No. 13-12923

In the

United States Court of Appeals

for the

District of Eleventh Circuit

Jane Doe No. 1 and Jane Doe No. 2,

Plaintiffs-Appellees,

v.

United States of America,

Defendant,

Roy Black et al.,

Intervenors/Appellants.

JANE DOE NO. 1 AND JANE DOE NO.2'S APPELLEE BRIEF

Appeal from the
United States District Court for the
Southern District of Florida

Bradley J. Edwards
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS & LEHRMAN, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
Telephone (954) 524-2820
Facsimile (954) 524-2822
E-mail: brad@pathtojustice.com

Paul G. Cassell
S.J. QUINNEY COLLEGE OF LAW
AT THE UNIV. OF UTAH
332 South, 1400 East, Room 101
Salt Lake City, Utah 84112-0300
Telephone (801) 585-5202
Facsimile (801) 581-6897
E-mail: cassellp@law.utah.edu

Counsel for Plaintiffs/Appellees Jane Doe No. 1 and Jane Doe No. 2

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, Jane Doe No. 1 and Jane Doe No. 2, through undersigned counsel, hereby certifies that the following persons have an interest in the outcome of this case:

1. Marra, The Honorable Kenneth
2. Acosta, R. Alexander
3. Black, Roy
4. Cassell, Paul G.
5. Edwards, Bradley J.
6. Epstein, Jeffrey
7. Ferrer, Wifredo A.
8. Howell, Jay
9. Lee, Dexter
10. Lefkowitz, Jay
11. Perczek, Jackie
12. Reinhart, Bruce
13. Sánchez, Eduardo I.
14. Sloman, Jeffrey
15. Villafaña, A. Marie
16. Weinberg, Martin

17. Doe No. 1, Jane

18. Doe No. 2, Jane

Note: As they have in the court below, as well as in parallel civil court proceedings, Jane Doe #1 and Jane Doe #2 proceed by way of pseudonym as victims of child sexual assault.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Jane Doe No. 1 and Jane Doe No. 2 request oral argument in this case to clarify the factual record.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellees Jane Doe No. 1 and Jane Doe No. 2 (hereinafter "the victims") have a pending motion to dismiss for lack of subject matter jurisdiction. For the reasons articulated in that motion, the Court lacks jurisdiction over this appeal.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

In the district court, the victims have alleged the following facts, which the district court properly assumed to be true in ruling on the pre-trial discovery motion of appellants Roy Black, Martin Weinberg, and Jeffrey Epstein (hereinafter collectively referred to as "Epstein") to prevent disclosure of certain correspondence.[1]

The Epstein Investigation and the Non-Prosecution Agreement

In 2006, the Federal Bureau of Investigation opened an investigation into allegations that Epstein had been sexually abusing underage girls over the proceeding five years. The United States Attorney's Office for the Southern District of Florida accepted the case for prosecution, and in June, 2007 and August, 2007, the FBI issued victim notification letters to the appellees, Jane Doe No. 1 and Jane Doe No.2.

Extensive plea discussions then ensued between the U.S. Attorney's Office

[1] All of the following facts are taken from the District Court's recent decision, denying the Government's Motion to Dismiss, District Court Docket Entry (DE) 189, the Victims' Motion for Summary Judgment (DE 48), an affidavit supporting discovery (DE 225-1), and related orders.

and Epstein, a politically-connected billionaire represented by a battery of high-powered attorneys. On September 24, 2007, the U.S. Attorney's Office entered into a non-prosecution agreement ("NPA") with Epstein, in which it agreed not to file any federal charges against Epstein in exchange for Epstein pleading guilty to two minor state offenses.[2] The Office entered into the NPA without first conferring with victims, and without alerting them to the existence of the agreement, either before or promptly after the fact – facts that the Government apparently concedes.

The U.S. Attorney's Office then kept the victims in the dark about the agreement for roughly nine months, making no mention of the NPA in intervening correspondence and verbal communications between the victims, the FBI, and the local United States Attorney's Office. *See* DE 48 at 7-20. The post-agreement deception includes January 10, 2008, letters from the U.S. Attorney's Office to both Jane Doe No. 1 and Jane Doe No. 2 advising that the case "is currently under investigation" and that "it can be a lengthy process and we request your continued patience while we conduct a thorough investigation." *Id.* at 16. This letter (other letters like it up through at least May 2008) did not inform the victims that Epstein had months earlier already entered into a non-prosecution agreement regarding the crimes committed against them, a fact that Epstein

[2] The charges were solicitation of prostitution and procurement of minors to engage in prostitution, in violation of Fla. Stat. §§796.07 and 796.03.

concedes. *See* Appellant's (Appt's) Br. at 2 ("In September, 2007, . . . Jeffrey Epstein entered into a non-prosecution agreement with the Government."). In addition, the U.S. Attorney's Office sent a letter to the victims' counsel in June, 2008, asking them to submit a letter expressing on why federal charges should be filed against Epstein – without disclosing that the U.S. Attorney's Office had already entered into the NPA blocking the filing of such charges.

This post-agreement deception was done specifically at the behest of Epstein. The victims have specifically alleged that the U.S. Attorney's Office – pushed by Epstein – wanted the non-prosecution agreement kept from public view because of the intense public criticism that would have resulted from allowing a politically-connected billionaire who had sexually abused more than 30 minor girls to escape from federal prosecution with only a county court jail sentence. DE 48 at 11. The victims have also alleged that the Office wanted the agreement concealed at this time because of the possibility that the victims could have objected to the agreement in court and perhaps convinced the judge reviewing the agreement not to accept it. *Id.* It is undisputed that extensive negotiations took place between Epstein and prosecutors regarding crime victim notifications – negotiations that lead to the Government not providing notifications to Jane Doe No. 1 and Jane Doe No. 2. *Id.* at 13-14; *see also* DE 225-1 at 50. The Government has further admitted that its negotiations with

defense counsel regarding victim notifications was not standard practice. DE 225-1 at 50.

Ultimately, on June 27, 2008, the Assistant United States Attorney assigned to the Epstein case contacted victims' counsel to advise that Epstein was scheduled to plead guilty to certain state court charges on June 30, 2008, again without mentioning that the anticipated plea in the state court was the result of the pre-existing agreement with the federal authorities. DE 48 at 19-20.

On June 30, 2008, Epstein pled guilty to the state law charges. Jane Doe No. 1 and Jane Doe No. 2 did not attend that proceeding because they did not know about the existence of the NPA; nor did they know that this guilty plea would block the filing of federal charges for Epstein's crimes against them. *Id.* at 19.

On July 3, 2008, victims' counsel sent a letter to the U.S. Attorney's Office advising that Jane Doe No. 1 wished to see federal charges brought against Epstein. Of course, when counsel drafted that letter, he did not know that Epstein had entered into a non-prosecution agreement barring such charges ten months earlier. *Id.* at 20.

Procedural History Surrounding the Victims' CVRA Petition

The victims' counsel began to hear rumors that Epstein was working out some sort of an arrangement with the U.S. Attorney's Office, an arrangement that

was not be disclosed to the victims. Accordingly, on July 7, 2008, Jane Doe No. 1 filed an "emergency" petition under the Crime Victims' Rights Act, 18 U.S.C. § 3771, contending that Epstein was currently involved in plea negotiations with the U.S. Attorney's Office which "may likely result in a disposition of the charges in the next several days." CVRA Petition, DE 1at 3. Arguing that they had been wrongfully excluded from those discussions, Jane Doe No. 1 asserted a violation of her CVRA rights to confer with federal prosecutors; to be treated with fairness; to receive timely notice of relevant court proceedings and to receive information about her right to restitution. *Id.* (*citing* 18 U.S.C. § 3771(a)).

On July 9, 2008, the government filed its response, disclaiming application of the CVRA to pre-indictment negotiations with prospective defendants. Alternatively, the government contended it did use its "best efforts" to comply with the CVRA's requirements in its dealings with Jane Doe No. 1. DE 13.

On July 11, 2008, the District Court held a hearing on the initial petition. DE 15. During the course of that hearing, the Court allowed Jane Doe No. 2 to be added as an additional victim. The Government acknowledged that both Jane Doe No. 1 and Jane Doe No. 2 met the CVRA's definition of "crime victims."

During that hearing, for the first time victims' counsel began to learn that

the Government and Epstein had concluded a NPA months earlier. *See* DE 15 at 24. The District Court then inquired, in view of the fact that the agreement was at least nine months old, whether the proceedings could still be regarded as an emergency. Having just learned that the NPA was executed months earlier, victim's counsel agreed that he could see no reason why the matter needed to be handled on an emergency basis. DE 15 at 25.

The District Court indicated that the case would require some factual development, and the Government and victims' counsel agreed to reach a stipulated set of facts. Later, on August 21, 2008, the District Court provided a copy of the NPA to the victims. DE 26.

Over the following months, the victims attempted (unsuccessfully) to negotiate an agreed statement of facts with the Government about how the NPA was negotiated without providing them an opportunity to confer regarding it. They also pursued collateral civil claims against Epstein, during which they also learned facts relevant to their CVRA suit. For example, Epstein produced to the victims' counsel significant parts of the correspondence concerning the NPA. The victims ultimately successfully settled their civil cases with Epstein.

The victims, however, were unsuccessful in reaching any agreement with the Government regarding the CVRA case. Because the Government refused to reach any stipulated set of facts, on March 21, 2011, the victims filed a Motion for

Finding of Violations of the CVRA and a supporting statement of facts. DE 48. They also filed a motion to use the correspondence that they had previously received from Epstein in the civil case in their CVRA case. DE 51.

Procedural History Regarding Releasing the Correspondence

On April 7, 2011, two of Epstein's numerous criminal defense attorneys – appellants Roy Black and Martin Weinberg – filed a motion for limited intervention in the case, arguing that their right to confidentiality in the correspondence would be violated if the victims' were allowed to use the correspondence. DE 56. Jeffrey Epstein also later filed his own motion to intervene to object to release of the correspondence. DE 93. Later, Epstein and his attorneys filed a motion for protective order, asking the Court to bar release of the correspondence. DE 160. At no point, however, did Epstein or his attorneys provide any affidavits or other factual information establishing that the correspondence was confidential. Nor did they provide a privilege log or other description of the materials in question.

While these intervention motions were pending, on September 26, 2011, the District Court entered its order partially granting the victims' motion for a finding of violations of the CVRA, recognizing that the CVRA can apply before formal charges are filed against an accused. DE 99. The Court, however, denied the victims' motion to have their facts accepted, instead deferring ruling on the

merits of the victims' claims pending development of a full factual record. The Court also authorized the victims to conduct limited discovery. DE 99 at 11. The victims quickly requested discovery from the Government, including correspondence between the Government and Epstein's attorneys regarding the non-prosecution agreement.

On November 8, 2011, the day on which the Government was due to produce discovery, it instead moved to dismiss the entire CVRA proceeding for alleged lack of subject matter jurisdiction (DE 119), and successfully sought a stay of discovery (DE 121, 123). The victims filed a response. DE 127.

On March 29, 2012, the district court turned to the motions to intervene, granting both Epstein's motion to intervene (DE 159) and his attorneys' motion to intervene (DE 158). The Court emphasized, however, that the question of the merits of the intervenors' objections remained to be determined.

After additional proceedings, on June 18, 2013, the district court denied Epstein's efforts to bar release of the plea bargain correspondence. DE 188. The District Court began by noting that the same arguments that Epstein was raising had previously been rejected in one of the victims' parallel federal civil lawsuits, and it saw "no reason to revisit that ruling here." *Id.* at 3-4. The District Court then rejected Epstein's argument that the correspondence was protected under Fed. R. Evid. 410, because that Rule by its own terms does not apply in situations where a

defendant later pleads guilty. The District Court next rejected Epstein's argument that it should invent a new "plea negotiations" privilege that would apply to the correspondence, explaining that "Congress has already addressed the competing policy interests raised by plea discussion evidence with the passage of the plea-statement rules found at Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410, which generally prohibits admission at trial of a defendant's statements made during plea discussions, without carving out any special privilege relating to plea discussion materials. Considering the Congressional forbearance on this issue – and the presumptively public nature of plea agreements in this District –, this court declines the intervenors' invitation to expand Rule 410 by crafting a federal common law privilege for plea discussions." DE 188 at 7-8.

The next day, the District Court entered a detailed written opinion denying the Government's motion to dismiss. DE 189. After carefully reviewing the CVRA's remedial provisions, the Court explained that "the CVRA is properly interpreted to authorize the rescission or 're-opening' of a prosecutorial agreement – including a non-prosecution agreement – reached in violation of the prosecutor's conferral obligations under the statute." DE 189 at 7. In light of this conclusion, the District Court explained that it was then "obligated to decide whether, as crime victims, petitioners have asserted valid reasons why the court should vacate or re-open the non-prosecution agreement reached between Epstein and the [U.S.

Attorney's Office]. Whether the evidentiary proofs will entitle them to that relief is a question properly reserved for determination upon a fully developed evidentiary record." DE 189 at 11-12. The Court then ordered the Government to begin to produce the requested discovery. DE 190.

On June 27, 2013, Epstein and his attorneys filed a notice of appeal from the District Court's denial of efforts of block release of the plea bargain correspondence. DE's 194-96. Epstein also filed for a stay pending appeal (DE 193), and the victims filed a response in opposition (DE 198). The district court denied the motion to stay, explaining:

> In this case, intervenors have neither demonstrated a probable likelihood of success on the merits on appeal, *see e.g. In re MSTG, Inc.*, 675 F.3d 1337 (7th Cir. 2012) (rejecting request for recognition of new privilege for settlement discussions; finding need for confidence and trust alone insufficient reason to create a new privilege, and noting that Congress, in enacting Fed. R. Civ. Evid. 408, governing admissibility of statements made during "compromise negotiations, " did not take additional step of protecting settlement negotiations from discovery); *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (noting circuit courts' near unanimous rejection of selective waiver concept as applied to attorney-client and work-product privileges), nor that the balance of equities weighs heavily in favor of granting a stay.

DE 206 at 2-3. E

STANDARD OF REVIEW

1. The victims first present the issue that Epstein has failed to develop a factual record to support his claim that the correspondence in question is

confidential. This issue is a purely factual one, which this Court would review by giving due deference issue to the District Court in managing discovery matters. *World Holdings, LLC v. Federal Republic of Germany*, 701 F.3d 641, 649 (11th Cir. 2012).

2. The District Court rejected Epstein's claim that correspondence by his attorneys was protected from discovery by Rule 410 for two reasons: first, because it was not general discussions of leniency and statements made in the hope of avoiding a federal indictment rather than plea negotiations; and, second, that it involved negotiations for charges to which Epstein ultimately plead guilty. These are both factual findings, for which review is limited to determining whether the district court "had an adequate factual basis for the decision it rendered" and whether the decision was "clearly erroneous." *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1244 (11th Cir. 2008).

3. Epstein asks this Court to overturn the District Court's decision not to recognize a new privilege for plea bargaining. This Court has held that "a new privilege should only be recognized where there is a 'compelling justification." *International Horizons, Inc. v. The Committee of Unsecured Creditors,* 689 F.2d 996, 1004 (11th Cir.1982) (internal quotation omitted). The issue is thus whether the District Court erred in finding no such compelling justification.

SUMMARY OF THE ARGUMENT

Appellants Jeffrey Epstein and his attorneys argue that they have some sort of interest in the confidentiality of correspondence that they sent to government prosecutors – prosecutors who were attempting convict their client of sex offenses. The district court properly rejected their argument and this Court should affirm the decision below for three reasons.

1. Epstein never developed any evidentiary record in the district court that the correspondence in question was confidential. Accordingly, he has simply failed to establish the required factual record to permit him to challenge the District Court's conclusions. *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting privilege holder not "excused from meeting [his] burden of proving the communication confidential and within the [applicable] privilege").

2. Rule 410 of the Federal Rules of Evidence does not apply to bar discovery of the correspondence, because (a) the Rule does not apply where a criminal defendant pleads guilty; (b) the District Court's factual finding that the correspondence was not primarily plea negotiations was not clearly erroneous; (c) entirely apart from whether they can use the correspondence against Epstein, the victims can discover the correspondence to use against the Government; (d) Rule 410 does not, in any event, even apply to the early discovery phase of litigation; (e)

no work product privilege exists over correspondence that was exchanged by Epstein with his adversaries.

3. This Court should not create a new privilege for plea bargaining in this case, because Rule 410 provides sufficient protection for such negotiations and the Court should not undermine the Crime Victims' Rights Act.

This Court should also dismiss Epstein's appeal because it lacks jurisdiction over an interlocutory appeal of a discovery dispute.

ARGUMENT

In the District Court, the victims have advanced detailed allegations that Epstein and the Government agreed to a non-prosecution agreement and then further agreed to conceal it from the victims for many months. The District Court has ordered the Government to provide to the victims correspondence between Epstein and the Government that will shed light on these allegations.

In his brief to this Court, Epstein does not contest the merits of the victims' allegations. Instead, he argues that the District Court's action was improper because of alleged confidentiality of the correspondence, either under Fed. R. Evid. 410 or a "common law" privilege. Indeed, Epstein goes so far as to argue that the District Court's decision somehow "dramatically reshapes the landscape of criminal settlement negotiations" (Appt's Br. at 10). Epstein thus stakes out the sweeping position that prosecutors and defense attorneys are free to bargain away

criminal charges in secrecy without any consideration of the interests of crime victims, or the public for that matter.

If such a landscape ever existed, it exists no more. In the Crime Victims' Rights Act, Pub. L. 108-405, Title I, § 102(a), 118 Stat. 2261 (2004), Congress made clear that victims are entitled to information about the handling of the prosecution of crimes committed against them. As one circuit has observed, "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The CVRA sought to change this by making victims independent participants in the criminal justice process." *Kenna*, 435 F.3d 1011, 1013 (9th Cir. 2006).

To that end, the CVRA guarantees crime victims a series of rights, including the right "to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(5). Congress was concerned that crime victims "were kept in the dark by . . . a court system that simply did not have a place for them." 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Congress gave victims "the simple right to know what is going on . . . ." *Id.*

The District Court below properly recognized that the victims have advanced serious allegations about deliberate violations of the CVRA. To develop a record about exactly what happened during the federal investigation of Epstein's crimes against them, the District Court has ordered the Government to provide to

the victims certain correspondence related to the Epstein prosecution. In doing so, the District Court properly rejected Epstein's claim that information he willingly provided to prosecutors is somehow blocked from discovery by Fed. R. Evid. 410. Not only has Epstein failed to provide factual support for his claims, but the Rule is obviously inapplicable. As the District Court properly found, the Rule only applies to defendants who have not pled guilty, not those (like Epstein) who have pled. Moreover, Epstein cannot invoke the Rule to block the victims efforts to discovery materials *from the Government*; the Rule has no application to discovery proceedings and no application to efforts to obtain materials for use against someone other than the defendant.

I. EPSTEIN HAS FAILED TO DEVELOP AN EVIDENTIARY RECORD IN THE DISTRICT COURT THAT HE HAS ANY INTEREST IN THE CONFIDENTIALITY OF THE CORRESPONDENCE.

In the District Court, Epstein made generalized allegations that he would be harmed if the plea bargain correspondence were to be provided to the victims. But he never offered any facts surrounding the alleged confidentiality of the correspondence, much less facts showing how he would be injured if the victims reviewed that correspondence. Accordingly, this Court should reject his appeal for the simple reason that the factual predicate for all of his arguments is lacking.

The ordinary procedure for establishing privilege is to provide not only a privilege log, but more important, an affidavit regarding the confidential nature of

the allegedly privileged materials. *See, e.g., Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1265 (11th Cir. 2008) (noting affidavits gave the distict court "an adequate basis to determine the privileges asserted . . . ."). Here Epstein has failed to provide the required privilege log under the Local Rules of the District Court. *See* Local Rule 26.1(g), S.D. Florida. But more broadly, he has not provided any factual support (i.e., affidavits or similar evidence) from which this Court could conclude that he will be injured by the release of the correspondence.

Epstein's failure to provide such evidentiary materials is not merely a procedural defect, but apparently a deliberate ploy. The victims have alleged (with evidentiary support) that Epstein was well aware that the CVRA required prosecutors to confer with victims and that he pressured the prosecutors into violating their CVRA obligations. *See, e.g.*, DE 48 at 12-15. For Epstein to contest this allegation, he would have to provide affidavits (from both his attorneys and him) that he believed that the prosecutors would keep everything that they discussed during plea bargaining secret from the victims without any urging from Epstein. Such affidavits would be in contradiction with the limited factual record that exists in this case at this point, which is presumably why Epstein has not provided *any* factual record about the confidentiality of the materials at issue. But regardless of the reasons for Epstein's failure to build a factual record, the simple

fact at this point is that he has failed to create the necessary factual support to carry *his* burden of proof on privilege issues. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting privilege holder not "excused from meeting [his] burden of proving the communication confidential and within the [applicable] privilege").[3]

Epstein may argue that he contended below that the documents were privileged. But simply because he made an argument below does not mean that he has provided an appropriate evidentiary basis for that argument. The District Court record does not contain even the rudimentary elements that would allow this Court to make an informed assessment of Epstein's claim: How many documents are at issue? Who created the documents? Who looked at the allegedly "confidential" documents? Do these documents actually involve plea negotiations? Did anyone expect that the documents would be maintained as "confidential"? These are all facts that the Court would need to have before it to allow Epstein to get to first base with his arguments – and these are all facts that are entirely absent from the record.

In the District Court, the Government specifically warned Epstein that he would need to build a record to support his arguments:

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[3] Epstein's brief to this Court does now contain several quotations from the oral arguments of his attorney's below. *See, e.g.,* Appt's Br. at 19. The arguments do not provide proof of the factual propositions that would be required to sustain his privilege claims. And, more fundamentally, arguments are not evidence.

> However, upon intervention, Movant Epstein will have to meet his burden of establishing that he was in fact represented by specific attorneys, and that they had privileged communications in the course of that attorney-client relationship that have been or are at the risk of, unauthorized disclosure. Movant Epstein bears the burden of establishing that the communications he seeks to withhold from disclosure fall within the attorney-client or other privilege. "In meeting this burden, each element of the privilege must be affirmatively demonstrated, and the party claiming privilege must provide the court with *evidence that demonstrates the existence of the privilege*, which often is accomplished by affidavit."

DE 98 at 3-4 (emphasis added) (*quoting El-Ad Residences at Mirarmar Condo. Ass'n, Inc. v. Mt. Hawley Ins. Co.*, 716 F. Supp. 2d 1257, 1262 (S.D. Fla. 2010)). Rather than heed that specific warning from the Government that he needed to provide "evidence that demonstrates the existence of the privilege," Epstein decided to provide nothing at all.[4]

The victims, too, specifically argued to the District Court that, for example, "Epstein must *present evidence* that he will be injured if the victims read the correspondence." DE 98 at 11 (emphasis added). As with the Government's warning, Epstein elected not to heed the warning given by the victims.

In sum, *nothing* exists in the record that would allow Epstein to carry *his* burden of proof that the correspondence was confidential. That failure is fatal to

[4] At various points in his brief, Epstein claims that the Government supports his appeal. But the Government has not chosen to join this appeal and, to the contrary, has indicated to the District Court that is has collected all of the materials at issue and stands ready to deliver them to victims as soon as this Court permits it. *See, e.g.,* DE 216-1 at 9 (noting correspondence with Epstein's defense counsel that will be produced to opposing counsel upon lifting of stay).

appeal. *See, e.g., In re Subpoena Duces Tecum Issued to Commodity Futures Trading Com'n*, 439 F.3d 740, 754 (D.C. Cir. 2006) (rejecting privilege claim where appellant "failed to meet its burden of demonstrating that the disputed subpoenaed documents were created for the purpose of settlement discussions and therefore would merit protection under any federal settlement privilege . . . .").

II. THE CORRESPONDENCE BETWEEN THE GOVERNMENT AND EPSTEIN IS NOT PROTECTED FROM DISCOVERY BY FEDERAL RULE OF EVIDENCE 410 OR BY THE WORK PRODUCT DOCTRINE.

Epstein's lead argument is that the correspondence is protected from discovery by Federal Rule of Evidence 410 and/or the work product doctrine. Appt's Br. at 14-24. He is simply incorrect, as no protection exists for correspondence he voluntarily sent to federal prosecutors.

A. RULE 410 DOES NOT APPLY IN THIS CASE BECAUSE THE PLEA DISCUSSIONS LEAD TO A GUILTY PLEA.

Rule 410 is fundamentally inapplicable here because it is designed to protect defendants who are cloaked with a presumption of innocence, not those (like convicted sex offender Epstein) who have plead guilty to a crime. Because "Rule 410 is an exception to the general principle that all relevant evidence is admissible at trial, *see* Fed.R.Evid. 402, its limitations are not to be read broadly." *United States v. Barrow*, 400 F.3d 109, 116 (2d Cir. 2005). Here Epstein pled guilty to

state sex offenses as part of his far-ranging plea discussions with federal prosecutors, so the rule does not apply.

While Epstein repeatedly argues that the correspondence falls within the "heartland" of Rule 410 (Appt's Br. at 7), he never argues that it falls within the *text* of the Rule. Rule 410 provides in its entirety:

> Rule 410. Pleas, Plea Discussions, and Related Statements
> (a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
> (1) a guilty plea that was later withdrawn;
> (2) a nolo contendere plea;
> (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11or a comparable state procedure; or
> (4) *a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.*
> (b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4);
> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
> (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Although Epstein has not made a factual record about what the correspondence involves (*see* Part I, *supra*), he appears to argue that the correspondence falls within Rule 410(4), italicized above. But the plain language of that provision is narrowly written to cover *only* a "statement made in the course of plea discussions with an attorney for the prosecuting authority which do *not* result in a plea of

guilty." Fed. R. Evid. 410(4) (emphasis added). Obviously, a prerequisite to applying the rule is a case where no plea of guilty "resulted" from the discussions. *See, e.g., United States v. Paden*, 908 F.2d 1229, 1235 (5th Cir. 1990) (statements made during negotiations that resulted in a final plea of guilty not protected under Rule 410), *cert. denied*, 498 U.S. 1039 (1991); *United States v. Ruhkowsi*, 814 F.2d 594, 596 (11th Cir. 1987) (discussing application of the rule in situations where "plea negotiations . . . broke down" and case went to trial).[5]

Here, although Epstein evades this central point in his brief, his plea discussions undeniably did result in a plea of guilty. On this point, the District Court made a specific finding of fact: "[T]he communications between Epstein's counsel and federal prosecutors at issue here ultimately *did* result in entry of a plea

[5] Cases such as these also make clear that Epstein's protestations that the District Court's decision to release plea discussion is somehow unprecedented, *see, e.g.,* Appt's Br. at 10, are simply untrue. Courts sometimes find Rule 410 applies and sometimes that it does not. In fact, in earlier civil litigation against Epstein, the district court ordered this correspondence produced to one of Epstein's sexual assault victims, rejecting his Rule 410 argument. DE 226, *Jane Doe #2 v. Jeffrey* Epstein, No. 08-cv-80893-MARRA (S.D. Fla. Jan.5, 2011). Like that decision, the decision on appeal in this case is simply a routine discovery determination that the correspondence at issue falls outside the protections of Rule 410. Moreover, courts routinely override even opinion work product claims in situations where the attorney's conduct is at issue in the case. *See, e.g., In re John Doe,* 662 F.2d 1073, 1080 (4th Cir. 1981); *Charlotte Motor Speedway, Inc. v. International Ins. Co.*, 125 F.R.D. 127, 130 (M.D.N.C. 1989). Of course, in this case the conduct prosecutors and Epstein in reaching the secret non-prosecution agreement is the central element of the case. Indeed, the only thing that is unprecedented about this case is the fact that Epstein and prosecutors choose to negotiate about how to keep crime victims from learning what was happening rather than to comply with the Crime Victims' Rights Act.

of guilty by Epstein – to specific state charges – thereby removing the statements from the narrow orbit of 'statement[s] made during plea discussions . . . if the discussions did not result in a guilty plea . . . " which are inadmissible in proceedings against the defendant making them under Rule 410." DE 188 at 4-5 (emphasis in original). That finding of fact can be overturned only if it is clearly erroneous. It is not.

Again, while Epstein bears the burden of proof on *his* privilege claim, he has failed to develop any factual record in support of his claim. *See* Part I, supra. More specifically, he cannot deny that the non-prosecution agreement that is at the heart of this case specifically includes a provision for Epstein to plead guilty to two state offenses. The NPA recites that "Epstein seeks to resolve *globally* his state and federal criminal liability and Epstein understands and acknowledges that, in exchange for the benefits provided by this agreement, he agrees to comply with its terms, including undertaking certain actions with the State Attorney's Office." NPA at 2 (emphasis added).[6] The NPA goes on to specifically provide that, in exchange for avoiding federal prosecution, Epstein will plead guilty to two state offenses:

> Epstein shall *plead guilty* . . . to the Indictment as currently pending against him in the 15th Judicial Circuit in and for Palm Beach County (Case No. 2006-cf-009495AXXXMB) charging one (1) count of solicitation of prostitution, in violation of Fl. Stat. § 796.07. In

[6] For the convenience of the Court, a copy of the NPA is attached to this brief.

> addition, Epstein shall *plead guilty* to an Information filed by the States Attorney's Office charging Epstein with an offense that requires him to register as a sex offender, that is, the solicitation of minors to engage in prostitution, in violation of Florida Statutes Section 796.03.

Id. at 3 (emphases added). And, as the District Court specifically found, Epstein ultimately did plead guilty to those two Florida offenses – and did so pursuant to the "global" agreement as a result of his plea discussions. DE 188 at 4.

While Epstein does not discuss the specific linkage in the NPA between the his non-prosecution for federal offenses in exchange for pleading guilty to two state charges, he does contend that Rule 410 is limited to guilty pleas to federal offenses. The plain language of Rule 410(4) does not contain any such limitation, narrowly extending protection only to negotiations that "did not result in a guilty plea" without requiring that that plea be to a federal charge.[7] And such a limitation of the rule to guilty pleas to federal charges only would be extremely unwieldy, since many criminal cases now involve discussions that span multiple jurisdictions

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[7] Epstein perversely flips around this absence of a limitation, contending that if Congress had intended to cover situations where defendants pled guilty to state charges, it needed to say so. Appt's Br. at 26. But Congress simply used the plain term "guilty plea" rather than the more cumbersome formulation "guilty plea to a federal, state, or local offense." In the same sentence, Congress also used the broad formulation "prosecuting authority" rather than a narrower, federal formulation such "United States Attorney." Fed. R. Evid. 410(4). Finally, in another part of Rule 410, Congress did see fit to itemize both state and federal proceedings. Fed. R. Evid. 410(3). The fact that it chose a broader formulation here makes clear its intention to cover both state and federal pleas in Rule 410(4), as the caselaw holds.

– which is why defendants, such as Epstein, frequently seek a "global" resolution of their criminal liability. In any event, case law makes quite clear that Rule 410 draws no distinction between federal pleas and state pleas. *See, e.g., United States v. Chapman*, 954 F.2d 1352, 1360 (7th Cir. 1992) (applying rule to discussions over "withdrawn state plea"); *United States v. Kerik*, 531 F.Supp.2d 610 (S.D.N.Y. 2008) ("Rule 410 applies in federal proceedings to statements made in connection with prior state pleas"); *see also United States v. Holmes*, 794 F.2d 345, 349 (8th Cir.1986) (permitting the admission of a guilty plea from state court in a federal proceeding).

The only substantial argument that Epstein makes is that the "substantive settlement discussions thus revolved around [federal] offenses to which Epstein did not ultimately plead guilty . . . ." Appt's Br. at 27. Of course, this is a factual argument about the nature of the discussions – a factual argument that lacks any record support. Epstein has not shown that the District Court was clearly erroneous in concluding that correspondence involved global plea discussions that "revolved around" not merely Epstein's non-prosecution for federal charges but also, in exchange, his guilty plea to state charges.

B. THE DISTRICT COURT'S FACTUAL FINDING THAT SIGNIFICANT PARTS OF THE CORRESPONDENCE CONCERNED SUBJECTS OTHER THAN PLEA NEGOTIATIONS IS NOT CLEARLY ERRONEOUS.

As a second reason for denying Epstein's motion to bar release of the correspondence, the District Court made a specific factual finding that significant parts of the correspondence did not involve "plea discussions" protected under Rule 410 but rather general discussions of leniency. Epstein has not shown – and cannot show – that this factual finding is clearly erroneous.

As one reason for finding the correspondence not covered by Rule 410, the District Court noted that "[a]s a threshold matter, 'statement[]s during plea discussions' protected under Fed. R. Evid. 410 do not include general discussions of leniency and statements made in the hope of avoiding a federal indictment – arguably the content of the correspondence at issue here." DE 188 at 4. For support, the District Court cited the relevant case law from this Court (as well as from other Courts of Appeals). *See* DE 188 at 4 (*citing United States v. Merrill*, 685 F.3d 1002 (11th Cir. 2012) (statements made to AUSA during meetings were not statements made during plea negotiations under Rule 410, where there were no pending charges against defendant when discussions occurred; general discussion of leniency did not transform meeting into plea negotiations)); *see also* DE 188 at 4 (*citing United States v. Edelmann*, 458 F.3d 791, 804-06 (8th Cir. 2006); *United States v. Hare*, 49 F.3d 447, 450 (8th Cir. 1995). This is a factual finding by the

District Court, based on its familiarity with the correspondence. The Court reviews such a finding only to determine whether it is clearly erroneous. *See In re Grand Jury Proceedings, No. 4-10*, 707 F.3d 1262, 1266 (11th Cir. 2013) (factual determination underlying privilege rulings reviewed only for clear error).

Epstein does not contend that the District Court misunderstood the applicable legal standards. Instead, Epstein launches a fact-based challenge, contending that "the best proof that the communications at issue were not merely 'general discussion of leniency' is that they unquestionably resulted in an agreement which settled the federal criminal investigation of Epstein." Appt's Br. at 24-25. The Court will notice that this factual argument comes unadorned of any citations to the record below. No doubt this is because Epstein has simply failed to create any record below. Thus, when Epstein says it is "unquestionably" true that the communications were not general discussions of leniency, the victims would simply respond that this is indeed in question – because the District Court has specifically made a factual finding to the contrary.

The victims, moreover, have very specific reasons for raising doubt about whether all of the correspondence focused as narrowly on the "plea discussions," that the rule protects. *See* Fed. R. Evid. 410(4) (extending protection only to "plea discussions"). The victims have made detailed allegations that significant parts of the correspondence deal with Epstein's defense attorneys attempting to improperly

interfere with the Government's required notifications to them under the Crime Victims' Rights Act. For example, the victims have alleged that on November 29, 2007, the U.S. Attorney's Office sent to Jay Lefkowitz, one of Epstein's many defense lawyers, a draft crime victim notification letter which would have explained the NPA to Epstein's multiple victims. DE 48 at 13. The victims have further alleged that because of concerns from Epstein's defense attorneys (presumably communicated in writing as part of the correspondence at issue here), the U.S. Attorney's Office did not send that proposed victim notification letter to victims, but instead sent a misleading letter that the case was "still under investigation." *Id.* Whatever may be the reach of Rule 410 protections for "plea discussions," it certainly would not extend to defense attorney's negotiations with prosecutors regarding the scope of their congressionally-mandated CVRA notifications to crime victims. Certainly a defendant would not be "exhibit[ing] an actual subjective expectation to negotiate a plea," *United States v. Merrill*, 685 F.3d at 1012, when attempting to prevent the Government from informing crime victims about a previously-consummated non-prosecution agreement that prevented prosecution of crimes against those very victims. And Epstein's argument that the correspondence was based on "established practice . . . regarding the confidentiality of such communications" (Appt's Br. at 17) rings hollow. It is hardly "established practice" for defense attorneys to convince federal prosecutors

not to notify victims about the outcome of their cases. Indeed, the Government has specifically admitted to the contrary that "[i]t is *not* standard practice for the U.S. Attorney's Office to negotiate with defense attorneys about the extent of notifications provided to crime victims." DE 225-1 at 50 (emphasis added).

Of course, the normal way for this Court to review a District Court's determination about the nature of alleged privilege material would be to review an affidavit and accompanying privilege log provided to the District Court by the party asserting privilege. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1314 (11th Cir. 2001) (noting presence of affidavit and privilege log in the record). Here, Epstein has failed not only to provide an affidavit and privilege but *any* materials that would allow this Court to overturn the District Court's finding about the nature of the materials. Accordingly, this Court should simply affirm the District Court's factual determination that the correspondence at issue does not involve "plea discussions" by rather "general discussions of leniency and statements made in the hope of avoiding a federal indictment."[8]

[8] Epstein has not argued – either in his brief to this Court or in the court below – that the correspondence at issue can be separated into documents that involve plea discussions and those that do not. And, of course, he has not provided a privilege log or other basis for making any such a discriminating, document-by-document judgment. Accordingly, the District Court's ruling about the general nature of *all* the documents must be affirmed.

C. RULE 410 DOES NOT APPLY HERE BECAUSE THE VICTIMS CAN USE THE CORRESPONDENCE AGAINST THE GOVERNMENT.

Although the District Court did not need to reach them, several other grounds apparent in the record support the ruling below. This Court should affirm on these grounds as well. *Thomas v. Cooper Lighting, Inc.,* 506 F.3d 1361, 1364 (11th Cir.2007) (judgment below can be affirmed on any ground apparent from the record).[9]

Rule 410 is inapplicable here because it would, at most, bar admissibility of the correspondence into evidence "against the *defendant* who made the plea," Fed. R. Evid. 410 – i.e., against Jeffrey Epstein. But the victims intend initially to obtain and use the correspondence to pursue further discovery and to seek relief *from the Government*. Indeed, the district court's order requiring production of the correspondence is not directed to Epstein at all – it is directed solely to the Government. DE 190 at 2.

By its plain terms, Rule 410 only bars the admission of evidence "*against the defendant* who made the plea." Fed. R. Evid. 410. The purpose underlying this rule is to "promote negotiations by permitting *defendants* to talk to prosecutors without sacrificing *their* ability to defend themselves if no disposition is reached." *United States v. Barrow,* 400 F.3d 109, 116 (2d Cir.2005) (emphases added).

[9] The victims raised these arguments below, DE 106 at 5-13, but the District Court did not need to consider them.

Thus, the Rule has no application where the discussions are being used not against a defendant but rather against the Government. *See, e.g., United States v. Biaggi*, 909 F.2d 662, 691 (2d Cir. 1990) (holding that under Rule 410 "plea negotiations are inadmissible 'against the defendant' . . . and it does not necessarily follow that the Government is entitled to a similar shield").

Here, the victims intend to use the correspondence to prove initially that the Government violated their CVRA rights.[10] Having proven a violation of their rights, they will then seek various remedies against the Government.[11] As they have made clear throughout this litigation, they also ultimately intend to ask for the Court to impose (among other things) the one remedy that will most directly respond to the Government's violation of their rights: invalidation of the non-prosecution agreement so that they can confer with the Government about the possibility of actually prosecuting Epstein for the sex offenses he committed against them. Epstein's lawyers claim that any such use would be a use "against" the defendant and therefore covered by this language in Rule 410. This claim, however, assumes that the Rule 410 bars every court action that might ultimately have some collateral, harmful effect on a defendant. But Rule 410 is much more

[10] The victims do not believe they stand in an adversarial posture with the Government, as Congress has obligated the Government to use its "best efforts" to protect the CVRA rights of crime victims. 18 U.S.C. § 3771(c)(1).

[11] A list of the remedies that the victims intend to seek from the Government is found in DE 127 at 13-15.

narrowly drafted – forbidding not uses that may eventually *harm* the defendant, but instead more narrowly admissibility of plea negotiations into evidence directly *"against the defendant"* in a "civil or criminal proceeding." Fed. R. Evid. 410.[12]

In any event, regardless of how that issue ultimately plays out, at this early point in the District Court proceedings, the victims are still conducting discovery in an attempt to prove to the District Court that the Government failed in its obligations to properly confer with the victims about the NPA. Obtaining discovery is obviously not a use against Epstein. Rule 410 is accordingly inapplicable.

D. RULE 410 DOES NOT BAR DISCOVERY OF THE CORRESPONDENCE.

Epstein's reliance on Rule 410 is also plainly premature. By its plain terms, the rule does not apply to discovery. Instead, it bars only the admissibility of "evidence" against the defendant in a "proceeding." *See* Fed. R. Evid. 410 (barring use of certain "evidence" in a "civil or criminal proceeding"). The Rule thus does not apply to the discovery phase at all. *See In re MSTG, Inc.*, 675 F.3d 1337 (7th

[12] Epstein also argues that it would be improper for the District Court to invalidate the non-prosecution agreement, even if the victims prove a deliberate agreement between the Government and him that lead to an agreement reached in violation of the Crime Victims' Rights Act. Appt's Br. at 16 n.4. This issue is not currently before this Court. As Epstein concedes, however, the District Court has already ruled against his legal position in a detailed opinion. DE 189. And, as the victims have argued at length below, there is ample basis for a District Court to set aside an illegal plea agreement. *See* DE 127 at 8-13.

Cir. 2012) (noting that Congress, in enacting Fed. R. Civ. Evid. 408, governing admissibility of statements made during "compromise negotiations," did not take additional step of protecting settlement negotiations from discovery).

Confirming the discoverability of plea discussions are the Advisory Committee Notes to Rule 410. Advisory Committee explains that the Rule was originally drafted to forbid use of plea discussions "for any purpose." Fed. R. Evid. 410, Advisory Committee Note to 1974 Enactment. However, the Rule was specifically amended by the Senate to allow use of plea statements where other statements have been introduced (a "completeness" provision) and for perjury purposes. *Id.*

Of particular relevance here, the completeness provision provides that even a protected plea bargaining statement is admissible "in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." Fed. R. Evid. 410(b)(2). Here, the Government has already made it quite clear in its pleadings that it will introduce certain statements about the course of the plea negotiations. *See, e.g.,* DE 225-1 at 45-56 (Government response to request for admission); DE 58 at 10-14 (Government version of contested facts). From these pleadings, it is clear the Government intends to introduce many statements about the timing and course of plea discussions. For example, in its

response to the victims' summary judgment motion, the Government makes clear that it intends to argue that it properly conferred with the victims over eighteen months. *See* DE 62 at 37. Similarly, the Government intends to dispute that after it entered into the NPA with Epstein it sent misleading notices to the victims about the case still being "under investigation"). *Id.* at 41. It is simply unfair for the Government to be able to pick and choose from all the events surrounding the plea negotiations only those that support its case, while depriving the victims of the opportunity to even discover information that might bolster their case. *See Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.,* 136 F.3d 695, 704 (10th Cir. 1998) (a litigant cannot use privilege "as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion."). And Rule 410 in particular blocks such a one-sided approach. Instead, under the Rule, the victims are entitled to show the full course of plea discussions at any ultimate hearing in this case about whether the Government violated their CVRA rights.

The District Court has already ruled that important factual questions exist about what happened in this case: "Whether the evidentiary proofs will entitle [the victims] to that relief [of setting aside the non-prosecution agreement] is a question properly reserved for determination upon a fully developed evidentiary record." DE 189 at 11-12. The Court has further indicated that it will be considering an

"estoppel" argument raised by the Government as a defense in this case. DE 189 at 12 n.6. The Court has noted that this argument "implicates a fact-sensitive equitable defense which must be considered in the historical factual context of *the entire interface* between Epstein, the relevant prosecutorial authorities and the federal offense victims – including an assessment of the allegation of a deliberate conspiracy between Epstein and federal prosecutors to keep the victims in the dark on the pendency of negotiations between Epstein and federal authorities until well after the fact and presentation of the non-prosecution agreement to them as *a* fait accompli." DE 189 at 12 n.6 (emphasis added). The victims thus have a compelling need for information about the Government's actions to show what the "entire interface" was and to respond to the Government's estoppel arguments, as well as other defenses that it appears to be preparing to raise.

Finally, this Court has also noted that even if plea discussions are excluded from use at trial, "derivative evidence" obtained from plea discussion is never excluded. *See United States v. Ruhkowsi*, 814 F.2d 594, 599 (11th Cir. 1987). Accordingly, even if Rule 410 were somehow applicable to later proceedings here, the victims are free to obtain the correspondence now and follow whatever discovery leads it may provide. In light of all these points, it is obvious that Epstein's efforts to contort Rule 410 into a barrier barring discovery by the victims against the Government is meritless.

E. THE WORK PRODUCT DOCTRINE DOES NOT APPLY TO CORRESPONDENCE WITH AN ADVERSARY.

At various points in his briefing to this Court, Epstein seems to allude to the work product doctrine as having some bearing on the correspondence at issue. Appt's Br. at 12 (argument heading mentioning work product doctrine). But Epstein never develops this argument at any length in his brief. Any implicit argument that the work product doctrine bars release of the correspondence should be rejected.

Perhaps the reason Epstein has not pressed a work-product argument at any length is because it would be nonsensical to argue that the work product doctrine applies to correspondence between adversaries; prosecutors and defense attorneys do not operate in a confidential relationship.

Case law is clear that "[d]isclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846 (8th Cir. 1988). In summarily rejecting Epstein's claim, the District Court found that Epstein had waived any work product protection in the materials by turning them over to the federal prosecutors:

> Assuming without deciding that any part of the correspondence in question reflects "the mental impressions, conclusions, or legal theories" of Epstein's attorneys, Fed. R. Civ. P. 26(b)(3), any work product protection which might otherwise attach to this product was necessarily forfeited when Epstein voluntarily submitted the

> information to the United States Attorney's Office in the hopes of receiving the quid pro quo of lenient punishment for any wrongdoings exposed in the process. Work product protection is provided only against "adversaries." Thus, disclosure of the material to an adversary, real or potential, works a forfeiture of work product protection. In this case, Epstein's attorneys' disclosure to the United States Attorney's Office was plainly a disclosure to a potential adversary. The United States Attorneys' office, at that juncture, was reviewing evidence relating to Epstein' sexual crimes against minor females within the Southern District of Florida and deliberating the filing of relevant federal charges; while Epstein's counsel clearly hoped to avoid any actual litigation between the United States and Epstein, the potential for such litigation was plainly there. By voluntarily and deliberating disclosing this material to federal prosecutorial authorities investigating allegations against Epstein at that time, any work product protection was necessarily lost.

DE 188 at 6 (*citing, inter alia, United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997). Numerous cases have reached the same conclusion as the District Court in similar circumstances. [13]

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[13] *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991) (Westinghouse's disclosure of work product materials to the Justice Department during an investigation "waived the work-product doctrine as against all other adversaries."); *In re Qwest Communications, Inc.*, 450 F.3d 1179, 1192-1201 (10th Cir. 2006) (company's disclosure of documents to the SEC during criminal investigation waived work product protections); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2005) ("any work product objection was waived by [party] via production" of the documents in question); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302 (6th Cir. 2002) (attorney client/work product privilege was "never designed to protect conversations between a client and the Government — i.e., an adverse party — rather, it pertains only to conversations between the client and *his or her* attorney. . . purpose [of attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Nowhere amongst these reasons [for protection] is the ability to 'talk candidly with

Moreover, as the District Court made clear, it was simply "assuming" without deciding that the correspondence could properly be described as work product. To obtain a reversal from this Court of the District Court's decision, Epstein would need to prove that the materials actually are work product materials. Again, he has failed to build any record to that effect in the District Court.

In any event, any such attempt would be doomed to failure. Significant parts of the correspondence obviously could not even arguably qualify as work-product, such as Epstein's lawyer's efforts to get the Government to stop making notifications to crime victims. Moreover, Epstein would have to prove that the correspondence was prepared in anticipation of litigation. Many such documents were presumably not so prepared, and certainly not prepared in anticipation of litigation about the Crime Victims' Rights Act. *See, e.g., Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 549 (D. Ariz. 2002) (documents not protected by work product because not prepared in connection with case at hand); *Hendrick v. Avis Rent A Car System, Inc.*, 916 F.Supp. 256, 259 (W.D.N.Y.,1996) (no work product existed because "the documents sought were not prepared in

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the Government.'"); *In re Chrysler Motors Overnight Evaluation Litigation*, 860 F.2d 844, 846-47 (8th 1988) (defendant company's disclosure of computer tape to class counsel during settlement negotiated waived work product when tape sought by government as part of criminal case); *In re Sealed Case*, 676 F.2d 793, 824-25 (D.C. Cir. 1982) (production of documents during settlement discussions with the SEC waived work product protection as to grand jury materials).

anticipation of *this particular litigation*") (internal quotation omitted and emphasis added)).

It is also important to emphasize that the work-product is a qualified privilege, subject to a host of exceptions and ultimately a balancing of interests to determine whether the doctrine should be applied. One of the most important is the fact that one of the parties to the correspondence – the Government – has a statutory obligation to uses its "best efforts" to protect crime victims' rights. 18 U.S.C. § 3771(c)(1). In light of that clear statutory command, the Government has its own independent obligation to use the correspondence to help protect the victims' rights, including providing the correspondence to the victims. *See* DE 106 at 17-18; *see also* DE 226 at 12-14. No such work product confidentiality can operate in such circumstances, which further underscores the fact that any purported "reliance" by the defense attorneys on the idea that the correspondence would not be provided to the victims was unreasonable.

Work product is also subject to a crime-fraud-misconduct exception. *See Cox v. Administrator U.S. Steel & Carnie*, 17 F.3d 1386, 1422 (11th Cir. 1994). The victims have alleged in detail that such an exception applies in connection with the Government's attempt to assert work product protection to internal Justice Department documents. *See* DE 225-1 at 23. The same exceptions would prevent Epstein from prevailing on any (as of yet undeveloped) work production assertion.

For all these reasons, the Court should reject Epstein's claim that its correspondence with prosecutors during plea negotiations somehow is confidential work product immune from discovery.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT CORRESPONDENCE BETWEEN THE GOVERNMENT AND EPSTEIN IS NOT PROTECTED FROM DISCOVERY BY SOME KIND OF "COMMON LAW" PLEA BARGAINING PRIVILEGE.

For all the reasons just given, Rule 410 (and the work product doctrine) do not bar the victims from discovering correspondence about how the non-prosecution agreement was reached. Perhaps recognizing the weakness of this argument, Epstein raises as a final, fallback claim that the District Court erred in declining to recognize a new "common law" privilege for "settlement/plea negotiation communications in criminal cases." Appt's Br at 28. This argument, too, lacks any merit.

A. THE COURTS CANNOT CREATE A "COMMON LAW" PRIVILEGE THAT OVERULES THE LIMITATIONS OF RULE 410 AND THE STATUTORY COMMANDS OF THE CRIME VICTIMS' RIGHTS ACT.

Epstein asks this Court to invent some sort of new "common law" privilege under Federal Rule of Evidence 501. But the Supreme Court has been clear, however, that courts must "not create and apply an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence. Inasmuch as testimonial exclusionary rules and privileges contravene

the fundamental principle that the public has a right to every man's evidence, any such privilege must be strictly construed." *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990) (internal quotations omitted).

While Epstein does not cite the controlling legal standard for creating a privilege in this Circuit, this Court has strongly cautioned that "the rule in this circuit is that a new privilege should only be recognized where there is a 'compelling justification.'" *International Horizons, Inc. v. The Committee of Unsecured Creditors,* 689 F.2d 996, 1004 (11th Cir.1982) (*quoting In re Dinnan,* 661 F.2d 426 (5th Cir.1981)). This Court has explained that this stringent rule arises from the federal courts' disfavor of privileges and from the policy of construing privileges narrowly, so as to protect the "search for truth." 689 F.2d at 1003 (*quoting United States v. Nixon,* 418 U.S. 683 (1974)).

Here, this Court has strong reason to be skeptical of a new plea bargaining privilege. The transparent purpose behind Epstein's "common law" effort is to avoid the specific limitations contained in Rule 410 – limitations that prevent him from availing himself of Rule 410. *See* Part II, *supra*. But the Supreme Court has made clear that courts must be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *University of Pennsylvania v. E.E.O.C.,* 493 U.S. 182, 189 (1990) (internal quotation omitted). This Court

should not use the general provisions of Rule 501 to effectively supersede the detailed limitations contained in Rule 410.

In addition, Epstein's argument would require this Court to supersede the Crime Victims' Rights Act. The CVRA promises crime victims a series of rights, including rights specifically at issue in this case: the right to confer with prosecutors, to be notified of court hearings, and to be treated with fairness. 18 U.S.C. § 3771(a)(2) & (5) & (8). The CVRA further commands that the courts have specific obligations to "ensure" that crime victims' rights are protected. 18 U.S.C. § 3771(b)(1) ("the court shall ensure that the crime victim is afforded the rights described [in the CVRA] . . . ."). Of course, it is to "ensure" that such rights are protected for Jane Doe No. 1and Jane Doe No. 2, two acknowledged victims of Epstein's sex offenses, that the District Court has ordered the Government to make the correspondence available to them. The District Court properly gave precedence to the protection of statutorily-created rights over Epstein's alleged "common law" privilege.

B. NO "COMMON LAW" PRIVILEGE FOR PLEA BARGAINING EXISTS.

Even if this Court were willing to entertain the idea that it should embark on an exercise of "common law" privilege making, no common law privilege exists for plea bargaining. While Epstein frequently alludes to "constitutional considerations" that supposedly undergird plea bargaining, the simple fact remains

that "there is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). To be sure, the courts tolerate widespread plea bargaining because it helps reduce the workload of congested criminal dockets. But common law rulemaking should not be used to exalt administrative convenience over the far more important value of the search for truth.[14]

Moreover, were the Court to consider creating such a privilege, this would be a poor case in which to do so. Epstein is forced to admit that, at least in federal court, his Sixth Amendment rights have not yet attached in this case, because no indictment has yet been filed. *See* Appt's Br. at 33; *see Lampley v. City of Dade City*, 327 F.3d 1186, 1195 (11th Cir. 2003). Therefore, this case does not present any occasion for considering the scope of a privilege to protect Sixth Amendment right to counsel interests.

In addition, as is apparent from the District Court's rulings, this case involves a highly unusual situation where crime victims have raised credible allegations of an arrangement between prosecutors and defense attorneys to violate statutorily-mandated crime victims' rights. Indeed, the Government has recently admitted that "[i]t is not standard practice for the U.S. Attorney's Office to

[14] Of course, if their client wishes, defense counsel should always explore plea bargaining opportunities. *See Padilla v. Kentucky*, 130 S.C.t 1473, 1485 (2010). But this is a far cry from proving there is a "right" to plea bargaining or that protecting plea bargaining opportunities is more important than, for example, protecting congressionally-mandated crime victims' rights conferred in the CVRA.

negotiate with defense attorneys about the extent of notifications provided to crime victims," DE 225-1 at 50, negotiations that it nonetheless undertook in this case. *Id.* Accordingly, were the Court to even consider creating a new privilege, it would be doing so in circumstances that do not reflect ordinary plea bargaining practices.

Make no mistake about the sweeping position that Epstein is advancing: He is not arguing that this Court should recognize a narrow privilege that would prevent the victims from using any admissions of guilt he may have made. Instead, Epstein is broadly claiming that his defense attorneys and the Government can agree between themselves to undertake secret plea discussions — even in violation of congressionally-mandated crime victims' rights in the CVRA — and then later block the crime victims from obtaining the information that would prove the violation that has happened. Such a privilege would, among other things, directly conflict with the statutory command of Congress that crime victims must be "treated with fairness," 18 U.S.C. § 3771(a)(8),.

Epstein claims that defense attorneys must have assurances that communications with prosecutors will never be turned over to crime victims. Appt's Br. at 10. But it is now settled that if defense attorneys want to engage in plea discussions with federal prosecutors, they must now be aware that the prosecutors will, in turn, confer with victims about the plea arrangements. Indeed, the Attorney General has promulgated guidelines requiring such conferences. *See*

U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM-WITNESS ASSISTANCE 41 (2012) ("Federal prosecutors should be available to confer with victims about major case decisions, such as . . . plea negotiations . . . ."). And when a criminal defendant works with a prosecutor to violate that congressionally-created right to confer, the defendant can hardly complain about efforts to reveal what he has done. In short, Epstein cannot correspond with the government about how to avoid the requirements of the CVRA and then expect to be able to hide behind some nebulous "common law privilege" to escape accountability for any resulting violation of law.

Perhaps recognizing that tenuousness of raising plea bargaining over truth-seeking values, Epstein attempts to repackage his proposed privilege as a "mediation" privilege. Appt's Br. at 47. But Epstein implicitly concedes that there is no well-established "common law" support for a mediation privilege, as he is able to cite only a smattering of cases (three in total over the last 32 years) recognizing such a privilege. *See* Appt's Br. at 40.[15] None of these cases are from the Eleventh Circuit, which (unlike other jurisdictions) requires a strong showing

[15] Epstein also remarkably alleges that there is a "consensus among the states" in favor of protecting plea discussions. Appt's Br.a t 42 & n.10. But his citations simply show that many states have adopted Fed. R. Evid. 410 essentially verbatim, including the limitations that prevent Epstein from taking advantage of its protections here. If anything, his citations show that there is a consensus among the states *not* to protect the correspondence at issue here.

of "compelling" justification before a new privilege can be created. *International Horizons, Inc. v. The Committee of Unsecured Creditors,* 689 F.2d 996, 1004 (11th Cir.1982) ("compelling" justification required to interfere with the search for truth in federal cases). Moreover, none of the three cases cited involve plea bargaining in criminal cases – presumably because that subject is already directly covered in detail in Rule 410. Finally, these cases involve situations where a court thought it important to create "confidentiality and trust *between participants* in a mediation proceeding." *See, e.g., Folb v. Motion Picture Ind. Pension & Health Plans*, 16 F.Supp.2d 1164, 1175 (C.D. Cal. 1998) (emphasis added)). Here, of course, Epstein is not trying to create trust with the Government, but rather to block third parties to illegal negotiations learn what happened. No other Court of Appeals has extended a new privilege in such a situation. *See, e.g., In re MSTG, Inc*., 675 F.3d 1337 (7th Cir. 2012) (rejecting request for recognition of new privilege for settlement discussions; finding need for confidence and trust alone insufficient reason to create a new privilege, and noting that Congress, in enacting Fed. R. Civ. Evid. 408, governing admissibility of statements made during "compromise negotiations," did not take additional step of protecting settlement negotiations from discovery). Epstein has not established the "compelling" reason that would be required for such an unprecedented step. The District Court's decision not to do so should be affirmed.

IV. THIS COURT DOES NOT POSSESS JURISDICTION OVER AN INTERLOCUTORY DISCOVERY DISPUTED.

Not only is Epstein's appeal meritless, but it is also not properly before the Court at this time. Epstein is asking this Court to jump into the middle of a District Court discovery dispute. The Supreme Court in *Mohawk Industries, Inc. v. Carpenter,* 130 S. Ct. 599 (2009), cautioned that "the district judge can better exercise [his or her] responsibility to [to police prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Id.* at 605. For all of the reasons explained in the victims' pending Motion to Dismiss Non-Party Interlocutory Appeal and Reply in Support of Motion to Dismiss Non-Party Interlocutory Appeal, this Court should dismiss Epstein's appeal for lack of jurisdiction.

Because the victims have fully briefed the jurisdictional arguments in connection with their pending motion, they will not repeat their arguments here. The victims will, however, point out that there is serious discussion among the federal courts of appeals questioning the continued viability of the *Perlman* doctrine in the wake of *Mohawk*. The relevant opinions are summarized in *United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1209 n. 5 (10th Cir. 2013) ("A few circuit courts of appeals have discussed the impact of the *Mohawk* decision on the *Perlman* doctrine, with varying results.").

Epstein relies heavily on one of those opinions, *United States v. Krane*, 625 F.3d 568 (9th Cir. 2010). *See* Appt's Br. at 50. But the circumstances there hardly match the circumstances here. In that case, a recognized privilege holder sought interlocutory review to bar release of documents protected by the attorney client privilege in connection with a criminal case. The Ninth Circuit in *Krane* allowed the appeal, noting that "for all practical purposes, this appeal [was] [the privilege holders] *only opportunity* to seek review of the district court's order adverse to its claims of attorney-client privilege . . . ." *Id.* at 573 (emphasis added). Here, however, Epstein will have other opportunities to present a challenge to the use of the correspondence, because he has moved to intervene in other proceedings below.

Indeed, the victims need to alert the Court that Epstein, a billionaire with a battery of well-paid attorneys, appears to be embarking on a steady stream of motions to intervene below, with a possible steady stream of interlocutory appeals to this Court. After strategically delaying any entrance for several years, Epstein has now filed three separate motions to intervene in the District Court. Epstein first sought limited intervention not when the case was first filed in 2008, but rather more than three years later; on September 2, 2011, he moved to intervene with regard to correspondence between his attorneys and federal prosecutors (DE 93) – the intervention that has prompted this appeal. In response, the victims

objected that his efforts were untimely. DE 96. The victims also warned against "subjecting the [District] Court (and the victims) to an endless stream of 'limited' intervention motions from Epstein and his attorneys whenever a hearing does not unfold to his liking." DE 96 at 17. Ultimately, the District Court sided with Epstein on this particular motion, allowing his limited intervention (and that of his attorneys) on issues related to the correspondence. DE 158,159. Later, of course, the District Court rejected Epstein's arguments against releasing the correspondence to this Court, prompting Epstein's current interlocutory appeal.

In June of this year, another hearing unfolded in a way not to Epstein's liking. On June 18, 2013, the court denied the Government's motion to dismiss (DE 189) and a few days later, Epstein filed another motion for limited" intervention – this one a "prospective" motion anticipating that the District Court will need to determine whether the non-prosecution agreement in this case can be set aside as a remedy for the Government's violation of the CVRA. DE 207. The victims responded, DE 209, noting that on this particular issue, they had no objection to intervention because the issue had not yet been subject to any litigation. DE 212. That motion by Epstein to intervene remains pending before the District Court and is unopposed.

Most recently, on July 26, 2013, Epstein filed a *third* motion for "limited" intervention regarding grand jury materials that the District Court had ordered the

Government to produce to the victims. Epstein claimed that his motion was timely because the issue regarding the grand jury materials on recently became ripe. DE 215 at 3. Yet the issue was actually several years old, as the victims have argued in their opposition to the motion (which is pending before the District Court). DE 221.

Given that Epstein has filed three separate motions to intervene – the District Court has granted one of them, one of them is unopposed, and one remains under consideration – it can hardly be said that this appeal is somehow Epstein's "only opportunity" for further review of the relevant issues. Indeed, unless this Court makes clear that this interlocutory appeal is improper, it can perhaps look forward to (and subject the District Court to) a series of future interlocutory appeals that could disrupt the proceedings below. This kind of delaying tactic was precisely the sort of danger that *Mohawk* warned against. Accordingly, this Court should find that it lacks jurisdiction at this time to consider Epstein's interlocutory appeal of the District Court's discovery order regarding the correspondence.

CONCLUSION

For all these reasons, this Court should find that it lack jurisdiction over this appeal. If this Court reaches the merits of the appeal, it should affirm the decision of the District Court.

DATED: August 30, 2013

Respectfully Submitted,

Paul G. Cassell
S.J. Quinney College of Law at the
University of Utah
332 S. 1400 E.
Salt Lake City, UT 84112
Telephone: 801-585-5202
Facsimile: 801-585-6833
E-Mail: cassellp@law.utah.edu

and

Bradley J. Edwards
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS & LEHRMAN,
P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
Telephone (954) 524-2820
Facsimile (954) 524-2822
Florida Bar No.: 542075
E-mail: brad@pathtojustice.com

Attorneys for Appellees Jane Doe No. 1 and Jane Doe No. 2

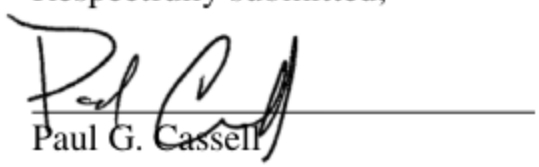
CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 typeface using Microsoft Word 2010 in 14 pt Time New Roman type.

Respectfully submitted,



Paul G. Cassell

CERTIFICATE OF SERVICE

The foregoing document was served on August 30, 2013, on the following using the Court's CM/ECF system:

Dexter Lee
A. Marie Villafaña
Assistant U.S. Attorneys
500 S. Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711 Fax: (561) 820-8777
E-mail: Dexter.Lee@usdoj.gov
E-mail: ann.marie.c.villafana@usdoj.gov
Attorneys for the Government

Roy Black, Esq.
Jackie Perczek, Esq.
Black, Srebnick, Kornspan & Stumpf, P.A.
201 South Biscayne Boulevard
Suite 1300
Miami, FL 33131
E-mail: rblack@royblack.com
E-mail: jperczek@royblack.com
(305) 37106421
(305) 358-2006

Martin G. Weinberg
Martin G. Weinberg, PC
20 PARK PLZ STE 1000
Boston, MA 02116-4301
Email: owlmgw@att.net
(617) 227-3700

EXHIBIT A

IN RE:
INVESTIGATION OF
JEFFREY EPSTEIN
_____/

NON-PROSECUTION AGREEMENT

IT APPEARING that the City of Palm Beach Police Department and the State Attorney's Office for the 15th Judicial Circuit in and for Palm Beach County (hereinafter, the "State Attorney's Office") have conducted an investigation into the conduct of Jeffrey Epstein (hereinafter "Epstein");

IT APPEARING that the State Attorney's Office has charged Epstein by indictment with solicitation of prostitution, in violation of Florida Statutes Section 796.07;

IT APPEARING that the United States Attorney's Office and the Federal Bureau of Investigation have conducted their own investigation into Epstein's background and any offenses that may have been committed by Epstein against the United States from in or around 2001 through in or around September 2007, including:

(1) knowingly and willfully conspiring with others known and unknown to commit an offense against the United States, that is, to use a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females to engage in prostitution, in violation of Title 18, United States Code, Section 2422(b); all in violation of Title 18, United States Code, Section 371;

(2) knowingly and willfully conspiring with others known and unknown to travel in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with minor females, in violation of Title 18, United States Code, Section 2423(b); all in violation of Title 18, United States Code, Section 2423(e);

(3) using a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2;

(4) traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with minor females; in violation

of Title 18, United States Code, Section 2423(b); and

(5) knowingly, in and affecting interstate and foreign commerce, recruiting, enticing, and obtaining by any means a person, knowing that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act as defined in 18 U.S.C. § 1591(c)(1); in violation of Title 18, United States Code, Sections 1591(a)(1) and 2; and

IT APPEARING that Epstein seeks to resolve globally his state and federal criminal liability and Epstein understands and acknowledges that, in exchange for the benefits provided by this agreement, he agrees to comply with its terms, including undertaking certain actions with the State Attorney's Office;

IT APPEARING, after an investigation of the offenses and Epstein's background by both State and Federal law enforcement agencies, and after due consultation with the State Attorney's Office, that the interests of the United States, the State of Florida, and the Defendant will be served by the following procedure;

THEREFORE, on the authority of R. Alexander Acosta, United States Attorney for the Southern District of Florida, prosecution in this District for these offenses shall be deferred in favor of prosecution by the State of Florida, provided that Epstein abides by the following conditions and the requirements of this Agreement set forth below.

If the United States Attorney should determine, based on reliable evidence, that, during the period of the Agreement, Epstein willfully violated any of the conditions of this Agreement, then the United States Attorney may, within ninety (90) days following the expiration of the term of home confinement discussed below, provide Epstein with timely notice specifying the condition(s) of the Agreement that he has violated, and shall initiate its prosecution on any offense within sixty (60) days' of giving notice of the violation. Any notice provided to Epstein pursuant to this paragraph shall be provided within 60 days of the United States learning of facts which may provide a basis for a determination of a breach of the Agreement.

After timely fulfilling all the terms and conditions of the Agreement, no prosecution for the offenses set out on pages 1 and 2 of this Agreement, nor any other offenses that have been the subject of the joint investigation by the Federal Bureau of Investigation and the United States Attorney's Office, nor any offenses that arose from the Federal Grand Jury investigation will be instituted in this District, and the charges against Epstein if any, will be dismissed.

Terms of the Agreement:

1. Epstein shall plead guilty (not nolo contendere) to the Indictment as currently pending against him in the 15th Judicial Circuit in and for Palm Beach County (Case No. 2006-cf-009495AXXXMB) charging one (1) count of solicitation of prostitution, in violation of Fl. Stat. § 796.07. In addition, Epstein shall plead guilty to an Information filed by the State Attorney's Office charging Epstein with an offense that requires him to register as a sex offender, that is, the solicitation of minors to engage in prostitution, in violation of Florida Statutes Section 796.03;

2. Epstein shall make a binding recommendation that the Court impose a thirty (30) month sentence to be divided as follows:

   (a) Epstein shall be sentenced to consecutive terms of twelve (12) months and six (6) months in county jail for all charges, without any opportunity for withholding adjudication or sentencing, and without probation or community control in lieu of imprisonment; and

   (b) Epstein shall be sentenced to a term of twelve (12) months of community control consecutive to his two terms in county jail as described in Term 2(a), *supra*.

3. This agreement is contingent upon a Judge of the 15th Judicial Circuit accepting and executing the sentence agreed upon between the State Attorney's Office and Epstein, the details of which are set forth in this agreement.

4. The terms contained in paragraphs 1 and 2, *supra*, do not foreclose Epstein and the State Attorney's Office from agreeing to recommend any additional charge(s) or any additional term(s) of probation and/or incarceration.

5. Epstein shall waive all challenges to the Information filed by the State Attorney's Office and shall waive the right to appeal his conviction and sentence, except a sentence that exceeds what is set forth in paragraph (2), *supra*.

6. Epstein shall provide to the U.S. Attorney's Office copies of all

proposed agreements with the State Attorney's Office prior to entering into those agreements.

7. The United States shall provide Epstein's attorneys with a list of individuals whom it has identified as victims, as defined in 18 U.S.C. § 2255, after Epstein has signed this agreement and been sentenced. Upon the execution of this agreement, the United States, in consultation with and subject to the good faith approval of Epstein's counsel, shall select an attorney representative for these persons, who shall be paid for by Epstein. Epstein's counsel may contact the identified individuals through that representative.

8. If any of the individuals referred to in paragraph (7), *supra*, elects to file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the United States District Court for the Southern District of Florida over his person and/or the subject matter, and Epstein waives his right to contest liability and also waives his right to contest damages up to an amount as agreed to between the identified individual and Epstein, so long as the identified individual elects to proceed exclusively under 18 U.S.C. § 2255, and agrees to waive any other claim for damages, whether pursuant to state, federal, or common law. Notwithstanding this waiver, as to those individuals whose names appear on the list provided by the United States, Epstein's signature on this agreement, his waivers and failures to contest liability and such damages in any suit are not to be construed as an admission of any criminal or civil liability.

9. Epstein's signature on this agreement also is not to be construed as an admission of civil or criminal liability or a waiver of any jurisdictional or other defense as to any person whose name does not appear on the list provided by the United States.

10. Except as to those individuals who elect to proceed exclusively under 18 U.S.C. § 2255, as set forth in paragraph (8), *supra*, neither Epstein's signature on this agreement, nor its terms, nor any resulting waivers or settlements by Epstein are to be construed as admissions or evidence of civil or criminal liability or a waiver of any jurisdictional or other defense as to any person, whether or not her name appears on the list provided by the United States.

11. Epstein shall use his best efforts to enter his guilty plea and be

sentenced not later than October 26, 2007. The United States has no objection to Epstein self-reporting to begin serving his sentence not later than January 4, 2008.

12. Epstein agrees that he will not be afforded any benefits with respect to gain time, other than the rights, opportunities, and benefits as any other inmate, including but not limited to, eligibility for gain time credit based on standard rules and regulations that apply in the State of Florida. At the United States' request, Epstein agrees to provide an accounting of the gain time he earned during his period of incarceration.

13. The parties anticipate that this agreement will not be made part of any public record. If the United States receives a Freedom of Information Act request or any compulsory process commanding the disclosure of the agreement, it will provide notice to Epstein before making that disclosure.

Epstein understands that the United States Attorney has no authority to require the State Attorney's Office to abide by any terms of this agreement. Epstein understands that it is his obligation to undertake discussions with the State Attorney's Office and to use his best efforts to ensure compliance with these procedures, which compliance will be necessary to satisfy the United States' interest. Epstein also understands that it is his obligation to use his best efforts to convince the Judge of the 15th Judicial Circuit to accept Epstein's binding recommendation regarding the sentence to be imposed, and understands that the failure to do so will be a breach of the agreement.

In consideration of Epstein's agreement to plead guilty and to provide compensation in the manner described above, if Epstein successfully fulfills all of the terms and conditions of this agreement, the United States also agrees that it will not institute any criminal charges [redacted]tential co-conspirat[redacted]ing but not limited to [redacted], Lesley Groff, or [redacted]. Further, upon execution of this agreement and a plea agreement with the State Attorney's Office, the federal Grand Jury investigation will be suspended, and all pending federal Grand Jury subpoenas will be held in abeyance unless and until the defendant violates any term of this agreement. The defendant likewise agrees to withdraw his pending motion to intervene and to quash certain grand jury subpoenas. Both parties agree to maintain their evidence, specifically evidence requested by or directly related to the grand jury subpoenas that have been issued, and including certain computer equipment, inviolate until all of the terms of this agreement have been satisfied. Upon the successful completion of the terms of this agreement, all outstanding grand jury subpoenas shall be deemed withdrawn.

By signing this agreement, Epstein asserts and certifies that each of these terms is material to this agreement and is supported by independent consideration and that a breach of any one of these conditions allows the United States to elect to terminate the agreement and to investigate and prosecute Epstein and any other individual or entity for any and all federal offenses.

By signing this agreement, Epstein asserts and certifies that he is aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. Epstein further is aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information, or in bringing a defendant to trial. Epstein hereby requests that the United States Attorney for the Southern District of Florida defer such prosecution. Epstein agrees and consents that any delay from the date of this Agreement to the date of initiation of prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at his own request, and he hereby waives any defense to such prosecution on the ground that such delay operated to deny him rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of months equal to the period between the signing of this agreement and the breach of this agreement as to those offenses that were the subject of the grand jury's investigation. Epstein further asserts and certifies that he understands that the Fifth Amendment and Rule 7(a) of the Federal Rules of Criminal Procedure provide that all felonies must be charged in an indictment presented to a grand jury. Epstein hereby agrees and consents that, if a prosecution against him is instituted for any offense that was the subject of the grand jury's investigation, it may be by way of an Information signed and filed by the United States Attorney, and hereby waives his right to be indicted by a grand jury as to any such offense.

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By signing this agreement, Epstein asserts and certifies that the above has been read and explained to him. Epstein hereby states that he understands the conditions of this Non-Prosecution Agreement and agrees to comply with them.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Dated: _____

By: _____
A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

Dated: 8/24/07

_____
JEFFREY EPSTEIN

Dated: _____

_____
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: _____

_____
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

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UNITED STATES ATTORNEY

Dated: _____

By: _____
A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

Dated: _____

_____
JEFFREY EPSTEIN

Dated: 9/24/07

_____
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: _____

_____
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN

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A. MARIE VILLAFAÑA
ASSISTANT U.S. ATTORNEY

Dated: _____
JEFFREY EPSTEIN

Dated: _____
GERALD LEFCOURT, ESQ.
COUNSEL TO JEFFREY EPSTEIN

Dated: 9-24-07
LILLY ANN SANCHEZ, ESQ.
ATTORNEY FOR JEFFREY EPSTEIN