No. 24-

IN THE

Supreme Court of the United States

KENDALL STREB,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The "reasonable jurists" test was created only as a *threshold* to discourage *frivolous* habeas appeals. It was never intended as a sky-reaching wall over which only a handful of certificate-of-appealability applicants surmount. Statutorily, 28 U.S.C. § 2253(c) nowhere suggests habeas appeals are to be the exception, not the norm. This Court should correct circuits' pattern refusals to issue COAs, and establish clearly how to go about "demonstrating" that "reasonable jurists" exist who would find an issue "debatable" or deserving of "encouragement to proceed further." The circuits' unfaithfulness to the test raises the first question. The second question is also of national importance, and is the issue for which a COA was sought:

I. Is the "reasonable jurists" test being administered faithfully and consistently in circuits such as the Fourth, in which COA applications have been denied over 8,400 times since 1996, while less than 100 have been granted; or, in the Eighth, which has only granted 109 COAs between January 2015 and January 2025; or, in the Sixth, which has granted just 427 COAs in 2,372 cases in that same time frame?

II. Do this Court's holdings in plea bargaining precedents *Lafler*, *Frye* and *Padilla* dictate that federal criminal defense attorneys should provide Sentencing Guideline calculations when relaying plea offers to clients, in order to avoid being ineffective under *Strickland*?

RELATED CASES

- *United States v. Streb*, No. 24-2697. U.S. Court of Appeals for the Eighth Circuit. Judgment entered December 12, 2024.

- *Streb v. United States*, 4:23-cv-00448-SMR. U.S. District Court for the Southern District of Iowa. Judgment entered August 9, 2024.

- *United States v. Streb*, No. 20-3028. U.S. Court of Appeals for the Eighth Circuit. Decided June 7, 2022; Revised July 1, 2022.

- *Streb v. United States*, 4:19-cr-00076-SMR-HCA-3. U.S. District Court for the Southern District of Iowa. Judgment entered September 24, 2020; Amended October 13, 2020.

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OPINIONS BELOW

The judgment of the court of appeals refusing a certificate of appealability to review a district court's denial of a motion brought under 28 U.S.C. 2255 appears at Appendix 1a-2a. The decision of the district court was issued in an unreported order, Appx. 3a-29a.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The following provisions are compiled in Section D of the Appendix: 28 U.S.C. 2253; 28 U.S.C. 2255; and, U.S.S.G. 2G1.3. See Appx. 45a-59a.

STATEMENT OF THE CASE

The "reasonable jurists" test was conceived to winnow out frivolous habeas corpus appeals. *Barefoot v. Estelle*, 463 U.S. 880, 893 fn. 4 (1983). The test was carried over after the Antiterrorism Effective Death Penalty Act of 1996, to determine whether a certificate of appealability ("COA") should be issued to allow an appeal to proceed in circuit court. However, in many circuits the "reasonable jurists" test is now mere dicta, inconveniently recited as part of the erection of an un-scalable wall rather than the "relatively low" crossable "threshold" envisioned when this Court handed down *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003). For example, the Fourth Circuit has issued over 8,500 COA rulings between 1996 and January 1, 2025, and yet a COA has only been granted in less than 100 of those cases, suggesting that a staggering 99% of those COA applications were frivolous. Meanwhile, the Eighth Circuit—whence this case emanates—likely refuses just as many COAs as does the Fourth Circuit. Those denials are generally unreported, while only 109 COA grants appear on Westlaw between January 2015 and January 2025. There are thousands of COA applications rejected by the circuits every year, but the statistics are elusive. The website uscourts.gov reported upwards of 6,300 COA denials in 2011, but just 13 in 2023, though over 9,000 COA applications were "terminated" on "procedural grounds" against state and federal inmates that year.[1]

1. Statistics for all circuits' appellate dispositions are kept by the Administrative Office of the U.S. Courts. Here are the links for the tables published in 1998, 2011 and 2023:
www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1998/appendices/b5asep98.pdf

The misapplication of the "reasonable jurists" test to these filings has created a problem of national importance which requires that this Court exercise its supervisory power to correct. See Supreme Court Rule 10(a) (" . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"). The test requires the COA applicant to "demonstrate" that "reasonable jurists" would find the lower court's resolution of an issue to be "debatable" or "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. However, no cases from this Court or any of the circuits describe how to "demonstrate" the existence of these "reasonable jurists." While many circuits have penned decisions stating what will *not* suffice to surmount the "reasonable jurists" hurdle, none provide any glimpse of the secret formula. This void has led to widespread unpredictability, with inconsistent—and even absurd—results, such as the fact that some circuits will grant a COA if there has been a lower court dissent along the way, while others do not even believe that their own brethren *who author dissenting opinions on whether to grant the COA itself* qualify as "reasonable jurists finding an issue debatable." (*Infra.*)

This case also presents the question of whether federal criminal defense attorneys must provide clients with Sentencing Guideline calculations attendant to plea offers. The district court in its 2255 ruling said that no cases require defense attorneys to do so (Appx. 16a), and the

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www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/B05ASep11.pdf
www.uscourts.gov/sites/default/files/data_tables/jb_b5a_0930.2023.pdf

Eighth Circuit, in summarily denying a COA, implicitly ruled that "no reasonable jurist would find [that conclusion] debatable." However, in 2010, this Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010) held that *Strickland* requires defense attorneys to inform their non-citizen clients about the potential immigration consequences of a conviction. And, this Court in 2012 held in *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), that defense attorneys owe a duty to timely communicate plea offers, and to give competent advice about them. However, this Court has yet to hold that *Strickland* requires criminal defense attorneys to inform their clients about potential Sentencing Guideline ranges inherent in plea offers in federal cases. It would seem axiomatic. After all, it is incongruous to require lawyers to discuss immigration consequences with their non-citizen clients, but not advise citizen clients (or non-citizens, as the case may be) about ranges of punishment.

In this case, petitioner Kendall Streb was convicted of having sex with three prostitutes at area hotels. Those prostitutes advertised their ages as 19, though they were actually 15 years old. Streb also gave these girls methamphetamine. The Government's evidence was strong and the case should never have gone to trial. After the jury convicted Streb, he received a 268-month sentence. Prior to trial, the Government had extended a very generous plea offer to Streb, but his attorneys never calculated the Sentencing Guidelines for the offer, and never provided Streb with an estimate of the sentence he would have received by pleading guilty. It was not until after Streb lost his direct appeal, *United States v. Streb*, 36 F.4th 782 (8th Cir. 2022), that Streb was apprised by

post-conviction counsel that the Guideline range under the plea offer was only 151-188 months. A *Strickland* claim of ineffective-assistance was then lodged in a motion filed pursuant to 28 U.S.C. 2255.

The district court summarily denied Mr. Streb's 2255 motion without an evidentiary hearing, even though Streb's affidavit and his trial counsel's affidavit contradicted each other. While Streb was adamant that he never received a Guideline estimate for the plea offer, his trial counsel claimed he had informed Streb about the Guidelines, but counsel offered nothing further, such as any estimate he purportedly calculated for Streb. Meanwhile, the Government oddly contended that its plea offer provided Streb nothing other than three levels off for "acceptance of responsibility" per U.S.S.G. 3E1.1. (Streb's Total Offense Level in his Presentence Report was off the Guidelines chart and scored out at higher than Life, at Level 44. As a Category II offender, his range under the plea offer, according to the prosecutor who handled Streb's trial and opposed his 2255 motion, was 324-405 months. Streb was almost 53 when the plea offer was extended.)

Following the district court's dismissal, the Eighth Circuit issued a three-sentence COA denial, proclaiming that the panel "carefully reviewed" the record. This denial can only stand if its implication is indeed sound, that no "reasonable jurists" would find it "debatable" that trial counsel's failure to calculate and provide to Streb the plea offer's Guidelines was ineffective under *Strickland*. This denial can only stand if the case law that underlies the Guideline calculations in Streb's 2255 motion is ignored.

The salient facts of this case are:

1. Mr. Streb was charged in April, 2019 with four counts of sex trafficking, coercion and enticement, in violation of 18 U.S.C. 1591 and 18 U.S.C. 2422. He was accused of soliciting three teenage prostitutes, "MVA," "MVB" and "MVE." He was charged in four other counts with distributing methamphetamine to two of the girls, in violation of 21 U.S.C. 841 and 21 U.S.C. 859. And he was charged in two counts with illegally possessing guns while engaged in drug crimes, in violation of 18 U.S.C. 922 and 18 U.S.C. 924(a) & (c). In January 2020, Streb was convicted at trial of all charges except one that was dismissed, and he received 268 months in prison.

2. After losing his appeal, *United States v. Streb*, 36 F.4th 782 (8th Cir. 2022)(Appx. 30a-44a), Streb learned that the plea offer his lawyer received prior to trial would have resulted in a significantly shorter sentence than Streb was told. Streb's lawyer never provided him with any Sentencing Guidelines calculations for the plea offer. Upon learning that the plea offer's Guidelines yielded a sentence of 151-188 months compared to the life-plus-60-month-sentence Streb faced after losing his trial, Streb then timely filed for post-conviction relief under 28 U.S.C. 2255 back in the district court, alleging ineffective assistance on the part of counsel for not providing him with that crucial information. (In his motion, Streb confirmed by affidavit that had he been presented with those Guideline calculations, he would have accepted the plea offer.)

3. Specifically, the offer required that Streb plead guilty to only a single count of sex trafficking, a single

count of drug distribution and a single count of gun possession by a drug user. (Southern District of Iowa case 4:23-cv-00448-SMR, Dkt 1-2 plea offer.) This offer provided an off-the-top 60-month sentence reduction via dismissal of the 924(c) gun charges. But there was much more, had Streb's counsel calculated the attendant Guidelines and communicated them to Streb.

4. Proof of the fact that defense counsel was not handling the plea offer properly lies in the fact that subsequent to sending the offer, the prosecution intercepted Streb's jailhouse phone calls which suggested that counsel neglected to inform Streb about the proposed deal. The Government then requested a *Frye* hearing, at which defense counsel simply stated to the court that the offer was communicated to Streb and he declined it. There was no inquiry into the terms of the offer or the resulting Sentencing Guideline differences between the offer and a trial loss.

5. Streb thus remained unaware of the true benefits of the Government's plea offer until the undersigned was retained by his family after Streb's direct appeal and re-examined the entire case history. Trial counsel's file revealed that he never calculated any Guideline estimates for the plea offer, or in the event of a guilty verdict. Had counsel run Guideline calculations for the sentence expected under the terms of the plea offer, and contrasted those against the anticipated sentence following trial, Streb would have seen why the plea offer should have been accepted, and he would have done so. (4:23-cv-00448-SMR, Dkt 1-1 Streb affidavit.)

6. Here are those calculations:

Final Presentence Report. The PSR compiled following trial showed a starting base offense level for sex trafficking as Level 30. The probation officer then added four more levels after concluding that Streb misrepresented his identity to entice the girls, and used a computer to facilitate the prostitution crimes. Two more levels were added because a computer was used and sex actually took place. The probation officer then assessed the same enhancements in triplicate, one for each girl, before calculating the drug-offense aspect of the case, dealing with providing drugs (methamphetamine) to a minor. The net result was an additional three levels added per the Grouping Rules in Chapter 3. The probation officer also recommended a Chapter 4 enhancement by characterizing Streb as a "repeat and dangerous sex offender against minors." The end result was that Streb was given an Offense Level of 44, which is 1 level above the maximum of 43, corresponding to life-in-prison. (S.D. Iowa case 4:19-cr-00076-SMR-HCA-3, Dkt 481, pages 13-18, paragraphs 40-88, 157.)

Guidelines under the plea offer. The Government's offer required Streb to plead guilty to one count of sex trafficking, one count of drug distribution, and one count of unlawfully possessing a firearm while using or addicted to drugs. Thus, the starting point for the analysis is that the sex trafficking offense and its characteristics yielded a Level 36, per USSG 2G1.3. (Dkt 481, PSR paragraphs 43-46.)

Grouping Rules, i.e., PSR paragraphs 83-85, would not have applied to the dismissed counts referencing the

two other girls. (*See* Guideline 2G1.3(d)(1).) This is because the Grouping Rules do not extend beyond the "offense of *conviction*," i.e., one child to whom the *conviction* pertains per the terms of the plea offer. *United States v. Weiner*, 518 Fed. Appx. 358, 363- 366, 2013 Westlaw 1196961 at *4-*6 (6th Cir. 2013) ("offense" defined as "the offense of conviction"; noting that USSG 2D1.3(d) does not save the Probation Office's error in applying the Grouping Rules); see also, *United States v. Arbaugh*, 2018 Westlaw 3539446 at *1-*2 (W.D. VA 2018) (same conclusion that Grouping Rules only apply to counts of *conviction*; confirmed when Probation Office conferred with Sentencing Commission).

On top of that, the misconduct contained in the dismissed counts could not be attributed against Streb under "relevant conduct," as explained in PSR paragraphs 41, 42 and footnote 1 on PSR page 11. (4:19-cr-00076-SMR-HCA-3, Dkt 481; see also, *Weiner*, 518 Fed. Appx. 364-366, 2013 WL 1196961 at *5-*7 ("Defendant's pre-charge sexual conduct with Victim's No. 1, 2, and 3 also does not constitute 'relevant conduct' under [Section] 1B1.3(a)(1)(A).").)

The plea offer would have also enabled Streb to avoid the Grouping Rules in relation to the drug distribution charge. It would have been scored under USSG 2D1.1. The base offense level would have been 22, to which two levels would be added for illegal possession of a firearm while using drugs, yielding a Level 24. (Dkt 481, PSR paragraphs 69-70.)

Per the Grouping Rules in USSG 3D1.2-1.4, because the disparity between the sex count and the drug count is 12 levels, no units would be assigned and thus no increase

in offense levels would be assessed. In similar regard, the 5-level increase for a Chapter Four enhancement per PSR paragraph 86 would be inapplicable because Streb's crimes do not trigger the definition of "prohibited sexual conduct" found in Application Note 4 of USSG 4B1.5(b). Streb's offense did not arise under 18 U.S.C. 2426(b)(1)(A) or (B), and his offense did not involve child pornography.

All tallied, Streb's adjusted offense level under the plea offer was 36. From there, Streb would have been entitled to a three-level reduction for "acceptance of responsibility." The plea offer therefore offered Streb a Total Offense Level of 33. He scored as a Criminal History Category II (Dkt 481, PSR paragraph 98), yielding a range of incarceration of 151-188 months. This is substantially less than the life sentence he was set to receive at sentencing, as well as the 268 months ultimately imposed.

7. *Defense counsel's response.* Streb's counsel was instructed to provide an affidavit in response to Streb's allegations. Counsel conceded on the second page that he never provided any Guideline estimates to Streb in writing. Nowhere in his affidavit did counsel state what he orally advised Streb the Guidelines would be under the plea offer. Instead, counsel carefully stated he discussed the Guidelines with Streb "prior to the *conviction*," not the earlier expiration date contained in the plea offer. Moreover, counsel failed to provide the district court with any Guideline calculations for the plea offer anywhere in his affidavit, or by attaching anything from his file. (4:23-cv-00448-SMR, Dkt 7, 9.)

Counsel's excuse for Streb not accepting the plea offer was that he was preoccupied with the threat of the

mandatory minimums attendant to the sex trafficking and drug charges. (4:23-cv-00448-SMR, Dkt 9, pages 1-4.)

8. *Government's Guideline calculation of its plea offer.* The Government in its Response attempted to circumvent Streb's argument that his attorney failed to advise him of the enormous Guideline reduction in the plea offer by arguing that the offer provided, at most, a 2-3 level reduction for acceptance of responsibility. (4:23-cv-00448-SMR, Dkt 12, pages 7-8.)

9. *District court's 2255 ruling.* The trial judge stated three things in denying relief. First, the court characterized the undersigned's Guideline calculations as hypothetical and speculative. Second, the Court deemed as dispositive trial counsel's claim that he "extensively discussed the plea agreement and the potential sentencing risk" with Streb, while incongruously calling Streb's claim that the Guidelines were never calculated for him "self-serving." Third, the court said that case law did not impose a duty on defense attorneys to provide Guideline calculations. (Appx. 12a-16a.)

10. The Eighth Circuit denied a COA on December 12, 2024. (Appx. 1a-2a.)

As will be shown below, the "reasonable jurists" test is not being faithfully administered. Regardless, the post-conviction record of this case shows that the Eighth Circuit's COA denial was an abdication of its duty to afford evidence-backed and documented COA applications a fair and thorough consideration, especially given that a COA is merely a threshold, not an insurmountable wall.

REASONS FOR GRANTING THE PETITION

Since 1996's AEDPA and its revisions to 28 U.S.C. 2253, habeas petitioners seeking on-the-merits appellate review from a circuit court must first obtain a COA by clearing a threshold consisting of two components. The statute states that a COA may be given to an aggrieved petitioner wishing to appeal a habeas denial if he "ma[kes] a substantial showing of the denial of a constitutional right." This Court has explained that in addition to the aforementioned statutory phrase, the petitioner must also show that "reasonable jurists would find the district court's assessment [of said claim] debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). However, no post-AEDPA opinions from this Court then establish any prongs, definitions or standards setting forth exactly how a petitioner is to "demonstrate" that there are one or more "reasonable jurists" out there who might agree with, or at least find debatable, the petitioner's constitutional argument or claim. One case suggests that the "test" is "objective," *Beard v. Banks*, 542 U.S. 406, 423 (2004), but nothing more. Neither are there any elaborations about the test in circuit court decisions.

That said, this Court has made resoundingly clear that the "reasonable jurists" test is merely a low threshold designed to simply winnow out frivolous appeals. And yet the COA declination rate, in excess of 99% in at least one circuit, evidences a blatant *de facto* disregard of this Court's instructions for the determination of these applications as stated in *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

This case offers the vehicle to clearly define this gate-keeping tool which was originally named and conceived to ferret out only those cases undeserving of post-conviction appellate scrutiny. Because of the test's failure rate, it is essential that the Court pronounce the "reasonable jurists" test clearly for all to understand, in precise terms rather than its current nebulous and ambiguous form. This Court should grant certiorari, and would even be justified in summarily reversing the Eighth Circuit. However, there is a dire need for an opinion imploring all circuits to re-conform their rulings to the low burden required to obtain a COA, and refrain from pre-judging appeals before litigants have had full opportunity to brief and argue what is, for all of them, their final chance to show entitlement to a new trial and/or sentencing.

I. Because the "Reasonable Jurists" Test Is Not Being Administered Properly Or Consistently In The Circuits, The Court Should Grant This Petition, Define How It Is That An Applicant "Demonstrates" That "Reasonable Jurists" Would Find A Case "Debatable," And Institute Uniformity In The Lower Courts.

A. This Court's opinions in *Slack v. McDaniel*, *Miller-El v. Cockrell*, and *Tennard v. Dretke* all impose the "reasonable jurists" test as a prerequisite to appellate post-conviction review, but do not define or explain it.

The first post-AEDPA habeas case to make its way to the Supreme Court was *Williams v. Taylor*, 529 U.S. 362 (2000). That case addressed an ineffective-assistance claim in a capital case where defense counsel failed to

investigate and present mitigating evidence in the penalty phase. Within the *Williams* opinion appeared the phrase "reasonable jurists," but the context was employing the phrase as a review tool for federal district courts under 28 U.S.C. 2254 when examining petitioners' state post-conviction case histories to decide if the state systems "unreasonably" applied federal law. *Id.* at 374-384. In so doing, the Court borrowed the "reasonable jurists" concept from *Teague v. Lane*, 489 U.S. 288 (1989), the case in which parameters were established to curb state habeas petitioners' attempts to convince federal district courts that newly pronounced rules of constitutional law ought to apply retroactively to petitioners' state cases.

Eight days after *Williams*, this Court decided *Slack v. McDaniel*, 529 U.S. 473 (2000), which imputed the concept of "reasonable jurists" into the determination required by 28 U.S.C. 2253(c)(2), dealing with how to obtain a COA from a 2254 or 2255 denial. In *Slack*, the question resolved was whether a district court's dismissal of a 2254 petition on procedural grounds precluded appellate review in circuit court. In holding that 28 U.S.C. 2253 as revised still provides access to federal appellate tribunals—albeit under limited circumstances now requiring a COA—the Court adopted and engrafted upon 28 U.S.C. 2253 the language found in *Barefoot v. Estelle*, 463 U.S. 880, 893 fn. 4 (1983), which required habeas petitioners asking for an appeal to "demonstrate that the issues are 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.' [citations omitted]." The *Slack* opinion then subtly re-phrased the *Barefoot* quote for 2253 purposes to be: "The petitioner must demonstrate that reasonable jurists would

find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. So, after *Slack*, COA applicants were required to make two showings: (1) a constitutional claim; and, (2) a lower court resolution which "reasonable jurists" would, themselves, find debatable or incorrect. However, as for further guidance on how to identify who these "jurists of reason" are, or how to "demonstrate" that they would find an issue to be debatable or wrong, none was given.

The next case after *Slack* to discuss "reasonable jurists" in anything more than a passing way was *Miller-El v. Cockrell*, 537 U.S. 322, 323-324 (2003), a *Batson* jury-selection case. The opening summary's last sentence was worded as: "The Supreme Court, Justice Kennedy, held that reasonable jurists could have debated whether the prosecution's use of peremptory strikes against African-American prospective jurors was result of purposeful discrimination, and thus petitioner was entitled to COA." The *Miller-El* Court then ruled that *Slack*'s COA hurdles combined to constitute nothing more than a "threshold examination" of the lower court's finding. In describing the nature of this "threshold" which COA applicants must cross, the Court made clear the burden is very low:

> Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"

***

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.

***

To that end, our 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. 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 § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383.

***

> By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course.
>
> 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. *Barefoot, supra*, at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

Id., 537 U.S. 335-338.

Justice Scalia authored a concurring opinion which all but condemned the second prong of *Slack*, i.e., the "reasonable jurists" test, decrying it as "another additional requirement":

> The Court today imposes another additional requirement: A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. *Ante*, at 1039. To give an example, suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, *even if* the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of § 2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d). This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

Id., 537 U.S. 350-351.

Regardless, while *Miller-El* made clear what the *Slack* test was *not* designed to do, i.e., summarily refuse COA applications, *Miller-El* still did not go so far as to explain *how* one "demonstrates" that "reasonable jurists"

would find an issue "debatable," nor how one even finds or identifies who these "reasonable jurists" might be.

A little over a year later, the phrase "reasonable jurists" popped up again, this time in *Tennard v. Dretke*, 542 U.S. 274 (2004), a case deciding whether a defendant's IQ is relevant in the sentencing phase of a capital case. Of course, in order to run with that issue, the "reasonable jurists" threshold first had to be crossed. *Tennard* was being addressed by the Court under a certiorari grant for a second time, and shortly after providing that background, the Court scathingly penned, "Despite paying lipservice to the principles guiding issuance of a COA, *Tennard v. Cockrell*, 284 F.3d at 594, the Fifth Circuit's analysis proceeded along a distinctly different track." *Tennard*, 542 U.S. at 283. However, the Court did not elaborate further about the COA standard, instead only replacing citations to *Slack* and *Miller-El* with *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) and *Barefoot*, 463 U.S. at 893 fn. 4. *Tennard*, 542 U.S. at 282. The Court did not explain how one goes about passing over the COA threshold.

Perhaps best illustrative of the ambiguity and imprecise nature of the "reasonable jurists" test is the fact that in *Tennard*, Chief Justice Rehnquist penned a dissent in which he stated, "Because I believe that reasonable jurists would not find the District Court's assessment of the constitutional claims debatable or wrong, I dissent." *Id.* at 289-290. In other words, Justice Rehnquist had just deemed the six Justices making up the majority "unreasonable," for if they were perceived by him as "reasonable jurists," then he would have to concede under *Slack* and *Miller-El* that their majority opinion *at least* made the central issue in Mr. Tennard's 2254 litigation "*debatable*."

The same day that *Tennard* was handed down, some light almost appeared at the end of this jurisprudential tunnel in the form of *Beard v. Banks*, 542 U.S. 406 (2004), but not quite.

B. This Court's opinions in *Beard v. Banks* and *Medellin v. Dretke* drifted towards identifying and delineating what the "reasonable jurists" test means in practice, but both of these cases stopped frustratingly short, with little happening in this area of law in the twenty years since those decisions.

In *Beard*—a case addressing jury instructions on mitigating evidence in capital cases—the Court implicitly acknowledged in the syllabus what is argued in this petition, which is that the "reasonable jurists" test is not defined, but rather, in operation leaves litigants with only guesswork:

> Moreover, there is no need to guess whether reasonable jurists could have differed as to whether the *Lockett* line of cases compelled *Mills*. Four dissenting Justices in *Mills* reasoned that because nothing prevented the jury from hearing the mitigating evidence, *Lockett* did not control; and three dissenting Justices in *McKoy* concluded that *Lockett* did not remotely support the new focus on individual jurors.

Id., 542 U.S. at 407; see also, 542 U.S. at 415 ("But there is no need to guess. In *Mills*, four Justices dissented . . . In *McKoy*, three Justices dissented . . . ").

While it can be posited that *Beard* thus established that a dissenting opinion from a Justice (and by logical extension, a circuit judge) embracing the COA applicant's argument certainly would suffice to surmount the "reasonable jurists" threshold, on the very next page the waters were muddied once more:

> Because the focus of the inquiry is whether *reasonable jurists* could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new.

Id. at 416 fn. 5.

The footnote appears to conflate the value of a dissenting opinion for purposes of a "reasonable jurists" COA inquiry with whether a dissent "suffices to show that the rule is new" under *Teague*. See also, dissenting opinion of Justices Souter and Ginsburg:

> In determining whether *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), states a new rule of constitutional law for purpose of *Teague*' *s* general bar to applying such rules on collateral review, the Court invokes the perspective of "'all reasonable jurists,'" *ante*, at 2511 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)); see also *ante*, at 2512, 2513. It acknowledges, however, that this standard is objective, so that the presence of actual disagreement among jurists and even among Members of this Court does not conclusively

> establish a rule's novelty. *Ante*, at 2513, n. 5; cf. *Wright v. West*, 505 U.S. 277, 304, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (O'CONNOR, J., concurring in judgment). This objectively reasonable jurist is a cousin to the common law's reasonable person, whose job is to impose a judicially determined standard of conduct on litigants who come before the court. Similarly, the function of *Teague*' *s* reasonable-jurist standard is to distinguish those developments in this Court's jurisprudence that state judges should have anticipated from those they could not have been expected to foresee.

Beard, 542 U.S. at 423.

Justices Souter's and Ginsburg's dissenting opinion was therefore the first commentary from this Court which attempted to define the objective standard, "reasonable jurists," but it ended without explanation of how one actually does goes about "demonstrating" it to satisfy *Slack* and *Miller-El.*

In *Medellin v. Dretke*, 544 U.S. 660 (2005), a Mexican national who was convicted of participating in a gang rape and murder of two girls in 1993 argued in his 2254 litigation that state officials had failed to notify him, after his arrest, of his rights under the Vienna Convention on Consular Relations. The Court decided it had improvidently granted certiorari, and in so ruling, affirmed the Fifth Circuit's denial of a COA. Justice O'Connor dissented, joined by Justices Stevens, Souter and Breyer. Justice O'Connor wrote, "Jose' Ernesto Medellin offered proof to the Court of Appeals that reasonable jurists would find debatable

or wrong the District Court's disposition of his claim that Texas violated his rights under the Vienna Convention on Consular Relations . . . " *Id.* at 672. However, Justice O'Connor did not thereafter describe the "proof" Medellin offered to the circuit court. The opportunity to identify for litigants and judges what the phrase "reasonable jurists" means had come and gone.

The next ten years passed with virtually nothing being said about the "reasonable jurists" test until *Jordan v. Fisher*, 576 U.S. 1071 (2015), where Justice Sotomayor (joined by Justices Ginsburg and Kagan) criticized the Fifth Circuit in a capital case because it was "too demanding in assessing whether reasonable jurists could debate the District Court's denial of Jordan's habeas petition." Justice Sotomayor explained that, "Two [circuit] judges . . . found Jordan's vindictiveness claim highly debatable." *Id.* Indeed, Justices Sotomayor, Ginsburg and Kagan also found the case debatable. So rhetorically, how can anyone say that this appeal was frivolous?

In 2016, the Court's majority in *Welch v. United States*, 578 U.S. 120 (2016) reminded federal judges that the "reasonable jurists" test "'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief.'" *Id.* at 127. However, Justice Thomas dissented because he believed that the majority focused its analysis on the Eleventh Circuit's denial of a COA, whereas Congress intended appellate review of the district court's assessment of the movant's claims was debatable or wrong. *Id.* at 137. Here again though, no Justice described the test or explained how it is to be implemented.

The year after that, the Court issued *Buck v. Davis*, 580 U.S. 100 (2017), wherein Justice Roberts attempted to clarify the thought process and end-product of the "reasonable jurists" test by writing that:

> At the COA stage, 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." [*Miller-el*,], at 327, 123 S.Ct. 1029. This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims."
>
> ***
>
> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage.*

Buck, 580 U.S. at 115, 116-117.

As it stands today, the concept remains largely undefined by this Court. Justice Scalia's criticism in *Miller-El* of the additional *Slack* hurdle, the "reasonable jurists" test, is well-deserved. The test has not gained traction, while litigants are left to struggle with trying to identify "reasonable jurists" and "demonstrate" that they would find a given issue "debatable or wrong." As of now, this is the Court's most recent comment on the "reasonable jurists" test, found in a dissent by Justice Sotomayor (joined by Justices Kagan and Jackson) from a decision to stay an execution of a Missouri inmate seeking a competency hearing before his death sentence is carried out:

> The Supreme Court of Missouri, over a noted dissent, denied Johnson a competency hearing because it concluded that he had not made a substantial threshold showing of insanity. That was error. A federal District Court then denied Johnson habeas relief. A panel of the Eighth Circuit stayed his execution and issued a certificate of appealability (COA), which would have permitted his competency claim to be fully briefed and argued on the merits. But the en banc Eighth Circuit, over a dissent from three judges, vacated that stay and declined to issue a COA because it concluded that no reasonable jurist could disagree with the District Court. That too was error. Because reasonable jurists could, did, and still debate whether the District Court should have granted habeas relief, the Eighth Circuit should have authorized an appeal.

Johnson v. Vandergriff, 600 U.S. –, 143 S.Ct. 2551, 2552 (2023).

C. The result is that the "reasonable jurists" test is not truly a meaningful part of COA analysis, and is thus all but ignored in the circuit courts.

As the Court said in *Barefoot*, 463 U.S. at 893 fn. 4, the purpose of the "reasonable jurists" test is to winnow out the frivolous appeal. But statistics show that the circuits overwhelmingly deny COAs, thus implying that virtually all COA applications are frivolous. Since January 2015, it appears that the First Circuit has presided over only 45 cases where either a district court or one of the circuit judges has issued a COA. In that same time frame, the Second Circuit has handled only 124 COA cases, while there have been just 210 in the Third Circuit. There have been 224 COAs granted in the Fourth Circuit, 355 in the Fifth Circuit, and 427 in the Sixth Circuit. There appear to have been just 141 COAs granted in the Seventh Circuit, 109 in the Eighth Circuit, and 260 in the Ninth Circuit. There have been 256 COAs granted between 2015 and 2025 in the Tenth Circuit, while the Eleventh Circuit leads all regions with 635 over that period.

The reader must be mindful that the number of COA *denials* varies significantly on Westlaw, perhaps due to the circuits each deciding differently on which unpublished decisions and orders are forwarded to Thomson Reuters. For example, the Eighth Circuit shows only 150 COA decisions in total between January 2015 and January 2025, while the Fourth Circuit shows 4,646, with 2,372 in the Sixth Circuit and over 1,800 in the Fifth, Tenth and Eleventh Circuits. The others have forwarded less than a thousand each over those ten years, though the statistics available from the Administrative Office of the U.S. Courts show that there have been more than 60,000 COA cases brought up to the circuits in those ten years.

Not only do statistics suggest disparate application of the "reasonable jurists" test, the dicta about the test does, too. For example, the Third Circuit has stated that the showing for entitlement to a COA is only "something more than the absence of frivolity or the existence of mere good faith on his or her part [without going so far as] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Pabon v. Mahanoy*, 654 F.3d 385, 393 (3rd Cir. 2011) (stating also, in fn. 9 that "[d]eciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA.")

Meanwhile, the Fourth Circuit—while denying over 8,400, COA applications since AEDPA's inception in 1996—said in *Ivey v. Catoe*, 36 Fed.Appx. 718, 723 (4th Cir. 2002) that, "[t]he assessment of whether a certificate of appealability should be granted must be made on an *issue-by-issue* basis." (emphasis added) It is not plausible to suggest that "reasonable jurists" would agree 99.9% of the time that post-conviction *cases* deserve no further attention, let alone that 99.9% of *issues* raised in those cases are unworthy of appellate consideration. Given these statistics, the Fourth Circuit's administration of the "reasonable jurists" test is simply a delusion of justice.

The Fifth Circuit seems far more contemplative when it comes to examining COA applications, and stated in 2014 that "any doubts as to whether a COA should issue must be resolved in the petitioner's favor . . . [especially] in a death penalty case." *Escamilla v. Stephens*, 749 F.3d 380, 387 (5th Cir. 2014). However, this pronouncement from the Fifth Circuit thus establishes a double-standard, suggesting that non-capital cases are entitled to less consideration under the same COA legal standards than capital cases.

In the Sixth Circuit, even where a panel member dissents on the denial of the COA, or on habeas relief, itself, majority panel members have concluded the applicant has not satisfied the "reasonable jurists" test. See *Dillard v. Burt*, 194 Fed.Appx. 365, 370-373 (6th Cir. 2006) (dissenting opinion disagrees with majority's decision to vacate COA previously granted by brethren circuit judge, though dissenting judge agrees with denial of habeas relief); *Cyars v. Hofbauer*, 383 F.3d 485, 493-495 (6th Cir. 2004) (dissenting judge arguing for conditional grant of habeas corpus because trial counsel was ineffective). This is circuitous and inherently contradictory: A Sixth Circuit dissenting judge's separate opinion voicing debate on an issue does not make that issue "debatable,' and thus leads to majority circuit judges implicitly deeming their dissenting brethren "unreasonable jurists."

Then there is the Seventh Circuit, which will allow an appeal to proceed if the COA granted by a district court is lacking or defective, so long as the state does not challenge the improvident grant of the COA. *Rivera v. Pollard*, 504 Fed.Appx. 502, 504 (7th Cir. 2013). This would seem to have the effect of weakening the "reasonable jurists" standard, making it a requirement subject to waiver, and allowing appeals to proceed to briefing and argument in the Seventh Circuit which quite obviously could never see the light of day in the "99.9%" Fourth Circuit.

The Eighth Circuit in denying a COA once wrote, "That one or two judges may agree with some aspect of Dansby's position does not establish that reasonable jurists could debate the merits of the district court's ruling." *Dansby v. Hobbs*, 691 F.3d 934, 937 (8th Cir. 2012). Yet common sense would dictate that when one or

more judges agree with a COA applicant, the test has been passed.

The Ninth Circuit has stated that in contemplating the grant of a COA, its job with respect to the substantive prong of an application is to "take only a quick look to determine whether the petition facially alleges the denial of a constitutional right." *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007); see also, *Cox v. McDaniel*, 72 Fed. Appx. 617, 618 (9th Cir. 2003) ("Taking a quick look at the face of the complaint, reasonable jurists would find the assessment of these claims to be debatable."). This is far different treatment than COA applications receive in other circuits.

Unlike the Ninth Circuit which glimpses at the "face of the complaint" to determine whether an issue is debatable, the Tenth Circuit has gone so far as to review "[an applicant's] appellate brief and application for COA, the district court's order, and the entire record on appeal." *Newson v. Attorney General of Kansas*, 568 Fed.Appx. 562, 563 (10th Cir. 2014). Indeed, it is the practice of the Tenth Circuit to allow lawyers for COA applicants to submit their entire merits brief within which there is to be included just a short COA discussion. See *Betts v. McKune*, 568 Fed.Appx. 562 (10th Cir. 2014). Other circuits, however, condemn the idea of "deciding an appeal without jurisdiction." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003), quoting *Miller-El*, 537 U.S. at 337.

Whatever can be said about the "reasonable jurists" test, what is beyond debatable is that the circuits have fallen into confusion and disharmony in their COA holdings. As a result, the federal courts fail to uniformly

communicate to litigants and appellate practitioners just where the lines are drawn for how to identify what issues deserve appellate habeas review, and which do not. This state of flux requires this Court to intervene.

As will be explained next, the Eighth Circuit most certainly should have found Streb's ineffective-assistance claim debatable. The district court wrongly concluded Streb had no *Strickland* claim because no federal decision has ever imposed an obligation on a defense attorney to advise a client about the Sentencing Guidelines when relaying a plea offer. After all, if *Padilla v. Kentucky*, 559 U.S. 356 (2010) is read to require attorneys to apprise their non-citizen clients about the potential immigration consequences of a conviction, it should go without saying that counsel should always be advising every one of their federal clients—citizen and non-citizen alike—about the projected length of incarceration they face under the Sentencing Guidelines, as well.

II. Whether Reasonable Jurists Would Find Debatable A Ruling That Excused Federal Criminal Defense Attorneys From Providing Sentencing Guideline Calculations When Relaying Plea Offers to Clients, After The Court's *Strickland* Holdings in *Lafler*, *Frye* and *Padilla*,

The Court should grant certiorari, and then rule that the Eighth Circuit was wrong to deny Mr. Streb a COA. The primary reason is that the district court's ruling is most certainly debatable among reasonable jurists, where the judge said that no case requires defense attorneys to provide Sentencing Guideline estimates when conveying plea offers to clients.

A defendant claiming ineffective assistance of counsel must point to his attorneys' objective performance deficiencies, and then demonstrate resultant prejudice. *Strickland v. Washington*, 104 S.Ct. 2052 (1984). In terms of plea bargaining, *Strickland* applies to the decision to reject an offer and proceed to trial, but the analysis is nuanced and specific to plea advice rather than trial strategy. The Court in *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), held that defense attorneys owe a duty to timely communicate plea offers, and to give competent advice concerning the decision to plead guilty versus proceeding with trial. In order to establish *Strickland* prejudice, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a *sentence of less prison time*. *Frye*, 132 S.Ct. at 1409; see also, *Glover v. United States*, 121 S.Ct. 696, 700-701 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

Both *Lafler* and *Frye* arose out of the Court's decision just two years earlier in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that as part of being constitutionally competent in conveying plea offers, defense attorneys owe non-citizen clients information about the potential immigration and deportation consequences of those offers. *Id*. at 374.

While it might seem obvious that a lawyer explaining a plea offer would be required to provide a range of punishments to the client as well, the district court found no such obligation. (Appx. 16a.) But at least in the federal system, punishment prognostications always begin with the Sentencing Guidelines. *Pulsifer v. United States*,

601 U.S. 124, 156 (2024) ("In the mine run of federal cases, a court will start with sentencing guidelines the United States Sentencing Commission has prepared at Congress's direction."; Gorsuch, J. dissenting). So it should be inconceivable that a lawyer could be said to have competently relayed a plea offer to a client without providing the Guideline estimates for the plea offer contrasted against the worst-case scenario of a guilty verdict at trial. However, if the district court is correct, federal post-conviction law currently only requires defense attorneys to provide non-citizen clients with immigration and deportation warnings, while there is no obligation to inform clients (citizen and non-citizen) about the range of punishment they face. This incongruity must be corrected then, because while only a few clients will need immigration advice, all clients need punishment estimates, and accurate ones at that.

There are circuit *Strickland* decisions requiring defense attorneys to provide competent Sentencing Guidelines advice when explaining a plea offer. See *Wanatee v. Ault*, 259 F.3d 700, 703-704 (8th Cir. 2001) (even defendant who received fair trial can show prejudice in plea process by showing that objectively lesser sentence would have been assessed, and subjectively he would have pled guilty; defense counsel must inform the defendant about the plea offer and relevant law as well); *United States v. Mayhew*, 995 F.3d 171 (4th Cir. 2021) (counsel advised against plea, estimating only 2-5 year sentence after trial, but Guidelines yielded 262-327 months); *United States v. Gordon*, 156 F.3d 376, 381 (2nd Cir. 1998) (sufficient objective evidence that defendant would have taken plea exists due to "a great disparity between the actual maximum sentence exposure under the Sentencing

Guidelines and the sentence exposure represented by defendant's attorney"). While these decisions are on the books, they apparently are insufficient to constitute what should be a hard and fast rule pursuant to *Strickland*: Defense attorneys must provide their federal clients with Sentencing Guidelines calculations and range-of-punishment estimates that are part and parcel of plea offers.

The case at bar is the perfect vehicle for spreading the word. Defense counsel claimed that he provided Sentencing Guideline calculations to Streb prior to his *conviction* but did not directly say he provided Sentencing Guideline estimates to Streb before the expiration date of the plea offer. And, counsel provided no Guideline estimates to the district court in his affidavits, nor documentation proving that he ever constructed any. The undersigned provided the district court with the Guideline calculations for the plea offer, but the Government responded to the 2255 motion by claiming it only offered Streb 3 levels off for "acceptance of responsibility" per U.S.S.G. 3E1.1. The district court never performed a Guideline calculation for the plea offer, though the plea offer was before the court as an exhibit to the 2255 motion. (See Appx. B; see also, 4:23-cv-00448-SMR, Dkt 1-2 plea offer.)

If the undersigned is correct in his Guideline calculations—which are subject to easy verification—then Streb is entitled to 2255 relief either way. If his defense attorney miscalculated the Guidelines and arrived at the same erroneous conclusion about the plea offer as was suggested by the Government, then counsel misevaluated the plea offer because the reality is that it offered a much lower sentence than anyone realized, which constitutes

deficient performance under *Strickland*. Conversely, if counsel correctly calculated the Guidelines under the plea offer, the proof provided to the district court shows no such calculations were ever documented and provided to Streb, again leading to a finding of deficient performance.

These conclusions should have been entitled to deference until an evidentiary hearing was held because a movant's allegations in his 2255 motion and affidavit are entitled to a presumption of validity as a matter of law. *Dat v. United States*, 920 F.3d 1192, 1193-1194 (8th Cir. 2019); see also, *Estremera v. United States*, 724 F.3d 773, 779 (7th Cir. 2013); *Griffin v. United States*, 330 F.3d 733, 738-739 (6th Cir. 2003) (defendant's claim that plea offer was never explained, coupled with lack of notes in attorney's file that might have shown plea offer was explained, added to huge sentencing disparity between plea offer and trial, all combine to show "reasonable probability" that defendant would have pled guilty with proper advice).

For the district court (or the Eighth Circuit) to have found otherwise was error because no hearing was granted. *United States v. McNeil*, 126 F.4th 935, 943 (4th Cir. 2025) ("a hearing is required when a movant presents a colorable Sixth Amendment claim showing disputed facts beyond the record, or when a credibility determination is necessary to resolve the claim.").

This claim should have led to a grant of 2255 relief. Streb's convictions should have been vacated and he should then have been permitted to accept the Government's plea offer. *Wiggins v. United States*, 900 F.3d 618 (8th Cir. 2018) (trial counsel neglected to inform client of mandatory life sentence when explaining plea offers for 15 years, and for

10-life; district court ordered government to reoffer 10-life plea bargain, which movant accepted). Streb was facing a sentence of life-plus-60-months, but the plea bargain that was not explained to him offered a Sentencing Guideline range of 151-188 months, well below even the 268-month sentence he ultimately received. Streb made clear in his 2255 filings that if the Court granted relief on this first claim, Streb would accept the plea offer and abandon all other claims in his 2255 motion.

CONCLUSION

The district court chose defense counsel's affidavit over Streb's without an evidentiary hearing, and erroneously stated that federal post-conviction law does not impose upon defense counsel the obligation to calculate and communicate Sentencing Guideline estimates when conveying a plea offer. This was wrong. If it is important for non-citizens to understand the consequences that a plea deal or an unfavorable verdict will have on their immigration status, it is equally important that citizens and non-citizens alike understand the effect that the Guidelines will have on plea deals in federal cases. When presented with this case, the Eighth Circuit erred in concluding that the district court's reasoning and dismissal were not debatable.

These errors now present this Court with the opportunity to clarify both the "reasonable jurists" test and federal defense attorneys' obligations in the plea bargaining phase of a case, under *Lafler, Frye* and *Padilla*.

Petitioner asks that in a nod to nominative determinism, the nine reasonable jurists sitting on this Court find this case worthy of debate and encouragement to proceed further; grant certiorari; and either provide plenary review to the *Strickland* issue, or remand the case for an evidentiary hearing.

Respectfully submitted,

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APPENDIX

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED DECEMBER 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2697

KENDALL STREB,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from U.S. District Court for the
Southern District of Iowa - Central
(4:23-cv-00448-SMR)

JUDGMENT

Before LOKEN, ERICKSON, and STRAS, Circuit Judges.

Appendix A

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

December 12, 2024

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION, FILED AUGUST 9, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Case No. 4:23-cv-00448-SMR
Crim. No. 4:19-cr-00076-SMR-HCA-3

KENDALL ANDREW STREB,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER ON MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Movant Kendall Andrew Streb filed this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. [ECF No. 1]. He challenges his sentence in *United States v. Streb*, 4:19-cr-00076-SMR-HCA-3 (S.D. Iowa) ("Crim. Case"). The Court takes judicial notice of the proceedings in that case.

Appendix B

I. BACKGROUND

A. Factual Background

Streb was indicted alongside five co-defendants for participating in sex trafficking of children. He was also charged with possessing and distributing methamphetamine, and possession of a firearm by an unlawful drug user. Third Superseding Indictment, Crim. Case, ECF No. 163 (sealed). Streb proceeded to a jury trial where the Government presented evidence that he paid money and traded drugs for sex from three underage girls between the ages of fifteen and seventeen years old (collectively, "Minor Victims"). All three Minor Victims testified against Streb at trial.

Minor Victim B testified that beginning approximately in November 2018 through February 2019, Streb paid her for sex on numerous occasions. *United States v. Streb*, 477 F. Supp. 3d 835, 846 (S.D. Iowa 2020) (noting that phone records introduced at trial reflected at least seven interactions between Streb and Minor Victim B). She testified that Streb would pay her cash or provide methamphetamine, sometimes both, in exchange for sex.

Minor Victim E met Streb through Minor Victim B, after she had asked the latter how to make money. She met Streb at a hotel in late December 2018, and had sex with him in exchange for money and methamphetamine. Minor Victim E testified that she told Streb she was 17 years old before having sex with him. *Id.* Streb had several more encounters with the minor victims, where he

would typically pick them up and take them to a nearby hotel before having sex with them for money and/or methamphetamine. He would often use methamphetamine with them before these interactions as well.

Streb was later connected by Minor Victim B to a third victim—Minor Victim A. Minor Victim B testified that she encouraged Minor Victim A to contact Streb about arranging an encounter to have sex for money. *Id.* at 847. Minor Victim A, who was 15 years old at the time, testified that she told Streb she was 17 years old and in high school while he transported her to a hotel. Once they arrived at the hotel, Streb engaged in different sex acts with the minor in exchange for money.

Streb's home and truck were searched pursuant to a warrant in March 2019, where law enforcement recovered firearms and methamphetamine. *Id.* The search turned up items consistent with drug distribution including a digital scale, razor blade, mirror, empty baggies, envelopes, and methamphetamine. Streb's live-in girlfriend confirmed that the firearms belonged to him. He admitted that he owned the firearms and that he was a methamphetamine user in two post-*Miranda* interviews with police after the search of his home. *Id.* After three hours of deliberation, the jury convicted Streb on all but one count.

B. Procedural Background

Streb was sentenced to 268 months' imprisonment. Am. J., Crim. Case, ECF No. 506. He received a 208-month concurrent sentence on the sex trafficking,

drug distribution, and drug user in possession of a firearm charges. *Id.* In Count 18, Streb was convicted of possession of a firearm in furtherance of a drug trafficking crime prohibited by 18 U.S.C. § 924(c). Section 924(c) imposes a mandatory 60 months' imprisonment which may not run concurrently to any other sentence.

The United States Court of Appeals for the Eighth Circuit affirmed the judgment in full. *United States v. Streb*, 36 F.4th 782 (8th Cir. 2022). The panel rejected his claims regarding late disclosure of evidence by the Government, assertedly erroneous evidentiary rulings, sufficiency of the evidence, and the propriety of his sentence. *Id.* at 786 (remarking that Streb argued that "the district court erred from start to finish, and nearly every point in between.").

Streb then timely filed this motion pursuant to Section 2255. In his 89-page Motion, he raises four specific grounds for relief including three claims for ineffective assistance of counsel against his defense attorneys Alfredo Parrish and Gina Messamer. Both attorneys filed an affidavit responding to his allegations at the direction of the Court. [ECF No. 9].

First, Streb argues that he received ineffective assistance of counsel because counsel allegedly failed to fully explain the details of a plea offer from the Government. Streb contends that he was not apprised of the potential sentencing range he faced if he proceeded to trial rather than accepting the plea offer. If he had been advised of the disparity in potential sentences he "would have definitely accepted the plea offer." [ECF No. 1-1 ¶ 1].

Streb also argues that counsel was ineffective in presenting his main defense to the sex trafficking charges. He contends that he did not have a reasonable opportunity to observe the minor victims to assess their ages in part because they wore heavy makeup when he interacted with them. However, according to Streb, he was unable to present this defense because his lawyers did not heed admonitions by the Court that proper foundation was necessary before presenting this potentially exculpatory evidence. He argues in his Motion that this was ineffective assistance of counsel.

In Streb's third claim for ineffective assistance of counsel, he argues that counsel should have sought dismissal of the firearm charges on Second Amendment grounds. He points out that some courts have concluded that Section 922(g)(3) has been found to be unconstitutional as-applied. Streb's fourth ground for relief under Section 2255 is a standalone claim that his firearm charge violates the Second Amendment, independent of any ineffective assistance by counsel.

II. DISCUSSION

A. Section 2255 Standard

A federal inmate may file a motion under 28 U.S.C. § 2255 for relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject

to collateral attack." 28 U.S.C. § 2255(a). Section 2255 is intended to provide federal prisoners with "a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011). If "the files and records of the case conclusively show" that a petitioner is not entitled to relief, no evidentiary hearing is required. *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) (finding that no hearing is required when a claim is "inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.").

B. Analysis

1. Ground One: Failure to Advise of Potential Sentencing Ranges

In his first claim for ineffective assistance of counsel, Streb argues that neither of his counsel presented him with calculations on the Federal Sentencing Guidelines while he considered the Government's plea offer. He contends that had he been informed of the disparity between his sentence under a plea bargain versus a conviction by a jury, he would have accepted the Government's plea offer.

a. Legal Standard

Streb brings claims asserting a violation of his right to counsel protected by the Sixth Amendment to the United States Constitution. The Sixth Amendment guarantees a defendant the effective assistance of counsel

at "critical stages of a criminal proceeding," which include more than just the trial phase. *See United States v. Lafler*, 566 U.S. 156, 165 (noting that the protections of the Sixth Amendment "are not designed simply to protect the trial"). The standard for whether counsel was unconstitutionally ineffective was defined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate ineffective assistance of counsel under the *Strickland* standard, a movant must show (1) counsel's performance was deficient, and (2) the deficiency was prejudicial. *Id* at 687. A court is not required to address both components of the *Strickland* standard if a movant makes an insufficient showing on one of the prongs. *Id.* at 697.

To establish the deficiency prong, a movant must show that counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. A court measures the reasonableness of counsel's performance according to "prevailing professional norms." *Id*. The inquiry into an attorney's representation is "whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). There is a strong presumption that representation by counsel was objectively reasonable, and a court must be highly deferential during its evaluation. *Strickland*, 466 U.S. at 689. Courts have long been cautioned that "[b]ecause hindsight analysis is problematic" they should "'indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance.'" *Abernathy v. Hobbs*, 748 F.3d 813, 817 (8th Cir. 2014) (quoting *United States v. Staples*, 410 F.3d 484, 488

(8th Cir. 2005)). This means that strategic choices by counsel are "virtually unchallengeable" if they are made after thorough investigation of the law and facts—even strategic choices that are "made after less than complete investigation" are reasonable provided that reasonable professional judgment supports those limitations on the investigation. *Strickland*, 466 U.S. at 690–91. To obtain relief on an ineffective assistance claim, attorney performance must be so "deficient" and the errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment.'" *Holder v. United States*, 721 F.3d 979, 987 (8th Cir. 2013) (quoting *Strickland*, 466 U.S. at 687).

Prejudice can be established by a showing of "a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 694). This must be done by "consider[ing] the attorney error [not] in isolation, but instead [to] assess how the error fits into the big picture of what happened at trial." *Marcrum v. Luebbers*, 509 F.3d 489, 503 (8th Cir. 2007) (citing *Strickland*, 466 U.S. at 696). A reasonable probability must be one that is "sufficient to undermine confidence in the outcome" of the result. *Cullen*, 563 U.S. at 189 (citation omitted). This requires a "substantial" rather than a mere "conceivable" likelihood of a different outcome in the proceeding. *Richter*, 562 U.S. at 112. The ultimate focus of this inquiry is the fundamental fairness of the proceeding. *Strickland*, 466 U.S. at 696.

Appendix B

Among the "critical stages" where the Sixth Amendment guarantees the right to counsel is the plea negotiation stage. *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (identifying "arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea" as critical stages). Accordingly, the *Strickland* test for ineffective assistance of counsel applies to the plea bargaining stage. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."). The Eighth Circuit has held that the *Frye* rule does not apply to informal plea offers or expressed interest in potential plea negotiations by the prosecution. *Ramirez v. United States*, 751 F.3d 604, 608 (8th Cir. 2014).

The Supreme Court has held that there is "a general rule" that defense counsel has a professional duty to communicate formal plea offers by the prosecution if they are favorable to a defendant. *Frye*, 566 U.S. at 145. Establishing prejudice for ineffective assistance of counsel related to a plea offer, a movant must "demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id*. at 147. This obligates a movant to "'present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised.'" *Sanders v. United States*, 341 F.3d 720, 723 (8th Cir. 2003) (quoting *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995)). A movant must also show a reasonable probability that the plea agreement would have been

entered without it being withdrawn by the prosecution or refused by the district court. *Frye*, 566 U.S. at 148 (noting that "[t]his further showing is of particular importance because a defendant has no right to be offered a plea . . . nor a federal right that a judge accept it.").

b. Discussion

Prior to trial, the Government extended a plea offer to Streb where he would plead guilty to one count of sex trafficking of a minor, one count of possession with intent to distribute methamphetamine, and one count of unlawful user in possession of a firearm. [ECF No. 12-1 at 4]. In exchange, the Government would agree to dismiss the other seven counts including possession of a firearm in furtherance of a drug trafficking crime. As noted earlier in the discussing the sentence imposed on Streb, possession of a firearm in furtherance of a drug trafficking crime—codified at 18 U.S.C. § 924(c)—carries a mandatory minimum sentence of 60 months which must be imposed consecutively to any other term of imprisonment.[1] *Id.*

Streb argues in his Motion that this offer "was all but impossible to reject" primarily because the Government offered to dismiss the Section 924(c) count. [ECF No. 2 at 32]. Furthermore, if he had accepted the plea offer,

1. 18 U.S.C. § 924(c)(1)(D) provides, "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed."

Streb would have benefitted from a three-level reduction in his Base Level Offense under the Sentencing Guidelines for acceptance of responsibility. *See* U.S.S.G. § 3E1.1. Along with the concomitant reduction in offense level, Streb's advisory guideline under the plea agreement would have been significantly lower. He would have also avoided sentencing enhancements under a guilty plea. Streb advances a hypothetical sentencing calculation of 151–188 months under a plea agreement. After speculating about a possible variance at sentencing, he argues that any sentence imposed after a plea agreement would have been far shorter than the 268 months actually imposed. [ECF No. 2 at 35].

Streb maintains that his counsel did not provide him with "actual mathematical calculations" to permit him to make an informed decision about the plea offer. *Id.* Accordingly, he insists that his rejection of the plea offer was unintelligent due to ineffective assistance of counsel. Streb acknowledges that the Court held a *Frye* hearing prior to trial wherein he confirmed that a plea agreement had been communicated to him, he contends that the Court did not inquire into whether he had been presented with specific sentencing calculations or whether he understood the benefits of the proposal.

In their affidavit filed in this case, counsel writes that he extensively discussed the Government's plea offer with Streb. They aver that Attorney Parrish discussed the plea agreement and the potential sentencing risk that Streb faced if he proceeded to trial and lost. [ECF No. 9 ¶ 1]. Attorney Parrish attached a letter from December

6, 2019, which documents these plea-related discussions with his client. *Id.* ¶ 2. In an email to the Government on October 28, 2019, he references a discussion with Streb concerning the plea agreement. *Id.* ¶ 5. A copy of this email was attached to Attorney Parrish's affidavit. [ECF No. 9-19]. Attorney Parrish recounts that he had "many meetings" with Streb prior to trial which included the risk that Streb faced a possible 15-year mandatory minimum rather than a 10-year mandatory minimum. [ECF No. 9 ¶¶ 7–8].

The record establishes that Attorney Parrish thoroughly reviewed the plea offer and potential sentence. His contemporary communications with the Government repeatedly mention that the primary obstacle for Streb was a mandatory minimum. [ECF No. 9 ¶¶ 1–5, 8]. In fact, the Government filed an unopposed motion for a *Frye* hearing in order to make a record of the plea offer. Crim. Case, ECF No. 206. During the hearing, the Government explained that they had extended the plea offer discussed above on September 5th, explaining that "if a plea offer was accepted that [Streb] would likely receive a lower sentence than if he proceeds to trial and he's convicted." Mtn. Hearing Tr., Crim. Case, ECF No. 276 at 43.[2] Attorney Parrish responded to the Government's concerns

2. At the hearing, the Court told Streb that the purpose of the hearing was to allow the Government to make a record of the plea offers that had been extended "so that in the event you go to trial and you are convicted, you don't complain three years from now that you never knew about a plea deal that was in front of you and to make sure you're fully informed." Mtn. Hearing, Tr., Crim. Case, ECF No. 276 at 42.

about the plea offer that he discussed all options with Streb shortly after he was retained, as was his usual practice. *Id.* at 45. The Court then directly asked Streb whether he knew about the plea offer and talked about it with Attorney Parrish, to which Streb responded in the affirmative. *Id.* at 49. Streb also confirmed that it was his decision to reject the offer. *Id.*

Nothing in the record of the criminal proceeding or this case supports Streb's claims except his own self-serving statements. In fact, they are contradicted by his own statements, the statements of Attorney Parrish in open court, and the contemporaneous communications between Attorney Parrish and the Government. *See Hyles v. United States*, 754 F.3d 530, 535 (8th Cir. 2014) ("Nothing in the record indicates [movant] wanted to accept the plea offer and would have acknowledged [his] guilt."). Streb attempts to obfuscate the reality that he was apprised about the potential consequences of proceeding to trial by pointing out that he was not informed about his "Base Offense Level" and "Grouping Rules." [ECF No. 1-1 ¶ 1]. This level of detail regarding the federal sentencing regime is easily distinguishable from one Eighth Circuit case upon which Streb relies. *See Wanatee v. Ault*, 259 F.3d 700, 703 (8th Cir. 2001) (holding that the district court did not err in granting relief to a state petitioner when defense counsel failed to advise him that felonious assault may serve as the predicate felony for a felony murder charge). Nowhere in his affidavit does Streb contend that he was not advised that he would likely receive a lower sentence by agreeing to plead guilty.

Streb identifies no constitutionally-imposed duty for defense counsel to present specific mathematical estimates under the Federal Sentencing Guidelines. Case law finding ineffective assistance of counsel at the plea bargaining stage are inapposite. *See Frye*, 566 U.S. at 139 (counsel failed to convey plea offer); *Lafler*, 566 U.S. at 161 (attorney advised rejection of plea offer); *Padilla*, 559 U.S. at 360 (counsel incorrectly advised client about immigration consequences of conviction).

The out-of-Circuit precedent relied upon by Streb is also distinguishable. *United States v. Gordon*, 156 F.3d 376, 377–78 (2d Cir. 1998) (counsel "grossly underestimated" client's potential sentence when he stated a conviction at trial would result in a maximum of 120 months' imprisonment. Defendant received a 210-month sentence after rejecting a plea offer in the range of 92 to 115 months); *United States v. Jenks*, No. 20-4023, 2022 WL 1252366, at *4 (10th Cir. Apr. 28, 2022) (movant rejected multiple plea offers based on erroneous advice of counsel concerning DNA test results); *see also Knight v. United States*, 37 F.3d 769, 775 (1st Cir. 1995) (denying relief based on an allegedly incorrect sentencing prediction because "an inaccurate prediction about sentencing will generally not alone be sufficient to sustain a claim of ineffective assistance of counsel").

In the cases cited by Streb, defense counsel was found to be ineffective because they provided incorrect legal analysis, improperly advised rejection of the plea offer, or did not convey the offer before it expired or at all. In this case, there is no such contention. Rather, Streb contends

that his counsel did not do enough to convince *him* to take the plea offer. He offers no authority for his novel claim that defense counsel may be constitutionally ineffective in this manner. Streb is not entitled to relief on this ground.

2. Ground Two: Failure to Assert Defense

For his second claim, Streb argues that he is entitled to relief under Section 2255 because Attorney Parrish failed to lay the necessary foundation to introduce evidence regarding the appearance of the minor victims at the time of their interactions with him. A person is guilty of sex trafficking of children if they know a person is underage or if they recklessly disregard that they are under 18 years old. *See* 18 U.S.C. § 1591(a) (requiring knowledge or a "reckless disregard of the fact . . . that a person has not attained the age of 18 years"). Streb argues that counsel intended to defend against the sex trafficking charges by presenting evidence that the minor victims wore make-up in person and in the internet ads, which misrepresented their ages to Streb. According to Streb, the Court repeatedly advised Attorney Parrish that he needed to lay the foundation for such a defense before this evidence could be admitted. He also claims that counsel did not properly advise him about the need for testimony by Streb himself before the defense could be properly asserted.

Streb highlights that the jury was advised about this defense—that the minor victims misrepresented their ages to him—in Attorney Parrish's opening statement. Even after setting out this defense from the outset,

he points out that counsel did not ask Minor Victim A about whether she wore makeup during her testimony. [ECF No. 2 at 51]. Streb acknowledges that counsel "did attempt to establish" that Minor Victim E, who was the second victim to testify, perhaps deceived him about her age during their interactions. *Id.* There was also some reference to makeup usage during the testimony of Minor Victim B, but Streb also faults this as insufficient because the Court disallowed his proposed expert witness. The Court concluded that expert testimony by the proposed witness would be irrelevant to Streb's interactions with Minor Victim A and Minor Victim E.

Streb alleges that Attorney Parrish was also ineffective on this ground because he misadvised him about the need to testify in his own defense. *Id.* at 57. On this point, he takes the position that because counsel told the jury in his opening statement that Streb would testify, his failure to do so resulted in a loss of credibility for the defense. Furthermore, Streb urges that he would have been able to testify about the impact of makeup on the appearance of the minor victims, which he insists would have allowed testimony by his expert cosmetologist. He also could have explained the length of time he had to observe each of his victims and why he believed they were over the age of 18.

Attorney Parrish explains in his affidavit that he had thoroughly examined this issue pretrial but concluded that even if Streb did not precisely know the ages of the minor victims, he was reckless at a minimum. [ECF No. 9 ¶ 12]. Attorney Parrish added that he was concerned

that if Streb testified, he would admit to all elements of the charges. *Id.* ¶ 15. Streb could not truthfully deny that the minor victims were underage or that he supplied them with narcotics, leaving Attorney Parrish with the professional opinion that Streb was more likely to be acquitted by not testifying. *Id.* He also notes that it is not unusual to outline a specific defense strategy to the jury during opening statements, only to revise it as the trial progresses. *Id.* ¶ 16. Attorney Parrish wrote that he had previously viewed the minor victims on video, but once they testified in-person "it was clear they would have appeared underage at the time Mr. Streb was in contact with them." *Id.* ¶ 18. Some of the questions asked of Minor Victim E during her testimony did not open doors to his defense. *Id.* ¶ 19. Attorney Messamer did not ask Minor Victim A about wearing makeup because after observing her appearance and demeanor, counsel concluded that it would not be persuasive to ask her about the subject. *Id.* ¶ 20. Counsel was also unsure about what she would say in response to an inquiry about makeup. Minor Victim B was asked about makeup and she said that she enjoyed it. *Id.* ¶ 21.

Attorney Parrish and Streb engaged in discussion about whether he should testify in his defense until Streb stated on the record that he would not testify. *Id.* ¶ 25. Both Attorney Parrish and Attorney Messamer were concerned that testimony by Streb would not benefit his case and open him up to a longer sentence and possible obstruction of justice enhancements.

Streb's claim for relief on this ground is without merit. First, as the Government points out in its resistance,

the Eighth Circuit held on direct appeal that Streb had a "reasonable opportunity to observe" Minor Victim A and Minor Victim E. *Streb*, 36 F.4th at 788 ("There is no dispute here that Streb had such an opportunity."). If a person has the reasonable opportunity to observe a victim's age, that negates the Government's burden to show the defendant's *mens rea*. *See United States v. Zam Lian Mung*, 989 F.3d 639, 643 (8th Cir. 2021) (noting that the prosecution does not have to prove that the defendant was at least reckless "when the facts demonstrate 'the defendant had a reasonable opportunity to observe'" the victim) (quoting 18 U.S.C. § 1591(c)). Thus, this evidence of his scienter would not benefit him on those convictions.

As to Minor Victim A, the jury found that Streb recklessly disregarded her age. Jury Verdict, Crim. Case, ECF No. 344 at 3. But Attorney Parrish and Attorney Messamer aver in their affidavit that questioning Minor Victim A on her appearance at the time of Streb's interactions with her was unpredictable. First, Minor Victim A appeared very young at the time of her in-court testimony, so counsel was concerned they would lose credibility with the jury if they pressed her on the issue. Second, counsel points out that Minor Victim A had never been questioned about whether she wore makeup during her interactions with Streb, so there was uncertainty as to her response which could have backfired.

Streb affirmed on the record that he decided to not testify on his own, after consultation with his attorneys.[3]

3. Prior to inquiring about his decision, the Court gave Streb a lengthy explanation about how the jury would be instructed on

Trial Tr., Crim. Case, ECF No. 409 at 254–55 (sealed). There was no evidence in the record that Streb ever saw an advertisement of Minor Victim A, much less an advertisement depicting her wearing makeup that could support that Streb did not recklessly disregard her age. Minor Victim A also testified at trial that she told Streb that she was 17 years old and a student in high school when she met him. Trial Tr., Crim. Case, ECF No. 407 at 27 (sealed). Rather than confronting her about whether she looked over 18, counsel questioned Minor Victim A about the environment on the night she met Streb including the length of time and the lighting. Trial Tr., Crim. Case, ECF No. 407 at 57–59 (sealed). As explained by Attorney Parrish and Attorney Messamer, it was their professional opinion that this was the best way to raise questions about Minor Victim A's appearance, given her obvious youth at trial. [ECF No. 9 ¶ 20].

These choices fall clearly within the scope of strategic choices by counsel, and do not fall outside the "wide range of professional assistance" by attorneys. *Strickland*, 466 U.S. at 689; *United States v. Taylor*, 258 F.3d 815, 820 (8th Cir. 2001) (describing the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). In essence, Streb

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his testimony and the potential downsides if he chose to take the stand in his own defense. He was then directly asked if he wished to testify in the case. Trial Tr., Crim. Case, ECF No. 409 at 255 (sealed). Streb responded, "I will not testify at this point." *Id*. Attorney Parrish then had a colloquy with his own client where Streb confirmed that he had discussed "in some detail[]" the "ramifications" about whether Streb should testify. *Id*. at 256.

has the benefit of hindsight and wishes for the Court to second-guess these choices. *Id.* ("Judicial scrutiny of counsel's performance must be highly deferential."). Trial strategy by counsel is not ineffective assistance because it is unsuccessful. *Graham v. Dormire*, 212 F.3d 437, 440 (8th Cir. 2000) (citing *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996)). Additionally, cross-examination by counsel is reviewed on collateral review in the same manner as other matters of trial strategy where it is committed "to the professional discretion of counsel." *United States v. Villalpando*, 259 F.3d 934, 939 (8th Cir. 2001). As such, even if the Court proceeded to the second element of the *Strickland* analysis, the record is clear that Streb cannot establish any prejudice.

3. Ground Three: Failure to Raise Second Amendment Challenge

Streb's final two grounds for relief are centered on the firearm charge. He first argues that his counsel was ineffective not challenging Section 922(g)(3) on Second Amendment grounds. Streb also contends that the law violates the Second Amendment independent of any ineffective assistance of counsel. In their affidavit, Attorney Parrish and Attorney Messamer explain that they did not raise a Second Amendment challenge because it was not a meritorious argument at the time of his trial. [ECF No. 9 ¶ 27].

Streb was sentenced and judgment was entered against him on September 24, 2020. J., Crim. Case, ECF No. 496. The Eighth Circuit affirmed the judgment in

full on June 7, 2022. Crim. Case, ECF No. 679. On June 23, 2022, the Supreme Court issued its ruling in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). In *Bruen*, the Supreme Court replaced the traditional tier of scrutiny analysis for constitutional claims for a test "rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 19 (holding that the "two-step approach" to Second Amendment challenges used by lower courts was "one step too many"). In the wake of the decision in *Bruen*, the federal judiciary has considered numerous challenges to federal and state laws on Second Amendment grounds.[4]

In support of his argument, Streb relies on a 2023 decision by the United States Court of Appeals for the Fifth Circuit. *See United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the panel held the Section 922(g)(3) violates the Second Amendment as-applied to defendants if they were not proven to be intoxicated at

4. *See, e.g.*, *Worth v. Jacobson*, 103 F.4th 677, 683 (8th Cir. 2024) (challenging Minnesota's Citizens' Personal Protection Act of 2003 facially and as-applied); *United States v. Veasley*, 98 F.4th 906, 908 (8th Cir. 2024) (facial challenge to Section 922(g)(3)); *United States v. White*, Crim. No. 22-207 (JRT/ECW), 2024 WL 3402741, at *2 (D. Minn. July 11, 2024) (rejecting facial challenge to Section 992(g)(1)); *United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024) (as-applied challenge to Section 922(g)(1)); *Oakland Tactical Supply, LLC v. Howell Twp.*, 103 F.4th 1186, 1198 (6th Cir. 2024) (as-applied challenge to local shooting range ordinance); *United States v. Sing-Ledezma*, CAUSE NO. EP-23-CR-823(1)-KC, 2023 WL 8587869, at *1 (W.D. Tex. Dec. 11, 2023) (facial challenge to Section 992(k)).

the time they were convicted of possessing a firearm. *Id.* at 348. However, the decision in *Daniels* has been vacated by the Supreme Court since Streb submitted his brief. *United States v. Daniels*, No. 23-376, ___ S. Ct. ___, 2024 WL 3259662, at *1 (U.S. July 2, 2024) (granting certiorari, vacating judgment, and remanding in light of the decision in *Rahimi*). Even before the judgment was vacated, Streb's claim for ineffective assistance of counsel on this claim was without merit.

First, not only was *Daniels* decided *after* Streb's trial, but it is also non-binding within the United States District Court for the Southern District of Iowa. At the time of trial there *was* mandatory precedent within the Eighth Circuit on the issue of drug user in possession of a firearm. *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 20 10) (rejecting challenge after concluding that Section 922(g)(3) "is the type of longstanding prohibition on the possession of firearms that *Heller* declared presumptively lawful"). The Eighth Circuit has since upheld the facial constitutionality of Section 922(g)(3) under a *Bruen* analysis. *United States v. Yeasley*, 98 F.4th 906, 918 (8th Cir. 2024) (concluding that Section 922(g)(3) is not facially unconstitutional).

Streb attempts to evade this problem by urging that *Daniels* was based on "longstanding Second Amendment history." [ECF No. 2 at 73]. By not filing a motion to dismiss on this basis, Streb claims that his counsel was constitutionally ineffective because it did not preserve the issue for his direct appeal. He insists that even if his Second Amendment challenge failed in the district

court, "the Fifth Circuit's decision in *Daniels* likely would have compelled the Eighth Circuit to reach the issue" in his direct appeal. *Id.* at 81. This is demonstrably wrong because the panel affirmed the judgment in Streb's case on June 7, 2022, over two weeks prior to the decision in *Bruen*, and 14 months before *Daniels* applied the *Bruen* analysis. *See* Op. Crim. Case, ECF No. 679; *Bruen*, 597 U.S. at 1; *Daniels*, 77 F.4th at 337. Counsel cannot be ineffective for not raising an issue that was not supported by precedent at the time. *Brown v. United States*, 311 F.3d at 875, 878 (8th Cir. 2002); *see also Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) ("It is not ineffective assistance of counsel to withdraw arguments that have no support in the law.") (cleaned up).

Streb also cannot establish prejudice because, as noted above, the Eighth Circuit has rejected facial challenges to the law. Second Amendment challenges to Section 922(g)(3) have all been rejected by every judge within the Southern District of Iowa. *See*, *e.g.*, *United States v. Randall*, 656 F. Supp. 3d 851, 855 (S.D. Iowa 2023); *United States v. Le*, 669 F. Supp. 3d 754, 757–58 (S.D. Iowa 2023). This near-uniformity also applies to district courts in other Circuits.[5]

5. *See*, *e.g.*, *United States v. Claybrooks*, 90 F.4th 248, 253 (4th Cir. 2024) (rejecting as-applied challenge); *Gilpin v. United States*, No. 23-1131, 2024 WL 1929297, at *1 (8th Cir. May 2, 2024) (affirming denial of facial challenge); *United States v. Posey*, 655 F. Supp. 3d 762, 776 (N.D. Ind. 2023) (denying defendant's facial challenge); *United States v. Sanchez*, 646 F. Supp. 3d 825, 828 (W.D. Tex. 2022) (rejecting facial and as-applied challenge); *United States v. Espinoza-Melgar*, 687 F. Supp. 3d 1196, 1206 (D.

Therefore, notwithstanding the clear lack of ineffectiveness for not raising a Second Amendment challenge pre-*Bruen*, Streb cannot show a reasonable probability that the result of his criminal proceeding would have been different. *Strickland*, 466 U.S. at 693.

4. Ground Four: Standalone Second Amendment Challenge

Distinct from his ineffective assistance of counsel ground, Streb seeks to challenge his conviction directly under the Second Amendment. However, this is procedurally defaulted because he could have raised it on direct appeal. *Jennings v. United States*, 696 F.3d 759, 762–63 (8th Cir. 2012) ("[A] petition may not raise an issue before the district court for the first time in a § 2255 motion if the issue was not presented on direct appeal from the conviction."). Courts have long held that a claim brought pursuant to Section 2255 is not a "second direct appeal and issues raised for the first time in a § 2255 petition are procedurally defaulted." *Meeks v. United States*, 742 F.3d 841, 844 (8th Cir. 2014) (citation omitted). Procedural default applies to constitutional claims. *Id.*

To overcome procedural default, a petitioner must establish cause for the procedural default and actual prejudice, or actual innocence. *Bousley v. United States*, 523 U.S. 614, 622 (1998). "To establish cause, a petitioner

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Utah 2023) (denying facial challenge); *United States v. Lewis*, 694 F. Supp. 3d 1046, 1052–53 (M.D. Tenn. 2023) (rejecting as-applied challenge).

must show that some objective factor external to the defense prevented him from presenting or developing the factual or legal basis of his constitutional claim." *Joubert v. Hopkins*, 75 F.3d 1232, 1242 (8th Cir. 1996). Prejudice means that the error "worked to his *actual* and substantial disadvantage, infecting the entire trial with error." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). If cause and prejudice cannot be established, a petitioner may advance a procedurally defaulted claim if he can demonstrate "actual innocence." *See Bousley*, 523 U.S. at 622. Petitioners are rarely successful in bringing claims of actual innocence. *Weeks v. Bowersox*, 119 F.3d 1342, 1351 (8th Cir. 1997).

There is no dispute here that Streb did not challenge his conviction on Second Amendment grounds on appeal. He offers no basis to find cause for this procedural default and there is no reason to conclude that he is actually innocent of the charge either. *See Bousley*, 523 U.S. at 623 ("[A]ctual innocence means factual innocence not mere legal insufficiency."). Under certain circumstances, the Supreme Court will announce a new rule of constitutional law that is retroactive on collateral review. Streb cannot avoid procedural default on this basis either because the plain text of *Bruen* does not establish a new constitutional rule, much less a retroactive rule pertaining to Section 922(g)(3). Streb cannot obtain relief on either of his Second Amendment grounds.

III. CONCLUSION

Based on its review, the Court holds that the files and records of this case conclusively demonstrate Streb is not entitled to any relief and the case may be dismissed without a hearing. *See Voytik*, 778 F.2d at 1308. Streb has not demonstrated that he received ineffective assistance of counsel. For the reasons stated above, Streb's Motion to Vacate, Set Aside, or Correct Sentence is DENIED. [ECF No. 1]. The case is DISMISSED.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citation omitted). Streb has not made a substantial showing of the denial of a constitutional right on his claims. He may request issuance of a certificate of appealability by a judge with the Eighth Circuit. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 9th day of August, 2024.

/s/_____
STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JUNE 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-3028

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KENDALL STREB,

Defendant-Appellant,

HUMAN TRAFFICKING INSTITUTE,

Amicus on Behalf of Appellee.

Appeal from United States District Court
for the Southern District of Iowa – Central

Submitted: October 22, 2021
Filed: June 7, 2022
Revised: July 1, 2022

Before ERICKSON, GRASZ, and STRAS, Circuit Judges.

Appendix C

STRAS, Circuit Judge.

A jury found Kendall Streb guilty of various sex-trafficking, firearm, and drug crimes. Although his challenges run the gamut from alleged discovery violations to complaints about his sentence, we affirm.

I.

An indictment charged Streb with child sex-trafficking, illegal possession of firearms, and drug possession and distribution. The drug and firearm charges arose out of his line of work: dealing methamphetamine.

Streb also paid for sex, using both cash and drugs. The sexual encounters started with Minor Victim B, but soon involved her friends too. After law enforcement caught wind of his criminal activities, officers searched his home and found firearms in a closet near some drugs that were packaged for sale.

At trial, a jury found Streb guilty of multiple crimes,[1] which earned him a sentence of 268 months in prison. He

1. Sex trafficking of children, 18 U.S.C. § 1591(a)(1), (b)(2); distributing methamphetamine to a minor, 21 U.S.C. §§ 841(a)(1), 859; possessing methamphetamine with intent to distribute it, 21 U.S.C. § 841(a)(1), 841(b)(1)(C); possessing a firearm in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i); and unlawfully possessing a firearm, 18 U.S.C. §§ 922(g)(3), 924(a)(2).

argues that the district court[2] erred from start to finish, and at nearly every point in between.

II.

Streb's first set of arguments focus on the government's eve-of-trial disclosure about benefits it had provided to several minor victims. The district court denied his motion to dismiss the indictment or, in the alternative, to exclude their testimony. We review this decision for an abuse of discretion. *See United States v. Sandoval-Rodriguez*, 452 F.3d 984, 989 (8th Cir. 2006) (exclusion of testimony); *United States v. DeCoteau*, 186 F.3d 1008, 1009 (8th Cir. 1999) (dismissal of indictment).

A.

Forty-eight hours before Streb's trial was set to begin, the government sent defense counsel a short letter disclosing that state and federal law-enforcement officials, including members of the United States Attorney's Office, had provided basic necessities to Streb's minor victims, including meals, clothing, and personal-hygiene items. After defense counsel objected to the letter's lack of specificity, the district court ordered the government to supplement it.

The government returned later that day with more information. For the lunches it provided, for example,

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2. The Honorable Stephanie M. Rose, then United States District Judge for the Southern District of Iowa, now Chief Judge, United States District Court for the Southern District of Iowa.

the government disclosed who attended and how much they cost. It also reported giving one of the victims $50 in donated gift cards for the purchase of school supplies.

According to Streb, these tardy disclosures justified one of two remedies: dismissal of the indictment or the complete exclusion of testimony from those who benefited. In the alternative, he was willing to settle for an evidentiary hearing. Despite characterizing the circumstances as "problematic," the district court offered an even more modest solution: a continuance. After consulting with Streb, defense counsel opted to move forward with jury selection instead.

The issue came up again after jury selection. At that point, the district court formally denied Streb's motion because the remedies he requested were too "extreme." Once again, however, the district court proposed alternatives: an appropriate jury instruction and "wide open cross-examination" to explore any potential bias.

B.

Streb argues that the district court abused its discretion by not doing more. If a party has committed a discovery violation, Federal Rule of Criminal Procedure 16(d)(2) provides a menu of options to remedy it: ordering additional discovery, granting "a continuance," excluding the "undisclosed evidence," and entering "any other order that is just under the circumstances." The choice of remedy depends on "whether the government acted in bad faith and the reason(s) for [the] delay in production";

"whether there [was] any prejudice to the defendant"; and "whether any lesser sanction [would have been] appropriate to secure future [g]overnment compliance." *United States v. Pherigo*, 327 F.3d 690, 694 (8th Cir. 2003).

Notably, Streb has difficulty explaining what rule or order the government violated. There was no constitutional violation because "due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial." *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005); *see also Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Although the disclosure came later than Streb would have liked, the district court offered a continuance to make sure that defense counsel had time to consider its impact on the case. And besides, the information was not furnished "too late for the defendant to use it at trial." *Almendares*, 397 F.3d at 664. Defense counsel *actually* relied on it when cross-examining one of the victims.

Streb fails to identify any other possibility. Indeed, when questioned at oral argument, counsel could only surmise that the government's conduct in this case amounted to "what could be considered an ethical" and "tactical violation."[3] Oral Arg. at 15:10-15:24. But even if

3. In his brief, Streb suggests in passing that the government's practice of providing food, personal-hygiene products, and clothing to minor sex-trafficking victims is bribery. *See* 18 U.S.C. § 201(c)(2). As the Human Trafficking Institute points out in its amicus brief, however, every circuit to have considered this question, including ours, has disagreed. *See United States v. Ihnatenko*, 482 F.3d 1097, 1099-1100 (9th Cir. 2007) (collecting cases from

we were to assume what the government did adds up to a discovery violation, we would still conclude that the district court did not abuse its discretion by offering a continuance, a jury instruction, and "wide open cross-examination." *See* Fed. R. Crim. P. 16(d)(2)(B), (D).

C.

Nor was an evidentiary hearing required to explore whether the government acted in bad faith. *See Pherigo*, 327 F.3d at 694. Following jury selection, the district court questioned the government at length about the benefits the witnesses received and the reasons for not disclosing them sooner. *See id.* The court then offered a continuance to Streb, which would have given defense counsel time to investigate the government's conduct, fine-tune his trial strategy, and potentially request additional discovery. The decision to offer a continuance rather than a hearing, particularly given the court's already in-depth questioning of the government, was not an abuse of discretion.

III.

Trial brought the next set of objections, this time to three of the district court's evidentiary rulings. Our review is for an abuse of discretion, *United States v. Street*, 531 F.3d 703, 708 (8th Cir. 2008), keeping in mind that

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the First, Third, Fourth, Fifth, Seventh, and Eighth Circuits); *United States v. Albanese*, 195 F.3d 389, 394 (8th Cir. 1999) (observing that this court "ha[s] a long history of allowing the government to compensate witnesses for their participation in criminal investigations").

we will reverse only if an error "affected the defendant's substantial rights or had more than a slight influence on the verdict," *United States v. Picardi*, 739 F.3d 1118, 1124 (8th Cir. 2014) (citation omitted).

A.

The first evidentiary ruling was the district court's refusal to admit sexually explicit advertisements offering Minor Victim B's services as an escort. In addition to promoting sex-for-cash, the ads listed her age as nineteen. Streb's position is that, had the jury seen them, it would have concluded that he could not have known that she was only fifteen, which would have negated the mental-state requirement of the child-sex-trafficking offense. *See* 18 U.S.C. § 1591(a) (requiring knowledge or a "reckless disregard of the fact[] . . . that the person has not attained the age of 18 years"). According to the court, the advertisements were inadmissible because they were "offered to prove that a victim engaged in other sexual behavior," Fed. R. Evid. 412(a), and were substantially more prejudicial than probative, Fed. R. Evid. 403.

We need not decide whether the district court abused its discretion because the ruling had no "influence on" the jury's verdict. *See Picardi*, 739 F.3d at 1124 (citation omitted). According to another provision in the child-sex-trafficking statute, the government did not need to prove that Streb knew or recklessly disregarded Minor Victim B's age if he "had a reasonable opportunity to observe" her beforehand. 18 U.S.C. § 1591(c).

There is no dispute here that Streb had such an opportunity, which means that the government did not *also* have to prove that he "knew or recklessly disregarded" her age. *See United States v. Zam Lian Mung*, 989 F.3d 639, 643 (8th Cir. 2021) (stating that the government is "relieve[d]" from "proving the 'defendant knew, or recklessly disregarded'" the victim's age "when the facts demonstrate 'the defendant had a reasonable opportunity to observe the person . . . solicited'" (quoting 18 U.S.C. § 1591(c))); *see also United States v. Koech*, 992 F.3d 686, 688 (8th Cir. 2021) (noting that section 1591(c) "alter[s] the mens rea requirement regarding the victim's age"); *United States v. Whyte*, 928 F.3d 1317, 1329-30 (11th Cir. 2019) (explaining that the statute "unambiguously creates an independent basis of liability when the government proves a defendant had a reasonable opportunity to observe the victim"). Missing out on the chance to rebut a point that made no difference to the outcome could not have "influence[d] . . . the verdict." *Picardi*, 739 F.3d at 1124 (citation omitted).

B.

The second evidentiary challenge fares no better than the first. This time, the focus is on the specific charge in Minor Victim B's juvenile-delinquency petition, which was dismissed before the trial in this case began. Streb's goal was to show that she was testifying to avoid a serious charge of her own.

The district court ruled that this line of questioning was off-limits. First, "juvenile adjudications" have limited

admissibility. *See* Fed. R. Evid. 609(d) (providing that "[e]vidence of a juvenile adjudication is admissible under this rule" only if several requirements are met). And second, discussing the specific charge she faced would have been "inflammatory and highly prejudicial," not to mention that it would have "confused the issues before the jury." *See* Fed. R. Evid. 403.

Although Streb once again argues that the district court abused its discretion, any error in cutting off this line of questioning was harmless. Defense counsel was able to impeach Minor Victim B without getting into specifics, including probing her about the fact that she had previously been accused "of some crimes." He was also able to establish during the cross-examination of a detective that there had been a delinquency petition filed against her, which had been dismissed once she began cooperating with the government. Perhaps most importantly, cross-examination established that Minor Victim B understood that she would return to a juvenile-detention center if she refused to testify, which highlighted her possible pro-government bias. Having thoroughly attacked her credibility during cross-examination, defense counsel would have accomplished little more by discussing the specific charge in the petition.[4] *See United States v. Oakie*, 993 F.3d 1051, 1054 (8th Cir. 2021) (per curiam).

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4. For this reason, to the extent Streb argues that his Confrontation Clause rights were violated, *see Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), any error was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

C.

The third evidentiary challenge might be the most straightforward of all. The district court limited defense counsel's ability to impeach two of the minor victims with their past inconsistent statements out of a concern for trial management and the risk of having inadmissible hearsay come in through the back door. *See* Fed. R. Evid. 801(d)(1); *see also* Fed R. Evid. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth . . . avoid wasting time . . . and . . . protect witnesses from harassment or undue embarrassment."); Fed. R. Evid. 802 (prohibition on hearsay).

Once again, harmless error poses an obstacle for Streb. As the government points out, defense counsel spent hours cross-examining both witnesses, including about their prior statements. For his part, Streb cannot identify a single statement or passage that was closed off by the district court's ruling. With otherwise strong evidence of guilt and no telling what the unspecified prior statements might have shown, any error here had, at most, only "a slight influence on the verdict." *Picardi*, 739 F.3d at 1124 (citation omitted).

IV.

Once the government finished presenting its case, Streb moved for an acquittal on the illegal-possession-of-a-firearm count. *See* 18 U.S.C. § 924(c)(1)(A) (possessing

a firearm in furtherance of a drug-trafficking crime). He admitted that he possessed a firearm, but claimed that the evidence did not show that he had done so "in furtherance" of a drug-trafficking crime. *Id.* We review the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the verdict. *See United States v. Maloney*, 466 F.3d 663, 666 (8th Cir. 2006).

The in-furtherance element required the government to establish a "nexus" between Streb's possession of a firearm and a drug crime. *United States v. Sanchez-Garcia*, 461 F.3d 939, 946 (8th Cir. 2006) (citation omitted). The former must "further[], advanc[e] or help[] forward" the latter. *Id.* (citation omitted). "[A] jury can draw this inference if the firearm is kept in close proximity to the drugs, it is quickly accessible, and there is expert testimony regarding the use of firearms in connection with drug trafficking." *United States v. White*, 962 F.3d 1052, 1056 (8th Cir. 2020) (quotation marks omitted).

The government's evidence followed this formula exactly. A search uncovered two firearms and three extra magazines in his bedroom closet, which was just a few feet away from packaged methamphetamine. It also revealed a firearm in his truck, which he used to move the drugs. Finally, expert testimony established a connection between guns and drug trafficking. Taken together, the evidence was sufficient for the jury to conclude that Streb kept firearms at his home and in his truck to protect the drugs he distributed. *See id.* (involving similar facts); *Sanchez-Garcia*, 461 F.3d at 947 (same).

V.

Sentencing also produced its own share of challenges. Leaving no stone unturned, Streb asks us to review three enhancements, the criminal-history calculation, and the substantive reasonableness of the sentence.

A.

Multiple enhancements went into determining Streb's total offense level of 43. He complains about three of them: (1) a two-level enhancement for "unduly influenc[ing] a minor to engage in prohibited sexual conduct," U.S.S.G. § 2G1.3(b)(2)(B); (2) a two-level enhancement for using "a computer," *id.* § 2G1.3(b)(3); and (3) a five-level enhancement for "engag[ing] in a pattern of activity involving prohibited sexual conduct," *id.* § 4B1.5(b)(1). In evaluating each, we review "the district court's construction and application of the sentencing guidelines de novo and its factual findings for clear error." *United States v. Hagen*, 641 F.3d 268, 270 (8th Cir. 2011) (italics omitted).

1.

The undue-influence enhancement focuses on the "voluntariness of the minor's behavior." U.S.S.G. § 2G1.3 cmt. n.3(B). Streb's position is that the minors consented to the "prohibited sexual conduct," which takes the enhancement off the table. *See id.* § 2G1.3(b)(2)(B).

The problem with Streb's argument is that it does not account for the "rebuttable presumption that" the

enhancement applies when the defendant "is at least 10 years older than the minor." *Id.* § 2G1.3 cmt. n.3(B). Streb was more than 30 years older than each of his victims, and he often exchanged drugs for sex with cash-strapped and methamphetamine-addicted minors. On this record, Streb came nowhere close to rebutting the presumption of undue influence.

2.

The evidence also established that Streb used his cellphone to arrange the "prohibited" sexual encounters. U.S.S.G. § 2G1.3(b)(3). A two-level enhancement is available if the "offense involved the use of a computer . . . to . . . facilitate the travel of . . . the minor to engage in prohibited sexual conduct." *Id.* We have already held that a cellphone is a "computer," at least under the "broad" statutory definition that applies here. *United States v. Kramer*, 631 F.3d 900, 903 (8th Cir. 2011); *see also* U.S.S.G. § 2G1.3(b)(3) cmt. n.1 (explaining that "'[c]omputer' has the meaning given that term in 18 U.S.C. § 1030(e)(1)" (citation omitted)).

3.

We can also make quick work of Streb's objection to the five-level enhancement for "engag[ing] in a pattern of activity involving prohibited sexual conduct." U.S.S.G. § 4B1.5(b)(1). "[A]t least two separate occasions" makes out a pattern, *id.* § 4B1.5(b)(1) cmt. n.4(B)(i), and here, the district court found that Streb paid *three* minors for sex, two on multiple occasions. *See id.* § 4B1.5 cmt. n.2

(listing Streb's offenses as "covered sex crimes"). More than enough to form a pattern.

B.

Streb does not fare any better with the challenge to his criminal-history score. There are two main considerations: the number of "prior sentence[s] of imprisonment" that a defendant has served and the length of each one. U.S.S.G. § 4A1.1. In limited situations, multiple sentences can be treated as one, but only if they "resulted from offenses contained in the same charging instrument" or "were imposed on the same day." *Id.* § 4A1.2(a)(2).

Streb seeks to avail himself of one of these exceptions for two "prior sentences" he served for passing bad checks. *Id.* § 4A1.1. The problem is that the criminal acts were committed in different counties, meaning that they were not prosecuted under "the same charging instrument," *id.* § 4A1.2(a)(2), and the sentences were not "imposed on the same day," *id.* Under these circumstances, his criminal-history score stands.

C.

Finally, we conclude that Streb's 268-month sentence, a substantial downward variance from the recommendation of life imprisonment, is substantively reasonable. *See United States v. McKanry*, 628 F.3d 1010, 1022 (8th Cir. 2011) ("[I]t is nearly inconceivable" that once a district court has varied downward, it "abuse[s] its discretion in not varying downward [even] further." (quotation marks

omitted)); *see also* U.S.S.G. Part A (setting a range of life for someone with an offense level of 43). The record establishes that the district court sufficiently considered the statutory sentencing factors, 18 U.S.C. § 3553(a), and did not rely on an improper factor or commit a clear error of judgment. *See United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc).

VI.

We accordingly affirm the judgment of the district court.

APPENDIX D — PROVISIONS INVOLVED

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

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

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(B)** the final order in a proceeding under section 2255.

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

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

Appendix D

28 U.S.C.A. § 2255. Federal custody; remedies on motion attacking sentence

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

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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

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

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

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

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

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

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

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

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

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

Appendix D

UNITED STATES SENTENCING COMMISSION
GUIDELINES MANUAL 2018

[SEAL]

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This document contains the text of the *Guidelines Manual* incorporating amendments effective November 1, 2018, and earlier.

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§2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex

Appendix D

Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

(1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);

(2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);

(3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or

(4) **24**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels.

(4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.

(5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Appendix D

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425.

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Commercial sex act***" has the meaning given that term in 18 U.S.C. § 1591(e)(3).

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Illicit sexual conduct***" has the meaning given that term in 18 U.S.C. § 2423(f).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Participant***" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"***Sexual act***" has the meaning given that term in 18 U.S.C. § 2246(2).

"***Sexual contact***" has the meaning given that term in 18 U.S.C. § 2246(3).

2. **Application of Subsection (b)(1).—**

   (A) **Custody, Care, or Supervisory Control.—** Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Application of Subsection (b)(2).—**

(A) **Misrepresentation of Participant's Identity.—** The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Undue Influence.**—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.

However, subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. **Application of Subsection (b)(3)(A).**—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. **Application of Subsection (c).—**

(A) **Application of Subsection (c)(1).—**The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "***sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

(B) **Application of Subsection (c)(3).—**For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):

(i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and

thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

(ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).

(iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of

declining participation in, or communicating unwillingness to engage in, the sexual act.

6. **Application of Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

7. **Upward Departure Provision.**—If the offense involved more than ten minors, an upward departure may be warranted.

Historical Note	Effective November 1, 2004 (amendment 664). Amended effective November 1, 2007 (amendment 701); November 1, 2009 (amendments 732 and 737); November 1, 2018 (amendment 812).

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