No. 01-42

In the Supreme Court of the United States

CLIFTON S. COREY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. 7(3), extends to a United States military enclave in a foreign nation and to United States diplomatic premises in a foreign nation.

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OPINIONS BELOW

The opinion of the court of appeals that is at issue in this petition (Pet. App. 1-77) is reported at 232 F.3d 1166. The court of appeals simultaneously issued a second opinion (App., *infra*, 1a-2a), which is unreported, but the judgment is noted at 246 F.3d 676 (Table). The opinion of the district court (Pet. App. 94-107) is unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 79; App., *infra*, 2a) were entered on November 20, 2000. A petition for rehearing was denied on April 9, 2001 (Pet. App. 78). The petition for a writ of certiorari was filed

on July 6, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on four counts of aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 2241(a), and four counts of sexual abuse within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 2242(1). The district court sentenced petitioner to 262 months of imprisonment. Pet. App. 3. The court of appeals affirmed the district court's determination that it had jurisdiction over the charged offenses pursuant to 18 U.S.C. 7(3). Pet. App. 1-77. In a separate opinion, however, the court of appeals vacated petitioner's convictions because the court found errors during the trial. App., *infra*, 1a-2a.

1. Petitioner is a United States citizen who worked for the United States Air Force as a civilian postmaster. From 1992 until August 1993, petitioner lived with his family in quarters on Yokota Air Force Base in Japan, where petitioner managed the base post office. From late 1993 until 1996, while still an employee of the Department of Defense, petitioner managed the post office at the United States Embassy in Manila. In the Philippines, petitioner and his family resided in a private apartment building that the United States Embassy rented for the use of government employees. Pet. App. 2; Gov't C.A. Br. 5 & n.2, 7.

In 1996, petitioner's stepdaughter told her doctor that petitioner had sexually abused her for five years. Pet. App. 2. After an investigation, petitioner was charged with 11 counts of sexual abuse and aggravated

sexual abuse, in violation of 18 U.S.C. 2241(a) and 18 U.S.C. 2242(1). The indictment alleged that the sexual assaults took place in petitioner's residence on Yokota Air Force Base and in his government housing in the Philippines, and that both of those locations were within the "special maritime and territorial jurisdiction of the United States," as defined in 18 U.S.C. 7(3) and referenced in 18 U.S.C. 2241(a) and 2242(1). Pet. App. 2-3; 7/23/97 Third Superseding Indictment. The "special maritime and territorial jurisdiction of the United States" includes, *inter alia*,

> [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. 7(3).

Petitioner's first trial ended in a hung jury. Pet. App. 95. Before the second trial, as it had done before the first trial, the government moved *in limine* to establish the district court's jurisdiction. Petitioner filed a motion to dismiss in which he contended that crimes committed on foreign soil are not within the special maritime and territorial jurisdiction of the United States. See *id.* at 95-96. The district court granted the government's motion and denied petitioner's motion to dismiss. *Id.* at 94-107. At the second trial, petitioner was convicted on eight of the 11 counts of the indictment. The district court sentenced petitioner to 262 months of imprisonment. *Id.* at 3.

2. The court of appeals vacated petitioner's convictions and remanded for a new trial. App., *infra*, 2a. In

an unpublished opinion, the court of appeals held that the district court had denied petitioner his right to cross-examine witnesses and should have excluded certain testimony that medical problems suffered by petitioner's stepdaughter were caused by sexual abuse. App., *infra*, at 1a-2a.

In a published opinion issued the same day, the court of appeals held that the district court correctly concluded that it had jurisdiction over petitioner's offenses because the premises where the sexual assaults allegedly occurred were within the special maritime and territorial jurisdiction of the United States. In so holding, the court rejected the reasoning of *United States* v. *Gatlin*, 216 F.3d 207 (2000), in which the Second Circuit had held that, when read in light of the presumption against extraterritorial application of United States law, the text and history of 18 U.S.C. 7(3) preclude its application to foreign soil.

The court of appeals in this case concluded that the general presumption against extraterritorial application of United States law (see generally *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) is inapplicable to Section 7(3) because the statute specifically addresses jurisdiction; because Section 7(3) applies only to areas that are under the control of the United States, where other governments are unlikely to have an interest in regulating conduct; and because Section 7 as a whole extends the reach of federal criminal laws "beyond *ordinary* land and seas * * * to areas where American citizens and property need protection, yet no other government effectively safeguards those interests." Pet. App. 9; see *id.* at 7-9.

The court of appeals was "not persuaded" (Pet. App. 11) by the Second Circuit's conclusion in *Gatlin* that, when Congress enacted Section 7(3) and earlier ver-

sions of the provision, it intended to assert jurisdiction only on federal reservations within the territorial limits of the United States. *Id.* at 11-18; see *Gatlin*, 216 F.3d at 216-220. The court concluded that Congress "understood criminal jurisdiction to extend to all lands claimed by the United States, without regard to whether they were within a particular state or even within the Continental United States." Pet. App. 18.

Finally, the court of appeals concluded (Pet. App. 21-39) that the two locations where petitioner allegedly abused his stepdaughter—Yokota Air Force Base and the United States Embassy apartment building in Manila—came within the scope of Section 7(3) because both were "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof." 18 U.S.C. 7(3).

Judge McKeown dissented. Pet. App. 40-77. Consistent with the Second Circuit's opinion in *Gatlin*, she would have applied the presumption against extraterritoriality to construction of Section 7(3). Pet. App. 43-53. Finding the statute "a poster-child for ambiguity" with respect to its extraterritorial reach (*id.* at 60), Judge McKeown considered the legislative history of the provision, which, she believed, showed that Congress intended only to reach conduct on federal reservations within the United States. *Id.* at 60-70.

Judge McKeown also drew support (Pet. App. 75-76) from Congress's recent passage of the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488. Among other things, that legislation subjects to prosecution in federal district court any person who, "while employed by or accompanying the Armed Forces outside the United States," engages in conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would

constitute an offense punishable by imprisonment for more than one year. 18 U.S.C. 3261(a). The new legislation, Judge McKeown concluded, was enacted to close a "gap" regarding jurisdiction over civilians accompanying the military abroad, which had been created by *Reid* v. *Covert*, 354 U.S. 1 (1957) (plurality opinion). In *Covert*, the Court held that military courts lacked authority, in capital cases, to try civilian dependents who accompanied members of the military abroad. *Ibid.* Congress's determination that it was necessary to enact a new provision specifically establishing district courts' jurisdiction over civilians accompanying the military outside the United States indicated to Judge McKeown that Section 7(3) should not be read as establishing such jurisdiction. Pet. App. 75-76.

ARGUMENT

As petitioner observes (Pet. 7-9), the Ninth Circuit and the Fourth Circuit are in disagreement with the Second Circuit on a question of statutory interpretation relating to extraterritorial application of 18 U.S.C. 7(3).[1] The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488, renders that limited disagreement among the circuits of little continuing

[1] In *United States* v. *Erdos*, 474 F.2d 157, cert. denied, 414 U.S. 876 (1973), the Fourth Circuit concluded that United States embassy property abroad constitutes "lands reserved or acquired for the use of the United States, and under its exclusive or concurrent jurisdiction" for purposes of 18 U.S.C. 7(3), and thus is within federal jurisdiction. 474 F.2d at 159-160. Petitioner suggests (Pet. 8-9) that the reasoning of the Fourth Circuit in *Erdos* differs from the reasoning of the Ninth Circuit in this case with respect to the status of United States embassy premises abroad. But on the question about which the circuits disagree—whether Section 7(3) applies extraterritorially—the Fourth Circuit and the Ninth Circuit are in full agreement. See Pet. App. 9-10 (noting agreement).

significance. Further review by this Court therefore is not warranted.

1. On November 22, 2000, two days after the court of appeals' decision in this case, the President signed the Military Extraterritorial Jurisdiction Act into law. That law, which responded in part to *United States* v. *Gatlin*, 216 F.3d 207 (2d Cir. 2000),[2] subjects to prosecution in federal district court any person who, while "employed by or accompanying the Armed Forces outside the United States," or while a member of the armed forces, engages in conduct that would be a felony if committed within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. 3261(a). The new law eliminates any prospective ambiguity about federal criminal jurisdiction over persons who, like petitioner, are charged with committing felonies in foreign nations while associated with the United States military.

Whereas Section 7(3) asserts federal criminal jurisdiction based on the locus of the crime, the Military Extraterritorial Jurisdiction Act subjects individuals to extraterritorial criminal jurisdiction on the basis of their status as persons employed by or accompanying the armed forces abroad, or as members of the armed forces subject to the Uniform Code of Military Justice (10 U.S.C. 801 *et seq.*). See 18 U.S.C. 3261(a). In the experience of the Department of Justice, persons covered by the new statute—such as military personnel, civilian employees of the military, civilian contract employees, and military dependents accompanying service-

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[2] The *Gatlin* court took the "unusual step of directing the Clerk of the Court to forward a copy of [its] opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees." 216 F.3d at 223.

members overseas—account for the overwhelming majority of criminal cases in which Section 7(3) might otherwise have been invoked to support extraterritorial jurisdiction. See also Overseas Jurisdiction Advisory Committee, *Report to the Secretary of Defense, the Attorney General, and the Congress of the United States* 29 (1997) (characterizing the ability to assert criminal jurisdiction over U.S. diplomatic personnel as "only a minor problem"). As a result of the Military Extraterritorial Jurisdiction Act, therefore, the government will have little need to rely on Section 7(3) in future prosecutions of crimes that take place abroad.

2. Even before enactment of the Military Extraterritorial Jurisdiction Act, moreover, the issue presented by this petition rarely arose. Other than this case, only two appellate decisions—*Gatlin* and *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973)—have directly addressed the question of whether United States enclaves overseas fall within the ambit of Section 7(3). The infrequency with which the question presented by the petition arose even before the 2000 enactment of the Military Extraterritorial Jurisdiction Act further reinforces that the question does not merit this Court's review.

3. Finally, we note that the court of appeals reversed petitioner's conviction on evidentiary grounds, App., *infra*, 2a, and the government has not sought further review of that decision. If petitioner is retried, the retrial could lead to an acquittal, thus rendering the court of appeals' construction of 18 U.S.C. 7(3) of no further consequence to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2001

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLIFTON S. COREY, DEFENDANT-APPELLANT

No. 99-10232
D.C. No. CR-96-01019-MLR

Argued and Submitted Mar. 14, 2000
Decided Nov. 20, 2000

Before KOZINSKI, KLEINFELD, and MCKEOWN, Circuit Judges.*

The district court abused its discretion by preventing Corey from cross-examining the government's witnesses. *See United States v. Harris*, 185 F.3d 999, 1008 (9th Cir. 1999). Corey's defense at trial was that his former wife induced her children to fabricate the charges against him. Yet the district court permitted only vague references to the conflicts within the family. The court also impeded Corey's attempts to impeach

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

the victim, Anna, and her brother, Ronnie, both of whose credibility was central to the case. These interferences with Corey's defense violated his right to confrontation and cannot be considered harmless. *See id.*

Anna's statements to her nurse were admissible under the hearsay exception for statements made for purposes of medical diagnosis. *See* Fed. R. Evid. 803(4). These statements included the identity of the abuser, which we have recognized may be relevant to treatment in sex-offense cases. *See United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992). The declarant need not have made such statements to a physician. *See* Fed. R. Evid. 803(4) advisory committee's note.

However, the district court did abuse its discretion by admitting the nurse's testimony that Anna's ailments were *caused* by sexual abuse. The nurse was not qualified to offer an opinion as to the cause of a malady. *See* Fed. R. Evid. 702.

The judgment of conviction is VACATED and the case REMANDED for a new trial. The pending motion for release is referred to the district court. The mandate shall issue forthwith. Fed. R. App. P. 2.