No. **16-2174**

In the

United States Court of Appeals

for the

Fourth Circuit

TREY SIMS,

Plaintiff-Appellant,

v.

KENNETH E. LABOWITZ, ADMINISTRATOR PURSUANT TO CODE OF VIRGINIA § 64.2-454 OF THE ESTATE OF DAVID E. ABBOTT,

Defendant-Appellee,

CLAIBORNE RICHARDSON,

Defendant.

AMICUS BRIEF OF THE CHILDREN'S JUSTICE FUND AND CHILD USA IN SUPPORT OF THE PLAINTIFF-APPELLANT TREY SIMS

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INTEREST OF AMICI CHILDREN'S JUSTICE FUND AND CHILD USA

The Children's Justice Fund ["CJF"] is a nonprofit organization whose main purpose is providing financial support, technical assistance, and strategic guidance to unrelated organizations, institutions, and individuals that serve victims of child trafficking, child sex abuse, online child sexual exploitation, and child pornography. The CJF conducts and promotes legal, empirical, and social science research concerning child trafficking, child sex abuse, online child sexual exploitation, and child pornography with the goal of encouraging the development and implementation of child-victim-centered best practices, policies, and law reform. A core aspect of the CJF's mission is filing amicus briefs, writing law review articles, and issuing papers and reports in support and in furtherance of its overall mission and focus on child victims.

CHILD USA shines a light on better pathways to truly protect all children from abuse and neglect. CHILD USA conducts research, compiles evidence, promotes ideas, and proposes the most effective policies to prevent childhood abuse and neglect. CHILD USA draws on the combined expertise of the nation's leading medical and legal academics to reach evidence-based solutions to persistent and widespread child abuse and neglect.

CJF and Child USA are well-qualified to help this Court understand issues which are essential to reaching a proper determination of this matter. The case law concerning 18 U.S.C. 2255 is sparse and relatively rare. The application of section 2255 in this case will set an important precedent not only in the Fourth Circuit, but around the country.

ARGUMENT

The initial Fourth Circuit panel erred in upholding the district court's dismissal of Sims' claim that he is entitled to damages under section 2255 as a "person who, while a minor was a victim of a violation of section [18 U.S.C. 2251(a)]…and who suffers personal injury as a result of such violation." *Sims v. Labowitz*, 877 F.3d 171 (4th Cir. 2017).

In this case, Sims relied on the Defendant-Appellee David E. Abbott's ["Abbott"] violation of section 2251(a) as the predicate act for establishing liability under section 2255. Section 2251(a) prohibits "any person" from "coerc[ing] any minor to engage in…any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." Section 2251(a) applies to "any person"—including law enforcement officers—without exception and does not use the term "child pornography."

The initial panel used the wrong definition when interpreting section 2251(a).[1] Section 2251(a) relies on the definition of "sexually explicit conduct" set forth in 18 U.S.C. 2256(2)(A), not 18 U.S.C. 2256(2)(B). In defining "sexually explicit conduct," section 2256(2)(A) contains four more or less objective definitional terms—"sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse"—and one subjective term—"lascivious exhibition of the genitals or pubic area of any person" (the so-called "*Dost* factors" named after a district court's decision in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), aff'd sub nom. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), aff'd 813 F.2d 1231 (9th Cir. 1987)).

The panel grounded its conclusions exclusively on the subjective "lascivious exhibition" definition while ignoring the more objective "masturbation" term with

[1] The panel, in fact, makes an even more crucial typographical and substantive error by citing and applying the language in section 2256(2)(B)(ii) "graphic or simulated lascivious…masturbation" and section § 2256(2)(B)(iii) "graphic or simulated lascivious exhibition of the genitals or pubic are of any person" while attributing it to section 2256(2)(A). Section 2256(2)(B) only applies "for the purposes of subsection 8(B) of this section" which defines "child pornography." *See* 18 U.S.C. 2256(8)(B). While the minor victim in this case was depicted in what is commonly referred to as child pornography, the predicate act section 2251(a) nowhere uses the term "child pornography" and instead relies on the definition of "sexually explicit conduct." Section 2256(2)(A) defines "sexually explicit conduct" for the entire chapter while section 2256(2)(B) defines "sexually explicit conduct" when the term "child pornography" is used. Since the term "child pornography" is not used in section 2251(a), the panel improperly used the definition for "child pornography" in section 2256(2)(B) and compounded its error by mistakenly attributing it to the wrong section, 2256(2)(A). In summary, section 2256(2)(A) applies to the statute in question, section 2256(2)(B) does not.

the result being that the "intent to elicit a sexual response" requirement from *Dost* is grafted onto section 2255 with potentially profound implications for this case and future plaintiff victims.

Concerning the objective "masturbation" versus the subjective "*Dost* factors," the panel ignores its own finding of facts. While the panel uses the term "masturbate" twelve times in its decision:

- ordering the child to masturbate in the presence of others [*Sims*, 877 F.3d at 175];
- ordered him to masturbate in the presence of others [*Id.* at 177];
- ordering Sims to masturbate to obtain an erection [*Id.* at 178];
- requiring Sims to masturbate in the presence of others [*Id.*];
- requiring an individual to masturbate in the presence of others [*Id.* at 179];
- demanding that Sims masturbate in the presence of others to achieve an erection [*Id.*];
- demanding that Sims masturbate in the presence of others [*Id.* at 180];
- required that the individual achieve an erection or masturbate in the presence of others [*Id.*];
- the order that he masturbate in the presence of others [*Id.* at 181];
- required Sims to masturbate [*Id.* at 181];
- Abbott took photographs of Sims' penis and ordered Sims to masturbate [*Id.* at 182];
- the warrant did not purport to authorize Abbott's conduct of requiring Sims to masturbate in the presence of the officers [*Id.* at 182 FN 4];

it inexplicably finds that "the factor most critical to our analysis is the question whether the visual display of the victim's genitalia was intended to elicit a sexual response in the viewer."[2] *Id.*

Abbot's argument that "there are insufficient facts to support a claim that [Sims' movement of his penis] constituted simulated masturbation" [Response to Appellant's Petition for Rehearing and Rehearing *En Banc*, Doc 53 p.12] places the definition of the term "masturbation" at issue. In his seminal work, *Sex and Reason*, Judge Richard A. Posner explains that "masturbation (at least when solitary and in private) has never been made a crime, even though both in the early Christian era and in Victorian England (and America) it was regarded…as a serious offense

[2] There is much confusion in the panel's decision precipitated by the mixed up definitions. If the panel was (incorrectly) relying on the definitions in section 2256(2)(B)(ii), then it made sense for it to rely on "lascivious simulated masturbation" and interpolate the *Dost* lascivious requirement. But even this interpretation is strained because the panel completely ignored the parallel "graphic masturbation" as "sexually explicit conduct." If Sims was indeed masturbating, as the court repeatedly found, then he was not only "lasciviously masturbating," he was "graphically masturbating" (the definition of "graphic" is "vividly descriptive, life-like" and "providing or conveying full, unexpurgated detail; expressly stated or represented; explicit, esp. in the depiction of sex or violence" OED Online, Oxford University Press, www.oed.com/view/Entry/80829 accessed 19 January 2018). While the panel undertook and relied upon as dispositive a lascivious analysis under *Dost*, it completely ignored the graphic analysis. It was this incorrect reliance on *Dost* which effectively grafted a requirement that a plaintiff bringing an action under section 2255 prove that any alleged predicate criminal conduct "elicit a sexual response in the viewer." If this interpretation of the statute is upheld, plaintiff victims will be at a distinct disadvantage when the child pornography depicting them is categorically "graphic" or, if the proper definition is used, the child pornography depicting them is "actual or simulated" masturbation, sexual intercourse, etc. Compare 18 U.S.C. 2256(2)(A)(iii) "sexually explicit conduct means actual or simulated masturbation," with 18 U.S.C. 2256(2)(B)(ii)(II), "sexually explicit conduct means graphic or lascivious simulated masturbation." The court should only turn to the *Dost* factors when the child pornography depicts neither actual, simulated, nor graphic conduct.

against good morals, a crime against unborn generations, a factor predisposing the perpetrator to sex crimes, and a form of attempted suicide, all rolled into one." Richard A. Posner, *Sex and Reason* 207 (1992). Not surprisingly, no court has yet addressed the issue of what specific conduct constitutes masturbation under section 2255. In the absence of a statutory definition, it is well established that a court will look to whether the non-statutorily defined term has a "plain and unambiguous meaning." *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012) citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

A need to define "masturbation" came before the Ninth Circuit in the case of *United States v. Banks* when the court was tasked with determining whether the conduct of touching and rubbing a very young child's penis repeatedly with a baby wipe constituted masturbation. *United States v. Banks,* 556 F.3d 967, 978 (9th Cir. 2009). The Ninth Circuit affirmed the district court's decision to rely on a definition of masturbation as being conduct "that included the stimulation of genitalia in a manner that would stimulate an adult." *Id.* at 971. The court affirmed that this conduct constituted masturbation despite the fact that the child was unable to obtain an erection or orgasm. *Id.* The court acknowledged that although a young child's sex organs may not respond in the same manner as that of an adult, it

is the goal of the activity and not the outcome itself which is dispositive in defining the term. *Id.* at 979.

The Military Court of Appeals also attempted to define masturbation based on a plain meaning definition that masturbation is "[s]elf-stimulation of the genital organs for purposes of sexual pleasure." *United States v. Ramirez*, 21 M.J. 353, 354-55 (C.A.A.F. 1986). It further explained that masturbation involves "the induction of erection and the obtaining of sexual satisfaction, in either sex, from manual or other artificial mechanical stimulation of the genitals." *Id.*

Many states have chosen to define masturbation through statutes, regulations, jury instructions, and rely on plain usage. Although the language and specificity of the definitions vary, erotic stimulation of the genitals is consistent among the majority of definitions. The manner of manipulation is not typically specified nor a part of the state definitions.[3]

[3] *See e.g. State v. Frederick*, No. M2014-01653-CCA-R3-CD, 2015 WL 5924942 (Tenn. Crim. App. Oct. 12, 2015) (ordinary meaning; does not require intent to reach orgasm); *Morales v. State*, No. 05-98-00255-CR, 1999 WL 185034, at *3 (Tex. App. Apr. 6, 1999); Colo. Rev. Stat. Ann. § 18-6-403 ("masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person); *City of Columbus v. Heck*, No. 98AP-1384, 1999 WL 1009734 (Ohio Ct. App. Nov. 9, 1999) (the substance or relevant part of the term masturbation involves the stimulation or manipulation of genital organs regardless of whether the activity involves self-stimulation or the stimulation of another); *People v. Ricky T.*, 405 Ill. App. 3d 98,100 (2010), as corrected (Oct. 22, 2010) (court looked to plain and ordinary meaning and found that orgasm or ejaculation was not required to constitute

Regardless of whether this Court relies on the panel's finding of masturbation or engages in a *de novo* review, Sims was by any definition masturbating by stimulating or manipulating his penis upon instruction by Abbott to achieve an erection. Since "masturbation" and "graphic masturbation" is *per se* "sexually explicit conduct" under section 2256(2)(A) and (B), Abbot violated section 2251(a) by coercing Sims to engage in such sexually explicit conduct in order to produce a visual depiction of such conduct. Abbot is therefore liable under section 2255 and the *Dost* factor relied upon by the panel—that visual display Sims' genitalia was intended to elicit a sexual response—is unnecessary and unwarranted.[4]

Abbott properly raised, and the panel considered, his qualified immunity defense. The purpose of a qualified immunity defense is to protect an official from civil liability, "…except where the official clearly broke the law." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991). While this defense is most commonly applied in

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masturbation; the manner of manipulation was not specified and the focus was on the goal of erotic stimulation).

[4] The panel inexplicably glossed over compelling evidence that Abbott likely directed Sims to masturbate in order to elicit a sexual response. Although the panel acknowledged that Abbott "died" before Sims' case was filed, they failed to consider the circumstances surrounding his death and summarily dismiss Sims' "allegation that Abbott previously had been accused of unlawful sexual conduct with minors." *Sims*, 877 F.3d at 183 Apparently Abbott's death was a result of "suicide on being served with warrants for his own arrest for unlawful sexual conduct with minors." *See* Appellant's Petition for Rehearing and Rehearing En Banc, Doc 45 p. 3 FN 3. If the panel was determined to use the *Dost* factors, these facts, which should be taken as true, were crucial.

cases of constitutional violations, qualified immunity has been widely applied to other federal statutory claims including claims under 18 U.S.C. 2255.

In the leading case of *Doe v. Boland*, 630 F.3d 491 (6th Cir. 2011), children depicted in morphed photographs filed a section 2255 action against an expert witness who specialized in technology-related legal issues. The defendant argued that imposing civil liability on him as an expert witness would subject all manner of participants in the criminal justice system to similar liability. The Sixth Circuit found that "a series of common law immunities prevents such actions, and nothing in the child pornography laws purports to overrule these immunities." *Id.* at 498. The court held that "there is no reason to think that this "cluster of immunities" applicable to § 1983 (and Bivens) actions, does not apply equally to actions under the child pornography laws. Nothing in the text of that statute suggests Congress intended to "impinge on a tradition so well grounded in history and reason." *Id.* (internal citations removed).[5]

It makes no sense that the panel denied Abbott's qualified immunity on Sims' constitutional Fourth Amendment claim while granting it on his section 2255 civil claim. *Sims* at 182–83 ("even though we previously explained that the search

[5] The Fourth Circuit specifically found that qualified immunity is a defense against claims arising under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. *Torcasio v. Murray,* 57 F.3d 1340, 1343 (4th Cir. 1995).

as alleged was unjustified and unlawful, this conclusion does not transform the purported purpose of the search into one involving lascivious intent"). Once again the improper reliance on the *Dost* factors distracted the panel's attention from the purpose of qualified immunity as a defense for state actors. The panel's held that the law enforcement search which led to the creation of child pornography was "unjustified and unlawful." Like the "fruit of the poisonous tree" doctrine, an unjustified and unlawful search should subject a child pornographer to civil liability under section 2255. *See Nardone v. United States*, 308 U.S. 338, 341 (1939). An unjustified and unlawful search under the Fourth Amendment should result in a denial of qualified immunity for the purposes of section 2255.

CONCLUSION

For all these reasons, Sims' Petition for Rehearing or Rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 29(B)(4)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains less than 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/James R. Marsh
James R. Marsh

CERTIFICATE OF SERVICE

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