No. 19-13843

In the

United States Court of Appeals

for the

Eleventh Circuit

In Re: Courtney Wild,

Crime Victim-Petitioner.

PETITION FOR REHEARING EN BANC

On Petition for Writ of Mandamus under the Crime Victims' Rights Act to the United States District Court for the Southern District of Florida

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made to allow the judges of this Court to evaluate possible disqualification or recusal.

The underlying Crime Victims' Rights Act petition was filed in the district court by two sexual assault victims, who were minors when Jeffrey Epstein sexually assaulted them. To protect their privacy, they were identified throughout the district court proceedings by the pseudonyms "Jane Doe 1" and "Jane Doe 2." Now, for purposes of this petition, petitioner Jane Doe 1 has determined that the best way to encourage other sexual assault victims to step forward is for her to proceed without a pseudonym. Petitioner's name is Courtney Wild.

While Ms. Wild files this petition alone, many of the issues she raises and remedies she seeks would apply to dozens of other women who were victimized when they were underage girls by Epstein. Accordingly, at various points, we refer to Ms. Wild's arguments as "the victims'" arguments.

Ms. Wild is represented by:

Cassell, Paul G. (Salt Lake City, Utah);

Edwards, Bradley J. (Fort Lauderdale, Florida); and

Howell, Jay (Jacksonville, Florida).

The respondent is the United States. The underlying non-prosecution agreement at issue was negotiated by attorneys for the United States Attorney's Office for the Southern District of Florida, which (after its recusal) is currently represented by the United States Attorney's Office for the Northern District of Georgia. The Government has been represented by the following attorneys:

Acosta, R. Alexander—former U.S. Attorney for the S. Dist. of Florida;

Ferrer, Wifredo A.—former U.S. Attorney for the S. District of Florida;

Greenberg, Benjamin G.—Asst. U.S. Attorney for the S. Dist. of Florida;

Kitchens, Nathan P.—Asst. U.S. Attorney for the N. Dist. of Georgia;

Lee, Dexter —Asst. U.S. Attorney for the S. Dist. of Florida;

McBath, J. Elizabeth—Asst. U.S. Attorney for the N. Dist. of Georgia;

Orshan, Ariana Fajardo—U.S. Attorney for the S. Dist. of Florida;

Pak, Byung J.—U.S. Attorney for the N. Dist. of Georgia;

Sánchez, Eduardo I.—Asst. U.S. Attorney for the S. Dist. of Florida;

Steinberg, Jill—Asst. U.S. Attorney for the N. Dist. of Georgia; and

Villafaña, Maria—Asst. U.S. Attorney for the S. Dist. of Florida.

Jeffrey Epstein was an intervenor in the proceedings. He is now deceased and therefore is no longer a party to these proceedings. It is also arguable that "potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff, or Nadia Marcinkova" (DE 361-62 at 5) are interested in this case.

Roy Black and Martin Weinberg, Epstein's attorneys, also intervened in the proceedings below and before this Court on issues related to privileged documents.

Because this is a mandamus petition filed under the Crime Victims' Rights Act, the United States District Court for the Southern District of Florida (Marra, J.) is technically a nominal respondent.

No corporate entities are parties to this proceeding.

11TH CIRCUIT RULE 35-5(C) STATEMENT OF IMPORTANCE

I express a belief, based on a reasoned and studied professional judgment, that this appeal/application for CVRA relief (*see* 18 U.S.C. § 3771(d)(3)) involves two questions of exceptional importance:

1. Whether crime victims' rights can attach under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, before the Government formally files criminal charges, as the Fifth Circuit and various district courts have previously held?

2. Whether Congress' 2015 CVRA amendment requiring that "[i]n deciding [a CVRA] … application, the court of appeals shall apply ordinary standards of appellate review," 18 U.S.C. § 3771(d)(3), permits the Government to inject new issues into a CVRA enforcement action and expand its rights beyond those conferred in the judgment below without following the ordinary appellate requirement of filing a cross-appeal?

By Court order dated April 23, 2020, a judge on this Court withheld issuance of the mandate in this appeal.

/s/ Paul G. Cassell

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INTRODUCTION AND STATEMENT OF ISSUES THAT MERIT EN BANC CONSIDERATION

The full Court should rehear this case—perhaps the most important case in our nation's history involving crime victims' rights in the criminal justice process.

This case arises against the backdrop of underlying facts that "are beyond scandalous—they tell a tale of national disgrace." Majority Opinion ("Op.") at 2. Petitioner Courtney Wild and more than thirty girls "suffered unspeakable horror" at the hands of an international sex trafficking organization operated by wealthy financier Jeffrey Epstein. *Id.* But after the victims reported the crimes against them, they were "left in the dark—and, so it seems, *affirmatively misled*—by government lawyers" about a secret non-prosecution agreement (NPA) that the Government negotiated with Epstein. *Id.*

On these egregious facts, a divided panel decision (with three separate opinions spanning 120 pages) refused to find any violation of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The majority concluded that because the Government—working closely with Epstein's battery of high-powered lawyers—never formally filed federal criminal charges in the case, the CVRA was never "trigger[ed]." *Id.* The majority admitted that its narrow reading of the CVRA leaves this important Act of Congress ineffectual in many cases. In fact, the majority acknowledged that "[u]nder our reading, the 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 before instituting criminal proceedings." Op. at 52-53. Judge Hull's 60-page dissent put the matter more plainly: "the [m]ajority's contorted statutory interpretation materially revises the statute's plain text and guts victims' rights under the CVRA." *Id.* at 62 (Hull, J., dissenting) ("Dissent").

If the panel decision is left in place, it will permit "secret" justice depriving literally thousands of crime victims throughout this Circuit of any CVRA rights until the Government formally files charges. This will create perverse incentives for the Government to negotiate secret agreements within this Circuit rather than elsewhere, such as in the adjoining Fifth Circuit. The Fifth Circuit long ago held that "[i]n passing the [CVRA], Congress made the policy decision—which we are bound to enforce—that [crime] victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached." *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008).

The majority's "regret[table]" interpretation of the CVRA (Op. 52) is not required. The majority candidly concedes that "[t]he interpretation of the CVRA that [Ms. Wild] advances, and that the district court adopted, is not implausible." Op. 18. Indeed, as the dissent carefully explains, the majority's perverse interpretation could be avoided simply by this Court "enforce[ing] the plain and unambiguous text of the CVRA…." Dissent at 60. And equally remarkably, this issue of vital importance was

one that the Government placed before this Court in its response brief, rather than following the normal—and required—appellate procedure of filing a cross-appeal.

Rather than leave standing this panel decision which "guts" victims' rights, this Court should rehear this case en banc and consider two questions of exceptional public importance that will determine how crime victims' rights are enforced throughout this Circuit:

1. Whether crime victims' rights can attach under the CVRA before the Government formally files criminal charges, as the Fifth Circuit and various district courts have previously held?

2. Whether Congress' 2015 CVRA amendment requiring that "[i]n deciding [a CVRA] … application, the court of appeals shall apply ordinary standards of appellate review," 18 U.S.C. § 3771(d)(3), permits the Government to inject new issues into a CVRA enforcement action and expand its rights beyond those conferred in the judgment below without following the ordinary appellate requirement of filing a cross-appeal?

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

As all judges on the panel agreed, for years well-connected financier Jeffrey Epstein and multiple coconspirators sexually trafficked and abused more than thirty minor girls, including petitioner Courtney Wild. After reports from the victims, the Palm Beach Police Department and FBI referred the case for prosecution to the U.S.

Attorney's Office for the Southern District of Florida. The Government's lawyers then secretly discussed the case for months with Epstein's enormous defense team, who sought to deflect prosecutors from filing the 53-page indictment that they had drafted.

While these extended discussions were continuing, the Government's lawyers also sent letters to Epstein's known victims, including Ms. Wild, promising them that they had rights under the CVRA. The Government explained that "as a victim … of a federal offense, you have a number of rights." *See* Letter from Asst. U.S. Attorney Marie Villafaña to Courtney Wild (June 7, 2007) (exhibit 1 to this petition). The Government's letters enumerated eight CVRA rights—including, as particularly relevant here, "[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." *Id.* These letters further told the victims that "your case is under investigation" and that they would receive "notification of upcoming case events." *Id.*

Ultimately, the Government and Epstein covertly agreed to "an infamous non-prosecution agreement." Op. 4. Under this extraordinary NPA, Epstein would eventually plead guilty in Florida court to two offenses. In exchange, the NPA labelled Epstein's child victims "prostitutes" and granted immunity from federal criminal prosecution in Florida to all of Epstein's "potential coconspirators" (only

four of whom were identified by name). The agreement also contained financial provisions that were "likely calculated to quickly and quietly resolve as many victim [civil] suits as possible." Op. 4. Once the NPA was signed, the victims were never notified about it and, "[w]orse, it appears that prosecutors worked hand-in-hand with Epstein's lawyers—or at the very least acceded to their requests—to keep the NPA's existence and terms hidden from the victims." Op. 4-5. Thereafter, the Government's efforts "graduated from passive nondisclosure to (or at least close to) active misrepresentation." Op. 5. The Government sent letters to the victims telling them this case "is currently under investigation" and requesting "continued patience." Op. 5. Ultimately, "[i]f secrecy was the goal, it appears to have been achieved—there is no indication that any of Epstein's victims were informed about the NPA or his state charges until after he pleaded guilty." Op. 6.

Shortly after Epstein's plea to the state charges triggering the NPA, in July 2008 Ms. Wild filed an action in the district court below, alleging a violation of her CVRA rights. It was only after filing this suit that she learned of the NPA's existence. Years of litigation followed. In 2011, the district ruled that, in this particular case, the CVRA extended protections to Ms. Wild even before the formal filing of federal criminal charges. 817 F. Supp. 2d 1337 (S.D. Fla. 2011). The district court noted that the CVRA applies to the Justice Department and other "agencies of the United States engaged in the *detection, investigation,* or prosecution of crime," *id.* at 1342 (*citing*

18 U.S.C. § 3771(c)(1) (emphasis in original)), language which "surely contemplates pre-charge application of the CVRA." *Id.* And the district court further noted that a victim can assert CVRA rights "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 the district in which the crime occurred." *Id.* (*citing* 18 U.S.C. § 3771(d)(3) (emphasis in original)). The district court reasoned that "[i]f the CVRA's rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime." *Id.*

Proceeding on the basis of this ruling, over the next eight years, Ms. Wild attempted to prove that the Government had violated her CVRA rights. Ultimately, in February 2019, the district court agreed, holding that the Government's deliberate concealment of the NPA violated the CVRA rights of Ms. Wild and Epstein's many other sex abuse victims. 359 F.Supp.3d 1201. The district court then ordered briefing on the appropriate remedy for the violation.

Elsewhere, in the summer of 2019, federal authorities in New York arrested Epstein, charging him with running an international sex trafficking organization. A few weeks later, Epstein apparently committed suicide in New York. And three weeks later, the district court in this Florida action abruptly concluded that the victims' requests for remedies had become moot—even though the victims were

seeking to invalidate the NPA's provision extending immunity to Epstein's coconspirators.

Two weeks later, on September 30, 2019, Ms. Wild sought review of this mootness dismissal before this Court, as the CVRA authorizes. 18 U.S.C. § 3771(d)(3). Ms. Wild also stipulated to a much more extended time frame for a ruling than the standard 72-hours that the CVRA provides. *See* 18 U.S.C. § 3771(d)(3). Acting within the 72-hour period, on October 2, 2019, this Court granted extended briefing time to the Government, allowing it to file its response a month later, and also granting Ms. Wild an opportunity to reply a month after that.

Taking advantage of the extra time, in response to Ms. Wild's petition, the Government raised (among other points) the new issue of whether the CVRA extends rights to crime victims before the formal filing of federal criminal charges. In her reply, Ms. Wild argued that this new issue was not properly before this Court. Ms. Wild explained that a ruling in the Government's favor on this issue would significantly enlarge the Government's rights beyond those contained in mootness dismissal below and, thus, under normal appellate rules, the Government was required to take a cross-appeal to present the question. Ms. Wild also defended the district court's 2011 ruling that, on the facts here, the CVRA applied before charges were filed.

Following oral argument, a divided panel of this Court concluded that it could reach the new issue of the CVRA's application pre-charging. Ruling on that issue, the majority overturned the promise that the Government had made in writing to Ms. Wild and dozens of other Epstein victims. The majority reluctantly held that crime victims have no CVRA rights at all until prosecutors formally file federal criminal charges. The dissenting judge strongly challenged the majority's reading of the CVRA, arguing that "our Court should enforce the plain and unambiguous text of the CVRA and hold that the victims had two CVRA rights—the right to confer with the government's attorney and the right to be treated fairly—that were repeatedly violated by the [Government]." Dissent 60.

Ms. Wild's timely petition for rehearing en banc now follows.

ARGUMENT

I. This Court Should Grant Rehearing En Banc on the Important Issue of Whether the CVRA Extends Any Rights to Crime Victims Before Federal Charges are Formally Filed.

The full Court should consider the critical issue of whether the formal filing of federal criminal charges is a necessary "trigger" for applying the CVRA. This recurring issue warrants en banc review. While "[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard," the CVRA worked a dramatic change "by making victims independent participants in the criminal justice process." *Kenna v.*

U.S. Dist. Court for C.D. of Cal., 435 F.3d 1011, 1013 (9th Cir. 2006). Indeed, "'[w]hen Congress enacted the CVRA, it intended to protect crime victims throughout the criminal justice process—from the investigative phases to the final conclusion of a case.'" 157 CONG. REC. S3607 (June 8, 2011) (statement of Sen. Kyl) (quoting letter to Attorney General Holder).

A. The CVRA's Application to Federal Agencies "Engaged in the Detection, Investigation, or Prosecution of Crime" Makes Clear that the Act Applies Before Charges are Filed.

Congress has made clear that the CVRA can apply during a criminal investigation, by expressly applying the Act to federal agencies involved in the "investigation" of crime. The CVRA instructs the Justice Department and "other departments and agencies of the United States engaged in the *detection, investigation*, ***or*** *prosecution* of crime" to "make their best efforts to see that crime victims are . . . accorded[] the rights described in [the CVRA]." 18 U.S.C. § 3771(c)(1) (emphases added). The dissent ably explains 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…." Dissent 90-91.

The majority does not dispute that the dissent's interpretation is an entirely natural and straightforward reading of the CVRA's text. Indeed, any other reading

cannot explain "why Congress found it necessary to break out three separate phases of the criminal justice process: the 'detection,' 'investigation,' and 'prosecution' of crime," because all agencies will, post-charging, necessarily be "engaged in" the "prosecution" of crimes. Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 87 (2014). Ultimately the majority is 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 …." Op. 31 n.15 (emphasis added). Of course, interpreting the language to be a "belt-and-suspenders approach" gives away the game: The majority's interpretation improperly renders important language in the statute superfluous, contrary to the cardinal rule of statutory construction that an Act of Congress should be construed whenever possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (internal quotation marks omitted)).

B. The CVRA's Venue Provision Extending Rights When "No Prosecution is Underway" Clearly Extends CVRA Rights Pre-Charging.

Another CVRA provision straightforwardly extends the CVRA's protections before the formal filing of charges. The CVRA's venue provision expressly provides

that crime victims can assert their CVRA rights "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 the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). As the dissent ably explains, this provision "conclusively demonstrates that the Act gives crime victims rights pre-charge…. Read most naturally, 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." Dissent 91; *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.'").

To avoid this simple conclusion, the majority creates a novel reading of the venue provision. The majority claims that the phrase "no prosecution is underway"

could hypertechnically refer only to the hours "between the filing of the criminal complaint and the suspect's initial appearance before a judge…." Op. 34. This obscure reading is anything but "obvious." Op. 34 n.18. No other court has ever given the language 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 indictment.

The majority'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." But, unsurprisingly, the term "prosecution" is commonly used to describe events that happen after the filing of a complaint. For example, 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*." WAYNE R. LAFAVE ET AL, CRIMINAL PROCEDURE § 1.2(g), at 11 (5th ed. 2009) (emphases added). Indeed, the drafters of the Federal Rules of Criminal Procedure specifically used the term "prosecution" to refer to events after the filing of a complaint. 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."* Fed. R. Crim. P. 20(a) (emphasis added). 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* …." *See also* Fed. R. Crim. P. 58(b) & (c) (similar language).

These sources make clear that the commonsense 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," Fed. R. Crim. P. 3—then a "prosecution" has begun. Before then, no prosecution is "underway," and victims assert their CVRA rights in the district where the crime was committed.

Rather than adopting this uncomplicated reading of the CVRA, the majority instead resorts to several cases regarding when the Sixth Amendment right to counsel attaches. Op. at 34-35. The majority cites a 2006 Fourth Circuit decision, *United States v. Alvarado*, 440 F.3d 191, 199-200 (4th Cir. 2006), and two other Court of Appeals decisions from 2008 and 2011, holding that, for purposes of the Sixth Amendment's right to counsel, no rights attach until the defendant physically appears in Court—and thus no "prosecution" begins until that time. But Congress enacted the CVRA in 2004. The majority's cited caselaw is all post-enactment and directly conflicts with substantial pre-enactment Court of Appeals authority, holding that the filing of a complaint *is* sufficient to trigger the Sixth Amendment's right to counsel. *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).

Moreover, as the dissent points out, it is unclear why the majority believes that the time frame for the attachment of the Sixth Amendment's right to counsel is the decisive one for determining when a Sixth Amendment "prosecution" begins. Dissent 92 n.17. If the majority had looked to the caselaw for the attachment of the Sixth Amendment's right to a speedy trial, then a "prosecution" would begin "as early as the time of arrest and holding to answer a criminal charge." *Id.* (*citing United States v. Gouveia*, 467 U.S. 180, 190 (1984)).

But in any event, reading the CVRA as employing the ordinary, everyday meaning of words makes more sense than reading it as using "legal term[s] of art." Op. 34. It is important to remember that (unlike criminal defendants) most crime victims will lack legal counsel. *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims,* 13 OHIO ST. J. CRIM. L. 67, 77 (2015). 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 the "legal terms of art" upon which the majority's strained reading necessarily relies.

As a fallback, without any sense of apparent irony, the majority also thinks that the CVRA's venue clause might also be read to somehow refer not to the very

beginning of the process but to its very end. Thus, to avoid the dissent's straightforward reading of the venue clause, the majority contends 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." Op. 36 (emphasis added).

This alternative reading is curious, because if a *final* judgment exists, then it is hard to understand how any victims' rights could still be a stake. But in an attempt to defend its reading, the majority notes that the CVRA permits a victim to "re-open a plea or sentence." Op. 36 (*citing* 18 U.S.C. § 3771(d)(5)). Then, recognizing a problem, the majority immediately drops 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." Op. 36 n.19. Not "perfectly seamless" indeed! On the majority's reading, the CVRA could require a victim, for example, to file a post-judgment motion to re-open a defendant's criminal sentence in a court that lacked any jurisdiction to do so. It is unclear why the majority prefers its fallback reading of the no-prosecution-underway clause in preference to the dissent's straightforward reading—which is "seamless."

C. Reading the CVRA as Extending Some Pre-Charging Rights Does Not Burden Law Enforcement and Is Consistent with Congress' Intent.

The recurring theme to the majority opinion is that applying the CVRA pre-charging, while "not implausible" as a matter of text (Op. 18), somehow produces results that the majority disagrees with—i.e., a requirement that law enforcement officials will too often be forced to "reasonably" confer with crime victims before charges are filed. *Cf.* Dissent 65 ("Given this is a plain-text case, the Majority curiously carries on at length about slippery slopes and bad policy implications…."). As an empirical matter, the majority's concerns are overblown, as we explain below. But as a jurisprudential matter, the majority's approach requires rehearing en banc, because it contradicts this Court's repeated holdings that when the statutory "language at issue has a plain and unambiguous meaning," this Court "need go no further." *United States v. St. Amour,* 886 F.3d 1009, 1013 (11th Cir. 2018).

Ultimately, what kinds of rights crime victims deserve in the criminal justice process is a policy decision left to Congress. Given that the majority "regret[s]" its ruling (Op. 52) and that it seems "obvious" that prosecutors should have conferred with Epstein's victims (Op. 53), it is hard to understand how the majority concludes that Congress did not intend to cover cases such as this one. As the majority reads the CVRA, Congress drafted the "Crime Victims' Rights Act"—essentially a broad bill of rights for crime victims—to be easily circumvented by prosecutors through

the simple expedient of "negotiating 'secret' plea and non-prosecution agreements, … before instituting criminal proceedings." Op. 52. Surely a more natural reading of the Act is one that blocks such deceitful maneuvers.

The majority, however, predicts that ruling for Ms. Wild would produce intractable administrative problems, because the ruling would have "no logical stopping point." Op. 51. This sky-will-fall prediction is belied by the Justice Department's ability to provide pre-charging rights to victims—including in this very case! The Justice Department had no difficulty in determining that, as of 2006, when its "attorney for the Government in the case" (18 U.S.C. § 3771(a)(5)) was actively negotiating with Epstein's numerous defense attorneys, 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" (359 F.Supp.3d at 1205, 1208 (emphasis added)), telling Ms. Wild and other victims that, "as a victim … of a federal offense you have a number of [CVRA] rights." *See* Ex. 1. In 2011, the District Court gave the same reading to the CVRA that the U.S. Attorney's Office had previously—i.e., that the CVRA extends some pre-charging rights to crime victims in the Southern District of Florida. 817 F.Supp.2d 1336, 1341. And the sky did not fall.

Perhaps the Justice Department does not have any difficulty in providing pre-charging notifications to crime victims because it has long been required to do so.

In another statute that pre-dated the CVRA's enactment, Congress required all Justice Department agencies engaged in "the detection, investigation, or prosecution of crime" to "[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…." 34 U.S.C. § 20141(b). Thereafter, the statute requires Justice Department agencies to provide those 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." 34 U.S.C § 20141(c)(3). In light of these provisions, the Justice Department's investigative agencies "provide [service referrals, reasonable protection, and notice concerning the status of the investigation] to thousands of victims every year, whether or not the investigation results in a federal prosecution." Letter from Ronald Weich, Asst. Attorney General to Jon Kyl, U.S. Senator (Nov. 3, 2011), *cited in* Cassell et al., *supra,* 104 J. CRIM. L. & CRIMINOLOGY at 96. Presumably in crafting the CVRA in 2004, Congress understood that the Justice Department was already making these pre-charging notifications.

In addition, in 2015, Congress added a new right to the CVRA that indisputably applies pre-charging. In 2015, Congress added to the CVRA's list of rights "the right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990…."

("VRRA")."[1] 18 U.S.C. § 3771(a)(10). This amendment clearly confirms that Congress understood the CVRA as applying before charges are formally filed. The VRRA obviously requires notice to victims about "services" provided well before charges are filed, such as how rape victims can obtain medical services. *See* Op. 38-40. But victims seeking to enforce their (2015) CVRA right to notice about VRRA services must rely on the CVRA's pre-existing (2004) CVRA enforcement mechanisms—including the no-prosecution-underway venue provision discussed earlier. *See* 18 U.S.C. § 3771(d)(3). 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 apply pre-charging.

It is also important to understand that the CVRA's "reasonable" right to "confer with the attorney for the Government in the case," 18 U.S.C. § 3771(a)(5), can comfortably apply pre-charging without creating any administrative difficulties. The majority predicts complications could arise because the reasonableness

[1] This provision has since been recodified from 42 U.S.C. 10607 to 34 U.S.C. § 20141.

limitation is "squishy." Op. 31. Indeed, the majority offers a parade of horribles, speculating that the CVRA could be read—quite unreasonably—to require federal law enforcement agencies to "confer" with victims before even conducting "a raid." *Id.* But as the dissent strongly responds, "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." Dissent 107. The reasonableness limitation thus explains why the majority's conjectured problems have never occurred anywhere in the country, even though the CVRA has been applied pre-charging by other courts—such as the Fifth Circuit.

D. The Majority's Ruling Unjustifiably Creates a Circuit Split with the Fifth Circuit.

One Court that has long applied the CVRA pre-charging is a large circuit adjacent to this Circuit: the Fifth Circuit. Since 2008, the law of that populous Circuit has been that the CVRA extends rights before the formal filing of charges. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), the Circuit rejected a district court's decision to keep a plea secret from victims until it was filed, specifically explaining 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." *Id.* at 395.

The majority relegates discussion of *Dean* to a footnote, giving several (unpersuasive) reasons for splitting from its clear holding. Op. 49 n.25. For example, the majority characterizes the Fifth Circuit ruling as "technically dictum" because the Fifth Circuit ultimately denied part of the victims' mandamus petition in that case. *Id.* But the Fifth Circuit initially *granted* the victims' petition, blocking any further district court consideration of the plea agreement until the Fifth Circuit could finally rule. 527 F.3d at 393. And then, when the Circuit released its published opinion, it stated in the opening paragraph that "[w]e *find a statutory violation* [of the CVRA]…." 527 F.3d at 392 (emphasis added). 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*…." *Id.* at 395 (emphasis added). The majority's footnote in this case 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's ruling "dictum."[2]

Whether prosecutors must confer about non-prosecution agreements is a recurring issue, particularly in complicated and important criminal investigations. For example, deferred and non-prosecution agreements have been described as the

[2] On April 21, 2020, counsel's Westlaw search engine identified 137 "citing references" to *In re Dean*. Using the "search within results" feature of Westlaw produced only one reference to "dicta" or "dictum" in connection with the decision—the majority's opinion here.

"standard method" for "resolv[ing] a criminal investigation of a corporation." Peter J. Henning, *Dealing with Corporate Misconduct*, 66 FLA. L. REV. F. 20, 20 (2015). If this Circuit elects to diverge from the Fifth Circuit's approach, one can confidently predict that this Circuit will become a favorite for multistate businesses, who could "forum shop" and negotiate secret non-prosecution agreements in this Circuit that would be impossible elsewhere. This important issue of the CVRA's pre-charging application deserves the attention of the full Court.

II. This Court Should Grant Rehearing En Banc on the Important Issue of Whether "Ordinary Standards of Appellate Review" Permit the Government to Enlarge Its Rights Without Filing a Cross-Appeal During the Disposition of a CVRA Petition.

This Court should also rehear this case en banc to consider the sly procedural maneuver used by the Government to obtain a panel decision relieving it of all pre-charging CVRA obligations. The Government was required to seek such a broad ruling by filing a cross-appeal, rather than by using its response brief to inject this separate issue into Ms. Wild's CVRA application. The issue of the CVRA's pre-charging application was never properly before this Court.

Some procedural background: In 2011, the district court agreed with Ms. Wild that the CVRA extended some rights to crime victims before charges were filed. 817 F.Supp.2d 1336. Years of litigation followed on the premise that the CVRA applied rights pre-charging. Indeed, this Court decided an interlocutory appeal on that premise. *See Doe v. United States*, 749 F.3d 999 (11th Cir. 2014) (rejecting Epstein's

lawyers' argument for a "plea bargaining privilege"). Ultimately, in February 2019, the district court found that the Government had violated the victims' CVRA rights; and then, in September 2019, the district court abruptly closed the case for mootness, due to Epstein's apparent suicide.

As permitted by the CVRA, Ms. Wild sought review of that mootness dismissal by filing a CVRA petition with this Court and stipulating to a briefing schedule for resolving the petition extending beyond the normal 72-hour time frame. *See* 18 U.S.C. § 3771(d)(3). This Court approved the extension, and during the next month the Government did not file any notice of a cross-appeal. Instead, the Government wrote and filed a lengthy response brief, arguing (among other things) that the CVRA did not apply pre-charging. In reply, Ms. Wild objected to the Government attempting to enlarge its rights beyond those contained in the judgment below—i.e., beyond the finding of mootness below.

Following oral argument, the majority reached and decided the case based on the Government's sweeping new argument. The majority conceded that it is "true that in the usual case, the government's failure to cross-appeal the district court's adverse 2011 order might well have precluded our review of that decision [that the CVRA extends rights pre-charging]." Op. 16 n.6 (*citing Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008)). However, because Ms. Wild had used the procedural vehicle specified in the CVRA ("an application" for a writ of mandamus, 18 U.S.C.

§ 3771(d)(3)), the majority held that the government was entitled to raise "any argument that it likes" for this Court rejecting Ms. Wild's application. Op. 16 n.6.

The majority acknowledged that, under current law, Ms. Wild is entitled to "ordinary standards of appellate review." 18 U.S.C. § 3771(d)(3). Previously, this Court had held (contrary to several other circuits) that crime victims were only entitled to "highly deferential" review of their CVRA petitions. *See In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1237 (11th Cir. 2014). In 2015, Congress overturned this Court's ruling, requiring 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); *see also* H.R. Rep. 114-7 at 8 (2015) (noting circuit split and stating "[t]his section adopts the approach followed by … the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005)….").

While recognizing Congress' 2015 amendment, the majority concluded that "it does not direct us to employ the *rules of procedure* that would apply if this were a typical appeal." Op. 16 n.6 (emphasis added). But this reading exalts form over substance, ignoring the obvious reason Congress made the change. 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) (emphasis added)). Accordingly, in 2015, 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 majority reads the provision as if it artificially gave crime victims only *ordinary substantive (but not procedural) standards* of appellate review. This approach very much deviates from "ordinary standards" of appellate review, because now crime victims must confront arguments and obstacles that other appellate litigants do not face—as in this case.

Congress did not intend to allow the Government in its response to a CVRA petition to deflect an appellate court's attention away from the question of enforcing a victim's rights. Indeed, in the CVRA itself, Congress authorized the Government to appeal CVRA questions only in circumstances inapplicable here. *See* 18 U.S.C. § 3771(d)(4). Moreover, in creating the CVRA's expedited appellate review provisions, Congress allowed for a single judge to issue the CVRA writ and required

the Court to act "forthwith"—i.e., within 72 hours (unless the litigants, with the approval of the court, stipulated to a longer time period). 18 U.S.C. § 3771(d)(3). And Congress directed this Court to "take up and decide *such application*," 18 U.S.C. § 3771(d)(3) (emphasis added)—that is, *the victim's* application, not the Government's separate concerns.

Ordinarily, of course, a CVRA application can be resolved very rapidly (i.e., in less than 72 hours) because it will only involve a victim's petition and a Government response. *See* Fed. R. App. P. 21(b) (no provision for reply to response to mandamus petition). Congress could not have intended to allow the Government to raise new issues in its response to which victims might never get to reply. Indeed, in this case, because the Government did not cross appeal on the issue of the CVRA's pre-charging application, Ms. Wild was only able to brief the issue within the truncated space of a reply. And Ms. Wild's supporting amicus—the National Crime Victims' Law Institute—was precluded from addressing the issue entirely.

Whether the Government can present new claims in its response to victims' CVRA applications is an important procedural question, as it will establish the standards for reviewing all crime victims' rights petitions by this Court. Also, if the panel decision is allowed to stand, this Court should foresee that in the future crime victims will not stipulate to more than 72 hours for briefing and a decision, because the Government could use the extra time to raise new arguments for denying the

victims' petition. The issue of whether crime victims will have the same protections as other litigants before this Court deserves this full Court's attention.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation established by this Court's order of April 27, 2020, granting Ms. Wild's motion to file a petition not exceeding 6,300 words, because this brief contains 6,299 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Microsoft Word software that counsel employs.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced Time New Roman typeface using 14-point Times New Roman type.

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