No.-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC D. GATHINGS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

I. Was the appellate court's summary denial of a certificate of appealability (COA) reciting that it had "carefully reviewed the original file of the district court"—sidestepping the facial inquiry whether any issue in the application was debatable among reasonable jurists—an exorbitant application of the statutory standard as this Court has construed it to square it with the Suspension Clause?

II. Would reasonable jurists find it debatable or wrong that the abuse of respondent's physical custody over petitioner to deny him evidence on which to construct or support his grounds for relief ***and*** to deny him confidential correspondence with §2255 counsel—together with appointed counsel's refusal to provide him criminal discovery—has ***not*** prolonged the impediment to his pursuit of the relief the Suspension Clause guarantees?

III. Would reasonable jurists find it debatable or wrong to uphold a conviction and sentence based on a suppressed premise in a plea agreement, when neither the facts the lay accused perceived nor any explanation from appointed counsel put him on notice that respondent and the courts would deem an admission to participating in local intrastate telephone calls to trigger Commerce-Clause jurisdiction?

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Petition

Petitioner respectfully petitions this Court to review the order of the Eighth Circuit denying a certificate of appealability (COA) from the criminal-case judge's dismissal of a 28 U.S.C. §2255 action without discovery or hearing.

Orders Below

The Eighth-Circuit orders (A:1a & 13a)[1] are unpublished, as are the criminal-case judge's orders dismissing the action for lack of jurisdiction (2a) and denying a motion to alter or amend notwithstanding his acknowledgment that he had jurisdiction (11a) and the judgment entered on a separate date (9a).

Jurisdiction

Gathings filed a pro-se §2255 motion on September 2, 2016. He filed an attorney-drafted amended motion on December 12, 2018. ECF##1 & 9.[2] The criminal-case judge adopted respondent's position that the original motion did not fall within any of the one-year periods in §2255(f) (A:5a n.1). He dismissed the original motion for ***lack of jurisdiction***

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[1]Gathings cites to the serially-paginated appendix as "A:*n*,"—*n* being the appendix page(s) cited.

[2]Gathings cites corroborating documentation from the §2255 action below not necessary to understand the petition—but available on PACER—by "ECF#" and the clerk-assigned Document Number, sometimes including a colon and pages cited. Gathings cites corroboration from the criminal action (*United States v. Gathings*, No. 4:11-CR-00052-GAF) with the case number immediately preceding the "#" that introduces the official Document Number.

on October 23, 2016 (A:2a) and denied leave to file the amended motion (A:9a n.2). On November 22, 2017, Gathings filed a Rule-59(e) motion, pointing out that the governing authorities held that respondent's asserted basis for dismissal was ***not*** jurisdictional. He also filed a conditional application for COA. The criminal-case judge denied both on December 19, 2017. A:11a-13a.

On February 14, 2018, Gathings filed a notice of appeal. Under Fed. R. App. P. 22(b)(2), the notice is deemed an application for COA when the criminal-case judge—after admitting error on the juridical basis of its initial adverse judgment—sought to evade appellate review of his remaining errors. On May 16, 2018, the Eighth Circuit denied COA summarily but for the recitation that it had "carefully reviewed the original file of the district court." On June 29, 2018, Gathings filed a rehearing petition, which it summarily denied on July 19, 2018. A:13a-14a.

Petitioner invokes this Court's jurisdiction to review the Eighth-Circuit orders under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes, and Rules Involved in the Case

The applicable legal texts—listed at page iv, *supra*—appear in the appendix at 14a-18a.

Statement

Under the Antiterrorism & Effective Death Penalty Act (AEDPA),[3] to appeal denial of 28 U.S.C. §2254 or §2255 relief, an applicant must have a COA. This Court has held that the standard for granting COA on an issue isn't the lower court's own certitude but whether an issue is "debatable amongst jurists of reason."[4] In denying COA on the basis that it had "carefully reviewed the original file of the district court," the Eighth Circuit's sidestepping of the debatability-among-jurists-of-reason inquiry has thus far allowed the lower courts to deny Gathings the one full round of collateral-attack litigation this Court construes AEDPA to allow to honor the Suspension Clause.[5]

Factual Background

On August 12, 2009, in the Circuit Court of Boone County (Columbia, Missouri), the State of Missouri charged petitioner with a felony in using someone else's credit card.[6] On August 15 it

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[3]Pub.L. 104-132, 110 Stat. 1217.

[4]*Miller-El v Cockrell,* 537 U.S. 322, 336 (2003).

[5]U.S. Const. art. I, § 9, cl. 2.

[6]Nos. 09BA-CR04003 & 09BA-CR04003-01, docket and charge/sentence available at https://www.courts.mo.gov/casenet (last visited Oct. 7, 2018) by selecting the "Case Number Search" tab and entering the case number.

charged him with discharging a shotgun in front of his house in Columbia.[7]

Therefore, on August 21 the same state court that had placed him on two years' probation after a thirty-day jail term—for receiving stolen property worth less than $500—revoked his probation and committed him to the Missouri Department of Corrections.[8] The department assigned him to the Algoa Correctional Center, in Jefferson City, Missouri; Jefferson City is a little over thirty miles from Columbia.[9]

On November 23, 2009, the state court sentenced Gathings to imprisonment for four years in the Missouri Department of Corrections for the new separate offenses. The department continued to imprison him at the Algoa Correctional Center.

County and state custodians recorded telephone calls Gathings made from these central-Missouri institutions to his home and other locations in central Missouri.

On March 2, 2011, respondent United States indicted him and Brandy Key for, among other things, sex-trafficking a 17-year-old female ("FV2") from

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[7]Nos. 09BA-CR04041 & 09BA-CR04041-01, also available at https://www.courts.mo.gov/casenet (last visited Oct. 7, 2018).

[8]No. 09BA-CR00943, also available at https://www.courts.mo.gov/casenet (last visited Oct. 7, 2018).

[9]https://www.mapquest.com/directions/from/us/mo/columbia-282039021/to/us/mo/jefferson-city-282027123 (last visited Oct. 8, 2018).

about June 1, 2009, through about December 30, 2009, in violation of 18 U.S.C. §1591(a),[10] §1594(a)(attempting to violate subsection (a)), and §2 (causing another to violate any federal criminal statute). #4:11-CR-00052-GAF#1:3. On March 18, the district court appointed private counsel, Robin D. Fowler, under the Criminal Justice Act to represent Gathings. #4:11-CR-00052-GAF#15.

According to an affidavit Gathings filed in his §2255 action, respondent detained him in a jail where he "could not get mail, have books or letters, or shower more than three times a week, and the guards were crueler than in most jails and prisons"; but both counsel agreed that if he pled guilty to something, he "would be transferred to CCA-Leavenworth, where [his] brother was being held." A:23a (¶11). He continued: "But for the conditions at the jail and both attorneys' use of them to coerce a guilty plea, I would not have waived my right to a trial and the other rights one loses in pleading guilty." A:24a (¶12).

Gathings initially relates that he asked appointed counsel to see the discovery in the case against him, but counsel denied having it. A:22a-23a (¶¶5-6).

According to subsequent declarations under penalty of perjury, appointed counsel told Gathings that

[10]Subsequently Congress amended §1591 to include a new paragraph (e)(4) defining "participation in a venture" and renumbering the preexisting paragraphs.

if he didn't plead guilty to something, he faced imprisonment from seventy-five years (A:25a ¶5) to life (A:41a ¶10).

At a court appearance—Gathings adds—the prosecutor made a statement that she had some papers she was not supposed to have had. The court questioned her about this, and she stammered, not knowing what to say. Plea counsel "picked up where she left off and saved her." A:26a (¶8).

On October 17, 2011, Gathings signed a plea agreement on a single count: sex-trafficking the 17-year-old. The "Factual Basis" in the plea agreement said: "While in custody, he discussed selling females for commercial sex and his knowledge that FV2 was a minor on recorded calls from the facility."

In the same affidavit about appointed counsel's denial of discovery and collaboration with respondent to use aversive jail conditions to cause him to plead, Gathing explains that nothing about any call in which he participated from the jail or prison led him to believe it involved or partook of interstate commerce. A:23a (¶8). His sworn record evidence was that when he signed the plea agreement, he "was not aware that the use of a jail phone would be deemed to be interstate or foreign commerce for the purpose of establishing the jurisdictional element of the count to which [appointed counsel] advised [him] to plead guilty." A:23a (¶7). Far from advising him that respondent would later spring the clause as converting an allegation of private sin, municipal ordinance-violation, or state offense into a federal

crime, appointed counsel told him "the feds do anything they want, and [Gathings] had to take the plea because they were not going to come down on the sentence." A:23a (¶10).

Gathings relates that plea counsel told him he would be sentenced to imprisonment for fifteen years no matter what he did. A:24a (¶13). There would be a presentence report. Gathings continues: "But for this advice, I would have been more forthcoming in the interview by the Probation Officer who was preparing the presentence investigation report against me." A:24a (¶14).

On March 6, 2012, the plea-taking/sentencing judge sentenced Gathings to imprisonment for fifteen years. #4:11-CR-00052-GAF#75. On March 8, 2012, Gathings filed a pro-se notice of appeal. #4:11-CR-00052-GAF#86. On March 9 the plea-taking/sentencing judge amended the judgment to reflect that Gathings had pleaded guilty to count II of an indictment rather than an information. #4:11-CR-00052-GAF#81. On March 15 he amended it again to backdate the sentencing. #4:11-CR-00052-GAF#85.

After Gathings pled guilty and was sentenced, he again asked plea counsel for the discovery to use in preparing an appeal. In addition to telling Gathings that he had no appeal rights, plea counsel said he "could not have a copy of [his] full discovery because it would cost too much money, and that [plea counsel] did not have it anyway." A:26a (¶9). (The written plea agreement preserved Gathings's "right to appeal his sentence, directly or collaterally,

on…claims of (1) ineffective assistance of counsel; (2) prosecutorial misconduct; or (3) an illegal sentence." #4:11-CR-00052-GAF#48:11 (¶17(b))). Gathings explained further: "I called Mr. Fowler to get my discovery for my appeal, and he told me that it would cost me a lot of money to copy it, and that he had already sent it back to the F.B.I." A:40a (¶9).

On March 19 the plea-taking/sentencing court filed a pro-se §2255 motion alleging assistance of plea counsel in that the latter told him he would get life imprisonment if he went to trial, and failed to go over the plea agreement with him, leaving him to do it himself when he didn't understand what he was doing or what the terms meant—that he had lost confidence that plea counsel was on his side and had sought new counsel, but the plea-taking/sentencing court had denied his request. #4:11-CR-00052-GAF#88:4-5. The plea-taking/sentencing court opened a new matter for the pro-se §2255 action, #12-0348-CV-W-GAF-P.

On March 21, 2012, the Eighth Circuit appointed plea counsel to represent Gathings on direct appeal. On March 22 the plea-taking/sentencing judge dismissed the §2255 motion without prejudice as premature, citing the pending direct appeal. #12-0348-CV-W-GAF-P#3.

On March 28 plea counsel filed a motion to withdraw—adducing Gathings's now-delayed allegations of ineffective assistance of counsel. #12-1686. The Eighth Circuit summarily denied his motion the next day.

On April 5, 2012, the Eighth Circuit filed a handwritten document dated March 26 in which Gathings—having had no trial, and having been denied his discovery—said "his attorney" had persuaded him to withdraw his direct appeal. In addition to denying that he had Gathings's discovery ***and*** saying it would cost too much to copy it for him, A:26a (¶9) & A:40a (¶9), plea counsel's advice—Gathings reported in declarations before the plea-taking/sentencing judge—included the propositions that

- he had "no appeal rights" A:26a (¶9);
- "the Government can do whatever they wanted to do";
- because he had signed a plea agreement under Fed.R.Crim.P. 11(c)(1)(C), he "could never file an appeal"; and
- signing the plea agreement had stripped him of all his rights. A:41a (¶¶6-8).

On May 17, 2012, the Eighth Circuit dismissed the direct appeal. #12-1686.

Procedural History

On September 2, 2016, Gathings filed a pro-se §2255 motion, pleading actual innocence among the reasons for doing so notwithstanding the time since the challenged conviction and sentence became final. ECF#1:27.

On December 12, 2016, he filed an attorney-drafted amended motion, verifying or confirming

- that he had pursued his discovery diligently but that plea counsel had denied to him that he had it;
- that plea counsel had admitted to §2255 counsel that he had kept it until a year had passed since the conviction became final and had then returned it to the prosecution;[11] and
- that when §2255 counsel entered his appearance and sought the criminal-case discovery from the prosecutor then on the case—offering to accept a protective order—she refused to provide the discovery (A:18a-22a).

Gathings pleaded that respondent was continuing the impediment first created by its privy—appointed counsel—in refusing to provide it to Gathings for the purpose of his direct appeal or the 2012 pro-se §2255 motion which the plea-taking/sentencing judge had dismissed without prejudice. ECF#9:16.

Once Gathings had lawyered-up, it was practicable to document for use in court some of what respondent was doing to keep in place the impediment to his establishing his actual innocence in order to bring his motion within the coverage of 28 U.S.C. §2255(f)(4) as pleaded in his pending §2255 motions.

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[11]On November 22, 2016, plea counsel told §2255 counsel by telephone that he had kept the discovery until one year after the conviction became final. Gathings credited §2255 counsel's report of plea counsel's admission, and summarized it in the verified amended motion (ECF#9:16).

Gathings pleaded that this brought his case within §2255(f)(2) as well.

In a declaration executed February 1, 2017, Gathings related that on January 17, 2017, respondent's agent "counselor" Wasson had called him out to receive legal mail. (At that time the undersigned typically used U.S. Postal Service Priority Mail—including mailers provided by USPS—to allow him to track deliveries to incarcerated clients.) Wasson told him that legal mail was a means by which attorneys smuggled drugs into the Bureau of Prisons, so Wasson refused to provide Gathings the USPS mailer in which counsel had sent him various materials. Though Gathings was not sure, it appeared to him the mail had already been opened. When Gathings objected to this handling of this legal mail, Wasson took him to a location not in view of surveillance cameras and yelled at him until he accepted the compromised mail. A27a-28a.

In addition to the declaration covering the drug-smuggling accusation against §2255 counsel and opening of legal mail on January 17, Gathings submitted the truncated photocopy of a subsequent mailing from §2255 counsel Wasson handed him instead of a mailer on January 26, 2017. A33a-35a.

On November 13, 2017, another of respondent's agents, Chapman, opened Gathings's legal mail from §2255 counsel, reviewed it, and ***shredded*** parts of it in Gathings's presence. A:39a-40b.

The Bureau of Prisons lists the policies and procedures governing its institution at

https://www.bop.gov/PubliclnfolexecutePolicysearch?todo=query (last visited March 28, 2017) (ECF#18-5). The one that is supposed to govern the opening and delivery of mail from attorneys to clients is U.S. Bureau of Prisons Program Statement 5265.14, Correspondence, *https://www.bop.gov/policy/progstat/5265_014.pdf* (last visited March 28, 2017):

> The staff of each institution of the Bureau of Prisons has the authority to open all mail addressed to you before it is delivered to you. "Special Mail" (mail from…attorneys…) may be opened only in your presence to be checked for contraband. This procedure occurs only if the sender is adequately identified on the envelope and the front of the envelope is marked "Special Mail — Open only in the presence of the inmate." Other mail may be opened and read by the staff. … [ECF#18-6 at § 540.12 (emphasis added).]

In addition to opening legal mail outside his presence and denying him the quasi-governmental container that would have secured the letters, memoranda, drafts, and other documents on three sides with the option of closing the fourth—***and*** actually destroying the legal mail after reading it at least in part—respondent's agents have taken legal papers including confidential and privileged correspondence from §2255 counsel once it had cleared the gantlets of the mailroom and the opening by a "counselor."

In a declaration executed March 4, 2017, Gathings relates that on February 15, 2017, respondent's agents shook down his unit. Before they got to his cell, he could see they were going through other prisoners' legal mail inside their cells. A:29a (¶5). Then they removed him from his cell and dumped out the contents of tubs which prisoners use for storage; but they took the tub containing his legal work, including stamps and envelopes. A:29a-30a (¶6).

Respondent kept Gathings's legal work for eight days—withholding some altogether. A:30a (¶10); A:31a (¶5). What respondent returned after eight days included two letters and four memoranda from §2255 counsel as well as a ***draft*** of a pleading. A:32a-33a.

On September 11, 2017, another of respondent's agents locked Gathings out of his cell from about 8:00 a.m. until 4:00 p.m. During this time, he found, respondent had gone through his legal work and taken more. A:35a-37a.

The plea-taking/sentencing judge dismissed Gathings's pro-se motion as not coming within any of the four one-year limitation periods in §2255(f), then denied a Rule-59(e) motion and COA. *See* pages 1-2, *supra*. The Eighth Circuit denied COA on the ground that it had "carefully reviewed the original file of the district court," then denied rehearing. A:1a & 13a-14a.

Reasons for Granting Certiorari

This case is about one man's liberty. It is also about the role of the Constitution as this Court has expounded it, the availability of effectual protection for the rights of all individuals, and the existence of the states as separate centers of legitimate power as opposed to the erection of a unitary form of government the Framers rejected.

I. Denial of COA on the ground that the denying court had "carefully reviewed the original file of the district court" is ultra vires in deciding an application for COA.

A. In keeping AEDPA consistent with the Suspension Clause, this Court holds the COA standard to be whether the decision on an issue was "debatable" among reasonable jurists regardless how any would decide it.

In 1948 Congress adopted §2255 as the default vehicle for federal prisoners to exercise the "Privilege of the Writ of Habeas Corpus" the body of the Constitution guarantees them. An original petition for habeas corpus under §2241 arises in the venue of confinement—potentially thousands of miles from witnesses and sentencing courts. In 1948, federal

prisons were concentrated in a few districts.[12] Section-2255 motions go to the sentencing district—which then had greater access to the file.

In 1996, Congress adopted the Antiterrorism & Effective Death Penalty Act (AEDPA). It required—for the first time—federal prisoners to seek leave to appeal, placing them under the same "certificate of appealability" (COA) requirement Congress applied to state petitioners under 28 U.S.C. §2254, which previously required state prisoners to get a "certificate of probable cause" (CPC).

To keep AEDPA from violating the Suspension Clause, this Court has checked the statute's most extreme potential applications: from the first, it saw AEDPA must be construed in light of the Suspension Clause.[13] *Slack v. McDaniel*[14] refuses to hold a petition "second or successive" because an earlier court dismissed its previous presentation as unexhausted. *Holland v. Florida*[15] recognizes equitable tolling as precluding remorseless application of one-year limitation because of writ's extraordinary importance:

> The importance of the Great Writ, the only writ explicitly protected by the

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[12] 2 R. HERTZ & J.S. LIEBMAN, FEDERAL HABEAS CORPUS PRAC. & PROC. §41.2[a] at 2284-85 (7th ed. 2015 & LEXISNEXIS Supp. 2017).

[13] *Felker v. Turpin,* 518 U.S. 651, 663-64 (1996); *see also* 518 U.S. at 658-64.

[14] 529 U.S. 473, 485-86 (2000).

[15] 560 U.S 631, 649 (2010).

> Constitution . . . along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

From AEDPA's enactment through the present, this Court has construed it with deference to the Suspension Clause as one procedural protection the Framers didn't wait for the ratification debates to include in the Constitution.[16]

This had included *Slack*'s applying the same test for appeals from denials under both §2254 and §2255 that courts had applied under §2254's CPC standard, and applying it not only to substantive constitutional grounds but also to procedural issues affecting the Privilege of the Writ: any other construction of the statute would ignore the Writ's "vital role in protecting constitutional rights."[17] Even before *Slack*, this Court recognized its jurisdiction to review by certiorari the lower courts' denial of COA.[18] As lower courts denied COA against this Court's construction of §2253(c)(2) in light of the

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[16]*See* 1 HERTZ & LIEBMAN § 3.2 & nn.39-45 (collecting and explaining cases).

[17]529 U.S. at 481-83.

[18]*Hohn v. United States*, 524 U.S. 236, 251-52 (1998).

Constitution, it announced still more decisions against precluding habeas-corpus/§2255 appeals.

In *Miller-El v. Cockrell*, the Court reiterates the standard for COA:[19]

> when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra*, at 484.

This Court thought it had made itself clear enough in *Slack*'s authoritative construction of

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[19]537 U.S. 322, 327 (2003) , citing *Slack v. McDaniel*, and quoting 28 U.S.C. § 2253(c)(2).

AEDPA's new requirement to avoid suspension of the writ of habeas corpus in the absence of the conditions the Constitution requires.[20] Because lower courts had instead used the COA requirement to strangle in the crib movant/petitioners' grounds for relief and their responses to respondents' overweening procedural defenses, in *Miller-El* the Court took pains to emphasize the limits of the inquiry on the question whether to grant a COA:

> In *Slack*, *supra*, at 483, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484 (quoting *Barefoot*, *supra*, at 893, n. 4.[21]

[20] *E.g., Felker v. Turpin*, 518 U.S. 65 (1996).

[21] 537 U.S. at 336.

B. The standard for granting a COA is objective—whether reasonable jurists could differ over how an issue was resolved, or would disagree with how it was resolved.

The test is not one's certainty of the correctness of a judge's result, but whether the way the relief-denier reached it would be universal among judges who are in control of their faculties:

> We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.[22]

It continues that "a COA does not require a showing that the appeal will succeed", and therefore a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." To apply such a standard would mistake its longstanding construction of AEDPA to render it consistent with the Suspension Clause:

> The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a

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[22] *Id.*

> judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra,* at 893, n. 4.[23]

The test is not predictive of any result on appeal, or even that any actual judge would agree with the petitioner or movant seeking to appeal:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.[24]

The question is not whether the result is wrong, but whether it is "debatable among jurists of reason" even though ***after*** briefing and argument, ***every*** one of them might agree that the denial of relief should be affirmed.

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[23]537 U.S. at 337.

[24]*Id.* at 338.

Miller-El and the pre- and post-AEDPA decisions on which it relies recognize that though appeals exist to do justice between the immediate parties, they also exist to clarify the law for future parties. Thus, when one or more issues in a case reflect a split among the circuits, or a split of authority within one's circuit or among the courts and the profession generally—let alone a deviation from federal law as this Court has expounded it—a COA should be granted even if the granting court believes the applicant wrong on that issue or those issues.[25]

Because the test under §2253 is not a subjective one—but one where the relevant population is all jurists of reason—one of the best indications that they would differ over the correct outcome or the best reasoning is the fact that they ***have*** on substantially similar issues.

For a court to deny COA on an issue it decided adversely to the applicant just because of how strongly it agrees with itself "sidesteps the process" and is ultra vires.[26] In *Buck v. Davis*,[27] this Court reversed a circuit for "'sidestep[ping] [the COA] process by first deciding the merits of an appeal; and then justifying its denial of a COA based on its adjudication of the actual merits'"—rather than limiting itself to whether the district-court decision was debatable among reasonable jurists.

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[25]Id. at 327, citing *Slack,* 529 U.S. at 484.

[26]537 U.S. at 336-37.

[27]137 S.Ct. 759, 773 (2017), quoting *Miller-El*, 537 U.S. at 337-38.

Despite this Court's limits on COA denials, the plea-taking/sentencing judge that denied Gathings's §2255 pro-se motion—along with leave to file an amended motion, discovery and a hearing—also denied COA. The Eighth Circuit summarily denied COA—and rehearing. The latter's summary COA denial says that it "carefully reviewed the original file of the district court" (A:1a). But in *Buck v. Davis*, THE CHIEF JUSTICE explains that that "hurts rather than helps" respondent, because a lower court's "procedures . . . employed at the COA stage should be consonant with the limited nature of the inquiry"—*i.e.*, "an initial determination whether a claim is reasonably debatable." Poring over the megabytes of pleadings, exhibits, and orders from the district court is beyond the lower court's jurisdiction as this Court has applied the Suspension Clause to AEDPA.

C. Reasonable jurists would disagree, or at least find debatable, that AEDPA's one-year limitation period—running from four different points—is preclusive when this Court holds it isn't.

The initial dismissal order says that the plea-taking/sentencing court did not have jurisdiction over the §2255 action. It said it didn't have jurisdiction because it adopted respondent's time-bar argument. It did so in spite of respondent's role in ***causing*** Gathings not to have the evidence—which he placed before the plea-taking/sentencing judge by declarations and exhibits—that he would have presented but for

- denial of discovery by plea counsel and his return of it to respondent instead of providing it to Gathings even in redacted form, A:26a (¶9) & A:40a (¶9);
- other de facto if not de jure spoliation, including destruction or seizure of mail from §2255 counsel to Gathings, A:29a-30a (¶¶5-10), 31a-33a & Decl. Exh. A (¶¶5-7), 33a-34a, 37a (¶12), and 39a (¶¶5-7);
- physical intimidation of Gathings by guards and other agents of respondent, A:30a (¶¶7-9) and 38a (¶6);
- denial of the ill-gotten copy of Gathings's discovery to §2255 counsel on his request and agreement to a protective order, ECF#9:16 and A:18a-22a, and
- opening of §2255 counsel's mail to Gathings outside his presence and whatever respondent's agents did with it then in addition to making it clear his mail was not secure despite its proper marking. A: 27a-28a (¶¶5-10), 33a-35a, and 39a (¶¶5-7).

By these and—on information and belief—other ways Gathings could not establish before having counsel who wasn't implicated in respondent's machinations, respondent has prevented him from finding all the facts there are to support his existing claims and to identify any additional claims—and facts in

support of statutory or equitable tolling—whose factual bases it has destroyed or is concealing by jailers' reading and ***shredding*** legal mail, obstruction of justice, client intimidation, or other outrageous government misconduct. And the plea-taking/sentencing judge countenanced this misconduct, then tried to cover it up by denying COA.

After Gathings pointed out that the dismissal for want of jurisdiction was a distortion of superior-court precedent, the plea-taking/sentencing judge amended his dismissal verbally, but continued to rely on the respondent-created untimeliness—about which Gathings had presented record evidence establishing a pattern under which the verbally-revised basis of the dismissal was attributable to respondents' and its plea-counsel privy's[28] misconduct. It admitted that AEDPA's one-year time limitation—from four different starting-points—was "technically not a 'jurisdictional bar,'" but in the same breath said "motions presented beyond these time limits should be dismissed as untimely." It relied on the premise that Gathings had not proved governmental interference within the only ***earliest*** of the conceivable starting-points for determining the limit on his ability to challenge its jurisdiction to impose

[28]*Murray v. Carrier,* 477 U.S. 478, 488 (1986) (where a "procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State"), and *Glasser v. United States*, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused"); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985),; 446 U.S. 335, 343 (1980).

the custody for which §2255 provides the default remedy. It did so while leaving unremedied respondent's refusal to return the discovery it had tendered to plea counsel and denying any new discovery that would have shown how one of the other three starting-points had restarted the one year as Congress passed the statute, President Clinton signed it, and this Court construed it.

But as this Court has construed AEDPA to avoid constitutional questions about its violation of the Suspension Clause, AEDPA's new 2253(c) does not render any federal court powerless to correct a constitutional violation. AEDPA created an affirmative defense. Any consideration of respondent's affirmative defense must take into account its outrageous government misconduct.

On the showing Gathings has made, denial of COA on the basis of its "careful[] review[]" of the district-court file conflicts with this Court's decisions in *Slack*, *Miller-El* and *Buck*. U.S.S.Ct.R. 10(c). By foreclosing the §2255-process issue he sought to raise—allowing plea counsel, the prosecution, and federal jailers to collude to prevent a federal prisoner's review of discovery and to prevent him from communicating confidentially with independent counsel, the Eighth Circuit has again sanctioned a departure from the accepted and usual course of judicial proceedings. U.S.S.Ct.R. 10(a).

II. Reasonable jurists would find debatable or would disagree that respondent could not be disentitled to rely on the affirmative defense of the AEDPA limitations when it and its privies had been impeding Gathings's investigation and preparation of his §2255 motion since before plea counsel entirely stopped representing Gathings, and continues to this very day to impede them after notice to its attorney assigned to this case and to the plea-taking/sentencing court.

The physical power to imprison carries with it the physical power to render one unable to challenge the custody, whether pretrial or on direct appeal or collateral relief. Custodians need not cut out prisoner's tongues, break their fingers, and hold them totally incommunicato at secret locations to forfeit any benefit the statutes supposed to implement the Suspension Clause would otherwise give them. Only when courts place checks on what custodians do to impede what the persons in their custody can do to keep their legal materials, to communicate with courts and attorneys (when the latter could normally be only in confidence), and to be free from harassment for maintaining challenges to their custody can the legal system and the society it's supposed to serve have any confidence that the people who are in custody should be.

This is particularly sensitive when the prosecutorial, investigative, and imprisonment functions come under the same executive—as they do in the federal government as opposed to most if not all of the

states. When respondent's agents exercise their physical power over someone challenging their custody in such a way as to thwart the processes the Constitution itself, the statutes enacted to implement it, and the decisions construing these constitutional provisions and statutes, it deprives respondent of any entitlement to rely on the ill-gotten advantage from reading a prisoner's mail or shredding evidence from their attorney.

In its order in which "[m]uch of the Respondent's argument is adopted without quotation designated" saying that he had no jurisdiction to hear Gathings's §2255 action, A:5a n.1 & A:9a n.2, the plea-taking/sentencing judge cites an unpublished district court order in *United States v. Lussier*[29] as showing what government active measures it would take "to prevent a prisoner from asserting his or her rights." A:6a. But *Lussier* shows what did ***not*** count according to one or two judges—lockdowns when they aren't done on purpose to keep prisoners from going to the law library, and heat stroke occurring entirely after the missed deadline. Nothing about opening and taking mail from his attorney, nothing about previous counsel's lying about movant/petitioner's discovery and giving it back to what he doubtless regarded as his counsel in a §2255 proceeding once he thought he was clear of such an action in the ordinary course. *Lussier* is no help to respondent—it

[29]2013 WL 673752 (D. Minn. Feb. 25, 2013) (unpublished).

and its privy have engaged in red-handed government interference subversive of the Suspension Clause.

The "no-jurisdiction" plea-taking/sentencing judge's order cites other unpublished orders and opinions about law libraries as losing cases for prisoners seeking to show government interference in preparation and filing of pleadings. A:7a. None involves the kind of history Gathings has been able to get past respondent's prison mailroom or into the hands of his §2255 counsel when his "counselor" allows counsel into respondent's institution—and out afterward.

Given the physical and psychological invasion of Gathings's ability to wage litigation he has shown after entry of counsel who had defended corrections conditions cases and knew what to look for, there is no telling what lengths respondent went to when Gathings was pro se or still in the hands of compliant appointed counsel—who lied about not having Gathings's discovery ***and*** said it would cost too much to copy it for him—who told him the feds could do whatever they wanted, and it didn't matter what he did, he was getting fifteen years. A:24a (¶¶13-14) and A:41a (¶¶6 & 9).

Only with the guiding hand of counsel who has had experience on both sides of corrections litigation did Gathings succeed against the litigation-suppression efforts of the most powerful entity on the face of the earth in getting the declarations he filed before

the plea-taking/sentencing judge to detail its misconduct—all of which were before the Eighth Circuit and are reproduced here at A:22a-41a.

Before a reasonable jurist could say Gathings is ***not*** entitled to equitable estoppel to prevail against respondent's nonjurisdictional affirmative defense, Gathings needs at least an evidentiary hearing—and to be fair, discovery to prepare for it. In *Estremera v. United States*,[30] the Seventh Circuit speaking through Judge Easterbrook found that a hearing was necessary to determine whether to allow a combination of original-counsel misfeasance and inadequate ***library*** resources—never mind opening mail to chill a prisoner's confidence in correspondence with independent counsel, taking legal papers and not returning them (even shredding them in his presence), and keeping him in solitary confinement—was sufficient to overcome respondent's defense of untimeliness under ***one out of four*** of the statutory starting-points, throughout the first of which of which plea counsel kept the discovery while telling Gathings he didn't have it.

The same year, the same court vacated and remanded in *Weddington v. Zatecky*,[31] for "further findings, including an evidentiary hearing, if necessary" because that appellant had presented declarations that guards had "prohibited access to his legal

[30]724 F.3d 773, 775-77 (7th Cir. 2013).

[31]721 F.3d 456, 464-65 (7th Cir.2013).

materials while he was housed in disciplinary segregation," and the Seventh Circuit held that this would entitle him to equitable tolling.

And though *Estemera* and *Weddington* are from the circuit just across the Mississippi from the Eighth, they aren't a sport. In *United States v. Gabaldon*,[32] the Tenth Circuit vacated a dismissal without making factual findings on the movant's allegations of confiscation of his legal materials, deeming it an extraordinary circumstance for purposes of equitable tolling. In *Valverde v. Stinson*,[33] the Second Circuit held a guard's confiscation of a prisoner's draft habeas petition and related legal papers can justify equitable tolling of the one-year limitations period, reasoning: "The intentional confiscation of a prisoner's habeas corpus petition and related legal papers by a corrections officer is 'extraordinary' as a matter of law." In *Lott v. Mueller*,[34] the Ninth Circuit vacated and remanded for fact-finding on a prisoner's averments that staff denied him access to his legal files during two temporary transfers that lasted 82 days, because "our case law as applied to the particular facts of this case entitles Lott to equitable tolling."

The virtual party order holding that the plea-taking/sentencing judge didn't have jurisdiction over Gathings's §2255 action cites *Gassler v. Bruton*[35] for

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[32]522 F.3d 1121, 1124–27 (10th Cir.2008).

[33]224 F.3d 129, 133 (2d Cir.2000).

[34]304 F.3d 918, 920 (9th Cir.2002).

[35]255 F.3d 492 (8th Cir. 2001).

the proposition that "[p]ossession of discovery is not a condition precedent to filing for habeas relief . . . ." But *Gassler* did ***not*** involve discovery: it involved a ***trial transcript***. Nothing in the opinion suggests that Gassler was tried in absentia. The trial was not a black box into which respondent placed what it wanted behind Gathings's back. ***That*** is federal criminal discovery.

Although Gassler appears to have received some rough handling from the public defender's office based on the fact that he was incarcerated out-of-state at the time,[36] the latter ***did*** offer to send him portions he selected free of charge, or the whole transcript for the expenses of doing so—which is more than respondent would do here even for money, an option it never offered (as it prints it, so that would be no incentive to let Gathings's §2255 counsel see behind the curtain, and it would charge him with bribery in any event). Whereas expense is a good-faith concern in indigent-defense entities, hiding the ball from a prisoner attempting to prepare and prove an actual-innocence argument is not. Keeping Gathings from knowing what plea counsel knew but didn't tell him is not. *Gassler* is of no help to the Behemoth.

Equitable tolling of a federal limitation—or to put it another way, equitable estoppel—is for "extraordinary" circumstances.[37] If this Court believes that respondent's behavior toward Gathings and

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[36] *Id.* at 493.

[37] *Holland*, *supra*, 560 U.S. at 649-54.

§2255 counsel is ordinary, we have come to an even worse state than it appears. Unless this Court accepts it as ordinary for federal guards to violate their own published procedures—*see* A:31a-35a (and ECF##18:4-8 generally)—on the pretext that §2255 counsel is a drug mule (A:27a (¶6), and to lie and shred when Gathings attempts to do anything about his custody, then this case meets *Holland*'s criterion.

Respondent and the several states have the power to squish like a bug ***any*** direct appeal, post-conviction relief proceeding, or conditions suit by abusing the physical and psychological power they have over inmates. This is not peculiar to federal habeas corpus and §2255. Recent legislation has made incarcerated plaintiffs, petitioners, and movants especially vulnerable to illegitimate use of government interference to cover up constitutional violations. But the Framers believed habeas corpus so vital to a free republic that they guaranteed it in the body of the Constitution rather than waiting to add it to the Bill of Rights.

In this case, the most dangerous sovereign in the world needs a clear signal—not one chilled by PLRA's[38] derogation from the Magna Carta—that it cannot conduct itself as it has here with impunity. Gathings needs a hearing where a goon will not be able to take him outside the coverage of surveillance cameras. *Cf.* A:30a (¶¶8-9).

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[38]42 U.S.C. § 1997e.

What goes around comes around. As the demographics of the country change in the direction of people who look more like Eric Gathings[39]—and barring voter suppression the likes of which we haven't seen since the height of Jim Crow, and its maintenance against direct action by the majority to terminate its disenfranchisement (probably with extreme prejudice in some instances)—***normalizing*** behavior like respondent's in this case could lead to a Kafkaesque GULAG for those who sanction it today[40] and especially for their children. Respondent cannot safely be allowed to profit from its own wrong.

By its summary sidestepping the inquiry this Court mandates at the COA stage, the Eighth Circuit has validated the denial of a day in court the several circuits whose decisions Gathings cites would have accorded. Not only is this a traditional

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[39]*See* W.H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 10/262 & Fig. 1-1 (2018)("in about three decades, whites will constitute a minority of all Americans"), citing U.S. Census Bureau, 2017 National Population Projections Tables (Last Revised: September 6, 2018), available at https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html (last visited Oct. 10, 2018); *see also* U.S. Census Bureau, Projecting Majority-Minority, Dec. 3, 2014, available at https://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-tps16_graphic.pdf (last visited Oct. 10, 2018).

[40]*E.g., United States v. Maggio*, 862 F.3d 642 (8th Cir.2017)(affirming criminal conviction and upward-variance sentence of 120 months' imprisonment against judge).

basis for the grant of certiorari.[41] It shows that reasonable jurists in fact disagree with the Eighth Circuit's resolution of the question is consistent with §2255—let alone the Suspension Clause. And it sanctions a departure from the accepted and usual course of judicial proceedings. U.S.S.Ct.R. 10(a).

III. Reasonable jurists would find debatable or would agree that Gathing's guilty plea was unconstitutionally involuntary and unknowing—and the product of ineffective assistance of counsel—because appointed counsel failed to inform Gathings that the language in the plea agreement relating to recorded calls between a jail or prison in which he was confined and a nearby location in the same state could be taken as an admission to a necessary element of the offense when the premise is itself debatable and was by no means self-evident (or explained) to Gathings.

In a memorandum of law in the plea-taking/sentencing court (ECF#15), Gathings distinguished or showed to be dictum the decisions or language from them that respondent cited as making the case open-and-shut that the interstate and foreign commerce element of its case was established, so that Gathings's ostensible admission of it went without saying. Respondent cited authority—which in turn relied on other authority—applying different statutes, in different procedural postures, and technologies

[41] U.S.S.Ct.R. 10(a).

far different from jailhouse phones, involving individuals who were not confined to that means of realtime communications with their friends and loved ones.[42] If it isn't a clean-cut case to someone who has taught constitutional law for 8½ years and practiced it for 33, it could hardly be so clear to someone like Gathings in the school-to-prison pipeline. Any contention that Gathings knew interstate commerce when he saw it is a fraud on every court before which it's peddled.

In *United States v. Lopez*,[43] the contemporary Court recognized that the pendulum had swung too far in the direction of not enforcing limitations on the federal government arising from the fact that the Constitution did not create a unitary polity but one in which neither the federal government nor the states were totally sovereign to the exclusion of the

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[42]*E.g.*, *United States v. R.J.S., Jr.*, 366 F.3d 960, 960 (8th Cir.), *cert. denied*, 543 U.S. 909 (2004)(statute—18 U.S.C. § 844(e)—specifically included telephone usage), *citing United States v. Corum*, 362 F.3d 489 (8th Cir.2004), *cert. denied*, 543 U.S. 1056 (2005)(also arising under same statute as *R.J.S.,* specifically including telephones, as well as another—18 U.S.C. § 247(a)(2)—whose violation by means of interstate phone use the prosecution proved in a trial rather than avoiding the facts with a trick), and *Myzel v. Fields*, 386 F.2d 718 (8th Cir.1967), *cert. denied*, 390 U.S. 951 (1968)(civil case arising under §10 of the Securities & Exchange Act, 15 U.S.C. §78j(b) and S.E.C. Rule 10b-5, 17 C.F.R. §240.10b-5, in which there was a jury trial that the Eighth Circuit found to have established interstate activity which made the telephone question academic).

[43]514 U.S. 549 (1995).

other, but all were subject to the sovereign People who had ordained and established the Constitution that envisioned both to exist in harmony—checking each other lest the accumulation of power threaten the rights of individuals.[44]

Lopez required that when Congress legislates in such a manner as to resemble state statutes or local ordinances under the aegis of the Commerce Clause,[45] there really has to be a basis for the courts to find that the legislation regulates interstate or foreign commerce in order to protect the channels of interstate or foreign commerce, to protect the instrumentalities of interstate or foreign commerce or persons or things in it, or to regulate activities that have a substantial relation to interstate or foreign commerce.[46] Although *Lopez* acknowledges that findings by Congress before it passes legislation may help the Court in its "independent" determination whether an activity substantially affected interstate or foreign commerce,[47] nothing in its opinion invites Congress to make up facts in order to evade the social contract the Court is charged with enforcing against all comers, saying that what's local is national or vice versa, or that because a temporary majority of successful candidates want to project that they feel strongly about something, it gives them the

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[44]*Id.* at 552, citing FEDERALIST No. 45 and *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

[45]U.S. Const. art. I, § 8, cl. 3.

[46]*Id.* at 558-59.

[47]*Id.* at 562-63.

legal right to skirt the limits the People placed on them in the course of agreeing to any national government at all.

Enforcing this rule of law and the constitutional principles underlying it, *Lopez* affirmed the Fifth Circuit's decision that the statute under which the accused had been convicted went beyond the power of Congress under the Commerce Clause. The statute purported to make it a federal crime to possess an otherwise lawful firearm within 1000' of a school. It contained no element that required the prosecution to prove by lawful evidence in a contested trial or by a lawful admission in a constitutional guilty-plea proceeding that the conduct alleged had any connection whatsoever to interstate or foreign commerce. It held that such an element is constitutionally necessary in order that the accused would receive a "case-by-case inquiry" that the behavior the statute denounces for other reasons has any tie to interstate commerce outside the prosecutor's dreamscape.[48]

Neither the plea agreement nor the plea colloquy includes an admission that Gathings's ***conduct*** fell within the element giving rise to federal criminal liability. Congress enacted an interstate hook as meeting the element requirement for the statute: that the acts alleged occurred "in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States". 18 U.S.C. § 1591(a)(1). The prosecution

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[48] *Id.* at 561-62.

even included part of this language in the only count of the indictment to which it obtained a guilty plea: "in and affecting interstate and foreign commerce." #4:11-CR-52-GAF#1:3.

But the written guilty-plea agreement does not include language tracking the statute or the indictment. It refers only to "recorded calls from the facility" #4:11-CR-52-GAF#48:2, ¶ 3. In ECF#15, Gathings demonstrated that the automatic slide from jailhouse calls to interstate commerce is neither a sure thing in terms of precedent nor what a layman with a limited education would assume to be involved in an intrastate call on the only phone the State of Missouri made available to him.

In *Smith v. Ayres*[49]—a civil securities-fraud and RICO action, in which the parties were actually deemed to be of equal dignity—the Fifth Circuit found that its precedent said that interstate or foreign commerce actually meant across state lines, even in criminal cases.[50] It did so later in *United States v. Izydore*,[51] even though the decision required it to reverse criminal convictions on several counts.

In addition to requiring that the call, text, e-mail, or smoke signal be in or affecting interstate or foreign commerce, Congress qualified the interstate-commerce element with "knowingly," and the plea

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[49]845 F.2d 1360, 1365-66 & n.21 (5th Cir.1988).

[50]*Id.* n.22.

[51]167 F.3d 213, 219-20 (5th Cir.1999).

agreement and plea colloquy absolutely fail even if one assumes arguendo that telephone equals interstate in some prosecutor's dreams. Holding otherwise would make violation of the statute a strict liability offense. But only when the prosecution charges the accused under subsection (c) of the same statute is it relieved of the burden of proof on anything, and that is the age of the person trafficked, not the predicate for going federal.

Ignoring the mens rea on the jurisdictional element would render the term *knowingly* nugatory, ultra vires creating a common-law crime in the face of the longstanding rejection of there even being federal common-law crimes.[52] And more to the point, in the face of Congress's imposition of a mens rea requirement.

At one point ***besides*** the propositions of fact Gathings was agreeing to, the plea colloquy refers to "affecting interstate and foreign commerce." #4:11-CR-52-GAF#76:10 (lines 7-8). But that was what the prosecution would have had to prove if the case had gone to trial—just the opposite of what happened. The language was conditional, and ***not*** meeting the condition was the reason for the trip to the courthouse. What the plea colloquy ***did*** elicit from Gathings under oath and in so many words was that he admitted to the contents of ¶ 3 of the

[52]*E.g., United States v. Santos*, 553 U.S. 507, 523 (2008) (superseded by statute on other grounds); *United States v. Bass*, 404 U.S. 336, 348-49 (1971); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

plea agreement (*id.* at 10-11)—which all participants purported to be intended to avoid a trial, and that he at least actually intended it to do so.

In *McCarthy v. United States*—decided before the enactment of Fed. R. Crim. P. 11(h) and other additions to Rule 11—this Court reversed a conviction based on a plea of guilty for failure to observe procedural safeguards against abuse of such pleas. *McCarthy*'s explanation of the importance of observing the law precisely when taking a plea stands under the present rule as well and informs its application:

> because a guilty plea is an admission of ***all*** the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.[53]

Subsequent decisions raise the question what part of "all" respondent doesn't understand. In *United States v. Hunt*,[54] the Ninth Circuit reversed a guilty-plea drug conviction because the prosecution did not adduce an admission that the accused had possessed cocaine, when that difference between what he did admit and what he didn't increased his sentencing exposure from one year to twenty:

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[53]394 U.S. 459, 466 (1969) (footnotes omitted, emphasis added)

[54]656 F.3d 906, 913, 916-17 (9th Cir. 2011).

"When a conviction is obtained through a guilty plea rather than a jury verdict, '[t]he government has the burden "at the plea colloquy to seek an explicit admission of any unlawful conduct it seeks to attribute to the defendant."'"[55]

Therefore, reasonable jurists would agree or at least find debatable that it was ineffective assistance of counsel for plea counsel to fail to explain (A:23a (¶¶7-10)) that admitting to a call from a jail in Missouri to a friend or relative in Missouri could be argued to be admitting to activity in or affecting interstate commerce. ECF#9:6-10.

Once more, by its summary sidestepping the inquiry this Court mandates at the COA stage, the Eighth Circuit has validated a judgment at variance with the several circuits whose decisions Gathings cites. Not only is this a traditional basis for the grant of certiorari.[56] It shows that reasonable jurists in fact disagree with the Eighth Circuit's resolution of the question whether the conduct alleged against Gathings was a federal offense—or whether he should have thought it was when he pled guilty. U.S.S.Ct.R. 10(a).

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[55]*Id.* at 912, *quoting United States v. Thomas*, 355 F.3d 1191 (9th Cir. 2004), *citing United States v. Cazares*, 121 F.3d 1241, 1248 (9th Cir. 1997) (vacating sentence for failure of plea colloquy to establish specific fact necessary to enhancement), *citing McCarthy v. United States*, *supra.*

[56]U.S.S.Ct.R. 10(a).

Conclusion

WHEREFORE, the petitioner prays the Court for its order

- granting a writ of certiorari to the Eighth Circuit to review its denial of COA; or, in the alternative;
- issuing its own COA on any or all issues identified in this petition; and
- for such other relief as law and justice indicate.

Respectfully submitted,

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