

NO - 22-7031

IN THE SUPREME COURT OF THE UNITED STATES

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 RECONSIDERATION BRIEF

David A. Diehl

Petitioner

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Questions Presented

- Point 1 Does the decision to require a COA to appeal a mixed 60(b) motion depend on who submitted the COA: defendant versus the district court.
- Point 2 Intervening Circumstances of a substantial effect.
- Point 3 Can a sufficient Evidence finding made on Direct Appeal categorically prevent a subsequent Ineffective Counsel Issue concerning the same overall Issue (Nexus hole)
- Point 4 Does the finding in Jackson v. Virginia apply to a specific factual and legal finding made by an implicit or explicit Fed. R. Cr. P. 23(c) motion.
- Point 5 Should late Brady and Fraud on The Court Claims Require A COA To Appeal
- Point 6 Should United States v. Booker Apply to Pre-Booker offenses.

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:

Solicitor General of The United States
Room 5614 Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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MOTION FOR RECONSIDERATION

Supreme Court Rule 44.2 allows for substantial grounds not previously presented.

Ground #1

Does the decision to require a COA to appeal a mixed 60(b) motion depend on who submitted the COA: defendant versus the district court?

on page 13 of the government's reply brief they argue a COA requirement is based on who submitted the 60(b) motion to the circuit court, "when a district court transfers a Prisoner's Rule 60(b) motion to the court of appeals in order for the court of appeals to determine whether to authorize a second or successive section 2255 application '[a]n appeal of such a transfer order does not require a COA.'" citing Stolcy v. Lumpkin 8 F.4th at 390.

The government then distinguishes petitioner's circumstances saying "Here, however, the district court's order did not purport to transfer any part of Petitioner's Rule 60(b) motion to the court of appeals, but instead denied one claim and dismissed the others. Requiring a COA as a prerequisite to appeal of that order was thus fully consistent with Spitznas and the Fifth Circuit's prior precedent."

The district court's dismissal treats two of petitioner's claims as true 60(b), and dismissed the fraud on the court claim, saying, "Dient's remaining allegations, which he characterizes as Rule 60(b) claims, are, in substance, challenges to his criminal proceeding or issues resolved against him on the merits in his habeas proceeding.... Accordingly, they are construed as successive...." Order page 8

With regard to the 2255 Grounds two, four, ten Eleven, and thirteen, "Judge Lane (magistrate) directly addressed these claims" Order page 7.

As an initial matter, and discussed more fully below, the Magistrate never addressed Petitioner's 2255 Grounds 2, 4, or thirteen in particular, and therefore makes no attempt to say where they were addressed. This is a most serious integrity issue per 66(b)(6).

Petitioner's Rule 60(d)(3) has also never been considered, and is most certainly not, "challenges to his Criminal proceeding or issues resolved against him on the merits in his habeas proceeding" This is explained in detail on pages 16-19 in Petitioner's Certiorari. Petitioner's right to Due Process by law and under the Constitution has been flagrantly denied.

Furthermore, and most relevant here, a COA should not hinge on whether or not a district court transfers what it considers to be successive matters — especially when it finds the motion mixed. The district court just dismissed the issues.

This in part is why Petitioner has sought Certiorari from this court, to resolve this important issue, and to provide guidance to the circuit courts. Certiorari is appropriate here.

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#2

Petitioner presents new case law as
intervening circumstances here.

Two new statute of limitation cases are relevant to the question of what offenses 18 U.S.C. § 3283 includes. In United States v. ISO, 2023 U.S. Dist. Lexis 99815 (Dist. of N.M., June 8th 2023) the court applies § 3283 to sexual abuse at 18 U.S.C. § 2242, which petitioner agrees it applies to since § 2242 was a part of the 1986 Sexual Abuse Act. The court also has accordingly no reliance on 18 U.S.C. § 3509(a)(8)'s sexual abuse definition, which has nothing to do with the limitation at 18 U.S.C. § 3283. The only question in ISO is whether the categorical test applies to "offense involving." As petitioner has shown in his certiorari petition, per Supreme Court precedent, it would be the essential element test that controls, if a test is applicable at all. A second new case is United States v. Majeed, 2023 U.S. Dist. Lexis 130360 (D. Kansas, July 27, 2023). In Majeed the court contemplates applying § 3283 to a forced labor charge where the defendant hit a minor with a paddle. The court of course doesn't rely on § 3509(a) definitions.

These cases exhibit how important it is for the Supreme Court to make a ruling on the vague and ambiguous 18 USC. § 3283.

The Court will hopefully reiterate its prior precedent that limitations can not be considered on appeal where the record is not developed. See Miller v. United States, 2023 U.S. App. Lexis 20546 (1st Cir. August 2023) (No limitation claims or I.C. on appeal).

In petitioner's case he was making accusations that his attorney didn't raise the limitation issue because he was in fact working against his clients interests. Whether this was true or not could not have been determined without a hearing, so it certainly wasn't a "pure matter of Law." See direct appeal opinion. On 2/25/25 the district court prevented petitioner from an evidence hearing on the basis the Fifth Circuit denied a pre-appeal motion where petitioner requested an investigation of corruption be made.

The district court found the limitation issue to be a true Rule 60(b) issue, but made no real merit finding. Why counsel failed to raise this legitimate issue, he was paid to raise, remains a mystery. Also see other Nexus related fraud allegations.

Grounds Not Previously Submitted

#3

Can a Sufficient Evidence Finding Made on Direct Appeal Categorically Prevent a Subsequent Ineffective Counsel Issue Concerning The Same Outcome Issue (Nexus here)

On direct appeal Petitioner raised an ineffective counsel claim which concerned the interstate Commerce Nexus. The court did not consider the claim as raised, which is plain by the record. The claim was re-raised on 2255 along with separate but related claims. Instead of reviewing those claims under a Strickland analysis, the court found the matter had been resolved on appeal. The relevant 2255 grounds included 2, 4, 5, and 13.

The sufficiency of evidence finding on appeal was the very result of the ineffective issues raised on 2255. Several of the 2255 grounds were just plain ignored, and are thus void Fed. R. Civ. P. 60(b) (6) 2255 integrity errors. Counsel failed to base his trial argument on the outstanding section of the stipulation, failed to argue against United States v. Runyan collectively, failed to re-raise the 4th Amendment challenge, and failed to move for a Rule 23(c).

failed to move for a Fed. R. Cr. P. Rule 23(c) to lock in the district court's narrow and incollect finding of fact and law. That finding essentially said Runyan applies to anyones transport in interstate commerce of any visual depiction no matter who produced it, if it looks the same as the original.

The government knew this finding would not be upheld so committed fraud on the Fifth Circuit on appeal and then again on the district court on 2255. See 60(d)(3) argument in main brief.

The Fifth circuit's sufficiency finding was never grounds to have both ignored and procedurally barred petitioner's ineffective counsel claims on 2255. This is a Rule 60(b)(6) integrity issue which was also mischaracterized as being "directly addressed" (supra.) The Supreme court will find the record agrees with petitioner on this issue.

This is a very important question of law applicable to numerous individuals. This matter addresses a fundamental due process issue. Certiorari should be granted.

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Does the finding in Jackson v. Virginia
apply to a specific factual and legal
finding made by an implicit or explicit
Fed. R. Cr. P. 23(c) motion.

At petitioner's bench trial Judge Lee Yeakel made a narrow legal finding defendant only on the fact reproductions of visual depictions petitioner originally produced were transported in interstate commerce. The court stated the defendant does not have to be involved in any transport. The court effectively found that all visual depictions that look the same, are the same.

Petitioner had every reason to believe that this question of law was preserved for resolution on appeal. Petitioner raised the issue that 18 USC 2251(a)'s third nexus clause doesn't apply to reproduction produced by third parties as ineffective counsel on appeal, but that argument was not considered. The Fifth Circuit instead used Jackson v. Virginia to

alter the trial court's finding.

The question here concerns the relationship between Fed. R. Cr. P. 23(c) and Jackson v. Virginia.

Petitioner in his certiorari has shown how misusing Jackson v. Virginia in this case caused the upholding of an improper conviction. The Fifth Circuit relied on hard drives travelling from Florida to Texas for interstate commerce, but the hard drives were not evidence for very specific reasons. ⁽¹⁾ This is explained in detail in petitioner's certiorari. Petitioner also had little reason to demand against use of the internet on appeal since the district court explicitly found §2251(c)'s third nexus clause constitutional and sufficient without any involvement by petitioner. An argument could have been made IRC doesn't prove interstate commerce as other courts have found. And Petitioner did show that prior to 2008 use of an interstate facility wasn't

¹ Petitioner's Fraud on the court accusations per Fed. R. Cr. P. 60(d)(3) explains this as does the First supplemental brief.

covered by § 2251(a). See United States v. Haas, 37 F.4th 1256 (7th c. 2022) indicating the Fifth has never resolved the issue. Also United States v. Elarik, 24 F.4th 565 (6th cir. 2022) (same). Note also the stipulations out standing section shows the government must prove petitioners purpose, and 'transmit' wasn't added until 2008. Third Party reproductions were not petitioners purpose. ①

The entire land scope of the legal issue was altered on appeal from a determination as to petitioner's purpose relating to what was produced, to whether petitioner transported his visual depiction. See Pattern Jury Instruction → Fifth Circuit → Substantial offense instructions → 2.24 → Sexual exploitation of a minor § 2251(a) - applying Dicht, 775 F.3d 714, 721 (5th cir 2015). The jury instruction says Dicht himself used a facility of interstate commerce.

One of the most attractive features of a bench trial is that a definitive factual and legal finding can be preserved. The Supreme Court should grant certiorari in this case to clarify the important role of Rule 23(c) and its relationship to Jackson v. Virginia.

2. Petitioner cites case law from 4 circuits on this.

#5Should Late Brady And Fraud On The Court Claims Require A COA TO Appeal

As shown Petitioner's Rule 60(d)(3) claims were never reviewed on appeal or on 2255. The claims in fact in-part concern evidence that petitioner first became aware of during the 2255 process. During the process the government revealed evidence that they had a file list allegedly produced from petitioner's hard drives. Additional evidence shows the government was aware that their only witness never said he saw charged counts on the hard drives. The government had this evidence destroyed as explained in petitioner's Final Reply to this Court. ⁽¹⁾ They interfered with petitioner's attorney-client privilege to have the attorney destroy his actual work product.

Petitioner argues Late Brady and Fed. R. Civ. P. Rule 60(d)(3) don't require a COA to appeal. This is an important National issue.

1. Also in the supplemental brief

#6Should United States v. Booker Apply TO
Pre Booker Offenses.

In Beckles v. United States, 580 U.S. 256 (2017) this court left open whether the vagueness doctrine could be applied to cases when, "the guidelines did fix sentences."

Petitioner here argues the principle should apply to the *ex post facto* clause. Petitioner's correct guideline was actually 151-180 months. ⊕ Since petitioner has served thirteen years, at 8590 he has completed the sentence based on the adopted guideline score. Instead however, because of a 400 month upward variance, based entirely on the fact the depictions had been transported, petitioner has life to go.

Petitioner is 61 years old and was a first time offender. No victim requested the extreme sentence or even bothered to complete an impact statement. The description of the act, i.e. intercourse, is also straight provable libel meant to bias petitioner on appeal.

- I. Petitioner was put in a criminal history category of II because of a 1990 menacing charge however the PSR said the menacing information, "is solely used as factual information... not accessing criminal history..."

This sentence is clearly a violation of the Constitution's ex post facto clause, because the measure of punishment became the stacked statutory range, versus, the guideline range.

Prior to *Booker* 561.2 said, "The sentence imposed on one or more of the other counts shall run consecutive, but only to the extent necessary to produce a combined sentence equal to the total punishment." Making 561.2 advisory certainly altered the "substantial formula" used to calculate the applicable sentence range. As of *Booker*, and especially in this case, the guidelines were no longer "the lodestone of sentencing" *Peugh v. United States* 569 U.S. 530, 544 (2013).

Here the sentencing court never even commented on why the correct range would not satisfy §3553(a) objectives. It never said distribution was non-hearthlands. The six page §3553(a) explanation gives no hint at how the court arrived at the 600 month sentence. Finally, the sentence creates a giant disparity between petitioner and "similarly situated" perpetrators. This resulted from the court failing to rely on similar guideline ranges, relevant statistics, and the court

failed to compare similar case facts. The government's cases presented three defendants as comparos all of which had guideline life, and long term abuse. Petitioner's conduct lasted under 1 hour.

The ex post facto argument was misconstrued on appeal as a procedural versus substantive argument. Peugh says violations are a matter of degree. The district court flat out procedurally barred the ex post facto arguments.

Thirteen years have gone by, 23 from the offense date. Petitioner should not be forced to go through another multi year process to have the Constitutional issue considered.

Consider that per §131.11 the district court was required to use the 1999 guidelines, specifically to avoid ex post facto concerns.

Since 18 U.S.C. §3283 is being misused to capture offenses decades after the offense, this issue is extremely important. The consequences of "similarly situated" not including when the offense occurred leads to extreme disparities. Certiorary should be granted.

CERTIFICATION

I Petitioner David A. Diehl Defendant
proceeding Pro Se in Supreme Court Case
22-7031 attest that the enclosed motion
for Rehearing is presented in good faith
and not for delay.

David A. Diehl

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Certificate of Service

I defendant David A. Diehl Certify that on October 24th, 2023 I handed mailroom staff this envelope containing the petition for Rehearing with First Class postage appended. I invoke the mailbox rule. This Certification is in compliance with 28 U.S.C. § 1746.

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Oct 24th 2023

