Appendix: A

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.
David Lee Emmert Jr.

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:11-cr-00116-001

USM Number: 13155-030

Stephen A. Swift
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. Two of the Indictment filed December 13, 2011

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252(a)(4)(B), 2252(b)(2)	Possession of Child Pornography	02/12/2010	Two

☐ See additional count(s) on page 2

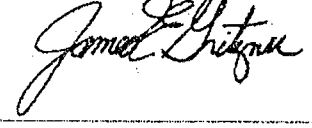
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) One of the Indictment ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 20, 2014
Date of Imposition of Judgment



Signature of Judge

James E. Gritzner, Chief U.S. District Judge
Name of Judge Title of Judge

August 20, 2014
Date

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DEFENDANT: David Lee Emmert Jr.
CASE NUMBER: 3:11-cr-00116-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 months on Count One of the Indictment filed December 13, 2011

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: David Lee Emmert Jr.
CASE NUMBER: 3:11-cr-00116-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
Ten years on Count One of the Indictment filed December 13, 2011

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☑ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional condition on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation office;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

A

DEFENDANT: David Lee Emmert Jr.
CASE NUMBER: 3:11-cr-00116-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a sex offender treatment program, to include psychological testing and a polygraph examination, as directed by the U.S. Probation Officer. The defendant shall also abide by all supplemental conditions of sex offender treatment, to include abstaining from alcohol. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. Sex offender assessments and treatment shall be conducted by therapists and polygraph examiners approved by the U.S. Probation Office, who shall release all reports to the U.S. Probation Office. The results of a polygraph examination will not be used for the purpose of revocation of supervised release. If disclosure is required by mandatory reporting laws, polygraph results will be reported to appropriate treatment personnel, law enforcement, and related agencies with the approval of the Court. If polygraph results reveal possible new criminal behavior, this will be reported to the appropriate law enforcement and related agencies after obtaining approval from the Court.

The defendant shall not have any contact (personal, electronic, mail, or otherwise) with any child under the age of 18, including in employment, without the prior approval of the U.S. Probation Officer. If contact is approved, the defendant must comply with any conditions or limitations on this contact, as set forth by the U.S. Probation Officer. Incidental contact in the course of daily commercial transactions is permissible.

The defendant shall not contact the victims, nor the victims' families without prior permission from the U.S. Probation Officer.

The defendant shall not view or possess any form of sexually stimulating pornography, correspond with anyone in the business of providing such material, or enter adult entertainment venues where sexually stimulating pornography is the primary product(s) for purchase or viewing.

The defendant shall obtain residences as approved by the U.S. Probation Officer. The defendant shall notify the U.S. Probation Office of any locations where the defendant receives mail or like matter. The defendant shall not obtain a new mailing address, post office box, or the facility of any private business for residence or postal transactions without the prior approval of the U.S. Probation Officer.

The defendant shall not possess or use a computer or any other device with an internal, external, or wireless modem, without the prior approval of the U.S. Probation Officer. If computer use is approved, the defendant shall submit to unannounced examinations of all computer equipment, the installation of monitoring hardware and software, and the possible removal of such equipment for a more thorough inspection. If computer use for employment purposes is approved by the U.S. Probation Officer, the defendant shall permit third party disclosure to any employer or potential employer concerning any computer-related restrictions that are imposed upon the defendant.

The defendant shall submit to a search of his person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

The defendant shall comply with all sex offender laws for the state in which he resides and shall register with the local sheriff's office within the applicable time frame.

The defendant may not possess any type of camera (to include cameras within cellular telephones) or video recording device without the prior approval of the U.S. Probation Officer.

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AO 245B (Rev. 09/11) Judgment in a Criminal Case
vl Sheet 5 — Criminal Monetary Penalties

DEFENDANT: David Lee Emmert Jr.
CASE NUMBER: 3:11-cr-00116-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 500.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
DC	$500.00	$500.00	
TOTALS	$500.00	$500.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: David Lee Emmert Jr.
CASE NUMBER: 3:11-cr-00116-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 600.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

A Black WD external hard drive (SN: WCAUK0053961); a HP black laptop and power cord (SN: CNF7235244); a HP silver computer tower (SN: MXK512OW9J; a Black WD hard drive (SN: WMAL73714372); and a Logitech webcame (SN: LNA43201570).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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Appendix: B

United States of America, Plaintiff - Appellee v. David Lee Emmert, Jr., Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2016 U.S. App. LEXIS 10811
No. 14-2969
January 15, 2016, Submitted
June 15, 2016, Filed

Editorial Information: Prior History

Appeal from United States District Court for the Southern District of Iowa - Davenport.

Counsel For United States of America, Plaintiff - Appellee: Clifford R. Cronk, Assistant U.S. Attorney, U.S. Attorney's Office, Davenport, IA.

David Lee Emmert, Jr., Defendant - Appellant, Pro se, Marion, IL.

For David Lee Emmert, Jr., Defendant - Appellant: Stephen Arthur Swift, Klinger & Robinson, Cedar Rapids, IA.

Judges: Before WOLLMAN, MELLOY, and COLLOTON, Circuit Judges.

CASE SUMMARY Evidence of defendant's prior sexual abuse conviction and alleged abuse of a minor was admissible under Fed. R. Evid. 414 at his trial for possession of child pornography; enhancement of his sentence under 18 U.S.C.S. § 2252(b)(2) based on his sexual abuse conviction at age 17 did not violate the Eighth Amendment.

OVERVIEW: HOLDINGS: [1]-Admission at defendant's trial for possession of child pornography of evidence of his prior conviction for sexual abuse of his sister and his alleged sexual abuse of his daughter was proper under Fed. R. Evid. 414. The evidence showed he had a propensity for exploiting young girls and connected him to pornographic images found on his computer; [2]-Enhancement of defendant's sentence under 18 U.S.C.S. § 2252(b)(2) based on his prior conviction, which occurred when he was 17, did not violate the Eighth Amendment. Convictions for crimes committed as a juvenile could be used in determining whether the § 2252(b)(2) enhancement applied; [3]-The district court did not err in ordering defendant to pay restitution to one victim to cover medical expenses, as the victim received treatment subsequent to the time defendant possessed images of her.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Evidence > Relevance > Sex Offenses > Similar Crimes > Child Molestation Cases
Evidence > Relevance > Confusion, Prejudice & Waste of Time

A court of appeals reviews evidentiary rulings for abuse of discretion. Fed. R. Evid. 414 provides that in a criminal case in which a defendant is accused of child molestation, the court may admit evidence that

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the defendant committed any other child molestation. Fed. R. Evid. 414(a). "Child molestation" includes acts relating to child pornography which are prohibited by 18 U.S.C.S. ch. 110. Rule 414(d)(2)(B). The evidence can be used for any purpose for which it is relevant, including the defendant's propensity to commit such offenses. Evidence of a prior child molestation is relevant if it was committed in a manner similar to the charged offense. If the evidence is relevant, admissibility hinges on whether the testimony's probative value is substantially outweighed by one or more factors enumerated in Fed. R. Evid. 403. In evaluating admissibility of Rule 414 evidence, placing limits on the testimony and providing cautionary jury instructions may indicate that the district court properly balanced the probative value with the risk of unfair prejudice.

Evidence > Relevance > Sex Offenses > Similar Crimes > Child Molestation Cases

Congress placed no time limit on Fed. R. Evid. 414 evidence.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation

A court of appeals reviews claims of constitutional error and issues of statutory construction de novo.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography
Criminal Law & Procedure > Sentencing > Ranges

18 U.S.C.S. § 2252(b)(2) increases the minimum and maximum sentences in child pornography cases where the defendant has a prior sexual abuse conviction.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Ranges
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment

The Eighth Amendment does not prohibit the use of a juvenile adjudication as the basis for applying the 18 U.S.C.S. § 2252(b) sentencing enhancement.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography
Criminal Law & Procedure > Sentencing > Ranges
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment

Armed Career Criminal Act sentencing enhancements based on convictions for crimes committed as a juvenile do not violate the Eighth Amendment. Such convictions necessarily may be considered in determining whether the 18 U.S.C.S. § 2252(b) enhancement applies.

Criminal Law & Procedure > Sentencing > Restitution

A court of appeals reviews a district court's decision to award restitution for an abuse of discretion and the district court's finding as to the amount of loss for clear error.

Criminal Law & Procedure > Sentencing > Restitution
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography

Pursuant to 18 U.S.C.S. § 2259, restitution is proper only to the extent that the defendant's offense

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proximately caused the victim's losses. The unlawful conduct of everyone who reproduces, distributes, or possesses the images of a victim's abuse plays a part in sustaining and aggravating the tragedy. In determining the amount of restitution owed to a child pornography victim by a defendant, district courts may consider a number of factors, though they should not treat the inquiry as a purely mathematical or mechanical exercise.

Opinion

Opinion by: MELLOY

Opinion

MELLOY, Circuit Judge.

David **Emmert**, Jr., was convicted by a jury of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and 2252(b)(2). The district court1 sentenced **Emmert** to 240 months in prison and ordered him to pay $500 in restitution to one of his victims. **Emmert** appeals, arguing the district court erred in: (1) admitting evidence of his prior sexual abuse conviction and uncharged sexual abuse of a minor; (2) enhancing his sentence based on an adult conviction for sexual assault that occurred when **Emmert** was 17 years old; and (3) ordering restitution. We affirm.

I. Background

This case began as a sexual abuse investigation in February 2010 in response to allegations that **Emmert** had sexually abused his 13-year-old daughter, LE. On February 12, 2010, officials obtained a search warrant and conducted a search of Emmert's home. During the search, police found a desktop computer with a webcam, a laptop computer, 39 DVDs, and an external hard drive. The DVDs contained sexually explicit images and videos of JS, a girl who had been fourteen or fifteen years old when the images were recorded. The external hard drive contained images of at least three different minor females: DF from Ohio, LM from Georgia, and DC from Nevada. All three were thirteen or fourteen years old when the images were recorded. Investigators also found programs related to hacking and webcam infiltration on Emmert's desktop computer. During the course of the investigation, officials learned **Emmert** had been convicted for sexually abusing his younger sister, EB, in 1989, when **Emmert** was 17.

On December 11, 2011, a grand jury indicted **Emmert** on charges of sexual exploitation of a child, in violation of 18 U.S.C. §§ 2251(a), 2251(e), and 3559(e), and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and 2252(b)(2). On December 21, 2011, the government advised **Emmert** that he faced increased penalties if convicted due to his prior conviction for sexually abusing EB. Specifically, the potential penalty for possession of child pornography increased from a ten-year maximum sentence to a ten-year minimum sentence and a twenty-year maximum sentence.

Before trial, the government dismissed the charge for sexual exploitation of a child. **Emmert** also filed two motions in limine, suggesting he would face unfair prejudice if the government were allowed to introduce evidence of: (1) his 1989 conviction for sexual abuse of EB, and (2) the uncharged allegations of sexual abuse of LE. The district court denied Emmert's motions and permitted the government to use evidence relating to EB and LE under Rule 414. The district court provided a cautionary instruction to jurors regarding this evidence.

A jury trial commenced on May 5, 2014, regarding the remaining count of possession of child pornography. EB, LE, and four minor females testified against **Emmert**. JS testified about her two-year online relationship with **Emmert**, during which he threatened to hack her computer if she did not provide certain sexually explicit images. LM and DC testified that they were asked to perform sexually explicit acts over webcam and knew someone was watching, but they did not know they were being recorded. DC learned she was being recorded when her mother found out about an explicit video of her posted on a website. LM also learned videos of her had been recorded from other people who saw the videos online. DF testified she did not know or believe that anyone was watching her through her webcam until **Emmert** contacted her and threatened to publish explicit images of her unless she followed his orders. When DF created a new email account to escape Emmert's harassment, **Emmert** eventually tracked her down and published 135 explicit images of DF on the social networking and photo sharing site, Flickr, as punishment. An investigator testified that images of JS, DF, LM, and DC were found on Emmert's external hard drive and his DVDs.

On May 9, 2014, the jury found **Emmert** guilty of possessing child pornography, including at least 545 videos and 180 images. The district court sentenced **Emmert** to 240 months in prison and a lifetime of supervised release and ordered him to pay $500 in restitution to the family of DC to cover medical expenses related to suicide attempts and cutting herself. **Emmert** appeals.

II. Discussion

Emmert argues the district court erred in: (1) admitting Rule 414 evidence of a prior sexual abuse conviction and uncharged sexual abuse of a minor; (2) enhancing his sentence based on an adult conviction of sexual assault that occurred when **Emmert** was 17 years old; and (3) ordering restitution.

A. Rule 414 Evidence

We review evidentiary rulings for abuse of discretion. United States v. Never Misses A Shot, 781 F.3d 1017, 1027 (8th Cir. 2015). Rule 414 provides: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation." Fed. R. Evid. 414(a). "Child molestation" includes acts relating to child pornography which are prohibited by 18 U.S.C. chapter 110. Id. 414(d)(2)(B). The evidence can be used for any purpose for which it is relevant, "including the defendant's propensity to commit such offenses." United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001). Evidence of a prior child molestation is relevant if it was "committed in a manner similar to the charged offense." Never Misses A Shot, 781 F.3d at 1027 (quoting United States v. Rodriguez, 581 F.3d 775, 796 (8th Cir. 2009)). If the evidence is relevant, "admissibility hinges on whether the testimony's probative value is substantially outweighed by one or more factors enumerated in Rule 403." Id. In evaluating admissibility of Rule 414 evidence, placing limits on the testimony and providing cautionary jury instructions may indicate that the district court properly balanced the probative value with the risk of unfair prejudice. See United States v. Crow Eagle, 705 F.3d 325, 328 (8th Cir. 2013).

Here, **Emmert** argues his prior conviction for sexual abuse of EB and the alleged sexual abuse of LE are too dissimilar to be relevant to the instant charged offense of possession of child pornography. In particular, **Emmert** contends the nature of the offenses are different because he knew EB and LE were minors, but did not know three of the alleged victims of child pornography were minors. In addition, **Emmert** claims that his conviction for sexually abusing EB is too remote to the current proceeding and that the testimony of LE regarding the uncharged sexual abuse is unreliable. Because EB and LE were the first witnesses called by the government, **Emmert** contends their testimony was highly prejudicial in shaping the jury's first impression of him.

As the district court concluded, the evidence that **Emmert** sexually abused EB and LE is probative of Emmert's interest in underage girls. Emmert's sexual abuse and child pornography victims were similar in age, and **Emmert** performed or possessed images depicting similar explicit acts on each victim. In this way, Emmert's prior conduct shows he has a propensity for exploiting young girls and connects him to the pornographic images found on his hard drive. The district court tempered the prejudicial effect of this evidence by providing a jury instruction on propensity evidence. Moreover, for Rule 414 purposes, it does not matter that Emmert's prior sexual abuse of EB occurred up to twenty years before the instant offense. See Gabe, 237 F.3d at 960 (noting that Congress placed no time limit on Rule 414 evidence and permitting evidence of sexual abuse from twenty years ago). Thus, we affirm the district court's decision to admit evidence of Emmert's prior acts of sexual abuse.

B. Sentencing Enhancement

Next, **Emmert** argues the district court violated the Eighth Amendment when it imposed a sentencing enhancement pursuant to 18 U.S.C. § 2252(b)(2).2 "We review claims of constitutional error and issues of statutory construction de novo." United States v. Smith, 656 F.3d 821, 826 (8th Cir. 2011) (quoting Royal v. Kautzky, 375 F.3d 720, 722 (8th Cir. 2004)).

At oral argument, Emmert's counsel cited United States v. Sykes, 809 F.3d 435 (8th Cir. 2016), in which we considered whether the Eighth Amendment prohibits the use of a juvenile court conviction for enhancement purposes under the Armed Career Criminal Act ("ACCA"). Although similar to the issue here, Sykes does not foreclose arguments that the § 2252(b) enhancement is distinguishable from the ACCA enhancement. Rather, we look to United States v. Woodard, 694 F.3d 950, 953 (8th Cir. 2012), where we held that the Eighth Amendment does not prohibit the use of a juvenile adjudication as the basis for applying the § 2252(b) sentencing enhancement. In so holding, we relied on a prior holding that a juvenile adjudication may constitute a prior conviction with regard to the ACCA sentencing enhancement. See United States v. Smalley, 294 F.3d 1030, 1031 (8th Cir. 2002). In Woodard, we "appl[ied] the [Smalley] analysis . . . [to] hold that a juvenile adjudication may be considered a prior conviction under 18 U.S.C. § 2252(b)." Woodard, 694 F.3d at 953.

Here, we are presented with a constitutional, rather than statutory, question. As discussed above, we have determined that ACCA sentencing enhancements based on convictions for crimes committed as a juvenile do not violate the Eighth Amendment. Sykes, 809 F.3d at 440; United States v. Jones, 574 F.3d 546, 553 (8th Cir. 2009). Considering the logic of Woodard, such convictions necessarily may be considered in determining whether the § 2252(b) enhancement applies. Therefore, we conclude that the district court did not err when it considered Emmert's prior conviction for sexual assault in applying the § 2252(b) sentencing enhancement.

C. Restitution

Finally, **Emmert** argues the district court erred in ordering restitution when no causal connection between his actions and DC's losses had been established. "We review 'the district court's decision to award restitution for an abuse of discretion and the district court's finding as to the amount of loss for clear error.'" United States v. Beckmann, 786 F.3d 672, 681 (8th Cir. 2015) (quoting United States v. Kay, 717 F.3d 659, 666 (8th Cir. 2013)). Pursuant to 18 U.S.C. § 2259, "[r]estitution is proper . . . only to the extent that the defendant's offense proximately caused the victim's losses." Id. at 682 (citing Paroline v. United States, 134 S. Ct. 1710, 1720, 188 L. Ed. 2d 714 (2014)). The Supreme Court noted, "The unlawful conduct of everyone who reproduces, distributes, or possesses the images of [a] victim's abuse . . . plays a part in sustaining and aggravating th[e] tragedy." Paroline, 134 S. Ct. at 1726. "[I]n determining the amount of restitution owed to a child pornography victim by a defendant, district courts may consider a number of factors, though they should not treat

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the inquiry as a purely mathematical or mechanical exercise." United States v. Evans, 802 F.3d 942, 950 (8th Cir. 2015).

Emmert argues the district court should not have ordered restitution because there was no evidence offered at sentencing to support a basis for awarding restitution. As documented in Emmert's PSR and at oral argument, the parties disagree as to when DC was informed that **Emmert** possessed images of her and when she sought treatment.3 **Emmert** contends that DC's treatment predates the time when DC became aware that **Emmert** possessed the pornographic images of her. As such, **Emmert** concludes that he cannot be held responsible for a loss arising before he committed the instant offense. In awarding restitution, the district court concluded: "Because this is a rather modest claim under all of the circumstances and while it is not related to specific medical care, the fact of some emotional distress that might have supported the need for some medical care, I think the amount of $500 . . . is adequately supported by the record."

During trial, DC testified that after learning the explicit video of her was posted online, she felt "ashamed and really guilty." DC's mother also testified that DC "was devastated about the fact that all of these strange people were out there watching her." Considering this testimony, the mere absence of evidence detailing the specific nature and timing of medical expenses is not sufficient to show an abuse of discretion. Further, Emmert's causation arguments are unavailing in light of Paroline, which recognized the existence of ongoing harm each time someone possesses images of a victim. At trial, the jury found beyond a reasonable doubt that **Emmert** possessed child pornography between 2005 and February 2010. For purposes of considering restitution, there was evidence at trial that **Emmert** possessed a video of DC as of June 9, 2008. R. Doc. 194, at 140-41, 203, 210. Contrary to Emmert's contentions, the government need not prove that DC incurred a loss after she learned Emmert's identity in 2011. Rather, it is sufficient to show that DC received treatment subsequent to the time **Emmert** possessed images of her. Because the record supports a finding that **Emmert** possessed images in June 2008, and DC requested restitution for treatment and services provided in 2009 and 2010, the district court did not abuse its discretion in concluding that **Emmert** proximately caused DC's loss. Finally, despite the fact that DC has not documented each expense, the district court was entitled to rely on the testimony and a basic knowledge of medical expenses in determining that $500 in restitution was a reasonable and likely underestimated sum for the type of medical and psychological treatment DC required. Thus, we conclude that the district court did not abuse its discretion in awarding DC restitution, nor did the district court clearly err in determining the amount of the loss to be $500.

III. Conclusion

Based on the foregoing, we affirm the judgment of the district court.

Footnotes

1

The Honorable James E. Gritzner, United States Chief District Judge for the Southern District of Iowa.

2

Section 2252(b)(2) increases the minimum and maximum sentences in child pornography cases where the defendant has a prior sexual abuse conviction.

3

The Victim Impact portion of Emmert's PSR included DC's claim for "$500 in restitution to cover her medical expenses (copayments and out of pocket expenses) from suicide attempts and cutting herself." However, the PSR reflects that "[Emmert] object[ed] . . . , noting that DC's request involve (sic) her medical care and treatment in 2009 and 2010 and that it was not until 2011 when it was discovered that [Emmert] possessed child pornography involving DC."

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Appendix: C

KLINGER, ROBINSON & FORD, L.L.P.

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June 23, 2016

LEGAL MAIL–Open ONLY in the Presence of the Inmate

David Lee Emmert, Jr. – Register #13155-030
USP Marion
United States Penitentiary
P.O. Box 1000
Marion, IL 62959

Dear Mr. Emmert:

I am in receipt of your letter dated June 7, 2016. I have reviewed that letter and made a review of prior communications I've had with you on this case, particularly as it relates to this issue. I have also done some updated research. Enclosed you will find a copy of the recent decision from the 9th Circuit, *United States v. Sullivan*, 797 F.3d 623 (9th Cir., July 29, 2015). In that case the 9th Circuit concluded that the California convictions that that defendant had would qualify as the appropriate predicate offenses. In making this conclusion, the Sullivan Court cites back to the *Taylor v. United States* Supreme Court case, *Taylor v. United States*, 495 U.S. 575, which talks about the general principal of applying a federal generic definition of the crime, and then comparing the elements of the state offense with that federal generic definition. In addition, in 18 U.S.C. §2252 the language that supports the enhancement provides as follows:

> "...*relating* to aggravated sexual abuse, sexual abuse, or abuse of sexual conduct involving a minor or ward,..."

The term *relating* has been given a broad definition, as recognized in the Sullivan case and previously recognized in the 8th Circuit. In addition, I believe the 8th Circuit may have also recently addressed this issue.

The *Johnson* case struck out a portion of the Armed Career Criminal Act, specifically that portion that deals with the "or otherwise involves conduct that presents a serious potential risk of personal injury to another." I believe this was struck down as it was considered to be void due to the vagueness and lack of specific definition. That has not been extended to this statutory framework.

Attachment to Legal Mail
1 of 2

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There is a pending case from Iowa that may add some clarification in this area. The case of *United States v. Mathis* was argued a couple months ago, and decision may come out any day now. This deals with the Iowa burglary statutes and whether or not they can be predicate offenses under the Armed Career Criminal. Again, this deals with the categorical definitions of *Taylor* and what burglary convictions may end up qualifying. Potentially there may be some arguments raised as to the lack of federal statutory definitions of the terms in 18 U.S.C. §2252. Specifically, the terms of "aggravated sexual abuse", "sexual abuse" and "abuse of sexual conduct" are not specifically defined. Congress has relied upon the case law developed to include those state court convictions as sufficient to be predicate offenses.

Brief and Argument has been conducted in your case. We have not directly addressed or relied upon this issue. We addressed it as a potential violation of the 8th Amendment for cruel and unusual punishment. This argument related to the fact that your enhancement was based on a conviction occurring prior to your turning age 18. That is not the same legal argument as the *Johnson* argument.

I do not see the basis for the *Johnson* case to be applicable in your case. You may want to raise that in the event you are unsuccessful in this appeal as an alleged error or ineffective assistance of counsel.

Yours truly,

KLINGER, ROBINSON & FORD, L.L.P.

Stephen A. Swift

SAS:grl
Enclosure
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Appendix D

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

DAVID LEE EMMERT, JR., Petitioner - Movant,	)	
vs.	)	Case No. 4:18-cv-92-JEG
UNITED STATES OF AMERICA, Respondent.	)	

REPLY TO COUNSEL'S RESPONSE, AND
MOTION FOR LEAVE TO AMEND § 2255

David Emmert appears pro se to reply to counsel's response (Doc. No. 18), and moves the Honorable Court to amend his previously filed petition under 28 U.S.C. § 2255. Movant proposes only one ground for relief:

I PROPOSED GROUND

Whether, in Light of Mathis v. United States, 136 S.Ct. 2243 (June 23, 2016), Mr. Emmert's Fifth Amendment (Due Process), or Sixth Amendment (Effective Assistance of Counsel), Rights Are in Violation Because His Prior State-Court Conviction Under Illinois Statute 720 ILCS 5 / 11-1.20 (was 720 ILCS 5 / 12-13) [Criminal Sexual Assault in § 12-13(a)(3), Chapter 38, Illinois Revised Statute (1989)], Cannot Qualify to Enhance His Statutory Mandatory Minimum Sentence.

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II REASONS THE PROPOSED GROUND IS A VALID REQUEST

1. Mathis was decided on June 23, 2016, just eight days after Mr. Emmert's appeal order was issued by the Eighth Circuit. United States v. Emmert, 825 F.3d 906 (8th Cir. 2016).

2. Emmert received his current counsel's "Response to Court's Order No. 7" (Doc. No. 18) on August 9, 2018.**

3. The combined effect of having considerable time to reflect on his writings thus far, coupled with current counsel Adam Zenor's effectively throwing in the towel under Rule 11 of the Fed. R. Civ. P., have together produced an obvious and singular claim: While his appellate attorney could not have known of Mathis prior to the Eighth Circuit's decision, he did have time under the 14-day window of Rule 35 and Rule 40 of the Federal Rules of Appellate Procedure to make the argument proposed herein.

4. Even if his appellate counsel cannot be faulted for such an obvious blunder, the instant court may consider the ground a due process violation as described in Mathis itself.

III AUTHORITY IN SUPPORT

The short version of the holding in Mathis that has successfully overturned numerous illegal mandatory minimums across the country, is simply: A state-court prior statute of conviction that enumerates various factual means of committing a single element, rather than one that lists multiple elements disjunctively is indivisible and therefore subject to the categorical approach. Jones v. United States, 870 F.3d 750 (8th Cir. 2017) (Citing Mathis, 136

** Mr. Zenor's assessment missed that Emmert made a sentencing enhancement complaint. That, coupled with the reasons contained herein provide further factual support for this proposed amendment.

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S.Ct. 2243 at 2249, 2253 (2016).

Mathis is not limited in its application to "only" the ACCA. See, for example, Id. at 136 S.Ct. 2251 & *fn.2 (Immigration); see also, United States v. Patterson, U.S. D.C. Minn. 0:17-cv-3537, 2017 U.S. Dist. LEXIS 183460 (on mertis of guidelines (career offender, not ACCA) sentence argument in a 2255 where defense counsel was not ineffective for failing to raise Mathis claim at sentencing because Mathis was decided a year after that.)

Richard Mathis, from Iowa, is a registered sex offender, like Mr. Emmert. Prior state-court sex offenses have often been analyzed and in a few cases been stricken down as inapplicable to enhance a defendant. See, Coleman v. United States, U.S. D.C. W.D. Wis. (10-cv-736, 2016 U.S. Dist. 61610, May 10, 2016) (Wisconsin sexual assault was a crime of violence in 1997, but not so by the time Coleman's petition was filed; Petitition denied for other reasons); United States v. Cazares-Rodriguez, U.S. D.C. S.D. Cal. 3:17-cv-327, May 19, 2017, U.S. Dist. LEXIS 76781 (Relief granted because California statutes for criminal lewd acts upon a child and child molestation categorically do not apply to removal and relief granted striking down applicability of Title 8 U.S.C. § 1101, using Mathis); See also, United States v. Dahl, 833 F.3d 345 (3rd Cir. 2016) (Under Mathis, Delaware's sexual activity with minors statutes became not categorically "sex offense convictions" because the state statute defines "sexual contact" more broadly than the federal statute); Kirk v. United States, U.S. D.C. N.D. Miss. No. 4:05-cr-52 (November 1, 2016) (Georgia's statute for child molestation is no longer a "violent felony" under Mathis).

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IV THE ILLINOIS STATUTE AND WHY, UNDER MATHIS, United States v. Sonnenberg, 556 F.3d 667 (8th Cir. 2009), IS NO LONGER TENABLE UNDER THE CONSTITUTION

The Categorical Approach and Modified Categorical Approach demand the definition of the State Court crimes come from the state of conviction and no-where else. This is the approach the Supreme Court took in Begay v. United States, 128 S.Ct. 1851 (2008), to the definition of a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). At bar, Mr. Emmert's enhancement from the 0-10 year range to the 10-to-20 year range is under 18 U.S.C. § 2252A(b)(2). That statute provides a mandatory minimum sentence for those who have a prior conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor." Since these definitions are not in the enhancement statute 2252A, but rather plainly, obviously, and have common contemporary definitions in the earlier statutes of conviction (not enhancement) in 18 U.S.C. § 2241-43, then, as a matter of federal law, the approach the Supreme Court used in Begay (comparing the state statute to the federal definitions obviously listed in the same chapter of federal definitions of sex offenses), is the approach to use here. Mathis' mandatory use of the categorical approach demands nothing less than exact, strict due process usage such as this.

Emmert's prior conviction in Illinois reads as follows:
"A person commits criminal sexual assualt if that person commits an act of sexual penetration and (1) uses force or threat of force; (2) that the victim knows is unable to understand the nature of the act or is unable to give knowing consent; (3) is a family member of the victim, and the victim is under 18 years of age; or (4) is 17 years of age or over and holds a position of

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trust, authority, or supervision in relation to the victim, and the victim is at least 13 years of age but under 18 years of age." (720 ILCS 5 / 11-1.20).

It is unquestioned that the conviction of record is set forth in paragraph 53 of the Presentence Investigation Report as falling under Section 12-13(a)(3). Section (a)(3) is that part of the conviction of record where the person committing the act "is a family member of the victim, and the victim is under 18 years of age." (PSR ¶53).

Two things to notice. Mr. Emmert's statute of conviction (the only thing relevant here, as looking at what he actually did is not permitted under the Categorical Approach) is not "aggravated sexual assault." That would require a different statutory designation that is not in the record of conviction.

Second, the federal definitions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor" no-where consider the broad scope of activity prohibited by the Illinois Statute: namely, penetrating a family member who is under 18 years of age. Emmert was not convicted of using "force or threat of force." He was not convicted of taking advantage because he was someone "that the victim knows is unable to understand the nature of the act or is unable to give knowing consent." He was not convicted of doing something where he was "17 years of age or over and holds a position of trust, authority, or supervision in relation to the victim, and the victim is at least 13 years of age but under 18 years of age."

The Illinois Statute clearly "enumerates various factual means of committing a single element" (here, mens rea)**. Section 12-13(a)(1-4) will each produce the same conviction with the same penalty range. Subsection (a) (an act of sexual penetration) is the "actus rea" element. Factual means of committing

** or causation, ibid.

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the mens rea element are listed as Subsections (a)(1 through 4), and therefore make the statute of conviction "Indivisible".

This Mathis-based argument is something Emmert's counsel should have made. His trial counsel pointed out the older, sloppier way of analyzing a state-court prior conviction in his sentencing memorandum. (Doc. No. 191 at 8-9) (Citing Descamps v. United States, 133 St. Ct. 2276, 2283-86 (2013). This matters because what once was considered divisible and therefore vulnerable to use of the "modified" categorical approach is no longer tenable.

Clearly, the alternative means of committing the Illinois offense encompasses behavior that both is, and is not, "abusive." Take, for example, the consentual penetration of a step-brother and step-sister who are both 17 years old. That would violate 720 ILCS 5 / 11-1.20 (was section 12-13(a)(3) in 1989). It would not, however, be "abusive" as contemplated by the plain, ordinary, everyday understand of Sonnenberg, nor would it violate the common definitions found in the mandatory federal analogs of 18 U.S.C. § 2241-2248. See, for example, United States v. Osborne, 551 F.3d 718 (7th Cir. 2009).

And it is the enhanced punishment of an aggravated version of the statute that clarifies this. In Mathis, "the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under Apprendi they must be elements." Mathis, 136 S.Ct. 2243 at 2256. The Mathis court went on to emphasize the difference between a jury having to "agree on any circumstance increasing a statutory penalty," and if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission." Id. Thanks to the exhaustive efforts of the PSR, and the reliable record from the state of Illinois, we know (are not guessing) that Mr. Emmert's

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statute of conviction is not "divisible". He was not convicted of 720 ILCS 5. That would be a chapter of several different sexual offenses with a wide range of punishments. It does not stop short, say of listing Section 12-13, either. The state of Illinois statutes have an (a), (b), etc., all with different range of punishments and different elements. No. What we have here, is the very specific statute of conviction of 12-13(a) (sexual penetration), with one range of punishments. And, just so we don't have to go guessing as to which causal mens rea element examples (factual scenarios) were used (some within and some outside the federal crimes relating to abusive sexual issues), what we have is very specific: Sexual penetration between two members of a family, where one is under the age of 18. No implied abuse. No implied force or violence. Just broad examples of bad taste. The statute does not even take the time to narrow it down to incest. It could be between, as we said before, a step-brother and a step-sister, two gay step-siblings, or whatever.

V CONCLUSION

Because the Illinois statute is defined more broadly and is indivisible than is permissible vis-a-vis the federal statutes and common sense, then under Mathis, Mr. Emmert is requesting a merits-based, amended 2255 ground. Mr. Emmert's counsel was Ineffective on appeal, or his Due Process rights are being violated for the continued use of the prior conviction to enhance him with a statutory mandatory minimum.

Of further consideration of the efforts of Mr. Zenor, Emmert cannot contend with a trained attorney and it would cast Emmert in a bad light if he waxed into aggravated animosity. However, while Emmert agrees in part with Zenor's

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assessment, he disagrees that he has not met the burden of cause and prejudice, where cause and prejudice can be met by alleging cumulative attorney error. Most of counsel's response deals with off-handedly dismissing issues already addressed, but fails to confront that these issues were addressed weakly (that is, ineffectively). The Sixth Amendment right to counsel is a different claim than say, a Fourth Amendment search warrant issue and one may argue the latter was ineffectively argued/researched with a "reasonable probability of a different outcome" because of the former, in a 2255. Mr. Emmert respectfully requests that the Honorable and generous court cast its consideration on this point as it decides whether to agree with Mr. Zenor's assessment of the first 2255 efforts.

WHEREFORE, for all of the reasons mentioned above, Mr. Emmert respectfully requests that the Honorable Court GRANT his leave to amend by one Ground (Fed.R.Civ.P.15a-d). and GRANT Mr. Zenor the opportunity to base his own amended grounds "set forth, or attempted to be set forth" in the original complaint. Fed. R. Civ. P., Rule 15.

August 13, 2018
Date Executed

/s/ Dan Emmert
David Emmert, pro se
USM # 13155-030
P.O. Box 1000
Marion, IL 62959

Under penalty of perjury pursuant to 28 U.S.C. § 1746, I hereby swear and verify that the foregoing is true and correct as an affidavit; further, that it has been deposited this day in the institution's internal mail system designed for legal mail, United States Postal Service, first-class postage.

Prepared By:
Eric Welch, paralegal

Certificate of Service

I hereby certify that a copy of the foregoing has been mailed via United States Postal Service, first-class postage prepaid upon the following:

Clifford R. Cronk
Assistant U.S. Attorney
United States Attorney's Office - Davenport
131 East 4th Street, Suite 310
Davenport, IA
52801

Clerk And Sidney P. L. C.
C/O Atty. Austin D. Zenor
600 E Court AVE
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Appendix: E

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

DAVID LEE EMMERT, JR., Movant, vs. UNITED STATES OF AMERICA, Respondent.	**Civil No. 4:18-cv-00092–JEG** **Crim. No. 3:11-cr-00116–JEG-HCA** **ORDER**

David Lee Emmert brought this pro se Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, challenging his conviction and sentence in *United States v. Emmert*, 3:11-cr-00116–JEG-HCA (S.D. Iowa) ("Crim. Case"). The Court appointed counsel to represent Emmert in these § 2255 proceedings. Order, ECF No. 7.

A movant is entitled to an evidentiary hearing on the § 2255 motion "[u]nless the motion and the files and records of the case conclusively show" the movant is not entitled to relief. 28 U.S.C. § 2255(b); *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (standard for evidentiary hearing); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) ("'No hearing is required . . . where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.'") (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008)).

The files and records of the case conclusively show Emmert is not entitled to relief, therefore, no evidentiary hearing is necessary, and the § 2255 motion must be summarily dismissed.

I. PROCEDURAL HISTORY

A jury convicted Emmert of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). J. 1, Crim. Case, ECF No. 198. The Court sentenced Emmert to 240 months in prison. *Id.* at 2. Emmert's conviction and sentence were affirmed on appeal. *United States v. Emmert*, 825 F.3d 906 (8th Cir. 2016).

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In his original pro se § 2255 motion, Emmert asserted multiple grounds for relief. Mot., ECF No. 1. Because it was not clear what claims Emmert was asserting, the Court directed Emmert to amend his pleading. Order 1–2, ECF No. 4. The Court then granted Emmert's request for counsel and directed counsel to file an amended motion. Order 1–2, ECF No. 7.

Rather than amend the motion, counsel filed a report stating none of Emmert's § 2255 claims were viable. Report ¶ 8, ECF No. 18. Emmert then filed a pro se response to counsel's report in which he sought leave to bring "only one ground for relief," that is, a Fifth Amendment claim based on *Mathis v. United States*, 136 S. Ct. 2243 (2016), and a Sixth Amendment claim based on counsel's failure to previously raise a *Mathis*-type claim. Reply 1, ECF No. 19. The Court granted Emmert's motion to amend, dismissed all previous claims, and directed the Government to respond to Emmert's claims. Order 1–2, ECF No. 21.

The Government resists Emmert's claims. Resp., ECF No. 26. Emmert, pro se, filed supplemental materials in support of his claims. Aff., ECF No. 22; Reply, ECF No. 29; and Suppl., ECF No. 32. Counsel for Emmert also filed a response in support of Emmert's claims. Resp., ECF No. 30. The Court has considered all of these documents and materials in its review and ruling on the § 2255 motion.

II. DISCUSSION

A minimum and maximum sentence for a child pornography conviction is imposed if a defendant has a prior state conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). In 1989, Emmert was convicted of criminal sexual assault in Illinois. Final Presentence Investigation Report (PSR) ¶ 53, Crim. Case, ECF No. 188. Based on this conviction, the Government sought enhanced penalties under 18 U.S.C. § 2252(b)(2), which exposed Emmert to at least ten but no more than twenty years in prison. Enhancement Info., Crim. Case, ECF No. 5.

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The Armed Career Criminal Act (ACCA) is another criminal statute that enhances penalties for prior criminal conduct. 18 U.S.C. § 924(e)(1). In order to qualify as a predicate felony under the ACCA, the elements of the crime of conviction must be the same as, or narrower than, the relevant generic offense. *Mathis*, 136 S. Ct. at 2257 (holding Iowa burglary does not satisfy the generic definition of burglary and therefore cannot qualify as a crime of violence). Emmert argues this same analysis should be extended to the enhanced penalties of § 2252(b)(2), that is, his prior Illinois conviction for criminal sexual assault cannot qualify as a predicate felony to enhance his sentence under 18 U.S.C. § 2252(b)(2) because the criminal statute encompasses conduct beyond the generic definitions of "aggravated sexual abuse, sexual abuse, or abusive sexual conduct" listed in the federal statute. ECF No. 19 at 5. Emmert also contends defense counsel was ineffective for failing to raise this claim. *Id.* at 2, 6.

The Government resists the motion, asserting Emmert's claims are procedurally barred, untimely, and without merit. ECF No. 26 at 7–14.

A. Procedural Bar

Emmert raises two claims in his amended complaint. ECF No. 19 at 1. First, he asserts the application of *Mathis* to his case demonstrates his sentence violates the Due Process Clause. *Id.* Second, he contends defense counsel was ineffective for failing to raise this *Mathis*-type claim. *Id.* The Government contends Emmert is procedurally barred from raising his claims in this § 2255 motion because he failed to raise them on direct appeal. ECF No. 26 at 7.

Claims of ineffective assistance of counsel are generally reserved for § 2255 review. *United States v. Sanchez-Gonzalez*, 643 F.3d 626, 628 (8th Cir. 2011) (reviewing on direct appeal only those "exceptional cases" where relevant factual record has been fully developed, where failure to consider claim on direct appeal would constitute plain miscarriage of justice, or

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alleged error is readily apparent). Thus, raised in the context of ineffective assistance of counsel, the claim is not procedurally barred.

Neither does the Court find that the *Mathis* argument, presented as an independent claim, should be procedurally defaulted. Generally, where a defendant fails to raise a claim on direct appeal, he procedurally defaults the claim for purposes of collateral review unless he can demonstrate cause and prejudice for failing to do so. *Bousley v. United States*, 523 U.S. 614, 622 (1998). "'Absent unusual circumstances, a showing of ineffective assistance of counsel satisfies both cause and prejudice.'" *Walking Eagle v. United States*, 742 F.3d 1079, 1082 (8th Cir. 2014) (quoting *United States v. Frady*, 456 U.S. 152, 167–68 (1982)). The Supreme Court also has excused procedural default where a claim was so novel that a legal basis was not reasonably available at the time of appeal. *Reed v. Ross*, 468 U.S. 1, 13 (1984).

At the time of Emmert's trial and direct appeal, the law regarding qualifying predicate felonies as used to enhance criminal penalties was just beginning to evolve with respect to the ACCA. *See Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (holding residual clause of ACCA to be unconstitutionally vague). Although *Mathis* had yet to be decided, Emmert's sentencing counsel did raise the issue as to whether a modified categorical approach could be applied to the statutory definition of the prior offense with respect to the term "minor." *See* Def.'s Sent. Mem. 8–10, Crim. Case, ECF No. 191 (discussing application of *Taylor v. United States*, 495 U.S. 575 (1990), and *Descamps v. United States*, 570 U.S. 254 (2013), to Illinois conviction); *see also* Sent. Tr. 5, Crim. Case, ECF No. 216 (arguing Court must apply categorical approach to determine whether Illinois conviction qualifies as predicate felony under § 2252(b)(2)).

Emmert's direct appeal was decided just eight days before *Mathis* was issued by the Supreme Court. *Compare Emmert*, 825 F.3d at 906 (filed June 15, 2016), with *Mathis*, 136 S.

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Ct. at 2243 (decided June 23, 2016). Emmert argues counsel had "time under the 14-day window of Rule 35 and Rule 40 of the Federal Rules of Appellate Procedure" to make some type of *Mathis*-argument to the Court of Appeals. ECF No. 19 at 2. In support of his argument, Emmert submits a copy of correspondence from his defense counsel written after his conviction was affirmed on direct appeal. Letter 1–2, ECF No. 22-1. Counsel specifically referred to *Mathis* in the letter but ultimately concluded such a claim was inapplicable to Emmert's situation. *Id.* at 2.

The Court recognizes the uniqueness of this argument at the time of appeal. At the time *Mathis* was decided, *Johnson* had not yet been applied to other federal enhancement statutes that contained identical language. *See e.g. United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (extending *Johnson* analysis to 18 U.S.C. § 924(c)(3)(B)); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (extending *Johnson* analysis to 18 U.S.C. § 16(b)). The application of *Johnson* to § 2252(b)(2), a statute that uses different language to define the predicate felony, was even more questionable, which is why counsel chose not to pursue that claim in a post-appeal motion.

Because of the evolving nature of *Johnson* and *Mathis* at the time of Emmert's appeal, the Court concludes this claim was so novel that the legal basis was not reasonably available to him at the time of appeal. Emmert's failure to raise the claims on direct appeal does not procedurally bar the claims in this proceeding. See *Reed*, 468 U.S. at 13; *Chaney v. United States*, 917 F.3d 895, 900 (6th Cir. 2019) (movant should not be faulted for failing to make "an argument that would have had no practical effect whatsoever given the then-viable residual clause"); *United States v. Snyder*, 871 F.3d 1122, 1127–28 (10th Cir. 2017) (concluding *Johnson* claim not reasonably available to movant at the time of direct appeal and provides cause and prejudice to overcome procedural default).

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Thus, Emmert's amended claims, both his independent Due Process claim and his claim of ineffective assistance of counsel, are not procedurally barred.

B. Timeliness

Emmert had one year after his conviction was final to bring a § 2255 motion. 28 U.S.C. § 2255(f)(1). His conviction was final when the Supreme Court denied his application for writ of certiorari on March 20, 2017. Notice, Crim. Case, ECF No. 226 (filed April 5, 2017). Therefore, Emmert had until March of 2018 to file his § 2255 claims in order to be timely.

Emmert's original § 2255 motion, placed in the prison mail system on March 16, 2018, was within the one-year statute of limitation. ECF No. 1 at 19; *see Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999) (extending prison mailbox rule—which deems pro se prisoner's submissions "filed" the date it is placed in prison mail system—to pro se § 2255 motion). However, the amended § 2255 motion was not placed in the prison mail system until August 13, 2018, which was outside of the one-year time limit. Reply 8, ECF No. 19.

"Claims made in an untimely filed motion under § 2255 may be deemed timely if they relate back to a timely filed motion as allowed by Federal Rule of Civil Procedure 15(c)." *Taylor v. United States,* 792 F.3d 865, 869 (8th Cir. 2015) (quoting *Dodd v. United States,* 614 F.3d 512, 515 (8th Cir. 2010)). An amended claim relates back to the original motion if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). A claim will "arise out of the same conduct, transaction, or occurrence," if the new claim is "tied to a common core of operative facts." *Taylor*, 792 F.3d at 869 (internal quotations omitted). Further, the facts alleged in the prior pleading "must be specific enough to put the opposing party on notice of the factual basis for the [new] claim." *Id.* (internal quotations omitted).

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The Government asserts Emmert's new claims do not relate back because "[p]rior to August of 2018, Emmert had not claimed that the prior felony conviction at issue was not a proper conviction to enhance the punishment in his case." ECF No. 26 at 9. Emmert disagrees and asserts there were at least four references in his original § 2255 motion to which the new claim relates back. Emmert Aff. ¶ 7 (a)–(d), ECF No. 22.

First, Emmert refers to his ineffective assistance of counsel claim, which alleged defense counsel rushed through the objections at sentencing. *Id.* at ¶ 7(a). There Emmert alleged counsel

> waited till the day of PSR objections being due to file an extension (DCD 184). Swift told Emmert the phone lines were down and unable to contact Emmert, but made no attempt to visit. Swift then rushed through the objections, not fully researching them. Which, was critical stage as Emmert is sentenced in regards to the information contained in those reports.

Attach. F 22, ¶ 23, ECF No. 1-8 (grammar and punctuation in original). This language supports Emmert's claim that defense counsel failed to thoroughly prepare for sentencing and failed to consider all possible objections. There is nothing in this language or its context, however, to put the Government on notice that Emmert believed counsel should have argued his previous Illinois conviction was overly broad and unable to stand as a predicate felony under § 2252(b).

Emmert refers to three additional descriptions in his § 2255 motion that allege he was punished for his 1989 Illinois conviction three times. *See* ECF No. 22 at ¶ 7(b) (referring to Attach. M 17, ECF No. 1-15); *id.* at ¶ 7(c) (referring to Attach. H 4–5, ¶ 2, ECF No. 1-10); and *id.* at § 7(d) (referring to Attach. I 18, ¶ 11, ECF No. 1-11). The allegations of multiple punishment are discussed in that context of judicial misconduct in Attachment M. Attachments H and I do raise the multiple punishment issue in the context of ineffective assistance of trial and appellate counsel, but the argument is that Emmert received multiple punishments for the same

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crime. He does not allege or make any inference that 18 U.S.C. § 2252(b)(2) was overly broad as applied to his Illinois conviction.

Emmert appears to be arguing the mere reference to increased punishment or any allegation of ineffective assistance of counsel relates the new claim back to the original motion. This is not sufficient. "[I]t is not enough that both an original motion and an amended motion allege ineffective assistance of counsel during a trial." *Dodd*, 614 F.3d at 515 (8th Cir. 2010). Instead the allegations that serve as the basis of the ineffective assistance of counsel claim "must be of the same 'time and type' as those in the original motion, such that they arise from the same core set of operative facts." *Id.* (further citations omitted).

The claims raised in the original § 2255 motion assert Emmert was punished for the 1989 conviction three times, one of those times being the sentence given under § 2252(b)(2). The amended claims, however, allege Emmert's 1989 Illinois conviction sweeps too broadly to qualify as a predicate felony under § 2252(b)(2). Although both claims arose from the imposition of the same sentence, these are distinct legal theories. They are not the same type as the claims in the original motion. Emmert's allegations in the original § 2255 were not "specific enough to put the opposing party on notice of the factual basis for the claim." *Id.* Without any tie to "a common core of operative facts" in the original § 2255 motion, the amended claims do not relate back and are therefore untimely.

C. Substantive Claim

Even if Emmert's amended claims related back, they would fail on the merits either because the 1989 Illinois conviction qualifies as a predicate felony under § 2252(b)(2), or alternatively, any error pursuant to the imposition of sentence under § 2252(b)(2) was harmless.

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1. Qualifying Predicate Felony

The minimum and maximum sentence for a child pornography conviction is increased where the defendant has a prior state conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). Emmert was convicted of Illinois criminal sexual assault, which at the time was defined as when a

> person commits an act of sexual penetration and:
>
> (1) uses force or threat of force;
> (2) that the victim knows is unable to understand the nature of the act or is unable to give knowing consent;
> (3) is a family member of the victim, and the victim is under 18 years of age; or
> (4) is 17 years of age or over and holds a position of trust, authority or supervision in relation to the victim, and the victim is at least 13 years of age but under 18 years of age.

720 Ill. Comp. Stat. 5/11-1.20 (1989) (formerly numbered Ill. Rev. Stat. 1989, Ch. 38, para. 12-13). Emmert contends his conviction for Illinois criminal sexual assault cannot qualify as a predicate conviction under § 2252(b)(2) because it encompasses conduct that is broader than the state statutes listed in §2252(b)(2) related to sexual abuse. ECF No. 19 at 7.

Generally, courts use a categorical approach to determine whether the prior conviction used to enhance a sentence is broader than the statute used to enhance the sentence. *Mathis*, 136 S. Ct. at 2248. Under this approach, a court is to "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the crime as federally defined], while ignoring the particular facts of the case." *Id.* If a statute sets out a single set of elements to define a single crime, and those elements criminalize conduct beyond what was intended by the federal statute, then a conviction under the indivisible statute cannot serve as a predicate felony to enhance a defendant's sentence. *Id.* at 2248–49. If the elements of the statute are set out as

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alternatives defining multiple crimes, however, then the statute is deemed divisible, and courts are to apply a modified categorical approach to determine whether the charged offense is encompassed by the definition intended by the federal statute. *Id.* at 2249. A court applying the modified categorical approach may "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

Emmert argues his Illinois conviction is indivisible because the crime could be committed in multiple ways or means to "produce the same conviction with the same penalty range." ECF No. 19 at 5–6; *see Mathis*, 136 S. Ct. at 2248–49 (statute that lists alternative means as opposed to alternative elements to commit crime is indivisible). Emmert suggests, for example, that the Illinois criminal sexual assault statute could be violated by the marriage of minor step-siblings, even though the crime would not "relate to" any type of sexual abuse as listed by the federal enhancement statute. ECF No. 19 at 6.

An enhancement under § 2252(b), however, "does not require the state statute of conviction to be the same as or narrower than the analogous federal law. Rather, the words 'relating to' in § 2252(b) expand the range of enhancement-triggering convictions.'" *United States v. Kaufmann*, 940 F.3d 377, 378 (7th Cir. 2019) (citing *United States v. Kraemer*, 933 F.3d 675, 679–83 (7th Cir. 2019)).

The Eighth Circuit Court of Appeals has signaled its agreement with this analysis, stating the categorical approach set out in *Mathis* "is inapposite to § 2252." *United States v. Mayokok*, 854 F.3d 987, 993 n.2 (8th Cir. 2017). In *Mayokok*, the Court of Appeals described how the Armed Career Criminal Act, the statute challenged in *Mathis*, defines a "violent felony" as one that "*is*" a felony as set out in the applicable clause of the statute. *Id.* (emphasis added).

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Mayokok concluded that such a "concrete term" requires that the predicate crime be either the same as or narrower than those of the generic offense described in the federal statute. *Id.* Under § 2252, however, "Congress used the modifier 'relating to,' and 'we must assume' that it did so 'for a purpose.'" *Id.* (citing *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (holding the state laws described in 18 U.S.C. § 2252(b) do not require exact similarity with federal definitions in order to apply)). That purpose, "was to subject a wider range of prior convictions to the § 2252(b)(1) enhancement." *Id.; cf. United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019) (in context of aiding and abetting conviction, "when a federal enhancement provision incorporates state offenses by language other than a reference to generic crimes, the categorical approach still applies, but the inquiry is focused on applying the ordinary meaning of the words used in the federal law to the statutory definition of the prior state offense.") (citing *Sonnenberg*, 556 F.3d at 671); *but see United States v. Reinhart*, 893 F.3d 606, 615 n.4 (9th Cir. 2018) (rejecting *Mayokok*'s analysis as unpersuasive).

The language of § 2252(b)(2) does not have to "criminalize exactly the same conduct," but only criminalize conduct which "relates to" state sexual abuse laws. *Mayokok*, 854 F.3d at 992–93. "The phrase 'relating to' carries a broad ordinary meaning, *i.e.* to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association or connection with." *Id.* (quoting *Sonneberg*, 556 F.3d at 671). Given this common definition, the Court concludes the Illinois statute for criminal sexual assault necessarily "relates to" the statutes listed in § 2252(b)(2), and Emmert was correctly sentenced under that statute.

2. Harmless Error

Finally, regardless of procedural bar, timeliness, or whether the Illinois conviction may serve as a predicate felony to the application of § 2252(b)(2), Emmert cannot show he suffered any prejudice as a result of his sentence. "On collateral review, an error is harmless unless it

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results in 'actual prejudice,' that is, a 'substantial and injurious effect or influence in determining' a movant's sentence." *Golinveaux v. United States*, 915 F.3d 564, 569-70 (8th Cir. 2019) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). In this case, the application of § 2252(b)(2) resulted in a lesser sentence for Emmert. With a total offense level of 43, and criminal history category of IV, Emmert's guideline range was life imprisonment under the Sentencing Guidelines. PSR 21 ¶ 105, Crim. Case, ECF No. 188; *see also* Sent. Tr., Crim. Case, ECF No. 216 ("this case actually results in a guideline range that would be life"). The statutory maximum of 20 years was well below life imprisonment, the sentence the Court would have imposed under the Sentencing Guidelines. Thus, even if there was any error in applying § 2252(b)(2) to Emmert's sentence, and the Court does not concede there was, the error would have been harmless, and Emmert is not entitled to relief.

C. Ineffective Assistance of Counsel Claim

To show counsel failed to provide constitutionally effective assistance under the Sixth Amendment, a movant must show (1) counsel's representation was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Because the Court concludes above that a *Mathis*-type argument would not have succeeded in the Court of Appeals, counsel's failure to raise a meritless argument cannot constitute ineffective assistance of counsel. *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994) (per curiam). This claim must also be dismissed.

III. SUMMARY AND CONCLUSION

After careful review, the Court concludes Emmert's amended claims are untimely and, even assuming timeliness, without merit. It plainly appears Emmert is not entitled to relief, and **his § 2255 motion is DENIED** without evidentiary hearing. *See* Rule 4(b) of the Rules

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Governing Section 2255 Proceedings in the United States District Courts. **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 Federal Rule of Appellate Procedure 22(b). A certificate of appealability may issue only if a movant "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) (internal quotation marks and citations omitted).

Emmert has not made a substantial showing of the denial of a constitutional right regarding his claims, and **no Certificate of Appealability will issue in this case.** He may request issuance of a Certificate of Appealability by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 25th day of November, 2019.

JAMES E. GRITZNER, Senior Judge
U.S. DISTRICT COURT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

JUDGMENT IN A CIVIL CASE

DAVID LEE EMMERT, JR.,

CASE NO.: 4:18-cv-00092

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____ **JURY VERDICT .** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__✓__ **DECISION BY COURT.** This action came before the Court. The matter has been fully submitted and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Petitioner's § 2255 motion is denied. The case is dismissed. No Certificate of Appealability will issue in this case.

Date: November 26, 2019

Clerk, U.S. District Court

Sherry L Gates

By: Deputy Clerk

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Appendix F

DCD36 Filed 12/26/19 1 of 63

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

DAVID LEE EMMERT, JR., Movant,	)	
vs.	)	Civil No. 4: 18-cv-00092-JEG
	)	Crim. No. 3: ll-cr-00116-JEG
UNITED STATES OF AMERICA, Respondent.	)	

MOTION TO ALTER, AMEND or VACATE ORDER (Doc. 34), RULE 59(e) of the FEDERAL RULES CIVIL PROCEDURE,
(Confirmation Bias)

David Emmert appears *pro se* and moves the Court under Rule 59(e) of the Federal Rules of Civil Procedure to alter, amend or vacate the order denying him relief under 28 U.S.C. § 2255. His fundamental challenge under habeas corpus is the 10-year mandatory (statutory) minimum enhancement for the legal misuse of a prior state-court conviction, under 18 U.S.C. § 2252(b)(2).

Emmert's statutory sentencing range was raised from "0-10" years, to "10 to 20" years, as handed down in *United States v. Emmert*, 3:11-cr-00116-JEG-HCA (S.D. Iowa) ("Crim. Case"). This challenge found support in *Mathis v. United States*, 136 S.Ct. 2243 (2016), and *Shepard v. United States*, 544 U.S. 13, 16 (2005).

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A Brief History

A jury convicted Emmert of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). [Crim. Case, Doc. No. 198]. The Court sentenced Emmert to 240 months in prison despite his objections to the PSR that this was improper because his prior state-court conviction should not be counted. [Crim. Case Doc. 186: Objections to PSI at p20, ¶105: Sentencing range "should be 78-97 months"]. Emmert's conviction and sentence were affirmed on appeal. *United States v. Emmert*, 825 F.3d 906 (8th Cir. 2016).

In his original *pro se* § 2255 motion, Emmert asserted multiple grounds for relief. [ECF No. l: 2255]. Because it was not clear what claims Emmert was asserting, the Court directed Emmert to amend his pleading. [ECF 4: Order, at 1-2]. The Court then granted Emmert's request for counsel and directed counsel to file an amended motion. [ECF 7: Order at 1-2]. In addition, Emmert did his best to obediently shave the original 300-page § 2255, down to a mere 8 pages, based on information extracted from the filing. [ECF 19]. Unfortunately, the Court mistook this single ground of already-claimed operative facts as a "new" ground (because it admittedly did not read the first one), even though Emmert's motion to amend cited to the original facts and moved as an amendment under Rule 15. The Court granted Emmert's motion to amend, dismissed all previous claims,

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and directed the Government to respond to Emmert's claims. [ECF 21: Order at 1-2].

The Government resisted Emmert's claims. [ECF 26]. Emmert, *pro se*, filed supplemental materials in support of his claims. [ECF 22: Aff.]; ECF 29: Reply; and ECF 32: Supplemental Authority]. Counsel for Emmert also filed a response in support of Emmert's claims. [ECF 30].

As demonstrated below, Emmert here argues that the Court materially omitted facts and law which reasonable jurists could conclude were debatable in its review and ruling on the § 2255 motion.

Procedural Posture

The Court agrees that Emmert is not procedurally barred from raising the *Mathis* claim under either theory (Due Process or IAC). "Emmert's amended claims, both his independent Due Process claim and his claim of ineffective assistance of counsel, are not procedurally barred." [ECF 34: Order at 6]. After all, this was the same factual basis he challenged in the PSR. [Crim. Case., Doc. 186-9: PSR Objections at 20, ¶104]. And one of the same issues that Emmert's attorney discussed at sentencing: [ECF 34: Order at 4, citing Crim. Case Doc. No. 216, Sentencing Transcript at 5] (Arguing Court must apply categorical approach to determine whether Emmert's prior Illinois conviction qualifies as a predicate

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felony under § 2252(b)(2).) Emmert's appellate attorney also wrote a letter about this post-appeal briefing, responding to Emmert's request to challenge the mandatory minimum sentence enhancement, too. [ECF No. 22-1 (Letter at 1-2, mentioning *Mathis*)].

The ingrained history (factual basis) of the claim has matured post-*Mathis*, as the Court recognizes. This motion under Rule 59(e) points to reversible internal inconsistencies and omission of dispositive material. Read correctly, Emmert's 2255 claim is both timely and substantively valuable.

Enumerated Errors

The Court augers two independent theories for denying the 2255 (timeliness and substantive), both of which Emmert challenges in this Motion under Rule 59(e):

1. The Court *allowed* the "relates back" amendment on the previously raised "operative set of facts" admitting it was "rambling" [ECF 4]. But inexplicably the Court now finds a denial theory labeled "timeliness" for *not* relating back. Therefore, Emmert first challenges the omitted yet dispositive, previously raised facts below as well as the overlooked law of *pro se* filings.
2. The Court then whip-saws from that outcomes-based, *narrow* definition of "relates," and three pages later explodes the same "relates" term to "carry a *broad* ordinary meaning," in order "to subject

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a *wider* range of prior convictions to the § 2252(b)(1) enhancement," *contra* the categorical approach in tension among circuits. (Emphasis added)

In short, the Order materially overlooks relevant facts mentioned in ECF 1 (claiming "0 to 10" to "10 to 20-year" mandatory-minimum enhancement); the court denies relief on a false premise without mentioning the *pro se* standards of interpretation. And by citing to sister Circuit law (nearly all pre-*Mathis*) and *dicta* in our Eighth Circuit, the court denies relief on the untrue premises embedded in those decisions; decisions which primarily pre-date *Mathis* and fly in the face of the Ninth and the Second Circuits use of *Mathis/Taylor* applications of the categorical approach of prior sex offenses. *Esquivel-Quintana v. Sessions*, 198 LED2d 22 (May 30, 2017).

Standards

The court must grant Emmert's motion if it finds "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). When "jurisdictional and constitutional errors" are not at issue, "the permissible scope of a § 2255 collateral attack on a final conviction or

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sentence is severely limited; an error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." *Sun Bear v. United States,* 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (internal quotation omitted). "An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority." *Id.* at 705. A statutory mandatory minimum handed down without a proper prior conviction is one such example of a miscarriage of justice.

A movant is entitled to an evidentiary hearing on the§ 2255 motion "[u]nless the motion and the files and records of the case *conclusively* show" the movant is not entitled to relief. 28 U.S.C. § 2255(b) (emphasis added); *Voytik v. United States,* 778 F.2d 1306, 1308 (8th Cir. 1985) (standard for evidentiary hearing); see also *Franco v. United States,* 762 F.3d 761, 763 (8th Cir. 2014) ("'No hearing is required ... where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based."') (quoting *Anjulo-Lopez v. United States,* 541 F.3d 814,817 (8th Cir. 2008)).

However, the standard for a Certificate of Appealability is a low one, for "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-*

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El v. Cockrell, 537 U.S. 322,336 (2003) (internal quotation marks and citations omitted).

Based on the errors below, Movant requests under Rule 59(e) that the court fix mistakes of fact and law prior to incurring the cost of an appeal. *Finch v. City of Vernon*, 845 F.2d 256, 258-59 (7th Cir. 1988). And also look at inadvertent errors of material omission that the court obviously should include. *Inglr ex rel. Estate v. YeHon*, 439 F.3d 191, 197 (4th Cir. 2006). And even if the Court does not address the confirmation bias, then reasonable jurists could debate these issues, which is all that a COA requires. *Miller-El* (citing *Slack v. McDaniel*):

I. Overlooked Prior Conviction Issue: "from 0 to 10, to 10 to 20 years" Mandatory Minimum Boost, and the *Pro se* Standard

> The Court allowed the "relates back" amendment on the previously raised "operative set of facts" admitting it was "rambling" [ECF 4]. But inexplicably the Court now finds a denial theory labeled "timeliness" for *not* relating back. Therefore Emmert first challenges the omitted, yet dispositive, "previously raised facts" below, as well as the overlooked law of *pro se* filings.

Compare, ECF 1: 2255 Attachment H, p.3, ¶2 (Emmert's previously raised claim of an illegal enhancement "from 0-10, to 10-20 years" based on misapplication of his prior state court conviction unchallenged by ineffective counsel); *with* ECF 34: Order at 7-8 (material omission of the "0-10 to 10-20"

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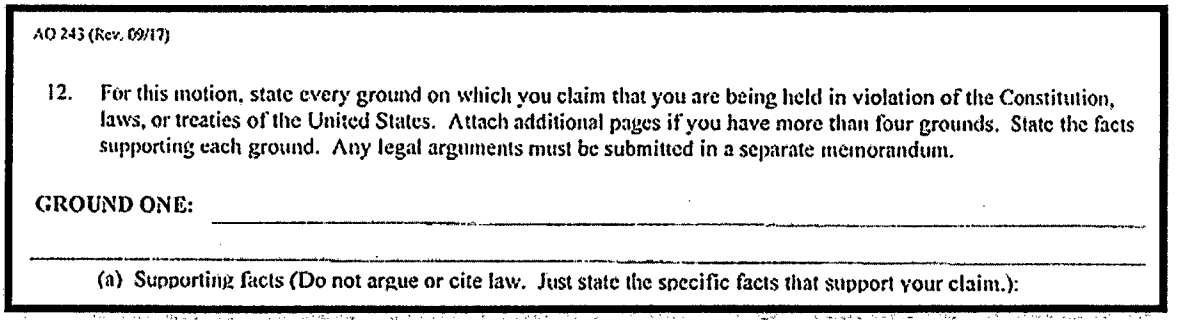
sentence enhancement raised in the 2255, and erroneously saying "[Emmert] does not allege or make any inference that 18 U.S.C. § 2252(b)(2) was overly broad as applied to his Illinois conviction.")

Pro se Standard "Relates"

Petitioners for habeas relief like Emmert are instructed to "not cite case law," but the Order weaponized this Rule. A *pro se* prisoner litigant simply reading Title 28 U.S.C. § 2255, the Rules Governing Proceedings Under § 2255, and the plain language of the Administrative Court's § 2255 Form ("AO 243" at ¶12), will see unanimous direction to "not argue or cite law," when filing a 2255.



AO 243 (Rev. 09/17)

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

It is manifest bias to blame Emmert's compliance to the 2255 form to deny relief, faulting him for not uttering the magic words "*Mathis*" when all he had to do – according to the rules – was make the factual claim of an erroneous mandatory minimum sentence enhancement; something which this Court agrees (but does not address) that appointed 2255 counsel Zenor supports.

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The court erred under *United States v. Gray*, 581 F.3d 749 (8th Cir. 2009) (courts are to "generously consider" a *pro se* claim and hold a *pro se* filing - any filing by an inmate, whether represented or not - to "less stringent standards than formal pleadings drafted by lawyers"), and permit an expansive state-law sentencing issue to move forward. (Citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The *pro se* standard favors a fair interpretation of "relating," not the impossibly narrow version in the Order.

The Court's omission of *Haines* and *Gray*, after acknowledging the gist of the amendment under a "relates back" motion, should be corrected because the so-called *Mathis* ground "relates-back" to the sentencing issue raised in the original motion. Reasonable jurists would debate that the only way this ground could not relate back is by material omission of the language in Attachment H, mentioned above. Even when appointed 2255 counsel Zenor got to write about it, it was crystal clear to him what Emmert was arguing, but this Court omits to include any comment on counsel's findings. [ECF 30: Defense Counsel's Response].

The Court *partially cites* the original 2255 (which it admittedly didn't read to comprehension), to change the meaning of one claim: "Emmert was punished for the 1989 conviction three times, one of those times being the sentence given under § 2252(b)(2)." [ECF 34: Order at 8]. The Court does not say how it was

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able to first find the 2255 indecipherable, and then decipher it to fit a pre-determined outcome. The Court refutes a *parody* of the issue by saying "Emmert appears to be arguing the *mere reference* to increased punishment or any allegation of ineffective assistance of counsel relates the new claim back to the original motion." [ECF 34 at 8] (emphasis added). But exaggerating and berating it as a "mere reference" unfairly represents the substantive issue raised in the facts of the original 2255 (concerning a statutory mandatory minimum enhancement on a prior conviction that ought not be counted). *See* ECF 1: Attachment M (Due Process, adjudicative issue) at p.16, ¶C(5); *See* also, ECF 1: Attachment H (**IAC Claim**, mandatory minimum enhancement Emmert). Emmert explicitly called for relief in Attachment H at p.3, ¶2 and p.5, ¶2 where his attorney failed to object to being enhanced **"from 0-10, to 10-20"** prejudice based on his state-court prior conviction.

Put simply, what the Court got wrong was that Emmert did originally make more than "the mere reference to increased punishment." Since he was appointed counsel based on a learning disability anyway, that overlooked fact alone should bring pause to the Order's strangling of the definition for "relates." Emmert's claim demonstrates sufficient facts under the *pro se* standard that the mandatory minimum enhancement *is the prejudice prong* (a sentence exceeding

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the statutory maximum) "**from 0-10, to 10-20**" under the *cause* of due process (Attachment M), or IAC (Attachment H), or both.

The Court has found the narrowest and most restrictive interpretation of "relates" to now change its tune and exclude the amendment. Reasonable jurists would debate whether his claim "relates back," given the Order's omission of evidence that Emmert *did* complain of the mandatory minimum enhancement based on the improper use of his state-court prior conviction ... precisely what *Mathis* is all about. A COA should issue because reasonable debate is all that is required. *Miller-El v. Cockrell*, 537 U.S. 322,336 (2003).

II. The Order is Internally Inconsistent Regarding the Term "Relating"

> The Court whip-saws from an outcomes-based, *narrow* definition of "relates," and three pages later explodes the same "relates" term to "carry a *broad* ordinary meaning," in order "to subject a *wider* range of prior convictions to the § 2252(b)(1) enhancement," *contra* the categorical approach in tension among circuits. (Emphasis added)

See, ECF 34 at 11, citing *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (pre-*Mathis*), *United States v. Mayokok*, 854 F.3d 987, 993, n.2 (8th Cir. 2017) (dicta); and *United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019) (post-*Mathis*, inapplicable aiding and abetting case).

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The Court acknowledges a deepening Circuit Split on the issue. [ECF 34 at 11, citing *United States v. Reinhart*, 893 F.3d 606, 615 n.4 (9th Cir. 2018) (rejecting *Mayokok)*]. The Court at bar does not mention *Reinhart's* progeny *United States v. Schlopp*, 938 F.3d 1053 (9th Cir. 2019), nor its substantive harmony with *United States v. Kroll*, No. 16-4310 (2nd Cir. March 5, 2019).) The Order acknowledges the supplemental authority filed at bar, but neither analyzes nor responds to it.

Reasonable jurists would debate the self-contradictory back-and-forth use of the word "relates" (narrow to broad) as classic confirmation bias. But to be fair, it is worth citing at length from the Order's denial regarding this "relating to" theory:

> "Emmert argues his Illinois conviction is indivisible because the crime could be committed in multiple ways or means to "produce the same conviction with the same penalty range." ECF No. 19 at 5-6; see *Mathis*, 136 S. Ct. at 2248-49 (statute that lists alternative means as opposed to alternative elements to commit crime is indivisible). Emmert suggests, for example, that the Illinois criminal sexual assault statute could be violated by the marriage of minor step-siblings, even though the crime would not "relate to" any type of sexual abuse as listed by the federal enhancement statute. ECF No. 19 at 6.
>
> An enhancement under § 2252(b), however, "does not require the state statute of conviction to be the same as or narrower than the analogous federal law. Rather, the words 'relating to' in § 2252(b) expand the range of enhancement-triggering convictions." *United States v. Kaufmann*, 940

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F.3d 377, 378 (7th Cir. 2019) (citing *United States v. Kraemer*, 933 F.3d 675, 679-83 (7th Cir. 2019)).

The Eighth Circuit Court of Appeals has signaled its agreement with this analysis, stating the categorical approach set out in *Mathis* "is inapposite to § 2252." *United States v. Mayokok*, 854 F.3d 987, 993 n.2 (8th Cir. 2017). In *Mayokok*, the Court of Appeals described how the Armed Career Criminal Act, the statute challenged in *Mathis*, defines a "violent felony" as one that "is" a felony as set out in the applicable clause of the statute. Id. (emphasis added).

Mayokok concluded that such a "concrete term" requires that the predicate crime be either the same as or narrower than those of the generic offense described in the federal statute. *Id.*

Under § 2252, however, "Congress used the modifier 'relating to,' and 'we must assume' that it did so 'for a purpose.'" *Id.* (citing *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (holding the state laws described in 18 U.S.C. § 2252(b) do not require exact similarity with federal definitions in order to apply)). That purpose, "was to subject a wider range of prior convictions to the § 2252(b)(l) enhancement." *Id.*; *cf United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019) (in context of aiding and abetting conviction, "when a federal enhancement provision incorporates state offenses by language other than a reference to generic crimes, the categorical approach still applies, but the inquiry is focused on applying the ordinary meaning of the words used in the federal law to the statutory definition of the prior state offense.") (citing *Sonnenberg*, 556 F.3d at 671); but see *United States v. Reinhart*, 893 F.3d 606,615 nA (9th Cir. 2018) (rejecting *Mayokok's* analysis as unpersuasive).

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> The language of § 2252(b)(2) does not have to "criminalize exactly the same conduct," but only criminalize conduct which "relates to" state sexual abuse laws. *Mayokok,* 854 F.3d at 992-93. "The phrase 'relating to' carries a broad ordinary meaning, i.e. to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association or connection with." Id. (quoting *Sonnenberg,* 556 F.3d at 671). **Given this common definition, the Court concludes the Illinois statute for criminal sexual assault necessarily "relates to" the statutes listed in § 2252(b)(2), and Emmert was correctly sentenced under that statute."**

[Doc. 34: Order at 10-11] (Emphasis added).

When the Order relies on that *Mayokok* phrase, "the categorical approach set out in *Mathis* is inapposite to § 2252," it was *dicta,* in a footnote. When the Order relies on *Sonnenberg's* phrase, "'relating to' carries a broad ordinary meaning," it was prior to *Mathis,* but more importantly, prior to the Supreme Court decision *Esquivel-Quintana v. Sessions,* 198 LED2d 22 (May 30, 2017), which explicitly referenced the Illinois conviction at bar, 720 Ill. Comp. Stat. 5/11/1.20.

Esquivel-Quintana held that federal enhancement statutes [such as § 2252(b)(2) at bar], shall not boost a defendant's sentence for prior state convictions relating to "sexual abuse of a minor," where the statute contains - as one of its factual causation scenarios that are broader than the federal categorical comparison - that victim's age to be 17.

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When the Order says that § 2252(b) "does not require the state statute of conviction to be the same as or narrower than the analogous federal law. Rather, the words 'relating to' in § 2252(b) expand the range of enhancement-triggering convictions," it does so by citing to a non-controlling sister circuit in *United States v. Kaufmann*, 940 F.3d at 378 (citing *Kraemer*), and avoids talking about *Schlopp* or *Kroll*.

Following current law, the Court erred in its substantive review of the claim under *Mathis v. United States*, 136 S.Ct. 2243 (2016), and *Shepard v. United States*, 544 U.S. 13, 16 (2005). *Esquivel-Quintana* dealt with having a prior conviction for "any aggravated felony." This was followed by a word salad of possibilities mentioned in Title 8 which weave an even more broad application than "relating to" specific federal offenses as those defined in Chapter 109A!

<u>In Decreasing Order of Specificity, the Categorical Approach is Uniformly Applied (From "*Is*," to "*Relates to*," and finally "*Any*" State Conviction)</u>

The Court's reliance on *dicta* in *United States v. Mayokok*, 854 F.3d 987,993 n.2 (8th Cir. 2017), and *United States v. Kraemer*, 933 F.3d 675, 679-83 (7th Cir. 2019) is an error that narrowly distorts the "violent felony" analysis of *Mathis*, *Taylor*, *Shepard*, etc. To explain, the statute 18 U.S.C. § 924(e)(2)(B)(i) (residual clause) mentions "**any**" conviction that "has an element"; but § 924(e)(2)(B)(ii)

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(enumerated clause) [the only section that *Mayokok* describes] has "violent felony" as one that "**is**" a felony as set out in the applicable clause of the statute.

The Ninth Circuit decisions of *United States v. Reinhart*, 893 F.3d 606,615 n.4 (9th Cir. 2018), *United States v. Schlopp*, 938 F.3d 1053 (9th Cir. 2019), reveal the difference between good data and bad data. *Kraemer's* reasoning only focused on the "is" of the enumerated clause, completely ignoring the problem child of the residual clause. As the Court is aware, "any" conviction with an "element" could no longer be reasonably handled – even by the categorical and modified categorical approaches, and was struck down as unconstitutional. What is more, *Esquivel-Quintana* (post-*Mathis*), and *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (pre-*Mathis*) dealt with immigration statutes analyzing prior sex offenses using the "any aggravated felony" language, similar to the residual clause. "Any" felony as used in *Esquivel-Quintana* and *Mellouli* is broader than "relates to" of 2252(b)(2).

For the Court at bar to discard the categorical approach for the lowest-recidivism offenders (by citing to a different circuit decision which relied on historically false data), but keep the categorical approach intact for higher-risk offenders (by class), is asinine. *See* the United States Sentencing Commission: "*The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*", March 2017 Report, available at www.ussc.gov, immigration cases account for

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55.1 % recidivism, which far out-number sex offenders (at 37.6% recidivism). [USSG Report, Table 4. See attached].

The Court turns the categorical approach on its head by basically saying "anything illegal in the state" relates to "any current federal sex offense." That flies in the face of logic, reason, data, and empirical analysis. It confirms the practice of prejudicially referring to a whole class of offenders rationalized by a perverse voodoo victimology.

The notion that the "relating to" language of§ 2252(b)(2) somehow neuters the categorical approach is based on outdated data; data so destructive it undermined Congressional efforts since 1996 (see attached). In *Packingham v. North Carolina,* U.S., No. 15-1194 (2017), the Supreme Court compared the 2003 Bureau of Justice Statistics report examining recidivism rates for sex offenders released in 1994, to a voluminous amount of current research. According to the arguments in *Packingham,* the Justice Department Report relied upon by Congress in the *Kraemer* decision (which was in turn relied upon by this Court at bar to deny relief), is junk science.

It turns out these old prejudicial notions were written by an Oregon prison psychologist with a master's degree and no research background, who claimed that "his sex offender treatment program worked better than anyone else's." This travesty of justice infected the SCOTUS decision of *Smith v. Doe,* ___ U.S.

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____, a 2003 decision which upheld the constitutionality of sex offender registries, something which the SCOTUS acknowledged its 2003 basis as erroneous when deciding *Packingham* (8-0 unanimous decision; briefs of Petitioner and amicus, fully adopted into this Motion as if set forth here.)

Criticized by *Packingham*, the statistic mentioned in *Smith v. Doe* – that 80 percent of convicted sex offenders will offend again – is off by an average of 65 percent, depending on offender's risk levels, according to research from Arizona State University law professor Ira Ellman. *Id.* If the Supreme Court (or this Court, for that matter) relies on the faulty figures again it would unjustly subject people like Emmert to inappropriately harsh sentences; people who pose "no clear and present danger ... they're no more likely to offend than most of us." *Id.*

This Court's rationalization for applying a "broad, ordinary meaning" that turns the categorical approach on its head comes from *Kraemer*. But *Kraemer* gets it dead wrong on recidivism statistics (citing 1998 Congressional decisions which show the Seventh Circuit relied on the flawed Department of Justice reports.) It also relies – not on a Title 18 or Immigration case – but rather a tax case to read the tea leaves of "relates to." *Kraemer*, citing *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1760 (2018), and five other pre-*Mathis* circuit decisions.

Nowhere is this error more clear than *Kraemer's* "relating to" search as relied upon in another deportation case of *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (pre-

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Mathis, an enhancement triggered when one is "convicted of a violation of ... any law or regulation of a State, ... *relating to* a controlled substance." *Kraemer*, 2019 U.S. App. LEXIS 12.

The Court at bar is lulled by the same sad siren song relied upon in *Kraemer*; that is, exclusively on law enforcement testimony "about the nature of child sex offenders, how they seek out relationships with children and how the recidivism rates for such offenders are 10 times higher than other, types of criminal offenders." *Kraemer*, 2019 U.S. App. LEXIS at 16-17, citing H.R. Rep. No. 105-557, at 12 (1998). So much of Emmert's acquitted and uncharged conduct warped the Court's sentencing at bar, that the completely wrong hermeneutic about recidivism among sex offenders was the straw the broke the camel's back.

That false recidivism and irrelevant conduct data is good for law enforcement budgets, but devastating to the Truth. What is more, our sister circuits are already disagreeing with turning the categorical approach on its head *for a certain class of persons*: "Sex offenders are no more likely to re-offend than a member of the general public." *Packingham.*

Empirical and scholarly studies demonstrate sex offenders are among the least likely to re-offend, **even below immigration cases** (cases which use a broader "any" reference to a state prior, and "relates to" as well). *See, Id.; see* also,

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By way of comparison, it is like saying "abortion clinics are far more likely to reduce abortions and unwanted pregnancies by lobbying for criminalizing a class of persons who offer pro-life counseling services at their clinic doors," when the empirical data suggests the opposite: Planned Parenthood's own records demonstrate skyrocketing abortion rates from 1973 to 2000, and in *N.O.W. v. Scheidler*, the Supreme Court shows that sidewalk counseling (which N.O.W. unsuccessfully claimed was criminal under RICO), actually *saves* lives, reducing the murder of abortion, and encourages healthy pregnancies. The chilling truth is that no federal statute is exempt from using the categorical and modified categorical approach when analyzing a prior sex offense, just because it is a sex offense.

Conclusion

Reasonable jurists would debate whether the files and records of the case "conclusively" show Emmert is not entitled to relief on his single 2255 claim. An evidentiary hearing is warranted and the § 2255 motion must be granted, or else a Certificate of Appealability issued.

Both the "relates to" issue and the "relates back" issue should use a fair definition of "relates" connected to reality. The Court is requested to not deepen the divide which separates the current disposition with the majority of "relates

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to" and "any" prior conviction language; language used to analyze prior convictions from offenders with much higher recidivism rates than sex offenders.

12-18-19 /s/

Date Executed

Under penalty of perjury pursuant to 28 U.S.C. § 1746, I hereby swear and verify that the foregoing is true and correct as an affidavit; Further, that it has been deposited under Prison Mailbox Rule this day in the institution's internal mail System designed for legal mail, United States Postal Service, first-class postage prepaid.

David Lee Emmert, *pro se*
13155-030
P.O. Box 1000
Marion, IL 62959

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Certificate of Service

I hereby certify that a copy of the foregoing was mailed this day via United States Postal Service, first-class postage prepaid, upon the following:

Clifford R. Cronk
AUSA
131 East 4th St. Suite 310
Davenport, IA 52801

Adam D. Zenor
500 E. Court Ave.
Suite 200
Des Moines, IA 50309

12-18-19
Date Executed

/s/
David Lee Emmert, *pro se*

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Appendix G

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

DAVID LEE EMMERT, JR., Movant, vs. UNITED STATES OF AMERICA, Respondent.	**Civil No. 4:18-cv-00092–JEG** **Crim. No. 3:11-cr-00116–JEG-HCA** **ORDER**

Before the Court is Movant David Lee Emmert, Jr.'s Motion to Alter or Amend the Court's judgment pursuant to Fed. R. Civ. P. 59(e). ECF No. 36. On November 25, 2019, the Court dismissed Emmert's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. Order, ECF No. 34. The Motion challenged the sentence in *United States v. Emmert*, 3:11–cr–00116–JEG-HCA (S.D. Iowa). After amending his original § 2255 motion, the only claims before the Court were whether Emmert was entitled to relief based on *Mathis v. United States*, 136 S. Ct. 2243 (2016), and a Sixth Amendment claim based on counsel's failure to previously raise a *Mathis*-type claim. Reply 1, ECF No. 19.

The Court determined the claim was not procedurally barred. ECF No. 34 at 3–6. Nonetheless, because the claim did not "relate back" to any claim made in the original and timely § 2255 motion, the Court concluded the claim was untimely. *Id.* at 6–8 (*Mathis*-type claim not specific enough to put opposing party on notice of factual basis for claim). Moreover, even if the claims had been timely, they would have been without merit, *id.* at 8–11, or would have resulted in harmless error. *Id.* at 11-12.

Rule 59(e) is limited to correcting "manifest errors of law or fact or to present newly discovered evidence" and cannot be used to introduce new facts or legal arguments which could have been offered or raised earlier. *Holder v. United States*, 721 F.3d 979, 986 (8th Cir. 2013)

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(internal citations omitted). Emmert's Rule 59 motion reasserts the legal argument he raised in his counseled and pro se briefs or raises information which could have been raised prior to the entry of the Court's final order. Emmert has not shown any manifest error of law or fact to justify amending or altering its order.

The motion to alter or amend, ECF No. 36, is **DENIED.**

IT IS SO ORDERED.

Dated this 30th day of December, 2019.

JAMES E. GRITZNER, Senior Judge
U.S. DISTRICT COURT

6

Appendix H

APPEAL NO. 20-1179

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAVID LEE EMMERT, JR.,
Appellant – Movant,

vs.

UNITED STATES OF AMERICA,
Appellee – Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
Crim. No. 3:11-cr-00116-JEG
Civil No. 4:18-cv-00092-JEG
James E. Gritzner, District Court Judge

MOTION for CERTIFICATE OF APPEALABILITY

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Contents

JURISDICTION

A jury convicted Emmert of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). [Crim. Case, ECF 198]. The Court sentenced Emmert to 240 months in prison. [*Id.* at 2]. Emmert's conviction and sentence were affirmed on appeal. *United States v. Emmert*, 825 F.3d 906 (8th Cir. 2016).

In his original pro se § 2255 motion, Emmert asserted multiple grounds for relief. [ECF 1]. Because the court was unclear what claims Emmert was asserting, Judge Gritzner directed Emmert to amend his pleading. [ECF 4: Order at 1-2]. The Court then granted Emmert's request for counsel and directed counsel to file an amended motion. [ECF 7: Order at 1-2].

Rather than amend the motion, counsel filed a report stating none of Emmert's § 2255 claims were viable. [ECF 18: Report at 8]. However, counsel filed a follow-up to that report, and supported a "relates back" amendment he agreed from the facts to be practical. [ECF 30: Response supporting *Mathis* claim].

Emmert sought leave to bring "only one ground for relief" that is, a Fifth Amendment claim based on *Mathis v. United States*, 136 S. Ct. 2243 (2016), and a Sixth Amendment claim based on counsel's failure to previously raise a *Mathis*-

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type claim. [ECF 19]. The Court granted Emmert's motion to amend, dismissed all previous claims, and directed the Government to respond to Emmert's claims. [ECF 21: Order 1-2].

The Government resisted Emmert's claims. [ECF 26: Response]. Emmert, *pro se*, filed supplemental materials in support of his claims. [ECF 22: Aff.; ECF 29: Reply; and ECF 32: Suppl.] The district court considered those documents and counsel's materials filed on his behalf in its review and ruling on the § 2255 motion, but the court made no record statement about having actually read the entire initial 2255. [ECF 34: 2255 Denial]. Emmert filed a timely Rule 59(e) motion, which was denied. [ECF 37].

David Emmert appears *pro se* and moves the Court for a Certificate of Appealability because reasonable jurists would debate the district court's denial of his motion under 28 U.S.C. § 2255. For the reasons below, this Court has jurisdiction to grant a certificate of Appealability ("COA") to Mr. Emmert, under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, and 28 U.S.C. § 2253(c)(1)(B).

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QUESTIONS PRESENTED FOR REVIEW

The district court augured two catch-all theories for denying relief (i.e. procedural and substantive). As such, the questions on appeal are as follows:

1) Whether Reasonable Jurists Would Debate That the District Court Committed Clear Error in Either the 2255 Ruling, the Rule 59(e), or Both When Applying the "Relates Back" and Pro se Standard
2) Would Reasonable Jurists Debate Whether the District Court Erred in Applying the Categorical Approach in Tension Among Circuits:
   a. By Whip-sawing from a *narrow* definition of "relates," to exploding the same term to a "*broad* ordinary meaning," in order "to subject a *wider* range of prior convictions to the § 2252(b)(1) enhancement," by citing to dicta and pre-*Mathis* decisions in this circuit, and conflicting interpretations from sister circuits.
   b. Disregarding the Supreme Court's guidance on age-specific sex offenses, including the state-court sex offense at bar.
   c. False and Misleading Recidivism.

SUMMARY OF ARGUMENT

Emmert's challenge is the 10-year mandatory (statutory) minimum enhancement: he alleges that his prior state-court conviction (which is age-

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specific) is constitutionally improper under 18 U.S.C. § 2252(b)(2). Said another way, Emmert's statutory sentencing range was raised from "0-10" years, to "10 to 20" years, for a prior conviction that does not qualify under the categorical approach.

This challenge finds support in **(1)** already-claimed operative facts, **(2)** *Mathis v. United States*, 136 S.Ct. 2243 (2016), *Shepard v. United States*, 544 U.S. 13, 16 (2005), and **(3)** because the Illinois statute punishes both a wider swath of conduct than the federal generic offense, and also punishes based on an age of 17, instead of 16. *See, Esquivel-Quintana v. Sessions*, 198 LED2d 22 (May 30, 2017) (Granting relief and explicitly referencing the Illinois conviction at bar, 720 Ill. Comp. Stat. 5/11/1.20, with a different federal baseline statute, but the same categorical approach for a sex offense using state-law statute of conviction).

The district court materially overlooked relevant facts. Emmert repeatedly claimed that "0 to 10" to "10 to 20-year" mandatory-minimum enhancement was improper). Also, the district court ignored or unfairly misapplied the *pro se* standards of interpretation, avoided commenting or discussing the initial 2255, and from all accounts did not read it to comprehension (in order to form a fair basis for comparison on what is "new" and what "relates back"). [ECF 4: Order,

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Characterizing Emmert's initial attempt as "rambling," acknowledging his "learning disabilities" and "articulation issues." See below on Emmert's condition of *Jacobson's Syndrome*).]

Finally, by citing to sister-Circuit law (nearly all pre-*Mathis*), and *dicta* in our Eighth Circuit, the district court denied relief using authority from the Seventh Circuit; a Circuit in tension with other circuit courts of appeal on the issue. The district court did not find the prickly issue "debatable" despite circuit conflict on how to apply the categorical approach of prior sex offenses to a federal baseline offense. The Supreme Court guidance of Esquivel-*Quintana v. Sessions*, 198 LED2d 22 (May 30, 2017) was likewise ignored. Emmert argues that the district court's material omissions, overlooked law, and use of a circuit split between the 7th Circuit and the 9th/2nd Circuits to neuter the categorical approach, is *a priori* **debatable**, where the Eighth Circuit has not definitively decided the issue.

Therefore, Emmert requests a Certificate of Appealability because reasonable jurists would disagree in their review on the § 2255 and Rule 59(e) rulings.

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STATEMENT OF THE CASE

A jury convicted Emmert of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). [Crim. Case, Doc. No. 198]. The Court sentenced Emmert to 240 months in prison despite his objections to the PSR saying this was improper because his prior state-court conviction should not be counted. [Crim. Case Doc. 186: Objections to PSI at p20, ¶104-5: Sentencing range "should be 78-97 months"] (Ex. B). Emmert's conviction and sentence were affirmed on appeal. *United States v. Emmert*, 825 F.3d 906 (8th Cir. 2016).

In his original *pro se* § 2255 motion, Emmert asserted multiple grounds for relief. [ECF No. l: 2255]. Because the district court was not clear on what claims Emmert was asserting (he suffers from an emotional-cognitive disorder known as *Jacobson's Syndrome*, which is closely related to the Down's Syndrome range of mental/physical abilities, PSR at ¶ 82), the court directed Emmert to amend his pleading. [ECF 4: Order, at 1-2]. On that record, for all intents and purposes the district court did not read the original 2255 in its entirety.

ENUMERATED CLEAR ERRORS OF FACT:

1. ECF 1: 2255 Attachment H, p.3, ¶1 ("The Judge in sum, stated that he was sentencing Emmert to the maximum allowed and was not going to

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review or correct Emmert's PSR objections. Swift filed to object at sentencing or in direct appeal."); and *Id.*, ¶2 ("Emmert was originally punished for [the state court case] in his original conviction [ECF 1, Ex. 25]. Emmert was then enhanced due to his past [Crim. ECF No. 5], enhancing Emmert's sentence from "0-10" to "10-20" [years].... Now Emmert is punished a third time by increasing his punishment to the maximum of 20.") *Id.* ("Swift noted that the government was double counting to inscrease [sic] Emmert's criminal history[.] ... "Swift calculated Emmert at a range of 78 to 97 months [], well under the maximum 20 years that he had received.")

2. ECF 1: Attachment M (Due Process, adjudicative issue) at p.16, ¶C(4) ("Emmert's sentencing range was 78-97 months") (citing objections to the PSR's p.20, ¶105.), and ¶C(5) ("punished for EB [the state of Illinois conviction] 3 times i) original conviction in 1989; ii) enhancement (Crim. ECF 5); iii) and increased punishment on top of the [mandatory minimum] enhancement ... to further increase punishment.")

3. ECF 1: Attachment I at p. 17, ¶11 (IAC for prejudicially avoiding appeal issue that "Emmert was punished for everything but possession: a) [] once in the original [state] conviction, twice for increased punishment [sentencing enhancement]; and third for EB's statements at sentencing and her new unproven allegations of abuse.") Emmert clarified that being punished for "everything but possession" included the mandatory minimum enhancement § 2252(b)(2), and certain Guidelines enhancements.

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4. Crim. Doc. ECF 202, ¶12: Motion for New Trial filed Spring 2014 and included as a substantive attachment to the 2255 docket, ECF 1:

"Approx 1-1/2 years ago defendant wrote his attorney over the enhancement that he had paper that said a person who committed an act while 18 yrs and older and seen no provision to include minors charged as an adult. That he didn't think the enhancement applied. His attorney ignored his letter and gave no response. Currently defendant re-told his attorney, who responded like was his 1st time hearing it. His attorney could not find where it state that problem is due to 1-1/2 yrs ago defendant doesn't know either since sent all papers to his attorney prior to trial.

Defendant not sure if it's in the enhancement definitions, application notes, or what is proscribed as a sex offense under state law.

But believes that enhancement refers to state sex crimes and in definition of those state crimes. It stated a person who commits a sex crime as an adult 18+ and up. Not a minor committed as an adult.

If it applies defendant's would of been sentenced to 0 to 10 yrs not 10 to 20. Since he was a minor 17 [age] convicted as an adult. Which would effect his time.

Defendant requested his attorney research and received no response except that enhancement don't' state age. Defendant think its in definition as to what constitutes as a state sex crime."

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The district court next granted Emmert's request for counsel and directed counsel to file an amended motion. [ECF 7: ORDER at 1-2]. Emmert also received the assistance of a fellow inmate, who is a paralegal, to help in relevant communication. In addition to this help, Emmert shaved the original 300-page § 2255, down to a mere 8 pages based on information extracted from the initial filing. [ECF 19: Motion to Amend]. Given the sudden shift in justiciability and pending dismissal under Rule 4, Emmert felt under duress to re-organize his thoughts on previously pleaded facts unless he amended it in a short time.

Emmert's Motion to Amend cited to the *original* facts as an amendment under Rule 15. [ECF 19: *Pro se* Motion to Amend]. The Court granted Emmert's motion to amend, dismissed all previous claims, and directed the Government to respond to Emmert's claims. [ECF 21: ORDER at 1-2]. The Government resisted Emmert's claims. [ECF 26]. Emmert, *pro se,* filed supplemental materials in support of his claims. [ECF 22: Aff.; ECF 29: Reply; and ECF 32: Supplemental Authority]. Counsel for Emmert also supported Emmert's claims. [ECF 30].

Inexplicably, and without asking for Emmert's consent under *Castro v. United States,* the district court construed Emmert's *pro se* amendment as a "new" single

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ground. Emmert disagreed with this interpretation because the amended pleading was simply a re-statement of already-claimed operative facts, but this time mentioned *Mathis*. [ECF 36: Motion under Rule 59(e)]. Emmert's Rule 59 motion claimed court error where Judge Gritzner admittedly did not fairly apprehend the contents of his initial 2255. Emmert's position for the Rule 59(e), therefore, was "what could the court compare the amendment to, if the court agreed he did not read it?" And second, the same district court granted the "relates back" amendment, but reversed saying the ground did not "relate back." [*Compare*, ECF 1 and attachments to this COA, *with* ECF 37: Denial of Rule 59 Motion]. Emmert filed a notice of appeal. [ECF 38ff: Notice of Appeal].

The record shows that Emmert was not procedurally barred from raising the *Mathis* claim under either Due Process or Ineffective Assistance of Counsel in his 2255: "Emmert's amended claims, both his independent Due Process claim and his claim of ineffective assistance of counsel, are not procedurally barred." [ECF 34: Order at 6]. After all, this was the same factual basis he challenged in the PSR. [Crim. Case., Doc. 186-9: PSR Objections at 20, ¶104]; and one of the same issues Emmert's attorney discussed at sentencing: [ECF 34: Order at 4, citing Crim. Case Doc. No. 216, Sentencing Transcript at 5] (Arguing Court must apply

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categorical approach to determine whether Emmert's prior Illinois conviction qualifies as a predicate felony under § 2252(b)(2).)

Emmert's appellate attorney also wrote a letter about this post-appeal briefing, responding to Emmert's request to challenge the mandatory minimum sentence enhancement, too. [ECF No. 22-1 (Letter at 1-2, mentioning but not applying the then-new case of *Mathis*)].

ARGUMENT

STANDARD OF REVIEW

Mr. Emmert need only show that reasonable jurists might debate the handling of his § 2255 motion below, a low bar that this appeal passes. He must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A showing is substantial enough to merit a COA when "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.s. 473, 484 (2000). This Court can grant Mr. Emmert a COA even if the Court does not ultimately

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believe that he will prevail on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("[A] COA does not require a showing that the appeal will succeed ... 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.")

MR. EMMERT HAS MADE A SUBSTANTIAL SHOWING OF INEFFECTIVE ASSISTANCE

Reasonable jurists could debate whether the district court erred in denying Mr. Emmert a hearing to establish the ineffectiveness of his trial counsel. They also could debate the district court sailing on the sea of uncertainty outside the Eighth Circuit, where the compass needle spins from one authoritative position to another on the issue at bar. Mr. Emmert asserts that if circuit courts of appeal debate the issue, reasonable jurists would also, and therefore a COA should issue.

Even if the above is passed by, the clear error by the district court of substantially ignored facts submitted in the initial 2255 (attached here for convenience), show that if they were included, it does not "conclusively"

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preclude a claim for ineffective assistance of counsel or due process; therefore, a hearing was statutorily required. 28 U.S.C. § 2255(b).

Emmert's motion would pass muster if it finds "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) (emphasis added). Emmert claimed both Fifth and Sixth Amendment rights within his one ground that gave him an argumentatively excessive sentence.

A movant is entitled to an evidentiary hearing on the § 2255 motion "[u]nless the motion and the files and records of the case *conclusively* show" the movant is not entitled to relief. 28 U.S.C. § 2255(b) (emphasis added); *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (standard for evidentiary hearing); see also *Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) ("'No hearing is required ... where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.'") (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814,817 (8th Cir. 2008)).

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The standard for a Certificate of Appealability is a low one, for "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) (internal quotation marks and citations omitted).

1. Whether Reasonable Jurists Would Debate That the District Court Erred in Either the Rule 59(e) or 2255 Ruling, When Applying the "Relates Back" and Pro se Standard By Clear Error ... When it Did Not Read the Initial 2255

Compare, ECF 1: 2255 Attachment H, p.3, ¶2 (Emmert's previously raised claim of an illegal enhancement "from 0-10, to 10-20 years" based on misapplication of his prior state court conviction unchallenged by ineffective counsel); *with* ECF 34: Order at 7-8 (material omission of the "0-10 to 10-20" sentence enhancement raised in the 2255, and erroneously saying that, "[Emmert] does not allege or make any inference that 18 U.S.C. § 2252(b)(2) was overly broad as applied to his Illinois conviction.") This is false and misleading.

Reasonable jurists could conclude that the previously raised facts were sufficient to amend the initial pleading. The district court does not mention them all completely, and this Court has the obligation to decide for itself whether

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Emmert's *pro se,* mentally challenged efforts rise to the level of acceptance for a "relates back" amendment.

Pro se Standard "Relates"

Petitioners for habeas relief like Emmert are instructed to "not cite case law," but the district court's order weaponized this Rule. A *pro se* prisoner litigant simply reading Title 28 U.S.C. § 2255, the Rules Governing Proceedings Under § 2255, and the plain language of the Administrative Court's § 2255 Form ("AO 243" at ¶12), will see unanimous direction to "not argue or cite law," when filing a 2255.

Reasonable jurists could find confirmation bias by exploiting Emmert's compliance to the 2255 form to deny relief, faulting him for not uttering the magic words "*Mathis*" when all he had to do – according to the rules – was make the *factual* claim of an erroneous mandatory minimum sentence enhancement; something which the district court agrees (but does not address) when it appointed 2255 counsel. And for all that, appointed counsel agreed on all aspects of Emmert's *pro se* efforts (both in the amending, and in the substance). It

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was not novel since he raised the issue in his PSR objections, at sentencing, and attached his defense counsel's letter mentioning *Mathis* to his initial 2255.

At sentencing, the district court judge admitted to a pre-meditated "max" sentence and further said he would "not review the PSI objections" and give Emmert "life" if he could. By not objecting, reasonable jurists could find that counsel was ineffective on a likely appeal issue, and further find that neither the statutory mandatory minimum enhancement nor *any* Guidelines enhancements demonstrated a certain bias in the court and not simply an adverse ruling. Without an objection, Emmert was in a poor position to ask the Eighth Circuit to examine the reasonableness of the judge not including his justification for not reading the PSR objections. If the sentencing transcript can be understood on its face, this is evidence of why the district court did not even read Emmert's initial 2255 to have a fair basis of comparison when ruling on the amendment.

The district court took an unusual tack, *contra* the standard affirmed in *United States v. Gray*, 581 F.3d 749 (8th Cir. 2009) (courts are to "generously consider" a *pro se* claim and hold a *pro se* filing - any filing by an inmate, whether represented or not - to "less stringent standards than formal pleadings drafted by lawyers"). In *Gray*, the court permit an expansive state-law sentencing issue to move

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forward. (Citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).) Reasonable jurists would debate that the *pro se* standard favors a fair interpretation of "relating," not the impossibly narrow version in the order.

The court's omission of *Haines* and *Gray* is something reasonable jurists would think should be corrected. They could find that the only way a *Mathis* ground would not relate back is by material omission of the language in Attachment H of the 2255, among others (see enumerated errors, above). Even when appointed 2255 counsel Adam Zenor got to write about it, it was crystal clear to him what Emmert was arguing, but the district court omits to include any comment on counsel's findings. [ECF 30: Defense Counsel's Response]. This places the district court's confirmation bias on refusing to read the PSR objections supported by the empirical data on Emmert's likelihood to re-offend and what level offender he was.

Continuing, the Court *partially cites* the original 2255 (which it admittedly didn't read to comprehension), to change the meaning of one claim: "Emmert was punished for the 1989 conviction three times, one of those times being the sentence given under § 2252(b)(2)." [ECF 34: Order at 8]. The district court does not say how it was able to first find the 2255 *indecipherable*, and then decipher it

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enough to fit a pre-determined conclusion. The district court refutes a *parody* of the issue, by saying "Emmert appears to be arguing the *mere reference* to increased punishment or any allegation of ineffective assistance of counsel relates the new claim back to the original motion." [ECF 34 at 8] (emphasis added). But berating it as a "mere reference" unfairly represents the substantive issue raised in the facts of the original 2255 (that a statutory mandatory minimum enhancement on the Illinois conviction ought not be counted). *See* enumerate errors, above.

Put simply, what the district court got wrong was that Emmert *did* originally make more than "the mere reference to increased punishment." This is more than a difference of opinion, it is clear error of fact according to the record.

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2. **Would Reasonable Jurists Debate Whether the District Court Erred in Applying the Categorical Approach in Tension Among Circuits:**

A. BY WHIP-SAWING FROM A *NARROW* DEFINITION OF "RELATES," TO EXPLODING THE SAME TERM TO A "*BROAD* ORDINARY MEANING," IN ORDER "TO SUBJECT A *WIDER* RANGE OF PRIOR CONVICTIONS TO THE § 2252(B)(1) ENHANCEMENT," BY CITING TO DICTA AND PRE-*MATHIS* DECISIONS IN THIS CIRCUIT, AND CONFLICTING INTERPRETATIONS FROM SISTER CIRCUITS.

The Order strangled the definition for a "relates"-back amendment. Emmert's initial 2255 claim demonstrates sufficient facts under the *pro se* standard that the mandatory minimum enhancement *is the prejudice prong* (a sentence exceeding the statutory maximum) "**from 0-10, to 10-20**" under the *cause* of due process (Attachment M), or IAC (Attachment H). *Id.* (enumerated errors above).

Reasonable jurists would debate whether his claim "relates back," given the Order's omission of evidence that Emmert *did* complain of the mandatory minimum enhancement based on the improper use of his state-court prior conviction ... precisely what *Mathis* is all about. A COA should issue because

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reasonable debate is all that is required. *Miller-El v. Cockrell,* 537 U.S. 322,336 (2003).

The district court acknowledges a deepening Circuit Split on the issue. [ECF 34 at 11, citing *United States v. Reinhart,* 893 F.3d 606, 615 n.4 (9th Cir. 2018) (rejecting *Mayokok)*]. The district court does not mention *Reinhart's* progeny *United States v. Schlopp,* 938 F.3d 1053 (9th Cir. 2019), nor its substantive harmony with *United States v. Kroll,* No. 16-4310 (2nd Cir. March 5, 2019).) The Order acknowledges "considering" the supplemental authority filed at bar, but is silent on any analysis and silent on attorney Zenor's own arguments filed below.

For example, see *United States v. Sonnenberg,* 556 F.3d 667, 671 (8th Cir. 2009), is pre-*Mathis; United States v. Mayokok,* 854 F.3d 987, 993, n.2 (8th Cir. 2017), is dicta; and *United States v. Boleyn,* 929 F.3d 932, 936 (8th Cir. 2019) while post-*Mathis, Boleyn* is inapplicable because it is an aiding and abetting case and not about § 2252(b)(2). Nothing in the district court's order citing of a *holding* in the Eighth Circuit is on point with the issue at bar.

Reasonable jurists would debate the district court's self-contradictory, back-and-forth use of the word "relates" (narrow on the amendment, to a broad

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neutering of the categorical approach), as classic confirmation bias. The Order's denial regarding this "relating to" theory appears below:

> "Emmert argues his Illinois conviction is indivisible because the crime could be committed in multiple ways or means to 'produce the same conviction with the same penalty range.' ECF No. 19 at 5-6; see *Mathis*, 136 S. Ct. at 2248-49 (statute that lists alternative means as opposed to alternative elements to commit crime is indivisible). Emmert suggests, for example, that the Illinois criminal sexual assault statute could be violated by the marriage of minor step-siblings, even though the crime would not 'relate to' any type of sexual abuse as listed by the federal enhancement statute. ECF No. 19 at 6." [Doc. 34: Order at 10-11]

In point of fact, Emmert *did* raise the age of 17 (under 18) limitation difference in Illinois as an example, too. See enumerated error #4, above. Continuing, the district court says the following:

> An enhancement under § 2252(b), however, "does not require the state statute of conviction to be the same as or narrower than the analogous federal law. Rather, the words 'relating to' in § 2252(b) expand the range of enhancement-triggering convictions." *United States v. Kaufmann*, 940 F.3d 377, 378 (7th Cir. 2019) (citing *United States v. Kraemer*, 933 F.3d 675, 679-83 (7th Cir. 2019)).

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The Eighth Circuit Court of Appeals has signaled its agreement with this analysis, stating the categorical approach set out in *Mathis* "is inapposite to § 2252." *United States v. Mayokok*, 854 F.3d 987, 993 n.2 (8th Cir. 2017). In *Mayokok*, the Court of Appeals described how the Armed Career Criminal Act, the statute challenged in *Mathis*, defines a "violent felony" as one that "is" a felony as set out in the applicable clause of the statute. *Id.* (emphasis added).

Mayokok concluded that such a "concrete term" requires that the predicate crime be either the same as or narrower than those of the generic offense described in the federal statute. *Id.*

Under § 2252, however, "Congress used the modifier 'relating to,' and 'we must assume' that it did so 'for a purpose.'" *Id.* (citing *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (holding the state laws described in 18 U.S.C. § 2252(b) do not require exact similarity with federal definitions in order to apply)). That purpose, "was to subject a wider range of prior convictions to the § 2252(b)(l) enhancement." *Id.*; *cf United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019) ...; but see *United States v. Reinhart*, 893 F.3d 606,615 n* (9th Cir. 2018) (rejecting *Mayokok's* analysis as unpersuasive)." [Doc. 34: Order at 10-11]

The district court concludes that "The phrase 'relating to' carries a broad ordinary meaning, i.e. to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association or connection with." Id. (quoting *Sonnenberg*, 556 F.3d at 671). **Given this common definition, the Court concludes the Illinois statute for criminal sexual assault**

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necessarily "relates to" the statutes listed in § 2252(b)(2), and Emmert was correctly sentenced under that statute."

[Doc. 34: Order at 10-11] (Emphasis added).

On the contrary, when the court relies on that *Mayokok* phrase, "the categorical approach set out in *Mathis* is inapposite to § 2252," it was *dicta*, in a footnote. When the district court relies on *Sonnenberg's* phrase, "'relating to' carries a broad ordinary meaning," it was prior to *Mathis*, but more importantly, pre-dated the Supreme Court decision *Esquivel-Quintana v. Sessions*, 198 LED2d 22 (May 30, 2017), which explicitly referenced the Illinois conviction at bar, 720 Ill. Comp. Stat. 5/11/1.20.

B. DISREGARDING THE SUPREME COURT'S GUIDANCE ON AGE-SPECIFIC SEX OFFENSES, INCLUDING THE STATE-COURT SEX OFFENSE AT BAR.

Esquivel-Quintana held that federal baseline enhancement statutes shall not boost a defendant's sentence for prior state convictions relating to "sexual abuse of a minor," where the statute contains - as one of its factual causation scenarios that are broader than the federal categorical comparison - that victim's age to be

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17. (There, a deportation case; here, § 2252(b)(2).) Even if reasonable jurists could not argue (or for that matter, agree) that several courts of appeal are in disagreement on the categorical approach of § 2252(b)(2) as it relates to § 2252A(a)(5) (simple possession), then they would argue this point: they would likely find it debatable that the Supreme Court has come to an opposite decision from the district court at bar for a class of offenders who are several times more likely to re-offend than former sex offenders (*see* Recidivism section, below).

When the district court says that § 2252(b) "does not require the state statute of conviction to be the same as or narrower than the analogous federal law. Rather, the words 'relating to' in § 2252(b) expand the range of enhancement-triggering convictions," it does so by citing to a non-controlling sister circuit in *United States v. Kaufmann*, 940 F.3d at 378 (citing *Kraemer*), and avoids talking about the Ninth and Second Circuit cases of *Schlopp* and *Kroll*, each of those *contra* the Seventh Circuit.

Following current law, the district court erred in its substantive review of the claim under *Mathis v. United States*, 136 S.Ct. 2243 (2016), and *Shepard v. United States*, 544 U.S. 13, 16 (2005). *Esquivel-Quintana* dealt with having a prior conviction for "any aggravated felony." This was followed by a word salad of

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possibilities mentioned in Title 8 which weaves an even more broad application of "relating to" as compared to the federal offenses defined in Chapter 109A.

Reasonable Jurists Could Conclude that the Categorical Approach is Uniformly Applied in Different Federal Baseline Statutes (from "Is," to "Relates to," and finally "Any" State Conviction)

The district court's reliance on *dicta* in *United States v. Mayokok,* 854 F.3d 987,993 n.2 (8th Cir. 2017), and *United States v. Kraemer,* 933 F.3d 675, 679-83 (7th Cir. 2019) is an error that distorts the "violent felony" analysis of *Mathis, Taylor, Shepard,* etc. To explain, the statute 18 U.S.C. § 924(e)(2)(B)(i) (residual clause) mentions "**any**" conviction that "has an element"; but § 924(e)(2)(B)(ii) (enumerated clause) [the only section that *Mayokok* describes] has "violent felony" as one that "**is**" a felony as set out in the applicable clause of the statute.

The Ninth Circuit decisions of *United States v. Reinhart,* 893 F.3d 606,615 n.4 (9th Cir. 2018), *United States v. Schlopp,* 938 F.3d 1053 (9th Cir. 2019), reveal the debatable difference. *Kraemer's* reasoning only focused on the "is" of the enumerated clause, completely ignoring the problem child of the residual clause or other federal statutes still using the same language. As the Court is aware, "any" conviction with an "element" could no longer be reasonably handled by

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the ACCA statute – even by the categorical and modified categorical approaches – and it was therefore struck down as unconstitutional. What is more, *Esquivel-Quintana* (post-*Mathis*), and *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (pre-*Mathis*) dealt with immigration statutes analyzing prior sex offenses using the "any aggravated felony" language, similar to the residual clause. "Any" felony as used in *Esquivel-Quintana* and *Mellouli* is broader than "relates to" of 2252(b)(2). Therefore *a fortiori*, the categorical approach *compares* the federal baseline statute of 2252(b)(2) list of generic offenses defined in Chapter 109A and 110, *to* the state of Illinois prior sex offense conviction. Even if this court disagrees with that logic, reasonable jurists would debate it according to other circuit's interpreting the same Supreme Court decisions.

False and Misleading Recidivism

THE POLICY CONSIDERATIONS OF RECIDIVISM STUDIES AND STATISTICS LOBBY IN FAVOR OF GRANTING A COA

The district court rationalizes-away the categorical approach for the lowest-recidivism offenders (that is, sex offenders), by citing to a different circuit decision which relied on historically false data. Using that false premise, the

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district court keeps the categorical approach intact for higher-risk offenders (by class). *See* the United States Sentencing Commission: "*The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*", March 2017 Report, available at www.ussc.gov, immigration cases account for 55.1 % recidivism, which far out-number sex offenders (at 37.6% recidivism). [USSG Report, Table 4. See attached].

The district court turns the categorical approach on its head by basically saying "anything illegal in the state" relates to "any current federal sex offense." That defies logic, reason, data, and empirical analysis. It confirms the practice of prejudicially referring to a whole class of offenders by non-empirical voodoo victimology.

What is more, the notion that the "relating to" language of § 2252(b)(2) somehow neuters the categorical approach is based on outdated data; data so destructive it undermined Congressional efforts since 1996 (see attached). In *Packingham v. North Carolina*, U.S., No. 15-1194 (2017), the Supreme Court compared the 2003 Bureau of Justice Statistics report examining recidivism rates for sex offenders released in 1994, to a voluminous amount of current research. According to the arguments in *Packingham*, the Justice Department Report relied

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upon by Congress in the *Kraemer* decision (which was in turn relied upon by the district court at bar to deny relief), is junk science.

It turns out these old prejudicial notions were written by an Oregon prison psychologist with a master's degree and no research background, who claimed that "his sex offender treatment program worked better than anyone else's." This travesty of justice infected the SCOTUS decision of *Smith v. Doe*, ___ U.S. ____, a 2003 decision which upheld the constitutionality of sex offender registries. When deciding *Packingham* (8-0 unanimous decision; briefs of Petitioner and amicus, fully adopted into this Motion as if set forth here), the U.S. Supreme Court acknowledged that its *Smith v. Doe* basis was erroneous

Criticized by *Packingham*, the statistic mentioned in *Smith v. Doe* – that 80 percent of convicted sex offenders will offend again – is off by an average of 65 percent, depending on offender's risk levels, according to research from Arizona State University law professor Ira Ellman. *Id.* If the Supreme Court (or this Court, for that matter) relies on the faulty figures again it would unjustly subject people like Emmert to inappropriately harsh sentences; people who pose "no clear and present danger ... they're no more likely to offend than most of us." *Id.*

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Emmert's record at bar shows that in preparing for this case, he took both the RAZOR & STATIC 99 nationally accepted sex offender assessment tools. [ECF 1, Ex. H, ¶6]. Taken together, the objective psychological data shows Emmert scored "low" risk, "unlikely" to reoffend, and did not score him as a "predator". The capstone being Emmert needed "no further treatment". [Ex. G; and Ex. B: PSR Objections at 17, ¶84].

The district court's rationalization for applying a "broad, ordinary meaning," which turns the categorical approach on its head, came from *Kraemer*. But *Kraemer* gets it dead wrong on recidivism statistics (citing 1998 Congressional decisions which show the Seventh Circuit relied on the flawed Department of Justice reports.) It also relies – not on a Title 18 or Immigration case – but rather a tax case to read the tea leaves of "relates to." *Kraemer*, citing *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1760 (2018), and five other pre-*Mathis* circuit decisions.

Nowhere is *Kraemer's* "relating to" error more clear than in another deportation case, *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (pre-*Mathis*, an enhancement triggered when one is "convicted of a violation of ... any law or

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regulation of a State, ... *relating to* a controlled substance." *Kraemer*, 2019 U.S. App. LEXIS 12.

The district court sang the same sad siren song relied upon in *Kraemer*; that is, exclusively on law enforcement testimony "about the nature of child sex offenders, how they seek out relationships with children and how the recidivism rates for such offenders are 10 times higher than other, types of criminal offenders." *Kraemer*, 2019 U.S. App. LEXIS at 16-17, citing H.R. Rep. No. 105-557, at 12 (1998). So much of Emmert's acquitted and uncharged conduct warped the Court's sentencing at bar, that the completely wrong hermeneutic about recidivism among sex offenders belied reality.

That false data on recidivism and irrelevant conduct is good for law enforcement budgets, but devastating to the Truth. What is more, our sister circuits are already disagreeing with turning the categorical approach on its head *for a certain class of persons*: "Sex offenders are no more likely to re-offend than a member of the general public." *Packingham.*

Empirical and scholarly studies demonstrate sex offenders are among the least likely to re-offend, **even below immigration cases** (cases which use a broader "any" reference to a state prior, and "relates to" as well). *See, Id.; see* also,

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By way of comparison, it is like saying "abortion clinics are far more likely to reduce abortions and unwanted pregnancies by lobbying for criminalizing a class of persons who offer pro-life counseling services at their clinic doors," when the empirical data suggests the opposite: Planned Parenthood's own records demonstrate skyrocketing abortion rates from 1973 to 2000, and in *N.O.W. v. Scheidler*, the Supreme Court shows that sidewalk counseling (which N.O.W. unsuccessfully claimed was criminal under RICO), actually *saves* lives, reducing murder by abortion, and encourages healthy pregnancies. The chilling truth is that no federal statute is exempt from using the categorical and modified categorical approach when analyzing a prior sex offense, simply for being a sex offense.

Conclusion

This Court should grant Mr. Emmert a COA pursuant to Fed. R. App. Pro. 22(b)(1) and 28 U.S.C. § 2253(c)(1)(B) and permit the appeal to proceed. Reasonable jurists would debate whether the files and records of the case

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"conclusively" show Emmert is not entitled to relief on the "relating back" 2255 claim for the following reasons:

1) Reasonable Jurists Would Debate That the District Court Committed Clear Error in Either the 2255 Ruling, the Rule 59(e), or Both When Applying the "Relates Back," the *Pro se* Standard, or Both.
2) Reasonable Jurists Debate Whether the District Court Erred in Applying the Categorical Approach in Tension Among Circuits:
   a. By Whip-sawing from a *narrow* definition of "relates," to exploding the same term to a "*broad* ordinary meaning," in order "to subject a *wider* range of prior convictions to the § 2252(b)(1) enhancement," by citing to dicta and pre-*Mathis* decisions in this circuit, and conflicting interpretations from sister circuits.
   b. Disregarding the Supreme Court's guidance on age-specific sex offenses, including the state-court sex offense at bar.
   c. False and Misleading Recidivism.

3/26/2020 /s/

Date Executed — David Lee Emmert, *pro se*

Under penalty of perjury pursuant to 28 U.S.C. § 1746, I hereby swear and verify that the foregoing is true and correct as an affidavit; Further, that it has been deposited under Prison Mailbox Rule this day in the institution's internal mail System designed for legal mail, United States Postal Service, first-class postage prepaid.

13155-030
P.O. Box 1000
Marion, IL 62959

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Certificate of Service

I hereby certify that a copy of the foregoing was mailed this day via United States Postal Service, first-class postage prepaid, upon the following:

Clifford R. Cronk
AUSA
131 East 4th St. Suite 310
Davenport, IA 52801

3/26/2020 /s/ _____

Date Executed David Lee Emmert, *pro se*

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Appendix I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1179

David Lee Emmert, Jr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:18-cv-00092-JEG)

JUDGMENT

Before LOKEN, COLLOTON, and KOBES, 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.

April 08, 2020

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

/s/ Michael E. Gans

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Appendix J

Appeal No. 20-1179

United States Court of Appeals
For the Eighth Circuit

DAVID LEE EMMERT, JR.,
Petitioner – Appellant,

v.

UNITED STATES OF AMERICA,
Respondent – Appellee

Appeal from the U.S. District Court
for the Southern District of Iowa – Des Moines
(4:18-cv-00092-JEG)

Petition for Re-hearing Under Fed. R. App. Proc. 40
On Application for a Certificate of Appealability

David Lee Emmert, Jr.
13155-030
P.O. Box 1000
Marion, IL 62959

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A petition for panel rehearing is a procedural due process right guaranteed through the Fifth Amendment by Rule 40 of the Federal Rules of Appellate Procedure.

Rule 40(a)(2) states, "The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted."

Indifference is a form of injustice. In order to quell any doubts about the single-clerk-signed order concerning the perfunctory denial, Mr. Emmert petitions for panel rehearing.

Overlooked or Misapprehended Points of Fact and Law

1. Whether or not the Mathis [v. United States], 136 S.Ct. 2243 (2016)] amendment relates back necessarily begins with a question of fact. Emmert presented record filings from ECF 1 (2255 Docket), supporting the argument against using his prior Illinois conviction to boost his mandatory minimum sentence. He later amended his entire initial 2255 down to just eight pages and one ground consolidating his various mandatory minimum sentencing claims down to the Mathis Due Process/Ineffective Assistance of Counsel claim. The panel did not comment on the fact the district court record is silent concerning its reading-to-comprehension of the initial 2255; in fact, the court called it rambling and incomprehensible. The way for the Mathis amendment to move forward hinges on a clear statement from the district court (or the Panel at bar) on the four overlooked facts listed on pages 7-9 of Emmert's motion for a COA. Since nothing like recognition of fact appears in the record, panel rehearing is warranted. Perfunctory denial of this instant petition is tacit agreement to unfairness.

2. Whether of not the Mathis claim warrants relief is a question of law reviewed de novo on a 2255. Since the panel's one-sentence denial lacked any

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review standard applied to the facts in tension among circuit courts of appeal, rehearing is warranted.

Detailed argument in support of rehearing the denial of the COA is attached to this Petition for Panel Rehearing as a Memorandum in Support. It is hereby adopted into this Petition as if fully set forth here.

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Appeal No. 20-1179

United States Court of Appeals
for the Eighth Circuit

DAVID LEE EMMERT, JR.,
Petitioner - Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent - Appellee.

MEMORANDUM IN SUPPORT

[of Petition for Panel Re-hearing]

This was the original motion attached that was filed, see Appendix H

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Appendix K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1179

David Lee Emmert, Jr.

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:18-cv-00092-JEG)

ORDER

The petition for rehearing by the panel is denied as overlength.

May 15, 2020

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

/s/ Michael E. Gans

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Appendix L

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-1179

David Lee Emmert, Jr.
Appellant,

vs.

United States of America,
Appellee.

Appeal from U.S. D.C. S.D. Iowa - Des Moines
(4:18-cv-00092-JEG)

MOTION TO VACATE

David Emmert appears pro se requesting that the court vacate its ORDER dated May 15, 2020 (denying rehearing as overlength). The Federal Rules of Appellate Procedure, Rule 40(b) say a petition for panel rehearing must not exceed 15 pages.

Mr. Emmert's Petition for Panel Rehearing was only three pages. It was accompanied by a "Memorandum in Support" of rehearing, out of an abundance of caution, as a representation of the issues raised in his motion for a certificate of appealability. This was meant to make the court's job easier, not harder. Due to his pro se status, Mr. Emmert begs this Court to vacate its order denying rehearing and re-instate. He respectfully re-submits the exact same three-page petition with this motion.

5-20-2020 /s/

Date Executed

Under penalty of perjury pursuant to
28 U.S.C. § 1746, I hereby swear and verify
that the foregoing is true and correct as an affidavit.
Further, that it has been deposited this day
in the institution's internal mail system
designed for legal mail under Prison Mailbox Rule,
United States Postal Service, first-class postage prepaid.

David L. Emmert, pro se
13155-030
P.O. Box 1000
Marion, IL 62959

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forewarded via the CMF System upon filing by the clerk, or by United States Postal Service, first-class postage prepaid, upon the following:
Clifford R. Cronk, AUSA, 131 East 4th St. Suite 310, Davenport, IA 52801

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Appeal No. 20-1179

United States Court of Appeals
For the Eighth Circuit

DAVID LEE EMMERT, JR.,
Petitioner – Appellant,

v.

UNITED STATES OF AMERICA,
Respondent – Appellee

Appeal from the U.S. District Court
for the Southern District of Iowa – Des Moines
(4:18-cv-00092-JEG)

Petition for Re-hearing Under Fed. R. App. Proc. 40
On Application for a Certificate of Appealability

David Lee Emmert, Jr.
13155-030
P.O. Box 1000
Marion, IL 62959

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A petition for panel rehearing is a procedural due process right guaranteed through the Fifth Amendment by Rule 40 of the Federal Rules of Appellate Procedure.

Rule 40(a)(2) states, "The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted."

Indifference is a form of injustice. In order to quell any doubts about the single-clerk-signed order concerning the perfunctory denial, Mr. Emmert petitions for panel rehearing.

Overlooked or Misapprehended Points of Fact and Law

1. Whether or not the Mathis [v. United States], 136 S.Ct. 2243 (2016)] amendment relates back necessarily begins with a question of fact. Emmert presented record filings from ECF 1 (2255 Docket), supporting the argument against using his prior Illinois conviction to boost his mandatory minimum sentence. He later amended his entire initial 2255 down to just eight pages and one ground consolidating his various mandatory minimum sentencing claims down to the Mathis Due Process/Ineffective Assistance of Counsel claim. The panel did not comment on the fact the district court record is silent concerning its reading-to-comprehension of the initial 2255; in fact, the court called it rambling and incomprehensible. The way for the Mathis amendment to move forward hinges on a clear statement from the district court (or the Panel at bar) on the four overlooked facts listed on pages 7-9 of Emmert's motion for a COA. Since nothing like recognition of fact appears in the record, panel rehearing is warranted. Perfunctory denial of this instant petition is tacit agreement to unfairness.

2. Whether of not the Mathis claim warrants relief is a question of law reviewed de novo on a 2255. Since the panel's one-sentence denial lacked any

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review standard applied to the facts in tension among circuit courts of appeal, rehearing is warranted.

Detailed argument in support of rehearing the denial of the COA is attached to this Petition for Panel Rehearing as a Memorandum in Support. It is hereby adopted into this Petition as if fully set forth here.

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Appendix M

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1179

David Lee Emmert, Jr.

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:18-cv-00092-JEG)

MANDATE

In accordance with the judgment of 04/08/2020, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

May 22, 2020

Clerk, U.S. Court of Appeals, Eighth Circuit

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Appendix N

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

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

May 29, 2020

Mr. David Lee Emmert Jr.
U.S. PENITENTIARY
13155-030
P.O. Box 1000
Marion, IL 62959-0000

RE: 20-1179 David Emmert, Jr. v. United States

Dear Mr. Emmert Jr.:

The motion to vacate the Judge Order denying the petition for rehearing as overlength is rejected under Eighth Circuit Rule 40A(c). Successive petitions for rehearing are not allowed. The clerk will accept for filing only 1 petition for rehearing from any party to an appeal and will not accept any motion to reconsider the court's ruling on a petition for rehearing or rehearing en banc.

Michael E. Gans
Clerk of Court

CRJ

Enclosure(s)

cc: Mr. John S. Courter
Mr. Clifford R. Cronk
Mr. Richard D. Westphal

District Court/Agency Case Number(s): 4:18-cv-00092-JEG

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