

2021

A Victim's Right to Confer Under the Crime Victim's Rights Act

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Lauren K. Cook, *A Victim's Right to Confer Under the Crime Victim's Rights Act*, 43 CAMPBELL L. REV. 543 (2021).

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A Victim's Right to Confer Under the Crime Victim's Rights Act

ABSTRACT

The federal Crime Victims' Rights Act (CVRA) grants a victim the right to confer with the United States attorney serving on his or her case. However, in practice, the attorney's criminal charging decisions can impede the victim's access to this right. This Comment analyzes a crime victim's right to confer in light of the recent In re Wild case, in which a survivor of Jeffery Epstein's alleged sex-trafficking crimes was effectively denied the right to confer with the government attorney on her case because criminal charges were never filed. This Comment advocates for an interpretation of the CVRA that allows a victim to confer with the attorney irrespective of the filing of criminal charges, in accordance with In re Wild's dissenting opinion.

ABSTRACT	543
INTRODUCTION.....	544
I. BACKGROUND	545
A. Crime Victims' Rights Act	545
II. INTERPRETATIONS OF RIGHT TO "REASONABLY CONFER"	549
A. When does the right attach?	550
1. Post-charge Interpretation	550
2. Pre-charge Interpretation by the In re Wild Dissent and the Fifth Circuit	553
3. Pre-charge Interpretation by Legal Scholarship	556
B. What does a victim have the right to confer about?	557
III. IMPORTANCE OF RIGHT TO "REASONABLY CONFER"	558
IV. SOLUTION	561
A. A Victim's Right to Confer Should be Broadly Construed	561
B. Proposed Amendment Language to the CVRA Conferral Right Provision	564
C. Counterarguments to Broadly Construing a Victim's Right to Confer	565
CONCLUSION	567

INTRODUCTION

Billionaire Jeffery Epstein sexually abused hundreds of young women, including Ms. Courtney Wild.¹ Now, over ten years later, Ms. Wild believes that, in addition to enduring Epstein's abuse, the criminal justice system has also abused her.² In short, federal prosecutors effectively denied Ms. Wild her right to confer with them under the Crime Victims' Rights Act (CVRA) when they executed a non-prosecution agreement (NPA) with Epstein for sexual abuse and trafficking charges without first informing Ms. Wild.³

Congress passed the CVRA in 2004 with the aim of promoting crime victims' participation in the criminal justice process.⁴ The CVRA outlines a series of ten rights explicitly afforded to victims of federal crimes.⁵ One of these rights is the "reasonable right to confer" with the government attorney handling the case.⁶ But considerable debate exists regarding the scope of that conferral right. Specifically, courts disagree about when the right attaches and what exactly a victim has the right to confer about.⁷ In order to uphold the purpose of the CVRA and promote victim participation in the criminal justice process, courts should construe a victim's right to confer to apply before the government files criminal charges, and Congress should amend the language of the CVRA to specify the conferral right's scope. These recommendations will ensure a victim's "reasonable right to confer" is upheld in the absence of a filed, formal charging document.

One article and one student-written comment have been published in the last ten years on this subject, but both pre-date the panel majority opinion in *In re Wild*.⁸ While this Comment, like previous writings, takes

1. Radical Media, *Jeffrey Epstein: Filthy Rich*, NETFLIX (May 27, 2020), <https://www.radicalmedia.com/work/jeffrey-epstein-filthy-rich> [https://perma.cc/6V4L-MJZT].

2. *Id.*

3. *In re Wild*, 955 F.3d 1196, 1198–1200 (11th Cir. 2020), *vacated*, 967 F.3d 1285 (2020).

4. *Id.* at 1227 (Hull, J., dissenting) (“[T]he CVRA was enacted to protect crime victim’s rights and ensure their involvement in the criminal justice process.” (citations omitted)).

5. 18 U.S.C. § 3771 (2018).

6. 18 U.S.C. § 3771(a)(5) (2018).

7. Compare *In re Wild*, 955 F.3d at 1204–05 (majority opinion), with *In re Wild*, 955 F.3d at 1223–50 (Hull, J., dissenting), and *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008).

8. Elliot Smith, Comment, *Is There a Pre-Charge Conferral Right in the CVRA?*, 2010 U. CHI. LEGAL F. 407, 428 (2010) (advocating for a construction of the conferral right which allows a victim to express his or her views to the prosecutor irrespective of the timing of plea or non-prosecution agreement negotiations); 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, 75 (2014) (focusing on rebutting the

the position that a victim's "reasonable right to confer" under the CVRA⁹ should be construed to apply before criminal charges are filed, this Comment proposes amended language regarding a victim's right to confer that aligns with the CVRA's intended purpose. This Comment also considers how the *In re Wild* decision has impacted the debate surrounding the scope of the CVRA.

Part I of this Comment begins with background information on the CVRA and *In re Wild* case. Part II focuses on scope interpretations of a victim's right to confer under the CVRA, including both when the right attaches and the object of conferral. Part III includes a brief policy discussion about the importance of the conferral right. Part IV outlines a proposed solution to misconstruing the timing and scope of the conferral right, including sample language to clarify the scope of the right within the CVRA's text. Part IV also includes counterarguments to a pre-charge conferral right before the Comment concludes.

I. BACKGROUND

A. Crime Victims' Rights Act

Statutorily codified victim rights were largely limited to state constitutions prior to 2004.¹⁰ In the 1970s, the United States Supreme Court recognized that, when a citizen is not prosecuted or threatened with prosecution, he or she does not have standing to contest prosecutorial policies, but the Court acknowledged that Congress could provide such standing by enacting statutes creating legal rights for victims.¹¹ In 2004, Congress capitalized on that suggestion and passed the CVRA.¹²

For the six years immediately following the CVRA's passage, the number of identified victims of federal crimes increased by 298%,¹³ highlighting the CVRA's significant impact on both identifying crime

Office of Legal Counsel's guidelines regarding a post-charge conferral right under the CVRA, using a previous case filed on behalf of other Epstein victims).

9. 18 U.S.C. § 3771(a)(5).

10. See Robin Turner, *Examination of Victim Rights: Ensuring Safety and Participation in Court Process*, 40 MONT. LAW. 18, 18 (2015).

11. *Id.*; Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973).

12. 18 U.S.C. § 3771.

13. Turner, *supra* note 10, at 18 (“[T]he number of identified victims in federal cases has more than tripled since the CVRA passed, increasing from 554,654 victims in 2004 to 2.2 million victims in 2010, a 298 percent increase. Victim notifications doubled to 5.7 million notices within one year of CVRA’s passage in 2004 and totaled nearly 8 million in 2010.” (citation omitted)).

victims and affording them participation in the criminal justice process. The CVRA's primary drafter, Senator Jon Kyl, expressed his intention to "correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."¹⁴ The CVRA was ultimately intended to enlarge, not limit, a crime victim's rights.¹⁵

Under the CVRA, a crime victim is afforded the following rights:

- (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 . . . 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.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- (10) 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 1990¹⁶

The CVRA defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense."¹⁷ Other key terms such as "crime," "reasonable," and "confer" are left undefined in the CVRA's text.¹⁸ This Comment exclusively focuses on a victim's "reasonable right to confer."¹⁹

14. 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("It is not the intent of [the CVRA] that its significance be whittled down or marginalized by the courts or the executive branch.").

15. *Id.*

16. 18 U.S.C. § 3771(a).

17. § 3771(e)(2)(A).

18. § 3771.

19. § 3771(a)(5).

Courts have adopted various constructions of the conferral right's intended scope.²⁰ In her *In re Wild* dissent, Judge Hull defined "confer" as to "speak with,"²¹ while the Fifth Circuit Court of Appeals equated conferral with meaningful communication.²² Although these definitions vary slightly in substance, all of the interpretations confirm that in order to confer, at least two parties must communicate. In the context of *In re Wild*, it is undisputed that the parties to the conferral at issue are the victim, Ms. Wild, and the team of government attorneys on her case. However, debate exists with respect to when the conferral right's trigger during the prosecutorial process and what the parties are intended to confer about. The *In re Wild* panel majority opinion describes the case's facts as "beyond scandalous" and a "national disgrace."²³ These facts provide a shocking framework to analyze the disputed scope of a victim's right to confer.

From 1999 to 2008, billionaire Jeffrey Epstein paid his associates to recruit girls and women, some as young as fourteen, to travel to his properties and suffer sexual assault by either Epstein or his friends.²⁴ The panel majority found at least thirty underage girls were harmed in this arrangement,²⁵ but other sources estimate "hundreds" of victims.²⁶ After sexually abusing these girls and women, Epstein compensated his victims in exchange for their vows to recruit other young women into his sexual-abuse scheme.²⁷ Many of the victims were from low-income families living in Epstein's home community of Palm Beach, Florida.²⁸

In 2005, the Palm Beach Police Department and the Federal Bureau of Investigation (FBI) began a two-year investigation into Epstein's conduct.²⁹ Two years later, the investigators referred the matter to the United States Attorney's Office for the Southern District of Florida for prosecution, and a team of government attorneys began an eight-month period of

20. Compare *In re Wild*, 955 F.3d 1196, 1204–05 (11th Cir. 2020), *vacated*, 967 F.3d 1285 (2020) (majority opinion) (advocating the CVRA conferral right attaches after criminal proceedings are initiated by the filing of criminal charges), with *In re Wild*, 955 F.3d 1196, 1223–50 (Hull, J., dissenting), and *In re Dean*, 527 F.3d 391 (5th Cir. 2008) (interpreting the conferral right to apply irrespective of the filing of criminal charges).

21. *In re Wild*, 955 F.3d at 1247 (Hull, J., dissenting). Black's Law Dictionary defines "confer" as "to consult with one another." *Confer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. *In re Dean*, 527 F.3d at 395.

23. *In re Wild*, 955 F.3d at 1198 (majority opinion).

24. *Id.*

25. *Id.*

26. Radical Media, *supra* note 1.

27. *In re Wild*, 955 F.3d at 1198.

28. Radical Media, *supra* note 1.

29. *In re Wild*, 955 F.3d at 1198.

negotiations with Epstein's team of defense attorneys.³⁰ Approximately five months later, more than two years after initiating the investigation into Epstein's allegations, federal prosecutors filed an eighty-two page prosecution memo and a fifty-three page draft indictment with Epstein's extensive sex crime allegations.³¹

Epstein's counsel and federal prosecutors then exchanged multiple drafts of an NPA³²; the final agreement granted Epstein—and his co-conspirators—immunity from federal prosecution if he pleaded guilty to two state level prostitution offenses.³³ Epstein pleaded guilty to state prostitution charges in June 2004, and the court sentenced him to eighteen months' imprisonment, twelve months' home confinement, and lifetime sex-offender status.³⁴

During NPA negotiations, federal prosecutors issued letters to Epstein's known victims outlining each of their rights under the CVRA, including each of the victims' reasonable right to confer with the Government's attorneys.³⁵ Further, after Ms. Wild filed a civil action seeking enforcement of her rights under the CVRA, the district court found this letter did not include information regarding the NPA; Epstein's known victims were never informed of the NPA or even informed that an NPA was under consideration.³⁶ At Epstein's request, prosecutors did not notify his victims about the NPA regarding the federal charges for almost a year.³⁷ Prosecutors also did not inform the alleged victims of the state charges until after Epstein pleaded guilty and the charges were finalized.³⁸

Ms. Wild then brought suit alleging violations of, among other CVRA rights, her right to confer with the government attorneys.³⁹ In 2011, the district court held that federal prosecutors violated Ms. Wild's right to confer by entering into and executing an NPA without first conferring with her and other known victims. But the court left open the issue of appropriate

30. *Id.* at 1198–99.

31. *Id.* at 1198.

32. A non-prosecution agreement (NPA) is a contractual arrangement between a United States government agency and a company or an individual facing a criminal or civil investigation documenting the agency's decision to refrain from filing charges. *Non-Prosecution Agreement*, WESTLAW PRACTICAL LAW GLOSSARY 9-608-6205 (2020).

33. *In re Wild*, 955 F.3d at 1198.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1200.

remedies.⁴⁰ Because Epstein's death effectively mooted the unresolved issue of remedies, the district court dismissed Ms. Wild's case, which prompted her to file a writ of mandamus with the Eleventh Circuit on the issue of appropriate remedies for the CVRA violations.⁴¹ The Eleventh Circuit ultimately reversed the district court's finding and denied Ms. Wild's petition on the grounds that federal prosecutors did not violate her right to confer under the CVRA.⁴² The court reasoned the right to confer does not attach until criminal proceedings are initiated, and criminal proceedings are only initiated by filing a criminal complaint, information, or indictment.⁴³ This ruling effectively gives government attorneys the right to refuse to confer with crime victims within the Eleventh Circuit's jurisdiction until a formal charging document is filed. The panel majority's narrow interpretation of the right to confer compelled Ms. Wild to file a petition for an en banc hearing; the Eleventh Circuit granted the petition on August 7, 2020.⁴⁴ Accordingly, the Eleventh Circuit vacated the panel opinion, and the case is currently pending en banc review.⁴⁵

The Eleventh Circuit's panel majority opinion was accompanied by a lone but scrupulous dissent. Judge Hull advocated that the "plain and unambiguous text of the CVRA [did] not include [a] post-indictment temporal restriction that the Majority add[ed] to the statute."⁴⁶ Judge Hull's dissent ultimately rested on the plain language of the statute, logic of the Fifth Circuit Court of Appeals' interpretation of the conferral right in *In re Dean*,⁴⁷ and policy considerations surrounding a victim's right to confer.⁴⁸

II. INTERPRETATIONS OF RIGHT TO "REASONABLY CONFER"

In interpreting the scope of a victim's right to confer, relevant considerations include both when it attaches during the criminal justice process and the specific object the conferral right concerns. Before

40. *Id.* at 1201.

41. *Id.* at 1202.

42. *Id.* at 1219. Although the petitioner's remedy requests with respect to Epstein were mooted by his death, the Eleventh Circuit majority determined the petitioner's civil case against the government with respect to her other requested remedies remained live. *Id.* at 1248 (Hull, J., dissenting).

43. *Id.* at 1219 (majority opinion).

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

45. *Id.* The court heard oral arguments for the case on December 3, 2020.

46. *In re Wild*, 955 F.3d 1196, 1225 (11th Cir. 2020), *vacated*, 967 F.3d 1285 (2020) (Hull, J., dissenting).

47. *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008).

48. *In re Wild*, 955 F.3d at 1240 (Hull, J., dissenting).

exploring scope interpretations, a brief background of the plea negotiations process is helpful. Plea negotiations can occur at various times throughout a case, including before criminal charges are filed. A federal prosecutor first notifies an individual of his or her involvement in an alleged crime; the individual can then retain a defense attorney, who negotiates a plea agreement to the charges with the federal prosecutor.⁴⁹ The prosecutor can then file the charging document and plea agreement simultaneously, effectively “closing” the case before it is ever formally “opened.”

A. When does the right attach?

In addition to the *In re Wild* panel majority, other executive branch entities interpret the conferral right to attach only after criminal charges are filed.⁵⁰ Alternatively, other appellate courts and the CVRA’s primary drafter, Senator Jon Kyl, support *In re Wild*’s dissenting opinion’s interpretation that a victim’s conferral right attaches irrespective of filed criminal charges against the defendant.⁵¹

1. Post-charge Interpretation

Primarily, the *In re Wild* panel majority determined the right to confer with a government attorney is available to a victim only after the commencement of legal proceedings.⁵² The panel majority interpreted the commencement of legal proceedings to occur when a formal charging document is filed.⁵³ This post-charge interpretation of the CVRA conferral right produced a shocking reality for Ms. Wild and Epstein’s other victims because federal prosecutors never filed the drafted indictment of sexual abuse and trafficking allegations.⁵⁴ Because federal criminal charges were not filed before Epstein executed the NPA, Ms. Wild never had a right to confer with attorneys assigned to her case.⁵⁵ Therefore, the eight-month period in which prosecutors negotiated an NPA with Epstein’s lawyers before any charges were filed fell outside the scope of Ms. Wild’s conferral right.⁵⁶ In effect, this sealed the NPA negotiations in secrecy, and Ms. Wild

49. Smith, *supra* note 8, at 436–37.

50. Availability of Rights Under the Crime Victims’ Rights Act of 2004, 34 Op. O.L.C. 239, 239–40 (2010) [hereinafter Availability of Rights]; 28 C.F.R. § 45.10 (2019).

51. *In re Wild*, 955 F.3d at 1240 (Hull, J., dissenting); *In re Dean*, 527 F.3d at 391; 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

52. *In re Wild*, 955 F.3d at 1205 (majority opinion).

53. *Id.*

54. *Id.* at 1198.

55. *Id.* at 1212.

56. *Id.*

did not learn of the NPA until July 2008, long after the agreement was executed.⁵⁷

The panel majority grounded its interpretation of a post-charge conferral right in the statute's text and history.⁵⁸ The CVRA includes no explicit language of when the conferral right attaches; rather, the text only affords victims the "reasonable right to confer" with the attorney on the case.⁵⁹ The panel majority analyzed text from other sections of the CVRA outside of the specific conferral right provision, such as the use of the terms "crime," which denotes that a crime has in fact occurred, and "accused," which implies commencement of criminal proceedings.⁶⁰ In the conferral right provision, the panel majority interpreted a victim's right to "confer with *the attorney for the Government in the case*" to be an easily identifiable attorney, or group of attorneys, to support its conclusion that criminal proceedings must be initiated, and an attorney assigned, in order for a victim to have a right to confer under the CVRA.⁶¹ Further, the panel majority acknowledged the term "case" could refer to either a "judicial" or an "investigative" case.⁶² It ultimately determined that a judicial case, which ordinarily requires the initiation of legal proceedings, is "undoubtedly" the "primary" construction of the word.⁶³

The court's historical support for its interpretation of a post-charge conferral right is rooted in an assumption that at the time of the CVRA's passage, the legislature must have "indisputably" known about the Victims' Rights and Restitution Act of 1990 (VRRRA).⁶⁴ The VRRRA, unlike the CVRA, explicitly concerns victim rights; the VRRRA triggers victim rights upon the "detection" of crime.⁶⁵ Because the CVRA mimics some of the VRRRA's specific language but excludes portions that "by their express terms, plainly apply before criminal proceedings begin[.]" the panel majority assumed the legislature did not intend for the CVRA to apply pre-charge.⁶⁶

Finally, the panel majority interpreted a post-charge conferral right in the context of the executive branch's exclusive power of prosecutorial

57. *Id.* at 1200.

58. *Id.* at 1212.

59. 18 U.S.C. § 3771(a)(5) (2018).

60. *In re Wild*, 955 F.3d at 1206–07.

61. *Id.* at 1207–08 (emphasis added).

62. *Id.* at 1207.

63. *Id.*

64. *Id.* at 1214–15.

65. 34 U.S.C. § 20141(a) (2018).

66. *In re Wild*, 955 F.3d at 1214.

discretion.⁶⁷ The court acknowledged that allowing victims to access their conferral right pre-charge would impair prosecutorial discretion principles.⁶⁸ It emphasized that a prosecutor's decision to prosecute is entirely "exclusive" and "absolute,"⁶⁹ and that construction of a pre-charge conferral right would "requir[e] . . . consultation with victims before raids, warrant applications, arrests, witness interviews, lineups, and interrogations . . . work[ing] an extraordinary expansion of an already-extraordinary statute."⁷⁰

As noted in the text of the CVRA,⁷¹ the Department of Justice's (DOJ) Office of Legal Counsel (OLC) promulgated regulations to afford certain rights to victims.⁷² These regulations were codified separate from the CVRA and also do not expressly address the issue of when a victim's rights attach in the course of the criminal justice process.⁷³ In the wake of litigation surrounding Epstein's sexual-abuse allegations brought by Ms. Wild and other like victims in 2010, the OLC issued an explanatory memorandum addressing the threshold question of when a victim's right to confer attaches.⁷⁴ The OLC determined that all victim rights under the CVRA, including the reasonable right to confer, attach "from the time that criminal proceedings are initiated (by complaint, information, or indictment)."⁷⁵ The memorandum was released shortly after Ms. Wild filed her initial suit. The timing of the release prompted suspicion that the government memorandum was "designed to justify what most people would say is unjustifiable"⁷⁶ because the OLC had never before released a public comment on the timing of a victim's right to confer. Media outlets publicized that the memorandum justified a secret deal that allowed a wealthy man and his associates to evade federal sex-trafficking charges.⁷⁷ The *In re Wild* panel majority drew upon the OLC's conclusion that victim

67. *Id.* at 1216–18.

68. *Id.*

69. *Id.* at 1218 (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

70. *Id.* at 1218.

71. 18 U.S.C. § 3771(f)(1) (2018).

72. 28 C.F.R. § 45.10 (2019).

73. *Id.*

74. Availability of Rights, *supra* note 50, at 239, 247–53.

75. *Id.*

76. RJ Vogt, *Victims' Rights Suffer Blow in Epstein Case*, LAW360 (Apr. 19, 2020, 8:02 PM), <https://www.law360.com/articles/1265036/victims-rights-suffer-blow-in-epstein-case> [<https://perma.cc/G3QY-GP3E>].

77. *Id.*

rights attach upon the filing of criminal proceedings against the defendant to support its post-charge interpretation of the conferral right.⁷⁸

Notably, by ruling that the CVRA conferral right attaches post-charge, the panel majority contradicted Eleventh Circuit precedent from *Frank v. United States*. Although the *Frank* court did not reach the merits of the petitioner's claim, the court opined that while the petitioner was not a "crime victim" under the CVRA, a crime victim may assert CVRA rights, including the right to confer, "even if there is no ongoing prosecution in connection with the applicable crime."⁷⁹ The panel majority's ruling in *In re Wild* states that a victim does not have a right to confer with the government attorney until criminal charges are filed, irrespective of an "ongoing judicial proceeding."⁸⁰ Unfortunately, the panel majority did not acknowledge or address this apparent contradiction of precedent in the *In re Wild* opinion.

In short, the panel majority's interpretation of a post-charge application of a victim's right to confer is primarily grounded in the absence of any pre-charge language in the CVRA, as well as in executive guidance regarding CVRA interpretation.

2. Pre-charge Interpretation by the *In re Wild* Dissent and the Fifth Circuit

Alternatively, the conferral right can apply before the filing of a formal charging document, or pre-charge. The dissenting opinion in *In re Wild* and the Court of Appeals for the Fifth Circuit upheld a pre-charge interpretation primarily by analyzing the CVRA's text and purpose.⁸¹ Judge Hull's dissenting opinion looked to the statutory text and its plain meaning as a starting point for determining when a victim's conferral right attaches.⁸² Unlike the panel majority, which used external text to interpret the conferral provision language, Judge Hull interpreted the conferral provision's exclusion of the phrases judicial proceeding and filing of a charging document to indicate that the conferral right may attach pre-charge.⁸³ Judge Hull opined that if the CVRA's drafters intended the conferral right to attach only after charges are filed, the drafters would have explicitly stated so in

78. *In re Wild*, 955 F.3d 1196, 1213–14 n.20 (11th Cir.), *vacated*, 967 F.3d 1285 (2020).

79. *Frank v. United States*, 789 F. App'x 177, 179 (11th Cir. 2019).

80. *In re Wild*, 955 F.3d at 1207.

81. *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Wild*, 955 F.3d at 1225 (Hull, J., dissenting).

82. *In re Wild*, 955 F.3d at 1225 (Hull, J., dissenting).

83. *Id.* at 1236, 1242.

the text of the statute itself.⁸⁴ Therefore, the absence of temporal language in the provision indicates the drafter's intent to not place a time cap on the conferral right during the criminal justice process.⁸⁵

Further, should the language of the conferral right provision be deemed ambiguous, and therefore not subject to a traditional, plain meaning analysis, Judge Hull concluded a pre-charge conferral right aligns most appropriately with the CVRA's intended purpose—promoting victims' participation in the criminal justice system.⁸⁶ If the conferral right does not apply to pre-charge proceedings, such as the plea and NPA negotiation process, and charges are never filed, as in the Epstein case, victims are completely deprived of any CVRA rights.⁸⁷ This result is entirely out of line with the purpose of the CVRA because it deprives victims of their legal right to participate in discussions with prosecutors.⁸⁸

Senator Jon Kyl announced the CVRA's purpose in his statements on the Senate floor at the time of the CVRA's passage. Senator Kyl stated he intended for a victim's CVRA conferral right to encompass “any critical stage or disposition of the case.”⁸⁹ Although this language is not expressly captured within the text of the CVRA, the primary drafter's stated intention at the time of the CVRA's passage certainly provides context for interpreting the CVRA's enumerated words.⁹⁰ Judge Hull interpreted the investigative process, as well as negotiations for plea deals and NPAs, to be critical stages of the case because both could be dispositive.⁹¹ Senator Kyl's statement clarifies that the conferral right was not intended to attach only with the filing of criminal charges. Rather, a victim's right to confer applies during any critical stage of the criminal justice process in a particular case.⁹²

In re Wild's dissenting opinion draws considerable support from the Fifth Circuit Court of Appeals' opinion in *In re Dean* regarding a victim's right to confer “pre-indictment.”⁹³ The *In re Dean* majority acknowledged that a crime victim has a conferral right even if there is no ongoing

84. *Id.* at 1235–36.

85. *Id.*

86. *Id.* at 1227.

87. *Id.* at 1224.

88. *Id.*

89. 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

90. Statements made by legislative sponsors should be afforded “substantial weight” in statutory interpretation. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951).

91. *In re Wild*, 955 F.3d at 1237–39 (Hull, J., dissenting).

92. 150 CONG. REC. S10911.

93. *In re Wild*, 955 F.3d 1196 at 1243 (Hull, J., dissenting).

prosecution in connection with the applicable crime.⁹⁴ The majority reasoned that “victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached.”⁹⁵ In dicta, the Fifth Circuit majority opined that by executing a plea agreement without informing a crime victim or learning the victim’s views on the agreement’s details, government attorneys would effectively violate a victim’s right to confer.⁹⁶ Because the victims in *In re Dean* were not found to be “crime victims” under the CVRA, the district court dismissed the victims’ claim without ruling on the issue of when the conferral right attached.⁹⁷ Much like the pre-filing plea agreement at issue in *In re Dean*, in *In re Wild*, federal prosecutors prepared an extensive indictment and executed an NPA for the potential sex crime charges with Epstein’s lawyers without ever conferring with the known victims.⁹⁸ Therefore, under the Fifth Circuit majority’s reasoning, the federal prosecutors on the case in *In re Wild* would have had a legal obligation to confer with the victims, including Ms. Wild, even before prosecutorial decisions commenced. Because federal prosecutors did not confer with Epstein’s victims until after the NPA was executed, they violated Ms. Wild’s reasonable right to confer under the CVRA.⁹⁹

In addition, although the Second Circuit Court of Appeals has not addressed this threshold issue, a prosecutor in that circuit explained that “keeping victims in the loop about a case, pre-charge, was standard procedure,” which highlights that at least one other circuit follows the Fifth Circuit’s pre-charge interpretation.¹⁰⁰ The CVRA applies to federal employees involved in the detection, investigation, and prosecution of crime.¹⁰¹ The DOJ’s *Justice Manual*, which outlines the protocol for federal entities engaged in the detection, investigation, and prosecution of crime, contains a provision on the scope of the conferral right.¹⁰² The manual directs federal prosecutors to “consider victims’ views about[] any proposed or contemplated plea negotiations.”¹⁰³ Due to client confidentiality

94. *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008).

95. *Id.* at 395.

96. *Id.* at 394; *In re Wild*, 955 F.3d at 1243 (Hull, J., dissenting).

97. *See In re Dean*, 527 F.3d at 393.

98. *In re Wild*, 955 F.3d at 1243 (Hull, J., dissenting).

99. *Id.* at 1225.

100. Vogt, *supra* note 76.

101. 18 U.S.C. § 3771(c)(1) (2018).

102. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 6, 96 Stat. 1256 (to be codified at 18 U.S.C. § 1512); U.S. Dep’t of Just., Just. Manual § 9-16.030 (2019).

103. U.S. Dep’t of Just., Just. Manual § 9-16.030.

concerns and the practicalities of the prosecutorial process, a victim's avenue to prosecution information is generally limited to communicating with the prosecutors assigned to the case. The standards governing federal prosecutors, as outlined in the *Justice Manual*, direct them to confer with victims before resolving plea negotiations, which aligns with a pre-charge interpretation of the CVRA's reasonable right to confer.¹⁰⁴

3. *Pre-charge Interpretation by Legal Scholarship*

Finally, legal scholarship suggests that the conferral right can attach pre-charge, and as early as the criminal investigation process.¹⁰⁵ Criminal law professor Paul Cassell's 2014 article asserted all CVRA rights, including the right to confer, attach when (1) an employee of any "department or agency of the United States engaged in the detection, investigation, or prosecution of crime has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense" and (2) the employee determines the identifiable "person is a putative victim of that offense."¹⁰⁶

Cassell analyzed victim identification through the framework of the government's traditional process of identifying defendants to a particular case.¹⁰⁷ His article advocated that government attorneys should notify putative victims to a potential crime in the same way that putative defendants are notified of their suspect status within a federal case.¹⁰⁸ Remarkably, nothing in the process of notifying a suspected defendant warrants the filing of criminal charges.¹⁰⁹ Cassell argued victim rights should attach in the same manner—upon substantial evidence that the putative victim has experienced harm through the commission of a federal offense.¹¹⁰ Cassell's interpretation carries particular weight in an *In re Wild* analysis because his article includes a discussion of *Does v. United States*, a federal district court case involving Epstein victims.¹¹¹ Three months before Epstein executed his NPA, Jane Doe Number One, an anonymous victim of Epstein's sexual abuse, received a letter from the United States Attorney's Office.¹¹² The letter contained information that Ms. Doe was in

104. *Id.*

105. Cassell et al., *supra* note 8, at 92.

106. *Id.*

107. *Id.* at 93.

108. *Id.*

109. *Id.*

110. *Id.* at 92.

111. *Does v. United States*, 817 F. Supp. 2d 1337, 1338 (S.D. Fla. 2011).

112. Cassell et al., *supra* note 8, at 97.

possession of a “number of rights,” including the right to confer with the attorney on the case.¹¹³ Therefore, it was obvious to even the government attorneys that the CVRA conferral right applied to Ms. Doe before the NPA was executed and charges were filed.¹¹⁴ Professor Cassell pointed out that only later, during litigation concerning Ms. Doe’s CVRA rights in the Epstein case, did the government attorneys begin to advocate for the position that the CVRA did not apply to Ms. Doe because criminal charges were never filed.¹¹⁵ As Professor Cassell noted, the United States Attorney’s Office’s decision to argue that the CVRA did not apply to Ms. Doe reveals an internal inconsistency in how the CVRA is interpreted within government agencies: the FBI assumed Ms. Doe’s right to confer applied during the period in which the NPA was pending, but the United States attorneys argued otherwise during litigation.

B. What does a victim have the right to confer about?

While the discussion in *In re Wild* centers on *when* the right to confer attaches, a universal understanding of what a victim has the right to confer *about* may clarify the timing of when the right attaches. For example, if NPAs were universally deemed an adequate object of conferral, the conferral right would be interpreted to apply pre-charge in every jurisdiction, as by definition, NPAs occur before a prosecutor files criminal charges.¹¹⁶

Primarily, by its plain language, the CVRA affords victims the right to confer with the attorney on the case.¹¹⁷ This language narrows the scope of the conferral right to involve matters between the victim and assigned prosecutor.¹¹⁸ Because the conferral right exists between a victim and the attorney handling the victim’s case, the conferral right logically affords these parties the right to discuss the criminal allegations.¹¹⁹ Because the victim and attorney can discuss the allegations relevant to the case, whether criminal charges are pending or filed should not affect a victim’s right to confer.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Non-Prosecution Agreement*, *supra* note 32.

117. 18 U.S.C. § 3771(a)(5) (2018).

118. § 3771(a)(5).

119. § 3771(a)(5); *see also* Oral Argument at 8:30, 9:10–9:17, *In re Wild*, 955 F.3d 1196 (11th Cir. Dec. 3, 2020) (No. 19-13843), [https://www.ca11.uscourts.gov/oral-argument-recordings?title=19-13843&field_or_case_name_value=&field_or_argument_date_value%5Bvalue%5D%5Byear%5D=&field_or_argument_date_value%5Bvalue%5D%5Bmonth%5D=\[https://perma.cc/TVB5-LMTE\]](https://www.ca11.uscourts.gov/oral-argument-recordings?title=19-13843&field_or_case_name_value=&field_or_argument_date_value%5Bvalue%5D%5Byear%5D=&field_or_argument_date_value%5Bvalue%5D%5Bmonth%5D=[https://perma.cc/TVB5-LMTE]).

The definition of “prosecution” is another key consideration in determining the scope of the conferral right. Specifically, if “prosecution” includes drafting an indictment and negotiating plea deals and NPAs, as Judge Hull advocated, then the conferral right should attach once those activities have commenced.¹²⁰ The Fifth Circuit explicitly includes the “plea negotiation process” in its definition of prosecution, meaning the conferral right applies to the entirety of the pre-charge plea negotiation process.¹²¹ Alternatively, the panel majority defined “prosecution” as existing upon the filing of a formal charging document,¹²² which the OLC memorandum considers to be a complaint or indictment.¹²³ According to the panel majority’s interpretation, any procedure occurring pre-filing of a complaint or indictment is not considered a part of the prosecutorial process and is thus outside the scope of a crime victim’s right to confer.¹²⁴

Ultimately, a universal interpretation of what types of activities are considered part of the prosecutorial process could also clarify when a victim’s right to confer attaches. If pre-charge plea deals and NPA negotiations are considered a prosecutorial procedure, then a victim has a right to confer about these activities irrespective of a filed charging document.

III. IMPORTANCE OF RIGHT TO “REASONABLY CONFER”

Properly interpreting the scope of a victim’s conferral right under the CVRA requires an understanding of the significance of the right itself. The scope of a victim’s right to confer under the CVRA has received media attention, as Epstein’s wealth and social status gave him notoriety even before his death in 2019.¹²⁵ The alleged victims’ experiences with Epstein, including Ms. Wild’s, proved so dramatic that Netflix produced a documentary on the subject.¹²⁶ The documentary utilizes Epstein’s victims’ stories to illustrate some of the policy implications relevant to when a victim’s right to confer attaches.¹²⁷ For example, the panel majority’s ruling

120. *In re Wild*, 955 F.3d 1196, 1240 (11th Cir. 2020), *vacated*, 967 F.3d 1285 (2020) (Hull, J., dissenting).

121. *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008).

122. *In re Wild*, 955 F.3d at 1212 (majority opinion).

123. Availability of Rights, *supra* note 50, at 244.

124. *In re Wild*, 955 F.3d at 1212.

125. *Jeffrey Epstein: Financier Found Dead in New York Prison Cell*, BBC NEWS (Aug. 10, 2019), <https://www.bbc.com/news/world-us-canada-49306032> [<https://perma.cc/T8DR-U5BV>].

126. Radical Media, *supra* note 1.

127. *Id.*

in *In re Wild* swings justice in favor of wealthy or well-resourced perpetrators who can afford to compensate a team of attorneys to negotiate an NPA or other plea agreement deal on behalf of their clients before criminal charges are filed.¹²⁸ Contrary to the purpose of the CVRA, this practice effectively leaves victims completely out of the criminal justice process because if the attorney does not file criminal charges, a victim has no right to confer with the attorney.¹²⁹ Second, Ms. Wild's feelings of abuse at the hands of the criminal justice system¹³⁰ highlight a lack of emotional safety for crime victims, and if victims do not feel safe, they will be unable to meaningfully participate in the criminal justice process.¹³¹

A victim's right to confer is the only right afforded under the CVRA that is potentially enforceable before the filing of criminal charges, so the conferral right is a victim's only avenue to exercising the entire set of rights afforded in the CVRA in a particular case.¹³² Practically speaking, if a case boasts both an identifiable victim and attorney, some harm or threat of harm has warranted the commencement of a criminal investigation. If a prosecutor drafts an indictment and proceeds to negotiate with the accused's defense attorneys without involving the victim, such as in *In re Wild*, the victim has no legal rights within the prosecutorial process, even though the victim is proximately harmed by the crime. Denying a victim the right to confer with the government attorney during the plea deal negotiations or NPA process effectively strips the victim of his or her participation in the criminal justice system.

The criminal justice system exists, at least partly, to effectuate a sense of justice on behalf of a victim, as the victim has been proximately harmed by the commission of the crime. Thus, victim participation is critical to the functioning of the criminal justice system.¹³³ Victims can also be the most effective witnesses in a criminal prosecution, as they can testify to the events and consequences that actually occurred during the commission of the offense.¹³⁴ However, if victims are denied CVRA rights, and effectively alienated from the criminal justice process, a sense of unfairness and

128. *In re Wild*, 955 F.3d at 1240 (Hull, J., dissenting).

129. *Id.* at 1224.

130. *Id.*

131. Turner, *supra* note 10, at 18.

132. See *In re Wild*, 955 F.3d at 1224–25 (Hull, J., dissenting).

133. OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 7 (2005), https://www.justice.gov/archive/olp/ag_guidelines.pdf [<https://perma.cc/KP7N-RKFL>].

134. Vogt, *supra* note 76.

disrespect for the system is likely to result.¹³⁵ This disrespect can translate into a tendency to disregard law enforcement and prosecutorial authority, particularly in high-crime communities.¹³⁶

Further, when the criminal justice system is viewed as unfair, victims will likely be dissuaded from participating in it; a crime victim treated unfairly is less likely to report an incident or threat of harm in the future, under the belief that the victim's experience will not matter to the prosecutorial process.¹³⁷ Decreased victim reporting could have disastrous societal consequences, as it increases the risk that the criminal will continue, unencumbered by law enforcement, to harm the purported victim and other people in the community, ultimately resulting in a lack of crime control.¹³⁸ A victim's diminished sense of trust in the criminal justice system is also likely to have ripple effects in the broader community, particularly in cases that involve a subject or topic of media interest.¹³⁹ When victims cannot participate in the criminal justice system, they are treated as objects, rather than subjects, and thus become vulnerable to "infinite manipulation" by the system itself.¹⁴⁰

Finally, the conferral right is important with respect to including community representation in the criminal justice process. Community representation is important because community members are usually proximately affected by criminal harm.¹⁴¹ Prosecutorial power includes the authority to determine "the fate of defendants," as the prosecutor wields charging power, and over ninety percent of criminal cases are resolved before a trial.¹⁴² Because the majority of criminal matters conclude without a trial by a jury of peers, prosecutors' impressions of criminal cases largely shape the criminal justice system.¹⁴³ Without jury trials insulating the criminal justice process with community perspectives, government attorneys often make prosecutorial decisions in a vacuum of their own experience. A victim exercising his or her conferral right under the CVRA allows the attorney to engage with a layperson's firsthand perspective and

135. Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 327 (2007).

136. *Id.*

137. *Id.* at 328.

138. *Id.* at 329.

139. *Id.* at 328.

140. *Id.* at 331.

141. Andrea Cipriano, *'Old Boys Club' of White, Male Prosecutors Facing Change: Study*, CRIME REP. (Oct. 24, 2019), <https://thecrimereport.org/2019/10/24/white-men-dominate-u-s-prosecutor-positions-says-study/> [<https://perma.cc/ABM8-F7BJ>].

142. *Id.*

143. *Id.*

ensures a member of the community is represented in the criminal justice process.

IV. SOLUTION

In order to effectuate the purpose of the CVRA and afford victims involvement in the criminal justice system,¹⁴⁴ courts should universally adopt a broad construction of when the conferral right attaches. Congress should amend the CVRA to include language explicitly stating that negotiations for any resolution of the case are included in the scope of a victim's right to confer.

A. A Victim's Right to Confer Should be Broadly Construed

First, courts, including the upcoming en banc panel for *In re Wild*, should broadly construe a victim's reasonable right to confer to apply pre-charge; statutory interpretation, legislative purpose, and public policy arguments all support this interpretation. Statutory interpretation begins with ascertaining the plain meaning of the statutory text.¹⁴⁵ The judiciary should assume both the legislature's inclusion and omission of particular language in each statutory provision is an intentional choice.¹⁴⁶ Here, the conferral right's text includes no reference to the timing of when the conferral right attaches; thus, the courts should not insert one.¹⁴⁷ Courts should instead treat the legislature's omission of a temporal limitation within the text of the act as intentional, and capitalize on the textual limitation that is included—"reasonable."¹⁴⁸ Outside of the conferral right provision, the CVRA references certain rights that are only applicable in a

144. *In re Wild*, 955 F.3d 1196, 1227 (11th Cir. 2020), *vacated*, 967 F.3d 1285 (2020) (Hull, J., dissenting).

145. *Id.* at 1234; *see* *Yates v. United States*, 574 U.S. 528, 537 (2015) (explaining that "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole").

146. *In re Wild*, 955 F.3d at 1236 (Hull, J., dissenting); *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018) (quoting *United States v. Fisher*, 289 F.3d 1329, 1337–38 (11th Cir. 2002)); *see* *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denoted a different idea.").

147. *In re Wild*, 955 F.3d at 1236 (Hull, J., dissenting).

148. *Id.* at 1235.

judicial hearing,¹⁴⁹ which supports the argument that the absence of language limiting a victim's right to confer to the context of a judicial proceeding was intentional.

Further, section 3771(c) of the CVRA applies to all federal agencies "engaged in the detection, investigation or prosecution of crime."¹⁵⁰ Even if plea and NPA negotiations are not included in the term "prosecution," the CVRA's text applies to any federal agency involved in the crime detection and investigation process.¹⁵¹ A crime that has not been detected cannot logically be an object of plea or NPA negotiations.¹⁵² Therefore, if the CVRA provisions explicitly apply to entities not engaged in prosecution, a victim's right to confer should logically exist irrespective of the filing of prosecutorial charges. When viewed in the context of the CVRA's language, the absence of a temporal limitation in the conferral right provision's text contemplates the legislature's pre-charge intention.¹⁵³

The CVRA was enacted to effectuate the purpose of increasing victim participation in the criminal justice system.¹⁵⁴ In a case resolved pre-charge, denying a victim his or her conferral right prevents his or her participation in the criminal justice system, which is contrary to this purpose. Therefore, when viewed through the CVRA's purpose to ensure victim involvement in the criminal justice process, the conferral right should be construed to apply pre-charge in order to ensure it exists independent of a prosecutor's decision to file criminal charges.

Similarly, the Attorney General Guidelines for Victim and Witness Assistance direct DOJ officials to use best efforts to identify victims as soon as possible after a crime occurs, as early as the commencement of a criminal investigation.¹⁵⁵ This instruction is intended to ensure that the federal government assists crime victims to the fullest extent possible.¹⁵⁶ A direction to identify victims as soon as possible does not support a conferral right only attaching after charges are filed. Rather, the DOJ has mandated the opposite—that victims be involved from the outset of the

149. *Id.*

150. 18 U.S.C. § 3771(c)(1) (2018).

151. *Id.*

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

153. *Id.* at 1235–37.

154. *Id.* at 1227 (Hull, J., dissenting) (citation omitted); see *Kenna v. U.S. District Court (Walters)*, 435 F.3d 1011, 1015 (9th Cir. 2006) (stating "floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members."); 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (Statement of Sen. Kyl).

155. OFF. FOR VICTIMS OF CRIME, *supra* note 133; see also Cassell et al., *supra* note 8, at 77.

156. OFF. FOR VICTIMS OF CRIME, *supra* note 133.

investigation.¹⁵⁷ These guidelines support victim participation as crucial to the criminal justice process, and attorneys should not deny victims this participation by violating their right to confer about the case.

Additionally, public policy objectives of both involving and protecting crime victims during the criminal justice process support a pre-charge interpretation of the conferral right. The Fifth Circuit states that the CVRA's passage demonstrates Congress's policy decision that "victims have a right to inform the plea negotiations process by conferring with prosecutors before a plea agreement is reached."¹⁵⁸ A post-charge interpretation of the conferral right makes the existence of victim rights contingent upon a federal prosecutor's decision to file a formal charging document. This could enable prosecutors to bypass the victim's lived experience, who was proximately harmed as a result of the commission of the offense.¹⁵⁹ The harm or threat of harm a victim experienced as a result of the commission of an offense exists independent of a prosecutor's decision to file criminal charges. Although a prosecutor can recommend punishment for the accused, the prosecutor cannot eliminate the harm a victim has suffered by filing a criminal charge. A post-charge conferral interpretation effectively strips a victim of his or her agency and participation in the criminal justice process.

Finally, in cases such as *In re Wild*, in which the accused can afford to compensate a team of high-profile defense attorneys to negotiate a NPA with federal prosecutors, a post-charge conferral interpretation steers justice in favor of wealthy or well-resourced criminals.¹⁶⁰ This result is particularly concerning in light of the egregious level of harm Ms. Wild experienced during years of sexual exploitation and abuse by Epstein.¹⁶¹ In a post-charge jurisdiction, absent filing criminal charges, the victim's conferral right does not exist; this result leaves the victim without agency in redressing the harm he or she suffered.¹⁶²

157. Cassell et al., *supra* note 8, at 77.

158. *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008).

159. *In re Wild*, 955 F.3d at 1240, 1246 (Hull, J., dissenting).

160. *Id.* at 1240.

161. *See id.* at 1198 (majority opinion) ("Despite our sympathy for Ms. Wild and others like her, who suffered unspeakable horror at Epstein's hands, only to be left in the dark—and, so it seems, affirmatively misled—by government lawyers, we find ourselves constrained to deny her petition.").

162. *Id.* at 1224.

B. Proposed Amendment Language to the CVRA Conferral Right Provision

If courts refuse to construe the CVRA to apply pre-charge, then Congress should amend the conferral right provision to specify the right's object. The CVRA's purpose would be better served by adding certain language from Ms. Wild's proposed amendment specifying a right to confer with the government attorney about any resolution of the case before the resolution is finalized.

During oral arguments for *In re Wild*, Ms. Wild's counsel unsuccessfully advocated for the conferral right to attach when "an investigation has 'matured' to the point where . . . prosecutors are 'negotiating with defense attorneys and signing agreements.'"¹⁶³ However, the term "mature" may not ensure a victim's right to confer is upheld during pre-charge negotiations because if prosecutors can exclude victims from a conversation about an NPA, as in *In re Wild*, it would allow prosecutors to conveniently neglect a victim's conferral right and couch their justification in an "unmatured" prosecution.

Further, in 2019, Ms. Wild proposed a self-titled amendment to the CVRA to deter future government attorneys from excluding victims as she was. Her proposal includes amending section five of the CVRA by replacing "Government in the case"¹⁶⁴ with "the Government, including the right to confer about any plea bargain or other resolution of the case before such plea bargain or resolution is presented to the court or otherwise finalized."¹⁶⁵ Therefore, the Courtney Wild Crime Victims' Rights Reform Act of 2019 contains two noteworthy items with respect to analyzing the scope of a victim's right to confer.

First, the proposed legislation replaces the "attorney for the Government in the case"¹⁶⁶ with "the Government[.]"¹⁶⁷ This affords victims a wide latitude of access to the government at large, rather than a single attorney, and includes federal officials engaged in the detection and

163. Oral Argument at 8:30, 9:10–17, *In re Wild*, 955 F.3d 1196, 1211 (11th Cir. Dec. 3, 2020) (No.19-13843), [https://www.ca11.uscourts.gov/oral-argument-recordings?title=19-13843&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=\[https://perma.cc/TVB5-LMTE\]](https://www.ca11.uscourts.gov/oral-argument-recordings?title=19-13843&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=[https://perma.cc/TVB5-LMTE]).

164. 18 U.S.C. § 3771(a)(5) (2018).

165. Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. § 2(1)(A) (2019).

166. 18 U.S.C. § 3771(a)(5).

167. H.R. 4729.

investigation, not just the direct prosecution, of crime.¹⁶⁸ As previously discussed, the CVRA contains a reference to its applicability to other executive departments engaged in the detection and investigation of crime, but this reference is not codified in the same provision of the CVRA as the conferral right.¹⁶⁹ The placement of the provision applying the CVRA to other governmental departments was a key point of contention between the panel majority and dissenting opinions in *In re Wild*.¹⁷⁰ However, including an identifier as broad as “the Government” may actually increase a victim’s difficulty in realizing his or her conferral right, as there is no readily identifiable point of contact in the provision’s text. Especially regarding a crime victim, who is presumably a recently harmed, vulnerable individual, trying to determine whom exactly the victim should confer with may be practically impossible. For example, a victim could not pick up the phone and dial “the Government’s” number like he or she could “the attorney for the Government in the case.”¹⁷¹

Second, the proposed amendment language in the Courtney Wild Crime Victims’ Rights Reform Act of 2019 also expands the scope of the conferral right within the text of the CVRA. In the amendment, the right to confer is retained with the language “including,” which implies the conferral right exists in the same capacity as the original language but is also expanded by words specifying a right to confer before any resolution of the case is finalized.¹⁷² By including the language “resolution of the case,” the proposed language ensures all possible avenues associated with pre-charge proceedings would be included in a victim’s right to confer. By allowing a victim the right to confer with the government before finalizing any resolution of the case, the proposed amended language ensures the victim will be informed prior to the decision-making process. Ultimately, the CVRA should retain the words “government attorney on the case,” but add language specifying a right to confer about any resolution of the case before the resolution is finalized, in order to ensure victims are properly afforded their CVRA rights.

C. Counterarguments to Broadly Construing a Victim’s Right to Confer

As unfortunate as a post-charge conferral right may be for victims, there are at least three counterarguments for broadly construing a victim’s

168. 18 U.S.C. § 3771(c)(1).

169. *Id.*

170. *In re Wild*, 955 F.3d 1196, 1210–11 (11th Cir. 2020), *vacated*, 967 F.3d 1285 (2020) (majority opinion); *In re Wild*, 955 F.3d at 1237 (Hull, J., dissenting).

171. 18 U.S.C. § 3771(a)(5).

172. H.R. 4729.

“reasonable right to confer” in the CVRA.¹⁷³ First, as the *In re Wild* panel majority opines, a broad construction of a victim’s conferral right may not fall within the plain meaning of the CVRA’s text.¹⁷⁴ This purportedly textualist approach follows the logic that the Crime Victims’ Rights Act should attach upon commission of a *crime*, which traditionally exists upon filing of a formal charging document.¹⁷⁵ The panel majority notes that if the conferral right was intended to apply pre-charge, Congress would not have used language that contemplates post-charge proceedings, such as “crime victim,” “accused,” and “case” in the statutory text.¹⁷⁶ Although the panel majority’s contentions are largely unfounded when viewed in light of the statute’s intended purpose, the lack of a pre-charge specification in the text of the conferral right provision will likely continue to pose statutory interpretation issues regarding when the right to confer attaches if the language is not clarified.¹⁷⁷

Second, the panel majority notes that a broad construction of a victim’s right to confer with an attorney before criminal charges are filed creates a potential burden to the prosecutorial process but cites no evidence to support this assertion.¹⁷⁸ At present, jurisdictions construing a “precharge conferral right” do not include a right for victims in raids, warrant applications, and other investigative procedures, and the panel majority failed to point to empirical evidence that construing a victim’s conferral right to apply precharge would not open such a floodgate.¹⁷⁹

Further, construing the conferral right to apply pre-charge does not change the substance of the right—the victim still has the right to confer with the attorney on the case—it only influences the timing of when the substantive right attaches. No substantive changes to the prosecutorial process occur when a conferral right is applied before charges are filed. Instead, the attorney simply notifies the victim before filing the charging document as opposed to after.

Opponents of a broad construction may argue a pre-charge conferral right could impact a defendant’s timely decision to accept a plea deal or NPA. In this scenario, it is important to consider the purpose of the CVRA, which is to afford rights to crime victims,¹⁸⁰ not to enhance a prosecutor’s

173. 18 U.S.C. § 3771(a)(5).

174. *In re Wild*, 955 F.3d at 1205–06 (majority opinion).

175. *Id.* at 1212.

176. *Id.* at 1205–08.

177. *Id.* at 1205 (noting that contrary to the panel majority’s holding, the CVRA “could be read to apply pre-charge”).

178. *Id.* at 1211, 1216.

179. *See id.* at 1244 (Hull, J., dissenting); *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008).

180. *In re Wild*, 955 F.3d at 1227 (Hull, J., dissenting).

ability to extract a speedy confession or signature in a plea deal with a criminal defendant. The CVRA is primarily victim-centered, as evidenced in its title, rather than prosecutor- or criminal-defendant-focused.

Third, both the panel majority and dissenting opinions in *In re Wild* generally skirt the potential constitutional issue relevant to a pre-charge conferral right.¹⁸¹ The Constitution grants the executive branch of government the exclusive power of prosecutorial discretion¹⁸² and is therefore relevant to discussing potential counterarguments to construing a pre-charge conferral right. In short, prosecutorial discretion is traditionally interpreted as the decision whether to prosecute.¹⁸³ However, the word “confer” does not equate to “decide.” Rather, conferral implies a discussion with, not a decision made by, the victim.¹⁸⁴ After conferring with the victim regarding the relevant prosecution, plea, or non-prosecution options, the government attorney retains absolute discretion as to whether or not to prosecute the accused, irrespective of the victim’s opinion on the matter.¹⁸⁵ The conferral right is simply an avenue for the victim to be informed on what is happening with his or her case before it is resolved.

Further, in the text of the CVRA, the legislature codified an express provision regarding an intention not to limit prosecutorial discretion by its passage.¹⁸⁶ Therefore, with respect to a pre-charge conferral right, the potential constitutional concern is simply not at issue, and again, it is important to consider the purpose of the CVRA, which is to codify victims’—not prosecutors’—rights.¹⁸⁷

CONCLUSION

Ultimately, to uphold the purpose of the CVRA and ensure a crime victim’s participation in the criminal justice process,¹⁸⁸ a victim’s right to confer should be construed to apply pre-charge. The CVRA should be amended with language specifying the scope of the conferral right to ensure a victim’s “reasonable right to confer”¹⁸⁹ is upheld in the absence of a filed formal charging document. Specifically, the CVRA’s text should include

181. *Id.* at 1216–17 (majority opinion); *id.* at 1246–47 (Hull, J., dissenting).

182. U.S. CONST. art. II, § 3.

183. *In re Wild*, 955 F.3d at 1247 (Hull, J., dissenting).

184. *See In re Dean*, 527 F.3d at 395.

185. *In re Wild*, 955 F.3d at 1247 (Hull, J., dissenting).

186. 18 U.S.C. § 3771(d)(6) (2018).

187. *In re Wild*, 955 F.3d at 1227 (Hull, J., dissenting).

188. *Id.* at 1227 (quoting *Kenna v. U.S. District Court (Walter)*, 435 F.3d 1011, 1016 (9th Cir. 2006)).

189. 18 U.S.C. § 3771(a)(5).

the right to confer “about any resolution of the case before such resolution is presented to the court or otherwise finalized” in order to ensure the pre-charge application of the conferral right is codified within the text of the statute.

Several concerns exist with respect to the timing and scope of a victim’s right to confer under the CVRA. At the upcoming en banc hearing, all twelve judges on the Eleventh Circuit will rule on a crime victim’s right to confer pre-charge. In this hearing, the Eleventh Circuit should ensure victims are included in the criminal justice process by upholding their right to confer with a government attorney irrespective of the filing of criminal charges. Additionally, Ms. Wild’s proposed amendment language is in the first of a lengthy, six-stage passage process, and a successful bill can take years to pass. The low likelihood of the amendment’s imminent passage increases the weight on the upcoming en banc decision.

Until the conferral right’s text is properly amended, or the issue is before the United States Supreme Court, courts will likely continue to construe the timing of the conferral right differently. Unfortunately, in jurisdictions that do not construe the conferral right to attach pre-charge, victims will continue to be excluded from the criminal justice process in cases where criminal charges are never filed. This is likely to lead victims to continue to feel abused by the criminal justice system, much like Ms. Wild’s experience.¹⁹⁰ This reality is particularly problematic in cases where the accused evades criminal charges using his or her wealth and connections. Denying a victim’s right to confer in these situations swings justice in favor of wealthy or well-resourced criminals and away from the victims who have been harmed.

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190. Radical Media, *supra* note 1.

*J.D. Candidate 2022, Campbell University School of Law. The Author would like to thank Professor Bolitho for his instrumental role in the editing process and the members of the *Campbell Law Review* for their work, encouragement, and support.