

NO 22-7031

In The Supreme Court of The United States

David A. Diehl Petitioner

VS.

United States of America

On Petition For Writ of Certiorari To
The Fifth Circuit Court of Appeals.

Defendant's First Supplemental Brief

David A. Diehl, 53214018

Federal Correctional Complex

USP Coleman II

PO Box 1034.

Coleman, FL 33521

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NO 22-7031

DAVID ANDREW DIEHL, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS SUPPLEMENTAL BRIEF

OPINIONS BELOW

The opinion of the Court of appeals (Pet. A 11-12) is not published in the Federal Reporter but is available at 2022 WL 19073965. The order of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the Court of appeals was entered on October 4, 2022. A petition for rehearing was denied on Dec 9, 2022 (Pet. App. C1). The Petition for writ of certiorari was filed March 8, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (2).

Petitioner/defendant David A. Diehl proceeding pro se hereby submits this first supplemental brief in the above styled cause.

Petitioner per Supreme Court Rule 15.8 brings attention to United States v. Monson, 2023 U.S. App. Lexis 16075 (1st Cir. 2023). In Monson the court acknowledged (although not explicitly adopting) that 18 U.S.C. §2251(a)'s language "such visual depiction" applies only to what the defendant "produced," and not subsequent reproductions. Monson opinion: "Likely thus is properly viewed as a case in which an independent actor produced the hard drive image, and that the conduct could not properly be imputed to the defendant's who created the previous image."

Petitioner's certiorari petition Point 3 argues despite being raised on appeal, and again on 2255, Petitioner's Monson-like argument was ignored. See 2255 Grounds 2 and 5.

In Petitioner's Point 4 certiorari argument he argued that to avoid the Monson-like argument the United States has committed repeated acts of

fraud on the Court per Fed. R. Civ. P. 60(d)(3). Per Monson Petitioner never "produced" the evidence presented at trial. The trial court's finding of law was essentially that reproductions and productions are equivalent. See Stipulation, "That the visual depiction contained in the video exhibits [traveled]; i.e. encorporeal. Petitioner raised the Monson argument on appeal but government fraud prevented it being evaluated.

"Petitioner was prevented from presenting his defense through carefully planned and executed material subversion of the legal process." see Farriss v. Burton, 2016 U.S. Dist. Lexis 98336 (10th Cir. 2016) (discussing intrinsic versus extrinsic fraud on the court). Here fraud occurred on appeal and 2255. Procedural and integrity errors contributed.

Given the real finding of the trial court, no rational trier of fact could have found Petitioner guilty since he didn't produce the evidence, and all parties understood that.

"Although the district court was not requested to do so, it orally made special findings of fact," United States v. Hogue, 132 F.3d 1087 (5th Cir. 1998).

Fraud

The government fraud was driven by a need to circumvent an evaluation on appeal of this limited legal finding. See "all or nothing" remark referenced in petition for certiorary p 19 FN 1.

The fraud basically involved recommending improper inferences to non-evidence hard drives while also comprimizing Petitioner's Fourth Amendment and Fifth Amendment due process rights. The fraud involved the United States concealing evidence concerning hearsay on the part of Petitioner's attorney. The fraud was on the court itself.

The United States told the trial court and Fifth Circuit that the visual depictions existed on a seized computer hard drive when they knew that to be false. A withheld FBI 302 report shows that government witness Ken Courtney told the FBI he saw charges on an external computer storage medium. But see sentencing trans.

AUSA Devlin: "He had it on his encrypted hard drive according to the testimony of Mr. Courtney... and when we get that hard drive decrypted." p 79. 80. See FBI 302 page 3-4. This remark clearly references the drives identified in the second. warrant and in the government's possession.

This FBI 302 was part of the released discovery which was attorney-work-product, that the government had destroyed. See Petitioner's Reply brief Page 3-8).

In Petitioner's Certiorary petition he also shows that the seized internal drives couldn't have produced the file listing, identified as Item-O in the government's discovery inventory list. This list had to have been produced by a non-encrypted device.

It appears that illegally seizing this device, and withholding information on how it was obtained, drove the government's fraudulent actions as discussed in Petitioner's petition for cert. P19. See

Trial trans. p.102, AUSA Deulin: "Okay on a hard drive or some other computer media." And see the government's recommend sua sponte seizure which included the two internal hard drives in the Second warrant, plus, : "other storage mediums and computer accessories."

At that point the government committed fraud on the court by illegally seizing Petitioner's personal property through subterfuge. This couldn't have been discovered prior to learning of Item O.

This device was apparently provided to law enforcement secretly by petitioner's trial counsel, and the government has sought to keep this treachery secret by compromising petitioner's constitutional rights. See United States v. Throckmorton, 98 US 61, 65, 66 (1878) (A compromised attorney can constitute fraud on the court).

It should be noted that the purpose of using petitioner's ex-wife as an agent in the first place was to supercede the denied first search warrant, while also manufacturing a federal nexus. This was also fraud.

The only real legal issue rested on the principle discussed in Monson. See Petitioner's direct appeal Final Reply page 12-18, Diehl: "The unrelated possession or transport of reproductions by others doesn't confer Federal jurisdiction over this Appellant's § 2251(c) charges." Page 14. Petitioner was robbed of this argument by the government's outrageous conduct that affects the court's ability to administer justice. Monson is consistent with the other two circuits to examine the issue.

David A. Diehl
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9-5-2023