KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

777 South Figueroa Street
Los Angeles, California 90017

(213) 680-8400

www.kirkland.com

Facsimile:
(213) 680-8500

Kenneth W. Starr
To Call Writer Directly:
(213) 680-8440
kstarr@kirkland.com

December 17, 2007

VIA FACSIMILE (305) 530-6444

Honorable R. Alexander Acosta
United States Attorney
United States Attorney's Office
Southern District of Florida
99 NE 4th Street
Miami, FL 33132

Re: Jeffrey Epstein

Dear Alex:

Thank you for meeting with us on Friday, December 14, 2007. The meeting demonstrated significant agreement on broad issues of policy. We all agree on the centrality of the principle of horizontal equality, namely that Mr. Epstein should be treated no differently — neither more nor less favorably — than a less prominent or less wealthy defendant accused of similar conduct. We also all agree that no person should be allowed to plead guilty to a statute that does not precisely apply to his conduct. We agree as well that the goal of these extensive negotiations is to reach a just, equitable, proportional and truthful result. In this letter, we seek to implement these agreed-upon principles.

However, we are deeply concerned that, at this late juncture, we remain unenlightened as to a coherent theory of federal criminal law that would pass serious muster. Especially in view of (i) the unprecedentedly expansive interpretation of 18 U.S.C. § 2422(b) and, relatedly, (ii) the unprecedented employment of 18 U.S.C. § 2255, we have only recently come to understand that [redacted] adorns your list of would-be victims. The theory of her inclusion remains enshrouded in mystery. In any event, she is manifestly not a victim, for reasons we shall elucidate. So too, we have respectfully requested illumination as to the factual predicate for the applicability of Florida Statute § 796.03, which now appears deeply problematic. We are met time and again substantively with silence, but when the veil of ignorance is only slightly lifted, the actual, truthful facts as weighed in a fair and reasonable balance are found fatally wanting. This is fundamentally unfair and profoundly wrong.

We are eager to resolve these issues with your Office expeditiously. To that end, we respectfully reaffirm our request for a prompt, independent, expedited review of the evidence,

which includes but is not limited to Ms. [redacted] testimony; the witness transcripts; the tainted Detective Recarey reports; and our prior submissions. In light of the concerns we raised and the evidence we discussed at the December 14 meeting, we are firmly persuaded that this provides the only avenue for Mr. Epstein to be afforded the bedrock value of horizontal equality. We now elaborate on the three pivotal issues last discussed at last Friday's (December 14) meeting.

I. The Conduct is Not a Registerable Offense Under Florida Law

Under the Agreement, Mr. Epstein is to plead guilty to an indictment charging one count of Florida Statute § 796.07, solicitation of prostitution, and to one count of Florida Statute § 796.03, procuring a minor for prostitution. Given the commercial nature of the conduct generally associated with § 796.03, a defendant convicted under this statute must register as a sexual offender under Florida's Sex Offender Registration and Notification Act (the "Florida's Sex Act"). However, Mr. Epstein's alleged conduct does not meet the requirements of § 796.03, or for that matter, any of the other Florida statutes that require registration.

A. Florida Statute § 796.03 is Inapplicable

It should be noted that at the time § 796.03 was negotiated between the parties, Ms. Villafana maintained (and continued to maintain as late as last week), that a § 796.03 charge involved the solicitation of a minor, not the procurement of a minor. During those negotiations, we repeatedly asked Ms. Villafana to confirm that she possessed the requisite evidence to make out a registerable charge, to which she unwaveringly replied that she did in fact possess this evidence. Although she has refused to disclose such evidence despite our repeated requests, we continued to proceed in good faith. We were then informed by Lana Belohlavek that solicitation of a minor is not a registerable offense, and we promptly made that known to Ms. Villafana. With the evidence at hand, it is clear that § 796.03 is a procurement statute that has no application to Mr. Epstein whatsoever.[1]

Under § 796.03, "[a] person who procures for prostitution, or causes to be prostituted, any person who is under the age of 18 years commits a felony of the second degree . . .". Conviction under this statute requires an offender to register as a sexual offender (whereas a defendant convicted of soliciting a prostitute under § 796.07 does not). Recognizing this

[1] It is obvious from the first plea proposal we received from Ms. Villafana, that she has always seen solicitation of a minor as the appropriate charge under the facts (this is also the State's recommended charge). What is now apparent is that she thought that solicitation of a minor was both a felony and a registerable charge under Florida law. It is not. Rather than force-fit another charge that matches the sentence Ms. Villafana desires, your Office should implement the state charge that it has maintained is the most appropriate for the alleged conduct — solicitation of a minor.

distinction, the legislature drew a bright line between procuring a minor for prostitution on the one hand, and solicitation for prostitution on the other. Indeed, procurement under § 796.03 is clearly not the same as solicitation under § 796.07, as the former requires that the defendant procure the minor to engage in a sex act with a **third party**, not the defendant himself.

This clear demarcation is well settled law in Florida. In *Register v. State*, for instance, the court reversed a conviction of § 796.03 for a defendant who offered a 12-year-old girl money to have sex with him. The court further explained that to expand the meaning of the statute would be disingenuous to the intent of the legislature:

> We find nothing in either statute that would support the State's argument that offering money while soliciting someone to have sex with the offeror was intended to have the same criminal consequences as inducing a victim to engage in sexual activity with a **third party to the financial benefit of the pimp**. A person who offers money to a minor to have sex with him commits a crime. The Florida Legislature has designated such an act of solicitation as a less severe crime than exploiting a minor to engage in sexual activity with a third party, to the procurer's financial advantage. This distinction is a matter within the exclusive prerogative of the legislative branch.

Register, 715 So.2d 274, 278 (Fla. 1st DCA 1998). (emphasis added) [2]

Similarly, in *Kobel v. State*, the defendant's conviction under § 796.03 was reversed because the court determined that the defendant's actions did not constitute procurement. In *Kobel*, the defendant approached a ten-year old boy and his friend on the street, arranged to meet them in an alley, and offered the boys money for oral sex. The defendant was arrested and charged with two counts of procurement of a minor for prostitution, in violation of § 796.03 and two counts of attempted indecent assault. The appellate court determined that the defendant's conduct did not constitute the crime of procurement and held that § 796.03 did not apply because the defendant had not attempted to hire a minor to have sex with a third party. The court recognized that both acts are punishable crimes, but made a clear delineation between them:

> [I]n the context of prostitution, the word "procure" must be given its specialized meaning, which is "to obtain as a prostitute **for another**," connoting a **commercial motive.** Although the solicitation of a minor for sex and the procurement of a minor for prostitution are both evil deeds, the use of a minor for the "commercial enterprise" of prostitution is a greater evil.

---

2 This long-settled body of state statutory and decisional law has not, to our knowledge, been criticized or otherwise drawn into question by Florida's duly-elected, policy-sensitive Governors including Governor Jeb Bush and the incumbent Governor.

Kobel, 745 So. 2d 979, 982 (Fla. 4th DCA 1999).[3] (emphasis added)

Other Florida decisions have echoed the reasoning and analysis of *Kobel* and *Register*. *See Petty v. State,* 761 So.2d 474 (Fla 3d DCA 2000) (reversing a conviction of § 793.03 for a defendant who paid a prostitute for sexual acts she engaged in with the defendant because the court found no evidence of *commercial* exploitation). Here, Mr. Epstein did not procure any minor for a third party under the meaning of § 793.03. Given the well settled legal precedent, it is clear that § 796.03, the operative statute requiring registration under the Agreement, does not fit the conduct alleged and therefore required registration should be removed from the Agreement.

B. The Conduct Does Not Require Registration Under Florida Law

Other statutes for which registration is required also present circumstances that in no way fit Mr. Epstein's alleged conduct. It is clear based on these statutes that the legislature intended for registration to apply to only the most heinous cases of crimes against children. *See* Florida Statute § 943.0435(1)(a)(1). Specifically, sexual offenders are persons who have been convicted of committing, attempting, soliciting or conspiring to commit the following crimes:

> kidnapping of a child; false imprisonment of a child under the age of 13; luring or enticing a child under 12 into a structure, dwelling or conveyance for an unlawful purpose; sexual battery; procuring child prostitution; lewd and lascivious offenses committed upon or in the presence of a person under 16; lewd and lascivious battery, molestation, or conduct; lewd and lascivious offenses committed in the presence of an elderly person, battery, and molestation; promoting a sexual performance by a child; showing obscene material to a minor; possessing child computer pornography; transmitting child pornography; buying or selling a minor with knowledge the minor will be portrayed as engaging or appearing to engage in sex acts.

See Doe. v. Moore, 410 F.3d 1337, 1340 (11th Cir. 2005) (citing Florida Statute § 943.0435(1)(a)(1). Not only does Mr. Epstein's conduct not fall within any of the delineated statutes, but his alleged acts are not comparable in terms of severity or harm. All of the women alleged to be minors at the time of the purported conduct were over the age of 12, indeed over the age of 14, with the vast majority of those women who were allegedly under 18 being 16 or 17; there is no evidence of battery; there is no child pornography; and there is no evidence of

---

[3] The *Kobel* case expressly overturned the 4th District opinion in *McCann* where a conviction under § 796.03 for a defendant who offered a minor money to engage in sex with the defendant himself was affirmed. *See McCann v. State*, 711 So. 2d 1290 (Fla. 4th DCA 1998).

kidnapping, imprisonment, luring, or procuring.[4] In many instances, these women called Mr. Epstein to solicit work as a masseuse, and in each instance these women were paid for their services.

C. The State Attorney's Office Does Not Believe the Conduct is Registerable

It should not be surprising then that no registerable statute – federal or state – appears to cover the conduct in this case. This is because registration, as a matter of law and policy, has always been limited to extremely dangerous sexual deviants who pose higher than ordinary risks of recidivism. Applying a registerable crime to solicitation-type conduct of the kind at issue here would bring into question the very constitutionality of registration. It would also dilute its impact and compromise the credibility of those who are responsible for vouching for the dangerousness of defendants required to register for life — here the State Attorney's Office.[5]

Indeed, the State Attorney's Office has long maintained that Mr. Epstein's alleged conduct does not give rise to a registerable offense in Florida. The State believes that house arrest is a more than appropriate sentence. However, contrary to your policy of horizontal equality, your Office rejected the State's view of the case and effectively dictated a harsher sentence to the State under the rationale that house arrest would amount to "mansion arrest" for Mr. Epstein. Treating Mr. Epstein differently from any other similarly charged individual simply because of his wealth directly contravenes the policy of horizontal equality.

Given that Mr. Epstein's conduct does not fit the requirement for registration nor does his life or circumstances fit the need for registration, we propose that Mr. Epstein's charge be modified to reflect this.

II. The Conduct is Not a § 2422 Offense

A. A Review of the Applicability of § 2422 is Also Necessary

We appreciate your concern about whether the Florida statute to which Mr. Epstein is required to plead under the Agreement actually fits the facts of the case. We believe, however,

---

4 It should be noted that in the history of Florida law, there has never been a statutory rape charge where the exchange of money was involved.

5 Your Office's repeated references to the State Attorney's Office as "a joke" are without merit. Barry Krischer, the Palm Beach County State Attorney, has served in office for 12 years. Lana Belohlavek, the lead prosecutor in this matter, has over a decade of experience prosecuting sex-related crimes and was a founding member of the Child Abuse Protocol.

that you should be even more concerned about whether the federal statutes fit the facts. The concern over the federal statutes should be greater for several compelling reasons of constitutionality, statutory construction, ethics and principle.

First. We believe, and understand you to share our belief, that it is improper to require a defendant to accept a plea to questionably applicable statutes. In the same vein, it is far more improper to indict, or threaten to indict, a defendant under an equally questionable statute. There is a long tradition of accepting pleas that allow for some flexibility as to the crime charged, since pleas represent a mutual agreement and mutual waiver by the parties. Although certain elements cannot, in law, be waived, courts have treated this issue more flexibly in the context of plea agreements. There is no such flexibility in the context of an indictment or threatened indictment.

Second. Federal statutes are, as a matter of constitutional law, required to be even clearer and less subject to common law expansion than state statutes. As far back as 1812, the Supreme Court has held that there could be no common law crimes under federal law. *See United States v. Hudson*, 7 Cranch 32, 43 (1812) ("[O]ur Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers."). The states have never been subject to this limitation on the federal government. Indeed, at the time of the Founding there were state common law crimes, and state courts had broad authority — subject to consideration of fair warning — to apply common law principles to the construction of state criminal statutes. Federal courts have never had such authority:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used…

McBoyle v. U.S., 283 U.S. 25, 27 (1931) (Justice Holmes). There could be no federal common law crimes because criminal law has traditionally been the province of the states, except in instances of over-arching federal interests, of which none are implicated in the matter at hand.

Third. This issue is especially compelling in the context of a federal statute that purports to make a federal crime out of conduct that has traditionally been the province of the states, as

sex with minors and solicitation of sex for money have always been.[6] Before a federal statute can be construed to cover such conduct, its language must be "unmistakably clear", because Congress cannot be presumed to have intended to disrupt the delicate balance between federal and state jurisdiction over crimes that have been traditionally prosecuted by the states. In cases raising potential *Petite* issues, the federal statute must unambiguously cover the conduct at issue.

Fourth. The federal statutes at issue in this case are far more draconian than the state statutes. The federal statutes carry far higher minimum mandatory sentences and higher guidelines. The courts have always required greater clarity, predictability and certainty in the application of harsh statutes than less harsh ones.

Fifth. It would raise profound issues of federal criminal enforcement for your Office deliberately to apply a more permissive statute to its own work than to a *state* statute. It would be unconscionable not to apply at least as rigorous a standard of certainty and clarity to your Office's indictment than to a state statute, even one that is part of a deal made by your Office. It would be unseemly in the extreme for your Office to apply a more permissive standard to its own work than to a state statute.

We believe strongly that a dispassionate and fair review of the facts will reveal that even if the **same** standards were to be applied to the applicability *vel non* of the state and federal statutes, the conclusion could not in good conscience be reached that the Florida statute is inapplicable, while at the same time concluding that the federal statutes are applicable. The daunting standards that must be applied to federal statutes include the following:

- **The Rule of Lenity**: The Supreme Court has long held that criminal statutes that are subject to differing interpretations should be construed in the defendant's favor. *See Pasquantino v. U.S.*, 544 U.S. 349, 383 (2005) ("We have long held that, when confronted with 'two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'") (citing *United States v. McNally,* 483 U.S. 350, 359-360 (1987); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)) Furthermore, the rule of lenity also applies to Florida state criminal law. *See Register v. State*, 715 So.2d 274, 278 (Fla. 1st DCA 1998) ("To the extent that penal statutory language is indefinite or 'is susceptible of differing constructions,' due process requires a strict construction of the language in the defendant's favor under the rule of lenity") (*citing* F. Stat. §

---

6 As we have made clear throughout this investigation, the alleged conduct does not implicate over-arching federal interests because the conduct was purely local in nature, the conduct is covered by state law, and there are no indicia of force, coercion, violence, drugs, luring or trafficking.

775.021(1) (1995); *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991); *Logan v. State*, 666 So.2d 260, 261 (Fla. 4th DCA 1996)).

- **Plain Meaning:** Commonly accepted principles of statutory law require that statutes be given their plain and unambiguous meaning, if one exists. *See Helvering v. New York Trust Co.*, 292 U.S. 455, 469 (1934) ("Under the recognized rules of construction we should give the words of the statute their ordinary and common meaning") (citations omitted).

- **Clarity and Predictability**: "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite". *See United States v. Bass*, 404 U.S. 336, 347-48 (1971) (citations and footnote omitted). It is fundamentally unfair to apply to conduct criminal statues that cannot be understood clearly. Furthermore, given that one primary purpose of criminal law is to announce that one will be punished for the crimes they commit, the statutes condemning them to a sentence should clearly and predictably express the conduct that is prohibited. The fact that even members of our own defense team, including Professor Alan Dershowitz, with 45 years of experience in reading, teaching and litigating criminal statutes, could not determine that any of the federal statutes would be applicable to Mr. Epstein's conduct, a lay person cannot be expected to make that determination. As confirmed by Judge Stern's conclusions regarding the application of § 2422(b), as well as the other relevant federal statutes, the conduct at issue is clearly not within the predictable scope of § 2422. *See* Judge Stern's Letter ("In sum, whatever sexual contact occurred, occurred face to face, without the use of an instrumentality of interstate commerce to persuade or induce it, and therefore, was not an act proscribed by the statute. Accordingly Mr. Epstein committed no crime within the scope of § 2422(b).").

- **No Creative Applications of the Law:** Furthermore, criminal statutes should not lend themselves to creative interpretations. "[C]riminal prosecution, as distinguished from civil lawsuits, is not supposed to be based on novel theories. Before anyone can be criminally prosecuted, both the alleged criminal conduct and the penalty must be spelled out unambiguously in a plainly worded criminal statute understandable to the average citizen . . .there is no room for creativity by prosecutors who are understandably eager to send messages to miscreants who are themselves using creativity in circumventing anachronistic criminal statutes." *See* Alan M. Dershowitz, *Making Up The Law,* N.Y. Times 33, Aug. 16, 1996.

- **Do Not Apply Creative Applications for the First Time in a Close Case**: This matter is undoubtedly one of first impression. To stretch the federal statutes beyond recognition

to fit the conduct without any precedent can have dangerous and unforeseen consequences.

- **Clear Legislative Intent to Preempt State Law:** Well-established law also respects the sovereignty of states with respect to asserting criminal law. "[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

- **Narrowly Tailored Statutes Should Apply:** If there are two statutes — one that narrowly and precisely fits the facts, and another that is broad and general — the narrow statute should apply. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotations omitted). This is especially true if the narrow statute is a state statute and the more general statute is a federal statute, especially in an area traditionally prosecuted by the states. *See United States v. Evans*, 476 F.3d 1176 (11th Cir. 2007) ("prostitution [is] a vice traditionally governed by state regulation").

We believe with great conviction that Congress needs to speak clearly when a federal criminal statute reaches quintessentially state sexual conduct and subjects an accused citizen to potential consequences of gravely serious federal guidelines (and in some cases minimum mandatory) sentencing. We have repeatedly represented to you and others in the hierarchy of your Office that we believe that the facts of Mr. Epstein's conduct simply do not conform to the legal requirements for prosecution under § 2422(b) or any conspiracy brought under § 371 to violate § 2422(b). In fact, the chasm between Mr. Epstein's conduct and § 2422(b) mirrors the gulf between his conduct and Florida Statute § 796.03.

B. § 2422 Plainly Does Not Apply to These Facts

We have been informed that § 2242(b) served as the pivotal federal statute which was the foundation of either conspiracy (under 18 U.S.C. § 371) or the substantive charges. At the December 14 meeting, Ms. Villafana provided insight into the Government's theory of prosecution, stating that sexual contact with an underage female and an out-of-state phone call were sufficient to support a § 2242(b) charge. This is quite wrong as a matter of law. There was manifestly no inducement so as to make out a § 2242(b) charge, and sexual contact with an

underage female, without more, is incontestably and quintessentially a state offense.[7] Our previously expressed but profoundly substantial concerns regarding the failure of the known facts to conform to or support a federal charge for violating § 2422(b) were reinforced, first, by our review of the sworn testimony of Ms. [redacted]; second, by letters from your Office advising us that the list of "victims" of Mr. Epstein's federal violations had been reviewed and narrowed but that Ms. [redacted] remained on that list; and third, by Ms. [redacted] stated theory of liability under § 2422(b) at the December 14 meeting.

Although Ms. Villafana alleges, that pursuant to the Agreement, Ms. [redacted] is a "victim" of federal crimes, her testimony unmistakably reveals that not only did Ms. [redacted] suffer no injury (let alone damages), but she would probably never mount such a claim. Indeed, Ms. [redacted] testimony establishes that the conduct was consensual; that she lied to Mr. Epstein about her age; that she instructed others to lie to Mr. Epstein about their ages; that there was no sexual contact at any time; and that there was no inducement over the telephone or any other form of communication. Excerpts of Ms. [redacted] testimony establishing each of these pivotal points are set forth below:

- **Consent**

  Q: Okay. When did you meet him and who introduced you to Jeffrey?

  A: My girlfriend, [redacted], introduced me to Jeffrey.[8] ([redacted] Sworn Statement at 5-6)

  * * * * *

  Q: Now you said that [redacted] told you that he likes massages. Did she elaborate on what types of massages?

  A: She said sometimes he likes topless massages, but you don't have to do anything you don't want to do. He just likes massages. ([redacted] Sworn Statement at 7)

  * * * * *

---

7 On July 6, 2007, we previously sent to your Office a submission regarding the inapplicability of § 2422(b). We have attached the July 6 submission to this letter.

8 Although we are unaware as to whether [redacted] is on the government's list of alleged "victims", it bears mentioning that [redacted] has a criminal record and other damaging credibility issues, including a history of drug abuse, violence, and prostitution.

A: I said, I told Jeffrey, I heard you like massages topless. And he's like, yeah, he said, but you don't have to do anything that you don't feel comfortable with. And I said okay, but I willingly took it off. ([redacted] Sworn Statement at 10)

- **Lied About Her Age**

A: . . . So I asked her, I said well, what about my age? And she said well, just make sure that you tell him that you're 18. And I had a fake ID at the time and we went there. ([redacted] Sworn Statement at 6)

* * * * *

A: . . . I had a fake ID anyways, saying that I was 18. And she just said make sure you're 18 because Jeffrey doesn't want any underage girls. ([redacted] Sworn Statement at 8)

* * * * *

A: . . . of course, he thought I was 18. . . ([redacted] Sworn Statement at 13)

- **Instructed Others to Lie About Their Ages**

A: . . . I bring a lot, like maybe -- I don't know, maybe 30, maybe 30 [girls to Epstein]. It was all about the money to me at that time. ([redacted] Sworn Statement at 28)

* * * * *

A: . . . I would tell my girlfriends just like [redacted] approached me. Make sure you tell him you're 18. Well, these girls that I brought, I know that they were 18 or 19 or 20. And the girls that I didn't know and I don't know if they were lying or not, I would say make sure that you tell him you're 18. ([redacted] Sworn Statement at 22)

- **No Sexual Contact**

A: . . . So I willingly the first time took off my top when I gave him a massage and nothing more than that. It was just a back massage and neck massage and I was out of there. ([redacted] Sworn Statement at 9)

* * * * *

Q: Did he at any point kiss you, touch you, show any kind of affection towards you?

A: Never, never. ([redacted] Sworn Statement at 21)

* * * * *

A: He didn't want me to touch him and he didn't touch me at all. ([redacted] Sworn Statement at 17)

* * * * *

A: I would wear panties. Willingly one time because we were making jokes and everything and willingly one time I had, yes, I was totally nude, but I was fine with it.

Q: Okay.

A: Totally fine with it.

Q: And how did that massage go?

A: Actually, it was a foot massage and he was sitting on the couch. We didn't even have the massage table out and I gave him a foot rub and I was nude. ([redacted] Sworn Statement at 20-21)

* * * * *

Q: He never pulled you closer to him in a sexual way?

A: I wish. No, no, never, ever, ever, no, never. Jeffrey is an awesome man, no. ([redacted] Sworn Statement at 21)

* * * * *

Q: Okay. And with the other girls, was it the same as what you did or different?

A: Yeah, yeah. I mean, well, I was more willingly to do more, you know. Like I said, I went nude for him one time. But the other girls, they practically were topless and that's all that they were willing to do. Some girls didn't want to go topless and Jeffrey didn't mind. ([redacted] Sworn Statement at 23)

- **No Inducement**

A: . . . Jeffrey, he was a very awesome guy and I just -- I don't know. I ended up giving him my number so I could -- I didn't want [redacted] or Brian to drive me anymore. I would rather go to him on my own. ([redacted] Sworn Statement at 15)

* * * * *

A: No, I gave Jeffrey my number. And I said, you know, any time you want me to give you a massage again, I'll more than welcome to. ([redacted] Sworn Statement at 8)

* * * * *

A: Me and Jeffrey hardly ever talked on the phone. He was always busy. It was mostly [redacted]. We'd talk when I would get there, you know. So it was like hey, do you want to come in? Yes, cool, you know. Come there, no, cool, bye. ([redacted] Sworn Statement at 32-33)

* * * * *

Q: We have -- I don't know. We have some messages I guess that some girls' names that would call Jeffrey and leave a [message] . . . ([redacted] Sworn Statement at 25)

* * * * *

A: Every girl that I brought to Jeffrey, they said they were fine with it. And like, for instance, [redacted], a lot of girls begged me to bring them back. They wanted to come back for the money. And as far as I know, we all had fun there. ([redacted] Sworn Statement at 45)

In sum, Ms. [redacted] testimony clearly shows that she is not a victim. In fact, Ms. [redacted] never wanted to cooperate with the investigation — she refused to cooperate with the FBI, refused service of a subpoena, hired an attorney, and forced the government to give her immunity before she would speak to them. It cannot be that she may now seek relief from Mr. Epstein as a "victim" under § 2255 without proof of injury or inducement.

Furthermore, Ms. [redacted] assertion of documentary proof of an interstate phone call by Ms. [redacted] does not establish the nexus required for inducement under § 2422. When challenged at the December 14 meeting to justify the apparent chasm between the demands of the federal criminal statute and the testimony of Ms. [redacted], Ms. Villafana offered only an out-of-state toll record. While this document may be inconsistent with a small part of Ms. [redacted] testimony as to the issue of the locus of phone calls, it utterly fails to demonstrate that the Government theory supports what at its essence is a federalization of underage prostitution (see Villafana letter to Lefkowitz of December 13, 2007 at pg 4, par 1). This is compellingly so for several reasons:

- Absent testimony, the evidence does not exclude the possibility that Mr. Epstein neither caused nor knew of the call in question or the possibility that neither Ms. [redacted] nor Mr. Epstein were even participants on the call;

- Absent the testimony of one of the participants, the documented record of the fact of a call does not negate the possibility that the call did not even involve discussion about scheduling a visit from Ms. [redacted] to Mr. Epstein's house nor any other material subject matter;

- Absent the testimony of one of the participants, there is no evidence of inducement, an essential element of the statute and an element that requires significantly more than scheduling a visit with someone who like Ms. [redacted] was agreeable to come to Mr. Epstein's house prior to the call;

- Absent evidence of the content of the call, a telephone record reflecting an out of state call is completely consistent with someone returning a call initiated by Ms. [redacted] rather than "inducing" a sexual act;

- A review of message logs seized from Mr. Epstein's residence during the state investigation (as well as a review of Ms. [redacted] testimony) would reflect that it was common for there to be incoming calls by women of all ages asking to be called and seeking to visit Mr. Epstein; and

- The alleged conduct is far outside the heartland of conduct that § 2422(b) was clearly designed by Congress to prevent Internet (or arguably, by extension, telephone) luring.

Indeed, Ms. [redacted] denies that she was ever induced to come to Mr. Epstein's house. The phone record cannot sustain a federal prosecution without more. We know, from reviewing Ms. [redacted] transcript, that there is no more. Even if there were telephone communications regarding the scheduling of massages, *mere solicitation is not inducement.* Inducement carries with it a much higher standard than solicitation.[9] In entrapment cases for instance, the Government has argued, and the courts have agreed, that inducement requires "conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party". *U.S. v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993); *U.S. v. Shutts*, 2007 WL 4287666 at *3 (S.D.Fla. Dec. 5, 2007). "Neither mere solicitation nor the creation of opportunities to commit an offense comprises inducement," because "[i]nducement entails some semblance of 'arm-twisting,' pleading, or coercive tactics". *Marreel v. State*, 841 So.2d 600, 603 (Fla.App. 4th Dist. 2003)

[9] This is particularly true when there is little to no evidence that the defendant even made the calls himself.

(finding no government inducement because "appellant had already demonstrated his predisposition to commit the offense"). Here, Mr. Epstein at the very worst is guilty of solicitation because he only provided women with an opportunity to commit the act of prostitution by arranging for appointments to be scheduled. Scheduling by telephone, by itself, does not rise to the level of inducement because there is neither a "semblance of arm-twisting, pleading, or coercive tactics" nor an attempt to "implant a criminal design in the mind" of any party.

The designation of Ms. [redacted] as a "victim" in the face of her own testimony is emblematic of the greater problem with the sweeping federal investigation of this matter. That she remains on a shortened list of § 2255-eligible "victims" in the face of sworn testimony reflecting no inducement, no injury is required for § 2255 recovery, and no violation of the most applicable federal predicates, § 2422(b), should, we contend, trigger deep concern that those who were drafting and/or reviewing the federal indictment that was the catalyst for the Agreement were themselves misinformed about the scope and demands of proof required by § 2422(b). With underage sexual contact a matter of state criminal prohibition, the additional requisites of federal law unproven by more than a toll record, and the consequences flowing from the current Agreement as serious as the inevitability of unwarranted civil recoveries of an amount that could be $150,000 to requiring a state sentence of 18 months in jail and a lifetime of registration as the conditions for Mr. Epstein to avoid a charge of violating § 2422(b) — a charge for which we strongly believe him to be innocent — we believe the overall risk of a miscarriage of justice to compel a reconsideration of the federal charging decision that catalyzed the execution of the Agreement. This is particularly true in light of the unprecedented application of § 2422 in this manner. We have previously provided charts of every reported precedent demonstrating that the reach of § 2422(b) being advanced by your Office in this matter is unprecedented. Attempts by CEOS to match the facts of Mr. Epstein's conduct with any prior case — reported or otherwise — generated a single distinguishable precedent that had no relationship to the facts under consideration in this matter.[10]

Indeed, upon a careful review of the evidence, your Office will undoubtedly conclude that federal law is being taken where it has never gone before, and this is the last clear chance for this District through your independent judgment — on its own volition — to do the right thing. Therefore, we urge that you direct that a full and fair and complete examination of the most trustworthy evidence be ordered.

---

10 In *U.S. v. Boehm*, the defendant bought and distributed crack cocaine and cocaine to underage girls; admitted to knowing that the girls were underage; arranged for underage girls to have sex with other members of the conspiracy in exchange for the drugs; and he was in possession of illegal firearms at the time of the alleged conduct.

III. Finality With Respect to § 2255

For several weeks, we have articulated our fundamental — and growing — concerns with respect to the profound policy issues raised by your Office's invocation of § 2255. It is common ground among us that § 2255 has not been the subject of policy guidance from Main Justice, over the long life of this unusual statute. It is therefore undisputed that we are sailing in uncharted jurisprudential and policy waters. This should not be a matter entrusted to the judgment of those who have not run the separation-of-powers gauntlet of Presidential nomination and Senate confirmation. As we discussed at our December 14 meeting, and you quite courteously listened, we believe that, as implemented in this extraordinary situation, § 2255 abounds with basic issues founding in the Due Process Clause of the Fifth Amendment.

For these reasons, we deeply appreciate your contemplation of the appropriateness of the § 2255 portion of the Agreement. As we discussed during the December 14 meeting, and as expressed in our December 11 letter, it is improper for Mr. Epstein to be required to pay recovery to individuals who do nothing but simply assert a claim under § 2255. Some of the individuals identified do not consider themselves victims, nor would they be considered victims under any meaning of the law, given the evidence. Furthermore, § 2255 allows for a civil remedy and there is no basis for the government to be involved with the recovery of damages based on civil claims of private individuals.

While we appreciate your Office's objective to provide certain individuals with restitution in connection with this matter, we strongly urge you to consider an appropriate process by which such restitution can made. We respectfully reiterate that this process, should not include any further federal interference in any way with respect to the recovery of civil claims.

IV. Conclusion

We believe — and know you share our belief — that citizens should be treated alike regardless of wealth or status when it comes to criminal justice. We ask for nothing more of your treatment of Mr. Epstein than that he be treated as would any other citizen of Palm Beach under similar circumstances. Mr. Epstein should not be charged with offenses to which his conduct does not apply, in either the state or federal context. Equal treatment would require that Mr. Epstein's prosecution be carried out by the State Attorney's Office. Mr. Epstein's conduct does not appropriately fit within the heartland of federal law. Further, we respectfully submit that the federal government should not sit as an "appellate court" and permit an unhappy state investigator (in this case one who we contend had little fidelity to the law) to seek review of a decision made in good faith regarding the charging decisions of an elected state prosecutor.

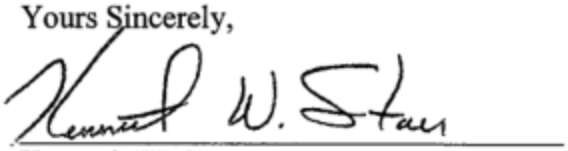
As we have expressed to you both at our meeting and in this letter, Florida law mandates that the procurement of a minor for the purposes of solicitation requires that the defendant procured the individual for activity with a third party. Mr. Epstein's alleged conduct does not fit this offense. The routine and practice of Florida state authorities and courts is to distinguish between solicitation and procurement of minors, the former being a misdemeanor under state law, the latter a felony (and the commission of multiple misdemeanors does not create a felony). Equal treatment would mandate that Mr. Epstein be charged for solicitation and thus, not be required to register as a sexual offender. It is improper for the federal government to direct a citizen to seek an enhancement of charges that the state prosecutor has deemed appropriately fit the conduct and that prosecutors conclusions are consistent with practices regarding other citizens of his county for similar offenses. We believe that you should authorize the State Attorney for Palm Beach County to decide — based on all the evidence, which we agree you should provide him if you agree that he should make the charging decision — whether to require a prosecution of Mr. Epstein for solicitation (which the evidence supports) or procurement (which the evidence does not support) and that federal involvement in this case should be narrowly tailored to serve only this goal.[11]

Lastly, we reaffirm our request for independent review of the evidence. Previously, we requested but you declined to provide the draft indictment. We understand that we have no statutory right to a FBI 302 that inculpates Mr. Epstein (although we believe that Brady principles would encourage the disclosure of FBI 302 reports that exonerate him). We are concerned that there is information that could be rebutted if disclosed but instead, known only to the FBI and your Office, it stands unchallenged. For that reason, we urge you or someone you trust to review the evidence on an expedited basis. We will provide without delay all transcripts of state interviews that are not already in your possession. We will answer any questions the "reviewer" has. We seek such review not to delay the process. We will do everything that is requested to provide any information the reviewer seeks from our investigation. We believe that given the unique context of the current case — one without federal precedent — that such a process is consistent with the highest and most noble goals of the criminal justice system: to learn the truth.

---

11 If you Office wishes, it may submit this letter to the State Attorney's Office, but the State Attorney's Office should then make the sentencing determination based on the evidence.

Yours Sincerely,



Kenneth W. Starr

Jay P. Lefkowitz

cc: Jeffrey H. Sloman, First Assistant U.S. Attorney