

II. PETITIONERS' FAILURE TO PROSECUTE THEIR CASE PROMPTLY HAS MADE THE CASE MOOT.

As explained above, at the initial hearing on the Emergency Petition, Petitioners stated that their desired result was the setting aside of the NPA and the prosecution of Epstein. At the second hearing on the matter, counsel stated that they no longer wanted that remedy and stated that they would inform the Court of their desired remedy upon reviewing the full NPA. However, after reviewing the NPA, no such notification was provided, other than filing a motion to unseal the NPA. And, although the most recent motion (DE48) contains no demand for a remedy, the clear suggestion is that Petitioners are seeking to set aside the NPA. [**CITE PRESS COVERAGE RE "STINKS TO HIGH HEAVEN."**]

Epstein entered his guilty plea to state charges on June 30, 2008. At the time that Petitioners filed the Emergency Petition on July 7, 2008, Epstein had been imprisoned for seven (7) days. At the time of the first hearing on the matter on July 11th, when the Petitioners made clear that they wanted to invalidate the NPA, Epstein had been imprisoned for eleven (11) days. At that hearing, the Petitioners stated that they were seeking that remedy, even though Epstein had entered his state court guilty plea in reliance on the NPA. (DE15 at 20-21.) The Court asked Petitioners about whether the Court needed to rule on the Emergency Petition quickly, and the Petitioners said that the Court did not need to do so. (*Id.* at 26.)

Briefing on the "Emergency Petition" was completed by August 1st, and the second hearing on the Petition was completed on August 14th, wherein the Petitioners admitted that the Court had a sufficient record and did not need to take any additional evidence in the matter. (DE19; DE27 at 4-5.) By this point, Epstein had served 49 days of his 18-month term of imprisonment.

Thereafter, other than Petitioners' motion to unseal the NPA, there was no further action on the matter until the Court's Order to administratively close the case.

Epstein was released from prison in July 2009 and his term of probation ended in July 2010. [**ADD DECLARATION AND CITES.**]

The CVRA's drafters understood that victims' rights of access needed to be balanced against defendants' rights to Due Process. Unlike the victims' rights, which are only statutory constructs, defendants' rights are guaranteed in the Constitution. Accordingly, the CVRA contains strict time constraints. First, a "district court shall take up and decide any motion asserting a victim's right forthwith." 18 U.S.C. § 3771(d)(3). ^{E1} Second, if the district court denies the victim's motion, the victim may petition the court of appeal for a writ of mandamus of the "court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." *Id.* Third, in "no event shall proceedings be stayed or subject to a continuance of more than five

days for purposes of enforcing this chapter.” *Id.* Fourth, the CVRA specifies that “[i]n no case shall failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if . . . (B) the victim petitions the court of appeals for a writ of mandamus within 14 days . . .” 18 U.S.C. § 3771(d)(5).

The First Circuit addressed how the conflict between the rights of victims and defendants is exacerbated by the passage of time in *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010). In *Aguirre-Gonzalez*, a group of victims appealed an order of restitution, asserting that they were improperly excluded from the restitution award. However, rather than seeking a writ of mandamus under the expedited procedure in the CVRA, the victims filed a “regular” appeal. The Court of Appeals began by deciding that “crime victims are not parties to a criminal sentencing proceeding [and] the baseline rule is that crime victims, as non-parties, may not [directly] appeal a defendant’s criminal sentence;” *id.* at 53 (extensive citations omitted); thus, crime victims are limited to proceeding via mandamus. *Id.* at 54-55.

Next, the First Circuit considered whether it could convert the crime victims’ direct appeal into a petition for writ of mandamus. Although the parties agreed that the court had the authority to do so, the First Circuit declined because of its effect on the Due Process rights of the defendant:

The CVRA plainly envisions that crime victims’ petitions challenging a denial of their rights will be taken up and decided in short order. It requires expeditious consideration by the district court, quick appellate review, and provides that a victim may not move to disturb a defendant’s plea or sentence unless, among other things, “the victim petitions the court of appeals for a writ of mandamus within 14 days” of the denial of the victim’s motion in the district court. 18 U.S.C. §§ 3771(d)(3), 3771(d)(5). We are mindful that the federal restitution statutes are intended to protect victims, not defendants. *See, e.g., United States v. Rostoff*, 164 F.3d 63, 66 (1st Cir. 1999) (applying VWPA). However, the criminal justice system also has a strong interest in the finality of criminal sentences. *Olsen v. Correio*, 189 F.3d 52, 69 (1st Cir. 1999) (noting society’s “interest in the integrity of the system of compromise resolution of criminal charges”); *see Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (“The guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system . . . The advantages can be secured, however, only if disposition by guilty plea are accorded a great measure of finality.”); *see also Teague v. Lane*, 489 U.S. 288, 309 (1989) (“The principle of finality . . . is essential to the operation of our criminal justice system.”) These finality concerns animate the CVRA’s procedural mechanisms.

The CVRA was in force when appellants elected to pursue a direct appeal rather than petition for the writ as provided by statute and more than two years have passed since the district court sentenced Aguirre. Under these circumstances, we conclude that appellants would not be entitled to mandamus relief . . .

Id. at 55-56 (brackets in original removed).

In this case, the CVRA was in force when Petitioners elected to tell the Court that there was no longer any “Emergency.” It was in effect during the second hearing when Petitioners announced that they were no longer seeking to have the NPA set aside, but, instead, would review the NPA and then advise the Court of the

remedy they were seeking. It was in effect throughout the years thereafter when there was no activity on the case. Petitioners' counsel is well acquainted with the CVRA and Rule 60, as he is credited with being the source of the initial draft of Rule 60. *See* 153 Cong. Rec. S8742, S8746 (June 29, 2007) ("Federal district court judge Paul Cassell initiated the process [of incorporating the CVRA into the Federal Rules] by recommending rule changes to the Advisory Committee on Criminal Rules.") And Petitioners were also well aware that Epstein was serving his prison sentence for his state court guilty plea, as administered by the Palm Beach County Sheriff's Office, in accordance with the terms of the NPA.

Against this backdrop, the Petitioners elected to focus on exercising their right to collect damages from Epstein, and filed civil suits against him. Through those civil suits, they had the opportunity to have a public trial where they could have held him publicly accountable for the harms they alleged he caused them. Instead, they chose to enter into confidential settlement agreements with him. Only after those confidential settlement agreements were signed, and after Epstein completed his term of imprisonment and his term of community control, did the Court file its administrative order closing the case, which prompted Petitioners to file their notice that they intended to continue litigating this claim.

Petitioners bear the burden of proof as to all stages of their claim, that is, (1) that there is a justiciable case or controversy; (2) that there was any violation of the CVRA in this case where no federal charges were ever filed; (3) that their case is not moot – i.e., that there is still a remedy available for the harm that was alleged to have occurred and that Petitioners are entitled to that remedy. The remedy that is sought is an equitable one, because the CVRA clearly states that no claim for damages is allowed, *see* 18 U.S.C. § 3771(d)(6), and that remedy will impact a non-party to this suit – Epstein. In deciding whether the Petitioners have shown that they are entitled to the remedy that they at one time disavowed – setting aside the NPA – the Court should consider a comment from Washington Supreme Court Justice James M. Dolliver: "[E]mphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel . . . represents a dangerous return to the private blood feud mentality." Dolliver, James, "Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come," 34 *Wayne L. Rev.* 87, 90 (1987) (quoted in Levine, Danielle, "Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution," 104 *Nw. U. L. Rev.* 335, 353 (2010)).

Everyone who has encountered the Epstein case has an opinion regarding the NPA, the state court plea, the sentence imposed, and the way the sentence was served. If the settlement agreements were made public, people would doubtless have differences of opinion on those, as well. Nonetheless, the facts remain that Epstein

entered his state court guilty plea in reliance on the NPA and he served his sentence. The Petitioners knew these facts and could have sought expedited review of their claim. They elected not to do so. As in *Aguirre*, the Petitioners' election not to seek expedited resolution should not be used to violate a criminal defendant's Due Process rights.

^{F1}The Federal Rules Committee interpreted this as: "The court must promptly decide any motion asserting a victim's rights described in these rules." Fed. R. Crim. P. 60(b)(1).