

No. 19-35955

United States Court of Appeals
for the
Ninth Circuit

Steven Douglas Rockett,
Appellant,

v.

N.S.,
Appellee.

On appeal from U.S. District Court for Oregon, Portland
Case No. 3:16-cv-02171-AC
The Honorable Michael H. Simon

**APPLICATION OF CHILD USA FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE**

Marci A. Hamilton, Esq.
CEO & Academic Director
CHILD USA
Robert A. Fox Professor of Practice
University of Pennsylvania
3814 Walnut Street
Philadelphia, PA 19104
Tel: (215) 539-1906
marcih@sas.upenn.edu

DUANE MORRIS LLP
Paul J. Killion (SBN 124550)
Adrian Gawain Cadoppi (SBN 320205)
Bridget S. Cho (SBN 325844)
Spear Tower, One Market
Suite 2200
San Francisco, CA 94105-1127
Telephone: +1 415 957 3000
Facsimile: +1 415 957 3001
E-mail: pkillion@duanemorris.com
acadoppi@duanemorris.com
bscho@duanemorris.com

Attorneys for *Amici Curiae*
CHILD USA

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE**

Pursuant to Federal Rules of Appellate Procedure 29(a)(3), (b)(3) and Ninth Circuit Rule 29-3, CHILD USA respectfully requests permission to file this amicus curiae brief in support of Appellee.

CHILD USA is the leading non-profit think tank working to end child abuse and neglect in the United States. CHILD USA engages in high-level legal, social science, and medical research and analysis to derive the best public policies to end child abuse and neglect. Given CHILD USA's current and past experience in its mission to increase public safety and eliminate barriers to justice for child sex abuse victims who have been harmed by individuals and institutions, CHILD USA is familiar with the issues presented in the underlying criminal case, *United States v. Steven Douglas Rockett*, Case No. 3:13-cr-005577-SI (D.Or. 2016), and with the briefing in this civil matter, *N.S. v. Steven Douglas Rockett*, Case No. 3:16-cv-02171-AC (D.Or. 2016).

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CHILD USA believes additional briefing would be helpful to the Court addressing the legislative history behind 18 U.S.C. sections 2251 and 2255, at issue in this appeal, and how other circuit courts of appeals have addressed similar issues. This is the focus of the attached amicus curiae brief.

Appellee N.S. has consented to this amicus brief. While CHILD USA has endeavored to obtain the consent of Appellant Steven Douglas Rockett to file this brief, CHILD USA has not received a response to its letter. Accordingly, CHILD USA respectfully asks this Court for permission to file the attached amicus curiae brief, pursuant to Federal Rules of Appellate Procedure 29(a)(3),(b)(3) and Ninth Circuit Rule 29-3.

As a nonprofit 26 U.S.C. section 501(c)(3) organization, CHILD USA receives contributions from many interested members of the public and foundations. CHILD USA has historically specified on its website where it has received specific funds for a specific use. No party or their counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amicus curiae, its members, and its

counsel—has contributed money that was intended to fund preparation or submission of the brief.

Dated: February 21, 2020

Respectfully submitted,

DUANE MORRIS LLP

By: /s/ Paul J. Killion

Paul J. Killion
Adrian Gawain Cadoppi
Bridget S. Cho

Marci A. Hamilton
CEO & Academic Director

Attorneys for *Amicus Curiae*
CHILD USA

CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), I certify that:

This application complies with the type-volume limitation of the Federal Rules of Appellate Procedure, Rule 32(a)(7)(B) because this brief contains 372 words, excluding the parts of the brief excepted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(b)(iii).

This application complies with the typeface requirements of Federal Rules of Appellate Procedure, Rule 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure, Rule 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using the Word 2016 program Century Schoolbook 14-point font.

Dated: February 21, 2020

DUANE MORRIS LLP

By: /s/ Paul J. Killion
Paul J. Killion (SBN 124550)

Attorney for *Amicus Curiae*
CHILD USA

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, I electronically filed the foregoing **APPLICATION**, together with its accompanying **AMICUS CURIAE BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF users will be served by the CM/ECF system.

I further certify that I have mailed a true copy of the foregoing **APPLICATION**, together with its accompanying **AMICUS CURIAE BRIEF**, on February 21, 2020, to the following by prepaid, first-class mail:

Steven Douglas Rockett
Inmate No. 75742065
USP-Tucson
P.O. Box 24550
Tucson, AZ 85734

Dated: February 21, 2020

DUANE MORRIS LLP

By: /s/ Paul J. Killion
Paul J. Killion (SBN 124550)

Attorney for *Amicus Curiae*
CHILD USA

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IN SUPPORT OF APPELLEE

Marci A. Hamilton, Esq.
CEO & Academic Director
CHILD USA
Robert A. Fox Professor of Practice
University of Pennsylvania
3814 Walnut Street
Philadelphia, PA 19104
Tel: (215) 539-1906
marcih@sas.upenn.edu

DUANE MORRIS LLP
Paul J. Killion (SBN 124550)
Adrian Gawain Cadoppi (SBN 320205)
Bridget S. Cho (SBN 325844)
Spear Tower, One Market
Suite 2200
San Francisco, CA 94105-1127
Telephone: +1 415 957 3000
E-mail: pjkillion@duanemorris.com
acadoppi@duanemorris.com
bscho@duanemorris.com

Attorneys for *Amici Curiae*
CHILD USA

CORPORATE DISCLOSURE STATEMENT

CHILD USA is a non-profit organization subject to tax exempt status under 26 U.S.C. section 501(c)(3) and organized under the laws of Pennsylvania.

Dated: February 21, 2020

DUANE MORRIS LLP

By: /s/ Paul J. Killion
Paul J. Killion (SBN 124550)

Attorney for *Amicus Curiae*
CHILD USA

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INTRODUCTION

In the criminal matter below, Appellant, Steven Douglas Rockett (“Rockett”) was convicted in the United States District Court, District of Oregon, Portland Division (“District Court”) of attempting to produce child pornography in violation of 18 U.S.C. section 2251 (“Section 2251”), subdivisions (a) and (e). N.S., the victim of that violation, suffered personal injury, entitling her to recover an award of \$150,000 in civil damages, and other relief, in accordance with 18 U.S.C. section 2255 (“Section 2255”).

In an effort to avoid liability under Section 2255, Rockett argues this Court should distinguish his actual conviction of “Attempting to Produce Child Pornography . . . [i]n violation of . . . Sections 2251(a) and (e)” from an “actual” violation of Section 2251. (SER 37, 42-43, 50; Rockett’s Opening Brief (“ROB”), 3.) But the plain language of Section 2251 and the legislative intent behind Section 2255 are clear – Section 2255 is to extend civil compensation to all child victims suffering personal injuries from sexual exploitation. Congress intended for civil recovery under Section 2255 to be expansive, to mitigate the harms caused to victims of child sexual exploitation, including both attempted

and completed acts relating to child sexual abuse imagery. CHILD USA respectfully submits that this Court should affirm the District Court's decision.

INTERESTS OF *AMICI CURIAE*

Amicus curiae, CHILD USA, is the leading non-profit think tank working to end child abuse and child neglect in the United States. CHILD USA engages in high-level legal, social science, and medical research and analysis to derive the best public policies to end child abuse and neglect. Distinct from an organization engaged in the direct delivery of services, CHILD USA develops evidence-based solutions and information needed by policymakers, youth-serving organizations, courts, media, and the public to increase child protection and the common good.

CHILD USA works to protect children from abuse in various contexts including its national child sex abuse statute of limitations reform initiative. CHILD USA's interest in this case is directly correlated with its mission to increase public safety and eliminate barriers to justice for child sex abuse victims who have been harmed by individuals and institutions.

ISSUE ADDRESSED

Is a conviction for attempting to violate 18 U.S.C. section 2251(a) a predicate offense for liability under 18 U.S.C. section 2255(a)?¹

STATEMENT OF THE CASE

N.S. is identified in the District Court using her initials. (Appellee's Supplemental Excerpts of Record ("SER") 8). In 2013, when N.S. was 14 years old, in a text exchange using Facebook, Rockett, attempted to convince N.S. to photograph herself in a sexually suggestive pose using her cell phone camera and to send the photograph to him. (SER 9, 50-51.) N.S. responded that the cell phone Rockett purchased for her was stolen. (SER 9, 60.) Rockett offered to replace the phone but stated that N.S. would have to come to him to get it. (SER 9, 60, 62.) N.S. understood this to mean that she would need to engage in additional sexual acts with Rockett and responded that she would "just go without one i don't want to do that stuff again... i have nightmares cuz of it and i cry my self to sleep alot since then..." (SER 9, 62.)

¹ CHILD USA does not address the summary judgment-related issues raised in Appellant's brief.

Between approximately 2004 and 2011, when N.S. was between five and twelve years old, she alleges Rockett performed numerous, repeated, and frequent criminal sexual acts upon N.S., including oral sodomy, anal and vaginal rape, touching of her sexual and other intimate parts, and photographing or visually recording her in the nude and engaging in sexual acts. (SER 9, 51.) As a result of N.S.'s fortitude and resistance to Rockett's enticement in 2013, Rockett was unable to actually obtain an explicit photo from N.S. before he was arrested. (SER 9, 62.)

On March 11, 2015, an Oregon state jury convicted Rockett of eight felony sex offenses against Plaintiff when Plaintiff was under the age of 14.² (SER 28-34.) On May 26, 2016, a federal criminal jury in Oregon district court convicted Rockett of, among other charges, "Attempting to Produce Child Pornography . . . [i]n violation of . . .

² Sodomy in the Second Degree, in violation of Oregon Revised Statutes ("ORS") § 163.395 (two counts), Rape in the Second Degree, in violation of ORS § 163.365 (two counts), Sexual Abuse in the Second Degree, in violation of ORS § 163.365 (two counts), and Using a Child in a Display of Sexually Explicit Conduct, in violation of ORS § 163.670 (two counts). (SER 29-34.)

Sections 2251(a) and (e)” for an offense committed against N.S. when she was 14 years old. (SER 37, 42-43, 50.)

On November 15, 2016, after Rockett’s state and federal convictions, N.S. filed this civil case in the U.S. District Court for the District of Oregon, seeking to recover civil damages under Section 2255 for the harm she suffered as a result of Rockett’s solicitation of pornographic images from her while she was a minor. (SER 63-66.)

Rockett moved to dismiss N.S.’s complaint on the grounds, *inter alia*, that: (1) N.S. failed to state a cognizable claim for relief because Rockett’s conviction for attempting to produce child pornography under Section 2251 was not a predicate offense for liability under Section 2255; and (2) N.S. did not plead facts sufficient to state she suffered personal injury as required under Section 2255. (SER 4-7.) N.S. then moved for summary judgment as to her Section 2255 claim. (SER 50-51.)

On October 29, 2018, Magistrate Judge John V. Acosta issued his findings and recommended that Rockett’s motion to dismiss be denied and that N.S.’s motion for summary judgment be granted. (SER 8-25.)

The District Judge, Michael H. Simon, adopted the magistrate's findings and recommendations. (SER 4-7.) Observing that "the attempted exploitation of a young girl for fabrication of child pornography is a serious offense, and one that Congress has chosen to criminalize and punish with lengthy prison sentences," the District Judge found that Rockett's conviction for attempting to produce child pornography in violation of Sections 2251(a) and (e) amounted to a violation of Section 2255, and added that "being a victim of child sex abuse inherently causes the child to suffer personal injuries and 'the statute does not create one category of victims and another category of people who suffer personal injuries.'" (SER 6 (quoting *Doe v. Boland*, 698 F.3d 877, 881 (6th Cir. 2012).)

On appeal, Rockett urges this Court to find that a conviction for an attempt to violate Section 2251 is not a predicate offense establishing liability under Section 2255, arguing his conviction of attempt was not "an actual violation of [Section 2251]," and that "Congress intended for [Section 2255] to apply to minors that were victims of actual violations of the listed sections, not victims of attempts . . . to violate the listed sections." (ROB at 3; Attachment to Rockett's

Opening Brief (“AROB”), 2.) CHILD USA addresses only this issue.³ As explained below, Rockett’s argument is meritless.

ARGUMENT

I. In the Years Preceding 18 U.S.C. § 2255, Both Congress and the Supreme Court Recognized the Growing Problems of Child Pornography and Child Sexual Exploitation.

In recent years, innovations in technology and the Internet have facilitated the explosive onslaught of child sexual abuse imagery. It is a growing problem and continues to be a growing problem in the United States. Since its inception in 1998, the National Center for Missing and Exploited Children’s tip line has received more than 63.4 million reports of suspected child sexual exploitation. 16.8 million of those reports came from electronic service providers in *2019 alone*. NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, <http://www.missingkids.org/footer/media/keyfacts#exploitedchildrenstatistics>, (last visited February 21, 2020).

In 1977, Congress passed its first legislation directly targeting child pornography. *See* Child Protection Act of 1984, Pub. L. No. 98-

³ Rockett also appeals the District Court’s decision denying his request to conduct initial general discovery. As noted, CHILD USA does not address this issue.

292, § 3, 98 Stat. 204 (1984); *see also* James R. Marsh, *Masha's Law: A Federal Civil Remedy For Child Pornography Victims*, 61 SYRACUSE L.REV. 459, 467 (2011). The Act “outlawed the use of children in production of *obscene* materials.” *Id.* at 467-468 (emphasis added); *see Miller v. California*, 413 U.S. 15, 25 (1973) (*Miller*) (defining “obscenity”).

In 1982, the Supreme Court held that child pornography was not protected by the First Amendment even if it did not meet *Miller's* obscenity standard. *New York v. Ferber*, 458 U.S. 747, 764 (1982) (*Ferber*). The Supreme Court's *Ferber* decision resulted from its concern that child “pornography pose[d] an even greater threat to the child victim than d[id] sexual abuse or prostitution,” because child pornography victims “must go through life knowing that the recording is circulating within the mass distribution system for child pornography.” *Id.* at 759 n.10 (*quoting* David P. Shoumlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L.REV. 535, 545 (1981)).

“It is evident beyond the need for elaboration that a State's interest in ‘safeguarding the physical and psychological well-being of a

minor' is 'compelling' . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to physiological, emotional, and mental health of the child.” *Osborne v. Ohio*, 495 U.S. 103, 109 (1991) (quoting *Ferber*, 458 U.S. at 756-57, 758). For those reasons, the Supreme Court decided that state legislators should be given “greater leeway” when acting to protect children from being victimized by child pornography. *Ferber*, 458 U.S. at 756.

In response to the Supreme Court’s decision in *Ferber*, Congress enacted the Child Protection Act of 1984. The Child Protection Act broadened the definition of “child pornography” to include sexually suggestive images of minors, not just obscene ones, to address the growing problem of “youth . . . exploited in the production of . . . pornographic materials.” Child Protection Act of 1984 §§ 2(2)-(3), 4(3), 5(4).

In 1986, the Attorney General’s Commission on Pornography (“Commission”) conducted an extensive study of child pornography and determined that “[t]he legislative assault on child pornography” up until that point had “drastically curtailed [child pornography’s] public

presence,” but had not “ended the problem.” U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMM’N ON PORNOGRAPHY: FINAL REPORT 608-609 (1986). Sadly, the Commission concluded that there was “no evidence... suggest[ing] that children [were] any less at risk than before.” *Id.* at 609.

II. Congress Enacted 18 U.S.C. § 2255 as a Direct Response to Sexual Exploitation of Children in an Effort to Provide Relief to Victims of Child Sexual Abuse and to Prevent Further Crimes.

It was in the backdrop of these unsettling concerns that Congress, in 1986, enacted Section 2255, later dubbed “Masha’s Law.” Section 2255 provides civil remedies for minors who have been victims of certain sexual exploitation crimes. 18 U.S.C. § 2255. Specifically, Section 2255 provides any minor who was a victim of a “violation” of any of the enumerated statutes with a right to sue for civil damages:

Any person who, while a minor, was a victim of a violation of section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 . . . and who suffers personal injury as a result of such violation . . . shall recover . . . liquidated damages in the amount of \$150,000, and the cost of the action, including reasonable attorney’s fees and other litigation costs reasonably incurred.

18 U.S.C. § 2255, subd. (a).⁴

The plain language of Section 2255 is straightforward. It allows persons who were victims while a minor of violations of any of the enumerated statutes and who suffered injuries thereby to recover civil damages and litigation costs. Notably, only one of Section 2255's enumerated statutes – 18 U.S.C. 2241(c) – specifically references a subdivision. All the other included statutes make no distinction between the subdivisions. Congress's intent plainly was that “violations,” for the purposes of Section 2255, included any violation of any subdivision of the enumerated statutes.

The statute under which Rockett was convicted in this case, Section 2251, is one of the enumerated statutes in Section 2255. Section 2251 criminalizes, among other conduct, “enticing” minors to engage in sexually explicit conduct for the purposes of recording the activity. 18 U.S.C. § 2251, subd. (a). Specifically, Section 2251(a) provides that “[a]ny person who employs, uses, persuades, induces,

⁴ This is the current version of Section 2255. Its operative language is unchanged from the version in place when Rockett's civil liability was determined.

entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct . . . shall be punished as provided under subsection (e) . . .” 18 U.S.C. § 2251, subd. (a) (emphasis added). Section 2251, subsection (e), in turn, provides that “[a]ny individual who violates, or *attempts* . . . to violate [Section 2251] shall be . . . imprisoned” 18 U.S.C. § 2251, subd. (e) (emphasis added).

III. Rockett’s Argument that an Attempt To Violate 18 U.S.C. § 2251 Is Not an “Actual” Violation Is Unavailing Because the Plain Language of Section 2251(e) Indicates that Attempts Are Violations and Other Courts of Appeals Have Consistently Reached this Conclusion.

Rockett’s argument that his conviction was not “an actual violation of [Section 2251]” because “[i]t is impossible to violate a statute by attempting to violate the same statute,” is at odds with his actual conviction. (ROB at 3; AROB at 2.) The argument is defeated by the language of his grand jury charges, verdict, and criminal judgment, as well as the plain language of Section 2251 and relevant case law interpreting and applying the statute.

A. The Language in Rockett’s Grand Jury Charges, Verdict, and Criminal Judgment, as well as the Plain Language of Section 2251 Establish that He Violated Section 2251.

Rockett’s grand jury charges accused him of “knowingly and unlawfully . . . entic[ing] . . . ‘N.S.,’ a minor, to engage in sexually explicit conduct for the purpose of producing a visual depiction of said conduct . . . [*i*]n violation of . . . Section 2251(a) and (e).” (SER 37 (emphasis added).) Rockett’s federal verdict states he was found “Guilty” of “Attempting to Produce Child Pornography.” (SER 42.) And Rockett’s federal criminal judgment states that he was found “guilty” of violating “[Section 2251] (a) and (e) – Producing Child Pornography.” (SER 43.) When read together, these documents clearly indicate that Rockett was charged and convicted of “Attempting to Produce Child Pornography . . . *in violation of* Section 2251(a) and (e).” (SER 37, 42-43 (emphasis added).)

Under the plain language of Section 2251(e), “[a]ny individual who . . . *attempts . . . to violate*, this section shall be . . . imprisoned” 18 U.S.C. § 2251, subd. (e) (emphasis added). Courts have interpreted nearly identical wording in other criminal statutes to mean attempts also constitute violations of the statute. For example, 18 U.S.C.

Section 1751, which applies to assassination of the President, includes the following language: “Whoever kills (1) any individual who is the President of the United States . . . shall be punished as provided by sections 1111 and 1112 of this title.” 18 U.S.C. § 1751, subd. (a). Subsection (c) then goes onto proscribe “attempt” amid punishment related language: “Whoever attempts to kill . . . any individual in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.” 18 U.S.C. § 1751, subd. (c). In *United States v. Duran*, the court held that the defendant “*violated* § 1751 by attempting to assassinate the President of the United States.” 96 F.3d 1495, 1507-1509 (D.C. Cir. 1996) (emphasis added).

In short, when Rockett’s grand jury charges, verdict, and criminal judgment are read together, along with the plain language of Section 2251, it is unmistakable that Rockett’s attempt to produce sexually explicit images of N.S. constitutes a violation of Section 2251.

B. Other Courts Of Appeals Have Held that Violations of 18 U.S.C. § 2251 Include Attempts.

Every Circuit to address whether attempted conduct pursuant to Section 2251 qualifies as a “violation” of Section 2251 has rejected Rockett’s argument that attempts are not considered “actual” violations.

In *U.S. v. Raney*, a defendant engaged in messaging an undercover police officer posing as a minor and made plans to meet, have sexual relations, and take pornographic pictures of her. 342 F.3d 551, 553-554 (7th Cir. 2003) (*Raney*). When the defendant went to the arranged meeting place and tried to make contact with the undercover police officer, he was arrested and the police discovered a camera in his vehicle. *Id.* at 554. The defendant was indicted and convicted of attempted manufacture of child pornography in violation of Section 2251(a) and (e) – the very conviction at issue here. *Id.* at 555-556.

The defendant appealed and, similar to *Rockett*, argued his indictment was defective because an attempt to violate Section 2251 was not an actual violation of the statute because the word “attempt” only appeared amid the “charging” language in subdivision (a), not the “punishment” language of subdivision (e). *Raney*, 342 F.3d at 560-61. The Seventh Circuit rejected defendant’s argument, holding that Section 2251 “plainly proscribes not only the manufacture of child pornography, but also the inchoate crime[] of *attempt*.” *Id.* at 561 (emphasis added);

Likewise, in *United States v. Buculei*, the defendant was convicted of attempting to create a visual depiction of a minor forced to engage in sexually explicit conduct in violation of Section 2251, but the videotape stopped before the victim had undressed. 262 F.3d 322, 328-330 (4th Cir. 2001) (*Buculei*). The defendant, like Rockett here, argued, that because he was unsuccessful in his attempt to actually produce a visual depiction of sexually explicit conduct with the child victim, he had not committed a violation of Section 2251(a). *Id.* at 327-328. The Court held that simply because the defendant was unsuccessful in his attempt to actually produce a visual depiction of sexually explicit conduct with a minor does not mean that he did not violate Section 2251. *Id.* at 328. The Court affirmed the defendant's conviction of an attempt to create a visual depiction of a minor subjected to sexually explicit conduct in violation of Section 2251(a). *Id.* at 330.

In *United States v. Johnson*, the Court affirmed the defendant's conviction for *attempting* to entice a minor into sexual activity, and referred to the defendant's conviction as being "in violation of 18 U.S.C. §§ 2251(a) and [(e)]." 376 F.3d 689, 691-693, 696, (7th Cir. 2004); *accord U.S. v. Crow*, 164 F.3d 229, 234 (5th Cir. 1999) (recognizing that

“[subsection (e)] provides punishment for ‘any individual who violates, or attempts or conspires to violate’ this section.”).

In sum, Rockett’s argument that “attempts” are not “actual” violations is without merit. Since violations of Section 2251 include attempts to violate Section 2251, it is clear that Rockett’s attempt to violate Section 2251(a) and (e) satisfies the “violation” requirement under Section 2255.

IV. The Legislative History Of 18 U.S.C. § 2255 Demonstrates Congress’ Intent to Provide Child Victims With Relief For A Broad Variety Of Sexually Exploitative Acts, Including Attempts To Obtain Explicit Photos.

Rockett further argues that “Congress intended for [Section 2255] to apply to minors that were victims of actual violations of the listed sections, not victims of attempts . . . to violate the listed sections.” (AROB at 2.) But Section 2255’s legislative history clearly indicates otherwise.

The legislative history behind Section 2255 demonstrates that Congress intended all violations of any of the child exploitation statutes enumerated in Section 2255, including “attempts,” to also qualify as “violations” for the purposes of the civil remedies in Section 2255.

In 1986, Congress found that “child exploitation ha[d] become a multi-million dollar industry . . . by a nationwide network of individuals openly advertising their desire to exploit children,” causing “physiological, psychological, and emotional harm” to children. Child Abuse Victims’ Rights Act of 1986, Pub. L. No. 99-500, § 702, subds. (1), (2), 100 Stat. 1783 (1986). Congress noted that at the time, “the Federal Government lack[ed] sufficient enforcement tools to combat concerted efforts to exploit children” and that “exploitation victims lack[ed] effective remedies under Federal law.” *Id.* § 702, subd. (3). Driven by these findings, Congress enacted the Child Abuse Victims’ Rights Act of 1986. *Id.* § 701.

In passing the Act, Congress sought to “strengthen laws” proscribing perpetrators’ efforts to exploit children through child pornography by adding civil penalties in addition to the criminal statutes. Child Abuse Victims’ Rights Act of 1986 §§ 702, subd. (2), 703. Section 2255 embodied Congress’s intent to combat “efforts to exploit children” by providing victims of child exploitation with a civil remedy to help make them whole after suffering abuse.

Originally, Section 2255 extended civil remedies only to victims of violations of 18 U.S.C. sections 2251 and 2252:

Any minor who is a victim of a violation of section 2251 or 2252 of this title and who suffers personal injury as a result of such violation . . . shall recover the actual damages such minor sustains and the cost of suit including a reasonable attorney's fee. Any minor as described . . . shall be deemed to have sustained damages of no less than \$50,000 in value.

Child Abuse Victims' Rights Act of 1986 § 703, subd. (a). But in the years following the Child Abuse Victims' Rights Act, Congress passed further legislation in support of its broad intent to combat perpetrators' efforts to exploit children.

In 1998, Congress enacted the Protection of Children From Sexual Predators Act, which greatly expanded the list of child exploitation statutes that qualified for Section 2255's civil remedies. Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, § 605, 112 Stat. 2984 (1998) (expanding Section 2255 to include violations of 18 U.S.C. §§ 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, and 2423).

Congress also expanded many of the offenses listed in Section 2255 to make clear that *attempts* to violate those referenced statutes also constituted violations, and thereby entitled the victims to civil

compensation under Section 2255. *See, e.g.*, Protection of Children From Sexual Predators Act of 1998 § 102, subd. (1)(a) (amending violation under 18 U.S.C. § 2422 of enticing or coercing a minor to engage in prostitution to include an attempt to violate the statute); *Id.* § 103, subd. (1)(a) (construing violation under 18 U.S.C. § 2423 of transportation of a minor with intent to engage in sexual activity to include an attempt to violate the statute); *Id.* § 106, subd. (1) (amending violation under 18 U.S.C. § 2421 of transporting an individual with the intent that such individual engage in prostitution to include an attempt to violate the statute).

Congress did not need to expand the meaning of Section 2251, of course, because it already included in Section 2251(e) “attempts” within the ambit of proscribed conduct under the statute. *See* Violent Crime Control And Law Enforcement Act of 1994, Pub. L. No. 103-322, § 160001, subd. (e), 108 Stat. 1796 (1994) (“Sections 2251(d) and 2252(b) of title 18, United States Code, are each amended by inserting ‘, or attempts or conspires to violate,’ after ‘violates’ each place it appears.”) (Note that Section 2255(e) originally appeared as Section 2255(d)).

Many of the other statutes added to Section 2255's list of included offenses in the Protection of Children From Sexual Predators Act also contain clear language indicating that, like Section 2251(e) here, even attempts are "violations" for the purposes of Section 2255. *See, e.g.*, 18 U.S.C. § 2241, subd. (c) (regarding aggravated sexual abuse [". . . or attempts to do so, shall be . . . imprisoned"]); 18 U.S.C. § 2242 (regarding sexual abuse [". . . or attempts to do so, shall be . . . imprisoned"]); 18 U.S.C. § 2243, subds. (a), (b) (regarding sexual abuse of a minor or ward [". . . or attempts to do so, shall be . . . imprisoned"]); 18 U.S.C. § 2421 (regarding transportation of an individual for prostitution [". . . or attempts to do so, shall be . . . imprisoned"]); 18 U.S.C. § 2422 (regarding coercion or enticement for prostitution [". . . or attempts to do so, shall be . . . imprisoned"]).

In short, there is no indication in the legislative history that Congress sought to allow child victims to recover only when the perpetrator fully completed his crime. Rather, the statutory changes indicate Congress intended to eradicate all forms of child sexual exploitation. As one district court explained, "[t]he text and structure of the [child pornography] statutes prohibit conduct across a spectrum of

activity ranging from merely possessing child pornography to” mailing, transporting, shipping, receiving, distributing, reproducing, advertising, promoting, presenting, selling, or possessing child pornography. *U.S. v. Strayer*, No. 8:80CR482, 2010 WL 2560466, *8 (D.Neb. Jun. 24, 2010) (analyzing 18 U.S.C. § 2252A). The “clear focus of [child pornography] legislation” was to eradicate all of “the patent evils of child pornography” and its effects on “the exploited children.” *Id.*

Child sexual exploitation persists as a destructive but thriving industry, forcing Congress to enact further legislation to protect children from these harms. In 2006, Congress passed the Adam Walsh Child Protection And Safety Act. *See Adam Walsh Child Protection And Safety Act*, Pub. L. No. 109-248, 120 Stat. 587 (2006). This legislation was prompted by the tragic events of “Masha Allen,” a five year-old Russian orphan girl who was adopted by a single American man who raped and sexually abused her for six years until he was caught by the F.B.I. in 2003. *See Marsh, supra*, at 460 (explaining the history of Masha’s Law).

Masha’s “adoptive father turned her into one of the world’s most infamous ‘child porn stars’ by producing over 200 sexually explicit

images which are on eighty percent of the computers of apprehended child molesters worldwide.” *See Marsh, supra*, at 460. The heinous crimes against Masha led to the Adam Walsh Child Protection And Safety Act, which amended Section 2255 to, among other things, increase the civil penalty under the statute from \$50,000 to \$150,000 per violation, and broaden the scope of the individuals who qualify for recovery to include not only minors, but “[a]ny person who, while a minor, was a victim of a violation of sections 2241(c), 2242, 2243, 2251, 2251A, 2252, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, *regardless of whether the injury occurred while such person was a minor.*” Adam Walsh Child Protection And Safety Act of 2006 §§ 707 subds. (b)(2)(B), (b)(1)(A)(a) (2006 amendments to the Section 2255’s language distinguished by italics); *see also Marsh, supra*, at 461. The amended Section 2255 was also formally renamed “Masha’s Law.” Adam Walsh Child Protection And Safety Act of 2006 § 707, subd. (a).

Prior to the Senate’s vote on the bill within which Masha’s Law was included, United States Senator Joe Biden explained the legislation’s overall purpose and made clear it was intended to

compensate victims of both attempts to create child pornography as well as completed acts: “there is no higher duty than to protect our society’s children, to take *every step possible* to prevent them from coming to harm, and to punish those who *attempt to* or succeed in harming them.”⁵ 152 Cong. Rec. S8012-02, S8026 (2006) (statement of Sen. Joe Biden) (emphasis added).

In sum, since first enacting Section 2255 in the Child Abuse Victims’ Rights Act of 1986, Congress has continually broadened the law’s proscriptions against child exploitation in furtherance of a demonstrated intent to combat all efforts to exploit children in all forms. Attempted conduct in violation of the statutes enumerated in Section 2255 are also harmful, which Congress clearly recognized when they criminalized acts of “enticement” in Section 2251(a). Section 2255’s legislative history demonstrates that Congress intended “attempts” in violation of the enumerated statutes also to qualify as “actual” violations for the purposes of the civil remedies in Section 2255.

⁵ The bill within which Masha’s Law was included was titled the Children’s Safety And Violent Crime Reduction Act of 2006. 152 Cong. Rec. S8012-02 (2006).

V. The Legislative History of 18 U.S.C. § 2255, the Plain Language of 18 U.S.C. §§ 2251 and 2255, and the Applicable Cases All Indicate that Rockett’s Conviction for Violating 18 U.S.C. § 2251 Satisfies the Requirement for Civil Compensation to His Victim Under 18 U.S.C. § 2255.

As the District Court found, Section 2251’s plain language and case law, along with Section 2255’s statutory wording and legislative history, each indicate that Rockett’s conviction for an attempted violation of Section 2251 qualifies as a “violation” for the purposes of Section 2255.

Here, the jury convicted Rockett of “Attempting to Produce Child Pornography . . . [*i*]n violation of . . . Sections 2251(a) and (e).” (SER 37, 42-43.) The plain language of Section 2251(e) also proscribes “attempts” to violate Section 2251(a) and punishes attempts in the same manner as any other violation of Section 2251.

Moreover, all of the Courts of Appeals that have addressed arguments similar to Rockett’s have come to the same conclusion: attempts to engage in the conduct proscribed in Section 2251 constitutes “actual” violations of the statute. This conclusion is consistent with the legislative history of Section 2255, which indicates Congress intended Section 2255 to provide broad relief to child victims

harmful by attempts to sexually exploit them, as was the case here. There is no indication that Congress meant to limit relief to only those children who suffered injuries from crimes where the bad actor had fully completed a bad act. To the contrary, attempts to commit child sexual exploitation crimes are extremely harmful to children, and the exact type of harm that Congress intended to remedy through Masha's Law.

CONCLUSION

Amicus Curiae CHILD USA urges this Court to affirm the District Court judgment and find that Rockett's conviction for an attempted violation of 18 U.S.C. § 2251 is sufficient to entitle N.S. for relief under 18 U.S.C. § 2255.

Dated: February 21, 2020

Respectfully submitted,

DUANE MORRIS LLP

By: /s/ Paul J. Killion

Paul J. Killion
Adrian Gawain Cadoppi
Bridget S. Cho

Marci A. Hamilton
CEO & Academic Director

Attorneys for *Amicus Curiae*
CHILD USA

CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure, Rule 32(a)(7)(B) because this brief contains 5,042 words, excluding the parts of the brief excepted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(b)(iii).

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure, Rule 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure, Rule 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using the Word 2016 program Century Schoolbook 14-point font.

Dated: February 21, 2020

DUANE MORRIS LLP

By: _____
Paul J. Killion (SBN 124550)

Attorney for *Amicus Curiae*
CHILD USA