No. 13-12923

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOE NO. 2,

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ROY BLACK ET AL.,

Intervenors-Appellants

MOTION TO DISMISS NON-PARTY INTERLOCUTORY APPEAL

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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.

/s/ Paul G. Cassell

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Paul G. Cassell, Esq.
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MOTION TO DISMISS NON-PARTY INTERLOCUTORY APPEAL

INTRODUCTION

This interlocutory appeal arises from a petition filed in the district court by two acknowledged crime victims, Jane Doe No. 1 and Jane Doe No. 2 (hereinafter sometimes referred to as "the victims"), to enforce their rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The U.S. Attorney's Office for the Southern District of Florida investigated Jeffrey Epstein's sexual abuse of the victims and notified them that they were protected "victims" under the CVRA. The Office, however, ultimately reached a plea deal with Epstein. Under the deal, the Office allowed Epstein to plead guilty to two minor state charges (not involving the victims), in exchange for which the Office entered into a non-prosecution agreement (NPA) with Epstein agreeing not to file any federal charges.

The victims were never notified of this agreement until after it was concluded and, indeed, the U.S. Attorney's Office and Epstein's attorneys worked together to keep its existence secret from the victims. After the agreement was consummated, Jane Doe No. 1 and Jane Doe No. 2 filed a petition under the CVRA alleging that the U.S. Attorney's Office had violated their CVRA rights and seeking appropriate remedies, including vacating the NPA.

The District Court handling the case (Marra, J.) has found that ruling on the victims' petition requires an appropriate factual record. He accordingly has ordered the U.S. Attorney's Office to provide to the victims certain correspondence between the Office and Epstein's lawyers regarding the plea bargain. Epstein and his attorneys (hereinafter collectively referred to as "Epstein") intervened to challenge the release of that correspondence, and the district court rejected their arguments against release.

Epstein has now filed this interlocutory appeal, seeking reversal of the District Court's discovery order providing the correspondence to the victims. This Court should dismiss Epstein's interlocutory appeal because jurisdiction does not exist to hear the appeal challenging the discovery ruling at this time. Under the Supreme Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), it is clear that someone (like Epstein) who is litigating in a case cannot take an immediate, interlocutory appeal of an alleged privilege issue, but must instead wait to the conclusion of the case to (if necessary) seek appellate review. In light of *Mohawk*'s clear holding on this point, Epstein's effort to rely on *Perlman v. United States,* 247 U.S. 7 (1918), to seek interlocutory review is unavailing.

Epstein has also failed to provide any evidentiary support for the conclusion that he will be injured if the correspondence is released to the victims.

For both of these reasons, the Court should accordingly dismiss Epstein's appeal for lack of jurisdiction.

FACTUAL BACKGROUND

In the district court, the victims have alleged the following facts, which the district court properly assumed to be true in ruling on Epstein's pre-trial motion.[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 petitioners, Jane Doe No. 1 and Jane Doe No.2.

Extensive plea discussions then ensued between the U.S. Attorney's Office 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 with Epstein, in which it agreed not to file any federal charges against Epstein in exchange for Epstein pleading guilty

[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, and related orders.

to two minor state offenses.[2] The Office entered into this Agreement 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. The post-agreement deception includes a May 30, 2008, letter from the U.S. Attorney's Office to a recognized victim 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." 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 the victims' views 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.

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-

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

existing agreement with the federal authorities.

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. Epstein pled guilty to the state law charges.

Procedure History Surrounding the Victims' CVRA Petition

On July 7, 2008, Jane Doe No. 1 filed an "emergency" petition under the CVRA, 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. Claiming to be 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)). She also sought appropriate relief for any violations.

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 notice and conferral requirements in its dealings with Jane Doe No. 1.

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

Over the following months, the victims attempted (unsuccessfully) to negotiate an agreed statement of facts with the Government. 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 by his attorneys 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 have their facts accepted because of the Government's failure to contest their facts. DE 49. 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, Epstein's criminal defense attorneys – appellants Roy Black, Martin Weinberg, and Jay Lefkowitz – 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. They sought leave to file pleadings objecting to release of the correspondence. DE 56. Jeffrey Epstein also later filed his own motion to intervene to object to release of the correspondence. DE 93. Subsequently, Epstein and his attorneys filed a motion for a 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.

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. Based on the Government's agreement that it was empowered to do so, the court also authorized the victims to conduct limited discovery in the form of requests

for production of documents and requests for admissions directed to the U.S. Attorney's Office, with leave for either party to request additional discovery as appropriate. DE 99 at 11. The victims therefore requested discovery from the Government, including correspondence between the Government and Epstein's attorney 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 pending resolution of that motion (DE 121, 123). In its motion to dismiss, the government contended that the victims lacked standing to seek redress for the violations of the CVRA. 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 objections raised remained to be determined.

After additional pleadings and motions, 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 to bar disclosure of the correspondence had previously been rejected in one of the victims' parallel federal civil lawsuits. The District Court then rejected Epstein's

argument that the correspondence was protected under Fed. R. Evid. 410, because that Rule by its on 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 entered on order lifting its previous stay of discovery, and ordering 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 to that request (DE 198).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO ENTERTAIN EPSTEIN'S INTERLOCUTORY APPEAL OF THE DISTRICT COURT'S DISCOVERY ORDER DIRECTED TO THE GOVERNMENT.

This Court lacks jurisdiction over Epstein's interlocutory appeal of a district court discovery order directed to the Government. Epstein apparently relies on 28 U.S.C. § 1291 for jurisdiction.[3] Instead, in his pleadings below, Epstein claimed

[3] Epstein has not obtained any district court certification permitting an interlocutory appeal under 28 U.S.C. § 1292(b), which gives district courts discretion to authorize interlocutory appeals in civil cases where "an immediate appeal from the order may materially advance the ultimate termination of the

that he is entitled to an interlocutory appeal under *Perlman v. United States,* 247 U.S. 7 (1918). Epstein argues that "questions of privilege and confidentiality asserted by non-parties to the litigation are paradigmatic examples of circumstances in which interlocutory appeals are allowed." DE 193 at 2.

Epstein (and his battery of lawyers), however, have conspicuously ignored a recent controlling decision from the Supreme Court, which makes clear that an interlocutory appeal is not permitted to challenge privilege issues.

A. The Supreme Court's Recent Decision in *Mohawk* Makes Clear that Privilege Rulings During Discovery are Not Immediately Appealable But Instead Must be Challenged (If Necessary) at the Conclusion of a Case.

Contrary to Epstein's claim below that a denial of an assertion of privilege can be immediately appealed, the Supreme Court has recently concluded otherwise. In *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), the Supreme Court affirmed this Circuit and rejected an effort by a defendant to take an interlocutory appeal of a district court decision denying an attorney-client

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litigation." Presumably the reasons that Epstein does not rely on this provision is that he does not want the expansive discovery that would follow from characterizing this cases as a "civil" case, as well as the insurmountable problem of demonstrating that his time-wasting, interlocutory appeal would somehow advance the ultimate termination of the litigation.

The case below has been opened as a civil case. In their response to this motion, Epstein and the Government should be required to state clearly whether they believe the civil rules or the criminal rules apply to this case and to this appeal.

privilege claim. *Mohawk* explained that "[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Id.* at 605 (internal quotations omitted). *Mohawk* noted that "most discovery rulings are not final" and thus not appealable. *Id.* at 606. *Mohawk* 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.

Mohawk specifically held attorney-client privilege issues to be no different than other discovery rulings: "In our estimation, post-judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." *Id.* Rather than follow this recent, controlling decision, Epstein's relies on *Perlman v. United States*, 247 U.S. 7 (1918), as grounds for an interlocutory appeal. Of course, appellate court jurisdiction is typically confined to "final" judgments of the district court. 28 U.S.C. § 1291. *Perlman* recognized a narrow exception to the final judgment rule in situations where a district court has denied a motion to quash a grand jury subpoena directed at a disinterested third party, non-litigant, leaving the privilege holder powerless to remedy harm from disclosure. [4]

[4] Not only is the exception narrow, but it has also been regarded as "Delphic" by no less an authority than Judge Friendly. *See In re Sealed Case*, ---F.3d---, 2013 WL 2120157, at *5 (D.C. Cir. 2013) (refusing to read *Perlman* expansively, *citing*

Perlman's reasoning, however, directly conflicts with *Mohawk*. As the Seventh Circuit has recently explained, "*Mohawk* . . . calls *Perlman* and its successors into question, because, whether the order is directed against a litigant or a third party, an appeal from the final decision will allow review of the district court's ruling." *Wilson v. O'Brien*, 621 F.3d 641, 643 (7th Cir. 2010); *accord Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236-40 (6th Cir. 2011) ("[T]he *Mohawk* decision has altered the legal landscape related to collateral appeals of discovery orders adverse to the attorney-client privilege and narrowed the category of cases that qualify for interlocutory review."). Under these recent court of appeals authorities from other circuits,[5] "Only when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate." *Wilson,* 621 F.3d at 643; *Holt-Orstead*, 641 F.3d at 240.

In light of these latest decisions, Epstein cannot avail himself of an interlocutory appeal if he is a litigant in the case. If he is a litigant, then he can simply wait (like every other litigant) to challenge an erroneous privilege order (or any other order for that matter) on appeal from any adverse judgment against him. By previously filing a motion for limited intervention in this case (which the District Court granted, *see* DE 159 and DE 160), Epstein is now a litigant in this

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Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 591 F.2d 174, 178 (2d Cir.1979) (Friendly, J.)).

[5] This Court has not discussed *Perlman* recently.

case. Indeed, Epstein has announced that he will seek to intervene further in this case should any effort be made by the victims to seek a remedy that would harm him. *See, e.g.,* DE 108 at 13 n.3 (claiming that Epstein has an "interest" in the non-prosecution agreement and that his interests would later become "ripe" if the District Court were to consider invalidating that agreement). Of course, this point only underscores the fact that harm to Epstein may never occur, as it is uncertain at this point in the litigation whether the district court will determine to invalidate the agreement. Avoiding unnecessary appellate court review of an issue that may never become ripe is one of "the usual benefits of deferring appeal until litigation concludes." *Mohawk*, 130 S. Ct. at 605 . As a result of his current posture in this case, Epstein can (if allowed to intervene later) appeal any adverse privilege ruling that ends up harming him at the conclusion of this case. Accordingly, under *Mohawk*, this Court lacks jurisdiction to hear any interlocutory appeal from Epstein now.

B. The District Court's Discovery Order is Not Immediately Appealable Under *Perlman*.

In addition to limits that *Mohawk* places on the *Perlman* doctrine, the doctrine itself does not allow Epstein to take an immediate, interlocutory appeal for multiple reasons.

1. Epstein is Not a Privilege Holder and Thus is Not Covered by *Perlman*.

The first hurdle that Epstein cannot clear is the fact that the *Perlman* doctrine applies to claims of privilege, not other ancillary discovery or evidentiary claims. *See, e.g., In re Grand Jury Proceedings*, 142 F.3d 1416, 1419 (11th Cir. 1998) (applying *Perlman* in context of attorney-client privilege claim). Epstein is not seeking to take an interlocutory appeal of what is truly a *privilege* issue. Instead, he first purports to appeal an issue regarding the applicability of Rule 410 of the Federal Rules of Evidence, which makes some plea discussions "not admissible" in certain situations. *See* Fed. R. Evid. 410 ("In a civil or criminal case, evidence of the following is not *admissible* . . . ."). Thus, Rule 410 does not purport to protect certain plea discussions from *disclosure*; it only protects against their introduction into *evidence*. By taking appeal of an issue regarding the rules governing the admissibility of evidence, Epstein obviously falls outside the parameters of the *Perlman* doctrine. *See, e.g., United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1207 (10th Cir. 2013) (discussing how *Perlman* doctrine applies only to situations "where a third party has a justiciable interest in preventing a third party's *disclosure* of documents").

Epstein also purports to appeal an issue of whether the District Court erred in failing to invent a brand new privilege for communications in the course of plea negotiations. But here again, such a speculative claim falls outside the reach of the *Perlman* doctrine. *Perlman* applies to someone who *holds* a privilege, not someone

who is arguing for a new privilege. *See In re Sealed Case*, ---F.3d---, 2013 WL 2120157 at *5 (D.C. Cir. 2013) ("Typically, *Perlman* permits a *privilege-holder* to appeal a disclosure order directed at a disinterested third party . . . .") (emphasis added)). We are aware of no case (and Epstein cited none below) in which an interlocutory appeal was allowed under *Perlman* by a party who wants to *create* a new privilege, rather than defend an existing one.

In sum, Epstein seeks to take an interlocutory appeal of an evidentiary issue and a privilege-creation issue, neither of which fall within the narrow *Perlman* doctrine.

2. Epstein Is Not Challenging a Grand Jury Subpoena and Therefore Perlman is Inapplicable.

A case brought by crime victims to enforce their rights under the CVRA is not subject to the *Perlman* doctrine. *Perlman* applies in situations involving grand jury subpoenas. For example, the five cases from this Circuit discussing *Perlman* appeals over the last fifty years have all involved grand jury subpoenas. *In re Grand Jury Subpoenas*, 142 F.3d 1416 (11th Cir. 1998); *In re Federal Grand Jury Proceedings (FGJ 91-9), Cohen*, 975 F.2d 1488 (11th Cir. 1992); *In re Grand Jury Proceedings*, 832 F.2d 554 (11th Cir. 1987); *In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199 (11th Cir. 1981); *In re Grand Jury Proceedings*, 528 F.2d 983 (11th Cir. 1976). This Circuit is not unusual in this regard. As the Tenth Circuit explained a few weeks ago: "We are aware of no case . . . that extends

Perlman beyond criminal grand jury proceedings. *We decline to do so here.*" *United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1207 (10th Cir. May 2013) (internal quotation omitted) (emphasis in original). This Court should not extend *Perlman* doctrine into the new context of crime victims' rights cases.

3. Because the Plea Bargain Correspondence Held by the Government, a Party in this Case, Perlman Is Inapplicable.

Yet another reason Epstein cannot take an interlocutory appeal is that this is not a situation where a disinterested third party has the correspondence in question. Instead, the correspondence is held by a party to this action: the Government.

It is generally agreed that the *Perlman* rule "applies only when the privilege holder is powerless to avert the mischief of a district court's discovery order because the materials in question are held by a *disinterested* third party." *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 239 (6th Cir. 2011) (internal quotations omitted) (emphasis added). That is not the case here. The Government is not a disinterested "third party" to this lawsuit: To the contrary, it is a party which is actively litigating in opposition to the victims' claims. Accordingly, should any improper use be made of correspondence between it and Epstein, then the Government will no doubt point that out to the district court or seek further appellate review at the end of this case.

Indeed, under Epstein's theory, the Government is apparently a co-holder of the privilege in question. Epstein has asked this Court to invent a new privilege

for "plea negotiations" (DE 193 at 10), which presumably would extend not just to defense counsel but also to prosecutors. As a result, the Government is not "disinterested" in the asserted privilege, but in fact would possess the privilege if Epstein's theory were to be recognized.[6] *Perlman* is inapplicable for this reason as well.

II. EPSTEIN HAS NOT PROVEN ANY INJURY WHICH WOULD WARRANT THIS COURT'S EXERCISE OF APPELLATE JURISDICTION.

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. He has accordingly failed to provide any evidence of an "injury" that would warrant appellate jurisdiction. His appeal must accordingly be dismissed for lack of subject matter jurisdiction. *See, e.g., Florida Wildlife Federation, Inc. v. South Florida Water Management Dist.*, 647 F.3d

[6] It is instructive to note that, even though the correspondence at issue is between Epstein's attorneys and the Government's attorneys, the Government cannot now take an interlocutory appeal from the Court's order releasing the correspondence. *See* 18 U.S.C 3731 (limiting interlocutory appeals by the Government in criminal cases to orders suppressing evidence). It would be anomalous to allow an interlocutory appeal by Epstein regarding his correspondence with the Government where the Government would be barred from taking an appeal regarding its correspondence with Epstein.

1296, 1302 (11th Cir. 2011) (court has jurisdiction to hear a suit only where evidence establishes that a claimant " has suffered an 'injury in fact' that is . . . concrete and particularized . . . .") (internal quotation omitted).

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) ("Given the availability of affidavits and the [applicable Privilege] Index, combined with the in camera viewing, the district court had 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). 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 to avoid placing in the record the understanding of his attorneys and him about whether the prosecutors were statutorily obligated to communicate with the victims. 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. 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 from which this Court could find that he will be injured if the correspondence is provided to the victims. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting privilege holder not "excused from meeting their burden of proving the communication confidential and within the attorney-client privilege"). His appeal must accordingly be dismissed for lack of subject matter jurisdiction.[7]

CONCLUSION

For all the foregoing reasons, the Court should dismiss Epstein's interlocutory appeal for lack of jurisdiction.

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[7] Because of Epstein's failure to even establish an injury from release of the correspondence, he also has obviously failed to establish any "irreparable injury," the requirement for obtaining a stay of district court proceedings concerning the materials.

DATED: July 2, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on July 2, 2013, on the following using the Court's CM/ECF system:

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