22-7031

No. _____

ORIGINAL

FILED
MAR 18 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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 PRESENTED

Point 1 - Should a Fed.R.Civ.P. 60(b) and 60(d)(3) mixed motion initially be reviewed de novo, without requiring a certificate of Appealability

Point 2 - Are ignorred 2255 issues "procedural rulings that preclude a merits determination." per Gonzales v. Crosby.

Point 3 - Were Petitioenr's 2255 Grounds 2,4, and 13 ever evaluated on their merits.

Point 4 - Was it proper to treat a Fed.R.Civ.P. 60(d)(3) fraud on the court issue, as a second or successive issue.

Point 5 - Did the district court error by treating Petitioner's statute of limitations fraud claim as procedurally barred.

Point 6 - Did the district court error by treating Petitioner's ex post facto sentencing argument as procedurally barred.

LIST OF PARTIES

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:

United States Court Of Appeals Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, Louisianna 70130 3408

Solicitor General Of The United States
Roon 5614 DOJ
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Questions Presented i

List Of Parties ii

Table Of Contents iii

Index Of Appendix iv

Table Of Authorities ..... v-vii

Opinion and Orders 1

Jurisdictional Statement 2

Statutory Provisions 3

Statement Of the Case 4-5

Arguments

Point 1 - Should a Fed.R.Civ.P. 60(b) and 60(d)(3) mixed motion initially be reviewed de novo, without requiring a Certificate Of Appealability. 6-7

Point 2 - Are ignorred 2255 issues, "procdurally rulings that preclude a merits determination" per Gonzales V. Crosby 8

Point 3 - Were Petitioner's 2255 Grounds 2,4, and 13 ever evaluated on their merits. 9-15

Point 4 - Was it proper to treat a Fed.R.Civ.P. 60(d)(3) fraud on the court issue, as a second or successive issue. 16-19

Point 5 - Did the district court error by treating Petitioner's statute of limitations fraud claim as procedurally barred. 20-31

Point 6 - Did the district court error by treating Petitioner's ex post facto sentencing argument as procedurally barred. 32-34

Conclusion 34

Certificate of Service 35

Certificate of Compliance 36

IV
INDEX OF APPENDICES

Appendix A - Fifth Circuit denial of Certificate Of Appealability (COA)

Appendix B - District courts denial of COA

Appendix C - Petition for en banc Denial

Appendix D - Clerk of Court for Fifth Circuit's Improper Denial of Petitioner's Motion To Hear His Rule 60(b), d(3) Claim Without COA

Appendix E - Two Page letter to Clerk, Treated as a Reconsideration Motion.

Appendix F - FOIA Response by FBI Concerning Illegally Seized Hard Drive

Appendix G - FOIA Response by FBI Relying On Exemptions

Appendix H - Turnover Inventory Report

Appendix I - Judgement and Committment

TABLE OF AUTHORITIES

Agostini v. Felton, 521 US 203 (1997) .. 24
Arrendo v. University, 950 f.3d 294 (5th Cir. 2020) .. 20
B.F. Goodrich Co. v. Rubber Latex Products Inc., 400 f.2d 401 (6th cir. 1968)..12
Black v. Davis, 902 f.3d 541 (5th Cir. 2018) .. 31
Brady v. Maryland, 373 U.S. 83 (1963) .. 17
Bridges v. United States, 346 U.S. 209 (1953) .. 29
Clark v. Blackburn, 619 f.2d 431 (5th Cir. 1980) .. 24
Corley v. United States, 556 us 303 (2009) .. 26
Crisby v. Jones, 960 f.2d 925 (11th Cir. 1992) .. 12
Crocker v. Naulent, SOLS L.L.C., 941 f.3d 206 (5th Cir. 2019) .. 26
Deal v. United States, 508 U.S. 129 (1993) .. 28
Federal Trade Commission vs A.P.W. Paper Co., 328 US 193 (1946) .. 26
Fierro v. Johnson, 119 f.3d 147 (5th Cir. 1999) .. 7
Golf King Shrimp Company v. Wirtz, 407 f.2d 508 (1990) .. 11
Gonzalez v. Crosby, 545 US 524 (2005) .. 12,19,23
Harbison v. Bell, 556 U.S. 180 (2009) .. 6,7
Haywood v. United States, 393 f.2d 780 (5th Cir. 1968) .. 11
Hughyes Aircraft Co. v. Jackobson, 524 US 432 (1999) .. 26
Ibara v. Holder, 736 f.3d 903 (10th c. 2013) .. 26
Korman Assoc Inc. v. United States, 527 f.3d 443 (5th c. 2002) .. 25
Lockhart v. Nelson, 488 us 33 (1988) .. 13
Masachio v. United States, 136 s.ct. 709 (2016) .. 20
Mathis v. United States, 195 L.Ed 2d 604 (2016) .. 29
Montclair v. Ramsdell, 107 US 147 (1883) .. 26
Nighawan v. Holder, 557 U.S. 29 (2009) .. 29
Pearson v. First Natl. Mortg. Corp., 200 f.3d 30 (1st C. 1997)
Pepper v. United States, 179 LED2D 196 (2010) .. 24
Peugh v. United States, 569 U.S. 530 (2013) .. 31,32
Rozier v. Ford Motor Co., 573 f.2d 1332 (5th Cir. 1978)
Ruiz v. Quarterman, 504 f.3d 523 (5th c. 2007) .. 12, 18, 23
Seven Elves Inc. v. Eskensaski, 635 f.2d 396 (5th Cir. 1981).. 12

Slack v. McDaniel, 146 LED2D 542 .. 12,23
Spike v. Louisianna, 2020 U.S. Dist. Lexis 145555 (5th Cir. 2022) .. 18
Spitznas v. Boone, 464 f.3d 1213 (10th c. 2006) .. 7
Storey v. Lunpkin 8 f.4th 382 (5th C. 2021) .. 6
Taylor v. Dir, 2022 U.S. Dist. Lexis 49420 (5th Cir. 2022) .. 7
Toussie v. United States, 397 U.S. 112 .. 25
Tradewin Enuytl. Restoration, Inc. v. St Tnnan Park LLC
578 f.3d 255 (5th Cir. 2009).. 20
TRW v. Andrews, 534 US 19 (2001).. 23
United States v. Archer, 486 f.2d 670 (2d Cir. 1973) .. 16
United States v. Aquilar, 503 f.3d 431 (5th Cir. 2007) .. 20
United States v. Bartlett, 235 US 72 (1914) .. 28
United States v. BotsvlYuk, 552 Fed. Appx. 198 (3rd Cir. 2013) .. 20
United States v. Coates, 949 f.2d 104 (4th Cir. 1991) .. 16
United States v. Coutentos, 651 f.3d 809 (8th Cir. 2011) .. 22
United States v. Davis, 1390 s.ct. 2319) (1019) .. 30
United States v. Descamps, 570 U.S. 254 (2013) .. 30
United States v. Diehl, 775 f.3d 714 (5th Cir. 2015) .. 25
United States v. Dodge, 599 f.3d 1347 (11th Cir. 2010) .. 29
United States v. Freeman, 11 LED 724 .. 26
United States v. Fulton, 780 f.3d 683 (5th Cir. 2015) .. 6
United States v. Gypsun Co. 33 U.S. 364 (1948) .. 10
United States v. Haas, 37 f.4th 1256 (7th Cir. 2022) .. 14
United States v. Higgs, 193 f.supp. 3d 495 (4th Cir. 2016)
United States v. Hirst, 2022 U.S. Dist. Lexis 71034 (2d Cir. 2022).. 20
United States v. Johnson, 699 f.supp.226 (N.D. Cal 1998) .. 29
United States v. Johnson, 496 f.2d 1131 (5th Cir. 1974) .. 11
United States v. Kuok, 671 f.3d 931 (10 Cir. 2011) .. 15
United States v. Kroeber, 2014 U.S. Dist. Lexis 4722 (M.D. Fl 2014).. 9
United States v. Lively, 852 f.3d 549 (6th Cir. 2017) .. 8
United States v. Lockhart, 382 f.3d 447 (4th Cir. 2004) .. 11

United States v. Maxwell, 2022 U.S. Dist. Lexis 61718(S.D. NY) .. 25
United States v. McDuff, 639 fed. appx. 978 (5th Cir. 2016) .. 20
United States v. McElvain, 272 US 633 (1926) .. 25
United States v. McBurnette, 382 f.app'x. 813 (11th Cir. 2010) .. 9
United States v. McRae, 793 f.3d 392 (4th Cir. 2015) .. 7
United States v. Miller, 911 f.3d 638 (1st cir. 2018) .. 21
United States v. Piette, 2022 U.S. App. 23004 (10th C. 2022) .. 28
United States v. Riddle, 249 f.3d 529 (6th Cir. 2001) .. 11
United States v. Roselex-Orosco, 8 f.3d 198 (5th Cir. 1993) .. 20
United States v. Schneider, 801 f.3d 186 (3rd Cir. 2015) .. 29
United States v. Soccocia, 58 f.3d 754 (1st Cir. 1995) .. 11
United States v. Taylor, 749 f.3d 499 (5th Cir. 2012) .. 8
United States v. Taylor, 956 f.2d 572 (6th Cir. 1992) .. 10
United States v. Taylor, 2022 U.S. Dist. Lexis 220735 (8th c.2022) .. 11
United States v. Terrell, 700 f.3d 755 .. 10
United States v. Vialva, 904 f.3d 356 (5th Cir. 2018) .. 23
United States v. Williams, 16 f.supp. 3d 1301 (10th Cir. 2014) .. 7
United States v. Truss, 70 M.J. 545 (2011) .. 11
United States v. Williams, 790 f.3d 1059 (10th Cir. 2015) .. 15
Wardlow v. Davis, 819 fed. appx. 234 (5th Cir. 2020) .. 6,12,23
Weingarten v. United States., 865 f.3d 48 (2nd c. 2017) .. 20
Will v. Lunpkin, 978 f.3d 933 (5th Cir. 2020) .. 12
Willson v. United States, 250 f.2d 312 (9th Cir. 1957) .. 11
***
Mooney v. Holohan, 294 U.S. 103 .. 19
Pyle v. Kansas, 317 U.S. 213 (1942) .. 19
Napue v. Illinois, 360 U.s. 264 (1959).
Scott v. United States, 81 f. supp. 3d (11th cir. 2015) .. 19
Leal v. Quarterman, 573 f.3d 214 (5th Cir. 2009) .. 19
Garcia v. Quarterman, 573 f.3d 214 (5th Cir. 2009) .. 19

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 _____; 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 B 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

For cases from federal court:

The date on which the United States Court Of Appeals decided my Petition For Certificate Of Appealability for Fed.R.Civ.P. 60(b), and 60(d)(3) claim was 10-4-2022.

A timely petition for rehearing en banc was denied by the United States Court Of Appeal on 12-9-2022.

A timely petition for rehearing was denied, and the case closed on 1-20-2023. See Statement Of Case for details.

STATUTORY PROVISIONS

18 U.S.C. §2251(a) (2000) 3rd Nexus Clause

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

18 U.S.C. §2256(5) - Visual Depiction

[physical medims] .. and in 2008 "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.

STATEMENT OF THE CASE

On 7-29-2016 Petitioner began preperation for his 2255 by requesting discovery released to his attorney. Around 20 motions were filed and denied[1]. Petitioner filed a 50 page discovery request per Fed.R.2255 Rule 6, #267, which was denied by the Magistrate, but not the judge himself. See Report and Recomendation (hereinafter recommendation, p. 5-8 #270[2].

Meanwhile on 7-29-2016 Petitioner filed a first 2255, #209. The government responded, and Petitioner filed a reply. #218, 225. On 12-13-2018 Petitioner submitted an amended 2255 with 13 independant Grounds. #266. On 1-11-2019 the magistrate entered an Amended Recomendation. #270. In response Petitioner filed an Amended Objection with 24 independant objections. #274. On 2-4-2019 the court entered an order dismissing Petitioner's 2255. Petitioner then filed a motion for reconsideration which was denied. Petitioner filed a timely appeal which was denied (ECF 293,) and a writ of Certiory which was denied.

RULE 60(b)

On April 29, 2021 Petitioner filed a "motion for consideration of Rule 60(b) claims. (ECF 297), then filed a "First Amended Motion for Consideration of Fed.R.Civ.P.Rule 60(b) claims." (ECF No. 300). Petitioner then filed a "First Supplemental Brief for Pending R.60(b) motion and memorandum." (ECF No. 305). On 1-3-22 the district court denied the Rule 60(b) motion, and on 1-12-22 Petitioner filed a motion to alter or amend, which was denied.

RULE 60(b) APPEAL

On 5-10-22 Petitioner filed a timely appeal titled "Motion To Consider Pending Fed.R.Civ.P. 60(b) and 60(d)(3)/"

---

1. Motion for discovery doc 200-205, 208, 215, 216, 220, 221, 223 236, 244, 250, 251, 289, 290, Petition For Particular FBI Report - #267.

On 5-16-22 Petitioner filed "A Motion To Consider Pending 60(b), (d) Without Certificate of Appealability." Unknown to Petitioner and without notice, the clerk tabled this motion on 5-23-22.

Petitioner filed two supplemental briefs, the first on 7-21-22 and a second on 9-19-22 which told of a relevant circuit split.. On 10-4-22 the 60(b), (d)(3) was dismissed. Because the 5-16-22 motion discussed above had not been first ruled on, petitioner wrote a two page letter to theeclerk argueing the 60(b) dismissal was pre-mature. Instead of responding, the court treated the two page letter as a motion for reconsideration and dismissed it on 11-2-22. The letter specifically said it was not a motion for reconsideration and did not conform to Fed.R.App.P. 27(b) or local rules. However, not having received the dismissal, Petitioner mailed his correct reconsideration motion on 11-7-22. When Petioner did get the notice, Petitioner on 11-9-22 filed a "Motion to rescind order dated 11-2-2022." On 11-14-22 Petitioner filed a motion for reconsideration enbanc. On 12-9-22 the en banc was denied and on 12-20-22 the plain reconsideration was denied.

On 12-20-22 Petitioner was informed by the clerk (by telephone) that the 5-16-22, Motion To Consider 60(b), (d) without a COA) had been tabled as a result of being misconstrued. See Appendix E. In reponse on 1-5-23 Petitioner filed a motion to recall the mandate, which was dismissed on 1-20-23, and the case was closed.

GENERAL STATEMENT OF FACT

It is in no way clear what standard of review the Fifth Circuit applied to the review of Petitioner's Rule 60(b), (d) petition. There is no doubt that the clerk had no authority to dismiss (table) the 5-16-22 motion which asked the court to do a de novo review without any requirement for a Certificate Of Appealability.

Its also clear that treating a two page letter as a reconsideration motion was also an error. Not only did the letter say that it was not a reconsideration motion, but as shown it couldn't have been since it in no way met the requirements of a reconsideration motion. The careless treatment of Petitioner's filings is reflective of the Fifth Circuit's entire dealings with Petitioner's case as shown below.

REASON FOR GRANTING THE WRIT

POINT 1

A. Conflict among the federal courts of appeals, mixed motion review.

The Fifth Circuit's decision not to review Petitioner's "mixed motion"[1] denovo and without a Certificate Of Appealability is directly contrary to the adopted procedure of atleast two other circuits, and conflicts with the Fifth Circuit's own dubious precident. In Spitznas v. Boone, 464 f.3d 1213 (10th Cir. 2006) and United States v. McRae, 793 f.3d 392 (4th Cir. 2015) the courts found that a mixed motion should be evaluated without a COA requirement as a "threshold matter." The Fifth Circuit in Storey v. Lumpkin, 8 f.4th 382 (5th Cir. 2021) seems to agree. Also United States v. Fulton, 780 f.3d 683, 688 (5th Cir. 2015); Wardlow v. Davis, 819 Fed. Appx. 234, 237 (5th Cir. 2020). The Supreme Court has not specifically addressed the issue. See Harbison v. Bell, 556 U.S. 180 (2009).

B. Importance of the question.

When a circuit court is confronted with a motion that has been found to contain both 60(b) and second and successive issues by a district court the circuit court should review the motion to determine if the categorization of the issues is correct. This proceedure will prevent the petitioner from being subjected to the serious AEDPA restrictions pre-maturely.

The facts of this case provide a good example of the results of not having a fixed procedure, and direction from the Supreme Court. The Fifth Circuit is also inconsistent with other panels See Tanksley v. Davis, 2018 U.S. Dist. Lexis 30315 (5th Cir. 2018) Citing Spitznas v. Boone (supra).

DISTRICT COURT CATEGORIZATION

The district court's categorization of Petitioner's 60(b) and (d)(3) issues was arbitrary and incorrect. On page 7 of the district court's order, the court says that Petitioner's 2255 Grounds 2,4,10,11, and 13 were "comprehensively addressed," in the Amended Report and Recomendation (hereinafter recomendation). Citing ECF 300 at 14-21. See Appendix B. p7. Grounds 2,4, and 13 however have never been addressed on their merits by any court in any manner, at any time. This is irrefutable as shown in other Points below. Regarding Petitioner's Rule 60(d)(3) claim, the district court said the claim "in substance [are] challenges to his [petitioner's] criminal proceeding or issues resolved against him on the merits in his habeas proceedings." citing (ECF no. 300 at 22-47) See Point 4 below for the error of this finding. The court does not describe the 60(d)(3) standard and mistakingly calls it a b,3 challenge.

The two issues the court did find were 60(b)(6) issues allegedly qualify because, "the ruling precluded a merits determination ." Appendix B7 par. 2. However, even assuming that Counts 2, 4, and 13 were spcifically addressed, at a minimum they also were determined to be procedurally barred. To dispose of the two issues qualified as 60(b), the court next says, "... [Diehl] however has failed to show that he is entitled to Rule 60(b) relief, because he fails to demonstrate that the procedural bar ruling was in error, or that there is any merit to his claim of widespread prosecutorial misconduct." The court however according to precedent, was required to review the merits of the claim, which it failed to do. In Ruiz v. Quarterman, 504 f.3d 523, 531 (5th Cir. 2007) the court said "Where the denial of relief precludes examination of the full merits of the cause ... even a slight abuse may justify reversal."

60(d)(3) FRAUD CLAIM

The district court categorized Petitioner's Fed.R.Civ.P. 60 (d)(3) fraud on the court claim as a second or successive 2255 claim. Whether or not the facts truely support this categorization wasn't reviewed in any meaningful way by the Fifth Circuit. Other courts are split on how to treat 60(d)(3) issues. See United States v. Williams, 790 f.3d 1059 (10th Cir. 2015) (Treating 60(d)(3) as a second or successive, but remanding for evidence hearing); Fierro v. Johnson, 197 f.3d 147, 153-54 (5th Cir. 1999) (Rule 60(b)(3) may survive AEDPA); Storey v. Lumpkin, 142 S. Ct. 2576 (2022) (Warning Circuit courts not to apply the AEDPA constraints to liberly when prosecurotial misconduct is alleged.) Here extreme fraud on the court is alleged.

Petitioner urges the Supreme Court to define standards to control the review of mixed motions, and this case represents a perfect opportunity to do so.

POINT 2

There is confusion among Circuit courts as to the extent of what is included in Gonzales v. Crosby's 545 U.S. 524, 528 (2005). "... procedural rulings that preclude a merits determination."

In Gonzales the court only names : failure to exhaust, procedural default, or statute of limitations bars. Gonzales, 545 U.S. at n.4 and n.5. Points 3-6 below involve 2255 issues that were all procedurally barred or ignorred completely.

Petitioner prays that the Supreme Court will expound on what 'procedural bars' qualify for a merits review per Fed.A.Civ.P. 60(b)(6), and what qualifies as an extraordinary circumstance. The question is, does repeatedly failing to consider the merits of Petitioner's arguments throughout all proceedings qualify. The points below independantly justify Supreme Court intervention. Points 2 and 4 involve issues upon which circuits are split. Point 5 involves an outlandish disregard for Supreme Court precident governing statutory interpretation, and Point 6, shows that the Fifth Circuit ignorred the principles behind Peugh v. United States.

SECTION 2255 GROUND 2 AND 5

POINT 3

On 2255, Petitioner argued in his Ground 2 and 5 that his trial counsel was ineffective for having no viable legal strategy, and for making several severe legal mistakes. In particular, Petitioner argued that counsel's only trial argument was issue precluded, and had been defeated in every circuit to consider it. Because of these mistakes, a plea was passed over, a stipulation was signed for no reason, and the trial was a farce.

The proper defense, and the one the stipulation was based on involved a simple challenge to the plain language of 18 U.S.C. §2251(a). Section 2251(a)'s third nexus is not triggered by third party transport of THEIR reproductions, which was the only legal finding of the bench trial. Petitioner did not produce : "the videotape or digital video component" used as the trial exhibits. The government produced those exhibits from material they apparently received from the National Center For Missing And Exploited Children, NCMEC. See Trial Trans Day2, p.4:15. Restated, Counsel needed to focus on the "outstanding" section of the stipulation, and object to productions, and third party reproductions as equivelant. See Trial Trans Day2, p.6;19.

EVIDENCE HEARING DENIED

Instead of granting an evidentiary hearing, or conducting any analysis on the Ground 2 and 5 ineffective counsel claims, the habeas court itself misconstrued petitioner's argument by saying

> COURT: "The court does not have jurisdiction over this crime unless the government proves the created images were transported across state lines."
>
> See Amended Report and Recomendation Dkt 270, p.3
>
> Hereinafter "Report."

The government in their reply brief however understood petitioner's argument saying "The statute [2251(a)] never refers to an original visual depiction, but any visual depiction." This question of law would have been an issue of first impression to the Fifth Circuit. Other circuits are split. See United States v. Lively, 852 f.3d 549, (6th Cir. 2017), but see United States

v. Kroeber, 2014 U.S. Dist. Lexis 4722 (M.D. Fl. 2014) Citing United States v. McBurnette, 382 f.app'x 813, 814-815 (11th Cir. 2010). As Lively points out, every circuit (even the Fifth), has found that anyones saving a copy of a visual depiction to disc "produces" per that definition, a new visual depiction.

THE 2255 COURT AND THE 60(b) COURT FOUND GROUND 2 AND 5 Barred

In the Amended Report, the court found that Petitioner's 2255 Ground 2 and 5 were both Procedurally barred, based on the Fifth Circuit's appeal decision. Quoting the Fifth Circuit:

> "The fact that the video's that were created in Texas and found in other states, [together with the witness testimony] supporting the district court's finding is sufficient to satisfy the nexus requirement.

The bracket part is discussed below, but clearly this finding does not address petitioner's ineffective counsel error in any way. The court considers productions, and third party reproductions as if they were the same. This is the exact error that the trial court made.

Petitioner had raised the issue correctly in his appeal brief:

> Petitioners Appeal Brief: " 'such' image (i.e. the one created by appellant) was never found to have been transported in interstate commerce. The one actually produced [by the §2251(a) defendant] is what §2251 specifies. See Page 36-37.

Note also that in appellant's "Ground two For Dismissal" section, he challenges the constitutionality of §2251(a) as applied. The Fifth Circuit made this argument moot when it changed the trial courts special legal finding as discussed below.

Judge Yeakel in the bench trial made the following legal finding, based on his view of the facts:

> TRIAL COURT: "The facts are clear beyond a reasonable doubt that the production of the child pornography occurred within the state of Texas and it appeared in other states and, therefore the court finds that is enough to show that it had been transported in interstate or foreign commerce."

The court's finding was based on the government's own promisses that this would be sufficient evidence. As the transcripts show, the court sought confirmation from them multiple times, before making this specific decision.

The significance of this finding to the government was clear which was that their witness Ken Courtney was not found credible, and was not going to be relied on. On appeal it was this fact the government sought to get changed.

GOVERNMENT APPEAL BRIEF

Instead of addressing petitioner's appeal arguments, the government on appeal sought to get the trial court's factual and legal decision changed. [1]

> GOVERNMENT: "Courtney testified ... Diehl showed him some Jane Doe video images contained on a hard drive." See Page 40.

Also

> "Courtney also testified Diehl ... Used IRC [Internet Relay chat]" See Page 43

With regard to Petitioner's argument that reproduction of third parties dont trigger §2251(a)'s third nexus clause, the government argued:

> GOVERNMENT: "[The Fifth Circuit holds] the government need not prove that the defendant who is charged [under 2251] ... also be the same person who transported it in interstate commerce" citing United States v. Terrell, 700 F.3d 755. 761. [2]

As Lively (supra) shows however, Terrell is completely inacplicable to the issue of what §2251(a)'s "such visual depiction" includes.

---

1. Credibility decisions are the providence of the trial court. See United States v. Gypsum Co., 333 U.S. 364, 395 (1948); United States v. Taylor, 956 f.2d 572, 576 (6th Cir. 1992) ("finding of fact anchored in credibility assessments are generally not subject to reversal upon repelant review.")

FIFTH CIRCUIT APPEAL DECISION

Using United States v. Riddle, 249 f.3d 529, 536 (6th Cir. 2001), a case that has no considerations for special findings made in bench trials (per Fed.R.Cr.P. 23(c)), the Fifth Circuit used the government recomended inferences to completely change the trial court's findings[1]. As a result Petitioner's appeal arguments became moot, and were not considered. This included the constructive amendment argument - which wasn't considered de novo, the constitutional argument, and the challenge to §2251(a)'s plain language. See United States v. Johnson, 496 f.2d 1131 (5th Cir. 1974) citing Haywood v. United States, 393 f.2d 780 (5th Cir. 1968) (finding a court's findings of fact essential to appellant review, and where the findings were not clear, the case should be remanded.) In United States v. Soccocia, 58 f.3d 754, 785 (1st Cir. 1995) the court found that findings of fact could be oral, as they were in Petitioer's bench trial. Also see United States v. Truss, 70 M.J. 545 (2011) (same); United States v. Lockhart, 382 f.3d 447 (4th Cir. 2004) N.2 (District court made finding without Fed.R.Cr.P. Rule 23(c) request.); United States v. Taylor, 2020 U.S. Dist. Lexis 220735 (8th Cir. 2020) (finding of fact can be oral);

Although the trial court's factual and legal findings were brief, they were "sufficiently comprehensive and pertinent to the issue to provide a basis for the decision." United States v. Johnson, 496 f.2d 1131, n.7 (5th Cir. 1974) citing Golf King Shrimp Company v. Wirtz, 407 f.2d 508, 515 (5TH 1990).(discussing corresponding Fed.R.Civ.P. 52).

Not considering the trial court's finding here, "Perpetuat[ed] an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent element of the offense," Wilson v. United States, 250 f.2d 312 (9th Cir. 1957). Moreover, not only are special findings criticle for appellant review, but, "are an important factor in the proper application of the doctrine of res judicata and estoppel." B.F.

1. This page is equally applicable to the Point 4 fraud on the court section below

2255 GROUND 13 - 4TH AMENDMENT VIOLATION
POINT 3

In the Fifth Circuit's improper, generalized sufficiency of evidence finding[1], the court relied on illegally sized hard drives that were never admitted as evidence.to find there was interstate commerce. See Lockhart v. Nelson, 488 US 33, 42 (1988) (only admitted evidence can be used in a sufficiency of evidence review). Since the trial court specifically did not rely on the hard drives, (See Recomendation page 18 "The hard drive was not offered into evidence at trial), Petitioner had no cause to challenge the illegal seizure on appeal. After the Fifth Circuit relied on the hard drive on appeal however, Petitioner challenged the Fourth Amendment Violation in his habeas corpus petition as Ground 13. This challenge to the illegal seizure of petitioner's computers was ignorred entirely in the review, making this a Rule 60(b)(6) integrity violation. At pretrial, Judge Yeakel told counsel to object if the government trid to use the equipment in their case in chief. See Gentry v. Sevier, 597 f.3d 838, 851-52 (7th Cir. 2010) (Ineffective Counsel claim can be challenged in habeas where caunsel failed to pursue meritorious Fourth Amendment claim); Joshua v. Dewitt, 341 f.3d 430, 449-50 (5th Cir. 2002) (same); Kimmelman v. Morrison, 477 U.S. 365, 382-83 (1986) (same).

This is an example of an improper procedural bar, and this was a meritorious claim. Petitioner's 60(d)(3) fraud claim is also related. See Point 4 below.

Gonzales requires procedural bar analysis to be narrowly construed, even so ignorring 2255 Grounds completely would qualify.

1. Improper because as demonstrated the trial court entered a special and narrow legal finding of law and fact, despite no Fed. R.Cr.P. 23(c) request, and petitioner challenged the plain language of 2251(a), and its constitutionality only on appeal. Finally, the motion for judgment of aquital at the bench trial wasn't saved and additional testimony was brought fourth.

2255 GROUND 4 (2251(a) - 2008 applied ex post facto) WAS IGNORRED

POINT 3

Petitioner's 2255 Ground 4, which was also ignorred, becomes relevant in the event the Supreme Court fails to reverse to correct the aforementioned errors. In particular, if the Fifth Circuit's appeal decision is allowed to procedurally bar Petitioners 2255 Nexus arguments, then Ground 4 becomes relevant.

The post 2008 version of §2251(a) greatly reduced the evidence requirements of 18 U.S.C. §2251(a). Just 'use of a facility of interstate commerce' became sufficient, post 2008. The definition of visual depiction (18 U.S.C. §2256(5) was also greatly expanded to include data - divorced from the media it existed on.

Petitioner submitted a supplemental brief highlighting the fact that there is a circuit split on the effects of these amended changes to the law. The Fifth Circuit has failed to weigh in on these changes. See United States v. Haas, 37 f.4th 1256 (7th Cir. 2022) (Discussing the issue and the split).

Counsel was ineffective for not objecting to the post 2008 language being used throughout the trial. Along with trial counsel's other numerous errors, this proved devastating.

The Fifth Circuit changed the trial court's finding to infer that petitioner used Internet Relay Chat to transport visual depictions in interstate commerce. This new theory of liability left Petitioner in an indefensible position, since the trial court itself did not infer such a thing.

Because 2255 Ground 4 was ignorred violating Fed.R.Civ.P. 60(b)(6), Petitioner has been left in an indefensible position. Petitioner prays the Supreme Court will reverse this conviction because 1) the trial court's special finding was improperly altered by the Fifth Circuit, and 2) The proper version of §2251(a) does not give the federal government jurisdiction by just 'use of a facility of interstate commerce' and data was not an enumerated type of visual depiction in the pre-2008 version of §2251(a).

RULE 60(d)(3) FRAUD ON THE COURT

POINT 4

The district court dismissed Petitionr's fraud on the court claim by saying:

> COURT: "Diehl's remaiing allegations which he characterizes as Rule 60(b) are in substance challenges to his criminal proceedings, or issues resolved against him on the merits in his habeas proceeding .... Accordingly they are construed as second or successive section 2255 claims. Report P. 8.

Petitioner's 60(d)(3) fraud claims are based on:

1) The government manufactured the federal nexus through fraud and deceit.
2) The fraud involved the knowing misrepresentation of the trial court's finding of fact and law both on appeal and §2255.
3) The fraud involved preventing Petitioner from knowing what equipment the government seized, and importantly how that equipment was obtained.
4) The fraud involved witholding exculpatory information about the seizure.
5) The fraud involved conspiring with Petitioner's trial attorney who had no defense at trial, and purposely did not challenge the Fourth Amendment violation at trial.

"CHALLENGES TO CRIMINAL PROCEEDING"

Petitioner's 60(d)(3) fraud claim is not a "challenge to the criminal proceeding." The harm caused from the fraud did not even occur until the Fifth Circuit, relying on the government's fraud, altered the trial court's findings. This left petitioner in a position of being unable to defend the case. On appeal the government fabricated evidence when they relied on illegally seized computer hard drives, that they knew to be esculpatory. See United States v. Williams, 16 F. Supp. 3d 1301 (10th Cir. 2014) (" Fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court.") Also see United States v. Kvok, 671 f.3d 931 (10th Cir. 2011) citing United

States v. Coates, 949 f.2d 104, 106 (4th Cir. 1991) ("Manufactured jurisdiction cannot form the basis for a federal prosecution"); United States v. Archer, 486 f.2d 670, 681 (2d Cir. 1973) (same);

"ISSUES RESOLVED AGAINST PETITIONER ON 2255"

The above mentioned fraud claims were never resolved on 2255. As shown earlier for example 2255 Count 13 involving the illegal seazure was ignorred by the 2255 court. An evidence hearing was denied without consideration for the Fourth Amendment violation. See Doc 270 Page 22. Petitioner has also shown 2255 Grounds 2 and 4 were not considered, or improperly procedurally barred.

Finally, in the prosecutorial misconduct section of the Amended Report and Recommendation, the magistrate says himself that Petitioner's prosecutorial misconduct issues were challenged under the cummulative error doctrine, where "relief may be obtained only when constitutional errors so fatally infect the trial that they violate the trial's fundamental fairness" Page 21. See Petitioner's 2255 Fact U, page 48 "Although Judge Yeakel specifically did not, the Fifth Circuit upheld Diehl's conviction based on the testimony of Ken Courtney seeing charged counts on a hard drive...." This was not considered under rules and precident controlling Rule 60 (d)(3). And, Petitioner wasn't harmed at trial.

FOURTH AND FIFTH AMENDMENT VIOLATION

The Fifth and Fourth Amendment violations span the entire case from the FBI's actions following the denial of their search warrant, until recently when they continue through FOIA denials, to disclose what they seized, how they seized it, and what they decrypted, and whether it was esculpatory. At every juncture where the government would have been forced to reveal these details, something happened to prevent it. 1) A forfeiture count wasn't requested from the Grand Jury - 3 times 2) At pre-trial the government avoided a Fourth

Amendment hearing by saying they would not use seazed equipment in their case in chief. 3) When Petitioner requested to inspect the equipment, the government demanded a password. They would have been required to disclose what they had, had not Petitioner refused to be blackmailed. 4) In their forfeiture request, which was granted sua sponta (without a forfeiture count in the indictment) they requested "other forms of media" to hide what they had, and how they got it. 5) Finally, because there was no notice of seizure petitioner's sentencing attorney had no reason to challenge it by raising a Fed.R.Cr.P. 32.2(a) request to inspect. Notice that in the government's appeal brief they argue the seized equipment had charged counts. See Page 30. This means something was decrypted. The United States has violated Brady v. Maryland,373 US 83 (1963).

FRAUD CONTINUED ON 2255

The government fraud continued on the habeas court when it's response brief it said:

> GOVERNMENT: "Movant disagrees with the district court's assessment of witness Courtney's testimony and credibility and is grasping at straws to revisit the issue." Response p 23.

The district court specifically said what part of Courtney's testimony it found credibile, which was nothing more than the visual depictions were available on the Internet. See Trial Trans 157:17. [1] However, since that was already in the stipulation, on Day 2 of the trial, Courtney was irrelevant. The court clearly said "it defies common sense to say" reproductions being found outside of Texas wouldn't be sufficient evidence. Day 2 Trial Trans 7:4. Additionally, the court said that it takes nothing more, in other words the court found it constitutional as applied. The government's above statement about Courtney's credibility is fraud on the court right under the court's nose. It is nothing more than an attempt to rewrite the court's original finding. Worse, during three different FBI interviews, Courtney never said he saw a charged count on Petitioer's computer, At trial he added this statement, which the government then relied on for their fraudulent 4th amendment actions.

The fact that the government misrepresented the trial court's actual finding of fact and law both on appeal, and Habeas to rely on hard drives travelling in interstate commerce has been demonstrated.[1] The fraud however did not become ripe until after Petitioner submitted his 2255 on 7-29-16 (Doc 209), when the government submitted a reply to an independant motion (Appendix H1-h4). In their reply, and for the first time, the government revealed that they had a file listing. (Item 0). Unfortunately they were successful in preventing its disclosure. See. H-4. On 9-10-2021 the government hid behind FOIA exemptions to conceal the details of a 4900 page file listing. See Appendix F3, E1. See Scott v. United States, 81 F. Supp. 3d 1326 (11th Cir. 2015); Leal v. Quarterman, 573 f.3d 214, 222 (5th Cir. 2009)(Only defects that were wholly non-existant at the time Petitioner filed his motion to vacate are Rule 60(b)(3), and not successive). Also Garcia v. Quarterman, 573 f.3d 214 (5th cir 2009).

Concealing this file listing while also relying on the illegally seized, non-evidence hard drive required Machiavelian cunning, and is a Rule 60(d)(3) violation. This egregious conduct amounts to a material subversion of the legal process, because in addition to the above facts, the seazed hard drives couldn't have produced the file listings, because the encryption scheme is known to be unbreakable, and its a boot strap drive, with far less than 4900 files. The listing likely came from a device provided to trial counsel, and the government is concealing this treathory. This factual predicate is now ripe.

There is clear and convincing evidence of fraud which has undoubtably prevented the moving party from fully and fairly presenting his case. Spike v. Louisianna, 2020 U.S. Dist. Lexis 1455 (5th Cir. 2022). Petitioner has demonstrated an unconscionable scheme to manufacture an element of the §2251(a) offense, and withold evidence. Also See Rozier v. Ford Motor co., 573 f.2d 1332 (5th Cir. 1978); Mooney v. Holohan, 294 U.S. 103, 112 (1935); Pyle v. Kansas, 317 U.S. 213 (1942); Napue v. Illinois, 360 U.S. 264, 269 (1959).

---

1. See Trial Trans p. 168 Gov: "... Its all or nothing..." and Page 175 agreeing to a limitted finding before actual finding was made.

SECTION 2255 GROUND ONE STATUTE OF LIMITATIONS

POINT 5

In Petitioner's Section 2255 Ground One he challenged the applicability of the statute of limitations at 18 U.S.C. §3283 to his charges at 18 U.S.C. §2251(a). Petitioner requested an evidentiary hearing to determine why his counsel forfeited the defense during a pre-trial hearing. [1] In the district court's adopted Amended Report and Recomendation however, the court found that the argument was procedurally barred on both the actual argument, and seperately allegations of corruption. Petitioner objected to the Report, but received no reply to the objections. Petitioner then appealed to the Fifth Circuit and Supreme Court (cert denied).

RULE 60(b) RELATED FACTS

In Petitioner's Fed.R.Civ.P. 60(b) motion to the district court the limitation issue was again challenged. Petitioner argued ~~argued~~ that no court had ever truely reached the merits of the issues because of an erroneos procedural decision. See Gonzalex v. Crosby, 545 U.S. 524, 528 (2005).

In the district courts Rule 60(b) denial order, the court found that the issues were true 60(b) issues, but that there was no merit to either the corruption allegations, or the underlying issue itself. Petitioner requested a Certificate of Appealability then from the Fifth Circuit, who denied the motion without any comment..

ARGUMENT

A. PROCEDURAL BAR

To deny an evidence hearing into the corruption allegations, the district court relied on a motion filed at the Fifth Circuit prior to Petitioner's actual appeal brief, titled "Memorandun

1. A Rule governing 2255 Rule 6 request for discovery was ignorred

In support of Motion For Independant Investigation Of Corruption On the Part Of The United States And Steve Orr Trial Counsel." The motion was submitted on 6-20-2014, and dismissed on 1-8-2015.

RECORD WAS NOT RIPE ON APPEAL

The pre appeal motion should not be used to procedurally bar Petitioner's ineffective counsel claim concerning counsel's failure to adequately research the issue. Per United States v. Roselex-Orosco, 8 F.3d 198, 199 (5th Cir. 1993), and United States v. Aquilar , 503 f.3d 431 (5th Cir. 2007), ineffective counsel claims can't be considered on appeal unless the record is fully developed. Also see Arrendo v. University, 950 f.3d 294, 297 (5th Cir. 2020) (Denying a pre-appeal investigation motion because it wasn't first introduced in the district court, and was therefore not part of the record, citing Tradewinds Enuytl. Restoration, Inc. v. St. Tmman Park LLc, 578 f.3d 255, 262 (5th Cir. 2009) (In light of factual determinations necessary to resolve Tradewinds new argument we decline to consider it [on apeal]).") The Supreme Court agrees, See United States v. McDuff, 639 Fed. Appx. 978, 981 (5th Cir. 2016) Citing Musachio v. United States, 136 S. Ct. 709 (2016) (Limitations can not be raised for the first time on appeal because there is not record.) But see the consequences of not raising it in Weingarten v. United States, 865 f.3d 48, 59 (2nd Cir. 2017) (court did not give full consideration to limitations issue on 2255 because it wasn't raised first on direct appeal.)
See the following cases where the court refused to hear the issue on appeal: United States v. Botsviyuk, 552 Fed. Appx. 198, 182 (3rd Cir. 2013); United States v. Hirst, 2022 U.S. Dist. Lexis 71034 , Lex 18 (2d Cir. 2022).

In petitioner's 2255 Ground 1, he argued that his trial counsel could never have justified not challenging the 10 year old charges at pre-trial without conducting serious research into the issue . The limitation defense is of course an

affirmative defense. See United States v. Miller, 911 F.3d 638 (1st Cir. 2018)

> Court: "so the next question that must be asked is : why did the defendant's trial counsel refrain from asserting such a defense .. We are left to guess at trial counsel's thought processes, expecially since we are unable to discern any strategic or tactical reason for spuring the defense." i.d. 646.

See Weingarten v. United States, 865 F.3d 48, 53,(2d Cir. 2017) (Attorney explained his strategy).

Counsel's now available affidavit makes no attempt to explain his strategy. He was hired based on his commitment to challenge the limitation. Section 18 U.S.C. §3283 is anything but clear that it would include coverage of Child Pornography offenses included in Title 18 under Chapter 110. Furthermore, there was no negative precident in 2010 in the Fifth Circuit,

GOVERNMENT MISREPRESENTATIONS

A major element of Petitioner's fraud claims in the pre-appeal motion was that the United States argument's in prior cases relied on misrepresentations of factual issues. The fraudulent statements are aimed at creating a false dependency on the definition of sexual abuse at 18 U.S.C. §3509(a)(8) - sexual abuse, which is a term used in the statute of limitations at 18 U.S.C. §3283.

These statements include that (1) the first sentence of §3509 (k) was relocated to §3283 in 1994 because a general "consolidation" of statutes of limitations had taken place. The real reason it was relocated however was because it was mislocated from the start. Statutes of limitations belong in Chapter 213 of Title 18 not Chapter 223. (2) the government also argued that §3509(a)(8) is relevant to §3283 because - numerous amendments had been made to "expand" §3283. The truth is however that only one new offense category has been added to §3283 (kidnapping) which isn't defined in §3509 at all. And neither is "physical abuse" defined in §3509(a).

(3) Finally, the government has consistently argued that prior to 1994 the language of §3509(k) and §3283 wasexactly the same. The truth is however that §3509(k) was the first sentence of a civil stay law. What the relationship is between that stay law, and a criminal limitation can't be determined, but it seems to have caused the misplacement of the limitation, not any dependancy on the sexual abuse definitions. This is clear by the fact CONGRESS CHOSE NOT TO REFERENCE THEM.

On appeal the Fifth Circuit uncritically adopted these same arguments and relied on the definitions to uphold Petitioenr's conviction. There were other allegations in the pre-appeal motion to investigate (dismissed as wholly speculative). One allegation stated that to avoid §3283 and instead rely on 18 U.S.C. §3299, the government has, in other circuits, altered the actual offense dates. Petitioner provided concrete proof and cited the judges comments in the relevant cases. The allegations were anything but speculative. See United States v. Coutentos, 651 F.3d 809, 816-17 (8th Cir..2011).

Petitioner argues here that the United States has at a minimal an obligation to be honest in their representations to circuit courts.

THE FIFTH CIRCUIT'S FINDING IS INCOMPLETE

On appeal, the merits of petitioner's arguments were not fully evaluated, and the Fifth Circuit's finding is incomplete. The Fifth Circuit finding states:

> Court: "under the definitions in §3509(a), using children to engage in sexually explicit conduct including 'exploitation' in the form of child pornography, constitutes 'sexual abuse' of a child, 18 U.S.C. §3509(a)(6), (a)(8).
> [United States v. Diehl, 775 F.3d 714]

However, the definitions at §3509(a) are mutually exclusive, and §3509(a)(8) includes "other forms of sexual exploitation." Including exploitation via the sexual abuse definition makes exploitation

superfluous in the definitions of child, and child abuse at §3509 (a)(2), and (3). See TRW v. Andrews, 534 US 19 (2001) (" 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.") This cardinal principle was flagrantly disregarded, along with other rules of statutory interpretation in the Fifth Circuits opion regarding the statute of limitations. Supreme court precident was also disregarded as is shown below.

DISTRICT COURT FOUND THIS 60(b) ISSUE AS A TRUE 60(b) ISSUE

In its 60(b) denial order, the district court treated the statute of limitation challenge as a true 60(b)(6) issue, but said it was procedurally barred as follows:

> Court : "Diehl, however, has failed to demonstrate that the procedural ruling was in error, or that there is any merit to his claim of widespread prosecutorial misconduct. See Page 7.

There are two major problems with the above conclusion. First, Petitioner's trial counsel was accused of fraud concerning this issue, and facts to support this were presented in Petitioner's 2255, and Fed.R.Supp.2255 Rule 6 discovery motion.[1] Second, on 60(b) review, the district court failed to review the merits of the claim. See Wardlow v. Davis, 819 Fed. Appx. 234, 234 ,237 (5th Cir. 2020) citing Gonzalez v. Crosby, 545 U.S. at 532 n.4; Ruiz v. Quarterman, 504 f.3d 523, 532 (5th Cir. 2007) (" Where denial of relief precludes examination of the full merits of the cause... even a slight abuse may justify reversal.") Also, the denial of a merit analysis based on the dismissal of a pre-appeal motion to investigate, was anything but a "plain procedural bar." See Slack v. McDaniel, 146 LED2D 542. In United States v. Vialva, 904 f.3d 356 (5th Cir. 2018) the court said that motions

1. On 1-27-2018 the Rule 6 Petition For Discovery (Doc 240) was filed. The court itself failed to rule on the Petition.

can legitimately ask a court to reevaluate already decided claims as long as the motion credibly alleges a non-merits defect in the prior habeas proceeding. The Vialva court further went on to evaluate the merits of his claims.

In trial counsel's affidavit on 2255, he says only that "I researched and concluded that the statute applicable to what Mr. Diehl was accused of had not expired". Steve Orr affidavit P.1-2.

PROCEDURAL BAR SUMMARY

Rule 60(b)(6) applies to this statute of limitations issue because the procedural bar was in error, and the merits of the underlying claim were improperly barred by a pre-appeal motion to investigate's denial. An evidence hearing, where trial counsel can explain his strategy is necessary. See Clark v. Blackburn, 619 F.2d 431, 432 (5th Cir. 1980) ("If the district court cannot reolve the ineffective counsel issue without examing evidence beyond the record, it must hold a hearing."). See Miller (supra).

There are other fraud allegations in Petitioner's 60(b), 60(d)(3) motion that involve the actions of trial counsel. There are very serious allegations, The district courts 60(b) disposition of the motion however treats those allegations as second or succeeding actions, thereby breaking these two issues apart. See above for the Fraud allegations per 60(d)(3)..

The final reason that this issue should be remanded to the district court for further hearings is because the Fifth Circuit's finding on the relevance of 18 U.S.C. §3283 to petitioner's charges is fatally flawed, violates well established Supreme Court precident, and in general violates statutory interpretation doctrine as descibed below. See Pepper v. United States, 179 LED2D 196 (2010) (Holding collateral Estoppell doesn't apply if the court is convinced that its prior decision would work a manifest injustice, citing Agostini v. Felton, 521 US 203, 236 (1997).

SUPREME COURT PRECIDENT WAS IGNORRED

I. REPOSE

The Fifth Circuit's interpretation of 18 U.S.C. §3283 violates Supreme Court Precident, and 18 U.S.C. §3282(b). Section 3283 does not include exploitation offenses, and that term was removed from proposals. See H.R. 3958 1990, and S.1923 Nov 6, 1989. Statute of limitations are required to clearly indicate what offenses they apply to, and repose rests with the defendant. See United States v. McElvain, 272 US 633 (1926), Toussie v. United States, 397 U.S. 112, 114-15 (1970).

Several judges have been leary of following this age old precident. See comments by Judge Nathan in United States v. Maxwell, 2022 U.S. Dist. Lexis 61718 (S.D. NY) (harm to children "outweighs defendant's interest in repose.") This same shunning of Supreme Court precident appears to have occurred in Petitioner's case.

II. PLAIN LANGUAGE

The Fifth Circuit defied Supreme court precident by failing to interpret the plain language of §3283. Instead, the court said only, "the plain language of the statutory definitions contradict Diehl's assertion ....", Diehl, 775 f.3d 714.

It is the plain language of the statute that controls, not unreferenced definitions. See United States v. James, 478 US 597, 604 (1987); Korman Assoc Inc. v. United States, 527 f.3d 443 (5th Cir. 2002) ("Courts are authorized to deviate from the literal language of the statute if the plain language ... would lead to absurd results or defeat the intent of congress.") But the Fifth Circuit's solution does both. Sexual or physical abuse is a term of art, not two terms, and kidnapping isn't defined at §3509(a).

Congress chose not to reference §3509(a) from §3283 after one technical correction, and two additional amendments. See 18 U.S.C. §2255 in contrast which does rely on the child abuse definitions ((a)(3) - (a)(9), (11)). Most proposals targetted the limitation at Title 18 Chapter 213 from the start.with no dependance on definitions.

Section §3283's must be fully considered, and no part made insignificant, "a court should compare all parts of a statute ... to ascertain the intention of the legislature", United States v. Freeman, 11 LED 724; "Courts have a duty to give effect if possible to every clause or word of a statute," Crocker v. Naulent SOLS L.L.C., 941 f.3d 206 (5th Cir. 2019); Montclair v. Ramsdell, 107 US 147, 152 (1883); C orley v. United States, 556 US 303, 314 (2009). The Fifth Circuit failed to consider, physical abuse, kidnapping , child, as well as "offense involving," and "No other statute of limitations shall preclude prosecution...."

Finally, §3283 was a new limitation as of 1994 because it was a part of a conforming repeal. See Hughes Aircraft Co v. Jackobson, 525 US 432, 438 (1999) ("The starting point in discerning congressional intent is the existing, and not the predecessor statute.")

III. IN PARI MATERIA

The doctrine of in pari materia (on the same subject) would have applied to show that the Child Abuse Definitions on which the Fifth Circuit's opinion relies have nothing to do with the satatue of limitations at §3283. The definitions apply to Federal Tort law claims. See 18 U.S.C. §2255 and 34 U.S.C. 20431. Civil and Criminal definitions often differ, Ibara v. Holder, 736 f.3d 903, 911 (10th Cir. 2013). Section 3283 and the definitions are different in purpose, scope, and sanctions. Federal Trade commission v. A.P.W. Paper Co., 328 US 193 (1946).

IV. NO TERM MAY BE MADE INSIGNIFICANT

If the §3509(a) definitions are relevant to §3283, then they must act in harmony. This means that the apparent incompatibility of the child and child abuse definitions must be explained, and the definition of sex crime at §3509(a)(10) must be accounted for.

With regard to the sex crime definition see the Senate proposal dated July 11, 1990 of the VCAA.

> "The limitation of time within which a prosecution must be commenced for a sex crime involving a child victim regardless whether the crime involved force or resulted in serious physical injury or death is 5 years after the child reaches 18." Page 16963.

Sex crime was in turn defined at proposed Rule 52.1(a)(10) "means an act of sexual abuse that is a criminal act." p. 16961. This definition left it up to some other entity to define criminal act. Note also it was a crime of physical abuse ect. that the limitation applied to, and exploitation was removed prior to enactment.

The reference to force and sex crime leads directly to the 1986 Sexual Abuse Act where the limitation was initially first suggested.[1] See remarks by Victoria Toensig, Deputy Assistant Attorney General,: "Section 2031 and 2031 of Title 18 ... prohibit only rape and statutory rape; 18 U.S.C. 113(a) prohibits assault with intent to commit rape. Aside from prostitution offenses, these are virtually the only federal statutes that describe and punish sexual crimes. P. 95.

Sexual abuse was also defined. See remarks by Peter W. Rodina J.R., Chairman, Committee on Judiciary, "H.R. 4745 repeals the existing federal rape statutes and creates a new chapter 109A that comprehensively defines sexual abuse offenses." Page 21. There is in pari materia between the 1986 SAA and the limitation enacted in the Victim Of Child Abuse Act of 1990 (VCCA).

---

1. Congressional Record Proceedings and Debates of 108th congress First Session, April 10, 2003 Vol 148 No58,
And Sexual Abuse Act of 1986 Report 99-594, 99th Congress, 2d Session, House.

In the 2003 Protect Act the targeted offenses were once again described as sex crimes. See Congressional record proceedings and debates of the 108th congress first session, April 10, 2003 Vol 148 No 58.Senator Orrin Hatch: "[The Protect Act] removes the statute of limitations for sex crimes. This provision will be particularly helpful in cases where there is old DNA evidence, but still no subject. p. 5138. Senators Grassley and Leahy also used sex crimes to describe the offenses covered by §3283. pages 5149 and 5138. See United States v. Bartlett, 235 US 72 (1914) (" Where the same word [sex crime] is used by a legislative body in a different portion of an act, or in different acts in Pari Materia , it will be understood that the legislature intended to use the same word in the same sense throughout the act, or throughout several acts.") Sex crime is synonomous with the term of art Sexual or physical abuse.

An important observation concerning Senator Hatches remarks is that the DNA exception at 18 U.S.C. §3282(b) applies only to Chapter 109A offenses despite strong objections from the Justice Department's legislative review staff.*

The Fifth Circuit errored in not interpreting the plain language of §3283, and not considering the relationship of the §3509(a) definitions to each other. See Deal v. United States,[1] "a fundamental principle of statutory construction [is[that the meaning of a word cannot be determined in isolatoin, but must be drawn from the context in which it it used.". Sexual abuse simply can not be interpreted in isolation.

V. "No Other Statute Of Limitations Shall Preclude Prosecution

The Fifth Circuit also failed to interpret the plain language section of §3283 that superceeds other limitations. This particular language has stymied other courts. See United States v. Piette, 2022 U.S. App. 23004 (10th Cir. 2022) (Observing that if §3283 had been meant to superceed §3282, it would have said so. citing 18

‡. Deal 58 U.S. 129 (1993)
*. Cong Rec Senate S. 151 April 10, 2003 Section 202 p.54

U.S.C. §1091(p) and §3286(a). The Piette court doesn't seem to consider that when assimilating state offenses, state statute of limitations may also need to be superceeded. See United States v. Johnson, 699 F. Supp. 226 (N.D. Cal, 1998) (Superceeding state limitations.) The 1986 SAA discussed the need to assimilate Incest and other state crimes.

VI." Any Offense Involving"

The Fifth Circuit also failed to give consideration to the "offense involving" section of §3283's plain language. In fact they misinterpreted Petitioner's argument who did not argue §3283 only applies where a sex act of physical contact occurred. Petitioner argued correctly that sexual exploitation, and sexual abuse are seperate crimes, and 18 U.S.C. §2251 has no essential element of sexual abuse at all.

Other circuits have attempted to decipher "offense involving." These circuits have sought to distinquish the finding of the Supreme Court in Bridges v. United States, 346 U.S. 209 (1953) (finding offense involving fraud, requires fraud as an essential element of the charged offense.) In United States v. Schneider, 801 f.3d 186, 196-97 (3rd Cir. 2015), the court tried to make such a distinction by saying the Wartime Suspention Act which Bridges applied to had a "propriety of conservatism", but that §3283 and the VCAA didn't. This is false as shown above. Section 3283 applies where the United States has jurisdiction of sexual abuse. Schneider relies on a United States v. Dodge, 599 f.3d 1347, and 1352(11th Cir. 2010) a case that has nothing to do with statutes of limitations in general, or §3283 in particular. Dodge considers SORNA.

Also see Nighawan v. Holder, 557 U.S. 29, 33-34 (2009) which demonstrates statutory language that requires a conduct analysis, and Mathis v. United States, 195 L.Ed. 2d 604 (2016) (trying to

formalize when 'offense involving' should be considered against the actual conduct that takes place while violating a statute). See United States v. Descamps, 570 U.S. 254, 268 (2013) ("No one suggested that a particular crime might sometimes count depending on facts"). See United States v. Davis, 1390 S.Ct. 2319 (2019) (" If anything the statutes use of the present and not past tense would lead itself to a categorical approach.") Section 3283 is worded involving which is present tense.

LIMITATION SUMMARY

The Fifth Circuit has clearly violated Supreme Court precident on statutory construction in arriving at its incomplete and dubious section 3283 conclusion. Sexual Exploitation was removed from proposals prior to the enactment of the limitation. It in fact appears that §3283 is a delayed enactment of the limitation first proposed, and definitly needed 1986 Sexual Abuse Act. This means that 18 U.S.C. §3299 was the first statute of limitation to include Chapter 110 offenses. The fact Congress refused to make §3299 retroactive speaks volumes to this logical conclusion. The fact the DNA exception,at §3282(b) is limited to Chapter 109A also supports the conclusion.

Unless it is true, "harm to children outweighs defendant's interest in repose," the Supreme Court should hear this Petition and uphold the rules of statutory construction, which have been so badly defiled in this case.

Finally, in Petitioner's case he was given a 30 year upward variance on the decade old charges where the Guildline max was around 20 years. The cases used to justify the sentence were all post Booker, and had Guildline max. These individuals were in no way "similarly situated," per 18 U.S.C. §3553.

EX POST FACTO SENTENCE

POINT 6

In Petitioner's 2255 Ground 8, he argued that his sentence, which included a 30 variance (without notice), violated the ex post fact clause of the constitution. Petitioner also argued that Peugh v. United States, 569 U.S. 530 (2013) would influed the proper consideration of the issue. Because of the timing of Peugh Petitioner was unable to brief it on appeal.

On page 13 of the 2255 Report and Recomendatoin (Amended), the court found that the issue was procedurally barred, because, "The Fifth Circuit issued its opinion [on direct appeal] after the Peugh case on which Diehl relies ...."

In Petitioner's subsequent 60(b), (d)(3) motion, he argued that although on appeal the Fifth Circuit did acknowlege the issue, there was no indication that Peugh was considered. In the court's dismissal order however, it found that although the issue was a 60(b)(6) issue, Petitioner had failed to show the procedural bar in the Report was in error, or that there was merit to the issue. See Page 7 of the 60(b) denial.

In Petitioner's 60(b), (d)(3) appeal, he disputed the validity of the procedural bar. Petitioner pointed out that if anything, the Fifth Circuit's appeal finding demonstrated that they misconstrued Petitionr's ex post facto argument entirely. On appeal, the argument was raised under the substantive reasonablness section of his brief, but the Fifth Circuit interpreted the argument as a procedural argument. They said, "[Diehl] argues that the ex post principles required the district court to impose a sentence within the Guidelines range." p.12, 14.

The Fifth Circuit's COA denial of the 60(b), (d)(3) makes this observation: "We will not consider Diehl's claim raised for the first time in his COA motion that his ex post facto claim was erroneously construed as a procedural argument instead of a substantive argument." Citing Black v. Davis, 902 f.3d 541, 545 (5th Cir. 2018).

In addition to the court's obvious inconsistencies regarding what can be brought on appeal in the first instance (Like petitioner's statute of limitations, and jurisdictional arguments), the court never addresses the argument that Peugh v. United States wasn't addressed by the Fifth Circuit on appeal. Petitioner couldn't have even addressed Peugh in his brief on appeal, because the Fifth Circuit refused to stay his appeal pending the Supreme Court's opinion.

The Fifth Circuit never determined whether the changes to the sentencing laws that took place between 1999 when the crime occurred, and 2010 when the arrest took place presented a "sufficient risk" of affecting Petitioner from receiving "fundamental justice."

As petitioner's Judgement and Committment shows, the 30 year upward variance was based on a single fact[1] which was the allegation that the video was found in 2500 cases. The 1999 Guidelines had no enhancement for that factor, the 2004 Guidelines however trough 2g2.1(b)(2) assigned 2 points to distribution. The pre Booker Guidelines were much more binding on courts, and departures were governed by stricker rules. The delayed arrest led directly to a sentence that statistics show, would have been highly unlikely if petitioner would have been arrested in a timely fashion.

In Petitioner's case the court relied almost entirely on the statutory range, to discount the Guidelines. This, despite the fact the child pornography Guidelines were hijacked by Congress.

> COURT: "[The] Guidelines calculation is non-productive when the statutory range is available past Fanfare,Kimbrough, and Booker."

The court never said it had a disagreement with the Guidelines, and infact ignorred the policy disagreement challenge raised by Petitioner's attorney. In fact the Guidelines according to the court did not even influence the sentence.

> COURT: "The sentence I would impose today is the sentence I would inpose had we not ever had a discussion of the Guidelines, and if we did not have the Guidelines at all. Sent Trans p.108.

Average sentences in 1999 were 240 months, which is exactly where the Guideline calculation fell.

---

1. Numnber of victims, and conduct were directly accounted for in calculation.

The 60(b), (d)(3) procedural bar is in error. No court has given any consideration to the affect of Peugh v. United States. The Fifth Circuit is obviously reluctant to do so now, since Petitioner's case has been repeatedly used as precident for extreme variances. The principles in Peugh are broader than just correctly calculating a Guideline score.

CONCLUSION

Petitioner prays that the Supreme court will grant certiorari to resolve the important issues presented in this case.

David A. Diehl, 53214018
Federal Correctional Complex
USP Colenan II
PO Box 1034
Colenan, FL 33521

David A. Diehl (pro-se)

March 7, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on ~~February~~ March 8, 2023, I mailed the foregong document to the Solicitor General, and the United States Attorney in the Western District Of Texas (San Antonio) at the below address'es by placing the envelopes affixed with First Class Postage in the mailroom.

David A. Diehl

March 7, 2023

CERTIFICATE OF COMPLIANCE

Pursuent to Fed.R.App.P. 32(a)(7) the undersigned certifies this brief complies with the type-volueme limitations of Fed.R. App.P 32(a)(7):

1. Exclusive of the portions of the brief excepted by Fed.R.App. P. 32(a)(7)(B)(iii) the brief contains 34 pages.

2. The brief was typed on a typewriter

3. The undersigned understands a material misrepresentation completing this certificate, or circumvention of the type-volume limits in Fed.R.App.P. 32(a)(7) may result in the court's stiking the brief and imposing sanctions against the person signing the brief.

David A. Diehl

David A. Diehl
Pro Se

March 7, 2023