

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Jay Lefkowitz [JLefkowitz@kirkland.com]  
**Sent:** Thursday, September 13, 2007 7:35 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re:

Sounds good. I will be at home. Let's talk at 9 am. [REDACTED] 877 3944. Already thinking about the same statutes.

Look forward to speaking in the morning.

Best, Jay

----- Original Message -----

**From:** "Villafana, Ann Marie C. \ (USAFLS\)" [Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** 09/13/2007 07:26 PM AST  
**To:** Jay Lefkowitz  
**Subject:** RE:

Hi Jay -- Yes, I am. I have been spending some quality time with Title 18 looking for misdemeanors. Do you want to take a look at 18 USC 403, 18 USC 1512(d), and 47 USC 223(a)(1)(B) and we can talk about them tomorrow? I know that someone mentioned there being activity on an airplane, I just want to make sure that there is factual basis for the plea that the agents can confirm.

I'm not sure exactly where I will be tomorrow morning, so is it alright if I call you?

Have a good evening.

A. Marie Villafana  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Jay Lefkowitz [mailto:JLefkowitz@kirkland.com]  
**Sent:** Thursday, September 13, 2007 7:21 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:**

Marie - Are you free to speak at 9 am tomorrow?

Thanks. Jay

\*\*\*\*\*

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:27 PM  
**To:** 'Jay Lefkowitz'  
**Subject:** RE:

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\*\*\*\*\*

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Jay Lefkowitz [JLefkowitz@kirkland.com]  
**Sent:** Wednesday, September 12, 2007 5:55 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Cc:** Lourie, Andrew (USAFLS)  
**Subject:** Re: Jeffrey Epstein

Andy - meant to copy you on my first attempt to respond to Marie.

We appreciate the courtesy of today's meeting and your agreement and Alex's. We understand the concerns you are raising and will work over the next few days to come up with a mutually acceptable solution. I will speak with you no later than Monday, and in the interim, if we come up with a solution, we will be in touch with you.

Best, Jay

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----- Original Message -----

**From:** "Villafana, Ann Marie C. \ (USAFLS\)" [Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** 09/12/2007 03:43 PM AST  
**To:** Jay Lefkowitz  
**Cc:** "Lourie, Andrew \ (USAFLS\)" <Andrew.Lourie@usdoj.gov>  
**Subject:** Jeffrey Epstein

Jay – It was nice seeing you again. Andy and I talked with Alex and Jeff. We are all satisfied in principle with the agreement, but the Office is uncomfortable with the recommended federal charge. Specifically, we are concerned about the effect of taking the position that Mr. Epstein's house is in the special maritime and territorial jurisdiction of the United States, and we have no evidence of any assaults occurring either on Mr. Epstein's plane or offshore from his residence.

We are hoping that you can find an alternative federal statute that can be used. I also will wait to hear from Jack Goldberger to discuss logistics.

Thank you.

*A. Marie Villafaña*

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

Phone 561 209-1047

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**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Wednesday, September 12, 2007 3:44 PM  
**To:** 'lefkowitz@kirkland.com'  
**Cc:** Lourie, Andrew (USAFLS)  
**Subject:** Jeffrey Epstein

Jay – It was nice seeing you again. Andy and I talked with Alex and Jeff. We are all satisfied in principle with the agreement, but the Office is uncomfortable with the recommended federal charge. Specifically, we are concerned about the effect of taking the position that Mr. Epstein's house is in the special maritime and territorial jurisdiction of the United States, and we have no evidence of any assaults occurring either on Mr. Epstein's plane or offshore from his residence.

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**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 8:10 PM  
**To:** Oosterbaan, Andrew  
**Subject:** RE: Epstein

Hi Drew – I tracked down the AUSA in Alaska and he is sending the trust agreement out to me. I will let you know how things go in the morning.

Thanks.

*A. Marie Villafana*  
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West Palm Beach, FL 33401  
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---

**From:** Oosterbaan, Andrew  
**Sent:** Thursday, September 13, 2007 7:54 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Epstein

Thanks for the information, Marie. I'll get the details on the Boehm arrangements from the prosecutors and get back to you tomorrow. I believe the girls agreed to the arrangement, but I'll confirm that. I should have the indictment reviewed by then as well.

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Thursday, September 13, 2007 7:37 PM  
**To:** Oosterbaan, Andrew  
**Subject:** Epstein

Hi Drew – Sorry to bother you, but the plea negotiations are getting fast and furious. Epstein's lawyers are fixated on this idea of a "victim's fund" rather than having the girls file separate 2255 actions. I know that the reason they want to do it is not out of the goodness of their hearts but to keep this stuff out of the public Court files, but in some ways it will help the girls, too. Do you know anything about how the fund in Alaska was worked out? Did all the victims consent or did the Court just do it?

Thank you for your help. I also turned in the indictment package to my immediate supervisor today, so I expect some edits back from her before it goes higher up the chain. If you had any thoughts, please let me know.

*A. Marie Villafana*  
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**Villafana, Ann Marie C. (USAFLS)**

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**From:** Oosterbaan, Andrew  
**Sent:** Tuesday, September 11, 2007 11:53 AM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Revised Epstein Indictment

I had not heard. The counter-offering is unfortunate, but I suppose it's understandable. Let me know how it goes. Thanks, Marie.

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Tuesday, September 11, 2007 11:48 AM  
**To:** Oosterbaan, Andrew  
**Subject:** RE: Revised Epstein Indictment

Probably some time tomorrow, just to Karen Atkinson to get a first read, then it will go to Rolando and then up to Jeff. I am still shooting for 9/25 for an indictment date, assuming they don't take our counter-counter-offer.

In case you haven't heard, yesterday one of Epstein's lawyers countered with 15 months jail followed by 15 months "community confinement" (a/k/a home confinement), and we counter-counter-ed with 20 months jail followed by 10 months community confinement.

Here is the agreement that was sent out

Thanks, Drew.

*A. Marie Villafaña*  
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**From:** Oosterbaan, Andrew  
**Sent:** Tuesday, September 11, 2007 11:39 AM  
**To:** Villafana, Ann Marie C. (USAFLS); McMillan, John (USAFLS)  
**Cc:** E.Kuyrkendall@ic.fbi.gov; Richards, Jason R.  
**Subject:** RE: Revised Epstein Indictment

Will do. When do you plan to submit it?

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Tuesday, September 11, 2007 11:34 AM  
**To:** McMillan, John (USAFLS); Oosterbaan, Andrew  
**Cc:** E.Kuyrkendall@ic.fbi.gov; Richards, Jason R.  
**Subject:** Revised Epstein Indictment

Hi all – Here is the revised version of the indictment. We are still doing some proofreading, but I wanted to get some feedback before I start sending it through the chain of command. Can you let me know what you think?

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 11, 2007 11:48 AM  
**To:** Oosterbaan, Andrew  
**Subject:** RE: Revised Epstein Indictment  
**Attachments:** 070910 Epstein Non-Prosecution Agreement.pdf

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**Subject:** Revised Epstein Indictment

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<<070911 revised indictment.wpd>>

*A. Marie Villafana*

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

**Exhibit 48**

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 11, 2007 2:15 PM  
**To:** Gerald Lefcourt  
**Cc:** Acosta, Alex (USAFLS); Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Revised Agreement re Epstein

Dear Gerry: I have attached a revised version, as per Mr. Acosta's request. The operative terms have not changed. If you have any questions, please do not hesitate to call. Also, please confirm your receipt of this e-mail.

Thank you.



070911 Epstein  
Ion-Prosecution..

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, September 10, 2007 5:23 PM  
**To:** Gerald Lefcourt  
**Cc:** Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Jeffrey Epstein

Gerry:

As per your discussion with U.S. Attorney Acosta, I have attached the Office's written counterproposal. If you have any questions regarding its terms, please do not hesitate to call.



070910 Epstein  
Non-Prosecution..

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

"Sloman, Jeff (USAFLS)" <Jeff.Sloman@usdoj.gov>

11/27/2007 01:55 PM

To

"Jay Lefkowitz" <JLefkowitz@kirkland.com> cc  
"Acosta, Alex (USAFLS)" <Alex.Acosta@usdoj.gov> Subject  
Epstein

Jay,

Please accept my apologies for not getting back to you sooner but I was a little under the weather yesterday. I hope that you enjoyed your Thanksgiving.

Regarding the issue of due diligence concerning Judge [REDACTED] selection, I'd like to make a few observations. First, Guy Lewis has known for some time that Judge [REDACTED] was making reasonable efforts to secure Aaron Podhurst and Bob Josephsberg for this assignment. In fact, when I told you of Judge [REDACTED] selection during our meeting last Wednesday, November 21st, you and Professor Dershowitz seemed very comfortable, and certainly not surprised, with the selection. Podhurst and Josephsberg are no strangers to nearly the entire Epstein defense team including Guy Lewis, Lili Ann Sanchez, Roy Black, and, apparently, Professor Dershowitz who said he knew Mr. Josephsberg from law school. Second, Podhurst and Josephsberg have long-standing stellar reputations for their legal acumen and ethics. It's hard for me to imagine how much more vetting needs to be done.

The United States has a statutory obligation (Justice for All Act of 2004) to notify the victims of the anticipated upcoming events and their rights associated with the agreement entered into by the United States and Mr. Epstein in a timely fashion. Tomorrow will make one full week since you were formally notified of the selection. I must insist that the vetting process [REDACTED] to an end. Therefore, unless you provide me with a good faith objection to Judge [REDACTED] selection by COB tomorrow, November 28, 2007, I will authorize the notification of the victims. Should you give me the go-ahead on Podhurst and Josephsberg selection by COB tomorrow, I will simultaneously send you a draft of the letter. I intend to notify the victims by letter after COB Thursday, November 29th. Thanks,

Jeff

\*\*\*\*\*  
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\*\*\*\*\*

back to work after the Thanksgiving Holiday, and yet your demands regarding timing suggest that I have been sitting on my hands for days.

You should know that the first time I learned about Judge [REDACTED] selection of Podhurst and Josephsberg, and indeed the first time I ever heard their names, was in our meeting with you on Wednesday of last week. Nevertheless, I have now been able to confer with my client, and we have determined that the selection of Podhurst and Josephsberg are acceptable to us, reserving, of course, our previously stated objections to the manner in which you have interpreted the section 2255 portions of the Agreement.

We do, however, strongly and emphatically object to your sending a letter to the alleged victims. Without a fair opportunity to review and the ability to make objections to this letter, it is completely unacceptable that you would send it without our consideration. Additionally, given that the US Attorney's office has made clear it cannot vouch for the claims of the victims, it would be incendiary and inappropriate for your Office to send such a letter. Indeed, because it is a certainty that any such letter would immediately be leaked to the press, your actions will only have the effect of injuring Mr. Epstein and promoting spurious civil litigation directed at him. We believe it is entirely unprecedented, and in any event, inappropriate for the Government to be the instigator of such lawsuits.

Finally, we disagree with your view that you are required to notify the alleged victims pursuant to the Justice for All Act of 2004. First, 18 USC section 2255, the relevant statute under the Non-Prosecution Agreement for the settlement of civil remedies, does not have any connection to the Justice for All Act. Section 2255 was enacted as part of a different statute. Second, the Justice for All Act refers to restitution, and section 2255 is not a restitution statute. It is a civil remedy. As you know, we had offered to provide a restitution fund for the alleged victims in this matter; however that option was rejected by your Office. Had that option been chosen, we would not object to your notifying the alleged victims at this point. At this juncture, however, we do not accept your contention that there is a requirement that the government notify the alleged victims of a potential civil remedy in this case.

Accordingly, for all the reasons we have stated above, we respectfully -- and firmly -- object to your sending any letter whatsoever to the alleged victims in this matter. Furthermore, if a letter is to be sent to these individuals, we believe we should have a right to review and make objections to that submission prior to it being sent to any alleged victims. We also request that if your Office believes that it must send a letter to go to the alleged victims, who still have not been identified to us, it should happen only after Mr. Epstein has entered his plea. This letter should then come from the attorney representative, and not from the Government, to avoid any bias.

As you know, Judge Starr has requested a meeting with Assistant Attorney General Fisher to address what we believe is the unprecedented nature of the section 2255 component of the Agreement. We are hopeful that this meeting will take place as early as next week. Accordingly, we respectfully request that we postpone our discussion of sending a letter to the alleged victims until after that meeting. We strongly believe that rushing to send any letter out this week is not the wisest manner in which to proceed. Given that Mr. Epstein will not even enter his plea for another few weeks, time is clearly not of the essence regarding any notification to the identified individuals.

Thanks very much,

Jay

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Lourie, Andrew  
**Sent:** Wednesday, November 28, 2007 5:02 PM  
**To:** Villafana, Ann Marie C. (USAFLS); Oosterbaan, Andrew  
**Cc:** Garcia, Rolando (USAFLS)  
**Subject:** Re: Epstein

Ok thx. Would you send me your last proposed nonpros with them with the 2255 language?

----- Original Message -----

**From:** Villafana, Ann Marie C. (USAFLS) <Ann.Marie.C.Villafana@usdoj.gov>  
**To:** Lourie, Andrew; Oosterbaan, Andrew  
**Cc:** Garcia, Rolando (USAFLS) <RGarcia@usa.doj.gov>  
**Sent:** Wed Nov 28 16:48:48 2007  
**Subject:** FW: Epstein

Hi Andy and Drew -- This is the first that I have heard about another attempt to meet with someone in Washington. I thought I would give you a heads up.

Hope all is well, Andy.

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Sloman, Jeff (USAFLS)  
**Sent:** Wednesday, November 28, 2007 4:35 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Fw: Epstein

Marie,

Can u send Jay the proposed letter and redact the names? Thx, Jeff

-----  
Sent from my BlackBerry Wireless Handheld

----- Original Message -----

**From:** Jay Lefkowitz <JLefkowitz@kirkland.com>  
**To:** Sloman, Jeff (USAFLS)  
**Cc:** Acosta, Alex (USAFLS)  
**Sent:** Wed Nov 28 16:29:09 2007  
**Subject:** Re: Epstein

Dear Jeff:

I received your email yesterday and was a little surprised at the tone of your letter, given the fact that we spoke last week and had what I thought was a productive meeting. I was especially surprised given that your letter arrived on only the second day

The United States has a statutory obligation (Justice for All Act of 2004) to notify the victims of the anticipated upcoming events and their rights associated with the agreement entered into by the United States and Mr. Epstein in a timely fashion. Tomorrow will make one full week since you were formally notified of the selection. I must insist that the vetting process come to an end. Therefore, unless you provide me with a good faith objection to Judge [REDACTED] selection by COB tomorrow, November 28, 2007, I will authorize the notification of the victims. Should you give me the go-ahead on Podhurst and Josephsberg selection by COB tomorrow, I will simultaneously send you a draft of the letter. I intend to notify the victims by letter after COB Thursday, November 29th. Thanks,

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11/27/2007 01:55 PM

To

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I received your email yesterday and was a little surprised at the tone of your letter, given the fact that we spoke last week and had what I thought was a productive meeting. I was especially surprised given that your letter arrived on only the second day back to work after the Thanksgiving Holiday, and yet your demands regarding timing suggest that I have been sitting on my hands for days.

You should know that the first time I learned about Judge [REDACTED]'s selection of Podhurst and Josephsberg, and indeed the first time I ever heard their names, was in our meeting with you on Wednesday of last week. Nevertheless, I have now been able to confer with my client, and we have determined that the selection of Podhurst and Josephsberg are acceptable to us, reserving, of course, our previously stated objections to the manner in which you have interpreted the section 2255 portions of the Agreement.

We do, however, strongly and emphatically object to your sending a letter to the alleged victims. Without a fair opportunity to review and the ability to make objections to this letter, it is completely unacceptable that you would send it without our consideration. Additionally, given that the US Attorney's office has made clear it cannot vouch for the claims of the victims, it would be incendiary and inappropriate for your Office to send such a letter. Indeed, because it is a certainty that any such letter would immediately be leaked to the press, your actions will only have the effect of injuring Mr. Epstein and promoting spurious civil litigation directed at him. We believe it is entirely unprecedented, and in any event, inappropriate for the Government to be the instigator of such lawsuits.

Finally, we disagree with your view that you are required to notify the alleged victims pursuant to the Justice for All Act of 2004. First, 18 USC section 2255, the relevant statute under the Non-Prosecution Agreement for the settlement of civil remedies, does not have any connection to the Justice for All Act. Section 2255 was enacted as part of a different statute. Second, the Justice for All Act refers to restitution, and section 2255 is not a restitution statute. It is a civil remedy. As you know, we had offered to provide a restitution fund for the alleged victims in this matter; however that option was rejected by your Office. Had that option been chosen, we would not object to your notifying the alleged victims at this point. At this juncture, however, we do not accept your contention

**Recipient**

'Lourie, Andrew'

Garcia, Rolando (USAFLS)

Atkinson, Karen (USAFLS)

**Read**

Read: 9/19/2007 5:10 PM

Read: 9/19/2007 4:36 PM

Jay

----- Original Message -----

From: Jay Lefkowitz  
Sent: 09/19/2007 03:35 PM EDT  
To: Jay Lefkowitz  
Subject: Draft Plea Agreement

(See attached file: 9.19.07 Draft Plea Agreement  
(Clean).doc)

(See attached file: 9.19.07 Draft Plea Agreement  
(Redlined).doc)

\*\*\*\*\*

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\*\*\*\*\*

Tracking:

## **Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Wednesday, September 19, 2007 4:33 PM  
**To:** 'Lourie, Andrew'; Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS)  
**Subject:** RE: Draft Plea Agreement

**Importance:** High

Andy and Rolando -- This is my proposed response (below). I know that you keep saying he is going to plead, and he will plead if we cave on everything, but I really do not think that Mr. Epstein is going to engage in serious negotiations until he sees the Indictment and shows up in mag court (preferably in flip-flops). In reviewing the indictment package, if you would like to maintain flexibility for the future, we could indict Mr. Epstein just on Count 1 (the conspiracy charge), and, if he won't plead to 5 years at that time, supersede with the remaining counts and just go to trial. But we gave them an initial deadline of early August with the 24-month sentence. We are now seven weeks later and we are just spinning our wheels.

Jay -- The same problems that I e-mailed you about on Sunday and discussed yesterday with you and Rolando and that you discussed with Andy are still in here. Paragraphs 4, 7, 8, 9, and 11 have specifically been discussed and rejected. Paragraphs 17 through 19 have been addressed in paragraph 2 and will not be repeated. You have removed our paragraphs 4 (regarding the application of the Sentencing Guidelines) and 18 (appeal waiver) both of which are specifically required by the Office's Appellate Division. You have replaced Mr. Epstein's plea to a registrable offense, to one that does not require registration, and you have again delayed the plea until after Mr. Epstein completes his federal prison sentence. Rolando and I specifically told you that was unacceptable, and Barry Krischer also has informed us that he will not keep his case open for that period. You also have inserted that this is a Rule 11(c)(1)(C) plea, which binds the judge, which you know we have specifically rejected.

There are other, smaller, changes that the Office probably cannot agree to, but the bigger issues are these. If you or your client insists on these, there can be no plea agreement.

A. Marie Villafaña  
Assistant U.S. Attorney  
561 209-1047

-----Original Message-----

**From:** Jay Lefkowitz [mailto:JLefkowitz@kirkland.com]  
**Sent:** Wednesday, September 19, 2007 3:44 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Fw: Draft Plea Agreement

Confidential  
For settlement purposes only

Marie - I wanted to get this to you before I took off for nyc. I am landing at 7 and would like to speak shortly thereafter.

I am still considering which of the options you suggested Sunday. In this email, I am sending you a redline of your federal resolution. I am also working on a deferred prosecution agreement because it may well be that we cannot reach agreement here. I don't think there are that many issues left open, although clearly we still need to have further discussions. I also like your suggestion from Sunday that we consider a C plea.

I know that Alex would have to sign off on it and that he has not done so as of now.

Regarding my schedule, I am available tonight to speak, all afternoon tomorrow (I am in fed court in nyc on another criminal matter tomorrow am), and then all day Friday.

I will plan on seeing you Monday. I am confident that one of the approaches we have discussed will work out.

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For settlement purposes only

Marie - I wanted to get this to you before I took off for nyc. I am landing at 7 and would like to speak shortly thereafter.

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----- Original Message -----

From: Jay Lefkowitz  
Sent: 09/19/2007 03:35 PM EDT  
To: Jay Lefkowitz  
Subject: Draft Plea Agreement

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(See attached file: 9.19.07 Draft Plea Agreement (Clean).doc)

(See attached file: 9.19.07 Draft Plea Agreement (Redlined).doc)

\*\*\*\*\*

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\*\*\*\*\*

Tracking:

3042

EFTA00226127

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Wednesday, September 19, 2007 4:33 PM  
**To:** Lourie, Andrew; Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS)  
**Subject:** RE: Draft Plea Agreement

**Importance:** High

Andy and Rolando -- This is my proposed response (below). I know that you keep saying he is going to plead, and he will plead if we cave on everything, but I really do not think that Mr. Epstein is going to engage in serious negotiations until he sees the Indictment and shows up in mag court (preferably in flip-flops). In reviewing the indictment package, if you would like to maintain flexibility for the future, we could indict Mr. Epstein just on Count 1 (the conspiracy charge), and, if he won't plead to 5 years at that time, supersede with the remaining counts and just go to trial. But we gave them an initial deadline of early August with the 24-month sentence. We are now seven weeks later and we are just spinning our wheels.

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There are other, smaller, changes that the Office probably cannot agree to, but the bigger issues are these. If you or your client insists on these, there can be no plea agreement.

A. Marie Villafaña  
Assistant U.S. Attorney  
561 209-1047

-----Original Message-----

**From:** Jay Lefkowitz [mailto:JLefkowitz@kirkland.com]  
**Sent:** Wednesday, September 19, 2007 3:44 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Fw: Draft Plea Agreement

Good job. A few thoughts:

I would eliminate the first sentence of para 2. Is there another way to deal with the issue in para 3 without this in the plea agreement? Do we need para 10? Isn't para 11 sufficient without 10? Is it our place to include para 13 in this agreement? I think it belongs in the state agreement and it looks out of place here.

I think you should include Roy or another member of the FL Bar on the plea agreement so we are not slowed down at the last minute by Pro Hac stuff.

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 2:36 PM  
**To:** Lourie, Andrew  
**Subject:** RE: epstein

FYI – The Palm Beach Post reported the whole deal in today's paper and claimed to have a "federal source" and a "spy" in Epstein's camp.

*A. Marie Villafana*  
Assistant U.S. Attorney  
561 209-1047

**From:** Lourie, Andrew [mailto:Andrew.Lourie2@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 2:33 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: epstein

Can you send me copy of the last thing you sent them? Thanks.

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 2:31 PM  
**To:** Lourie, Andrew; Garcia, Rolando (USAFLS)  
**Subject:** RE: epstein

We are still waiting for a "redline" of the agreement that they seemed happy with yesterday. Barry and Lanna and Epstein's attorneys are coming to our office on Monday to finalize everything with the plan of getting him at least arraigned on Monday afternoon. They tried to drag it into Tuesday and I said no.

*A. Marie Villafana*  
Assistant U.S. Attorney  
561 209-1047

**From:** Lourie, Andrew [mailto:Andrew.Lourie2@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 2:25 PM  
**To:** Villafana, Ann Marie C. (USAFLS); Garcia, Rolando (USAFLS)  
**Subject:** epstein

What is the latest?

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Lourie, Andrew [Andrew.Lourie2@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 4:21 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: epstein

I will reach out to Alex to discuss.

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 4:13 PM  
**To:** Villafana, Ann Marie C. (USAFLS); Lourie, Andrew  
**Cc:** Garcia, Rolando (USAFLS)  
**Subject:** RE: epstein

Oh, and [REDACTED] took out the appeal waiver.

*A. Marie Villafana*  
Assistant U.S. Attorney  
561 209-1047

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Wednesday, September 19, 2007 4:05 PM  
**To:** 'Lourie, Andrew'  
**Cc:** Garcia, Rolando (USAFLS)  
**Subject:** RE: epstein  
**Importance:** High

I just got their "red-lined" version. I will forward it to you. Here are the issues that Rolando and I specifically discussed with them and rejected, that they have re-inserted into the agreement.

1. We agree to recommend that no PSI be prepared.
2. They have converted it into an ABA plea – as though we wouldn't notice?
3. [REDACTED] want us to agree to the incorrect calculation of the guidelines
4. Instead of agreeing that the girls can sue Epstein, they cannot sue him and instead are bound to apply to a trust administered by the State Court (Jay and I have addressed this at least three times and it keeps appearing in his versions)
5. They changed the state charge that he has to plead guilty to to a non-registrable offense and he doesn't have to plead to that charge until after he has finished serving his federal sentence.
6. They want us not to oppose a request for a prison camp designation.
7. They have re-added paragraphs 17 through 19, all of which are addressed by paragraph 2.

There are other problems too, but these are the highlights. This is NOT good faith negotiations.

*A. Marie Villafana*  
Assistant U.S. Attorney  
561 209-1047

---

**From:** Lourie, Andrew [mailto:Andrew.Lourie2@usdoj.gov]  
**Sent:** Wednesday, September 19, 2007 3:50 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Cc:** Garcia, Rolando (USAFLS)  
**Subject:** RE: epstein

Hi Jay – I was hoping there would be things for me to read this morning, but I will try to remain patient.

I believe there are only two types of agreements that would apply to this case: (1) a plea agreement to a federal charge or charges; and (2) a non-prosecution agreement (which is really a deferred prosecution agreement because the defendant agrees that if he violates the agreement, the U.S. can prosecute him).

A plea agreement is part of the court file. It is not accessible on-line via PACER, but someone can go to the Clerk's Office to obtain a copy.

A non-prosecution agreement would not be made public or filed with the Court, but it would remain part of our case file. It probably would be subject to a FOIA request, but it is not something that we would distribute without compulsory process.

On the obstruction charges, many of the facts I included in that first proffer were hypothesized based upon our discussions and the agents' observations of Ms. Groff. We will need to interview her to confirm the accuracy of those facts. On a second count, we could rely on the incident where Mr. Epstein's private investigators followed ██████'s father, forcing him off the road. Or, if there is something more recent related to any grand jury subpoenas, we could consider that.

Hope that helps.

*A. Marie Villafaña*

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

Phone 561 209-1047

Fax 561 820-8777

---

this with a state plea as well so he serves the additional time there. I need to see your language for proffers on the two charges - (taking Nadia and Sarah out of the jurisdiction to avoid process.)

Alternatively, at this stage, we could have just one count for 12 months and then 6 months incarceration under the state, followed by community control and probabtion. I am not sure which is more practicable.

Please let me know when you are free to speak.

Thanks -- Jay

"Villafana, Ann Marie C. (USAFLS)"  
<Ann.Marie.C.Villafana@usdoj.gov>

To "Jay Lefkowitz" <JLefkowitz@kirkland.com>  
cc  
Subject RE: Draft Agreements?

09/18/2007 09:14 AM

Hi Jay -- I know that the U.S. Attorney will not go below 18 months of prison/jail time (and I would strongly oppose the suggestion).

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**From:** Jay Lefkowitz [mailto:JLefkowitz@kirkland.com]  
**Sent:** Tuesday, September 18, 2007 8:59 AM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Draft Agreements?

---

an alternative to what we discussed just now might be to plead to one count of 1512, serve 12 months plus supervised release which would be one year of home detention (if we can make that work), followed by two years of probation in the state on the state charges with the first 6 months being community control.

"Villafana, Ann Marie C. (USAFLS)" <Ann.Marie.C.Villafana@usdoj.gov>

09/18/2007 08:44 AM

To "Jay Lefkowitz" <JLefkowitz@kirkland.com>  
cc  
Subject Draft Agreements?

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 18, 2007 11:43 AM  
**To:** 'Lourie, Andrew'; Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS)  
**Subject:** RE: Draft Agreements?

He also removed any promise to plead to a registrable offense and the promise related to the girls' damages claims.

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 18, 2007 11:18 AM  
**To:** 'Lourie, Andrew'; Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS)  
**Subject:** FW: Draft Agreements?  
**Importance:** High

Andy and Rolando: Please see below so you understand my frustration. This document is [REDACTED] different from what Jay just told Andy they would agree to. He has it written as 16 months' imprisonment followed by 8 months federal supervised release. He wants us to recommend an improper calculation of the guidelines, and he wants to waive the PSI so he can keep all of his information confidential. I have already told Jay that the PSI language and other language in this agreement was unacceptable to our office. I will send back a plea agreement that reads consistent with what Jay represented to Andy but I don't believe that this will be resolved by Tuesday unless they come down here and we have a group contract writing session with the state attorney's office and the decision-makers.

---

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

---

**From:** Jay Lefkowitz [mailto:JLefkowitz@kirkland.com]  
**Sent:** Tuesday, September 18, 2007 11:09 AM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Draft Agreements?

Confidential -- For Settlement purposes only.

Marie -- Please look this over and let's see if we can identify any issues that we need to discuss in greater detail. Since you can't go to only one count of obstruction, but 18 would become about 15 with gain time, I have made a proposal of a total 24 month sentence based on two informations. This would include a period of home detention. We can then follow

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 18, 2007 9:31 AM  
**To:** Acosta, Alex (USAFLS); Lourie, Andrew (USAFLS); Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); McMillan, John (USAFLS)  
**Subject:** Epstein Negotiations

**Importance:** High

Hi all – I think that we may be near the end of our negotiations with Mr. Epstein, and not because we have reached a resolution. As I mentioned yesterday, I spent about 12 hours over the weekend drafting Informations, changing plea agreements, and writing factual proffers. I was supposed to receive a draft agreement from them yesterday, which never arrived. At that time, they were leaning towards pleading only to state charges and doing all of the time in state custody.

Late last night I talked to Jay Lefkowitz who asked about Epstein pleading to two twelve-month federal charges with half of his jail time being spent in home confinement pursuant to the guidelines. I told him that I had no objection to that approach but, in the interest of full disclosure, I did not believe that Mr. Epstein would be eligible because he will not be in Zone A or B. This morning Jay called and said that I was correct but, if we could get Mr. Epstein down to 14 months, then he thought he would be eligible.

My response: have him plead to two separate Informations. On the first one he gets 12 months' imprisonment and on the second he gets twelve months, with six served in home confinement, to run consecutively.

I just received an e-mail asking if Mr. Epstein could just do 12 months imprisonment instead.

As you can see, Mr. Epstein is having second thoughts about doing jail time. I would like to send Jay an e-mail stating that if we do not have a signed agreement by tomorrow at 5:00, negotiations will end. I have selected tomorrow at 5:00 because it gives them enough time to really negotiate an agreement if they are serious about it, and, if not, it gives me one day before the Jewish holiday to get witnesses lined up for Tuesday's grand jury appearance, when I plan to present the indictment, and it gives the office sufficient time to review the indictment package.

Do you concur?

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, September 17, 2007 11:44 AM  
**To:** Acosta, Alex (USAFLS)  
**Subject:** RE: Latest update

Absolutely. There were a lot of problems with their last attempt. They tried to re-open all the loopholes that I had sewn shut.

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Acosta, Alex (USAFLS)  
**Sent:** Monday, September 17, 2007 11:43 AM  
**To:** Villafana, Ann Marie C. (USAFLS); Garcia, Rolando (USAFLS); Lourie, Andrew (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); McMillan, John (USAFLS)  
**Subject:** Re: Latest update

Pls make sure they know its only a draft, and that we still need to approve final. The form and language may need polishing.

-----  
Sent from my BlackBerry Wireless Handheld

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
**To:** Garcia, Rolando (USAFLS) <RGarcia@usa.doj.gov>; Acosta, Alex (USAFLS) <AAcosta@usa.doj.gov>; Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
**CC:** Atkinson, Karen (USAFLS) <KAtkinson@usa.doj.gov>; McMillan, John (USAFLS) <JMcMillan@usa.doj.gov>  
**Sent:** Mon Sep 17 11:33:14 2007  
**Subject:** Latest update

Hi all - Just spoke with Jay Lefkowitz, he reports that, as of now, they are leaning back towards pleading only to state charges with a Non-Prosecution agreement. They are doing some legal research and talking with the state, and Jay thinks that they should have a proposed agreement by late tonight or early tomorrow morning. I am going to send him our last version of the Non-Prosecution Agreement so that he has a template to work from. Jay has my numbers in case I need to go home early and any questions come up.

As soon as I know something, I will pass it along.

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

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**Sent:** Monday, September 17, 2007 11:33 AM  
**To:** Garcia, Rolando (USAFLS); Acosta, Alex (USAFLS); Lourie, Andrew (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); McMillan, John (USAFLS)  
**Subject:** Latest update

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West Palm Beach, FL 33401  
Phone 561 209-1047  
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**Villafana, Ann Marie C. (USAFLS)**

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**Sent:** Tuesday, September 18, 2007 9:31 AM  
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**Cc:** Atkinson, Karen (USAFLS); McMillan, John (USAFLS)  
**Subject:** Epstein Negotiations

**Importance:** High

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**M** response: have him plead to two separate Informations. On the first one he gets 12 months' imprisonment and on the second he gets twelve months, with six served in home confinement, to run consecutively.

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---

Do you concur?

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

3123

EFTA00226138

---

**From:** Garcia, Rolando (USAFLS)  
**Sent:** Monday, September 17, 2007 10:26 AM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Epstein

Marie,

Where are we at in the plea negotiations?

prosecution agreement, the ones I have sent you recently are plea agreements that get filed with the court. Please see if the appeal waiver language in those versions is alright.

Re your paragraph 7: As I mentioned, we will not waive the presentence investigation. I know that this will delay Mr. Epstein's sentencing by 70 days, but that will allow him to get all of his affairs in order. As to bail, it will be set at the time of arraignment, and we can work out a joint recommendation regarding the amount and its limitations. I have no objection to making a joint recommendation that Mr. Epstein remain out on bond pending his sentencing, but I'm not sure that it belongs in a plea agreement, especially since I can't bind the court on that issue. However, I can assure you, and we can put it on the record during the plea colloquy, that I will join in your recommendation that he remain out on bond pending sentencing. The same goes for the prison camp issue. As I mentioned, I have opposed a designation only once in a very particular case. I can assure you, and we can put it on the record at the plea colloquy that I will not oppose your recommendation for Mr. Epstein's designation.

Re your paragraph 8: As I mentioned over the telephone, I cannot bind the girls to the Trust Agreement, and I don't think it is appropriate that a state court would administer a trust that seeks to pay for federal civil claims. We both want to avoid unscrupulous attorneys and/or litigants from coming forward, and I know that your client wants to keep these matters outside of public court filings, but I just don't have the power to do what you ask. Here is my recommendation. During the period between Mr. Epstein's plea and sentencing, I make a motion for appointment of the Guardian Ad Litem. The three of us sit down and discuss things, and I will facilitate as much as I can getting the girls' approval of this procedure because, as I mentioned, I think it is probably in their best interests. In terms of plea agreement language, let me suggest the following:

The United States agrees to make a motion seeking the appointment of a Guardian ad Litem to represent the identified victims. Following the appointment of such Guardian, the parties agree to work together in good faith to develop a Trust Agreement, subject to the Court's approval, that would provide for any damages owed to the identified victims pursuant to 18 U.S.C. Section 2255. Then include the last two sentences of your paragraph 8.

Re the two paragraphs following your paragraph 8: I will include our standard language regarding resolving all criminal liability and I will mention "co-conspirators," but I would prefer not to highlight for the judge all of the other crimes and all of the other persons that we could charge. Also, we do not have the power to bind Immigration and we make it a policy not to try to, however, I can tell you that, as far as I know, there is no plan to try to proceed on any immigration charges against either Ms. Ross or Ms. Marcinkova.

Also, on the grand jury subpoenas, I can prepare letters withdrawing them as of the signing of the plea agreement, but I would prefer to take out that language. In my eyes, once we have a plea agreement, the grand jury's investigation has ended and there can be no more use of the grand jury's subpoena power.

I had hoped that we were far closer to resolving this than it appears that we are. Can I suggest that tomorrow we either meet live or via teleconference, either with your client or having him within a quick phone call, to hash out these items? I was hoping to work only a half day tomorrow to save my voice for Tuesday's hearing and grand jury, if necessary, but maybe we can set a time to meet. If you want to meet "off campus" somewhere, that is fine. I will make sure that I have all the necessary decision makers present or "on call," as well.

If we can resolve some of these issues today, let's try to, and then save only the difficult issues for tomorrow.

Sorry for the long e-mail, and for ruining your date with your daughter.

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, September 17, 2007 10:35 AM  
**To:** Garcia, Rolando (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** RE: Epstein

Hi Rolando – Here is the last e-mail that I sent to Jay last night. Jay talked with his client about it and reports that they are leaning towards options 1 or 4. They are going to try to make that decision today (there seems to be some dissension in the ranks because Jack Goldberger gave some incorrect information), and draft a proposed either Non-Prosecution Agreement or Plea Agreement. As you can see from my list below, there are a number of things in their last draft that were unacceptable. All of the loopholes that I sewed up they tried to open. So, Jay is supposed to be consulting with Roy Black regarding the correct state information and then will give me a call.

I agreed to ask the Judge to take the hearing off calendar tomorrow and to postpone the grand jury appearances that were scheduled from tomorrow, but I told him in no uncertain terms that I am indicting on the 25<sup>th</sup> so this needs to be resolved early this week. Andy and I talked about all of this as well. Long answer to a short question, sorry.

Hi Jay -- This can wait until after the show, but my voice is going so I thought I would type it up. I talked to Andy and he still doesn't like the factual basis. In his opinion, the plea should only address the crimes that we were addressing, and we were not investigating Mr. Epstein abusing his girlfriend.

So, these are the only options that he recommended:

1. We go back to the original agreement where Mr. Epstein pleads only to state charges and serves his time in the state, except that we can agree to only 18 months imprisonment.
2. Mr. Epstein pleads guilty to the state charges and also pleads to either two obstruction counts or to one count of violating 47 USC 223(a)(1)(B), with a joint non-binding recommendation of 18 months, so that Mr. Epstein can serve his time federally.
3. (My suggestion only, not Andy's): I go back to the U.S. Attorney and ask him to agree to an ABA-plea to a 371 count (conspiracy to violate 2422(b)) with a binding 20-month recommendation so that Mr. Epstein can serve all of his time in a federal facility.

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Or 4. Mr. Epstein pleads to one obstruction count, and serves part of his time federally and part state.

On your other proposed changes, some are fine and some are problematic.

Re your paragraph 2: As to timing, it is my understanding that Mr. Epstein needs to be sentenced in the state after he is sentenced in the federal case, but not that he needs to plead guilty and be sentenced after serving his federal time. Andy recommended that some of the timing issues be addressed only in the state agreement, so that it isn't obvious to the judge that we are trying to create federal jurisdiction for prison purposes. My understanding is that Mr. Epstein should sign a state plea agreement, plead guilty to the federal offenses, plead guilty to the state offenses, be sentenced on the federal offenses, and then be sentenced on the state offenses, and then start serving the federal sentence.

Re your paragraph 3: As to the reservation of Mr. Epstein's right to withdraw his state plea or to appeal his state plea or sentence, that is fine, but we need the caveat that, if he were to do so, the United States could proceed on our charges.

Re your paragraph 6: With respect to the waiver of the right to appeal the federal sentence, given the way we have drafted the information, it is possible that getting to the 18 month sentence will require an upward departure. The version of the agreement that you were working from is a federal non-

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Sloman, Jeff (USAFLS)  
**Sent:** Friday, September 14, 2007 1:04 PM  
**To:** Villafana, Ann Marie C. (USAFLS); Acosta, Alex (USAFLS); Garcia, Rolando (USAFLS);  
Lourie, Andrew (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); Ball, Shawn (USAFLS)  
**Subject:** RE: Epstein Documents

Andy has agreed to help finalize this. I will be out of town beginning tomorrow.

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Friday, September 14, 2007 9:52 AM  
**To:** Sloman, Jeff (USAFLS); Acosta, Alex (USAFLS); Garcia, Rolando (USAFLS); Lourie, Andrew (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); Ball, Shawn (USAFLS)  
**Subject:** Epstein Documents

Here are the proposed plea agreement and information. If any changes need to be made, please contact Shawn via e-mail or at 561 209-1037. I will be out the rest of the day, but you can get me at 561 601-2301, and I will be able to access e-mail over the weekend.

Thank you!

<< File: Information charging 1512 and 113.wpd >>  
<< File: OLY Plea Agreement v4 1512 and 113 violations.wpd >>

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Lourie, Andrew (USAFLS)  
**Sent:** Friday, September 14, 2007 11:09 AM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Epstein update

The assault sounds like a stretch and factually sort of silly

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Sent from my BlackBerry Wireless Handheld

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
**To:** Sloman, Jeff (USAFLS) <JSloman@usa.doj.gov>; Acosta, Alex (USAFLS) <AAcosta@usa.doj.gov>;  
Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>; Garcia, Rolando (USAFLS) <RGarcia@usa.doj.gov>  
**CC:** Atkinson, Karen (USAFLS) <KAtkinson@usa.doj.gov>; McMillan, John (USAFLS)  
<JMcMillan@usa.doj.gov>; Ball, Shawn (USAFLS) <SBall@usa.doj.gov>  
**Sent:** Fri Sep 14 09:25:05 2007  
**Subject:** Epstein update

Hi all - Jay and I talked through the main issue, which was the charges that Epstein would plead guilty to. He put in a pitch for only 12 months, I put in a pitch that he plead to 24 with a 20-month recommendation, and we decided that we would be stuck with the 18 months. So he will plead to one count of obstructing a witness from reporting a crime based upon Sarah Kellen's call to one of the girls subtly pressuring her not to participate in the investigation and one count of simple assault on an airplane based upon an incident where Epstein "put great pressure" [Jay's words] on Kellen to call the girls to set up appointments.

I will revise the plea agreement accordingly and draft an information for your review. I will be out the rest of the day, but I will be accessible over the weekend. I will give all of the electronic files to Karen and Shawn in case you need to make changes. Jay thinks we will have a signed agreement by Monday and I am hoping that we can convince Judge Marra to use the time on Tuesday that he set aside for the hearing to take the plea instead.

Documents to follow soon.

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Friday, September 14, 2007 9:52 AM  
**To:** Sloman, Jeff (USAFLS); Acosta, Alex (USAFLS); Garcia, Rolando (USAFLS); Lourie, Andrew (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); Ball, Shawn (USAFLS)  
**Subject:** Epstein Documents

Here are the proposed plea agreement and information. If any changes need to be made, please contact Shawn via e-mail or at 561 209-1037. I will be out the rest of the day, but you can get me at 561 601-2301, and I will be able to access e-mail over the weekend.

Thank you!



Information  
arguing 1512 and



OLY Plea  
ement v4 1512 a

*A. Marie Villafaña*  
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Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Friday, September 14, 2007 9:25 AM  
**To:** Sloman, Jeff (USAFLS); Acosta, Alex (USAFLS); Lourie, Andrew (USAFLS); Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); McMillan, John (USAFLS); Ball, Shawn (USAFLS)  
**Subject:** Epstein update

Hi all – Jay and I talked through the main issue, which was the charges that Epstein would plead guilty to. He put in a pitch for only 12 months, I put in a pitch that he plead to 24 with a 20-month recommendation, and we decided that we would be stuck with the 18 months. So he will plead to one count of obstructing a witness from reporting a crime based upon [REDACTED] call to one of the girls subtly pressuring her not to participate in the investigation and one count of simple assault on an airplane based upon an incident where Epstein “put great pressure” [Jay’s words] on Kellen to call the girls to set up appointments.

I will revise the plea agreement accordingly and draft an information for your review. I will be out the rest of the day, but I will be accessible over the weekend. I will give all of the electronic files to Karen and Shawn in case you need to make changes. Jay thinks we will have a signed agreement by Monday and I am hoping that we can convince Judge Marra to use the time on Tuesday that he set aside for the hearing to take the plea instead.

Documents to follow soon.

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Phone 561 209-1047  
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Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 8:12 PM  
**To:** Atkinson, Karen (USAFLS); Ball, Shawn (USAFLS)  
**Cc:** McMillan, John (USAFLS)  
**Subject:** Epstein Indictment Package

In case Karen has any changes to the indictment package and wants to send it on to Rolando, here are the indictment and pros memo. Shawn has the forms.



070913 revised    Pros Memo    2nd Addendum  
indictment.wpd 1-07 REVISED.wp    Pros Memo.wpd

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:29 PM  
**To:** Garcia, Rolando (USAFLS); Sloman, Jeff (USAFLS)  
**Subject:** Telephone Conference with Jay Lefkowitz tomorrow morning

Hi all – I just received an e-mail from Jay Lefkowitz wanting to do a call tomorrow morning. Andy will be on the road, but will be on the conference call. Does anyone else want to join in?

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

I then paged through Title 18, and came up with two possibilities. 18 U.S.C. § 403 is a misdemeanor with a one year statutory maximum for violation of the privacy rights of a child victim. We would have to show an intentional disclosure of documents or information concerning a child victim to someone other than a participant in the legal proceedings. When the state prosecution first hit the press, Epstein's attorneys (especially Roy Black) made statements about the "credibility" of some of the child victims, with specific identifying information, and I would base two charges on information disclosed about two of the victims.

18 U.S.C. § 1512(d) is also a misdemeanor with a one year statutory maximum. We would have to show that Epstein (or someone on his behalf) intentionally harassed another person to hinder, delay, prevent, or dissuade the person from reporting to a law enforcement officer the commission or possible commission of a federal offense, or to dissuade the person from causing a criminal prosecution to be sought or instituted. Three girls have mentioned exertions of pressure to keep them from reporting the offenses or talking to law enforcement.

My guess is that he will object to these charges because he would have to plead to two counts, which would expose him to the potential of a 24-month sentence. If he does so, I recommend that we reconsider the Rule 11 plea rather than try to create violations out of whole cloth.

I also determined that a defendant who receives a prison sentence on a misdemeanor offense is also eligible for one year of supervised release.

Another option is a plea to 47 U.S.C. § 223(a)(1)(B), which prohibits someone "in interstate or foreign communications, by means of a telecommunications device knowingly -- . . . (ii) initiates the transmission of any . . . request, suggestion, proposal, . . . or other communication which is obscene . . . knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication." This is a felony offense, with a two-year statutory maximum.

To move things along, I have put together an information package assuming a plea to two counts of violating section 403. I will leave that info with Karen as well, in case you want to make any changes tomorrow.

Thank you.

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West Palm Beach, FL 33401  
Phone 561 209-1047  
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**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Lourie, Andrew (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:28 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Epstein plea

U can give him my cell. If he calls me early I will be in car  
-----

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
**To:** Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
**Sent:** Thu Sep 13 19:23:59 2007  
**Subject:** RE: Epstein plea

Hi Andy -- It would still have to be a conspiracy to commit an assault on a plane. I just want to make sure that we have something that is factually accurate. Just trying to plan ahead.

I just got an e-mail from Jay Lefkowitz asking if I am free to talk tomorrow at 9:00. Will you be in then? I have to report to the hospital at 10:15.

A. Marie Villafana  
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-----Original Message-----

**From:** Lourie, Andrew (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:20 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Epstein plea

He is going to give us an assault on the plane or we can do conspiracy  
-----

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
**To:** Acosta, Alex (USAFLS) <AAcosta@usa.doj.gov>; Sloman, Jeff (USAFLS) <JSloman@usa.doj.gov>; Garcia, Rolando (USAFLS) <RGarcia@usa.doj.gov>  
**CC:** Atkinson, Karen (USAFLS) <KAtkinson@usa.doj.gov>; Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
**Sent:** Thu Sep 13 18:58:18 2007  
**Subject:** Epstein plea

Hi all - I have not heard back from any of Mr. Epstein's attorneys today about the plea, but I know that they are out for the holiday. I will be out tomorrow, so today I finished the indictment package if we decide to go forward. It currently is with Karen Atkinson.

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Sent from my BlackBerry Wireless Handheld

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To: Acosta, Alex (USAFLS) <AAcosta@usa.doj.gov>; Sloman, Jeff (USAFLS) <JSloman@usa.doj.gov>;  
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CC: Atkinson, Karen (USAFLS) <KAtkinson@usa.doj.gov>; Lourie, Andrew (USAFLS)  
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18 U.S.C. § 1512(d) is also a misdemeanor with a one year statutory maximum. We would have to show that Epstein (or someone on his behalf) intentionally harassed another person to hinder, delay, prevent, or dissuade the person from reporting to a law enforcement officer the commission or possible commission of a federal offense, or to dissuade the person from causing a criminal prosecution to be sought or instituted. Three girls have mentioned exertions of pressure to keep them from reporting the offenses or talking to law enforcement.

My guess is that he will object to these charges because he would have to plead to two counts, which would expose him to the potential of a 24-month sentence. If he does so, I recommend that we reconsider the Rule 11 plea rather than try to create violations out of whole cloth.

I also determined that a defendant who receives a prison sentence on a misdemeanor offense is also eligible for one year of supervised release.

Another option is a plea to 47 U.S.C. § 223(a)(1)(B), which prohibits someone "in interstate or foreign communications, by means of a telecommunications device knowingly -- . . . (ii) initiates the transmission of any . . . request, suggestion, proposal, . . . or other communication which is obscene . . . knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication." This is a felony offense, with a two-year statutory maximum.

To move things along, I have put together an information package assuming a plea to two counts of violating section 403. I will leave that info with Karen as well, in case you want to make any changes tomorrow.

Thank you.

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Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:27 PM  
**To:** Lourie, Andrew (USAFLS)  
**Subject:** RE: Epstein plea

Alright. I will get Rolando and/or Jeff on with me.

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Lourie, Andrew (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:27 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Epstein plea

I have a 930 hearing in miami.

-----  
Sent from my BlackBerry Wireless Handheld

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**To:** Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
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A. Marie Villafaña  
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**Sent:** Thursday, September 13, 2007 7:20 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
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Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:24 PM  
**To:** Lourie, Andrew (USAFLS)  
**Subject:** RE: Epstein plea

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A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
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**Sent:** Thursday, September 13, 2007 7:20 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Epstein plea

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Sent from my BlackBerry Wireless Handheld

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**To:** Acosta, Alex (USAFLS) <AAcosta@usa.doj.gov>; Sloman, Jeff (USAFLS) <JSloman@usa.doj.gov>; Garcia, Rolando (USAFLS) <RGarcia@usa.doj.gov>  
**CC:** Atkinson, Karen (USAFLS) <KAtkinson@usa.doj.gov>; Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
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**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 7:10 PM  
**To:** Atkinson, Karen (USAFLS); Ball, Shawn (USAFLS)  
**Cc:** McMillan, John (USAFLS)  
**Subject:** Epstein Information Package

Hi all – Here is the Information and Plea Agreement for the Information Package. Shawn has all of the other forms on her computer.

Thank you!



Information



OLY Plea

charging 403.wpement v3 misderr

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 13, 2007 6:58 PM  
**To:** Acosta, Alex (USAFLS); Sloman, Jeff (USAFLS); Garcia, Rolando (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Epstein plea

Hi all – I have not heard back from any of Mr. Epstein’s attorneys today about the plea, but I know that they are out for the holiday. I will be out tomorrow, so today I finished the indictment package if we decide to go forward. It currently is with Karen Atkinson.

I then paged through Title 18, and came up with two possibilities. 18 U.S.C. § 403 is a misdemeanor with a one year statutory maximum for violation of the privacy rights of a child victim. We would have to show an intentional disclosure of documents or information concerning a child victim to someone other than a participant in the legal proceedings. When the state prosecution first hit the press, Epstein’s attorneys (especially Roy Black) made statements about the “credibility” of some of the child victims, with specific identifying information, and I would base two charges on information disclosed about two of the victims.

18 U.S.C. § 1512(d) is also a misdemeanor with a one year statutory maximum. We would have to show that Epstein (or someone on his behalf) intentionally harassed another person to hinder, delay, prevent, or dissuade the person from reporting to a law enforcement officer the commission or possible commission of a federal offense, or to dissuade the person from causing a criminal prosecution to be sought or instituted. Three girls have mentioned exertions of pressure to keep them from reporting the offenses or talking to law enforcement.

My guess is that he will object to these charges because he would have to plead to two counts, which would expose him to the potential of a 24-month sentence. If he does so, I recommend that we reconsider the Rule 11 plea rather than try to create violations out of whole cloth.

I also determined that a defendant who receives a prison sentence on a misdemeanor offense is also eligible for one year of supervised release.

Another option is a plea to 47 U.S.C. § 223(a)(1)(B), which prohibits someone “in interstate or foreign communications, by means of a telecommunications device knowingly -- . . . (ii) initiates the transmission of any . . . request, suggestion, proposal, . . . or other communication which is obscene . . . knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.” This is a felony offense, with a two-year statutory maximum.

To move things along, I have put together an information package assuming a plea to two counts of violating section 403. I will leave that info with Karen as well, in case you want to make any changes tomorrow.

Thank you.

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

From: Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
To: Gerald Lefcourt <GBL@lefcourtlaw.com>  
CC: Acosta, Alex (USAFLS) <AAcosta@usa.doj.gov>; Sloman, Jeff (USAFLS) <JSloman@usa.doj.gov>;  
Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
Sent: Tue Sep 11 14:15:25 2007  
Subject: Revised Agreement re Epstein

Dear Gerry: I have attached a revised version, as per Mr. Acosta's request. The operative terms have not changed. If you have any questions, please do not hesitate to call. Also, please confirm your receipt of this e-mail.

Thank you.

<<070911 Epstein Non-Prosecution Agreement.pdf>>

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 11, 2007 5:01 PM  
**To:** Lourie, Andrew (USAFLS)  
**Subject:** RE: Revised Agreement re Epstein

Hi Andy -- I will try to get back as soon as possible. I just don't know how long I will be at the hospital. Is it just us three or is Gerry Lefcourt also attending? What should I be prepared to discuss?

A. Marie Villafana  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Lourie, Andrew (USAFLS)  
**Sent:** Tuesday, September 11, 2007 4:54 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Revised Agreement re Epstein

Good. Barry leaves early for jewish holidays any chance u can make 130

-----  
Sent from my BlackBerry Wireless Handheld

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
**To:** Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
**Sent:** Tue Sep 11 16:52:10 2007  
**Subject:** RE: Revised Agreement re Epstein

Plead to the three specified charges, a 30 month sentence, split 20 in jail and 10 in "community control," and agree that the girls are victims for purposes of damages. We also put in deadlines for a plea and sentencing date.

A. Marie Villafana  
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-----Original Message-----

**From:** Lourie, Andrew (USAFLS)  
**Sent:** Tuesday, September 11, 2007 2:17 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Re: Revised Agreement re Epstein

What is our latest offer?

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Sent from my BlackBerry Wireless Handheld

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Tracking:

<< File: OLY Non-Prosecution Agreement v3.wpd >>

A. Marie Villafaña  
Assistant U.S. Attorney  
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any one of these conditions allows the United States to elect to terminate the agreement and to investigate and prosecute Epstein for any and all federal offenses.

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

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

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From: Villafana, Ann Marie C. (USAFLS)  
Sent: Monday, September 10, 2007 5:03 PM  
To: Sloman, Jeff (USAFLS); Acosta, Alex (USAFLS)  
Cc: McMillan, John (USAFLS); Garcia, Rolando (USAFLS); Atkinson, Karen (USAFLS); Lourie, Andrew (USAFLS)  
Subject: Non-Prosecution Agreement

Here is my proposed Non-Prosecution Agreement. Since Gerry Lefcourt is the attorney who contacted Andy Lourie with the counter-offer, I have used his name as attorney for Mr. Epstein. If another attorney will be in that role, I can change the signature block. Please let me know if you have any questions or changes.

(hereinafter, the "State Attorney's Office") charging violations of the following Florida Statutes:

(a) lewd and lascivious battery on a child, in violation of Fl. Stat. 800.04(4);

(b) solicitation of minors to engage in prostitution, in violation of Fl. Stat. 796.03; and

(c) engaging in sexual activity with minors at least sixteen years of age, in violation of Fl. Stat. 794.05.

2. Epstein and the State Attorney's Office shall make a joint, binding recommendation that the Court impose a thirty (30) month sentence to be divided as follows:

(a) Epstein shall begin by serving at least twenty (20) months in prison, without any opportunity for withholding adjudication or sentencing, and without probation or community control in lieu of imprisonment; and

(b) following the term of imprisonment, Epstein shall serve ten (10) months of community control.

3. Epstein shall waive all challenges to the Information filed by the State Attorney's Office and shall waive the right to appeal his conviction and sentence.

4. Epstein shall provide to the U.S. Attorney's Office copies of all proposed agreements with the State Attorney's Office prior to entering into those agreements.

5. Epstein agrees that, if any of the victims identified in the federal investigation file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the U.S. District Court for the Southern District of Florida over his person and/or the subject matter, and Epstein will not contest that the identified victims are persons who, while minors, were victims of violations of Title 18, United States Code, Sections(s) 2422 and/or 2423.

6. The United States shall provide Epstein's attorneys with a list of the identified victims, which will not exceed forty, after Epstein has signed this agreement and entered his guilty plea. The United States shall make a motion with the United States District Court for the Southern District of Florida for the appointment of a guardian ad litem for the identified victims and Epstein's counsel may contact the identified victims through that counsel.

7. Epstein shall enter his guilty plea and be sentenced not later than September 28, 2007, and shall begin service of his sentence not later than October 15, 2007.

8. With credit for gain time, Epstein shall serve at least 17 months in a state correctional institution.

Epstein understands that the United States Attorney has no authority to require the State of Florida to abide by any terms of this agreement. Epstein understand that it is his obligation to undertake discussions with the State of Florida to ensure compliance with these procedures, which compliance will be necessary to satisfy the United States interest, pursuant to the petit policy.

By signing this agreement, Epstein asserts and certifies that each of these terms is material to this agreement and is supported by independent consideration and that a breach of

IT APPEARING that the State of Florida has charged Epstein with \_\_\_\_;

IT APPEARING that the United States has conducted its own investigation of the offenses and Epstein's background;

IT APPEARING that Epstein has committed offenses against the United States from in or around 2001 through in or around October 2005, including:

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

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

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

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

IT APPEARING that Epstein has accepted responsibility for his behavior by his signature on this Agreement; and

IT APPEARING, after an investigation of the offenses and Epstein's background, that the interest of the United States pursuant to the petit policy will be served by the following procedure;

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

Should Epstein violate any of the conditions of this Agreement, the United States Attorney may at any time initiate prosecution against Epstein for any offense. In this case, the United States Attorney will furnish Epstein with notice specifying the condition(s) of the Agreement that he has violated.

After timely fulfilling all the terms and conditions of the Agreement, no prosecution for the offenses set out on page 1 of this Agreement will be instituted in this District, and the charges against Epstein if any, will be dismissed.

Terms of the Agreement:

1. Epstein shall plead guilty (not nolo contendere) to an Information filed by the State Attorney's Office for the 15th Judicial Circuit in and for Palm Beach County

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Sloman, Jeff (USAFLS)  
**Sent:** Tuesday, September 11, 2007 12:39 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Non-Prosecution Agreement

Yes

Sent from my GoodLink synchronized handheld (www.good.com)

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 11, 2007 12:05 PM Eastern Standard Time  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** RE: Non-Prosecution Agreement

Do you want me to make these and re-send to Gerry Lefcourt?

Thanks.

A. Marie Villafaña  
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**From:** Acosta, Alex (USAFLS)  
**Sent:** Monday, September 10, 2007 5:32 PM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** RE: Non-Prosecution Agreement

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**Cc:** McMillan, John (USAFLS); Garcia, Rolando (USAFLS); Atkinson, Karen (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Non-Prosecution Agreement

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  - (b) solicitation of minors to engage in prostitution, in violation of Fl. Stat. 796.03; and
  - (c) engaging in sexual activity with minors at least sixteen years of age, in violation of Fl. Stat. 794.05.
2. Epstein and the State Attorney's Office shall make a joint, binding recommendation that the Court impose a thirty (30) month sentence to be divided as follows:
  - (a) Epstein shall begin by serving at least twenty (20) months in prison, without any opportunity for withholding adjudication or sentencing, and without probation or community control in lieu of imprisonment; and
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3. Epstein shall waive all challenges to the Information filed by the State Attorney's Office and shall waive the right to appeal his conviction and sentence.
4. Epstein shall provide to the U.S. Attorney's Office copies of all proposed agreements with the State Attorney's Office prior to entering into those agreements.
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8. With credit for gain time, Epstein shall serve at least 17 months in a state correctional institution.

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1. Epstein shall plead guilty (not nolo contendere) to an Information filed by the State Attorney's Office for the 15th Judicial Circuit in and for Palm Beach County (hereinafter, the "State Attorney's Office") charging violations of the following Florida Statutes:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 11, 2007 12:06 PM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** RE: Non-Prosecution Agreement

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7. Epstein shall enter his guilty plea and be sentenced not later than September 28, 2007, and shall begin service of his sentence not later than October 15, 2007.
8. With credit for gain time, Epstein shall serve at least 17 months in a state correctional institution.

Epstein understands that the United States Attorney has no authority to require the State of Florida to abide by any terms of this agreement. Epstein understand that it is his obligation to undertake discussions with the State of Florida to ensure compliance with these procedures, which compliance will be necessary to satisfy the United States interest, pursuant to the petit policy.

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

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

- (4) traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with minor females; in violation of Title 18, United States Code, Section 2423(b); and
- (5) knowingly, in and affecting interstate and foreign commerce, recruiting, enticing, and obtaining by any means a person, knowing that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act as defined in 18 U.S.C. § 1591(c)(1); in violation of Title 18, United States Code, Sections 1591(a)(1) and 2; and

IT APPEARING that Epstein has accepted responsibility for his behavior by his signature on this Agreement; and

IT APPEARING, after an investigation of the offenses and Epstein's background, that the interest of the United States pursuant to the petit policy will be served by the following procedure;

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

Should Epstein violate any of the conditions of this Agreement, the United States Attorney may at any time initiate prosecution against Epstein for any offense. In this case, the United States Attorney will furnish Epstein with notice specifying the condition(s) of the Agreement that he has violated.

After timely fulfilling all the terms and conditions of the Agreement, no prosecution for the offenses set out on page 1 of this Agreement will be instituted in this District, and the charges against Epstein if any, will be dismissed.

Terms of the Agreement:

1. Epstein shall plead guilty (not nolo contendere) to an Information filed by the State Attorney's Office for the 15th Judicial Circuit in and for Palm Beach County (hereinafter, the "State Attorney's Office") charging violations of the following Florida Statutes:
  - (a) lewd and lascivious battery on a child, in violation of Fl. Stat. 800.04(4);
  - (b) solicitation of minors to engage in prostitution, in violation of Fl. Stat. 796.03; and
  - (c) engaging in sexual activity with minors at least sixteen years of age, in violation of Fl. Stat. 794.05.
2. Epstein and the State Attorney's Office shall make a joint, binding recommendation that the Court impose a thirty (30) month sentence to be divided as follows:
  - (a) Epstein shall begin by serving at least twenty (20) months in prison, without any opportunity for withholding adjudication or sentencing, and without probation or community control in lieu of imprisonment; and
  - (b) following the term of imprisonment, Epstein shall serve ten (10) months of community control.

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Sloman, Jeff (USAFLS)  
**Sent:** Tuesday, September 11, 2007 12:05 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** FW: Non-Prosecution Agreement

Got your message about the hearing. Alex had some suggested changes to the agreement that shouldn't affect the deal. Thanks, Jeff

---

**From:** Acosta, Alex (USAFLS)  
**Sent:** Monday, September 10, 2007 5:32 PM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** RE: Non-Prosecution Agreement

I did a small rewrite. Shouldn't effect things, but wanted to add the original state charges and a statement that it would be his job to move the state to add the additional charges.

---

IT APPEARING that the State of Florida has conducted an investigation into the conduct of Jeffrey (hereinafter "Epstein");

IT APPEARING that the State of Florida has charged Epstein with \_\_\_\_;

IT APPEARING that the United States has conducted its own investigation of the offenses and Epstein's background;

IT APPEARING that Epstein has committed offenses against the United States from in or around 2001 through in or around October 2005, including:

- (1) knowingly and willfully conspiring with others known and unknown to commit an offense against the United States, that is, to use a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females to engage in prostitution, in violation of Title 18, United States Code, Section 2422(b); all in violation of Title 18, United States Code, Section 371;
- (2) knowingly and willfully conspiring with others known and unknown to travel in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with minor females, in violation of Title 18, United States Code, Section 2423(b); all in violation of Title 18, United States Code, Section 2423(e);
- (3) using a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2;

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, September 10, 2007 3:52 PM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** Plea

Hi Jeff – Just talked with Andy. I am sure that he communicated these thoughts, but I wanted to mention a couple of things that I hoped to talk to you about.

There are two things that I think might be tricks up the sleeves of the defense. First, Lilly Ann had mentioned in our Miami meeting with all the defense attorneys that Epstein would be willing to do a split sentence of community control followed by jail time because, in the state system, if you complete community control without a violation, the jail time is converted to probation or more community control. Second, it wasn't clear that Epstein would be pleading to a child sex offense that involves sex offender registration. Third, I mentioned to Andy that the revised indictment references 19 victims, so 15 months is less than 1 month per victim. I agree that this is a reasonable counteroffer in light of our starting position of 24 months, but this is a really low sentence.

So, whatever the U.S. Attorney decides to do, can we please follow with a version of my written non-prosecution agreement? That will allow us to avoid any state shenanigans and will keep the defense on a strict timeline.

Before this counter-offer, I was going to propose that we include in our response to Messrs. Starr and Lefkowitz one page of the draft overt acts section. I have attached the proposed overt acts related to two of the girls, as an example.



Overt acts  
insert.wpd

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Exhibit 46**

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, September 10, 2007 5:24 PM  
**To:** Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** FBI

Jeff and Andy – The agents are asking whether Alex had a chance to talk to the SAIC. Do you know?

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

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Tracking:

3231

EFTA00226174

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, September 10, 2007 9:36 AM  
**To:** Sloman, Jeff (USAFLS)  
**Cc:** McMillan, John (USAFLS)  
**Subject:** All the fun you missed

Hi Jeff -- You missed so much fun stuff on Friday. I hope you had a good visit with your daughter. I am running off to Court, but I am hoping that we can talk this afternoon about the meeting and strategy going forward.

Alex asked Junior to talk to Nesbitt and Jason about the handling of the state court grand jury. Junior left a message saying he had done so and both reported that, in their opinions, it had been mishandled for a number of reasons. I don't think I can forward the message to your voicemail, so you may want to call Junior directly if you (or Alex) wants to hear it from the horse's mouth, as they say. This, by the way, is one of the things we should talk about this afternoon.

Thanks.

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, September 04, 2007 11:29 AM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** Meeting on Friday

Hi Jeff – I just left you a voicemail, so you can disregard that. We had a very good meeting with Drew on Friday. No one was sure whether you want an FBI presence at the meeting on Friday and Drew thought I should ask you. Could you let me know? And does the meeting with Epstein's team start at 2:00? Is there a plan for a pre-meeting meeting with our folks?

Thanks.

*A. Marie Villafana*  
Assistant U.S. Attorney  
561 209-1047

**Tracking:**

3255

EFTA00226176

**Recipient**

Sloman, Jeff (USAFLS)

**Read**

Read: 9/6/2007 5:58 PM

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, September 06, 2007 5:47 PM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** RE: Epstein

Hi Jeff – Funny you should ask. I have been wondering the same thing. Here is the term sheet and guidelines calculation that we provided at the last meeting. You and Matt and I had also discussed a possible federal plea to an Information charging a 371 conspiracy, with a Rule 11 plea with a two-year cap, but I think Matt must have asked Alex about it and it was nixed. Just to be prepared for tomorrow, I was just starting to draft a Rule 11 plea agreement in case Alex changes his mind and a formal non-prosecution agreement containing the state plea terms. As soon as those are ready, I will e-mail them to you.



Conf Plea  
gotiations final.w

There are three concerns that I hope we can address tomorrow. First, that there is an absolute drop-dead date for accepting or rejecting because it is strategically important that we indict before the end of September, which means presenting the indictment on September 25<sup>th</sup>. Second, the agents and I have not reached out to the victims to get their approval, which as Drew politely reminded me, is required under the law. And third, I do not want to make any promises about allowing Epstein to self-surrender because I still believe that we have a good chance of getting him detained.

On another note, Junior got a call today from the Palm Beach Police Chief because he got information that there will be an article released tomorrow about our meeting and that Epstein is going to plead to a state charge and the Chief wanted to know if the victims had been consulted about the deal. There has been some coverage in the New York press about Ken Starr, but I haven't seen anything local yet.

*A. Marie Villafana*  
Assistant U.S. Attorney  
561-209-1047

---

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**From:** Sloman, Jeff (USAFLS)  
**Sent:** Thursday, September 06, 2007 5:35 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** Epstein

Please refresh my recollection. What is the "deal" on the table?

Tracking:

3245

**Exhibit 44**

EFTA00226178

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Oosterbaan, Andrew  
**Sent:** Wednesday, August 08, 2007 5:43 PM  
**To:** Acosta, Alex (USAFLS); Villafana, Ann Marie C. (USAFLS); Campos, Cyndee (USAFLS)  
**Cc:** Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** RE: The meeting on Epstein

I'm more than happy to help, Alex. It doesn't take much of a reason to get me on a plane to Miami, and this meeting is certainly reason enough. If it's set any day after the 20th I'll be there. As for joining the trial team, I'm even rustier than Sloman and Lourie, but if Marie would stand for it count me in. Thanks very much.

Drew

---

**From:** Acosta, Alex (USAFLS) [mailto:Alex.Acosta@usdoj.gov]  
**Sent:** Wednesday, August 08, 2007 4:40 PM  
**To:** Villafana, Ann Marie C. (USAFLS); Campos, Cyndee (USAFLS)  
**Cc:** Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS); Oosterbaan, Andrew  
**Subject:** RE: The meeting on Epstein

Marie – I'll leave the target letter issue to Andy and Jeff. Re the meeting, Cyndee Campos will try to schedule it. There are several vacations going on next week, so Drew is not the only conflict. If Drew can come to Miami, that would be great. If not, we can VTC.

Drew – I appreciate your doing this. The meeting is to focus on constitutional and policy issues only; your being a part of it will, I hope, intercept an eventual appeal to DC. Maybe we can even interest you on joining the trial team (a short return to your old haunts) ..... ☺

Alex

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Wednesday, August 08, 2007 2:09 PM  
**To:** Acosta, Alex (USAFLS); Campos, Cyndee (USAFLS)  
**Cc:** Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS); Oosterbaan, Andrew  
**Subject:** The meeting on Epstein

Alex and Cyndee – I just got off the phone with Drew. He is gone from August 10<sup>th</sup> through August 20<sup>th</sup>, and will be back in his office on August 21<sup>st</sup>. He is willing to participate by telephone if we want to stay firm on our August 17<sup>th</sup> deadline. If the call is going to wait until after then, he also is willing to travel to Miami to attend the meeting in person, but if we do that, we should probably not have the meeting until August 23<sup>rd</sup> to give Drew some time to recover and catch up on his work before he hops on a flight down here.

The agents and I were planning to go to New York for August 20, 21, and 22 to serve target letters on the assistants and to interview some of Epstein's colleagues and former employees whom we know were around the girls. I would like to still do this trip, but I know there was some concern about serving target letters while we are trying to negotiate a plea. Can you give some guidance?

Thank you.

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Oosterbaan, Andrew  
**Sent:** Wednesday, August 08, 2007 5:53 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Epstein

Thanks very much, Marie. And, you'll have all the help from us you want. If you guys end up wanting a CEOS attorney on the team, the assignment might be different than if we're just helping with motions and responses (which would be fine). So, for now, if you need anything or want to discuss the case just contact me and I'll make sure you get what you need. Of course, feel free to contact Myesha directly if you think she can better assist you because of her background on a particular issue you've already discussed with her.

Thanks again.

---

**From:** Villafana, Ann Marie C. (USAFLS) [mailto:Ann.Marie.C.Villafana@usdoj.gov]  
**Sent:** Wednesday, August 08, 2007 4:26 PM  
**To:** Oosterbaan, Andrew  
**Subject:** Epstein

Hi Drew – I have attached a plea term sheet and the guideline calculation that was given to Mr. Epstein's attorneys on July 31<sup>st</sup>. Lilly's letter of August 2<sup>nd</sup> is sort of in response to that.

Several months ago when the pros memo was first sent to you, you mentioned adding a CEOS attorney to the team. We probably should wait until this attempt at plea negotiations is finished, but I hope to have a few motions/responses "in the bag" before I indict. The two that spring to mind most readily are an appeal to the district court if he is released on bond and a response to a motion to dismiss the indictment on the basis that one or all of the statutes is unconstitutional. Myesha Braden and I have spoken about the case a few times when I was doing research, and she has been wonderful, but if there is someone else that you think would be better, I am all up for the help.

Thank you.

<<FEDERAL SENTENCING GUIDELINES CALCULATION(Using November 1.wpd)>> <<Conf Plea Negotiations final.wpd>>

*A. Marie Villafaña*

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

Phone 561 209-1047

Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, August 07, 2007 12:08 PM  
**To:** Lourie, Andrew (USAFLS)  
**Subject:** Epstein

Hi Andy – FYI – Apparently the defense is displeased with Matt’s letter (which set a deadline of 8/17 and said that Alex wouldn’t meet with them). So, they are demanding a meeting with CEOS. Alex and Drew are going to try to do a conference call with the defense to avoid the troop going to DC.

Has Drew been kept in the loop? Is there anything I should send to him? And the agents just interviewed another girl who started going when she was 14.

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, August 07, 2007 12:05 PM  
**To:** Oosterbaan, Andrew  
**Subject:** Epstein

Hi Drew – I don't know how much Jeff and Andy have been keeping you in the loop, so let me know if you need any info or if you just want to talk before the meeting.

Thanks.

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

That's fine. Drew is totally on board. Do you want me to loop him in on this email chain? Are you around right now? Call me on my cell. 9548052013.

Sent from my GoodLink synchronized handheld ([www.good.com](http://www.good.com))

-----Original Message-----

From: Acosta, Alex (USAFLS)  
Sent: Tuesday, August 07, 2007 10:42 AM Eastern Standard Time  
To: Sloman, Jeff (USAFLS)  
Subject: Epstein - pls read

Jeff -- Apologies for the email in the middle of your vacation. With Matt gone and Andy out, I'm not sure who is speaking with CEOs on the Epstein matter.

His attorneys want to go to DC on the case, on the grounds of a process foul, i.e., that I have not met with them. I'm concerned that this will delay matters.

I am thinking of heading this off, by (i) agreeing to meet to discuss general legal policy only (the only matter in which DC has arguable jurisdiction), while making clear that we are not talking about the details of the case, and (ii) asking the Drew Oosterbaan to participate by teleconference, thereby intercepting the DC meeting.

Thoughts?

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, August 07, 2007 12:04 PM  
**To:** Yera, E.J. (USAFLS)  
**Subject:** FW: Epstein - pls read

FYI --

P.S. Matt's letter gave them a deadline of August 17th.

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Sloman, Jeff (USAFLS)  
**Sent:** Tuesday, August 07, 2007 11:49 AM  
**To:** Oosterbaan, Andrew  
**Cc:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** FW: Epstein - pls read

Marie and Drew,  
The chain of emails is self explanatory.  
Jeff

Sent from my GoodLink synchronized handheld ([www.good.com](http://www.good.com))

-----Original Message-----

**From:** Acosta, Alex (USAFLS)  
**Sent:** Tuesday, August 07, 2007 11:38 AM Eastern Standard Time  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** RE: Epstein - pls read

Just tried your cell. No need to call back. I would really appreciate it if you could loop him and Marie in as appropriate. I'll have the Cindy set up the meeting.

Sorry again to bother you, but everyone seems to be out this week.

-----Original Message-----

**From:** Sloman, Jeff (USAFLS)  
**Sent:** Tuesday, August 07, 2007 11:03 AM  
**To:** Acosta, Alex (USAFLS)  
**Subject:** RE: Epstein - pls read

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, August 06, 2007 10:06 AM  
**To:** Sloman, Jeff (USAFLS)  
**Subject:** Do you know if the letter went out?

Hi Jeff – Sorry to bother you when you are away. Do you know if the letter to Lilly went out on Friday?  
Thanks.

*A. Marie Villafaña*

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Monday, August 06, 2007 11:20 AM  
**To:** Campos, Cyndee (USAFLS); Devlin, Frederica (USAFLS)  
**Subject:** Contact with Matt Menchel

Hi Cyndee and Freddie – I need to check on whether Matt sent something out before he left. Jeff doesn't know if it went out, and he suggested that I try Matt on his cell. I call the cell number on the roster, but it seems to be disconnected. Do you have a contact number for him?

Thanks.

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

**Recipient**

Menchel, Matthew (USAFLS)  
Lourie, Andrew (USAFLS)  
Sloman, Jeff (USAFLS)  
Atkinson, Karen (USAFLS)

**Read**

Read: 8/3/2007 11:08 AM  
Read: 8/3/2007 10:17 AM

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Friday, August 03, 2007 10:12 AM  
**To:** Menchel, Matthew (USAFLS); Lourie, Andrew (USAFLS); Sloman, Jeff (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS)  
**Subject:** Epstein Letter

Hi all – I just noticed one typo in the letter (2<sup>nd</sup> paragraph, 2<sup>nd</sup> to last line – telephone). With respect to setting the deadline for the response, here is the timing that I would like to suggest.

If they are going to accept the deal, we would need to know by August 15<sup>th</sup>. (Since they are likely to ask for an extension, we might want to give them a soft deadline of the 10<sup>th</sup> so we can give an extension until the 15<sup>th</sup>.)

Assuming that the deal is not accepted, the agents and I will go to New York on August 20-21, to try to serve target letters on two of the assistants (the third is already represented) and to do two or three witness interviews. The target letters would invite the targets to appear before the grand jury on August 28<sup>th</sup>, and we will plan to indict on September 4<sup>th</sup>. This schedule also should give us enough time to resolve the computer issue with Judge Marra.

Let me know what you think. Thanks.

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

**Tracking:**

LILLY ANN SANCHEZ, ESQ.  
AUGUST 3, 2007  
PAGE 2

Please let us know your client's decision by no later than August 17. I have conferred with U.S. Attorney Acosta who has asked me to communicate that the two-year term of incarceration is a non-negotiable minimum to vindicate a federal interest, and, at this time, he is not inclined to meet with counsel for Mr. Epstein.

Sincerely,

R. Alexander Acosta  
United States Attorney

By:   
Matthew Menchel  
Chief, Criminal Division

cc: Roy Black  
Gerald B. Lefcourt  
R. Alexander Acosta  
Jeffrey Sloman  
Andrew Lourie  
A. Marie Villafaña



U.S. Department of Justice

United States Attorney  
Southern District of Florida

R. ALEXANDER ACOSTA  
UNITED STATES ATTORNEY

99 N.E. 4 Street  
Miami, FL 33132  
(305) 961-9100 - Telephone  
(305) 530-6444 - Facsimile

August 3, 2007

VIA FACSIMILE

Lilly Ann Sanchez, Esq.  
Fowler White Burnett  
1395 Brickell Ave Fl 14  
Miami Florida 33131-3300

Re: Jeffrey Epstein

Dear Lilly:

Thank you for your letter of August 2<sup>nd</sup> regarding your proposal on how to resolve the Epstein matter.

As we explained at our meeting on July 31, 2007, the Office believes that the federal interest will not be vindicated in the absence of a two-year term of state imprisonment for Mr. Epstein. That offer was not meant as a starting point for negotiations, it is the minimum term of imprisonment that will obviate the need for federal prosecution. The Office has never agreed that a state prison sentence is not appropriate for Mr. Epstein. Rather we simply stated that if Mr. Epstein preferred to serve his sentence in a federal penitentiary, we would be willing to explore a federal conviction that may allow that in lieu of any state resolution. Further, as I made clear in our follow up telephone conversation after the meeting, a plea to two federal misdemeanors was never extended or meant as an offer.

We also would reiterate that the agreement to Section 2255 liability applies to all of the minor girls identified during the federal investigation, not just the 12 that form the basis of an initial planned charging instrument.

As you know, the ability to engage in flexible plea negotiations is dramatically changed upon the return of an indictment. Once an indictment is returned, the Office does not intend to file a Superseding Information containing a lesser charge or to dismiss the case in favor of state prosecution.

Exhibit 41

**Recipient**  
Menchel, Matthew (USAFLS)

**Read**  
Read: 8/2/2007 9:01 AM

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, August 02, 2007 8:55 AM  
**To:** Menchel, Matthew (USAFLS)  
**Subject:** RE: Emailing: Conf Plea Negotiations.wpd

Hi Matt -- Thanks. I think I figured out a way to do a federal plea with a 2-1/2 year cap. It is a little funky, but it matches the facts.

A. Marie Villafaña  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Menchel, Matthew (USAFLS)  
**Sent:** Wednesday, August 01, 2007 6:42 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Emailing: Conf Plea Negotiations.wpd

Just letting you know that we didn't receive anything from the defense today. Lilly Sanchez called late in the afternoon to say it will be coming tomorrow.

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, July 31, 2007 1:37 PM  
**To:** Sloman, Jeff (USAFLS); Menchel, Matthew (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Emailing: Conf Plea Negotiations.wpd

Hi all -- I fixed some typos. Here is the final. We will be headed upstairs in a minute.

The message is ready to be sent with the following file or link attachments:

Conf Plea Negotiations.wpd

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

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From: Menchel, Matthew (USAFLS)  
Sent: Thursday, August 02, 2007 12:56 PM  
To: Sloman, Jeff (USAFLS); Villafana, Ann Marie C. (USAFLS); Lourie, Andrew (USAFLS)  
Subject: FW: JE -- letter  
Attachments: MenschelFinalLetter.pdf

FYI

-----Original Message-----

From: Lilly Ann Sanchez [mailto:las@FOWLER-WHITE.COM]  
Sent: Thursday, August 02, 2007 12:38 PM  
To: Menchel, Matthew (USAFLS)  
Cc: Jacqueline Borrero  
Subject: JE -- letter

matt- please see attached and confirm receipt.  
i am also having letter hand-delivered to you and alex.  
regards

Lilly Ann Sanchez, Esq.  
FOWLER WHITE BURNETT P.A.  
Espirito Santo Plaza, 14th Floor  
1395 Brickell Avenue  
Miami, Florida 33131-3302  
Telephone: (305) 789-9200  
Direct Dial: (305) 789-9279  
Facsimile: (305) 789-9201  
[lsanchez@fowler-white.com](mailto:lsanchez@fowler-white.com)

**\*\*TAX MATTERS- IRS Circular 230 Disclosure:** To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. If you would like such advice, please contact us.\*\*\*

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**Recipient**

Menchel, Matthew (USAFLS)  
Sloman, Jeff (USAFLS)  
Lourie, Andrew (USAFLS)

**Read**

Read: 8/2/2007 2:30 PM  
  
Read: 8/2/2007 2:33 PM

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**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, August 02, 2007 2:06 PM  
**To:** Menchel, Matthew (USAFLS); Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** RE: JE -- letter

Do you want to do a conference call? And has a meeting with Alex been set up yet?

Thanks.

A. Marie Villafaña  
Assistant U.S. Attorney  
561 209-1047

-----Original Message-----

**From:** Menchel, Matthew (USAFLS)  
**Sent:** Thursday, August 02, 2007 12:56 PM  
**To:** Sloman, Jeff (USAFLS); Villafana, Ann Marie C. (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** FW: JE -- letter

FYI

-----Original Message-----

**From:** Lilly Ann Sanchez [mailto:[las@FOWLER-WHITE.COM](mailto:las@FOWLER-WHITE.COM)]  
**Sent:** Thursday, August 02, 2007 12:38 PM  
**To:** Menchel, Matthew (USAFLS)  
**Cc:** Jacqueline Borrero  
**Subject:** JE -- letter

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i am also having letter hand-delivered to you and alex.  
regards

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**Recipient**

Menchel, Matthew (USAFLS)

Sloman, Jeff (USAFLS)

Lourie, Andrew (USAFLS)

**Read**

Read: 8/2/2007 2:52 PM

Read: 8/2/2007 3:51 PM

Deleted: 8/6/2007 9:47 AM

-----Original Message-----

From: Lilly Ann Sanchez [mailto:las@FOWLER-WHITE.COM]  
Sent: Thursday, August 02, 2007 12:38 PM  
To: Menchel, Matthew (USAFLS)  
Cc: Jacqueline Borrero  
Subject: JE -- letter

matt- please see attached and confirm receipt.  
i am also having letter hand-delivered to you and alex.  
regards

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Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

From: Villafana, Ann Marie C. (USAFLS)  
Sent: Thursday, August 02, 2007 2:47 PM  
To: Menchel, Matthew (USAFLS); Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
Subject: RE: JE -- letter

I am free any time before 5:30. Should Andy and I call you from his office?

A. Marie Villafaña  
Assistant U.S. Attorney  
561 209-1047

-----Original Message-----

From: Menchel, Matthew (USAFLS)  
Sent: Thursday, August 02, 2007 2:30 PM  
To: Villafana, Ann Marie C. (USAFLS); Sloman, Jeff (USAFLS); Lourie, Andrew (USAFLS)  
Subject: Re: JE -- letter

Yes, I think we should. Alex has to leave early but is available by phone.

-----  
Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Villafana, Ann Marie C. (USAFLS) <AVillafana@usa.doj.gov>  
To: Menchel, Matthew (USAFLS) <MMenchel@usa.doj.gov>; Sloman, Jeff (USAFLS) <JSloman@usa.doj.gov>; Lourie, Andrew (USAFLS) <ALourie@usa.doj.gov>  
Sent: Thu Aug 02 14:06:14 2007  
Subject: RE: JE -- letter

Do you want to do a conference call? And has a meeting with Alex been set up yet?

Thanks.

A. Marie Villafaña  
Assistant U.S. Attorney  
561 209-1047

-----Original Message-----

From: Menchel, Matthew (USAFLS)  
Sent: Thursday, August 02, 2007 12:56 PM  
To: Sloman, Jeff (USAFLS); Villafana, Ann Marie C. (USAFLS); Lourie, Andrew (USAFLS)  
Subject: FW: JE -- letter

FYI

**Recipient**

Sloman, Jeff (USAFLS)

Menchel, Matthew (USAFLS)

Lourie, Andrew (USAFLS)

**Read**

Read: 8/2/2007 5:00 PM

Read: 8/2/2007 4:58 PM

Read: 8/2/2007 5:10 PM

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, August 02, 2007 4:55 PM  
**To:** Sloman, Jeff (USAFLS); Menchel, Matthew (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Draft Response to Letter

Here is a draft. I put tomorrow's date on it so Matt will have time to talk to Alex.



070802 Sanchez  
ltr from Matt M...

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Menchel, Matthew (USAFLS)  
**Sent:** Thursday, August 02, 2007 12:56 PM  
**To:** Sloman, Jeff (USAFLS); Villafana, Ann Marie C. (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** FW: JE -- letter  
**Attachments:** MenschelFinalLetter.pdf

FYI

-----Original Message-----

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**Sent:** Thursday, August 02, 2007 12:38 PM  
**To:** Menchel, Matthew (USAFLS)  
**Cc:** Jacqueline Borrero  
**Subject:** JE -- letter

matt- please see attached and confirm receipt.  
i am also having letter hand-delivered to you and alex.  
regards

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- o Mandatory conditions as provided in Florida Statute § 948.03
- o Special conditions as stated above

If the terms of supervised custody and probation are successfully completed, then the two years of state prison is eliminated.

This proposal provides for the two year imposition of the state prison sentence if any violation of the supervised custody or probation occurs. Accordingly, the Office's position that Mr. Epstein agree to a resolution that includes jail time is satisfied by this proposal. It would immediately bring closure to a matter that has been pending for over two years, allows Mr. Epstein to commence with his sentence, and, most significantly, allow the victims to move forward with their lives. We are in process of scheduling a meeting with R. Alexander Acosta, United States Attorney, to further discuss this matter.

Sincerely,



Lilly Ann Sanchez

cc. R. Alexander Acosta  
Gerald Lefcourt  
Roy Black

The following proposal is offered as an assurance to the community that the goals of appropriate punishment and rehabilitation are attained.

We will agree to a sentence of two years in state prison pursuant to Florida Statute 948.012(2) which permits a split sentence whereby Mr. Epstein will be sentenced to a term of supervised custody, followed by a period of incarceration. Supervised custody in the state system includes potential daily surveillance, administered by officers with restricted case loads. Supervised custody is an individualized program in which the freedom of Mr. Epstein is limited to the confines of his residence with specific sanctions imposed and enforced. *See* Florida Statute 948.001(2). Should Mr. Epstein successfully complete the terms and conditions of his custody, the Judge will eliminate the incarcerative portion of the sentence. If Mr. Epstein, however, fails to comply with the conditions of his supervised custody. The period of incarceration will be immediately implemented.

We, therefore, propose the following:

- Two years supervised custody with the following mandatory and special conditions:
  - o Confinement to home
  - o Report to a community control officer at least once a week or more often as directed by the officer
  - o Permit a community control officer to visit him unannounced at home at any time, day or night
  - o Obtain psychological counseling
  - o No unsupervised contact with all the victims in the instant case
  - o Perform community service
  - o Payment of Restitution
  - o Application of 18 U.S.C. § 2255<sup>1</sup>
  - o Payment of a contribution of a defined amount to a charitable organization benefitting victims of sexual assault
  - o Payment of Court and probationary costs
  - o Payment of law enforcement investigative costs
  - o Submit to random drug testing
  - o Refrain from associating with persons engaged in criminal activities
  - o Refrain from committing any new law offenses
  - o Any other specific conditions that the Office may deem necessary

• Two additional years of reporting probation:

<sup>1</sup> 18 U.S.C. 2255 provides that any minor who suffers injury as a result of the commission of certain offenses shall recover actual damages and the cost of any suit. It is important to note that Mr. Epstein is prepared to fully fund the identified group of victims which are the focus of the Office – that is, the 12 individuals noted at the meeting on July 31, 2007. This would allow the victims to be able to promptly put this behind them and go forward with their lives. If given the opportunity to opine as to the appropriateness of Mr. Epstein's proposal, in my extensive experience in these types of cases, the victims prefer a quick resolution with compensation for damages and will always support any disposition that eliminates the need for trial.



MIAMI • FORT LAUDERDALE • WEST PALM BEACH • ST. PETERSBURG

ESPIRITO SANTO PLAZA  
FOURTEENTH FLOOR  
1395 BRICKELL AVENUE  
MIAMI, FLORIDA 33131  
TELEPHONE (305) 789-9200  
FACSIMILE (305) 789-9201

WWW.FOWLER-WHITE.COM

LILLY ANN SANCHEZ  
DIRECT PHONE No.: (305) 789-9279  
DIRECT FACSIMILE No.: (305) 728-7579  
LSANCHEZ@FOWLER-WHITE.COM

August 2, 2007

Mr. Matthew Menchel  
Chief, Criminal Division  
United States Attorney's Office  
Southern District of Florida  
99 NE 4 Street  
Miami, Florida 33132

Re: Jeffrey Epstein

Dear Matt:

As we discussed at Tuesday's meeting, and consistent with our view that no federal prosecution should lie in this matter, Mr. Epstein is prepared to resolve this matter via a state forum. We are in receipt of your memo regarding same and as the dynamics of the meeting did not allow for us to fully detail our proposal, we do so now. We believe that our respective positions are not very far apart and that a mutually agreeable resolution can be reached that will accomplish the interests of the United States Attorney's Office as well as those of the community.

We welcomed your recognition that a state prison sentence is neither appropriate for, nor acceptable to, Mr. Epstein, as the dangers of the state prison system pose risks that are clearly untenable. We acknowledge that your suggestion of a plea to two federal misdemeanors was an attempt to resolve this dilemma. Our proposal is significantly punitive, and if implemented, would, we believe, leave little doubt that the federal interest was demonstrably vindicated.

The Florida state judicial system, unlike the federal system, provides for numerous types of onerous sanctions after a defendant is remanded to the custody of the state. The sentence is tailored to the needs of the local community and the risk posed by a specific defendant. After a great deal of thought, our proposal consists of both a severe supervised custody, with an assurance that any violation would result in the immediate implementation of the two year period of incarceration. We must keep in mind that Jeffrey Epstein is a 54-year old man who has never been arrested before. He has lived an otherwise exemplary life, characterized by both many charitable contributions and philanthropic acts. His reputation has suffered significantly as a result of his poor judgment in these matters. He is well aware of the ramifications of his past behavior and, accordingly, there is no concern, whatsoever, that he will re-offend.

FOWLER WHITE BURNETT P.A.

Exhibit 40

EFTA00226205

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Friday, August 03, 2007 10:12 AM  
**To:** Menchel, Matthew (USAFLS); Lourie, Andrew (USAFLS); Sloman, Jeff (USAFLS)  
**Cc:** Atkinson, Karen (USAFLS)  
**Subject:** Epstein Letter

Hi all – I just noticed one typo in the letter (2<sup>nd</sup> paragraph, 2<sup>nd</sup> to last line – telephone). With respect to setting the deadline for the response, here is the timing that I would like to suggest.

If they are going to accept the deal, we would need to know by August 15<sup>th</sup>. (Since they are likely to ask for an extension, we might want to give them a soft deadline of the 10<sup>th</sup> so we can give an extension until the 15<sup>th</sup>.)

Assuming that the deal is not accepted, the agents and I will go to New York on August 20-21, to try to serve target letters on two of the assistants (the third is already represented) and to do two or three witness interviews. The target letters would invite the targets to appear before the grand jury on August 28<sup>th</sup>, and we will plan to indict on September 4<sup>th</sup>. This schedule also should give us enough time to resolve the computer issue with Judge Marra.

Let me know what you think. Thanks.

*A. Marie Villafana*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, August 02, 2007 8:55 AM  
**To:** Menchel, Matthew (USAFLS)  
**Subject:** RE: Emailing: Conf Plea Negotiations.wpd

Hi Matt -- Thanks. I think I figured out a way to do a federal plea with a 2-1/2 year cap. It is a little funky, but it matches the facts.

A. Marie Villafana  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

-----Original Message-----

**From:** Menchel, Matthew (USAFLS)  
**Sent:** Wednesday, August 01, 2007 6:42 PM  
**To:** Villafana, Ann Marie C. (USAFLS)  
**Subject:** RE: Emailing: Conf Plea Negotiations.wpd

Just letting you know that we didn't receive anything from the defense today. Lilly Sanchez called late in the afternoon to say it will be coming tomorrow.

-----Original Message-----

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, July 31, 2007 1:37 PM  
**To:** Sloman, Jeff (USAFLS); Menchel, Matthew (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Emailing: Conf Plea Negotiations.wpd

Hi all -- I fixed some typos. Here is the final. We will be headed upstairs in a minute.

The message is ready to be sent with the following file or link attachments:

Conf Plea Negotiations.wpd

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Tracking:

## CONFIDENTIAL PLEA NEGOTIATIONS

### TERMS OF EPSTEIN NON-PROSECUTION AGREEMENT

- Epstein pleads guilty (not nolo contendere) to an Information filed by the Palm Beach County State Attorney's Office charging him with:
  - (a) lewd and lascivious battery on a child, in violation of Fl. Stat. 800.04(4);
  - (b) solicitation of minors to engage in prostitution, in violation of Fl. Stat. 796.03; and
  - (c) engaging in sexual activity with minors at least sixteen years of age, in violation of Fl. Stat. 794.05.
  
- Epstein and the State Attorney's Office make a joint, binding recommendation that Epstein serve at least two years in prison, without any opportunity for withholding adjudication or sentencing; and without probation or community control in lieu of imprisonment.
  
- Epstein agrees to waive all challenges to the information filed by the State and the right to appeal.
  
- Epstein agrees that, if any of the victims identified in the federal investigation file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the U.S. District Court for the Southern District of Florida over his person and the subject matter. Epstein will not contest that the identified victims are persons who, while minors, were victims of violations of Title 18, United States Code, Sections(s) 2422 and/or 2423, and who suffered personal injury as a result of such violation(s).
  
- After Epstein enters his state court plea and is sentenced, the FBI and the U.S. Attorney's Office will close their investigations.
  
- This agreement only applies to the victims already identified and the crimes currently under investigation. If additional victims or crimes are discovered (for example, if child pornography is found on the computers that are the subject of the Motion to Quash), the FBI and the United States are free to investigate and prosecute those crimes.
  
- This offer will remain open only until 4:00 p.m., Friday, August 10, 2007. If accepted, Epstein must enter his state guilty plea not later than August 31, 2007.

**Villafana, Ann Marie C. (USAFLS)**

---

**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Tuesday, July 31, 2007 1:37 PM  
**To:** Sloman, Jeff (USAFLS); Menchel, Matthew (USAFLS); Lourie, Andrew (USAFLS)  
**Subject:** Emailing: Conf Plea Negotiations.wpd  
**Attachments:** Conf Plea Negotiations.wpd

Hi all -- I fixed some typos. Here is the final. We will be headed upstairs in a minute.

The message is ready to be sent with the following file or link attachments:

Conf Plea Negotiations.wpd

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Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 335237 (N.D.Cal.)

(Cite as: 2006 WL 335237 (N.D.Cal.))

plaintiffs." This stipulation, and plaintiffs' counsel's failure to secure the signature of counsel for all defendants, led to further litigation.

\*2 In sum, while the Court was not persuaded by White's attempts to get out of his agreement, the Court does not find that his conduct warrants sanctions under the Court's inherent authority.

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2006 WL 335237  
(N.D.Cal.)

END OF DOCUMENT

Westlaw.

Page 1

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 335237 (N.D.Cal.)

(Cite as: 2006 WL 335237 (N.D.Cal.))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
N.D. California.  
Jose ROE I, et al., Plaintiffs,  
v.  
Thomas F. WHITE, et al., Defendants.  
No. C 03-04035 CRB.

Feb. 13, 2006.

David Replogle, Law Offices of David Replogle,  
PC, San Francisco, CA, John E. Hill, Law Offices  
of John E. Hill, Oakland, CA, for Plaintiffs.

Nanci Lynne Clarence, Kate Dyer, Clarence &  
Dyer LLP, Jan Nielsen Little, Kecker & Van Nest,  
LLP, San Francisco, CA, William S. Berland,  
Ferguson & Berland, Berkeley, CA, for Defendants.

## ORDER

CHARLES R. BREYER, J.

\*1 Now pending before the Court is plaintiffs' motion for attorneys' fees incurred in enforcing its settlement with defendant Thomas White. After carefully considering the papers filed by the parties, the Court concludes that oral argument is unnecessary, *see* Local Rule 7-1(b), and DENIES plaintiffs' motion.

Plaintiffs are not entitled to attorneys' fees under 18 U.S.C. section 2255. Plaintiffs settled their claims under that statute, and the settlement expressly provides that each party shall bear its own costs and fees. Plaintiffs' reliance on *Maier v. Gagne*, 488 U.S. 122, 129 (1980) and *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) is specious. The settlement in neither case included a section explicitly providing that the

parties shall bear their own costs and attorneys' fees.

Plaintiffs did prevail on their summary judgment claim that the settlement agreement, that is, the contract between the parties, is enforceable. Unlike nearly every settlement agreement this Court has ever seen, however, the settlement agreement did *not* include a section providing that the prevailing party is entitled to fees and costs arising from any dispute under the agreement. Plaintiffs do not cite any law that remotely suggests that when a party successfully enforces a settlement agreement that does not include an attorneys' fee provision, that party is entitled to attorneys' fees pursuant to the substantive law of the settled case. Nor do they cite any case that suggests that a party who successfully enforces a settlement agreement is entitled to attorneys' fees incurred in enforcing the agreement when the agreement itself does not have an attorneys' fees provision. To award plaintiffs fees here would require the Court to rewrite the parties' agreement. This the Court will not do.

The Court also declines to sanction defendant White for his alleged "bad faith" conduct. While the Court found that White's arguments were motivated by his change of heart, the Court does not believe that his arguments were so frivolous as to warrant sanctions. This is especially so given that White was able to attack the enforceability of the settlement because of plaintiffs' counsels' omissions. For example, because plaintiffs' counsel failed to move for appointment of the guardian ad litem prior to the guardian's execution of the agreement on behalf of the three minor plaintiffs, and indeed, even before this Court initially approved the settlement, White was able to challenge the agreement on that ground. Similarly, because plaintiffs' counsel negotiated a global settlement that included two plaintiffs with whom counsel had not communicated in nearly a year, counsel had to seek a stipulation to modify the settlement when they could not locate the "missing

485 F.3d 1226

485 F.3d 1226

(Cite as: 485 F.3d 1226)

In her opening brief, however, she failed to offer any substantive arguments explaining why the district court erred in denying the motion. Consequently, we consider the issue waived. See *Wilburn* ■ *Mid-South Health Dev., Inc.*, 343 F.3d 1274, 1281 (10th Cir.2003) ("We ... will not consider issues that are raised on appeal but not adequately addressed."); *Adler* ■ *Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived.").

### III. CONCLUSION

We AFFIRM the district court's order dismissing Ms. Cisneros's ATS claims for lack of jurisdiction. We also AFFIRM the district court's grant of summary judgment on the § 2255 claims for failure to produce evidence of an essential element of the claims. Finally, we AFFIRM the dismissal of Ms. Cisneros's state-law claims and the denial of her joint motion for new trial and for reconsideration.

485 F.3d 1226

END OF DOCUMENT

485 F.3d 1226

485 F.3d 1226

(Cite as: 485 F.3d 1226)

include "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof...."

FN4. The current version of 18 U.S.C. § 2242(2) is:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly--

...

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

The amendments since enactment are irrelevant to our analysis.

FN5. The current version of § 2243(a) is:  
Sexual abuse ...

(a) Of a minor.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly engages in a sexual act with another person who--

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is a least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

The amendments since enactment are irrelevant to our analysis.

[3] Ms. Cisneros has claimed that two of Mr.

Aragon's acts came within the statutes because they occurred on federally owned land within the Medicine Bow National Forest. We agree with the district court, however, that she failed to offer sufficient evidence to support this claim. Most importantly, as pointed out by the district court, although Ms. Cisneros "include[d] latitude and longitude information in her [summary judgment response]," *Aplt.App.* at 127, she failed to provide any "documentary evidence showing that these locations were in fact on federally owned land and not on privately owned land within the Medicine Bow National Forest," *id.* at 138. On appeal her sole contention is that her evidence was adequate to show that the alleged acts occurred on federal land. In her summary-judgment response, she asserted that "[m]aps made/created by Plaintiff when retracing her 'steps' " were attached to her response, *id.* at 89; but there are no maps attached to the copy of the response in the record on appeal. Accordingly, we affirm the district court's ruling that Ms. Cisneros failed to establish an essential element of her § 2255 claims. Although failure to prove this element is not a jurisdictional \*1233 flaw because the complaint alleges the elements of the federal claims, *see Bell Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 90 L.Ed. 939 (1946), this failure nevertheless justified dismissal of the claims.

#### C. State-Law Claims and Supplemental Jurisdiction

[4] Ms. Cisneros's amended complaint also pleaded claims under state law for intentional infliction of emotional distress and assault and battery. She alleged that the district court could exercise supplemental jurisdiction over these claims under 28 U.S.C. § 1367. But because the district court correctly dismissed the federal claims, it could properly dismiss the state-law claims as well. *See id.* § 1367(c)(3).

#### D. Motion for New Trial and for Reconsideration

[5] Ms. Cisneros's notice of appeal stated that she is also appealing the district-court order denying her joint motion for a new trial and for reconsideration.

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- engage in any unlawful sexual activity;
- (b) The exploitive use of children in prostitution or other unlawful sexual practices;
- (c) The exploitive use of children in pornographic performances and materials.

This language hardly describes sexual misconduct "with a specificity comparable to the features of the 18th-century paradigms [that the Supreme Court has] recognized." *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739. The two articles are simply aspirational goals stated in imprecise language. [FN2]

FN2. We note that this is typical of many of the articles in the United Nations Convention. For example, section one of Article 12 provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Moreover, the law of nations, particularly the subset of that law enforceable under the ATS, does not include a norm simply because the norm is enshrined in the domestic law of all civilized societies. Auto theft is not a violation of international law. As the Supreme Court said in *Sosa*, the drafters of the ATS probably had in mind only rules of international law regulating the conduct of individuals that "overlapped with the norms of state relationships," 542 U.S. at 715, 124 S.Ct. 2739, that is, a "narrow set of violations of the law of nations[ ] admitting of a judicial remedy and at the same time threatening serious consequences in international affairs," *id.* The Court's requirement that the law-of-nations norm be defined with precision is not a substitute for the requirement that the violation be of a type that can substantially impact international affairs, but is an additional requirement. A pre-*Sosa* circuit-court opinion reflected this limitation when it recognized ATS causes of action for war crimes and genocide but not "torture and summary execution-- when not perpetrated in the course of genocide or war crimes." *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir.1995). There can be no doubt that the alleged

misconduct of Mr. Aragon was not of the sort that comes close to "threatening serious consequences in international affairs." *Sosa* at 715, 124 S.Ct. 2739. We therefore affirm the district court's rejection of Ms. Cisneros's ATS claims.

#### B. Claims Under 18 U.S.C. § 2255(a)

Section 2255(a) states:

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. [FN3]

FN3. We quote the version of the statute in effect from 1998 through 2005. An amendment enacted in 2006 would not affect our analysis. We note, however, that the version in effect from enactment in October 1986 until the 1998 amendment referred only to violations of §§ 2251 and 2252, so Ms. Cisneros could have a claim based on a violation of § 2255 only if the 1998 amendment applied retroactively to conduct preceding the amendment. We also note that on appeal Mr. Aragon has not raised a statute-of-limitations argument under § 2255(b).

\*1232 We will assume that a criminal conviction is not necessary for a defendant to face civil liability under the statute. See *Smith v. Husband*, 376 F.Supp.2d 603, 613 (E.D.Va.2005).

The predicate offenses alleged by Ms. Cisneros are violations of 18 U.S.C. §§ 2242(2) [FN4] and 2243(a). [FN5] The dispositive feature of both statutes is that they require prohibited acts to be committed within the "special maritime and territorial jurisdiction of the United States." That jurisdiction is defined by 18 U.S.C. § 7(3) to

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Applying this standard, the Court held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy [under § 1350]." *Id.* at 738, 124 S.Ct. 2739.

Ms. Cisneros asserts two types of sexual abuse. First, she alleges that Mr. Aragon violated the federal statutory-rape statute, 18 U.S.C. § 2243(a), because he had sexual relations with her when she was only 15 years old and he was 19. Second, she alleges that he violated 18 U.S.C. § 2242(2)(A) and (B) because he had sexual relations with her at a time when she was (1) incapable of appraising the nature of the conduct and (2) physically incapable of refusing to participate in the conduct. According to Ms. Cisneros, these statutory provisions are "a 'law of nation' [sic] providing this Court with enough to find jurisdiction under the ATS." *Apl. Br.* at 9. In the alternative, she contends that "there is plenty of common everyday evidence subject to judicial notice to show the 'law of nations' requirement is met." *Id.* at 8.

We reject both contentions. To begin with, criminalization of conduct by the United States does not mean that the conduct violates the law of nations. Such criminalization may be relevant evidence, but the controlling consideration is whether the claimed wrongdoing "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [that the Supreme Court has] recognized." *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739. A United States statute may or may not express "a norm of international character." Consequently, jurisdiction under § 1350 cannot be based solely on a violation of our criminal code.

For her second contention Ms. Cisneros relies on an Interpol website titled "Legislation of Interpol member states on sexual offences against children," *see* <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws>, and on Articles

16 and 34 of the United Nations Convention on the Rights of the Child, *see* <http://www.unhcr.ch/html/men2/6/crc/treaties/crc.htm>. But neither source states norms of international law that satisfy the "requirement of clear definition" set forth in *Sosa*. *See Sosa*, 542 U.S. at 733 n. 21, 124 S.Ct. 2739. The Interpol website simply summarizes pertinent statutes provided by member states. It does not purport to express any consensus among nations. And Ms. Cisneros makes no effort to extract or identify from the site any data that would support her view. We have not attempted to do that work for her but there is reason to doubt her conclusion. For example, as Mr. Aragon points out, it is hardly clear that his alleged acts would even be criminal in her native Mexico. [FN1]

FN1. *See* *Aplee*, Supp.App. at 88-89 (setting forth English-language translation of Article 262 of the Mexican Penal Code, which provides that "[w]hoever has copulation with a person older than twelve years and younger than eighteen, obtaining his consent through means of deceit, shall be subject to a sentence of three months to four years in prison"). Ms. Cisneros has not alleged the deceit required by Mexican law.

Articles 16 and 34 of the United Nations Convention on the Rights of the Child likewise provide Ms. Cisneros with no support. Article 16 states:

1. No child shall be subjected to arbitrary or unlawful interference with \*1231 his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

And Article 34 provides:

- States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
- (a) The inducement or coercion of a child to

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(2004).

[2] The plaintiff in *Sosa* was a Mexican national who had been unlawfully abducted in Mexico, held overnight, and then transported to the United States where he was arrested by federal officers on charges of the murder and torture of an agent of the federal Drug Enforcement Administration. *See id.* at 697-98, 124 S.Ct. 2739. Defendant \*1229 *Sosa* was a Mexican national who had participated in the abduction. After being acquitted on the charges against him, the plaintiff brought an action against *Sosa* in a United States district court under the ATS. *See id.* at 698-99, 124 S.Ct. 2739. The issue before the Supreme Court was whether the law of nations included "a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances." *Id.* at 736, 124 S.Ct. 2739. The Court concluded that it did not, holding that the plaintiff had no claim under the ATS. *See id.* at 738, 124 S.Ct. 2739. Although the Court did not articulate "the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350," *id.* at 732, 124 S.Ct. 2739, it did delineate the principal considerations.

The Court first concluded that the ATS, which was originally enacted as part of the Judiciary Act of 1789, is "only jurisdictional," *id.* at 712, 124 S.Ct. 2739, and does not create a statutory cause of action, *see id.* at 713, 124 S.Ct. 2739. But it rejected the notion that "the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action." *Id.* at 714, 124 S.Ct. 2739. Instead, according to the Court, the statute expressed Congress's intent "that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time." *Id.* One component of this law was "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Id.* at 715, 124 S.Ct. 2739. Within this law was

a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. *It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.*

*Id.* (emphasis added) (citation omitted). The Court concluded:

[A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

*Id.* at 724, 124 S.Ct. 2739.

The Court next addressed whether § 1350 empowered the federal courts to recognize under the law of nations new claims, in addition to the well-established traditional causes of action for "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* Although the Court accepted the possibility of new causes of action, it cautioned that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind." *Id.* at 725, 124 S.Ct. 2739. It continued: "[W]e think courts \*1230 should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.*

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FN\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Guy P. Cleveland, Cleveland Law Office, Cheyenne, Wyoming, for Plaintiff-Appellant.

Mary Elizabeth Galvan, Laramie, Wyoming, for Defendant-Appellee.

Before KELLY, LUCERO, and HARTZ, Circuit Judges.

HARTZ, Circuit Judge.

This appeal arises under two rarely invoked statutes. The Alien Tort Statute \*1228 (ATS), 28 U.S.C. § 1350, grants federal district courts jurisdiction to hear civil suits by aliens alleging torts committed in violation of the law of nations. Section 2255(a) of Title 18 creates a civil cause of action for victims of certain sexual offenses under federal law. Plaintiff Carmen T. Cisneros, a native and citizen of Mexico, relied on both statutes in suing Defendant Michael J. Aragon for alleged sexual offenses committed in this country while she was under 16. The district court granted Mr. Aragon summary judgment on the ground that it lacked subject-matter jurisdiction over either claim. It held that (1) it did not have subject-matter jurisdiction over the ATS claims because "the particular sex offenses asserted by ... [Ms. Cisneros] ... do not qualify as torts in violation of the law of nations," *Aplt.App.* at 133; and (2) it did not have subject-matter jurisdiction over the § 2255(a) claims because Ms. Cisneros had "failed to offer sufficient evidence to [prove that] the alleged sex acts ... occur[red] within the special maritime or territorial jurisdiction of the United States," *id.* at 134 (internal quotation marks omitted). We affirm the dismissal of the § 1350 claims for lack of jurisdiction. We also affirm the dismissal of the § 2255(a) claims but for failure to establish an element of the cause of action rather than for lack of

jurisdiction.

## I. BACKGROUND

Ms. Cisneros alleges that she was born in Mexico on October 22, 1971, was brought to Wyoming by her parents in 1979, and married Mr. Aragon in Wyoming on April 29, 1987, while she was 15. Their marriage was dissolved 13 years later. According to her amended complaint, Mr. Aragon's sexual offenses-- statutory rape and sexual assault by having sexual relations with one incapable of appraising the nature of the conduct or physically incapable of refusing to participate in the conduct--occurred in Wyoming during the year before she turned 16. Two of the offenses allegedly occurred in the Medicine Bow National Forest on federal land.

## II. ANALYSIS

[1] We have jurisdiction under 28 U.S.C. § 1291. We review the district court's summary judgment *de novo*, "apply[ing] the same legal standard to be used by the district court" under Fed.R.Civ.P. 56(c). *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir.2006). Under Rule 56(c) summary judgment shall be granted "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." Fed.R.Civ.P. 56(c).

### A. Claims Under the Alien Tort Statute

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Ms. Cisneros is not alleging that Mr. Aragon's conduct violated a treaty of the United States. Our inquiry thus focuses exclusively on whether Ms. Cisneros has sufficiently alleged a violation of the *law of nations*, as that term is used in § 1350. For guidance we turn to the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718

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United States Court of Appeals,  
Tenth Circuit.  
Carmen T. CISNEROS, Plaintiff-Appellant,  
Michael J. ARAGON, Defendant-Appellee.  
No. 06-8029.

May 21, 2007.

**Background:** Plaintiff, a citizen of Mexico, brought action against her former husband, alleging that sexual offenses he committed against her in a National Forest violated federal and Wyoming law. The United States District Court for the District of Wyoming, Clarence A. Brimmer, J., granted former husband's motion for summary judgment, and appeal was taken.

**Holdings:** The Court of Appeals, Hartz, Circuit Judge, held that:

(1) alien's ex-husband's alleged sexual conduct toward alien did not violate law of nations, as required for Alien Tort Statute (ATS) to grant district court jurisdiction over alien's suit, and  
(2) no evidence showed that locations in Medicine Bow National Forest where alien was allegedly subjected to statutory rape and sexual assault were on federally owned land.

Affirmed.

## West Headnotes

**[1] Federal Courts** ⇨776

170Bk776 Most Cited Cases

Court of Appeals reviews the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

**[2] Aliens, Immigration, and Citizenship** ⇨763

24k763 Most Cited Cases

Alien's ex-husband's alleged sexual conduct toward

alien did not violate law of nations, as required for Alien Tort Statute (ATS) to grant federal district court jurisdiction over alien's suit, even though conduct alleged violated federal statutes prohibiting statutory rape and sexual assault; claimed wrongdoing did not rest on a norm of international character, and in any case the forms of sexual conduct alleged were not of a type that could substantially impact international affairs. 18 U.S.C.A. §§ 2242(2)(A, B), 2243(a); 28 U.S.C.A. § 1350.

**[3] Rape** ⇨66

321k66 Most Cited Cases

There was no evidence showing that locations in Medicine Bow National Forest where alien was allegedly subjected to statutory rape and sexual assault were on federally owned land, within meaning of statute establishing federal cause of action for sexual abuse of a minor within the territorial jurisdiction of the United States. 18 U.S.C.A. §§ 2242(2)(A, B), 2243(a), 2255(a).

**[4] Federal Courts** ⇨18

170Bk18 Most Cited Cases

District court properly declined to exercise supplemental jurisdiction and dismissed former wife's claims, under Wyoming law, for intentional infliction of emotional distress and assault and battery, arising out of actions by her former husband, where the court correctly dismissed federal claims arising out of the same conduct. 28 U.S.C.A. § 1367(c)(3).

**[5] Federal Courts** ⇨915

170Bk915 Most Cited Cases

Plaintiff who failed, in her opening brief on appeal, to offer any substantive arguments explaining why the district court erred in denying her motion for a new trial and for reconsideration, would be considered to have waived such issue.

\*1227 Submitted on the briefs: [FN\*]

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claims brought pursuant to both 18 U.S.C. §§ 2255 and 2252A(f) since Plaintiffs are claiming that they are entitled to relief under Count IV as victims of a violation of Sections 2251, 2252, and 2252A. See 18 U.S.C. § 2255(a) and § 2252A(f)(1). The only cognizable claim of a violation of either 18 U.S.C. § 2251(a), 2252(a) or 2252A is against Defendant Playboy Enterprises for distributing the programs of the Contests on the Playboy Channel for one month after learning of the Plaintiffs' ages. Accordingly, Count IV should be dismissed as to all the other Defendants, except Defendant Playboy Enterprises.

#### D. Count [REDACTED]

Plaintiffs' allegations related to their claim of negligence in Count [REDACTED] against Anheuser-Busch and Daytona Beverages survives a motion to dismiss. Plaintiff has alleged sufficient facts to support a claim that these defendants were co-sponsors of the Contests along with Defendant Deslin Hotels and co-defendant Goldrush Disk Jockeys, and, "through their joint venture" persuaded, induced and enticed Plaintiffs to perform sexually explicit acts. This language withstands a motion to dismiss, but may not survive a motion for summary judgment if the facts in the record do not show that these Defendants were responsible for checking the ages of the contestants. If Goldrush is an independent contractor responsible for the screening of the contestants and staging the contests, these Defendants would have no liability under the negligence count.

Defendants' motions to dismiss this claim are denied.

#### IV. Analysis of Motions to Strike

The Motions to Strike filed by the Playboy Defendants and Deslin Hotel are well taken. Fed.R.Civ.P. 8(a) requires a complaint to contain a "short and plain statement" of the facts and legal grounds entitling the plaintiff to relief. Plaintiffs' Amended Complaint is a gross violation of the rules of civil procedure in federal court. Plaintiffs' counsel are instructed to strictly adhere to the Federal Rules of Civil Procedure and Local Rules for the United States District Court for the Middle District of Florida for all future filings.

\*6 The facts relevant to this action are straightforward and do not warrant a particularly lengthy pleading. Plaintiffs counsel are directed to omit from any subsequent filings any pictures, as well as any facts that are not required to be identified pursuant to Rule 8. Such facts include but are not limited to the following: facts related to the success, failure, or any other aspect of the Defendants' businesses not directly related to the events leading to the Plaintiffs' alleged injuries; facts related to songs that were allegedly played during the Contests; allegations of conduct or behavior of other participants in the Contests besides Plaintiffs; allegations of compliance or noncompliance with the federal record-keeping laws and regulations; facts related to other contests or events in which Plaintiffs did not participate; and facts related to the personal lives of any of the Defendants or their agents or employees. Plaintiffs also are instructed not to incorporate by reference paragraphs contained in one section of the complaint that are irrelevant to any other section of the complaint.

#### [REDACTED] Conclusion

For the reasons stated herein, it is therefore ORDERED AND ADJUDGED that:

1. Defendant Anheuser-Busch's Motion to Dismiss (Dkt.# 18); Defendant Deslin Hotel's Motion to Dismiss and Alternative Motion to Strike (Dkt.# 20); Playboy Defendants' Motion to Strike (Dkt.# 29); Playboy Defendants' Motion to Dismiss (Dkt.# 30); Defendants Directv and Time Warner Cable's Motion to Dismiss (Dkt. # 32); Defendant Cox Communication's Motion to Dismiss (Dkt.# 37); Defendant Daytona Beverage's Motion to Dismiss (Dkt.# 39); Defendant BV & BK Production's Motion to Dismiss (Dkt.# 42); Defendant Comcast Cable Communication's Motion to Dismiss (Dkt.# 44) are GRANTED in part and DENIED in part.

2. Plaintiffs shall have thirty (30) days from the date of this Order in which to file a Second Amended Complaint.

DONE and ORDERED.

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genitals, pubic areas, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party." Fla. Stat. § 827.071(1)(g) (emphasis supplied). Plaintiff Breitfeller was not alleged to have engaged in this type of conduct. Plaintiff Gautreaux is alleged to have exposed her vagina. While this allegation asserts a violation of the Florida statute, it is insufficient to support a RICO claim because it does not constitute "a pattern of criminal activity."

For these reasons, Defendants are entitled to a dismissal of Count I of Plaintiffs' Amended Complaint.

#### B. Count II

Plaintiffs' Count II fails because Plaintiffs have not alleged facts to support their contention that the Defendants were participating in a RICO enterprise and that they participated in the enterprise through a pattern of criminal activity based on violations of 18 U.S.C. §§ 2251(a), 2252(a) and 2252A, and *Fla. Stat.* 827.071(3)-(5). Plaintiffs' allegation that the Playboy Defendants, the TV Broadcasting Defendants, and the remaining co-defendants operating retail outlets were involved in an "enterprise" is based solely on what appear to be the normal business operations of these entities. Moreover, as with Defendant Anheuser-Busch in Count I, Plaintiffs have failed to allege that any of these Defendants even attended the events at the Desert Inn. In fact, there is no allegation that these Defendants even knew of these events in advance. [FN9] Thus, Plaintiffs' allegation that these Defendants participated in criminal activities by violating 18 U.S.C. § 2251(a) is of no assistance to their RICO claim in Count II. Plaintiffs' reliance on 18 U.S.C. § 2252(a) and 2252A, and *Fla. Stat.* 827.071(3)-(5) is misplaced for the same reasons as in Count I: Plaintiffs have failed to allege that any of these Defendants knew of their ages and they failed to demonstrate that they engaged in "sexual conduct" as defined by Florida law. [FN10] Count II, therefore, is subject to dismissal.

FN9. In one paragraph of the Amended Complaint, Plaintiffs allege that Defendant Prewitt "might have been" dispatched to

Daytona Beach by "Thomas W. Meservey, Andrew Barney, Dave McNulty, or Joe Francis." Plaintiffs proceed to allege that "in the case of Tom Meservey and/or Andrew Barney, Prewitt may have been dispatched ... on the true behalf of Playboy." Such deliberately ambiguous terms are insufficient to allege a relationship between Defendant Prewitt and any other Playboy Defendant in this action. If Plaintiffs have a basis for believing that Defendant Prewitt was operating as an agent for one of the Playboy Defendants, they must allege this fact in their complaint.

FN10. Plaintiffs do contend that Playboy Enterprises distributed the programs of the Contests on the "Playboy Channel" after learning that they were minors at the time the video-recordings were made. The continued distribution of these programs by one member of an alleged enterprise during the last month of a purported RICO enterprise scheme is insufficient to establish "a pattern of criminal activity."

#### C. Count IV

\*5 Defendants contend that Plaintiffs' Count IV (Count III is missing in the Complaint) brought pursuant to 18 U.S.C. §§ 2255 and 2252A(f) should be dismissed because Plaintiffs have failed to allege that they suffered any "personal injuries" as a result of their alleged criminal conduct. Failure to plead facts establishing "personal injuries" appears fatal to a **Section 2255** claim since relief under this section is limited to a minor who "suffers personal injuries." See 18 U.S.C. §§ 2255(a). Section 2252A(f), however, provides civil remedy relief for any "aggrieved person." Plaintiffs omission of allegations of "personal injuries," therefore, would not warrant dismissal of Count IV for claims brought pursuant to Section 2252A(f).

More fundamentally, however, this Court's findings with regard to establishing violations of 18 U.S.C. § 2251(a), 2252(a) and 2252A for purposes of the RICO counts would apply equally to Plaintiffs'

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approximately six months "was accomplished in too short a period of time ... to qualify it as a pattern of racketeering activity"); *see also Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir.1999) (noting that the Second Circuit "has never held a period of less than two years to constitute a substantial period of time").

Second, the criminal activities allegedly committed by Defendants in this RICO enterprise were violations of 18 U.S.C. §§ 2251(a), 2252(a) and 2252A, and *Fla. Stat.* 827.071. Plaintiffs, however, have failed to allege facts demonstrating that Defendants committed these criminal activities. Plaintiffs allege that Defendants Playboy.Com, Anheuser-Busch, and Daytona Beverages "engaged in an enterprise ... for the production and distribution of sexually explicit images of minors for profit," but these conclusory allegations are simply not substantiated by the facts alleged.

18 U.S.C. §§ 2251(a) prohibits persons from influencing minors to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct." The Amended Complaint is devoid of any facts demonstrating that Defendant Playboy.Com was even aware of the events taking place at the Desert Inn, let alone influenced the Plaintiffs' to perform the acts that occurred during the Contests for the purpose of obtaining video-recordings. Plaintiffs' allegations against Defendants Anheuser-Busch and Daytona Beverages are almost as baseless. At most, Plaintiffs claim that Defendants Anheuser-Busch and Daytona Beverages exploited a marketing opportunity that offered the potential for free advertising.

As Defendant Anheuser-Busch notes, there is no allegation that their employee identified in the Amended Complaint even attended the Contests. Plaintiffs have alleged that Daytona Beverages's employee was present during the Contests and handed out gift prizes to some of the contestants, but there is no allegation that he influenced the Plaintiffs to participate in the Contests or to reveal the private areas of the bodies. Moreover, hanging up banners in advance of the Contests and

providing temporary tattoos and contest prizes with Anheuser-Busch logos may support an allegation that these Defendants were joint sponsors of the Contests, but such allegations do not demonstrate participation in an enterprise to produce sexually explicit images of the two Plaintiffs and other minors. [FN7]

FN7. The Complaint does not allege that an employee of these Defendants knowingly enticed minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

\*4 Knowledge of a minor's age is necessary for a party to have violated 18 U.S.C. §§ 2252(a) and 2252A. *See e.g., United States v. X-Citement Video, Inc., et al.*, 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (concluding that the Section 2252's use of the term 'knowingly' "extends both to the sexually explicit nature of the material and to the age of the performers"). Plaintiffs, however, have failed to allege that any of the Defendants involved in this RICO enterprise knew of Plaintiffs' ages. [FN8] Defendants, therefore, could not have participated in a pattern of criminal activities by violating these statutes.

FN8. This Court specifically addressed this very issue in its order of February 17, 2005, when it granted Plaintiffs' request for severance. Plaintiffs' counsel, however, appear to have ignored this Court's admonition that they must "prove that these Defendants knew Plaintiffs were minors."

Plaintiffs are unable to rely on *Fla. Stat.* 827.071(2)-(5) to meet their burden of alleging a pattern of criminal conduct because they would have to have been engaged in "sexual conduct." This term is defined in a rather limited fashion to mean "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed

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the Contests at the Desert Inn. Plaintiffs allege that Defendants Anheuser-Busch, Daytona Beverages, Goldrush Disc Jockeys, Paul Prewitt, Playboy.com, Watchcams, BVBK, and Deslin Hotels "engaged in an enterprise ... for the production and distribution of sexually explicit images of minors for profit," in violation of Fla. Stat. § 772.103 (the "Florida RICO statute").

Count II of the Amended Complaint arises out of the events that took place after co-defendant Paul Prewitt sold his photographs and video-recordings to Lincolnwood and New City. The alleged basis of liability in Count II is identical to that in Count I. To wit: Plaintiffs allege that the Playboy Defendants, the TV Broadcasting Defendants, Defendants BVBK and Musicland, and co-defendant Watchcams "engaged in an enterprise ... for the production and distribution of sexually explicit images of minors for profit," in violation of the Florida RICO statute.

Count IV (there is no Count III) was brought against Defendants Deslin Hotels, Daytona Beverages, Anheuser-Busch, BVBK, the Playboy Defendants and the TV Broadcasting Defendants, pursuant to 18 U.S.C. §§ 2255 and 2252A(f). [FN6] These statutes create civil remedies for minors who are victims of various criminal acts of sexual exploitation, including 18 U.S.C. §§ 2251, 2252, and 2252A.

FN6. Plaintiffs actually use the disjunctive "and/or" when identifying the basis of liability under Count IV. This Court assumes for purposes of this Order that Plaintiffs are relying on both provisions under Count IV. Plaintiffs are directed not to use this ambiguous phrase in their second amended complaint.

Count [redacted] is a state law claim of negligence. Plaintiffs allege that Defendants Deslin Hotels, Anheuser-Busch, and Daytona Beverages failed to use reasonable care in conducting the Contests at the Desert Inn, failed to warn Plaintiffs that they were being recorded, and failed to prevent Plaintiffs from participating in the Contests.

## II. Motion to Dismiss Legal Standard

At the motion to dismiss stage, the court must view the complaint in a light most favorable to the plaintiff and construe all allegations in the complaint as true. *Hishon King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). A court may, however, dismiss a complaint on a dispositive issue of law, see *Marshall Cty. Bd. of Educ. Marshall Cty. Gas Dist.*, 992 F.2d 1171 (11th Cir.1993), and "conclusory allegations, unwarranted deductions of facts, or legal conclusions masquerading as facts will not prevent dismissal." *Jackson BellSouth Telecommunications*, 372 F.3d 1250, 1262- 1263 (11th Cir.2004) (citations omitted). "To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions: they are required to allege some factual bases for those conclusions or face dismissal of their claims. *Id.* at 1263.

## III. Analysis of Motions to Dismiss

\*3 Applying this legal standard to Plaintiffs' Amended Complaint, this Court finds that Count I and Count II should be dismissed as to Defendants and Count IV should be dismissed against all Defendants except Defendant Playboy Enterprises. Plaintiffs have alleged sufficient facts against Defendant Playboy Enterprises under Count IV and against Defendants Deslin Hotels, Inc., Anheuser-Busch, and Daytona Beverages under Count [redacted] to survive Defendants' motion to dismiss.

### A. Count I

Count I brought pursuant to Florida's RICO statute fails as a matter of law for multiple reasons. First, this RICO enterprise arises out of the events at the Desert Inn and occurred "over the course of several months." This period of time is insufficient to establish "a pattern of criminal activity" necessary to support a RICO claim. See e.g., *H.J. Inc. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242, 100 S.Ct. 2893, 106 L.Ed.2d 195 (1989)(holding that predicate acts "extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [pattern of criminal activity] requirement); *Aldridge Lily-Tulip, Inc. Salary Ret. Plan Benefits Comm.*, 953 F.2d 587, 593 (11th Cir.1992) (holding that criminal conduct lasting

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repetitive and inconsistent language and wholly irrelevant matters that disrupted the synthesis of the underlying facts. To the extent any of the facts identified herein have been misunderstood by this Court, Plaintiffs are directed to clarify these facts in their second amended complaint.

Plaintiffs participated in "Wet T-Shirt Contests" in Daytona Beach, Florida in the early part of March 2001 (the "Contests"). The Contests were held on an outdoor pool deck at the Desert Inn Resort (the "Desert Inn"), a hotel establishment owned and operated by Defendant Deslin Hotels. Both Plaintiffs were seventeen years-old at the time of the Contest. Before their participation in the Contests, Plaintiffs consumed alcohol in a conference room in the Desert Inn located behind the stage where the Contests were performed. They also affixed temporary tattoos that contained the "Bud Light" insignia to their arms, breasts, and backs.

Plaintiffs were intoxicated during the Contests, danced "erotically" and "provocatively" on stage, and exposed private parts of their bodies. Plaintiff Breitfeller exposed her uncovered breasts, areolae, buttocks and pubic area during her participation, while Plaintiff Gautreaux exposed her uncovered breasts, areolae, buttocks, pubic area, anus, and vagina. Plaintiffs received cash and gift prizes for their participation in the Contests, including a swimsuit containing the "Budweiser" insignia and other gifts containing other trademark insignias of Defendant Anheuser-Busch. The cash prizes were provided by co-defendant Watchcams and the gift prizes were provided by Defendant Anheuser-Busch.

The Contests were photographed and video-recorded by employees or agents of Defendant BV & BK Productions ("Defendant BVBK"), co-defendant Watchcams, and co-defendant Paul Prewitt. The photographs and video-recordings accumulated by Defendant BVBK and co-defendant Watchcams were made available on their various internet websites. Co-defendant Prewitt sold his materials to Defendants Lincolnwood Motion Pictures ("Lincolnwood") and

New City Releasing ("New City"), two of the Playboy Defendants, in and around September 2001. Thereafter, agents for Lincolnwood, New City, and various entities affiliated with Defendant Playboy Enterprises edited the videotapes into programs and sold rights to those programs to Defendant In-Demand ("In-Demand").

Beginning in 2002, In-Demand sold the rights to broadcast the programs to cable and satellite television companies (hereafter the "TV Broadcasting Defendants"). [FN5] The TV Broadcasting Defendants, in turn, broadcasted the programs electronically to their customers. The Playboy Defendants also broadcasted the programs on their own websites, distributed "hard-copies" of the programs in the form of "VHS" cassettes and "DVDs" to retail outlets for sale to the public, and advertised the programs on their respective websites and in other products sold by various "Playboy" entities.

FN5. The "TV Broadcasting Defendants" consist of Defendants Directv, Time Warner Cable, Cox Communications, Comcast Cable Communications, and other satellite and cable television operators named as co-defendants in this case.

\*2 In July of 2002, the Playboy Defendants were informed that their video-programs contained images of a sixteen year-old girl engaging in "sexually explicit conduct." On or about June 26, 2003, the Playboy Defendants were informed by Plaintiffs' counsel that their programs contained unlawful images of Plaintiffs who were seventeen years-old at the time the video-recordings were made. Defendant Playboy Enterprises broadcasted the programs of the Contests on the "Playboy Channel" the following month, notwithstanding the reports that these programs contained images of the Plaintiffs.

Plaintiffs filed their Amended Complaint (Dkt.# 5) under seal on March 28, 2005. The Amended Complaint consists of four counts. Count I is based on the events that occurred leading up to and during

Westlaw.

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**H**

United States District Court,  
M.D. Florida.  
Nicole BREITFELLER, et al., Plaintiffs,  
v.  
PLAYBOY ENTERTAINMENT GROUP, INC., et  
al., Defendants.  
No. 8:05CV405T30TGW.

Aug. 30, 2005.

David R. Cassetty, Restani, McAllister & Cassetty, P.A., Coral Gables, FL, Kevin P. O'Connor, Law Offices of Kevin P. O'Connor, Miami, FL, Richard Stuart Shankman, Litigation Concepts, L.C., Plant City, FL, for Plaintiffs.

D. Patricia Wallace, Jamie Lynn Zysk, Thomas R. Julin, Hunton & Williams LLP, Miami, FL, Brian A. Howie, Brian D. Wallach, Peter E. Moll, Howrey, Simon, Arnold & White, LLP, Washington, DC, Edward F. Gagain, Marshall, Dennehey, Warner, Coleman & Goggin, Mark E. Pena, Law Office of Mark E. Pena, Michael A. Gold, Todd Alan Foster, Cohen, Jayson & Foster, Tampa, FL, G. Mark Thompson, Marshall, Dennehey, Warner, Coleman & Goggin, Orlando, FL, Kimble Clark Bouchillon, Frost Tamayo Sessums & Aranda, P.A., Bartow, FL, Bruce A. Hanna, Cobb & Cole, Daytona Beach, FL, Michael Charles Huddleston, Huddleston & Teal, P.A., DeLand, FL, for Defendants.

Paul Prewitt, Daytona Beach, FL, pro se.

*ORDER*

MOODY, J.

\*1 THIS CAUSE comes before the Court upon the following: Defendant Anheuser-Busch's Motion to Dismiss (Dkt.# 18); Defendant Deslin Hotel's Motion to Dismiss and Alternative Motion to Strike (Dkt.# 20); Playboy Defendants' [FN1] Motion to

Strike (Dkt.# 29); Playboy Defendants' Motion to Dismiss (Dkt.# 30); Defendants Directv and Time Warner Cable's Motion to Dismiss (Dkt 32); Defendant Cox Communication's Motion to Dismiss (Dkt.# 37); Defendant Daytona Beverage's Motion to Dismiss (Dkt.# 39); Defendant BV & BK Production's Motion to Dismiss (Dkt.# 42); Defendant Comcast Cable Communication's Motion to Dismiss (Dkt.# 44); and Plaintiffs' Memoranda in Opposition thereto. [FN2]

FN1. The "Playboy Defendants" are comprised of the following twelve entities: Best Buy Company, Image Entertainment, In-Demand, Lincolnwood Motion Pictures, New City Releasing, Playboy Entertainment Group, Playboy Enterprises, Playboy Enterprises International, Playboy.com, Playboy TV International, Sun Capital Partners, and Trans World Entertainment.

FN2. For simplification and convenience, this Court has omitted the entity classification of each Defendant when identifying each by name.

After consideration, this Court finds that Defendants' Motions should be GRANTED in part and DENIED in part. [FN3]

FN3. All of the defendants whose Motions are before the Court will be referred to as "Defendants" for purposes of this Order.

## I. Background [FN4]

FN4. The underlying facts set forth in this section are derived from Plaintiffs' Amended Complaint, as Plaintiffs' allegations are assumed to be true at this stage of the proceedings. The Amended Complaint, however, includes ambiguous,

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the date of judgment), making available for the Thailand court proceedings all relevant documents and witnesses within his control, and agreeing that any final judgment rendered by the court of Thailand is entitled to full faith and credit in the courts of the United States. See *Baris*, 932 F.2d at 1551 (holding that district court may determine the conditions of dismissal). Boonma may move this court to reinstate this action in the event Bredimus seeks to evade the jurisdiction of the Thailand courts or to interpose a limitations defense.

\* \* \*

\*11 Defendant's May 9, 2005 motion to dismiss on grounds of *forum non conveniens* is granted.

SO ORDERED.

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jurisdiction. Boonma asserts that the Protection of Children from Sexual Predators Act of 1998, Pub.L. No. 105-314, 112 Stat. 2974 (1998), which expanded the number of sex crimes for which victims could seek a civil remedy, and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub.L. No. 108-21, 117 Stat. 650 (2003), which strengthened criminal penalties against offenders, as well as comments by the President and Secretary of State, evidence increased public concern to defeat the international sexual exploitation of children and hold sexual predators accountable. Boonma maintains that dismissing this case would clearly disregard United States public policy expressed by Congress and the Executive Branch.

\*10 Although the court recognizes that Congressional enactments and Administration policy evidence the intent to combat sex crimes against minors, it is not clear that dismissing this case in deference to a Thailand forum will thwart that intent. Dismissal on *forum non conveniens* grounds is conditioned on the existence of an adequate and available alternative forum. *See supra* § II. Where, as here, there is such a forum, the policy of deterring sexual exploitation of minors by holding them financially accountable will be served, regardless whether the court retains jurisdiction over this case.

The court therefore finds unpersuasive Boonma's argument that dismissal of this case would contravene public policy.

#### VIII

Having considered both the private and public interest factors, the court holds that Bredimus has made the strong showing necessary to justify dismissing this case on grounds of *forum non conveniens*, because the balance of convenience tilts strongly in favor of litigating the case in Thailand. Thailand is an available and adequate forum. The private interest factors, particularly the location of evidence and the cost of obtaining attendance of witnesses, indicate that Thailand is clearly the more convenient forum. In addition, the public interest factors favor litigating this dispute in

Thailand. Although there is no evidence of a relatively greater administrative burden in this court than in Thailand, there is strong evidence that the nexus of the case is in Thailand. Boonma is Thai, all the conduct that gives rise to the case occurred in Thailand, the people of Thailand have a considerably stronger interest in the outcome of the case than do those of Texas, and Thailand law would apply at least to one of Boonma's claims, even if this court retained jurisdiction. The only connection to Texas is that the defendant, who is now incarcerated in Kentucky, was a Texas resident at the time he was traveling abroad in Thailand.

Additionally, to deny defendant's motion to dismiss based on *forum non conveniens*, this court would be required to disagree explicitly with Chief Judge Fish's assessment in *Punyee* of the factors that apply in very similar circumstances. The court is quite hesitant to do so under the circumstances presented here, where the availability and adequacy of an alternative forum, as well as the relevant public and private interest factors, are essentially identical in each case. Were the court to deny the motion to dismiss, the plaintiff in this case would be allowed to litigate in her chosen forum whereas the plaintiffs in *Punyee* would be required to litigate in Thailand, despite the essentially-identical factual scenarios presented by the two cases.

#### IX

Because the court has decided in favor of dismissal, it must include a return jurisdiction clause in its dismissal order to ensure that the "plaintiff can reinstate [her] suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that the plaintiff may return to the American forum." *Air Crash*, 821 F.2d at 1166; *see Baris*, 932 F.2d at 1551-52. [REDACTED] judgment of dismissal is conditioned on Bredimus' timely submitting to service of process and jurisdiction in the appropriate Thailand forum upon Boonma's filing suit, waiving any statute of limitations defense that did not exist before Boonma filed this lawsuit on April 5, 2005 (provided Boonma files suit in an appropriate Thailand forum within 120 days from

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dismissal of this case on the grounds of *forum non conveniens* would frustrate Congress' intent to provide foreign victims of illicit sexual conduct a civil remedy in United States district courts. Boonma correctly points out that Congress is presumed to be aware of existing law when it enacts legislation. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 517, 112 L.Ed.2d 275 (1990). She argues that, because Congress intended to provide sex crime victims, such as her son, with a civil remedy, and because Congress is presumed to have been aware of the doctrine of *forum non conveniens*, it must have intended to abolish the doctrine in this context. The court disagrees.

Absent a clear Congressional manifestation of contrary intent, when a court construes a newly-enacted or revised statute, it presumes that the law is harmonious with existing law. See *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." (citation omitted)); *United States v. [REDACTED]*, 62 F.3d 602, 605 (4th Cir.1995). Boonma points to no clear Congressional intent to abolish the doctrine of *forum non conveniens* in the present context.

Neither would dismissal of this case on *forum non conveniens* grounds implicitly violate Congressional intent by rendering § 2255 a nullity. Boonma selectively quotes passages from 18 U.S.C. § 2423 that prohibit travel in foreign commerce for the purpose of engaging in illicit sexual conduct to argue that § 2255, which provides a civil remedy for violations of § 2423, would be meaningless if the cases of foreign plaintiffs could be dismissed based on *forum non conveniens*. This assertion depends on the faulty assumptions that many, if not all, plaintiffs who sue under § 2255 are foreign and that many, if not all, cases brought by foreign plaintiffs will be dismissed on *forum non conveniens* grounds.

\*9 Boonma begins by asserting that, by definition, the sexual abuse covered by § 2255, and

specifically by § 2423, occurs overseas, and that the victims it is meant to protect are "without exception foreign children." P. Br. at 1. The court disagrees. Section 2255 provides a civil remedy for victims of a number of different sexual offenses, under statutes that prohibit a wide array of conduct by those traveling in interstate or foreign commerce or located in areas of federal jurisdiction, such as those within maritime or territorial jurisdiction or within a federal prison. See 18 U.S.C. §§ 2255, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, and 2423. Further, § 2423, the statute upon which Boonma relies, prohibits not only United States citizens traveling in foreign commerce, but also persons traveling in interstate commerce or traveling into the United States, from engaging in illicit sexual conduct. See 18 U.S.C. § 2423(b). Boonma does not support her contention that victims of offenses for which § 2255 provides a civil remedy are necessarily all, or even mostly, foreign children.

Nor does it follow that the suits of all foreign plaintiffs who sue under § 2255 will be subject to dismissal based on the doctrine of *forum non conveniens*. For instance, a foreign plaintiff's home forum might not provide a cause of action for the conduct alleged, or the available remedy might be so inadequate that it could not be considered a remedy at all, in which case the plaintiff's case would not be dismissed. See *supra* § II. Indeed, dismissal on *forum non conveniens* grounds is conditioned upon the existence of an adequate and available alternative forum, *see id.*, so there is nothing inconsistent about Congress' intending to ensure that juvenile victims of sex crimes, including foreign victims, have a private cause of action, while preserving the doctrine of *forum non conveniens* in this context.

The court therefore declines to accept the argument that Congress intended to abolish the doctrine of *forum non conveniens* in this context by providing a cause of action under § 2255.

## VII

The court now considers Boonma's contention that public policy dictates that the court retain

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federal question cases)).

\*7 Were this case tried in Texas, Thailand law would likely apply to the claim for intentional infliction of emotional distress. To resolve choice-of-law questions, Texas courts apply the "most significant relationship" test set out in Restatement (Second) Conflict of Laws §§ 6 and 145. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex.1984) ("[I]n all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue."). The factors the court considers include (1) the needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied. Restatement (Second) Conflict of Laws § 6(2) (1971). The contacts to be considered in applying these principles include (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. *Id.* § 145(2).

Applying this test, Thailand clearly has the most significant relationship to this case. *Cf. Punyee*, 2004 WL 2511144, at \*8. Of the relevant contacts, the injury and conduct occurred in Thailand, and the relationship between the parties is centered there. The residence of the parties does not favor either Texas or Thailand because one party resides in each forum. Looking to the principles that the court's choice of law should further, it is clear that Thailand has a stronger policy interest in the case: that of protecting its children from sex crimes. In *Punyee* Chief Judge Fish noted the incentive that these victims have to sue in Texas due to the

availability of punitive damages awards under Texas law. *Id.* at \*9. He also pointed out, however, that "[w]ere the court to apply Texas law as a means of righting any perceived inequities of Thai law, it would be treading upon the policy choices the Thai government has made in the competing objectives and costs of tort law." *Id.*; see also *Vasquez*, 325 F.3d at 675 & n. 14 (holding that application of Texas law, where there was little justification for doing so to right any perceived inequities in Mexico's disparate provision of wrongful death damages, would undercut policy decision made by the Mexican people through their duly-elected lawmakers). *Punyee* held that applying Thailand law would promote "[u]niformity and accommodation of the competing policies of the two nations." *Punyee*, 2004 WL 2511144, at \*9; see also *Vasquez*, 325 F.3d at 675 ("Uniformity, predictability, and accommodation of the competing policies of the two nations favor applying Mexican law.").

\*8 Without deciding whether the determination of damages and fees under the federal statutory claims would be governed by Thailand or federal common law, the court can conclude that this public interest factor favors litigating this case in Thailand. If Thailand law applies, the court will be applying foreign law to all the claims. The need to apply foreign law points toward dismissal. *Piper*, 454 U.S. at 260 & n. 29 (citing decisions holding that need to apply foreign law, although not conclusive, favors dismissal). If federal common law applies, and if it does not dictate that the court follow Thailand law, then two different sets of substantive law would apply in the same case, a problem that *Piper* recognized. See *id.* at 260 (holding that district court properly considered that trial involving two sets of laws would be confusing to jury). If the case were tried in Thailand, the Thailand court would apply its own law under its conflict of law rules.

The court therefore holds that this factor favors litigating the case in Thailand.

## VI

The court now addresses Boonma's argument that

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Cir.1998) (holding that this factor favored neither British nor American forum where there was no indication in record that British courts are more or less congested than American courts). Because *Bredimus* has the burden of showing that this factor favors dismissal, the court holds that it supports litigating the case in Texas.

## B

\*6 The court next evaluates the burden of jury duty. "Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil*, 330 U.S. at 508-09. Texas jurors have little connection with the case because the plaintiff is Thai and all the conduct occurred in Thailand. See *Vasquez*, *Bridgestone/Firestone, Inc.*, 325 F.3d 665, 673 n. 10 (5th Cir.2003) (citing *Kamel*, *Hill-Rom Co.*, 108 F.3d 799, 804-05 (7th Cir.1997) (noting that Indiana residents have "a mere passing interest" where a foreign plaintiff is injured in a foreign land)). Because it involves criminal conduct by a Texas resident, Texas jurors have some interest in the case, but it is no more than the "little" public interest to which *Air Crash* refers. See *Air Crash*, 821 F.2d at 1166. This factor therefore favors litigating the case in Thailand.

The court turns next to the interest of holding the trial within the view and reach of those persons whose affairs it touches. The case touches the affairs of many Thailand citizens, including the other victims and their parents, the Thailand national and local authorities who investigated the incident, and the employees of the hotel where the conduct occurred. By contrast, this incident marginally touches the affairs of persons in the United States except the defendant. This factor therefore heavily favors litigating the case in Thailand.

## D

The court next addresses the interest in having localized controversies decided at home. There is a strong connection between the case and Thailand because the victim is Thai and all the conduct occurred in that country. Predatory sexual behavior directed at Thailand children is obviously a problem

that Thailand has a strong interest in combating. See *Vasquez*, 325 F.3d at 673 & n. 10 (holding that country where plaintiff hails from and suffered injury has obvious interest in protecting rights and welfare of its citizens). The only connection between the case and Texas is that the defendant is a Texas resident (although he is currently incarcerated in Kentucky). Although Texas has an interest in deterring its citizens from committing sex crimes abroad, Thailand's interest in this case is considerably stronger. See *Punyee*, 2004 WL 2511144 at \*8 ("[w]here aircraft accident occurred in a foreign country and victims were all citizens of that country, and only the aircraft manufacturer and propeller manufacturer were American citizens, foreign forum had a 'very strong interest' in the case" (citing *Piper*, 454 U.S. at 260)). This factor therefore favors litigating the case in Thailand.

## E

The court finally considers the avoidance of unnecessary problems in conflicts of law and the application of foreign law. Because Boonma asserts both federal statutory and state-law claims, this court would be required to apply two different sets of choice-of-law provisions to determine the law that applies. Were the court's jurisdiction based solely on diversity of citizenship, it would apply the choice-of-law rules of Texas, the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). In federal question cases such as this one, however, the court must apply federal common law choice-of-law rules to determine what substantive law applies to the claims arising under federal statutes. See *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir.1980). The *Erie* and *Klaxon* principles still apply to pendent state-law claims in cases in which federal jurisdiction is premised on a federal statute, so the court must apply the choice-of-law rules of the state in which it sits to determine the substantive law that applies to Boonma's claim for intentional infliction of emotional distress. See *Amoco Chem. Co. v. Tex Tin Corp.*, 925 F.Supp. 1192, 1202 n. 9 (S.D.Tex.1996) (citing *Doty*, *Sewall*, 908 F.2d 1053, 1063 (1st Cir.1990) (noting "it is well settled" that *Erie* applies to pendent claims asserted in

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factor favors litigating the case there.

#### B

The court next considers the availability of compulsory process for ensuring attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses. Neither party has briefed this issue thoroughly. As to unwilling witnesses, neither party has identified any witnesses who would be within subpoena range of this court. See Fed.R.Civ.P. 45(b)(2), (c)(3)(A)(ii), and (c)(3)(B)(iii). The possible witnesses mentioned besides the parties include the other victims, Thailand national and local authorities, medical providers, and hotel employees, all of whom are located in Thailand. The affidavit of Professor Chaninat Leeds does not mention the power of Thailand courts to subpoena unwilling witnesses located in Thailand, and neither party discusses whether these witnesses would be willing to testify.

\*5 The cost of obtaining attendance of willing witnesses points strongly in favor of litigating this case in Thailand. Neither party refers to any possible witnesses who reside in the United States, other than the defendant. Bredimus asserts that it would be extremely expensive to litigate this dispute in Texas because all the potential witnesses are in Thailand. Although Bredimus does not identify any of the potential witnesses already mentioned by name, there is good reason to believe they all reside in Thailand, so the cost of obtaining the attendance of these parties should be far lower in Thailand than in Texas. Further, Thailand law does not specifically authorize depositions, so it could be difficult to obtain deposition testimony for use in this court should it retain jurisdiction here. Boonma does not address this issue in her brief.

Because of this court's inability to compel attendance of unwilling witnesses and the high cost of obtaining attendance of willing witnesses, this factor favors litigating this dispute in Thailand.

Because the factor that considers probability of view of the premises is not relevant to this case, the court need not consider it.

#### D

The court next evaluates all practical considerations of efficiency and expense. Bredimus asserts that this factor favors the Thailand forum because any documentary evidence, including reports from the Thailand police authorities, medical providers, or hotel employees, would have to be translated into English for trial in Texas. Boonma does not address this issue in her brief. Because most of the documentary evidence is written in Thai, and all witnesses except the defendant are Thai, this factor favors litigating the case in Thailand.

#### E

The court holds that the private interest factors, viewed together, weigh heavily in favor of litigating the case in Thailand.

When the private interest factors do not weigh in favor of dismissal, the court must consider the public interest factors. *Robinson*, 117 F.3d at 908. Although the court is not obligated to consider the public interest factors when the balance of private interest factors favors dismissal, the court will do so. See *Baris Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550-51 (5th Cir.1991) (holding that if private interest factors weigh in favor of dismissal, no further inquiry need be made). "[E]ven when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant forum non conveniens dismissal upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute or that foreign law will predominate if jurisdiction is retained." *Air Crash*, 821 F.2d at 1165-66 (quoting *Pain United Techs. Corp.*, 637 F.2d 775, 792 (D.C.Cir.1980)).

#### A

The court first considers administrative difficulties arising from congested courts. Neither party addresses this issue in the briefs, and there is no indication in the record that this court is more congested than is the Thailand court that would hear this case. See *Capital Currency Exch., N. Nat'l Westminster Bank PLC*, 155 F.3d 603, 611 (2d

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Thailand law does not, however, provide for punitive damages for the type of conduct that Boonma alleges.

Boonma does not appear to address the availability or adequacy of Thailand as a forum. Instead, she argues only that dismissal of this action would violate Congress' intent in enacting 18 U.S.C. § 2255, which was to create a civil remedy in United States courts for foreign victims of child sex tourism, such as Doe.

Although a Thailand forum may not be as favorable to Boonma as is this court, she will not be deprived of all remedies, nor is there reason to think she will be treated unfairly. Because Thailand can exercise jurisdiction over both Bredimus and Boonma, and since neither will be deprived of all remedies or treated unfairly, the court holds that Thailand is an available and adequate forum. [FN5]

FN5. Bredimus is presently incarcerated in a federal prison in Kentucky, which neither party mentions in questioning the availability of an alternative forum in Thailand. His projected release date is within the next 18 months, at which point it appears he would be able to appear in court in Thailand. There does not appear to be a problem concerning his ability to submit to Thailand jurisdiction. Nor should there be a statute of limitations problem if trial cannot proceed until Bredimus is released, because Doe can sue any time within one year of reaching the age of majority, which will not occur until long after Bredimus is released.

#### IV

\*4 The court now examines the private interest factors.

##### A

Bredimus contends that a Thailand forum would be more convenient because of greater ease of access to the sources of proof. He asserts that all the relevant conduct in this case occurred in Thailand, all witnesses, including the other alleged victims,

hotel employees, and medical providers, are in Thailand, and all physical evidence and evidence of medical reports and expenses is in Thailand. This is the extent of his argument that a Thailand forum would be more convenient due to easier access to sources of proof. Boonma does not appear to address the location of the sources of proof.

Chief Judge Fish recently dismissed on the basis of *forum non conveniens* another lawsuit brought by Bredimus' other alleged victims, which arises out of the same set of events. See *Punyee ex rel. Doe # 1 v. Bredimus*, 2004 WL 2511144 (N.D.Tex. Nov.5, 2004) (Fish, C.J.). In addition to the witnesses already mentioned, Chief Judge Fish noted that other critical witnesses were also located in Thailand, such as "the Thai national and local authorities who investigated the incident [ ]and] the alleged procurers who 'lured' the children into Bredimus's hotel room." *Id.* at \*6. He also pointed out, however, that not every source of proof supported Thailand as the more convenient forum. *Id.* Apparently, some tangible and documentary evidence relevant to the present case was transferred to the United States for use in prosecuting Bredimus criminally. See *id.* According to the *Punyee* plaintiffs, this evidence includes (1) a videotape that Bredimus filmed while he engaged in sexually-explicit acts with the victims, (2) the video camera and the digital camera Bredimus used while he engaged in the sexually-explicit acts, (3) digital images and color copies of the images from the digital camera, (4) fingerprint analysis results, (5) documents relating to Bredimus' travel in Thailand, and (6) documents relating to the Thailand police investigation and court proceedings. *Id.* Although some evidence was more readily available in the United States than in Thailand, Chief Judge Fish held that the factor considering access to sources of proof weighed in favor of dismissal, because "most of the relevant information and key players, with the exception of Bredimus, [were] located in Thailand." *Id.*

Given that Boonma, all the non-party witnesses, and much of the relevant physical and documentary evidence--particularly the critical evidence relating to Doe's damages--are located in Thailand, this

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510 U.S. at 448-49 (quoting *Gulf Oil*, 330 U.S. at 508-09).

This court must follow a controlling procedural framework in applying the principles of *forum non conveniens* so that it exercises structured discretion. See *Air Crash*, 821 F.2d at 1165. The court first decides whether an available and adequate forum exists. *Id.* A foreign forum is available if "the entire case and all parties can come within the jurisdiction of that forum." *Id.* A defendant's submission to the jurisdiction of an alternative forum renders that forum available for the purposes of *forum non conveniens* analysis. *Veba-Chemie A.G. v. M/Getafix*, 711 F.2d 1243, 1245 (5th Cir.1983). A foreign forum is adequate if "the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *Air Crash*, 821 F.2d at 1165 (citations omitted). If the available remedy is "so clearly inadequate or unsatisfactory such that it is no remedy at all," however, this can be given "substantial weight" by the court. *Id.* at 1164 n. 27 (citing *Piper*, 454 U.S. at 254). If the court concludes the foreign forum is both available and adequate, it must then address the relevant factors of private interest, giving appropriate deference to plaintiff's initial choice of forum. *Id.* at 1165. The strong presumption in favor of plaintiff's choice of forum applies with less force, and is given less deference, when the plaintiff is foreign. *Piper*, 454 U.S. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."). If the court determines that the private interests do not weigh in favor of dismissal, it must then consider the public interest factors. *Air Crash*, 821 F.2d at 1165.

\*3 Bredimus has the burden of establishing that the doctrine of *forum non conveniens* applies. See *Robinson*, 117 F.3d at 907. His "burden of persuasion runs to all the elements of the *forum non conveniens* analysis." *Air Crash*, 821 F.2d at 1164.

While the burden is on the movant to establish that an alternative forum would be clearly more convenient, he need not submit overly-detailed affidavits, such as those that identify all the witnesses he would call and the testimony he would offer. See *Piper*, 454 U.S. at 258. The *forum non conveniens* motion is made "precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview," such that "[r]equiring extensive investigation would defeat the purpose of [the] motion." *Id.* Of course, the movant must provide "enough information to enable the District Court to balance the parties' interests." *Id.* The court must review the motion in light of the status of the case at the time the motion was filed. See *Air Crash*, 821 F.2d at 1166.

Bredimus contends this case involves conduct that occurred exclusively in Thailand, that an adequate alternative forum is available in Thailand, and that the private interest factors, particularly ease of access to evidence and availability of witnesses, and public interest factors, including the interest of a Thailand court in hearing localized controversies and the problem of an American court applying unfamiliar Thailand law, make Thailand a more convenient forum. Boonma responds that dismissal of this case would thwart Congress' intent in enacting 18 U.S.C. § 2255, which provides a civil remedy to victims of child sex tourism and other sexual offenses. She also argues that dismissal would frustrate the public policy of holding sex offenders accountable and deterring similar conduct by others.

### III

The court first considers whether Thailand is an available and adequate forum. Bredimus contends the forum is available because he has stipulated to the jurisdiction of Thailand courts and Boonma resides there. The case and all parties involved can thus come within the jurisdiction of the Thailand forum. Bredimus posits that the forum is adequate because Thailand law recognizes causes of action for injuries to one's life, body, health, or rights, and the right to sue for intangibles, such as emotional distress, loss of consortium, and pain and suffering.

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assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e). (2) The circumstance referred to in paragraph (1) is that(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by computer or mail; or (B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by computer or mail.

FN4. 18 U.S.C. § 2423(b):

A person who travels in interstate commerce or travels into the United States, or a United States citizen or ... who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. § 2423(c):

Any United States citizen ... 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.

## II

Under the federal doctrine of *forum non conveniens*, when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established.

*Am. Dredging Co.* [REDACTED] 510 U.S. 443, 447-48, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994)

(internal quotations omitted) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)). The doctrine of *forum non conveniens* applies "in all cases regardless of their jurisdictional bases or subject matter." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 (5th Cir.1987) (en banc) (emphasis omitted), *vacated on other grounds sub nom. Pan Am. World Airways, Inc.* [REDACTED] 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989), *opinion reinstated in part on other grounds*, 883 F.2d 17 (5th Cir.1989) (en banc) (per curiam). The court exercises its discretion based on consideration of private and public factors that trace their origin to *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Showing some deference to the plaintiff's choice of forum, the court must consider the following private interest factors:

\*2 [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses; [3] probability of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

*Robinson v. TCI/US W. Communications, Inc.*, 117 F.3d 900, 908 (5th Cir.1997) (quoting *Air Crash*, 821 F.2d at 1162); *see also Am. Dredging*, 510 U.S. at 448. The public interest factors include (1) the administrative difficulties courts face when litigation is piled up in congested centers instead of being handled at its origin; (2) the burden of jury duty imposed upon the people of a community that has no relation to the litigation; (3) in cases that touch the affairs of many persons, the interest in holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only; (4) the local interest in having localized controversies decided at home; and (5) the appropriateness of having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Am. Dredging*,

Westlaw.

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C

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Texas, Dallas Division.  
Dee BOONMA, as Next Friend of John Doe, a  
Minor, Plaintiff,

Nicholas BREDIMUS, Defendant.  
No. Civ.A.3:05-CV-0684-D.

July 29, 2005.

Jon-Bernard Schwartz, Les Weisbrod, Morgan &  
Weisbrod, Dallas, TX, David Replogle, Law  
Offices of David Replogle, San Francisco, CA, for  
Plaintiff.

John M. Phalen, Jr., Daniel J. Sheehan, Jr., Daniel  
Sheehan & Associates, Dallas, TX, for Defendant.

## MEMORANDUM OPINION AND ORDER

FITZWATER, J.

\*1 A Thailand citizen sues an American citizen in this forum to recover under 18 U.S.C. § 2255 for sexually-predatory conduct that the American citizen allegedly committed in Thailand. Defendant moves to dismiss based on the doctrine of *forum non conveniens*. Concluding that the private and public interest factors strongly demonstrate that the case should be litigated in Thailand, the court grants the motion. In doing so, the court emphasizes that the Thailand court is an available and adequate forum. This decision does not unduly benefit a defendant who has been accused of heinous sexually-predatory conduct.

I

Plaintiff Dee Boonma ("Boonma"), a Thailand citizen, as next friend of John Doe ("Doe"), a minor, sues defendant Nicholas Bredimus

("Bredimus"), a Texas resident incarcerated in Kentucky, under 18 U.S.C. § 2255(a), [FN1] alleging that Bredimus is liable for injuring Doe in 2001 at a Thailand hotel by engaging with him in non-consensual sexual acts, which Bredimus videotaped. Boonma asserts that Bredimus violated 18 U.S.C. § 2241, [FN2] which prohibits crossing a state line with intent to engage in a sexual act with a person under age 12; 18 U.S.C. § 2251, [FN3] which prohibits production or distribution of child pornography; and 18 U.S.C. § 2423, [FN4] which prohibits traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct; and that he is liable for intentional infliction of emotional distress. Bredimus moves to dismiss this action based on *forum non conveniens*.

FN1. 18 U.S.C. § 2255(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.

FN2. 18 U.S.C. § 2241(c):

Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years ... shall be fined under this title, imprisoned for any term of years or life, or both.

FN3. 18 U.S.C. § 2251(c):

(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor

Plaintiff claims negligent supervision and retention;

(D) **DENIED** as to Counts VI and VIII of Plaintiff's Complaint;

(E) **DENIED** as to Plaintiff's claim for punitive damages.

(2) Defendant Brother Antonio F. Antonucci's Motion for Summary Judgment (Doc. 76) is:

(A) **GRANTED** as to Counts IV, VII and VIII of Plaintiff's Complaint;

(B) **DENIED** as to Count VI of Plaintiff's Complaint.

(3) This case shall be placed on the June, 2007 trial list of this Court.



AMERICAN CIVIL LIBERTIES UNION, et al.

Alberto R. GONZALES in his official capacity as Attorney General of the United States.

Civil Action No. 98-5591.

United States District Court,  
E.D. Pennsylvania.

March 22, 2007.

**Background:** Civil liberties organizations and others, including Internet content providers, brought action alleging that Child Online Protection Act (COPA) violated the First and Fifth Amendments. Following affirmance, 217 F.3d 162, of initial grant, 31 F.Supp.2d 473, of a preliminary injunction against enforcement of COPA, the Supreme Court, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771, vacated judgment of the Court of Appeals, and remanded. On remand, the Court of Appeals, 322 F.3d 240, again affirmed. On appeal the Supreme Court, 124 S.Ct. 2783, affirmed the

decision which granted the preliminary injunction, and remanded for trial.

**Holdings:** On remand, the United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., Senior District Judge, held that:

(1) plaintiffs had standing;

(2) statute criminalizing transmission, over the World Wide Web (Web), of sexually explicit materials and communications which were available to and harmful to minors, was not narrowly tailored to Congress's compelling interest of protecting minors;

(3) statute was unconstitutionally vague; and

(4) statute was unconstitutionally overbroad.

Permanent injunction ordered.

1. Federal Civil Procedure ⇄103.2

In order to maintain standing to bring suit, plaintiffs must show, inter alia, that they have sustained or are immediately in danger of sustaining some direct injury that is not abstract, conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 2.

2. Constitutional Law ⇄699

In a pre-enforcement challenge to a statute carrying criminal penalties, standing exists when the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution. U.S.C.A. Const. Art. 3, § 2.

3. Telecommunications ⇄1314

Internet content providers were subject to a credible threat of prosecution under the Child Online Protection Act (COPA), and therefore had standing to bring challenge to COPA's constitutionality; providers engaged in Internet commu-

appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. *Id.* Stated another way, punitive damages will be imposed where the defendant knew or had reason to know of facts which create a high degree of risk of physical harm to another, and deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk. *Id.* at 771 n. 7.

[27] Viewing the summary judgment record in the light most favorable to Plaintiff, there is sufficient evidence to allow a reasonable jury to award punitive damages. The Diocesan Defendants and Brother Antonucci knew that Plaintiff was routinely sleeping in Liberatore's bedroom and that Liberatore had taken Plaintiff on several overnight trips. The Diocesan Defendants also knew about Liberatore's past involvement with Roe. Brother Antonucci had been told by Plaintiff that Liberatore had touched him in a sexual manner. A reasonable jury could conclude that a minor's sleeping in a priest's bedroom and a priest's taking a minor alone on overnight trips are facts which create a high degree of risk of physical harm to the minor. The failure to end this conduct, with its high degree of risk of physical harm to Plaintiff, could reasonably be viewed by a jury as reckless. As such, the Court will deny the Diocesan Defendants' motion for summary judgment as to Plaintiff's claim for punitive damages.

#### CONCLUSION

For the above stated reasons, the Court will: (1) grant the Diocesan Defendants' motion for summary judgment as to Count I (18 U.S.C. § 2255) of Plaintiff's Complaint; (2) grant the Diocese, Sacred Heart and Bishop Timlin's motion for summary judgment as to Count III (vicarious liability) of Plaintiff's Complaint; (3) grant Brother Antonucci's motion for summary

judgment as to Count IV (aiding and abetting) of Plaintiff's Complaint; (4) grant the Diocese, Sacred Heart and Bishop Timlin's motion for summary judgment as to Count [redacted] (negligent hiring, supervision and retention) of Plaintiff's Complaint to the extent that it claims negligent hiring; (5) deny the Diocese, Sacred Heart and Bishop Timlin's motion for summary judgment as to Count [redacted] (negligent hiring, supervision and retention) of Plaintiff's Complaint to the extent that it claims negligent supervision and retention; (6) deny Defendants' motion for summary judgment as to Count VI (negligence *per se*) of Plaintiff's Complaint; (7) grant Defendants' motion for summary judgment as to Count VII (intentional infliction of emotional distress) of Plaintiff's Complaint; (8) deny the Diocesan Defendants' motion for summary judgment as to Count VIII (breach of fiduciary duty) of Plaintiff's Complaint; (9) grant Brother Antonucci's motion for summary judgment as to Count VIII (breach of fiduciary duty) of Plaintiff's Complaint; and (10) deny the Diocesan Defendants' motion for summary judgment as to Plaintiff's claim for punitive damages.

An appropriate Order follows.

#### ORDER

NOW, this 19th day of March, 2007, IT IS HEREBY ORDERED that:

(1) Defendants Diocese of Scranton, Sacred Heart of Jesus Church, Bishop James C. Timlin, and Rev. Joseph R. Kopacz's Motion for Summary Judgment (Doc. 75-1) is:

- (A) GRANTED as to Counts I, III and VII of Plaintiff's Complaint;
- (B) GRANTED as to Count [redacted] of Plaintiff's Complaint to the extent that Plaintiff claims negligent hiring;
- (C) DENIED as to Count [redacted] of Plaintiff's Complaint to the extent that

plaintiff's theory of liability in *Podolinski*—that the diocesan officials violated church canons—would “necessarily involve an inquiry into the propriety of the decisions of church authorities on matters of discipline, internal organization, ecclesiastical rule, custom, and law.” *Id.* at 411; 1995 WL 610296, at \*15. Consequently, the Court finds *Podolinski* inapposite.

Accordingly, the Court concludes that the Supreme Court of Pennsylvania would recognize Plaintiff's breach of fiduciary duty claims against Liberatore and the Diocesan Defendants, and that such claims do not offend the First Amendment. Therefore, the Court will deny the Diocesan Defendants' motion for summary judgment as to Count VIII of Plaintiff's Complaint.

[24] However, the Court will grant Brother Antonucci's motion for summary judgment as to Count VIII of Plaintiff's Complaint. Plaintiff stated in his deposition that he informed Brother Antonucci of Liberatore's sexual abuse. Rather than encourage Plaintiff to contact the police or tell his mother, Brother Antonucci instructed Plaintiff “to forgive [Liberatore], to keep the issue private, and to not let other people know because it would ruin [Plaintiff's] life and [the lives of] others.” In essence, Plaintiff claims that this was bad advice and that, by giving this advice to Plaintiff, Brother Antonucci became liable to Plaintiff for breach of fiduciary duty. However, Plaintiff's claim is only a restatement of the claim of clergy malpractice, a professional negligence claim which is barred by the First Amendment and not recognized in Pennsylvania. See *Podolinski*, 23 Pa. D. & C. 4th at 399–400, 1995 WL 610296, at \*8. As such, the Court will grant Brother Antonucci's motion for summary judgment as to Count VIII of Plaintiff's Complaint.

#### IV. Plaintiff's Punitive Damages Claim

In his Complaint, Plaintiff seeks that punitive damages be imposed against the Diocesan Defendants and Brother Antonucci. The Diocesan Defendants move this Court to grant summary judgment in their favor as to this claim.

[25] Under Pennsylvania law, “[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.” *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742, 747 (1984). “As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.” *Hutchison ex rel. Hutchison v. Luddy*, 582 Pa. 114, 870 A.2d 766, 770 (2005). In determining whether punitive damages are warranted in a particular case, “[t]he state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious.” *Id.* at 771. An appreciation of the risk is a necessary element of the mental state required for the imposition of punitive damages. *Id.* at 772. As such, a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed. *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439, 445 (2005). However, notwithstanding this heightened standard, punitive damages may be awarded based on a cause of action sounding in negligence if the plaintiff is able to show that “the defendant's conduct not only was negligent but that the conduct was also outrageous.” *Hutchison*, 870 A.2d at 772.

[26] Accordingly, under Pennsylvania law, a punitive damages claim must be supported by evidence sufficient to establish that (1) the defendant had a subjective

recognition of a breach of fiduciary duty claim is necessary to protect a beholden parishioner from a self-serving priest. Moreover, the Pennsylvania Courts of Common Pleas have, in all three cases in which it was faced with the issue, recognized a breach of fiduciary duty claim against a priest accused of sexual misconduct. See *Morrison*, 68 Pa. D. & C. 4th 473, 2004 WL 3141330; *Nardella*, 36 Pa. D. & C. 4th 364, 1997 WL 1056878; *Podolinski*, 23 Pa. D. & C. 4th 385, 1995 WL 610296.

As to a diocese and its officials, a diocese exerts an overmastering influence over a plaintiff, or a plaintiff exhibits weakness, dependence on or justifiable trust in the diocese and its officials when, as here, the plaintiff is a minor and is involved in the church beyond that of a mere parishioner, whether by virtue of his serving the church, participating in church-sponsored activities, or receiving counseling from a priest. When the plaintiff is a minor, the power differential between the plaintiff and priest is magnified. This power differential makes it difficult for a minor who is involved in the church to refuse the unwelcome sexual advances of a priest or report such an advance to his parents or the authorities. See *Schneider v. Plymouth State College*, 144 N.H. 458, 744 A.2d 101 (1999) (holding that college owed a fiduciary duty to student, and that this duty was breached by sexual harassment of the student by a professor; noting that students are in a vulnerable situation because the power differential between faculty and students makes it difficult for students to refuse unwelcome sexual advances, thus necessitating college's duty to create a safe learning environment). Minors participating in church activities are therefore dependent on the diocese for protection, and the diocese is responsible to provide it. This vulnerability requires the diocese to be vigilant so that minors who are serving the church, participating

in church activities, or receiving counseling from a diocesan priest are doing so in an environment free from the threat of sexual abuse. See *Nardella*, 36 Pa. D. & C. at 381, 1997 WL 1056878, at \*10 (allowing plaintiff's breach of fiduciary duty claim to go forward against diocese and its officials on the ground that these defendants placed the priest "in a position to serve as [the plaintiff's] counselor, knowing of her vulnerability and [the priest's] past sexual misconduct").

[23] The recognition of Plaintiff's breach of fiduciary duty claim against Liberatore and the Diocesan Defendants does not offend the First Amendment. Plaintiff's breach of fiduciary duty claim only raises the issues of whether the parties did not deal on equal terms, but, rather, on the one side there was an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible, whether that unfair advantage was exploited by Liberatore, and whether the Diocesan Defendants failed to provide and maintain a safe environment for Plaintiff to participate in church activities. See *Moses*, 863 P.2d at 321 n. 13; *Leodom*, 117 A. at 411; *Schneider*, 744 A.2d at 105-06. No inquiry need be made into church doctrine or other ecclesiastical matters. No professional standard of care need be set for clergy. There is no risk of excessive governmental entanglement with religion.

The *Podolinski* case is not to the contrary. There, the Court of Common Pleas dismissed the plaintiff-parishioner's breach of fiduciary duty claim based upon the diocesan officials' failure to adhere to church canons when dealing with the plaintiff's complaint of a priest's sexual misconduct, as precluded by the First Amendment. 23 Pa. D. & C. 4th at 408-11, 1995 WL 610296, at \*13-15. As is obvious, the

the defendant-priest has breached that standard, one of the inquiries that several courts have held to result in the government's excessive entanglement with religion. *Moses*, 863 P.2d at 321 n. 13. As such, these courts conclude that the recognition of a breach of fiduciary duty claim in the presence of a special relationship does not offend the First Amendment. See *Martinelli*, 196 F.3d at 430-32 ("[t]he First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters"). Moreover, as the Florida Supreme Court recently explained, to hold that the First Amendment effectively immunizes church defendants from suit "could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment." *Malicki v. Doe*, 814 So.2d 347, 365 (Fla.2002).

#### 4. Prediction

[22] In light of the Supreme Court of Pennsylvania's definition of what constitutes a fiduciary relationship, see *Leedom*, 117 A. at 411 (a fiduciary relationship will be found to exist "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible"), the Court is of the opinion that the Supreme Court of Pennsylvania would recognize Plaintiff's breach of fiduciary duty claim against Liberatore and the Diocesan Defendants. Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that Plaintiff was more than a mere parishioner and that Liberatore and the Diocesan Defendants exerted an overmastering influence over Plaintiff, or that Plaintiff exhibited weakness, dependence on or justifiable trust in Liberatore and the Diocesan

Defendants. Additionally, the Court is of the opinion that the Supreme Court of Pennsylvania would hold that Plaintiff's breach of fiduciary duty claims do not offend the First Amendment. Consequently, the Court will deny the Diocesan Defendants' motion for summary judgment as to Count VIII of Plaintiff's Complaint.

As previously stated, under Pennsylvania law, a fiduciary relationship exists "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible." *Leedom*, 117 A. at 411; see also *Estate of Clark*, 359 A.2d at 781 (a fiduciary relationship exists "whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other").

This definition fits the relationship of a priest and a parishioner once the priest "accepts the parishioner's trust and accepts the role of counselor." *Moses*, 863 P.2d at 322-23. In such a case, the parishioner has justifiably placed his trust in the priest. In order to receive and make use of a priest's advice and counsel, a parishioner must necessarily depend upon the priest's knowledge and expertise, resulting in the priest's superiority and influence over the parishioner. Thus, once a counseling relationship has commenced, the parishioner and priest no longer deal on equal terms. This unequal relationship affords the priest opportunity to abuse the trust and confidence reposed in him or prey on a weak and dependent parishioner to his own benefit. The relationship therefore becomes fiduciary in nature and the

cause "defining the scope of fiduciary duty owed persons by their clergy . . . would require courts to define and express the standard of care followed by reasonable clergy of the particular faith involved, which in turn" would result in the court's excessive entanglement with religion); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907, 911 (1993) (refusing to recognize the plaintiff's breach of fiduciary duty cause of action against a member of the clergy, arising from the priest's alleged sexual misconduct, on First Amendment grounds, reasoning that, if it were to recognize such an action, the court would be confronted with the task of articulating the generalized standard of care for a clergyman required by the law of negligence).

These courts reject a breach of fiduciary duty claim on First Amendment grounds for one of two reasons. First, some courts hold that it is impossible for a plaintiff-parishioner to establish the existence of a fiduciary relationship with a priest or diocese without impermissibly resorting to religious understandings to demonstrate the necessary disparity in position and influence or explain why he reposed trust and confidence in the priest and diocese. See e.g., *Teadt*, 603 N.W.2d at 823; see also Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L.REV. 1789, 1827-28 (2004) ("To determine whether a religious relationship should give rise to a fiduciary obligation, a court would [impermissibly] need to examine the religious understandings of parishioner and priest"). Other courts reason that, if a breach of fiduciary duty claim were recognized, it would be necessary to define a reasonable duty standard and then evaluate a defendant-priest's conduct against that standard, *Dausch*, 52 F.3d at 1438 (claim for "clergy malpractice" is not recognized under Illinois law), resulting in excessive government entanglement with religion in viola-

tion of the First Amendment. *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 205 (Utah 2001); *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446, 453 (Tex.App.2000).

However, as mentioned above, an equal, if not greater, number of courts allow a breach of fiduciary duty claim when there exists a special relationship between the priest and parishioner, notwithstanding the First Amendment. See e.g., *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 757, 760-61 (Miss.2004) (affirming trial court's finding that plaintiff-parishioner's claim for breach of fiduciary duty is not prohibited by the First Amendment, but that a priest may not be held to be in a fiduciary relationship merely based upon his status as a priest, as recognizing such a duty on the basis of a position held within the church would require the court to define a reasonable standard of care and evaluate a priest's conduct compared to that standard, in violation of the First Amendment).

These courts reason that, when a breach of fiduciary duty claim arises from the priest's allegedly having used a parishioner's trust in him to his own advantage, rather than to the parishioner's benefit, all a court need ask is whether there is dealing on unequal terms based on the parishioner's trust, justifiably reposed, and whether that trust has been breached. See *Moses v. Diocese of Colorado*, 863 P.2d 310, 321 n. 13 (Colo.1993) ("the relevant facts are that the defendants . . . occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty"). Such inquiries are religion-neutral as they "involve[ ] purely secular conduct that is analogous to an intentional tort and does not hinge on ecclesiastical matters." *Gaines*, 354 F.Supp.2d at 583. A court also need not define a reasonable standard of care or inquire as to whether

an action against the diocese alleging that a priest in his parish used his position of trust to induce members of a church youth group, including the plaintiff, to engage in sexual relations with him. *Id.* at 414. After a jury found that a fiduciary relationship existed between the plaintiff and the diocese, the United States Court of Appeals for the Second Circuit upheld this verdict on appeal, finding that the relationship between the plaintiff and the diocese was fiduciary in nature. *Id.* at 429. The court supported its conclusion that a fiduciary relationship existed on the grounds that the diocese sponsored and encouraged the abusive priest's contact with the youth of the parish, the plaintiff attended a Catholic school within the diocese, participated in church activities, and had been taught throughout grade school catechism classes to trust and respect the bishop of the diocese. *Id.*

In *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me.2005), the Supreme Judicial Court of Maine held that a victim of child sexual abuse perpetrated by a priest could pursue a breach of fiduciary duty claim against the diocese, finding that the plaintiff had a fiduciary relationship with the diocese based upon his "prolonged and extensive involvement with the church as a student and altar boy" which distinguished him from a plaintiff "who asserts nothing more than general membership in a religious organization." *Id.* at 1220. The court continued, "[a] child who is both a student and an altar boy is subject to the supervision, control and authority of the Diocese on a daily basis. At its very core, this is a relationship marked by the 'great disparity of position and influence between the parties' that is a hallmark of a fiduciary relationship." *Id.*; see *F.G. v. MacDonell*, 150 N.J. 550, 696 A.2d 697, 704 (1997) (holding that plaintiff-parishioner stated cause of action for breach of fiduciary duty against a church rector based on the inappropriate

sexual relationship that developed between them while the rector was counseling the parishioner); *Destefano v. Grabrian*, 763 P.2d 275 (Colo.1988) (holding that the plaintiff, who had engaged in a sexual relationship with the Catholic priest who was counseling her, stated a cause of action for breach of fiduciary duty); *Erickson v. Christenson*, 99 Or.App. 104, 781 P.2d 383, 386 (1989) (recognizing plaintiff's breach of fiduciary duty claim against pastor who seduced her through counseling relationship).

As noted above, several courts have refused to recognize breach of fiduciary duty claims brought against priests or dioceses because such claims offend the First Amendment. See *Gaines*, 354 F.Supp.2d at 583 (citing *Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir.1994)); *Teadt v. St. John's Evangelical Church of Burr Oak, Mich.*, 237 Mich.App. 567, 603 N.W.2d 816, 823 (1999) (refusing to recognize the plaintiff's breach of fiduciary duty cause of action against a member of the clergy, arising from her sexual relationship with her minister, on First Amendment grounds, reasoning that the plaintiff could not establish any imbalance of power in the relationship or explain why she would repose trust in the minister without resorting to religious facts); *Langford v. Roman Catholic Diocese of Brooklyn*, 177 Misc.2d 897, 677 N.Y.S.2d 436 (N.Y.Sup.Ct.1998) (refusing to recognize the plaintiff's breach of fiduciary duty cause of action against a member of the clergy, arising from a priest's alleged sexual misconduct, on First Amendment grounds, reasoning that it would be impossible to show the existence of a fiduciary relationship, based on the plaintiff's repose of trust in the priest, without resort to religious facts); *H.R.B. v. J.L.G.* 913 S.W.2d 92, 98 (Mo.Ct.App. 1995) (refusing to recognize the plaintiff's breach of fiduciary duty action against church for clergy sexual misconduct be-

However, in *Podolinski v. Episcopal Diocese of Pittsburgh*, the court held that, while the plaintiff-parishioner's breach of fiduciary duty claim could go forward against the priest based on the sexual relationship that arose between them during marriage counseling sessions, the plaintiff-parishioner's breach of fiduciary duty claim against the diocese and its officials, arising from the improper manner, under church canons, in which the plaintiff's accusation against the priest was handled by these defendants, as well as the outcome of the diocese's investigatory and disciplinary procedures, was precluded by the First Amendment. 23 Pa. D. & C. 4th at 408-11, 1995 WL 610296, at \*13-15. The court reasoned that an adjudication on this claim would require it to inquire into the decision of church authorities on matters of "discipline, faith, internal organization or ecclesiastical rule, custom or law." *Id.*, 1995 WL 610296, at \*13-15.

### 3. Federal Courts and Supreme Courts of Other States

"[T]he federal and state supreme courts that have considered a breach of fiduciary duty claim . . . uniformly have rejected attempts to found the cause of action merely on the relationship between parishioners and members of the clergy." *Gaines*, 354 F.Supp.2d at 582, 584 ("it has consistently been recognized that the mere existence of a pastor-parishioner relationship does not in itself give rise to a fiduciary duty"). Moreover, several courts have refused to recognize breach of fiduciary duty claims brought against priests or dioceses on the ground that such claims offend the First Amendment. *Id.* at 583. However, some courts have been more willing to recognize breach of fiduciary duty claims in cases in which there is a special relationship between the plaintiff-parishioner and the defendant priest or diocese, such as when the plaintiff-parishioner received counseling from a diocesan

priest or participated in church-sponsored activities. *See id.* at 583-85.

In *Gaines v. Krawczyk*, the United States District Court for the Western District of Pennsylvania held that the Supreme Court of Pennsylvania would not recognize a breach of fiduciary duty claim in a case in which a priest furnished alcohol to a minor college student, who subsequently fell to his death from a crawlspace in the church. 354 F.Supp.2d at 582-85. The court reasoned that, because there was no counseling relationship, nor any special relationship for that matter, between the priest and minor student, there was no fiduciary relationship that could be breached. *Id.* at 584-85. The court explained that "the mere existence of a pastor-parishioner relationship does not in itself give rise to a fiduciary duty." *Id.* at 584. Rather, something more, such as a counseling relationship or other additional or special relationship which causes the parishioner to repose trust and confidence in the priest, is required to create a fiduciary relationship. *Id.*; *see Doe v. Hartz*, 52 F.Supp.2d 1027, 1065 (N.D.Iowa 1999) (interpreting Iowa law, dismissed breach of fiduciary duty claim because the plaintiff merely alleged a priest-parishioner relationship, and not a counseling relationship); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir.1998) (interpreting Texas law, permitted breach of fiduciary duty claim against minister because claim arose out of a counseling relationship, not merely a priest-parishioner relationship).

A fiduciary relationship was found to exist by the United States Court of Appeals for the Second Circuit in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir.1999) (interpreting Connecticut law). In *Martinelli*, the plaintiff, who was fourteen (14) at the time of the alleged sexual abuse, brought

the plaintiffs' contentions, holding that the plaintiffs' relationships with their dioceses, that of mere parishioners, did not constitute fiduciary relationships. *Meehan*, 870 A.2d at 922 n. 9; *Baselice*, 879 A.2d at 279 n. 4. The court reasoned that the plaintiffs' relationships with their dioceses were too general in nature, and, thus, did not rise to the higher level associations involved in fiduciary relationships such as attorney and client, doctor and patient, or clergy and penitent. *Meehan*, 870 A.2d at 922 n. 9; *Baselice*, 879 A.2d at 279 n. 4. As a counseling relationship is substantially similar to the priest-penitent relationship, the Superior Court's comparison of the plaintiff-parishioners' general-parishioner qua parishioner-relationship with their dioceses to the "specific, legally recognized higher level association" that characterizes a priest-penitent relationship suggests that the Superior Court would recognize a breach of fiduciary duty claim brought by a plaintiff against a priest and diocese when there existed a counseling or other special relationship above that of simply a parishioner.

The Pennsylvania Courts of Common Pleas have on three occasions recognized a claim against a priest or diocese for breach of fiduciary duty. See *Morrison v. Diocese of Altoona-Johnstown*, 68 Pa. D. & C. 4th 473, 2004 WL 3141330 (Pa.Com.Pl. Oct. 20, 2004); *Nardella v. Dattilo*, 36 Pa. D. & C. 4th 364, 1997 WL 1056878 (Pa.Com.Pl. Mar. 21, 1997) (en banc); *Podolinski v. Episcopal Diocese of Pittsburgh*, 23 Pa. D. & C. 4th 385, 1995 WL 610296 (Pa.Com.Pl. Mar. 22, 1995).

In *Morrison v. Diocese of Altoona-Johnstown*, the court held that the plaintiff-parishioner had stated a claim for breach of fiduciary duty against the diocese and its officials in two respects. 68 Pa. D. & C. 4th at 491, 2004 WL 3141330. First, the plaintiff, who had reported to diocesan officials that a priest had sexually

abused him while the plaintiff was a minor, had stated a claim for breach of fiduciary duty stemming from the diocesan officials' failure to uphold their promise that the priest would be denied future opportunities to come into contact with children. *Id.* The court reasoned that the diocesan officials' representations could have resulted in the creation of a fiduciary duty to plaintiff because a reasonable fact-finder could conclude that the officials' representations were intended to placate the plaintiff in order to gain his trust and thereby lessen the likelihood that he would bring legal action against them. *Id.* The court also recognized the plaintiff's claim for breach of fiduciary duty that arose from the diocesan officials' failure to uphold their unconditional promise to pay for the plaintiff's psychological counseling. *Id.* at 491-92.

In *Nardella v. Dattilo*, the court held that the plaintiff-parishioner, an adult woman, had stated a claim against her priest, the diocese, and diocesan officials for breach of fiduciary duty arising from the sexual relationship that developed between the plaintiff and priest during counseling sessions regarding the death of the plaintiff's mother. 36 Pa. D. & C. 4th at 380-82, 1997 WL 1056878, at \*10. The court found persuasive the plaintiff's argument that the priest breached his fiduciary duty, a duty that was owed to her as her counselor and priest, by acting in a manner not to benefit the plaintiff, but, rather, to satisfy his own sexual needs. *Id.* at 381, 1997 WL 1056878, at \*10. The court also allowed the plaintiff's claim against the diocese and its officials to go forward on the ground that these defendants breached their fiduciary duty to the plaintiff by placing the priest "in a position to serve as [the plaintiff's] counselor, knowing of her vulnerability and [the priest's] past sexual misconduct." *Id.* at 381, 1997 WL 1056878, at \*10.

deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible." *Id.*; see also *In re Estate of Clark*, 467 Pa. 628, 359 A.2d 777, 781 (1976) (a fiduciary relationship exists "as a matter of fact whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other"); *Drob v. Jaffe*, 351 Pa. 297, 41 A.2d 407, 408 (1945) (a fiduciary relationship "exists wherever one occupies toward another such a position of advisor or counsellor [sic] as reasonably to inspire confidence that he will act in good faith for the other's interest"). One in a fiduciary relationship with another is under a duty to act solely in the interest of that person. *McCarrell v. Cumberland County Employee's Retirement Bd.*, 120 Pa.Cmwlth. 94, 547 A.2d 1293, 1296 (1988); see also *Leedom*, 117 A. at 411 (a fiduciary relationship "is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself"). Failure to act in the other's interest results in breach of the duty imposed by the fiduciary relationship. RESTATEMENT (SECOND) OF TORTS § 874 (1979).

The Supreme Court of Pennsylvania has not determined whether or not there is a cause of action for breach of fiduciary duty against a priest or diocese. See *Gaines v. Krawczyk*, 354 F.Supp.2d 573, 582 (W.D.Pa.2004). Consequently, the Court "must don the soothsayer's garb and predict how [the Supreme Court of Pennsylvania] would rule if it were presented with the question." *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 349 (3d Cir.2001). In making this prediction, the Court should consider decisions of the intermediate and trial courts of the state, federal courts

interpreting the particular area of the law in question, and other state supreme courts that have addressed the matters raised. *Wiley v. State Farm Fire & Casualty Co.*, 995 F.2d 457, 459 (3d Cir.1993).

## 2. The Courts of Pennsylvania

Decisions of the intermediate and trial courts of Pennsylvania provide support for the conclusion that the Supreme Court of Pennsylvania would recognize Plaintiff's breach of fiduciary duty claim against Liberatore and the Diocesan Defendants. These decisions suggest a rule holding that, when a plaintiff had a special relationship with the defendant priest and diocese, such as counseling or participation in church-sponsored activities, a fiduciary relationship will be found to exist and the plaintiff's breach of fiduciary duty claim will be recognized.

The Superior Court of Pennsylvania has on two occasions refused to find a fiduciary relationship between parishioners and the diocese in actions arising from alleged acts of sexual abuse perpetrated by diocesan priests. See *Meehan v. Archdiocese of Philadelphia*, 870 A.2d 912, 922 n. 9 (Pa.Super.2005); *Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270, 279 n. 4 (Pa.Super.2005). In both *Meehan* and *Baselice*, the plaintiffs, victims of alleged sexual abuse by diocesan priests, had waited until long after the statute of limitations had expired to pursue their claims. 870 A.2d at 917-18, 879 A.2d at 278-79. The plaintiffs in both cases argued that they had a fiduciary relationship with their dioceses, and that, due to this relationship and the dioceses' general and systematic concealment of the offending priests' misconduct, the doctrine of fraudulent concealment tolled the statute of limitations. *Meehan*, 870 A.2d at 921-22; *Baselice*, 879 A.2d at 278-79. The Superior Court on both occasions rejected

against Liberatore, the Diocese, Sacred Heart, Bishop Timlin, Father Kopacz and Brother Antonucci. The Diocesan Defendants, as well as Brother Antonucci, now move the Court to grant summary judgment as to this claim.

[19, 20] "To prove a claim of intentional infliction of emotional distress, the following elements must be established: (1) the conduct must be extreme and outrageous; (2) it must be intentional or reckless; (3) it must cause emotional distress; (4) that distress must be severe." *Hoy v. Angelone*, 456 Pa.Super. 596, 691 A.2d 476, 482 (1997). Extreme and outrageous conduct is conduct which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Strickland v. University of Scranton*, 700 A.2d 979, 987 (Pa.Super.1997). Generally, "the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous!'" *Id.* In addition, to prevail on an intentional infliction of emotional distress cause of action, a plaintiff must provide competent medical evidence to prove the existence of emotional distress. *Kazatsky v. King David Memorial Park, Inc.*, 515 Pa. 183, 527 A.2d 988, 995 (1987); see *Hunger v. Grand Central Sanitation*, 447 Pa.Super. 575, 670 A.2d 173 (1996) (holding that, to prevail on intentional infliction of emotional distress claim, a plaintiff must prove that the defendant's conduct was extreme and outrageous and that the plaintiff suffered a medically confirmed injury).

In this case, Plaintiff has failed to present competent medical evidence to support his claim of severe emotional distress, as required under Pennsylvania law. As such, the Court will grant summary judgment

as to Count VII of Plaintiff's Complaint.

## F. Breach of Fiduciary Duty (Count VIII)

### 1. Introduction

In Count VIII, Plaintiff alleges that Defendants Liberatore, the Diocesan Defendants and Brother Antonucci breached their respective fiduciary duties to Plaintiff. Plaintiff argues that the Diocesan Defendants, as well as Brother Antonucci, breached their fiduciary duties that were owed to Plaintiff by placing Liberatore in a position to serve as Plaintiff's priest and counselor, by failing to remove Liberatore from that position, and by failing to report Liberatore to law enforcement authorities after having ample reason to believe Liberatore had committed acts of sexual abuse. Plaintiff contends that the Diocesan Defendants and Brother Antonucci, rather than act in his best interest, chose rather to act in their own interests by ignoring and even attempting to conceal Liberatore's sexual abuse of a minor. The Diocesan Defendants have moved for summary judgment as to this count, arguing that Pennsylvania does not recognize a claim for breach of fiduciary duty in a case similar to this one. Brother Antonucci also moves for summary judgment, asserting that the facts do not support Plaintiff's claim.

[21] Under Pennsylvania law, "[t]he general test for determining the existence of . . . a [fiduciary] relationship is whether it is clear that the parties did not deal on equal terms." *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416 (1981). Indeed, a fiduciary relationship "is not confined to any specific association of the parties." *Leedom v. Palmer*, 274 Pa. 22, 117 A. 410, 411 (1922) Rather, a fiduciary relationship will be found to exist "when the circumstances make it certain the parties do not

Heart, but did not serve in a clerical capacity, was a person required to report under section 6311. While Brother Antonucci was not a clergyman within the Diocese, section 6311(b) does not so limit the clergymen included within its reach. Indeed, the statute requires "any . . . member of the clergy" to report suspected child abuse. The Court does not interpret this provision to include only ordained priests within the Diocese and Brother Antonucci cites no case law so limiting the reach of section 6311. Brother Antonucci not only was a consecrated monk and hermit but, according to Plaintiff, he also held himself out to Plaintiff as a religious and spiritual advisor. In addition, the statute's intent is to require those persons who come into contact with children during the course of their employment to report suspected abuse. Here, there is no question that, during the course of his employment with Sacred Heart, Brother Antonucci did in fact come into contact with children, including Plaintiff. As such, the Court concludes that the Child Protective Services Act clearly applied to Brother Antonucci.

Third, a reasonable jury could find that Defendants violated the statute. Viewing the record in the light most favorable to Plaintiff, there is evidence which supports the conclusion that Defendants had "reasonable cause to suspect" that Liberatore was sexually abusing Plaintiff. The Diocesan Defendants were informed of Liberatore's past incidents involving Roe and Poe. They had also been informed of the fact that Plaintiff was sleeping in Liberatore's bedroom in the Rectory. In addition, several people had voiced their own concerns and suspicions regarding the relationship between Liberatore and Plaintiff, and supported these suspicions with their own personal observations of Liberatore's behavior towards Plaintiff. As Plaintiff was a parishioner, altar server and sacristan at Sacred Heart, and the reports concerned a Diocesan priest's

abuse, the Diocesan Defendants were in sufficient "contact" with Plaintiff to bring them within the reporting requirements of the Child Protective Services Act. As for Brother Antonucci, Plaintiff directly told him of Liberatore's sexual abuse. As such, Plaintiff "came into contact" with Brother Antonucci. Accordingly, there was sufficient evidence within the knowledge of Defendants to create "reasonable cause to suspect" that Liberatore was sexually abusing Plaintiff. As it is uncontested that Defendants did not report Liberatore's suspected abuse of Plaintiff to law enforcement authorities, a reasonable jury could conclude that Defendants violated section 6311 of the Child Protective Services Act.

Fourth, when viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could find that Defendants' failure to report Liberatore's sexual abuse of Plaintiff, in violation of section 6311, proximately caused the injuries Plaintiff suffered. Liberatore was convicted of sexual abuse, indecent assault and corruption of minors based on his May 2002 assaults upon Plaintiff. The Diocesan Defendants knew as early as January of 2001 that Plaintiff was sleeping in Liberatore's bedroom at the Rectory. Plaintiff also stated in his deposition that he told Brother Antonucci, prior to May of 2002, that Liberatore was sexually abusing him. As such, a reasonable jury could find that, had Defendants reported Liberatore to law enforcement authorities, Liberatore would not have had the opportunity to sexually abuse Plaintiff in May of 2002. Summary judgment as to Count VI is thus inappropriate and will be denied.

#### **E. Intentional Infliction of Emotional Distress (Count VII)**

In Count VII, Plaintiff asserts a claim of intentional infliction of emotional distress

least, grooming this young man, if not already involving him in a sexual relationship.

Consequently, Count [redacted] of Plaintiff's Complaint will survive summary judgment to the extent that Plaintiff claims that the Diocese, Sacred Heart and Bishop Timlin were negligent in supervising and retaining Liberatore. The Court will grant summary judgment as to Count [redacted] of Plaintiff's Complaint to the extent that Plaintiff claims that Liberatore was negligently hired.

#### D. Negligence Per Se (Count VI)

In Count VI of his Complaint, Plaintiff sets forth a claim of negligence *per se* arising from Defendants' alleged violation of the Child Protective Services Act, 23 PA. CONS.STAT. ANN. § 6311. Specifically, Plaintiff alleges that the Diocesan Defendants and Brother Antonucci failed to comply with the reporting requirements of section 6311. The Diocesan Defendants and Brother Antonucci now move this Court for summary judgment as to this count. The Diocesan Defendants argue that they never "came into contact" with Plaintiff and thus were not subject to section 6311. Brother Antonucci asserts that, because he was not employed by the Diocese as a priest, he too was not subject to the reporting requirement imposed by section 6311.

Section 6311 provides, in pertinent part:

Persons who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when they have reasonable cause to suspect, on the basis of their medical, professional or other training and experience, that a child coming before them in their pro-

fessional or official capacity is an abused child.

23 PA. CONS.STAT. ANN. § 6311(a). Under section 6311(b), "persons required to report under subsection (a) include, but are not limited to, any . . . member of the clergy." 23 PA. CONS.STAT. ANN. § 6311(b). As is clear from its language, subsection (b) recites an inclusive, rather than exclusive, list of those persons required to report.

[17, 18] Under Pennsylvania law, the elements of a negligence *per se* action are: (1) the purpose of the statute must be, at least in part, to protect the interest of the plaintiff, individually, as opposed to the public; (2) the statute must clearly apply to the conduct of the defendant; (3) the defendant must violate the statute; and (4) the violation of the statute must proximately cause the plaintiff injury. *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638, 644 (E.D.Pa.1999). After analyzing these factors, the Court is of the opinion that, when the evidence is viewed in the light most favorable to Plaintiff, a reasonable jury could conclude that the Diocesan Defendants and Brother Antonucci violated section 6311.

The first element of Plaintiff's negligence *per se* action is easily met. Section 6311 was clearly promulgated so as to protect abused children such as Plaintiff. *J.E.J. v. Tri-County Big Brothers/Big Sisters, Inc.*, 692 A.2d 582, 586 (Pa.Super.Ct.1997).

Second, clergy are expressly included within the list of individuals who have a duty to report suspected child abuse. 23 PA. CONS.STAT. ANN. § 6311(b). As such, the statute clearly applies to the Diocesan Defendants.

The Court is also of the opinion that Brother Antonucci, a benedictine monk who was hired by Liberatore to serve as a cantor, custodian and cook at Sacred

havior between consenting adults does not violate the rules of civil society.

It does not follow that a homosexual is more likely than a heterosexual to prey on minors of the same sex. As such, standing alone, Liberatore's homosexual behavior with regard to Roe, an adult, would be irrelevant as to the issue of whether the Diocesan Defendants had notice that Liberatore had a propensity to sexually abuse a minor male. However, Liberatore's behavior with regard to Roe becomes relevant, as to the issue of notice to the Diocesan Defendants, by virtue of the fact that it was strikingly similar to that which he later engaged in with regard to Plaintiff.

Liberatore was in Roe's company a great deal, bought Roe expensive gifts, took Roe on overnight trips and had Roe sleep in his room at the Seminary. This behavior was noticed by colleagues, who, in turn, made their observations and concerns known to the Diocesan Defendants. While at Sacred Heart, Liberatore counseled Plaintiff regarding the death of his father, hired Plaintiff as a sacristan, was in Plaintiff's company an inordinate amount of time, purchased expensive gifts for Plaintiff, took Plaintiff on overnight trips and had Plaintiff sleep in his room at the Rectory. Like his relationship with Roe, Liberatore's relationship with Plaintiff drew comment from people who were in a position to view, on a daily basis, much of what occurred between them. These people, in turn, informed the Diocese, Sacred Heart and Bishop Timlin of their observations and concerns.

Accordingly, Liberatore's homosexual behavior with regard to Roe is legally relevant as to the issue of whether the Diocese, Sacred Heart and Bishop Timlin had notice that Liberatore was, at the very least, grooming Plaintiff for a homosexual relationship, if not already involving him in one.

However, even ignoring Liberatore's relationship with Roe, a reasonable jury could conclude that there was adequate warning to the Diocese, Sacred Heart and Bishop Timlin that Liberatore was grooming Plaintiff for a homosexual relationship, and that it may well have already begun. The notice of Plaintiff's sleepovers in the Rectory, the gifts given to Plaintiff and the overnight trips is sufficient to allow a reasonable jury to conclude that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in retaining Liberatore as a Diocesan priest.

Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could also conclude that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in permitting, or failing to prevent, Liberatore's tortious conduct upon church premises, given Plaintiff's statement that Liberatore routinely sexually abused him while they slept in Liberatore's bedroom in the Sacred Heart Rectory.

Further, the Court cannot conclude as a matter of law that the Diocese, Sacred Heart and Bishop Timlin are not liable under Section 317 of the Restatement (Second) of Torts, as a reasonable jury could conclude that these defendants knew of the necessity and had the opportunity and ability to control Liberatore's actions, but nevertheless failed to exercise reasonable care to prevent Liberatore, acting outside the scope of his employment, from intentionally harming Plaintiff while on church premises. Given the evidence of Bishop Timlin's awareness of Liberatore's relationship with Roe, Plaintiff's sleeping in Liberatore's bedroom at the Rectory and the overnight trips on which Liberatore had taken Plaintiff, a reasonable jury could conclude that the Diocese, Sacred Heart and Bishop Timlin had reason to believe that Liberatore was, at the very

was or would become a child sex predator when he was hired in 1995.

As noted above, under Section 213(b) of the Restatement (Second) of Agency, a principal is liable for harm resulting from his conduct if he is negligent or reckless in the employment of improper persons in work involving risk of harm to others. RESTATEMENT (SECOND) OF AGENCY § 213(b). Additionally, under Section 213(d) of the Restatement (Second) of Agency, a principal is liable for harm resulting from his conduct if he is negligent or reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons upon his premises. RESTATEMENT (SECOND) OF AGENCY § 213(d).

Here, viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could find that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in retaining Liberatore because the jury could conclude that Liberatore was an improper person who posed a risk of sexual abuse to minor males. A reasonable jury could also find that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons on church premises based on Liberatore's sexual abuse of Plaintiff in the Sacred Heart Rectory.

There is evidence that Bishop Timlin was informed that Plaintiff was sleeping in Liberatore's bedroom at the Rectory and that Liberatore had taken Plaintiff on several overnight trips (O'Neill Letter). Bishop Timlin acknowledged that he would characterize such activity as grooming behavior. (Timlin Dep. 36:8-37:9.) Bishop Timlin was informed of Liberatore's inappropriate behavior with Roe and Poe. (Bohr Dep. 42:8-43:11; Summary at 2.) Shortly thereafter, Bishop Timlin removed Liberatore from the Seminary. However, rather than dismiss Liberatore as a Diocesan priest, Bishop Timlin assigned him to

another parish within the Diocese. Based on this evidence, a reasonable jury could infer that this provided Liberatore the opportunity to befriend Plaintiff and then sexually abuse him.

Further, the awareness of the potential Liberatore posed as a pedophile raises the question of the relevance of the Diocese's and Bishop Timlin's awareness of Liberatore's behavior with Roe. The Court finds it relevant for the following reasons.

A Roman Catholic priest takes a vow of celibacy at his ordination and, therefore, is called to refrain from any and all sexual activity. Wikipedia, *supra*, "Clerical Celibacy", [http://en.wikipedia.org/wiki/Celibacy#Clerical\\_celibacy](http://en.wikipedia.org/wiki/Celibacy#Clerical_celibacy). While any sexual act outside the sacrament of marriage is forbidden by the Church, Wikipedia, *supra*, "Roman Catholic Church", [http://en.wikipedia.org/wiki/Roman\\_Catholic\\_Church#Sexuality](http://en.wikipedia.org/wiki/Roman_Catholic_Church#Sexuality), homosexual acts are considered to be "intrinsically immoral" and "contrary to the natural law." Wikipedia, *supra*, "Instruction Concerning the Criteria for the Discernment of Vocations with regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders", [http://en.wikipedia.org/wiki/Instruction\\_Concerning\\_the\\_Criteria\\_for\\_the\\_Discernment\\_of\\_Vocations\\_with\\_regard\\_to\\_Persons\\_with\\_Homosexual\\_Tendencies\\_in\\_view\\_of\\_their\\_Admission\\_to\\_the\\_Seminary\\_and\\_to\\_Holy\\_Orders](http://en.wikipedia.org/wiki/Instruction_Concerning_the_Criteria_for_the_Discernment_of_Vocations_with_regard_to_Persons_with_Homosexual_Tendencies_in_view_of_their_Admission_to_the_Seminary_and_to_Holy_Orders). Indeed, the Church forbids the ordination of men to the priesthood who have "deeply rooted homosexual tendencies." Wikipedia, *supra*, "List of Christian denominational positions on homosexuality", [http://en.wikipedia.org/wiki/List\\_of\\_Christian\\_denominational\\_positions\\_on\\_homosexuality#Roman\\_Catholic\\_Church](http://en.wikipedia.org/wiki/List_of_Christian_denominational_positions_on_homosexuality#Roman_Catholic_Church). Nevertheless, in general, homosexual be-

### C. Negligent Hiring, Supervision and Retention (Count V)

Plaintiff next claims that the Diocese, Sacred Heart and Bishop Timlin are liable for negligence in their hiring, supervision and retention of Liberatore as a Diocesan priest.

[14] Under Pennsylvania law, an employer is subject to liability for harm resulting from his conduct if he is negligent or reckless "in the employment of improper persons or instrumentalities in work involving risk of harm to others; ... in the supervision of the activity; or ... in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control." *R.A. ex rel. N.A.*, 748 A.2d at 697 (citing RESTATEMENT (SECOND) OF AGENCY § 213(b), (d) (1958)). Moreover, a master has a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or is using a chattel of the master, and (b) the master knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control. *R.A. ex rel. N.A.*, 748 A.2d at 697 (citing RESTATEMENT (SECOND) OF TORTS § 317(a), (b) (1965)).

Accordingly, an employer owes a duty "to exercise reasonable care in selecting, supervising and controlling employees." *Id.* The Supreme Court of Pennsylvania has held that, "[t]o fasten liability on an employer[,] ... it must be shown that the employer knew or, in the exercise of ordinary care, should have known of the neces-

sity for exercising control of his employee." *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418, 422 (1968) (stating that, in a case in which an employee committed an assault, the employer may be liable for the failure to exercise reasonable care in determining the employee's propensity for violence).

In the instant case, the Diocese, Sacred Heart and Bishop Timlin may be liable if they knew or should have known that Liberatore had a propensity for committing sexual abuse and his employment as Pastor at Sacred Heart might create a situation where his propensity would harm a third person, such as Plaintiff. See *Coath v. Jones*, 277 Pa.Super. 479, 419 A.2d 1249, 1250-52 (1980) (holding, in a case in which a former employee of the defendant-employer raped the plaintiff after having gained entry to her home by representing that he was there on the defendant's business, first, that the defendant could be found liable if the perpetrator was known to have the inclination to assault women or if the defendant should have known that, and, second, that "if it were foreseeable by the defendant that [the perpetrator]" ... could attack a customer because he had, on a previous occasion, been admitted to her home on the employer's business, then there would exist a special relationship between defendant and the customer and a duty on the employer to give a reasonable warning to the customer).

[15, 16] When viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in supervising and retaining Liberatore. However, the Court concludes that a reasonable jury could not find that the Diocese, Sacred Heart and Bishop Timlin were negligent or reckless in hiring Liberatore because there is no evidence suggesting that Liberatore

tiously aiding and abetting Liberatore in his sexual abuse of Plaintiff. Under this theory of liability, based upon section 876 of the Restatement (Second) of Torts, "one is subject to liability for harm to a third person arising from the tortious conduct of another if he (a) does a tortious act in concert with the other or pursuant to a common design with him; (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." *Koken v. Steinberg*, 825 A.2d 723, 731 (Pa.Cmwith.2003).

Plaintiff neither avers, nor has presented evidence, that Brother Antonucci acted with Liberatore in a common scheme or plan. Subsection (a) is thus inapplicable.

[12] To determine whether Brother Antonucci provided "substantial assistance" to Liberatore, the comments to section 876 of the Restatement provide a list of five factors: (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) the defendant's presence or absence at the time of the tort; (4) the defendant's relation to the tortfeasor; and (5) the defendant's state of mind. *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 127 n. 27 (3d Cir.1999). A sixth factor—the duration of the assistance provided—is also considered. *Id.* (citing *Halberstam v. Welch*, 705 F.2d 472, 484 (D.C.Cir.1983)).

[13] Here, Plaintiff has failed to offer sufficient evidence to allow a reasonable jury to conclude that Brother Antonucci gave substantial assistance or encouragement to Liberatore. Plaintiff has offered evidence that Brother Antonucci dissuaded Plaintiff and his mother from reporting Liberatore's abuse to the authorities, instead suggesting that Plaintiff forgive Li-

beratore for his misdeeds. Under Pennsylvania case law, "substantial assistance" requires that the putative aider or abetter take some affirmative action which causes the tortious actor to conduct himself inappropriately. *Welch v. Porter*, 450 Pa.Super. 112, 675 A.2d 334, 338-39 (1996) (holding that the plaintiff, who was injured in a motor vehicle accident with a drunk driver, could not recover from the drunk driver's passenger, as an aider or abetter under section 876(b) of the Restatement, because the plaintiff did not aver that the passenger "engaged in any conduct that substantially assisted or encouraged [the driver] to consume alcohol and operate his vehicle in a negligent or reckless manner"); see *Cruz* [REDACTED] No. CI-04-01947, 2005 WL 1349615, at \*235-36 (Pa.Com.Pl. Jan. 26, 2005) (Plaintiff's complaint, arising out of allegations of child sexual abuse by employee of day care center, failed to state claim against the day care center and its owners for tortious aiding and abetting because it "fail[ed] to contain any allegations that the defendants affirmatively acted in any way to assist [the employee] in committing his alleged misdeeds").

Here, there is simply no evidence that Brother Antonucci aided the efforts of Liberatore or encouraged or incited him to commit his abusive acts. There is no evidence that Brother Antonucci was present during the commission of the abuse. Moreover, despite Brother Antonucci's advice, Plaintiff and his mother were entirely free to ignore him and contact the authorities on their own accord. As such, Brother Antonucci's efforts to dissuade Plaintiff and his mother from contacting the authorities cannot be viewed as "substantial assistance." Accordingly, the Court will grant Brother Antonucci's motion for summary judgment as to Count IV of Plaintiff's Complaint.

are vicariously liable for Liberatore's sexual molestation of Plaintiff, and that these acts were performed during the course of and within the scope of Liberatore's employment as a priest. The Diocese, Sacred Heart and Bishop Timlin now move for summary judgment as to this count, arguing that Liberatore's acts were committed outside the scope of his employment.

[7, 8] Under Pennsylvania law, "an employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment." *Fitzgerald v. McCutcheon*, 270 Pa.Super. 102, 410 A.2d 1270, 1271 (1979). "In certain circumstances, liability of the employer may also extend to intentional or criminal acts committed by the employee." *Id.* "The conduct of an employee is considered 'within the scope of employment' for purposes of vicarious liability if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer." *R.A. ex rel. N.A. v. First Church of Christ*, 748 A.2d 692, 699 (Pa.Super.2000). "Where, however, the employee commits an act encompassing the use of force which is excessive and so dangerous as to be totally without responsibility or reason, the employer is not responsible as a matter of law." *Fitzgerald*, 410 A.2d at 1272. Indeed, "a master is not liable for the willful misconduct of his servant, and that such willful misconduct, while it may be within the course of the employment, is not within the scope thereof." *McMaster v. Reale*, 177 Pa.Super. 429, 110 A.2d 831, 832 (1955).

[9] In addition, Pennsylvania courts have held that "an assault committed by an employee upon another for personal reasons or in an outrageous manner is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment." *Fitzgerald*, 410 A.2d at 1272. For example, in *Sanchez by Rivera v. Montanez*, 165 Pa. Cmwlth. 381, 645 A.2d 383 (1994), a child and his parents sued a community action agency, alleging that the agency was vicariously liable for an employee's sexual molestation of the plaintiff child. The Commonwealth Court of Pennsylvania affirmed the trial court's entry of summary judgment in the defendant agency's favor, holding that the employee's actions were clearly outrageous and motivated purely by personal reasons. *Id.* at 391, 645 A.2d 383.

[10] Here, it is clear that Liberatore's sexual molestation of Plaintiff was not within the scope or nature of his employment as a priest. Indeed, "[t]he activity of which [Plaintiff] now complains is wholly inconsistent with the role of one who is received into the Holy Orders as an ordained priest of the Roman Catholic Church." *Hutchison by Hutchison v. Luddy*, 453 Pa.Super. 420, 683 A.2d 1254, 1256 (1996). Moreover, the acts of sexual abuse perpetrated by Liberatore were both outrageous and certainly not actuated by any purpose of serving the Diocese, Sacred Heart or Bishop Timlin. As such, no reasonable jury could find in favor of Plaintiff on his vicarious liability claim. Therefore, the Court will grant summary judgment in favor of the Diocese, Sacred Heart and Bishop Timlin as to Count III of Plaintiff's Complaint.

#### B. Aiding and Abetting (Count IV)

[11] In Count IV, Plaintiff sets forth a claim against Brother Antonucci for tor-

1989) (upholding district court's use of the so-called "ostrich instruction," which allows the inference of knowledge if it is found that the putative aider or abettor had a strong suspicion yet shut his eyes for fear of what he would learn), there still remains no evidence even remotely suggesting that the Diocesan Defendants shared Liberatore's specific intent to commit the sexual offenses. While the Diocesan Defendants may have avoided learning of Liberatore's offenses, there is no evidence that the Diocesan Defendants desired that his crimes be accomplished. Also absent from the record is any evidence showing that the Diocesan Defendants actively participated in some manner to assist Liberatore in the commission of his offenses. As such, the Diocesan Defendants' motion for summary judgement will be granted as to Count I of Plaintiff's Complaint.

## II. Subject Matter Jurisdiction

[5] Under 28 U.S.C. § 1367(a), "the district court shall have supplemental jurisdiction over all of the claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that include joinder or intervention of additional parties." Thus, section 1367(a) provides for pendent-party jurisdiction in federal question cases. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) ("[t]he last sentence of § 1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties"). Consequently, this Court may exercise supplemental jurisdiction over Plaintiff's state law claims against the Diocesan Defendants and Brother Antonucci so long as these claims share a common nucleus

of operative fact with Plaintiff's federal law claim against Liberatore such that Plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

[6] Under Third Circuit jurisprudence, "mere tangential overlap of facts is insufficient [to constitute a common nucleus of operative fact], but total congruity between the operative facts . . . is unnecessary." *Nanavati ■ Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 105 (3d Cir. 1988). Plaintiff's state law claims against the Diocesan Defendants and Brother Antonucci satisfy this standard.

Plaintiff's federal claim against Liberatore arose from sexual abuse that was perpetrated by Liberatore while he was a priest within the Diocese. Plaintiff's state claims against the Diocesan Defendants and Brother Antonucci are based on these same facts, with the caveat that Plaintiff's state claims require proof of additional facts beyond merely Liberatore's acts of abuse. Thus, while not totally congruous, Plaintiff's federal and state claims share more than a mere tangential overlap. As such, Plaintiff's state law claims against the Diocesan Defendants and Brother Antonucci share a common nucleus of operative fact with his federal law claims against Liberatore. Therefore, the Court has jurisdiction over all of Plaintiff's federal and state claims.

The Court will now address Plaintiff's state law claims against the Diocesan Defendants and Brother Antonucci.

## III. Plaintiff's State Law Claims against the Diocesan Defendants and Brother Antonucci (Counts III, IV, ■, VI, VII and VIII)

### A. Vicarious Liability (Count III)

In Count III, Plaintiff alleges that the Diocese, Sacred Heart and Bishop Timlin

ingly transported Plaintiff, while a minor, to New York and Europe, in interstate and foreign commerce, with the intent of engaging in illegal sexual activity with Plaintiff, in violation of 18 U.S.C. §§ 2421, 2422 and 2423. However, the Diocesan Defendants argue that they did not take part in Liberatore's criminal activities. As such, they contend they cannot be liable under section 2255.

[2] Under 18 U.S.C. § 2(a), "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a *principal*" (emphasis added). As such, one who criminally aids or abets a listed offense is punishable as though he himself committed the offense. *United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.*, 793 F.Supp. 1114, 1134 (E.D.N.Y.1992). Consequently, if one has aided or abetted another in violating one of the statutes listed in section 2255, then he himself has committed an act indictable under that listed statute. As the aider or abettor has himself committed an indictable act, he is liable to the plaintiff under section 2255. See 132 Cong. Rec. E1983-01 (daily ed. June 5, 1986) (statement of Rep. Siljander during extension of remarks). Accordingly, if the Diocesan Defendants criminally aided or abetted Liberatore in the commission of his sexual offenses, they may be held liable under section 2255.

[3] In order to establish the offense of criminal aiding and abetting, it must be shown that: (1) the substantive offense has been committed; (2) the defendant knew the offense was being committed; and (3) the defendant acted with the intent to facilitate it. *United States v. Cartwright*, 359 F.3d 281, 287 (3d Cir.2004) (citations omitted); see also *United States v. Newman*, 490 F.2d 139, 143 (3d Cir.1974) (in order to be liable as an aider or abettor, the defendant must have participated in

the substantive crime with the desire that the crime be accomplished; unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute). "[A]cting with intent to facilitate the substantive offense requires that one acted with the 'intent to help those involved with a *certain* crime.'" *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir.1991) (quoting *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir.1988)). Indeed, "[t]he state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal offense." *United States v. Centner*, 116 F.3d 473 (Table), 1997 WL 328766, at \*2 (4th Cir.1997); *United States v. Loder*, 23 F.3d 586, 591 (1st Cir.1994); *United States v. Valencia*, 907 F.2d 671, 680 (7th Cir. 1990); *United States v. Gallishaw*, 428 F.2d 760 (2d Cir.1970).

[4] As noted, there is sufficient evidence to allow a reasonable jury to conclude that multiple listed offenses were committed by Liberatore. As such, the first element of criminal aiding and abetting is satisfied. However, even viewing the evidence in the light most favorable to Plaintiff, the Court concludes that no reasonable jury could find that the second and third elements of the aiding and abetting offense are satisfied. While Plaintiff's evidence demonstrates that the Diocesan Defendants had reason to suspect that Liberatore was sexually abusing Plaintiff, there is nothing in the record demonstrating that the Diocesan Defendants consciously shared Liberatore's knowledge of the underlying substantive offenses, as well as the specific criminal intent to commit them. See *Loder*, 23 F.3d at 591. Indeed, "[a] general suspicion that an unlawful act may occur is not enough." *United States v. Labat*, 905 F.2d 18, 23 (2d Cir.1990). While it is possible to infer knowledge from a combination of suspicion and indifference to the truth, see *United States v. Talkington*, 875 F.2d 591, 595 (7th Cir.

Act of 1986 on October 18, 1986. *Id.* at 611; see Pub.L. No. 99-500, 100 Stat. 1783-39 (1986). This enactment expanded the scope of the Protection of Children Against Sexual Exploitation Act of 1977, Pub.L. 95-225, 92 Stat. 7 (1978), "to provide a civil remedy for personal injuries suffered by victims of child sexual exploitation." *Id.* Initially, this civil remedy was to be included in the civil Racketeer Influenced and Corrupt Organizations ("RICO") statutes, which already provided remedies for victims of crime. *Id.* (citing 132 Cong. Rec. H3362-02 (daily ed. June 5, 1986) (statement of Rep. Young) ("The Child Abuse Victims['] Rights Act of 1986 is a crucial piece of legislation. This bill would at last add the sexual exploitation of children part to the Racketeer[ ] Influence[d] and Corrupt Organizations statute[ ]"). Later drafts of the bill were also proposed to be contained within the RICO statutes. *Id.* (citing 132 Cong. Rec. E1983-01 (daily ed. June 5, 1986) (statement of Rep. Siljander during extension of remarks)). "The intent in proposing to include the statute within RICO was to allow for increased criminal penalties as well as expanded investigatory powers to arrest perpetrators of the offenses." *Id.* (citing 132 Cong. Rec. H3362-02 (daily ed. June 5, 1986) (statement of Rep. Young)). Child pornography, transportation of minors for illegal sexual activity and related offenses, sections 2251, 2251A, 2252, 2260, 2421, 2422 and 2423, were, in fact, added to the definition of racketeering activities under the RICO statutes. *Id.*; see 18 U.S.C. § 1961(1)(B) (including within the definition of "racketeering activity" any act which is indictable under sections 2251, 2251A, 2252, 2260, 2421, 2422 and 2423).

At first, the proposed civil remedy would have given the Government or the victim the right to sue the offender in order to receive treble damages and attorney fees, but not until after the "offender [was] convicted under Civil RICO." 132 Cong. Rec.

E290-02 (Feb. 5, 1986) (statement of Rep. Siljander) ("If an offender is convicted under Civil RICO, the Government or the victim is given the right to sue the offender in order to receive treble damages and attorney fees"). In later debates, a bill was proposed that provided a cause of action to any person injured personally *from an act indictable* under certain child sexual exploitation statutes. *Smith*, 376 F.Supp.2d at 611 (citing 132 Cong. Rec. E1983-01 (daily ed. June 5, 1986) (statement of Rep. Siljander during extension of remarks)). During later congressional proceedings, one of the congressional representatives who introduced the bill stated "[f]or purposes of [section 2255], violations are to be determined by a preponderance of the evidence. Successful plaintiffs are entitled to recover the cost of the suit, including a reasonable attorney's fee, *from those found guilty of a violation.*" 132 Cong. Rec. E3242-02 (daily ed. September 23, 1986) (statement of Rep. Green during extension of remarks) (emphasis added); see *id.*

Based on this legislative history, the *Smith* court concluded that Congress' intent was "to make the civil remedies provision available to any victim able to show by a preponderance of the evidence that *the defendant committed the acts described in any of the listed offenses.*" *Id.* at 613 (emphasis added).

[1] This Court concludes that, based upon *Smith* and the legislative history of section 2255, in order to be subject to liability under section 2255, a defendant must be proven to have violated at least one of the criminal statutes listed in section 2255 by a preponderance of the evidence.

Here, there is sufficient evidence that would allow a reasonable jury to conclude that such violations occurred, as Plaintiff has offered evidence that Liberatore know-

den of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. See *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir.1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. See *Anderson*, 477 U.S. at 256-257, 106 S.Ct. 2505.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505.

#### DISCUSSION

The Diocesan Defendants now move the Court to grant summary judgment in their favor as to Counts I, III, VI, VII and VIII of Plaintiff's Complaint. Also, Brother Antonucci moves the Court to grant summary judgment in his favor as to Counts IV, VI, VII and VIII of Plaintiff's Complaint. The Diocesan Defendants also seek summary judgment as to Plaintiff's claim for punitive damages.

#### I. Plaintiff's Federal Law Claim (Count I)

Under 18 U.S.C. § 2255, "[a]ny 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[, sections which prohibit, inter alia, child molestation, exploitation and pornography,] and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such a person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the costs of the suit, including a reasonable attorney's fee." Section 2255 thus provides child victims of sexual abuse, molestation and exploitation with a federal cause of action for money damages. The issue here is against whom may that federal cause of action be brought. The Diocesan Defendants argue that section 2255 only subjects Liberatore, the one who has violated statutes listed in section 2255, to civil liability. Conversely, Plaintiff argues that the Diocesan Defendants can be held liable for the offenses committed by Liberatore under the doctrine of agency.

Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has had any cases concerning section 2255. Indeed, there is only a single reported case involving section 2255.

In *Smith v. Husband*, 376 F.Supp.2d 603, 613 (E.D.Va.2005), the United States District Court for the Eastern District of Virginia, held, after analyzing the legislative history of section 2255 to determine Congress' intent, that a criminal conviction under one of the listed statutes was not a prerequisite to the institution of a civil action under section 2255. The court first noted that section 2255 was enacted as part of The Child Abuse Victims' Rights

that, sometime during Liberatore's tenure as a priest in the Diocese, he had been sent to Southdown Institute, a non-profit clinic and psychological treatment facility for clergy located in Ontario, Canada, <http://www.southdown.on.ca/#>. (See Bishop Martino Dep. 39:23-40:2.) Bishop Martino spoke with Liberatore in late November of 2003 about the concerns raised by Liberatore's file. (Bishop Martino Dep. 41:5-20.)

In January of 2004, Plaintiff and another young man came forward and alleged that Liberatore had sexually abused them. (See Bishop Martino Dep. 108:16-18.) Later that month, Bishop Martino hired an investigator, James Seidel ("Seidel"), to investigate these allegations. (Bishop Martino Dep. 108:8-11; see James Seidel Investigative Insert, Doc. 89-5 pp. 16-17.)

In May of 2004, Liberatore was arrested and charged with sexual abuse in the State of New York, as well as multiple counts of indecent assault and corruption of minors in the Commonwealth of Pennsylvania. (Doc. 89-3 pp. 34-44; Doc. 41-2 p. 24.) Liberatore pleaded guilty to those offenses. (*Id.*) On July 23, 2004, Bishop Martino dismissed Liberatore from the clerical state, having concluded that "the delict of sexual abuse of a minor was committed by the Reverend Albert M. Liberatore." (Votum at 1.)

## II. Procedural History

On November 5, 2004, Plaintiff filed a Complaint in this Court. (Doc. 1-1.) Therein, Plaintiff asserted a claim pursuant to 18 U.S.C. § 2255, a section of The Child Abuse Victims' Rights Act of 1986. (Doc. 1-1 ¶¶ 48-51.) Plaintiff also raised state law claims of assault and battery (Doc. 1-1 ¶¶ 52-55), vicarious liability (Doc. 1-1 ¶¶ 56-62), aiding and abetting (Doc. 1-1 ¶¶ 63-68), negligent hiring, supervision and retention (Doc. 1-1 ¶¶ 69-75), negligence per se (Doc. 1-1 ¶¶ 76-81),

intentional infliction of emotional distress (Doc. 1-1 ¶¶ 82-88), and breach of fiduciary duty (Doc. 1-1 ¶¶ 89-95). On November 3, 2006, both the Diocesan Defendants and Brother Antonucci filed motions for summary judgment. (Docs. 75, 76.) These motions are fully briefed and ripe for disposition.

## LEGAL STANDARD

Summary judgment is appropriate 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." FED.R.CIV.P. 56(c). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. See *id.* at 248, 106 S.Ct. 2505. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.*

Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. See 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed.1983). The moving party may present its own evidence or, where the nonmoving party has the bur-

As noted above, Bishop Timlin was informed of Liberatore's behavior, with regard to both Roe and Plaintiff, and the suspicions raised by it. With regard to Roe, Bishop Timlin received the Bambara Memo informing him of Father Bambara's "grave concern[s]" regarding the relationship between Liberatore and Roe, including the fact that Roe was often in Liberatore's room until late at night. (Bambara Memo.) Bishop Timlin was also notified of the incident that occurred late at night at the Seminary involving Liberatore and Roe. (Bohr Dep. 42:8-43:11.) In addition, Bishop Timlin was informed of Poe giving Liberatore a back massage while Liberatore lay on Poe's bed. (Summary at 2.)

With regard to Plaintiff, in January of 2001, Bishop Timlin received the O'Neill Letter informing him that Plaintiff often-times slept overnight in Liberatore's bedroom at the Rectory and that Liberatore had taken Plaintiff on several overnight trips. (O'Neill Letter.)

#### D. Brother Antonio F. Antonucci

Brother Antonio Antonucci, a Benedictine monk who moved to Scranton in the Fall of 2000 to attend the University of Scranton (Brother Antonio Antonucci Dep. 12:7-13:14-15; 14:12-13, Sept. 18, 2006, Doc. 90-2), was also informed of Liberatore's sexual abuse of Plaintiff. (Pl.'s Dep. 65:1-66:19). Specifically, Plaintiff told Brother Antonucci, who worked as a cantor, custodian and cook at Sacred Heart (Doc. 76 ¶ 5), that he slept in Liberatore's bed in the Rectory (Pl.'s Dep. 64:8-11), and that Liberatore would grope Plaintiff in a sexual manner while they wrestled. (Pl.'s Dep. 65:14-66:5.) Rather than encourage Plaintiff to contact the police, or, at the least, tell his mother, Brother Antonucci instructed Plaintiff "to forgive [Liberatore], to keep the issue private, and to not let other people know because it would ruin [Plaintiff's] life and [the lives of] others." (Pl.'s Dep. 66:12-15.)

#### E. Plaintiff's Relationship with Liberatore Ends

In May of 2002, when Plaintiff was seventeen (17) years old, Liberatore touched Plaintiff's genitals while they were in Liberatore's office at the University of Scranton. (Votum of Bishop Joseph Martino, dated July 23, 2004, Doc. 88-2 pp. 2-3, "Votum".) Later that month, Liberatore took Plaintiff on a trip to New York, staying overnight in the same bed at a hotel. (See Pl.'s Dep. 197:23-25; 199:19-23; Doc. 1-1 ¶ 37.) During the night, Liberatore tried to give Plaintiff oral sex, placing his mouth around Plaintiff's penis. (Pl.'s Dep. 199:19-23.) At this point, it became obvious to Plaintiff that Liberatore had homosexual intentions regarding him. (*Id.*) These were the last incidents of sexual abuse perpetrated by Liberatore upon Plaintiff.

#### F. Liberatore's Dismissal from the Clergy and his Criminal Convictions

In July of 2003, Joseph Martino was named Bishop of Scranton, replacing Bishop Timlin. (Bishop Joseph Martino Dep. 10:5, July 13, 2006, Doc. 88-3.) Martino officially became Bishop on October 1, 2003. (Bishop Martino Dep. 11:9.) At some point early in his tenure, Bishop Martino became aware of the rumors and incidents involving Liberatore. (Bishop Martino Dep. 14:5-8.) Upon review of Liberatore's personnel file, Bishop Martino became "alarmed" at the history of inappropriate behavior. (Bishop Martino Dep. 21:12-25.) Bishop Martino was troubled by the incident at the Seminary involving Roe, the back massage involving Peter Poe, and another incident which occurred in December of 2002 while Liberatore was visiting the Catholic University of Louvain in Belgium. (See Bishop Martino Dep. 32:12-33:25.) Bishop Martino discovered

informing him as to what Minora had told him—i.e., that Plaintiff had been sleeping overnight in Liberatore's bedroom at the Rectory and that Liberatore had taken Plaintiff on several overnight trips. (Letter from Monsignor Kevin O'Neill to Bishop Timlin, dated January 29, 2001, Doc. 89-4 p. 34 of 42, "O'Neill Letter".)

Additionally, in late 2000 and early 2001, Ann Marie Zongilla ("Zongilla"), a cook and housekeeper at Sacred Heart (Ann Marie Zongilla Dep. 6:24-25, Jan. 30, 2006, Doc. 89-4), voiced her suspicion that Liberatore was sexually abusing Plaintiff to Susan Doxbeck, the Pastoral Assistant at Sacred Heart, Father Emmanuel, a priest at Sacred Heart, Reverend Edward Williams ("Father Williams"), also a priest at Sacred Heart, and Monsignor John Bendik. (Zongilla Dep. 28:18-21; 36:21-24; 37:6-8; 44:2-9; 60:13-15; Reverend Edward Williams Dep. 35:19-23, Jan. 26, 2006, Doc. 80-2.)

In the fall of 2001 (*see* Williams Dep. 35:19-23), Helen Negvesky ("Negvesky"), an employee for the Diocese, informed Monsignor Bendik of her concerns about the relationship between Liberatore and Plaintiff. (Helen Negvesky Dep. 40:5-21, Nov. 17, 2005, Doc. 80-4.) Negvesky testified that she told Monsignor Bendik that Plaintiff was "around the Rectory more than [she] thought he should be, and the way Father [Liberatore] looked at him, that they went places together, and just that it didn't seem right, . . . [and] it didn't look good." (Negvesky Dep. 41:22-42:3.) Negvesky also told Monsignor Bendik of an incident in which Plaintiff "put his hand down Liberatore's pants." (Negvesky Dep. 42:14-17.) Negvesky also stated that there were empty bottles of alcohol littered around Liberatore's room in the Rectory, and, consequently, she suspected that Liberatore was plying Plaintiff with alcohol. (Negvesky Dep. 43:14-22.)

Also in the fall of 2001, after receiving reports from Negvesky and Zongilla concerning suspicious behavior engaged in by Liberatore and Plaintiff, Father Williams spoke with Monsignor Bendik about the relationship between Liberatore and Plaintiff. (Williams Dep. 35:19-36:25.) Father Williams informed Monsignor Bendik that he thought Liberatore was obsessed with Plaintiff and that Liberatore spent an inordinate amount of time with Plaintiff, including wrestling with Plaintiff and taking Plaintiff on overnight trips. (Williams Dep. 35:19-36:25.) Father Williams also told Monsignor Bendik that the Sacred Heart staff suspected that Liberatore was sexually abusing Plaintiff. (Williams Dep. 37:7-9.)

Monsignor John Bendik acknowledged that he had received calls from Negvesky and Zongilla, each of whom voiced a suspicion that Liberatore was sexually abusing Plaintiff. (Monsignor John Bendik Dep. 38:18-19; 41:1; 41:20; 47:1-2, Doc. 89-1.) Monsignor Bendik also stated that he had spoken with Father Williams, who expressed his own concerns regarding the impropriety of the relationship between Liberatore and Plaintiff. (Bendik Dep. 52:15-17.) After his conversation with Father Williams, Monsignor Bendik contacted Father Kopacz and "told him there was a concern expressed to me from the Parish of Sacred Heart about [the] relationship [between Liberatore and Plaintiff]." (Bendik Dep. 38:18-22.) Specifically, Monsignor Bendik told Father Kopacz that Liberatore had "a relationship with a young man [at Sacred Heart] parish that could be going beyond the barriers, beyond the parameters, and he better check it out." (Bendik Dep. 65:18-20.) Monsignor Bendik also told Father Kopacz that "something had better be done for the sake of [Plaintiff]." (Bendik Dep. 61:11-12.)

Dep. 166:4-7, Oct. 17, 2006, Doc. 89-3 p. 13)—that is, Liberatore undertook to establish an intimate friendship with Plaintiff in preparation to the eventual introduction of sexual activity. Wikipedia, The Free Encyclopedia, "Child Grooming", [http://en.wikipedia.org/wiki/Child\\_grooming](http://en.wikipedia.org/wiki/Child_grooming) (last visited March 15, 2007). During this time, Liberatore took Plaintiff to movies and restaurants (Pl.'s Dep. 153:3-5), and gave him expensive gifts, such as a Movado watch, a cellular phone and fencing equipment. (Minora Dep. 15:4-10; 17:14-16.) The Diocesan Defendants agree that Liberatore's actions with regard to Plaintiff would be characterized as grooming behavior. (Timlin Dep. 36:8-37:9.) Liberatore also provided counseling to Plaintiff and Plaintiff's mother after Plaintiff's father had taken ill and, then, passed away. (Moe Decl. ¶¶ 22-25.) Liberatore became a father figure to Plaintiff. (*Id.*; Pl.'s Dep. 189:20-190:1.)

Eventually, Liberatore began to make sexual overtures toward Plaintiff. (Pl.'s Dep. 166:7-10.) More than two years of sexual abuse ensued, ultimately ending in May of 2002. (*See* Doc. 1-1 ¶ 37.) During this period of time, Plaintiff would routinely sleep in Liberatore's bed in the Rectory at Sacred Heart. (Pl.'s Dep. 169:24-25.) On nights Plaintiff would sleep over, Liberatore would oftentimes "spoon" Plaintiff (Pl.'s Dep. 173:5-10)—that is, Liberatore and Plaintiff would lie in bed on their sides with Liberatore's front to Plaintiff's back, such that they fit together in a manner similar to spoons. Wikipedia, *supra*, "Spooning", <http://en.wikipedia.org/wiki/Spooning>. On many nights, Liberatore would masturbate while Plaintiff was lying with him in bed. (Pl.'s Dep. 173:10-14.)

Plaintiff also related incidents in which Liberatore would grope Plaintiff's genitals (Pl.'s Dep. 173:21-25), wear Plaintiff's clothes (Pl.'s Dep. 173:21-22), and describe sexual techniques and other graphic sexual

behavior (Pl.'s Dep. 179:1-5). Liberatore would also wrestle with Plaintiff, oftentimes groping him in a sexual manner rather than attempt a wrestling maneuver. (Pl.'s Dep. 65:18-66:2.) Liberatore also admitted to Plaintiff that he was a homosexual, and described to Plaintiff sexually explicit acts which he and his homosexual friends would perform. (Pl.'s Dep. 179:12-16.) Liberatore also took Plaintiff on trips to New York, staying overnight in a single hotel room with only one bed. (Pl.'s Dep. 189:5-14.) In addition, Liberatore took Plaintiff to Belgium while he was completing his dissertation. (Pl.'s Dep. 152:12; Minora Dep. 15:6.) While in Belgium, Plaintiff slept in the same bed with Liberatore, who would masturbate in the bed and grope Plaintiff while he tried to sleep. (Pl.'s Dep. 245:7-13.)

### C. The Diocesan Defendants

On several occasions the Diocesan Defendants were informed of some of the behavior involving Liberatore and Plaintiff. In January of 2001, Patricia Minora ("Minora"), a friend of Plaintiff's mother, spoke to two priests with whom she had been long-time friends, Monsignors Kevin O'Neill and Joseph Kelly, about her suspicions concerning the relationship between Liberatore and Plaintiff. (Minora Dep. 21:14-31:8.) Minora told them that Plaintiff slept overnight in the Rectory with Liberatore, and that Liberatore had given Plaintiff extravagant gifts and even taken Plaintiff on overnight trips. (*Id.*) These priests advised Minora to contact Father Kopacz and inform him of her suspicions. (*Id.*) Minora then called Father Kopacz and told him of the relationship between Liberatore and Plaintiff. (*Id.*)

After receiving a phone call from Minora concerning the relationship between Liberatore and Plaintiff, Monsignor Kevin O'Neill wrote a letter to Bishop Timlin

he knew. (Roe Dep. 47:14-48:15; 58:2-7.) Roe then "got pretty emotional" and started to cry. (Roe Dep. 58:7-9.) Roe then tried to leave Liberatore's room, but Liberatore physically blocked his attempt. (Roe Dep. 59:2-4.) Roe then tried to throw Liberatore out of the way. (Roe Dep. 59:9.) Pushing and shoving ensued, and Liberatore ended up falling on the ground. (Roe Dep. 59:10-11.) This altercation awakened many, if not all, of the seminarians and faculty. (Letter from Roe to The Seminarians of St. Pius X Seminary, dated April 5, 1997, Doc. 80-8, "Roe Letter".) One seminarian, Reverend Thomas Muldowney ("Father Muldowney"), even came to Liberatore's room to help calm Roe down. (Roe Dep. 59:12-13.) Father Muldowney stated in his deposition that Roe, appearing very upset, yelled, "I'm a twenty-two (22) year old fucking homosexual." (Reverend Thomas Muldowney Dep. 46:1-4, Dec. 8, 2005, Doc. 88-8 p. 16 of 26.) Father Muldowney stated that several other seminarians heard the commotion and came to the room. (Muldowney Dep. 46:5-11.) Father Muldowney reported the incident to Monsignor Bohr, the Rector at the Seminary, who, in turn, contacted Bishop Timlin to inform him of it. (Monsignor David Bohr Dep. 42:8-43:11, Jan. 3, 2006, Doc. 82-2.) Eventually, Roe was calmed down and then fell asleep in Liberatore's room. (Roe Dep. 60:1-3.) When Roe woke up the next morning, he found that he was in Liberatore's bed with Liberatore in bed next to him. (Roe Dep. 60:4-6.) Liberatore's hand was down Roe's pants and was touching Roe's penis. (Roe Dep. 60:7.) Liberatore then attempted to perform oral sex on Roe. (Roe Dep. 61:2-3.) At that point, the bell for morning prayer rang, and Roe was able to extricate himself from the situation. (Roe Dep. 60:12-18.)

A few days later, Roe told Monsignor Rupert that he had been sleeping in Liberatore's bedroom, in Liberatore's bed.

(Roe Dep. 62:20-63:3.) Roe also informed Monsignor Rupert that Liberatore had made several attempts to have homosexual contact with Roe. (Roe Dep. 63:12-15.) Roe had many conversations with Monsignor Rupert regarding his relationship with Liberatore. (Roe Dep. 63:9-10.)

In March of 1997, Bishop Timlin was informed of an incident involving Liberatore and one of the male seminarians. (Summary of Concerns Regarding Fr. Liberatore, dated March 1997, Doc. 88-8, "Summary".) During a tour of the Seminary, on February 24, 1997, twenty (20) boys from Bishop Hoban High School "passed by the open door to Peter Poe's room in which Fr. Al [Liberatore] was seen lying on Peter's bed and being given a back massage by Peter." (Summary at 2.) Bishop Timlin was also informed of Liberatore's "close relationships" with several of the seminarians, including Michael Moe. (Summary at 1.)

After the altercation between Liberatore and Roe and the back massage with Poe, Bishop Timlin removed Liberatore from the Seminary and reassigned him to St. Clare's Parish in Dunmore, Pennsylvania. (Bohr Dep. 44:8-9; 68:21-69:4; See Roe Letter at 3.) In July of 1997, Liberatore was reassigned again, this time to Sacred Heart, located in Duryea, Pennsylvania. (See Doc. 1-1 ¶ 11.) Shortly thereafter, Liberatore was named the Pastor of Sacred Heart. (See *id.*)

#### B. Liberatore and Plaintiff

Plaintiff was a parishioner and alter server of Sacred Heart. (Moe Decl. ¶ 20.) In 1999, Liberatore, as Pastor of Sacred Heart, hired Plaintiff, who was then fourteen (14) years of age, to work at Sacred Heart as a sacristan. (See Doc. 1-1 ¶ 14; Patricia Minora Dep. 13:1-6, Jan. 26, 2006, Doc. 89-2.) Over the course of the next year, Liberatore "groomed" Plaintiff (Pl.'s

the night of drinking. (Roe Dep. 19:14-22; 27:2-18.)

During the fall of 1996, Liberatore took Roe and another seminarian, Michael Moe ("Moe"), who was then nineteen (19) years of age, to New York City for dinner and drinks. (Roe Dep. 29:19-31:7; Decl. of Michael Moe ¶ 15, Sept. 14, 2006, Doc. 88-8.) The three of them then stayed the night in a hotel suite. (Roe Dep. 30:18-31:1.) While Moe slept on the couch, Liberatore and Roe slept in the lone bed. (Roe Dep. 31:14-16.)

This incident was called to the attention of Bishop Timlin by Father Bambera, who, in November of 1996, wrote a memo to Bishop Timlin expressing "serious concerns . . . regarding questionable behavior of Father Al Liberatore." (Memo from Father Bambera to Bishop Timlin, dated November 27, 1996, Doc. 80-7, "Bambera Memo".) Father Bambera described this incident as one of "grave concern." (*Id.*) Father Bambera also informed Bishop Timlin of the "evolution of [the] relationship" between Liberatore and Roe, which he stated had "become very obvious to the seminarians as well." (*Id.*) While Father Bambera opined that he did not feel there was anything improper about the relationship, he related to Bishop Timlin that Liberatore and Roe spent "an inordinate amount of time" together, that Roe was "often in [Liberatore's] rooms until late at night", and that Roe "often becomes the focus of [Liberatore's] attention at seminary gatherings." (*Id.*) Father Bambera also noted that he had informed others in the Diocese, namely Monsignor David Bohr, Bishop Dougherty, Monsignor John Esseff and Monsignor Dale Rupert, of the relationship between Liberatore and Roe. (*Id.*)

On an evening in the fall of 1996, Liberatore and Roe were watching a movie in Liberatore's room at the Seminary. (Roe Dep. 39:1-22.) Roe was lying on the couch

while Liberatore was lying on the floor near the couch. (*Id.*) After the movie, Liberatore tried to touch Roe in a sexually explicit manner. (Roe Dep. 46:12-18.) Liberatore then began to discuss sexuality—homosexuality in particular—with Roe. (Roe Dep. 43:8-12.) During this conversation, Liberatore encouraged Roe to engage in homosexual relations with him. (Roe Dep. 43:11-44:10.) Liberatore also discussed with Roe the homosexual activity that Liberatore had engaged in with others, including describing in detail what homosexual acts he had performed. (Roe Dep. 44:17-22.) In fact, Liberatore described homosexual acts in which he had engaged while living in the Seminary. (Roe Dep. 44:20-22.)

In the early part of 1997, Liberatore and Roe took a trip to Philadelphia. (Roe Dep. 50:10-13.) After spending the evening at Dave & Buster's, a bar and arcade, Liberatore and Roe stayed the night in a hotel room. (Roe Dep. 53:16-22.) During the night, Liberatore "got out of his bed and got into [Roe's] bed and laid down next to [Roe] and put his arm around [Roe], and at some point during the night [Liberatore] put his hand down [Roe's] pants." (*Id.*)

Roe related other incidents in which Liberatore made unwanted sexual contact with him, including one instance when Roe awakened to find Liberatore's penis in his hand. (Roe Dep. 69:6-7.)

Another incident, occurring during the spring of 1997, began at dinner when Liberatore maneuvered his foot into Roe's crotch while they were at a restaurant. (Roe Dep. 56:20-57:2.) After dinner, Liberatore invited Roe back to spend the night in his bedroom at the Seminary. (Roe Dep. 57:16-18.) While speaking in the sitting room before heading to bed, Liberatore expressed his displeasure in Roe's attraction to a young woman whom

## BACKGROUND

## I. Factual History

## A. Defendant Rev. Albert M. Liberatore and Richard Roe

Defendant Rev. Albert M. Liberatore ("Liberatore") was ordained as a priest in the Diocese by Bishop Timlin on August 26, 1989. (Curriculum Vitae of Rev. Albert M. Liberatore, Doc. 88-2 p. 5, "Liberatore CV".) Following several years of study at the Catholic University of Louvain, in Leuven, Belgium, towards obtaining a Ph.D. in Theology, Liberatore returned to Scranton and, in June of 1995, was assigned by Bishop Timlin to serve as Vocations Director of the Diocese. (Bishop James C. Timlin Dep. 168:2-5, Sept. 22, 2006, Docs. 88-5, 88-6; Liberatore CV at 2.) Liberatore took up residence at St. Pius X Seminary (the "Seminary") in Dalton, Pennsylvania. (Liberatore CV at 2.) Liberatore also taught classes at the University of Scranton as a non-resident faculty member. (Liberatore CV at 2; Richard Roe Dep. 11:18-19, Sept. 5, 2006, Doc. 88-4.)

In the fall of 1995, Liberatore befriended Richard Roe ("Roe"), a twenty-one (21) year old male student in the Sacramental Theology class which he taught at the University of Scranton.<sup>1</sup> (Roe Dep. 11:17-14:18.) Later that semester, Liberatore wrote Roe a letter inquiring as to whether Roe was interested in discerning whether he had a calling for the priesthood. (Roe Dep. 12:1-22.) Roe, in fact, was interested, and, thereafter, he and Liberatore began spending a great deal of time together. (Roe Dep. 15:2-18:22.) Liberatore took Roe out to dinner, purchased gifts for him, and took him to New York City on multiple occasions. (*Id.*)

1. Although they were adults, the Court chooses to refer to Roe and others with whom Liberatore engaged in inappropriate conduct

In the spring of 1996, Liberatore encouraged Roe, then a college senior and near graduation, to pursue a full-time position as the Director of Youth and Young Adult Retreats for the Diocese. (Roe Dep. 20:9-11.) This position would require Roe to have an office at the Seminary, where Liberatore resided. (Roe Dep. 21:10-12.) Roe was hired for the position, thanks in part to Liberatore's recommendation. (Roe Dep. 21:14-18.)

After Roe graduated from the University of Scranton, Liberatore took him to Los Angeles, California, as a graduation gift. (Roe Dep. 23:1-15.) The night before Liberatore and Roe were to fly to Los Angeles they went out to several bars to drink. (Roe Dep. 24:1-6.) On the way home, Liberatore and Roe sat in the back seat of a car driven by one of Liberatore's friends. (Roe Dep. 24:8-17.) During the drive, Liberatore "leaned on [Roe] and put his hand on [Roe's] thigh." (Roe Dep. 24:20-22.) Roe construed this as a sexual overture. (Roe Dep. 27:17.)

Despite the sexual overture on the part of Liberatore, for much of the summer of 1996, Roe stayed in Liberatore's bedroom at the Seminary while he looked for an apartment. (Roe Dep. 29:1-6; 33:1.) After Roe had found an apartment, he often-times stayed overnight in Liberatore's bedroom at the Seminary. (Roe Dep. 32:16-33:1.) This state of affairs was not kept secret from the other seminarians. (Roe Dep. 33:5-8.) Liberatore would also oftentimes fail to return to the Seminary and instead stay overnight at Roe's apartment. (Roe Dep. 46:1-4.) Near the end of the summer of 1996, Liberatore began having discussions with Roe about sexuality, particularly in regard to what had transpired in the car on the way home from

by fictitious names because of the delicate nature of the facts in this case.

raised issues of whether, rather than parties dealing on equal terms, there was either overmastering influence on one side, or weakness, dependence, or trust on the other, whether that unfair advantage was exploited by priest, and whether diocesan defendants failed to provide and maintain a safe environment for victim to participate in church activities. U.S.C.A. Const. Amend. 1.

**24. Constitutional Law** Ⓒ1340(1)  
**Religious Societies** Ⓒ30

Claim of clergy malpractice is professional negligence claim which is barred by the First Amendment and not recognized in Pennsylvania. U.S.C.A. Const. Amend. 1.

**25. Damages** Ⓒ91.5(1)

Under Pennsylvania law, punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others.

**26. Damages** Ⓒ91.5(1)

Under Pennsylvania law, punitive damages claim must be supported by evidence sufficient to establish that (1) defendant had subjective appreciation of risk of harm to which plaintiff was exposed and that (2) he acted or failed to act in conscious disregard of that risk; stated another way, punitive damages will be imposed where defendant knew or had reason to know of facts which create a high degree of risk of physical harm to another, and deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk.

**27. Federal Civil Procedure** Ⓒ2515

Genuine issues of material fact, as to whether diocese, church, bishop, another priest, and benedictine monk were reckless in failing to end conduct with high degree of risk of physical harm, precluded summary judgment for them on punitive damages claim under Pennsylvania law by

parishioner who was sexually abused as teenager by parish priest with history of "inappropriate behavior"; they knew that priest had past involvement with seminarian and that teenage parishioner was routinely sleeping in priest's bedroom and had accompanied priest on several overnight trips, and he had told monk that priest had touched him in a sexual manner.

Daniel T. Brier, Donna A. Walsh, Myers Brier & Kelly, LLP, Scranton, PA, for Plaintiff.

J. Moran, Abrahamsen, Moran & Conaboy, P.C., Stephanie L. Austria, James E. O'Brien, Jr., Kennedy, O'Brien, McCormack & Mulcahey, Christopher J. Osborne, Powell Law, Scranton, PA, Karoline Mehalchick, Joseph A. O'Brien, Oliver, Price & Rhodes, Clarks Summit, PA, for Defendants.

**MEMORANDUM**

CAPUTO, District Judge.

Presently before the Court are Defendants Diocese of Scranton (the "Diocese"), Sacred Heart of Jesus Church ("Sacred Heart"), Bishop James C. Timlin ("Bishop Timlin"), Rev. Joseph R. Kopacz ("Father Kopacz") (collectively the "Diocesan Defendants") and Brother Antonio F. Antonucci's ("Brother Antonucci") (collectively "Defendants") motions for summary judgment (Docs. 75-1, 76) as to Counts I, III, IV, VI, VII and VIII of Plaintiff John Doe's Complaint (Doc. 1). The Diocesan Defendants also seek summary judgment as to Plaintiff's claim for punitive damages. For the reasons stated below, the Court will grant in part and deny in part Defendants' motions. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367(a).

agents, upon premises or with instrumentalities under his control.

**15. Federal Civil Procedure** ⇨2515

Genuine issue of material fact, as to whether diocese, church, bishop, and another priest were negligent or reckless in supervising and retaining priest who sexually abused teenage parishioner, precluded summary judgment for them on those claims.

**16. Religious Societies** ⇨30

Under Pennsylvania law, diocese, church, bishop, and another priest (diocesan defendants) were not negligent or reckless in hiring priest who sexually abused teenage parishioner, as there was no evidence when priest was hired which suggested that he was or would become a child sex predator.

**17. Negligence** ⇨259, 409

Under Pennsylvania law, elements of a negligence per se action arising out of statute creating duty are (1) purpose of the statute must be, at least in part, to protect the interest of the plaintiff, individually, as opposed to the public, (2) the statute must clearly apply to the conduct of the defendant, (3) the defendant must violate the statute, and (4) the violation of the statute must proximately cause the plaintiff injury.

**18. Federal Civil Procedure** ⇨2515

Genuine issues of material fact, as to whether diocese, church, bishop, another priest, and benedictine monk were negligent per se for failing to report their suspicions of child abuse as required by Pennsylvania statute, precluded summary judgment on claim of negligence per se by parishioner who was sexually abused as teenager by parish priest. 23 Pa.C.S.A. § 6311.

**19. Damages** ⇨57.21, 57.22

Under Pennsylvania law, to prove a claim of intentional infliction of emotional

distress, the following elements must be established: (1) the conduct must be extreme and outrageous, (2) it must be intentional or reckless, (3) it must cause emotional distress, and (4) that distress must be severe; "extreme and outrageous conduct" is conduct which is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.

See publication Words and Phrases for other judicial constructions and definitions.

**20. Damages** ⇨192

Under Pennsylvania law, to prevail on intentional infliction of emotional distress cause of action, plaintiff must provide competent medical evidence to prove the existence of emotional distress.

**21. Fraud** ⇨7

Under Pennsylvania law, general test for determining existence of fiduciary relationship is whether it is clear that the parties did not deal on equal terms.

**22. Religious Societies** ⇨30

Under Pennsylvania law as predicted by federal district court in that state, Supreme Court of Pennsylvania would recognize sexually abused parishioner's breach of fiduciary duty claim against abusive priest and diocesan defendants.

**23. Constitutional Law** ⇨1340(4)

**Religious Societies** ⇨30

Recognition of breach of fiduciary duty claim against diocesan defendants, and Pennsylvania priest who had sexually abused teenage parishioner, did not offend the First Amendment, as no inquiry had to be made into church doctrine or other ecclesiastical matters, no professional standard of care had to be set for clergy, and there was no risk of excessive governmental entanglement with religion; claim only

### 8. Labor and Employment ⇨3045, 3046(1)

Under Pennsylvania law, conduct of an employee is considered "within the scope of employment" for purposes of vicarious liability if (1) it is of a kind and nature that the employee is employed to perform, (2) it occurs substantially within the authorized time and space limits, (3) it is actuated, at least in part, by a purpose to serve the employer, and (4) force is intentionally used by the employee against another, the use of force is not unexpected by the employer.

See publication Words and Phrases for other judicial constructions and definitions.

### 9. Labor and Employment ⇨3056(1)

Under Pennsylvania law, assault committed by an employee upon another for personal reasons or in an outrageous manner is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment, for purposes of imposing liability on employer based on principles of respondeat superior.

### 10. Religious Societies ⇨30

Under Pennsylvania law, diocese, church, bishop, and another priest (diocesan defendants) were not vicariously liable for parish priest's sexual molestation of teenage parishioner; molestation was not within the scope or nature of priest's employment, and acts of sexual abuse he perpetrated were outrageous and not actuated by any purpose of serving those defendants.

### 11. Torts ⇨132, 133

Under Pennsylvania law, one is subject to liability for harm to third person arising from the tortious conduct of another if he (a) does a tortious act in concert with the other or pursuant to a common design with him, (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. Restatement (Second) of Torts § 876.

### 12. Torts ⇨133

Factors used to determine whether third person accused of tortious aiding and abetting provided substantial assistance to tortfeasor are (1) nature of the act encouraged, (2) amount of assistance given by defendant, (3) defendant's presence or absence at time of tort, (4) defendant's relation to tortfeasor, and (5) defendant's state of mind; sixth factor, duration of assistance provided, is also considered. Restatement (Second) of Torts § 876.

### 13. Religious Societies ⇨30

Under Pennsylvania law, monk who dissuaded teenager and his mother from reporting priest's sexual abuse of teenager to authorities, instead suggesting that he forgive priest for his misdeeds, did not tortiously aid and abet priest in that abuse; substantial assistance required that putative aider or abettor take some affirmative action which caused tortious actor to conduct himself inappropriately, there was no evidence monk aided priest's efforts, encouraged or incited priest to commit abusive acts, or was present during commission of the abuse, and teenager and his mother were entirely free to ignore monk's advice and contact authorities on their own accord.

### 14. Labor and Employment ⇨3040, 3043

Under Pennsylvania law, employer is subject to liability for harm resulting from his conduct if he is negligent or reckless in the employment of improper persons or instrumentalities in work involving risk of harm to others, in the supervision of the activity, or in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or

- (8) Supreme Court of Pennsylvania would recognize breach of fiduciary duty claim against abusive priest and diocese defendants, and that claim would not offend the First Amendment; and
- (9) fact issues precluded summary judgment on punitive damages claim.
- Motion granted in part and denied in part.

#### 1. Criminal Law $\S$ 1220

In order to be subject to liability under Child Abuse Victims' Rights Act (CAVRA), defendant must be proven by a preponderance of the evidence to have violated at least one of the criminal statutes listed in federal statute providing civil remedy to minor victim who suffers personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography. 18 U.S.C.A. §§ 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2255, 2260, 2421, 2422, 2423.

#### 2. Criminal Law $\S$ 59(5), 1220

One who criminally aids or abets offense against the United States is punishable as though he himself committed the offense; consequently, if one has aided or abetted another in violating one of statutes listed in Child Abuse Victims' Rights Act (CAVRA), then he himself has committed an act indictable under listed statute and is liable to victim under CAVRA. 18 U.S.C.A. §§ 2(a), 2255.

#### 3. Criminal Law $\S$ 59(5)

In order to establish offense of criminal aiding and abetting, it must be shown that (1) the substantive offense has been committed, (2) the defendant knew the offense was being committed, and (3) the defendant acted with the intent to facilitate it. 18 U.S.C.A. § 2(a).

#### 4. Religious Societies $\S$ 30

Diocese, church, bishop, and another priest (diocesan defendants) did not aid and abet parish priest who sexually abused teenage parishioner in violation of Child

Abuse Victims' Rights Act (CAVRA); while that priest committed multiple listed statutory offenses, diocesan defendants did not know the offenses were being committed and act with the intent to facilitate them. 18 U.S.C.A. §§ 2(a), 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2255, 2260, 2421, 2422, 2423.

#### 5. Federal Courts $\S$ 15

District court could exercise supplemental jurisdiction over claims under Pennsylvania law against diocese, church, bishop, and another priest (diocesan defendants) by parishioner who was sexually abused as teenager by priest, as his claims for assault and battery, vicarious liability, aiding and abetting, negligent hiring, supervision and retention, negligence per se, intentional infliction of emotional distress, and breach of fiduciary duty shared a common nucleus of operative fact with his federal Child Abuse Victims' Rights Act (CAVRA) claim. 18 U.S.C.A. § 2255; 28 U.S.C.A. § 1367(a).

#### 6. Federal Courts $\S$ 14.1

Mere tangential overlap of facts is insufficient to constitute a "common nucleus of operative fact" needed for supplemental jurisdiction, but total congruity between the operative facts is unnecessary. 28 U.S.C.A. § 1367(a).

See publication Words and Phrases for other judicial constructions and definitions.

#### 7. Labor and Employment $\S$ 3045, 3055, 3062

Under Pennsylvania law, employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment; in certain circumstances, liability of the employer may also extend to intentional or criminal acts committed by the employee.

355 F.3d at 1336. Therefore, the Court must conclude that one of ordinary skill in the art would not find it obvious to combine Bowring and Hooker in this way.

#### V. Conclusion

The Court has construed the claims of the '903 Patent and finds that Mars' 5900-series coin changers, when placed within Type 1 and Type 2 vending machines do not infringe claims 1, 2, 3, 4, 6, 11, and 12 of the '903 Patent. Alternatively, if the Court had construed the claims in the manner urged by Coinco, all asserted claims would be invalid for lack of an enabling disclosure, claims 1, 2, 3, 4, and 11 would be invalid for anticipation, and claim 6 would be invalid for obviousness.

The forgoing shall constitute the Court's Findings of Fact and Conclusions of Law under Fed.R.Civ.P.52.



John DOE, Plaintiff,

Rev. Albert M. LIBERATORE, Jr., Diocese of Scranton, Sacred Heart of Jesus Church, Bishop James C. Timlin, Rev. Joseph R. Kopacz and Brother Antonio F. Antonucci, Defendants.

Civil Action No. 3:04-CV-2427.

United States District Court,  
M.D. Pennsylvania.

March 19, 2007.

**Background:** Parishioner who had been sexually abused as teenager by parish

Levasseur did not dispute the examiner's findings of obviousness as the claims were originally written, but instead resubmitted his application with additional limitations to the claims. Because the patent examiner of the '903 Patent did not find claim 12 obvious after the changes made by Mr. Levasseur, the

priest with history of "inappropriate behavior" sued abuser as well as diocese, church, bishop, and another priest (diocesan defendants) and Benedictine monk alleging federal claim under Child Abuse Victims' Rights Act (CAVRA) and state law claims of assault and battery, vicarious liability, aiding and abetting, negligent hiring, supervision and retention, negligence per se, intentional infliction of emotional distress, and breach of fiduciary duty. Defendants other than the abuser moved for summary judgment.

**Holdings:** The District Court, Caputo, J., held that:

- (1) diocesan defendants did not aid and abet in federal CAVRA violation;
- (2) court had supplemental jurisdiction over state law claims;
- (3) diocesan defendants were not subject to vicarious liability for the sexual molestation;
- (4) monk did not tortiously aid and abet priest in his sexual abuse;
- (5) diocesan defendants were not negligent in hiring subject priest, but fact issues existed as to whether they were negligent in supervising and retaining him;
- (6) fact issues existed as to whether diocesan defendants and monk were negligent per se for failing to report their suspicions of child abuse as required by Pennsylvania statute;
- (7) defendants were not liable for intentional infliction of emotional distress, absent competent medical evidence to support claim of severe emotional distress;

Court will follow the holding of *Golight* and also not rely upon the examiner's original rejection of the '903 Patent as the sole basis for the finding of a motivation, suggestion, or teaching that must accompany a conclusion of obviousness.

Plaintiff has not provided any evidence that would satisfy any of the predicate statutes of 18 U.S.C. § 2255. Throughout Plaintiff's deposition, she continuously stated that she is was unaware of evidence that could prove the elements of any of the predicate statutes of 18 U.S.C. § 2255. (See Pl's Deposition). Accordingly, the Court finds that there is no genuine issue of material fact and Defendant's Motion for Summary Judgment is **GRANTED**.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

The Court **DIRECTS** the Clerk to send copies of this Memorandum Opinion and Order to counsel of record.

**IT IS SO ORDERED.**



Enkhbayar CHOIMBOL,  
et al, Plaintiff,

FAIRFIELD RESORTS, INC.,  
et al., Defendants.

No. Civ.A. 2:05CV463.

United States District Court,  
E.D. Virginia,  
Norfolk Division.

March 2, 2006.

**Background:** Immigrant workers for laundry, housekeeping, and grounds maintenance brought action against property owner and others to recover for unjust enrichment and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) by failing to pay overtime. Owner moved to dismiss.

**Holdings:** The District Court, Jackson, J., held that:

- (1) workers stated claim of unjust enrichment;
- (2) they adequately pled mail and wire fraud and money laundering as predicate acts;
- (3) they satisfied standing requirement for racketeering claim; and
- (4) they adequately alleged pattern of racketeering activity.

Motion denied.

#### 1. Implied and Constructive Contracts ⊕3

By alleging that alleged contractor took deposits from immigrant workers and property owner treated contractor as an agent, workers stated claim of unjust enrichment against owner; workers detailed actions on the part of owner by which the finder of fact could determine that contractor was in fact an employee or otherwise an agent of owner.

#### 2. Implied and Constructive Contracts ⊕3

Under [REDACTED] Law, to establish a claim for unjust enrichment a plaintiff must allege (1) a benefit conferred on the defendant by the plaintiff; (2) knowledge on the part of the defendant of the conferring of the benefit; and (3) acceptance or retention of the benefit by the defendant in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value.

#### 3. Postal Service ⊕35(2)

##### Telecommunications ⊕1014(2)

A plaintiff claiming mail or wire fraud as a racketeering predicate act must show that: (1) defendant knowingly participated in a scheme to defraud, and (2) the mails or interstate wire facilities were used in furtherance of the scheme; it is not necessary that the use of mails or wire facilities

such as Embassy Suites in Arizona. (Pl's Deposition at 32-35). Additionally, to satisfy the statute of limitations, Plaintiff must prove that these acts occurred in December 1997. Plaintiff has failed to satisfy the elements of 18 U.S.C. § 2241(c).

[3] Title 18, United States Code, Section 2243 provides for punishment for any person who engages in a sexual act with a person who is "under the custodial, supervisory, or disciplinary authority of the person so engaging" in the special maritime and territorial jurisdiction of the United States or in a Federal prison. Defendant was Plaintiff's step-father and could be considered to have "custodial, supervisory, or disciplinary authority" over Plaintiff. However, Plaintiff is still unable to overcome the hurdle that none of the actions occurred in "the special maritime and territorial jurisdiction of the United States or in a Federal Prison." 18 U.S.C. § 2243.

[4] Title 18, United States Code, Section 2251 provides that "any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . ." Defendant was convicted of 18 U.S.C. § 2251 for actions taking place during the summer of 1995 to the spring of 1996. However, to satisfy the statute of limitations for 18 U.S.C. § 2255, Plaintiff must show that violations of 18 U.S.C. § 2251 took place in December 1997.

According to both parties, the videotapes do not provide any dates or time stamps. (Pl's Deposition at 10-13). Additionally, the Plaintiff continuously stated in her deposition, she "has never watched the video" and doesn't know how old she was at the time of the video. (Pl's Deposition at 12-13).

Cales: . . . Between spring of 1996, okay, June 21, 1996, the last day of spring, until December 30, 1997 as you sit here today, do you have any

recollection of Mr. Husband recording either by visual or audio means any of the episodes of sexual activity that you and he engaged in?

*Plaintiff: To my knowledge, no.*

Cales: During that same period of time, from June 21 1996 until December 30, 1997, as you sit here today, do you have any recollection of Mr. Husband creating any video or audio recording of you engaged in sexual activity alone?

*Plaintiff: Not to my knowledge.*

Cales: Same period of time. From June 21, 1996 until December 30, 1997, are you aware of Mr. Husband having made a video or audio recording of you engaged with sexual or in sexual activity with another?

*Plaintiff: Not to my knowledge.*

Cales: During the time of June 21, 1996 to December 30, 1997, are you aware of Mr. Husband making any photograph or other depiction of you engaged in any sort of sexual activity?

*Plaintiff: Not to my knowledge.*

(Pl's Deposition at 31-32). The Court believes that Plaintiff has not provided any evidence that there were videotapes made during December 1997 or that she will be able to determine the exact dates of any sessions on the videotape. Accordingly, Plaintiff will not be able to satisfy the statute of limitations with respect to a violation of 18 U.S.C. § 2251.

[5] Lastly, Title 18, United States Code, Section 2252 provides for punishment when any person ships or receives any visual depiction of sexual exploitation of a minor in interstate commerce. Plaintiff has not provided any evidence to show Defendant shipped or intended to ship the videotape at any time. Therefore, Plaintiff cannot satisfy the elements of 18 U.S.C. § 2252.

nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To defeat summary judgment, the nonmoving party must go beyond the pleadings with affidavits, depositions, interrogatories, or other evidence to show that there is in fact a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment will be granted "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." *Id.* at 322, 106 S.Ct. 2548. While courts must take special care when considering a motion for summary judgment in a discrimination case because motive is often the critical issue, "summary judgment disposition remains appropriate if the [non-movant] cannot prevail as a matter of law." *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir.1996); *Ennis v. Nat. Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d, 55, 62 (4th Cir.1995) (requiring the plaintiff point to "any circumstance surrounding ... discharge that credibly raises an inference of unlawful discrimination").

### III. DISCUSSION

#### A. Timeliness

Defendant argues that Plaintiff's claim should be dismissed because Plaintiff cannot provide any evidence to satisfy 18 U.S.C. § 2252, the only predicate statute applicable to the case. (Mot. Summ. Judg. at 5). Title 18, United States Code, Section 2255 provides for civil relief for any violation of 18 U.S.C. §§ 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421,

2422, or 2423. The Court clearly expressed that Plaintiff could prevail by showing that a violation of any predicate statute of 18 U.S.C. § 2255 occurred on or after December 1997, while she was a minor. *Smith*, 376 F.Supp.2d at 616. Plaintiff has not restricted her relief to only one predicate statute of 18 U.S.C. § 2255.

[1] Plaintiff argues that because she can prove by preponderance of the evidence that a violation of 18 U.S.C. § 2241(a) occurred, she has satisfied the requirements of 18 U.S.C. § 2255. (Reply to Mot. Summ. Judg. at 5). However, 18 U.S.C. § 2241(a) is not a predicate felony of 18 U.S.C. § 2255. See 18 U.S.C. § 2255. Accordingly a violation of 18 U.S.C. § 2241(a) is irrelevant to this analysis.

Plaintiff's counsel indicated, at Plaintiff's deposition, that the case was being pursued for claimed violations of 18 U.S.C. §§ 2241, 2243, 2251, and 2252.<sup>2</sup> (Pl's Deposition at 30). The Court will now analyze each of these predicate statutes.

[2] Title 18, United States Code, Section 2241(c) provides for punishment when a person crosses a state line with intent to engage in a sexual act with someone under twelve or engages in a sexual act with a child between the ages of 12-16 in the special maritime and territorial jurisdiction of the United States or in a Federal Prison. Plaintiff has not provided any evidence that she can satisfy any of the elements of 18 U.S.C. § 2241(c). At best, Plaintiff provides evidence that Defendant took her on a road trip and molested in June of 1996. (Pl's Deposition at 27). However, Plaintiff could not show that it occurred in the special maritime or territorial jurisdiction of the United States. Plaintiff actually believed it occurred in general public hotel

2. Both parties have agreed that the current claim is not being pursued for any violation of

18 U.S.C. §§ 2251A, 2252A, 2260, 2421, 2422, and 2423. (Pl's Deposition at 25).

## I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff brings suit pursuant to Title 18, United States Code, Section 2255 for personal injuries she suffered as a result of Defendant, Jimmy Husband's actions. On April 7, 2003, Defendant pleaded guilty to eight counts of sexual exploitation of a minor, in violation of 18 U.S.C. §§ 2251(a) and (d), and 2256(1) and (2). On several occasions in the summer of 1995 and the spring of 1996, Defendant persuaded Plaintiff to engage in sexually explicit conduct, and did so for the purpose of producing a videotape of such conduct. Defendant was sentenced to eighty-seven months as to each count, all to be served consecutively for a total of 696 months, to be followed by three years of supervised release. Plaintiff now invokes the accompanying civil remedy for these criminal violations, stating that she has sustained and continues to sustain physical and mental damages, humiliation, and embarrassment as a result of Defendant's criminal acts.

Plaintiff first brought suit on December 9, 2003 anonymously alleging the same violations as alleged here. The Defendant moved to dismiss on several grounds including lack of personal and subject matter jurisdiction. On August 10, 2004, this Court granted Defendant's Motion to Dismiss based on Plaintiff's failure to obtain authorization to proceed anonymously. The Court did find that jurisdiction over Defendant was proper, however.

Plaintiff's instant complaint was filed on August 18, 2004. The Defendant filed a motion to dismiss on March 22, 2005. The

Court held a hearing on the Motion to Dismiss on May 5, 2005. The Defendant was represented by a guardian ad litem. On July 7, 2005, the Court denied Defendant's Motion to Dismiss finding that the Court had appropriate jurisdiction over the case and that Plaintiff's claims were not time barred. See *Smith v. Husband*, 376 F.Supp.2d 603 (E.D.Va.2005).

On January 10, 2006, Defendant filed the instant motion for summary judgment on the basis that Plaintiff has failed to provide any evidence that creates a genuine issue of material fact.<sup>1</sup> Plaintiff responded on January 13, 2006. The matter is now ripe for determination.

## II. LEGAL STANDARDS

### A. Summary Judgment

Rule 56(c) provides for summary judgment if the Court, viewing the record as a whole, determines "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." Fed.R.Civ.P. 56(c); *Haulbrook v. Michelin North Amer., Inc.*, 252 F.3d 696, 700 (4th Cir.2001) (citing *McKinney v. Bd of Trustees of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992)) (stating that "summary judgment should be granted only when it is perfectly clear that no issue of material fact exists, and it is not necessary to inquire further into the facts in order to clarify the operation of the law"). In deciding a motion for summary judgment, the Court must view the facts, and inferences to be drawn from the facts, in the light most favorable to the

1. Defendant also requested summary judgment on the grounds that the Court lacks personal and subject matter jurisdiction. Defendant did not make any supportive arguments but instead "adopted the arguments articulated in support of his Motion to Dismiss." (Mot. Summ. Judg. at 7). The Court previously denied that Motion to Dismiss and

found it had appropriate personal and subject matter jurisdiction. (See *Smith v. Husband*, 376 F.Supp.2d 603 (E.D.Va.2005)). Since Defendant has failed to make any new arguments, Defendant's Motion for Summary judgement as to lack of personal and subject matter jurisdiction is DENIED.

- (3) even if stepfather was considered to have custodial, supervisory, or disciplinary authority over victim, she could not establish predicate act, absent evidence that stepfather's actions occurred in the special maritime and territorial jurisdiction of the United States or in a federal prison;
- (4) victim failed to establish that stepfather videotaped her within statute of limitations; and
- (5) absent any evidence showing stepfather shipped or intended to ship videotape, victim could not establish predicate act.

Motion granted.

#### 1. Infants $\S$ 72(1)

Evidence that stepfather knowingly caused victim to engage in a sexual act by force or threat was not evidence of a predicate offense under federal statute providing civil relief to victim of statutes prohibiting child molestation, exploitation, and pornography. 18 U.S.C.A. §§ 2241(a), 2255.

#### 2. Infants $\S$ 72(1)

Evidence that stepfather took victim on a road trip and molested her in general public hotel did not show that stepfather engaged in a sexual act with a child between the ages of 12-16 in the special maritime and territorial jurisdiction of the United States or in a Federal Prison, as was required to establish predicate offense under federal statute providing civil relief to victim of statutes prohibiting child molestation. 18 U.S.C.A. §§ 2241(c), 2255.

#### 3. Infants $\S$ 72(1)

Even if step-father was considered to have custodial, supervisory, or disciplinary authority over victim, she could not establish predicate act under federal statute providing civil relief to victim of statutes prohibiting child molestation, exploitation, and pornography, absent evidence that

stepfather's actions occurred in the special maritime and territorial jurisdiction of the United States or in a federal prison. 18 U.S.C.A. §§ 2243, 2255.

#### 4. Limitation of Actions $\S$ 55(4), 70(1)

Victim of sexual exploitation failed to establish that she filed action against stepfather within six years after he videotaped her or not later than three years after her legal disability, as was required to maintain action under federal statute providing civil relief to victim of statutes prohibiting child pornography. 18 U.S.C.A. §§ 2251, 2255.

#### 5. Commerce $\S$ 80, 82.6

##### Infants $\S$ 72(1)

Absent any evidence showing stepfather shipped or intended to ship videotape of victim of sexual exploitation at any time, victim could not satisfy the elements of statute providing for punishment against any person who shipped or received any visual depiction of sexual exploitation of a minor in interstate commerce, as predicate offense under federal statute providing civil relief to victim of statutes prohibiting child molestation, exploitation, and pornography. 18 U.S.C.A. §§ 2252, 2255.

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Richard Ellis Garriott, Jr., Clarke Dolph Rapaport Hardy & Hull Plc, Norfolk, VA, for Plaintiff.

#### MEMORANDUM OPINION AND ORDER

JACKSON, District Judge.

This matter is before the Court on Defendant, Jimmy R. Husband's Motion for Summary Judgment. For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED**.

the investigation she "was stripped of [her] authority to obtain a warrant for any criminal offense concerning a law enforcement officer." (Pl.'s Resp. at 10). This argument is unsupported by the facts. Plaintiff, by her own admission, acknowledges that the investigation resulted in an administrative procedure clarifying the role of all animal control officers. (Pl. Dep. At 49:24-50:5) (emphasis added). In fact, since the investigation Plaintiff has been recognized for her superior performance on the job. (Gilbert Aff. ¶ 50). As such, it is clear that there was no adverse actions taken against Plaintiff, and thus she fails to meet the second element needed to state a prima facie case for retaliation.

### 3. Causal Connection

[9,10] Even assuming Plaintiff were able to establish an adverse employment action, Plaintiff can not show that the adverse action was causally connected to Plaintiff's protected activity. To establish a causal link between the protected activity and the adverse employment action, the decision-maker must have knowledge of the employee's protected activity. *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 655 (4th Cir.1998). In this case, it is undisputed that Defendant did not initiate the investigation, and that Kaiser, the individual who conducted the investigation, was unaware that Plaintiff filed an internal grievance about the 2003 promotion process. Accordingly, without knowledge of the grievance, there can be no causal link between the protected activity and any adverse employment action. The Court finds that Plaintiff fails to satisfy the third element.

Based on the foregoing, the Court finds that Defendant has shown that no genuine issue of material fact exists on Plaintiff's retaliation claim, and Defendant's Motion for Summary Judgment on Plaintiff's retaliation claim is **GRANTED**.

### IV. CONCLUSION

For all the foregoing reasons, Defendant's Motion for Summary Judgment on Plaintiff's Title VII gender discrimination and retaliation claims is **GRANTED**. The Court **DIRECTS** the Clerk to send a copy of this Order to the parties.

**IT IS SO ORDERED.**



SMITH, Plaintiff,

v.

Jimmy R. HUSBAND, Defendant.

No. 4:04CV101.

United States District Court,  
E.D. [REDACTED],  
Newport News Division.

Feb. 10, 2006.

**Background:** Victim of sexual exploitation sued stepfather, who had pleaded guilty to eight counts of sexual exploitation of a minor, pursuant to federal statute providing civil remedy for personal injuries resulting from such offenses. Stepfather filed motion for summary judgment.

**Holdings:** The District Court, Jackson, J., held that:

- (1) evidence that stepfather knowingly caused victim to engage in a sexual act by force or threat was not evidence of a predicate offense under federal statute providing civil relief to victim of statutes prohibiting child molestation, exploitation, and pornography;
- (2) evidence that stepfather took victim on a road trip and molested her in general public hotel was not evidence of a predicate offense;

procedural error by the Plaintiff. Plaintiff's situation is very similar to that in *Burnett* and other cases where equitable tolling has been found to apply. See *Burnett*, 380 U.S. at 434-35, 85 S.Ct. 1050; *Berry v. Pacific Sportfishing, Inc.*, 372 F.2d 213 (9th Cir.1967) (tolling statute of limitations after case improperly filed in state rather than federal court). But see *Shofer v. Hack*, 970 F.2d 1316, 1319 (4th Cir.1992). In *Burnett*, the original case was improperly filed in state court and dismissed for lack of venue. The plaintiff then re-filed in federal court after the statute of limitations expired, but the court tolled the limitations period given defendant's notice and the mere procedural error. 380 U.S. at 434-35, 85 S.Ct. 1050. In *Shofer v. Hack*, the court declined to toll the statute of limitations finding that the plaintiff had commenced the action in a "clearly inappropriate forum" because the state clearly lacked jurisdiction over ERISA matters. 970 F.2d at 1319. The court in *Shofer* distinguished *Burnett* and *Berry* finding that in those cases, it was not clearly evident that the original courts were improper. 970 F.2d at 1319.

Here, Plaintiff initiated suit anonymously, but there is no evidence that her filing was in clear violation of the court's jurisdiction as was the case in *Shofer*. In addition, Defendant has not even alleged that he would be prejudiced by the equitable tolling. See *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (discussing prejudice to the defendant as a factor the court must consider when determining whether to apply the doctrine of equitable tolling). He had notice of the exact claim in December 2003, before the limitations period had expired. Moreover, Plaintiff's case is exactly the situation contemplated in *Irwin* where the initial complaint had a procedural defect, but was nevertheless filed within the limitations period. 498 U.S. at 96, 111 S.Ct. 453; *Chao v. Va.*

*Dept of Transp.*, 291 F.3d 276 (4th Cir. 2002) (adopting the *Irwin* rule that allows for tolling absent any misconduct by the defendant). Tolling the statute of limitations equitably in this instance does not run counter to the purpose of the statute of limitations, which is to protect defendants by preventing surprises and preserving evidence. *Burnett*, 380 U.S. at 428, 85 S.Ct. 1050. Defendant cannot claim surprise by Plaintiff's action as the renewed case was filed mere days after the initial complaint was dismissed.

The Court therefore finds the doctrine of equitable tolling applicable to Plaintiff's claim because but for a procedural error in the original complaint, this action would have been timely. Plaintiff's argument that a continuing violation occurred therefore applies provided that such a violation occurred within six years of the filing of the December 2003 complaint. Plaintiff can maintain a cause of action provided that she can show by a preponderance of the evidence that any violation of 18 U.S.C. §§ 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 occurred on or after December 1997, while she was a minor. Accordingly, Defendant's Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6) is DENIED.

#### IV. CONCLUSION

Defendant's Motion to Dismiss is DENIED.

The Court DIRECTS the Clerk to send copies of this Memorandum Opinion and Order to counsel of record.

IT IS SO ORDERED.



possession of it constituted a new violation. The interstate transportation of child pornography, and possession thereof is prohibited by Title 18 United States Code, Sections 2252(a)(1) and (a)(4), and 2252A(a)(1) and (a)(5)(B).<sup>4</sup> As the videotape was made in New York by Defendant and seized from Defendant in ■■■■■, Plaintiff could arguably attempt to show that a violation of § 2252A or § 2252 occurred.<sup>5</sup> Nevertheless, even if Plaintiff could establish such a ■■■■■ by a preponderance of the evidence, Plaintiff would not be able to sue for that violation under § 2255. That section provides that only a minor who is a victim of §§ 2252A or 2252 among other statutes can sue for such a violation. Plaintiff represented that Defendant moved to ■■■■■ in October of 2001. Thus, even if he transported the videotape interstate at that time, Plaintiff was no longer a minor when that most recent violation and injury occurred. Thus, she does not meet the criteria for a plaintiff under § 2255 for any violations subsequent to her eighteenth birthday. Plaintiff's suit was brought more than six years after any of Defendant's conduct for which she can pursue a claim under § 2255.

### 3. Equitable Tolling

[28-31] The Court must also consider whether the doctrine of equitable tolling will allow Plaintiff's claim to go forward despite being in violation of the statute of

4. Title 18 U.S.C. § 2252A provides that Any person who (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography; or (5)(B) knowingly possesses any . . . videotape, . . . or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, . . . or that was produced using materials which have been mailed, or shipped or transported in interstate or foreign com-

limitations. The doctrine of equitable tolling applies to all federal statutes of limitation unless Congress specifically provides otherwise. See *Holmberg v. Armbricht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946). To determine whether to apply the doctrine, "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations . . ." *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 427, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). Specifically, federal courts have allowed equitable tolling when the claimant has filed a defective pleading during the statutory period. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); 51 Am.Jur.2d § 174 (2000) ("allowing equitable tolling when the plaintiff actively pursues his or her judicial remedies by filing a defective pleading during the statutory period . . ."). The Court must also consider that application of this equitable doctrine in order to relieve the strict application of a statute of limitations must be "guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Spencer v. Sutton*, 239 F.3d 626, 629 (4th Cir.2001).

As discussed above, Plaintiff commenced suit anonymously in December 2003. At that time, Defendant was served with a complaint alleging the same cause of action, but the case was dismissed due to a

merce by any means, including by computer; shall be punished as provided in subsection (b).

Title 18 U.S.C. § 2252 contains similar language but requires that the producing of a visual depiction involve the use of a minor engaging in sexually explicit conduct.

5. It is uncertain whether the mere transportation of a home video across state lines can meet the definition of interstate commerce under the statute.

of *Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (finding that to meet the continuing violations doctrine "the challenged action must be repeated within the statute of limitations period.").

[26] At the hearing, Plaintiff represented that although the criminal indictment and conviction concerned abusive behavior in 1995 and 1996, the abuse continued until she reached the age of eighteen and moved away from Defendant. These allegations are sufficient under the continuing violation doctrine because Plaintiff claims that Defendant engaged in a continuous course of conduct that injured her upon each instance of abuse. See *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir.1983) (noting that if the violation "does not occur at a single moment but in a series of separate acts and if the same alleged violation was committed at the time of each act, then the limitations period begins anew."). Plaintiff stated that she moved out in January of 1998, one month after her eighteenth birthday. Plaintiff then argues that because she first filed suit against Defendant in December of 2003, the Court should find that this Complaint relates back to that original complaint for the purposes of the statute of limitations. The Plaintiff first brought suit anonymously, but the case was dismissed for her failure to obtain authorization to make such an anonymous filing. See *Doe v. Husband*, No. 2:03cv166, slip op. at 10 (E.D.Va. August 10, 2004).

Under Plaintiff's theory on relating back, provided that she can establish that any violation of the listed sexual exploitation statutes occurred on or later than December 1997, her cause of action would be valid under the continuing violation doctrine. Plaintiff did not provide specific details regarding the abuse in December 1997, but it is foreseeable that she could prove that such a violation occurred in

order to support her claim for damages. The Court must therefore determine if the date of commencement of this action relates back to the original December 2003 filing for the purposes of the statute of limitations.

The Federal Rules of Civil Procedure provide that an amended pleading relate back to the date of the original pleading under three circumstances: "(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted" if certain conditions are met. Fed.R.Civ.P. 15(c). The statute does not contemplate a relation back to a prior dismissed case. Although Plaintiff's cause of action is the same, and the defendant is the same and was aware of the allegations against him, the situation is different from that of an amended complaint relating back to the original complaint in the same action. Plaintiff has cited no law, nor can the Court find any precedent for relating a subsequent complaint back to a prior complaint in a separate, though related, action that was dismissed because of the plaintiff's error. Plaintiff's argument that the date of filing is December 2003 for the purposes of the statute of limitations therefore fails.

[27] Thus, only if Plaintiff can show that Defendant violated any of the listed statutes within six years of the filing of this Complaint in August 2004, is this matter within the statute of limitations. At the hearing, Plaintiff suggested that because the videotape was made in New York, Defendant's interstate transportation of the item to [REDACTED] and continuing

C.1. A statute of limitations is not provided. Yet, the statute specifies that if a defendant has been convicted in a criminal proceeding for the offenses, that defendant cannot deny the essential allegations of the offense in the civil proceeding. 18 U.S.C. § 1964(d). It therefore follows that a criminal conviction is not necessary in order for a victim to pursue a civil remedy under that statute. See *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (finding that private action under § 1964(c) can proceed without a criminal conviction).

[22] These statutes provide further support to the Court's finding that Congress did not intend to provide a civil remedy for only those crimes where the perpetrator has been convicted criminally. Furthermore, although Plaintiff's proposed interpretation of the statute would alleviate her concern regarding the statute of limitations, it would foreclose other victims from pursuing the remedy if the defendant had not already been adjudged guilty. Absent definitive evidence indicating such Congressional intent, this Court is not prepared to interpret the statute in such a restrictive manner. The Court finds that given the legislative history of 18 U.S.C. § 2255, Congressional intent is to make the civil remedies provision available to any victim able to show by a preponderance of the evidence that the defendant committed the acts described in any of the listed offenses.

## 2. Date of first accrual

[23] The Court must next consider Defendant's argument that the statute of limitations has expired given the fact that the statute of limitations cannot run from the 2003 conviction. The statute provides that the claim "shall be barred unless the com-

plaint is filed within six years after the right of action first accrues." 18 U.S.C. § 2255. Under general principles of federal law, a plaintiff's cause of action first accrues when she possesses sufficient facts about the harm done to her that a reasonable inquiry would reveal the cause of action. *Nasim v. Warden, Md. House of Corrections*, 64 F.3d 951, 955 (4th Cir. 1995); *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir.2002) (a cause of action accrues "when it is sufficiently ripe that one can maintain suit on it."). Defendant argues that Plaintiff was aware of her cause of action at the time the abuse first occurred. With regards to the videotaping, he argues that she was aware of that cause of action when the tape was originally made in 1995/1996, and thus the statute of limitations expired six years after those dates.

[24, 25] The Plaintiff does not dispute the statement that she was aware of the videotaping at the time it was made. Yet, Plaintiff argues that since the statute does not require a criminal conviction as a prerequisite, she may rely on other dates of abuse to support her claim. Essentially, Plaintiff's argument is that the statute of limitations runs from the first accrual of the right of action based on any violation of the listed exploitation statutes. Moreover, Plaintiff argues that a new violation occurred each time Defendant abused her in violation of the listed statutes. Plaintiff relies on the continuing violation doctrine, which provides that each of a defendant's acts that cause injury to a plaintiff renews the cause of action for purposes of the statute of limitations. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (applying continuing violation doctrine to anti-trust cases); *Nat'l Adver. Co. v. City*

and related offenses were, however, added to the definition of racketeering activities under Chapter 96. See 132 Cong. Rec. S17295-02

(daily ed. Oct. 18, 1986) (statement of Senator Grassley).

applied only to minors. The analysis of that proposed draft indicated that a violation under § 2255 was to be proven only by a preponderance of the evidence. Furthermore, the earlier draft discussed in June 1986 provided that a victim could sue "from an act indictable" under the statute. This language again indicates that it was not Congress's intent that a conviction under the other sexual exploitation statutes be a prerequisite to the initiation of a civil suit for damages. The Court finds that legislative history indicates that 18 U.S.C. § 2255 was intended to provide a remedy for victims without requiring a criminal conviction.

The Court's holding is further bolstered by a consideration of other federal statutes providing for civil remedies to victims of criminal acts. Courts considering the proper interpretation of a statute often rely on the use of a particular term in other statutes. See *Rowan Cos. v. United States*, 452 U.S. 247, 101 S.Ct. 2288, 68 L.Ed.2d 814 (1981); *United States v. Duke Energy Corp.*, 411 F.3d 539, 547 (4th Cir. 2005). Title 18 U.S.C. § 1595 provides a civil remedy for the victims of forced labor, the trafficking of individuals with respect to peonage and the sex trafficking of children. That statute specifies that the civil action is stayed during the pendency of the criminal action, but does not specify a statute of limitations for the civil action. Although it is a relatively new law, and there are seemingly no cases invoking the statute, the language itself considers the possibility of a civil action being filed prior to the criminal action. See 18 U.S.C. § 1595(b)(1). Similarly, 18 U.S.C. § 2520 provides a civil remedy for the victim of an illegal wire tap. The relevant statute of

in 1998 to provide for damages in the event of a violation of the other sexual exploitation laws as well as §§ 2251 and 2252, and to allow treble damages.

limitations for that offense is "two years after the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2520(e). Several cases considering that statute have been dismissed based on the statute of limitations with no discussion of a criminal conviction as a prerequisite. See *Andes v. Knox*, 905 F.2d 188 (8th Cir.1990) (victim's claim barred by the statute of limitations though she did not know who had actually done the wiretapping until he pleaded guilty); *Brown v. American Broadcasting Co., Inc.*, 704 F.2d 1296 (4th Cir.1983) (issue of when the victim knew or should have known of the violation was one for the jury, and failed to grant summary judgment on the statute of limitations issue.)

[21] Other federal statutes have explicitly provided that a criminal conviction is not necessary for a victim to pursue civil remedies. The Violence Against Women Act, as enacted in 1994, provided for civil damages to the victim of a crime of violence motivated by gender, and assigned civil liability "whether or not [the criminal acts] have actually resulted in criminal charges, prosecution, or conviction . . ." 42 U.S.C. § 13981(c). See also, 42 U.S.C. § 13981(e)(2). Although, the statute was later held unconstitutional because it was not authorized by the Commerce Clause, *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the intent of the legislature was nevertheless clear that victims would have a right of recovery regardless of a criminal conviction. Finally, 18 U.S.C. § 1964(c), the statute discussed above, provides for a civil remedy for the victim of a racketeering operation.<sup>3</sup> See discussion *supra* Part III.

3. After discussion, the civil remedy provision for sexual exploitation was not included within Chapter 96, the RICO statutes, but instead was merely added to Chapter 110 along with the other provisions regarding the sexual exploitation of children. Child pornography

of this statute does not provide any context as to the meaning of violation. The Court must therefore rely upon other methods of statutory interpretation.

The Court must next look to the legislative history of the statute to interpret Congressional motives regarding its enactment. Title 18, United States Code, Section 2255 was enacted as part of The Child Abuse Victims' Rights Act of 1986 on October 18, 1986. Pub.L. No. 99-500, 100 Stat. 1783-39 (1986). It expanded the scope of the Protection of Children Against Sexual Exploitation Act of 1977, Pub.L. 95-225, 92 Stat. 7 (1978), to provide a civil remedy for personal injuries suffered by victims of child sexual exploitation. In the early drafts of the legislation, the civil remedy was discussed as an amendment to the civil Racketeer Influenced and Corrupt Organizations ("RICO") statute that already provided for remedies to crime victims. The intent in proposing to include the statute within RICO was to allow for increased criminal penalties as well as expanded investigatory powers to arrest perpetrators of the offenses. 132 Cong. Rec. H3362-02 (daily ed. June 5, 1986) (statement of Rep. Young). Initially, the representative introducing the bill proposed that "[i]f an offender is convicted under Civil RICO, the Government or the victim is given the right to sue the offender in order to receive treble damages and attorney fees." 132 Cong. Rec. E290-02 (Feb. 5, 1986) (statement of Rep. Siljander). In later debates, a bill was proposed still within the RICO statute that stated: "[a]ny person injured(1) personally by reason of a violation of section 1962 of this chapter if such injury results from an act indictable

under sections 2251 and 2252 of this title (relating to sexual exploitation of children) . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." See 132 Cong. Rec. E1983-01 (daily ed. June 5, 1986) (statement of Rep. Siljander during extension of remarks).

A later draft of the proposed legislation was entitled the Pornography Victims Protection Act. H.R. 5509. It contained a provision whereby a federal district court could order a perpetrator to divest himself of any profits received by his illegal activities, or to order the dissolution of any business enterprise associated with the activity. 132 Cong. Rec. E3242-02 (daily ed. September 23, 1986) (statement of Rep. Green during extension of remarks). In his remarks, Representative Green presented an analysis of the text of the bill conducted by the American Law Division of Congressional Research Services. The analysis discussed the civil remedies and provided that "for purposes of this section, violations are to be determined by a preponderance of the evidence. Successful plaintiffs are entitled to recover the cost of the suit, including a reasonable attorney's fee, from those found guilty of a violation." *Id.* Although that analysis was not binding upon Congress in enacting the statute, no subsequent drafts of the legislation contained language contrary to the interpretation provided.

The Court finds this discussion of the proposed bill persuasive. The language analyzed by the American Law Division was practically identical<sup>2</sup> to the final draft except that the final bill specified that it

2. The proposed draft provided that "[a]ny victim of a violation of §§ 2251 or 2252 who suffers physical injury, emotional distress, or property damage as a result of such violation may sue to recover damages in any appropri-

ate federal district court, and shall recover triple damages if a violation is found." 134 Cong. Rec. S372-01 (daily ed. February 1, 1988) (statement of Sen. Grassley). The final draft of the statute was subsequently amended

Plaintiff's complaint was filed after the six year statute of limitations expired. The relevant question is when the right of action first accrued. Plaintiff argues that her cause of action did not accrue until Defendant was convicted under the criminal statutes; specifically, that a conviction is a pre-requisite to filing suit under 18 U.S.C. § 2255, and therefore the statute of limitations did not begin to run until July 2003, when Defendant was convicted under 18 U.S.C. §§ 2251(a),(d) and 2256(1) and (2). Defendant argues that the right of action accrued at the time of the criminal acts for which he was convicted, which he states was at the latest 1996.

#### 1. Criminal conviction as a prerequisite to a civil suit

[17-20] Neither the Supreme Court nor the United States Court of Appeals for the Fourth Circuit has provided any guidance regarding this particular statute. Thus, in order to determine this question of first impression, the Court must use standard methods for interpreting a statute. "When interpreting a statute, [a court's] inquiry begins with the text." *United States v. Simmons*, 247 F.3d 118, 122 (4th Cir.2001); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). The Court must look first to the plain meaning of the words, and scrutinize the statute's "language, structure, and purpose." *United States v. Horton*, 321 F.3d 476, 479 (4th Cir.2003) (internal quotations omitted); *North Dakota v. United States*, 460 U.S. 300, 312-13, 103 S.Ct. 1095, 1102-03, 75 L.Ed.2d 77 (1983). Words in the text of the statute should be accorded "their ordinary meaning." *United States v. Sheek*, 990 F.2d 150, 152 (4th Cir.1993). If the language of the statute is plain, the Court ends the inquiry; if the language is ambiguous, the Court must consider other factors such as legislative history.

The plain text of 18 U.S.C. § 2255 reads:

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 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.

The statute does not specify whether a conviction under one of the listed statutes is necessary for a civil suit, or whether any violation of the listed statutes is sufficient. If a plaintiff must merely show that a violation has occurred, the Court would apply the preponderance of the evidence standard to find that such a violation had occurred, rather than the reasonable doubt standard employed for a criminal conviction. In some contexts, the term "violation" has been held not to imply a criminal conviction. *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) ("violation" refers only to a failure to adhere to legal requirements."). In *Sedima*, however, the Court relied upon the term's "indisputable meaning elsewhere in the statute." *Id.* The instant statute does not provide a clear indication of the term's meaning elsewhere in the statute; nor do related statutes contain the words "chargeable", "indictable", or "punishable" as did the statute at issue in *Sedima*. Though illustrative, the findings in *Sedima* cannot apply to every use of the term "violation" throughout the criminal code. Accordingly, the Court must consider the term in the context of the statute presented here. The language

and general jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). If the contacts with the forum are rare or limited but directly related to the cause of action, then the court's specific jurisdiction can be used to subject a defendant to suit in that court. *Id.* If a nonresident engages in some purposeful activity in the forum state, even a single act may constitute sufficient contact for a court to exercise personal jurisdiction. *Darden v. Heck's, Inc.*, 459 F.Supp. 956 (W.D.Va.1978). On the other hand, if defendant's activities within the forum state are substantial and pervasive, the court may exercise general jurisdiction over the defendant. *Helicopteros*, 466 U.S. at 415-16, 104 S.Ct. 1868.

At the hearing, the parties presented information regarding where both Plaintiff and Defendant resided during the period in question. Plaintiff was born on December 30, 1979, and during most of the relevant times she lived with her mother and stepfather, the Defendant. Plaintiff resided with Defendant in various states including ■, Kentucky, and Tennessee prior to 1993. Plaintiff alleges that Defendant's exploitation of her occurred in all of these residences. From 1993 until 1998, Plaintiff resided in New York with Defendant. It was during this time that Defendant made a videotape of himself engaging in illicit acts with the Plaintiff, a minor. In January 1998, Plaintiff reached the age of eighteen and moved out of the residence to another residence in New York. In 1999, she moved to ■ and has maintained residence in the state since. In October 2001, Defendant moved to ■. The parties were unsure

about the particulars of Defendant's arrest, but it seems that he was arrested in February 2002 in Newport News on state charges related to the sexual abuse. He was held in the Newport News jail, and later released. Defendant then apparently moved to Kansas, where he was arrested on the federal charges.

[16] On a motion to dismiss, the Court must construe Plaintiff's allegations as true.<sup>1</sup> Plaintiff maintains that Defendant's tortious behavior took place in ■ as well as New York and other states. Defendant did not appear at the hearing and has not contested that specific allegation in any of the pleadings he has submitted. He argues only that the conduct for which he was indicted occurred in New York. Plaintiff also maintains that at the time he was arrested in ■ Defendant possessed the illicit videotape, which caused a continuing tortious injury to her. Defendant's residence in the Commonwealth at the time some of the illegal conduct occurred is sufficient for the Court to exercise jurisdiction over the Defendant. Moreover, he was a resident at the time he possessed the illegally made videotape, and purposely availed himself of the privileges of conducting activities in ■. These facts are sufficient to establish Defendant's minimum contacts with the state for the purposes of due process. The Court finds jurisdiction over Defendant to be proper, and his Motion to Dismiss pursuant to Rule 12(b)(2) is DENIED.

### C. Statute of Limitations

The Defendant alleges that all of the relevant conduct occurred from the summer of 1995 to the Spring of 1996, and thus

1. At the hearing, although Plaintiff was present, she did not testify under oath as to the facts regarding her residence and Defendant's residence in the state. In addition, Defendant was not present to testify himself, or offer contrasting evidence for his guardian ad litem

to argue. Thus, since the Court merely heard counsel's arguments and did not take evidence regarding the issue of personal jurisdiction, the hearing is not considered an evidentiary hearing for the purposes of a rule 12(b)(2) motion.

### B. Personal Jurisdiction

[7] The Defendant argues that the Court lacks personal jurisdiction because he is not a resident of the Commonwealth, and all of the alleged acts took place in New York. The Plaintiff argues that Defendant did maintain a permanent residence in [REDACTED] for some of the relevant time period, that he was arrested on state charges related to this offense in [REDACTED], and that Defendant possessed and the police confiscated the illicit videotape in Virginia. Plaintiff also argues that some of the acts of exploitation did occur in Virginia, though not the specific acts for which Defendant was convicted criminally. The Defendant raised this same motion on Plaintiff's claim brought anonymously in 2003. At that time, the Court determined that jurisdiction over Defendant was proper because he committed a tortious act within the Commonwealth. See *Doe v. Husband*, No. 03cv166, slip op. at 10 (E.D.Va. August 10, 2004). At the hearing, the parties provided more details regarding both Plaintiff's and Defendant's former residence within the Commonwealth that further support the Court's decision in the former case.

[8, 9] The Virginia long arm statute allows the Court to exercise specific jurisdiction over a cause of action arising from a defendant's "[c]ausing tortious injury by an act or omission in this Commonwealth; [c]ausing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." Va.Code § 2.01-328.1 (2000). More generally, if a defendant transacts any business, or has an interest in, uses, or possesses real property in the Commonwealth, a [REDACTED] court can exercise personal jurisdiction over such defen-

dant. Va.Code § 2.01-328.1. [REDACTED] courts consistently hold that the Virginia long-arm statute, [REDACTED] Code § 8.01-328.1, extends personal jurisdiction to the limits of due process. *Peanut Corp. of Am. v. Hollywood Brands, Inc.*, 696 F.2d 311, 313 (4th Cir.1982); *Danville Plywood Corp. v. Plain & Fancy Kitchens, Inc.*, 218 Va. 533, 238 S.E.2d 800 (1977); *John G. Kolbe, Inc. v. Chromodern Chair Co.*, 211 Va. 736, 180 S.E.2d 664, 667 (1971). Thus, there exists only one issue to be determined; that is, whether Defendant's activities in [REDACTED] are such that in personam jurisdiction may be exercised without violating due process. See, e.g., *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 657 n. 2 (4th Cir.1989); *Superfos Invs. Ltd. v. FirstMiss*, 774 F.Supp. 393, 397 (E.D.Va.1991).

[10-12] The due process clause of the United States Constitution requires that a defendant have "minimum contacts" with the forum state such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Minimum contacts exist when the "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court here." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). In order for a court's jurisdiction to be proper, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Danville Plywood*, 238 S.E.2d at 802 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

[13-15] The United States Supreme Court ("Supreme Court") has developed a distinction between specific jurisdiction

miss based on Plaintiff's failure to obtain authorization to proceed anonymously. The Court did find that jurisdiction over Defendant was proper, however.

Plaintiff's instant complaint was filed on August 18, 2004. The Defendant filed a motion to dismiss on March 22, 2005 on the bases that Plaintiff's claims are barred by the statute of limitations, that the Court lacks personal jurisdiction over him, and that the Court lacks subject matter jurisdiction on the basis of a faulty criminal indictment. The Court held a hearing on the Motion to Dismiss on May 5, 2005. The Defendant was represented by a guardian ad litem.

## II. LEGAL STANDARDS

### A. Subject Matter Jurisdiction

[1-3] Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of actions on the basis of lack of subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction may attack the complaint on its face or the truth of the underlying jurisdictional allegations contained in the complaint. The nonmovant has the burden to allege and prove such jurisdiction. *Lane v. David P. Jacobson & Co., Ltd.*, 880 F.Supp. 1091, 1094 (E.D.Va. 1995) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982)). "A court asked to dismiss for lack of jurisdiction may resolve factual disputes to determine the proper disposition of the motion." *Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir.1986).

### B. Personal Jurisdiction

[4, 5] The Plaintiff has the burden of establishing personal jurisdiction by a preponderance of the evidence. *Combs v. Bakker*, 886 F.2d 673 (4th Cir.1989). A two-prong test governs an analysis of in personam jurisdiction. The first prong requires that the activity of the defendant fall within the reach of ■'s long arm

statute. The second prong requires that the defendant have minimum contacts with the state so that the exercise of jurisdiction does not offend basic notions of due process. *Wolf ■ Richmond County Hosp. Auth.*, 745 F.2d 904, 909 (4th Cir.1984), *cert. denied*, 474 U.S. 826, 106 S.Ct. 83, 88 L.Ed.2d 68 (1985).

## III. DISCUSSION

### A. Subject Matter Jurisdiction

[6] The Defendant first alleges that the Court lacks subject matter jurisdiction. Plaintiff sues invoking a federal statute, 18 U.S.C. § 2255, that specifically authorizes a civil suit for the victim of any of several statutes prohibiting child molestation, exploitation, and pornography. Accordingly, the Court has subject matter jurisdiction based upon the existence of a federal question. Defendant argues, however, that fatal flaws in his criminal indictment violate his rights under the Fifth Amendment and the Federal Rules of Criminal Procedure. He contends that he was denied the right to a grand jury proceeding, and that the indictment does not state all of the essential elements of the offense charged. Yet, even assuming the indictment and criminal conviction were invalid, Plaintiff can maintain a case based solely on the facts of the abuse. As discussed below, the criminal conviction is not necessary for Defendant to face civil liability for the underlying acts. See discussion *infra* Part III.C.1. The validity of Defendant's criminal conviction is therefore irrelevant to the question of whether the Court has subject matter jurisdiction. In addition, Defendant also fails to provide any specifics regarding his claim that the guilty plea or indictment were invalid. Defendant's motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is DENIED.

minor victim who suffered personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography, given that victim's original action, filed within limitations period, was dismissed due to procedural defect and that stepfather could not claim surprise since renewed case was filed mere days after initial complaint was dismissed, and therefore action was timely to the extent that victim could show that requisite violation occurred within six years of filing of original complaint. 18 U.S.C.A. § 2255.

**29. Limitation of Actions** ⇔104.5

Doctrine of equitable tolling applies to all federal statutes of limitation, unless Congress specifically provides otherwise.

**30. Limitation of Actions** ⇔104.5

In determining whether to apply the doctrine of equitable tolling, basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations.

**31. Limitation of Actions** ⇔104.5

Application of equitable tolling doctrine to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.

West Codenotes

**Recognized as Unconstitutional**

Violent Crime Control and Law Enforcement Act of 1994, § 40302, 42 U.S.C.A. § 13981.

Richard E. Garriott, Jr., Esquire, Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C., Norfolk, VA, Counsel for Plaintiff.

James Cales, Jr., Esquire, Furniss, Rashkind & Saunders, P.C., Norfolk, VA, Counsel for Defendant.

**MEMORANDUM OPINION  
AND ORDER**

JACKSON, District Judge.

This matter is before the Court on Defendant, Jimmy R. Husband's Motion to Dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and violation of the statute of limitations. For the reasons stated below, Defendant's Motion to Dismiss is **DENIED**.

**I. FACTUAL AND PROCEDURAL HISTORY**

Plaintiff brings suit pursuant to Title 18, United States Code, Section 2255 for personal injuries she suffered as a result of Defendant, Jimmy Husband's actions. Plaintiff alleges that Husband was convicted of sexual exploitation, in violation of 18 U.S.C. §§ 2251(a) and (d), and 2256(1) and (2). Defendant pleaded guilty to eight counts of sexual exploitation of a minor on April 7, 2003. On several occasions in the summer of 1995 and the spring of 1996, Defendant persuaded Plaintiff to engage in sexually explicit conduct, and did so for the purpose of producing a videotape of such conduct. Defendant was sentenced to eighty-seven months as to each count, all to be served consecutively for a total of 696 months, to be followed by three years of supervised release. Plaintiff now invokes the accompanying civil remedy for these criminal violations, stating that she has sustained and continues to sustain physical and mental damages, humiliation, and embarrassment as a result of Defendant's criminal acts.

Plaintiff first brought suit on December 9, 2003 anonymously alleging the same violations as alleged here. The Defendant moved to dismiss on several grounds including lack of personal and subject matter jurisdiction. On August 10, 2004, this Court granted Defendant's Motion to Dis-

**20. Statutes** ¶188, 217.4

If the language of a statute being interpreted is plain, court ends the inquiry, but if the language is ambiguous, court must consider other factors, such as legislative history.

**21. Racketeer Influenced and Corrupt Organizations** ¶57

Criminal conviction is not necessary for a victim to pursue a civil remedy under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1964(c, d).

**22. Infants** ¶72(2)

Conviction is not prerequisite to initiation of action for damages under federal statute providing civil remedy to minor victim who suffers personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography; rather, statute makes civil remedies available to any victim able to show by a preponderance of the evidence that defendant committed acts described in any of listed offenses. 18 U.S.C.A. § 2255.

**23. Limitation of Actions** ¶95(1)

Under general principles of federal law, plaintiff's cause of action first accrues when she possesses sufficient facts about the harm done to her that a reasonable inquiry would reveal the cause of action.

**24. Limitation of Actions** ¶58(1)

"Continuing violation doctrine" provides that each of defendant's acts that cause injury to plaintiff renews the cause of action for purposes of the statute of limitations.

See publication Words and Phrases for other judicial constructions and definitions.

**25. Limitation of Actions** ¶58(1)

Allegations that stepfather's sexual exploitation of victim continued after time period underlying stepfather's criminal conviction, until victim reached age of 18 and moved away from stepfather, sup-

ported application of continuing violation doctrine to victim's claims under federal statute providing civil remedy to minor victim who suffered personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography, given victim's assertion that stepfather engaged in continuous course of conduct that injured her upon each instance of abuse. 18 U.S.C.A. § 2255.

**26. Limitation of Actions** ¶58(1)

Action in which victim sued stepfather pursuant to statute providing civil remedy to minor victim who suffered personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography did not relate back to victim's prior action under statute, which was dismissed due to victim's failure to obtain authorization to file action anonymously, so as to make action timely under continuing violation doctrine. 18 U.S.C.A. § 2255; Fed. Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

**27. Limitation of Actions** ¶58(1)

Victim was no longer minor at the time stepfather allegedly transported between states videotape which he had made of himself engaging in illicit acts with victim while she was minor, and thus, even if such conduct violated statutes prohibiting interstate transportation of child pornography and possession thereof, victim could not sue based on such violation under federal statute providing civil remedy to minors who suffered personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography, and therefore such act did not establish violation within six-year statute of limitations. 18 U.S.C.A. §§ 2252(a)(1, 4), 2252A(a)(1), (a)(5)(B), 2255.

**28. Limitation of Actions** ¶104.5

Doctrine of equitable tolling applied to victim's action against stepfather under federal statute providing civil remedy to

during which he sexually exploited victim and allegations that, at the time stepfather was arrested in [REDACTED], he possessed videotape which he had made of himself engaging in illicit acts with victim while she was a minor established personal jurisdiction over stepfather, pursuant to [REDACTED] long-arm statute and due process principles, in victim's action under federal statute to recover for personal injuries caused by stepfather's sexual exploitation. U.S.C.A. Const.Amend. 14; 18 U.S.C.A. § 2255; Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.; West's V.C.A. § 8.01-328.1.

#### 8. Courts ⇨12(2.1, 2.15)

If defendant transacts any business or has an interest in, uses, or possesses real property in the Commonwealth of [REDACTED], [REDACTED] court can exercise personal jurisdiction over such defendant under Virginia's long-arm statute. West's V.C.A. § 8.01-328.1.

#### 9. Courts ⇨12(2.1)

[REDACTED] long-arm statute extends personal jurisdiction to the limits of due process. U.S.C.A. Const.Amend. 14; West's [REDACTED] § 8.01-328.1.

#### 10. Constitutional Law ⇨305(5)

Due process clause of the United States Constitution requires, for exercise of personal jurisdiction over defendant, that defendant have minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

#### 11. Federal Courts ⇨76.5

Minimum contacts exist to support personal jurisdiction when defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. U.S.C.A. Const.Amend. 14.

#### 12. Constitutional Law ⇨305(5)

For court's personal jurisdiction to be proper under due process principles, it is essential that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. U.S.C.A. Const. Amend. 14.

#### 13. Federal Courts ⇨76.10

If defendant's contacts with the forum state are rare or limited but directly related to the cause of action, court's specific jurisdiction can be used to subject defendant to suit in that court.

#### 14. Federal Courts ⇨76.10

If a nonresident engages in some purposeful activity in the forum state, even a single act may constitute sufficient contact for a court to exercise personal jurisdiction over nonresident.

#### 15. Federal Courts ⇨76.5

If defendant's activities within the forum state are substantial and pervasive, court may exercise general jurisdiction over defendant.

#### 16. Federal Courts ⇨96

On a motion to dismiss for lack of personal jurisdiction, court must construe plaintiff's allegations as true. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

#### 17. Statutes ⇨188

When interpreting a statute, court's inquiry begins with the statute's text.

#### 18. Statutes ⇨184, 188

Court must look first to the plain meaning of the words of a statute being construed and scrutinize the statute's language, structure, and purpose.

#### 19. Statutes ⇨188

Words in the text of a statute should be accorded their ordinary meaning.

Victoria SMITH, Plaintiff,  
■  
Jimmy R. HUSBAND, Defendant.  
No. CIV.A. 4:04CV101.

United States District Court,  
E.D. Virginia,  
Newport News Division.

July 7, 2005.

**Background:** Victim of sexual exploitation sued stepfather, who had pleaded guilty to eight counts of sexual exploitation of a minor, pursuant to federal statute providing civil remedy for personal injuries resulting from such offenses. Stepfather moved to dismiss.

**Holdings:** The District Court, Jackson, J., held that:

- (1) subject matter jurisdiction existed over action;
- (2) personal jurisdiction existed over stepfather;
- (3) as a matter of first impression, conviction is not prerequisite to civil action under federal statute providing remedy to minor victim who suffers personal injury due to violation of statutes prohibiting child molestation, exploitation, and pornography;
- (4) action did not relate back to victim's prior, anonymously filed, lawsuit;
- (5) victim did not establish violation occurring within six-year statute of limitations; and
- (6) doctrine of equitable tolling applied to action.

Motion denied.

**1. Federal Courts** ⇨29.1, 32

Motion to dismiss for lack of subject matter jurisdiction may attack the complaint on its face or the truth of the underlying jurisdictional allegations contained in the complaint. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**2. Federal Courts** ⇨34

On motion to dismiss for lack of subject matter jurisdiction, nonmovant has the burden to allege and prove such jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**3. Federal Courts** ⇨30

Court asked to dismiss for lack of subject matter jurisdiction may resolve factual disputes to determine the proper disposition of the motion. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**4. Federal Courts** ⇨96

Plaintiff has the burden of establishing personal jurisdiction by a preponderance of the evidence.

**5. Constitutional Law** ⇨305(5)

**Federal Courts** ⇨76.1

A two-prong test governs an analysis of in personam jurisdiction: the first prong requires that defendant's activity fall within the reach of state's long-arm statute, while the second prong requires that defendant have minimum contacts with the state so that the exercise of jurisdiction does not offend basic notions of due process. U.S.C.A. Const.Amend. 14.

**6. Infants** ⇨73

District court had subject matter jurisdiction over action brought under federal statute specifically authorizing civil suit by victim of statutes prohibiting child molestation, exploitation, and pornography, notwithstanding alleged flaws in perpetrator's criminal indictment and conviction; conviction was not necessary for perpetrator to face civil liability for underlying acts. 18 U.S.C.A. § 2255; Fed.Rules Civ.Proc. Rule 12(b)(1), 28 U.S.C.A.

**7. Constitutional Law** ⇨305(5)

**Courts** ⇨15

Uncontested allegation that stepfather resided in ■ during portion of time

district court found, giving the plaintiffs the benefit of every possible inference, no reasonable juror could find that the depiction of Jane Doe (4) converted the depiction of the two other Does into a lascivious exhibition of their genitalia or pubic areas.

[9] The district court similarly analyzed the studio photos under the criteria supplied by governing law. As the court concluded, all but three of the photos failed to meet the threshold requirement of exhibiting the genital or pubic areas of a minor. In the three that conceivably met the threshold, not only is there no naked display of the forbidden zones, no such zone serves as the focal point. The setting is not sexually suggestive—a white paper background typical of studio photography. The poses are not unnatural; the attire is of the kind used in artistic or theatrical shows. There is no hint of sexual coyness or readiness on the part of the plaintiffs to have sex. There is no incitement to lust. No reasonable juror could find any of the studio photos to qualify as criminal under the Protection of Children Against Sexual Exploitation Act.

[10] Finally, the district court considered two kinds of photos not in the record, but referenced in affidavits by the Does. According to Jane Doe (1) she was photographed by Lesoine wearing only tuxedo pants and a jacket. As the district court observed, this photo would not meet the statutory threshold. Jane Doe (1) also swore that she was photographed in “a very thin, see-through piece of material” at all times with the front of her body including the pubic area before the camera. Jane Doe (1) had never seen negatives or prints of these pictures. Jane Doe (2) swore to a similar affidavit. The district court followed *Villard* in holding that a lascivious exhibition could be established by testimony, *Villard*, 885 F.2d at 126, but

also took note of *Villard*'s admonition that detail was important and that imagination was no substitute for facts. The district court held that it could not determine from the affidavit whether the pubic areas were visible under the transparent material; it was necessary to know the lighting, the pose, and the focus of the camera to determine whether there was an exhibition. Lacking this information, the district court correctly held that no reasonable juror could find the referenced photos to be a lascivious exhibition.

As an author who was himself once the victim of overzealous censorship has written: genuine pornography “is almost always under-world; it doesn't come into the open . . . [y]ou can recognize it by the insult it offers, invariably, to sex, and to the human spirit.” D.H. [REDACTED], *Phoenix*, 175 (1936). The photographs at issue in this case offer no insult to sex or to the human spirit. No jury could find them to fall within the federal statute's definition of sexually explicit conduct.

As the case against Lesoine fails, a fortiori the case against her husband, a bystander, fails.

For the reasons stated, the judgment of the district court is AFFIRMED.



Yvette BRADLEY, Appellant

v.

The UNITED STATES of America;  
United States Customs Service; Raymond W. Kelly, Commissioner of the United States Customs Service, in his official capacity; Samuel H. Banks,

"1 or more books, magazines, periodicals, films, video tapes, or other matter" showing the prohibited conduct and produced by using materials transported in interstate commerce. Photos fall within the term "film," and we assume they were produced by materials shipped in interstate commerce. Under this section, the plaintiffs could prevail if they showed the other requirements of the statutory offense were met.

[5] *Sexually Explicit Conduct.* Every part of the human person from hair on the head to toes on the feet emits erotic signals depending on the customs and conventions and clothing of the country and the complex psychological makeup of the observer. Congress has chosen to criminalize only photos of the genitalia or pubic areas and of these parts only when they are the subject of "lascivious exhibition." Only then do they qualify as "sexually explicit conduct." 18 U.S.C. § 2256(2)(E).

[6] Case law has given an expansive reading to "exhibition" so that it includes not only the naked or visible showing of the forbidden areas but making them focal. *United States v. Knox*, 32 F.3d 733, 751 (3d Cir.1994). As the district court found, seven of the shower photos at the beach and one taken at the beach do not show these areas or make them a focal point, so there is no need to address the question of lasciviousness. These photos fall short of the threshold set by the statute.

[7] In ten other beach photos the pubic area of one plaintiff is slightly discernable. Reviewing these photos, the district court applied the criteria set by *United States v. Dost*, 636 F.Supp. 828, 832 (S.D.Cal.1986), which we have held should be used as a guide to whether an exhibition of genitalia or the pubic area is lascivious. *United States v. Villard*, 885 F.2d 117, 122 (3d Cir.1989). The first factor under *Dost* is

whether a forbidden area is the focus. The second is whether the setting of the depiction is sexually suggestive or generally associated with sexual activity. The third is whether the pose or attire of the minor is unnatural or inappropriate given her age. The fourth is whether the child is naked. The fifth is whether the child shows sexual coyness or willingness to engage in sex. The sixth is whether the photo is intended or designed to elicit a sexual response in the viewer. *Dost*, 636 F.Supp. at 832. As the district court observed, the list is not exhaustive and no single factor is dispositive. *Knox*, 32 F.3d at 746, n. 10, but more than one factor must be present to prove lasciviousness. *Villard*, 885 F.2d at 122.

[8] Applying these criteria, the district court found that, apart from the girls in the shower being unclothed, no reasonable juror could find a *Dost* factor present. The pubic areas were far from being focal. An open shower near a beach was not a place associated with sexual activity. It was natural to be nude when washing off from the sand. Neither *Doe* showed any sexual coyness. The final *Dost* factor simply puts again the underlying question: Is the exhibition lascivious? *Villard*, 885 F.2d at 125. The district court found that no lascivious design or intent could reasonably be found. Reviewing these findings and viewing the photos, we agree that no reasonable juror could find the beach photos lascivious—"that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.1987).

Plaintiffs repeat a not very convincing argument that the pose of another girl, Jane Doe (4), in one beach photo shows sexual coyness because her right knee is bent, her right heel is slightly raised, and she holds one finger to her mouth. As the

tigation into the photos. The District Attorney searched the Chamberlin home and Lesoine's studio and seized many of the photos and determined that they did not justify prosecution.

#### PROCEEDINGS

On December 10, 1997, the parents of Jane Doe (1) and Jane Doe (2) filed their amended complaint in this case in the Middle District of Pennsylvania.

The mother of a third girl, Jane Doe (3), also joined in this complaint. Jane Doe (3) was an adult at the time the complaint was filed and subsequently filed a motion stating that the lawsuit had been filed without her knowledge and consent and noting that the photos in which she appeared had been taken at her request. The court granted her motion for dismissal. Her mother then amended her complaint to allege that she, the mother, was entitled to damages under 18 U.S.C. § 2255(a). Holding that § 2255(a) gave no right of action to a parent, the district court granted summary judgment against her on both her federal and state claims. That judgment is not appealed.

On April 12, 2001, after a meticulous consideration of the evidence, the district court granted summary judgment on the federal claims of the parents of Does (1) and (2) and declined to exercise supplementary jurisdiction over their state claims.

The parents of the two Does appeal.

#### ANALYSIS

*Jurisdiction.* The plaintiffs' suit is predicated on a violation of certain sections of Chapter 110, Sexual Exploitation And Other Abuse Of Children, 18 U.S.C. §§ 2251-2260. Beginning in 1978, Congress has acted to bar the channels of interstate commerce to the makers and purveyors of

child pornography. *United States v. Rodia*, 194 F.3d 465, 477-75 (3d Cir.1999), and to do so has constitutionally extended the ban to the possessors of intrastate pornography. *Id.* at 477.

[1, 2] Before we can apply this formidable federal engine, we still must determine if we have jurisdiction under it. Jurisdiction cannot be conferred on us by the will or the waiver of the parties. *Delaware v. Van Arsdall*, 475 U.S. 673, 692, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). If jurisdiction does not exist, we are bound to dismiss the suit however long it has been maintained or how far it has traveled. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

[3] Federal jurisdiction here was pleaded in terms of transport of the photos in interstate commerce, which we find unproved. Lesoine knew that the Martha's Vineyard photos would be brought home by her to Pennsylvania, but such transportation, by whatever means it took place, was not transportation in commerce. As to the studio photos, there is no evidence to show that Lesoine knew they would be transported anywhere. However, interrogatories tendered to Lesoine by the plaintiffs and answered by her established that she had used Nikon cameras and Forte and T-max film, and no doubt she used chemicals. We assume, as did this court in *United States v. Rodia*, 194 F.3d at 473, that these materials had traveled in interstate commerce. They, therefore, supply the needed jurisdictional hook, even though, as *Rodia* held, they would be insufficient to sustain the constitutionality of the statute, *id.*, which, on other grounds, we upheld in that case.

[4] *The Defendant's Possession.* The plaintiffs also rely on § 2252(a)(4)(B), which criminalizes knowing possession of

and minors did not display any sexual coyness. 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(E).

#### 9. Infants ⇄13

Nude or partially-clothed photographs of minors, taken in photographer's studio, were not lascivious and therefore did not qualify as sexually explicit conduct in violation of statute prohibiting knowing possession of films showing sexual exploitation of minors; all but three of photos did not exhibit minors' genital or pubic areas at all, and for those three such forbidden zones were not nakedly displayed and did not serve as focal point, setting was not sexually suggestive, poses were not unnatural, and there was no hint of sexual coyness. 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(E).

#### 10. Infants ⇄13

Photographs of minors, taken in photographer's studio, which were not in the record but were referenced in affidavits of minors, could not be determined to be a lascivious exhibition, as would constitute sexually explicit conduct in violation of statute prohibiting knowing possession of films showing sexual exploitation of minors; affidavits did not allow district court to determine whether the pubic areas of the minors were visible under the transparent material. 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(E).

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Vincent S. Cimini (Argued), Foley, Cagnetti, Comerford & Cimini, Scranton, PA, Counsel for Appellants.

Michael D. Collins (Argued), Stroudsburg, PA, Counsel for Appellees.

1. Honorable John T. Noonan, Jr., Circuit Judge of the United States Court of Appeals

Before: SCIRICA, RENDELL and NOONAN,<sup>1</sup> Circuit Judges.

#### OPINION OF THE COURT

NOONAN, Circuit Judge.

This civil suit was brought for damages for violation of 18 U.S.C. §§ 2251-2259 (the Protection of Children Against Sexual Exploitation Act), as well as violation of state law. The district judge gave summary judgment for the defendants on the federal claim and declined to exercise jurisdiction over the state claims. We affirm the judgment of the district court.

#### FACTS

Kathryn Lesoine (Lesoine) is the wife of William Lawson Chamberlin; his daughter is Lesoine's stepdaughter. In August 1995, Lesoine took photographs of her stepdaughter and three of her stepdaughter's friends at the beach near the Chamberlins' home on Martha's Vineyard. One friend was Jane Doe (1), then 15, and another was Jane Doe (2), then 16. In March 1996, she took photos of the same two plaintiffs in her studio at the Chamberlin home in Waverly, Pennsylvania. In the beach photographs the girls were photographed naked, taking a shower. In the studio photographs they were partially clothed.

Another amateur photographer saw the photos Lesoine had taken and informed the mother of Jane Doe (2), who in turn informed her own husband and the parents of Jane Doe (1), of the photos' existence. The parents were upset that the photos had been taken without their consent. They asked the Lackawanna County District Attorney to conduct a criminal inves-

for the Ninth Circuit, sitting by designation.

Sexual Exploitation Act (PCASEA) against photographer who took pictures of the minors. The United States District Court for the Middle District of Pennsylvania, 139 F.Supp.2d 637, A. Richard Caputo, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Noonan, Circuit Judge, sitting by designation, held that (1) Court had jurisdiction, and (2) photographs were not lascivious.

Affirmed.

**1. Federal Courts ⇌31**

Jurisdiction cannot be conferred on the court by the will or the waiver of the parties.

**2. Federal Courts ⇌30**

If jurisdiction does not exist, court is bound to dismiss the suit however long it has been maintained or how far it has traveled.

**3. Infants ⇌13**

Court of Appeals had jurisdiction to hear appeal of case, brought against photographer who took nude and semi-nude pictures of minors, under Protection of Children Against Sexual Exploitation Act (PCASEA); photographer used cameras, film, and chemicals that had traveled in interstate commerce. 18 U.S.C.A. §§ 2251-2259.

**4. Infants ⇌13**

Nude and semi-nude photographs of minors taken by photographer fell within term "film" for purposes of statute criminalizing knowing possession of films and other materials, shipped in interstate commerce, showing sexual exploitation of minors. 18 U.S.C.A. § 2252(a)(4)(B).

**5. Infants ⇌13**

Photographs which qualify as "sexually explicit conduct," as would violate stat-

ute prohibiting depictions of sexual exploitation of minors, are those which depict minors' genitalia or pubic areas, and only when they are the subject of "lascivious exhibition." 18 U.S.C.A. § 2256(2)(E).

**6. Infants ⇌13**

Term "exhibition," for purposes of statute criminalizing photographs depicting sexual exploitation of minors, by depiction of minors' genitalia or pubic areas, and making them the subject of lascivious exhibition, includes not only the naked or visible showing of the forbidden areas but making them focal. 18 U.S.C.A. § 2256(2)(E).

See publication Words and Phrases for other judicial constructions and definitions.

**7. Infants ⇌13**

Criteria used in determining whether an exhibition of a minor's genitalia or pubic area is lascivious include whether a forbidden area is the focus, whether setting of depiction is sexually suggestive or generally associated with sexual activity, whether pose or attire of minor is unnatural or inappropriate given her age, whether the child is naked, whether child shows sexual coyness or willingness to engage in sex, and whether photo is intended or designed to elicit a sexual response in the viewer; list is not exhaustive and no single factor is dispositive.

**8. Infants ⇌13**

Nude photographs of minors, taken in a shower on a beach, were not lascivious and therefore did not qualify as sexually explicit conduct, as required for violation of statute prohibiting knowing possession of films and other materials, shipped in interstate commerce, showing sexual exploitation of minors; photos depicted natural activity of washing off sand, pubic areas of minors were not focal, shower was not a place associated with sexual activity,

and allow the Court to set the sentence. Ebel was insisting on a range that would result in a 36 month sentence. He eventually accepted a plea with a range of 37 to 46 months on the understanding that he would receive a 37 month sentence. He was induced to do nothing beyond what he had already stated he would agree to do.

Moreover, if we examine the types of plea agreements provided for in Rule 11, we can see that the District Judge's commitment to the 37 month sentence in effect transformed the plea agreement here to a Rule 11(e)(1)(C) plea. Under Rule 11(e)(1)(C), the defendant and the government agree to a specific sentence. When an 11(e)(1)(C) plea is negotiated, it is binding on the District Court if the court accepts it. Under Rule 11(e)(3), the court then is *required* to inform the defendant that the court will impose the specific, negotiated sentence. Because that commitment is clearly not considered coercive, see *United States v. Andrade-Larrios*, 39 F.3d 986, 990 (9th Cir.1994), we conclude that it is similarly not coercive under the circumstances here where the length of the sentence was one that the prosecution and the defendant had already found to be acceptable.

Other parts of the record support our conclusion that Ebel was not coerced. From arraignment through sentencing, Ebel displayed a clear understanding of the plea and sentencing process. He stated in his plea colloquy that no threats or promises "whatsoever" had been made to induce him to plead guilty. The District Judge also mentioned several times that Rule 11 limited the judge's involvement and admonished Ebel that, "I'm not offering you the 37 months. I'm telling you I'll go along with it, if that's what you people agree to."

The timing of Ebel's request to withdraw his guilty plea also indicated that he

changed his mind after seeing two co-defendants acquitted. Moreover, he did not mention coercion by the District Court as a reason to withdraw his plea until after his initial request to withdraw his plea had been denied.

We are therefore convinced from our examination of the record as a whole that Ebel's guilty plea was voluntary and was not coerced by the District Court. His rights were not substantially affected by the remarks of the judge. Therefore, under Rule 11(h), any error is harmless.

#### Conclusion

For the reasons stated above, we will affirm the judgment of the District Court.



John DOE # 1; Kelly Doe # 1, Parents of Jane Doe # 1, Individually and as Guardians on behalf of Minor Jane Doe # 1; John Doe # 2; Kelly Doe # 2, Parents of Jane Doe # 2, as Guardians on behalf of Minor Jane Doe # 2

William Lawson CHAMBERLIN, Jr.; Kathryn Lawson Chamberlin, his wife John Doe # 1, Kelly Doe # 1, John Doe # 2, and Kelly Doe # 2, Appellants

No. 01-2170.

United States Court of Appeals,  
Third Circuit.

Argued April 22, 2002.

Filed: June 19, 2002.

Minors and their parents brought action under Protection of Children Against

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venue "in any appropriate United States District Court." 18 U.S.C. § 2255(a). As is explained above, in the unique circumstances of these related lawsuits, and in light of this Court's experience with the earlier lawsuit filed by plaintiff's counsel against defendant White, this is not an appropriate forum.

### CONCLUSION

For the foregoing reasons, and on the condition that defendant comply with his executed and filed stipulation, these related actions are DISMISSED without prejudice based on forum non conveniens. The dismissal will be stayed for 30 days to give plaintiffs the opportunity to file suit in Mexico.

**IT IS SO ORDERED.**

N.D.Cal., 2007.

Martinez ■ White

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and prejudicial to him; he will be unable to attend a trial here and will have difficulty assisting in his defense. While he may not be able to attend trial in Mexico, he will be better able to assist in his defense because he will at least be in the same country. Moreover, this Court has no control over the Mexican jails and therefore cannot do anything to ensure that White has access to his attorneys or that plaintiffs are able to take discovery of White.

*All of the evidence* is in Mexico. And defendant has offered evidence that if the case is tried here defendant may not be able to obtain key evidence in Mexico because this Court has no subpoena power in Mexico. Discovery will all take place in Mexico and involve parties and witnesses that, for the most part, will not speak English. Independent medical exams will have to be conducted in Mexico.

Every trial witness will have to be flown to San Francisco from Mexico, assuming the United States government will even allow such witnesses into the United States. The Court is faced with the specter of many, if not most, witnesses, including defendant, having to testify by video or videotaped deposition. Plaintiffs have made no effort to show that any witnesses or even parties will actually be present in this Court for trial.

As for the sixth factor, the enforceability of the judgment, White has stipulated that he will satisfy any judgment entered against him in Mexico "pursuant to any lawsuit filed against him there by any of the plaintiffs herein for any of the same claims alleged in the Complaint filed herein on February 23, 2006."

The final factor is "other practical considerations." The Court has already heard one lawsuit brought by the same lawyer, similar foreign plaintiffs, and against the same defendant under the same laws. During that lawsuit plaintiffs continuously made allegations about conduct in Mexico that this Court has no ability to evaluate or address. The Court expects that the same types of allegations will be again made if these lawsuits are allowed to continue here. This concern, coupled with the undisputed fact that most witnesses and parties will be unavailable to travel to the United States, and that nearly all

documents and testimony will have to be translated, makes this Court an especially inconvenient forum. In sum, the private interest factors all weigh in favor of dismissal.

## 2. The public interest factors

Courts must also consider the following public interest factors:

- (1) local interest of lawsuit;
- (2) the court's familiarity with governing law;
- (3) the burden on local courts and juries;
- (4) congestion in the court; and
- \*6 (5) the costs of resolving a dispute unrelated to this forum.

*Lueck*, 236 F.3d at 1147.

These factors all weigh in favor of dismissing this action in favor of an action in Mexico. None of the parties currently resides in this District or even this country; while White once resided here, he had not lived here for several years since before these lawsuits were filed. While the people of this forum have an interest in ensuring that one of their former residents compensates the foreign victims of his travel to Mexico, an interest that is demonstrated by the enactment of section 2423 and the criminal indictment in this District against defendant White, the interest in Mexico regarding this case is extremely high. *See Piper Aircraft*, 454 U.S. at 260, 102 S.Ct. 252 (considering foreign state's interest in subject matter of the lawsuit and stating that "there is a local interest in having localized controversies decided at home"). Mexico extradited White from Thailand to Mexico to stand trial on criminal charges that are directly related to the allegations of this lawsuit, and White was convicted of at least some of those charges. All of the plaintiffs are from Mexico and currently reside there and defendant himself is currently incarcerated in Mexico. In the related case of *Roe v. White*, the parties have submitted newspaper articles that demonstrate that the Mexican public has shown great interest in the accusations against White.

The only factor that weighs in favor of hearing this lawsuit in this forum is that Congress provided for

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Plaintiffs do not point to anything else in the statute that would suggest that Congress intended to reject the application of the doctrine to suits under section 2255 that are brought for violations of section 2423. Indeed, the language of section 2255(a)-"may sue in any appropriate United States District Court"-suggests that Congress specifically delegated to the courts the decision whether a particular venue is appropriate.

### B. Adequate Alternative Forum

\*4 [4][5][6] "The defendant bears the burden of proving the existence of an adequate alternative forum." *Lueck*, 236 F.3d at 1143 (quoting *Cheng & Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.1983)). "[A]n alternative forum ordinarily exists when the defendant is amenable to service of process in the foreign forum." *Id.* A foreign country is not an inadequate forum merely because its laws offer[ ] the plaintiff a lesser remedy than he could expect to receive in the United States court system. *Id.* at 1143-45.

[7] White offers evidence that these plaintiffs have an alternative remedy in Mexico, the country where they reside, where he currently resides, and where the incidents at issue occurred. First, he offers evidence that he is subject to service of process in Mexico. Moreover, he has stipulated to accept service of any summons and complaint these plaintiffs file against him in Mexico arising from the same claims asserted in this lawsuit. Second, he offers evidence in the form of a declaration from White's Mexican criminal defense attorney that plaintiffs have a right to file an action for "moral damages" under the Civil Code of Jalisco. Plaintiffs do not dispute this evidence or otherwise contend that they do not have an adequate alternative forum in Mexico.

### C. The Balance of Public and Private Factors

[8][9] Ordinarily there is a strong presumption in favor of a plaintiff's choice of forum "which may be overcome only when the private and public interest factors clearly point towards trial in the alternative

forum." *Piper Aircraft v. Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). That presumption applies with less force, however, when the plaintiffs are foreign. *Id.* at 255-56. The Supreme Court has reasoned that when a plaintiff chooses his home forum, "it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Id.* at 256.

#### 1. Private interest factors

The Court must consider the following private interest factors:

- (1) the residence of the parties and witnesses;
- (2) the forum's convenience to the litigants;
- (3) access to physical evidence and other sources of proof;
- (4) whether unwilling witnesses can be compelled to testify;
- (5) the cost of bringing witnesses to trial;
- (6) the enforceability of the judgment; and
- (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Lueck*, 236 F.3d at 1145.

The first five factors all weigh in favor of proceeding in Mexico. *All of the parties*, including White, are located in Mexico. While White has or at least had, a residence in this District, he has not resided here for several years and it appears will not reside here for at least several more as he is currently serving a sentence in Mexico. Although White is under indictment in this District, there is no evidence in the record from which the Court could find that White will be returned to the United States in the near future, or even ever.

\*5 A Mexican forum is more convenient for all of the parties. There is no evidence in the record that any of the plaintiffs has ever been to the United States or even would be permitted to travel to the United States for trial. White's incarceration in Mexico makes trial here extremely inconvenient

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Congress was well aware of the doctrine of forum non conveniens and therefore it must have intended for the doctrine not to apply. No court appears to have addressed this question; indeed, the Court has only located one section 2255 case, and that case involved parties in the United States.

The Court is not persuaded by plaintiffs' argument. The argument assumes that if the Court were to hold that the doctrine of forum non conveniens applies, it will *always* operate to dismiss the claims of the foreign plaintiffs. This assumption is wrong. First, the doctrine applies only if the defendant shows that an alternative forum exists. Second, the court must then balance private and public factors. In many cases, that balance may lead to leaving the case in the United States, especially because in most cases the defendant or defendants will be located in the district where the action is brought. For example, in *Roe v. White*, 03-4035 CRB, a case before this Court involving the same defendant (and the same counsel), the Court denied the forum non conveniens motion because two defendants were located in the United States and the moving defendant (the defendant here), was not residing in the country where he was arguing the case should be brought (Mexico); rather, he was in Thailand resisting extradition to Mexico.

Moreover, plaintiffs' argument that Congress was aware of the doctrine of forum non conveniens when it added section 2423 to the private right of action cuts the other way; if Congress had intended to abrogate the doctrine for such cases it could have said so. Plaintiffs point to nothing in the statute or the legislative history that suggests that Congress had such an intent. They also do not point to a single case in which a court has held that the doctrine does not apply as a matter of law to certain types of cases.

\*3 While plaintiffs do not cite any case in which a court has held that the doctrine does not apply, the Court's own research reveals that the Ninth Circuit has held that the doctrine of forum non conveniens is inapplicable to Jones Act and FELA cases because each Act contains a mandatory venue provision. See *Creative Technology, Ltd. v. Aztech System Pte, Ltd.*, 61 F.3d 696, 700 (9th Cir.1995).

The inapplicability of forum non conveniens in these cases "is based on a privilege of venue, granted by the legislative body which created this right of action." *Id.* at 700. The "court must ascertain if there is anything about the specific federal statute which indicates that Congress implicitly spoke to, and rejected, the application of *forum non conveniens* doctrine to a suit thereunder." *Id.* (internal quotation marks and citation omitted). The Jones Act provides that jurisdiction "shall be under the court of the district in which the defendant employers resides or in which his principal office is located." *Id.* at 700 n. 1 (citing 46 U.S.C.App. § 688(a) (1988)). FELA also has a specific venue provision: an action may be brought in "the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.* at 700 n. 2 (citing 45 U.S.C. § 56 (1988)).

No such specific venue provision is present here. The Act merely provides a cause of action for damages in "any appropriate United States District Court." 18 U.S.C. § 2255(a). It does not mandate venue in any particular district, as do the Jones Act and FELA. In *Creative Technology*, for example, the plaintiff argued that forum non conveniens does not apply to actions under the Copyright Act because the Act provides for exclusive jurisdiction in the federal courts over the state courts. The Ninth Circuit held that forum non conveniens still applied because the Copyright Act merely states that the United States district courts shall have exclusive jurisdiction, it does not mandate venue in any particular district. 61 F.3d at 700.

The district court reached a similar conclusion in *In re Air Crash Over Taiwan Straits on May 25, 2002*, 331 F.Supp.2d 1176 (C.D.Cal.2004). The foreign plaintiffs brought suit in the United States under the Death on the High Seas Act ("DOHSA"). DOHSA, unlike the Jones Act and FELA, does not contain a mandatory venue provision; instead it merely provides that a plaintiff may maintain a suit for damages in the district courts. The court held that it could therefore apply the doctrine of forum non conveniens. *Id.* at 1207.

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and residents of Mexico and defendant Thomas White, a United States citizen, is currently incarcerated in Mexico after a conviction for conduct similar to the allegations in these lawsuits. Now pending before the Court is defendant's motion to dismiss the claims against him in these related actions on the ground of *forum non conveniens*. After carefully considering the parties' papers, and defendant's unobjected to November 2006 stipulation, the Court concludes that this action should be brought in Mexico, where all the relevant conduct occurred and where all the parties and witnesses reside.

### BACKGROUND

Plaintiffs allege that defendant traveled to Mexico, where he owned a home, and engaged in unlawful sexual activity with minors. Plaintiffs, who contend that they are victims of defendant's sexual conduct, are Mexican citizens and reside in Mexico; indeed, there is no evidence they have ever visited the United States. While defendant is a United States citizen who used to reside in this District, he has not been in the United States for some time. For a couple of years he was incarcerated in Thailand while he challenged Mexico's attempts to extradite him to Mexico to face criminal charges arising from his alleged sexual conduct with Mexican children. He was subsequently extradited to Mexico, tried, convicted, and sentenced. He is currently incarcerated in a Mexican jail.

### DISCUSSION

[1][2] "A district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir.2001). In deciding whether to dismiss for *forum non conveniens*, the court must consider "(1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favor dismissal." *Id.*

#### A. The Application of Forum Non Conveniens

[3] The initial issue is one of first impression: does the doctrine of *forum non conveniens* apply to cases brought under 18 U.S.C. section 2255? Plaintiffs argue that because Congress gave foreign victims of child abuse in foreign countries a right of action in a United States federal court, this Court, as a matter of law, cannot dismiss for *forum non conveniens*.

18 U.S.C. section 2423(b) makes it a federal crime for a person to **travel** in interstate commerce, to **travel** into the United States, or for a United States citizen or permanent resident to **travel** in foreign commerce, for the **purpose** of engaging in illicit sexual conduct. Section 2423(c) makes it a federal crime for a United States citizen or permanent resident to **travel** in foreign commerce and engage in illicit sexual conduct; there is no requirement that the illicit sex be the **purpose** of the **travel**. Section (c) was enacted in 2003. Pub.L. No. 108-21, Section 105.

\*2 18 U.S.C. section 2255 gives victims of sexual conduct who are minors a private right of action. Specifically minor victims of violations of sections 2241(e), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 who suffer a personal injury as a result of the violation may sue in "any appropriate United States District Court." 18 U.S.C. § 2255(a). Thus, the private right of action applies primarily to actions brought by victims who reside in the United States. Only section 2423, and then only a part of section 2423, gives a private right of action to foreign minors injured in foreign countries; the remaining actions address injuries sustained in the United States or its territories. Congress added section 2423 to section 2255 in 1998. Pub.L. No. 105-14 (1998).

Plaintiffs argue that because Congress created a private right of action for foreign victims of illicit sexual conduct in foreign countries, the equitable doctrine of *forum non conveniens* does not apply. They contend that if it were to apply, no foreign victims would ever be able to pursue their claims in federal court because, by definition, the bulk, if not all of the witnesses and evidence, will be in the foreign country where the abuse occurred. They argue further that when Congress added section 2423 to section 2255's private right of action

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170Bk45 k. Forum Non Conveniens. Most Cited Cases

For purposes of the doctrine of forum non conveniens, the defendant bears the burden of proving the existence of an adequate alternative forum.

**[5] Federal Courts 170B ⇌45**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk45 k. Forum Non Conveniens. Most Cited Cases

For purposes of the doctrine of forum non conveniens, an alternative forum ordinarily exists when the defendant is amenable to service of process in the foreign forum.

**[6] Federal Courts 170B ⇌45**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk45 k. Forum Non Conveniens. Most Cited Cases

For purposes of the doctrine of forum non conveniens, a foreign country is not an inadequate forum merely because its laws offer the plaintiff a lesser remedy than he could expect to receive in the United States court system.

**[7] Federal Courts 170B ⇌45**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk45 k. Forum Non Conveniens. Most Cited Cases

Action brought by sex offender's alleged victims, all Mexican citizens, against the offender under the Protection of Children Against Sexual Exploitation Act and the White Slave Traffic Act, would be dismissed without prejudice based on forum non conveniens, even though Congress had provided for venue "in any appropriate United States District

Court"; there was an adequate alternative forum in Mexico, all of the parties, including the offender, were located in Mexico, a Mexican forum was more convenient for all of the parties, all of the evidence was in Mexico, most witnesses and parties would be unavailable to travel to the United States, and nearly all documents and testimony would have to be translated. 18 U.S.C.A. §§ 2255(a), 2423(b).

**[8] Federal Courts 170B ⇌45**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk45 k. Forum Non Conveniens. Most Cited Cases

For purposes of the doctrine of forum non conveniens, ordinarily there is a strong presumption in favor of a plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.

**[9] Federal Courts 170B ⇌45**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk45 k. Forum Non Conveniens. Most Cited Cases

For purposes of the doctrine of forum non conveniens, the presumption in favor of a plaintiff's choice of forum applies with less force when the plaintiffs are foreign.

David Replogle, Law Offices Of David Replogle, Apc, San Francisco, CA, for Plaintiffs.  
 Geoffrey Rotwein, Esq., Geoffrey Rotwein, Attorney at Law, San Francisco, CA, for Defendant.

**MEMORANDUM AND ORDER**

BREYER, District Judge.

\*1 This action arises under the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. section 2251 and the White Slave Traffic Act, 18 U.S.C. section 2421. Plaintiffs are citizens

Westlaw.

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**H**

Martinez v. White  
N.D.Cal., 2007.

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.  
Gabriel Hilario Alcaraz MARTINEZ, et al.,  
Plaintiffs,

v.

Thomas F. WHITE, Defendant.  
Jose Luis Luna Trujillo, et al., Plaintiffs

v.

Thomas F. White, Defendant.  
Nos. C 06-1595 CRB, C 06-2322 CRB.

June 22, 2007.

**Background:** Sex offender's alleged victims, all Mexican citizens, brought actions against the offender under the Protection of Children Against Sexual Exploitation Act and the White Slave Traffic Act. The offender moved to dismiss all actions against him.

**Holdings:** The District Court, Breyer, J., held that:

- (1) in a matter of first impression, the doctrine of forum non conveniens applied, and
- (2) the action would be dismissed without prejudice based on forum non conveniens.

Ordered accordingly.

[1] Federal Courts 170B ↔45

170B Federal Courts  
170BI Jurisdiction and Powers in General  
170BI(B) Right to Decline Jurisdiction;  
Abstention Doctrine  
170Bk45 k. Forum Non Conveniens. Most Cited Cases

District court has discretion under forum non conveniens to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties.

[2] Federal Courts 170B ↔45

170B Federal Courts  
170BI Jurisdiction and Powers in General  
170BI(B) Right to Decline Jurisdiction;  
Abstention Doctrine  
170Bk45 k. Forum Non Conveniens. Most Cited Cases

In deciding whether to dismiss for forum non conveniens, the court must consider: (1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favor dismissal.

[3] Federal Courts 170B ↔45

170B Federal Courts  
170BI Jurisdiction and Powers in General  
170BI(B) Right to Decline Jurisdiction;  
Abstention Doctrine  
170Bk45 k. Forum Non Conveniens. Most Cited Cases

Doctrine of forum non conveniens applied to a case brought under the statute giving a private right of action to minor victims of sexual conduct, despite claim that, because Congress gave foreign victims of child abuse in foreign countries a right of action in a United States federal court, the district court could not dismiss for forum non conveniens; if Congress had intended to abrogate the doctrine for such cases it could have said so. 18 U.S.C.A. §§ 2255(a), 2423(b).

[4] Federal Courts 170B ↔45

170B Federal Courts  
170BI Jurisdiction and Powers in General  
170BI(B) Right to Decline Jurisdiction;  
Abstention Doctrine

18 USC § 2255 cases

Exhibit 37

**Villafana, Ann Marie C. (USAFLS)**

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**From:** Villafana, Ann Marie C. (USAFLS)  
**Sent:** Thursday, July 26, 2007 8:49 AM  
**To:** Menchel, Matthew (USAFLS)  
**Cc:** Lourie, Andrew (USAFLS)  
**Subject:** Epstein

Hi Matt – I had hoped to have a revised indictment for our discussion today but Mr. Black's motion has demanded my immediate attention.

However, in advance of our meeting this afternoon, I wanted to let you know my thoughts about some of the recommended changes that we had discussed the last time I was in Miami:

1. I will remove all but three of the travel counts. I will include in the indictment package demonstrative charts for the three counts that I would like to proceed on. The charts show the telephone traffic surrounding the travel dates.
2. I will remove a large number of overt acts and "beef up" those that remain with additional facts.
3. I would like to keep the Section 2421 count, but, since we consider [REDACTED] to be the least culpable of the defendants, we will contact her prior to indictment and try to work out a pre-indictment plea that will avoid having to name her as a defendant in the indictment.
4. I will remove the defendant corporations from the indictment.
5. I will add overt acts and counts related to two additional girls who have been identified and interviewed.

I will see you at 2:00. Thanks.

*A. Marie Villafaña*  
Assistant U.S. Attorney  
500 S. Australian Ave, Suite 400  
West Palm Beach, FL 33401  
Phone 561 209-1047  
Fax 561 820-8777

Tracking:



COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Heisler</i> , 2005 CCA LEXIS 131 (-M. Ct. Crim. App. 2005); Affirmed at <i>U.S. ■ Heisler</i> , 64 M.J. 82 (C.A.A.F. 2006)	Unpublished	<u>Internet Sting</u>	Emails with several minor boys; arranged to meet "15 yr-old boy" for sex; arrested at meeting.  Appellate court affirmed conviction.	Article 134, UCMJ (which incorporates 18 U.S.C. 2422(b)) & 134;  10 U.S.C. 880 & 934  Not Consummated  Showed up for meeting
	<i>U.S. ■ Proctor</i> , 2007 CCA LEXIS 187 (-M. Ct. Crim. App. 2007)	Unpublished	<u>Internet Sting</u>  by private organization	19 yr-old contacted "12 yr-old" & "14 yr-old" over several months; sexually explicit conversations; arranged to meet for sex but did not show.  Conviction and sentence affirmed.	2422(b); 10 U.S.C. 886, 891 & 934  Not Consummated
C.A.A.F.	<i>U.S. ■ Brooks</i> , 60 M.J. 495 (C.A.A.F. 2005)		<u>Internet</u> leading to <u>Internet Sting</u>	<b>Internet chat room</b> ; defendant initiated communications with private citizen in chat room; citizen reported to police & <b>Internet Sting</b> began; he continued contact & arranged to meet for sex and told her to bring "8 yr-old" neighbor; arrested in hotel where supposed to meet.  Conviction affirmed.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. v. Gray</i> , 2006 CCA LEXIS 130 (A.F. Ct. Crim. App., 2006)	Unpublished	<b><u>Internet Sting</u></b>	<b>Internet chat room</b> conversations; propositioned "14 yr-old"; arranged to meet for sex; arrested when he went to her house.  Conviction of indecent exposure set aside; all other convictions affirmed.	2422(b); 10 U.S.C. 880 & 934  Not Consummated  Showed up for meeting
	<i>U.S. ■ Amador</i> , 61 M.J. 619 (A.F. Ct. Crim. App. 2005)	Unpublished	<b><u>Internet Sting</u></b>	Chatted with "13 yr-old" on several occasions; arranged to meet at mall; have sex; shower & go to dinner; arrested when he showed up at the mall.	2422(b); 10 U.S.C. 920 & 934  Not Consummated  Showed up for meeting
Navy- Marine Ct. Crim. App.	<i>U.S. ■ Boggs</i> , 2007 CCA LEXIS 196 (-M. Ct. Crim. App. 2007)	Unpublished	<b><u>Internet Sting</u></b>  by private organization	<b>Internet chat room</b> , email & telephone contact; sexually explicit conversations; arranged & traveled to meet for sex; arrested at meeting place.  Sentenced to 8 years, dishonorable discharge & reduction in pay grade found unreasonably severe & reduced to 3 years.	2422(b); 2252A(a)(5)B); 10 U.S.C. 880 & 934  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Honzik,</i>            2003 CCA LEXIS 280            (A.F. Ct. Crim. App. 2003)</p>	<p>Unpublished</p>	<p><b><u>Internet Sting</u></b>            by private organization</p>	<p><b>Internet chat room</b> "Older Men for Younger Girls"; communicated with "13 yr-old"; sexually explicit as to what he would like to do to her; asked her to shave pubic area &amp; arranged to meet for sex; sent info about hotel reservations &amp; telephone number; suggested that she perform oral sex on him; drove to meet her arrested when he showed up</p> <p>Sentenced to 8 years, dishonorable discharge. Court affirmed conviction but reduced sentence to 7 years.</p>	<p>2422(b);            2252A;            10 U.S.C. 880 &amp; 934</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. ■ Larson,</i>            64 M.J. 559 (A.F. Ct. Crim. App. 2006)</p>		<p><b><u>Internet Sting</u></b></p>	<p>Contacted "14 yr-old" through <b>Internet</b> instant message service; turned conversation towards sex; asked if she would meet for sex; arranged to meet for sex; arrested when he showed up.</p> <p>Sentence 9 years. Conviction affirmed but sentence reduced to 6 years.</p>	<p>2422(b);            10 U.S.C. 880, 892 &amp; 934</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
A.F. Ct. Crim. App.	<i>U.S. █ Filipkowski,</i> 2002 CCA LEXIS 70 (A.F. Ct. Crim. App. 2002)	Unpublished	<u>Internet</u> <u>Sting</u>	<b>Internet chat room</b> "M4M"; conversations with "15 yr-old male"; sexually charged conversations; arranged to meet; arrested at mall when he showed up.  Appellate court affirmed conviction & 2 year sentence.	2422(b); 10 U.S.C. 890, 892 & 934  Not Consummated  Showed up for meeting
	<i>U.S. █ Moffeit,</i> 2004 CCA LEXIS 55 (A.F. Ct. Crim. App. 2004)	Unpublished	<b>Internet</b>	Defendant set up website seeking girls 13-20 yrs-old for pagan rituals; pornographic images retrieved from his disks.  Sentenced 45 months, dishonorable discharge, total forfeiture of pay. Conviction & sentence affirmed.	2422(b); 2252A; 10 U.S.C. 934  Not Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
E.D. Ky.	<i>U.S. ■ Kimberly,</i> 2005 U.S. Dist. LEXIS 27955 (E.D. Ky. 2005)		<b>Internet</b>	Defendant met 15 yr-old on the <b>Internet</b> ; solicited sex from her on the Internet; arranged to meet her for sex; met her and had sex.  Pled guilty. Motion to withdraw guilty plea denied.	2422(b)  Consummated
D. Nev.	<i>U.S. ■ Johnson,</i> 445 F. Supp. 2d 1181 (D. Nev. 2006)		<b>Internet Sting</b> (by state)	<b>Internet</b> communications; arranged to meet for sex and meet for sex; state charges dropped but federal charges filed.  Defendant contested "illegal state arrest"; Motion to suppress denied.	2252A(a)(5) (B); 2422(b)  Not Consummated  Showed up for meeting
D. Kan.	<i>U.S. ■ Riccardi,</i> 258 F. Supp. 2d 1212 (D. Kan. 2003)		<b>Internet &amp; telephone</b>	Approached 3 different minor males; asked them to go to the woods to spank themselves while he listened on the phone; one minor complied. Police found porn at the defendant's house in a "form for distribution through the internet".  Defendant found guilty & filed motion for judgment of acquittal and/or new trial, which was denied.	2252(a)(4)(B); 2422(b)

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
D. Kan.	<i>U.S. █ Kelly,</i> 2000 U.S. Dist. LEXIS 5293 (D. Kan. 2000)		Internet	Although he began using computer to solicit the victim when she was 15 yrs-old government's evidence was that defendant's purpose was to engage in consensual sex when victim turned 16.  Defendant's motion to dismiss counts of 2422(b) and 2423(b) granted because consensual sex with 16 yr-old is not criminal sexual conduct defined by 109A.	2422(b); 2423(b); 1512 (witness tampering )  No Information
DC	<i>U.S. █ Curtis,</i> 2005 WL 3312951 (D.D.C. 2005)	Unpublished	No Information	No information available. Indictment not accessible; no media information.  Found guilty. Defendant's motion for new trial denied.	2422(b); 2423(b); 2421; 2252(a)(1); 2252(a)(1) & (a)(5)(B); 2256; 1512(b)(1)& (b)(2)(A) No Information

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
W.D.N.Y.	<i>U.S. █ Friedman,</i> 2006 U.S. Dist. LEXIS 59445 (W.D.N.Y. 2006)		Internet	<p>Internet communications with 14 yr-old victim trying to entice her to have sex; misrepresented his age as 18 yrs-old when in actuality he was in his 40s; he met her at a mall and took her out to the woods to have sex with her; caught by mall security</p> <p>Challenged 81 month sentence because he had no prior convictions. Court affirmed sentence because defendant did not recognize wrongfulness of his conduct.</p>	<p>2422(b); 2423(b) [miscited in case as 4243(b)]</p> <p>Consummated/Force?</p>
D. Haw.	<i>U.S. █ Schnepfer,</i> 302 F. Supp. 2d 1170 (D. Haw. 2004)		Internet	<p>Internet used to entice minor and transfer obscene material.</p> <p>Defendant challenged constitutionality of sentencing guidelines post <i>Booker</i>; court denied defendant's motion to impose sentence without reference to sentencing guidelines.</p>	<p>1470; 2422(b)</p> <p>No Information</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Fuller,</i> 2006 U.S. Dist. LEXIS 63722 (N.D. Ind. 2006)		<u>Internet Sting</u>	Defendant chatted online with "13 yr-old"; agreed to drive to "girl's apartment" to engage in sexual activity; arrested when he showed up.  Defendant held without bond.	2422(b)  Not Consummated  Showed up for meeting
	<i>U.S. ■ Davey,</i> 2006 U.S. Dist. LEXIS 92427 (N.D. Ind. 2006)		<u>Internet Sting</u>	<b>Internet chat room</b> communications with "15 ½ yr-old" girl; graphic sexually explicit reference to what he would like to do with her; arranged to have sex; arrested when he showed up.  Court denied government request for pre-trial detention.	2422(b)  Not Consummated  Showed up for meeting
	<i>U.S. ■ Lohman,</i> 2006 U.S. Dist. LEXIS 79073 (N.D. Ind. 2006)		<u>Internet Sting</u>	Series of online conversations with "13 yr-old"; arranged to meet for sex; offered to bring porn film; arrested when he showed up at meeting place.  Court denied defendant's motion to revoke detention order because 2422(b) constitutes a crime of violence which created a presumption of detainment.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
W.D. Ill.	<i>U.S. v. [REDACTED]</i> , 102 F. Supp. 2d 946 (N.D. Ill. 2000)		<u>Internet Sting</u>	Communications with undercover agent – method not specified; arranged to meet and was arrested.	2422(b) and transporting child pornography  Not Consummated
Wis.	<i>State of Wisconsin v. Robins</i> , 646 N.W. 2d 287 (Wis. 2002)		<u>Internet Sting</u>	<b>Internet chat room</b> ; sexually explicit conversations; sent photos depicting self erect & of other minor boys masturbating; arranged to meet to have sex with “13 yr-old boy”; arrested when he went to meet.  Pled guilty to 2422(b); affirmed Circuit’s order denying defendant’s motion to dismiss because crime of attempt does not require actual minor.	2422(b)  Not Consummated  Showed up for meeting
N.D. Ind.	<i>U.S. v. Rouhselang</i> , 2006 U.S. Dist. LEXIS 62024 (N.D. Ind. 2006)		<u>Internet Sting</u>	Met “13 yr-old” online; sexually explicit chats; admitted to having sex with another young girl; suggested he take photos; arranged to meet for oral sex; arrested at meeting place; had camera in his possession.  Defendant ordered held without bond.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █</i> , 2006 U.S. Dist. LEXIS 65971 (D. Conn. 2006)		<b>Internet</b>	Defendant's motion for acquittal on charge of 2252A denied.	2422(b); 2423(b); 2251(a); 2252A(a)(5)(B) Consummated
<b>N.D. AL.</b>	<i>U.S. █ Powell</i> , 1 F. Supp. 2d 1419 (N.D. Ala. 1998)		<b><u>Internet Sting</u></b>	No information available. Motion to dismiss indictment denied.	2422(b); 2423(b)  Not Consummated
<b>W.D. La.</b>	<i>U.S. █ Kretser</i> , 2007 U.S. Dist. LEXIS 45441 (W.D. La. 2007)		<b><u>Internet Sting</u></b>	<b>Internet</b> chat during which defendant told "minor" they would be going to a motel for sexual activity & he would bring digital camera to take photos.  Sentencing guideline range is set at 235- 293 months in light of enhancements.	2422(b)  Not Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
D. Conn.	<i>U.S. █ Sweeney,</i> 2006 U.S. Dist. LEXIS 73025 (D. Conn. 2006)		<u>Internet Sting</u>	<p><b>Internet chat room</b> “Ilovmucholdermen” several explicit conversations of sadistic sexual behavior with “13 yr-old”; arranged to meet “minor” and arrested when left his home to do so.</p> <p>Pled guilty to 2422(b); challenged sentencing enhancements and claimed ineffective counsel; court denied all motions and refused to issue certificate of appealability and entered judgment for respondent.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Attempted to show up for meeting</p>
	<i>U.S. █ Kufrovich,</i> 997 F. Supp. 246 (D. Conn. 1997)		No Information	<p>No information available but indicated use of telephone, internet and mail. Indictment not accessible; no media information.</p> <p>Pre-trial motions. Charged with using telephone wires, <b>Internet</b> and U.S. mail. Overruled by <i>United States █ Griffith,</i> 284 F.3d 338, 351 (2d Cir. 2002).</p>	<p>2422(b); 2423</p> <p>No Information</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
E.D. Wis.	<p><i>U.S. █ Davidson,</i> 2006 U.S. Dist. LEXIS 95757 (E.D. Wis. 2006);</p> <p><i>U.S. █ Doyle,</i> 2007 U.S. Dist. LEXIS 11429 (E.D. Wis. 2007)</p>		<b><u>Internet Sting</u></b>	<p>Defendant pretending to be a 16 yr-old gay teen approached a "15 yr-old male teen" on the <b>Internet</b>; engaged in sexually explicit communications; suggested introducing the "15 yr-old" to his rich friend for "first-time" male-to-male sex; arranged to meet for sex; arrested when he showed up. Evidence that he had met other young men online.</p> <p>Constitutionality of 2423(b) upheld; neither statute requires actual minor; indictment need not specify the sexual conduct upon which it is based.</p>	<p>2422(b); 2423; 2252(a)(2) &amp; (a)(4)(B)</p> <p>Not Consummated</p>
W.D. Va.	<p><i>U.S. █ Jabbour,</i> 2007 U.S. Dist. LEXIS 13659 (W.D. Va. 2007)</p> <p>Magistrate judge report and recommendation (adopted by 2007 U.S. Dist LEXIS18262 (W.D. Va. 2007)</p>		<b><u>Internet Sting</u></b>	<p>Numerous online chats with "mother" of young girls interested in arranging sex; arranged to have sex with girls and traveled to do so; computer revealed videos &amp; photos of adult/infant, adult/minor, minor/animal sex.</p> <p>Magistrate recommended accepting defendant's guilty plea to 2422(b); 2252A(a)(5)(B) &amp;(b)(2); and 2256(8)(A).</p>	<p>22422(b); 2423(b); 2252A(a)(5)(B) &amp; (b)(2); 2256(8)(A)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
N.D. Ohio	<i>Chilleme</i> ■ <i>U.S.</i> , 2006 U.S. Dist. LEXIS 25920 (N.D. Ohio 2006) Dismissed by 2006 U.S. Dist. LEXIS 38800		<u>Internet Sting</u>	Defendant believed he was communicating with mother of "12 yr-old" and set up plans to meet for sex with both mother & daughter; traveled from Florida to Ohio to do so; arrested at meeting.  Defendant pled guilty; sought habeas relief from his 60 month sentence; court will conduct evidentiary hearing.	2422(b); 2423  Not Consummated  Showed up for meeting
E.D. Cal.	<i>U.S.</i> ■ <i>Carter</i> , 2006 U.S. Dist. LEXIS 22501 (E.D. Cal. 2006)		<u>Internet Sting</u>	<b>Internet chat room</b> "preteen parents who share"; defendant wants to have sex with daughter while mother watches; Internet email & chat room & telephone communications; arranged to meet & traveled to do so - arrested at airport.  Motion to dismiss denied because no actual minor required; claims he did not believe that he was communicating with a minor irrelevant to attempt charge; Congress has power under commerce clause; rule of lenity not applicable because 2422(b) is not ambiguous ; 2422(b) only regulates conduct not speech.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
M.D. Pa.	<p><i>U.S. █ Garcia,</i>  2005 WL 1862409 (M.D. Pa. 2005);  <i>see also U.S. v. Garcia,</i>  Slip Copy, 2007 WL 986874 (3<sup>rd</sup> Cir. 2007)(Unpublished) <i>supra</i></p>	Unpublished	Internet	<p>55 yr-old man established contact with 14 yr-old on the <b>Internet</b> – through IM &amp; emails; when their 14 yr-old daughter was absent from school her parents reported her missing; police found out that a man had called girl’s school to say she would not be in that day; daughter’s friend told police that the girl had been communicating regularly with a 55 yr-old from California on the Internet for 3-4 months; he had given her a cellular phone; he expressed a desire to have sexual intercourse with the girl and told her he was coming to see her; defendant picked the girl up at a bus stop and had sexual intercourse with her; when girl returned home she told police what happened</p>	<p>2422(b);  2423(b)    Consummated</p>
W.D.N.C.	<p>***<i>U.S. █ Howard,</i>  2006 U.S. Dist. LEXIS 67214 (W.D.N.C. 2006)  ***<i>Conspiracy/Pimps</i></p>		<p>No  Information  Pimp/  Prostitution</p>	<p>No specific information other than case involved interstate and underage prostitution, money laundering, crack distribution &amp; firearms possession.    Defendant’s motion for new trial denied.</p>	<p>2422(b);  2423;  1956    No Information  ***<i>Conspiracy/  Pimps</i></p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Lester,</i> 268 F. Supp. 2d 514 (E.D. Pa. 2003)</p>		<p><b>Internet</b></p>	<p><b>Internet chat room;</b> high school teacher corresponded with "7<sup>th</sup> grader" in chat room; followed by telephone conversations; sent 2 images of child porn over the <b>Internet</b>.</p> <p>Defendant motion for downward sentence departure based on diminished capacity denied.</p>	<p>2422(b); 2252</p> <p>Not Consummated</p>
	<p><i>*U.S. ■ Bianchi,</i> 2006 U.S. Dist. LEXIS 90073 (E.D. Pa. 2006)</p> <p><i>* Conspiracy</i></p>		<p>Foreign travel</p>	<p>Defendant conspired to travel to Cuba, Moldova, and Romania to have sex with minors.</p> <p>Foreign travel; wiretapped phone &amp; obtained phone records.</p> <p><i>Conspiracy to engage in illicit sexual conduct in foreign places in violation of 18 U.S.C. § 2423(e).</i></p> <p>Defendant seeks Jencks Act material prior to witness testifying.</p>	<p>2422(b); 2423</p> <p>Consummated</p> <p><i>*Conspiracy 2423(e)</i></p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
E.D. Pa.	<p><i>U.S. ■ Rosenberg,</i> 2004 U.S. Dist. LEXIS 19160 (E.D. Pa. 2004)</p>		<p><u>Internet Sting</u></p>	<p>58 yr-old computer instructor at public elementary school engaged in sexually explicit <b>Internet</b> communications with "13 yr-old" for over a year; 2 telephone conversations; arranged to meet but defendant did not show; arranged for another meeting 11 months later &amp; arrested at the mall where they were supposed to meet.</p> <p>Allowed to be released on bail because not a flight risk.</p>	<p>2422(b)  Not Consummated  Showed up for meeting</p>
	<p><i>U.S. ■ Tykarsky,</i> 2004 U.S. Dist. LEXIS 2567 (E.D. Pa. 2004)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> "Iloveoldermen2" defendant initiated communications with "14 yr-old"; sexually explicit conversations over several sessions; told her he wanted to perform sexual acts with her &amp; described in detail; made arrangements to meet for sex; arrested at the mall where they were to meet.</p> <p>Motion to suppress denied because defendant gave consent to search residence.</p>	<p>2422(b); 2423  Not Consummated  Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Candiano,</i> 2005 U.S. Dist. LEXIS 18206 (N.D. Ind. 2005)</p>		<p><b><u>Internet Sting</u></b> by private group</p>	<p>Defendant propositioned "13 yr-old" on <b>Internet</b> &amp; telephone &amp; arranged to meet for sex 3 times; group member did not show; organization posted his chat room conversations on the <b>Internet</b> &amp; he responded.</p> <p>Defendant moved to dismiss &amp; revoke detention order; motions denied.</p>	<p>2422(b)  Not Consummated</p>
	<p><i>U.S. ■ Wallace,</i> 2006 U.S. Dist. LEXIS 92609 (N.D. Ind. 2006)</p>		<p><b><u>Internet Sting</u></b></p>	<p>Sexually explicit <b>Internet</b> communications with "13 yr-old"; masturbated in front of webcam &amp; encouraged "minor" to do the same.</p> <p>For purpose of section 3156(a)(4)(B), 2422(b) charge is a crime of violence and creates a rebuttable presumption in favor of retention; defendant held without bond.</p>	<p>2422(b)  Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
D. Neb.	<p><i>U.S. ■ Jackson,</i> 2007 U.S. Dist. LEXIS 33639 (D. Neb. 2007)</p> <p><i>* State Conspiracy charge dropped, no federal conspiracy</i></p>		<u>Internet Sting</u>	<p><b>Internet</b> chats with "14 yr-old"; arranged to meet for sex; drove to meeting place with his daughter; left but police arrested him at his home.</p> <p><i>State charge of conspiracy of sexual assault dropped because no conspiracy charge allowed in Nebraska with undercover agent as conspirator</i></p> <p>Defendant filed motion in limine to exclude cut and paste portions of <b>Internet</b> conversations &amp; motion to dismiss because of pre-indictment delay. Case dismissed because of delay.</p>	<p>2422(b) Not Consummated</p> <p>Showed up for meeting but left</p> <p><i>* State Conspiracy Dropped*</i></p>
N.D. Iowa	<p><i>U.S. v. Townsend,</i> Slip Copy, 2007 WL 1320495 (N.D. Iowa 2007)</p>	Slip Copy	<b>Internet</b>	Order accepting Magistrates report and recommendation to accept defendant's guilty plea.	<p>2422(b) No Information</p>
N.D. Ind.	<p><i>U.S. ■ Capozzoli,</i> 2007 U.S. Dist. LEXIS 2812 (N.D. Ind. 2007)</p>		<u>Internet Sting</u>	<p><b>Internet</b> conversations with "minor" followed by telephone calls; sexually explicit conversations regarding masturbation.</p> <p>Defendant ordered detained without bail.</p>	<p>2422(b) Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Morrison,</i> 2003 WL 24054501 (S.E.N.D. 2003)</p>	<p>Unpublished</p>	<p><u>Internet Sting</u></p>	<p><b>Internet chat room;</b> 29 yr-old male entered chat room communications with "16 yr-old"; discussed different sex acts with her; asked if she would come to his house to "fool around"; gave her his address and arranged for her to come; arrested by police who went to his house at the meeting time.</p> <p>Appealed his conviction on grounds that no actual minor was involved and that statute is unconstitutional. Conviction affirmed.</p>	<p>2422(b)  Not Consummated</p>
<p><b>S.D. Miss.</b></p>	<p><i>U.S. ■ Luxford,</i> Slip Copy, 2007 WL 1729589 (S.D. Miss. 2007)</p>	<p>Slip Copy</p>	<p><b>Internet</b></p>	<p>Defendant met 13 yr-old online; arranged to meet at the mall; when they met the "13 yr-old had brought a friend; defendant tried to get the friend to leave but she would not; defendant continued online and cell phone communications with the 13 yr-old; arranged to meet again; had oral sex; he bought condoms and they went to his hotel and had sex.</p> <p>Motion to transfer is denied.</p>	<p>2422(b)  Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
N.D. Ill.	<i>U.S. █ Barked</i> , 2004 U.S. Dist. LEXIS 27162 (N.D. Ill. 2004)		<b><u>Internet Sting</u></b>	Communications over <b>Internet</b> ; arranged to meet & traveled to meet "15 yr-old" for sex; arrested at meeting. Defendant's motion to dismiss denied.	2422(b); 2423  Not Consummated
	<i>U.S. █ Echt</i> , 2001 U.S. Dist. LEXIS 25970 (N.D. Ill. 2001)		<b><u>Internet Sting</u></b>	Defendant's motion to dismiss on ground that "knowingly" in statute applies to age of the victim denied.	2422(b) Not Consummated
S.E.N.D.	<i>U.S. █ Patten</i> , 2003 U.S. Dist. LEXIS 16072 (S.E. N.D. 2003)		<b>Internet</b>	<b>Internet chat room</b> communications with "16 yr-old"; sexually explicit conversations; arranged to meet for sex; arrested at meeting. Motion to dismiss denied.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
N.D. Tex.	<p><i>U.S. █ Jackson,</i>            2002 U.S. Dist. LEXIS 6168 (N.D. Tex. 2002); <i>see U.S. █ Jackson,</i> 2002 U.S. LEXIS 539 (N.D. Tex. 2002) for details of facts; and <i>U.S. █ Jackson,</i> 69 Fed. Appx. 658 (5<sup>th</sup> Cir. 2003) and <i>U.S. █ Jackson,</i> 2005 U.S. Dist. LEXIS 33111 (N.D. Tex. 2005)</p>		<u>Internet Sting</u>	<p>No specific information available other than use of <b>Internet</b> to lure minor boys for oral sex.</p> <p>Magistrate judge recommended vacating sentence of 180 months because trial court applied enhancement for criminal sexual abuse as defined in 2241 &amp; 2242 because prisoner's crime did not fall into the definition.</p>	<p>2422(b);            2252(a)(4)(B);            2253</p> <p>Not Consummated</p>
	<p><i>U.S. █ Jackson,</i>            2002 U.S. LEXIS 539 (N.D. Tex. 2002)</p>		<u>Internet Sting</u>	<p>Defendant placed an ad on an <b>Internet</b> site looking for boy to have oral sex; continued graphic conversations with "boy" for months describing sexual acts he would perform; sent porn; arranged to meet "13 yr-old boy" for sex but did not show; continued communications &amp; arranged to meet for sex at mall, telephone confirmation; arrested when he went to meet the "boy"; police found child porn on computer.</p> <p>Motion to vacate denied.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Johnson,</i> 1999 U.S. Dist. LEXIS 8819 (N.D.N.Y. 1999)		<b>Internet</b>	Met girls (13, 16, and on under 18 yrs-old) and <b>Internet chat room</b> and had sex with them.  Defendant pled guilty but challenged 88 month sentence recommendation; court imposed 88 month sentence  Affirmed at <i>U.S. █ Johnson</i> , 446 F.3d 272 (2d Cir. 2006) <i>supra</i> .	<i>See U.S. █ Johnson,</i> 2005 U.S. Dist. LEXIS 52  Consummated
<b>W.D. Tex.</b>	<i>U.S. █ Dodd,</i> 349 F. Supp. 2d 1039 (W.D. Tex. 2004)		<b><u>Internet Sting</u></b>	<b>Internet chat room</b> communications with "14 yr-old"; sent photos of himself with erect penis; arranged to meet for sex; arrested at meeting.  Motion to suppress search warrants denied.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Vasquez</i> , 2003 U.S. Dist. LEXIS 2339 (D. Me. 2003)		No Information	No information available. Motion to exclude pre-Miranda statements and evidence from bag denied.	<i>See U.S. █ Vasquez</i> , 2003 U.S. Dist. LEXIS 2339 (D. Me. 2003) <i>infra</i>
N.D.N.Y.	<i>U.S. █ Johnson</i> , 2005 U.S. Dist. LEXIS 52 (N.D.N.Y. 2005)		Internet	<b>Internet chat room</b> ; 37 yr-old male met 13 yr-old; 16 yr-old and one other under 18 yrs-old and had sex with them. Affirmed at 446 F.3d 272 (2d Cir. 2006) <i>supra</i> .	2422(b); 2423(b); 2252(a)(1) & (a)(4) Consummated
	<i>In The Matter of The Herald Company, Inc.</i> , 2006 U.S. Dist. LEXIS 11930 (N.D.N.Y. 2006); underlying case <i>U.S. █ Gosek</i> , Case No. 5- 05-MJ-341 (N.D.N.Y. 2005)		Telephone	Mayor solicited 14 yr-old for sex in exchange for promise of drugs; used others to arrange for sexual encounters for him in return for drugs or money. Mayor charged with 2422(b); regarding unsealing of affidavits in support of wiretap on cellular phone.	2422(b)  Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Spurlock,</i> 386 F. Supp. 2d 1072 (W.D. Mo. 2005)		<u>Internet Sting</u>	<b>Internet chat room</b> "Daughters who love daddies"; chats with "mother" of 3 kids; masturbated in front of webcam while having sexually explicit conversation with "13 yr-old daughter"; arranged to meet for sex with "13, 10 & 8 yr-old" children with their "mother" by telephone; arrested at meeting place & police found condoms, beer, DVD player & x-rated videos & duct tape.  Defendant filed motion to dismiss on grounds that legally impossible because no actual minor was involved; general magistrate declined to apply <i>Helder &amp;</i> recommended that motion be denied.	2422(b); 2423; 2253; 1470  Not Consummated  Showed up for meeting
D. Me.	<i>U.S. █ Vasquez,</i> 241 F. Supp. 2d 34 (D. Me. 2003) <i>see also</i> <i>U.S. █ Vasquez,</i> 2003 U.S. Dist. LEXIS 2339 (D. Me. 2003) <i>infra</i>		<b>Internet</b>	Solicited sex from 13 yr-old using <b>Internet</b> ; arranged to meet for sex & traveled to meet; arrested at hotel <i>–unclear if case initially sting operation but communications were recorded.</i>  Defendant appealed detention order; court affirmed and adopted the detention order and required pre-trial detention.	2422(b); 2423  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
W.D. Mo.	<p><i>U.S. █ Hicks,</i>  2005 U.S. Dist. LEXIS  36625 (W.D. Mo. 2005)</p>		<p><u>Internet  Sting</u></p>	<p>Defendant alleged to have used <b>Internet</b> &amp; telephone to entice a minor; traveled to engage in sex act.</p> <p>Defendant claimed no violation of 2422(b) &amp; 2423 because no actual minor; court agrees and defendant's motion to dismiss is granted based on <i>Helder</i>.</p>	<p>2422(b);  2423(b)  Not Consummated  Showed up at meeting</p>
	<p><i>U.S. █ Helder,</i>  2005 U.S. Dist. LEXIS  38874 (W.D. Mo.  2005),<i>reversed, U.S. █  Helder,</i> 2006 U.S. App.  LEXIS 15995 (8<sup>th</sup> Cir.  2006) <i>supra</i></p>		<p><u>Internet  Sting</u></p>	<p>No information available.</p> <p>Court held that 2422(b) requires actual under age not mere "belief" by defendant that underage; defendant discharged from pre-trial release and judgment of acquittal entered. Reversed on appeal.</p>	<p>2422(b)    Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
E.D. Va.	<p><i>U.S. v. Kaye</i>, 451 F. Supp. 2d 775 (E.D. Va., 2006);</p> <p><i>U.S. v. Kaye</i>, 2006 U.S. Dist. LEXIS 54281 (E.D. Va. 2006)</p>		<p><b>Internet Sting</b></p> <p>by private organization</p>	<p>IM communications; followed by telephone calls from 54 yr-old male to "13 yr-old boy"; sexually explicit communications; arranged to meet for sex; went to meeting &amp; filmed by Dateline.</p> <p>Court found that use of Internet and instant message satisfied the interstate commerce component; all elements of 2422 &amp; 2423 satisfied.</p>	<p>2422(b); 2423</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. v. Holloman</i>, Slip Copy, 2006 WL 2796641 (E.D. Va. 2006)</p>	Slip Copy	No Information	<p>No information available. Indictment not accessible; no media information.</p> <p>Defendant sought recusal because judge served as Chairman of the Attorney General's Commission on Pornography more than 20 years earlier. Denied.</p>	<p>2422(b); 2423(b)</p> <p>No Information</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Brand,</i> 2005 U.S. Dist. LEXIS 634 (S.D.N.Y. 2005)		Internet & telephone	No information available.	2422(b); 2423 No Information
	<i>U.S. █ Carrasquillo,</i> 2004 U.S. Dist. LEXIS 741 (S.D.N.Y. 2004)		US Mail	No specific information available other than case involved mail from jail to minor step-son.  Motion to suppress letters obtained from cell search, handwriting exemplars & expert's report. Court held that search was legal, exemplars from dictation were not testimonial once misspellings were removed but new expert required because he saw exemplars containing the spelling errors.	2422(b); 1470 (mail)  Not Consummated
	<i>U.S. █ ██████,</i> 2006 U.S. Dist. LEXIS 64576 (S.D.N.Y. 2006)		<u>Internet</u> <u>Sting</u>	Private citizen pretended to be "13 yr-old"; defendant contacted and initiated sexually explicit conversations including asking if 13 yr-old would like to "love me for money"; communications turned over to police.  Claimed entrapment and sought acquittal; court denied motion.	2422(b)  Not Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Silo,</i> Slip Copy, 2007 WL 1655399 (S.D. Fla. 2007)</p>	Slip Copy	<b>Internet</b>	<p>Internet use. Report and recommendation that guilty plea be accepted.</p>	<p>2422(b) No Information</p>
S.D.N.Y.	<p><i>U.S. █ McDarrah,</i> 2006 U.S. Dist. LEXIS 48269 (S.D.N.Y. 2006); <i>U.S. █ McDarrah,</i> 2007 LEXIS 6590 (S.D.N.Y. 2007)</p>		<b><u>Internet Sting</u></b>	<p>FBI posted an ad on Craigslist advertising young girls for sex; defendant responded &amp; offered money for oral sex with 13 yr-old but did not show; later defendant contacted same agent (inadvertently) pretending to be 13 yr-old girl; defendant arrested outside of home where he thought "girl" lived.</p> <p>Challenged constitutionality of 2422(b) on its face and as applied. Appellate court ruled 2422 constitutional, but allowed defendant leave to renew his motion to suppress post-arrest statements use; this is memorandum order on preliminary evidentiary issue regarding introduction of images at trial; court found binder containing 16 images recovered from defendant's computer could be presented but not CD-ROM of over 140.</p>	<p>2422(b)  Not Consummated  Showed up at "girl's" house</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Thrift</i> , 205 Fed. Appx. 816 (11 <sup>th</sup> Cir. 2006)	Unpublished	<b>Internet</b>	Online communications with "15 yr-old"; sexually explicit conversations and discusses traveling to have sex; uses phone to arrange for meeting; arrested when he went to meet.  Appealed sentencing. Court affirmed sentencing except the lifetime supervision for possession of firearm.	2422(b); 2423(b); 922(g)(1) & (2) Not Consummated
<b>M.D. Fla.</b>	<i>U.S. ■ Sterba</i> , 22 F. Supp. 2d 1333 (M.D. Fla. 1998)		<b>Internet Sting</b>	<b>Internet chat room.</b> No specific details available.  Indictment dismissed because of prosecutorial misconduct.	2422(b)  Not Consummated
<b>S.D. Fla.</b>	<i>U.S. ■ McDaniel</i> , 470 F. Supp. 2d 1372 (S.D. Fla. 2007)	(Villafana case)	<b>Internet</b>	19 yr-old contacted 12 yr-old & communicated for 18 months; believed to be in love; traveled to meet girl who was 14 yrs-old by then and had sex; parents helped police find them at a hotel. Government introduced evidence that 2 other underage girls had had relations with defendant.  Pled guilty. Court wrote opinion to explain reasons for its departure from guidelines.	2422(b); 2423(b)  Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. v. Rader</i> , 2007 U.S. App. LEXIS 12791 (11 <sup>th</sup> Cir. 2007)	Unpublished	<b><u>Internet Sting</u></b>	<b>Internet</b> conversations with undercover agent; sent videos of adults having sex with 2 to 4 yr-olds.  Pled guilty but appealed 151 month sentence & \$15,000 fine. Affirmed.	2422(b); 2252(a)(1)  Not Consummated
	<i>U.S. █ Watson</i> , 179 Fed. Appx. 663 (11 <sup>th</sup> Cir. 2006)	Unpublished	<b><u>Internet Sting</u></b>	57 yr-old dentist communicated with "12 yr-old girl"; sexually explicit conversations; sent her photos of girls 1-5 being raped to "show her" what they would be doing.  Convicted of 2422(b) and 2252A(a)(2)(A); appealed enhancement of his sentence for over 600 images of child porn. Affirmed.	2422(b); 2252A(a)(2)(A)  Not Consummated
	<i>U.S. █ Hoss</i> , 192 Fed. Appx. 867 (11 <sup>th</sup> Cir. 2006)	Unpublished	<b>Computer</b>	No information available.  Appealed 260 month sentence. Affirmed.	2422(b); 2241(c); 2252  No Information

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Garrett,</i> 190 F.3d 1220 (11<sup>th</sup> Cir. 1999)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> as part of police investigation of child porn; defendant contacted "15 yr-old girl"; for 2 months talked about sexual acts they would perform; sent photos of young children having sex and asked if she would perform those acts with him; gave his phone number &amp; arranged to meet but could not make it. Search warrant obtained &amp; police found child porn on his computer.</p> <p>Appealed sentence because expert testified that acts depicted in photos would cause pain. Affirmed.</p>	<p>2422(b); 2252(a)(2); 2252(a)(1)</p> <p>Not Consummated</p>
	<p><i>U.S. █ Tillmon,</i> 195 F.3d 640 (11<sup>th</sup> Cir. 1999)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet</b> communications with "14 yr-old"; defendant attempted to persuade her to meet him in motel to engage in various sexual acts; sent 3 photos of sexually explicit conduct over Internet.</p> <p>Pled guilty but contested 87 month sentence because court did not group offenses. Court said primary victim of porn is person depicted so 3 separate counts of porn.</p>	<p>2422(b); 2252(a)(1)</p> <p>Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Root</i>, 296 F.3d 1222 (11<sup>th</sup> Cir. 2002)</p>		<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room</b> "I Love Older Men"; defendant engaged in explicit sexual conversation with "13 yr-old student" describing sexual acts that he wanted to perform with her &amp; have her perform on him; arranged to meet for sex and arrested when he showed up.  Conviction &amp; sentence affirmed; no need for actual minor.</p>	<p>2422(b); 2423(b); 2243  Not Consummated  Showed up for meeting</p>
	<p><i>U.S. v. Burgess</i>, 175 F.3d 1261 (11<sup>th</sup> Cir. 1999)</p>		<p><b><u>Internet Sting</u></b> by private citizen</p>	<p><b>Internet chat room</b> "barely legal females"; sexually explicit conversations; arranged to meet &amp; arrested when he showed up.  Appealed conviction. Conviction reversed because court failed to give cautionary jury instruction about defendant's failure to testify.</p>	<p>2422(b); 2423(b)  Not Consummated  Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Orrega,</i> 363 F.3d 1093 (11 <sup>th</sup> Cir. 2004)		<u>Internet Sting</u>	<b>Internet chat room</b> ; defendant said he was 24 yrs-old & began communication with "16 yr-old"; told her he wanted to meet to have sex but meeting never took place; few weeks later defendant again contacted "16 yr-old" & arranged to meet to have oral sex; arrested at meeting place.  Court vacated & remanded because downward departure not warranted.	2422(b)  Not Consummated  Showed up at meeting
	<i>U.S. ■ Panfil,</i> 338 F.3d 1299 (11 <sup>th</sup> Cir. 2003)		<u>Internet Sting</u>	<b>Internet chat room</b> communications with "13 yr-old"; sexually explicit; told her he would give her powerful orgasms with oral sex; arranged to meet for sex; arrested at meeting place.  Challenged constitutionality of 2422(b) & his sentence. Court affirmed both conviction & sentence.	2422(b)  Not Consummated  Showed up for meeting
	<i>U.S. ■ Miranda,</i> 348 F.3d 1322 (11 <sup>th</sup> Cir. 2003)		<u>Internet Sting</u>	<b>Internet chat room</b> ; conversations about having sex with "13 yr-old"; arranged to meet for sex; arrested at meeting place  Government appealed sentence. Vacated & remanded.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Blas,</i>  360 F.3d 1268 (11<sup>th</sup> Cir.  2004)</p>		<p><b>Internet</b></p>	<p>48 yr-old initiated <b>Internet</b> communications with 14 yr-old; lied about his age at the beginning; over a period of several months defendant told 14 yr-old he was 47 yrs-old &amp; that she was his girlfriend; told her he wanted to "make L-U-█" to her; arranged to meet for sex and did meet &amp; have sex; defendant knew that he was HIV+ but did not tell her; 6 months later he met another 14 yr-old online; discussed sex &amp; their relationship for hours; told her of his HIV status but said she could not catch it because of the medication he was taking; planned to visit her to have sex but he was arrested before.</p> <p>Pled guilty but contested sentence of 180 months &amp; 70 months concurrent, \$15,000 fine, \$86 restitution &amp; \$300 special assessment. Affirmed.</p>	<p>2422(b);  2423(b)</p> <p>Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Rojas,</i> 145 Fed. Appx. 647 (11 <sup>th</sup> Cir. 2005)	Unpublished	<b><u>Internet Sting</u></b>	No specific information available but implication is that this was internet communication with "13 yr-old" for oral sex.  Challenged 2422(b) constitutionality. Conviction affirmed.	2422(b)  Not Consummated
	<i>U.S. ■ Scott,</i> 426 F.3d 1324 (11 <sup>th</sup> Cir. 2005)		<b><u>Internet Sting</u></b>	<b>Internet chat room</b> for parents of young children to arrange for them to have sex with others; agent pretending to be "father of 6 yr-old boy & 4 yr-old girl" approached by defendant interested in having sex with the children; arranged to meet & told agent he would bring "gifts" like stuffed animals to gain the children's cooperation; arrested when he showed up at meeting place. Police found stuffed animals, chains, whips, knives, restraints & other sexual paraphernalia in his car.  Pled guilty but contested his 135 month sentence. Court affirmed sentence.	2422(b); 2423(b); 2241(c)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Grossman,</i> 2007 U.S. App. LEXIS 12500 (11<sup>th</sup> Cir. 2007)</p>	Unpublished	<u>Internet Sting</u>	<p><b>Internet chat room</b> “preteen, baby and toddler sex”; initiated communications with “31 yr-old mother of 9 yr-old”; expressed desire to meet for sex with child; arranged to meet both “mother &amp; daughter” for sex; arrested when he arrived. Conviction affirmed.</p>	<p>2422(b); 2241(c)  Not Consummated  Showed up for meeting</p>
	<p><i>U.S. █ Houston,</i> 177 Fed. Appx. 57 (11<sup>th</sup> Cir. 2006)</p>	Unpublished	<u>Internet Sting</u>	<p><b>Internet chat room</b> communications with “mother of 14 yr-old girl”; arranged meeting with the girl to have sex with her; arrested at meeting place.  Contested 5 year sentence. Affirmed.</p>	<p>2422(b)  Not Consummated  Showed up for meeting</p>
	<p><i>U.S. █ Haynes,</i> 160 Fed. Appx. 940 (11<sup>th</sup> Cir. 2005)</p>	Unpublished	<u>Internet Sting</u>	<p><b>Internet chat room</b> “Young Teens for Older Men”; 39 yr-old initiated chat with “14 yr-old”; sexually explicit details as to how he would like to “lick her from head to toe”; arranged to meet &amp; suggested they have Chinese dinner &amp; movie; arrested at meeting place; police found loaded gun; 92 rounds of ammunition; condoms &amp; Chinese restaurant menu in his car.  Sentenced to 78 months. Conviction affirmed; sentence vacated &amp; remanded because of <i>Booker</i> error.</p>	<p>2422(b)  Not Consummated  Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p>***U.S. █ <i>Hornaday</i>, 392 F.3d 1306 (11<sup>th</sup> Cir. 2004)</p> <p>***<i>Conspiracy charge was error but it was harmless</i></p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> "Loving Families" where people communicate about having sex with children; undercover entered as "father of son &amp; daughter"; defendant contacted agent &amp; said he was bisexual looking for "loving family" &amp; that he had had prior family relations &amp; wanted more; explicit discussion about having sex with children; telephoned &amp; arranged to meet; arrested when he showed up.</p> <p>Appealed guilty verdict. Appellate court rejected argument that he did not use the Internet to communicate directly with minor and held that conspiracy charge was error, albeit harmless, because did not abet undercover agent but that error too was harmless given the facts of the case.</p>	<p>2422(b); 18 USC 2</p> <p>Not Consummated</p> <p>***<i>Conspiracy charge was harmless error</i></p>
	<p>U.S. █ <i>Bohannon</i>, 476 F.3d 1246 (11<sup>th</sup> Cir. 2007)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> "I love older men"; defendant initiated communications with "15 yr-old"; arranged to meet to have oral &amp; genital sex; arrested when he showed up.</p> <p>Appealed 120 month sentence. Affirmed.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Murrell</i>, 368 F.3d 1283 (11<sup>th</sup> Cir. 2004)</p>		<p><u>Internet</u> <u>Sting</u></p>	<p><b>Internet chat rooms</b> “family love” &amp; “Rent F Vry Yng”; communicated with same agent who pretended to be “mother of 13 yr-old” &amp; “father of teen girl”; defendant expressed interest in meeting “mother &amp; daughter” for sex; asked “father” if he was renting a daughter; continued conversations online &amp; via telephone with “father” and arranged to meet to have oral sex &amp; intercourse with “daughter”; agreed to pay \$300; showed up at hotel &amp; paid the money to agent; arrested on the way to hotel room to meet “girl”.</p> <p>Appealed indictment because never directly communicated with minor &amp; sentencing enhancement to 33 months &amp; 3 years supervision. Affirmed.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. v. Pipkins, et al.</i>, 378 F.3d 1281 (11<sup>th</sup> Cir. 2004)</p>		<p>No Information Pimp/ Prostitution</p>	<p>Pimps ran prostitution ring using under age girls; in total 15 pimps were arrested &amp; 13 pled guilty.</p> <p>Defendants found guilty of conspiracy in violation of 1962(d); One defendant set up website for “escort service”.</p> <p>One defendant sentenced to 40 yrs; other to 30 yrs. Affirmed.</p>	<p>2422(b); 1951; 1952(a)(3); 1584; 1028 &amp; 21 USC 859; Conspiracy 1962(d) RICO</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Searcy</i>, 418 F.3d 1193 (11<sup>th</sup> Cir. 2005)</p>		<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room;</b> defendant's screen name was "Obsessedad11"; informed undercover agent that he was member of father-daughter swap club; talked on telephone &amp; arranged face-to-face meeting with agent; at meeting told agent he wanted to arrange to have sex with agent's daughter &amp; agent could have sex with defendant's children; arrested at meeting.</p> <p>Challenged conviction &amp; upward enhancement of his sentence for crime of violence. Affirmed.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Clarke,</i> 159 Fed. Appx. 128 (11 <sup>th</sup> Cir. 2005)	Unpublished	Foreign Travel Sting	No specific information available but implication is that this is a sex tourism case.  Alleges entrapment; conviction affirmed.	2422(b); 2423(c); 1591(a); 1594(a)  Not Consummated
	<i>U.S., Clerk █ Yost,</i> 479 F.3d 815 (11 <sup>th</sup> Cir. 2007)		<u>Internet Sting</u>	<b>Internet chat room</b> conversations with 3 different “girls” – all same undercover agent– in chat room; sexually explicit discussions; arranged to meet for oral sex with one “girl” but no show; arranged to meet with another & arrested when he showed up to meet her.  Conviction affirmed.	2422(b)  Not Consummated  Showed up for meeting
	<i>U.S. █ Bolen,</i> 136 Fed. Appx. 325 (11 <sup>th</sup> Cir. 2005)	Unpublished	<u>Internet Sting</u>	<b>Internet chat room</b> “sex with younger”; conversations with “25 yr-old mother of 3 yr-old”; communications over several days; used telephone to finalize plans to meet.  Contested conviction & 110 month sentence on grounds that 2422(b) did not apply when used intermediary to arrange for sex & did not apply to sex with fictitious infant. Conviction affirmed; sentence appeal dismissed due to waiver of right to appeal.	2422(b)  Not Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Evans,</i> 476 F.3d 1176 (11 <sup>th</sup> Cir. 2007)		Telephone/ Prostitution Ring	14 yr-old worked for defendant (& 2 co-defendants) as prostitute; he was pimp & arranged date for her; notified her of "dates" on her cell phone; he provided condoms manufactured overseas & imported into Ga.; she was hospitalized with AIDS; he called her from land line & induced her to return to work for him as a prostitute.  Challenged application of federal statute to purely local activity. Court affirmed.	1591; 2422(b)  Consummated
	<i>U.S. ■ Strevell,</i> 185 Fed. Appx. 841 (11 <sup>th</sup> Cir. 2006)	Unpublished	Foreign Travel Sting	Several telephone conversations arranging for travel to Costa Rica for sex with "14 yr-old"; paid for travel; arrested at airport.	2422(b); 2423(b); 1591(a); 1594(a)  Not Consummated  Showed up for travel
	<i>U.S. ■ ■■■■■,</i> 174 Fed. Appx. 475 (11 <sup>th</sup> Cir. 2006)	Unpublished	Foreign Travel Sting	Defendant responded to ad for sex travel to Costa Rica; negotiated & paid for trip to have sex in Costa Rica with 16 yr-old but cancelled; arranged instead to meet girls in US; arrested when he showed up.	2422(b); 2594(a)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
11 <sup>th</sup> Cir.	<i>U.S. v. Morton</i> , 364 F.3d 1300 (11 <sup>th</sup> Cir. 2004)		<u>Internet Sting</u>	<p><b>Internet chat room</b> "I love older men"; communication followed by telephone calls to several "victims"; sent and requested sexually explicit photos over the Internet; told "victims" he wanted to have sex.</p> <p>Pled guilty; issue of first impression for 11<sup>th</sup> Circuit as to whether enhancement for "pattern" of abuse involving minor could be applied if no actual minor but instead undercover agent. Appellate court affirmed enhancement because pattern of activity used minor interchangeably with victim.</p>	2252A; 2422(b)  Not Consummated
	<i>U.S. v. Manley</i> , Slip Copy, 2007 WL 1379982 (11 <sup>th</sup> Cir. 2007)	Slip Copy Not for Publication	<u>Internet Sting</u>	<p><b>Internet chat room</b> communications between father of 12 yr-old boy and "mother of 12 yr-old girl"; several chats; expressed desire to engage in sex with "12 yr-old" daughter; told "mother" she could have sex with his 12 yr-old son; arranged to meet for sex &amp; arrested when he showed up. Police found laptop, items for sexual activity &amp; 401 photos of child porn – some of which depicted his son.</p> <p>Pled guilty to child porn. Appealed 360 months sentence. Affirmed.</p>	2422(b); 2252A(a)(1) & (a)(2)(A)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Williams,</i> 220 Fed. Appx. 851 (10<sup>th</sup> Cir. 2007)</p>	Unpublished	<p>No Information Pimp/ Prostitution/ Force</p>	<p>Defendant was a pimp who beat and raped his prostitutes – some as young as 13 yrs-old; he threatened them and their children.</p> <p>Pled guilty to 2422(b) so that government would dismiss 6-count indictment for one single charge. Sentenced as a career offender. Appealed his sentence. Court dismissed appeal and enforced his waiver of his right to appeal.</p>	<p>2422(b); and 5 others unnamed</p> <p>Consummated/Force</p>
	<p><i>U.S. ■ Crayton,</i> 143 Fed. Appx. 77 (10<sup>th</sup> Cir. 2005)</p>	Unpublished	<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room</b> communications with “14 yr-old”; described graphic sexual activity; and sent sexual photo; masturbated in front of webcam; offered to teach “14 yr-old” about sex &amp; to buy her a ticket to come meet him; arrested at meeting place.</p> <p>Pled guilty; court enhanced sentence because of use of computer &amp; “victim” under 16 yrs-old &amp; down for accepting responsibility; sentenced to 108 months. Appellate court affirmed sentence because actual under age victim not required for attempt.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Wales,</i> 127 Fed. Appx. 424 (10 <sup>th</sup> Cir. 2005)	Unpublished	<u>Internet Sting</u>	<b>Internet chat room</b> ; sexually explicit communications; defendant already on probation for sexual assault; when arrested he pled guilty but said he never showed up for any of the meetings he set up; just masturbated.  Found guilty of attempt at bench trial and sentenced to 180 months & 3 year supervision.	2422(b); 2451(a) & (b)  Not Consummated
	<i>U.S. ■ Brown,</i> 126 Fed. Appx. 448 (10 <sup>th</sup> Cir. 2005)		<u>Internet Sting</u>	<b>Internet chat room</b> communications with "13 yr-old"; arranged to meet for sexual encounter; arrested when he went to meet "underage girl".  Challenged introduction of Internet conversations as prejudicial. Appellate court affirmed – probative value outweighed prejudicial; sentenced 46 months & 3 years supervision & \$500 fine.	2422(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Johnson,</i> 183 F.3d 1175 (10<sup>th</sup> Cir. 1999)</p>		<p><b>Internet</b> leading to <b><u>Sting</u></b> <b><u>Operation</u></b></p>	<p><b>Internet chat room;</b> defendant met on &amp; communicated via Internet &amp; telephone with underage male; sent items through mail; arranged to meet and had sex; victim cooperated with authorities and telephoned defendant; calls monitored; computer search revealed pornographic photos of 16 or under.</p> <p>Defendant entered one plea agreement for 2 cases but challenged sentence enhancement - sentence 27 months &amp; 3 years supervision &amp; \$2,875.87 restitution affirmed.</p>	<p>2422(b); 2423(b); 2252; 2253</p> <p>Consummated</p>
	<p><i>U.S. █ Byrne,</i> 171 F.3d 1231 (10<sup>th</sup> Cir. 1999)</p>		<p><b>Internet</b></p>	<p><b>Internet chat room;</b> met minor; arranged to meet for sex; had sex.</p> <p>Sentence of 21 months &amp; 3 year supervision affirmed.</p>	<p>2422(b); 2423(b)</p> <p>Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ ████,</i>  165 Fed. Appx. 586 (10<sup>th</sup>  Cir. 2006)</p>		<p><b><u>Internet  Sting</u></b></p>	<p><b>Internet chat room</b> communications with "13 yr-old"; explicit sexual conversations; agreed to meet and arrested at meeting place.</p> <p>Found guilty by jury; challenged that "actual" minor was necessary for 2422 violation. Appellate court denied his request for Certificate of Appealability &amp; dismissal.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. █ Harms,</i>  371 F.3d 1208 (10<sup>th</sup> Cir.  2004)</p>		<p><b>Internet</b></p>	<p>No information available other than use of internet.</p> <p>Pled guilty to 2422(b) &amp; 2252A; sentenced to 51 months &amp; 2 years supervision; challenged conviction based on <i>Ashcroft █ Free Speech Coalition</i>, 122 S.Ct. 1389 (2002) finding parts of Child Protection Act unconstitutional; claimed ineffective counsel. Affirmed.</p>	<p>2422(b);  2252A</p> <p>No Information</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Sims,</i> 428 F.3d 945 (10<sup>th</sup> Cir. 2005)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b>; private citizen had assumed profile of "16 &amp; 12 yr-old" as a gag; received sexually explicit communications for 5 months from defendant as well as photos and sexually explicit images of defendant with other children; defendant arrested when he traveled to meet.</p> <p>Convicted; sentenced to 37 months &amp; \$10,000 fine; court affirmed conviction but vacated sentence because trial court erred by using downward departure of 9 levels.</p>	<p>2422(b); 2423(b); 2252(a)(1)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. ■ Thomas,</i> 410 F.3d 1235 (10<sup>th</sup> Cir. 2005)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b>; several online chats with undercover agent; arranged to meet but did not show; six months later online in chat room again but using different name; showed up for meeting with his 2 children in the back seat; found porno film playing on his computer and transcript of the online chat.</p> <p>First trial resulted in hung jury; but later charged by superseding indictment &amp; sentenced to 70 months imprisonment and 5 years supervision; challenged constitutionality of 2422(b) &amp; sentencing. Affirmed.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting but just drove around and attempted to leave</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Pearl</i>, 324 F.3d 1210 (10<sup>th</sup> Cir. 2003)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b>; conversations, email &amp; telephone with “12 yr-old”; attempted to arrange to have sex from first encounter; sent photos of child porn; email followed by letters with undercover agent pretending to be “12 yr-old’s” uncle wanting to molest her; defendant arrested when he showed up for meeting with “uncle”.</p> <p>Vacated as to 2252A counts due to error in jury instructions but affirmed as to 2423 &amp; 2422(b).</p>	<p>2252A; 2422(b); 2423</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. v. Munro</i>, 394 F.3d 865 (10<sup>th</sup> Cir. 2005)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> communication with “13 yr-old”; told her he wanted to have oral sex with her; asked if she would like to make a “movie” together; arranged to meet at elementary school – told her to wear something sexy; arrested at the school.</p> <p>Contested sentence enhancement for “violent” crime; court affirmed because risk in sexual abuse of minor is enough to support enhancement; PROTECT Act is constitutional.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
10 <sup>th</sup> Cir.	<p><i>U.S. ■ Phillips,</i> 165 Fed. Appx. 677 (10<sup>th</sup> Cir. 2006)</p>	Unpublished	Telephone Pimp/ Prostitution	<p>No specific information available other than the fact that the case involved a pimp whose telephone conversations with underage prostitutes and cell phone records were obtained.</p> <p>Pled guilty to one count of 2422(b); court found facts regarding defendant's use of violence, involvement in prostitution, exertion of undue influence on a minor, his role as a leader in a criminal enterprise and his criminal history; sentenced to 125 months; challenged <i>Booker</i> error in sentencing. Appellate court affirmed, error harmless because it would provide same sentence even if Sentencing Guidelines were found unconstitutional.</p>	<p>2422(b) and 2</p> <p>Consummated Force/Pimp</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Dhingra,</i> 371 F.3d 557 (9<sup>th</sup> Cir. 2004)</p>		<p><b>Internet</b></p>	<p>AOL IM chats with 14 yr-old girl; sexually explicit conversations; defendant persisted in trying to arrange to meet for sex; met for sex &amp; defendant forced 14 yr-old to have sex with him.</p> <p>Defendant challenged constitutionality of 2422(b). Conviction affirmed.</p>	<p>2422(b)</p> <p>Consummated/Force</p>
	<p><i>U.S. █ Vail,</i> 101 Fed. Appx. 190 (9<sup>th</sup> Cir. 2004)</p>	<p>Unpublished</p>	<p><b><u>Internet</u></b> <b><u>Sting</u></b></p>	<p>No specific information available, other than sting.</p> <p>Defendant appealed conviction &amp; sentence because no "actual" minor was involved. Conviction affirmed but sentence vacated because court should have used downward departure.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Strater,</i> 150 Fed. Appx. 610 (9 <sup>th</sup> Cir. 2005)	Unpublished	<b><u>Internet Sting</u></b>	<b>Internet chat room;</b> no specific information available. Defendant claimed entrapment.  Conviction affirmed.	2422(b); 2423(b)  Not Consummated
	<i>U.S. █ Schnepfer,</i> 161 Fed. Appx. 678 (9 <sup>th</sup> Cir. 2006)	Unpublished	<b><u>Internet Sting</u></b>	<b>Internet chat room;</b> evidence clear defendant believed he was communicating with "minor"; attempted to entice her to fly to Hawaii to have sex; defendant claimed entrapment. Affirmed.	2422(b); 2423(b)  Not Consummated
	<i>U.S. █ Curtin,</i> 443 F.3d 1084 (9 <sup>th</sup> Cir. 2006)		<b><u>Internet Sting</u></b>	<i>See 2007 U.S. App. LEXIS 12110 (9<sup>th</sup> Cir. 2007) supra.</i>	
	<i>U.S. █ Anderson,</i> 2007 U.S. App. LEXIS 11856 (9 <sup>th</sup> Cir. 2007)	Unpublished	<b>Internet</b>	Online <b>Internet</b> chat, no specific information available.  Conviction affirmed.	2422(b)  No Information

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>United States v. Messano</i> , 114 Fed. Appx. 785 (9th Cir. 2004)	Unpublished	<u>Internet Sting</u>	Defendant developed relationship over a period of several months on the Internet with "13 yr-old"; discussed sexually explicit activity; arranged to meet for sex; arrested when he showed up.  Appellate court affirmed conviction; later sentence vacated and remanded in <i>Messano</i> , 2005 U.S. LEXIS 19341 (9th Cir. 2005) for resentencing in keeping with <i>Booker</i> .	2422(b); 2423(b)  Not Consummated  Showed up at meeting
	<i>U.S. v. Tashbook</i> , 144 Fed. Appx. 610 (9th Cir. 2005)	Unpublished	<u>Internet</u>	Defendant placed ads on <b>Internet</b> for his "production" company; communicated with victims by email and telephone; rented a hotel room and took photos of victim; coerced victim to engage in non-consensual explicit sex for purposes of taking photographs.  Sentenced to 60 years. Conviction and sentence affirmed.	2422(b); 2423(b); 2251(a); 2252(a)(2)  Consummated/Force
	<i>U.S. v. Shahin</i> , 179 Fed. Appx. 420 (9th Cir. 2006)	Unpublished	<u>Internet Sting</u>	No specific information available; defendant corresponded with undercover agent.  Appealed conviction claiming legal impossibility and not real minor. Conviction affirmed.	2422(b)  Not Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Meek</i>, 366 F.3d 705 (9<sup>th</sup> Cir. 2004)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> contact of 14 yr-old male; had sex with 14 yr-old &amp; posted naked photos of boy on the Internet; police took over boy's Internet account and were approached by defendant claiming he was still interested in "hooking up"; continued to seek sexual encounter with "boy" over next month discussing in graphic details sexual acts he hoped to perform on the boy; arranged to meet for sex &amp; arrested when he did.</p> <p>Pled guilty to 2422(b) and challenged legality of search of his computer &amp; alleged no violation because no "actual" minor. Conviction affirmed.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. v. O'Brien</i>, 27 Fed. Appx. 882 (9<sup>th</sup> Cir. 2001)</p>	<p>Unpublished</p>	<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b>; initiated sexual conversations with minor; tried to entice "girl" to visit; paid for ticket for her to visit &amp; live with him; admitted to her that he had visited "Girls and Older Guys" <b>Internet chat room</b> and chatted with other teenage girls.</p> <p>Claimed entrapment. Conviction affirmed.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Weir</i> , 52 Fed. Appx. 423 (9 <sup>th</sup> Cir. 2002)	Unpublished	No Information	No information available. Indictment not accessible; no media information. 210 month sentence affirmed.	2422(b); 2251(a) & (d); 2256; 2252(a)(5)(B) No Information
	<i>U.S. v. Grenman</i> , Slip Copy, 2007 WL 841093 (9 <sup>th</sup> Cir. 2007)	Not for Publication	No Information	No information available. Appeal of sentence. Affirmed in part, vacated in part and remanded.	2422(b) No Information
	<i>U.S. ■ Nisely</i> , 172 Fed. Appx. 713 (9 <sup>th</sup> Cir. 2006)	Unpublished	<b>Internet</b>	No information available but implication is that <b>Internet used</b> . Defendant convicted of 2422(b); contested supervised release which prohibited use of computer.	2422(b) No Information
	<i>U.S. ■ Curtin</i> , 2007 U.S. App. LEXIS 12110 (9 <sup>th</sup> Cir. 2007)		<b><u>Internet Sting</u></b>	<b>Internet chat room</b> ; explicit sexual conversations for 4 hours; exchanged photos; defendant arranged to meet for sex with "14 yr-old".  Defendant claimed that he did not believe that he was meeting a "14 yr-old"; he contested the government's introduction of 140 stories of sexual activity by minors on his PDA to prove his intent. Affirmed.	2422(b); 2423(b)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. v. Kozlowski</i> , 2007 U.S. App. LEXIS 9489 (9 <sup>th</sup> Cir. 2007)	Unpublished	<u>Internet Sting</u>	<b>Internet chat room</b> ; 27 yr-old engaged in sexually explicit communications with "14 yr-old"; arranged to meet for sex at his hotel.  Anders Brief appeal of sentence of 60 months; denied.	2422(b); 2423(b) Not Consummated
	<i>U.S. v. Messano</i> , 2005 U.S. App. LEXIS 19341 (9 <sup>th</sup> Cir. 2005);	Unpublished		Affirmed conviction in earlier case but remanded regarding resentencing because court applied sentencing guidelines as optional.	
	<i>U.S. v. Jenkins</i> , 163 Fed. Appx. 578 (9 <sup>th</sup> Cir. 2006)	Unpublished	<b>Internet</b>	No information available. Pled guilty to 2422(b) and 2423(b). Appealed 46 month sentence. Remanded for further proceedings.	2422(b); 2423(b); 2252(a)(4); 2253 No Information
	<i>U.S. v. Ayoub</i> , 177 Fed. Appx. 765 (9 <sup>th</sup> Cir. 2006)	Unpublished	<u>Internet Sting</u>	Defendant claimed entrapment and that he did not believe he was dealing with a minor.  Conviction affirmed.	2422(b); 2423(b) Not Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Gleich,</i> 397 F.3d 608 (8<sup>th</sup> Cir. 2007)</p>		<p><b>Internet</b></p>	<p>12 yr-old male told police that defendant had photographed him in sexually explicit poses and had shown him photos of other children; police got a warrant &amp; discovered 3 computers with child pornography unrelated to the offense investigation.</p> <p>Pled guilty to 2252(a)(2); sentence was enhanced under "pattern of activity involving sexual abuse"; defendant contested introduction of evidence &amp; use of enhancement. Appellate court denied motion to suppress but vacated sentence because no "pattern" (transmitting photo of buttocks of child over the Internet was not separate sexual abuse).</p>	<p>2251(a) &amp; ©); 2252(a)(2) &amp; (b)(1); 2252(a)(4)(B); 2422(b)</p> <p>Consummated on porn charges - no info on 2422(b)</p>
<p>9<sup>th</sup> Cir.</p>	<p><i>U.S. v. Jahner,</i> 72 Fed. Appx. 665 (9<sup>th</sup> Cir. 2003)</p>	<p>Unpublished</p>	<p>No Information</p>	<p>No information available. Indictment not accessible; no media information.</p> <p>Defendant pled guilty to 2422(b) &amp; 2423(b) and stipulated that he had sent photos of himself masturbating to someone he believed to be a minor; challenged introduction of the photos as prejudicial. Affirmed.</p>	<p>2422(b); 2423(b)</p> <p>No Information</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Leach,</i>  2007 U.S. App. LEXIS  14832 (8<sup>th</sup> Cir. 2007)</p>		<p><u>Internet  Sting</u></p>	<p><b>Internet chat room</b> conversations with "14 yr-old"; arranged to meet for sex; arrested at airport.</p> <p>Pled guilty to 2422(b) in exchange for government dropping 2423(b) &amp; criminal forfeiture charges; had pled guilty to attempted aggravated criminal sodomy of a 13 yr-old he had met in a chat room but had not yet ■ sentenced; trial court declined to apply enhancement based on state court case because sentencing had not occurred yet, enhancement would have resulted in 168-210 month sentence; defendant received 72 month sentence; government appealed. Appellate court vacated sentence and remanded for resentencing.</p>	<p>2422(b);  2423(b);  2253 (criminal forfeiture)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Garate,</i> 482 F.3d 1013 (8<sup>th</sup> Cir. 2007)</p>		<p><b>Internet</b></p>	<p><b>Internet chat room</b>; met 12 yr-old in chat room; communicated via Internet &amp; telephone; traveled to have sex and did; at time arrested he was 20 &amp; girl was 14.</p> <p>Pled guilty to 2423(b) charge &amp; government agreed to drop 2422(b) charge; received 30 month sentence. Government appealed. Reversed due to factors such as anguish caused parents (father had warned defendant several times to leave daughter alone when he found out about the communications).</p>	<p>2422(b); 2423(b)</p> <p>Consummated</p>
	<p><i>U.S. █ Patten,</i> 397 F.3d 1100 (8<sup>th</sup> Cir. 2005)</p>		<p><b><u>Internet</u></b> <b><u>Sting</u></b></p>	<p><b>2 Internet chat room</b> communications &amp; 1 telephone conversation, explicit sexual conversations; arranged to meet; arrested at meeting place.</p> <p>15 month sentence and sufficiency of evidence challenged on appeal. Affirmed.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Hicks,</i> 457 F.3d 838 (8<sup>th</sup> Cir. 2006), overruled <i>Helder</i>, 452 F.3d 751</p>		<p><u>Internet Sting</u></p>	<p>Defendant initiated <b>Internet</b> conversation with “13 yr-old” followed by telephone calls; stated he was interested in having vaginal intercourse with “13 yr-old” minor &amp; was willing to travel from FL to Kansas City; arrested when he arrived at airport.</p> <p>Government appealed dismissal of indictment. Appellate court reversed because actual minor not required.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. █ D'Andrea,</i> 473 F.3d 859 (8<sup>th</sup> Cir. 2007)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> and telephone communications with “13 yr-old”; defendant made plans to travel for sex; did same with another undercover agent; many times masturbated in front of webcam; arrested at meeting place. Police found nightgown, condoms, lubricant &amp; camera, video &amp; computer equipment; search warrant obtained for computer revealed many other similar “chats” and child pornography.</p> <p>Defendant challenged government enhancement for “uncharged conduct” including similar other sex chats &amp; exchange of sexually explicit photos with 12, 17 and 14 yr-old girls Appellate court affirmed sentence enhancement.</p>	<p>2422(b); 2252(b)(2)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Naiden</i>, 424 F.3d 718 (8<sup>th</sup> Cir. 2005)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> "IluvOlderMen"; during chats defendant asked "14 yr-old" for photos; asked if she was a virgin and if she would come to visit him where her "virginity would be over"; arranged to meet to have sex and told her they would marry in a few years; repeatedly told her that was important to keep this a secret; he sent her money for ticket; arrested when he went to pick her up at the train station.</p> <p>Challenged lower court's refusal to allow his friend to testify that he did not believe the victim was actually 14 yrs-old. Appellate court affirmed because even if it had been error not to allow testimony, which it was not, there was overwhelming evidence of his belief that she was 14 yrs-old.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Blazek,</i> 431 F.3d 1104 (8<sup>th</sup> Cir. 2005)</p>		<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room</b> “male-to-male”; conversations for 15 months; gave detailed description of how he would give massage; graphic sexual conversations, discussed oral sex and suggested a 3-way with “15 yr-old’s” friend; arranged to meet for sex; arrested at meeting. Computer search revealed child pornography.</p> <p>Appealed conviction &amp; sentence claiming not actual minor and insufficient evidence. Affirmed because attempt charge does not require actual minor. 235 month sentence affirmed because enhancement applied to use of undercover “minor victim”.</p>	<p>2422(b); 2423(b); 2252(a)(2) and (A)(4)(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Dickson,</i> 149 Fed. Appx. 543 (8<sup>th</sup> Cir.)</p>	<p>Unpublished</p>	<p><u>Internet Sting</u></p>	<p><b>Internet chat room;</b> IM chats between 47 yr-old man and "15 yr-old"; exchanged addresses and defendant asked "15 yr-old" to meet him in a hotel parking lot near his house; defendant told her he wanted to make love to her; when "15 yr-old" stated she had no experience defendant asked if he could teach her; arrested when he went to meet her at the hotel parking lot.</p> <p>Appealed conviction and 60 month sentence. Affirmed.</p>	<p>2422(b)</p> <p>Not Consummated</p>
	<p><i>U.S. █ Little,</i> 485 F.3d 1210 (8<sup>th</sup> Cir. 2007)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room;</b> IM chats during which defendant arranged to have sex with minor; arrested when he showed up at the park. There was evidence that the defendant had previously attempted to engage in sex; online conversations with 12 &amp; 13 yr-old girls prior to the sting operation that resulted in his arrest.</p> <p>The government contested his release on bail for 60 days before his self-surrender. Court vacated order and remanded for issuance of a bench warrant.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
8 <sup>th</sup> Cir.	U.S. █ <i>Rayl</i> , 270 F.3d 709 (8 <sup>th</sup> Cir. 2001)		Internet	<p><b>Internet chat room;</b> “Pen-pal” email contact initiated by defendant pretending to be 15 yr-old girl whose father was teaching her to have sex; arranged to meet underage victim in mall but defendant showed up instead &amp; told victim that “15 yr-old” could not make it; took victim to hotel, threatened her with knife, forced her to take clothes off and took photos; showed her photos of other young girls; continued to send increasingly hostile emails trying to get her to have sex.</p> <p>Defendant appealed sufficiency of evidence, credibility of witness and also challenged government’s introduction of pediatrician that photos were of under 18 yr-olds. Affirmed.</p>	<p>2422(b); 2252(a); 2252A(a)(1) and (a)(5)(B)</p> <p>Not Consummated/Force to have victim pose for naked photos</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Angle,</i> 234 F.3d 326 (7<sup>th</sup> Cir. 2000)</p>		<p><u>Internet Sting</u></p>	<p>Father discovered suspicious activity on son's computer and reported to the FBI; via sting operation defendant met "13 yr-old" boy online; told boy he loved him &amp; would take care of him; sexually explicit conversations; offered to give boy money &amp; gifts in exchange for his address &amp; phone number; in another sting by FBI, defendant ordered sexually explicit materials involving minors &amp; advised to hold delivery because he was going to Mexico for 8 days "to play with the boys"; arrested when he came back from Mexico.</p> <p>Appealed his sentence and conviction; sentenced to 325 months for 2252 and 120 months for 2422(b) &amp; registration as sex offender; court affirmed but remanded for sentencing because he did not have notice regarding sex offender registration.</p>	<p>2252(a)(2); 2253(a)(4)(B); 2422(b)</p> <p>Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Shutic,</i> 274 F.3d 1123 (7<sup>th</sup> Cir. 2001)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> "Male for Barely Legal Female"; initiated conversation with "14 yr-old"; over 6 month period sent over 51 images of people engaged in sexual intercourse &amp; discussed plans to meet to engage in intercourse; defendant flew from his home in OH to IN but returned home when he saw unmarked police cars; defendant attempted to meet "14 yr-old" again but was arrested when he showed up; defendant had also made contact with another "minor" and had scheduled meeting for sex.</p> <p>Pled guilty but challenged his sentence based on court's refusal to group counts of child pornography claiming they involved the same primary victim – society. Affirmed.</p>	<p>2422(b); 2243(a); 2252A(a)(1)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Lovaas,</i>            241 F.3d 900 (7<sup>th</sup> Cir.            2001)</p>		<p><b><u>Internet</u></b>  <b><u>Sting</u></b></p>	<p>Email messages with “14 yr-old” boy asked for photos and sent photos of young boys engaging in sex &amp; sent underwear; police obtained permission to search house from wife and found over 1800 images of minors engaging in sexual activity; defendant confessed to having had prior sexual contact with other minors.</p> <p>Pled guilty to 2252; offense level based on “pattern”; defendant challenged and requested downward departure because he volunteered info about other crimes; court affirmed.</p>	<p>2422(b);            2252(a)(1) &amp; (a)(4)(B)</p> <p>Not Consummated</p>



COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Veazey,</i> — F.3d —, 2007 WL 1892821 (7<sup>th</sup> Cir. 2007)</p>	<p>Slip Copy for Publication</p>	<p><u>Internet</u> <u>Sting</u></p>	<p><b>Internet chat room</b> “ *!SeXy HiGh SchOol HoTTiEs*” ; 48 yr-old man communicated with “15 yr-old” by Internet &amp; later by telephone for months; very graphic sexually explicit conversations; defendant tried to teach “15 yr-old” how to seduce her friend; told her he wanted to have sex with her &amp; her friend and wanted to take photos &amp; make a movie; arranged to meet for sex; arrested when he showed up.  Affirmed.</p>	<p>2422(b); 2423(b)  Not Consummated  Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
7 <sup>th</sup> Cir.	<i>U.S. ■ Mallon,</i> 345 F.3d 943 (7 <sup>th</sup> Cir. 2003)		<u>Internet Sting</u>	<p><b>Internet chat room;</b> British citizen met “15 yr-old” in chat room; he repeatedly attempted to entice her into having sex with him and boasted about another relationship with a “15 yr-old” in Florida; when “15 yr-old” finally agreed defendant flew from Belfast to Chicago for that purpose; arrested in hotel when he tried to hug &amp; kiss the agent. Police found condoms; video camera set-up to film in hotel room; at defendant’s home police found sexually graphic communications between defendant and other minors.</p> <p>Government challenged the judge’s downward departure in sentencing based on defendant’s heart condition and severely diminished capacity to make good judgments and deportable alien status; court vacated the sentence and remanded.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<i>Doe, et al. ■ Smith, et al.,</i> 470 F.3d 331 (7 <sup>th</sup> Cir. 2006)			Molestation of minor student by school dean.	<p>2422(b)</p> <p>Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Humphrey,</i> 146 Fed. Appx. 1 (6 <sup>th</sup> Cir. 2005)	Unpublished	<b>Internet Sting</b>	Defendant set up a meeting through the Internet and traveled to engage in sex with "7 & 12 yr-olds & their mother".  Pled guilty. Challenged sentencing; court reversed sentencing because sentence was issued under a "pre-Booker" regime.	2422(b); 2423(b)  Not Consummated  Showed up for meeting
	<i>U.S. ■ Salazar,</i> 185 Fed. Appx. 484 (6 <sup>th</sup> Cir. 2006)	Unpublished	<b>Internet</b>	Online solicitation.  Consolidation of 2 cases same defendant - New Mexico & Michigan grand jury charges of 2422(a) & (b); 2423(b) & 2251.  Pled guilty without reservation to challenge constitutionality of PROTECT Act. Act found constitutional and conviction affirmed.	2422(a) & (b); 2423(b); 2251(a)  No Information
	<i>U.S. ■ Volungus,</i> 8 Fed. Appx. 555 (6 <sup>th</sup> Cir. 2001)	Unpublished	No Information	No information available. Indictment not accessible; no media information.  Challenged application of special condition to his 3 year supervised release after serving his 53 month sentence that he not possess a computer; court affirmed because defendant agreed to the condition at pre-sentence hearing.	2422(b); 2252A  No Information

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Bailey,</i> 228 F.3d 637 (6 <sup>th</sup> Cir. 2000)		<b>Internet</b>	Defendant contacted minors through Internet; used graphic language describing how he wanted to perform oral sex on them and urged them to meet him; asked for photos of minors; admitted to trying to set up meetings for sex with other minors but said they never took place.  Guilty of attempt to use the <b>Internet</b> to persuade, etc.	2422(b)  Not Consummated
	<i>U.S. ■ Coppedge,</i> 12 Fed. Appx. 270 (6 <sup>th</sup> Cir. 2001)	Unpublished	<b>Computer</b>	No specific information available.  Pled guilty to using computer to entice a minor & 2423(b); challenged 57 month & 3 year supervision sentence. Affirmed.	2422(b); 2423(b)
	<i>U.S. ■ Champion,</i> 248 F.3d 502 (6 <sup>th</sup> Cir. 2001)		<b>Internet (involves kidnapping)</b>	<b>Internet chat room;</b> met 13 yr-old in internet chat room while pretending to be 19 yrs-old; took her interstate; sexually molested her over 3 day period and held her against her will.  Pled guilty; challenged sentence enhancement as career offender and as violent crime; court affirmed sentence.	2422(b); 2423(a); 2251(a); 2252A(4)(B)  Consummated/ Force

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. ■ Payne,</i> 77 Fed. Appx. 772 (6 <sup>th</sup> Cir. 2003)	Unpublished	<u>Internet Sting</u>	<p><b>Internet chat room</b> contact with "14 yr-old"; defendant asked "14 yr-old" if she would perform oral sex on him and told her he wanted to touch her under her clothes; arranged to meet at a restaurant; arrested when he showed up.</p> <p>Pled guilty but challenged sentence base offense level computation; court affirmed 24 month &amp; 2 year supervision.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<i>U.S. ■ McCall,</i> 79 Fed. Appx. 795 (6 <sup>th</sup> Cir. 2003)	Unpublished	<u>Internet Sting</u>	<p><b>Internet chat room</b>; initiated communication with "15 yr-old"; FBI took over and continued communications as "13 yr-old"; defendant indicated he wanted to engage in sexual intercourse with "13 yr-old" and arranged to meet; arrested at the meeting place. His computer revealed contact with at least 3 actual minors.</p> <p>Charged with 2243(a) and 2422(b); pled guilty to 2423 in exchange for dropping 2422 charge; challenged court's failure to depart downward; appellate court dismissed for lack of jurisdiction because judge knew that she could depart downward.</p>	<p>2422(b); 2243(a)</p> <p>Not Consummated</p> <p>Showed up at meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Chriswell,</i> 401 F.3d 459 (6<sup>th</sup> Cir. 2005)</p>		<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room</b> ""I Love Older Men"; 52 yr-old met "14 yr-old" in chat room; engaged in at least 14 explicit sexual conversations; arranged to meet and arrested when he showed up.</p> <p>Appeals 2 level enhancement of sentence because undercover agent was not actual minor; court agreed with defendant and reversed and remanded.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. █ Hamm,</i> 400 F.3d 336 (6<sup>th</sup> Cir. 2005)</p>		<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room</b> "I wanna do older men"; 27 yr-old initiated conversation with "14 yr-old"; defendant expressed desire to have sexual relations with her &amp; sent her money to buy a plane ticket in order to meet him for sexual activity; arrested when he went to airport to pick her up.</p> <p>Pled guilty and challenged 33 month sentence because court failed to recognize its ability to depart downward from the guidelines; sentence vacated.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Fuller,</i> 77 Fed. Appx. 371 (6<sup>th</sup> Cir. 2003)</p>	Unpublished	<b><u>Internet Sting</u></b>	<p>Defendant engaged in <b>Internet</b> IM chats with adult women which he continued with telephone contact; women reported him to police because of his preoccupation with having sex with minors; police conducted Internet sting operation; defendant began IM &amp; telephone communications with "14 yr-old"; described explicit sexual acts, including mother/daughter sex; sent photos of women having sex with dogs; arranged a meeting with "14 yr-old" to have sex; arrested when he showed up. Challenged sentence of 135 months &amp; 2 year supervision. Affirmed.</p>	<p>2422(b); 2252(a)(1) &amp; (a)(4)(B)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>
	<p><i>U.S. ■ Kisor,</i> 104 Fed. Appx. 479 (6<sup>th</sup> Cir. 2004)</p>	Unpublished	<b>Internet</b>	<p><b>Internet chat room;</b> 32 yr-old met 16 yr-old; engaged in IM and telephone communications containing graphic descriptions of sexual desires &amp; role playing; mother found daughter in motel room with defendant and called police.</p> <p>Appeal of the court's refusal to ask jurors during voir dire if they thought that a 16 year-old could seduce an adult. Court found no error.</p>	<p>2422(b)</p> <p>Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Yokeley,</i> Slip Copy, 2007 WL 1958627 (6<sup>th</sup> Cir. 2007)</p>	<p>Slip Copy Not for Publication</p>	<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> “moms want older men for daughter”; approached “mother of 12 &amp; 9 yr-olds” for sex with all three; graphic conversations with “12 yr-old” about having oral sex with her &amp; getting her “9 yr-old” sister to participate; used telephone to finalize arrangements to meet for sex with “girls” &amp; told them to get morning after pill because he did not want to use condom; wanted to be first sexual partner of the “12 yr-old”; arrested when he showed up.</p> <p>Pled guilty; contested 108 month sentence. Affirmed.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
6 <sup>th</sup> Cir.	<i>U.S. ■ Smith,</i> 20 Fed. Appx. 412 (6 <sup>th</sup> Cir. 2001)	Unpublished	<b>Internet</b>	<b>Internet</b> and telephone communications between 42 yr-old and 16 yr-old girl; the two met and had sexual relations; when the 16 yr-old tried to end the relationship, the defendant threatened and physically abused her; police engage in undercover investigation.  Challenged use of prior felony convictions to enhance sentencing to 150 months. Affirmed.	2422(b); 2423(b); 2252  Consummated
	<i>U.S. ■ First,</i> Slip Copy, 2007 WL 1700818 (6 <sup>th</sup> Cir. 2007)	Slip Copy Not for Publication	<b><u>Internet</u></b> <b><u>Sting</u></b>	<b>Internet</b> communications between defendant and “mother of under age girls”; defendant expressed interest in having sex with “daughters”; arranged to meet; arrested when he showed up after attempting to escape and hit officer with his car.  Pled guilty; contested 144 month & 10 yr. supervision sentence. Affirmed.	2422(b); 2423(b) 2241(c); 2241(c); 111 (assault of officer)  Not Consummated  Showed up for meeting

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. █ Wise,</i>  447 F.3d 440 (5<sup>th</sup> Cir.  2006)</p>		<p><b>Internet</b></p>	<p><b>Internet chat room;</b> 38 yr-old from Texas established Internet contact with 13 yr-old; defendant lied about his age because he knew 13 yr-old was not interested in sexual relationship with someone his age; IM chats and telephone conversations got more and more sexually explicit; defendant and 13 yr-old discussed sex acts they would perform together; defendant asked her to send explicit nude photos of herself; arranged to travel to meet for sex and recorded encounters; met on at least 3 separate occasions and performed sexual acts &amp; took non-sexual &amp; sexual photos.</p> <p>Contested 168 month sentence because of "grouping" in pre-sentence report. Affirmed.</p>	<p>2422(b);  2423(b)</p> <p>Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Armendariz</i>, 451 F.3d 352 (5<sup>th</sup> Cir. 2006)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b>“Lil Boys for Older Men”; 38 yr-old man entered &amp; contacted minor “boy” through chat room describing sexual encounters he would like to have with the “boy”; claimed he would like to teach the “boy” how to perform sexually; later used phone to continue contact and arranged to meet for sex; arrested when he showed up for the meeting. Computer analysis showed that he had corresponded with at least 4-5 other actual minor males but had never attempted to have sex with them.</p> <p>Government contested failure to require supervision upon release after 60 month sentence; sentence vacated and remanded because court did not consider the guidelines in not requiring post release supervision.</p>	<p>2422(b)</p> <p>Not Consummated</p> <p>Showed up for meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
5 <sup>th</sup> Cir.	<i>U.S. ■ Cherian,</i> 58 Fed. Appx. 596 (5 <sup>th</sup> Cir. 2003)	Unpublished	<u>Internet Sting</u>	<b>Internet chat room</b> "Mom and Daughter Sex"; defendant initiated conversations with "mother of 13 yr-old"; over 13 months communicated with her relating sexually explicit details of sex experiences and preferences with the "13 yr-old"; arranged to meet "13 yr-old" for sex and arrested when he showed up.  Conviction affirmed.	2422(b); 2423(b)  Not Consummated  Showed up for meeting
	<i>U.S. ■ Berger,</i> 119 Fed. Appx. 658 (5 <sup>th</sup> Cir. 2005)	Unpublished	No Information	No information available. Indictment not accessible.  Pled guilty to 2422(b); appealed plea and sentence. Appeal dismissed.	2422(b)  No Information
	<i>U.S. ■ Latorre,</i> 61 Fed. Appx 557 (5 <sup>th</sup> Cir. 2003)	Unpublished	No Information	No information available. Indictment not accessible; no media information.  Sentence restriction that prohibits defendant from "visiting any areas near schools, day-care centers..." after release from 105 months imprisonment affirmed.	2422(b); 2423(b)  No Information

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
4 <sup>th</sup> Cir.	<i>U.S. v. Kaye</i> Slip Copy, 432007 WL 1978226 (4 <sup>th</sup> Cir. 2007)	Slip Copy Not for Publication	<u>Internet Sting</u> by private organization	<b>Internet</b> communications by 54 yr-old male with "13 yr-old male"; defendant told "13 yr-old" he was "prowling for young men" on the Internet; defendant emailed explicit photos of himself naked and having oral sex with another male; defendant engaged in several sexually explicit chats with "14 yr-old"; arranged to meet "14 yr-old" for sex; when defendant arrived he was met by "Dateline" crew instead.  Conviction & sentence affirmed	2422(b); 2423(b)  Not Consummated
	<i>U.S. v. Bray</i> , 133 Fed. Appx. 80 (4 <sup>th</sup> Cir. 2005)	Unpublished	No Information	No information available. Indictment not accessible; media information.  Challenge to sentence of 168 and 180 months for 2 counts of 2422(b) conviction and 60 month conviction for marijuana possession – all but 24 months to be concurrent or alternative sentence of 204 months - court affirmed sentence.	2422(b); 21 USC 841 (marijuana possession )  No Information
	<i>U.S. v. Taylor</i> , 6 Fed. Appx. 174 (4 <sup>th</sup> Cir. 2001)	Slip Copy  Not for Publication	No Information	No information available. Indictment not accessible; no media information.  Appealed 71 month sentence. Affirmed.	2422(b); 2423(b)  No Information

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Tykarsky</i>, 446 F.3d 458 (3<sup>rd</sup> Cir. 2006)</p>		<p><u>Internet Sting</u></p>	<p><b>Internet chat room</b> "Iloveoldermen2"; defendant initiated IM chat with "14 yr-old"; indicated interest in having sex with her; contacted the "14 yr-old" on at least 8 different dates &amp; described in explicit detail sexual acts he hoped to perform with her; asked "14 yr-old" for photo; during Internet chat defendant arranged to meet "14 yr-old" at a hotel and described sexual acts he intended to engage in with her; defendant showed up at hotel and arrested.</p> <p>Actual minor not required; maximum sentencing provided by PROTECT Act remanded because conduct occurred before effective date of the Act (April 30, 2003).</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p> <p>Showed up at meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	U.S. █ <i>Awwad</i> , 184 Fed. Appx. 201 (3 <sup>rd</sup> Cir. 2006)	Unpublished	<u>Internet Sting</u>	Case involved typical internet sting operation. No specific facts available.	2422(b); 2423(b)  Not Consummated
	U.S. █ <i>Garcia</i> , Slip Copy, 2007 WL 986874 (3 <sup>rd</sup> Cir. 2007); <i>see also</i> U.S. █ <i>Garcia</i> , 2005 WL 1862409 (M.D. Pa. 2005)(Unpublished) <i>infra</i>	Slip Copy  Not for Publication	<b>Internet</b>	56 yr-old male met 14 yr-old on <b>Internet</b> ; traveled to meet her for sex and had sex with her.  Pled guilty but appealed 100 month, 5yr supervision & fines. Affirmed.	2422(b); 2423(b)  Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
3 <sup>rd</sup> Cir.	<i>U.S. v. Lee</i> , 315 F.3d 206 (3 <sup>rd</sup> Cir. 2003)		Internet	<p><b>Internet chat room</b>  “GirlsandOlderGuys”; 30 yr-old contacted minor in chat room; met actual 15 yr-old in chat room; arranged to have her travel to meet him; they met and engaged in sexual acts. Also attempted to meet other minors online to engage in sexual activity; transmitted child porn online.</p> <p>Pled guilty to 2252A and 2422(b) and sentenced to 57 months; appealed sentence requiring supervised release condition requiring random polygraph testing. Affirmed.</p>	2252A(a)(1) & (b)(1); (a)(5)(B) & (b)(2); 2423(b); 2422(b)  Consummated
	<i>U.S. v. Hlavac</i> , Slip Copy, 2006 WL 3368897 (3 <sup>rd</sup> Cir. 2006)	Slip Copy Not for Publication	Internet	Defendant responded to Internet propositions made by mother of a 2 yr-old offering her for sex; arranged for the sexual encounter with the infant online. When arrested police found child porn on his computer including descriptions of his fantasies of engaging in sex with the mother and infant. Appealed 240 month sentence. Affirmed.	2422(b); 2423(b); 2252(a)(2); 2252(a)(4)(B); 2253  Consummated

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Brand</i>, 467 F.3d 179 (2<sup>nd</sup> Cir. 2006)</p>		<p><b><u>Internet Sting</u></b></p>	<p><b>Internet chat room</b>; civilian posing as “13 yr-old girl” in “I Love Older Men” chat room; defendant proposed they meet and he “hug” her and they could fool around and “do it all”; offered to “teach her” how to have sex and “how to be a woman”; civilian turned chats over to police; defendant used the telephone to plan and arrange to meet for sex; arrested when he showed up. Police found child porn on his computer and condoms in his car.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated.</p> <p>Showed up at meeting</p>
	<p><i>U.S. v. Johnson</i>, 221 F.3d 83 (2<sup>nd</sup> Cir. 2000)</p>		<p><b>Internet</b></p>	<p><b>Internet</b> contact with 3 separate minor girls and traveled to engage in illegal sexual conduct; traveled from MA to NY; VA to MD; &amp; VA to MI to meet 13 yr-olds &amp; have sex; and convinced minor to travel from MD to VA to have oral sex with him; all through the <b>Internet</b>.</p> <p>Pled guilty – 88 month sentence Affirmed.</p>	<p>2422(b); 2423(b); 2252(a)(1) &amp; (a)(4)(B)</p> <p>Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Minnici</i>, 128 Fed. Appx. 827 (2<sup>nd</sup> Cir. 2005)</p>	<p>Unpublished</p>	<p><u>Internet Sting</u></p>	<p>Defendant drove 170 miles to engage in sexual activities with "13 yr-old" after engaging in IM chats, and telephone conversations. Defendant found to be in possession of graphic photographs. Defendant also engaged in IM chats with "14 yr-old" during which he expressed desire to travel to meet her; also other IM chats where defendant described "coaching" high-school girls in sexual terms; photo of grown man masturbating in front of a 2 yr-old.</p> <p>"Addictive" nature of Internet communications with minor warranted pre-trial detention and revocation of bond.</p>	<p>2422(b); 2423(b)</p> <p>Not Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. ■ Weisser,</i> 417 F.3d 336 (2<sup>nd</sup> Cir. 2005)</p>		<p><b><u>Internet</u></b> <b><u>Sting</u></b></p>	<p>AOL IM chats (over 6) between 45 yr-old male from San Francisco and "11 yr-old male" in NYC; discussed in graphic language the kinds of previous sexual activity he had engaged in with other minor males and those he planned to engage in with the "11 yr-old"; defendant arranged to meet the "boy" at a hotel in NYC; talked on the telephone twice (calls recorded); requested photos to verify age; made detailed plan for "11 yr-old" to skip school and stay with him at hotel in NYC; defendant sent "11 yr-old" his flight and hotel information and waited for "boy" in hotel room where arrested; police found defendant with sexual paraphernalia and CD in computer containing child porn which had been created from images downloaded from defendant's computer.</p> <p>210 month sentence remanded to be reconsidered in light of <i>U.S. ■ Crosby,</i> 397 F.3d 103 (2d Cir. 2005).</p>	<p>2422(b); 2423(b); 2252A(a)(1)</p> <p>Not Consummated</p> <p>Showed up at meeting</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<p><i>U.S. v. Friedman</i>, 139 Fed. Appx. 330 (2<sup>nd</sup> Cir. 2005)</p>	<p>Unpublished</p>	<p><b>Internet</b></p>	<p>Email communications with actual 14 yr-old; defendant arranged to meet and actually met 14 yr-old girl and engaged in "sexual touching"; interrupted by security guard at mall; Ims reflected defendant's intention upon meeting 14 yr old to present himself in an aroused state; defendant found with condoms in his car; &amp; when arrested photos were found on his digital camera, one of which he had sent to the 14 yr-old via email. Conviction affirmed but 81 month sentence vacated to be reconsidered in light of <i>Booker</i>.</p>	<p>2422(b); 2423(b)  Consummated</p>

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
	<i>U.S. █ Gravenhorst</i> , 2006 U.S. App. LEXIS 32373 (1st Cir. 2006); vacating 377 F.3d 49 (1 <sup>ST</sup> Cir. 2004)	Unpublished	Internet	Use of email by 45 yr-old male to proposition 4 16 yr-old girls & one under 16 yrs-old to engage in sex with him; defendant pretended to be 19 yr-old and sent numerous graphic emails asking minors for sex; also sent sexually-charged images to them – including couple engaging in sex and an erect penis.  Sentence vacated in light of <i>Booker</i> .	2422(b); 1470; 1462  No Information
2 <sup>nd</sup> Cir.	<i>U.S. █ █</i> ; 148 F.3d 207 (2 <sup>nd</sup> Cir. 1998)		Pimp/ Prostitution	Gang members; pimp recruited underage girls for prostitution and traveled interstate with them.	2422(b); 2423(b)  No Information

It is also clear that in no case – other than *U.S. v. Howard*, 2006 U.S. Dist. LEXIS 67214 (W.D.N.C. 2006) (co-conspirator pimps in prostitution ring) – was there a successful charge of conspiracy based on §2422(b). *See, e.g., U.S. v. Pisman*, 443 F.3d 912 (7<sup>th</sup> Cir. 2006) (2423(b) conspiracy); *U.S. v. Pipkins, et al.*, 378 F.3d 1281 (11<sup>th</sup> Cir. 2004) (RICO conspiracy); *U.S. v. Hornaday*, 392 F.3d 1306 (11<sup>th</sup> Cir. 2004) (conspiracy charge was error); *U.S. v. Jackson*, 2007 U.S. Dist. LEXIS 33639 (D. Neb. 2007) (state conspiracy charge dropped because no conspiracy possible with undercover agent); *v. Bianchi*, 2006 U.S. Dist. LEXIS 90073 (E.D. Pa. 2006) (2423(e) conspiracy).

COURT	CASES		FACILITY	FACTS/COMMUNICATION	CHARGE
1 <sup>st</sup> Cir.	<i>U.S. v. Dewire</i> , 271 F.3d 333 (1 <sup>st</sup> Cir. 2001)		Internet	AOL instant message (IM) communication with “12 yr-old”; sexually explicit conversation, at the end of which defendant arranged to meet “12 yr-old” at a restaurant. In reality communications were with an adult swim team coach who had been using the girl’s computer; coach turned print out of conversation over to police who observed defendant entering and leaving the restaurant and arrested him. Sentence 13 months; appealed conviction & sentence. Affirmed.	2422(b)  Not Consummated  Showed up for meeting

JEFFREY EPSTEIN

18 U.S.C. §2422(b) CASE ANALYSIS CHART

A nationwide search of all cases listing charges under 18 U.S.C. §2422(b) underscores the undeniable fact that this statutory provision has been used almost exclusively to apply to situations involving **Internet** “trolling” by sexual predators. Out of a total of 184 cases listed in the chart below, the overwhelming majority – 160 cases – involves communications using the Internet. Of those cases, 113 involve the classic “**Internet Sting**” operations where either the government or a private organization has focused its investigative efforts on the use of the Internet to lure infants and minors, 2-14 years-old. Of those 113 cases, 76 involve the use of **Internet chat rooms**. As the chart reflects, the circumstances under which this statute has been applied invariably involve communications containing an explicit inducement – if not many – to the minor to engage in sex, and reflect the defendant’s clear knowledge of the age of the minor.

Notably out of the 184 cases, two of the three cases in which the telephone served as the sole facility of interstate commerce involve charges against pimps of prostitution rings. Both of those cases involve the pimps’ use of the telephone to arrange appointments for prostitutes to further their business ventures. In addition, both of those cases include violence, distribution of narcotics, use of force and possession of firearms and the like. [REDACTED] *p. Evans*, 476 F.3d 1176 (11th Cir. 2007); *U.S. v. Phillips*, 165 Fed. Appx. 677 (10th Cir. 2006). The only other instance where the telephone provided the sole basis for a charge under 2422(b) presented a situation where the enticement/inducement of known underage girls for sexual activity was explicitly made over the telephone. Lastly, the telephone and not the Internet served as the “facility or instrument” of interstate commerce in 4 foreign travel sting operation cases geared towards “sex tourism”. Several other cases involving pimps (3) failed to mention the facility used.<sup>1</sup>

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<sup>1</sup> The 14 remaining cases involving charges under 2422(b) fail to provide any information as to the facts underlying the charges.