No. 20-6673

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

David a. Diehl — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David A. Diehl
(Your Name)

53214018 FCC Coleman II
(Address)

PO Box 1034, Coleman, FL 33521
(City, State, Zip Code)

(Phone Number)

Questions

Petitioner seeks a certificate of Appealability to appeal the denial of three issues below.

I.

Does 18 USC §3283 expressly include 18 U.S.C. §2251(a), and did the Fifth Circuit error by considering the issue on appeal while denying an evidence hearing.

II.

Was petitioner's sentence "likely" per Peugh v. United States 569 U.S. 530 (2013). Is petitioner procedurally barred.

III.

Was Counsel ineffective for failing to subject the prosecutions case to meaningful adversarial testing. And what is the evidence requirement of 18 USC §2251(a)'s third Nexus Clause (2000). Does it include broadcasts, transmissions, or the interstate transport of other people productions and reproductions.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 19-50165; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 1-7-2015 1-7-2015

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9-11-2020, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3509(k) (1990) - Extension of child statute of limitations

[No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual and physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.] If at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal actio nis pending which arises out of the same occurance and which the child is a victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil actio nduring the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

18 U.S.C. §3283 - Offenses Against Children

No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual and physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

18 USC §2251(a) (2000) 3rd nexus clause

... or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

18 USC § 2251(a) (2008) 3rd nexus clause

or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 USC § 2256(5) 2008 visual depiction

[Physical mediums] ... data stored on computer disk or by electronic means which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format[7,1]

18 USC § 3299 (2006 Statute of limitation)

Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 [18 USCS §1201] involving a minor victim or for any felony under chapter 109A ..., 110 ....

STATEMENT OF THE CASE

On October 19, 2010 Petitioner was charged in a second superceeding indictment with ten counts of violating 18 U.S.C. §2251(a), sexual exploitation of a minor. The offenses all took place a decade prior, on or before December 2000. This was not in dispute. On February 7, 2011 Petitioner proceeded to a bench trial after signing a stipulation of facts to every element of the offense baring the interstate nexus. On February 8, 2011 the trial court found Petitioner guilty on all ten counts. Prior to sentencing, Petitioner fired his trial consel, Steve Orr, and hired Jerry Morris. On October 24, 2011 Judge Lee Yeakel during sentencing found that the correct Guideline range using the 2000 Guidelines was between 210 and 262 months. However treating the Guidelines as advisory, Judge Yeakel used a post Booker varience to arrive at a 600 month sentence. The court found no reason to depart and stated none on the record. On April 15, 2013 the Fifth Circuit accepted Petitioner's pro-se appeal brief. Petitioner fired his appelant counsel Jerry Morris. On October 9, 2013 Petitioner filed a motion for an independent investigation into corruption on the part of Steve Orr and the United States concerning the misrepresentation of the statute of limitations at 18 U.S.C. §3283. That motion was dismissed by the Fifth Circuit as conclusory and denied any discovery procedure. On January 29, 2015, the Fifth Circuit upheld the conviction finding that the statute of limitations at §3283 applied to Chapter 110 exploitation offenses. The court also found that the third jurisdictional nexus clause of 18 U.S.C. §2251(a) does not require mens rea to be proven. Finally, the court made a finding on the substantial and procedural reasonableness of Petitioner's sentence. On February 9, 2015 Petitioner filed a rehearing en banc Petition which was denied. On July 15, 2015 Petitioner

filed a Petition for certuary with the Supreme Court which was denied on October 17, 2016.

28 U.S.C. §2255

On October 6, 2016 Petitioner filed a motion to vacate, set aside or correct the sentence pursuent to 28 U.S.C. §2255. On October 6, 2016 Petitioner's §2255 was distributed to Trial counsel Steve Orr, and sentencing counsel Jerry Morris who both submitted their affidavits in reply. On January 27, 2018 Petitioner filed a Petition For Discovery wereby he provided grounds for an evidentuary hearing.[1] On December 17, 2018 Petitioner sought leave to amend his §2255 (Dkt No. 263). On January 7, 2019 the district court granted leave to amend, dismissing the prior §2255 as moot. The amended §2255 was referred to Magistrate Mark Lane (Dkt 265, 266). A first Petition For Particular FBI Report was filed on January 7, 2019 (Dkt 267). A Petition to file Supplementary Brief Concerning Statute Of Limitation Corruption, and Ex Post Facto Sentence was filed on January 7, 2019 (Dkt 269). A Petition For In Camera Inspection by Special Master Of All Work Product Concerning the Statute Of Limitations was filed on January 11, 2019. (Dkt 272). On January 11, 2019 Magistrate Lane filed a Report and Recomendation, recomending the dismissal of Petitioner's §2255, supplemental brief were denied, and the court ordered all previous released discovery material be returned to the United States.[2] On January 17, 2019 Petitioner filed an Objection To The Report and Recomendation, and an amendment to that same document. (Dkt 272). Judge Yeakel adopted the R&R in full. (Dkt 275). On February 4, 2019 Petitioner appealed to the Fifth Circuit.

On May 6, 2020 the Fifth Circuit dismissed petitioner's petition For COA Amended without comment. No 19-50165. On May 25, 2020 Petitioner filed a petition for rehearing, (Dkt).

1. Dkt 240
2. Dkt 270

LEGAL STANDARD

A certificate of appealability should be issued when a jurist of reason could find debatable whether the district court was correct in its procedural ruling Slack v. McDaniels, 529 U.S. 473, 483 (2000). All of Petitioner's 2255 issues were allegedly procedurally barred.

Petitioner also has to show whether reasonable jurists could debate whether the petitioner should have been resolved differently Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

Petitioner must demonstrate that the argument is "adequate to deserve encouragement to proceed," and that the arguments were not "squarly foreclosed by statute, rule, or authoritive court decisions, or lacking any factual basis in the record." Barefoot v. Estelle, 463 U.S. 880, 893. That liberal standard is easily met here.

ISSUE ONE

Issue one argues that the Statute Of Limitations (SOL) at 18 U.S.C. §3283 does not include any Chapter 110 offenses[1], and that the government is knowingly misapplying it to these cases.

Petitioner argues that § 3283 must be interpreted using its plain language, and that both sexual and physical abuse must be defined to reach the correct interpretation. Courts have made physical abuse insignificant violating well established law.

The phrase "sexual or physical abuse" is a moniker for Chapter 109A, and the repealed offenses it replaced including 18 U.S.C. § 2031, §2032, and §113(a). The SOL is a product of the 1986 Sexual Abuse Act, but its actual enactment was delayed until 1990 in the Crime Control Act.

Petitioner argues that congress intentionally did not add any Chapter 110 offenses to the SOL, and that its true purpose was to extend the SOL for rape, carnal knowledge of a minor, and assault to commit rape where the United States had jurisdiction of those offenses.[2]

Petitioner argues that only 18 U.S.C. §3299 enacted in the Adam Walsh Act of 2006 extended the SOL for sex related offenses.

Petitioenr argues that the issue is of national importance given the far reaching implications associated with SOL laws. There are a "host of conflicting considerations," that goes into bal ancing the interests of society and an accused person. Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1394 (7th Cir. 1990). The conflicting considerations include:

> "The right to be free of stale claims in time comes to prevail over the right to prosecute."
> Railroad Telegraphers v. Railroad Express Agency, 321 US 342, 349 (1944)

Destroying a perpetrators family, career, and life over decade old conduct is a highly questionable practice, Societies legal resources may be better spent on active crimes.

1. There doesn't seem to be any real debate about §3283 not including posession, distribution, or receipt of child pornography.
2. Section 3283 is custon written for assimulation and superceeds state limitations

The Supreme Court has found

> "Statute of limitations represent a legislative assessment of the relative interests of the state and the defendant in administering and receiving justice."
> United States v. Marion, 404 US 307, 322 (1971).

Receiving justice (due process) includes assuring the fidelity of evidence, protecting against radically increasing sentences[1], and even more subtle considerations like changes in legal terms, statutes, and technology. In Petitioner's case the indictment was constructively amended in myriad ways, and the only tangible nexus evidence consisted of hearsay testimony.

"Administering justice," marion, also applies to societies interests. Society has a vested interest in quick arrests for numerous reasons. Allowing for a longer statute of limitations in in many ways contrary to this goal.

Petitioner argues that Congress had a different SOL goal for Chapter 110 offenses, and that the conflicting considerations were different. Instead of enacting a longer SOL, congress chose to commit significant resources to solve crimes quickly. The programs allowing this included Internet Crimes Against Children, and Child Victim Identification Program. New reporting laws were also enacted in the 1990 Crime Control Act for the same reason. Congress also implemented record keeping laws that affected everyone making films with ad ult content. These records only had to be retained for a minimum of five years as of 1993. See 28 U.S.C. 75.4. Since failure to have the records carried jail time, a longer SOL would have been contentious. See Connection Distrib. Co. v. Holder, 557 F.3d 321, 368 (6th Cir. 2008). The record keeping laws had already been declared unconstitutional prior to the enactment of the SOL then at 18 U.S.C. §3509(k).

1. Petitioner received a 30 year upward variance on decade old charges where prior to 2006 the Guidelines were mandatory, and average sentences in 1997 were 79 months. Petitioner filed a brief detailing these facts, (denied).

ISSUE ONE FACTS

Prior to his direct appeal petitioner filed a motion to investigate corruption involving the misapplication of 18 U.S.C. § 3283 to his charges (DOC 00512894 (Dkt 238, Jan 8, 2015). The Fifth Circuit ruled against the motion, and other related discovery motions. On 28 U.S.C. 2255 petitioner was again denied the ability to develop the facts.

COUNSEL

Prior to a pretrial hearing (Dkt 134), Petitioner insisted that his counsel challenge the decade old 18 U.S.C. § 2251(a) charges as being time expired. Statutes of limitations (SOL) must be challenged prior to trial or the challenge is deemed waived, United States v. Leo Sure Chief, 438 F.3d 920, 922 (9th Cir. 2006). In Petitioner's case there were no allegations that the conduct occurred past June 2000. If 18 U.S.C. §§3282 applied (5 years), then the government had until June 2005 to arrest. Petitioner was instead arrested April 2010. Section 18 U.S.C § 3299 (Enacted July 2006) would not apply.

There was simply no reason for counsel not to have challenged the limitations period prior to the hearing held December 2010. See United States v. Jones,542 F.3d 661, 664 (6th Cir. 1976)(Motions are capable of determiniation before trial if they raise questions of law rather than fact.) There was never a question of fact here.

PRECIDENT

Counsel's failure to challenge the SOL (after petitioner's repeated insistence) is unexplainable since there was no Circuit precident finding that the SOL at 18 U.S.C. § 3283 applied to 18 U.S.C.§§ 2251(a) charges. Only a few district court cases had been heard which did not serve as good precident. In United States v. Husband, 119 Fed. Appx. 475 (4th Cir. 2004) the government avoided 3283 altogether by calling his offenses inchoate. In United States v. Gool,2009 U.S. Dist. Lexis 61451 (June 17, 2009, S.D. Iowa), Gool pointed out that sexual exploitation is seperate from sexual abuse in both the definition of child and child abuse at 18 U.S.C. § 3509(a)(2), and (3) respectively. The court said, "The court recognizes that there is some question as to

whether §3283 applies to child pornography cases." Id. Gool pled so the issues stopped there. In United States v. Panner , 2007 U.S. Dist. Lexis 11589 (E.D. Cal 2007) the court found, "In response the government proffers a set of facts that if proved would amount to sexual abuse under any definition of that term." Id. . But, Panner wasn't charged with sexual abuse, which §3283 does apply to, and the phrase to define is "sexual or physical abuse" which as shown below refers to Chapter 109A and nothing else. Panner also pled to posession of the very images he produced. The government then enhanced the production back in avoiding the SOL.

In United States v. Coutentos,[1] 651 F.3d 809 (8th Cir. August 2011) the court found that §3283 included §2251(a) offenses but not possession offenses under the theory that the former involves a sex act and the later doesn't. Note that possession is a continueing offense. The court apparently used the definition 18 U.S.C. §3509(a)(8) as the definition of "sexual abuse" without making any analysis on the record as to why. The term physical abuse was ignored which is not defined at §3509(a)(8). The court also mentioned Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2003) "Child pornography is a 'permanent record of a child's (Sexual) abuse ...'" and Osborne v. Ohio, 495 U.S. 103 (1990) "The ongoing harm is to the victim's reputation and emotional well being...." But these are certainly not definitions of "sexual or physical abuse."

In their brief the government relied on a myriad of fallicious statements aimed at avoiding §3283's plain language.:

> GOVERNMENT: "The term 'sexual abuse' formally used in subsection (k) and now found at 3509(a)(8) ...." *4
>
> GOVERNMENT: "Defendant misses the logical conclusion that the definitional section that once applied to §3509(k) explicitly now apply to the identically worded successor to §3509(k), §3283."

This last statement was taken from Sensi's government brief (Doc 62 P. 15)

Shorty after Coutentos was heard the 9th Circuit heard United

1. Coutentos and Carpenter were both heard following petitionr's trial.

States v. Carpenter, 680 F.3d 1101 (9th Cir. May 2012). In Carpenter the court, relying on the government's brief also applied 3509(a)(8) on the basis that:

> COURT: "Title 18 's only definition of the term is in 18 U.S.C. § 3509(a)"

This statement was taken from Panner Gov Brief (Doc 26 p. 7).

> COURT: "subsection (a) was part of the same statutory section as the first extended statute of limitation for offenses involving the sexual abuse of children. Congress then recodified the sections as part of an effort to consolidate various statutes of limitations in a single chapter."

Petitioner argues it is statements like these that rise to the level of corruption. There was no consolidation, Congress simply chose not to reference the §3509(a) definitions, and "sexual or physical abuse" was never defined there. These statements led the court to find:

> COURT: The offense of producing child pornography involves the 'sexual abuse' of a child as that term is defined in §3283." (originates from Coutentos)

Section §3283 does not reference any definitions for its terms child, "sexual or physical abuse," or kidnapping. As the government is perfectly aware §3283 defines child itself, Chapter 109 is the definition for both sexual and physical abuse, and kidnapping is defined by 18 U.S. C. Chapter 55 This is proven below.

PETITIONERS DIRECT APPEAL

To avoid any chance of a procedural bar on 28 U.S.C. §2255, because it was far from clear when the issue had to be raised, Petitioner challenged the SOL. He however continued to allege that corruption and fraud on the courts was taking place.

After saying the issue was a pure matter of law, the Fifth Circuit found

> COURT: Under the definitions in 3509(a), using children to engage in sexually explicit conduct, including "exploitation" in the form of child pornography consistutes "sexual abuse" of a child. 18 U.S.C. 3509(a)(6), (a)(8). Diehl 775 F. d 714 *7.

Petitioner's legal arguments were ignored including that §3283's plain language is controlling (p.16), and that physical abuse can't be ignorred (p.19-20).

28 U.S.C. §2255

On §2255 the district court found that petitioner was procedurally barred from raising the SOL argument, and petitioner was denied an evidentiary hearing. As justification the court cited the Fifth Circuit's denial of petitioners pre-appeal request for an independant investigation into fraud. See Report and Recomendation (R&R) (Doc 270 p.22 n.4), and the first R&R (Doc 253 on 10-23-18) citing the Fifth Circuits conclusion "wholly speculative and unsupported by the record." Petitioner had tried repeatedly to develop the record . The magistrate commented "This court does not sit as an appelant court to the Fifth Circuit." Petitioner had also requested discovery from the district court, past trial. See "motion for permission to subpoena certain evidence relevant to applicability of limitations for 18 U.S.C. §2251(a)" sent 3-13-2013.

SOL PROCEDURAL BAR ON §2255

The district court cited United States v. Kalish, 780 F.2d 506, 508 (5th Cir. 1986), United States v. Jones, 614 f.2d 80,82 (5th Cir. 1988), and United States v. Seglar, 37 F.3d 1131, 1134 (5th Cir. 1994) as grounds to procedurally bar petitioner. These cases however are easily distinguishable as petitioner challenged the issue as ineffective counsel, petitioner repeatedly requested discovery, and petitioner alleged fraud and was prepared to prove it. These cases are also pre United States v. Massaro, 538 U.S. 500 (2003). The Fifth Circuit's finding on appeal that the SOL issue was a pure matter of law was incorrect, citing United States v. Rozelez, 707 F.2d 132, 138 (5th Cir. 1983). See United States v. Coutentos (supra) where in contrast to the petitioner he requested the court to hear the issue, made no fraud claims, and said the record was developed. See (Appeal brief p.38, Gov brief p.9010).

The consequences of not challenging the SOL were potentially severe. See United States v. Weingarten, 2017 U.S. App. Lexis 135 (2nd Cir. 2017) ("Its not our place on this appeal (ß2255) to resolve it definitely since it hadn't been raised on appeal.) This is catch-22.

The Supreme Court has recently considered similar circumstances: in Trevino v. Thaller, 569 U.S. 413 (2013) (A distinction between (1) a state that denies permission to raise the claim on direct appeal, and (2) a state that grants permission but denies a fair meaningful opportunity to develop the claim is a distinction without a diffence.")

In Massaro the Supreme Court recognized that often defendants raise ineffective counsel issues on appeal for no other reason than the threat of procedural bar, and that "cetain questions may arrise in subsequent 2255 proceedings concerning the conclusiveness of those determinations." See also United States v. aquilar, 503 F.3d 431, 436 (5th Cir. 2009) (Declining tohear ineffective claim on appeal because the district court had not held a hearing, and the record did not provide sufficient detail about trial consel's conduct and motivations to allow this court to make a fair evaluation of the merits of the claim.") Rozelez does not apply to the facts of this case and to any extent it matters, petitioner's request for an independant investigation into corruption was far from "wholly speculative." [1]

EVIDENTIARY HEARING

Petitioner justified an evidence hearing in a 50 page Rule 6 motion (Dkt 240) and a supplemental brief (Dkt 269). The misconduct claims are independant of the underlying issue. See Mui v. United States , 614 F.3d 50 (2d Cir. 2009) (misconduct claims are independant) See United States v. Guerra, 588 F.2d 213, 216 (5th Cir. 1969) (" An evidence hearing should be granted unless the record conclusively shows the defendant is not entitled to relief ."). "In every case the (court) has the power constrained only by sound descretion to receive evidence bearing upon the applicant's constitutional claim,"

1. Aletering evidence by changing the production date (Gool, Sensii, Coutentos), mischarging (Panner, Coutentos)

Townsend v. Sain, 372 U.S. 293, 318 (1963).

Post appeal, petitioner was also able to access his grand jury transcipts which show clearly that they were misled when asking about the controlling SOL. The misleading testimony caused the Grand Jury to cease their investigatigation on the matter violating United States v. Bonds, 784 F.3d 582 (9th Cir. 2014). Counsel's affidavit on the matter is also available now for the first time.

All case files were witheld from the petitioner, despite being retained by his counsel which resulted in an entirely seperate interlockutory appeal clear to the Supreme Court. See (Doc 270 p.5)

Petitioner also filed a motion for an in-camera inspection of the correspondense between the AUSA in this case and Washington D.C superiors. (Dkt 272), Jan 11, 2019. There is strong evidence that senior level Justice Department officials knew that §3283 did not include 18 U.S.C. § 2251(a). The "work product" was used to get the indictment, at trial, and on appeal. It is therefore not a work product..

FURTHER GOUNDS

I. There are interrelated ineffective cousel issues, some beign raised for the first time on 2255.

II. The Fifth Circuit could never have known conclusively that §3283 includes 18 U.S.C. §2251(a) charges on appeal, and conclusively is the standard in other circuits. See United States v. Miller, 911 f.2d 638 (1st Cir. 2018)(Evaluating §3283)

III. According to the Supreme Court statute of limitations issues can not be considered on appeal for plain error because the record is not developed as is the case here. See United States v. McDuff, 639 Fed. Appx. 978, 981 (5th Cir. 2016) citing Musachio v. United States, 136 S. Ct. 709 (2016). See also United States v. Botsvynyuk, 552 Fed. Appx, 552 Fed. Appx. 178 (3rd Cir. 2013)(refusing to consider the SOL on appeal); United States v. Litwok, 611 Fed. Appx. 12 (2nd Cir. 2015) (same).

IV. The Fifth Circuits SOL decision is clearly erroneous, relies on false statements, is void of any controlling legal principles, ignores the legislative history, superceeds congress, and ignores Supreme Court precident. See Pepper v. United States, 179 LED2D 196.

LEGAL ARGUMENT

I. In Pari Materia

The Fifth Circuit and other circuits have mistakenly relied on the fact the SOL at §3283 was originally placed at 18 U.S.C. §3509 (k) to rely on the sexual abuse definition at §3509(a)(8) to define §3283's "sexual or physical abuse" phrase. The legislative history of the SOL however indicates that the SOL was put in § 3509(k) for no other reason than both it and the civil stay language . . . extend time.[1] See H.R. 3958 Feb, 1990 (Dewine) who proposed the stay and SOL reside in Chapter 213 of Title 18. In any case, Congress chose not to reference the inapplicable §3509 definitions following a technical correction in 1994. See 18 U.S.C. §2258 in contrast which references the Child Abuse definitions from Title 42. There is no in pari materia between the definitions and the SOL at §3283. See United States v. McElaney, 54 M.J. 120, 126 (2000) (observing the SOL acts independantly of §3509). The Child Abuse definitions and the SOL are not concepts of the same order, See Wachovia Bank v. Schmidt, 546 U.S. 303,316 (in gerneral).

Amazingly it appears that the Child Abuse definitions at §3509 (a)(3)-(a)(9),(11) are incompatible with section §3509 itself. The definition that governs §3509 as a hole is Child at §3509(a)(2) which contains three terms (sexual abuse, physical abuse and exploitation). The Child Abuse definitions contains five terms, three of which differ. See United States v. Allen, 127F.3d 1292 (10th Cir. 1997) (3509 applies to Sexual abuse, physical abuse, and exploitation), and Cong. Rec. House, Oct 27, 1990 p. 36930, describing the semantics of the child definition. Some definitions are simply section specific (adult attendant, MDCAT).

The Child Abuse definitions are for subsection K, which applies to child abuse reporting at 18 U.S.C. § 2258 and 42 U.S.C. § 13031. The definitions are for negligence claims under tort law. Section §13031 is a "public safety law" Doe v. United States, 381 F.Supp.3d

1. "Staff members from both chambers worked to settle the less difficult topics, such as victims rights", 1990 Bush Signs Stipped Down Crime Bill" p.20

573, 607 (4th Cir. 2019). Civil and Criminal definitions offer differ in purpose, Ibarra v. Holder, 736 F.3d 902, 910 (10th Cir. 2013). The definitions describe the kind of conduct which must be reported by certain business profesionals ex: Physicians: physical injury, psychologists:mental injury, Counselors / Social Workers: neglect, Commercial film and photo processors: Child Pornography. See Brown v. Gartner, 513 US 115, 118 (1994) ("Proper statutory construction requires considering a phrases placement and purpose in the statutory sheme.) Statutes of limitations surely belong in Chapter 213, and this was known from the start.

Not even section 3509 has any use for the Child definitions because the constitutional sensitive rules require a hearing. See United States v. Broussard, 767 F. Supp. 1536, 1540 (Cent. Dist. Oregon 1991), using the Child Abuse neglect definition to include 18 U.S.C. § 241 (Conspiracy to deprive others of constitutional rights), and §1584 (involuntary servitude).But any dictionary definition of exploitation would have included "taking advantage" of the children.

The Fifth Circuit ignorred the fact that the SOL defines Child itself, and neither physical abuse nor kidnapping were ever defined at § 3509(a). Its also notable that the sex-act definition is nothing but a remnant from proposals, and its very unusual that the child abuse definitions are intermixed obfuscating their true purpose. It almost seems nefarious. See §13031 in contrast..

II. Superfluity

The Fifth Circuits finding that exploitation at §3509(a)(6) is included by sexual abuse at §3509(a)(8) makes exploitation superfluous at §3509(a)(2), and (3). The solution also causes "prostitution" to be redundant in § 3509(a)(8). This is an absurd result. See Korman Assoc Inc. v. United States, 527 F.3d 303 (5th Cir. 2008) (Courts must avoid absurd interpretation results, and use the plain language of a statute unless it leads to absurd results.)

The sexual abuse term at (a)(8) does also not include 18 U.S.C. §2251(a) as it is missing "for the purpose of producing a visual depiction." See United States v. Lee, 603 F.3d 904, 912 (11th Cir. 2010) (commenting on the difference between coercion and exploitation) , and 42 U.S.C.§5106G.

Superfluity avoidance is a fundamental statutory doctrine, Corley v. United States, 129 S.Ct. 1558)(When on plausible interpretation creates surplusage, and another does not, the later generally controls.") Congress consistently uses the phrase "sexual abuse or exploitation" to include both offenses. See United States v. Pharis, 176 F.3d 434, 436 (5th Cir. 1999), and 42 U.S.C. §§608, 3796aa-8, 678, and 5101. Sexual exploitation is not included under sexual abuse. See 8 U.S.C. §1101(a)(43)(a) and (i).

III. SEXUAL ABUSE COMPATIBILITY

Section 3509(a)(8) is also incompatible with plain dictionary definitions of sexual abuse. See Blacks Law (1999) requiring a special relationship, or Merriam Webster, requiring sexual contact. And the Fifth Circuit itself has avoided §3509(a)(8) as a definition of sexual abuse. See Contreras v. HOlder, 890 F.3d 542, 545 (5th Cir. 2018).

See Esquivel-Quintana v. HOlder, 137 S.Ct. 1562 (2017) (Criticizing circuits that are in conflict with definitions that they say they use.)

IV. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

The express mention of one thing excludes it elsewhere where it is not mentioned. See BMC Software I.N.C. v. C.I.R., 780 F.3d 669, 677 (5th Cir. 2015). Section 3509(a)(2) includes exploitation offenses , but §3283 excludes them. Infact Sexual exploitatoin was considered and removed from several proposals. See H.R. 3958 (1990), S.1923 (1989). The Fifth Circuit and other courts usurp congress by re-adding it.

V. PHYSICAL ABUSE IS MADE INSIGNIFICANT

The Fifth Circuit's interpretation of 18 U.S.C. §3283 makes "physical abuse" insignificant in the phrase "sexual or physical

abuse". "It is a cardinal principle of statutory interpretation that if it can be prevented no clause, sentence, or word shall be superfluous, void, or insignificant," TRW Inc. V. Andrews, 534 U.S. 19 (2001); Williams v. Taylor, 529 US 362 (2000); United Stats v. Menashe, 348 US 528-539 (1955) citing Montclair v. Ramsdell, 107 US 147, 152 (1883); Crocker v. Navient Sols L.L C., 941 F.3d 206 (5th Cir. 2019)(Courts must give effect to every clause or word if possible.)

VI. PLAIN LANGUAGE

Given these fundamental statutory doctrines, Congress' own choice to remove exploitation, and its own choice not to reference §3509(a) definitions (marked for the purpose of that section), and expecially the legislative history of the SOL, a plain language interpretation is appropriate. "Absent persuasive reasons, the plain language of the statute applies," Burns v. Alcara, 43 LED2D 469 (1975); Consumer product Safety Commission et. al. v. GTE Sylvania Inc. Et All, 447 U.S. 102 (1980); Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (" Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") See United States v. Mills, 850 F.3d 693 (4th Cir. 2017) (Defining sexual exploitation, "... because its not defined in 2251(e)") citing Perrin v. United States, 444 U.S. 37, 42 (1979).

VII. RELEVANT LEGISLATIVE HISTORY

1986 Sexual Abuse Act

The Fifth Circuit relied on the statement "Title 18's only definition of the term Sexual Abuse is in 18 U.S.C. 3509(a)" to apply 3283 to Petitioner's charges. Diehl 775 F.3d 714 (2015)

According to the 1986 Sexual Abuse Act, Chapter 109A "Comprehensively defines sexual abuse offenses." See 1984 Federal Rape Law Reform, Hearing Subcommittee on Criminal Justice, House Of Rep. 98th Congress, 2nd Session, Aug 31, and Sept 12, 1984,

H.R. 4876 Sexual Assault Act of 1984. And 1986 Sexual Abuse Act Of 1986 H.R. Rep. 99-594. 1986 p.20. "H.R. 4745 is drafted to cover the widest possible variety of sexual abuse ....." 1986 p.14. Physical abuse is also baked into Chapter 109A, "Subsection (a)(2) and (3) in effect delete the current law offense of assault with intent to commit rape. Such an offense is necessary in current law (18 USC §2031), which does not proscribe attempted rape (18 U.S.C. §113(a)), but is no longer necessary because new Chapter 109A proscribes attempts...." 1986 p.20.

The SOL was recomended as early as 1984, but not enacted then because, "Rape, therefore is principly a state law enforcement problem." 1986 P.7 and 1984 p.100, 108. The SOL was instead enacted inside five years of 1986, in 1990. Therefore no time lapse occurred. This explains why in 1990 the SOL is not discussed. See United States v. Johns, 15 F.3d 740 (8th Cir. 1993) (Using 3509(k) to extend the SOL for repealed statutes.).

The most likely reson that §3283 is worded "No statute of limitation that would otherwise preclude prosecution for an offense ...." is because it is designed to superceed state SOL in assimilatoin circumstances. See 1986 p9, 20, 94. Title 18 U.S.C. 1153(a) was amended in accordance, by adding Chapter 109A to the offense list. See United States v. Johnson, 699 F. Supp. 226 (1998 , N.D. Cal) (Superceeding a state SOL). See Miller (supra) showing confusion on why 3283 doesn't name what other SOL it superceeds.

In Esquival Quintana v. Holder (supra) the Supreme Court commented that statutes can be used as generic definitions. Chapter 109A defines sexual act, sexual contact and the offenses considered sexual abuse. Section 3283 also applies to the repealed offenses. This is a comprehensive solution that makes no term superfluous, and insignificant. It also explains why 18 U.S.C. 3299 was required in the year 2006.

1990 AND BEYOND

Nothing in the subsequent legislative history of the SOL contradicts the fact Chapter 109A defines "sexual or physical abuse."

A final 1990 House bill which contained the completed SOL language targetted the SOL for Chapter 213 from the start, and defined a child as someone under 15, or up to 18 for those with a development age of 15. Section 3283 had to have an age limit in any case since 18 U.S.C. §2241(a) includes adults.

In 1994 the SOL portion of §3509(k) was relocated to 18 U.S.C. §3283 as part of a conforming repeal titled "technical correction." Congress chose not to reference 3509(a).

The SOL is not mentioned again until October 1, 2002 in a House Judiciary Committee review.[1] In the review Deputy A.G. Daniel Collins quotes §3283 and strongly recomends its replacement. Collins proposes a new 18 U.S.C. §3296 and the House passed it.

On November 25, 2002 Assistant AG Daniel J. Bryant sent a letter to Joseph Biden[2] J.R. also recomending §3296. Section 3296 was designed to 1) eliminate the SOL altogether, and 2) "provide straightforwardly" coverage for chapters 109A, 110, 117, 18 U.S.C. 1201." P9. Bryant argued the change should be made retroactive. Bryant also said section 10 of the bill, which applied to DNA (enacted as 18 U.S.C. §3282(b)), should be eliminated because "... (it) excludes rapes and sexual assaults prosecuted under other chapters of the code, such as Chapter 117 ...." p. The senate rejected both proposals saying

> SENATE : Rather than disregard the SOL entirely, for crimes of sexual assault, the DNA sexual Assault Justice Act of 2002 authorizes the issuance of "John Doe" DNA incictments for federal sexual assault crimes .... John Doe indictments strike the appropriate balance: they encourage swift and efficient investigations whild recognizing the durability and credibility of DNA evidence ...." H.R. Cong. Rec. 108-66 p.15[3]

1. U.S. DOJ Office Of Legislative Affairs
2. House Judiciary Committee on Crime Terrorism and Homeland Security Subcommittee "Child Abduction Prevention"
3. Advanced Justice Through Forensic DNA Technology, Thur, July 17, 2003 p.17 FN 11.

Only in the discussion of §3296 was disregarding the SOL "entirely", made, but notice congress refered to the target offenses as "sexual assault," and as enacted §3282(b) included Chapter 109A only. Notice also that in Bryant's recomendation, kidnapping is 18 U.S.C. §1201, not a generic definition.

ARMED FORCES

The only other legislative history concerning §3283 involves the Armed forces. In 2003 S. Rep. No. 108-46 (2003) p. 317 shows §3283 was evaluated as a SOL for the military, but rejected in favor of their own, because their proposal would "limit the application to cases involving minors under 16 - the limit for such offenses under the substantive criminal provision of the UCMJ." They didnt say, because it - 3283 includes offenses that the military doesn't. In fact they didnt add Chapter 110 until January 2006. They did however adopt the title of §3283 which was "sexual or physical abuse." However, also on January 3, 2006 the title of UCMJ 10 U.S.C. 843 was changed to "Rape or Carnal Knowledge," presumbably to conform to the 1986 Sexual Abuse Act. See United States v. Acosta-Zapata 65 M.J. 811 (2007); United States v. Chero, 76 M.J. 688 (2017) (" The congressional intent in codifying an affirmative defense in 10 U.S.C. §920(d) was to modify the UCMJ to conform to the spirit of the Sexual Abuse Act of 1986 (18 U.S.C. 2241-2245)." See S. Rep. No. 104-112 P.1.

2006 ADAM WALSH ACT

In The 2006 Adam Walsh Act, the 2003 proposed §3296 saw life as 18 U.S.C §3299, but congress chose not to make it retoactive. Section 3283 was not repealed, as only it includes the repealed 1986 offenses of sexual assault and assault with intent to commit rape, and assimilation on Indian land.

SUMMARY

Section 2251(a) doesn't punish sexual assault, it instead punishes produc ing visual depiction of lasivious activity. If sexual assault occu rs, the proper authorities will bring those charges, and that entities SOL will apply. "A limitation carving out an exception should apply to cases shown to be clearly within its purpose." United States v. McElavain, 272 US 633 (1926).

THE SENTENCE VIOLATED THE EX POST FACT CLAUSE

FACTS

On direct appeal Petitioner argued that his sentence, which was 30 years over the recomended Guidelines sentence on decade old charges was a procedural error, a substantive error, and a violation of the ex post fact clause of the United States constitution. With regard to the ex post facto violation, Petitioner had asked the Fifth Circuit to postpone hearing the appeal until after Peugh v. United States 569 U.S. 530 (2013) was heard. See "Motion To Stay Appeal Pending Supreme Court Decision In Peugh ..." Filed Feb 26, 2013, rejected on March 5, 2013. The Fifth Circuit denied the motion and entered a finding on the appeal. On 28 U.S.C. §2255 Magistrate Lane denied the ex post facto issue saying Petitioner was procedurally barred. The magistrate argued that the Fifth Circuit didn't stay the appeal, but did hear petitioner's case after Peugh. The magistrate also argued that Peugh wasn't a new rule of law.

Petitioner argues herein that he is not procedurally barred because the sentence was a constitutional violation, and in excess of the maximum authorized by law.

The Fifth Circuit found that United States v. Austin, 432 F.3d 598, 599 (5th Cir. 2006) stands for the proposition that the ex post facto clause is not effected by judicial changes. However, Peugh contradicts this. Nor does Austin have anything to do with Petitioner's case as she received the law end of a Guideline sentence. Peugh found that the likely hood of the sentence is the primary guide to a ex post facto violation. Petitioner's sentence was not at all likely in 1999 when the offenses took place.

Petitioner's sentence violated the ex post facto clause also because there was no reason to depart, and the applicable guidelines had "legal force." United States v. Dean, 604 F.3d 169, 173 (4th Cir. 2010); Coleman v. Thopson, 501 U.S. 722, 753 (1991) (COA granted becaues sentencing error possibly constitutional). See Petition For Discovery, Attachment F, for a comprehensive list of average sentences.

Reasonable jurists could find it debatable whether the District court was correct in its finding that Petitioner is procedurally barred.

Issue III Jurisdiction

Was counsel ineffective for failing to subject the prosecution's case to meaningfull adversarial testing. And what is the evidence requirement of 18 USC §2251(a)'s third Nexus clause.

I.

At pretrial, counsel raised a challenge to federal jurisdiction of petitioner's case on a constitutional basis. The trial judge ruled against the argument. After convincing petitioner to sign a stipulation and proceed to a bench trial, counsel raised the same exact argument, making the trial a farce.

II.

Courts are split on what constitutes a visual depiction for the purpose of interstate transport. One circuit has found that only the charged encorporeal scene must be found outside of the defendant's state to trigger jurisdiction. This is the position the 10th Circuit has taken. At least two other circuits have found transport detail evidence must exist. The 1st and 9th have made this choice. The choice may depend on the version of the statute. In this case, the Fifth Circuit erred when it failed to address this question of law. Runyan doesn't apply as shown.

Relevant Facts

Charges

In a second superceeding indictment petitioner was charged with 10 Counts of 18 USC §2251(a), sexual exploitation of a minor. As of arrest the charges were a decade old.

The video evidence was produced by the National Center for missing and Exploited children (NCMEC). No visual depictions were found in the possession of Petitioner Dichl. No evidence existed concerning how the visual depictions had been transported in interstate commerce, or what was transported.[1]

Because the government could not prove Petitioner had any intent to transport, they dropped distribution charges and did not charge Petitioner with §2251(a)'s first nexus clause.

Bill of Particular

In a motion for Bill of Particulars (Doc 44,57) Petitioner sought information on exactly what it was that was transported in interstate Commerce. The definition of visual depiction at 18 USC. §2256(5) enumerates physical mediums only. The Bill of Particulars was denied in the pre-trial hearing after Counsel inexplicably changed

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1. Evidence hearing per Doc 240 Rule 6 was denied on 2255. See Report Doc 270 P. 22

the argument / justification to one of where one segment began and another ended. See DOC P. 6. Dec 21, 2010 (Pretrial.)

Pretrial Hearing

In the pretrial hearing Counsel raised a motion to dismiss on two grounds. First, Counsel argued that §2251(a) was unconstitutional if the government could not prove Petitioner had intent to transport charged counts in interstate commerce. The Court dismissed that argument saying §2251(a) is not "vague, ambiguous, or overly broad." In other words §2251(a) says what it means; the first nexus clause requires intent, and the third doesn't. The second argument involved the fact that the exploitation (Chapter 110 Title 18) offenses are not based on scenes, or encorporeal substances being found in interstate commerce, but rather mediums. Transport details therefore, at least prior to the §2251(a) amendendment made in 2008, had to be proven. Counsel cited United States v. Schaefer, 501 F.3d 1197 (10th Cir. 2007). Unfortunatly when Counsel mentioned Shaefer the Judge terminated that part of the hearing.

Court: "So that leaves us with whether or not Congress has the authority to regulate what you assert are wholly intrastate productions ...." P. 18

Counsel also challenged a government search warrant that yielded two hard drives. The hard drives had nothing illegal on them, and the government said they had no plans to introduce them at trial. p.40. The court said that if that changed counsel should object. Counsel never inspected the drives per 18 usc §3509(m), and failed to object when the government at trial started promissing they contained charged counts. Trial Transcript (T.T) p. 153. The trial court did not rely on the hard drives in its specific decision, but the Fifth Circuit did on appeal. See Petitioners 2255 ground 11.

Stipulation

Believing that the government must show <u>what</u> was transported in interstate commerce, and by who, petitioner agreed to stipulate to other facts and have a bench trial. This decision was based on the remaining viable pre-trial argument being made. Petitioner had his counsel telephone <u>Schafer's</u> (supra) attorney to make sure counsel understood the defense. He did understand it.

In the stipulation petitioner agreed that the captured scenes existed "on digital media" outside of Texas (according to the FBI) and

that they were available on the Internet. See Stipulation p.15 (15(a)) and p.10-c.

To be clear, petitioner was agreeing at most that he originally shot the scenes, not that he created or transported those visual depictions in whatever format they existed—wherever they were found. See 2255 Ground 12 Concering hearsay also. On any other basis the stipulation would have been a guilty plea!

A visual depiction per 18 USC §2256(5) is defined as films, photographs, negatives, slides, books, and other visual and print mediums. Past 1996 data stored on computer disks was added. In 2008 transmitted data, whether or not it was saved was added. The latter does not apply to petitioner's indictment.

These facts are very important to petitioner's case, and counsel needed to understand them. Consider the following:

Court: why is it [visual depiction] not like a gun?

Mr. Orr: Guns a physical thing.

Court: Worlds changed.

TT 183 : 6-10.

But as shown, visual depiction was a medium, and transmit wasn't included.

Trial Facts

At trial Counsel abandoned any efforts to examine 18 USC §2251(a)'s nexus clauses, or to examine the appropriate meaning of visual depiction at 18 USC §2256(5). Counsel did not make any effort to determine what was transported in interstate commerce. Counsel allowed the wrong version of §2251(a) to be used throughout the trial without objection. Counsel failed to inspect the illegally seized hard drives, or to object when the government began to promise they had charged counts without any proof of that. Counsel failed to object to government reports that visual depictions were found outside of Texas as hearsay. Counsel failed to point out that witness Ken Courtney's testimony, even if believed, would not prove interstate transport. Counsel moved for an unnecessary Motion For Judgment of Aquital in a bench trial,[7] Counsel raised as his only argument one that had already been disposed of at pretrial, based on scienter.

Following closing arguments Judge Yeakel

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7. Deluna v. United States, 227 F.2d 114, 116 (5th 1955)

asked Counsel why finding copies of visual depictions out side of Texas was not sufficient evidence, but Counsel had no answer. TT 176:8 - 179:7. Because Counsel had only a Constitutional Challenge, Judge Yeakel asked the government why §2251(a) was Constitutional without requiring intent to transport on the part of the producer.!

Court: "I believe thats were the issue is joined at this point ..." TT 185:2.

In response the government argued that issue had been resolved at pre-trial.

Court: Theres always a different slant to it after I have had an opportunity to hear all of the evidence other than what was just presented for the purpose of a preliminary motion. The burden were now at reasonable doubt stage, which is different than earlier." TT 186: 1-5.

On day 2 the court explicitly said in its finding, that the only relevant evidence was the fact "it" appeared outside of Texas. TT Day 2 7:10. Witness testimony was therefore irrelevant. "It" was never defined. The finding used §2251(a) 2008 instead of 2000.

Appeal Facts

On appeal petitioner challenged the jurisdictional nexus in two seperate grounds. Ground two was an appeal of the trial court's finding that §2251(a)'s third nexus clause is constitutional based only on the fact productions or reproductions were found outside of Texas. The Fifth circuit ruled against this argument citing United States v. Terrell, 700 F.3d 755, 759 (5th Cir. 2012). Terrell looks only at §2251(a) syntax, and considers the second nexus clause. To support the scienter finding, the Fifth Circuit said, "Further the record includes specific evidence from which the district court could reasonably infer that Diehl himself transported."[1] Diehl, 775 F.3d 714, p.10. On page 40 of the government's reply brief, they encouraged the inference saying, "The record also reveals that an ample circumstantial factual predicate [exists] supporting the district court's conclusion that the interstate commerce nexus was proven." The Fifth Circuit found petitioner had intent to transport, thus changing the trial court's factual finding, and constructively

1. Found outside of Texas wasn't enough?

amending the indictment since petitioner wasn't charged with §2251(a)'s first nexus clause, which punishes those with intent. See Fifth Circuit Model Pattern Jury Instructions, §2251(a) first clause, citing Dichl, Runyan.

In petitioners appeal brief he seperatly (Grd 2) challenged the trial court's constructive amendment of the indictment, under ineffective counsel, provided a very limited argument, and requested a new trial. See government reply brief p. 37-38, "This case thus presents that rare ocassion where the record is sufficiently developed." The Fifth Circuit found in a footnote (P. 11, Fn 2) that petitioner wasn't prejudiced, because the amendment only happened once[1] "when announcing its [trial courts] verdict." And, "Nevertheless the district court correctly identified the issue and the goverments burden, and expressly found that the government had proven that the videos actually moved in interstate commerce as required by the applicable version of §2251(a). Dichl has not shown prejudice resulting from counsel's failure to object to the court's extraneous comments." The actual argument raised in Ground One was not considered at all on appeal.

1. The wrong statute was read six times not once.

Argument

Stipulation Ground 7

In Counsel's affidavit (P.5) he blames Petitioner for his failed trial strategy. Counsel says Petitioner forced him to raise the constitutional challenge at pretrial, and as a result a government witness testified at trial which "proved interstate commerce." The witness however didn't prove interstate commerce, and was not a part of the trial court's Finding. Counsel does not attempt to explain why he re-raised an argument which had been resolved at pre-trial, or why he failed to argue the Schaffer based argument, that the stipulation was based on. The fact is the scienter argument had very little chance of success. See United States v. Fenton, 654 F. Supp. 379 (E.D. PA 1987). (§2251(a) already has a scienter - using a minor to produce a visual depiction). Nor did Counsel have an actual legal argument.

When Counsel re-raised the scienter argument the government themselves complained that the argument had been resolved at pre trial. TT 185:9. In an effort to salvage the trial however, Judge Yeakel said:

> Court "The burden, were now at reasonable doubt stage, which is different than earlier."

T.T. 186:3.

Mr Devlin: Right....

Counsel simply had not other argument:

Mr. Orr: "We believe that finding videos somewhere is not enough to show that they were transported."

T.T. 156:11-13, and 179:23.

It appears that the government itself thought the stipulation was a guilty plea - at trial they said SO. T.T. 153:18 and 166. But the stipulation contradicts this: "The only issue remaining is whether sufficient evidence has been introduced to prove the third [nexus] element." Stipulation p.13. This is an oxymoron. In their 2255 response, the government changed course and said, "the Fifth Circuit did not rely exclusively on the stipulation." The trial court clearly did however, and the Fifth Circuit expanded the trial court's narrow evidence finding. Again it wouldnt have been a constitutional question if Courtney were found credible.

Given these facts, petitioner was denied a right to meaning fully contest the government's case. This resulted in a waiver to contest

the transport evidence itself, including the NCMEC reports which were hear say. see 2255 Ground 11. As shown counsel failed to object to government promises about the illegally seized hard drives, or examine them. Although the trial court did not rely on them, the Fifth circuit atleast in part used them to uphold the conviction. Counsel failed to point out that witness Courtney's other testimony wouldn't establish interstate commerce[1]. Again the trial court didn't use Courtney, but the Fifth Circuit relied on him for scienter.

By stipulating, petitioner also forfeited the right to contest the video evidence itself[2]. Petitioner forfeited a jury. Petitioner did not stipulate for benefits or in lieu of a plea.

In the Report and Recomendation the magistrate found: magistrate: "The stipulation expressly did not concede the third element: that the visual depiction was mailed or actually transported in interstate or foreign commerce." P. 16. But by re-raising an already defeated

1 see united states v. wright, 625 F.3d 583 (9th cir. 2010) (IRC doesn't prove interstate transport). Also see 2255 Ground 10.

2. Including illegally obtained evidence.

argument Counsel really caused a mistrial. There wasn't any "different slant" to the fact allegedly charged scenes existed outside of Texas. TT 186:2. The net effect was Counsel did conceed jurisdiction. This is plain.

Given the facts, Counsel's advice to enter into the stipulation fell below an objective reasonableness, and had a prejudicial effect on the trial.

The trial Court had a responsibility to make certain that a waiver of rights complies with the requirement of Johnson v. Gerbs, 304 U.S. 458, 464 (1938). as "an intentional relinquishment or abandonment of a known right or privilage." Compare Brookhart v. Fanis, 384 U.S. 1 (1996); McCarthy v. united states, 394 U.S. 459, 466 (1969); and Boykin v. United States, 395 U.S. 238, 242 (1969). Petitioner could never have forseen Counsel's having no argument other than what was defeated at pretrial. The Court gave mr. orr multiple chances to explain why copies found outside Texas would be insufficient. As shown Counsel simply had no answer. In Counsel's affidavit he admits there was no strategy. Affidavit P.5.

Motion For Judgment of Aquital (Grnd 6)

In the Report and Recomendation the district Court found that Petitioner was not prejudiced by the Rule 29, and that it did not lead to the Fifth Circuit's use of government witness Ken Courtney. The Court also found that the evidence was not re-evaluated following the closing arguments. Petitioner objected to these findings.[1]

The evidence was clearly re-evaluated following closing arguments. TT 185-186. The issue became one of constitutionality only. If witness Courtney had been found credible this would not have been the result. Rule 29's dont apply to Constitutional arguments. See United States V. Hurley, 529 Fed. Appx. 569 (6th Cir. 2013). The Court narrowed the evidence. See Wright Vs. United States 512 A.2d 804 (D.C. 1986) ("If a defendant puts on a defense following the close, all the evidence should be considered.") Counsel certainly put on a new witness, and defense. It was the Fifth Circuit who resurrected Courtny. See Jackson V. Virginia, 443 U.S. 307 (1979) ("A Court of appeals may not usurp the role of a finder of fact.")

The Fifth Circuit's sufficiency of evidence finding should not be used to procedurally bar Petitioner's 2255 nexus arguments.

1. DOC 274 P 9-10

Wrong Defense (2255 Grnd 5)

Constructive Amendment (3,4)

On page 13 of the report and recomendation the district court found that petitioner was proceedurally bared from arguing that the trial court constructively amended the indictment and that counsel never brought foreward the only viable argument, "The Fifth Circuit rejected the argument Diehl contends trial counsel should have made." Doc 270 p.13. As shown in the Appeal Factual Section of this brief, this is false. The Fifth Circuit never considered the ineffective counsel issue raised on appeal as Ground one on page 34. The argument concerns the meaning of §2251(a)'s "such visual depiction." See government's 2255 Reply brief, Doc 218 p.12, "[2251(a)] does not refer to a visual depiction, but any visual depiction, which can include a copy of film, video, or data." Furthermore, the Fifth Circuit's interences about government witness Ken Courtney were in the context of the scienter argument, which as discussed also constructively amends the indictment.

The Fifth Circuit's footnote analysis of the issue on appeal should not be used as a

procedural bar. The record wasn't developed, and the trial Court did not consider the correct "burden," because the correct argument was never raised. Constructive amendments are also structural errors. See United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999) ("When a constructive amendment is found the error is fatal and reversable per se even when not preserved by objection.") ; Stirone v. United States, 361 U.S. 212, 219 (1960).

The finding of the trial Court, as clearly illustrated by the transcripts, was only that charged visual depictions existed outside of Texas. That fact was stipulated to. The Fifth Circuit at the bequest of the government has changed the factual finding. The definition of what a visual depiction is was always the question of law, and Counsel was grossly ineffective for not arguing that it does not include transported data seperate from a medium, and doesn't include other peoples productions, reproductions, or their use of the Internet. Consider how United States v. Runyan was misapplied to petitioner at trial

Gov. Off "... just the mere fact that Something is found on the Internet somewhere else is not adequate to Convict ...." TT 157:4-6.
Court: "... Its not up to me to tell the Fifth Circuit that they were wrong."

But Runyan doesn't stand for that, and see United States v. Crain 877 F.3d 637 (5th Cir. 2017) (The Fifth Circuit has not explicitly addressed 'transported in interstate commerce.") Other Circuits are split on the meaning of visual depiction. See United States v. Lewis, 554 F.3d 208 (1st Cir. 2009), United States v. Write, 625 F.3d 583 (9th Cir. 2010) (transport details are necessary because visual depiction is not an encorporeal substance). These cases don't even consider transmitted data (Bloodenstein). See United States v. Wilson, 182 F.3d 737 (10th Cir. 1999) (Discussing when a visual depiction is created).

Conclusion

From the begining the government had no transport evidence at all. The question of law which thus far has been avoided is, what Constitutes interstate transport, and "Such visual depiction." This case should be remanded for retrial or vacated.