

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

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APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI

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**JOHN WILLIAM SIMON\***

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*Attorney for Petitioner*

October 16, 2018



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**Order of the United States Court of Appeals for  
the Eighth Circuit summarily denying motion  
for certificate of appealability:**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 18-1329

Eric Gathings

Movant - Appellant

v.

United States of America

Respondent - Appellee

---

Appeal from U.S. District Court for the Western Dis-  
trict of Missouri - Kansas City (4:16-cv-00991-GAF)

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**JUDGMENT**

Before COLLOTON, BENTON and KELLY, Circuit  
Judges.

This appeal comes before the court on appel-  
lant's application for a certificate of appealability.  
The court has carefully reviewed the original file of  
the district court, and the application for a certificate  
of appealability is denied. The appeal is dismissed.

May 16, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**Order of the United States District Court for  
the Western District of Missouri dismissing  
§2255 motion for lack of jurisdiction:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

ERIC GATHINGS,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 16-00991-
	)	CV-W-GAF
	)	Crim. No. 11-00052-
	)	CR-W-GAF-1
UNITED STATES	)	
OF AMERICA,	)	
	)	
Respondent.	)	

**ORDER**

Now before the Court is Respondent United States of America's ("Respondent" or the "Government") Motion to Dismiss. (Doc. # 10). The Government requests the Court dismiss Movant Eric Gathings' ("Movant" or "Gathings") Amended Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. §



2255. (Id.). For the reasons set forth below, the Government's Motion is GRANTED.

## DISCUSSION

### I. BACKGROUND

On March 2, 2011, a federal grand jury returned an indictment charging Gathings with sex trafficking of an adult by force, fraud or coercion; sex trafficking of a minor; being a felon in possession of a firearm; conspiracy to distribute a controlled substance to a person under 21-years old; use of an interstate facility to threaten a person; and use of an interstate facility to facilitate unlawful activity. (Crim. No. 11-00052-CR-W-GAF-1, Doc. # 1). On October 12, 2011, pursuant to a written plea agreement, Gathings pleaded guilty to Count Two of an indictment charging him with sex trafficking of a minor. (Id., Doc. ## 47, 48). The agreed-upon facts set forth in Gathings' written Rule 11(c)(1)(C) binding plea agreement, signed by Gathings and his attorney, are set out below:

In 2009, Eric Gathings recruited a homeless minor, Female Victim #2 (hereafter, FV2) to engage in acts of commercial sex for his financial benefit. He provided housing for the her [sic], but took her earnings after requiring that she sell herself for sex. After discharging a sawed off shotgun in his front yard, he was incarcerated in state custody. During this time of incarceration, he continued to sell FV2 through the assistance of an organized prostitution ring called "Aleesha Angels" ran by Brandy Key. Key also

( 3a )

profited from the sale of FV2 for commercial sex acts. Gathings had FV2 provide him with her earnings to assist him with bond and later to provide him with funding for his prisoner's account. While in custody, he discussed selling females for commercial sex and his knowledge that FV2 was a minor on recorded calls from the facility

(*Id.*, Doc. # 48, ¶ 3).

The plea agreement provided that the parties would jointly recommend a sentence of not more than 15 years' imprisonment. (*Id.* at ¶ 8). After Gathings entered his guilty plea, the Court sentenced him to a 180-month term of imprisonment on March 6, 2012. (*Id.*, Doc. ## 74-75). On September 2, 2016, Gathings filed a pro se motion under 28 U.S.C. § 2255. (Civ. No. 16- 00991-CV-W-GAF, Doc. # 1). On December 6, 2016, he filed an amended motion under 28 U.S.C. § 2255—this time through counsel. (*Id.*, Doc. # 9). Respondent now moves to dismiss, arguing that Gathings' motion is untimely and that it fails on the merits. (*Id.*, Doc. # 10).

## II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a movant may collaterally attack his sentence on four grounds: “(1) ‘that the sentence was imposed in violation of the Constitution or laws of the United States,’ (2) ‘that the court was without jurisdiction to impose such sentence,’ (3) ‘that the sentence was in excess of the maximum authorized by law,’ and (4) that the sentence ‘is otherwise subject to collateral attack.’” *Hill v. United States*, 368 U.S.

424, 426-427 (1962) (quoting 28 U.S.C. § 2255). Arguments that might warrant reversal on direct appeal do not necessarily support collateral attack. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994).

### III. ANALYSIS<sup>1</sup>

Movants that seek to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 face the following period of limitation for filing:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized

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<sup>1</sup>Upon review of the record and the law, Respondent's position is found to be persuasive. Much of the Respondent's argument is adopted without quotation designated.

by the Supreme Court and made retroactively applicable to cases on collateral review; or

- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Courts dismiss motions filed outside that one-year time period as untimely. *See Moore v. United States*, 173 F.3d 1131, 1133-35 (8th Cir. 1999). District courts lack jurisdiction to consider § 2255 motions that are not timely-filed. *United States v. Craycraft*, 167 F.3d 451, 456-57 (8th Cir. 1999).

This Court originally sentenced Gathings on March 6, 2012, which is over four years before Gathings filed his original § 2255 motion. (*See* Crim. No. 11-00052-GAF-1, Doc. # 75). However, Gathings argues that the Government has refused to turn over the audio recordings of his prison phone calls that underlie the factual basis of his guilty plea. (Civ. No. 16-00991-CV-W-GAF, Doc. # 13, p. 6). He contends that the Government's refusal implicates parts (2) and (4) of § 2255's limitations subsection. As both claims involve the discovery associated with his underlying criminal case, their analyses overlap.

Part (2) of § 2255(f) addresses scenarios where the government takes active measures to prevent a prisoner from asserting his or her rights. *See United States v. Lussier*, No. 06-366 (MJD), 2013 WL 673752, at \*3 (D. Minn. Feb. 25, 2013) (discussing § 2255(f)(2)'s protections). Many of the cases within the Eighth

Circuit that analyze whether the government created an unconstitutional impediment to a prisoner's right to file a post-conviction motion involve prisoners challenging the adequacy of law libraries and the adequacy of legal assistance provided them while incarcerated. *See Bear v. Fayram*, No. 4:08-cv-00180-RAW, 2010 WL 4927940, at \*5 (S.D. Iowa Apr. 5, 2010) (under 28 U.S.C. § 2244); *Dean v. Houston*, No. 4:05CV3124, 2006 WL 83103, at \*3 (D. Neb. Jan. 12, 2006) (same).<sup>22</sup> However, in this circumstance, the only impediment Gathings asserts is that the Government denied his request for discovery on December 1, 2016. (See Doc. # 13, Ex. B). He points to no government action that posed an impediment prior to that date. This was still more than three years after the expiration of his time to file under § 2255(f). Possession of discovery is not a condition precedent to filing for habeas relief, and Gathings was able to file prior to obtaining the audio recordings of his phone-conversations. *See Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001).

Gathings' habeas petition could still be timely if he is able to show that his filing was within one year of the date on which he discovered facts supporting his claim, or the date on which the claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f)(4). However, Gathings

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<sup>22</sup>*Bear* and *Dean* discuss unconstitutional impediments under § 2244. *Bear*, 2010 WL 4927940 at \*5; *Dean*, 2006 WL 83103 at \*3. Sections 2244 and 2255 contain nearly identical one-year limitation language, and courts apply the same analysis to both. *See Hieb v. Pringle*, No. 3:17– CV–31, 2017 WL 3575027, at \*6 n.6 (D.N.D. May 16, 2017) (collecting cases).

neither presents new facts regarding his claim, nor has he sought the alleged new information with due diligence. “Due diligence . . . does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option . . . [b]ut, it does at least require that a prisoner make *reasonable* efforts to discover the facts supporting his claims.” *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 (8th Cir. 2008) (internal quotations omitted) (emphasis in original).

Throughout all of Gathings’ briefing, he makes no mention of a fact he discovered within the last year that would give rise to a cognizable § 2255 claim, nor does he explain why he asked for the prison recordings for the first time in December 2016. (See Docs. ## 1, 9, 12, 13, 15, 17, 18, 20). “The government’s failure to provide the documents does not affect [Gathings’] obligation to work diligently to obtain them.” *Deroo v. United States*, 709 F.3d 1242, 1245 (8th Cir. 2013). Gathings’ attempt to obtain discovery over four years from the date of his sentencing is not due diligence as contemplated by § 2255(f)(4). See *Johnson v. United States*, 544 U.S. 295, 311 (2005).

### CONCLUSION

The Court concludes that Gathings was not subject to a government action that unconstitutionally impeded his ability to file his motion under 28 U.S.C. § 2255, that he cannot demonstrate he discovered a new fact supporting his claim within the last year, and that he has not exercised due diligence in pursuing relief. For the reasons set forth above, the Court lacks jurisdiction to rule on Gathings’ Amended Motion to Vacate, Set Aside, or Correct Sentence under 28

U.S.C. § 2255, and the action is DISMISSED as untimely.<sup>3</sup>

IT IS SO ORDERED.

s/ Gary A. Fenner

GARY A. FENNER, JUDGE

UNITED STATES DISTRICT COURT

DATED: October 23, 2017

**Judgment of the United States District Court  
for the Western District of Missouri dismissing  
§2255 motion for lack of jurisdiction:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

ERIC GATHINGS,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 16-00991-
	)	CV-W-GAF
	)	Crim. No. 11-00052-
	)	CR-W-GAF-1
UNITED STATES	)	
OF AMERICA,	)	
	)	
Respondent.	)	

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<sup>3</sup>As the Court does not have jurisdiction to hear the underlying § 2255 Motion, Gathings' Motion for Leave to file an Amended Motion under § 2255 (Doc. # 12) and Motion to Proceed with Discovery (Doc. # 18) are similarly denied.

**JUDGMENT IN A CIVIL ACTION**

- Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- x Decision of the Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that the Court lacks jurisdiction to rule on Gathings' Amended Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, and the action is DISMISSED as untimely.

Dated: October 23, 2017    PAIGE WYMORE-WYNN  
Clerk of Court

Entered: October 25, 2017 /s/ Lisa Mitchell  
(By) Deputy Clerk



**Order of the United States District Court for  
the Western District of Missouri denying mo-  
tion to alter or amend:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

<b>ERIC GATHINGS,</b>	)	
	)	
<b>Movant,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 16-00991-</b>
	)	<b>CV-W-GAF</b>
	)	<b>Crim. No. 11-00052-</b>
	)	<b>CR-W-GAF-1</b>
<b>UNITED STATES</b>	)	
<b>OF AMERICA,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER**

Movant Eric D. Gathings' Motion to Alter or Amend Dismissal Without Discovery on the Ground of Lack of Jurisdiction (doc. #23) and Conditional Motion for Certificate of Appealability (doc. #24) are both denied.

In his Motion to Alter or Amend Dismissal, Gathings argues that this court's Order (doc. # 21) dismissing his Motion under 28 U.S.C. § 2255 was in error because the court determined that it did not have jurisdiction to consider his claims and that because Gathings asked his lawyer for discovery within the one year period he had to file a § 2255 motion, equitable tolling was triggered. As addressed in the court's

Order dismissing his motion under § 2255, the motion was well outside the one year limitation. Gathings points to no government action that acted as an impediment to the timely filing of his post-conviction motion. Gathings' effort to obtain discovery over four years from the date of his sentencing pursuant to a binding plea agreement was not due diligence.

While the statutory one year time limit imposed under § 2255(f) is technically not a "jurisdictional bar," motions presented beyond these time limits should be dismissed as untimely. *See Moore v. United States*, 173 F.3d 1131, 1133-35 (8<sup>th</sup> Cir. 1999); *Campa-Fabela v. United States*, 339 F.3d 993, 993-94 (8<sup>th</sup> Cir. 2003). The fact that this court referred to lacking jurisdiction to take up Gathings' claims rather than more accurately referencing the claims as time barred does nothing to alter the analysis provided or the ultimate conclusion that the claims are statutorily barred.

The government has timely raised a statute of limitations defense and Gathings has not established grounds for equitable tolling under the circumstances herein. This court is precluded from considering the merits of Gathings' untimely claims. *See United States v. Craycraft*, 167 F.3d 451, 457 (8<sup>th</sup> Cir. 1999).

A certificate of appealability should be issued only if Movant can make a substantial showing of the denial of a constitutional right or raise an issue that is debatable among jurists of reason or deserving of further proceedings. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Gathings has not made this showing.

Accordingly, for the reasons stated herein and as addressed in the court's Order (doc. #21) dismissing

Gathings' Motion under § 2255, his Motions to Alter or Amend Dismissal Without Discovery On the Ground of Lack of Jurisdiction (doc. #23) and his Conditional Motion for Certificate of Appealability (doc. #24) are both denied.

s/ Gary A. Fenner

GARY A. FENNER, JUDGE

UNITED STATES DISTRICT COURT

DATED: December 19, 2017

**Order of the United States Court of Appeals for the Eighth Circuit summarily denying rehearing and rehearing en banc:**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 18-1329

Eric Gathings

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City (4:16-cv-00991-GAF)

**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 19, 2018

( 13a )

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**Legal Authority Required by Subparagraph 1(f)  
or 1(g)(i):**

**U.S. Const. art. I, § 9, cl. 2 (Suspension Clause):**

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

**U.S. Const. amend. V (Due Process Clause):**

No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

**U.S. Const. amend. VI (Assistance of Counsel Clause):**

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

**28 U.S.C. § 2253(c):**

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

**28 U.S.C. § 2255:**

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with

respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the of judgment conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

**Dist. Ct. Doc. No 13-2: Reply e-mail from assistant local federal prosecutor denying discovery in underlying criminal case, including e-mail to which it was a reply and the attached letter from independent counsel offering to agree to protective order:**

Gathings v. United States  
No. 4:16-CV-991-W-GAF  
Response to Motion to Dismiss  
Exhibit 1

Thursday, December 1, 2016 at 11:04:21 PM Central  
Standard Time

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**Subject:** RE: Attachments  
**Date:** Thursday, December 1, 2016 at 9:42:04 AM  
Central Standard Time  
**From:** Moore, Teresa (USAMOW)  
**To:** John William Simon (Official Account)

Dear Mr. Simon,

Thank you for your email, letter, and copy of your entry of appearance. Because Mr. Gathings's motion to



vacate pursuant to 28 U.S.C. 2255 was filed outside the one-year time limit, I am asking the Court to dismiss the motion as untimely. Further, based on the claims alleged in the motion I believe the issues presented are legal in nature and an investigation of the underlying criminal activity will not advance the issues presented. If requested, you may be able to obtain a copy of the Presentence Investigation directly from the Court. The Government does not believe that there is good cause to obtain the discovery in the underlying criminal case. I understand you may proceed with filing a motion with the Court, and I will oppose such motion.

Thank you,

Teresa

Teresa Moore

Assistant United States Attorney

Chief Computer Crimes and Child Exploitation Unit

400 East 9th Street, Suite 5510

Kansas City, Missouri 64106

816-426-4256

teresa.moore2@usdoj.gov

-----Original Message-----

From: John William Simon (Official Account)

[mailto:simonjw1@yahoo.com]

Sent: Tuesday, November 29, 2016 11:06 AM

To: Moore, Teresa (USAMOW)

<Tmoore6@usa.doj.gov>

Subject: Attachments

Dear Ms. Moore,

Please find attached a letter and a file-stamped copy  
of my entry of appearance.

Very truly yours,  
JOHN WILLIAM SIMON, J.D., Ph.D.  
Principal  
Constitutional Advocacy, LLC  
7201 Delmar Blvd., Suite 201  
St. Louis, Missouri 63130-4106  
(314) 604-6982  
Fax: (314) 754-9083  
[www.constitutionaladvocacy.com](http://www.constitutionaladvocacy.com)  
[www.linkedin.com/pub/john-william-simon/24/3/8b3/](http://www.linkedin.com/pub/john-william-simon/24/3/8b3/)

"It's not the land . . . It's the idea that we all have  
value, you and me. What we're fighting for, in the  
end . .  
. we're fighting for each other."  
— Joshua Lawrence Chamberlain, 30 June 1863

[Sent from Remagen]

John William Simon  
J.D., PH.D.  
Constitutional Advocacy, LLC  
7201 Delmar Blvd., Suite 201  
St. Louis, Missouri 63130-4106  
(314) 604-6982 *www.ConstitutionalAdvocacy.com*  
FAX (314) 754-9083 *simonjw1@yahoo.com*

November 29, 2018

Teresa A. Moore, Esq.  
Assistant United States Attorney  
400 East Ninth Street, Fifth Floor  
( 20a )

Kansas City, Missouri 64104

Re: Discovery in *U.S. v. Gathings*, No. 11-00052-01-CR-W-GAF

Dear Ms. Moore:

Please find enclosed my entry of appearance as counsel for the movant/petitioner in *Eric D. Gathings v. U.S.*, No. 16-00991-CV-W, now pending before the U.S. District Court for the Western District of Missouri, and specifically before the Hon. Gary A. Fenner. You filed a response to show cause in this matter on November 14, 2016. Doc. No. 6.

As part of his response to a memorandum signed by Mr. Gathings, plea counsel, Mr. Robin Fowler, has informed me in part that he returned the discovery to the U.S. Attorney's Office after the one-year limitation period based on only one of the four triggering events in 28 U.S.C. § 2255(f) had passed.

In order to complete my investigation of the case, I need to review the discovery. I understand that it will include information which is deemed confidential, and use in the case of such matter would require filing under seal. I assume that you have the criminal case file along with the post-conviction relief case file, and that you could provide this to me in time that I would not need to seek an extension of time to file the traverse solely on account of what plea counsel did with the discovery. If it is not available, please let me know what time you will require to produce it.

Thank you for your courtesy and consideration in this matter.

( 21a )

Very truly yours,  
s/John William Simon  
JOHN WILLIAM SIMON

**Dist. Ct. Doc. No. 13-3: Affidavit of petitioner to his lack of knowledge of any interstate aspect to intrastate calls and to plea counsel's failure to advise of consequences prosecution would attach to statement regarding calls in plea agreement:**

Gathings v. United States  
No. 4:16-CV-991-W-GAF  
Response to Motion to Dismiss  
Exhibit 2

AFFIDAVIT

COMES NOW the affiant, Eric D. Gathings, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. I asked appointed counsel, Robin Fowler, in the underlying criminal action against me, United States v. Gathings, No. 11-52-CR-W-GAF, to see the discovery in the case against me.

6. Mr. Fowler told me that he did not have the discovery.

7. At the time I signed the plea agreement Mr. Fowler advised me to sign, I 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 he advised me to plead guilty.

8. Nothing about any call in which I participated from the jail led me to believe that there was any interstate or foreign commerce involved in the call.

9. If I had believed that the case against me was founded on the premise that a call from a jail to one or more other locations in the same state counted as interstate or foreign commerce, I would not have waived my right to a jury trial and the other rights one waives in entering into a plea of guilty.

10. Far from advising me that that would be the consequences of the words "on recorded calls from the facility" in the plea agreement, Mr. Fowler that the feds do anything they want, and I had to take the plea because they were not going to come down on the sentence.

11. Where the respondent held me pending trial, I 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. Mr. Fowler and the prosecutor agreed that if I pled guilty, I would be transferred to CCA-Leavenworth, where my brother was being held.

12. 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.

13. In his capacity as Court-appointed counsel, after I signed the plea agreement Mr. Fowler advised me that I was going to be sentenced to fifteen years no matter what I did.

14. 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.

Further, the affiant saith naught.

I swear or affirm that the foregoing is true and correct.

s/Eric D. Gathings  
ERIC D. GATHINGS  
Reg. No. 23005-045

STATE OF IN                    )  
  ) SS.  
COUNTY OF VIGO            )

Subscribed and sworn to before me, a Notary Public, this 19 day of December 2016.

s/S. Williams  
NOTARY PUBLIC

My commission expires on 3-2-22.

STUART LORAN WILLIAMS  
Notary Public - Seal  
State of Indiana  
Vigo County  
My Commission Expires Mar 2, 2022

**Doc. No. 13-4: Declaration of petitioner regarding plea counsel's acting as prosecutor's privy:**

Gathings v. United States  
No. 4:16-CV-991-W-GAF  
Response to Motion to Dismiss  
Exhibit 3

**DECLARATION**

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. When I was sent back to M.D.O.C. to get paroled to federal custody, Mr. Fowler came to see me to threaten me for Ms. Cordes with a plea agreement of 75 to 100 years in prison if I went to trial.

6. Mr. Fowler never argued anything on my plea agreement or PSI even after I raised some issues.

7. The victim told them that she didn't work for me, after I brought that fact up, Mr. Fowler on his next visit brought me paperwork saying that she did work for me. Showing me that he was working with prosecution.

8. At my court hearing to change attorney's, Ms. Cordes made a statement that she had some papers in her possession that she was not suppose to be in possession of. Judge Fenner asked her how she got it. She didn't know what to say. While she stammered, Mr. Fowler picked up where she left off and saved her.

9. Soon after I was convicted and sentenced, I filed an appeal. I was told by Mr. Fowler that I had no appeal rights. I could not have a copy of my full discovery because it would cost too much money, and that he did not have it anyway.

10. My codefendant ran a prostitution ring, dealt with all the calls and computers. She even admitted the victim worked for her. She got a lesser charge and sentence than I did. All I did was call my own house from jail, and got the leadership role plus 15 years.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 12-19-16



s/Eric D. Gathings  
ERIC D. GATHINGS  
Reg. No. 23005-045

**Dist. Ct. Doc. No. 18-2: Declaration of petitioner regarding respondent's compromising of legal mail on pretext that independent counsel was drug mule:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Motion for Leave to Proceed with Discovery  
Discovery Motion Exhibit 1

DECLARATION

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. On 1-17-17 I was called to the day room by counselor K. Wasson to receive legal mail.
6. Counselor Wasson stated to me the legal mail is how "you guys" have been getting drugs into the prison, and that he was not going to be giving me the envelope that my legal mail came in. I don't know if

( 27a )

the mail was opened already or not. It appeared to be to me.

7. I then told counselor Wasson that if I can't get my legal mail the way it as sent to me that I wanted him to send it back to where it came from and went back to my cell.

8. Counselor Wasson then called me back down to him and told me that he wanted to see me in the back. (Meaning in his office with no cameras.) I really didn't want to go there, but I sent back anyway because I know what happens to so many others here.

9. In his office he proceeded to yell at me and removing [E.D.G. 3-4-17] my legal mail that I wanted sent back to my attorney. He continued to get in my face yelling. I asked to be let out of his office. I asked Mr. Chapman unit manager to let me out. I asked officer Boatright to let me out also. No one would let me out of there.

10. I eventually took the legal mail because I had to take it. Mr. Wasson gave me no other choice.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 2-1-17

s/Eric D. Gathings 23006-045  
ERIC D. GATHINGS  
Reg. No. 23005-045

**Dist. Ct. Doc. No. 18-3: Declaration of petitioner regarding respondent's taking of legal materials including mail and keeping them for eight days:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Motion for Leave to Proceed with Discovery  
Discovery Motion Exhibit 2

DECLARATION

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. On 2-15-17 my whole unit was subject to a major shake down. Everything was looked through...mattresses scanned, we were scanned. As I was looking out of my door window I noticed that the officers were looking through other inmates legal mail inside their cells.
6. When the officers got to my cell they took me and my cell mates out and when we got back, I noticed that the tupperware buckets were gone. My food bucket had been dumped on the floor. The

bucket containing my legal work was taken from the cell, along with my legal papers, envelopes, and stamps.

7. I then pushed the emergency button to get somebody's attention to ask about my legal work. Unit Manager Royer came to the door. I asked him why was my food container dumped on the floor and my legal mail container was taken from my cell?

8. Unit manager Royer then made is a point to tell me twice that he did it. He took my legal papers. And said that if I pushed the button again that he would write me up for a 200 series incident report. I had to leave it alone.

9. The compound Captain mad a round in our unit the next day. I told him about it. He said that he would talk to our unit manager about it.

10. They ended up keeping my legal papers for eight days. When I got them back some of my Declarations were missing.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 3-4-17

s/Eric D. Gathings  
ERIC D. GATHINGS  
Reg. No. 23005-045

**Dist. Ct. Doc. No. 18-4: Declaration of petitioner regarding respondent's incomplete return of legal materials including mail after keeping all of them for eight days:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Motion for Leave to Proceed with Discovery  
Discovery Motion Exhibit 3

DECLARATION

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. In my declaration of today's date, I describe in detail how agents of the respondent in my section 2255 case took my legal papers and kept them for eight days, taking away some of them altogether.
6. Due to the respondent's agents locking down Terre Haute and banning attorneys during the lockdown, I was not able to show the papers that the staff took but returned until now.

7. The following list is a true and correct inventory (Declaration exhibit A) of the documents the respondent's agents took on 2-15-17 and did eventually return.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 3-4-17

s/Eric D. Gathings  
ERIC D. GATHINGS  
Reg. No. 23005-045

#### DECLARATION EXHIBIT A

1. Affidavit -- Exh. 2 to Response to Motion to Dismiss (3 pp.)
2. Declaration -- Exh. 3 to Response to Motion to Dismiss (2 pp.)
3. Letter from JWS of October 29, 2016 (3 pp.)
4. JWS resumé dated August 18, 2016 (9 pp.)
5. Memo from JWS of December 30, 2016 (3 pp.)
6. Doc. No. 13 (20 pp.)
7. Letter from JWS of December 16, 2016 (3 pp.)
8. E-mail showing filing of Doc. No. 10 (2 pp.)
9. Memo from JWS of January 13, 2017 (1 p.)
10. Draft from JWS of point re timeliness of amended motion (with red watermark) (5 pp.)
11. Memo from JWS of January 14, 2017 (3 pp.)

12. Blank one-page declaration form for this client (1 p.)
13. Exh. 4 to Response to Motion to Dismiss (2 pp.)
14. Memo from JWS of January 16, 2017 (1 p.)
15. Table of exhibits to Response to Motion to Dismiss (1 p.)
16. Doc. No. 10 (7 pp.)
17. Doc. No. 12 (4 pp.)
18. Doc. No. 11 (6 pp.)
19. Draft from JWS of Memorandum of Law in Support of First Amended Motion (pp. i-vi & 1-20)
20. Doc. No. 15 (21 pp.)

**Dist. Ct. Doc. No. 18-7: Example of photocopy of truncated portion of a USPS mailer that respondent provided petitioner instead of the mailer itself:**

[Page 1 of 2 in exhibit filed in district court:]

PRESS FIRMLY TO SEAL

---

PRIORITY MAIL  
POSTAGE. REQUIRED

---

This is the what I receive  
now instead of the envelope  
my legal mail comes in.

**John William Simon**

J.D., PH.D.

Constitutional Advocacy, LLC

7201 Delmar Blvd., Suite 201 (314) 645-1776  
St. Louis, Missouri 63130-4106 Fax (314) 754-9083

---

Mr. Eric D. Gathings

Reg. No. 23005-045

AOI-222L

USP Terre Haute

P.O. Box 33

Terre Haute, Indiana 47808

[Bar Code]

**SPECIAL MAIL: OPEN ONLY IN THE  
PRESENCE OF THE INMATE**

<p><i>Gathings v. United States</i>, No. 4:16-CV-991-GFG U.S. Dist. Ct. W.D. Mo. Motion for Leave to Proceed with Discovery Discovery Motion Exhibit 7</p>
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July 2013 VISIT US AT USPS.COM® [USPS  
5 X 9.5 ORDER FREE SUPPLIES ONLINE LOGO]

[Following paragraph vertical on right margin:]

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[Page 2 of 2 in exhibit filed in district court:]



TRACKE  
ITY This is what I received [star symbols]  
L [star symbol] instead of my envelope. INSURE  
[star symbol]  
ELOPE

FCC TERRE HAUTE  
SPECIAL LEGAL MAIL  
DATE/TIME RCVD FROM POSTAL SERVICE 1-26-17 1000  
DATE/TIME RCVD FROM MAIL ROOM 1-26-17  
RECEIVED BY Chatman  
DATE/TIME DELIVERED 1-26-17 1600  
DELIVERED BY K. Wasson

14F July 2013 [USPS  
): 12.5 x 9.5 LOGO]

**Dist. Ct. Doc. No. 23-1: Declaration of petitioner regarding respondent's repeated searching through his legal papers, including mail, and taking some of it:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Post-Judgment Motions  
Motion Exhibit 1

DECLARATION

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.

( 35a )

2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.

3. I am of legal age and of sound mind and body.

4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.

5. In this action I am represented by John William Simon, Constitutional Advocacy LLC, 7201 Delmar Blvd. # 201, St. Louis, Missouri 63130-4106.

6. On September 11, 2017 another inmate was in my cell from another unit (Out of Bounds) at 8:00 AM

7. Officer Sajnaj came to my cell to get the inmate and me and took us to the lieutenants office where he had us strip searched. After we were strip searched I was sent to the yard to pick up paper.

8. When I returned to my housing unit my cell door was locked. I asked officer sajnay if he would open my door. He said "no" that he was going to search it.

9. Officer Sajnaj then went into my cell and searched. He pretty much wrecked my cell and tore things up.

10. When officer Sajnaj was done he locked my cell door back and left to go to his office. Locking me out of my cell until 4 pm. This whole thing started at 8:20 AM. I wasn't allowed to use the bathroom during this time or eat because all of my things and ID was locked up.

11. When I was finally allowed in my cell at 4:00 count time my cell was demolished. Headphones were broken and books were torn up.

12. My legal work was gone through again. All of my legal mail was out of order. Some of it was not even there again.

13. I never said anything to officer Sajnaj about the situation.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 9-25-17

s/Eric D. Gathings 23006-045

ERIC D. GATHINGS

Reg. No. 23005-045

**Dist. Ct. Doc. No. 23-2: Declaration of petitioner regarding respondent's continued harassment by its agent K. Wasson:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Post-Judgment Motions  
Motion Exhibit 2

DECLARATION

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.

( 37a )

2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.

3. I am of legal age and of sound mind and body.

4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.

5. I have been having a hard time with my counselor Wasson again.

6. Counselor Wasson has had me in a two man cell by myself for two months. Counselor Wasson keeps denying other inmates and myself a cell change to move in with me, or me to move with someone else. Counselor Wasson refuses to help me with anything that I need help with. Also I have been drug tested five times in one month. Two of those times were in two days. 1 on 9-13-17 and again on 7-14-17 @ 1:20 AM

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 9-25-17

s/Eric D. Gathings 23006-045  
ERIC D. GATHINGS  
Reg. No. 23005-045

**Dist. Ct. Doc. No. 27-1: Declaration of petitioner regarding respondent's ongoing reading and destruction of legal mail:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Supplemental Suggestions in Support of Post-Judgment Motions -- Motion Exhibit 1

**DECLARATION**

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. On 11-13-17 at approximately 1:00 pm I received legal my from my attorney Mr. Simon.
6. My counselor Mr. Chapman went through my mail and took out my P.S.R. and Declarations and told me that I could not have it, and shredded it all.
7. All I received in my legal mail was my plea agreement, plea transcript, and the memorandum attached. This is why my declarations are late.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 11-27-17

s/Eric D. Gathings 23006-045  
ERIC D. GATHINGS  
Reg. No. 23005-045

**Dist. Ct. Doc. No. 27-2: Declaration of petitioner regarding plea counsel's misadvice causing him to forego earlier remedies:**

*Gathings v. United States*, No. 4:16-CV-991-GFG  
U.S. Dist. Ct. W.D. Mo.  
Supplemental Suggestions in Support of Post-Judgment Motions -- Motion Exhibit 2

DECLARATION

COMES NOW the declarant, Eric D. Gathings, and as authorized by 28 U.S.C. § 1746, states and declares under penalty of perjury all as follows:

1. My name is Eric D. Gathings.
2. I am a prisoner of the federal government, incarcerated at USP Terre Haute, 4700 Bureau Road South, Terre Haute, Vigo County, Indiana 47808.
3. I am of legal age and of sound mind and body.
4. I am the movant/petitioner in an action under 28 U.S.C. § 2255, Gathings v. United States, No. 16-991-CV-W-GAG.
5. I did not raise the grounds for relief in my pro se motion because my then attorney Robin Fowler had done nothing for me on my case.

6. Mr. Fowler told me about everything I thought was wrong on my case that the Government can do whatever they wanted to. Even let people go free that actually committed a crime.

7. Mr. Fowler told me that after signing an 11c.1.c. plea agreement that I could never file an appeal.

8. Mr. Fowler said that signing that plea agreement would strip me of all my rights.

9. 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.

10. Mr. Fowler convinced me that taking the ten years was my best bet, because if I went to trial that that the Government was going to give me life in prison. I was wanting to file an appeal, but I didn't have what I needed to do so.

Further, declarant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 11-27-17

s/Eric D. Gathings 23006-045  
ERIC D. GATHINGS  
Reg. No. 23005-045