



WHITE-COLLAR CRIME

Expert Analysis

Epstein Saga Puts Spotlight On Crime Victims' Rights Act

The significance of the Crime Victims' Rights Act (CVRA), which is intended to guarantee crime victims a role in federal criminal proceedings, has been highlighted in the case of Jeffrey E. Epstein, the financier accused of sexually trafficking underage girls. Because the government's noncompliance with the CVRA in negotiating Epstein's plea deal in 2008 led to the former U.S. Attorney for the Southern District of Florida, Alexander R. Acosta, losing his cabinet position as Secretary of Labor, practitioners can expect prosecutors and judges to be more focused on the CVRA going forward.

Worthy of the attention of white-collar practitioners is the currently pending motion by two victims in the Epstein case to rescind the key portions of Epstein's non-prosecution agreement—those that barred his prosecution in the Southern District of Florida—based on the court's prior finding that the government violated the



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CVRA. Although Epstein's death this past weekend in an apparent suicide now makes it unlikely that the court will rule on that aspect of the motion, the possibility that a violation of the CVRA could result in the rescission of a non-prosecution agreement has implications

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Crime Victims' Rights Act

Congress enacted the CVRA, codified at 18 U.S.C. §3771, in 2004 "to make crime victims full participants in the criminal justice system." It

requires federal employees engaged in criminal investigations and prosecutions "to make their best efforts to see that crime victims are notified of, and accorded," a list of ten enumerated rights. These rights have been found to attach before formal charges are filed and courts are instructed to "ensure that crime victims are afforded" the rights therein.

Among the rights guaranteed crime victims by the CVRA is the right to "reasonable, accurate, and timely notice" of any public court or parole proceeding and the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. In addition, the CVRA mandates that prosecutors and government attorneys confer with crime victims and give them timely notice of any plea bargain or deferred prosecution agreement.

The statute provides that victims or their lawful representatives may seek to enforce these rights by bringing a motion for relief to compel prosecutors to comply in the district court in which the case is being prosecuted or, if no prosecution is underway, in the district

in which the crime occurred. The CVRA requires district courts to take up such motions "forthwith" and appellate courts to decide within 72 hours of filing any challenge of a denial of rights brought by mandamus petition. Although the statute makes clear that in no case should a violation of the CVRA provide grounds for a new trial, under the clause of the act codified at 18 U.S.C. §3771(d)(5), a victim may make a motion to re-open a plea or sentence if: (1) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (2) the victim petitions the court of appeals for a writ of mandamus within 14 days; and (3) the accused has not pled guilty to the highest offense charged.

In reviewing the history of the CVRA in its 2016 decision in *Federal Insurance Company v. United States of America*, the U.S. Court of Appeals for the Second Circuit noted that because the act began as a proposed constitutional amendment, the law is "relatively sparse [in] technical detail." That lack of detail has left open questions regarding the appropriate remedy for the government's violation of the statute. Congress specifically provided that violations do not result in a civil cause of action for damages, but rather directed the attorney general to "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials . . ." The statute further states that the attorney general or his/her designee be the

final arbiter of any filed complaint. The Justice Department enacted regulations to outline the procedures a crime victim shall follow when he or she believes their CVRA rights have been violated. 28 C.F.R. §45.10. The regulations provide that because the Justice Department's Victims' Rights Ombudsman is the "final arbiter," its determination is not subject to judicial review. When violations are found, the responsible employee is required to undergo

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training on victims' rights. If the violation was found to be willful or wanton, the ombudsman is authorized to recommend "a range of disciplinary sanctions" which may include written reprimands, suspensions, reductions in grade or pay, removals or furloughs.

The Epstein Case

In 2005, the Federal Bureau of Investigation and local police in Palm Beach, Florida, initiated an undercover investigation of Epstein after receiving allegations that he had molested an underage girl at his Florida mansion. The investigation is claimed to have revealed that Epstein had engaged in similar

behavior with multiple underage girls and had organized a sex ring where minor girls allegedly were "lent" to other individuals.

The FBI's investigation led to the preparation of a 53-page indictment against Epstein. The indictment was never presented to a grand jury, however. In 2008, federal prosecutors, led by Acosta, negotiated a non-prosecution agreement with Epstein which allowed him to plead guilty in state court to lesser charges of soliciting a minor for prostitution. Epstein served 13 months at the Palm Beach County Sheriff's Department Stockade, during which time he was allowed to leave custody and work from his office six days a week.

A series of articles from The Miami Herald exposed the nature of a so-called secret deal that allowed Epstein to evade federal sex trafficking charges. Two of Epstein's victims have cited the government's alleged failure to comply with the CVRA's requirements that prosecutors confer with crime victims and provide timely notice of proposed plea-bargaining arrangements in a long running litigation in the U.S. District Court for the Southern District of Florida.

After initially filing an emergency petition in that court for relief under the CVRA in July 2008, the victims filed a motion in 2011 seeking a finding that the government violated their CVRA rights. The government sought dismissal of the case. Although details of the arguments are elusive because the briefing remains sealed, the deci-

sion of District Judge Kenneth E. Marra denying the motion, *Doe v. United States*, 950 F. Supp. 2d 1262, 1266 (S.D. Fla. 2013), reveals that the government argued the victims did not have standing because the relief they sought—the vacation or rescission of the non-prosecution agreement to enforce their CVRA rights—was legally impossible. The government argued that rescission of an otherwise valid agreement is prohibited by constitutional due process even if the agreement was entered into in violation of the CVRA. Further, the government argued that even if the court could set aside the agreement, such ruling would be futile because the prosecutors' office legally was bound to abide by the terms of its earlier contract.

Judge Marra found as a threshold matter that the CVRA "authorize[d] the rescission or 're-opening' of a prosecutorial agreement, including a non-prosecution arrangement—reached in violation of a prosecutor's conferral obligations under the statute." Noting that §3771(d)(5) specifically contemplates the re-opening of a plea or sentence where the government has not complied with the CVRA, the court, without detailed analysis, rejected the government's due process claim. The court further relied on case law and legislative history to expansively read the statute to permit the rescission of non-prosecution agreements just as it permits the rescission of plea agreements.

In a subsequent motion for partial summary judgment, the two

victims asserted that prosecutors violated their right to confer under the CVRA. On Feb. 21, 2019, Marra issued a decision agreeing with the victims, making detailed findings that prosecutors violated the CVRA by failing to confer with the two victims when they entered into the 2008 non-prosecution agreement with Epstein. The court found "particularly problematic" the government's concealment of the 2008 agreement and statements that misled victims to believe that federal prosecution was still possible.

Appropriate Remedy

Still at issue in the case is the appropriate remedy. In briefing filed in May 2019, the victims have sought a variety of equitable remedies, including a letter of apology from the U.S. Attorney's Office and monetary sanctions. In addition, and most significantly to white-collar practitioners, the victims seek rescission of the portion of the non-prosecution agreement precluding federal prosecution of Epstein in the Southern District of Florida. The victims argue that the CVRA's procedural restrictions set forth in §3771(d)(5) do not apply because they are not seeking to re-open a plea: Epstein never pleaded guilty in federal court. The victims also argue that the court's findings that Epstein joined with the government deliberately to keep his agreement from the victims means that he cannot be heard to complain about losing the benefit of the resulting illegal agreement.

The government asserts that none

of the equitable relief sought by the victims is authorized by the CVRA because the statute specifically refers enforcement to the Justice Department. The government further argues that partial rescission of the non-prosecution agreement is inappropriate because (1) it would harm those victims who do not want the case re-opened and desire to remain anonymous; (2) it would have the perverse effect of allowing the government to disregard its obligations under the agreement (i.e., an immunity grant) despite the fact that Epstein has complied with his obligations; and (3) it contravenes the basic tenets of contract law.

The government further points out the inconsistency in the victims' position. The victims asserted an expansive reading of §3771(d)(5) of the CVRA, which allows for rescission in limited circumstances, beyond pleas or sentences to permit the possibility of rescission of the non-prosecution agreement at issue, and the district court accepted that position in its 2013 decision. But the victims now argue that the express procedural requirements of §3771(d)(5)—which they cannot satisfy—do not apply. According to the government, the petitioners "cannot have it both ways."

The court's decision is pending as of the preparation of this article.

Implications for White-Collar Cases

Recognizing that Epstein's death may moot the question, strong reasons would nevertheless have militated against permitting rescission

of Epstein's non-prosecution agreement. The government's position that the CVRA was intentionally drafted to narrowly limit the remedies available to victims are well taken, and the notion that the victims can expand the reach of §3771(d)(5) to reach non-prosecution agreements but be relieved of its express procedural requirements is hard to square.

Further, the constitutional due process implications for a defendant raised by such a result appear substantial. Courts long have recognized that plea or similar agreements in criminal cases are unique contracts raising special due process concerns for fairness to defendants, and on that basis have required the government to specifically perform such agreements or completely relieved a defendant of the impact of the plea. Because Epstein served his full state court sentence, he could not have been relieved of the impact of his plea. However unduly lenient some may now view it, the partial rescission that the victims sought years after the fact appears unsupported in the case law and unsupportable on basic contract principles.

Further, even before Epstein's death, the unusual circumstances of the case might have rendered moot the victims' rescission demand. Subsequent to the filing of the parties' remedies briefs, on July 8, 2019, the U.S. Attorney's Office for the Southern District of New York announced that it had filed charges against Epstein for sex trafficking of minors in

New York and Palm Beach Florida between 2002 and 2005. That prosecution appeared to vindicate the two victims' demands for a federal prosecution and to have provided them an avenue to exercise their CVRA right to confer with prosecutors.

But experience teaches that a bad set of facts can push the law. Here, the misconduct of which Epstein was accused is egregious, and public furor was exacerbated by the perception that he used his wealth and privilege to manipulate the criminal justice system, with the knowing assistance of prosecutors, in violation of the terms and intent of the CVRA.

The attention and publicity that a ruling rescinding Epstein's non-prosecution agreement would have generated likely would embolden victims and their representatives to assert their rights to be informed about and confer with prosecutors about plea agreements. That would be unwelcome to white-collar practitioners, who often seek to pursue efforts to dispose of cases with the least possible media and victim attention. In significant business-related prosecutions, a large number of persons and entities may claim to be victims; dealing with them can create logistical and practical difficulties for prosecutors, who typically prefer the advantage of a maximum level of control over their case.

Further, because many potential prosecutions of corporations are resolved by non-prosecution

agreements and deferred prosecution agreements—both of which are generally not considered "plea" agreements—a ruling extending the CVRA's rescission remedy to such agreements but not enforcing its strict procedural requirements would inject significant new uncertainty into their finality. Such a ruling might have generated a fair number of questions from in-house corporate counsel in industries, like financial services and health care, that tend to get regular prosecutorial and regulatory enforcement attention.

Conclusion

The alleged victims of Jeffrey Epstein already have used the CVRA to successfully bring down a former U.S. attorney. But for Epstein's death, their effort to use the statute to rescind Epstein's non-prosecution agreement could have had even greater implications for the criminal justice system.