STERN & KILCULLEN, LLC

COUNSELORS AT LAW

HERBERT J. STERN
KEVIN M. KILCULLEN
JEFFREY SPEISER
JOEL M. SILVERSTEIN
EDWARD S. NATHAN
PASQUALE J. RUFOLO
JOHN P. INGLESINO
LINDA A. ELFENBEIN
TERRY L. TRANTINA
JOHN P. WYCISKALA
ALAIN LEIBMAN
LISA D. TAYLOR
MARK W. RUFOLO
STEVEN D. GORELICK

75 LIVINGSTON AVENUE
ROSELAND, NEW JERSEY 07068
[redacted]

LING LAU
MELISSA L. NIGLIO GELADE
SHAUN T. HUGHEY
NATHAN J. STEIN
MICHAEL DINGER
BRIAN J. DEBOER
HOWARD B. TAT
EDUARDO J. JIMENEZ

RICHARD EDWARD HAMILTON
OF COUNSEL

November 19, 2007

Alan Dershowitz, Esq.
Harvard Law School
[redacted]

Re: Jeffrey Epstein

Dear Mr. Dershowitz:

You have asked me to review the procedures and methods employed by the United States Attorney's Office for the Southern District of Florida in injecting itself into the State of Florida investigation and prosecution of your client, Jeffrey Epstein.

In short, and as will be set forth at greater length herein, my review indicates that the federal authorities inappropriately involved themselves in the investigation by the state authorities and employed highly irregular and coercive tactics to override the judgment of state law enforcement authorities as to the appropriate disposition of their case against your client. What is particularly unusual here is that the allegations against Mr. Epstein are the type that are routinely and traditionally investigated and disposed of by state authorities and which the United States only rarely, if ever, retains jurisdiction. What is even more extraordinary here is the obvious purpose of the federal authorities to

dictate the outcome of a state proceeding under circumstances of limited, if not actually nonexistent federal interest.

My Background

I have extensive experience in the administration of criminal justice both on the state and on the federal level. I was employed as an Assistant District Attorney in New York County from February 1962 until October 1965. One of the investigations I was responsible for was the death of Malcolm X. From 1965 until 1969 I was employed by the United States Department of Justice in Washington as a trial attorney in the organized crime and racketeering section of the Criminal Division. I was assigned to investigate and to prosecute cases involving wrongdoing in municipal government and in the trade union movement. In 1969 I became the Chief Assistant to the United States Attorney for the District of New Jersey. From 1970 to 1971, I was the acting United States Attorney for the District of New Jersey. From 1971 through 1973, I was the United States Attorney for the District of New Jersey. In these positions I personally conducted or supervised trials of numerous public officials on both the state and federal level as well as a myriad of other federal crimes, and worked closely with law enforcement officials at the local and state levels. From 1973 through 1987, I was a United States District Judge for the District of New Jersey and presided over many criminal trials and proceedings. In 1979 I was selected by the United States Department of State to be the United States Judge for Berlin to preside over a trial of individuals who allegedly highjacked an airplane from East Germany to West Berlin. Since 1987, I have been in the private

practice of law and have represented clients in various jurisdictions who have been investigated by federal and state authorities. Attached is a copy of my resume.

Thus, I am very familiar with the operation of the criminal justice system both on the federal and state levels, as well as the factors used by federal and state prosecutors in charging defendants.

The Allegations

Mr. Epstein is alleged to have had improper sexual contact, solely in Florida, with women who were under the age of 18. Mr. Epstein maintained residences both in New York and Florida and would repeatedly fly from New York to Florida where his primary residence was located.

It is alleged that before he would travel to Florida, Mr. Epstein would ask his assistant to make various arrangements, including appointments with physicians, business meetings and the like. He would also have her arrange for women to come to his home to provide him with massages, for which they were paid. Mr. Epstein says that he specifically directed his assistant that he wished the masseuses to be young, but that they should all be over 18 years of age. There are allegations that during the massage, Mr. Epstein would occasionally masturbate, and with the woman's consent, would on occasion ask to touch her. There are also disputed allegations that on occasions there may have also been penetration.

What does not seem to be in dispute is that there are no claims that Mr. Epstein transported any minors in interstate commerce, nor did he troll the internet or use the

internet to identify or lure any minor to engage in any improper conduct. There is no credible evidence that Mr. Epstein specifically targeted young children for sexual activity of any sort or that he is a sexual predator who preys on children, although it later turned out that some of the women were younger than 18. Nor are there any plausible claims that Mr. Epstein used force or threats against anyone or that he profited financially.

The matter came under investigation by the State officials in Florida. After Mr. Epstein learned of the allegations, he fully cooperated with the State authorities. The investigation revealed what is stated above - - no violence was ever used, there was no targeting of minors, there was no coercion, financial gain etc. - - and, importantly, there were serious creditability problems with many of the witnesses, at least one of whom refused to comply with a grand jury subpoena to testify. Accordingly, after a 13 month investigation, the State offered Mr. Epstein a plea to aggravated assault with a sentence of 5 years probation. The State also agreed that it would not be necessary for Mr. Epstein to plead to an offense that would require him to register as a sex offender with state authorities, since state prosecutors did not regard him as posing a danger to children or others.

After a disgruntled local police officer complained of the terms of the plea agreement between Mr. Epstein and the State of Florida, the United States Attorney's office interjected itself in the disposition of this case, conducted an investigation, and advised Mr. Epstein that he must consent to a plea with the State of Florida that would require: a) at least an 18 month jail sentence, b) that he register as a sex offender, c) that

he agree, without even knowing their names, that women who claimed they provided him with massages - - as many as 40 persons - - be allowed to sue him, d) that he would not contest jurisdiction or the facts of those suits, e) that each woman be entitled to $150,000 in damages (or an amount agreed to by the parties), f) and that the United States Attorney's office select the attorney for the women (a business colleague of the boyfriend of the Assistant United States Attorney handling the case was initially chosen). Mr. Epstein was threatened that upon a failure by him to comply with all of these demands, the United States Attorney would bring additional charges against him for violations of federal law, specifically 18 U.S.C. § 2422(c)(Enticement of a Minor to Engage in Sexual Activity) and/or 18 U.S.C. § 2423(b) (Travel with Intent to Engage in Illegal Sexual Conduct) and perhaps money laundering, 18 U.S.C. § 1956(a)(3).

These threats, if implemented, would have exposed Mr. Epstein to a period of incarceration of approximately 180 months (15 years) under the Sentencing Guidelines.

* * * *

I have reviewed the submissions made on behalf of Mr. Epstein to the United States Attorney's office in the Southern District of Florida, which concluded that the cited federal statutes are inapplicable to the allegations made against Mr. Epstein and therefore, as a matter of substantive federal law, it was inappropriate for the United States Attorney's office to threaten such a prosecution. In my professional opinion, these

conclusions are correct. I will first address those statutes and explain why I believe the conclusions reached in the prior submissions were appropriate.

18 U.S.C. § 2422(b) (Enticement of a Minor)

Section 2422(b) provides:

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

Section 2422(b) was added to the Mann Act ten years ago, as part of the Telecommunications Act of 1996, in order to combat internet predators. As the Eleventh Circuit has recognized:

> [T]his particular sub-section was included in Title V of the Telecommunications Act, which is the section titled 'Obscenity and Violence,' after the Senate Judiciary Committee held a hearing regarding child endangerment via the internet.

See United Sates v. Searcy, 418 F.3d 1193, 1197 (11th Cir. 2005) (citing H.R. Rep. No. 104-458, at 193 (1996) (Conf.Rep.)). See also K. Seto, Note: How Should Legislation Deal with Children and the Victims and Perpetrators of Cyberstalking?, 9 Cardozo Women's L.J. 67 (2002).

In enacting subsection (b), Congressional concerns were focused on a particular and recent phenomenon. Young people were using the internet in ever-increasing

numbers, and it was proving to be a dangerous place. According to a DOJ study, one in five youths (ages 10 to 17) had received a sexual approach or solicitation over the internet in the previous year. One in 33 had received an "aggressive sexual solicitation," in which a predator had asked a young person to meet somewhere, called a young person on the phone, and/or sent the young person correspondence, money, or gifts through the U.S. Postal Service. See Office for Victims of Crime, U.S. Dep't of Justice, OVC Bulletin, "Internet Crimes Against Children" (3d prtg. 2005).

Unfortunately, computers and the internet had facilitated sexual predators who prey on children. Historically, child predators found their victims in public places where children tend to gather, such as schoolyards and playgrounds. But, as Congress recognized, with so many children online, the internet provided predators a new place - cyberspace - to target children for criminal acts. Use of the internet, which occurs in private, and the secrecy and deception it permits, eliminates many of the risks predators face when making contact in person, and presents special law enforcement problems that are difficult for any local jurisdiction to tackle.

The statutory language and reported decisions confirm the statute's important but narrow focus. Unlike 18 U.S.C. §§ 2241 et seq., § 2422(b) does not establish any federal sex crimes with a minor. Section 2422's subject is not sex, sexual activity, or face-to-face sexual exploitation of minors. Such behavior remains a matter of state, not federal, concern.

Section 2422(b) defines a crime of communication, not of contact. It makes unlawful a narrow category of communication, one not protected by the First Amendment because the target is a minor, and the subject is one that enjoys no constitutional protection. Both the attempt and the substantive crime defined by § 2422 are complete at the time that communication with a minor, or purported minor, takes place; the essence of the crime occurs before any face to face meeting or any sexual activity with a minor has taken place, regardless of whether any meeting or activity ever eventuates.

In sum, the statute was designed to address, and is therefore limited to situations where a person, purposefully and knowingly, targets a minor, and communicates with that minor by means of an instrumentality of interstate commerce. This conduct almost always originates in a chatroom on the internet or by email - - to use the anonymity and opportunities for deception permitted by these media - - to persuade a person he knows or believes to be a minor to engage in sexual activity, which would constitute a crime under state law, were it to occur.

The reported cases reveal that is the way federal prosecutors have understood the statute. Virtually all of the prosecutions brought under § 2422(b), resulting in published decisions, have essentially involved a standard fact pattern where an undercover agent pretends to be a young teenager on-line, and is directly solicitated. See United States v. Farner, 251 F.3d 510 (5th Cir. 2001). See also United States v. Root, 296 F.3d 1222, 1227-28 (11th Cir. 2002); United States v. Sims, 428 F.3d 945, 959 (10th Cir. 2005); United States v. Helder, 452 F.3d 751 (8th Cir. 2006); United States v. Meek, 366 F.3d 705, 717-

20 (9th Cir. 2004).

There are approximately two dozen Eleventh Circuit cases involving prosecutions under § 2422(b), most of which involve this prototypical fact pattern. See, e.g., United States v. Morton, 364 F.3d 1300 (11th Cir. 2004), vacated for further consideration in light of Booker, 125 S. Ct. 1338 (2006), opinion reinstated by, 144 Fed. Appx. 804 (2005); United States v. Orrega, 363 F.3d 1093 (11th Cir. 2004); United States v. Miranda, 348 F.3d 1322 (11th Cir. 2003); United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999); United States v.Panfil, 338 F.3d 1299 (11th Cir. 2003); United States v. Garrett, 190 F.3d 1220 (11th Cir. 1999); United States v. Burgess, 175 F.3d 1261 (11th Cir. 1999); United States v. Rojas, 145 Fed. Appx. 647 (11th Cir. 2005); United States v. Root, 296 F. 3d 1222 (11th Cir. 2002).

What all of these cases have in common is that the defendant used the internet to purposefully communicate directly with a minor or a purported minor (or a person with influence over such a minor or purported minor), with the intent to arrange a sexual tryst believing that the individual was a minor and with the knowledge that such sexual activity was illegal because of the age of the victim. This is precisely the situation the statute was designed to reach.

Mr. Epstein's situation has nothing in common with the scenario Congress acted to address. In Mr. Epstein's case, even assuming for purposes of this memorandum that there was inappropriate sexual contact with minors, there was no use whatsoever of the internet, or any other communication device, in an attempt to induce a minor.

The statutorily proscribed act is the use of a channel of interstate commerce to persuade, induce, entice or coerce. "The underlying criminal conduct Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself. That is, if a person persuaded a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate §2422(b)." United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004). See also United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000) ("Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves."). The forbidden conduct is the actual or attempted persuasion, inducement, enticement, or coercion; if there has been sexual misconduct without persuasion, there is no violation of this law.

Furthermore, the persuasion must be first directed at an individual known by the defendant to be younger than 18. Second, its subject must be the minor's participation in prostitution or sexual activity that would be a criminal offense under state law. Confining the statute's reach to such situations is precisely what eliminates what would otherwise be First Amendment problems. See Bailey, 228 F.3d at 639 ("Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts.").

As the plain language of the statute and the legislative history shows, the use of the internet, telephone, or mail is not merely a jurisdictional "hook"; it is the very crux of the crime. Congress was not addressing face to face interactions between adults and

minors during which inducement might be used, but rather interactions that occurred over the internet, sometimes followed by the phone or the mail.

The statute requires that the persuasion must occur "knowingly". Thus, someone commits the offense only if (1) he knows (or believes) that person is under 18, and (2) knows that the activity he is proposing would be illegal with a person of the age he believes that person to be. Since the age of consent varies from jurisdiction to jurisdiction within the United States, and is generally 16 or 17, even an actor's knowledge that the individual he is attempting to persuade is not yet 18 does not mean that he is knowingly seeking to persuade or induce someone to engage in activity that would constitute a crime. See Richard A. Posner & Katharine B. Silbaug, A Guide to America's Sex Laws 44 (Univ. of Chi. Press 1998). Accordingly, to violate § 2422(b), an actor must know that he is trying to persuade not only someone under 18, but someone who is considered a minor in the jurisdiction, and that the sexual conduct contemplated would constitute a crime.

Thus, if a defendant believes he is interacting with an adult, he is not guilty of the federal crime even if he is dealing with a minor pretending to be a grown-up. See United States v. Thomas, 410 F.3d 1235 (10th Cir. 2005).

Mr. Epstein did not use any facility of interstate commerce to do the forbidden act - to persuade, entice, induce, or coerce - nor did he attempt to do so. His staff used the phone to make a variety of arrangements for Mr. Epstein's stays in Palm Beach, including getting the house ready for his arrival, checking movie schedules, and making phone calls

to schedule doctors' appointments, business appointments, personal training, physical therapy and massages. Even if Mr. Epstein could be held responsible for his assistant's use of the telephone, her calls regarding massages were not the statutorily proscribed persuasions or enticements of a minor to do illegal acts but simply to set up appointments.

Assuming Mr. Epstein persuaded individuals to engage in forbidden conduct with him in his home, he did not violate the statute. There was no inducement by or on the telephone or on the internet, and none is alleged. For example, if during a massage, Mr. Epstein inquired if the masseuse was interested in doing something more, and she said yes, the inducement, if any, occurred face to face and without the use of any telephone or the internet. Any subsequent telephone call by his staff for scheduling purposes for another massage was for that purpose and not for an inducement, which had already occurred face to face.

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).

18 U.S.C. § 2423(b) (Travel with Intent to Engage in Illegal Sexual Conduct)

Similarly, the facts of this case do not make out a violation of 18 U.S.C. § 2423(b).

Section 2423(b) provides that:

> A person who travels in interstate commerce ... for the purpose of engaging in any illicit sexual conduct with

> another person shall be fined under this title or imprisoned not more than 30 years, or both.

["Illicit sexual conduct" means a sexual act that occurs with a person under age 16, or a commercial sex act with a person under age 18. See §2423(f) and 18 U.S.C. 2243(a).]

Mr. Epstein did not violate 18 U.S.C. § 2423(b) because his travel to Florida was not for the purpose of engaging in a sexual act with a person younger than 16, nor a commercial sex act with a person under 18. Assuming that Mr. Epstein purposefully engaged in a proscribed act in Florida, it arose long after his travel to Florida was complete, while a massage with a particular masseuse was in progress.

Like § 2422(b), § 2423(b) does not criminalize sexual conduct, with any person, regardless of that person's age. Rather, it criminalizes travel for the purpose of engaging in unlawful sexual activities. United States v. Hayward, 359 F.3d 631, 638 (3d Cir. 2004). See also United States v. Tykarsky, 446 F.3d 458, 471 (3d Cir. 2006):

> The relationship between the mens rea and the actus reus required by § 2423(b) is neither incidental nor tangential. Section 2423(b) does not simply prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor in another state. The travel must be for the purpose of engaging in the unlawful sexual act.

See also Hansen v. Huff, 291 U.S. 559, 562-63 (1934) and Mortensen v. United States, 322 U.S. 369, 374 (1944) ("An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the

interstate journey and must be the dominant motive of such interstate movement.") (emphasis added); Cleveland v. United States, 329 U.S. 14, 20 (1946) ("There was evidence ... that the unlawful purpose was the dominant motive.").[1]

Under these standards, there is no basis for concluding that Mr. Epstein's principal purpose in going to Florida was to engage in illicit sexual conduct, as defined by the statute, even if we assume that some such conduct occurred while he was there. Given the other purposes of his 50 or more Florida trips, the act of going there cannot itself give rise to any inference of improper purpose. On the contrary, it is evident that the principal purpose of his trips to Florida was to go to his Palm Beach home for reasons that were professional, personal and financial, including to minimize his taxes by establishing a residence. Mr. Epstein surely did not go to Florida because its laws governing sexual conduct with young people are particularly lax.[2]

Moreover, no violation of § 2423(b) occurred because, even assuming at some point during the massages Mr. Epstein knew that the particular masseuse was under 18 years old and that certain behavior could be illegal, such knowledge would have come into being when he was already in Palm Beach and could not have been a factor motivating him to go there. Since the vast majority of his masseuses were over 18, and he usually did not

---

[1] Some Courts have held that the illicit sexual conduct must be: an "efficient and compelling purpose," United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997); a "motivating purpose," United States v. Campbell, 49 F.3d 1079, 1083 (5th Cir. 1995), or "at least one of the defendant's motivations for taking the trip in the first place," United States v. Ellis, 935 F.2d 385, 389 (1st Cir. 1991). See also United States v. Hoschouer, 224 Fed. Appx. 923 (11th Cir. 2007) (unpublished).

[2] The age of consent varies from state to state. In Connecticut, it is 16 for intercourse, Conn. Gen. Stat. Ann. § 53a-71, and 15 for sexual contact. Conn. Gen. Stat. Ann. § 53a-73a. In Massachusetts and New Jersey, the age of consent is 16. Mass. Gen. Laws ch. 265, § 23; Mass. Gen. Laws ch. 272, § 35A; NJ. Stat. Ann. § 2C:14-2. New York sets the age of consent at 17. [redacted]. Penal Law § 130.05(3).

know who his masseuse would be until she arrived at his home, sexual contact with a minor could not have been a factor motivating his travel.[3]

18 U.S.C. § 1956(a)(3) (Money Laundering)

No reasonable reading of the money laundering statute can countenance a charge against Mr. Epstein, for the statute on its face, and as applied by the courts, has absolutely no application to the alleged misconduct. Under the facts of this case, to charge Mr. Epstein with violating the money laundering statute would be unprecedented.

The Eleventh Circuit has held that "[t]o prove money laundering under § 1956(a)(3), the government must show that the defendant (1) conducted or attempted to conduct a financial transaction (2) involving property represented to be the proceeds of specified unlawful activity, (3) with the intent (a) 'to promote the carrying on of specified unlawful activity,' (b) 'to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity,' or (c) 'to avoid a transaction reporting requirement under State or Federal law'," United States v. Puche, 350 F.3d 1137, 1142-43 (11th Cir. 2003).[4] See also United States v. Arditti, 955 F.2d 331 (5th Cir. 1992).

---

[3] Nor are any of the other sections of 18 U.S.C. 2423 prohibiting "sex tourism" applicable. Section (a) prohibits transporting a minor (under 18) in interstate or foreign commerce for sexual purposes. Section (c) prohibits traveling to a foreign country to engage in illicit sexual conduct. Section (d) prohibits facilitating travel of a person for the purpose of engaging in illicit sexual conduct for financial gain. All that has been alleged is that Mr. Epstein traveled to his home in Florida and engaged in sexual activities with local Florida residents. There are no allegations whatsoever that he ever transported a minor or an adult to another state or foreign country for sexual purposes, or for that matter, that he traveled to a foreign country to engage in illicit sexual activities.

[4] Instructive is the Eleventh Circuit Pattern Jury Instruction 70.4 which states that the defendant can be found guilty of § 1956(a)(3)(A) only if (1) he knowingly conducted a financial transaction; (2) the transaction involved property represented to be the proceeds of specified unlawful activity or that was used to conduct

Thus, it is clear that the statute unquestionably requires (a) the use of proceeds of specified unlawful activity; or (b) cash which is or was represented to be the product of unlawful activity, with neither paradigm being applicable in the ease.

Mr. Epstein did not receive money or funds from any criminal conduct which he then used in a financial transaction. See, e.g., United States v. Taylor, 239 F. 3d 994 (9th Cir. 2001) (defendant charged with running an illegal escort service and using proceeds from that business to pay credit cards used to purchase airline tickets to fly prostitutes to Las Vegas). Nor did Mr. Epstein use money he knew to be unlawfully tainted in a financial transaction designed to promote prostitution or other criminal conduct. Rather, to the extent the evidence may show that Mr. Epstein paid for sexual services, he most certainly did so with untainted, legitimately earned funds.

* * * *

Having demonstrated that there is no real federal interest in this case, because there is no federal crime, it is apparent that the United States Attorney's Office is simply attempting to dictate the procedures and outcome of a state prosecution in which federal authorities can have no legitimate interest. It may be that some law enforcement authorities in other jurisdictions, state or federal, might choose to handle this matter differently from the way chosen by the State of Florida, but that does not permit or even excuse their outside interference.

---

or facilitate specified unlawful activity; and (3) the defendant engaged in the transaction with the intent to promote the carrying on of specified unlawful activity.

Moreover, were there in fact a federal crime of some sort here that could be prosecuted - - and I suggest there is none - - traditional notions of prosecutorial discretion would mitigate against such a prosecution on the facts of this case.

The Factors That Federal Prosecutors Are Mandated To Consider in Determining Whether To Bring A Prosecution Militate Against Prosecution.

I have also reviewed the submissions made on behalf of Mr. Epstein which addressed the Petite Policy, which is set forth in the United States Attorney's Manual, and concluded that even assuming that there is a valid basis for federal charges, those charges would be barred by that Policy. In my professional opinion that conclusion was the correct one.

My review of the USAM not only supports this conclusion regarding the Petite Policy but also reveals that there are other sections of the USAM which would bar any federal prosecution or interference with state proceedings.

A. Declining To Prosecute

The United States Attorney's Manual [hereinafter "USAM"] sets forth when to initiate or decline prosecution. Section 9-27.220 provides, in pertinent part:

> The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:
>
> 1. No substantial Federal interest would be served by prosecution;

> 2. The person is subject to effective prosecution in another jurisdiction; or
>
> 3. There exists an adequate non-criminal alternative to prosecution.

Mr. Epstein has been prosecuted in Florida, which considered all of the issues and determined the appropriate crime to charge him with. As shown above, there is no federal interest here. Moreover, were we to assume that Mr. Epstein's conduct constitutes a federal crime that can be proved, nevertheless, no "substantial Federal interest" would be served by prosecuting him. On this question, the USAM Section 9-27.230 gives specific guidance:

> In determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:
>
> 1. Federal law enforcement priorities;
>
> 2. The nature and seriousness of the offense;
>
> 3. The deterrent effect of prosecution;
>
> 4. The person's culpability in connection with the offense;
>
> 5. The person's history with respect to criminal activity;
>
> 6. The person's willingness to cooperate in the investigation or prosecution of others; and

7. The probable sentence or other consequences if the person is convicted. [5]

Each of these factors militates against prosecution. As indicated, federal law enforcement priorities focus on the use of the internet to target minors, or trafficking in minors. The conduct in which Mr. Epstein arguably engaged was different in nature. Given its essentially sui generis character, its prosecution would have little or no deterrent effect.

Mr. Epstein has no criminal history. If prosecuted under statutes designed to address far more serious conduct and far more dangerous offenders, he would be subject to punishment that is grossly disproportionate to his behavior.

Clearly, whatever phone calls may have been made by Mr. Epstein's staff were merely incidental; they were not a means to lure underage women into illicit sexual acts while taking advantage of anonymity and distance. Likewise, Mr. Epstein's interstate travel was of no federal interest. He spent a great deal of his time in Florida because he has a home there, and for a variety of other reasons that had nothing to do with sexual behavior with underage woman. Given the attenuated relationship between sexual behavior with any person under 18 and the use of the phone (or interstate travel), the federal interest in this matter is slight, if existent at all.

The conduct at issue is not an example of a widespread phenomenon that crosses state lines or that is difficult for local authorities to prosecute. It does not involve targeting

[5] Each of these factors is discussed in greater detail in USAM 9-27.230(B).

of children. It does not involve organized prostitution, sex trafficking, or organized crime. It does not involve violence or threat of harm. It does not involve child pornography. Indeed, the circumstances of this case are idiosyncratic.

What is alleged here is entirely local sexual encounters - whether with an adult or a minor – which are, and always have been, the concern of local prosecutors. They are not what the federal statutes target, nor are they the kind of cases that the U.S. Attorney's Office usually pursues.

B. **Petite Policy**

In addition to the factors discussed above, the Petite Policy (regarding dual and successive prosecutions), should also be a bar to any federal prosecution or involvement in the State proceedings.

The USAM at 9-2.031 establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same acts involved in a prior state or federal proceeding. Though the Policy does not create any substantive or procedural rights enforceable by law, it nevertheless provides a valid basis for arguing against the institution of charges in this matter:

> This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the

> government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. . . .
>
> Satisfaction of the three substantive prerequisites does not mean that a proposed prosecution must be approved or brought. The traditional elements of federal prosecutorial discretion continue to apply.

USAM 9-2.031(A)

The Policy does not apply unless there has been a prior prosecution resulting in an acquittal or a conviction, including one resulting from a plea agreement. USAM 9-2.031(C). While here there technically has not been a conviction in the state courts, there would have been one but for the interference of federal authorities. Thus under the spirit, if not the language itself, the policy should apply here.

This matter does not involve a substantial federal interest, nor would the state prosecution leave a substantial federal interest "demonstrably unvindicated." "In general, the Department will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest." USAM 9-2.031(D).

The presumption may be overcome when the prior prosecution resulted in a sentence which was manifestly inadequate in light of the federal interest involved or if the choice of charges in the prior prosecution was affected by certain inappropriate or irrelevant factors such as "incompetence, corruption, intimidation, or undue influence."

No such factors exist here. The negotiations between Mr. Epstein and the State's Attorney's office were conducted at arms length, and sometimes in an atmosphere of

mutual hostility. At no point was Mr. Epstein granted any sort of "break" in his case due to his wealth, his political affiliations, or the prominence of his lawyers. If anything, those factors worked against him. The state prosecutors devoted enormous resources in a 13 month investigation.

Ultimately, the State's Attorney's office charged Mr. Epstein with a more severe crime than originally contemplated. In determining the charges, that Office obviously took into account the fact that some of the alleged victims have serious credibility problems, including damaging histories of lies, illegal drug use, and crime and therefore was concerned with the substantial possibility that with these witnesses it might not be able to make any case against Mr. Epstein.

The charging decision was not an act of favoritism, but rather an appropriate exercise of the State's Attorney's office's discretion. The conduct of the United States Attorney here is not merely intrusive of these arms length negotiations, it is coercive of a defendant and requires him to ask the State to impose a harsher punishment upon himself than the State itself has determined appropriate.

C. **Prosecution in Another Jurisdiction**

Furthermore, another section of the USAM 9-27.240, Initiating and Declining Charges Because of a Prosecution in Another Jurisdiction, would also prohibit any federal charges here.

In determining whether prosecution should be declined because the person is subject to prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;

2. The other jurisdictions ability and willingness to prosecute effectively; and

3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

There can be no dispute that the State of Florida had a strong interest in this prosecution and the ability and the willingness to prosecute it. Furthermore, the behavior alleged here is certainly one of local interest and of particular interest to the State authorities who conducted a 13 month investigation. This is not a civil rights case from the 1960's brought half heartedly and resulting in an acquittal. The sentence agreed to by the State, while it may not be to the federal authorities liking, is certainly within the parameters of sentences for these types of crimes and does not warrant federal intervention.

D. Payments of Money

The federal authorities have also insisted that any plea with the State of Florida must require Mr. Epstein to agree to be sued by as many as 40 of the women, that he not contest jurisdiction or the facts of those suits and that each woman be entitled to $150,000 in damages (or an amount agreed to by the parties). It is apparent that the

federal authorities have inappropriately tried to impose upon Mr. Epstein penalties provided for in 18 U.S.C. § 2255(a).

The federal prosecutors have attempted to circumvent the requirements of that statute by essentially making anyone who claims to be a victim automatically entitled to a $150,000 payment without any requirement of proof of injury, which the statute requires. Prosecutors shouldn't be in the business of helping alleged victims of *state* crimes secure financial settlements especially here where some of the victims may be suspect.

In addition, a threat by a prosecutor to prosecute unless payments are made to *potential* prosecution witnesses is highly inappropriate and not something that I have ever encountered before.[6] In United States v. Singleton, 165 F.3d 1297, 1302 (10th Cir. 1999) the Court frowned upon such behavior:

> Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign. A prosecutor who offers something other then a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government.

The demand for such payments for unproven "victims" in amounts unrelated to any rational standard is beyond the bounds of any legitimate or even rational governmental conduct.

---

[6] While federal law provides for restitution to victims and prosecutors have required restitution as part of plea agreements, it is done in situations where the victims are readily identifiable and their losses are ascertainable. Here, without any proof, the prosecutors demanded payments to unknown individuals who may not have been harmed at all.

In sum, coercing Mr. Epstein to pay $150,000 to 40 or so "victims" when no determination has been made that they are entitled to any compensation, in any amount, is unknown to me in my experience and is beyond mere heavy handedness: it is oppressive.

Conclusion

There was no reason for federal authorities to interfere in this case. The State of Florida devoted substantial resources investigating the case and considered all the evidence, including its strengths and weaknesses, in determining the appropriate sentence to resolve this matter. That sentence would have ensured that the defendant would never engage in such conduct again.

In my experience, as a line prosecutor, as a prosecutor in charge of a United States Attorney's office, and as a defense attorney involved in criminal cases throughout the country, I have never encountered a situation like this one where a federal prosecutor injects himself into a state proceeding and used threats of federal prosecution to force changes in the outcome of a state proceeding not merely to one more to his liking, but one which has no rational relationship to the situation. As unusual as this would be if there were a clear federal interest here, it is all the more shocking in this instance: a matter that is solely of state concern - - local sex crimes having no interstate or national importance - - with no attendant federal crime.

Furthermore, even if these federal statutes somehow applied to the situation here, it would still not be appropriate to bring these charges. The federal statutes were meant

to address exploitation of minors, trafficking in illegal sex across state and national borders, and child pornography. What we have here is one individual seeking sexual gratification in the privacy of his own home and if he did something inappropriate, it is not for the federal government to intrude by ignoring the Petite Policy and other similar restrictions, as well as our traditional concepts of federalism. The situation here is not what Congress had in mind when it enacted these statutes. If the federal authorities believe that the states are not properly policing the sex trade, the remedy should be to lobby Congress for stronger statutes, not to interfere in a state proceeding in order to make some kind of statement. It is not the federal government's role to police the states' exercise of prosecutional discretion, barring a serious impropriety. Surely, this is not that situation. If the true motivation of federal prosecutors here is simply their personal dislike of Mr. Epstein, or mere personal dislike for the crime or of their sympathy for the women, those are clearly impermissible considerations and are improper. See USAM 9-27. 260(A)(2).

In my judgment and experience, it would be most appropriate for the prosecutors in the United States Attorney's office to advise the State authorities that they have no further interest in these proceedings and that State and the defendant are free to negotiate whatever resolution they deem appropriate.

Sincerely,

HJS:lt

Herbert J. Stern