No. _____

CEDRIC MCDONALD,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondents-Appellee.

MOTION FOR LEAVE TO APPEAL *IN FORMA PAUPERIS*

Mr. McDonald asks for leave to file the attached petition *in forma pauperis*. Mr. Close has previously been permitted to appeal *in forma pauperis* before the 8th Circuit, and United States District Court in the Northern District of Iowa. Mr. Cole was appointed under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. See Appx. E. Thus, Mr. McDonald seeks leave to present this Petition for *Certiorari* under the United States Supreme Court Rule 39.1.

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Iowa City, Iowa 52240
(319) 519-2540 Office
(319) 359-4009Fax
ATTORNEY FOR PETITIONER

IN THE UNITED STATES SUPREME COURT

No. _____

CEDRIC MCDONALD,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondents-Appellees.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE COUNSEL IN FAILING TO OBJECT TO DISTRICT COURT'S USE OF A VIDEO IN VOIR DIRE, WHICH WAS DESINGED TO GET JURORS TO THINK ABOUT POSSIBLE UNCONSCIOUS RACIAL BIAS?

LIST OF PARTIES

1. All parties appear in the caption.

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8th Circuit Court

Order Denying Certificate of Appealability

Cedric McDonald v. United States, 18-293 (March 13, 2019)

United States District Court for Northern District of Iowa

Order Partially Granting Section 2255 Relief

McDonald v. United States, 3:17-3057 (Aug. 20, 2018)

JURISDICTION

Mr. McDonald is a federal prisoner seeking review of an 8th Circuit Panel decision affirming the denial of his Section 2255 Motion. Federal question jurisdiction exists under 28 U.S.C. § 1331. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

TIMELINESS

The 8th Circuit denied Mr. McDonald's Application for a Certificate of Appealability on March 13, 2019. Appx. B. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). That deadline falls on June 11, 2019. A document is considered timely filed it were

delivered on "if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing." Supreme Court Rule 29.2. This document was mailed via United States Postal Service on June 11, 2019, and post marked for delivery on that date. Thus, it is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 14th Amendment to US Constitution (Section 1)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Nature of the Case:

This case comes before this Court on an appeal from a denial of relief under 28 U.S.C. Section 2255. In his post-conviction, the Petitioner, Cedric McDonald, challenged March 17, 2015, conviction by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) (1), 924(a) (2), and 924(e) (1), and his June 30, 2015, sentence to 210 months of imprisonment, as an armed career criminal. The Court partially granted relief under Section 2255 and denied relief

on the claim that the district court improperly used a racially based video during jury selection, inserting race when Mr. McDonald did not want race brought up during his jury selection. Order; Appx. C. The District Court partially granted relief on his predicate felonies, finding that the prior burglary was wrongfully used as a predicate felony for the Armed Career Criminal Act (ACCA), but denied relief and a certificate of appealability on his claim of ineffective of counsel during jury selection. Ruling (Aug. 20, 2018); Appx. C. On March 13, 2019, the 8th Circuit affirmed the denial of the certificate. Appx. A. Mr. McDonald seeks certiorari review 8th Circuit's denial of a certificate of appealability.

REASON FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT AREA OF CONSTITUTIONAL LAW RELATING TO TRIAL COUNSEL'S DUTY TO OBJECT WHEN DISTRICT COURT INSERTS A RACIALLY BASED VIDEO DURING JURY SELECTION WITHOUT INQUIRING

This Court should grant certiorari under Rule 10 (a). This case raises important constitutional issues relating to the trial counsel's duty to ensure a jury selection process free of racial bias.

During jury selection, the District Court should a video, which he believed would help educate the jury about both intentional and unconscious race bias.

District Court Ruling; Appx. C. His expressed purpose in doing so was to address possible unconscious racial bias on part of jurors.

Mr. McDonald was not asked whether he consent to having the video shown or whether he even wanted the video. In fairness to district court, this Court has not provided much clarification on this area of law for nearly 40 years. What role, if any, does the Defendant have in directing whether questioning regarding racial prejudice should occur during jury selection? What role does counsel play in honoring in protecting a defendant's right to have a race free jury selection process?

- **This Court's past precedent in questioning regarding racial prejudice in voir dire.**

Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire. In *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), the Court recognized the broad role of the trial court: "[T]he questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." Id., at 310, 51 S.Ct., at 471. *See also Ham v. South Carolina*, 409 U.S. 524, 528, 93 S.Ct. 848, 851, 35 L.Ed.2d 46 (1973) (recognizing "the traditionally broad discretion accorded to the trial judge in conducting voir dire...."). Furthermore, Rule 24(a), Federal Rules of Criminal

Procedure, provides that the trial court may decide to conduct the voir dire itself or may allow the parties to conduct it. If the court conducts it, the parties may "supplement the examination by such further inquiry as [the court] deems proper"; alternatively, the court may limit participation to the submission of additional questions, which the court must ask only "as it deems proper."

Ham involved a black defendant charged with a drug offense. His defense was that the law enforcement officers had "framed" him in retaliation for his active, and widely known, participation in civil rights activities. The critical factor present in Ham, but not present in *Ristaino*, was that racial issues were "inextricably bound up with the conduct of the trial," and the consequent need, under all the circumstances, specifically to inquire into possible racial prejudice in order to assure an impartial jury. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). Although *Ristaino* involved an alleged criminal confrontation between a black assailant and a white victim, that fact pattern alone did not create a need of "constitutional dimensions" to question the jury concerning racial prejudice. 424 U.S., at 596, 597, 96 S.Ct., at 1021, 1022. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. As *Ristaino* demonstrates, there is no per se constitutional rule in such circumstances requiring inquiry as to racial prejudice. Id., at 596, n. 8, 96 S.Ct., at 1021, n. 8.

This Court again issues relating to race and jury selection in *Rosales-Lopez v. United States*, 451 U.S. 182, 189–90, 101 S. Ct. 1629, 1634–35, 68 L. Ed. 2d 22 (1981). In that case, this Court again reaffirmed that there is no constitutional duty to inquire into racial prejudice. Id. "Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions. In the federal court system, we have indicated that under our supervisory authority over the federal courts, we would require that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated. Ristaino, supra, at 597, n. 9, 96 S.Ct., at 1021, n. 9. This Court reaffirmed that it is the Defendant, not the Court, that is in the best position to explore whether racial prejudice should be inquired upon in jury selection. Thus, the defendants specifically requested voir dire concerning racial prejudice, satisfying one requirement for application of the "nonconstitutional" standard. *See Rosales-Lopez*, 451 U.S. at 191, 101 S.Ct. 1629 (leaving to the defendant, in the first

instance, the determination of whether he or she "would prefer to have the inquiry into racial or ethnic prejudice pursued").

In 1986, this Court had no trouble reversing in a capital case where the court failed to inquire into racial prejudice during jury selection, especially where there was a black defendant and white victim. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. *Turner v. Murray*, 476 U.S. 28, 35, 106 S. Ct. 1683, 1687–88, 90 L. Ed. 2d 27 (1986).

- **Application to this Case**

This case shows what happens when the shoe is on the other foot. What happens a Defendant does not want the court to inquire into his racial background and does not want to make an issue?

Mr. McDonald contends that the video used to remove racial prejudice, and make jurors aware of their own implicit racial basis itself tainted the jury. To obtain relief, this Court would have to make a finding that the video that it uses to remove racial prejudice deprived Mr. McDonald's of a jury selection process without regard to the color of his skin.

Mr. McDonald was certainly irritated at the beginning of trial. Just before trial, he wanted to fire his trial counsel, and this exchange occurred:

> THE COURT: Okay. I'd like to get started.
>
> Mr. McDonald, I was just told by Mr. Primmer that you want to fire him. That's not happening today. You're not going to jack around the system, and you're not going to jack me around. I'm going to give you a super fair trial, but you're not -- what's your grounds for firing your lawyer?
>
> THE DEFENDANT: I think that I'm sitting in here -- I think that -- I don't think that he can see through white people as I can him or any other black person can. I think that I'm sitting here in a slave port. I believe that this is a slave trade system camouflaged by a court system, and I don't think that he's going to represent me correct.

Trial Tr. Vol 1, p. 2, LL 3-14. This Court then replied that it would deny the motion to terminate counsel, finding it "baseless, frivolous." Tr. 2, LL 13-15.

Below, Mr. McDonald's counsel could find little, or no case law relating

to prejudice arising from showing of videos designed to remove racial prejudice. Most of relating to racial issues in jury selection arise from a fair cross section, or improperly striking jurors on account of race. *Powers v. Ohio*, 499 U.S. 400, 404-05, 111 S. Ct. 1364, 1367, 113 L. Ed. 2d 411 (1991) ("This Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct."). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race. on the false assumption that members of his race as a group are not qualified to serve as jurors, *see Norris v. Alabama*, 294 U.S. 587, 599 [55 S.Ct. 579, 584, 79 L.Ed. 1074] (1935); *Neal v. Delaware*, 103 U.S. 370, 397 [26 L.Ed. 567] (1881).

Looking at the case law, the District Court below relied heavily on *Rosales-Lopez* and did not have any guidance from this Court on the situation where a Defendant did not want race brought up during selection. District Court at p. 6; Appx. C. The Court noted that race was not an issue and the Defendant did not demonstrate that the video prejudiced the jury. *Id.* That is the point. Race should not be injected into proceedings unless the Defendant requests inquiry into racial prejudice.

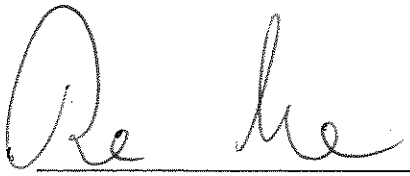
This time is now ripe for this Court to provide guidance on the important

issue of a Constitutional law. Since full merits briefing was not done below, this Court should grant, vacate and remand for full merits briefing before the 8th Circuit Court of Appeals. At the very least, Mr. McDonald has shown the substantial denial of a constitutional right. See 28 U.S.C. Section 2253 (c) (2) (certificate should be granted based upon a substantial showing of a denial of a constitutional right.).

CONCLUSION AND REQUESTED RELIEF

Under these circumstances, the most prudent course is to grant the Writ, vacate, and remand with an order to grant a certificate of appealability.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

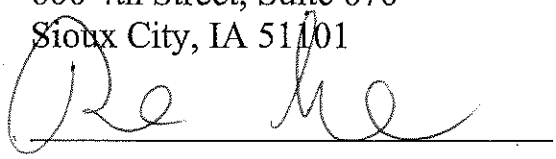
I, Rockne Cole, counsel for Petitioner, hereby certify that, on June 11, 2019, I mailed an original and 10 copies to the Supreme Court via United States Postal

Service Express Mail to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

and one copy to:

Mikala Marie Steenholdt
US Attorney's Office
600 4th Street, Suite 670
Sioux City, IA 51101



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United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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March 13, 2019

Mr. Rockne Ole Cole
COLE & VONDRA
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RE: 18-2943 Cedric McDonald v. United States

Dear Counsel:

Enclosed is a copy of the dispositive order entered today in the referenced case.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the time set by FRAP 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Pro se petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Michael E. Gans
Clerk of Court

MDS

Enclosure(s)

cc: Mr. Timothy T. Duax
Mr. Cedric McDonald
Mr. Rob Phelps
Ms. Mikala Steenholdt

District Court/Agency Case Number(s): 3:17-cv-03057-MWB

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2943

Cedric McDonald

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Ft. Dodge
(3:17-cv-03057-MWB)

JUDGMENT

Before LOKEN, GRASZ, and STRAS, Circuit Judges.

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.

March 13, 2019

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

/s/ Michael E. Gans

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

CEDRIC MCDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C 17-3057-MWB
(CR 14-3056-MWB-1)

OPINION AND ORDER REGARDING CERTIFICATE OF APPEALABILITY

This case is before me on remand from the Eighth Circuit Court of Appeals to consider whether a certificate of appealability should issue in light of *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997). I inadvertently omitted a determination on the certificate of appealability issue in my August 20, 2018, Opinion And Order Regarding Petitioner's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence. In that Opinion And Order, I granted petitioner McDonald's § 2255 Motion to the extent that his sentence of 210 months was corrected to 120 months, the maximum sentence that could have been imposed without an ACCA enhancement; denied the part of his § 2255 Motion claiming ineffective assistance of counsel for failing to challenge the determination that two prior second-degree robbery convictions, under Iowa law, were also predicate ACCA offenses; and denied the part of his § 2255 Motion claiming ineffective assistance of counsel for failing to object to the court's use of a video that addressed racial prejudice.

My denial, in part, of McDonald's claims for § 2255 relief raises the question of whether or not he is entitled to a certificate of appealability on those claims. In order to obtain a certificate of appealability on those claims, McDonald must make a substantial

showing of the denial of a constitutional right. *See Miller–El v. Cockrell*, 537 U.S. 322 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076–77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873–74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller–El v. Cockrell* that, "'[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.'" 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). For essentially the reasons set out in my August 20, 2018, Opinion And Order, I now conclude that McDonald has failed to make a substantial showing that denial of two of his claims is debatable among reasonable jurists, that a court could resolve any of the issues raised in those claims differently, or that any question raised in those claims deserves further proceedings. Consequently, a certificate of appealability is denied as to McDonald's claims for § 2255 relief that I denied. *See* 28 U.S.C. § 2253(c)(1)(B); *Miller-El*, 537 U.S. at 335-36; *Cox*, 133 F.3d at 569.

THEREFORE, no certificate of appealability will issue for any claim or contention in this case.

IT IS SO ORDERED.

DATED this 15th day of October, 2018.

Mark W. Bennett

MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

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

CEDRIC MCDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C 17-3057-MWB
(CR 14-3056-MWB-1)

OPINION AND ORDER REGARDING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE

This case is before me on petitioner Cedric McDonald's June 23, 2017, *pro se* Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct A Sentence By A Person In Federal Custody (docket no. 1), as amended with the assistance of counsel, *see* Movant's Merits Brief (docket no. 19). In his § 2255 Motion, as amended, McDonald challenges March 17, 2015, conviction by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1), and his June 30, 2015, sentence to 210 months of imprisonment, as an armed career criminal.[1] McDonald argues that his trial and appellate counsel was ineffective in failing to raise a challenge to his prior burglary conviction, under Iowa law, as a predicate offense for a sentencing enhancement under the Armed Career Criminal Act (ACCA), pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Taylor v. United States*, 495 U.S. 575 (1990). He contends that,

[1] The jury acquitted McDonald of a second charge of possession of a stolen firearm.

without the improper ACCA enhancement, his maximum sentence should have been 120 months. McDonald also claims that trial counsel was ineffective for failing to challenge the determination that two prior second-degree robbery convictions, under Iowa law, were also predicate ACCA offenses. Finally, McDonald challenges his conviction on the ground that his trial counsel was ineffective for failing to object to the court's use of a video that addressed racial prejudice, but which McDonald contends actually tainted the jury.

On March 12, 2018, the respondent filed its Response to McDonald's § 2255 Motion. As to McDonald's first claim for relief concerning counting the prior burglary conviction as an ACCA predicate offense, the respondent states that it "does not resist [McDonald's] request for relief insofar as he requests a sentence below the 15-year mandatory minimum sentence set forth in the ACCA," because, "[i]f [McDonald] were sentenced today, the maximum statutory sentence he might receive would be 10 years' imprisonment." Thus, the respondent states that McDonald's "term of imprisonment now may be reduced to a sentence of 10 years' imprisonment or less, either by correcting the sentence, or through vacating or setting aside his present sentence and holding a new sentencing hearing." On the other hand, the respondent argues that McDonald's challenge to counting the robbery convictions as predicate ACCA offenses should be denied, because it was not stated in his timely *pro se* § 2255 Motion and does not "relate back," because it is entirely new. The respondent also argues that McDonald's challenge to use of the video is without merit.

As to McDonald's claim concerning use of his prior burglary conviction as a predicate offense for an ACCA enhancement, I agree with the parties that McDonald is entitled to relief from his sentence pursuant to § 2255. "Section 2255 [of Title 28 of the United States Code] 'was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.'" *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011)

(en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)). Specifically, § 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). A petitioner is entitled to § 2255 relief for counsel's ineffective assistance, if counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

I agree that counting the burglary offense as a predicate ACCA offense is now clearly improper in light of *Mathis*, *Descamps*, and *Taylor*, and that counsel was ineffective in failing to recognize that *Descamps*, in particular, warranted asserting a challenge to counting that offense. Counsel's deficient performance was also clearly prejudicial, as it resulted in an increase of McDonald's sentence from no more than 120 months to at least 180 months pursuant to the ACCA enhancement. Here, I conclude that the appropriate relief is to correct McDonald's sentence to 120 months, the maximum he could have incurred if he were sentenced today. *See* 28 U.S.C. § 2255(a) permitting the court to "vacate, set aside, or correct the sentence"). No resentencing hearing is required, because, in light of my consideration of the 18 U.S.C. § 3553(a) factors and the presentence investigation report at McDonald's original sentencing, there is no likelihood that I would resentence McDonald below the maximum sentence now applicable. Relief on this claim is **granted** to the extent of correction of McDonald's sentence to 120 months.

I conclude that McDonald is not entitled to relief on his claim that his trial counsel was also ineffective in failing to challenge the counting of his two robbery convictions as predicate ACCA offenses. I agree with the respondent that this claim was not timely asserted in McDonald's original *pro se* § 2255 Motion and that it does not "relate back" to his timely claim. *See Mayle v. Felix*, 545 U.S. 644 (2005). More importantly, because McDonald has successfully challenged his predicate burglary offense as improperly counted, it is immaterial whether the robberies were also improperly counted as the other two predicate offenses. Relief on this claim is **denied**.

Finally, I find McDonald's challenge to the video used during jury selection to be without merit. McDonald argues that, although the video was used to attempt to eliminate racial prejudice and to make jurors aware of their own implicit racial biases, it tainted the jury, because it is only shown where a person of color is on trial. He also complains that I did not obtain his consent to show the video during jury selection.

I find that *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), upon which McDonald relies, is instructive, here, but that it does not require the relief McDonald seeks. In *Rosales-Lopez*, the Court explained,

> Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*.

Rosales-Lopez, 451 U.S. at 189. The Court wrote,

> In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. *Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.*

Rosales-Lopez, 451 U.S. 182, 191 (1981) (footnote omitted; emphasis added). McDonald has pointed to absolutely nothing to indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury, let alone that the video caused or exacerbated that influence. *Id.* McDonald has also pointed to no case law suggesting that counsel's failure to object to the video was deficient or prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). Indeed, McDonald has pointed to absolutely nothing to indicate that the video failed its intended purpose of helping to eliminate racial prejudice and to make jurors aware of their own explicit and implicit racial biases. Even if I had not shown the video, I always discuss race with potential jurors when race is salient in the case, as it was here, where the defendant was a member of a racial minority. Moreover, contrary to McDonald's assertion, the video is also used to discuss the presumption of innocence and the importance of keeping an open mind until the jurors hear and see all the evidence and deliberate. McDonald is also wrong that I only use the video with minority defendants—I have used it in all criminal cases for nearly a decade. Also, it was no surprise to defense counsel, because he has tried cases where I have used the video and was well aware of it. Thus, relief on this claim is **denied**.

THEREFORE, upon the foregoing, petitioner Cedric McDonald's June 23, 2017, *pro se* Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct A Sentence By A Person In Federal Custody (docket no. 1), as amended with the assistance of counsel, *see* Movant's Merits Brief (docket no. 19), is **granted in part and denied in part**, as follows:

1. The part of the § 2255 Motion claiming ineffective assistance of trial and appellate counsel for failing to raise a challenge to McDonald's prior burglary conviction, under Iowa law, as a predicate offense for a sentencing enhancement under the Armed Career Criminal Act (ACCA), is **granted** to the extent that McDonald's sentence of 210

months is **hereby corrected** to 120 months, the maximum sentence that could have been imposed without the ACCA enhancement.

2. The part of the § 2255 Motion claiming ineffective assistance of counsel for failing to challenge the determination that two prior second-degree robbery convictions, under Iowa law, were also predicate ACCA offenses, is **denied**.

3. The part of the § 2255 Motion claiming ineffective assistance of counsel for failing to object to the court's use of a video that addressed racial prejudice is **denied**.

IT IS SO ORDERED.

DATED this 20th day of August, 2018.

Mark W. Bennett

MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

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

CEDRIC MCDONALD, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	NO. C17-3057-MWB (CR 14-3056-MWB-1) JUDGMENT

DECISION BY COURT: This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Judgment is entered in accordance with the attached Order.

DATED: This 20th day of August, 2018

ROBERT L. PHELPS
Clerk

/s/ mml
(By) Deputy Clerk

APPROVED BY:

Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT JUDGE

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

CEDRIC MCDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C 17-3057-MWB
(CR 14-3056-MWB-1)

OPINION AND ORDER REGARDING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE

This case is before me on petitioner Cedric McDonald's June 23, 2017, *pro se* Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct A Sentence By A Person In Federal Custody (docket no. 1), as amended with the assistance of counsel, *see* Movant's Merits Brief (docket no. 19). In his § 2255 Motion, as amended, McDonald challenges March 17, 2015, conviction by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1), and his June 30, 2015, sentence to 210 months of imprisonment, as an armed career criminal.[1] McDonald argues that his trial and appellate counsel was ineffective in failing to raise a challenge to his prior burglary conviction, under Iowa law, as a predicate offense for a sentencing enhancement under the Armed Career Criminal Act (ACCA), pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Taylor v. United States*, 495 U.S. 575 (1990). He contends that,

[1] The jury acquitted McDonald of a second charge of possession of a stolen firearm.

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

CEDRIC MCDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C17-3057-MWB
No. CR14-3056-MWB

ORDER SETTING DEADLINE FOR RESPONDENT'S RESPONSE TO PETITIONER'S *PRO SE* MOTION TO VACATE SENTENCE AND JUDGMENT PURSUANT TO 28 U.S.C. § 2255

This case is before me on petitioner Cedric McDonald's *pro se* Motion To Vacate Sentence and Judgment Pursuant to 28 U.S.C. § 2255 (docket no. 1), and Motion for Appointment of Counsel (docket no. 2). I have conducted the required review under Rule 4(b) of the Rules Governing Section 2255 Proceedings and concludes that summary dismissal of petitioner's § 2255 motion is not appropriate at this time. *See Blackledge v. Allison*, 431 U.S. 63, 75-76(1977) (making clear that summary dismissal is appropriate where the allegations are vague or conclusory, palpably incredible, or patently frivolous or false). Accordingly, respondent United States is directed to file either an answer in accordance with Rule 5(b) of the Rules Governing Section 2255 Proceedings or an appropriate motion under Federal Rule of Civil Procedure 12 **on or before October 5, 2017**. *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings. In the event that an answer is filed by respondent United States, I will establish by subsequent order a briefing schedule.

McDonald's *pro se* Motion for Appointment of Counsel is granted. The Clerk of Court is directed to appoint counsel to represent petitioner McDonald on his Motion To Vacate Sentence and Judgment Pursuant to 28 U.S.C. § 2255.

IT IS SO ORDERED.

DATED this 3rd day of August, 2017.

Mark W. Bennett

MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA