

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID A. DIEHL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — 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)

(53214-018) FEDERAL CORRECTIONAL COMPLEX, USP II

(Address)

PO BOX 1034, COLEMAN, FL 33521

(City, State, Zip Code)

NONE

(Phone Number)

QUESTION(S) PRESENTED

- I. CAN THE GOVERNMENT DENY A 28 U.S.C. §2255 PETITIONER THE ABILITY TO EXAMINE PREVIOUSLY RELEASED DISCOVERY EVIDENCE, WHICH IS IN THE POSSESSION OF A DEFENDANTS ATTORNEY.
- II. DO ANY 18 U.S.C. §3509 PROCEDURES APPLY TO CHAPTER 110 OFFENSES.

LIST OF PARTIES

☒ 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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ⁷⁰⁴~~393~~ to the petition and is

☒ reported at ~~704 Fed. Appx. 393 (5th Cir. 2017)~~; 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☐ is unpublished.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 5 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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 courts**:

The date on which the United States Court of Appeals decided my case was Nov 28, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan 24, 2018, 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).

Cohen V. Beneficial Industrial Loan Corp, 337 US 541 (1949)

Collateral Order Doctrine Exception

☐ 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).

JURISDICTION

On November 29, 2017 The Fifth Circuit Court Of Appeals dismissed Petitioner's Interlocutory order on the basis that it was not a final order per 28 U.S.C. §1291. Per Cohen however, that court did have jurisdiction to here the issue. The disputed order meets the three part test outlined in Cohen:

1. The interlocutory order will conclusively determine the disputed question. This petition results from the government's infringement into the Petitioner's client-attorney privileges. See CASE HISTORY below. Petitioner is simple trying to review information relating to Petitioner's case, that has been in the possession of his previous attorney for approximately six years. The district court entered an order asking the Petitioner to justify any review of that information. The question of law herein disputes the courts legal right to make such a request.
2. The order must resolve an important issue completely separate from the merits of the underlying suit. The government relies on 18 U.S.C. §3509 to argue a defendant should not be allowed to review case information without justification. They rely on a host of arguments including that 18 U.S.C. §3509(d) applies to prevent such review. However, the Petitioner argues that the previously released case information is necessary to forming a complete and proper 28 U.S.C. §2255 Petition. This issue is completely independent of the underlying merit of the 28 U.S.C. §2255.
3. The issue must be effectively un-reviewable on appeal. In the present case the United States has put forth considerable effort into denying the Petitioner the ability to review case related information. The objective has been to limit the Petitioner's visibility into severe prosecutorial misconduct, and possible collusion involving Petitioner's trial attorney. The very issues raised on §2255, and how those issues will be raised is effected by the governments attempt to block access to the previously released discovery evidence, in the possession of Petitioner's attorney. There is no legal basis for the United States actions, and the district courts order in dispute here should be reviewed at this point because this is an important question of law, that if not addressed now, will result in issues totally un reviewable on appeal. Issues not raised

in Petitioner's 28 U.S.C. §2255 can not later be appealed. In fact, the entire basis of determining if an evidentiary hearing is appropriate will be effected by not having access to evidence that is exculpatory.

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18 U.S.C. §3299. Child abduction and sex offenses

Notwithstanding any other law, an indictment may be found or information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110 (except for section 2257 and 2257A), or 117, or section 1591.

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18 U.S.C. §3282(b). DNA profile indictment

(1) In general. In any indictment for an offense under Chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) Exemption. Any indictment described in paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to --

(A) the limitations period described under subsection(a);
and ...

.....15

18 U.S.C. §2255. Civil remedy for personal injuries

(a) In general. --Any person who, while a minor, was a victim of a violation of section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in an appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.

(b) Statute of Limitations.--Any action commenced under this section shall be barred unless the complaint is filed within 10 years after the right of action first accrues ...

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STATUTES AND RULES	TABLE OF AUTHORITIES	PAGE NUMBER
§ 3509. Child victims' and child witnesses' rights		

(a) **Definitions.** For purposes of this section--

- (1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;
- (2) the term "child" means a person who is under the age of 18, who is or is alleged to be--
 - (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
 - (B) a witness to a crime committed against another person;
- (3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;
- (4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;
- (5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;
- (6) the term "exploitation" means child pornography or child prostitution;
- (7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;
- (8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
- (9) the term "sexually explicit conduct" means actual or simulated--
 - (A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
 - (B) bestiality;
 - (C) masturbation;
 - (D) lascivious exhibition of the genitals or pubic area of a person or animal; or
 - (E) sadistic or masochistic abuse;
- (10) the term "sex crime" means an act of sexual abuse that is a criminal act;
- (11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the

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physical health of the child; and
(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

..... 12, 14, 15, 16-21

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§ 3283. Offenses against children	14, 15, 16, 17 18-21

No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.

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<u>18 U.S.C. §1153</u> .Offenses committed within Indian Country	16,17

(a) Any Indian who commits against the person or property of another indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113 [18 USCS §113], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offenses.

STATEMENT OF THE CASE

On or around April 15, 2016 Petitioner sought to review information in the possession of his ex sentencing attorney. That attorney (Gerry Morriss) despite having no obligation to, notified the United States attorneys office of Petitioner's request. That office immediately filed an injunction / protective order to prevent access to the information. Both the Petitioner and Mr. Morriss filed objections with the court. Magistrate Mark Lane then, with the governments assistance created a "inventory" list of items in possession of Petitioner attorney (highly redacted) and requested Petitioner to justify his need for each item. The relevant information includes interview with 31 adults, FBI reports, 302's ect, computer analysis reports, search warrants, Grand Jury Transcripts, ect.

Petitioner refused to provide justification on the basis he did not even know the esculpatory value of the information, much of which he had never seen and in-fact didn't know existed. Due to the extreme redaction, it was also unclear what the information represented.

Petitioner appealed the courts order as an interlocutory appeal and on November 28, 2017 the Fifth Circuit dismissed the appeal for lack of jurisdiction citing Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). In the courts opion they seem to conflate Petitioner's appeal as a Rule 6 request under Rules Governing 2255. Petitioner's case statement in the appeal however was perfectly clear about the circumstances surrounding the appeal. The court docket also left little room for misinterpretation.

On 12-7-2017 Petitioner submitted a Petition for rehearing / en banc. In that petition Petitioner argued that the Collateral Order Doctrine exception outlined in Cohen Benefical Industrial Loan Corp, 337 U.S. 541 (1949) would allow the court to hear the raised issue. On January 24, 2017 Petitioners request for rehearing was denied. On Febuary 16, 2018 Petitioner filed another Petition for rehearing, based on the Fifth Circuit's apparent conflation of the issue. That request was denied by the Clerk on the basis of no process available.

REASONS FOR GRANTING THE PETITION

THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURTS IMMEDIATE RESOLUTION.

A.

I. CAN THE GOVERNMENT DENY A 28 U.S.C. §2255 PETITIONER THE ABILITY TO EXAMINE PREVIOUSLY RELEASED DISCOVERY EVIDENCE, WHICH IS IN POSSESSION OF A DEFENDANT'S ATTORNEY.

The Fifth Circuit holding in this case raises issues of great practical importance and constitutional significance meriting this courts intervention. The issue of whether 18 U.S.C. §3509(d) or any other statute applies to prevent access to already released discovery information, that would be beneficial to a defendant who is preparing his/her 28 U.S.C. §2255, is an important issue of law.

The district courts order at issue here interfere with the petitioners right to prepare a defense. It also interfere with petitioners client-attorney privilege.

In asking the Petitioner to justify his need for already released discovery, and redacting the inventory list of that information to the point of being unintelligible, the courts interfere with Petitioners constitutional rights.

The government argues as grounds for this interference that:

1. Petitioner has no possessory interest in the discovery material
2. 18 U.S.C. §3509 requires the discovery material be properly secured, which the petitioner cannot abide by.
3. Petitioner may use the information to harass or retaliate against the victims.
4. Even though there are no minors in the case at this point, §3509 should still apply to protect their identities.
5. Petitioner is not entitled to discovery under 28 U.S.C. 2255 until he shows cause.
6. All of petitioner's 2255 claims assert legal issues, not factual ones.

In fact no circuit court has applied 18 U.S.C. §3509(d) in the manner proposed here by the United States. Section 3509(d) only applies to children, which here there are none, it exempts defendants, and it only applies to redact names and other personal identifiers.

The other points the government makes are without any merit. The discovery information can be kept safe because jail personnel has procedures for keeping the material in their possession, and from preventing duplication and printing. Furthermore, plaintiff has never threatened anyone. This is also not an issue of "discovery" per rule 6 of Rules Governing 2255.

What the government has done in Petitioner's case is to try and prevent him from obtaining evidence which demonstrates severe prosecutorial misconduct, and possible collusion with Petitioner's trial attorney.

Neither the government or the district court cite any cases supporting their infringement into Petitioners right to prepare his 2255 in light of all evidence already released to Petitioner's attorney.

The Supreme Court should excersize its authority at this point to prevent this dangerous precident from poisoning a defendant's right to prepare a defense.

B.

II. DO ANY 18 U.S.C. §3509 PROCEDURES APPLY TO CHAPTER 110 OFFENSES.

To what offenses the rules at 18 U.S.C. §3509 apply has been an ongoing question since that sections enactment in 1990, as part of the Victim of Child Abuse Act (VCAA). Nearly every circuit court has arrived at differing conclusions on this question of law. §3509 includes twelve federal rules that apply to minors who are victims or witnesses in federal trials¹. Several of these rules drastically effect the constitutional rights of defendants.

According to the 18 U.S.C. §3509(a)(2) definition of Child, the rules apply to a person under 18 who is (A) a victim of a crime of physical abuse, sexual abuse, or exploitation, or a witness to a crime committed against another person. See United States v. Allen, 127 F.3d 1292 (10th cir. 1997) (§3509 applies to cases of sexual abuse, physical abuse, and exploitation).

Section 3509(a) also contains the definition of twelve terms including child, child abuse, adult attendant, multidisciplinary child abuse teams (MDCAT), and sex crime. The exact purpose of these terms is unclear. For example sex crime is not used in the body of §3509, and Child's physical abuse term is not defined.

Several of the §3509 rules themselves have specific constraints governing their use. For example §3509(b), (c), and (e) require a personel evaluation of a victim or witness before they can be applied at trial.

Since the initial passage of the VCAA, two notable amendments have been made to it. In 1994, the first sentence of §3509(k) which appears to be a criminal statute of limitations (SOL) was repealed and moved to 18 U.S.C. §3283. In 2006 a new rule, §3509(m) was added, to regulate the duplication of child pornography evidence.

1. Section 3509(b) - direct confrontation rights, (c) witness competency, (d) redaction, (e) public trial, (f) victim impact statements, (g) multidisciplinary team usage, (h) guardian ad litem, (i) adult attendant, (k) staying civil actions,- gag order, (i) testimonial aid (m) evidence constraints

Section 3509 played a significant role in Petitioner's case. The §3283 was used to allow the arrest of petitioner a decade after the 1999 offense. Petitioner was then given a post Booker varience of 30 years over the top of the Guideline range. In a pre-trial hearing the district court agreed to close the courtroom during witness testimony - without evaluating any witnesses. During an evidence viewing session, the FBI and Assistant United States Attorney insisted on being present and taking notes, relying on §3509. Finally, this petition involves the united states use of §3509(d) to prevent the petitioner from viewing previously disclosed evidence in the possession of petitioner's sentencing attorney, Gerry Morriss.

Although each §3509 rules applicability to a case has been the subject of much debate in the various circuit courts, the question of which federal offenses §3509 applies to in general is constitutionally vague and ambiguous as will be shown herein. In particular, the definitions in §3509 can not be used to deterine when to apply §3509 rules.

Because of the inherent ambiguity in the §3509(a) definitions, the only way to determine what federal offenses §3509 applies to is to examine the VCAA legislative history. Although congressional comments concerning the VCAA are limited, the comments that do exist are quite explicit.

The Victim Of Child Abuse Act was for children who do enter the federal system through military basis, indian reservations and other federal lands and facilities. Legislation contained in Title XX [the VCAA] is not designed to garner any further jurisdiction over child abuse cases.

See H.R. 101-681(i) 1990 and United States v. Longstreath, 42 M.J. 806 (1995)

There are many other indications in the legislative history which show that congress meant these words. In the 2003 Protect Act for instance, congress discussed the purpose of a 18 U.S.C. §3283 amendment as being for "assault and rape cases." H.R. Cong. Rec. 108-66, P. 54. Congress' decision to limit John Doe indictments per 18 U.S.C. §3282(b) confirmed that Chapter 109A offenses were as far as congress intended to go with regard to sexual offenses. Chapter 109A is for federal enclaves and facilties.

The most likely reason congress was concerned with only rape and assault on federal enclaves was because the focus of the legislation was on Native American Land where the problem lied. The Armed forces themselves does not use §3509. See United States v. McElhaney, 54 M.J. 120 (C.A.A.F., 2000) and United States v. Spann, 51 M.J. 89 (USMJ, 1999). The focus of the VCAA can be discerned in part by legislative comments including:

The VCAA sets up some very good and tough reporting requirements for any kind of child abuse that may occur on a federal a federal enclave. 136 Cong. Rec. H6572, Oct 3, 1990, Mike Dewine, VCAA sponsor.

In parts of this country 20 percent of Indian children are sexually abused, one out of every five. Comments by Harry Reid, VCAA sponsor and Indian Affairs committee member.

Any legislation will primarily effect Native Americans. Cong. Rec. Senate, July 25, 2006, P. 5723, Senator Scott discussing the real effect of the Adam Walsh Act in 2006

Section 18 U.S.C. §1153, which was enacted in the Major Crimes Act controls which offenses the United States has jurisdiction of on Indian land. Since §1153 takes into consideration many factors concerning jurisdiction on Indian land, and the type of crimes the United States should prosecute, it makes sense that it is the best indicator of the offense range 18 U.S.C. §3509 rules apply to.

Unlike 18 U.S.C. §3509(a), which courts have relied on to dictate when to apply §3509 rules, §1153 names actual federal offenses when possible. Section 1153, like §3283 includes kidnapping but §3509 does not. Section 1153 uses Chapter 109A to define sexual assault instead of "rape." The 1986 Sexual Assault Act (SAA) made this change globally to federal code. Section 1153 has specific support for "physical abuse" referenced in §3509(a)(2): 18 U.S.C. §113, and generically as "an assault against an individual who has not attained the age of 16."

Section 3509(a)(8) is neither directed to substantive law, nor immigration law. It addresses neither elements of criminal conduct, nor the characteristics of aggravated felonies. Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001)

The definitions at §3509(a)(3) - (a)(9) contrary to misapplication by many circuit courts, including the Fifth Circuit in this case

do not dictate when to apply the §3509 rules.

Section §1153's role in §3509 is clear. For instance the purpose of §3509(a)(2)'s generic definition is to coordinate with §1153's purpose of assimilating state offenses.

Any offense referred to in subsection (a) of this section that is not defined and punished by federal law in force within the exclusive jurisdiction of the United States shall be punished in accordance with the law of the state in which such offense was committed as are in force at the time of the offenses. 18 U.S.C. §1153(b)

Because federal statute of limitations control in these assimilative circumstances, the §3509 / §3283 SOL also had to be generic. See United States v. Johnson, 699 F.Supp. 226 (1998, N.D. Cal) (Using federal limitations for assimilation)

Importantly to Petitioner's case is the fact that §1153 is missing any reference to Title 18 Chapter 110 "exploitation" offenses, and it does not target generic "exploitation" offenses.¹ The legislative history therefore shows exactly what offenses §3509 rules apply to. The §3283 SOL is particularly instructive with regard to the above conclusions. Prior to 2006 in fact the §3283 SOL was only applied to Native American cases. See United States v. Jeffries, 405, F.3d 682 (8th Cir. 2005); Johns, 15 F.3d 740 (8th Cir. 1993); Chief, 438 F.3d 920 (9th Cir. 2007). In or around 2007 however, the United States started mis-applying the SOL. In United States v. Panner, 2007 U.S. Dist Lexis 101192 (E.D. Cal. 2007) the court applied §3283 to possession of child pornography, on the basis that the surreptitious filming of a medical exam "was sexual abuse under any definition of that term." However, it is certainly not sexual abuse under Chapter 109A which is the comprehensive definition of sexual abuse in federal code. See below. The practice of using §3509(a)(8) definitions to determine when to apply VCAA (3509) rules really came into fruition in United States v. Contentos, 651 F.3d 809 (8th Cir. 2011). That court, while using §3509(a)(8) determined that §3283 includes 18 U.S.C. §2251, but excludes 18 U.S.C. §2252. This impossible result is typical of decisions involving §3509 definitions. One would have to conclude possession of child pornography is not an "other form of exploitation" to concur with the courts decision.

1. And Chapter 110 at the time only applied to interstate transport

To reach the decision also required the court to use §3509(a)(8) as the federal definition of sex act, which is instead defined at 18 U.S.C. §2258. The court had to ignore that after one repeal, and two amendments, §3283 doesn't reference the non-relevant §3509(a) definitions. Congress simply could not be clearer. The court also amazingly ignored the fact that the phrase "sexual or physical abuse" stands on its own, and that congress typically uses "sexual abuse or exploitation" to include Chapter 109 offenses along with 18 U.S.C. §2251. See United States v. Pharis, 176 F.3d 434 (8th Cir. 1999)¹. Finally, the court ignored that including "exploitation" / child pornography offenses through the §3509(a)(8) term makes "exploitation" superfluous in the definition of Child at §3509(a)(2). See Lockhart v. United States, 136 S. Ct 968 (2016) (avoiding ambiguity in terms without even considering how the terms are defined). Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that congress used two terms because it intended each term to have a particular non-superfluous meaning.") Congress infact removed "exploitation" from the plain language in proposals early on. See H.R. 3958 (1990), or S. 1923 (NOV (1989), both of which originally had "exploitation." Absent a cleary expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive, Consumer Product Safety Commission et. all. v. GTE Sylvania Inc. et all, 447 U.S. 102 (1980).

Section 3283 defines "child" independant of §3509(a), physical abuse and kidnapping are not defined by §3509(a) at all. Omission of a pre existing definition definition of a term often indicates congresses' intent to reject that definition. United States v. Taylor, 495 US 575 (1990). Section §3283's SOL was misplaced in 1990 and when correcting this in 1994 congress made clear §3509(a) doesn't apply to it.

Sexual abuse is also defined federally. The Sexual Abuse Act passed in 1986 (and in definite need of a SOL increase as of 1990) was designed to be the "comprehensive" definition of sexual abuse. See Report 99-594 May 9, 1986 "to accompany H.R. 4745" P. 21.

1. Also see 42 U.S.C. §608, §3796aa-8, §671, §5101.

That comprehensive definition includes multiple offenses that fully integrate with each other, and it defines sexual contact, and sex act. Lastely, Chapter 109A specifies jurisdictional constraints that apply to federal sexual abuse.

Sexual abuse is also defined by the United States Sentencing Guidelines. See Chapter 2, Part A, "Offenses Against The Person," Like §3283, Part A includes sexual and physical assault and kidnapping. See Lockhart (supra) concerning patterns of usage.

Courts have ignored the legislative history of the VCAA and misapplied the VCAA. Consider United States v. Brouard, 767 F. Supp. 1536 (C. Dist. Oregon 1991), applying §3509 rules to conspiracy to deprive others of constitutional rights, and conflating §3509(a) definitions in the process.

Some §3509 rules are less constitutionally intrusive than others and mis-use may be less prejudicial, some rules however are criticle to cases- such as the statute of limitations, and the ability to evaluate evidence.

Section 3283 clearly has no use for §3509(a) definitions, with this in mind, one must ask what purpose they serve to §3509 itself. The definitions are ambiguous. For example

1. Child at §3509(a)(2) doesn't include kidnapping, but §3283 does.
2. Physical abuse is undefined, and clearly it cant be the combination of physical and mental injury. Can a court extend the SOL for mental stress ?
3. Section 3283 excludes exploitation defined at §3509(a)(6) as prostitution and child pornography, but both the definition of child and child abuse include exploitation.
4. The definition of sexual abuse at §3509(a)(8) doesn't include §2251(a), which requires any "employment, use, persuasion ..." be "for the purpose of producing a visual depiction." This is the difference between sexual abuse and exploitation. See 42 U.S.C. §5106g which has the phrase. See United States v. Yost, 479 F.3d 904, 913 (11th Cir. 2009)
5. Child abuse contains 5 definitions of crime, Child contains 3.

Section 3509(a) is ambiguous as a result of congress lumping incompatible, section specific definitions together.

The §3509(a)(2) child definition applies to §3509(b), "Alternatives To Live In Court Testimony," which makes a constitutional distinction between "a child" being a witness, and "the child" being the victim. See Cong. Rec. House, Oct 27, 1990 P. 13296.

The Child Abuse definitions at §3509(a)(3) on the other hand seem to serve no other purpose than to define the components of a Multidisciplinary Child Abuse team. See (a)(3)-(a)(9). In Senate bill S.1965 (1989) the MDCAT section itself was defined as "any multi professional unit or unit defined in the relevant state child abuse reporting laws...." The federal child abuse reporting laws are 18 U.S.C. §2258 and 42 U.S.C. §13031. Section §2258 itself references the Child Abuse definitions from Title 42. The definitions come into play by allowing people who are abused to sue those who do not report as an exception to the Federal Tort Claims Act (FTCA).¹

Right up until the enactment of the VCAA congress was unsure where to locate the individual components of the VCAA. See the final House bill (Report 101-681, Sept 5, 1990, to accompany H.R. 5269) which located MDCAT, and reporting in their own sections, and thus had only child defined. Child was someone under 15, or 18 with a developmental age of 15. This would correspond to Chapter 109A offenses only.

The VCAA by congress own words was for physical and sexual assault that occurs on a federal enclave. As further evidence that congress' intent was narrow as to offenses, consider the proposed attempted federal jurisdictional expansion into state offenses:

1. The perpetrator was atleast 18 and four years senior to the victim, and
2. A crime of violence, a felony-offense against a person that has an element, the attempted use or threatened use of force.²

This language would also exclude any Chapter 110 offense which include consensual sex among married couples, simulations of sex as in the excoracist, and lascivious images of clothed individuals.

1. To sue abusers themselves 18 U.S.C. §2255 which specifically names federal offenses applies.
2. Cong. Rec. Senate July 11, 1990, Page 16959, Section 655, Abuse of Children in connection with drug offenses.

Several courts have used the sexual abuse definition at §3509(a)(8) to avoid the fact SOL apply to statutes, not a defendant's conduct. See United States v. Carpenter, 680 F.3d 1101 (9th Cir. 2012) (Using §3509(a)(8) to avoid the fact federal sexual abuse requires a sex act, and §3283 includes sexual abuse not exploitation). In United States v. Schneider, 801 F.3d 186 (3rd Cir. 2015) (applying §3283 to travel with intent to engage in a sexual act, 18 U.S.C. §2423(b)), the court found §3283's "offense involving sexual or physical abuse," applied to underlying conduct. The court attempted to distinguish §3283 from the decision in Bridges v. United States, 346 U.S. 209 (an offense involving fraud requires fraud to be an essential element of the statute), relying on United States v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010) (a SORNA agency case). Schneider reasoned because the §3283's time period was increased, the phrase "offense involving" should be interpreted differently. See Weingarten v. United States, 2017 U.S. App. Lexis 13586 (2nd Cir. 2017) (applying §3283 to 18 U.S.C. § 2423, citing Schneider) where the court actually inserts the word "conduct" into §3283's language. Id. Page 8. But see United States v. Noveck, 70 L.Ed. 904 (1926) (determining perjury has to have fraud as an essential element to trigger the SOL); Olivas-Motta v. Holder, 746 F.3d 907, 915 (9th Cir. 2013) (applying "offense involving" to the statute not conduct). See also the U.S.M.C. §843 Art 43 SOL which is based on §3283 and applies to offenses "constituting". Note this federal enclave did not include Chapter 110 offenses until 2006 the same year the Adam Walsh Act created 18 U.S.C. §~~3283~~³²⁹⁹, a SOL that included Chapter 110 offenses.

Note that the child definition at §3509(a)(2) applies to a victim of a crime of physical abuse, sexual abuse, or exploitation. See Congressional Research Service, Statute of Limitations In Federal Criminal Cases: An Overview, October 1, 2012, Charles Doyle Senior Specialist In American Public Law (RL31253), App. 7-8 "[§3283] permits an indictment or information charging kidnapping, or sexual abuse or physical abuse" to be extended by §3283.

Surely congress didn't intend for the SOL to be increased for any federal offense where physical abuse may have occurred - and not define physical abuse, and how would kidnapping be defined ?

18 U.S.C. §3509(a) is vague, ambiguous, and leads to arbitrary results. "A law is ambiguous if it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement," United States v. Johnson, 135 S.Ct. 2551. The term "sexual abuse" itself is also critically ambiguous in federal code.

For the reasons discussed the VCAA should be limited to the types of conduct described in 18 U.S.C. §1153, or the offenses described in the Sentencing Guidelines as "Offenses Against The Person."

Given these facts, §3509(d) can not apply to prevent Petitioner from reviewing the information in the possession of his attorney. Furthermore, the statute of limitations was expired on all charged counts in Petitioner's indictment.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

David A. Siehl

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