

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 16-51455  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

November 28, 2017

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID ANDREW DIEHL, also known as David A. Diehl,

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:16-CV-1124  
USDC No. 1:10-CR-297-1

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Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:\*

David Andrew Diehl, federal prisoner # 53214-018, appeals the district court's order in a discovery dispute pertaining to Diehl's 28 U.S.C. § 2255 proceeding. Diehl was convicted in 2011 of 10 counts of production of child pornography. After a bench trial, he was sentenced to 600 months of

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

imprisonment. This court affirmed, and on October 5, 2015, the Supreme Court denied certiorari.

Diehl filed a discovery motion in the district court in anticipation of seeking relief pursuant to 28 U.S.C. § 2255. The district court denied the motion, and the government then moved pursuant to 18 U.S.C. § 3509(d) for an order directing Diehl and his former attorney to return all discovery materials previously provided to them. The magistrate judge ordered Diehl to explain what discovery materials he needed and why. Diehl objected, and the district court overruled the objections and affirmed. Diehl then filed a timely notice of appeal.

During the course of the discovery dispute, Diehl timely filed a § 2255 motion in the district court. That motion is still pending.

We are obligated to examine the basis of our own jurisdiction. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). Generally, our jurisdiction is limited to the review of final orders, qualified interlocutory orders, and certain collateral orders. *Goodman v. Harris Cty.*, 443 F.3d 464, 467 (5th Cir. 2006). Discovery orders are generally not appealable. *Id.* Here, Diehl seeks to appeal an order requiring him to explain what discovery he needs and why. We lack jurisdiction to review the district court's interlocutory ruling. *See id.* at 467-69.

Accordingly, we DISMISS the appeal for lack of jurisdiction. Diehl's motion for leave to file a supplementary brief is DENIED as moot.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

**FILED****2016 DEC -7 PM 1:24**CLERK US DISTRICT COURT  
WESTERN DISTRICT OF TEXASBY                      *CP*  
DEPUTY

UNITED STATES OF AMERICA.  
PLAINTIFF,

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V.

CAUSE NO. A-10-CR-297-LY

DAVID ANDREW DIEHL,  
DEFENDANT.

**ORDER**

Before the court is Defendant David Andrew Diehl's "Objection to Magistrate's Order Entered November 18, 2016" filed December 5, 2016, regarding United States' Reply to Former Counsel's Response to United States' Motion for Return of Discovery Materials and Discovery Protective Order. (Doc. #215). On September 19, 2016, this court referred United States' Motion for Return of Discovery Materials and Discovery Protective Order filed August 25, 2016 (Doc. #202) to United States Magistrate Judge Mark Lane for report and recommendation pursuant to 28 U.S.C. §636(b) and Rule 1(e) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended, or for resolution pursuant to 18 U.S.C. § 3006A(b), 28 U.S.C. §636(b)(1)(A), and Rule 44 of the Federal Rules of Criminal Procedure (Doc. #204).

On November 4, 2016, the Government filed United States' Reply to Former Counsel's Response to United States' Motion for Return of Discovery Materials and Discovery Protective Order under seal, requesting that Defendant Diehl not be provided with a copy of the reply. The magistrate judge considered the request, and on November 18, 2016, rendered an order instructing the clerk to serve the order and sealed appendix, including a redacted version of United States' Reply to Former Counsel's Response to United States' Motion for Return of Discovery Materials and Discovery Protective Order, to Diehl. The magistrate judge further ordered Diehl or his former

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counsel to respond to the Government's inventory review contained within the redacted reply within 30 days.

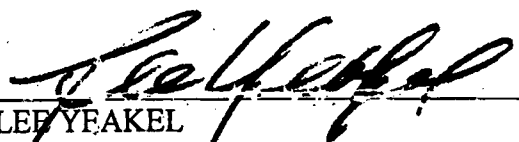
☆ In his objection, Diehl asserts that there exists no legal precedent for the magistrate judge's ruling, arguing that the information he seeks should not be sealed and that the related litigation concerning this matter should be open to the public. Diehl asks the court to order his former counsel to return to Diehl his entire case file and requests that all prior motions filed under seal be unsealed in the record in his case.

After considering Diehl's objection, the magistrate judge's order, and the case file, this court finds that the magistrate judge's ruling is not clearly erroneous nor is it contrary to law and concludes that the objection raised in Diehl's appeal should be overruled.

**IT IS THEREFORE ORDERED** that Defendant David Andrew Diehl's Objection to Magistrate's Order Entered on November 18, 2016 (Doc. #220) is **OVERRULED**.

**IT IS FINALLY ORDERED** that the United States Magistrate Judge's November 18, 2016 Order (Doc. #216) is **AFFIRMED**.

SIGNED this 7th day of December, 2016.

  
\_\_\_\_\_  
LEE YEAKEL  
UNITED STATES DISTRICT JUDGE

**FILED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY ME  
DEPUTY CLERK

UNITED STATES OF AMERICA,  
Plaintiff,

V.

DAVID ANDREW DIEHL,  
Defendant.

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A-10-CR-297-LY-ML

**ORDER**

Before the court is the Government's Sealed Reply to Former Counsel's Response to United States' Motion for Return of Discovery Materials and Discovery Protective Order (Dkt. #215), filed November 4, 2016. Given the sensitive nature of the information contained in the document, the Government did not serve the document on Defendant Diehl and requests that Defendant Diehl not be provided with a copy of the document.

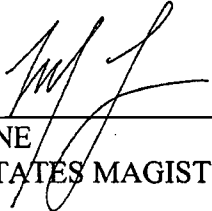
Recognizing the Government's concern for safeguarding the sensitive information contained in the document, but also recognizing the need to provide Defendant Diehl with proper notice, the court has redacted the Government's Response (redacted version attached as an Appendix to this Order). As the Government noted in its Reply, the redacted inventory tracks the inventory that Defendant Diehl previously received from counsel.

The court **ORDERS** the Clerk of Court to serve this Order with the attached Appendix on Defendant Diehl. The court further **ORDERS** that the Appendix to this Order be sealed. The Court further **ORDERS** that either Former Counsel or the Defendant David Andrew Diehl, or both, shall respond to the Government's inventory review within 30 days. That response should specifically describe why each individual item is needed, the anticipated use of that item in the

future, and why good cause exists for the release of the item to the incarcerated defendant.

Finally, the court **ORDERS** that any reply that identifies an individual shall be filed under seal.

SIGNED November 18, 2016

  
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MARK LANE  
UNITED STATES MAGISTRATE JUDGE

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**No. 16-51455**

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**UNITED STATES OF AMERICA,**

**Plaintiff - Appellee**

**v.**

**DAVID ANDREW DIEHL, also known as David A. Diehl,**

**Defendant - Appellant**

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**Appeal from the United States District Court  
for the Western District of Texas**

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**ON PETITION FOR REHEARING EN BANC**

**(Opinion: November 28, 2017, 5 Cir., \_\_\_\_\_, \_\_\_\_\_ F.3d \_\_\_\_\_)**

**Before KING, ELROD, and HIGGINSON, Circuit Judges.**

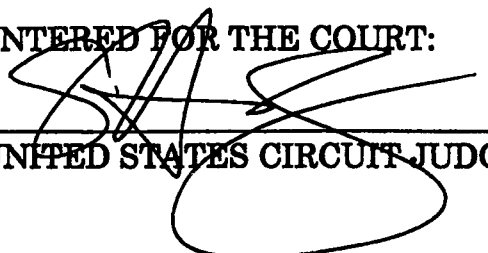
**PER CURIAM:**

- ( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.**

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- ( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

  
UNITED STATES CIRCUIT JUDGE



# Statutes of Limitation in Federal Criminal Cases: An Overview

Charles Doyle  
Senior Specialist in American Public Law

October 1, 2012

212

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

RL31253

CRS Report for Congress

*Prepared for Members and Committees of Congress*

involving child abuse,<sup>27</sup> the concealment of the assets of an estate in bankruptcy,<sup>28</sup> wartime fraud against the government,<sup>29</sup> dismissal of original charges,<sup>30</sup> fugitives,<sup>31</sup> foreign evidence,<sup>32</sup> or DNA evidence.<sup>33</sup>

## Child Protection

The child protection section, 18 U.S.C. 3283, permits an indictment or information charging kidnaping, or sexual abuse, or physical abuse, of a child under the age of 18 to be filed within the longer of 10 years or the life of the victim.<sup>34</sup> Section 3299 (enacted in 2006),<sup>35</sup> which eliminates the statute of limitations in cases of child abduction and sex offenses against children, supersedes §3283 wherever the two overlap.

## DNA

There are two DNA provisions. One, 18 U.S.C. 3297, suspends any applicable statute of limitations for the time required to identify an individual when DNA evidence implicates his involvement in a felony offense.<sup>36</sup> The other, 18 U.S.C. 3282(b), suspends the statute of limitations for federal sexual abuse violations by means of an indictment using a DNA profile alone to identify the person charged.<sup>37</sup> Neither provision comes into play when the offense involves sexual abuse of a child or child abduction. As noted earlier, prosecution for such crimes may be brought at any time under 18 U.S.C. 3299.

Section 3282(b) is the narrower of the two DNA provisions. It only applies to offenses proscribed in 18 U.S.C. ch. 109A. Chapter 109A outlaws abusive [sexual contact, sexual abuse, and aggravated sexual abuse] when any of these offenses is committed in a federal prison, or within

<sup>27</sup> 18 U.S.C. 3283.

<sup>28</sup> 18 U.S.C. 3284.

<sup>29</sup> 18 U.S.C. 3287.

<sup>30</sup> 18 U.S.C. 3288, 3289.

<sup>31</sup> 18 U.S.C. 3290.

<sup>32</sup> 18 U.S.C. 3292.

<sup>33</sup> 18 U.S.C. 3282(b), 3297.

★ <sup>34</sup> "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 10 years after the offense, whichever is longer," 18 U.S.C. 3283.

<sup>35</sup> See text at note 16, *supra*.

<sup>36</sup> 18 U.S.C. 3297 ("In a case in which DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period").

<sup>37</sup> 18 U.S.C. 3282(b)("(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) Exception. - Any indictment described under 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 (B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment. (3) Defined term. - For purposes of this subsection, the term 'DNA profile' means a set of DNA identification characteristics").