UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CIV-80119-MARRA-JOHNSON

JANE DOE NO. 2,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.
_____/

DEFENDANT EPSTEIN'S MOTION FOR SUMMARY JUDGMENT, INCLUDING SUPPORTING MEMORANDUM OF LAW

Defendant, JEFFREY EPSTEIN, ("EPSTEIN"), by and through his undersigned counsel, seeks summary judgment determining that under the undisputed material facts, (1) the version of 18 U.S.C. §2255, effective 1999 to Jul. 26, 2006, the period of time during which EPSTEIN's alleged conduct occurred, applies to Plaintiff JANE DOE NO. 2's claim brought pursuant to §2255 in Count III of the Second Amended Complaint [D.E. 56]; (2) Plaintiff has failed to and cannot establish a predicate act – under 18 U.S.C. §2422 as plead in her complaint, in order to state a cause of action pursuant to 18 U.S.C. §2255 (2005); and (3) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit. Rule 56, Fed.R.Civ.P. (2010); Local Gen. Rules 7.1, and 7.5 (S.D. Fla. 2010). In support of his motion, Defendant states:

Introduction

Defendant, without waiving any affirmative defense or grounds which may entitle him to summary judgment in this action or in any other actions brought by other plaintiffs

in multiple civil actions asserting §2255 and other claims against EPSTEIN, seeks summary judgment regarding the proper application of 18 U.S.C. §2255. Based on the undisputed material facts and applicable law relevant to the summary judgment sought, Defendant is entitled as a matter of law to the entry of summary judgment determining that (1) the version of 18 U.S.C. §2255, effective 1999 to Jul. 26, 2006, the period of time during which EPSTEIN's alleged conduct occurred, applies to Plaintiff's claim brought pursuant to §2255; (2) Plaintiff has not and cannot establish the requisite elements to state a claim under 18 U.S.C. §2255, which she attempts to assert in Count III of her Second Amended Complaint [D.E. 56]. In particular, the undisputed material facts show that Plaintiff has failed to and cannot establish a predicate act – under 18 U.S.C. §2422 as plead in her complaint, in order to state a cause of action pursuant to 18 U.S.C. §2255 (2005); and (3) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit. The pleadings and the discovery materials on file show that there is no genuine issue as to any material fact establishing that EPSTEIN is entitled as a matter of law to the summary judgments sought.

Statement of Material Facts in Support of Summary Judgment, Loc.Gen.Rule 7.5
Statement of the Case

1. Plaintiff JANE DOE NO. 2's Second Amended Complaint **[D.E. 56]**, dated February 27, 2009, attempts to assert three causes of action. Count I and Count II, respectively, attempt to allege state law claims under Florida law for "Sexual Assault and Battery," and "Intentional Infliction of Emotional Distress." Count III, which is the subject of this motion, is entitled "Coercion and Enticement to Sexual Activity in

Violation of 18 U.S.C. §2422," and attempts to assert a claim pursuant to 18 U.S.C. §2255. (Plaintiff JANE DOE NO. 2 shall be referred to as "JD2" or "Jane" or "Jane Doe." Plaintiff's Second Amended Complaint shall be referred to as "2d Am Comp," and is attached hereto as **Exhibit A**.).

2. According to the allegations - "**In or about 2004-2005**, Jane Doe, then approximately 16 years old, fell into Epstein's trap and became one of his victims." [2d Am Comp, ¶8]. Plaintiff further alleges that –

> …, Jane Doe was recruited to give Epstein a massage for monetary compensation. Jane was brought to Epstein's mansion in Palm Beach. Once at the mansion, Jane was introduced to Sarah Kellen, who led her up a flight of stairs to the room with the massage table. In this room, Epstein told Jane to take off her clothes and give him a massage. Jane kept her panties and bra on and complied with Epstein's instructions. Epstein wore only a towel around his waist. After a short period of time, Epstein removed the towel and rolled over exposing his penis. Epstein began to masturbate and he sexually assaulted Jane. [2d Am Comp, ¶12].
>
> After Epstein had completed the assault, Jane was then able to get dressed, leave the room and go back down the stairs. Jane was paid $200 by Epstein. The young girl who recruited Jane was paid $100 by Epstein for bringing Jane to him. [2d Am Comp, ¶13].

3. Material to this motion, in attempting to assert a claim in Count III pursuant to 18 U.S.C. §2255, Plaintiff alleges in material part that –

> 29. Epstein used a facility or means of interstate commerce to knowingly persuade, induce or entice Jane Doe, when she was under the age of 18 years, to engage in prostitution or sexual activity for which any person can be charged with a criminal offense.
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> 30. On June 30, 2008, Epstein entered a plea of guilty to violations of Florida §§796.07 and 796.03, in the 15th Judicial Circuit in and for Palm Beach County (Case Nos. …), for conduct involving the same plan or scheme as alleged herein.
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> 31. As to Plaintiff Jane Doe, Epstein could have been charged with criminal violations of Florida Statute §796.07(2)(including

subsections (c), (d), (e), (f), (g), and (h) thereof), and other criminal offenses including violations of Florida Statutes §§798.02 and 800.04 (including subsections (5), (6) and (7) thereof).

32. Epstein's acts and conduct are in violation of 18 U.S.C. §2422.

33. As a result of Epstein's violation of 18 U.S.C. §2422, Plaintiff has suffered personal injury, including mental, psychological and emotional damages.

4. In the "WHEREFORE" clause of Count III, Plaintiff "demands judgment against Jeffery Epstein for all damages available under 18 U.S.C. §2255(a), … ." See 2d Am Comp, Count III, **Exhibit A** hereto.

5. In trying to assert a violation of the federal criminal statute 18 U.S.C. 2422 as the requisite predicate act for a claim pursuant to 18 U.S.C. §2255(a)[1], Plaintiff generally tracks the language of subsection (b) of 18 U.S.C. 2422 (2004, 2005), which states in relevant part –

> **(b)** Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.
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> (The amended version of §2422 increases the term of imprisonment.)

(**See endnote 1 hereto for full text of 18 U.S.C. §2255**, the version that applied in 2004 and 2005, and the amended version effective July 27, 2006.)

6. Epstein never, using a facility or means of interstate commerce, knowingly persuaded, induced or enticed JD2, when she was under the age of 18 years, to engage in prostitution or sexual activity for which any person can be charged with a criminal offense, or attempted to do so. Deposition Testimony of JD2, taken March 3, 2010, pp.

212-14. A copy of the referenced pages is attached hereto as **Exhibit B**. **See endnote 2 for full text of 18 U.S.C. §2422.**[2]

7. JD had only one encounter with EPSTEIN in December of 2004 at his house in Palm Beach, Florida. (JD2 Deposition, p. 40, lines 18-25; p. 41, lines 1-9). According to JD2's complaint allegations and testimony, she was brought by another minor girl (Jane Doe No. 3) to EPSTEIN's Palm Beach home the one time in December of 2004. Jane Doe No. 3 picked up JD2 in her car and brought JD2 home afterward. (2d Am Comp, ¶¶10, 12-13; JD2 Deposition, 44-46). Jane Doe 3 was not a close personal friend of JD2; she was just someone JD2 went to school with. (Deposition, p. 37, lines 13-23). Jane Doe No. 3 passed a note JD2 while in high school class together, and Jane Doe No. 3 "wrote to me in class about what she, how she wanted me to go and give just old guys a massage and you get like $200. … ." "…it's in a place where there's a bunch of old guys and there's young girls. You don't need experience, and you just give them a massage and they pay good money just to have you massage them." (JD2 Deposition, p. 64, lines 5-25; p. 65, lines 1-16).

8. JD2 never had any communications with EPSTEIN via the telephone, cell-phone, computer, e-mails, or texting. (JD2 Deposition, p. 212-13). There is no testimony or complaint allegations that JD2 ever travelled anywhere with EPSTEIN.

9. JD2 was 22 years old at the time of her deposition taken on March 3, 2010. (JD2 Deposition, p. 31, lines 22-23). The original Complaint in this matter was filed on February 6, 2008. Thus, JD2 was 20 years old (or at the very least 19) at the time this suit was filed.

10. Interestingly, JD3 (who went to JE's home four times; was with JE only one time, but took JD2 and J.L., and drove JD4 one time) herself asserts in her testimony that despite her purportedly shocking experience with EPSTEIN that one occasion, she was willing to expose her friend, JD2, to this same "shocking, disturbing experience" she had had. (JD3 Deposition, p. 175).

Summary Judgment Standard

Summary judgment is proper under Rule 56(c)(2), Fed.R.Civ.P, when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Pursuant to Rule 56(b), "a party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim."

As stated by the Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552 (1986)

> ... summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Discussion of Law as Applied to Undisputed Material Facts Showing that EPSTEIN Is Entitled to Summary Judgment as a Matter of Law.

I. The version of 18 U.S.C. §2255 in effect at the time the purported conduct took place applies to the Plaintiff's §2255 claim against EPSTEIN, not the version as amended and effective July 27, 2006.

The applicable version of 18 U.S.C. §2255 provides –

PART I--CRIMES
CHAPTER 110--SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN
§ 2255. Civil remedy for personal injuries

> **(a) Any minor who is a victim of a violation of section** 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, **2422**, or 2423 **of this title and who suffers personal injury as a result of such violation** may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value.

(See endnote 1 for complete statutory text, pre and post amendment.)

By its own terms, 18 U.S.C. 2255(a) creates a cause of action for "a minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation … ." See generally, Smith v. Husband, 428 F.Supp.2d 432 (E.D. Va. 2006); Smith v. Husband, 376 F.Supp.2d 603 (E.D. Va. 2006); Doe v. Liberatore, 478 F.Supp.2d 742, 754 (M.D. Pa. 2007). The referenced statutes are all federal criminal statues contained in Title 18 of the United States Code. Thus, in order to sustain a cause of action under §2255, a plaintiff is required to prove all the elements of one of the statutory enumerated criminal predicate acts. See Gray v. Darby, 2009 WL 805435 (E.D. Pa. Mar. 25, 2005), requiring evidence to establish predicate act under 18 U.S.C. §2255 to state cause of action.

I. A. The statute in effect during the time the alleged conduct occurred applies to each of the Plaintiff's claim brought pursuant to 18 U.S.C. §2255 – not the amended

version which became effective on July 27, 2006. See endnote 1 for complete statutory text in effect prior to July 27, 2006 and as amended.

Plaintiff in her complaint asserts that the alleged conduct by EPSTEIN occurred prior to the amended version of §2255 taking effect. JD alleges '**in or about 2004-2005, Jane Doe, then approximately 16 years old,**" as the period of time during which the conduct at issue occurred. Based on JD2's deposition testimony, she had one encounter with EPSTEIN in December – 2004. Thus, it is undisputed Epstein's conduct occurred prior to §2255's amendment, effective July 27, 2006.

Under applicable law, the statute in effect at the time of the alleged conduct applies. See U.S. v. Scheidt, Slip Copy, 2010 WL 144837, fn. 1 (E.D.Cal. Jan. 11, 2010); U.S. v. Renga, 2009 WL 2579103, fn. 1 (E.D. Cal. Aug. 19, 2009); U.S. v. Ferenci, 2009 WL 2579102, fn. 1 (E.D. Cal. Aug. 19, 2009); U.S. v. Monk, 2009 WL 2567831, fn. 1 (E.D. Cal. Aug. 18, 2009); U.S. v. Zane, 2009 WL 2567832, fn.1 (E.D. Cal. Aug. 18 2009). In each of these cases, the referenced footnote states –

> Prior to July 27, 2006, the last sentence in Section §2255(a) read "Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value." Under the civil statute, the minimum restitution amount for any violation of Section 2252 (the predicate act at issue) is $150,000 for violations occurring after July 27, 2006 and $50,000 for violations occurring prior to $50,000.

Even with the typo (the extra "$50,000") at the end of the quoted sentence, it is clear that the Court applied the statute in effect at the time of the alleged criminal conduct constituting one of the statutorily enumerated predicate acts, which is consistent with applicable law discussed more fully below herein.

It is an axiom of law that "retroactivity is not favored in the law." Bowen, 488 U.S., at 208, 109 S.Ct., at 471 (1988). As eloquently stated in Landgraf v. USI Film Products, 114 S.Ct. 1483, 1497, 511 U.S. 244, 265-66 (1994):

> ... the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.[FN18] For that reason, the **"principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal**." *Kaiser,* 494 U.S., at 855, 110 S.Ct., at 1586 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.
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> FN18. See *General Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); [Further citations omitted].
>
> It is therefore not surprising **that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation**.[FN19] Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, *e.g., United States v. Brown,* 381 U.S. 437, 456-462, 85 S.Ct. 1707, 1719-1722, 14 L.Ed.2d 484 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976).
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> FN19. Article I contains two *Ex Post Facto* Clauses, one directed to Congress (§ 9, cl. 3), the other to the States (§ 10, cl. 1). We have construed the Clauses as applicable only to penal legislation. See *Calder v. Bull,* 3 Dall. 386, 390-391, 1 L.Ed. 648 (1798) (opinion of Chase, J.).
>
> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution

> against unpopular groups or individuals. As Justice Marshall observed in his opinion for **1498 the Court in *Weaver v. Graham,* 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)**, the *Ex Post Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."** *Id.,* at 28-29, 101 S.Ct., at 963-964 (citations omitted). [FN20]
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> FN20. See *Richmond v. J. A. Croson Co.,* 488 U.S. 469, 513-514, 109 S.Ct. 706, 732, 102 L.Ed.2d 854 (1989) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed") (STEVENS, J., concurring in part and concurring in judgment); *James v. United States,* 366 U.S. 213, 247, n. 3, 81 S.Ct. 1052, 1052, n. 3, 6 L.Ed.2d 246 (1961) (retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

These well entrenched constitutional protections and presumptions against retroactive application of legislation establish that 18 U.S.C. §2255 in effect at the time of the alleged conduct applies to the instant action, and not the amended version. See endnote 1 hereto.

I. B. Not only is there no clear express intent stating that the statute is to apply retroactively, but applying the current version of the statute, as amended in 2006, would be in clear violation of the Ex Post Facto Clause of the United States Constitution as it would be applied to events occurring before its enactment and would increase the penalty or punishment for the alleged crime. U.S. Const. Art. 1, §9, cl. 3, §10, cl. 1. U.S. v. Seigel, 153 F.3d 1256 (11th Cir. 1998); U.S. v. Edwards, 162 F.3d 87 (3d Cir. 1998); and generally, Calder v. Bull, 3 U.S. 386, 390, 1 L.Ed. 648, 1798 WL 587 (*Calder*) (1798).

> The United States Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress. U.S. Const. art. I, § 9, cl. 3. A law violates the Ex Post Facto Clause if it " 'appli[es] to events occurring before its enactment ... [and] disadvantage[s] the offender affected by it' by altering the

> definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)).
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> U.S. v. Siegel,153 F.3d 1256, 1259 (11th Cir. 1998).

§2255 is contained in Title 18 of the United States Codes - "Crimes and Criminal Procedure, Part I. Crimes, Chap. 110. Sexual Exploitation and Other Abuse of Children." 18 U.S.C. §2255 (2005), is entitled *Civil remedy for personal injuries*, and imposes a presumptive minimum of damages in the amount of $50,000, should Plaintiff prove any violation of the specified criminal statutes and that she suffered personal injury with actual damages sustained. Thus, the effect of the 2006 amendments, effective July 27, 2006, would be to triple the amount of the statutory minimum previously in effect during the time of the alleged acts.

The statute, as amended in 2006, contains no language stating that the application is to be retroactive. Thus, there is no manifest intent that the statute is to apply retroactively, and, accordingly, the statute in effect during the time of the alleged conduct is to apply. Landgraf v. USI Film Products, supra, at 1493, ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."). See fn. 1 herein.

This statute was enacted as part of the Federal Criminal Statutes targeting sexual predators and sex crimes against children. H.R. 3494, "Child Protection and Sexual Predator Punishment Act of 1998;" House Report No. 105-557, 11, 1998 U.S.C.A.N. 678, 679 (1998). Quoting from the "Background and Need For Legislation" portion of the House Report No. 105-557, 11-16, H.R. 3494, of which 18 U.S.C. §2255 is included, is described as "the most comprehensive package of new crimes and increased penalties

ever developed in response to crimes against children, particularly assaults facilitated by computers." Further showing that §2255 was enacted as a criminal penalty or punishment, "Title II – Punishing Sexual Predators," Sec. 206, from House Report No. 105-557, 5-6, specifically includes reference to the remedy created under §2255 as an additional means of punishing sexual predators, along with other penalties and punishments. Senatorial Comments in amending §2255 in 2006 confirm that the creation of the presumptive minimum damage amount is meant as an additional penalty against those who sexually exploit or abuse children. 2006 WL 2034118, 152 Cong. Rec. S8012-02. Senator Kerry refers to the statutorily imposed damage amount as "penalties." Id.

The cases of U.S. v. Siegel, supra (11th Cir. 1998), and U.S. v. Edwards, supra (3d Cir. 1998), also support Defendant's position that application of the current version of 18 U.S.C. §2255 would be in clear violation of the Ex Post Facto Clause. In Siegel, the Eleventh Circuit found that the Ex Post Facto Clause barred application of the Mandatory Victim Restitution Act of 1996 (MVRA) to the defendant whose criminal conduct occurred before the effective date of the statute, 18 U.S.C. §3664(f)(1)(A), even though the guilty plea and sentencing proceeding occurred after the effective date of the statute. On July 19, 1996, the defendant Siegel pleaded guilty to various charges under 18 U.S.C. §371 and §1956(a)(1)(A), (conspiracy to commit mail and wire fraud, bank fraud, and laundering of money instruments; and money laundering). He was sentenced on March 7, 1997. As part of his sentence, Siegel was ordered to pay $1,207,000.00 in restitution under the MVRA which became effective on April 24, 1996. Pub.L. No. 104-132, 110 Stat. 1214, 1229-1236. The 1996 amendments to MVRA required that the district court must order restitution in the full amount of the victim's loss without consideration of the

defendant's ability to pay. Prior to the enactment of the MVRA and under the former 18 U.S.C. §3664(a) of the Victim and Witness Protection Act of 1982 (VWPA), Pub.l. No. 97-291, 96 Stat. 1248, the court was required to consider, among other factors, the defendant's ability to pay in determining the amount of restitution.

When the MVRA was enacted in 1996, Congress stated that the amendments to the VWPA "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [Apr. 24, 1996]." Siegel, supra at 1258. The alleged crimes occurred between February, 1988 to May, 1990. The Court agreed with the defendant's position that 1996 MVRA "should not be applied in reviewing the validity of the court's restitution order because to do so would violate the Ex Post Facto Clause of the United States Constitution. See U.S. Const. art I, §9, cl. 3."

The Ex Post Facto analysis made by the Eleventh Circuit in Siegel is applicable to this action. In resolving the issue in favor of the defendant, the Court first considered whether a restitution order is a punishment. Id, at 1259. In determining that restitution was a punishment, the Court noted that §3663A(a)(1) of Title 18 expressly describes restitution as a "penalty." In addition, the Court also noted that "[a]lthough not in the context of an ex post facto determination, … restitution is a 'criminal penalty meant to have strong deterrent and rehabilitative effect.' United States v. Twitty, 107 F.3d 1482, 1493 n. 12 (11th Cir.1997)." Second, the Court considered "whether the imposition of restitution under the MVRA is an increased penalty as prohibited by the Ex Post Facto Clause." Id, at 1259. In determining that the application of the 1996 MVRA would indeed run afoul of the Constitution's Ex Post Facto Clause, the Court agreed with the

majority of the Circuits that restitution under the 1996 MVRA was an increased penalty.[1] "The effect of the MVRA can be detrimental to a defendant. Previously, after considering the defendant's financial condition, the court had the discretion to order restitution in an amount less than the loss sustained by the victim. Under the MVRA, however, the court must order restitution to each victim in the full amount." Id, at 1260. See also U.S. v. Edwards, 162 F.2d 87 (3rd Circuit 1998).

In the instant cases, in answering the first question, it is clear that that imposition of a minimum amount of damages, regardless of the amount of actual damages suffered by a minor victim, is meant to be a penalty or punishment. See statutory text and House Bill Reports, cited above herein, consistently referring to the presumptive minimum damages amount under §2255 as "punishment" or "penalties." According to the Ex Post Facto doctrine, although §2255 is labeled a "civil remedy," such label is not dispositive; "if the effect of the statute is to impose punishment that is criminal in nature, the ex post facto clause is implicated." *See generally*, Roman Catholic Bishop of Oakland v. Superior Court, 28 Cal.Rptr.3d 355, at 360, citing Kansas v. Hendricks, 521 U.S. 346, 360-61 (1997). The effect of applying the 2006 version of §2255 would be to triple the amount of the presumptive minimum damages to a minor who proves the elements of her §2255 claim. The fact that a plaintiff proceeding under §2255 has to prove a violation of a criminal statute and suffer personal injury to recover damages thereunder, further supports that the imposition of a minimum amount, regardless of a victim's actual

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[1] The Eleventh Circuit, in holding that "the MVRA cannot be applied to a person whose criminal conduct occurred prior to April 24, 1996," was "persuaded by the majority of districts on this issue." "Restitution is a criminal penalty carrying with it characteristics of criminal punishment." Siegel, supra at 1260. The Eleventh Circuit is in agreement with the Second, Third, Eighth, Ninth, and D.C. Circuits. See U.S. v. Futrell, 209 F.3d 1286, 1289-90 (11th Cir. 2000).

damages sustained, is meant and was enacted as additional punishment or penalty for violation of criminal sexual exploitation and abuse of minors.

Accordingly, this Court is required to apply the statute in effect at the time of the alleged criminal acts. Not only is there no language in the 2006 statute stating that it is to apply retroactively, but further, such application of the 2006 version of 18 U.S.C. §2255 to acts that occurred prior to its effective date would have a detrimental and punitive effect on Defendant by tripling the presumptive minimum of damages available to a plaintiff, regardless of the actual damages suffered.[2]

I. C. As discussed above, 18 U.S.C. §2255 was enacted as part of the criminal statutory scheme to punish and penalize those who sexually exploit and abuse minors, and thus, the Ex Post Fact Clause prohibits a retroactive application of the 2006 amended version. Even if one were to argue that the statute is "civil" and the damages thereunder are "civil" in nature, under the analysis provided by the United States Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994), pertaining to civil statutes, not only is there no express intent by Congress to apply the new statute to past conduct, but also, the clear effect of retroactive application of the statute would be to increase the potential liability for past conduct from a minimum of $50,000 to $150,000, and thus in violation of the constitutional prohibitions against such application. As noted, 18 U.S.C. §2255 is entitled "*Civil remedy for personal injuries.*" Notwithstanding this

[2] In other filed civil actions attempting to assert §2255 claims against EPSTEIN, some plaintiffs also propose that the minimum damage amount is to apply on a per violation basis; the absurdity of such position is further magnified when one considers that the presumptive damages amount was tripled to $150,000 by the 2006 amendment. Based on some plaintiffs' position, that amount would be multiplied even further based on the number of violations (along with injury) that she could prove. Clearly, the result is an unconstitutional increase in either a penalty or civil liability.

label, the statute was enacted as part of the criminal statutory scheme to punish those who sexually exploit and abuse minors. Regardless of the actual damages suffered or proven by a minor, as long as a minor proves violation of a specified statutory criminal act under §2255 and personal injury, the defendant is held liable for the statutory imposed minimum.

Although there does not exist any definitive ruling of whether the damages awarded under §2255 are meant as criminal punishment or a civil damages award, Defendant is still entitled to a determination as a matter of law that the statute in effect at the time of the alleged criminal conduct applies.

As explained by the Landgraf court, supra at 280, and at 1505,[3]

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, *increase a party's liability for past conduct,* or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Here, there is no clear expression of intent regarding the 2006 Act's application to conduct occurring well before its enactment. Clearly, however, as discussed in part B herein, the presumptive minimum amount of damages of $150,000 was enacted as a punishment or penalty upon those who sexually exploit and abuse minors. See discussion of House Bill Reports and Congressional background above herein. The amount triples

[3] In Landgraf, the United States Supreme Court affirmed the judgment of the Court of Appeals and refused to apply new provisions of the Civil Rights Act of 1991 to conduct occurring before the effective date of the Act. The Court determined that statutory text in question, §102, was subject to the presumption against statutory retroactivity.

the previous amount for which a defendant might be found liable, regardless of the amount of actual damages a plaintiff has suffered and proven. The new statute imposes a substantial increase in the monetary liability for past conduct.

As stated in Landgraf, "the extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." Courts have consistently refused to apply a statute which substantially increases a party's liability to conduct occurring before the statute's enactment. Landgraf, supra at 284-85. Even if plaintiff were to argue that retroactive application of the new statute "would vindicate its purpose more fully," even that consideration is not enough to rebut the presumption against retroactivity. Id, at 285-86. "The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation." Id.

Accordingly, as a matter of law, this Court is required to apply the version of 18 U.S.C. §2255 (2004) in effect at the time of the alleged conduct by EPSTEIN directed to Plaintiff.

II. Defendant is entitled to summary judgment on Count III, as under the undisputed material facts, Plaintiff has failed to and can not show a violation of a requisite predicate act to sustain a claim pursuant to 18 U.S.C. §2255.

As matter of law, Defendant is entitled to the entry of a summary judgment in his favor on Count III - entitled "Coercion and Enticement to Sexual Activity in Violation of 18 U.S.C. §2422." In reality, Count III is an attempt to bring a claim pursuant to 18 U.S.C. §2255(a), which creates a civil remedy for violations of certain federal criminal statutes as discussed herein. The undisputed material facts and applicable law show that Plaintiff does not and cannot establish the elements required to prove her §2255 claim.

As confirmed by Plaintiff in her deposition testimony, the alleged encounter with EPSTEIN took place sometime in December – 2004 at his Palm Beach, Florida mansion. The applicable version of 18 U.S.C. §2255 provides –

> PART I--CRIMES
> CHAPTER 110--SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN
> § 2255. Civil remedy for personal injuries
>
> **(a) Any minor who is a victim of a violation of section** 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, **2422**, or 2423 **of this title and who suffers personal injury as a result of such violation** may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value.
>
> (See endnote 1 for complete statutory text.)

By its own terms, 18 U.S.C. 2255(a) creates a cause of action for "a minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation … ." See generally, Gray v. Darby, 2009 WL 805435, 6 (E.D.Pa.,2009)("§2255 establishes a civil remedy for personal injuries suffered as a result of the violation of specific sections of the Code [U.S.C. Title 18]. Under this section, any minor who is the victim of any of those sections may sue in federal court to recover 'the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee.'"); Smith v. Husband, 428 F.Supp.2d 432 (E.D. Va. 2006); Smith v. Husband, 376 F.Supp.2d 603 (E.D. Va. 2006); Doe v. Liberatore, 478 F.Supp.2d 742, 754 (M.D. Pa. 2007). The referenced statutes are all federal criminal statues contained in Title 18 of the United States Code. In her complaint, Plaintiff partially tracks the language of 18 U.S.C.

§2422(b) and cites generally to §2422 in an attempt to assert a claim under 18 U.S.C. §2255. (2d Am Com, ¶30, 33-34). None of the State of Florida criminal statutes referenced by Plaintiff are a requisite predicate act required to prove a claim under 18 U.S.C. §2255. (See ¶30-31 of 2d Am Comp.).

Thus, in order to sustain a cause of action under §2255, Plaintiff is required to prove all the elements of one of the statutory enumerated predicate acts. See Gray v. Darby, 2009 WL 805435 (E.D. Pa. Mar. 25, 2005), requiring evidence to establish predicate act under 18 U.S.C. §2255 to state cause of action. As noted above, Plaintiff is relying on §2422 of Title 18, and tracks the language of subsection (b) of that statute. There is no evidence whatsoever of EPSTEIN "*using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, ...*"

In order to show a violation of 18 U.S.C. §2422(b), four elements must be proven: (1) use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) any individual who is younger than 18; (4) to engage in any sexual activity for which any person can be charged with a criminal offense, or attempting to do so. U.S. v. Thomas, 410 F.3d 1235, 1245 (10th Cir. 2005); U.S. v. Munro, 394 F.3d 865, 869 (10th Cir. 2005); U.S. v. Kaye, 451 F.Supp.2d 775, 782-83 (E.D. Va. 2006). The undisputed material facts show that EPSTEIN and JD2 never communicated at any time on any subject via the telephone, internet, texting, e-mails, or other form of electronic communication. JD2 testified that she was brought to EPSTEIN's home by another girl

(Jane Doe No. 3) that she went to school with in Palm Beach County. There is no testimony that JD2 travelled anywhere with EPSTEIN by car or otherwise. The one encounter occurred in Palm Beach, Florida at EPSTEIN's mansion. (See Statement of Facts, ¶¶6, 7, 8).

There was no (1) use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) any individual who is younger than 18; (4) to engage in any sexual activity for which any person can be charged with a criminal offense, or attempting to do so. See for e.g., U.S. v. Gagliardi, 506 F.3d 140, 150-51 (2d Cir. 2007). In Gagliardi, a defendant was convicted of violating §2422(b) where he initiated contact with girl he believed was a minor in an internet chat room called "I Love Older Men," repeatedly made sexual advances toward girl and her "friend," asked them for their pictures, steered the conversation toward sexual activities, described the acts that he would engage in with them, tried to set up a meeting with both of them, and appeared for a meeting with condoms and a Viagra pill in his car. Thus, the Circuit court agreed had the requisite intent to violate § 2422(b). The Circuit Court determined that a reasonable juror could also have found that the defendant took a substantial step beyond mere preparation when he arrived at the meeting place with two condoms and a Viagra pill in his car. See also U.S. v. Munro, 394 F.3d 865, 870 (10th Cir.2005)(Defendant convicted of attempting to persuade a minor to engage in sexual acts by using computer connected to the internet, under §2422(b), where chat room communications included defendant asking "girl" about her sexual history, her virginity, her experience wit oral sex, and the possibility of making a movie together; defendant further told "girl" about his desire to perform oral sex on her.); U.S. v. Barlow, 568 F.3d 215 (5th Cir. 2009). See

also U.S. v. Kaye, 451 F.Supp.2d 775, supra, where defendant engaged in lengthy "chat room" communications of a sexual nature with individual he believed was a 13 year old boy, described what he was going to do with 13 year old, and traveled to the home of the 13 year old.

Thus, because the evidence (JD2's own sworn testimony) establishes that there was no violation of §2422(b), an essential element of Plaintiff's 18 U.S.C §2255 claim asserted in Count III is missing. The claim fails as a matter of law and Defendant is entitled to the entry of summary judgment on the claim. Summary judgment is proper under Rule 56(c)(2), Fed.R.Civ.P, when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Pursuant to Rule 56(b), "a party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim."

Thus, under the undisputed material facts and applicable law, EPSTEIN is entitled to summary judgment on Count III of Plaintiff's Second Amended Complaint as a matter of law. JD2's own testimony establishes that EPSTEIN never used a facility or means of interstate commerce to knowingly persuade, induce, entice, or coerce her to engage in any sexual activity for which any person can be charged with a criminal offense, or attempting to do so. 18 U.S.C. §2422(b). Under the undisputed material facts, JD2 cannot show a violation of the enumerated predicate act, §2422(b) on which she relies, in order to prove her claim pursuant to 18 U.S.C. §2255; thus, an essential element of her §2255 cannot be established, entitling Defendant to the entry of summary judgment on Count III.

III. The Version of 18 U.S.C. § 2255 In Effect When The Predicate Acts Allegedly Were Committed Allowed Only "Minors" To File Suit.

The Second Amended Complaint is predicated on acts that occurred in December – 2004, when JD 2 was 16 years old. (See Statement Facts above). JD2 was 22 years old at the time of her deposition on March 3, 2010. The original Complaint in this matter was filed on February 6, 2008. Thus, JD2 was 20 years old (or at least 19) at the time this suit was filed and, thus, no longer a minor. (The age of majority under both federal and state law is 18 years old. See 18 U.S.C. §2256(1), defining a "minor" as "any person under the age of eighteen years;" and §1.01, *Definitions,* Fla. Stat., defining "minor" to include "any person who has not attained the age of 18 years.")

From 1999 to July 26, 2006, 18 U.S.C. § 2255(a) provided:

> ***Any minor who is a victim*** of a violation of [certain specified federal statutes] and who suffers personal injury as a result of such violation ***may sue*** in any appropriate United States District Court and shall recover the actual damages ***such minor sustains*** and the cost of the suit, including a reasonable attorney's fee. ***Any minor as described in the preceding sentence shall be deemed*** to have sustained damages of no less than $50,000 in value.

It is well settled that in interpreting a statute, the court's inquiry begins with the text and structure of the law. CBS, Inc. v. Prime Time 24 Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) ("We begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.'") (quoting Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (*en banc*)) (first alteration omitted). In this case, the plain text of the 2003 statute is both clear and unmistakable. It allowed only minors (or the representative of a then-minor, *see* Fed R. Civ. P. 17(c)) to initiate suit

under § 2255. It provided only that "any ***minor*** … may sue" and that "any ***minor*** … shall recover the actual damages ***such minor*** sustains" as a result of the predicate acts. *Id.* (emphasis added). The law's use of the present tense further underscored its limited scope: It spoke of "any minor who ***is*** a victim," provided that "such minor … shall recover" damages arising from the underlying offense, and stated that "any minor … shall be deemed" to have sustained at least $50,000 in damages. *Id.* (emphasis added). Where the statute's words are unambiguous—as the are here—the "judicial inquiry is complete." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (citation omitted)). Under the pre-July, 2006 version of the statute, only minors could initiate suit.

The recent case of U.S. v. Baker, 2009 WL 4572785, *7-8 (E.D. Tx Dec. 7, 2009), in discussing the restitution under 18 U.S.C. §2255 noted that when the statute was amended in 2006 – "Masha's Law increased the minimum damages amount from $50,000 to $150,000 and broadened the language of section 2255 to allow adults to recover for damages sustained while they were a minor." The plain reading of the statute makes clear that prior to the 2006 amendment, the remedy was created for the benefit of minors who suffered sexual exploitation as a result of violation of a statutorily enumerated criminal act(s).

To the extent there is any ambiguity in the text—and there is none—the law's legislative history further underscores Congress's intent to limit the right of action to minors: "Current law provides for a civil remedy for personal injuries resulting from child pornography offenses. This section expands the number of sex offenses ***in which a minor may pursue a civil remedy*** for personal injuries resulting from the offense." H.R. Rep. 105-557, at 23 (1998), *as reprinted in* 1998 U.S.C.C.A.N. 678, 692. And perhaps

most telling, Congress amended § 2255 in 2006—three years after the alleged misconduct in this case supposedly took place—to make the civil action available to persons who had turned 18 by the time they filed suit:

> (a) In general.—***Any person who, while a minor, was a victim*** of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred ***while such person was a minor, may sue*** in any appropriate United States District Court and shall recover the actual damages ***such person*** sustains and the cost of the suit, including a reasonable attorney's fee. ***Any person*** as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

18 U.S.C. § 2255 (2006) (emphasis added).

The contrast between the prior and 2006 versions of § 2255 is stark. The 2006 law replaces each of the prior law's uses of the term "minor" with the term "person." Where the 2006 law does refer to a "minor," it changes the prior law's present-tense references ("is") to past-tense references ("was"). And the 2006 law's new language now makes clear that, unlike the prior statute, those victimized while under the age of 18 may sue after they turn 18. Given that amendments must be interpreted "to have real and substantial effect," Stone v. I.N.S., 514 U.S. 386, 397 (1995), there can be no doubt that Congress recognized the prior statute's strict limitations and for the first time expanded the right of action to adults.

Indeed, the history of the 2006 amendments clearly shows that Congress intended to change the law, not merely to clarify it. Those amendments were made by § 707 of the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587, 650 (2006), and are known as "Masha's Law." As Senator Kerry—the author of Masha's Law—explained:

> What Masha's law does, and what is incorporated in here, is ***it changes "any minor" to "any person," so that if a minor is depicted in photographs pornographically that are distributed over the Internet, but by the time the abuser is caught, the minor is an adult, they can still recover. They cannot now, and that is ridiculous. It makes sure that recovery on the part of a minor can take place when they become an adult***....
>
> Although I don't think there is any price too high to cost an individual who would take advantage of a minor, ***I think it is only appropriate to ... make sure that reaching the age of adulthood does not exempt someone from recovery***. It is a tribute to continuing to do what this bill does, and that is look after the protection of minors and ensure that those who violate them are caught and punished and have to pay to the maximum extent.

152 Cong. Rec. S8012-02 at S8016 (July 20, 2006) (statement of Sen. Kerry) (emphasis added). Courts typically give special weight to the statements of a bill's sponsor, Corley v. U.S., 129 S.Ct. 1558, 1569 (Apr. 6, 2009) ("[A] sponsor's statement to the full Senate carries considerable weight.").[4] There is no basis to depart from that rule here.

It thus is no answer that the pre-amended statute's limitations clause provided that "in the case of a person under a legal disability, [the complaint may be filed] not later than three years after the disability," 18 U.S.C. § 2255(b) (2003), such that the unamended version of the law ***implicitly*** must have permitted victims to sue even after they turned 18. That interpretation not only would render Masha's Law superfluous; it

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[4] Similarly, the official summary prepared by the Congressional Research Service ("CRS") explained that Masha's Law "[r]evises provisions allowing victims of certain sex-related crimes to seek civil remedies ***to: (1) allow adults as well as minors to sue*** for injuries; and (2) increase from $50,000 to $150,000 the minimum level of damages." Official Summary of Pub. Law No. 109-248 (July 27, 2006), *as reprinted at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04472:@@@L&summ2=m& (emphasis added) (last visited May 10, 2009). Courts have long consulted official CRS summaries to assess legislative intent, *see, e.g.*, Rettig v. Pension Ben. Guar. Corp., 744 F.2d 133, 145 & n.7 (D.C. Cir. 1984); DIRECTV Inc. v. Cignarella, No. Civ.A 03-2384, 2005 WL 1252261 at *7 (D.N.J. May 24, 2005); Clohessy v. St. Francis Hosp. & Healthcare, No. 98-C-4818, 1999 WL 46898 *2-*3 (N.D. Ill. Jan. 28, 1999), and there is good reason to do so. By design, CRS summaries are intended to "objectively describe[] the measure's ... effect upon ... current law" so that Congress can make informed judgments about the impact of proposed bills. *See* The Library of Congress, *About CRS Summary*, *available at* http://thomas.loc.gov/bss/abt_dgst.html (last visited May 10, 2009).

would make Masha's Law's internally redundant, because Masha's Law retained the "legal disability" language from the prior version of § 2255(b). *See* 18 U.S.C. § 2255(b) (2006). In short, the retained "legal disability" language in § 2255(b) of the 2006 statute would be entirely redundant were it construed to do ***implicitly*** what the law elsewhere did ***expressly***. In these circumstances, the traditional rules against surplusage and redundancy apply with double force. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001). The "legal disability" language in § 2255(b) should be interpreted to reference classic legal disabilities like insanity, mental disability, or imprisonment—not age.

Indeed, that is precisely how Congress typically uses the term "legal disability": most federal statutes that use the term make clear that it doesn't include age. *See, e.g.*, 25 U.S.C. § 590c ("A share or interest payable to enrollees less than eighteen years of age ***or*** under legal disability shall be paid ....") (emphasis added); *id.* § 783 ("Funds payable under sections 781 to 785 of this title to minors ***or*** to persons under legal disability shall be paid....") (emphasis added); *id.* § 1128 ("Sums payable to enrollees ... who are less than eighteen years of age ***or*** who are under a legal disability shall be paid....") (emphasis added); *id.* § 1253 ("Sums payable ... to enrollees ... who are less than eighteen years of age ***or*** who are under a legal disability shall be paid....") (emphasis added); *id.* § 1273 (same); *id.* § 1283 (same); *id.* § 1295 (same); *id.* § 1300a-3 (same); *id.* § 1300c-3 (same); *id.* § 1300d-7 (same); *see also* 38 U.S.C. § 3501.

Needless to say, Congress would not have had to address age expressly in any of these statutes if the term "legal disability" necessarily included one's status as a minor; instead, Congress's mere use of the term "legal disability" already would account for a would-be plaintiff's minority status. Given the rule "against reading a text in a way that

makes part of it redundant," Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)), and the canon that "where words are employed in a statute which had at the time a well-known meaning … in the law of this country, they are presumed to have been used in that sense," Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911), § 2255's reference to "legal disability" can only be interpreted as a reference to classic disabilities like insanity or mental incapacity, but not age.

Accordingly, Defendant is entitled to summary judgment determining that the applicable version of §2255 allows for a minor to pursue the remedy thereunder. JD2 was 20 years old at the time she instituted this action, no longer a minor.

Conclusion

Thus, under the undisputed material facts and applicable law, Defendant is entitled to the entry of summary judgment determining that (1) the version of 18 U.S.C. §2255, effective 1999 to Jul. 26, 2006, the period of time during which EPSTEIN's alleged conduct occurred, applies to Plaintiff's claim brought pursuant to §2255; (2) Furthermore, JD2's own testimony establishes that EPSTEIN never used a facility or means of interstate commerce to knowingly persuade, induce, entice, or coerce her to engage in any sexual activity for which any person can be charged with a criminal offense, or attempting to do so. 18 U.S.C. §2422(b). Her testimony and the allegations of the complaint also show that EPSTEIN never traveled interstate with the specific intent of engaging in sexual activity with her. 18 U.S.C. 2423(b) and (e). Under the undisputed material facts, JD2 cannot show a violation of the enumerated predicate acts

on which she relies, in order to prove her claim pursuant to 18 U.S.C. §2255; thus, an essential element of her §2255 can not be established, entitling Defendant to the entry of summary judgment on Count III; and (3) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit.

WHEREFORE, Defendant requests that this Court enter the summary judgments sought herein. Defendant further requests an award of his attorney's fees and costs in defending this claim.

By: /s/ Robert D. Critton, Jr.
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following service list in the manner specified via transmission of Notices of Electronic Filing generated by CM/ECF on this 7th day of May, 2010:

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[1] **18 USCA §2255 (effective 1999 to Jul. 26, 2006)**

PART I--CRIMES
CHAPTER 110--SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2255. Civil remedy for personal injuries

(a) Any minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value.

(b) Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

CREDIT(S)

(Added Pub.L. 99-500, Title I, § 101(b) [Title VII, § 703(a)], Oct. 18, 1986, 100 Stat. 1783-75, and amended Pub.L. 99-591, Title I, § 101(b) [Title VII,

§ 703(a)], Oct. 30, 1986, 100 Stat. 3341-75; Pub.L. 105-314, Title VI, § 605, Oct. 30, 1998, 112 Stat. 2984.)

18 U.S.C. §2255, as amended 2006
Effective July 27, 2006

PART I--CRIMES
CHAPTER 110--SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2255. Civil remedy for personal injuries

(a) In general.--Any person who, while a minor, was a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

(b) Statute of limitations.--Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

CREDIT(S)

(Added Pub.L. 99-500, Title I, § 101(b) [Title VII, § 703(a)], Oct. 18, 1986, 100 Stat. 1783-75, and amended Pub.L. 99-591, Title I, § 101(b) [Title VII, § 703(a)], Oct. 30, 1986, 100 Stat. 3341-75; Pub.L. 105-314, Title VI, § 605, Oct. 30, 1998, 112 Stat. 2984; Pub.L. 109-248, Title VII, § 707(b), (c), July 27, 2006, 120 Stat. 650.)

* * * *

[2] **CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES**
Current through P.L. 107-377 (End) approved 12-19-02

§ 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

As amended, Apr. 30, 2003. (In effect during 2004 – 2005).

§ 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

Note: The amendment to the statute increased punishment that could be imposed for a violation thereof.