No. 24-

IN THE

Supreme Court of the United States

PHILLIP JOSHUA YELLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Miller-El*[1], this Court held of the relatively low level of showing necessary from a *habeas* Petitioner like Phillip J. Yellin to be entitled to a COA[2]:

> [O]ur opinion in *Slack* [*Slack v. McDaniel*, 529 U.S. 473 (2000)] held that a COA ***does not*** require a showing ***that the appeal will succeed***. Accordingly, a court of appeals should not decline the application for a COA ***merely because it believes the applicant will not demonstrate an entitlement to relief***.

Miller-El, at 337, emphasis added. Therefore, the first question presented by Mr. Yellin is:

1. Did the Ninth Circuit ignore the process, re-emphasized by this Court in *Buck v. Davis*[3] and *Miller-El,* when it refused to issue a COA compelled by Yellin's highly specific, corroborated actual innocence evidence, thereby arbitrarily demanding of him a more onerous showing than that long ago established by this Court in *Schlup?*[4]

In *Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977), this Court warned lower courts that in *habeas* petitions

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

2. Certificate of Appealability.

3 *Buck v. Davis,* 580 U.S. 100, 115 (2017).

4. *Schlup v. Delo,* 513 U.S. 298 (1995).

– "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive." Therefore, the second question presented by Yellin is:

2. Given that this Court in *Blackledge* specifically warned lower courts against making a credibility - "resolution on the basis of affidavits"- did the Ninth Circuit sanction a violation of *Blackledge* by approving a district court's improper credibility determinations on Yellin's uncontradicted *habeas* declarations alone?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Phillip Joshua Yellin was the Petitioner-defendant in the district court proceedings and appellant in the court of appeal proceedings. Respondent United State of America was the plaintiff in the district court proceedings and appellee in the court of appeal proceedings.

RULE 14(B) STATEMENT OF RELATED CASES

- *USA v. Phillip Joshua Yellin*, Ninth Circuit Court of Appeals, No. 23-2923, October 30, 2024.

- *USA v. Phillip Joshua Yellin*, No. 3:15-cr-03181-BTM-2, U.S. District Court for the Southern District of California, August 25, 2023.

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PETITION FOR WRIT OF CERTIORARI

In *Miller-El,* this Court held of the type of showing necessary from a Petitioner like Mr. Yellin to be entitled to a COA:

> [O]ur opinion in *Slack* held that a COA ***does not*** require a showing ***that the appeal will succeed***. Accordingly, a court of appeals should not decline the application for a COA ***merely because it believes the applicant will not demonstrate an entitlement to relief***.

Id., at 337, emphasis added. In *Miller-El*, this Court also specifically noted: "A prisoner seeking a COA must prove '***something more than the absence of frivolity***' or the existence of mere 'good faith' on his or her part." *Id.,* 338, emphasis added. The record unquestionably shows that Mr. Yellin proved far more than "the absence of frivolity." This is so because the district court, in its threshold gatekeeping function, did not initially dismiss Yellin's *habeas* because all he had shown was merely "the absence of frivolity". Instead, the court ordered the government to file a Response. App. 5a.

In *Buck v. Davis,* this Court explicitly noted:

> We ***reiterate*** what we have said before: A "court of appeals should limit its examination [at the COA stage] to ***a threshold inquiry*** into the underlying merit of [the] claims," ***and ask "only*** if the District Court's decision was debatable." [Quoting *Miller-El* at 327 and 348.]

Buck at 116, emphasis added.

With the preceding as backdrop, Phillip Joshua Yellin (Mr. Yellin), respectfully petitions for a *Writ* of *Certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit, refusing him a COA on October 30, 2024. App.1a. Mr. Yellin brings a unique case where the Ninth Circuit palpably ignored the lenient standard established by this Court in *Buck v. Davis* and *Miller-El* for petitioners like him seeking a COA. Instead, the lower court, by logical implication, required that he make a showing by a far more demanding standard for relief, in the face of the *prima facie* showing of IAC and entitlement to relief in his fully corroborated actual innocence *habeas*.

ORDERS BELOW

On October 30, 2024, the Court of Appeals for the Ninth Circuit issued its Order affirming the District Court's denial of Yellin's *habeas* petition. App.1a.

JURISDICTION

On October 30, 2024, the Ninth Circuit issued its Order denying Petitioner a Certificate of Appealability (COA). App.1. Denying Petitioner's request for a COA, the Ninth Circuit refused to review the District Court's Memorandum and Order of August 25, 2023, summarily denying Yellin's *habeas*. App.3a. Jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1651(a) and 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article I, Section 9, Clause 2:

> "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."

United States Constitution, Fifth Amendment:

> "No person shall ... be deprived of …liberty ... without due process of law…."

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

INTRODUCTION AND STATEMENT OF THE CASE

1. Introduction

This case presents two interrelated issues implicating the most fundamental cornerstones of the America criminal justice system – the right to the effective assistance of counsel and the right to due process and fair consideration of the Constitutionally guaranteed *Great Writ*[5] in post-conviction § 2255 proceedings.

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5. U.S. Constitution, Article I Section 9, Clause 2.

For Mr. Yellin, the district court and then the Ninth Circuit disregarded this Court's explicit petitioner-lenient standard for entitlement of a COA in § 2255 proceedings. The record readily shows that Mr. Yellin presented the district court, and later the Ninth Circuit, a robustly corroborated meritorious actual innocence *habeas,* facially entitling him to relief. His case also highlights case-specific facts and the need for this Court to step in and to clarify the lenient standard for petitioners like Mr. Yellin required under *Buck* and *Miller-El* and this Court's warning not to make credibility findings merely on *habeas* affidavits long ago issued in *Blackledge* at 73.

The uncontradicted record in the district court, and later the Ninth Circuit, makes it self-evident that Mr. Yellin's Fifth and Sixth Amendment rights were denied when the lower courts disregarded the applicable lenient standard. Yellin's unique facts also bring to light the disregard by the district court of Yellin's due process rights under RULES GOVERNING SECTION 2255 PROCEEDINGS, 28 U.S.C. § 2255.

2. Statement of the Case

In September 2015, Mr. Yellin was indicted in the Southern District of California, along with his elderly father, with violating 18 USC § 2252(a)(2) – knowingly receiving visual depictions of minors engaged in sexually explicit conduct. App. 4a.

Mr. Yellin pleaded guilty in March 2016, to a superseding information charging him with a different crime —knowingly possessing an obscene visual depiction of minors engaging in sexually explicit conduct. App.4a.

Mr. Yellin pleaded guilty, along with his elderly co-defendant father, as part of a "package" plea agreement. App.4a.

Yellin was sentenced on his guilty plea October 26, 2016, to "twenty-one months custody followed by ten years of supervised release." App.4a. Attorney David Baker represented Mr. Yellin. *Id.*

Thereafter, on February 1, 2023, Mr. Yelling file his § 2255 petition to vacate sentence maintaining that he was actually innocent, his attorney denied him his right to the effective assistance of counsel, and that his attorney was riddled with a conflict of interest by dual concurrent representation of himself and his co-defendant elderly father. App.4a. He corroborated his § 2255 issues with declarations from himself, his mother, and evidence. App.5a.

Prompted by the district court's order to file a *response* to Yellin's assertions, the Government instead filed a motion to dismiss arguing that Yellin failed to provide sufficient facts for actual innocence. App.5a. On August 25, 2023, the district court issued its order without a prior hearing denying Yellin's § 2255 motion also denying a certificate of appealability. App.3a.

On November 1, 2023, Mr. Yellin filed his Request for a Certificate of Appealability before the Ninth Circuit Court of Appeals. App.10a. The Ninth Circuit denied Yellin's his Request on October 30, 2024. App.1a.

REASONS FOR GRANTING THE PETITION

I. The Court must grant Yellin's *writ* petition because the Ninth Circuit ignored this Court's precedent in *Buck v. Davis* and *Miller-El,* when the lower court refused to issue a COA, despite the specific, corroborated, actual innocence claim, thereby arbitrarily imposing on Yellin a more onerous showing than that required in *Schlup.*

This case presents a recurring question regarding a need for the Court's supervisory powers relative to the proper standard appellate courts must apply when considering a request for a Certificate of Appealability in a 2255 *habeas* petition. In *Miller-El* this Court elaborated on the lenient standard required of a petitioner to be entitled to a COA:

> The holding in *Slack* would mean very little ***if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail***. It is consistent with [28 U.S.C.] § 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.'" [Citation omitted]

Miller-El at 337, emphasis added. There, This Court added "When a court of appeals sidesteps this process by first deciding the merits of [a *habeas*] appeal, and then justifying its denial of a COA based on its adjudication ***of the actual merits***, it is in essence deciding an appeal

without jurisdiction." *Miller-El* at 336-37, emphasis added. Mr. Yellin respectfully submits that this is exactly what the Ninth Circuit panel did to his robust, meritorious *habeas*.

A. Context for Yellin's Request for a COA

In his fully corroborated, actual innocence ineffective assistance of counsel (IAC) *habeas*, Mr. Yellin presented his own *detailed* actual innocence sworn declaration. App.18a Yellin's declaration was fully corroborated by an equally detailed declaration from his mother, Marcie Yellin. App.19a. The declarations, among additional compelling evidence, synergistically provided a variety of specific allegations supporting Mr. Yellin's actual-innocence assertion and an actual, non-waivable, conflict of interest infecting Yellin's defense counsel. Yellin's lawyer had also contemporaneously acted as layer and consultant to Yellin's co-defendant and elderly infirm father, William Yellin.

Facing Yellin's robust *habeas,* the district court properly ordered the Government to file a Response. But the Government chose to file only a Motion to Dismiss. In its non-responsive Motion, the Government merely argued that Yellin's *habeas* was ostensibly untimely because he supposedly failed to make a sufficient showing of actual innocence. App.3. The Government failed to support its Motion *with declaration(s)* countering Yellin's robust facts. In its reductive arguments, the Government also directly *disputed* Yellin's proffered, detailed, facts. The Government thereby injected credibility disputes between its own unsupported claims and Yellin's specific declarations.

Once the Government filed its Motion to Dismiss, the district court was faced with stark factual disputes. Central disputes that had to be resolved by an evidentiary hearing.

On the one hand, the court faced: 1) Yellin's specific facts that had to be accepted as *true and credible.*[6] On the other, the court had only the Government's unsupported polemic contesting the credibility and accuracy of Yellin's evidence. Indisputably, the court could not properly make credibility findings on Yellin's corroborated affidavits. An evidentiary hearing was compelled. *See, Blackledge* at 82, note 25

However, with perfunctory ease contrary to the letter and spirit of *The Rules Governing 2255 Proceedings* and this Court's binding precedent, the district court failed to hold an evidentiary hearing to fairly and equitably resolve the central credibility and factual disputes. Instead, the court denied Yellin's *habeas* on the pleadings alone. *Order Dismissing Defendant's 28 U.S.C. § 2255 Motion and Denying a Certificate of Appealability.* App. 3a. In in its biased process, the court violated 28 U.S.C. § 2253(b).

Section 2253(b) provides:

> ***Unless*** the motion and the files and records of the case ***conclusively show that the prisoner is***

6. *See*, *Dat v. United States*, 920 F.3d 1192, 1193–94 (8th Cir. 2019), *Garcia v. United States*, 679 F.3d 1013, 1014 (8th Cir. 2012), and *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000) "***An evidentiary hearing is required*** unless the motion, files, and records of the case ***conclusively*** show the defendant is not entitled to relief." Emphasis added.

> ***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***. …

Emphasis added. Yellin's specific, precise declarations and exhibits were far from the type of pleadings that conclusively show that he was "entitled to no relief." To the contrary.

Mr. Yellin demonstrated in his declarations and other evidence that he was indeed innocent. Yellin also demonstrated that he was denied his "constitutional right" to the effective assistance of counsel by being advised by his lawyer to plead guilty despite his professed innocence. He also showed that his lawyer was hopelessly riddled with a non-waivable conflict of interest. *See generally, Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003), where the Court held: "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.'" Emphasis added.

In also ignoring and then denying Yellin's issue of his lawyer's failure to conduct basic investigation into his innocence, the district court violated Ninth Circuit precedent in *Weeden v. Johnson,* 854 F.3d 1063, 1069 (9th Cir 2017), where the lower court noted:

> The Supreme Court has ***repeatedly*** made plain that counsel has the "duty to make reasonable investigations or to make a reasonable

> decision that makes particular investigations unnecessary." [*Strickland v. Washington*, 466 U.S. 668 (1984)] at 691; *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Hinton v. Alabama*, 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014).

Emphasis added.

Thereby, the district court denied Yellin his right to due process under the Fifth Amendment. In a 2255 setting, the district court was mandated to accept the specific allegations as true and then to shift the burden to the Government. See, 28 U.S.C. 2253(c)(2), discussed below.

B. The Government's Motion to Dismiss contained an admission that it had failed to file a "proper" response to Yellin's *habeas*.

On March 7, 2023, instead of filing a proper Response credibly addressing Yellin's specific facts and actual innocence, the Government filed its Motion to Dismiss superficially arguing that Yellin's *habeas* was "time barred." App.5a. The *habeas* was time-barred, according to the Government's argument, because Yellin failed to make the proper actual innocence showing allowing him to pass through the exception in the one-year statute of limitations under AEDPA.[7] App. 5a.

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7. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2255(f).

In making its time-bared argument, the Government ignored the Eighth Circuit's precedent in *Dat* about *habeas* allegations, the low standard in *Miller-El* for a COA, at 338, and the actual innocence showing required by the Ninth Circuit for first-time *habeas* petitioners in *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011), *en banc*,[8] (adopting the less demanding "more likely than not" standard).

In its Motion, the Government subjectively characterized Yellin's varied specific facts in the following conclusory manner:

> This case does not fall into the narrow class of cases implicating a fundamental miscarriage of justice. ***And Yellin's self-serving, conclusory statements that he is actually innocent***, ***without any support cannot*** relieve him of the AEDPA statute of limitations.

Id., emphasis added. Contrary to the Government spin, Mr. Yellin had substantial "support" for his "claims". App.18a-21a. Notably, the Government failed to include specific analysis as to why it self-servingly viewed Yellin's thirty-two paragraph declaration, the twenty-seven paragraph declaration from his mother, and the rest of exhibits, as somehow "insufficient".

In its failure to counter Yellin's facts in a proper Response supported by declarations, the Government offered more conclusory claims for the district court:

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8. Relying on *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

> Yellin ***does not assert facts showing he is actually innocent of his crime of conviction***. His ineffective assistance of counsel claim merely asserts claims of legal insufficiency, not factual innocence. Yellin attached self-serving declarations from him and his mother speculating that Yellin's father accessed Yellin's computer, ***and one email Mr. Baker sent*** as part of plea negotiations to the assigned prosecutor, arguing Yellin's "download was accidental." None of these materials contain "new" evidence, just the same arguments Yellin raised in 2016.

Id., at page 5, emphasis added. App. 17a.

But the existing record of Yellin's *habeas* establishes that the Government was unmoored from the facts in arguing that Yellin did not "assert facts showing he is actually innocent of his crime of conviction." To the contrary, Yellin's declarations were densely heavy with specific facts raising actual innocence. Some of these facts included:

> 17. I and Attorney Baker then met to discuss our case strategy. I explained that I felt innocent of the charges and explained that my father had access to [my] computer and had my passwords. Mr. Baker then said that he was going to be filing to separate my father's case from my own, that he was going to file a "Brady motion," and was going to move to dismiss the charges or go to trial. I made it very clear that I was not guilty of the charges; ***he agreed***.

> 18. My father then offered to testify on my behalf and to truthfully say how he was responsible for the child pornography found on my computer, how he had access to my computer, and that he had all my passwords.
>
> 19. I later learned from my mother how Attorney Turner practiced testimony and cross-examination of my father. Baker, my father's former consultant, was told that my father was willing to exonerate me.
>
> 20. I discussed with Mr. Baker the possibility of using a computer expert to help us. I even handed him the CV of an expert named Steven Moshlak. See, Exhibit 6 A. But Mr. Baker expressed no interest at all in using a computer expert, despite my firm statements to him that ***I had no interest in child pornography at all***. He also never discussed any forensic defenses to the charges.

App.19a, emphasis added.

The second declaration - from Yellin's Mother Marcie Yellin - raised even more facts regarding actual innocence and the conflict of interest infecting Attorney Baker:

> 1. I was closely involved in this case from the outset and witnessed most interactions and communications between my son, Phillip Yellin, and Attorneys David Baker and Greg Turner.
>
> ...

4. But soon thereafter, we were informed by Attorney Turner that he needed assistance from a lawyer experienced in federal cases because he lacked such experience. Attorney Turner told us that he planned to ask for help from his friend, Attorney David Baker, who had experience in the federal system. Attorney David Baker then joined my husband's legal team as a legal "consultant."

...

13. Attorney Baker was finally hired by my son Phillip after Turner contacted me (via email) to inform me that Baker would charge $20,000.00 as payment to handle the case and to formally appear as Phillip's lawyer.

14. As the case developed, we as a group - the family and the two lawyers – ***openly discussed how my husband could testify on my son's behalf to exonerate him. We all agreed that Phillip was innocent. At our earlier meeting, Mr. Baker passionately pointed out that Phillip's case was a "slam-dunk" for trial.***

15. My husband's exoneration of Phillip, to me, was logical because ***I had personal knowledge that my husband did in fact use Phillip's computer***. Moreover, my husband had been a computer expert for many years, and specifically a computer-security expert for over a decade. We all knew that my husband had the knowledge to easily access almost any computer.

> 16. Sometime later, we were informed that Attorney Baker was provided access to view incriminating evidence found by the FBI on Phillip's computer. This changed everything for us and ***the availability of my husband exonerating Phillip then became central***.

App. 19a-21a, emphasis added. In paragraph 19, Marcie Yellin specifically declared:

> 19. Later, my son Phillip showed me an email that Mr. Baker had sent to the prosecutor - AUSA Serano - regarding a "revised plea agreement". The email from Baker ***notes that Phillip may have been innocent, and that Phillip may have accidentally downloaded the child pornography found by the FBI on his computer***. This email is attached to my declaration as Exhibit "A".

App.21a, emphasis added.

Yellin's specific assertions of innocence were never contradicted by any opposing declarations from the Government. And the district court never directed that any be provided. Yet, the court stated that Yellin's actual innocence "claim" was not credible.

Notably, despite the Government's request to do so, the district court never made a finding that Yellin had waived his attorney-client privilege in his *habeas* assertions; a finding that would have permitted the Government to secure declarations from Attorney Baker. The Government also carefully avoided in its Motion and

request for an attorney-client privilege waiver any specific discussion of the statements by "Mr. Baker" in his email to the prosecutor assigned to the case at that time.

One of the additional statements by Attorney Baker ignored by the Government in its Motion was - "I still believe the download [of the child porn] was accidental and Phillip was not seeking out CP." And Baker's additional statement - "The viewing only happened one time and lasted 15 minutes." And - "The one time viewing happened five to six hours before the FBI raided the house." App.21a. The court also ignored this critical corroboration.

The record demonstrates that the Government, and the district court, surgically avoided acknowledging the legal and evidentiary significance of Baker's email exhibit. That significance was that it *corroborated* Yellin's, and his mother's, specific actual-innocence assertions that it had been his co-defendant father who was responsible for that child sexual material.

Compounding the failures by the Government noted above, the Government also unsuspectingly provided an implied admission in its Motion that it had failed to file a "proper Response" to Mr. Yellin's *habeas*. This is so because in its Motion, the Government asked the district court the following:

> Yellin's Motion is untimely and should be dismissed without addressing the merits; however, if this Court disagrees, ***the United States submits Yellin waived his attorney-client privilege, and certain communications between Yellin and Mr. Baker must be produced***.

App.22a-23a. Curiously, the Government added the following:

> Because Yellin raises ***two claims of ineffective assistance of counsel***, the United States seeks an order finding he waived the attorney-client privilege as to each of those claims. ***To properly respond to these allegations,*** the United States will need time to ***meet with Mr. Baker and prepare an affidavit in order to refute Yellin's claims***. Additionally, the United States requests all communications between Yellin and Mr. Baker concerning events and facts related to Yellin's claims of ineffective assistance of counsel. This information will gauge the extent of any notices and ***advice Mr. Baker provided Yellin as to possible conflicts, guilty pleas, the sex offender registration, risks of going to trial, and other issues raised in his Motion***.

App.23a, emphasis added. These admissions by the Government revealed its failure to "properly respond to these allegations" by Yellin. They also amplify Yellin's IAC issues and the specific facts regarding conflict of interest by Baker and, importantly for AEDPA – the specific actual innocence claims. Yet, the district court also failed to consider these corroborating facts.

In so doing, with the blessing of the court, the Government bypassed the district court's order directing it to file a *proper* Response to Yellin's *habeas* issues.

II. Yellin's *writ* petition must be granted because it presents a rare opportunity for this Court to provide guidance on the Court's warning issued long ago in *Blackledge* that lower courts were not to make credibility findings solely on *habeas* affidavits, summarily denying corroborated petitions.

An immediate result of the district court's failure to have an evidentiary hearing as required under these circumstances by *Blackledge*, was the court's clearly erroneous conclusions, ignored by the Ninth Circuit, about the merit in Yellin declarations and evidence. This erroneous conclusion by the district and appellate courts is demonstrated by the following facts.

A. The district court impermissibly makes several credibility conclusions without the benefit of an evidentiary hearing.

a. "He also stated that he 'plead[ed] guilty to save [his] father' from a more serious charge. (Id.)." App. 5a. This conclusion by the court was incorrect. Yellin's declaration explicitly stated that he pled guilty despite his innocence to save his father from "***spending the rest of his life in prison***." Emphasis added. App.24a.

b. "The defendant also submitted a declaration from his mother in which ***she claims*** the defendant's innocence was discussed in family conversations with the lawyers before the plea was entered and that they also discussed how her husband's testimony could

exonerate the defendant." Emphasis added. App. 5a. But the court's concluding this on the affidavits alone that Yellin "Claims" is an impermissible credibility conclusion. In 2255 the Petitioner's allegations are to be accepted as true.[9]

c. "She [Marcie Yellin] also ***claims*** to personally know that the defendant's father used the defendant's computer. (Id.)." App.5a. Emphasis added. Here again, the court's conclusion that Marcie Yellin "Claims" is an impermissible credibility conclusion. In a 2255, "if it plainly appears from the motion, any attached exhibits, and the record ... that the moving party is entitled to no relief" dismissal is required. *But* if moving party made the threshold showing of entitlement to relief after the Government filed its motion to dismiss, then a hearing must be ordered. Rule 4 (b).

28 USC § 2255 (b) provides "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." Emphasis added. The court failed to faithfully follow this Constitutional Due Process.

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9. Rules Governing Section 2255 proceedings for the U.S. District Courts, 28 USC § 2255. *See also,* Note 5, above.

Here, Yellin's allegations dispelled any notion that he was *not* entitled to relief, as provided by 2255(b).

> d. "The Court finds that the actual-innocence exception is unmet. The evidence presented by the defendant is insufficient to satisfy the 'exacting" and "demanding' exception. See id. at 1095; see also House v. Bell, 547 U.S. 518, 538 (2006) (explaining that the 'standard is demanding and permits review only in the extraordinary case' (quotation marks and citation omitted)). The defendant's evidence essentially consists ***only of his declaration and his mother's***. App.7a.

These clearly erroneous conclusion by the court were directly belied by the record. First, Yellin's then Attorney, David Baker's email to the AUSA handling the case noting Yellin's possible innocence by characterizing his downloading as a "mistake."

The district court similarly concluded that "His mother's declaration shows that ***she lacks actual knowledge*** of whether the defendant is innocent… ***she appears to lack personal knowledge of the defendant's guilt or innocence***." Emphasis added. App.7a. The court's conclusions are also dispelled by the declaration where Marcie Yellin *specifically* notes: "1. I was ***closely involved in this case*** from the outset ***and witnessed most interactions and communications*** between my son, Phillip Yellin, and Attorneys David Baker and Greg Turner."App.19a. Contrary to the court's clearly erroneous statements, Marcie Yellin was directly involved and had direct knowledge.

Marcie Yellin also asserted: "14. As the case developed, we as a group - the family and the two lawyers – ***openly discussed how my husband could testify on my son's behalf to exonerate him. We all agreed that Phillip was innocent. At our earlier meeting, Mr. Baker passionately pointed out that Phillip's case was a "slam-dunk" for trial.***" These unrebutted assertions by Ms. Yellin show that she had direct knowledge as a percipient witness of what the parties had been discussing regarding Yellin's actual innocence.

e. "The defendant's self-serving declaration is insufficient to satisfy the exception." App.7a. This was yet one more improper credibility conclusion divined by the court. The court's conclusion that Yellin's declaration was "self-serving" is contradicted by the specifics in his and Marcie Yellin's declarations, and corroborating email to the AUSA from Attorney Baker.

f. "Moreover, the defendant's delay in bringing his claim undermines the reliability of his declaration. See *id*. The defendant claims he pleaded guilty ***to save his father***. That claim is not only questionable because his plea did not save his father ***from a prison term***, but also because his father was released from custody in June 2020." Emphasis added App.8a.

These impermissible conclusions by the district court, without a proper hearing to determine credibility

as mandated by *Blackledge*, were clearly erroneous and were directly contradicted by the record. The court failed to articulate exactly how the "delay in bringing his claim" affected Yellin's *credibility*.

The second of the court's conclusion - that Yelling pleaded guilty to supposedly "save his father ***from a prison term....***" - is explicitly belied by the record. Yellin's declaration did *not* say he wanted to save his father "from a prison term." Yellin's specific declaration stated:

> 23. Baker later told me that the prosecutor threated [threatened] to withdraw my father's plea offer if I did not agree to plead guilty. Baker later continued to negotiate for me to plead guilty and began discussing the idea of a plea deal that would mitigate impact on me and save my father ***from spending the rest of his life in prison***." Emphasis added.

App. 24a.

The district court's Order denying Yellin's *habeas* on the pleadings and dismissing it was riddled with evident impermissible mistaken conclusions. As such, the district court's order denied Yelling his Fifth Amendment right to due process and Sixth Amendment right to the effective assistance of counsel.

B. The unique facts of this case compelled a certificate of appealability.

Title 28 U.S.C. Section 2253(c)(2) provides that a certificate of appealability may issue when "(1) the

applicant has made a substantial showing of the denial of a constitutional right." Phillip Joshua Yellin submits that the evidence in his *habeas* petition, and request to the Ninth Circuit, for a certificate of appealability, demonstrated that he comfortably met the standard for issuance of a COA, as interpreted by this Court in *Buck.* At 773.

It bears repeating that in *Buck,* this Court reaffirmed the *relatively low standard* required for issuance of a COA – "the ***only*** question is whether the applicant has shown 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.'" *Buck* at 773, quoting *Miller-El* at 336, emphasis added.

Here, the district court's and later the Ninth Circuit's orders dismissing Yellin's *habeas* contain incorrect, palpably subjective interpretations of what Yellin alleged in his two declarations and in his exhibits, uncontradicted by any counter declarations. The district court was faced with fact allegations that it had to accept as true and grant the *habeas or* order an evidentiary hearing.

Significantly, in its Motion to Dismiss Yellin's *habeas,* the government admitted that, if the court denied the Motion to Dismiss, then the Government needed "time to meet with Mr. baker and prepare an affidavit in order ***to refute***" Yellin's claims, emphasis added. The Government admitted that "To properly respond to" Yellin's "allegations", it needed to prepare a "proper" Response. Notably, the Government failed to provide evidence that Baker in fact would have credibly "refute[d]" Yellin's allegations. These significant concessions by the

Government were never critically acknowledged by the district court and Ninth Circuit.

The district court's order and its internally contradictory facts/reasoning is an order with which a "jurist of reason could disagree". *Miller-El* at 336. It is evident that the district court and the Ninth Circuit ignored legal precedent and key uncontradicted facts that established Yellin's actual innocence. Instead, Yellin's detailed facts were improperly and superficially characterized as "self-serving" without any meaningful analysis or hearing. The same was done to his conflicted-counsel issue – the district court and Ninth Circuit simply ignored this central issue altogether. Jurists of reason could easily disagree with the district and appellate courts in simply ignoring such compelling issues in a robust *habeas*.

C. Yellin's additional IAC issues ignored by the district court.

In his *habeas*, Mr. Yellin very specifically also challenged the *voluntariness* of his guilty plea and noted his lawyer's *conflicted advice*[10]. App. 31a. But Yellin also raised the IAC of his counsel for failure to investigate actual innocence, even before he involuntarily pleaded guilty to save his elderly father from "spending the rest of his life in prison." The district court simply never addressed this robust voluntariness issue at all.

In post-conviction proceedings, where Petitioners challenge the voluntariness of a waiver of trial and of a

10. *Mickens v. Taylor*, 535 U.S. 162 (2002).

guilty plea, it is routine to reactively cite to the colloquy given at the time of the waiver and entry of the guilty plea. Although it is also widely reported in the literature and case law that, like false confessions, increasingly, defendants plead guilty out of necessity. They do so even when they are not guilty and where they have meritorious defenses – as in Yellin's case. When they do so, they invariably make admissions that are simply not true nor voluntary, as here with Yellin. *See, Anatomy of a Plea*, by Andrew St. Laurent, The Champion, June 19, 2019, pages 42-47, National Association of Criminal Defense Lawyers.

Mr. Yellin respectfully submits that the declarations he provided to the district court, and Attorney Baker's email to the prosecutor, remain uncontradicted. This evidence established his actual innocence. But this evidence also established that his guilty plea was made under the unusual stress/duress of having to save his elderly father from spending *the rest of his life in prison*.

It is axiomatic that a waiver of trial and guilty plea must be voluntary, unaffected by influence *or a feeling of duty to help someone else*. *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993); *Brady v. United States,* 397 U.S. 742, 747-48 (1970). Here, Phillip J. Yellin provided the district court with a robust factual basis in his declarations and exhibits casting serious doubt about whether his guilty plea was freely and voluntarily entered. Indeed, in the change of plea colloquy, he was never asked if he was pleading guilty as part of that "package" plea agreement to help his then elderly, infirm father and co-defendant. Inexplicably, the Ninth Circuit also ignored this critical issue.

D. Yellin was denied his right to the effective assistance of counsel.

Mr. Yellin submits that he was denied his right to the effective assistance of counsel for another, separate reason. In an area where the lower court's own precedent compelled relief for him.

In *Weeden v. Johnson*, 854 F.3d 1063 (9th Cir. 2017), the Ninth Circuit held its own established precedent relative to the absolute duty of a lawyer to conduct adequate pretrial investigation, to then determine sound strategy (to either plead guilty or proceed to trial).

In *Weeden*, defense counsel failed to make *any* investigation into his 14-year-old client's psychological state of mind at the time of the offense. Counsel there made the "tactical" decision not to consult with a psychologist, fearing that such tactic could backfire and not support his approach to the case. Of such failures by counsel, the lower court aptly noted:

> The correct inquiry is not whether psychological evidence would have supported a preconceived trial strategy, ***but whether Weeden's counsel had a duty to investigate such evidence in order to form a trial strategy, considering "all the circumstances."*** [quoting *Strickland v. Washington*], *466 U.S. 668, at 691* (1984). ***The answer is yes***. The prosecution's felony murder theory required proof that Weeden had "specific intent to commit the underlying felony," *People v. Jones,* 82 Cal. App. 4th 663, 98 Cal. Rptr 2d. 724, 727 (Ct. App. 2000), so Weeden's "mental condition" was an essential factor in deciding

> whether she "actually had the required mental states for the crime," *People v. Steele,* 27 Cal. 4th 1230, 120 Cal. Rptr. 2d 432, 47 P.3d 225, 240 (Cal. 2002). ….Given the exculpatory potential of psychological evidence, counsel's failure to investigate "ignored pertinent avenues for investigation of which he should have been aware." ***Porter v. McCollum***, 558 U.S. 30, 40, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009).

Emphasis added. *Weeden* applied to the Ninth Circuit's duty to consider whether Yellin was indeed innocent of the knowing and voluntary possession of the child sexual material, whether he had the required "mental condition" or volition to plead guilty. Or whether he was indeed pleading guilty involuntarily out of guilt influenced by his instinct to save his elderly father from life in prison?

In *Weeden,* the Ninth Circuit also ruled:

> Counsel's performance was deficient because he failed to investigate, a failure highlighted by his later unreasonable justification for it. We do not suggest that counsel must investigate psychological evidence in every case, or even the ordinary case. ***But the Supreme Court has made clear that some "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts."***[citation omitted]. For the reasons noted above, this was such a case. ***The Court of Appeal's finding that counsel rendered adequate performance because he made a tactical decision not to investigate was therefore "contrary to, or***

> ***involved an unreasonable application of," clearly established Supreme Court law***. 28 U.S.C. § 2254(d)(1).

Weeden at 1471, emphasis added. Here, the uncontradicted declarations and corroborating evidence provided by Mr. Yellin established that he was denied his right to effective assistance because of his counsel's additional failure to conduct proper investigation into Yellin's innocence. Yet, here again, the Ninth Circuit and the district court failed to even address this issue. Yellin respectfully submits that this Court's supervisory role must be applied to correct such critical judicial oversights.

CONCLUSION

For the foregoing reasons, Phillip Joshua Yellin respectfully requests this Court grant his Petition for a *writ* of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: January 28, 2025

Respectfully Submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-2923

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILLIP JOSHUA YELLIN,

Defendant-Appellant.

D.C. Nos. 3:15-cr-03181-BTM-2
3:23-cv-00192-BTM
Southern District of California, San Diego

ORDER

Before: RAWLINSON and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in

its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 25, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILLIP JOSHUA YELLIN,

Defendant.

Case No.: 15-cr-03181-BTM-2

ORDER DISMISSING DEFENDANT'S 28 U.S.C. § 2255 MOTION AND DENYING A CERTIFICATE OF APPEALABILITY

[ECF NOS. 163 & 164]

Pending before the Court is Defendant Phillip Joshua Yellin's 28 U.S.C. § 2255 motion to vacate his plea and sentence. (ECF Nos. 163 & 164). The government has moved to dismiss the defendant's motion as untimely. For the reasons set forth below, the Court finds the defendant's motion untimely and the actual-innocence exception unmet, and thus dismisses his motion.

Appendix B

I. BACKGROUND

The defendant was originally charged in September 2015 with violating 18 U.S.C. § 2252(a)(2), which prohibits knowingly receiving visual depictions of minors engaged in sexually explicit conduct. (ECF No. 1). The defendant's father was charged in the same complaint with distributing such visual depictions. (Id.).

In March 2016, the defendant pleaded guilty to a Superseding Information charging him with violating 18 U.S.C. § 1466A(b), which prohibits knowingly possessing an obscene visual representation of "minors engaging in sexually explicit conduct." (ECF Nos. 52, 56, 57, & 59). The defendant and his father pleaded guilty under a "package" agreement, which required each of them to plead guilty in order for the other to receive the benefit of the agreement for a lesser charge. (ECF No. 56).

On October 26, 2016, the defendant was sentenced to twenty-one months custody followed by ten years of supervised release. (ECF No. 106). Judgment was entered on November 7, 2016, and a corrected judgement was entered on March 21, 2018. (ECF Nos. 111 & 125). David Baker represented the defendant. (ECF Nos. 21, 54, 106).

On February 1, 2023, the defendant filed this 28 U.S.C. § 2255 motion. (ECF No. 163). The defendant claims his plea and sentence must be vacated because his attorney's conflict of interest denied him his constitution right to the effective assistance of counsel. (Id.). He also claims he is actually innocent. (ECF Nos 163 & 186).

Appendix B

With his motion, the defendant submitted a declaration in which he claims that, *before he pleaded guilty,* (1) he told his lawyer that he was innocent; (2) his father admitted he was "responsible for the child pornography on [the defendant's] computer"; (3) his lawyer was told that his father would exonerate him; and (4) he wanted to use a computer expert in his defense. (ECF No. 163, Exh. A). He also stated that he "plead[ed] guilty to save [his] father" from a more serious charge. (Id.).

The defendant also submitted a declaration from his mother in which she claims the defendant's innocence was discussed in family conversations with the lawyers before the plea was entered and that they also discussed how her husband's testimony could exonerate the defendant. (ECF No. 163, Exh. B). She also claims to personally know that the defendant's father used the defendant's computer. (Id.). After the plea was entered, she claims, the defendant told her that he pleaded guilty to save his father. (Id.). Both declarations also mention an email from the defendant's attorney discussing the defendant's innocence. (ECF No. 163, Exhs. A & B). However, the email included with the defendant's motion does not claim he did not download the images, but rather that he downloaded the 85 images accidentally. (ECF No. 163, Exh. D).

The government invokes 28 U.S.C. § 2255(f)'s one-year limitations period and argues that the motion must be dismissed as untimely. The government argues there are insufficient facts supporting the defendant's actual-innocence claim.

Appendix B

II. DISCUSSION

There is no dispute that the defendant's motion was filed beyond the one-year limitations period set forth in 28 U.S.C. § 2255(f). His February 2023 motion was filed more than one year after his time to appeal his judgment expired, and is untimely. *See generally Smith v. Williams,* 871 F.3d 684, 686-87 (9th Cir. 2017) (explaining that the relevant judgment when analyzing a statute of limitations is the one the petitioner is confined under); *see also* 28 U.S.C. § 2255(f). However, a credible showing of actual innocence excuses an untimely petition under 28 U.S.C. § 2255. *See generally United States v. Reves,* 774 F.3d 562, 565-66 (9th Cir. 2014) (affirming denial of 2255 motion as untimely where defendant did not qualify for actual innocence exception); *see also McQuiggin v. Perkins,* 569 U.S. 383 (2013) (holding that a reliable showing of actual innocence can overcome the habeas time bar); *Lund v. United States,* 913 F.3d 665, 668 (7th Cir. 2019) ("The Supreme Court has never mentioned a difference in the purpose or application of the actual innocence exception between§ 2254 and § 2255 proceedings.").

A showing of actual innocence must "cast doubt on the conviction" and must be supported by newly presented evidence, that is, evidence that was not presented at the time of trial or the plea. *See Lee,* 653 F.3d at 938; *see also Sistrunk v. Armenakis,* 292 F.3d 669, 673 n.4 (9th Cir. 2002) (providing that evidence need only be newly presented, not necessarily newly discovered); *accord Gable v. Williams,* 49 F.4th 1315, 1322 (9th Cir. 2022) ("New evidence under *Schlup* does not actually have to

be newly discovered. Rather, we assess any evidence that is newly presented, as in not .presented at trial." (quotation marks and citations omitted)). An unexplained or unjustified delay in bringing the claim is relevant if it bears on the reliability of the evidence. *Larsen v. Soto,* 742 F.3d 1083, 1095 (9th Cir. 2013).

The actual-innocence standard is "exacting" and "demanding," but "affirmative proof of innocence is not strictly required." *Id.* at 1095-96. New evidence that "undermine[s] a court's confidence in [the] conviction" is sufficient. *Id.* at 1096.

The Court finds that the actual-innocence exception is unmet. The evidence presented by the defendant is insufficient to satisfy the "exacting" and "demanding" exception. *See id.* at 1095; *see also House v. Bell,* 547 U.S. 518, 538 (2006) (explaining that the "standard is demanding and permits review only in the extraordinary case" (quotation marks and citation omitted)). The defendant's evidence essentially consists only of his declaration and his mother's. His mother's declaration shows that she lacks actual knowledge of whether the defendant is innocent. Even if she can recall conversations where her family and the lawyers were discussing the defendant's innocence, she appears to lack personal knowledge of the defendant's guilt or innocence.

The defendant's self-serving declaration is insufficient to satisfy the exception. If a defendant could satisfy the exception through a self-serving declaration, the exception would "swallow the rule." *See generally Waldron-Ramsey v. Pacholke,* 556 F.3d 1008, 1011 (9th Cir. 2009) (explaining

that the threshold for equitable tolling is "very high, lest the exceptions swallow the rule" (citations omitted)). The statute of limitations would essentially be meaningless if a defendant could overcome it with a mere declaration asserting his innocence. Because the Ninth Circuit has explained that the standard is exacting and demanding, a self-serving declaration is insufficient to satisfy it. *See Larsen,* 742 F.3d at 1095; *see also Taylor v. Guzman,* No. 22-8708-FMO, 2023 U.S. Dist. LEXIS 127493, *17 (C.D. Cal. June 23, 2023) (rejecting actual-innocence claim in part because the petitioner's "assertions of innocence [were] self-serving and conclusory").

Moreover, the defendant's delay in bringing his claim undermines the reliability of his declaration. *See id.* The defendant claims he pleaded guilty to save his father. That claim is not only questionable because his plea did not save his father from a prison term, but also because his father was released from custody in June 2020. *United States v. William Harvey Yellin,* No. 15-cr-3181-BTM-1 (ECF Nos. 151 & 152). Thus, the defendant had every reason to assert his claim shortly thereafter, but he did not do so until February 2023. That lengthY delay also undermines the reliability of his declaration.

The defendant's declaration is also inconsistent with his plea colloquy, which was under oath, and sentencing allocution. At his plea hearing, he admitted under oath that the factual basis of his guilt set forth in the plea agreement was sufficient to prove his guilt beyond a reasonable doubt. (ECF No. 163, Exh. E). At his sentencing, he admitted that what he "did was a mistake." (ECF No. 173). The

defendant pleaded guilty and admitted his guilt to this Court at sentencing, which undermines his credibility and his declaration. *See generally United States v. Rubalcaba,* 811 F.2d 491, 494 (9th Cir. 1987) ("Solemn declarations in open court carry a strong presumption of verity." (citation omitted)).

In short, the primary evidence the defendant relies on for his actual-innocence claim is a self-serving declaration. His previous admission of guilt undermines that declaration, as does his lengthy delay in asserting this claim. The defendant's evidence does not undermine the Court's confidence in his conviction. Thus, the actual-innocence exception has not been satisfied, and the defendant has failed to overcome 28 U.S.C. § 2255(f)'s limitations period. The defendant's motion must be dismissed as untimely.

III. CONCLUSION

For the reasons stated, the defendant's § 2255 motion is **dismissed.** (ECF Nos. 163 & 164). The Court also **denies** a certificate of appealability under 28 U.S.C. § 2253.

IT IS SO ORDERED.

Dated: August 25, 2023

/s/ Barry Ted Moskowitz
Honorable Barry Ted Moskowitz
United States District Judge

APPENDIX C — PETITIONER-APPELLANT'S REQUEST FOR CERTIFICATE OF APPEALABILITY OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 1, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 23-2923
15CR3181-BTM-2; 23-CV-00192-BTM

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

PHILLIP JOSHUA YELLIN,

Petitioner-Appellant.

Appeal from the United States District Court
Southern District of California
The Honorable Barry Ted Moskowitz

Filed November 1, 2023

PETITIONER-APPELLANT'S REQUEST FOR CERTIFICATE OF APPEALABILITY

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Appendix C

[TABLES INTENTIONALLY OMITTED]

REQUEST FOR CERTIFICATE OF APPEALABILITY

Pursuant to Rules 4, (a)(1)(B), 22 (b)(2), and 27(d)(2), Federal Rules of Appellate Procedure, and the Rules of *Habeas Corpus* and Section 2255 Proceedings, Petitioner-Appellant Phillip Joshua Yellin (Mr. Yellin) respectfully asks this Court to issue a certificate of appealability (COA) to review the following IAC issues:

1. Whether Mr. Yellin was denied his right to the effective assistance of counsel under the Sixth Amendment, as interpreted in *Lafler/Frye*[1], when defense counsel advised him to plead guilty despite his asserted actual innocence?

2. Whether Yellin was denied effective assistance by his counsel's *de facto* non-waivable conflict of interest between counsel's independent duty to Yellin and simultaneous duty to the co-defendant and Yellin's father – William Yellin – contrary to *Mickens v. Taylor,* 535 U.S. 162 (2002)? And,

3. Whether the cumulative effect of defense counsel's errors denied Yellin his Sixth

1. *Lafler v. Cooper,* 566 U.S. 156 (2012), *Missouri v. Frye,* 132 S. Ct. 1399 (2012).

Appendix C

Amendment right to effective assistance under *United States v. Preston,* 873 F.3d 829, 835 (9th Cir. 2017)?

Mr. Yellin respectfully submits that a COA is compelled by the specific, robust, corroborated facts raised in his *habeas.*

I.
Context for Yellin's Request for a COA

In his fully corroborated, ineffective assistance of counsel (IAC) *habeas,* Mr. Yellin presented his own actual-innocence *detailed* declaration. *See,* Exhibit A, herein. Yellin's declaration was fully corroborated by an equally detailed declaration from his mother, Marcie Yellin. *See,* Exhibit B. The declarations, among additional compelling evidence, cumulatively provided a variety of specific compelling allegations supporting Yellin's actual-innocence assertion and an actual, non waivable, conflict of interest infecting Yellin's defense counsel.

Facing Yellin's robust *habeas,* the district court properly ordered the Government to file a Response. However, the Government did not follow the court's order to file a proper Response. Instead, the Government filed only a Motion to Dismiss. In its non-responsive Motion, the Government merely argued that Yellin's *habeas* was ostensibly untimely under AEDPA because he supposedly failed to make a sufficient showing of actual innocence. Docket 167.

Significantly, the Government failed to support its Motion with any contrary declaration(s). But in its reductive arguments, the Government also directly *disputed* Yellin's proffered, detailed, facts. The Government thereby injected credibility disputes between its own unsupported claims and Yellin's specific declarations.

Once the Government filed its contentious Motion to Dismiss, the district court was faced with inevitable fact disputes. Central disputes that had to be resolved by an evidentiary hearing. The disputes were stark.

On the one hand, the court faced: 1) Yellin's specific facts that had to be accepted as *true and credible.*[2] On the other, the court had only the Government's unsupported polemic contesting the credibility and accuracy of Yellin's evidence. Indisputably, an evidentiary hearing was compelled.

However, with perfunctory ease, contrary to the letter and spirit of *The Rules Governing 2255 Proceedings* and binding precedent, the district court failed to hold an evidentiary hearing to fairly and equitably resolve the central credibility and factual disputes. Instead, the court denied Yellin's *habeas* on the pleadings alone. Docket 174, *Order Dismissing Defendants 28 U.S.C. § 2255*

2. *See, Dat v. United States,* 920 F.3d 1192, 1193-94 (8th Cir. 2019), *Garcia v. United States*, 619 F.3d 1013, 1014 (8th Cir. 2012), and *Kingsberry v. United States,* 202 F.3d 1030, 1032 (8th Cir. 2000) "***An evidentiary hearing is required*** unless the motion, files, and records of the case ***conclusively*** show the defendant is not entitled to relief." Emphasis added.

Motion and Denying a Certificate of Appealability, here as Exhibit C. In so doing, the court violated 28 U.S.C. § 2253(b) in its biased process.

Section 2253(b) provides:

> ***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***. ...

Emphasis added. Yellin's specific, precise declarations and exhibits were far from the type of pleadings that conclusively show that he was "entitled to no relief." To the contrary.

Mr. Yellin demonstrated in his declarations and other evidence that he was indeed innocent. Yellin also demonstrated that he was denied his "constitutional right" to the effective assistance of counsel by being advised by his lawyer to plead guilty despite his professed innocence. He also showed that his lawyer was hopelessly riddled with a non-waivable conflict of interest. *See generally, Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003), where the Court held: "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.'" Emphasis added. *Miller-El* is more developed below.

In also ignoring and then denying Yellin's issue of his lawyer's failure to conduct basic investigation into his innocence, the district court violated this Court's precedent in *Weeden v. Johnson,* 854 F.3d 1063, 1069 (9th Cir 2017), where this Court noted:

> The Supreme Court has ***repeatedly*** made plain that counsel has the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [*Strickland v. Washington,* 466 U.S. 668 (1984)] at 691; *Kimmelman v. Morrison,* 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Hinton v. Alabama,* 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014).

Emphasis added.

Thereby, the district court denied Yellin his right to due process under the Fifth Amendment. In a 2255 setting, the district court was mandated to accept the specific allegations as true and then to shift the burden to the Government. See, 28 U.S.C. 2253(c)(2), discussed below at Section **III**.

II.

The Government's Motion to Dismiss Contained an admission that it had failed to file a "proper" response to Yellin's *habeas*.

On March 7, 2023, instead of filing a proper Response credibly addressing Yellin's specific facts and actual innocence, the Government filed its Motion to Dismiss superficially arguing that Yellin's *habeas* was "time barred." The *habeas* was time-barred, according to the Government's argument, because Yellin somehow failed to make the proper actual innocence showing allowing him to pass through the exception in the one-year statute of limitations under AEDPA.[3] Docket 167, page 4.

In making its time-bared argument, the Government ignored the Eighth Circuit's precedent in *Dat* about *habeas* allegations, the low standard in *Miller-El* for a COA, at 338, and the actual innocence showing required by this Court for first time *habeas* petitioners in *Lee v. Lampert,* 653 F.3d 929, 938 (9th Cir. 2011), en banc,[4] (adopting the less demanding "more likely than not" standard).

In its Motion, the Government subjectively characterized Yellin's varied specific facts in the following conclusory manner:

---

3. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2255(f).

4. Relying on *Schlup v. Delo,* 513 U.S. 298, 327 (1995).

> This case does not fall into the narrow class of cases implicating a fundamental miscarriage of justice. ***And Yellin's self-serving, conclusory statements that he is actually innocent, without any support cannot*** relieve him of the AEDPA statute of limitations.

Id., emphasis added. Contrary to the Government spin, Mr. Yellin had substantial "support" for his "claims". *See,* Exhibits A and B, herein. *See also,* Exhibit D, *Email from Yellin's former Defense Counsel to Government,* February 26, 2016, also provided by Yellin in his *habeas.* Notably, the Government failed to include specific analysis as to why it self-servingly viewed Yellin's thirty-two paragraph declaration, the twenty-seven paragraph declaration from his mother, and the rest of exhibits, as somehow "insufficient".

In its failure to counter Yellin's facts in a proper Response supported by declarations, the Government offered more conclusory claims for the district court:

> Yellin ***does not assert facts showing he is actually innocent of his crime of conviction***. His ineffective assistance of counsel claim merely asserts claims of legal insufficiency, not factual innocence. Yellin attached self-serving declarations from him and his mother speculating that Yellin's father accessed Yellin's computer, ***and one email Mr. Baker sent*** as part of plea negotiations to the assigned prosecutor, arguing Yellin's "download was

> accidental." None of these materials contain "new" evidence, just the same arguments Yellin raised in 2016.

Id., at page 5, emphasis added.

But the existing record of Yellin's *habeas* establishes that the Government was unmoored from the facts in arguing that Yellin did not "assert facts showing he is actually innocent of his crime of conviction." To the contrary, Yellin's declarations were heavy with specific facts raising actual innocence. Some of these facts include:

> 17. I and Attorney Baker then met to discuss our case strategy. I explained that I felt innocent of the charges and explained that my father had access to [my] computer and had my passwords. Mr. Baker then said that he was going to be filing to separate my father's case from my own, that he was going to file a "Brady motion," and was going to move to dismiss the charges or go to trial. I made it very clear that I was not guilty of the charges; ***he agreed***.
>
> 18. My father then offered to testify on my behalf and to truthfully say how he was responsible for the child pornography found on my computer, how he had access to my computer, and that he had all my passwords.
>
> 19. I later learned from my mother how Attorney Turner practiced testimony and

> cross-examination of my father. Baker, my father's former consultant, was told that my father was willing to exonerate me.
>
> 20. I discussed with Mr. Baker the possibility of using a computer expert to help us. I even handed him the CV of an expert named Steven Moshlak. See, Exhibit 6 A. But Mr. Baker expressed no interest at all in using a computer expert, despite my firm statements to him that ***I had no interest in child pornography at all***. He also never discussed any forensic defenses to the charges.

See, Exhibit A, paragraphs 17-20, emphasis added.

The second declaration – from Yellin's Mother Marcie Yellin – raised even more facts regarding actual innocence and the conflict of interest infecting Attorney Baker:

> 1. I was closely involved in this case from the outset and witnessed most interactions and communications between my son, Phillip Yellin, and Attorneys David Baker and Greg Turner.
>
> …
>
> 4. But soon thereafter, we were informed by Attorney Turner that he needed assistance from a lawyer experienced in federal cases because he lacked such experience. Attorney Turner told us that he planned to ask for help

from his friend, Attorney David Baker, who had experience in the federal system. Attorney David Baker then joined my husband's legal team as a legal "consultant."

…

13. Attorney Baker was finally hired by my son Phillip after Turner contacted me (via email) to inform me that Baker would charge $20,000.00 as payment to handle the case and to formally appear as Phillip's lawyer.

14. As the case developed, we as a group – the family and the two lawyers – ***openly discussed how my husband could testify on my son's behalf to exonerate him. We all agreed that Phillip was innocent. At our earlier meeting, Mr. Baker passionately pointed out that Phillip's case was a "slam-dunk" for trial.***

15. My husband's exoneration of Phillip, to me, was logical because ***I had personal knowledge that my husband did in fact use Phillip's computer***. Moreover, my husband had been a computer expert for many years, and specifically a computer-security expert for over a decade. We all knew that my husband had the knowledge to easily access almost any computer.

> 16. Sometime later, we were informed that Attorney Baker was provided access to view incriminating evidence found by the FBI on Phillip's computer. This changed everything for us and ***the availability of my husband exonerating Phillip then became central***.

Exhibit B, paragraphs 1, 4, 13-15, emphasis added. See also, paragraphs 18 and 19. In paragraph 19, Marcie Yellin specifically declared:

> 19. Later, my son Phillip showed me an email that Mr. Baker had sent to the prosecutor – AUSA Serano – regarding a "revised plea agreement". The email from Baker ***notes that Phillip may have been innocent, and that Phillip may have accidentally downloaded the child pornography found by the FBI on his computer***. This email is attached to my declaration as Exhibit "A".

Exhibit B, emphasis added.

Yellin's specific assertions of innocence were never contradicted by any opposing declarations from the Government. And the district court never directed that any be provided. Yet, the court stated that Yellin's actual innocence "claim" was not credible. *See,* discussion at Section **III**, below.

Notably, despite the Government's request to do so, the district court never made a finding that Yellin

had waived his attorney-client privilege in his *habeas* assertions; a finding that would have permitted the Government to secure declarations from Attorney Baker. The Government also carefully avoided in its Motion and request for an attorney-client privilege waiver any specific discussion of the statements by "Mr. Baker" in his email to the prosecutor assigned to the case at that time.

One of the additional statements by Baker that was ignored by the Government in its Motion was – "I still believe the download [of the child porn] was accidental and Phillip was not seeking out CP." And Baker's additional statement – "The viewing only happened one time and lasted 15 minutes." And – "The one time viewing happened five to six hours before the FBI raided the house." *See,* Exhibit D. The court also ignored this critical corroboration.

The record demonstrates that the Government, and the district court, surgically avoided acknowledging the legal and evidentiary significance of Baker's email exhibit. That significance was that it *corroborated* Yellin's, and his mother's, specific actual-innocence assertions that it had been his co-defendant father who was responsible for that child porn material.

Compounding the failures by the Government noted above, the Government also unsuspectingly provided an implied admission in its Motion that it had failed to file a "proper Response" to Mr. Yellin's *habeas.* This is so because in its Motion, the Government asked the district court the following:

> Yellin's Motion is untimely and should be dismissed without addressing the merits; however, if this Court disagrees, ***the United States submits Yellin waived his attorney-client privilege, and certain communications between Yellin and Mr. Baker must be produced***.

Government's Motion at page 8, emphasis added. Curiously, the Government added the following:

> Because Yellin raises ***two claims of ineffective assistance of counsel***, the United States seeks an order finding he waived the attorney-client privilege as to each of those claims. ***To properly respond to these allegations***, the United States will need time to ***meet with Mr. Baker and prepare an affidavit in order to refute Yellin's claims***. Additionally, the United States requests all communications between Yellin and Mr. Baker concerning events and facts related to Yellin's claims of ineffective assistance of counsel. This information will gauge the extent of any notices and ***advice Mr. Baker provided Yellin as to possible conflicts, guilty pleas, the sex offender registration, risks of going to trial, and other issues raised in his Motion***.

Id., page 9, emphasis added. These admissions by the Government underscore its failure to "properly respond to these allegations" by Yellin. They also amplify Yellin's IAC issues and the specific facts regarding conflict of interest

by Baker and, importantly for AEDPA – the specific actual innocence claims. Yet, the district court also failed to consider these corroborating facts, as developed below.

In so doing, with the blessing of the court, the Government bypassed the district court's order directing it to file a *proper* Response to Yellin's *habeas* issues.

III.
District Court's Flawed Order Denying Yellin's 2255

An immediate result of the district court's failure to have an evidentiary hearing was the court's clearly erroneous conclusions about the Yellin declarations. Palpable examples in the court's erroneous order follow.

1. The District Court Impermissibly Makes Several Credibility Conclusions Without the Benefit of Testimony:

a. "He also stated that he 'plead[ed] guilty to save [his] father' from a more serious charge. (Id.)." [Page 2, lines 21-23]

This conclusion by the court was incorrect. Yellin's declaration explicitly stated that he plead guilty despite his innocence to save his father from ***"spending the rest of his life in prison."*** Emphasis added [Yellin Dec. Page 6, line 1]

b. "The defendant also submitted a declaration from his mother in which ***she claims*** the defendant's innocence was discussed in family conversations with the lawyers before the plea was entered and that they also discussed how her husband's testimony could exonerate the defendant." Emphasis added [Page 2, lines 24-27]

But the court's conclusion that Yellin "Claims" is an impermissible credibility conclusion. In a 2255 the Petitioner's allegations are to be accepted as true.[5]

c. "She [Marcie Yellin] also ***claims*** to personally know that the defendant's father used the defendant's computer. (Id.)." Page 2, line 27-28; Page 3, line 1]

Here again, the court's conclusion that Marcie Yellin "Claims" is an impermissible credibility conclusion. In a 2255, "if it plainly appears from the motion, any attached exhibits, and the record ... that the moving party is entitled to no relief' dismissal is required. *But* if moving party made the threshold showing of entitlement to relief, then a proper opposition must be ordered. Rule 4 (b).

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5. Rules Governing Section 2255 proceedings for the U.S. District Courts, 28 USC § 2255.

Appendix C

28 USC § 2255 (b) provides "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."

Here, Yellin's allegations dispelled any notion that he was not entitled to relief, as provided by 2255(b).

d. "The Court finds that the actual-innocence exception is unmet. The evidence presented by the defendant is insufficient to satisfy the 'exacting" and "demanding' exception. See id. at 1095; see also House v. Bell, 547 U.S. 518, 538 (2006) (explaining that the 'standard is demanding and permits review only in the extraordinary case' (quotation marks and citation omitted)). The defendant's evidence essentially consists ***only of his declaration and his mother's***.

These conclusion by the court are directly belied by the record. First, Attorney David Baker's email to AUSA Serano noting Yellin's possible innocence by characterizing his downloading as a "mistake."

The court similarly concluded that "His mother's declaration shows that ***she lacks actual knowledge*** of whether the defendant is innocent ... ***she appears to lack personal knowledge of the defendant's guilt or innocence***." [Page 4, lines 13-22]

These conclusion are also dispelled by the declaration where Marcie Yellin specifically notes: "1. I was ***closely involved in this case*** from the outset ***and witnessed most interactions and communications*** between my son, Phillip Yellin, and Attorneys David Baker and Greg Turner." Marcie Yellin was directly involved and had direct knowledge.

Marcie Yellin also asserted: "14. As the case developed, we as a group – the family and the two lawyers – ***openly discussed how my husband could testify on my son's behalf to exonerate him. We all agreed that Phillip was innocent. At our earlier meeting, Mr. Baker passionately pointed out that Phillip's case was a "slam-dunk" for trial.***" These unrebutted assertions by Ms. Yellin show that she had direct knowledge as a percipient witness of what the parties had been discussing regarding Yellin's actual innocence.

e. "The defendant's self-serving declaration is insufficient to satisfy the exception." [23-24]

This is also an improper credibility conclusion divined by the court. The court's conclusion that Yellin's declaration was "self-serving" is contradicted by the specifics in his and Marcie Yellin's declarations, and corroborating email to the AUSA from Attorney Baker.

f. "Moreover, the defendant's delay in bringing his claim undermines the reliability of his declaration. See *id.* The defendant claims he pleaded guilty ***to save his father***. That claim is not only questionable because his plea did not save his father ***from a prison term***, but also because his father was released from custody in June 2020." Emphasis added [Page 5, lines 8-12]

These key conclusions by the court are erroneous and also directly contradicted by the record.

The first is that the court failed to articulate exactly how the "delay in bringing his claim" affected Yellin's credibility.

The second of the court's conclusion – that Yelling pleaded guilty to "save his father ***from a prison term***...." – is explicitly belied by the record. Yellin's declaration did *not* say he wanted to save his father "from a prison term."

Yellin's specific declaration stated:

> "23. Baker later told me that the prosecutor threated [threatened] to withdraw my father's plea offer if I did not agree to plead guilty. Baker later continued to negotiate for me to plead guilty and began discussing the idea of a plea deal that would mitigate impact on me and save my father ***from spending the rest of his life in prison***." Emphasis added.

g. "At his sentencing, he admitted that what he 'did was a mistake.'" [Page 5, lines 19-20]

The court here illogically conflated "mistake" with Yellin admitting that he was guilty. An unjustified leap of logic. A mistake can literally mean here that he should not have pleaded guilty. That by having done so, he made a mistake. An evidentiary hearing would have revealed that the "mistake" was having admitted guilt to a crime.

The district court's Order denying Yellin's *habeas* on the pleadings and dismissing it was riddled with evident mistaken conclusions. As such, the district court's order denied Yelling his Fifth Amendment right to due process and Sixth Amendment right to the effective assistance of counsel.

IV.
THE UNIQUE FACTS OF THIS CASE SUPPORT ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Title 28 U.S.C. Section 2253(c)(2) provides that a certificate of appealability may issue when "(1) the applicant has made a substantial showing of the denial of a constitutional right." Appellant Phillip Joshua Yellin submits that the evidence in his *habeas* Petition demonstrated that he has amply met the standard for issuance of a COA, as interpreted in *Buck v. Davis,* 137 S.Ct. 759, 773 (2017).

Appendix C

In *Buck,* the Court reaffirmed the *relatively low standard* required for issuance of a COA – "the ***only*** question is whether the applicant has shown 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.'" *Buck* at 773, quoting *Miller-El* v. *Cockrell,* 537 U. S. 322, 336 (2003), emphasis added.

Here, the district court's order dismissing Yellin's *habeas* contains incorrect, palpably subjective interpretations of what Yellin alleged in his two declarations and in his exhibits. The district court was faced with fact allegations that it had to accept as true and grant the *habeas or* order an evidentiary hearing.

Significantly, in its Motion to Dismiss Yellin's *habeas,* the government admitted that, if the court denied the Motion to Dismiss, then the Government needed "time to meet with Mr. baker and prepare an affidavit in order ***to refute***" Yellin's claims, emphasis added The Government admitted that "To properly respond to" Yellin's "allegations", it needed to prepare a "proper" Response. *Supra,* Section I. Docket 167, page 9. Notably, the Government failed to provide evidence that Baker in fact would have credibly "refute[d]" Yellin's allegations. These significant concessions were never acknowledged by the court.

The district court' Order and its internally contradictory facts/reasoning is an order with which a "jurist of reason could disagree". *Miller-El* v. *Cockrell*

at 336. It is evident that the district court ignored key facts that established Yellin's actual innocence assertions that were never contradicted by opposing declaration(s). Instead, Yellin's detailed facts were superficially characterized as "self-serving" without any meaningful analysis. The same was done to his conflicted-counsel issue – the district court ignored this central issue altogether. Jurists of reason could easily disagree with the district court in simply ignoring such issues in a *habeas.*

V.
YELLIN'S ADDITIONAL IAC ISSUES IGNORED BY THE DISTRICT COURT

In his *habeas,* Mr. Yellin very specifically challenged the *voluntariness* of his guilty plea and noted his lawyer's *conflicted advice*[6]. Docket 163-1, pages 11-14 and 15, line 1. But Yellin also raised the IAC of his counsel for failure to investigate actual innocence, even before he involuntarily pleaded guilty to save his elderly father from "spending the rest of his life in prison." The district court simply never addressed this voluntariness issue at all.

In post-conviction proceedings, where Petitioners challenge the voluntariness of a waiver of trial and of a guilty plea, it is routine to cite to the colloquy given at the time of the waiver and entry of the guilty plea. Although it is also widely reported in the literature and case law that, like false confessions, increasingly, defendants plead guilty out of necessity. They do so even when they are not

6. *Mickens v. Taylor,* 535 U.S. 162 (2002).

guilty and where they have meritorious defenses – as in Yellin's case. When they do so, they invariably make admissions that are simply not true nor voluntary, as here with Yellin. *See, Anatomy of a Plea,* by Andrew St. Laurent, The Champion, June 19, 2019, pages 42-47, National Association of Criminal Defense Lawyers.

Mr. Yellin respectfully submits that the declarations he provided to the district court, and Attorney Baker's email to the prosecutor here as Exhibit C, remain uncontradicted. This evidence established his actual innocence. But this evidence also established that his guilty plea was made under the unusual stress/duress of having to save his elderly father from spending the rest of his life in prison.

It is axiomatic that a waiver of trial and guilty plea must be voluntary, unaffected by influence or a feeling of duty to help someone else. *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993); *Brady v. United States*, 391 U.S. 742, 747-48 (1970). Here, Phillip Yellin provided the district court with a robust factual basis in his declarations and Exhibit C that cast serious doubt about whether his guilty plea was freely and voluntarily entered. Indeed, in the change of plea colloquy, he was never asked if he was pleading guilty to help his then elderly, infirm father and codefendant.

Expressly, Yellin's decisions were motivated principally by his desire to save his elderly father from spending *the rest of his life in prions.* Not to save his father from any

jail time, as the district court improperly concluded, but to save his father from *a life sentence.* Therefore, Yellin's waivers of trial, collateral attack, and guilty plea were involuntary. And the court simply failed to address this central issue.

VI.
YELLIN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

For the reasons detailed above, Yellin submits that he was denied his right to the effective assistance of counsel for another, separate reason.

In *Weeden v. Johnson,* 854 F.3d 1063 (9th Cir. 2017), this Court noted the established precedent relative to the absolute duty of a lawyer to conduct adequate pretrial investigation, to then determine strategy effectively (to either plead guilty or proceed to trial).

In *Weeden,* defense counsel failed to make *any* investigation into his 14-year-old client's psychological state of mind at the time of the offense. Counsel made the "tactical" decision not to consult with a psychologist, fearing that such tactic could backfire and not support his approach to the case. Of such failures, this Court aptly noted:

> The correct inquiry is not whether psychological evidence would have supported a preconceived trial strategy, ***but whether Weeden's counsel had a duty to investigate such evidence in***

> ***order to form a trial strategy, considering "all the circumstances***." [quoting *Strickland v. Washington*], 466 U.S. 668, at 691 (1984). The answer is yes. The prosecution's felony murder theory required proof that Weeden had "specific intent to commit the underlying felony," *People v. Jones,* 82 Cal. App. 4th 663, 98 Cal. Rptr 2d. 724, 727 (Ct. App. 2000), so Weeden's "mental condition" was an essential factor in deciding whether she "actually had the required mental states for the crime," *People v. Steele,* 27 Cal. 4th 1230, 120 Cal. Rptr. 2d 432, 47 P.3d 225, 240 (Cal. 2002). The Supreme Court has repeatedly noted that the mind of a fourteen-year-old is markedly less developed than that of an adult, [citations omitted], and trial counsel described Weeden as "unusually immature." Given the exculpatory potential of psychological evidence, counsel's failure to investigate "ignored pertinent avenues for investigation of which he should have been aware." *Porter v. McCollum,* 558 U.S. 30, 40, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009).

Emphasis added.

This Court then made this ruling, directly applicable to Yellin:

> Counsel's performance was deficient because he failed to investigate, a failure highlighted by his later unreasonable justification for it. We

> do not suggest that counsel must investigate psychological evidence in every case, or even the ordinary case. ***But the Supreme Court has made clear that some "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts."*** [citation omitted]. For the reasons noted above, this was such a case. The Court of Appeal's finding that counsel rendered adequate performance because he made a tactical decision not to investigate was therefore "contrary to, or involved an unreasonable application of," clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1).

Weeden at 1471, emphasis added. Here, the declarations and evidence provided by Yellin as to why he pleaded guilty despite his innocence, established that he was denied his right to effective assistance, in a manner indistinguishable from that in *Weeden.* Yet, here again, the district court failed to even address this issue.

CONCLUSION

The standard for issuing a Certificate of Appealability is a very low one. *Miller-El* at 338. In this request, Petitioner Yellin submits that he has made a substantial showing that the IAC issues he raised in his *habeas* are for sure debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle*, 453 U.S. 880, 893 fn.

4 (1983). For these reasons, Yellin respectfully requests this Court to issue a Certificate of Appealability.

Dated: October 31, 2023. Respectfully submitted,

/s/ Ezekiel E. Cortez
EZEKIEL E. CORTEZ
Attorney for
Appellant-Petitioner
Phillip Joshua Yellin

Appendix C

Exhibit A
Habeas Petition
U.S. v. Phillip Yellin
15CR3181-BTM

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(THE HONORABLE BARRY T. MOSKOWITZ)

Case Nos. 22CV-----BTM
15CR3181-BTM

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILLIP JOSHUA YELLIN,

Defendant.

PETITIONER'S DECLARATION ISO ACTUAL INNOCENCE PETITION FOR A *WRIT* OF *HABEAS CORPUS*

Appendix C

I, Philip Joshua Yellin, Defendant-Petitioner in the above-captioned matter, provide the following statements under oath and to the best of my ability because I believe that I was denied effective assistance of counsel by my former lawyer, David Baker:

1. Throughout the course of this case, my father, William Harvey Yellin, my mother, Marcie Yellin, and I talked about most of the events in his case first; and then, about our cases. We kept each other updated about a majority of the contacts with the lawyers. Therefore, I have personal knowledge of the facts I provide here.

2. Once my father knew that he was a suspect of a federal criminal investigation, he told me that he would search for an attorney. He found Attorney Jason Gregory Turner. My father met Attorney Turner outside the Vista courthouse—I drove my father there and I also met Turner. Shortly after that, my father informed my mother and me that he hired Turner.

3. Later, I was informed by my father that Attorney Turner needed a lawyer experienced in federal cases because Turner had little to no experience handling the type of case my father was facing. Turner brought in Attorney David Baker to help him. It was my understanding that Attorney Baker was acting as my father's consultant by working with or guiding Turner's actions.

4. Attorney Baker then joined my father's legal team. At that time no one in our family even suspected that I would need a lawyer nor that I would later become a defendant in the case.

5. In August/September 2015, I was told that Attorney Baker, on behalf of Turner and my father, scheduled a conference/meeting with the federal prosecutor to discuss a plea deal for my father. At this time, I still had no clue that I would later become a defendant in the case myself.

6. I was told that after Baker conferred with the prosecutor, Mr. Turner reached out to my father to inform him that Baker found out from the prosecutor that I was also a suspect and was going to be charged with the same type of crime. My father in turn telephoned me and later came to my apartment to tell me the bad, totally unexpected, news.

7. My mother, my father, and I, then met with Attorneys Turner and Baker in Turner's office after business hours. Baker explained to us that in his conference with the prosecutor—"AUSA Serano"—she asked whether Attorney Baker was there to discuss my father or to discuss me. According to Mr. Baker, AUSA Serano thought that Baker was there to advocate on my behalf, not for my father. And that the prosecutor said that they were going to file charges on both of us.

8. Attorneys Baker and Turner then discussed with us how Baker would represent me, and Turner would remain as my father's lawyer. At that time, I had no idea that this representation by Baker could give rise to a conflict of interest. Neither Baker nor Turner mentioned anything regarding any potential conflict of interest in Baker, who up to that point had acted as my father's legal consultant, but who would now be representing me.

9. After we all agreed that Attorney Baker would be my lawyer, I had several phone conversations with him over the course of the rest of 2015. We discussed what might be happening in the case and available options. Baker discussed with me his idea of how he could be appointed by the court to represent me.

10. Later, Turner informed us that he would arrange for a self-surrender for my father and for me. We surrendered before the holidays on or about December 3, 2015, and were taken into custody of the FBI. We were later taken to be held at the MCC.

11. The following day or so, I was taken before a magistrate (my father was held back during intake over medical concerns), and the magistrate appointed CJA Attorney Ward Clay as my attorney. I was taken to the 4th floor of the MCC, where I finally saw my father there.

12. Turner then helped me and my father work on a "bail package" for each of us. After the bail package was completed, Mr. Turner told us that he sent it to AUSA Serano for her review. But he told us that AUSA Serano was out of town at some convention and could not yet review the package.

13. Later, my father was taken to court. I was told that I would be taken to an upper floor of the MCC. But before my father returned from court and before I was moved to an upper floor at the MCC, I was called out for my first legal visit with Attorney Clay. Attorney Clay mentioned that he wasn't expecting to be appointed to my case because he had an upcoming vacation.

14. Later, my father alone was bailed out, but I remained behind at the MCC. I was told that this was because I had fallen short of the required bail security amount. With Mr. Clay on vacation, Attorney Turner worked on my bail package. Turner's efforts were eventually successful, and he got me out on bail.

15. Once I was out on bail, I met with Attorney Baker and signed a fee agreement that required me to pay $10,000 up front and $10,000 at some future time. Neither Turner nor my father participated in this meeting.

16. Attorney Baker and I then went to court to transfer representation from Ward Clay to David

Baker. I entered a not guilty plea and asked for modification of certain terms of my pretrial conditions, including whether my employer would need to be informed of the crimes pending against me.

17. I and Attorney Baker then met to discuss our case strategy. I explained that I felt innocent of the charges and explained that my father had access to my computer and had my passwords. Mr. Baker then said that he was going to be filing to separate my father's case from my own, that he was going to file a "Brady motion," and was going to move to dismiss the charges or go to trial. I made it very clear that I was not guilty of the charges; he agreed.

18. My father then offered to testify on my behalf and to truthfully say how he was responsible for the child pornography found on my computer, how he had access to my computer, and that he had all my passwords.

19. I later learned from my mother how Attorney Turner practiced testimony and cross-examination of my father. Baker, my father's former consultant, was told that my father was willing to exonerate me.

20. I discussed with Mr. Baker the possibility of using a computer expert to help us. I even handed him the CV of an expert named Steven Moshlak. *See*,

Exhibit A. But Mr. Baker expressed no interest at all in using a computer expert, despite my firm statements to him that I had no interest in child pornography at all. He also never discussed any forensic defenses to the charges.

21. During this same time, Attorney Baker told me that he went to the prosecutor's or FBI's office to look at evidence that was found on my computer. Baker expressed concern over what they had and began to backtrack on our initial plat of action. He showed me an email he sent the prosecutor—AUSA Serano—replying to her suggested "revised plea agreement" for me. I had never been informed of an initial plea offer.

22. The email Mr. Baker showed me noted that I may have been not guilty. That I may have downloaded the child pornography accidentally, and that I was somewhat of a victim of my own father. *See*, Exhibit B; email dated Feb. 26, 2016, at 6:08 PM.

23. Baker later told me that the prosecutor threated to withdraw my father's plea offer if I did not agree to plead guilty. Baker later continued to negotiate for me to plead guilty and began discussing the idea of a plea deal that would mitigate impact on me and save my father from spending the rest of his life in prison.

24. Baker specified that he would try to work out a plea agreement under which I would plead to a

"false statement charge," not to possessing child pornography. And, that registration as a sex offender would not be an absolute requirement. At this point I was frightened and did not want my actions to result in my father spending the rest of his life in prison. He was elderly, infirm, and that would destroy him, me, and my mother.

25. But Baker was unable to get me a false statement charge and I ended up pleading guilty to possessing child pornography. I agreed to plead guilty to save my father. I also agreed to plead guilty based on the promise from Baker that the chances for prison time and registration as a sex offender would be very low, if any.

26. Later, I pleaded guilty to a lesser charge of possession of child pornography. No one discussed how Baker had acted as my father's lawyer nor whether there was any conflict in the representation. When I pleaded guilty, I was not asked if I was pleading guilty to help anyone else. *See*, Exhibit C.

27. I had my sentencing in October 2016 and was sentenced to 21 months in custody and 10 years of supervised release. Contrary to what Mr. Baker assured me, the probation officer then told me right after sentencing that I was required to register as a sex offender with the state. I called Baker immediately to ask for his guidance and Baker simply told me that he would deal with it

upon my release from Terminal Island (TI). I self-surrender to TI in December 2016.

28. While in custody at TI, a case manager or counselor at the jail displayed my case file in front of me and I could see that they had the wrong wording for my conviction. Authorities at TI had relied on had the wrong wording—"Distribution and receipt of images of minors engaged in sexually explicit conduct" instead of what the statute prohibited—"possession" only. My Judgment & Conviction had the same aggravated charges as those of my father's. *See*, Exhibit D, J&C dated November 7, 2016.

29. After I was able to see that TI had the wrong aggravated wording in my judgment of conviction, my mother informed me that she had done a Google search and found that I was automatically registered as a sex offender. The registration was completed by the State authorities. It became clear to me then that the wrong wording in my judgment of conviction may have led the State authorities to find that registration for me was mandatory.

30. Very anxious, I tried several times to contact Baker so that he could correct the wording in my judgment of conviction, but he never responded. My mother also tried unsuccessfully. Baker simply stopped all contact with me and with my mother.

31. After 14 months at TI, I was released to a halfway house in San Diego. I then again attempted phone and email communication with Baker, but still received no response.

32. It was Probation Officer Crystal Tignor who then informed me that I in fact had the wrong wording in the charges of conviction all along and she, not Baker, had corrected them as of March 2018. *See*, Exhibit E, Corrected J&C, dated March 21, 2018.

I Declare the forgoing under oath and to the best of my ability.

Date: December 8, 2022. Declarant,

/s/ Phillip Joshua Yellin
Phillip Joshua Yellin

Appendix C

Exhibit B
Habeas Petition
U.S. v. Phillip Yellin
15CR3181-BTM

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(THE HONORABLE BARRY T. MOSKOWITZ)

Case Nos. 21CV-----BTM
15CR3181-BTM

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILLIP JOSHUA YELLIN,

Defendant.

Filed February 1, 2023

MARCIE YELLIN'S DECLARATION ISO
PETITION FOR A *WRIT OF HABEAS CORPUS*
BASED UPON ACTUAL INNOCENCE

Appendix C

I, Marcie Yellin, mother of Defendant-Petitioner in the above-captioned matter, hereby provide the following statements under oath, to the best of my ability, in support of this Petition:

1. I was closely involved in this case from the outset and witnessed most interactions and communications between my son, Phillip Yellin, and Attorneys David Baker and Greg Turner.

2. From the moment the authorities raided and searched our home, and throughout the course of the criminal case, I, my husband William Harvey Yellin, and my son Phillip Yellin, talked about most of the events in this case. We kept each other updated about most of the contacts with the authorities and the lawyers. Therefore, I have direct personal knowledge of the facts I provide.

3. After the authorities searched our home, my husband William began searching for an attorney to represent him because we expected that charges would be filed against him. My husband found attorney Jason Gregory Turner and he informed us that he had hired Mr. Turner to represent him.

4. But soon thereafter, we were informed by Attorney Turner that he needed assistance from a lawyer experienced in federal cases because he lacked such experience. Attorney Turner told us

that he planned to ask for help from his friend, Attorney David Baker, who had experience in the federal system. Attorney David Baker then joined my husband's legal team as a legal "consultant."

5. In approximately February 2015, my husband informed me that Turner was advising him to explore cooperation and to meet with the FBI to discuss what type of cooperation he could provide and how his cooperation might help his case. My husband agreed to do this because he could readily identify several names of offenders actively involved in the trafficking of child pornography. But later we were informed by Mr. Turner that the prosecutor was simply not interested in identifying these offenders nor in William's cooperation.

6. In August/September 2015, Attorney Baker told us that he scheduled and later had a conference with the federal prosecutor to discuss a possible plea agreement for my husband. Attorney Baker indicated he was friendly with the prosecutor and might do better than Mr. Turner with her.

7. Attorney Turner later spoke with Mr. Baker and Turner surprised my husband and me when he told us that the prosecutor said that my son Phillip was also suspect and was going to be charged with the same type of serious crime. This came as a horrific surprise. My husband then drove to Phillip's house to break the news to him in person.

8. As a family, we then met with Attorneys Turner and Baker, in Turner's office, after business hours. Baker explained what happened at the meeting with "AUSA Serano." The prosecutor basically told Baker that our son Phillip was also going to be charged with the same type of crime.

9. During this same after-hours meeting, Attorneys Baker and Turner then discuss how Baker could be hired to represent my son Phillip and Turner would remain as my husband's lawyer. Neither Baker nor Turner mentioned anything regarding any possible conflict of interest. We all agreed as a family that Baker would then be representing my son Phillip.

10. After the above-noted meeting with Attorneys Baker and Turner, my husband and son were told to surrender because they had been charged and Mr. Turner helped get the bail paperwork ready for William and Phillip. We were told that Turner negotiated "a self-surrender" date with the Prosecutor/FBI for my husband and son so that they would not have to be arrested.

11. Approximately two or so weeks later, Turner informs us that my husband and son could go ahead and surrender to the FBI. When my husband and son surrendered, they were taken to the local jail – the "MCC."

12. I later learned that at the arraignment my son Phillip, was given court-appointed Attorney Ward

Clay. We were surprised because Attorney Baker had told us that he had hoped to get appointed by the court for Phillip's case since his private fee would be quite high.

13. Attorney Baker was finally hired by my son Phillip after Turner contacted me (via email) to inform me that Baker would charge $20,000.00 as payment to handle the case and to formally appear as Phillip's lawyer.

14. As the case developed, we as a group – the family and the two lawyers – openly discussed how my husband could testify on my son's behalf to exonerate him. We all agreed that Phillip was innocent At our earlier meeting, Mr. Baker passionately pointed out that Phillip's case was a "slam-dunk" for trial.

15. My husband's exoneration of Phillip, to me, was logical because I had personal knowledge that my husband did in fact use Phillip's computer. Moreover, my husband had been a computer expert for many years, and specifically a computer-security expert for over a decade. We all knew that my husband had the knowledge to easily access almost any computer.

16. Sometime later, we were informed that Attorney Baker was provided access to view incriminating evidence found by the FBI on Phillip's computer. This changed everything for us and the availability

of my husband, exonerating Phillip then became central.

17. To explore my husband's exoneration of Phillip, I and my husband William drove out to meet with Mr. Turner at his office. But my husband was visibly agitated and anxious because he almost lost most of his private documents when his briefcase fell off the roof of the car where he had absentmindedly left it as we drove away.

18. The meeting with Mr. Turner then began with discussion of the possibility of my husband testifying to exonerate Phillip. To test my husband's ability to testify, Mr. Turner practiced cross-examination in my presence. But during the practice cross-examination, my husband was still agitated; later he told me that he had still been upset thinking how he almost lost his confidential documents. After the practice cross-examination, Mr. Turner told my husband that he would not be a good witness. Not because he appeared to not be telling the truth, but because of his awkward demeanor at that moment.

19. Later, my son Phillip showed me an email that Mr. Baker had sent to the prosecutor – AUSA Serano – regarding a "revised plea agreement". The email from Baker notes that Phillip may have been innocent, and that Phillip may have accidentally downloaded the child pornography found by the FBI on his computer. This email is attached to my declaration as Exhibit "A".

20. But then, Phillip informed us that the prosecutor threatened to revoke my husband's plea offer if Phillip did not also agree to plead guilty. This threat made Phillip very anxious. Phillip had always insisted on his innocence and that he had not knowingly downloaded any incriminating evidence. He insisted that he had absolutely no interest in child pornography.

21. However, Phillip did not want to risk my husband going to jail for what we openly discussed could be the rest of William's life in prison. My husband was elderly, needed a variety of medications, also suffered serious sleep apnea, and needed a CPAP machine. We were terrified for him. We discussed how we all felt like the prosecutor was extorting Phillip into pleading guilty

22. Mr. Baker then informed us that he had worked out a plea agreement for Phillip. Baker would propose to the prosecutor that Phillip could plead guilty to some type of "false statement charge," not to possessing child pornography. But according to Mr. Baker, the prosecutor had flatly rejected that suggestion.

23. I then had conversations with Phillip about how he agreed to plead guilty to help his father. Sadly, Phillip later went to court and pleaded guilty to what Mr. Baker told us was a lesser charge. Baker did assure us that the lesser charge would eliminate the need for Phillip to mandatorily

register as a sex offender federally, and that the likelihood of state registration would be determined later.

24. During the entire process of openly discussing my husband's and son's confidential communications about each of their cases with Attorneys Turner and Baker, we were never asked to sign a confidentiality agreement. At no time did Attorney Turner or Attorney Baker mention any waiver of conflict from my husband or from my son.

25. After my husband and son Phillip surrendered to go to prison, I made many futile attempts to contact Attorneys Baker and Turner to help me with releasing the properties we had put up to secure the bail.

26. Around this same time, Phillip informed me that, for some reason, the jail authorities had the wrong conviction on record for him. They had the same judgment of an aggravated type of crime as William's. Phillip desperately needed help from Baker to correct this serious oversight. Phillip concluded that the reason why he had been mandatorily registered as a sex offender by the state authorities may have been because of the wrong judgment.

27. Because Phillip's case was so unusual, Baker was also supposed to deal with the California authorities to eliminate the need for Phillip to register as a sex offender. My multiple attempts to contact Mr. Baker were ignored. This would happen again and again the more I had to interact with Mr. Baker after Phillip was incarcerated. Baker did none of the things he was asked to complete as Phillip's attorney. Attached to this declaration are the emails I exchanged with Baker. *See*, Exhibit "B".

I Declare the forgoing under oath and to the best of my ability.

Date: Sept. 17, 2022

Declarant,

/s/ Marcie Yellin
Marcie Yellin

Appendix C

Exhibit C
23-2923
15CR3181-BTM-2
DC Docket 174

["Order Dismissing Defendant's 28 U.S.C. § 2255 Motion and Denying A Certificate of Appealability" omitted here]

Appendix C

Exhibit D
Habeas Petition
U.S. v. Phillip Yellin
15CR3181-BTM

From: david barker
To: Alessandra P. Serano
Subject: Re: revised plea agreement/ Philip Yellin
Date: Fri, Feb 26, 2016 6:08 pm

RE: Phillip Yellin

All,

This case bothers me for a number of reasons. I have thought about what would be a fair resolution (trying to set aside the fact I am Phillip's Attorney).

There are a number of factors that I feel differentiate this case from the majority of CP cases:

1. If Bill was caught just a few years prior, I believe Phillip would be viewed as a victim not a Defendant. I cannot imagine the horror growing up in the Yellin household.

2. The images are reasonably tame by comparison, not that there is any excuse fro having any CP.

3. I still believe the download was accidental and Phillip was not seeking out CP. He was downloading Henti and just happened into the CP. I believe a search of the cookies on his computer will confirm this.

4. Based on the images that were not in the vault and how they were found on the computer it appears he only viewed 85 images.

5. The viewing only happened on time and lasted 15 minutes. It seems there is no sign that there were ever any other viewings or downloads or deleting of material.

6. The one time viewing happened five to six hours before the FBI raided the house. This is a bizarre circumstnace that makes Phillip Yellin the most unlucky guy on the planet.

7. The software on the computer probably organized and filed the files. We will never know if Phillip would have later deleted the material or kept the files. He most likely did not know the extent of what he had on the computer.

8. Like many CP clients, he is an educated man with no criminal history.

What I am asking for in this case is to let Phillip plead to a 1001 False Statement.

Joint recommendation for 18 months of custody and two years of supervised release. In addition, if we request a Psych evaluation and a PSR and stipulate that both documents are to be shared with probation and law enforcement. The CP will be a part of his permanent record.

Appendix C

Please consider this plea as Phillip will be doing real time in prison for what he has done. Plus for the next three plus years, he will be monitored. If he is involved in any questionable activity at any time in the future, California would be able to use the PSR against him under the California Penal Code. Obviously, if something like this came up in the federal system things would not go well for him. The charging statutes in this area of law are a giant hammer to keep him on the straight and narrow.

Thanks, I will talk to you soon.

David