

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80893-MARRA-JOHNSON



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's claim brought pursuant to §2255 in Count II of the First Amended Complaint [D.E. 38]; (2) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit; and (3) 18 U.S.C. §2255 allows for a single recovery of the presumptive minimum damages amount against a single Defendant, and not a multiplication thereof based on the number of statutory predicate act violations. 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:

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 2

### **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) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit; and (3) 18 U.S.C. §2255 allows for a single recovery of the presumptive minimum damages amount against a single Defendant, and not a multiplication thereof based on the number of statutory predicate act violations or incidents or counts. 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's First Amended Complaint [D.E. 38], dated April 17, 2009, attempted to assert five causes of action against Defendant. Pursuant to this Court's very recent Order [D.E. 125], dated March 3, 2010, on Defendant's Motion To Dismiss, For More Definite Statement & Strike, Count IV - entitled "Civil Remedy for Criminal Practices" pursuant to §772.104(1), Fla. Stat., was dismissed with prejudice.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 3

The Order also struck Plaintiff's claim for punitive damages under Count II, as Plaintiff conceded that punitive damages are not available under 18 U.S.C. §2255.

2. Having just received the Court's ruling on Defendant's motion to dismiss, Defendant has yet to file an answer and affirmative defenses to the First Amended Complaint. However, pursuant to this Court's Order Re-Setting Trial Date & Pretrial Deadlines [D.E. 119] the deadline for the filing of substantive pretrial motions by the parties is March 5, 2010. This action is currently set for trial on the two week calendar commencing Monday, July 16, 2010. [D.E. 119]. Thus, in order to comply with the Court's order, Defendant is filing the subject motion now. As stated above, Defendant requests and reserves the right to assert any and all affirmative defenses to this action and to file additional summary judgment motions based on such defenses as this case progresses.

3. Defendant by separate motion is also seeking summary judgment of Plaintiff's §2255 claim (Count II) as the pleadings and discovery on file show that Plaintiff can not establish a violation of her alleged requisite predicate acts. This motion should be decided first.

4. Count I attempts to allege a state law claim under Florida law for "Sexual Battery upon a Minor." Count II, which is the subject of this motion, attempts to assert a claim pursuant to 18 U.S.C. §2255. Count III attempts to allege a state law claim for "Intentional Infliction of Emotional Distress." Finally, Count V is entitled "Cause of Action Pursuant to Florida Statute 796.09." (Plaintiff JANE DOE shall be referred to as "JD" or "Jane" or "Jane Doe." Plaintiff's First Amended Complaint shall be referred to as "1st Am Comp," and is attached hereto as **Exhibit A.**)

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 4

5. According to the complaint, “Plaintiff, Jane Doe, was first brought to Defendant Epstein’s mansion **in early 2003**, when she was a fourteen-year old in middle school.”

[1st Am Comp, ¶16]. Plaintiff further alleges that –

**Beginning in approximately February 2003 and continuing until approximately June 2005**, the defendant coerced and enticed the impressionable, vulnerable, and economically deprived then minor Plaintiff in order to commit various acts of sexual misconduct against her. . . . [1st Am Comp, ¶18].

6. JD’s date of birth is June 17, 1988. [Deposition of Jane Doe, taken September 30, 2010, p. 11, lines 9-10]. The original Complaint in this matter was filed on August 13, 2008. Thus, JD was 20 years old at the time the suit was first filed.

7. In trying to assert a §2255 claim, Plaintiff attempts to claim a violation of the federal criminal statute 18 U.S.C. 2422(b) and §18 U.S.C. 2423(b) and (e) as the requisite predicate act.<sup>1</sup> (See endnote 1 hereto for full text of 18 U.S.C. §2255, the version that applied in 2003 through 2005, when the alleged acts occurred, and the amended version effective July 27, 2006.) See endnote 2 for full text of 18 U.S.C. §2422.<sup>2</sup> The amended version of §2422 increases the term of imprisonment). See endnote 3 for full text of 18 U.S.C. 2423, in effect at the time of the alleged conduct.<sup>3</sup>

8. In the “Wherefore” clause of Count II, Plaintiff “demands judgment against Defendant, Jeffrey Epstein, for compensatory damages, . . . attorneys’ fees, and such other and further relief as this Court deems just and proper.”

#### **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).

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 5

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 Showing that EPSTEIN Is Entitled to the Summary Judgment Sought 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 each of 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.)

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 6

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 statutes 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 ‘**beginning in approximately February 2003 and continuing until approximately June 2005,**’ as the period of time during which the conduct at issue occurred. Thus, it is undisputed Epstein’s conduct occurred prior to §2255’s amendment, effective July 27, 2006.

Based on Plaintiff’s own allegations, and 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.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 7

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.<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].

Jane Doe v. Epstein  
 Case No. 08-CV-80893-Marra-Johnson  
 Page 8

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.).

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”).

These well entrenched constitutional protections and presumptions against retroactive application of legislation establish that 18 U.S.C. §2255 in effect at the time

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 9

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. Siegel, 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).

§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.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 10

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 (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

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 11

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

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 12

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).

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 13

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 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

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 14

effect on Defendant by tripling the presumptive minimum of damages available to a plaintiff, regardless of the actual damages suffered.<sup>2</sup>

**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 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.

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<sup>2</sup> 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.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 15

Notwithstanding the above legal analysis, in the recent case of Individual Known to Defendant As 08MIST096.JPG and 08mist067.jpg v. Falso, 2009 WL 4807537 (N.D. N.Y. Dec. 9, 2009), the Federal Northern District New York Court addressed the issue of whether §2255 is a civil or criminal statute for purposes of the constitutional prohibition against double jeopardy. The New York Court stated that “looking to the plain language of §2255(a), it is clear that the statutory intent was to provide a civil remedy. This is exemplified by the title ... and the fact that the statute aims to provide compensation to individuals who suffered personal injury as a result of criminal conduct against them.” The New York Court in analyzing whether §2255 violated the Constitutional prohibition against double jeopardy, concluded that although the behavior to which §2255 is criminal, it did not find that the “primary aim” was “retribution and deterrence.” “The statute serves civil goals.” The “primary aim” is “the compensation for personal injuries sustained as a result of criminal conduct.”

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,<sup>3</sup>

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

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<sup>3</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 the effective date of the Act. The Court determined that statutory text in question, §102, was subject to the presumption against statutory retroactivity.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 16

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 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 in effect at the time of the alleged conduct in each of the Plaintiffs' cases against EPSTEIN.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 17

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

The First Amended Complaint is predicated exclusively on acts that allegedly occurred beginning in February, 2003 and continuing until approximately June, 2005. At that time, 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).

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 18

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 2003 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

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 19

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 ...*

Jane Doe v. Epstein  
 Case No. 08-CV-80893-Marra-Johnson  
 Page 20

*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.”).<sup>4</sup> There is no basis to depart from that rule here.

It thus is no answer that the 2003 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 would make Masha’s Law’s internally redundant, because Masha’s Law retained the “legal disability” language from the 2003 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

<sup>4</sup> 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); Clohesy 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](http://thomas.loc.gov/bss/abt_dgst.html) (last visited May 10, 2009).

Jane Doe v. Epstein  
 Case No. 08-CV-80893-Marra-Johnson  
 Page 21

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

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 22

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. JD was 20 years old at the time she instituted this action, no longer a minor.

**III. A. As a matter of law, Defendant is entitled to the entry of summary judgment determining that the remedy afforded pursuant to 18 U.S.C. §2255 allows for a single recovery of “actual damages” by a plaintiff against a defendant. The recovery afforded is not on a per violation or per incident or per count basis.**<sup>5</sup>

As noted above, certain of the Jane Does allege a single encounter with EPSTEIN while others allege multiple encounters. Under the plain meaning of the statutory text, §2255 does not allow for a multiplication of the presumptive “actual damages” by the number of incidents or violations (or counts) alleged. No where in the statutory text is there any reference to the “civil remedy” afforded against a defendant by this statute as being on a “per violation” or “per incident” or “per count” basis. 18 U.S.C. 2255(a) creates a “civil remedy” 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 ... .” The presumptive minimum damages amount speaks in terms of “actual damages.” See 18 U.S.C. §2255, quoted

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<sup>5</sup> In other §2255 actions filed against Defendant, Defendant has previously asserted the position that 18 U.S.C. §2255’s creates a single cause of action on behalf of a plaintiff against a defendant, as opposed to multiple causes of action on a per violation basis or as opposed to an allowance of a multiplication of the statutory presumptive minimum damages or “actual damages.” EPSTEIN asserts his position regarding the single recovery of damages in order to properly preserve all issues pertaining to the proper application of §2255 for appeal. See C.M.A. v. Epstein, Case No. 08-CIV-80811 Marra/Johnson; and Jane Doe II v. Epstein, Case No. 09-CIV-80469 Marra/Johnson.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 23

above in part I; See 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); and the recent cases in front of this court on Defendant's Motions to Dismiss and For More Definite Statement – Doe No. 2 v. Epstein, 2009 WL 383332 (S.D. Fla. Feb. 12, 2009); Doe No. 3 v. Epstein, 2009 WL 383330 (S.D. Fla. Feb. 12, 2009); Doe No. 4 v. Epstein, 2009 WL 383286 (S.D. Fla. Feb. 12, 2009); and Doe No. 5 v. Epstein, 2009 WL 383383 (S.D. Fla. Feb. 12, 2009); see also 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).

18 U.S.C.A. §2255 - *Civil Remedy for Personal Injuries*, creates a federal cause of action or “civil remedy” for a minor victim of sexual, abuse, molestation and exploitation, and allows for a single recovery of the “actual damages” sustained and proven by a “minor who is a victim of a violation” of an enumerated predicated act and who suffers personal injury as a result of such violation.” “18 U.S.C. §2255 gives victims of sexual conduct who are minors a private right of action.” Martinez v. White, 492 F.Supp.2d 1186, 1188 (N.D. Cal. 2007). 18 U.S.C.A. §2255 “merely provides a cause of action for damages in ‘any appropriate United States District Court.’” Id. at 1189.

Under the plain meaning of the statute, §2255 does not allow for the actual damages sustained to be duplicated or multiplied on behalf of a plaintiff against a defendant on a “per violation” or “per incident” or “per count” basis. No where in the

Jane Doe v. Epstein  
 Case No. 08-CV-80893-Marra-Johnson  
 Page 24

statutory text is there any reference to the recovery of damages afforded by this statute as being on a “per violation” or “per incident” or “per count” basis. 18 U.S.C. 2255(a) creates a civil remedy 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 ... .” The statute speaks in terms of the recovery of the “actual damages such minor sustains and the cost of suit, including attorney’s fees.” See 18 U.S.C. §2255(a), endnote i. See 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).

As to the meaning of “actual damages,” the Eleventh Circuit in McMillian v. F.D.I.C., 81 F.3d 1041, 1055 (11th Cir.1996)<sup>6</sup>, succinctly explained:

... “Compensatory damages” are defined as those damages that “will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury.” Black’s Law Dictionary (6th Ed.1991). **“Actual damages,” roughly synonymous with compensatory damages, are defined as “[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed ... to ‘nominal’ damages [and] ‘punitive’ damages.”** *Id.*<sup>FN15</sup> Finally, “[d]irect damages are such as follow immediately upon the act done.” *Id.* **Thus, “actual direct compensatory damages” appear to include those damages, flowing directly from the repudiation, which make one whole, as opposed to those which go farther by including future contingencies such as lost**

<sup>6</sup> In McMillian, the 11<sup>th</sup> Circuit was faced with the task of the interpretation of the statutory term “actual direct compensatory damages” under FIRREA, 12 U.S.C. §1821(e)(3)(i). In doing so, the Court began with the plain meaning of the phrase. See Perrin v. United States, 444 U.S. 37, 42-43, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning.”); United States v. McLymont, 45 F.3d 400, 401 (11th Cir.), *cert. denied*, 514 U.S. 1077, 115 S.Ct. 1723, 131 L.Ed.2d 581 (1995) (“[T]he plain meaning of this statute controls unless the language is ambiguous or leads to absurd results.”).

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 25

**profits and opportunities or damages based on speculation.** [Citation omitted]. ...

FN15. According to *Corpus Juris Secundum*, “**‘Compensatory damages’ and ‘actual damages’ are synonymous terms ... and include[ ] all damages other than punitive or exemplary damages.**” 25 C.J.S. Damages § 2 (1966).

(**Emphasis added**).

See also, Fanin v. U.S. Dept. of Veteran Affairs, 2009 WL 1677233 (11<sup>th</sup> Cir. June 17, 2009), citing Fitzpatrick v. IRS, 665 F.2d 327, 331 (11<sup>th</sup> Cir. 1982), *abrogated on other grounds by Doe v. Chao*, 540 U.S. 614, 124 S.Ct. 1204 (2004), (“Actual damages” recoverable under the Privacy Act are “proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-qualified injuries;” and the statutory minimum of \$1,000 under the Privacy Act is not available unless the plaintiff suffered some amount of “actual damages.”).

Considering the plain meaning of “actual damages” and the purpose of such damages is to “make one whole,” to allow a duplication or multiplication of the actual damages sustained is in direct conflict with the well entrenched legal principle against duplicative damages recovery. See generally, E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 297, 122 S.Ct. 754, 766 (2002)(“As we have noted, it ‘goes without saying that the courts can and should preclude double recovery by an individual.’”), citing General Telephone, 446 U.S., at 333, 100 S.Ct. 1698.

The purpose of damages recovery where a Plaintiff has suffered personal injury as a result of Defendant’s misconduct is to make the plaintiff whole, not to enrich the plaintiff. See 22 Am.Jur.2d *Damages* §36, stating the settled legal principle that –

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 26

The law abhors duplicative recoveries, and a plaintiff who is injured by a defendant's misconduct is, for the most part, entitled to be made whole, not enriched. Hence, for one injury, there should be one recovery, irrespective of the availability of multiple remedies and actions. Stated otherwise, a party cannot recover the same damages twice, even if recovery is based on different theories.

...  
... , a plaintiff who alleges separate causes of action is not permitted to recover more than the amount of damages actually suffered. There cannot be a double recovery for the same loss, even though different theories of liability are alleged in the complaint. ... .

See also, 22 Am.Jur.2d *Damages* § 28 –

The law abhors duplicative recoveries; in other words, a plaintiff who is injured by reason of a defendant's behavior is, for the most part, entitled to be made whole, not to be enriched. The sole object of compensatory damages is to make the injured party whole for losses actually suffered; the plaintiff cannot be made more than whole, make a profit, or receive more than one recovery for the same harm. Thus, a plaintiff in a civil action for damages cannot, in the absence of punitive or statutory treble damages, recover more than the loss actually suffered. The plaintiff is not entitled to a windfall, and the law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken.

See also recent case of U.S. v. Baker, supra, at \*8, wherein the Court was inclined to agree with the defendant's interpretation of §2255(a) of allowing for a single recovery of the statutory minimum damages amount as opposed to the government's argument that "the minimum amount of damages mandated by 18 U.S.C. §2255(a) applies to each of (pornographic) image produced by [defendant]." The government attempted to argue that restitution should be equal to the statutory minimum amount times the 55 photos produced by defendant. In rejecting the government's argument, the Court reiterated that the statutory minimum is a floor for damages – in other words, a mandated minimum. Nothing prevents a plaintiff from proving that he or she suffered damages in a greater amount.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 27

Had Congress wanted to write in a multiplier of actual damages recoverable it could have easily done so. For an example of a statute wherein the legislature included the language “for each violation” in assessing a “civil penalty,” see 18 U.S.C. §216, entitled “*Penalties and injunctions*,” of Chapter 11 – “Bribery, Graft, and Conflict of Interests,” also contained in Title 18 – “Crimes and Criminal Procedure.” Subsection (b) of §216 gives the United States Attorney General the power to bring a “civil action ... against any person who engages in conduct constituting an offense under” specified sections of the bribery, graft, and conflicts of interest statutes. The statute further provides in relevant part that “upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than \$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.” As noted, 18 U.S.C. §2255 does not include such language.

**III. B. As a matter of law, Defendant is entitled to the entry of summary judgment determining that the minimum statutory damages awarded under 18 U.S.C. §2255(a) are not subject to multiplier on a per incident or per violation or per count basis.**

As discussed above herein, by its own terms, §2255 provides for the recovery of “actual damages the minor sustains and the cost of the suit, including attorney’s fees.” The next sentence expressly states – “Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000 in value.” (Even the 2006 amended version provides – “Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.”) There is

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 28

absolutely no language that allows for a plaintiff to multiply the presumptive minimum damages recoverable on a “per violation” or “per incident” or “per count” basis.

If Plaintiff is alleging multiple counts in an effort to multiply the statutory minimum, such recovery would be improper based on the same legal principles that a duplication or multiplication of the “actual damages” sustained and proven would also be improper under the plain meaning of the statute. The \$50,000 is a statutory minimum; nothing prevents a plaintiff who suffers personal injury as a result of a violation of any enumerated predicated act from proving she sustained actual damages in an amount greater than the statutory minimum. At the same time, if she proves she suffered personal injury and suffered actual damages in an amount less than the statutory minimum, she is able to recover the minimum amount.

**III. C. In the alternative, pursuant to constitutional law principles of statutory interpretation, 18 U.S.C. §2255 is required to be interpreted as allowing for a single recovery of actual damages or the statutory minimum, where personal injury and actual damages are sustained and proven, on behalf of a plaintiff against a defendant. The recovery of damages is not subject to duplication or multiplication on a “per violation” or “per incident” or “per count” basis.**

As set forth above, it is Defendant’s position that under applicable law, 18 U.S.C. §2255 does not allow a Plaintiff to pursue the recovery of actual damages or the minimum afforded under the statute on a “per violation” or “per incident” basis by attempting to allege multiple counts thereunder or prove multiple predicate act violations. In the alternative, if one were to assume that the language of §2255 were vague or ambiguous, under the constitutional based protections of due process, judicial restraint, and the rule of lenity applied in construing a statute, Defendant’s position as to the

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 29

meaning of the statute would prevail. See United States v. Santos, 128 S.Ct. 2020, 2025 (2008). As summarized by the United States Supreme Court in Santos, supra, at 2025:

... The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. See *United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 61 L.Ed. 857 (1917); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931); *United States v. Bass*, 404 U.S. 336, 347-349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. ...

In Santos, the Court was faced with the interpretation of the term "proceeds" in the federal money laundering statute, 18 U.S.C. §1956. "The federal money-laundering statute prohibits a number of activities involving criminal 'proceeds.'" Id., at 2023. Noting that the term "proceeds" was not defined in the statute, the Supreme Court stated the well settled principle that "when a term is undefined, we give it its ordinary meaning." Id., at 2024. Under the ordinary meaning principle, the government's position was that proceeds meant "receipts," while the defendant's position was that proceeds meant "profits." The Supreme Court recognized that under either of the proffered "ordinary meanings," the provisions of the federal money-laundering statute were still coherent, not redundant, and the statute was not rendered "utterly absurd." Under such a situation, citing to a long line of cases and the established rule of lenity, "the tie must go to the defendant." Id., at 2025. See portion of Court's opinion quoted above. "Because the 'profits' definition of 'proceeds' is always more defendant friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." Id.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 30

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" requires that the Court resolve any statutory interpretation conflict in favor of Defendant. Assuming for the sake of argument that Plaintiff's multiple counts, 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, 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.

To allow a duplication or multiplication would subject Defendant EPSTEIN to a punishment that is not clearly prescribed – an unwritten multiplier of the "actual damages" or the presumptive minimum damages. The rule of lenity requires that Defendant's interpretation of the remedy afforded under §2255 be adopted.

In addition, under the Due Process Clause's basic principle of fair warning -

... a criminal statute must give fair warning of the conduct that it makes a crime ... . As was said in United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,

'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 31

Thus we have struck down a [state] criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law,' *ibid.*, and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

Thus, applying these well-entrenched constitutional principles of statutory interpretation and application, Defendant is entitled to the entry of summary judgment determining that 18 U.S.C. §2255 allows for a single recovery of damages against a Defendant; the statutory minimum is not subject to a multiplier on a per incident or per violation or per count basis.

#### 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) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit; and (3) 18 U.S.C. §2255 allows for a single recovery of the presumptive minimum damages amount against a single Defendant, and not a multiplication thereof based on the number of statutory predicate act violations or incidents or counts. The pleadings and the discovery materials on file show that there is

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 32

no genuine issue as to any material fact establishing that EPSTEIN is entitled as a matter of law to the summary judgments sought.

WHEREFORE, Defendant requests that this Court enter the summary judgments sought herein.

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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 5<sup>th</sup> day of March, 2010:

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Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 33

Salt Lake City, UT 84112

[Redacted]

*Co-counsel for Plaintiff Jane Doe*

Respectfully submitted,

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<sup>1</sup> 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.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 34

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(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.)

\* \* \* \*

<sup>2</sup> CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 35

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**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.**

§ 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.

<sup>3</sup> § 2423. Transportation of minors

(a) **Transportation with intent to engage in criminal sexual activity.**--A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

Jane Doe v. Epstein  
Case No. 08-CV-80893-Marra-Johnson  
Page 36

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**(b) Travel with intent to engage in illicit sexual conduct.**--A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

**(c) Engaging in illicit sexual conduct in foreign places.**--Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

**(d) Ancillary offenses.**--Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

**(e) Attempt and conspiracy.**--Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

**(f) Definition.**--As used in this section, the term "illicit sexual conduct" means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

**(g) Defense.**--In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

Effective April 30, 2003 to July 26, 2006.