

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80811-MARRA/JOHNSON

C.M. A.,

Plaintiff,

v.

JEFFREY EPSTEIN and SARAH  
KELLEN,

Defendants,

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**DEFENDANT EPSTEIN'S REPLY TO PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT, JEFFREY EPSTEIN'S, MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION, AND MOTION FOR MORE DEFINITE STATEMENT; MOTION TO STRIKE, AND SUPPORTING MEMORANDUM OF LAW, (dated April 13, 2009)**

Defendant, JEFFREY EPSTEIN, ("EPSTEIN"), by and through his undersigned counsel, files his reply to *Plaintiff's Memorandum in Response to Defendant, JEFFREY EPSTEIN's, Motion to Dismiss First Amended Complaint For Failure to State A Cause of Action; And Motion for More Definite Statement; Motion to Strike, And Supporting Memorandum of Law*, dated April 13, 2009, (hereinafter "Plaintiff's response"). In reply to Plaintiff's response and further supporting Defendant's motion to dismiss Count I through XXXI of Plaintiff's First Amended Complaint for failure to state a cause of action, and for more definite statement, or to strike, [DE 47], dated April 12, 2009, (hereinafter "Defendant's motion"), Defendant states:

**I. The 2003 version of 18 U.S.C. §2255 applies to this action.**

**A.**

The statute in affect during the time the alleged acts occurred is the applicable version of 18 U.S.C. §2255; in this action – the 2003 version (quoted at p. 7,

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Defendant's motion). 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.<sup>FN18</sup> 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.

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.<sup>FN19</sup> 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).

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.).

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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 responsiveness 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).<sup>FN20</sup>

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").

As discussed more fully below herein, these well entrenched constitutional protections and presumptions against retroactive application of legislation establish that the version of 18 U.S.C. §2255 (2003) in effect at the time of the alleged conduct applies to the instant action, and not the amended version as claimed by Plaintiff.

#### 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

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penalty or punishment for the alleged criminal conduct. U.S. Const. Art. 1, §9, cl. 3, §10, cl. 1. U.S. v. Seigel, 153 F.3d 1256 (11<sup>th</sup> 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)).

U.S. v. Siegel, 153 F.3d 1256, 1259 (11<sup>th</sup> Cir. 1998).

In improperly attempting to bring 30 separate counts pursuant to §2255, Plaintiff's First Amended Complaint alleges in part that "beginning in approximately late May or early June of 2002, and continuing until approximately August of 2003, the Defendant coerced and enticed the impressionable, vulnerable, and economically deprived then minor Plaintiff to commit various acts of sexual misconduct. These acts occurred, on average, one to three times per week from late may or early June of 2002 until August 2003." (1<sup>st</sup> Am. Complaint, ¶13). Rather than specifically alleging on which statutory version of 18 U.S.C. §2255 she is relying, Plaintiff generally alleges that her claim is "pursuant to 18 U.S.C. §2255." (1<sup>st</sup> Am. Complaint, ¶6, Counts I – XXX). No where in her complaint is there any allegation that she was relying on the 2006 amended version of the statute which increases the penalty of the presumptive minimum amount of actual damages from \$50,000.00 to \$150,000.00. Now, in her response, Plaintiff quotes to the

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2006 amended version of §2255 without any legal discussion supporting a retroactive application. (See p. 3 of Plaintiff's response).

§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 (2003), is entitled *Civil remedy for personal injuries*, and imposes a presumptive minimum of damages in the amount of \$50,000.00, should Plaintiff prove a violation of the specified criminal statutes, and suffer personal injury with actual damages. 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. (Taking Plaintiff's position that the presumptive minimum is meant to be multiplied per violation – the damages would be 4.5 million. The express language of the statute has no multiplier.)

No case has yet decided the specific issue before this Court – whether application of the 2006 version of §2255, which increased the statutorily presumed minimum damages from \$50,000 to \$150,000, regardless of the actual amount of damages suffered and proven, is prohibited from application under the Ex Post Fact Clause to the specified criminal acts occurring prior to the statutes effective date of July 27, 2006. 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

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effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.”).

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. Even the quotation from Senator Kerry, quoted at p. 7 of Plaintiff’s response, in amending §2255 in 2006 confirms 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* (11<sup>th</sup> 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

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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

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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.<sup>1</sup> “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 (3<sup>rd</sup> Circuit 1998).

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<sup>1</sup> 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 (11<sup>th</sup> Cir. 2000).

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In the instant case, 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 and proven 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. (Under Plaintiff's attempted approach – the presumptive minimum would potentially increase from 1.5 million to 4.5 million (\$50,000 X 30; \$150,000 X 30). The fact that a plaintiff proceeding under §2255 has to prove a violation of a criminal statute to recover damages thereunder, further supports that the imposition of a minimum amount, regardless of the amount of a victim's actual 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

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punitive effect on Defendant by tripling the presumptive minimum of damages available to a plaintiff.

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 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, under Plaintiff's attempted approach, the amount would increase from 1.5 million to 4.5 million dollars! As noted, 18 U.S.C. §2255 is entitled "*Civil remedy for personal injuries.*" Notwithstanding this 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 an accompanying violation of a specified statutory criminal act under §2255, the defendant is held liable for the statutory imposed minimum.

As explained by the Landgraf court, *supra* at 280, and at 1505,<sup>2</sup>

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<sup>2</sup> 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

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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 the previous amount for which a defendant might be found liable, regardless of the amount of actual damages sustained and proven. The new statute imposes a substantial increase in the monetary liability for past conduct. (As discussed below, Plaintiff also proposes 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).

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

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the effective date of the Act. The Court determined that statutory text in question, §102, was subject to the presumption against statutory retroactivity.

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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, this Court is required to apply the statute in effect at the time of the alleged conduct. 18 U.S.C. §2255 (2003).

**II. Plaintiff is required to plead a single cause of action pursuant to 18 U.S.C. §2255 and, the accompanying presumptive minimum damages should she ultimately plead and prove the elements of such claim is NOT imposed on a per violation basis. (Part III. A and D of Defendant's Motion to Dismiss). (P. 3-9 of Plaintiff's response).**

**A.** Further supporting Defendant's position that Plaintiff has improperly alleged multiple causes of actions under 18 U.S.C. §2255 in an attempt to multiply the presumptive minimum damages is the case of Gray v. Darby, slip copy, 2009 WL 805435 (E.D. Pa. Mar. 25, 2009). In that action, the plaintiff, a minor four year old boy, was enrolled at a church childcare facility. On various occasions from June 2006 through November 2006, the pastor would remove the child from the classroom and take him to a secluded room where he would sexually molest the young boy. The pastor also forced the child to engage in repeated conversations about sex and adult sex acts. During this time period, the pastor also sexually molested the boy during church related activities other than the child-care program, "located on the premises of the Limeville church." Ultimately, the young boy brought a cause of action against the pastor, the church, and other church officials. The plaintiff attempted to allege a 12

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count complaint, including a single cause of action pursuant to 18 U.S.C. §2255 (Count I), along with 11 other counts based on state law ranging from negligence to intentional and negligent infliction of emotional distress. The defendants moved to dismiss Count I because "plaintiffs have not pled sufficient facts to satisfy one of the predicate felonies mentioned in the statute."

In describing the remedy created under 18 U.S.C. §2255(a), the Eastern District of Pennsylvania stated that the statute "authorizes a civil remedy for personal injuries suffered by a minor victim of certain federal felonies, ... ." *Id.*, at 4. In other words, a minor, who is a victim of any of the specified predicate criminal acts, may bring a §2255 claim "to recover the actual damages such minor sustains," regardless if a plaintiff proves one or multiple violations. As long as a plaintiff proves any violation of a specified criminal act and that he or she suffered personal injury, he or she is entitled to the presumptive minimum of damages imposed by the applicable statute - \$50,000 in the instant case, even if the amount of actual damages proven is less. Again, the statute says nothing about the presumptive damages amount being for each violation or incident alleged.

In her response, (pp. 3-9), Plaintiff at one point states that the express language allows for "a separate cause of action for each separate incident," but then goes on to rely on statutory interpretation principles applied when the language is vague or ambiguous. See p. 4 of response where Plaintiff states – "A review of the wording of 18 U.S.C. §2255 demonstrates no ambiguity." Plaintiff then references a portion of the legislative history and background on "Masha's Law." Plaintiff can cite to no case law

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that supports an interpretation that would allow a plaintiff to assert multiple causes of action in an effort to multiply the presumptive minimum damages amount. Again, there is no express language in the statute allowing for such interpretation. No court with a §2255 cause of action before it has even suggested that the remedy thereunder allows a plaintiff to bring multiple causes of actions against a single defendant. The legislature very easily could have written the statute to create a cause of action for each violation proven against a particular defendant or could have written in a multiplier, but it did not.

The statute requires that a plaintiff who proves any violation of an enumerated criminal statute to also prove her "actual damages" – these damages, depending on the facts of a particular case, could be well in excess of the presumptive minimum imposed. There is nothing written into the statutory terms such that the \$50,000.00 (or as asserted by Plaintiff, the \$150,000.00) presumptive minimum is awarded for each violation proven. Again, regarding recoverable damages, the statutory terms speak in terms of a plaintiff "who suffers personal injury as a result of such violation [of any of the specified predicate acts]" ... "shall recover the actual damages such minor/person sustains and the cost of suit of the suit, including reasonable attorney's fee. Any minor/person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000/\$150,000 in value."<sup>3</sup> The statute creates a presumptive minimum of the "damages sustained" by a plaintiff and imposed on a defendant.

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<sup>3</sup> In quoting 18 U.S.C. §2255, Defendant juxtaposes the language used in the pre-2006 amended version of the statute, which applies in this action, to the language used in the statute as amended, effective July 27, 2006.

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Plaintiff's reliance on In re Hawaiian Airlines, Inc. (Konop v. Hawaiiin Airlines, Inc.), 355 B.R. 225 (D. Hi. 2006), is misplaced. Unlike the Stored Communications Act, 18 U.S.C. §2707(c), endnote<sup>1</sup>, at issue in the Hawaiian Airlines case, the presumptive minimum is tied to the minor or person proving that she or he has suffered personal injury, along with actual damages sustained, as a result of any violation. To even bring a cause of action under §2255, a "minor/person" must prove a violation of enumerated criminal statute and "suffer personal injury as a result of such violation." Only then "shall" such minor "recover the actual damages such minor sustains ... . Any minor/person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000/\$150,000 in value." The statute at issue in Hawaiian Airlines does not address personal injury type damages. Significantly, the court found that the Stored Communications Act does not even require that the plaintiff prove actual damages or profits made by the violator to recover the statutory cap. Recovery under §2255, unlike the Stored Communications Act, is limited to a minor/person "who suffers personal injury" and mandates a recover of "actual damages," no matter how little is actually proven, of the statutory minimum.

Hawaiian Airlines actually supports Defendant's position. The Court discussed and distinguished the Privacy Act, relying on Doe v. Chao, 540 U.S. 614, 124 S.Ct. 1204 (2004), which contained similar language to the Stored Communications Act, but concluded that \$1,000 minimum damage award under the Privacy Act was not subject to multiplication on a per violation basis because it was limited to a plaintiff who proves actual damages. See endnote 2 for relevant text of Privacy Act.<sup>2</sup> In Doe v. Chao, the

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plaintiff sued the Secretary of Labor for the Department of Labor's intentional or willful violation of the Privacy Act. The Government conceded that it had disclosed plaintiff's social security number on multiple occasions in violation of the act. Doe claimed emotional distress, but offered no corroboration of his claim, and thus, the Circuit Court on appeal held that \$1,000 minimum is available only to plaintiffs who suffer actual damages, and Doe had not raised a triable issue of fact of such damages. The United States Supreme Court, using a straightforward textual analysis, agreed with the Fourth Circuit Court of Appeal. §2255 is also limited to those plaintiffs who have suffered personal injury and sustained actual damages. The statute awards a minimum amount to those plaintiff's who prove not only a violation of a specified predicate act, but who prove they have suffered personal injury and actual damages as a result. In other words, the imposed damages minimum is tied to the actual damages sustained by a plaintiff who proves any violation of a predicate act and who suffers personal injury. The wording of §2255 is not like the Stored Communications Act at issue in Hawaiian Airlines, but is more akin to the wording of the Privacy Act as discussed in Doe v. Chao.

**B.** The recent case of United States v. Berdeal, 595 F.Supp.2d 1326 (S.D. Fla. 2009), further supports Defendant's argument that the "rule of lenity," (Sec. III.D. of Defendant's motion), requires that the Court resolve the statutory interpretation conflict in favor of Defendant. Assuming for the sake of argument that Plaintiff's multiple causes of action, leading to a multiplication of the statutory damages amount, is a reasonable interpretation, like Defendant's reasonable interpretation, under the "rule of lenity," any ambiguity is resolved in favor of the least draconian measure. In Berdeal,

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applying the rule of lenity, the Court sided with the Defendants' interpretation of the Lacey Act which makes illegal the possession of snook caught in specified jurisdictions. The snook had been caught in Nicaraguan waters. The defendants filed a motion to dismiss asserting the statute did not encompass snook caught in foreign waters. The United States disagreed. Both sides presented reasonable interpretations regarding the reach of the statute. In dismissing the indictment, the Court determined that the rule of lenity required it to accept defendants' interpretation.

**III. Also requiring dismissal Plaintiff has failed to sufficiently allege the requisite §2255 predicate acts. (Plaintiff's Response, p. 10)**

Also requiring dismissal of Plaintiff's purported §2255 claim(s) is Plaintiff's failure to sufficiently allege any violation of a requisite predicate act as specifically identified in subsection (a) of the statute. Plaintiff in her response, p. 10, agrees that she has failed to sufficiently allege the predicate act(s) required by §2255. Defendant has no objection to Plaintiff attempting to amend, but Plaintiff should be required to plead a single cause of action under §2255 (2003), without seeking to multiply the presumptive minimum damages.

**IV. 18 U.S.C. §2255 does not allow for the recovery of punitive damages. Thus, Plaintiff's request for punitive damages under §2255 is required to be dismissed or stricken. (Plaintiff's Response, Part III, p. 11-18).**

Plaintiff's reliance on Tachiona v. Mugabe, 216 F.Supp.2d 262 (S.D.N.Y. 2002), is misplaced as the federal statute at issue, the Torture Victim Protection Act (TVPA), is clearly distinguishable. (Plaintiff's response, p. 11). See endnote 3 for relevant text.<sup>3</sup> Unlike §2255 which expressly provides that a successful plaintiff "shall recover the actual damages such minor/person sustains," the TVPA simply states that an individual

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(who violates the TVPA) "shall, in a civil action, be liable for damages." Because the TVPA contains no delineation of the type of damages for which a defendant is liable, the court applied federal common law. §2255 expressly provides for the recovery of actual damages, and, further, imposes a statutory minimum even if the amount of actual damages proven is less than the statutory minimum. Again, had the legislature wanted to allow recovery of punitive damages, such language would have been included in the statute. See, e.g., 18 U.S.C. §2707(c), endnote 1 hereto, specifically allowing for recovery of "actual damages" and "punitive damages."

For the same reason, Plaintiff's reliance on Smith v. Wade, 461 U.S. 30 (1983), (Plaintiff's response, p. 12), is also misplaced. The Smith case dealt with the recovery of damages under the §1983 of the Civil Rights Act. The version of the statute in effect at the time contained absolutely no expression concerning the type of damages recoverable, but provided in relevant part that –

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, **shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.**

Rev. Stat. §1979, amended 93 Stat. 1284, Smith v. Wade, 461 U.S. 30, 31, 103 S.Ct. 1625, 1627 (1983), emphasis added.

Because the Court found no specific expression or guidance of the damages recoverable either in the statute itself or the legislative history, it looked to the common law of torts. Again, §2255 expressly provides for the recovery of "actual damages

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sustained” and imposes a minimum damages amount should plaintiff prove the elements of her claim.

Plaintiff's reference, at p. 13 of her response, to the fact that the legislature eliminated a proposed three-fold damages provision in favor of the “actual damages” language also supports Defendant's position. Remember, this statute was enacted as part of the criminal statutory scheme to punish those who sexually abuse and exploit children. In addition to facing the payment of “actual damages” to a minor/person who suffered personal injury as a result of predicate act violation, such an individual also faces criminal prosecution and the additional accompanying penalties of spending many years in jail. Despite Plaintiff's attempted reliance on the legislative discussions and history prior to the passage of §2255, the ultimate decision is reflected in the language of the statute itself which allows for the recovery of “actual damages,” and does not include punitive damages. Accordingly, Plaintiff's claim for punitive damages under 18 U.S.C. §2255 is required to be dismissed/stricken.

**VI. Count XXXI – “Sexual Battery” is required to be dismissed for failure to state a cause of action. In the alternative, Plaintiff should be required to more definitely state whether she is attempting to allege a claim under Florida common or statutory law, or some federal law, and further allege the required elements and factual allegations. (Response, Part IV, pp. 15-16)**

In her response, at p. 16, Plaintiff claims that “Count XXXI – Sexual Battery” is brought pursuant to Florida common law. Defendant stands on his original motion. If Plaintiff is proceeding under Florida common law, then she should more definitely state such cause of action pleading the requisite elements of a common law sexual battery

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claim without incorporating each and every prior count, which include references to federal and state criminal statutes.

WHEREFORE, Defendant requests that the Court enter an order granting his motion to dismiss, strike, and for more definite statement of Plaintiff's Amended Complaint.

**Certificate of Service**

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 by CM/ECF on this 8<sup>th</sup> day of May, 2009:

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Respectfully submitted,

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<sup>1</sup> See 18 U.S.C. §2707(c), of the Stored Communications Act for provision at issue.

**Title 18. Crimes and Criminal Procedure**

**Part I. Crimes**

**Chapter 121. Stored Wire and Electronic Communications and Transactional Records Access**

**§ 2707. Civil action**

**(a) Cause of action.**--Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

**(b) Relief.**--In a civil action under this section, appropriate relief includes--

- (1) such preliminary and other equitable or declaratory relief as may be appropriate;
- (2) damages under subsection (c); and
- (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

**(c) Damages.**--The court may assess as damages in a civil action under this

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section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

**(d) Administrative discipline.**--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

**(e) Defense.**--A good faith reliance on—

- (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under section 2703(f) of this title);
- (2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or
- (3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law.

**(f) Limitation.**--A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

**(g) Improper disclosure.**--Any willful disclosure of a 'record', as that term is defined in section 552a(a) of title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2703 of this title, or from a device installed pursuant to section 3123 or 3125 of this title, that is not a disclosure made in the proper performance of the official

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functions of the officer or governmental entity making the disclosure, is a violation of this chapter. This provision shall not apply to information previously lawfully disclosed (prior to the commencement of any civil or administrative proceeding under this chapter) to the public by a Federal, State, or local governmental entity or by the plaintiff in a civil action under this chapter.

<sup>2</sup> See §552a(g)(4), in bold, for relevant section of statute.

Title 5. Government Organization and Employees  
Part I. The Agencies Generally  
Chapter 5. Administrative Procedure  
Subchapter II. Administrative Procedure

**⇒§ 552a. Records maintained on individuals**

.....

**(g)(1) Civil remedies.**—Whenever any agency

**(A)** makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

**(B)** refuses to comply with an individual request under subsection (d)(1) of this section;

**(C)** fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

**(D)** fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

**(2)(A)** In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

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**(B)** The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

**(3)(A)** In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

**(B)** The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

**(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--**

**(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and**

**(B) the costs of the action together with reasonable attorney fees as determined by the court.**

<sup>3</sup> 28 U.S.C. §1350 - Torture Victim Protection Act – Section 2

**“Sec. 2. Establishment of civil action.**

**“(a) Liability.--**An individual who, under actual or apparent authority, or color of law, of any foreign nation--

**“(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or**

**“(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.**

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(Emphasis added).