotiations secret. So, the federal prosecutors asked for a court order relieving the government of any obligation to consult with the victims until after the plea was final. The district court believed that "any public notification of a potential criminal disposition resulting from the government's investigation [of the] explosion would prejudice [BP] and could impair the plea negotiation process and may prejudice the case in the event that no plea is reached."[160]

After a plea deal was signed and agreed to between the federal prosecutors and BP, it was unsealed, and victims of the explosion sought to have the agreement set aside. Unsuccessful in the district court,[161] the victims sought to have the agreement set aside by the Fifth Circuit. Relying on the CVRA, the Fifth Circuit rejected the district court's decision to keep a plea deal secret from victims until after it was filed. The Fifth Circuit explained that "[i]n passing the [CVRA], Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached."[162] The Circuit remanded the case base to the district court for further proceeding to give the victims an opportunity to object to the arrangement.[163]

Criminal Investigations? Apply the Crime Victims' Rights Act Before Criminal Charges are Filed? 104 J. CRIM. L. & CRIMINOLOGY 59, 98–103 (2014).

[158] *See In re* Dean, 527 F.3d 391 (5th Cir. 2008). In the interests of full disclosure, one of the authors (Cassell) served as counsel for the crime victims in the case.

[159] United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, 2008 U.S. Dist. LEXIS 12893 (S.D.Tex. Feb. 21, 2008).

[160] *In re* Dean, 527 F.3d at 392.

[161] *See* United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, 2008 U.S. Dist. LEXIS 12893 (S.D.Tex. Feb. 21, 2008).

[162] *Id*. at 395.

[163] *Id.* at 396.

The *Dean* holding created a real problem for the Eleventh Circuit panel majority. As a result of that 2008 decision, the controlling law in the Fifth Circuit has extended CVRA rights to victims before charges were filed for more than a decade. Given that the Circuit has handled well over one hundred thousand criminal cases during that time,[164] why have no reports emerged of the kinds of problems that the panel prophesized in the Epstein case?

The panel attempted to bury the inconvenient fact that the Fifth Circuit has long been doing what the panel argued was essentially impossible. The panel majority relegated its discussion of *Dean* to a footnote and then gave several (unpersuasive) reasons for splitting from the *Dean* holding.[165] For example, the panel characterized the Fifth Circuit ruling as "technically dictum" because the Fifth Circuit ultimately denied the mandamus petition asking for the plea to be set aside and simply remanded to the district court.[166] But to achieve that result, the Fifth Circuit had initially *granted* the victims' petition, blocking any further district court consideration of the BP plea agreement until the Fifth Circuit could finally rule.[167] And then, when the Circuit finally released its published opinion, it stated in the opinion's opening paragraph that "[w]e *find a statutory violation* [of the CVRA] . . . ."[168] The penultimate sentence in the Fifth Circuit's decision also instructed that, on remand, "the district court will *take heed that the victims have not been accorded their full rights under the CVRA* . . . ."[169] The Eleventh Circuit panel's footnote appears to be the first time, in the more than a decade since the Fifth Circuit handed down its decision, that any court (or legal scholar) has called the Fifth Circuit decision dictum.[170]

The panel also gave as a reason for declining to follow *Dean* that the parties there "didn't even dispute whether the CVRA applies before the commencement of criminal proceedings," and accordingly, "the question that

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[164] *See* U.S. SENTENCING COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 1 (2019) (reporting 21,369 federal offenders in the Fifth Circuit in fiscal year 2019 alone).

[165] *In re* Wild, 955 F.3d at 1219 n.25.

[166] *Id.*

[167] *In re* Dean, 527 F.3d at 393.

[168] *Id.* at 392 (emphasis added).

[169] *Id.* at 395 (emphasis added).

[170] We recently used Westlaw to run a search, which identified 137 "citing references" to *In re* Dean. Using Westlaw's "search within results" feature, we were unable to identify a single reference to "dicta" or "dictum" in connection with the *In re Dean* decision—other than the panel's opinion.

this case so clearly tees up was never subject to adversarial testing."[171] But in raising this narrow jurisprudential point, the panel missed the larger point: That the CVRA covered pre-charging plea negotiations was so obvious to the "parties" in that case—including the Justice Department—that no one even thought to contest it. Presumably the reason that Justice Department lawyers were not challenging the issue was that they have long been applying the CVRA before charging, without any problems in the Fifth Circuit.

If the Eleventh Circuit panel decision is reinstated en banc, the circuit split with the Fifth Circuit will create undesirable "forum shopping" consequences. For example, whether prosecutors must confer about non-prosecution agreements is a recurring issue, particularly in complicated and important criminal investigations. In fact, in the context of resolving the investigation of corporate crimes, deferred and non-prosecution agreements have been described as the "standard method."[172] Thus, under the Eleventh Circuit panel's ruling, in the future, multistate businesses will no doubt try and negotiate secret non-prosecution agreements in the Eleventh Circuit that would be impossible in other circuits. In other words, before charges are filed, the Eleventh Circuit will become a safe haven for circumventing the CVRA.

IV. MOVING BEYOND THE EPSTEIN LITIGATION TO PROTECT CRIME VICTIMS DURING INVESTIGATIONS

A. Addressing Secret Non-Prosecution Agreements

For all the reasons just discussed, the Eleventh Circuit's divided panel decision allowing secret non-prosecution agreements contradicts both the CVRA's plain language and important public policy considerations. Now that the case has been set for rehearing en banc, the full Eleventh Circuit should reject the earlier approach of the panel decision and instead issue a full-throated endorsement of the CVRA pre-charging coverage—for all the reasons articulated in this Article.

But regardless of how this particular case ultimately plays out before the Circuit (or the Supreme Court[173]), the CVRA's protections for crime

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[171] 955 F.3d at 1219 n.25.

[172] Peter J. Henning, *Dealing with Corporate Misconduct*, 66 FLA. L. REV. F. 20, 20 (2015).

[173] If the Eleventh Circuit were to adhere to the earlier panel position in ruling on the case en banc, the result would be a clear circuit split with the Fifth Circuit. Such a circuit

victims need to be clearly established. Even the panel decision appeared to recognize that further congressional action would be useful on this issue. In calling its own decision "regrettable," the panel noted that it was simply interpreting the CVRA in light of how "matters currently stand—which is to say at least as the CVRA is currently written."[174] The panel concluded that it was constrained to leave the victims "emptyhanded," and it was up to Congress to "amend the Act to make its intent clear."[175] In fact, the panel noted that its decision would allow prosecutors to enter "secret" pleas and NPAs "without ever notifying or conferring with victims . . . ."[176] The panel was unhappy with this conclusion, admitting that in "the wake of the public outcry over the federal prosecutors' handling of the Epstein case," "we can only hope" that prosecutors will not strike secret plea deals in the future.[177]

The dissent, while vehemently disagreeing with whether further congressional action was required to give victims pre-charging rights, powerfully explained that the panel's decision rendered the CVRA "impotent" in important situations and had the effect of "revis[ing] the statute's plain text" and "gut[ting] victims' rights under the CVRA."[178] The dissent, too, seemed to invite congressional action. The dissent put the point plainly, concluding that "[o]ur criminal justice system should safeguard children from sexual exploitation by criminal predators, not re-victimize them."[179] Presumably, the dissent was recognizing that child sex trafficking victims in other cases might not be able to secure pro bono attorneys to pursue more than twelve years of litigation to litigate and protect their rights—which is what the attorneys for Courtney Wild and other Epstein victims have had to undertake.

One way of addressing the need to protect victims before charges are filed is set out in proposed legislation currently pending before Congress. In 2019, Representative Jackie Speier and a bi-partisan group of representatives introduced a bill that would ensure that no other courts would reach the strained conclusion of the Eleventh Circuit panel majority. The legislation is entitled the "Courtney Wild Crime Victims' Rights Reform Act of 2019"

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split might well prompt Supreme Court review. *See* Rule 10(a), Supreme Court Rules (noting circuit split as one of the compelling reasons for granting a writ of certiorari).

[174] *In re* Wild, 955 F.3d at 1198.

[175] *Id.* at 1205, 1221.

[176] *Id.* at 1221.

[177] *Id.* (emphasis deleted).

[178] *Id.* at 1225, 1250 (Hull, J., dissenting).

[179] *Id.* at 1249–50 (Hull, J. dissenting).

(CVRRA),[180] recognizing the role that Courtney Wild—the lead victim in the Eleventh Circuit's *In re Wild* case—has played in trying to hold Jeffrey Epstein accountable.[181] As Representative Speier explained, her bill

> is named for the survivor who courageously led the way in asserting the rights of the scores of victims who fell prey to Jeffrey Epstein in Florida and were kept in the dark as federal prosecutors hashed out a secret and shockingly lenient plea deal. Courtney Wild fought in court for over 10 years before a Federal District Court finally declared that her rights, and the rights of other victims of the serial sexual predator, under the Crime Victims' Rights Act were violated.[182]

The CVRRA contains several important provisions that would help ensure that crime victims like Ms. Wild never again have to face arguments like those encountered from federal prosecutors in the Epstein case. Of particular importance for this Article, the legislation would add language that would specifically supersede the Eleventh Circuit panel's perverse ruling. While the panel held that victims had the right to confer with prosecutors only after charges had been filed, the CVRRA would make clear—through clarifying legislation[183]—that crime victims have the reasonable right to

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[180] H.R. 4729, 11th Cong., 1st Sess. (introduced Oct. 17, 2019).

[181] *See generally* Kate Sheehy, *Jeffrey Epstein Accuser: I was 14 Years Old and Still in Braces When Abuse Began*, N.Y. Post, July 8, 2019, available at https://nypost.com/2019/07/08/jeffrey-epstein-accuser-i-was-14-years-old-and-still-in-braces-when-abuse-began/; *see also* BRADLEY J. EDWARDS, RELENTLESS PURSUIT: MY FIGHT FOR THE VICTIMS OF JEFFREY EPSTEIN 24-40 (2020) (discussing Ms. Wild's efforts to obtain a prosecution of Epstein); Jeffrey Epstein: Filthy Rich (Netflix series in which Ms. Wild discusses her sexual abuse and later efforts to bring Epstein to justice).

[182] *See* Press Release, Rep. Speier (Oct. 17, 2019), available at https://speier.house.gov/2019/10/rep-speier-introduces-bipartisan-courtney-wild-crime-victims-rights-reform-act-of-2019-to-rectify-injustices-faced-by-epstein-s-victims.

[183] Representative Speier's legislation is designed not to expand existing law, but to clarify existing law. This point is important because, in a truly ironic twist, the federal prosecutors defending the Epstein NPA before Eleventh Circuit cited her legislation, designed to prevent any recurrence of violations of victims' rights, as reason for denying the victims any relief. Br. for the U.S. at 43, In re Wild, No. 19-13843. Precisely to avoid such a misreading of congressional intent, Representative Spier's press release accompanying the proposed legislation explicitly stated that the bill was designed to "clarify" what was already contained in existing law. *See* Press Release, *supra* note 182. Indeed, the Government's argument was so misleading that Representative Spier wrote to the Attorney General to explain that she was "displeased that [her] legislation and accompanying press release were misinterpreted, and [she] trust[s] that [the Attorney General] will direct. . . prosecutors to correct with the Eleventh Circuit their erroneous description of the proposed legislation." *See* Letter from Rep. Jackie Speier to Att'y Gen. William Barr, CONG. REC., Extension of

confer about not only "the case," but also "any plea bargain or other resolution of the case *before such plea bargain or resolution is presented to the court or otherwise finalized.*"[184] Thus, if approved, the CVRRA would give victims pre-charging rights when criminal case resolutions are being negotiated, "[c]larify[ing] that victims of federal crimes have the right to confer with the Government and be informed about key pre-charging developments in a case, such as plea bargains, non-prosecution agreements, and referrals to state and local law enforcement."[185]

The CVRRA also expands language in the 2015 amendment to the CVRA, providing that victims must receive timely notice not only of a "plea bargain or deferred prosecution agreement," but also of any "nonprosecution agreement, or the referral of a criminal investigation to another Federal, State, or local law enforcement entity."[186] This language would also prevent prosecutors from ever again reaching the kind of secret non-prosecution agreement that they reached in the Epstein case.[187]

The CVRRA also contains a provision that would simplify litigation regarding crime victims' rights compliance regarding non-prosecution agreements (as well as other issues). The CVRRA provides that if a dispute arises about CVRA compliance, then the Justice Department "shall promptly provide[] to the victim and, if requested, to the court reviewing the issue all relevant information and documents concerning the circumstances . . . ."[188] This provision would respond to the remarkable fact that between filing their action to enforce the CVRA and their motion for summary judgment, Epstein's victims spent more than seven years(!) in litigation that produced hundreds of docket entries.[189] Those years were spent attempting to pry from the government information about what had happened leading up to the secret

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Remarks E1495 (Nov. 21, 2019). The Government never took any corrective action, as Representative Speier had requested.

[184] H.R. 4729, § 2(1)(A) (amending 18 U.S.C. § 3771(a)(5)) (emphasis added).

[185] Press Release, *supra* note 182.

[186] H.R. 4729, § 2(1)(B) (amending 18 U.S.C. § 3771(a)(9)).

[187] While prosecutors would be forbidden from reaching deals that are secret from victims, the CVRRA contains a provision that, upon a showing of good cause, victims could be required to maintain "the confidentiality of any nonpublic information disclosed to the victim." *Id.* This provision could be invoked in the rare case where needs related to ongoing investigation might require some form of confidentiality.

[188] *Id.* § 2(2).

[189] *See* Petition, Does v. U.S., Case No. 9:08-cv-80736, Dkt. Entry 1 (S.D. Fla. July 7, 2008); Summary Judgment Motion, Dkt. Entry 361 (S.D. Fla. February 10, 2016).

NPA with Epstein.[190] Just as prosecutors have long been required to provide all exculpatory information to criminal defendants,[191] the prosecutors should likewise be required to rapidly provide to victims information about the circumstances surrounding a possible violation of crime victims' rights.

B. Extending Rights During the Investigative Process

The changes just discussed would effectively address one of the key problems in the Epstein case: secret non-prosecution agreements. But addressing such secret case resolutions is a manifestation of a larger problem, namely, how to ensure that crime victims are treated fairly during criminal investigations. In an earlier Article six years ago, two of us (Cassell and Edwards) suggested that the CVRA rights could be properly interpreted as extending victim rights before charges are filed when a federal criminal case has crystalized to a point where identifiable victims exist. We formulated our proposed interpretation this way:

> CVRA rights attach when an officer or employee of the Department of Justice or any other department or agency of the United States engaged in the detection, investigation, or prosecution of crime has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense . . . and in the judgment of the officer or employee, that person is a putative victim of that offense.[192]

In defense of this interpretation, we suggested that this formulation would borrow from the CVRA's "coverage" provision[193] and would provide a workable approach to determining when a case had progressed to the point where crime victims' rights could reasonably attach.

The panel decision specifically discussed this interpretation in its decision, explaining that "Professor Cassell's proposal reads like a finely-tuned statutory provision—but one that, unfortunately, Congress never

[190] *See, e.g.*, Doe v. U.S., Case No. 9:08-cv-80736, Dkt. Entry 50 at 3-5 (S.D. Fla. March 21, 2011) (describing government refusal to providing correspondence and other information about the case).

[191] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[192] *See* Cassell et al., *supra* note 157, at 92.

[193] *See supra* note 93–98 and accompanying text.

enacted."[194] For reasons discussed throughout this Article, we disagree that the CVRA does not currently extend pre-charging rights to victims. But, of course, Congress could respond to the Eleventh Circuit's narrow—and self-described "unfortunate"—reading of the CVRA by adopting a "finely-tuned statutory provision" along these lines.

As explained earlier in this Article,[195] adding such language into the CVRA would not create any noticeable problems for federal law enforcement agencies. Indeed, under the VRRA, federal law enforcement agencies have been obligated ever since 1990 to provide identified victims with "the earliest possible notice of . . . the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation."[196] Federal law enforcement agencies are thus already well versed in responding to the concerns of crime victims during criminal investigations.

The effect of extending CVRA rights into the investigative process is limited but important. The most far-reaching substantive right that victims would gain during the investigation would be the "right to be treated with fairness and with respect for the victim's dignity and privacy."[197] But while that right is far-reaching, affording victims this right should not require any changes to existing law enforcement practices. Hopefully, federal agencies are already treating victims fairly and respectfully and providing a right to such treatment would simply reinforce and guarantee what should be an existing practice.

Since 2015, victims have also had a right under the CVRA "to be informed of the rights under this Section and the services described in [the VRRA] . . . ."[198] This provision provides pre-charging notice to crime victims about such services as the medical treatment available to rape victims. Clearly this previously established right has been—and can continue to be—afforded to victims before charges are filed. Indeed, the Justice Department is already

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[194] *In re* Wild, 955 F.3d at 1211 n.16.

[195] *See supra* notes 157-172 and accompanying text.

[196] *Id*. § 20141(c)(3).

[197] 18 U.S.C. § 3771(a)(8). *See generally* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law For Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 126–28 (discussing the way in which fairness and dignity provisions for crime victims have been interpreted).

[198] 18 U.S.C. § 3771(a)(10), discussed at *supra* notes 153–156 and accompanying text.

providing such notices "to thousands of victims every year, whether or not the investigation results in a federal prosecution."[199]

And finally, extending rights before charging would give victims the "right to be reasonably protected from the accused."[200] This right can be particularly important for victims of violent crimes, who may face retaliation by those who have victimized them because they are cooperating with law enforcement. Extending a right of protection for such victims can be literally a life-or-death matter.[201] Waiting for the filing of charges before giving crime victims reasonable protection is waiting too long.

Reading the CVRA as generally extending rights before charging would not be an innovation, but rather a restoration of the original vision of the CVRA's drafters. Senator Kyl wrote a law review article about the Act in 2005, the year after he successfully co-sponsored enactment of the law. In his article, Senator Kyl explained that the CVRA applies before charges are filed:

> While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim's dignity and privacy each may arise without regard to the existence of legal proceedings.[202]

In 2005, Senator Kyl clearly believed that the CVRA extended these rights to crime victims even before charges are filed. That vision was sound then and, in the wake of an appellate panel's departure from it, should now be codified even more directly into the CVRA.

CONCLUSION

[199] Letter from Ronald Weich, Asst. Attorney General to Jon Kyl, U.S. Senator (Nov. 3, 2011).

[200] 18 U.S.C. § 3771(a)(1).

[201] *See generally* Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47 (2010).

[202] Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588-91 (2005).

The highly publicized Jeffrey Epstein case highlights a perennial issue in more routine the criminal justice cases. Victims have critical concerns at stake even before prosecutors formally file criminal charges—rights that Congress appeared to have protected for victims of federal crimes in enacting the CVRA. But, unfortunately, the Eleventh Circuit panel ruling, if reinstated by the Eleventh Circuit en banc, would mean that, at least for victims within that Circuit, the CVRA would provide no protection for victims during criminal investigations. And prosecutors would remain free, for example, to circumvent the CVRA and negotiate secret non-prosecution agreements.

Hopefully, the earlier panel was an aberration, which will be swiftly corrected by the Eleventh Circuit acting en banc (or by the Supreme Court, if the Eleventh Circuit en banc splits from Fifth Circuit's position that the CVRA applies pre charging). But Congress can also amend the CVRA to prevent future litigation (such as occurred in the Epstein case for more than twelve years) and guarantee protection for crime victims. Congress should clarify the Act by directly adding language that victims have a right to confer about non-prosecution agreements and other dispositions of federal criminal cases. And Congress should also clarify that during criminal investigations, crime victims possess other general CVRA rights, such as the right to fair treatment.

Of course, the issues surrounding the fair treatment of crime victims are not confined to federal criminal cases. As crime victims' rights become a recognized part of America's criminal justice architecture, those rights should also extend into the investigative and charging processes. The filing of criminal charges is an important part of the criminal justice system. But it is illogical to deprive crime victims of any rights until prosecutors finally make their charging decision. As the Epstein case sadly illustrates, such an artificial boundary can be misused by prosecutors to dispose of criminal cases while keeping victims in the dark about what is happening.

Crime victims suffer immediately—and often irreparably—when criminals commit crimes. Victims deserve rights in the criminal justice process while prosecutors determine whether to hold those criminals accountable.