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WHITE-COLLAR CRIME

Expert Analysis

Limiting Victims' Rights: Eleventh Circuit Reads CVRA Narrowly

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What we know about the life and conduct of Jeffrey Epstein is deeply unsettling at almost every turn—on matters ranging from how he amassed his wealth to how his federal non-prosecution deal came about, and how he came to die in federal custody in 2019, among other questions. The latest legal twist is an appeals court decision which held that federal prosecutors did not have an obligation under the Crime Victims' Rights Act (CVRA or the Act), to tell Epstein's victims of the decision not to prosecute Epstein for sex trafficking. *In re Wild*, 955 F.3d 1196, 1205 (11th Cir. 2020).

In the CVRA, Congress gave "crime victims" the right to be heard at critical junctures in a prosecution, as we previously explained in Elkan Abramowitz and Jonathan Sack, Victims' Rights and White-Collar Defense, N.Y.L.J. (July 11, 2017). Under the CVRA, victims of Epstein brought suit, claiming that the U.S. Attorney's Office for the Southern District of Florida violated their rights by failing to confer with the victims before entering into a non-prosecution agreement with Epstein in 2007 (the NPA). Many years later, the victims prevailed in the district court, though the issue of an appropriate remedy was still undecided at the time of Epstein's apparent suicide in August 2019. Following Epstein's death, the district court dismissed petitioner's suit, and the victims sought a writ of mandamus in the U.S. Court of Appeals for the Eleventh Circuit. In April 2020, the Eleventh Circuit held that rights of crime victims under the CVRA do not attach prior to the filing of criminal charges.

> The 'In re Wild' decision allows prosecutors to enter into agreements with targets of investigation without conferring with victims—unless the prosecutors choose to do so. This might help facilitate pre-charge resolutions of certain criminal investigations.

In this article, after summarizing the underlying facts and district court proceedings, we discuss the majority, concurring and dissenting opinions of the divided Eleventh Circuit, which reveal different approaches to balancing the statutory rights of victims with traditional principles of prosecutorial discretion and limited judicial authority. We conclude with a brief consideration of the possible impact of the decision.

The Epstein Investigation And NPA

The majority opinion began with a summary of the facts which culminated in the 2007 NPA and eventual CVRA litigation. *In re Wild*, 955 F.3d at 1198-99.

In 2005, the Palm Beach Police Department and FBI began an investigation of Epstein's conduct. The investigation revealed that Epstein and several co-conspirators had trafficked and sexually abused more than 30 girls over the course of many years. After developing substantial evidence, the FBI referred the matter for prosecution to the U.S. Attorney's Office for the Southern District of Florida (the Office).

During the investigation, the Office sent letters to the victims which explained their statutory rights under the CVRA. The letters informed the

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victims that they had the right, among other things, to "confer with the attorney for the government in the case," "to be treated with fairness," and to petition the District Court if the victim's CVRA rights were violated. The Office also represented that it would make "best efforts" to ensure the victim's rights under the CVRA were protected.

By May 2007, the Office had completed an 82-page prosecution memorandum and a 53-page draft indictment which accused Epstein of federal sex trafficking crimes. In September 2007, the U.S. Attorney informed Epstein's defense counsel that the Office had "decided to proceed with the indictment." Later that same month, however, the Office changed course and entered into the NPA, under which the federal prosecutors agreed not to prosecute Epstein in exchange for Epstein pleading guilty in Florida state court to state prostitution-solicitation charges.

The NPA also referenced Epstein's victims—specifically stating that victims could file uncontested lawsuits under 18 U.S.C. §2255, which authorizes civil claims for damages by sex-trafficking victims, but only if they agreed to waive other claims for damages. In a highly unusual provision, the NPA also granted immunity from prosecution to "potential co-conspirator[s]" of Epstein, none of whom had cooperated in the investigation or otherwise assisted the government.

The Office did not inform victims of the plea negotiations or confer with them about the NPA. To the contrary, the Office agreed with Epstein not to tell victims about the NPA until a state judge accepted Epstein's guilty plea. During the nine months between the NPA and the June 2008 guilty plea, the government communicated with victims but did not mention a possible deal with Epstein. The victims were told that the case was still under investigation, and they were asked "to be patient." Following the guilty plea, Epstein was given an 18-month sentence. The victims still had not been notified of the NPA.

District Court Proceedings

In July 2008, Courtney Wild brought an action in the Southern District of Florida which claimed that she was a "crime victim" under the CVRA and that the Office had violated her rights to, among other things, "confer with the attorney for the government in the case" and "to be treated with fairness and with respect."

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. §3771(e)(2)(A), and confers on crime victims eight specific rights, which include the "[t]he reasonable right to confer with the attorney for the Government in the case[,]" and "[t]he right to be treated with fairness and respect for the victim's dignity and privacy," 18 U.S.C. §3771(a)(5) and (8): the two statutory rights of greatest relevance to the Eleventh Circuit decision. Under the Act, "[o]fficers and employees of the Department of Justice and other departments and agencies engaged in the detection, investigation, or prosecution of crime" must use their "best efforts" to "see that crime victims are notified of, and accorded, the rights described in subsection (a)." Id. §3771(c)(1).

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In a significant change from prior law, the CVRA also requires courts to "ensure" that "[i]n any court proceeding involving an offense against the crime victim," the victim is afforded the rights enumerated in the CVRA. Id. §3771(b)(1). A crime victim seeking to vindicate her rights under the CVRA may proceed by motion "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." Id. §3771(d)(3).

In 2011, the district court issued an order addressing what it called "the threshold issue" of whether rights under the CVRA attach before the government brings formal charges against the defendants. *Does v. United States*, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011). The court held that they do attach because "the statutory language …" "clearly contemplates pre-charge proceedings." Id. at 1341-43. The district court cited *In re Dean*, in which the Fifth Circuit had noted that "[a]t least in the posture of th[e] case" before it, the victim's right to confer with prosecutors came into play before a charge was filed. 527 F.3d 391, 394 (5th Cir. 2008).

In February 2019, after years of discovery and motion practice, the district court ruled that the Office had violated the victims' CVRA rights to confer and be treated fairly. *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1218-22 (S.D. Fla. 2019). The court found that "[h]ad the petitioner[ ] been informed about the government's intention to forego federal prosecution of Epstein in deference to him pleading guilty to state charges," "she could have conferred with the attorney for the government and provided input." Id. at 1218.

That ruling left open the thorny issue of an appropriate remedy for a violation of statutory rights that had occurred nearly 12 years earlier. Before that issue was decided, Epstein was found dead of an apparent suicide on Aug. 10, 2019.

Following his death, the district court entered an order dismissing the case on various grounds.

The Decision

Calling the facts "beyond scandalous" and "a national disgrace," *In re Wild*, 955 F.3d at 1198, the Eleventh Circuit, Judge Kevin Newsom writing for the majority, held that rights under the CVRA, properly interpreted, attach only after the initiation of criminal proceedings. Id. at 1205.

Reading the text closely, Judge Newsom observed that all of the rights enumerated in subsection (a)—except for the rights to "confer" and "be treated with fairness and respect")—either expressly refer to or necessarily presuppose the existence of an ongoing proceeding in court. For example, the court noted that subsections (a)(2), (3), (4), and (7) each confer "proceeding"-focused rights; each refers to "proceeding[s]," "public proceedings," or public court proceedings," which apply only after the filing of charges. As to the two rights most at issue on appeal—to confer and be treated fairly—the majority invoked several common canons of interpretation to conclude that both subsections, despite not including an explicit temporal limitation, should be read to apply only after the institution of criminal proceedings. Id. at 1206-08.

The majority found confirmation for its reading of the text in a comparison of the CVRA with the Victims' Rights and Restitution Act of 1990 (the VRRA). The CVRA replaced some sections of the VRRA, but left other sections intact, including those in which victims have certain pre-charge rights (for example, the right to receive, on request, information about emergency medical and social services). The court concluded that Congress's decision to preserve certain pre-charge provisions from the VRRA, but not provide for an express pre-charge right to confer with prosecutors, shows that pre-charge rights should not be read into the text of the CVRA. Id. at 1214-15.

Lastly, the majority held that an alternative reading the statute would risk "impair[ing] … prosecutorial discretion"—a danger that the CVRA expressly seeks to avoid. See 18 U.S.C. §3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his directions."). In the majority's view, upholding the rights sought by petitioner would necessarily mean giving courts the authority to decide whether an individual was a "crime victim" prematurely, before charges are filed, and further to issue injunctions that required prosecutors and investigators to consult with victims before important investigative steps, such as warrant applications, witness interviews, lineups and interrogations. *In re Wild*, 955 F.3d at 1218. This sort of judicial intrusion into the investigative process would be "qualitatively different" from the powers given to courts by the CVRA after criminal charges are filed. Id. Once a charge is made public the prosecutor "steps into the court's jurisdiction" and necessarily "cedes some of her control of the course and management of the case." Id.

Concurring and Dissenting Opinions

Senior Judge Gerald Tjoflat wrote a concurring opinion which emphasized the structural implications of reading the statute as the petitioner requested. The petitioner's construction would raise "serious questions about whether … the judiciary would be violating the constitutional separation of powers." Id. at 1221. The notion that a district court could have pre-charging authority in regard to a criminal investigation and prosecutorial charging decision is "entirely incompatible with the constitutional assignment to the Executive Branch of exclusive power over prosecutorial decisions." Id. at 1222.

In a dissenting opinion, Judge Frank Hull accused the majority of "materially revis[ing] the statute's plain text" and "gut[ting] victims' rights under the CVRA." Id. at 1225. Judge Hull rejected the majority's reading of the statute based on a textual analysis that looked to different canons of interpretation—an illustration of how a textualist approach to statutory interpretation does not always yield the same results. See Elkan Abramowitz and Jonathan Sack, Justice Scalia's Approach to Textualism in White-Collar Law, N.Y.L.J. (March 1, 2016). In Hull's view, the rights of victims conferred by the CVRA could be reconciled with the institutional concerns expressed by the majority.

Conclusion

In October 2019, while the mandamus petition in *In re Wild* was pending, H.R. 4729, the Courtney Wild Crime Victims' Rights Reform Act of 2019, was introduced in the House of Representatives. The bill would make clear that crime victims have a right to confer with the Government and be informed about pre-charging developments in a case. The petitioner in *In re Wild* has also sought en banc review in the Eleventh Circuit. So, while we await the outcome of these developments, the *In re Wild* decision allows prosecutors to enter into agreements with targets of investigation without conferring with victims—unless the prosecutors choose to do so. This might help facilitate pre-charge resolutions of certain criminal investigations. The ultimate impact on white-collar criminal enforcement will surely play out in the future.