25-6278

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID A DIEHL -- PETITIONER

VS.

UNITED STATES -- RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

David Andrew Diehl
#53214018
PO Box 7007
Marianna, FL 32447 - 7007

QUESTIONS PRESENTED

QUESTION ONE

Did the fifth Circuit have subject matter jurisdiction on direct appeal to consider an ex post facto constitutional argument that was never raised.

QUESTION TWO

Does the full ex post facto clause apply where the offense occurred prior to United States v. Booker in light of Peugh v. United States.

QUESTION THREE

Did Diehl present facts showing fraud on the court per Fed.R.Civ.P. Rule 60(d)(3).

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
Room 5614 Dept Of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

INDEX OF APPENDIX

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS

Petitioner respectfully prays that a writ for certiorari issue to review the judgment below.

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at 2025 u.s. app. lexis 12684 (5th cir. 5-21-25)

The opinion of the United States district court appears at Appendix B to the petition and is reported at Not Published

JURISDICTION

FOR CASES FROM FEDERAL COURT

The date on which the United States Court of Appeals decided by case No. 24-50855 was May 21, 2025. Appendix A .

The date on which that court denied my Petition for Rehearing and seperate Rehearing en banc was July 31, 2025 Appendix B.

STATUTORY PROVISIONS

Fed. R. Civ. P. Rule 60(d)(3)

Fed. R. Civ. P. Rule 60(b)(6)

STATEMENT OF THE CASE

On 2-27-2024 Petitioner filed three seperate motions for the district court to rule on . The first motion was titled "Motion to Set Aside 2255" (Doc 330) That motion included a single fraud on the court claim per Fed. R. Civ. P. 60(d)(3), and three Fed.R.Civ.P. 60(b)(6) claims. The second motion was a request for an order to compell the government to provide an affidavit showing the source device that produced a forensic computer examination report (Doc 334). The final motion titled "Motion For Reconsideration of Issue 8" (ECF No. 331) was a challenge to the constitutionality of Petitioner's sentence, combined with a subject matter jurisdiction challenge as described herein. The district court ruled on all three motions on 5-30-2024 (Doc 338), Exhibit C. The district court denied the Motion To Set Aside 2255 finding the Rule 60(d)(3) fraud issue didn't rise to the applicable legal standard. The court found the 60(b)(6) issues were subsequent 2255 issues and that the court lacked jurisdiction to consider the issue. The final motion, "Motion For Reconsideration of 2255 Issue 8" (Doc 331) the court found was a Fed.R.Cr.P. Rule 59(e) motion and found that it was late. In the alternative the court found that to the extent it was a Rule 60(b)(6) challenge, the court lacked jurisdiction. Petitioner appealed and the Fifth Circuit denied the appeal on May 21, 2025. See Exhibit A. Petitioner filed a motion for reconsideration and reconsideration en banc (seperate motions) and the Fifth Circuit denied those on July 31, 2025. Petitioner then filed a timely Petition for Certiorari.

QUESTION ONE AND TWO
EX POST FACTO SENTENCE

CASE FACTS

On 2-27-2024 Petitioner Diehl filed his Motion For Reconsideration of 2255 Issue 8, (doc #331). The government responded, (doc #333), and Diehl Replied (Doc #). In the district court's consolidation order (doc #338, p.4), the court ruled that Diehl's motion was a Fed.R.Cr.P. Rule 59(e) motion, and ruled it was late. In the alternate, the court said to the extent it was a rule 60(b)(6) procedural challenge, a COA was needed from the fifth Circuit.[1] Diehl filed a Motion To Alter or Amend Issue 8 which the court denied. Diehl appealed, but the fifth Circuit dismissed the appeal without addressing the ex post facto sentence challenge.

---

1. Diehl had argued in part that new evidence existed in the form of statements made by the fifth Circuit when deniying Diehl's first Rule 60(b)(6). See United States v. Diehl, 2022 U.S. App. Lexis 37201 (5th cir. 2022) where the court said, "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). At the district court level, Diehl had said only "Its not clear what the fifth Circuit did." In his latest motion at issue here Diehl thought it relevant that the Fifth Circuit didn't try to defend the procedural v. Susbstantive mistake. This as shown herein was not a minor error.

1. SUBJECT MATTER JURISDICTION

For the first time in his Motion For Reconsideration of 2255 Diehl argued that the district court's 2255 procedural bar of his ex post facto sentencing argument was an error, because the Fifth Circuit never had subject matter jurisdiction to review a constitutional attack to the sentence in the first place. Diehl plainly never raised such an argument. The 2255 court barred a constitutional challenge saying: "The Fifth Circuit directly addressed and rejected Petitioner's ex post facto issue."

Subject matter jurisdiction challenges can be brought at any time. See Mitchell v. United States, 2020 U.S. Dist. Lexis 152497 (9th Cir. 2020). Also AEDPA is not applicable to constitutional challenges.

2. WHAT HAPPENED ON DIRECT APPEAL

What the Fifth Circuit actually did on direct appeal was to say "[Diehl] appears to argue that the ex post principle required the district court to impose a sentence within the guideline range." Diehl, 775 f.3d 714, 724 (5th Cir. 2015). The court then dismissed the claim citing United States v. Austin, 432 f.3d 598, 599 (5th Cir. 2005). The finding as already shown, was in the procedural section of the court's opinion, but Diehl raised the issue as a substantive issue under the title "The Trial Court Imposed a Substantially Unreasonable Sentence." Diehl argued the abuse of

descretion standard applied citing Gall v. United States, 552 U.S. 38 (2007).

3. DIEHL SHOWED CAUSE

Diehl did not challenge the constitutionality of United States v. Booker 543 U.S. 220 (2005) or Austin (supra) because the Fifth Circuit refused to stay Diehl's appeal pending the Supreme Court's resolution of Peugh v. United States, 569 U.S. 2013 . Also denied post Peugh were Diehl's request for counsel, and a request to file a supplemental brief on Peugh. Diehl filed his stay motion on 2-26-2013, and it was denied on 3-5-2013.

For a stay to succeed, per Fed.R.App.P. rule 8(a) Diehl had to prove 1) he would likely succeed on the merits and 2) he would be irreperably harmed. As for the second prong, Diehl was given a 30 year upward variance, on pre-Booker charges, were variances wern't an option. As for the first prong, Peugh had been granted certiorari, and he was affectivlychallenging the same precident that Austin(supra) relies on i.e. Rogers v. Tennesee, 532 U.S. 451, 462 (2001). As it turns out the Supreme Court did affect Rogers v. Tennessee. See United States v. Hurlburt, 835 F.3d 715 (7th Cir. 2016) (Demaree - 7th Circuit precident was reversed); United States v. Wasetta, 647 f.3d 980, (10th Cir. 2011) citing the effect of Peugh cross circuit.

4. MISINTERPRETING DIEHL'S SUBSTANTIVE ARGUMENT

A side effect of the Fifth Circuit's misinterpretation of Diehl's ex post facto statements, was that his substantive argument wasn't evaluated fully. Diehl citing United States v. Robertson, 662 F.3d 871, 880 (7th Cir. 2011) argued that "Robertson gives practical consideration to the ex post facto, due process concerns." Sent. Trans. p. 56.

In Diehl's argument there is no mention of Booker being unconstitutional or wrong, and Peugh could not be briefed since it had not been decided.

5. PROCEDURAL ERRORS AT SENTENCING

At sentencing the court spent considerable time calculating the correct guidline range, which when complete was accepted by all parties. The range accounted for 1)number of victims (3)[1] 2) number of counts (10)[2] 3) age of victims[3] 4) Conduct.[4] Diehl's criminal history was 1[5] . These factors led to a sentencing range of 240 - 260.

During sentencing the court said that calculating the Guideline range "... is largely non-productive when I look at a statute that gives me as broad of a range as I have" Sent Trans.51 . The court continued "... 2 points here and 2 points there...."St.110 . The court said that it felt the technical necessity of calculating the guideline range was of little importance given the statutory range St.110 . The court said, "The sentence I will impose today is the

---

1. Guideline N1 of 2g2.1 recomends a departure past 10 victims
2. Diehl received plus 3 enhancement per grouping rules
3. Diehl received plus 4 for under 12
4. Diehl got plus 2 for care and custody.
5. The correct number is criminal history of 0.

sentence that I would impose had we not ever had a dicussion of the guidelines, and if we did not have guidelines at all." S.t. 113. The court said, "The strongest factor ... is the seriousness ... what it has done ... and what it will continue to do ..." St. 113. Here however no victim appeared at sentencing, nor did any bother to fill out the victim impact statement. No civil suit was brought for damages. There was effectively no indication of present harm and atleast one victim had no memory of the event at all.[1]

Judge Yeakel made abundantly clear the statutory range alone would constrain the sentence, and calculating the guideline range was nothing more than a formality.[2]

There are serious procedural errors associated with the court's rational and remarks. In United States v. Duhon, 440 f.3d 711, (5th Cir. 2006) the court said " The [District] court cannot reasonably impose the same sentence regardless of the correct advisory range anymore than it could reasonably impose the same sentence regardess of the seriousness of the offense...." In Duhon the court said "The guidelines clearly reflect consideration of whether and degree to which harm to minors is or has been involved." See United States v. Perez-Rodriguez, 960 f.3d 748, (6th Cir. 2020) citing United States v. Poynter, 495 f.3d 349, 355 (6th Cir. 2007) "In the ordinary case, the commission recomendation of a sentence range 'will reflect a rough approximation of sentences that achieve §3553(a) objectives." citing Kimbrough

---

1 With regard to future harm see United States v. Brown, 843 f.3d 74, 91 (2d cir. 2016) citing United States v. Juwa, 508 f.3d 694, 700 (2d Cir. 2007) (sentence should be based on accurate information)

2 Relying on just the statutory range mimics the decent opinion in Peugh .

v. United States, 552 U.S. 85, 109 (2007) quoting Rita v. United States, 551 U.S. 338 (2007). Courts have also made clear that overreliance on the statutory range causes disparity in the sentence of similarly situated offenders. See Perez-Rodriguez citing §3553(a)(6).

6. HEARTLAND ANALYSIS

To determine if Diehl's case fell withing the heartland of 18 U.S.C. §2251(a) cases the court referred to three government cases all of which were post Booker, the defendant had guideline life, the conduct was long term, and in at least one extreme violence was used. The cases in effect had nothing in common with Diehl's case. The court's only comment concerning the cases was that they had only one victim. Again, the Guidelines recommend an upward departure over 10 victims. The court also considered three defense cases where those offenders had similar guideline ranges to Diehl. One had three victims like Diehl, and his offense like Diehl's occured many years prior to arrest. See United States v. Coutentos, 651 f.3d 809 (8th Cir. 2011) (Two grand daughters filmed in lesbian scene).

The only comparetive analysis done by the court was to compare production offenses to possession offenses, which does nothing to determine if a case is mine-run and per the Fifth Circuit is an error. See United States v. Grosenheider, 200 f.3d 321, 333 (5th Cir. 2000) ("It is clear that congress established a series of distinctly seperate offenses respecting child pornography, with higher sentences for offenses involving conduct more likely to be, or more directly harmful to minors than the mere posession offense.").

7. HEARTLAND REVIEW ON APPEAL

On direct appeal the Fifth Circuit misrepresented what happened at Diehl's sentence hearing, alleging that the district judge said the case wasn't "merely ordinary," and was "expecially grave." The district court however said no such thing.

The Fifth Circuit also alleged that the variance was based on factors which were fully accounted for in the guideline calculation. The district court stated no disagreement with the guidelines, or the way enhancements were factored. Importantly, the Fifth Circuit ignorred the fact that the Judgment and Committment per 18 U.S.C. §3553(c)(2) said exactly what the variance was based on. Section §3553(c)(2) requires "specificity."

8. STATED VARIANCE BASIS

Per the Judgment and Committment the variance was based entirely on circulation of the charged visual depictions. This factor however does not distinguish the case in any way, nor did the court say it did. Diehl can find no case where circulation drove a variance. The Guidelines award a two point enhancement if the offender himself distributes. Diehl was not charged with distributing, the variance concerns the actions of others. The Fifth Circuit acknowleged this in its opinion. Diehl, 775 f.3d 714, Lex24, (5th Cir. 2015).

In Kimbrough, 128 S. Ct. at 574-75 quoting Rita 127 S. Ct. at 2465, the court said, a district court's decision to vary from the advisory range may attract greatest respect when the sentencing judge finds a particular case outside the hearland to which the commission intends individual guidelines to apply." For a truely exceptional case consider United States v. Irey, 612 F.3d 1160

(11th Cir. 2010) (en banc) (50 victims, sadomasicist, rape, torture , widely distributed, 30 year sentence, no variance, charged with one count. The case was just prior to Diehls.

9. NC MEC STATS WERE NOT EVIDENCE

Furthermore the National Center For Missing Centers provided statistics were not entered as evidence in Diehl's case. However at sentencing the court said "I find based on evidence..." that the visual depictions were in wide circulation. The statistics were essentially hearsay. See United States v. Bates, 665 Fed. Appx. 810, 815(11th Cir. 2016). This evidence issue is affected by the ex post facto clause because the clear and convincing standard was replaced by the preponderance of evidence standard even when a sentencing factor has an extremely disapportionate effect on the sentence relative to the conviction. See United States v. Lucas, 101 F.4th 1158 (9th Cir. 2024) (en banc).

10. SENTENCE EXPLAINATION

The sentence variance justification in the Judgment and committment controls. See §§3553(c)(2), 3742(e)(3), and U.S.S.G. 5k2.0 (6). See United States v. Bolstic, 970 f.3d 607, 611 (5th Cir. 2020) (3553 (c)(2) allows for meaningful appellant review and perception of fair sentencing citing Gall, 552 U.S. at 56). See United States v. Ausburn, 502 f.3d 313, lex 46 ("The reason for imposing a non-guideline range sentence 'must be stated with specificity in the written order of the Judgement and Committment'" (3rd Cir. 2007); Also United States v. Pillault, 783 f.3d 282, Lex 24 (5th Cir. 2015) (The

government cites no cases that apply the oral-trumps-written rule to a statement of reason ing."); United States v. Denny, 653 f.3d 415, 462 (6th Cir. 2011) (Court explained in detail why the guidelines failed to reflect the seriousness of the offense); United States v. Flores-Natr, 2023 U.S. App. Lexis 6636 (1st Cir. 2023) (Court failed to provide a plausible sentencing rationale); United States v. Reyes-Corea, 81 F.4th 1 (1st Cir. 2023) (Reversed for failing to say how the defendants offense differed from the heartland.)

The Fifth Circuit only addressed the Judgment and Commitment's reason for the variance in a single statement, "It was not improper for the district court to consider the continuing impact of the victims" quoting the district court: "The videos have developed a life of their own." The J&C however doesn't show the court "considered" the alleged distribution, but rather it drove the entire variance. That alleged harm is traceable to the government sentencing memorandum citing Ashcroft v. Free Speach, Osborn v. Ohio, and New York v. Ferber Note however that 2251(a) was enacted for commercial exploitation in 1977, and interstate commerce is a predicate of the offense. To the best of Diehl's research, no variance has been based on this factor, which explains why the Fifth Circuit altered the J&C reason to include factors taken into account by the guidelines.

The district court itself failed to sufficiently explain the sentencing rational and this is a procedural error. See United States v. Bishop, 469 f.3d 896, 908 (10th Cir. 2006)("How compelling [sentence justification] must be is proportional to the extent of the difference between the advisory range, and the sentence imposed" citing cases.)

11. FAILURE TO CONSIDER DEFENDANT'S POLICY DISPUTE ARGUMENT

At his sentencing hearing Diehl objected to the 2G2.1 guidelines on the basis that they were promulgated by Congress not the guideline commission, and as statistics show, the enhancements apply in nearly every case. The district court failed to respond to the argument and although raised on appeal, the Fifth Circuit found that there were no procedural errors. See Rita v. United States, 127 S. Ct. 2456, 2468 (2007), "[t]he sentencing judge should set forth enough to satisfy the appellant court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."

SENTENCING SUMMARY

The district court's failure to treat the guidelines as a meaningful framework, its failure to determine what constitutes a minerun case, its failure to adequately explain how visual depiction circulation justifies a thirty year upward variance, and its failure to address Diehl's 2g2.1 argument represented reversable errors.

The Fifth Circuit reacted by both ignoring these raised issues and by misrepresenting the district court's statements concerning what may make the case unusual. The district court said it felt the case "rises to the top," but failed to explain in any way how the case differed from the thousands of other exploitation cases. Statistics that are now available (Exhibit D) show that the case is not unusual. The closest sentencing statistics to Diehl's 1999 conduct show average 2g2.1 sentences at 267 months.[1] With the correct guidelines range 151-180,[2] Diehl's conduct was well below the average.

---

1. Note also that in 1999 the offense level was 27
2. The probation officer said the menacing charge would not apply for criminal history.

1. EX POST FACTO CLAUSE AS APPLIED

As the Seventh Circuit explained in Hurlburt (supra), Booker made clear that the guidelines remain a meaningful benchmark, and this anchoring effect is enough to implicate the concerns underlying the ex post fact clause per Peugh. Similarly the procedural rules and appellate-review standards post Booker, provide a degree of binding legal effect and are sufficient to raise ex post facto concerns. "The guidelines post Booker are not merely a volume that the district court reads with acedemic interest ... they have real world consequences." id 723. One of the consequences is that reviewing courts can presume a within guideline range sentence is reasonable.

As the Supreme Court observed in Peugh, when the guideline range moves up or down the offender sentences respond to it. The Guidelines are the loadstone. In Peugh the Supreme Court also observed post Booker sentences had not changed substantially. The reason for that is because district courts conventionally treat the Guidelines with a great deal of respect. Here however, by the courts own words, post Booker the Guideline calculation process is "non productive," and the sentence would stand "had we not ever had a discussion of the guidelines, and if we did not have guidelines at all." Sent Trans 113. These statements are irreconcilable with the post Booker sentencing regime.

2. POST PEUGH CIRCUIT PRECIDENT ON EX POST FACTO IS IN DISARRAY

In the fifth Circuit's ex post facto ruling on direct appeal the court cited United States v. Austin (supra) as their ex post facto precident. This is actually not so clear cut as it first may appear. See United States v. Urbines-Fluentes, 900 F.3d 687 (5th Circuit 2018) (Explaining a more onerous guideline can't be applied .) Also see Marbon-Calderon v. United States, 631 f.3d 210 (5th Cir. 2011) identifying Castillo-Estevez v. United States, 597 f.3d 238 as precident. See United States v. Andrews, 532 f.3d 900 (D.C. 2008) identifying an entirely different Austin as precident.

In any case, Austin like United States v. Demaree, 459 F.3d 791 (7th Cir. 2006) can't survive Peugh. Austin like Demaree relies on Rogers v. Tennessee, 532 U.S. 451 (2001) to find the retroactive application of a new judical interpretation of a criminal statute does not implicate the ex post facto clause. Austin argues that since Booker was a judicial decision, only due process, and notice concerns apply to protect a defendant. Peugh however said that Miller v. Florida, 487 U.S. 423, 433 (1987) which honored the ex post facto clause was the closest analogy to the federal sentencing paradigm.

> The guidelines themselves state:
> "if the court determines that the use of the guidelines manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States constitution the court shall use the guideline manual in effect on the date the offense of conviction was committed."
> See 1B1.11(b)(1), (2)

Note the instruction is "shall use," not consult.

Austin also relies on United States v. Scroggins, 411 f.3d 572, 576 (5th Cir. 2005) which concerns Sixth amendment issues, not

the ex post facto clause. In Peugh however the Supreme Court clearly sought to distinguish the two. Finally, since Austin got the low end of the Guideline range, she wasn't prejudiced which explains the two page opinion.

3. OTHER EX POST FACTO CONSIDERATIONS

Other Ex Post Facto considerations include that Congress promulgated the 2g2.1 guideline - it was legislative. Also Booker did not alter 3553(c)(2), the sex offense guidelines. These facts complicate any conclusion that Booker should not trigger ex post facto concerns.

Booker certainly greatly reduced the "burden" of increasing the measure of punishment a defendant may be subject to due to the passing of time. Here Diehl was arrested a decade after the offenses, and the only reason that was permitted was because allegedly the statute of limitations at 18 U.S.C. §3283 applies to sexual exploitation offenses.[1]

In United States v. Turner, 548 f.3d 1094 (D.C. 2008) the court found the ex post facto clause applies when "the defendant has been substantially prejudiced, regardless if it was possible the defendant might have received the same sentence under the old guidelines. The test is whether there is a substantial risk that the defendant's sentence was more severe."

---

1. However 3283 says nothing of sexual exploitation, the term was removed from the plain language. The Fifth Circuit adds it back via a non-referenced definition of sexual abuse that Congress refused to reference. This violates the seperation of powers clause of the constitution.. Also where is physical abuse defined? Section 3283 is a belated enactment of the 1986 sexual abuse act, its terms are not defined because congress meant to assimilate state offenses on Indian land. 18 U.S.C. 1153(b). Only §3299 applies to 18 U.S.C. §2251(a).

4. BOOKER WAS UNEXPECTED AND INDEFENSIBLE

The final ex post facto consideration is whether or not Booker was "unexpected and indefensible by reference to the law which had been expressed [by congress] to the conduct at issue." Booker concerned the Six Amendment, and whether Judges alone could rule on sentencing enhancements in certain circumstances. Booker did not directly concern the ex post facto clause. It also was unexpected because the Supreme Court could have let congress amend the Sentencing Reform Act of 1984. If this had happened then it's doubtful Rogers v. Tennessee would ever have been mentioned. Rogers concerns the evolution of "common law."

The Sentencing Reform Act of 1984 was enacted into law to "curb 'variable sentencing caused by different judges' perceptions of the same criminal conduct." See United States v. Kirkpatrick, 589 F.3d 414, 416 (7th Cir. 2009). Its goal was to "channel sentencers' discretion and reduce sentencing disparities - a technical phrase describing the indefensibly wide range of punishments different judges had imposed on similarly situated defendants." See Mistretta v. United States, 488 U.S. 361, 367-68 (1989).

At sentencing here, the government cited three cases in their sentencing memorandum that had guideline life, not 151-180 (criminal history zero) as Diehl had. The cases were all post Booker, not like Diehl that pre-dated Booker by six years. The conduct in those cases included long term abuse and extreme violence. Diehl's conduct lasted one hour, followed by a decade of clear conduct prior to arrest.

Sentencing statistics in Exhibit D show that average sentences are far below Diehl's sentence, and most importantly variances are nearly always closely correlated to the guideline range, and they are rarely imposed.

QUESTION THREE

STATEMENT OF THE CASE

Plaintiff seeks certiorari concerning the Fifth Circuit's denial of three seperate motions which the court consolidated. See District court order, Appendix one (Order 39-2). The first defendant motion was titled "Motion to Set Aside 2255" (doc 330). That motion included a single Fraud on the Court claim per Fed. R.Civ.P. 60(d)(3). Also included were three seperate Rule 60(b)(6) claims. The second motion was a request for an order to compel the government to provide an affidavit showing the source device that produced a forensic computer examination report. (ECF No. 334). The final motion titled "Motion For Reconsideration of Issue 8 (ECF No. 331) was a challenge to the legality of Diehl's sentence.

The district court treated the Rule 60(d)(3) claim as a proper 60(d)(3) issue, but denied it on the merits. The court treated the three Rule 60(b)(6) claims as second or successive filings and dismissed for lack of jurisdiction. The court treated the sentence challenge in the same manner.

QUESTION THREE

FRAUD OVERVIEW

Rule 60(d)(3) is reserved for the worst kinds of fraud where the judicial machinary is improperly influenced. That level of fraud occurred in Diehl's case. Through machinations Diehl was denied his constitutional right to bring forth his primary defense. The defense had been won in every circuit to consider it.

The fabrication of evidence will also trigger Rule 60(d)(3) and herein Diehl shows that evidence was fabricated in two independant ways. Diehl also presents fact which show that the government interfeared with Diehl's attorney-client privilages in an effort to have evidence of fraud on the court destroyed. Included in that evidence are indications that Diehl's trial attorney may have comprimized himself.

The district court dismissed the fraud claim without holding an evidence hearing, and refused to compel the government to produce an affidavit showing what device produced the forensic.

1. STATEMENT OF FACTS

Over the years (in Diehl's initial 2255, in his first fraud on the court filing, and in a motion for an original 2241 writ to the Supreme Court (24-7234)) Diehl has argued that the Fifth Circuit errored when on direct appeal it based its interstate nexus finding on government recommended inferences. Those inferences relied on statements made by government cooperating witness Ken Courtney, who alleged 1) he saw a charged visual depiction on Diehl's computer one night,[1] and 2) Diehl told him that Diehl used the internet to trade child pornography. Based on these statements the conviction was upheld.

2. FED.R.CR.P. RULE 23(c)

The inferences on appeal were legally impermissable per Federal Rule Criminal procedure 23(c), because the trial judge

---

1. These statements were added to Courtneys statements to the FBI after being writed out of state jail and flown to Austin Texas.

at the bench trial orally entered a specific finding of fact and law. See United States v. Hogue, 132 f.3d 1087, 1090-91 (Lex 11) (5th Cir. 1998) (Oral findings of fact are acceptable) citing Charles and Wright §374 at 311-12 & N.5, 2d Ed. 1982 "Purpose of special findings of fact is to afford a reviewing court a clear understanding of the basis of a trial court's decision" citing cases. See United States v. Garza-Flores, 2021 U.S. Dist. Lexis 232711 (S.D. Tx, 2021) (Court can make special finding despite no request, citing Moores "535.05"); United States v. Johnson, 496 f.2d 1131, 1138 (5th Cir. 1974) ("Oral findings are sufficient depending on circumstances. The ultimate test as to the adequacy will be if they are sufficiently comprehensive and pertinent to the issue to provide a basis for the decision."); Gilbert v. Sterrett, 509 f.2d 1389, 1398 (5th Cir. 1975 (same). "The findings should not be discursive, they should state the evidence or any reasoning upon the evidence; they should be categorical, and confined to those propositions of fact which fit upon the relevant propositions of law." Carr v. yokohama Specie Bank LTD, 200 f.2d 1389, 1398 (5th Cir. 1975) itself citing Gulf King Shrimp Co. v. Wirtz, 107 f.2d 508, 515 (5th Cir. 1969).

Courts have found the trial court can and should explain credibility determinations, expecially if it concerns a legal defence citing United States v. Pinner, 561 f.2d 1203, 1207 (5th Cir. 1977).

Importantly, if a specific finding of fact and law was made, then findings based on inferences CAN NOT BE IMPLIED. See United States v. Ochoa, 526 f.2d 1278, FN6 (5th Cir. 1976) citing United States v. McClain, 417 f.2d 489, 492 (9th cir. 1968) citing Moores Federal Practice 623.05 (corrected) and cases. See United States v. Powell, 973 f.2d 885, 889 (10 Cir. 1992) (Special findings are helpful, but in their abscence, appellate court will imply finding supporting the judgment.) "Not considering the [specific] findings would perpetuate an injustice to deprive appellant of the consituent elements of the offense." Wilson v. United States, 250 f.2d 312, (9th Cir. 1957).

Findings of fact were not "absent" at Diehl's bench trial , and they were "sufficiently comprehensive and pertinent to the issue to provide a basis for the decision." The finding was not based on Diehl transporting visual depictions either physically or by the internet to which Diehl was not charged. The hard drives the government built their inference on also was not evidence, and at pre-trial the government promissed not to use in their case in chief.

3. TRIAL COURTS FINDING

The stipulation, the exhibits, and in fact the way Diehl was charged all relied on §2251(a)'s "such visual depiction" term applying to encorporeal images, or scenes per se. The court did not realize that §2251(a)'s third nexus clause only applies to what was produced when the minor was used, not subsequent reproductions.

The transcripts show a narrow and specific finding of fact and law that relies exclusively on the video's being available through the internet and nothing more. The government assured the court this fact was sufficient.

> Government : "... just having these video exhibits on the internet is sufficient to show interstate of foreign commerce ... And as Mr. Courtney testified ...." Trial Tr. 155:17.

The government assured the court that United States v. Runyan, 290 f.3d 223 (5th Cir. 2002) directly applied. Trial Tr. 154:18. The court then found, Court, "...I find based on Runyan ... and the testimony of Mr. Courtney, who I find credible as to that part ...." The credibility was clearly qualified. Additionally Diehl stipulated the depictions were on the internet. Given this fact, Courtney isn't mentioned again.

The court before making its final finding asked the government to reafirm their stance. Again the government assured the court that the producer need not be associated with distribution of the charged visual depiction. Trial Trans 175:11. Based on this the court said Court: it "defied common sense" to say charged counts were not involved in interstate commerce. Day 2 TT 7:4.

Counsel was ineffective for not challenging the plain language of 2251(a)'s "such visual depiction," and when he said Runyan was a bad decision, instead of inapplicable to Diehl's facts. See Trial Tr. 153:3. Runyan involves 2251(a)'s first nexus clause and does concern mens-rea. And, Runyan was going to use the internet to transport his visual depictions. Counsel was also ineffective in that he failed to object when the court found

Court: "The exhibits ... clearly satisfy the videotape or digital video component." Trail Tr. Day2 4:9. Everyone involved in the proceeding knew that Diehl did not produce the exhibits. In fact the United States produced the exhibits from depictions they obtained from unrelated third parties.

4. FIFTH CIRCUIT APPEAL FINDINGS

Diehl on appeal challenged the district court's finding in his "Ground Two For Dismissal" were he challenged the meaning of visual depiction in §2251(a)'s third nexus clause. For whatever reason the Fifth Circuit overlooked this argument, and without cause instead evaluated Coundel's mens-rea argument - which by the way never had any chance of winning. Diehl's argument was fundamentally an ineffective counsel argument, which according to Fifth Circuit precident can't be considered on direct appeal.

The court went out of its way to blur the distinction between what Diehl produced, and the evidence. It refered "the videos." The court when citing Runyan exclipsed out that it was he who was going to transport his videos. The court did not evaluate Diehl's constructive amendment claim, knowing it would only be relevant if Diehl himself transported visual depictions, which Diehl was not charged with for lack of any evidence.

5. CURRENT FRAUD CLAIMS

1) The government in their 2255 response argued Diehl's Nexus argument was ruled on by the Fifth Circuit on direct appeal.

See the government's 2255 response Doc 218, Page 12 "This issue was addressed by the Fifth Circuit in movant's appeal, and was resolved against movant." citing Diehl 775 f.3d 714, 721-22. As a result of this fraud the district court procedurally barred Diehl's ineffective assistance of counsel argument, and plainly Diehl has been prevented from ever raising the one defense that could have won; a defense the stipulation was based on; an argument that refusing a plea deal was based on. See See United States v. Lively, 852 f.3d 549 (6th Cir. 2017).

2) On 2255 the government continued to argue that witness Ken Courtney was found credible and a part of the trial courts factual finding. In other words the government was again arguing their appeal inferences were in good faith. During the bench trial when ruling on a Rule 29 motion, the court found Courtney credible to "that part," which was that visual depictions were available on the internet. This qualified finding had no impact because being on the internet was stipulated to. Importantly, third party reproductions were on the internet, and there was no accusation that Diehl produced them, otherwise the stipulation was a guilty plea.

3) During 2255 Diehl learned of a FBI 302 interview summary with witness Ken Courtney where he said he saw visual depictions at Diehl's house on an external, unencrypted drive. On appeal however the government led that court to believe that Courtney saw the images on the seized internal encrypted drives. This fraud represents evidence fabrication, and falls under Rule 60(d)(3).

4) Highly related to number 3 above is the fact during 2255 the

government got evidence of the fraud destroyed by effectively getting the 2255 court to force Diehl's sentencing attorney to destroy his clients records.[1] Also in the file was a forensic computer exam which was apparently made from the external non-encrypted device and was esculpatory. This report was reffered to as Item-0 in an inventory list the government was ordered to produce during 2255. These actions also relate to the government's fabrication of evidence as described.

5) Related to the mystery device that created the forensic, is the fact during sentencing the government moved to seize "other media devices" which were not in the warrant. The court not realizing what was happening at sentencing, sua sponte seized this device. This new evidence spells fraud on the sentencing court.

6) The device may have come from Diehl's sentencing attorney, and if it did this would represent a profound ethics violation cognizable under Rule 60(d)(3).

7) Finally, the government on 2255 again fabricated evidence by telling that court the evidence was digital copies made from analog masters.[2] This would eliminate the impact of Diehl's entire defense as explained.

See government 2255 reply Doc 218, p.7

---

1. This formed the basis of Diehl's contemporous Rule 60(b)(6) filing. Diehl argued that a Magistrate can't make a final ruling on such an injunction (#202), and the judge conflated an in camera motion with an unrelated in-camera motion (labeled #208). Finally the district court failed to rule on a discovery motion following Diehl's amendment to his 2255. The court did not rule on these 60(b)(6) issues, and instead ruled on an unrelated Rule 41(g) argument.
2. Its not clear where the government obtained the depictions from.

RULE 60(d)(3) LEGAL STANDARD

In United States v. Horohan, 294 US 103, 112 (1935) the Supreme court said, "... deliberate deception on a court by the presentation of false evidence is incompatible with 'rudimentary demands of justice." In United States v. Higgs, 193 f. supp. 3d 495 , 507 (4th Cir. 2016) the court observed that it is fraud on the court to fabricate evidence where it was planned, carefully executed, and intended to defraud the court.". In Scott v. United States, 81 f. supp. 3d 1326-37 (11th Cir. 2015) the court granted an evidence hearing where the government deceived the 2255 court. Finally, in United States v. Throckmorten, 98 US 61 (1878) the Supreme Court found that it was fraud on the court for a litigants own attorney to "connive at his defeat" or "sells out his client's interest ...." id 66.

LAW APPLIED

Diehl has demonstrated that the government fabricated evidence on direct appeal and 2255. On appeal the government built their hard drive inference (Despite Rule 23(c)) on a hard drive that wasn't the one described by their witness Ken Courtney. They also witheld from the Fifth Circuit that they had an esculpatory forensic examination from an undesclosed device. The forensic should have been disclosed per Brady v. Maryland, but Diehl's attorney's report never seeing it. The Fifth Circuit built their inference on the assumption the hard drive couldn't be decrypted.

During the 2255 proceedings the government again fabricated evidence when they told the district court that the visual depiction evidence were digital copies of Diehl's analog masters. Keep in mind, as shown they also argued on 2255 that Diehl's challenge to the plain language was considered on direct appeal. Clearly the 2255 court fully bought into this fraud. The deception was carefully planned, and executed and was designed to frustrate Diehl's 2255 Ground 5 argument. That argument showed "such visual depiction" as used in 18 U.S.C. §2251(a)'s third nexus clause applies only to what was produced while a minor was used. See Lively (supra).

Rule 60(d)(3) is triggered by fabrication of evidence. Withholding the esculpatory forensic report simply adds to the fraud. There is a question of what device produced the forensic. Was it seized by the cryptic language in the government sponsored sua-sponte seizure. Did the device come from Diehl's attorney. If either of these questions are true then Rule 60(d)(3) requirements are also met. The first has serious Fourth Amendment implications, and the second falls under Throckmorten.

Along with Diehl's Motion to Set Aside 2255, he also moved the court to order the government to provide an affidavit stating what device produced the forensic report described by an inventory list of discovery turned over to the defence as Item-O. The court denied it.

Wherefore, this case should be remanded back to the district court and an evidence hearing should be granted. Diehl prays for any other relief this court may find appropriate, including the dismissal of the case for the government's fraud which resulted in the denial of Diehl's primary argument, the bench trial was based on.

REASON FOR GRANTING PETITION FOR GROUND ONE AND TWO

GROUND ONE

This court should grant certiorari for Ground One, because its a question of national importance whether or not courts while evaluating pro-se appeals, after denying an attorney and a relevant stay based on a pending Supreme Court case , can also plainly misinterpret whether or not a constitutional argument was raised. This is fundamentaly a subject matter jurisdiction question.

GROUND TWO

Certiorari should be granted because whether or not the ex post facto clause fully applies to pre-Booker offenses is a question of national importance. Circuit courts are split, and intra circuit decisions are varied on this important question. Peugh v. United States, 569 U.S. 2013 never resolved this specific question because the issue did not arise.

Diehl's case shows how far removed just being required to calculate the sentence range with the correct guidelines is from the full protection of the ex post facto clause which encompases fundamental justice concerns. Diehl's correct sentence range was 151-180, and because of United States v. Booker, 543 U.S. 220 (2005), he received 600 months. Diehl's is an ideal case to consider the issue as the case facts show.

REASON FOR GRANTING PETITION FOR GROUND THREE

Congress enacted Fed.R.Civ.P. Rule 60(d)(3) with no statute of limitations to protect the judicial systems integrity. Diehl's case facts indicate just how far fraud on the court can be stretched. It is imperative that Rule 60(d)(3) have real teeth, so that litigants are well reminded to play within the rules.

Diehl's case facts show fabrication of evidence, machinations that led to Diehl never being able to bring his primary defense, witholding of exculpatory evidence, and the likely comprimise of his trial attorney.

The District court's ruling is one sentence long and failed to address any of the stated claims. The Fifth Circuit also gave little to no consideration to the serious issues presented. Rule 60(d)(3) serves an important purpose, and the Supreme Court should use this case to send such a message.