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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

A.B. and S.B., Minors, by and through

Erin K. Olson, their Conservator, and

D.L.,

Plaintiffs,

v.

ANDREW FRANKLIN KOWALCZYK,

Defendant. Case No. 3:19-cv-1521-MO

**PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

**LR 7-1 CERTIFICATION**

Counsel for plaintiffs certify that the opposing party is a prisoner not represented by counsel, and so conferral is not required.

**MOTION**

Plaintiffs move pursuant to FRCP 56 for summary judgment in their favor on each of their sole claims for relief because there is no genuine dispute as to any material fact since the defendant has been convicted of the predicate offenses in *United States of America v. Andrew Franklin Kowalczyk,* D. Or. Case No. 3:08-cr-00095-MO, and there is no reasonable dispute that the defendant’s offenses caused plaintiffs personal injury within the meaning of 18 U.S.C.

§ 2255.

This motion is supported by the accompanying “Declaration of Josh Lamborn” and its attached exhibits subject to judicial notice as described herein.

**REQUEST FOR JUDICIAL NOTICE**

Pursuant to Rule 201 of the Federal Rules of Evidence, plaintiff requests that the court take judicial notice of the following documents filed in *United States of America v. Andrew Franklin Kowalczyk,* D. Or. Case No. 3:08-cr-00095-MO:

1. Superseding Indictment (Dkt. #197 – Unredacted Version #199);
2. Final Jury Instructions, Nos. 11-14 (Dkt. #952);
3. Verdict (Dkt. # 954 – Unredacted Version #953); and
4. Judgment in a Criminal Case (Dkt. #1140).

These documents are attached as Exhibits 1-4 to the “Declaration of Josh Lamborn in Support of Plaintiffs’ Motion for Summary Judgment.”

It is well established that a federal district court can take judicial notice of its own records. *See* [*Chandler v. United States*, 378 F.2d 906, 909 (9th Cir. 1967)](https://advance.lexis.com/document/?pdmfid=1000516&crid=9c6cdc64-c456-45c7-91ce-f7a019ac6da8&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A7YF3-1DD1-2RHJ-X000-00000-00&pddocid=urn%3AcontentItem%3A7YF3-1DD1-2RHJ-X000-00000-00&pdcontentcomponentid=6419&pdshepid=urn%3AcontentItem%3A7YF3-WM91-2NSF-C2SJ-00000-00&pdteaserkey=sr8&ecomp=r89tk&earg=sr8&prid=25ccf2c5-07bb-4f0a-bea7-6c106f60ff45) (citations omitted) (proper for court to take judicial notice of judgment and commitment entered in earlier case in the same court). Pleadings and transcripts are proper subjects of judicial notice and therefore available to the court. *See* [*United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc*., 971 F.2d 244, 248 (9th Cir. 1992)](https://advance.lexis.com/document/teaserdocument/?pdmfid=1000516&crid=d5ee5d61-36b2-47f9-82b7-372286c5782a&pdteaserkey=h1&ecomp=r89tk&earg=sr1&prid=25ccf2c5-07bb-4f0a-bea7-6c106f60ff45) (a court may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (citations omitted)); *see also* [*Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001)](https://advance.lexis.com/document/?pdmfid=1000516&crid=86f3f503-cfa2-4132-b0f8-2a5df00676e3&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5BD6-D9M1-F04C-T059-00000-00&pddocid=urn%3AcontentItem%3A5BD6-D9M1-F04C-T059-00000-00&pdcontentcomponentid=6419&pdshepid=urn%3AcontentItem%3A5B8K-FNJ1-DXC8-73C0-00000-00&pdteaserkey=sr4&ecomp=r89tk&earg=sr4&prid=25ccf2c5-07bb-4f0a-bea7-6c106f60ff45) (court may take judicial notice of “matters of public record.”).

**STATEMENT OF RELEVANT FACTS**

(1) When Plaintiff A.B. was two years old, Defendant knowingly employed, used, persuaded, induced, enticed, and coerced her to engage insexually explicit conduct, including sexual intercourse and the lascivious exhibition of her genitals and pubic area, for the purpose of producing visual depictions of such conduct, said visual depictions having been transported in interstate commerce, and having been produced using materials that were mailed, shipped, and transported ininterstate or foreign commerce by any means, all in violation of Title 18, United States Code, Sections 2251 (a) and 2251 (e).

(2) When Plaintiff S.B. was two years old, Defendant knowingly employed, used, persuaded, induced, enticed, and coerced her to engage insexually explicit conduct, including sexual intercourse and the lascivious exhibition of her genitals and pubic area, for the purpose of producing visual depictions of such conduct, said visual depictions having been transported in interstate commerce, and having been produced using materials that were mailed, shipped, and transported ininterstate or foreign commerce by any means, all in violation of Title 18, United States Code, Sections 2251 (a) and 2251 (e).

(3) When Plaintiff D.L. was 8-9 years old, Defendant knowingly employed, used, persuaded, induced, enticed, and coerced her to engage insexually explicit conduct, including sexual intercourse and the lascivious exhibition of her genitals and pubic area, for the purpose of producing visual depictions of such conduct, said visual depictions having been transported in interstate commerce, and having been produced using materials that were mailed, shipped, and transported ininterstate or foreign commerce by any means, all in violation of Title 18, United States Code, Sections 2251 (a) and 2251 (e).

**ARGUMENT**

**PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT**

**UNDER MASHA’S LAW (18 U.S.C. § 2255)**

**A. Introduction.**

Plaintiffs are entitled to summary judgment on each of their sole claims for relief under Masha’s Law because defendant has been convicted of predicate offenses (18 U.S.C. § 2251), and plaintiffs necessarily suffered personal injury as a result of defendant’s commission of the predicate offenses.

Having established the defendant’s liability for a violation of Masha’s Law, plaintiffs are each entitled to the statutorily-mandated minimum damages of $150,000, together with attorney fees and other litigation costs reasonably incurred. 18 U.S.C. § 2255(a).

**B. The Summary Judgment Standard.**

Summary judgment will be granted when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Once the movants have met their initial burden of showing “an absence of evidence” supporting the nonmoving party's case, the burden is on the nonmoving party to show with “specific facts” that there is a genuine issue of fact suitable for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson,* 477 U.S. at 250.

If the moving parties show the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in the complaint, or with unsupported conjecture or conclusory statements. *Hernandez v. Spacelabs Medical, Inc*., 343 F.3d 1107, 1112 (9th Cir. 2003).

**C. Masha’s Law Overview.**

Masha’s Law provides in its entirety as follows:

1. In General.— Any person who, while a minor, was a victim of a violation of section [1589](https://www.law.cornell.edu/uscode/text/18/1589), [1590](https://www.law.cornell.edu/uscode/text/18/1590), [1591](https://www.law.cornell.edu/uscode/text/18/1591), [2241(c)](https://www.law.cornell.edu/uscode/text/18/lii:usc:t:18:s:2241:c), [2242](https://www.law.cornell.edu/uscode/text/18/2242), [2243](https://www.law.cornell.edu/uscode/text/18/2243), [2251](https://www.law.cornell.edu/uscode/text/18/2251), [2251A](https://www.law.cornell.edu/uscode/text/18/2251A), [2252](https://www.law.cornell.edu/uscode/text/18/2252), [2252A](https://www.law.cornell.edu/uscode/text/18/2252A), [2260](https://www.law.cornell.edu/uscode/text/18/2260), [2421](https://www.law.cornell.edu/uscode/text/18/2421), [2422](https://www.law.cornell.edu/uscode/text/18/2422), or [2423](https://www.law.cornell.edu/uscode/text/18/2423) 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, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney’s fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

1. Statute of Limitations.— Any action commenced under this section shall be barred unless the complaint is filed within 10 years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

18 U.S.C. § 2255.

Masha’s Law is named after Masha Allen, a Russian girl adopted at age five from a Russian orphanage by a wealthy Pittsburgh man who took sexually explicit photographs of her and widely distributed them online. *See* Marsh, James R., *Masha’s Law: A Federal Civil Remedy for Child Pornography Victims*, 61 Syracuse L. Rev. 459, 460 (2011). Masha’s Law was enacted in 2006 as part of the Adam Walsh Child Protection and Safety Act of 2006, and was an update to a 1986 law that provided for civil statutory damages of $50,000 for victims of child sexual exploitation. *Id.* at 472. Masha’s Law tripled the amount of the statutory damages to $150,000, reflecting the fact that up until that time, the penalties for downloading child abuse images were less severe than the penalties for downloading unlicensed music files. *Id*. As noted in the testimony of one of the sponsors of Masha’s Law:

Under current law, a victim of child exploitation is entitled to civil statutory damages in U.S. District Court in the amount of $50,000 -- less than the civil penalty for illegally downloading music off the Internet. This penalty is far too low to effectively deter would-be child pornographers. This legislation increases the civil penalties recoverable by victims of child sexual exploitation, including internet child pornography, to at least $150,000. This increased penalty will serve as a deterrent to those who disseminate and possess child pornography, as well as a means of compensating victims of this terrible abuse. If someone downloads a song off the Internet, Federal copyright law provides for statutory damages to be awarded to the copyright holder in the amount of $150,000. Downloading child pornography is far more detrimental to the victim than downloading copyrighted music and, as a result, the penalty should reflect that.

151 Cong. Rec. S14194 (daily ed. Dec. 20, 2005) (statement of Sen. John Kerry).

To establish liability under Masha’s Law, a plaintiff must prove he or she was a victim of the defendant’s violation of one of the specified federal criminal child pornography or child exploitation statutes, and that he or she suffered personal injury as a result of the violation. 18 U.S.C. 2255(a).

**D. There Are No Genuine Issues of Material Fact Since Defendant is Estopped from Relitigating Whether He Committed the Predicate Crimes and Plaintiffs Indisputably Suffered Personal Injury as a Result of the Crimes.**

**(i) Plaintiffs are Victims of Defendant’s Violations of 18 U.S.C. § 2251(a).**

There is no question that defendant committed the crimes of Sexual Exploitation of a Child Pornography in violation of 18 U.S.C. § 2251(a) for his actions against plaintiffs because a federal jury found him guilty and a federal judge sentenced him to 270 years in prison for the crimes. Decl. of Josh Lamborn, Exh. 1 (Superseding Indictment), Exh. 1 (Jury Instructions Nos 11-14); Exh. 3 (Verdict), Exh. 4 (Judgment in a Criminal Case)*.*

Defendant is estopped from relitigating the elements of Masha’s Law that are based upon his predicate offenses, i.e. his violations of 18 U.S.C. § 2251(a), because a criminal conviction has preclusive effect in a later civil proceeding. *State Farm Fire & Cas. Co. v. Sallak*, 140 Or. App. 89, 94, 914 P.2d 697 (1996) (citing *United States v. Bejar-Matrecios*, 618 F.2d 81, 83 (9th Cir. 1980)); *see also State Farm Fire and Cas. Co. v. Reuter*, 299 Or. 155, 163, 700 P.2d 236, 241 (1985).

**(ii) Plaintiffs Suffered Personal Injury as a Result of Defendant’s Commission of**

**Predicate Offenses.**

An order or judgment in a prior proceeding will preclude reconsideration of an issue "only as to those matters in issue or points controverted, upon determination of which the finding or verdict was rendered." *Sea-Land Serv. v. Gaudet*, 414 U.S. 573, 593, 39 L. Ed. 2d 9, 94 S. Ct. 806 (1974). Therefore, plaintiffs must demonstrate that they suffered “personal injury” as a result of defendant’s violations of 18 U.S.C. § 2251(a).

Victims of sex crimes need not prove any amount of damages in order to meet the requirement that they have suffered a “personal injury” under 18 U.S.C. § 2255. “A victim by definition is someone who suffers an injury.” *Doe v. Boland*, 698 F.3d 877, 882 (6th Cir. 2012). While “[m]ost tort plaintiffs . . . must show the amount of their damages[,] . . . § 2255 is no ordinary cause of action[,] and “[t]he point of a minimum-damages requirement is to allow victims of child pornography to recover without having to endure potentially damaging damages hearings.” *Id.* “Once a child has shown she was the victim of a sex crime, there is little point in forcing her to prove an amount of damages, only to have the court disregard that figure and award the statutory minimum.” *Id.* at 882; *see also Shovan v. Mercure*, 44 F. Supp. 3d 504, 511 (D. Vt. 2014) (“While the statute makes reference to both victimization and personal injury as a result of such victimization, the text makes clear that the victims necessarily suffer injuries as a result of their victimhood (in fact, the statute assumes damages of $150,000).”)

As noted by Judge Simon in a similar case in this district, “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’.” *N.S. v. Steven Douglas Rockett*, 2018 U.S. Dist. LEXIS 223664, 2018 WL 6920112 (D. Or. Case No 3:16-cv-2171-AC, Simon, J.), *quoting Boland*, 698 F.3d at 881. “By demonstrating as a matter of law that Plaintiff[s have] been the victim of a violation of section 2251, [they have] also demonstrated that [they] suffered personal injury from Defendant’s crimes.” *Id.*

**(iii) Defendant is Liable to Plaintiff for $150,000 Plus Attorney’s Fees** **and Costs.**

Since liability under Masha’s Law has been established, plaintiffs “shall recover” their actual damages or “shall be deemed to have sustained damages of no less than $150,000 in value.” 18 U.S.C. § 2255(a). Plaintiffs have each pled only the statutory minimum damages amount, so additional evidence is unnecessary.

**CONCLUSION**

Plaintiff This Court should grant summary judgment to each plaintiff and enter a money award in the amount of $150,000 each, plus their attorneys’ reasonable fees and costs.

DATED this 29th day of October, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served a true copy of the foregoing document and its supporting “Declaration of Josh Lamborn” on the defendant by prepaid, first-class mail, addressed as follows:

Andrew Franklin Kowalczyk, USM No. 39532-086

USP-Tucson

9300 S. Wilmot Road

Tucson, AZ 85756

Dated: October 29, 2019.

/s/ Josh Lamborn

Josh Lamborn