

VICTIMS’ RIGHTS MOVING FORWARD AFTER THE EPSTEIN CASE

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TABLE OF CONTENTS

INTRODUCTION.....	406
I. BACKGROUND.....	408
A. <i>The Crime Victims’ Rights Act—18 U.S.C. § 3771</i>	408
B. <i>The Mandamus Review Standard for the Crime Victims’ Rights Act</i>	410
C. <i>A Victim’s Role in Plea Agreements</i>	411
II. THE HISTORY OF THE CVRA	412
A. <i>The History of Silence</i>	412
B. <i>Giving Victims a Voice</i>	413
C. <i>The 2015 Amendments</i>	414
D. <i>The Department of Justice’s Take</i>	415
E. <i>The Courtney Wild Crime Victims’ Rights Reform Act of 2019..</i>	416
III. THE EPSTEIN CASE	417
A. <i>The Charges</i>	418
B. <i>The Eleventh Circuit’s Opinion</i>	420
C. <i>Analyzing the Eleventh Circuit’s Decision</i>	421
D. <i>Senator Feinstein and Former Senators Kyl and Hatch’s Amici Curiae Brief</i>	423
IV. THE AFTERMATH OF THE ELEVENTH CIRCUIT’S DECISION	423
V. THE PROBLEMS WITH PROSECUTORIAL DISCRETION.....	424
A. <i>The Role of Prosecutorial Discretion</i>	424
B. <i>Prosecutorial Discretion Under the CVRA</i>	425
C. <i>How States Address the Conferral Right and Prosecutorial Discretion</i>	426
D. <i>The CVRA Does Not Impinge on Prosecutorial Discretion</i>	427
CONCLUSION	428

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INTRODUCTION

Between 1999 and 2005, well-connected financier Jeffrey Epstein abused more than thirty minor girls in his Florida mansion.¹ Epstein traveled throughout the United States and overseas to find these girls, violating both Florida and federal law.² When law enforcement agencies caught wind of these crimes, government prosecutors began drafting a well-supported, fifty-three-page indictment against Epstein.³ Those same prosecutors then mailed Epstein's victims notification letters under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771.⁴ These notification letters informed Epstein's victims of their eight enumerated rights under the CVRA.⁵

The CVRA is arguably one of the most important achievements of the crime victims' rights movement. The CVRA gives crime victims the right to participate in the criminal justice system and ensures that crime victims are treated with fairness and respect.⁶ The CVRA provides crime victims eight enumerated rights in relation to the government's prosecution of a federal offense.⁷ One of these rights is a crime victim's "reasonable right to confer with the attorney for the Government in the case."⁸ This right provides victims with a voice in the criminal justice system and the chance to express their views to the prosecutor before any decisions are made in the case.⁹ But as the Epstein case exemplifies, a victim's right to confer with a government attorney may not apply in situations where no indictment is formally filed.¹⁰ And as the Epstein case further exemplifies, crime victims are often left without a voice in those situations.

But even under the CVRA, a crime victim's remedies are limited. And over a decade since its passage, the uncertainty remains as to how the CVRA extends to the crime victims.¹¹ In a majority of courts, the uncertainty of when the CVRA

¹ Patricia Mazzei, *Years After Plea Deal in Sex Case, Jeffrey Epstein's Accusers Will Get Their Day in Court*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/us/jeffrey-epstein-acosta-florida-sex-abuse.html> [perma.cc/YSD7-2AAG].

² *Id.*

³ Ali Watkins, *Jeffrey Epstein Is Indicted on Sex Charges as Discovery of Nude Photos Is Disclosed*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/nyregion/jeffrey-epstein-charges.html> [perma.cc/CH76-BTBH].

⁴ *In re Wild*, 955 F.3d 1196, 1199, 1202 (11th Cir. 2020).

⁵ *Id.* at 1199.

⁶ Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 65–66 (2014).

⁷ Elliot Smith, *Is There a Pre-Charge Conferment Right in the CVRA?*, 2010 U. CHI. LEGAL F. 407, 407 (2010).

⁸ *Id.*

⁹ *Id.* at 408.

¹⁰ *In re Wild*, 955 F.3d at 1200, 1205.

¹¹ *See id.* at 1205.

applies often hinges on how the CVRA defines the term “crime victim.”¹² Under 18 U.S.C. § 3771(e), “‘crime victim’ means a person directly or proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”¹³ Some courts have held that this definition suggests that crime victims have a broad conferral right that extends pre-indictment.¹⁴ But other courts have held that the CVRA’s conferral right is limited to cases where the government has filed an indictment and that no such conferral right exists pre-indictment.¹⁵

Despite the argument that the CVRA lacks textual clarity concerning the conferral right, as a matter of statutory interpretation, it is reasonable to find a pre-indictment conferral right in the CVRA.¹⁶ The CVRA recognizes that crime victims exist prior to an indictment being filed by the government.¹⁷ In its own statutory language, the CVRA states that “officers and employees of the Department of Justice . . . engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and afforded, [their CVRA] rights.”¹⁸ This provision recognizes that crime victims have rights even in the investigation stage of a crime, a stage that occurs before the filing of an indictment.¹⁹ And it also recognizes that crime victims can assert CVRA rights in a district court where the crime occurred, even if no prosecution is underway.²⁰ This broader reading of the CVRA shows how some courts have reasonably found that a crime victim’s rights should and do attach before an indictment is filed.²¹

But opponents of the broader reading of the conferral right often point to the fact that victims are not the only actors with interests in the criminal-justice

¹² See *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005) (“[T]he CVRA does not grant victims any rights against individuals who have not been convicted of a crime.”); *United States v. Turner*, 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005) (interpreting the CVRA definition of a crime victim “to include any person who would be considered a ‘crime victim’ if the government were to establish the truth of the factual allegations in its charging instrument”); *Searcy v. Skinner*, No. 6:06-1418-GRA-WMC, 2006 WL 1677177, at *2 (D.S.C. June 16, 2006) (“[T]he CVRA does not grant victims any rights against individuals who have not been convicted of a crime.” (quoting *In re Huff*, 409 F.3d at 564)); *Searcy v. Paletz*, No. 6:07-1389-GRA-WMC, 2007 WL 1875802, at *5 (D.S.C. June 27, 2007) (“[T]he CVRA does not grant victims any rights against individuals who have not been convicted of a crime.” (quoting *Skinner*, 2006 WL 1677177, at *2)); *United States v. Sharp*, 463 F. Supp. 2d 556, 558 (E.D. Va. 2006) (holding that the CVRA does not apply to victims of uncharged conduct).

¹³ 18 U.S.C. § 3771(e)(2)(A).

¹⁴ See cases cited *supra* note 12.

¹⁵ See cases cited *supra* note 12.

¹⁶ See generally 18 U.S.C. § 3771.

¹⁷ *Smith*, *supra* note 7, at 437.

¹⁸ *Id.* (alterations in original) (emphasis omitted) (quoting 18 U.S.C. § 3771(c)(1)).

¹⁹ See generally *id.*

²⁰ 18 U.S.C. § 3771(d)(3).

²¹ See cases cited *supra* note 12.

system.²² The opponents argue that a broad reading of this right can have a negative impact on defendants, judges, and prosecutors.²³ In reference to the negative impact on prosecutors, opponents often point out that a prosecutor's function is to represent society as a whole, not just the crime victim.²⁴ Recognizing a crime victim's right pre-indictment could also make it more difficult for the court to protect the defendant's presumption of innocence. Accordingly, judges could also be put in a more difficult position of determining whether the crime victim was directly and proximately harmed by the conduct underlying the offenses being bargained over.

As the Epstein case exemplifies, defining and clarifying the scope of a crime victim's rights under the CVRA is critical in determining how prosecutors should proceed with the case.²⁵ It is not uncommon for prosecutors and defendants to bargain over a plea pre-indictment rather than post-indictment.²⁶ And pre-indictment plea bargaining occurs in essentially all white-collar criminal cases.²⁷ In cases where prosecutors reach pre-indictment plea agreements, a crime victim's conferral right is effectively denied when the CVRA does not extend pre-indictment.²⁸ This scenario is seen in the Eleventh Circuit's decision in the *Epstein* case, which denied Epstein's victims their rights under the CVRA.²⁹

I. BACKGROUND

A. *The Crime Victims' Rights Act—18 U.S.C. § 3771*

In the last fifty years, every state has enacted legislative provisions addressing crime victims' rights, and a majority of those states have adopted constitutional provisions concerning victims' rights.³⁰ This prompted Congress to consider enacting several laws addressing the aspects of crime victim rights.³¹ And over the last thirty years, Congress has enacted significant crime victim-related legislation.³² This legislation included provisions that address victim restitution and compensation.³³ And provisions that improved victim participation in

²² Smith, *supra* note 7, at 431.

²³ *See id.*

²⁴ *Id.* at 431–32.

²⁵ *See In re Wild*, 955 F.3d 1196, 1199 (11th Cir. 2020).

²⁶ *See id.*

²⁷ *See id.*

²⁸ 5 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 21.1(h) at 557 (3d ed. 2007).

²⁹ *See In re Wild*, 955 F.3d at 1199–200.

³⁰ Peggy M. Tobolowsky, *Mandamus Muddle: The Mandamus Review Standard for the Federal Crime Victims' Rights Act*, 5 U. DENV. CRIM. L. REV. 123, 124 (2015).

³¹ *Id.*

³² *Id.* at 125.

³³ *Id.*

criminal-justice proceedings by including victim impact statements in pre-sentencing information.³⁴

After expanding the statutory list of federal crime victims' rights, Congress enacted the CVRA in 2004.³⁵ Congress enacted the CVRA with the intent of making crime victims independent participants in criminal court proceedings.³⁶ The CVRA's drafters explained that crime victims, and their families, were often ignored, cast aside, and treated as non-participants in the criminal-justice process.³⁷ The drafters went on to emphasize the importance of how critical the criminal-justice process was to a victim seeking justice.³⁸

Crime victims were often kept in the dark by prosecutors, judges, and the court system that simply did not have a place for them.³⁹ Senator Jon Kyl explained that many victims were "literally prevented . . . from participation in any meaningful way" prior to the enactment of the CVRA.⁴⁰ He stated that victims were being denied their basic rights by "being thrown into a system which they did not understand, which nobody was helping them with . . ." ⁴¹ The CVRA strengthened and expanded crime victims' rights in the federal criminal-justice system through its eight enumerated rights.⁴²

The eight enumerated rights under the CVRA include:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.⁴³

³⁴ *Id.*

³⁵ 18 U.S.C. § 3771.

³⁶ Cassell et al., *supra* note 6, at 66.

³⁷ 150 CONG. REC. 7297 (2004).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 7298 (statement of Sen. Jon Kyl).

⁴¹ *Id.*

⁴² 6 LAFAVE ET AL., *supra* note 28, § 24.4(d), at 419, § 26.5(d), at 814; 7 *id.* § 27.2(b), at 11; *see also* 5 *id.* § 21.3(f), at 768.

⁴³ 18 U.S.C. § 3771(a).

Within the CVRA, Congress also included a definition of the “crime victim” eligible to assert rights.⁴⁴ Congress defined a crime victim as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”⁴⁵ However, designated representatives can assert the victim’s rights on behalf of a crime victim when the victim is a minor, incompetent, incapacitated, or deceased.⁴⁶ The CVRA also includes many important enforcement mechanisms. These mechanisms include (1) directing courts to ensure that the crime victim is afforded the rights described in the CVRA; (2) directing the United States Attorney General to take measures to ensure that federal prosecutors make their best efforts to ensure that the crime victim is aware of their rights; (3) requiring a specific statement that the victim of a crime may assert their rights; and (4) allowing a writ of mandamus that asserts the victim’s rights to an appellate court.⁴⁷ The CVRA provides these enforcement mechanisms to ensure the rights of victims through the eight enumerated rights the CVRA guarantees.

B. The Mandamus Review Standard for the Crime Victims’ Rights Act

A writ of mandamus is a judicial remedy in the form of an order from a court to the government to do some specific act that the body is obliged under law to do.⁴⁸ The writ of mandamus is a part of the common law heritage that shaped American jurisprudence.⁴⁹ In *Marbury v. Madison*, the Supreme Court addressed the issuance of writs of mandamus.⁵⁰ The Court in *Marbury* explained that to use a mandamus as a proper remedy, the person to whom the writ is directed must be the appropriate subject of the writ, and the individual seeking the writ must be without other legal remedies.⁵¹ The Court again reviewed its mandamus jurisprudence in *Roche v. Evaporated Milk Association*.⁵² In *Roche*, the Court again explained that the function of a mandamus is to correct “an abuse of judicial power, or refusal to exercise it.”⁵³

The CVRA allows a crime victim to, “in essence, immediately appeal a denial of their rights by a trial court to the court of appeals, which must rule ‘forthwith.’ Simply put, the mandamus procedure allows an appellate court to take timely action to ensure that the trial court follows the rule of law” established by

⁴⁴ *Id.* § 3771(c)(2).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Tobolowsky, *supra* note 30, at 126–27.

⁴⁸ James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1530–31 (2001).

⁴⁹ *See generally id.*

⁵⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168–77 (1803).

⁵¹ *Id.* at 169.

⁵² *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21 (1943).

⁵³ *Id.* at 31.

the statute.⁵⁴ The writ of mandamus ensures that crime victims who are denied their rights have standing for appellate review of that denial.⁵⁵ It allows a crime victim to apply for a writ of mandamus to the appropriate appellate court, which requires the appellate court to take the writ and order the relief necessary to protect the crime victim's rights.⁵⁶ This provides victims with standing to appear in the appellate courts in the United States and with review for possible error below.⁵⁷ And this provision also requires that courts review these types of cases. This provision also allows the government to apply for a writ of mandamus instead of the crime victim.

A majority of circuit courts have adopted mandamus review of CVRA petitions.⁵⁸ The issues most frequently addressed in the mandamus petitions are the crime victims' participatory rights to confer with the prosecutor and a victim's role in plea agreements.⁵⁹ A victim's role in plea agreements raises many issues as to when a victim's rights attach. Although some courts hold that the victim's rights attach pre-indictment, others hold that crime victims do not have any rights in the plea-agreement stage of litigation.⁶⁰

C. *A Victim's Role in Plea Agreements*

The criminal-justice system has changed dramatically over time in numerous respects. In recent years, "plea agreements have grown to become the rule in the criminal justice system . . . , rather than trials."⁶¹ Courts around the United States have realized the importance of regulating these plea agreements and the importance of protecting a defendant's rights in plea agreements.⁶² However, as courts often protect a defendant's rights in plea agreements, little is done to protect victims' rights in plea agreements.⁶³ Further, the United States Supreme Court has focused solely on shaping plea agreements and defendants' rights, "but in doing so, [it] ignore[d] victims and their statutory rights" under the CVRA.⁶⁴ As plea agreements continue to "become more visible, . . . the victims still remain hidden."⁶⁵

⁵⁴ Tobolowsky, *supra* note 30, at 127.

⁵⁵ 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, 599–601 (2010).

⁵⁶ *See id.* at 599.

⁵⁷ *Id.*

⁵⁸ Tobolowsky, *supra* note 30, at 151.

⁵⁹ *Id.* at 152.

⁶⁰ *See* cases cited *supra* note 12.

⁶¹ Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 46 (2017).

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *Id.* at 46–47.

⁶⁵ *Id.* at 46.

“Plea agreements are the paradigm case of complicated decisions.”⁶⁶ These agreements suffer from time constraints, and the main actors in the game are the prosecutors, defendants, and judges.⁶⁷ Prosecutors tend to make plea agreements to avoid costly litigation and to help speed up the judicial process.⁶⁸ Defendants are presented with the plea agreement and the option to accept the agreement and avoid trial.⁶⁹ Judges often must decide quickly whether to accept these plea agreements, and, often times, judges approve the agreements.⁷⁰ However, while these three actors work through the plea agreement, the victim is rarely addressed and is often forgotten. For the victim, this case is pivotal. It can determine whether the victim feels safe, finds peace, or even feels recognized by the very legal system created to protect her.⁷¹ Once the plea agreement is signed, victims have little chance to challenge the process or even ask questions about the process.⁷²

The criminal-justice system continues to ignore a victim’s rights in plea agreements and fails to recognize a victim’s role in plea agreements. This is true, as evidenced by the Epstein case, even after the enactment of the CVRA in 2004.⁷³ Due to the dominance of plea agreements in the criminal-justice process, the importance of victims’ rights in plea agreements has become pivotal.⁷⁴

II. THE HISTORY OF THE CVRA

A. *The History of Silence*

Before examining the Epstein case, it is important to recognize the United States’ long history of silencing victims. Discrimination against survivors has been in existence for hundreds of years.⁷⁵ American history is filled with examples of oppressive and sexually violent acts perpetrated against minorities and women.⁷⁶

Before there was Christine Blasey Ford, there was Recy Taylor, an African-American woman who was raped by six white men in 1944 and fought for justice with the help of Rosa Parks. And in between the two of them, there was Anita Hill,

⁶⁶ *Id.* at 64.

⁶⁷ Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 324 (2007).

⁶⁸ *Id.*

⁶⁹ Pugach & Tamir, *supra* note 61, at 56.

⁷⁰ *See id.* at 64.

⁷¹ *Id.*

⁷² O’Hear, *supra* note 67, at 324.

⁷³ *In re Wild*, 955 F.3d 1196, 1199 (11th Cir. 2020).

⁷⁴ O’Hear, *supra* note 67, at 325.

⁷⁵ Sandra Park, *How America Systematically Fails Survivors of Sexual Violence*, ACLU (Oct. 16, 2018, 6:15 PM), <https://www.aclu.org/blog/womens-rights/violence-against-women/how-america-systematically-fails-survivors-sexual-violence> [perma.cc/4QUJ-XMN5].

⁷⁶ *Id.*

Tarana Burke, Alyssa Milano, Lupita Nyong'o, Tanya Selveratnam, Aly Raisman, and many, many more.⁷⁷

Throughout history, victims were often dismissed by law enforcement, ostracized by their communities, or even prosecuted for false reporting.⁷⁸ These victims often faced multiple layers of discrimination and a network of systems that foster it, leaving them hopeless.⁷⁹ And when a victim does not have the ability, the means, and the right to express her rights, she is effectively silenced by society.⁸⁰ This silence left victims and advocates powerless in a society that was founded to protect them.⁸¹ The oppression of crime victims in the criminal-justice system led to victims advocating to dismantle policies and practices that have allowed violence and discrimination to flourish.⁸² This movement picked up momentum in the early 1980s, with many advocates taking to the streets to challenge the norms that have silenced victims for many years.⁸³

B. *Giving Victims a Voice*

The Crime Victims' Right Movement began long before Congress enacted the CVRA. In the early 1980s, President Ronald Reagan appointed the President's Task Force on Victims of Crime, paving the way for the CVRA.⁸⁴ The Task Force was established to address the oppression of crime victims in the criminal-justice system.⁸⁵ The Task Force noted that "the criminal justice system has lost an essential balance. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them."⁸⁶

Recommendations made by the Task Force prompted multiple states to take action.⁸⁷ Many states addressed crime victims by amending their constitutions or by taking legislative reform.⁸⁸ "These measures guaranteed victims' rights in the criminal process, such as the right to be notified of court proceedings, to attend those proceedings, and to speak at appropriate points in the process, such as plea

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. CMTY. PSYCH. 263, 263 (2006).

⁸¹ *Id.*

⁸² Paul G. Cassell, *The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 2 (2015).

⁸³ *Id.*

⁸⁴ Cassell et al., *supra* note 6, at 63.

⁸⁵ *Id.* at 63–64.

⁸⁶ *Id.* at 63 (quoting LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982)).

⁸⁷ *Id.* at 64.

⁸⁸ DEAN G. KILPATRICK ET AL., NAT'L INST. OF JUST., THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (1998), <https://www.ojp.gov/pdffiles/173839.pdf> [perma.cc/3MR2-42J6].

bargaining and sentencing.”⁸⁹ After many states passed these amendments, advocates for victims’ rights focused on federal legislation to protect crime victims.⁹⁰ Thus, they approached Congress with legislation that would solve these problems.⁹¹

Congress enacted that legislation in 2004.⁹² “The CVRA was enacted with nearly unanimous support and little discussion.”⁹³ This led to phrasing that “is ‘sparse’ in ‘technical detail’ and lacking in procedural guidance.”⁹⁴ However, Congress’s goal was clear: it “sought to change the system’s obliviousness to crime victims that often ‘left crime victims and their families victimized yet again.’”⁹⁵ Congress emphasized the importance of allowing crime victims to play a role in the criminal-justice process and making victims independent participants in the criminal-justice process.⁹⁶ Congress viewed the CVRA as establishing a victim’s right to participate in the judicial process.⁹⁷

But Congress rushed to pass the CVRA, and as such, it suffers from a dearth of legislative history.⁹⁸ Neither the House nor the Senate held hearings.⁹⁹ The Senate did not publish a committee report. And although the House published a report, it failed to provide guidance.¹⁰⁰ It failed to define a “crime victim.”¹⁰¹ “The CVRA reads more like an amendment than a statute, with sweeping statements of rights and no discussion of how those rights should be implemented.”¹⁰²

C. *The 2015 Amendments*

In 2015, Congress amended the CVRA.¹⁰³ One of the amendments to the CVRA included the addition of a ninth enumerated right.¹⁰⁴ This right included

⁸⁹ Cassell et al., *supra* note 6, at 64.

⁹⁰ *Id.*

⁹¹ *Id.* at 65–66.

⁹² 18 U.S.C. § 3771.

⁹³ Zulkifl M. Zargar, *Secret Faits Accomplis: Declination Decisions, Nonprosecution Agreements, and the Crime Victims’ Right to Confer*, 89 FORDHAM L. REV. 343, 358 (2020).

⁹⁴ *Id.* (quoting *Fed. Ins. Co. v. United States*, 882 F.3d 348, 358 (2d Cir. 2018)).

⁹⁵ Cassell et al., *supra* note 6, at 66 (quoting 150 CONG. REC. 7296 (2004) (statement of Sen. Dianne Feinstein)).

⁹⁶ See Zargar, *supra* note 93, at 360.

⁹⁷ *Id.*

⁹⁸ See CHARLES DOYLE, CONG. RSCH. SERV., RL33679, CRIME VICTIMS’ RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771, at 5 (2021).

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 10.

¹⁰¹ *Id.* at 6.

¹⁰² Blanche Bong Cook, *Stepping into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away from Zero Sum Solutions*, 101 KY. L.J. 671, 704 (2012–2013) (quoting Erin C. Blondel, Note, *Victims’ Rights in an Adversary System*, 58 DUKE L.J. 237, 258 (2008)).

¹⁰³ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227, 240 (codified as amended at 18 U.S.C. § 3771(a)(9)–(10)).

¹⁰⁴ *Id.*

a crime victim's "right to be informed in a timely manner of any plea bargain or deferred prosecution agreement."¹⁰⁵ This required federal prosecutors to notify victims about plea agreements or deferred prosecution agreements that were finalized prior to the formal filing of charges.¹⁰⁶ Put simply, Congress amended the CVRA to make it clear: crime victims must be notified of such agreements made or reached prior to charging.¹⁰⁷ However, what remains unclear is what type of notice should be given to victims. Based on a series of cases out of district courts, the answer is that it varies according to the facts of the case.¹⁰⁸

D. The Department of Justice's Take

In 2010, the Department of Justice (DOJ) concluded that a victim's right under the CVRA attaches only "from the time that criminal proceedings are initiated."¹⁰⁹ The DOJ formed its opinion based on the CVRA's definition of crime victim, its legislative intent, and its structure.¹¹⁰ It found that a closer reading of the CVRA demonstrated little support for the notion that crime victims' rights apply pre-charge or pre-indictment.¹¹¹ However, some find this analysis unpersuasive.¹¹²

The DOJ's "lead argument is that the CVRA's definition of 'victim' presupposes that criminal charges have been formally filed."¹¹³ The CVRA defines a victim as someone who is "directly and proximately harmed as a result of the commission of a Federal offense."¹¹⁴ The DOJ views this definition as suggesting that a crime victim can only be determined after the decision to charge an individual of a federal offense.¹¹⁵ Specifically, the DOJ emphasizes that a crime victim cannot be identified until there is "a sworn written statement of probable cause to believe that a particular defendant committed an . . . offense," i.e., an indictment.¹¹⁶ However, this reading does not conclusively resolve the question of when rights attach. The DOJ routinely identifies victims before filing a criminal complaint because victim identification is required by statute and through its

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-By-Clause Analysis*, 5 PHX. L. REV. 301, 310–11 (2012).

¹⁰⁹ Availability of Rights Under the Crime Victims' Rights Act of 2004, 34 Op. O.L.C. 239, 239 (2010) [hereinafter Availability of Rights].

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² Cassell et al., *supra* note 6, at 75.

¹¹³ *Id.* at 76.

¹¹⁴ 18 U.S.C. § 3771(e)(2)(A).

¹¹⁵ Availability of Rights, *supra* note 109, at 245.

¹¹⁶ *Id.*

internal policy directives.¹¹⁷ Regardless, the DOJ has not changed its stance on when rights attach to crime victims.¹¹⁸

Shortly after the 2015 amendment, the DOJ again emphasized these views by filing a brief in the Southern District of New York.¹¹⁹ The brief explained the DOJ's view that the CVRA only applies after criminal charges are filed.¹²⁰ The DOJ continues to maintain its narrow reading of a victim's rights under the CVRA, maintaining that an expansive reading of the CVRA would open up the floodgates.¹²¹ However, following the DOJ's narrow reading, Representative Jackie Speier introduced the Courtney Wild Crime Victims' Rights Reform Act, seeking to expand a victim's right to confer with the government under the CVRA.¹²²

E. The Courtney Wild Crime Victims' Rights Reform Act of 2019

Representative Jackie Speier introduced the Courtney Wild Crime Victims' Rights Reform Act to honor all of Epstein's victims in 2019.¹²³ This Act seeks to expand a victim's right of conferral under the CVRA by honoring the "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."¹²⁴ The Act focuses on making certain that "victims of crime are treated with dignity throughout a criminal case" and seeks to "avoid further victimization" of those victims.¹²⁵ The legislation will update and improve the CVRA by clarifying the scope of victims' rights and creating stronger judicial and administrative processes for victims to assert their rights.

The proposed language states that victims would have a right to conferral "about any plea bargain or other resolution of the case before such plea bargain or resolution is presented to the court or otherwise finalized."¹²⁶ This language seeks to expand a victim's right under the CVRA and protect victims in cases where prosecutors read a non-prosecution agreement, like in the Epstein case.¹²⁷

¹¹⁷ *Id.* (explaining that the CVRA requires the DOJ to identify a crime victim that was directly and proximately harmed in order to charge a defendant with a particular federal offense).

¹¹⁸ *See id.*

¹¹⁹ Zargar, *supra* note 93, at 365.

¹²⁰ *Id.*

¹²¹ *Id.* at 360–61.

¹²² *See* Press Release, Jackie Speier, Congresswoman, Rep Speier Introduces Bipartisan Courtney Wild Crime Victims' Rights Reform Act of 2019 to Rectify Injustices Faced by Epstein's Victims (Oct. 17, 2019) [hereinafter Speier Press Release] (available at <http://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>) [perma.cc/8AXM-GV67].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. § 2 (2019).

¹²⁷ *Id.*

And, as Representative Speier states, it takes “steps to make sure that the courts and the Department of Justice follow through on the promises of the Crime Victims’ Rights Act.”¹²⁸ Representative Scott Perry also noted that this proposed bill is about “ensuring justice for the most vulnerable among us—to ensure that survivors of crime are made whole, and not re-victimized by unfair, opaque legal proceedings.”¹²⁹ And, finally, as Representative Lois Frankel said, “This bill ensures a more victim-centered process so that such a miscarriage of justice never happens again.”¹³⁰

The Crime Victims’ Rights Reform Act will clarify 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 or non-prosecution agreements.¹³¹ It will also increase the ability for victims to assert and protect their rights in court by allowing them to challenge proceedings when they were not given proper notice.¹³² And third, it will require that victims be heard in court when their rights are isolated and provide courts discretion to award other just and appropriate relief, including rescinding non-prosecution agreements.¹³³ But it is important to note that this proposed bill has not yet left the House. It has now been referred to the subcommittee on Crime, Terrorism, and Homeland Security.¹³⁴ However, if passed, this proposed bill will go a long way in improving the treatment of crime victims in the criminal-justice system, and it further clarifies that victims have a conferral right pre-indictment under the CVRA.

III. THE EPSTEIN CASE

The Epstein case centered around Jeffrey Epstein’s alleged sexual molestation of around thirty young girls between 2002 and 2005 at his West Palm Beach mansion.¹³⁵ Despite the overwhelming evidence against Epstein, the government prosecutor entered into a pre-indictment non-prosecution agreement with Epstein, promising to not prosecute him in exchange for him pleading guilty to two state felonies for soliciting prostitution with a minor.¹³⁶ Because of the agreement, no federal indictment was ever filed.¹³⁷

¹²⁸ Speier Press Release, *supra* note 122.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ H.R. 4729.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Committees: H.R.4729—116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/4729/committees> [perma.cc/D46J-A7J8].

¹³⁵ Mazzei, *supra* note 1.

¹³⁶ Josh Gerstein, *DOJ: Prosecutor Erred by Promising to Confer with Jeffrey Epstein Victims*, POLITICO (Dec. 3, 2020, 1:13 PM), <https://www.politico.com/news/2020/12/03/doj-prosecuter-jeffrey-epstein-victims-442648> [perma.cc/S3S2-MUPH].

¹³⁷ *Id.*

Epstein's victims were left in the dark, never told about the possibility of an agreement or the agreement itself until after the deal had been made.¹³⁸ When the victims learned of the agreement, two of them filed suit in federal court under the CVRA, alleging that both the agreement and the prosecutors violated their CVRA right to confer and their right to be treated fairly.¹³⁹ The government then contended that it had no obligation to extend victims any rights under the CVRA because no federal criminal charges were ever filed by the prosecutor.¹⁴⁰

The district court sided with the victims, finding that the CVRA attached to the victims pre-indictment.¹⁴¹ It noted that in cases where no formal charges have been filed, the CVRA conferral right still attaches from when a crime victim is identified by the prosecutors.¹⁴² However, the district court explained that although Epstein's victims demonstrated that the government violated their rights under the CVRA, in the end, the victims' relief was either (1) rendered moot by Epstein's death or (2) outside the jurisdiction of the court.¹⁴³

The government appealed this decision to the Eleventh Circuit, arguing again that the victims do not have a conferral right in cases where the prosecutors do not choose to file an indictment.¹⁴⁴ The Eleventh Circuit overturned the district court's ruling in a 120-page split-discussion.¹⁴⁵ However, it has since vacated the opinion pending an en banc rehearing.¹⁴⁶ But the question still remains: Does the CVRA attach to crime victims prior to the government filing an indictment?

A. *The Charges*

From 1999 to 2005, Jeffrey Epstein sexually abused more than thirty girls in one of his many Florida mansions.¹⁴⁷ These girls include Ms. Wild, who filed the complaint as Jane Doe Number One, and Jane Doe Number Two.¹⁴⁸ This abuse came to the attention of the Palm Beach Police Department in 2005.¹⁴⁹ During the Palm Beach Police Department's investigation of the case, officers asked the Federal Bureau of Investigation (FBI) to help investigate the sexual abuse.¹⁵⁰ The

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Doe 1 v. United States*, 411 F. Supp. 3d 1321, 1325 (S.D. Fla. 2019).

¹⁴¹ *Id.* at 1324, 1332.

¹⁴² *Id.* at 1328.

¹⁴³ *Id.* at 1326, 1331–32.

¹⁴⁴ *In re Wild*, 955 F.3d 1196, 1198 (11th Cir. 2020).

¹⁴⁵ *See id.* at 1220–24.

¹⁴⁶ *In re Wild*, 967 F.3d 1285 (11th Cir. 2020).

¹⁴⁷ Mazzei, *supra* note 1.

¹⁴⁸ *Id.*

¹⁴⁹ Mahita Gajanan, *Here's What to Know About the Sex Trafficking Case Against Jeffrey Epstein*, TIME, <https://time.com/5621911/jeffrey-epstein-sex-trafficking-what-to-know/> [perm a.cc/9HWH-TN43] (July 17, 2019, 12:00 PM).

¹⁵⁰ *Id.*

Palm Beach Police Department provided the FBI with that information, and the FBI determined that the allegations of abuse were credible.¹⁵¹ The case was then presented to the United States Attorney's Office for the Southern District of Florida.¹⁵²

The United States Attorney's Office for the Southern District of Florida then contacted Epstein in 2007.¹⁵³ This began the official negotiating period between Epstein and the government.¹⁵⁴ During this time, the crime victims were not notified of any negotiations between the two parties, although the victims were already known by the FBI and the United States Attorney's office.¹⁵⁵

When negotiations came to a close, Epstein secured a non-prosecution agreement with the government.¹⁵⁶ This agreement provided Epstein with an escape route; no federal charges would be brought against him in exchange for him pleading guilty to two counts of soliciting prostitution from a minor, a state felony.¹⁵⁷ After entering those two guilty pleas, Epstein was sentenced to eighteen months in state jail.¹⁵⁸ Epstein spent much of his jail term on "work-release," where he was able to reside in his luxurious home and office.¹⁵⁹ "He was also required to register as a sex offender and reach financial settlements with the dozens of victims who came forward in the case."¹⁶⁰

However, Epstein's victims were never informed of this non-prosecution agreement until after it had taken effect.¹⁶¹ Even after signing the agreement, the government continued to tell the victims that the case was under investigation and that the victims must be patient.¹⁶² Eventually, news broke about this non-prosecution agreement, and the victims filed a suit in federal district court under the CVRA.¹⁶³ The victims requested that the district court (1) rescind the provisions in the non-prosecution agreement, (2) declare that the Constitution would allow the prosecution of Epstein's co-conspirators despite the agreement, and (3) enjoin the government to confer with the victims and make best efforts to protect the victims' CVRA rights.¹⁶⁴

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ James Hill, *Key Takeaways from the Justice Department Review of Jeffrey Epstein Sweetheart Deal*, ABC NEWS (Nov. 16, 2020, 2:02 AM), <https://abcnews.go.com/US/key-takeaways-justice-department-review-jeffrey-epstein-sweetheart/story?id=74222922> [perma.cc/UJC2-X85W].

¹⁶² *Id.*

¹⁶³ *Doe 1 v. United States*, 411 F. Supp. 3d 1321, 1321 (S.D. Fla. 2019).

¹⁶⁴ *Id.* at 1324–25.

The victims' lawsuit argued that the prosecutors had violated their CVRA right to confer and their right to be treated fairly.¹⁶⁵ The victims also argued that the prosecutors had a duty to confer with them before signing the non-prosecution agreement and before it took effect.¹⁶⁶ In response, the government argued that it had no obligations under the CVRA to confer with the victims because Epstein had never been formally charged with any crimes.¹⁶⁷

The district court agreed with the victims, finding that their rights had been violated under the CVRA.¹⁶⁸ The court held that the CVRA rights of conferral and informing crime victims must extend to non-prosecution agreements.¹⁶⁹ The court ruled that the government had failed to advise the victims about its intention to enter into the non-prosecution agreement.¹⁷⁰ The government then subsequently appealed to the Eleventh Circuit, arguing that there is no pre-indictment conferral right under the CVRA.¹⁷¹

B. *The Eleventh Circuit's Opinion*

The Eleventh Circuit held that a victim's rights under the CVRA did not attach when the government entered into the non-prosecution agreement with Jeffrey Epstein, including the right to confer with the federal government's lawyers and the right to be treated fairly by them.¹⁷² It found that because the government had not filed charges or otherwise commenced criminal proceedings against Epstein, the victims had no rights under the CVRA as no criminal proceedings had begun in the case.¹⁷³ However, the Eleventh Circuit recognized the uncertainty in other circuits as to whether the CVRA applied before criminal proceedings begin.¹⁷⁴

After the Court noted that many district courts and circuit courts are divided on the issue of pre-indictment conferral rights, the Court considered the arguments in each case.¹⁷⁵ It noted that the most important factors to consider as to whether the CVRA applies pre-indictment are (1) the text of the CVRA, (2) the historical context of the CVRA, and (3) the prosecutorial discretion it intends to safeguard.¹⁷⁶ As to the text of the CVRA, the Court explained that reading the statute in its entirety suggests that the CVRA is best interpreted to apply "only after the commencement of criminal proceedings" because the term crime victim

¹⁶⁵ *Id.* at 1322–23.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1325.

¹⁶⁸ *Id.* at 1332.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *In re Wild*, 955 F.3d 1196, 1196 (11th Cir. 2020).

¹⁷² *Id.* at 1219–20.

¹⁷³ *Id.* at 1221.

¹⁷⁴ *Id.* at 1205 (citing other circuit decisions regarding the CVRA).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

implies the commission of a federal offense.¹⁷⁷ The Court also noted that the CVRA's history shows that it was enacted after the Victims' Rights and Restitution Act, 42 U.S.C. § 10607 (VRRRA).¹⁷⁸ And, it noted that the CVRA risks impairing prosecutorial discretion when applied pre-charge.¹⁷⁹

C. Analyzing the Eleventh Circuit's Decision

When analyzing whether a crime victim has the reasonable right to confer with the government pre-indictment, the Court first focused on the text of the CVRA.¹⁸⁰ Section A of the CVRA itself reads: "[t]he reasonable right to confer with the attorney for the Government in the case."¹⁸¹ The Court noted that "the case," referred to in the provision, indicates that an ongoing judicial proceeding should be taking place, as opposed to an investigation.¹⁸² The majority went on to explain that the word "case" in a criminal context signifies that proceedings have already commenced and that the "attorney for the Government" indicates that a pending case already exists.¹⁸³

However, when analyzing a crime victim's "right 'to be treated with fairness and with respect,'" the Court observed that no textual restriction or contextual restriction exists to limit this provision to only post-indictment cases.¹⁸⁴ The Court justified this hiccup by applying the statutory canon *noscitur a sociis*, meaning that it took the provision in context with the reasonable right to confer provision.¹⁸⁵ The Court used this textual analysis to conclude that the CVRA should apply post-charge, finding that the two provisions "speak directly to judicial enforcement of victims' statutory rights."¹⁸⁶ However, the Court made no reference to the CVRA's other *six* provisions.¹⁸⁷

As to the historical context, the Court simply compared the CVRA to the Victims' Rights and Restitution Act (VRRRA), a previous victims' rights act passed by Congress.¹⁸⁸ The VRRRA, prior to being repealed, awarded crime victims pre-indictment rights and ensured that victims received mandated services and rights under federal law.¹⁸⁹

¹⁷⁷ *Id.* at 1220.

¹⁷⁸ *Id.* at 1214.

¹⁷⁹ *Id.* at 1216.

¹⁸⁰ *Id.*

¹⁸¹ 18 U.S.C. § 3771(a)(5).

¹⁸² *In re Wild*, 955 F.3d at 1209–10.

¹⁸³ *Id.* at 1208.

¹⁸⁴ *Id.* (quoting 18 U.S.C. § 3771(a)(8)).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See generally id.*

¹⁸⁸ Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10601–07 (1990), *repealed by* 34 U.S.C. § 20141.

¹⁸⁹ *See id.*

The Court explained that “[t]he CVRA repealed and replaced some parts of the VRRRA, but left others intact.”¹⁹⁰ It explained that the VRRRA’s provisions were explicit when victims’ rights applied pre-charge and demonstrate that Congress “indisputably knew when it framed and enacted the CVRA” that it could expressly extend victims-rights protections pre-charge.¹⁹¹ The Court observed that Congress obviously had knowledge of these pre-indictment rights in the VRRRA but chose to repeal those portions of the VRRRA by not including them explicitly in the CVRA.¹⁹² It found that Congress’s intentional silence was compelling when considering not to award a victim rights pre-indictment under the CVRA.¹⁹³

And finally, the Court also justified its holding by explaining that if the CVRA attached pre-indictment, it would open the floodgates and tarnish prosecutorial discretion.¹⁹⁴ These floodgates would require law enforcement officers to consult with victims “before conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation.”¹⁹⁵ The Court explains that this slippery slope would open the floodgates to finding that the CVRA applies before an investigation takes place.¹⁹⁶

The Eleventh Circuit relied heavily on the principle of prosecutorial discretion in finding that the CVRA does not apply pre-charge.¹⁹⁷ In its own words, the factor of prosecutorial discretion is a “weighty one” that could impact the government’s discretion that the CVRA appears to safeguard.¹⁹⁸ The CVRA itself explicitly prohibits any interpretation of the entire CVRA that impairs the government’s discretion.¹⁹⁹ It explained that in the absence of charges, the government faces enormous pressure to find that an individual has “directly and proximately” caused the crime victim harm and committed a federal offense.²⁰⁰ But in the absence of charges, this determination would exhaust government resources to determine if an individual directly and proximately caused harm to a crime victim without the government pressing charges.²⁰¹

The Court also explained that applying CVRA rights pre-indictment could significantly intrude on prosecutor discretion because the rights would force the government to consult with victims more frequently and infringe on the absolute and exclusive power prosecutors hold in deciding to press charges.²⁰² It would

¹⁹⁰ *In re Wild*, 955 F.3d at 1214.

¹⁹¹ *Id.* at 1215.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1213.

¹⁹⁵ *Id.* at 1211.

¹⁹⁶ *See id.*

¹⁹⁷ *Id.* at 1216.

¹⁹⁸ *Id.*

¹⁹⁹ 18 U.S.C. § 3771(d)(6).

²⁰⁰ *In re Wild*, 955 F.3d at 1217–18.

²⁰¹ *Id.* at 1217.

²⁰² *See id.* at 1216, 1218.

also create slippery slope problems that would plague § 3771(c)(1) of the CVRA in the future.²⁰³ And all of these results, the Court concluded, should be avoided.²⁰⁴

D. Senator Feinstein and Former Senators Kyl and Hatch's Amici Curiae Brief

Following the Eleventh Circuit's decision, Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch filed an amici curiae brief.²⁰⁵ This brief argued that an en banc rehearing in the Eleventh Circuit "is needed to vindicate the rights of crime victims and ensure their involvement in the criminal justice system."²⁰⁶ Additionally, the senator and former senators argue that "rehearing *en banc* is needed to ensure fidelity to statutory text and restore uniformity amount the courts of appeals."²⁰⁷ The senators emphasized their strong interests in ensuring that the landmark CVRA legislation they drafted "is properly construed, and that crime victims and their families are afforded their hard-fought and much-deserved rights."²⁰⁸ Senators Kyl, Feinstein, and Hatch explained that this "[n]ation has made great strides toward treating crime victims and their families with greater respect, providing them with much-needed assistance, and ensuring they are included in criminal justice proceedings that impact their lives so profoundly."²⁰⁹

The CVRA took a major step forward in addressing crime victims' rights.²¹⁰ And as those senators correctly noted, the Eleventh Circuit's decision would "undo decades of progress toward recognizing and vindicating the vitally important rights of crime victims."²¹¹ The senators also believe that the Eleventh Circuit erred in finding that crime victims' rights do not attach pre-indictment and urged the Eleventh Circuit to reconsider its decision in the upcoming en banc hearing.²¹²

IV. THE AFTERMATH OF THE ELEVENTH CIRCUIT'S DECISION

The Eleventh Circuit is the first circuit court to find that CVRA rights do not apply pre-charge. This position could have vastly detrimental side effects. As the amici senators have emphasized, this decision undoes all of the progress made

²⁰³ See *id.* at 1211–12.

²⁰⁴ *Id.*

²⁰⁵ Zargar, *supra* note 93, at 347 n.23.

²⁰⁶ Brief of Senator Dianne Feinstein, et al. as Amici Curiae in Support of Rehearing En Banc at 11, *In re Wild*, 955 F.3d 1196 (11th Cir. 2020) (No. 19-13843).

²⁰⁷ *Id.* at 14.

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* at 18.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 12–13.

towards “recognizing and vindicating the vitally important rights of crime victims.”²¹³ The Eleventh Circuit’s ruling seems contrary to Congress’s intent and overlooks the fact that Congress is currently working on a bill that expands the right to confer to pre-indictment situations.²¹⁴ Congress enacted the CVRA to ensure that victims have a right to be informed during the plea-bargaining process.²¹⁵

In enacting the CVRA, Congress’s goal was clear. It sought to change the system’s obliviousness to crime victims that left crime victims and their families victimized yet again. This goal is evident from Congress’s efforts to introduce the Wild Crime Victims’ Rights Reform Act to honor all of Epstein’s victims in 2019. This Act continues to show Congress’s efforts to expand a victim’s right of conferral under the CVRA. Although the DOJ continues to maintain its narrow reading of a victim’s rights under the CVRA, the CVRA should not be limited for the sake of opening imaginary floodgates.²¹⁶

V. THE PROBLEMS WITH PROSECUTORIAL DISCRETION

This Part explores whether the CVRA asks too much of prosecutors when it extends a victim’s rights pre-indictment. Prosecutors have an ethical responsibility to protect the public’s interest and ensure just enforcement of the United States’ criminal laws. However, the prosecutor’s discretion remains intact even when the right to confer is mandatory.

A proper understanding of the purpose and scope of the CVRA, as discussed below, makes it clear that the prosecutor’s exercise of discretion is not curtailed. Although the CVRA does not require federal prosecutors to consider victims’ interests, it does ask that prosecutors make their “best efforts” to include crime victims in the judicial process and to enforce the victims’ rights.²¹⁷ It also addresses the argument of how and why ethical conflicts can arise when prosecutors put the victims’ private interests before the interests of the public at large.

A. *The Role of Prosecutorial Discretion*

Prosecutors have an ethical responsibility to protect the public’s interest and ensure just enforcement of the United States’ criminal laws. But the CVRA asks prosecutors to make their “best efforts” to enforce a victim’s rights.²¹⁸ A

²¹³ *Id.* at 18.

²¹⁴ See Courtney Wild Crime Victims’ Rights Reform Act of 2019, H.R. 4729, 116th Cong. § 2(1)(a) (2019). *But cf. In re Wild*, 955 F.3d 1196, 1196 (11th Cir. 2020).

²¹⁵ See H.R. 4729.

²¹⁶ *What Federal Rights Do Crime Victims Have?*, U.S. DEP’T OF JUST., <https://www.justice.gov/enrd/rights-victims> [perma.cc/GP7D-PQPM] (Apr. 12, 2021).

²¹⁷ 18 U.S.C. § 3771(c)(1).

²¹⁸ *Id.*

prosecutor's decision is often "guided by two basic questions: 'Can I prove the case?' and 'Should I prove the case?'"²¹⁹

To answer these questions, prosecutors often look to the strength of the evidence, the victims, a defendant's characteristics and circumstances, and the philosophies of doing justice and fairness. Taking into consideration the interest of prosecutorial discretion, the CVRA aims to prevent actions that impair the government's discretion.²²⁰ But the question remains as to whether representing crime victims' private interests under the CVRA creates an ethical conflict for prosecutors.

B. *Prosecutorial Discretion Under the CVRA*

The CVRA states that nothing within the Act "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."²²¹ Prosecutors have wide discretion in determining whether to pursue non-prosecution agreements instead of a conviction or dismissing charges.²²² Under these agreements, the government agrees to drop charges against an individual in exchange for that individual's compliance with the terms of the agreements.²²³ Accordingly, the CVRA allows prosecutors the discretion to pursue non-prosecution agreements.²²⁴ But the CVRA does not allow prosecutors the right to violate a crime victim's rights in doing so.²²⁵

A proper understanding of the purpose and scope of the CVRA makes it clear that the prosecutor's exercise of discretion is not curtailed. The CVRA does not stop prosecutors from making decisions that the victims do not like, nor does it prevent prosecutors from directing the prosecution.²²⁶ Rather, the CVRA eliminates the problem of victims being kept in the dark by prosecutors too busy to care enough.²²⁷ The CVRA only requires the government to confer with the victims before ultimately exercising its discretion.²²⁸

²¹⁹ Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making* 3 (Nat'l Crim. Just. Reference Serv., NCJ No. 240334, 2012), <https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf> [perma.cc/5H7A-YCMP].

²²⁰ See 18 U.S.C. § 3771.

²²¹ 18 U.S.C. § 3771(d)(6).

²²² Frederick & Stemen, *supra* note 219, at 25.

²²³ See U.S. Dep't of Just., Just. Manual § 9-27.600 (2018).

²²⁴ See 18 U.S.C. § 3771(a)(9); *In re Wild*, 955 F.3d 1196, 1199 (11th Cir. 2020).

²²⁵ 18 U.S.C. § 3771(b)(1).

²²⁶ Pugach & Tamir, *supra* note 61, at 49.

²²⁷ See *id.*

²²⁸ See generally 18 U.S.C. § 3771.

C. *How States Address the Conferral Right and Prosecutorial Discretion*

Both state and federal legislation have recognized a victims' conferral right.²²⁹ The statutory rights of victims vary widely from state to state.²³⁰ The right to confer with the prosecutor before charges are filed could be either discretionary or mandatory.²³¹ Some states have laws that require prosecutors to notify victims, and others require a general right to confer.²³² The states provide prosecutors with the discretion to confer with victims.²³³ However, most importantly, it should be noted that the prosecutor's discretion remains intact even when the right to confer is mandatory at the state level.²³⁴

However, federal courts generally are reluctant to interfere with the prosecutorial discretion to this degree.²³⁵ Some federal courts claim that representing a victim's private interests would create an ethical conflict for prosecutors as soon as the victim's interests diverge from those of the prosecutor or the public.²³⁶ They argue that prosecutors only have the responsibility of seeking justice for the parties and that, under the CVRA, victims are not specifically identified as a party.²³⁷

Many opponents to the pre-indictment conferral right argue that Congress may have tried to protect prosecutorial discretion by refusing to confer party status on victims.²³⁸ The opponents argue that representing a victim's private interests would infringe on a prosecutor's discretion because a prosecutor's interest does not always align with the victim's interest.²³⁹ They also focus on the issue that arises when victims "ask courts to reject plea agreements or vacate guilty pleas on the ground that the victims did not sufficiently confer with the prosecution regarding the plea."²⁴⁰ They claim that by asking courts to reject any agreement, it puts the court "in the awkward position of second-guessing the prosecutor's decisions," which, in turn, would "encourage prosecutors to act courteously toward victims while continuing to represent the United States' interests."²⁴¹

The Fifth Circuit confronted this very issue.²⁴² In *In re Dean*, the prosecution arranged a secret plea bargain to resolve a company's liability for violations of

²²⁹ Pugach & Tamir, *supra* note 61, at 49.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See Blondel, *supra* note 102, at 245–46, 260.

²³⁶ *Id.* at 263.

²³⁷ *Id.* at 264.

²³⁸ *Id.* at 260.

²³⁹ *Id.* at 263–64.

²⁴⁰ *Id.* at 268.

²⁴¹ *Id.* at 268–69.

²⁴² See *In re Dean*, 527 F.3d 391 (5th Cir. 2008).

environmental laws that resulted in an explosion at an oil refinery.²⁴³ These violations resulted in the release of dangerous gas into the environment, which then led to the catastrophic explosion in Texas City, Texas.²⁴⁴ The explosion killed fifteen workers and injured many more.²⁴⁵ The government in *Dean* chose not to confer with the victims before reaching a plea bargain with the oil company, BP Products North America.²⁴⁶ Because the government did not confer with the victims before reaching a plea bargain with BP, the victims sued to secure protection of their guaranteed right under the CVRA to confer with the attorney for the government.²⁴⁷ The Fifth Circuit held that prosecutors had to confer with victims, but it refused to compel the trial court to reject the plea agreement.²⁴⁸ However, the decision in *Dean* suggests that the Fifth Circuit also agrees that the CVRA does not impinge on prosecutorial discretion.²⁴⁹

But other courts have ruled that the CVRA does not create a right for crime victims to participate in plea negotiations. A district court in New York noted that the CVRA does not give victims a “veto power” over any prosecutorial decision or strategy.²⁵⁰ Similarly, the Second Circuit has found that “[n]othing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”²⁵¹ Although both these cases stand for the holding that a victim does not have a conferral right that applies pre-indictment under the CVRA, both emphasize the overarching idea that the CVRA does not aim to give victims a veto power, nor does it intend to influence a prosecutor’s decision.²⁵²

D. *The CVRA Does Not Impinge on Prosecutorial Discretion*

Some prosecutors claim that crime victims exercising their CVRA rights are likely to attempt to influence prosecutor decision-making when prosecutors have critically important discretionary choices to make.²⁵³ They also claim that victims’ rights add another variable into the already complex web of prosecution.²⁵⁴ This complex web of prosecution often centers around pre-trial release, charging, trials, pleas, and sentencing.²⁵⁵

²⁴³ *Id.* at 392; *see also* United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 660, 664–66 (S.D. Tex. 2009).

²⁴⁴ *BP Prods. N. Am. Inc.*, 610 F. Supp. 2d at 660, 664–66.

²⁴⁵ *In re Dean*, 527 F.3d at 392; *see also* *BP Prods. N. Am. Inc.*, 610 F. Supp. 2d at 660.

²⁴⁶ *In re Dean*, 527 F.3d at 393.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 394–96.

²⁴⁹ *See id.* at 395.

²⁵⁰ United States v. Rubin, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008).

²⁵¹ *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005).

²⁵² *See Rubin*, 558 F. Supp. 2d at 424; *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 564.

²⁵³ *See* Stacy Caplow, *What If There is No Client?: Prosecutors as “Counselors” of Crime Victims*, 5 CLINICAL L. REV. 1, 11 (1998).

²⁵⁴ *See id.* at 12.

²⁵⁵ *See id.* at 13.

But a victim's voice is only one piece of the puzzle when it comes to whether a prosecutor chooses to enter into a non-prosecution agreement. Research suggests that factors such as the type of offense, strength of the evidence, a defendant's characteristics, a victim's characteristics, and previous charges of the defendant are direct influences on whether a prosecutor chooses to go to trial.²⁵⁶ Prosecutors who argue that a victim's voice may influence prosecutor decision-making often overlook the "big picture" that prosecutors are required to take into account many factors when making their decisions.²⁵⁷

CONCLUSION

After the Epstein case, the criminal-justice system is at a turning point for victims' rights under the CVRA. The Epstein case raises a serious question as to whether victims' rights attach pre-indictment, and many courts are split on this issue. While drafting the CVRA, Senator Dianne Feinstein and former Senators Jon Kyl and Orrin Hatch focused on creating a criminal system that no longer turns a blind eye to its victims. The Eleventh Circuit's decision in the Epstein case does the opposite; it turned a blind eye to all of Epstein's victims.

The Eleventh Circuit's decision overlooked six of the CVRA's provisions and narrowly viewed the CVRA's historical context. Both the provisions and the historical context of the CVRA clearly indicate the CVRA was intended to cover victims' rights pre-indictment. The first provision of the CVRA provides that DOJ officers "engaged in the detection, investigation, or prosecution of [a] crime" must make an effort to ensure victims are notified of and awarded their CVRA rights.²⁵⁸ But the Eleventh Circuit dismissed this provision and instead justified its narrow reading of this provision as an instruction to DOJ attorneys. It found that this provision is best read as "to whom" and not a "when" provision. But this limited reading does not consider why the CVRA was enacted.

The CVRA is a tool used to balance the system, giving victims a voice in a system that often failed them. The intended result of the CVRA was to take into consideration a victim's interests, thereby building a stronger victim-focused administrative process and giving the victim a voice that helps preserve her rights without burdening the criminal-justice process. And, if used properly, the CVRA does not impede on a prosecutor's discretion.

But a victim's voice is only one piece of the puzzle when it comes to whether a prosecutor chooses to enter into a non-prosecution agreement. And although the CVRA does not require federal prosecutors to consider a victim's interests, it does ask that prosecutors make their "best effort" to include crime victims in

²⁵⁶ Frederick & Stemen, *supra* note 219, at 4.

²⁵⁷ Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 Nw. U. L. REV. 1429, 1432 (2017).

²⁵⁸ 18 U.S.C. § 3771(c)(1) ("Officers 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 subsection (a).").

the judicial process and to enforce the victims' rights. Prosecutors balance many factors when deciding to pursue a non-prosecution agreement. And those prosecutors often look to the "big picture" when deciding to prosecute crimes.²⁵⁹ One single factor, such as a victim's opinion or voice, does not overshadow the other factors the prosecutor must consider when entering into a plea agreement.

²⁵⁹ Rakoff, *supra* note 257.

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