APPENDIX

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

DARWIN LEE ZOCH, Movant, vs. UNITED STATES OF AMERICA Respondent.	No. C16-4066-LTS No. CR11-4031-LTS **ORDER REGARDING** **28 U.S.C. § 2255 MOTION**

I. INTRODUCTION

The matter before me is movant's second motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (Civ. Doc. No. 1), which he obtained authorization to file. In his second § 2255 motion, movant claims that he is entitled to relief under the recent United States Supreme Court decision in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). The Government disputes that movant is entitled to relief under 28 U.S.C. § 2255.

II. FACTS

A jury found movant guilty of count 1, being a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1) & 924(e) (Crim. Doc. No. 58). The court ordered a pre-sentence report to be prepared. The parties filed objections to the draft pre-sentence report (Crim. Doc. Nos. 71 & 72). United States Probation then filed a final pre-sentence report (Crim. Doc. No. 80) and the parties filed sentencing memoranda (Crim. Doc. Nos. 79 & 81). During the sentencing hearing on March 12, 2012, the Government offered documentary evidence in the form of the trial information, the plea agreement

and the judgment that related to movant's five prior convictions for second degree burglary under Iowa law (Crim. Doc. Nos. 78, 83). The court determined that movant qualified as an armed career criminal and calculated a sentencing guideline range of 188 to 235 months imprisonment based on a total adjusted offense level of 33 and a criminal history category IV (Crim. Doc. Nos. 80, 85 & 91). The court sentenced movant to a term of 180 months imprisonment (Crim. Doc. Nos. 84 & 91).

III. LEGAL STANDARD

A prisoner in custody under sentence of a federal court is able to move the sentencing court to vacate, set aside or correct a sentence. *See* 28 U.S.C. § 2255(a). To obtain relief pursuant to 28 U.S.C. § 2255, a federal prisoner must establish: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction to impose such sentence"; (3) "that the sentence was in excess of the maximum authorized by law"; or (4) "[that the judgment or sentence] is otherwise subject to collateral attack." *Id.*; *see also Hill v. United States*, 368 U.S. 424, 426-27 (1962) (listing four grounds upon which relief under 28 U.S.C. § 2255 may be claimed); *Watson*, 493 F.3d at 963 (same); *Lee v. United States*, 501 F.2d 494, 499-500 (8th Cir. 1974) (clarifying that subject matter jurisdiction exists over enumerated grounds within the statute); Rule 1 of the Rules Governing Section 2255 Proceedings (specifying scope of 28 U.S.C. § 2255). If any one of the four grounds is established, the court is required "to vacate and set aside the judgment and [it is required to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

When enacting 28 U.S.C. § 2255, Congress "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)) (internal quotation mark omitted). Although it appears to be broad, 28

U.S.C. § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). Rather, 28 U.S.C. § 2255 is intended to redress constitutional and jurisdictional errors and, apart from those errors, only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Sun Bear*, 644 F.3d at 704 (clarifying that the scope of 28 U.S.C. § 2255 is severely limited and quoting *Hill*, 368 U.S. at 428); *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987))). A collateral challenge under 28 U.S.C. § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) (making clear that a motion pursuant to 28 U.S.C. § 2255 will not be allowed to do service for an appeal). Consequently, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (quoting *Addonizio*, 442 U.S. at 184).

IV. ANALYSIS

The parties dispute whether movant has enough prior qualifying convictions to be subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). Movant argues that his five prior Iowa second degree burglary convictions do not qualify as predicate felonies and, therefore, that his sentence exceeds the non-ACCA statutory maximum. The Government argues that relief is not available under 28 U.S.C. § 2255 because movant failed to establish that the court relied on the residual clause addressed in *Johnson*. The Government further contends that it does not matter that if sentenced today, movant would no longer be subject to the enhanced ACCA

statutory range of punishment, because the Supreme Court's holdings in *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), and *Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243 (2016), do not provide an independent constitutional basis for attacking movant's sentence.

Under the ACCA, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if the defendant has three or more previous convictions for a "violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as any crime punishable by imprisonment for a term exceeding one year that: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) "is burglary, arson, or extortion, involves use of explosives"; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). These definitions of "violent felony" fall into three respective categories: (1) the elements clause; (2) the enumerated-crimes clause; and (3) and the residual clause.

In *Johnson*, the Supreme Court addressed the constitutionality of the residual clause; the Court held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to the defendant and invites arbitrary enforcement by judges." 135 S. Ct. at 2557. Shortly after invalidating the residual clause, the Supreme Court concluded in *Welch v. United States* that *Johnson* announced a substantive rule that applied retroactively on collateral review. 136 S. Ct. 1257, 1265. Hence, under *Johnson* and *Welch*, a prior conviction may not be used as a predicate ACCA offense if it falls under 18 U.S.C. § 924(e)(2)(B)'s invalidated residual clause.

The Court clarified, however, that the ACCA's other two clauses – the elements clause and the enumerated-crimes clause – remain viable. *Johnson*, 135 S. Ct. at 2563 ("Today's decision does not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony."); *accord United States v. Sykes*, 844 F.3d 712, 716 (8th Cir. 2016). Thus, application of

Johnson and *Welch* negates the use of a felony unless it qualifies as an ACCA predicate without relying on the residual clause. "[E]ven if a defendant's prior conviction was counted under the residual clause, courts can now consider whether that conviction counted under another clause of the ACCA." In re *Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016) (citing *Welch*, 136 S. Ct. at 1268).

A movant must prove that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence. *See id*. at 1273; *see also Stanley v. United States*, 827 F.3d 562, 566 (7th Cir. 2016) (stating that a "proponent of collateral review" must "produce evidence demonstrating entitlement to relief"); *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir. 1992) (citing *Kress v. United States*, 411 F.2d 16, 20-21 (8th Cir. 1969), for the proposition that the burden of proof is on petitioner in § 2255 proceeding); *Day v. United States*, 428 F.2d 1193, 1196 (8th Cir. 1970) (providing that petitioner bears burden of proof on each ground asserted in § 2255 motion); *Taylor v. United States*, 229 F.2d 826, 832 (8th Cir. 1956) ("Because the statutory proceeding is a collateral attack upon the judgment of conviction, the burden is on the [movant] to establish a basis for relief under some one or more of the grounds set forth in [§ 2255].").

If the court cannot tell whether, at sentencing, a movant's prior convictions qualified pursuant to the residual clause, which would render his sentence subject to being challenged under *Johnson*, or whether they qualified pursuant to the elements clause or the enumerated-crimes clause, which would not render his sentence subject to being challenged under *Johnson*, the court must deny relief under 28 U.S.C. § 2255. *See* In re *Moore*, 830 F.3d at 1273; *accord In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016). Thus, if movant's burglary convictions qualified as violent felonies under the enumerated-crimes clause (even if it also qualified under the residual clause) at the time of sentencing, the resulting sentence is not subject to attack. *See Hires*, 825 F.3d at 1303; *accord United States v. Gabrio*, No. 01-CR-165, 2017 U.S. Dist. LEXIS 122242, at *9 (D. Minn. Aug.

2, 2017); *Traxler v. United States*, No. 16-CV-747, 2016 U.S. Dist. LEXIS 117119 (W.D. Mich. Aug. 31, 2016); *Ziglar v. United States*, No. 16-CV-463, 2016 U.S. Dist. LEXIS 105955 (M.D. Ala. Aug. 11, 2016).

Importantly, it makes no difference whether movant's burglary convictions would count as a predicate if the court sentenced him today. *See Hires*, 825 F.3d at 1303 (explaining that "*Johnson* does not serve as a portal to assert a *Descamps* claim"); *see also United States v. Taylor*, 672 F. App'x 860, 861-64 (10th Cir. 2016) (determining that *Johnson* did not impact sentence imposed because prior burglary convictions qualified under enumerated-crimes clause and *Mathis* did not announce a new rule that is retroactively applicable to cases on collateral review);[1] *but see United States v. Winston*,

[1] The Eighth Circuit Court of Appeals has not directly addressed the relationship between *Johnson* and *Descamps* and/or *Mathis* with respect to an initial § 2255 motion. It, however, has addressed *Mathis* in the context of authorizing a second or successive § 2255 motion. *See, e.g.*, *Davis v. United States*, No. 16-2293, Eighth Circuit Entry ID 4518847 (8th Cir. Mar. 31, 2017) (unpublished) ("At the time of Davis's sentencing [on April 16, 2010], it was settled in the Eighth Circuit that third-degree burglary in Iowa was a generic burglary and thus a violent felony under the enumerated-offenses clause of 18 U.S.C. § 924(e). *United States v. Stevens*, 149 F.3d 747, 749 (8th Cir. 1998); *United States v. Austin*, 915 F.2d 363, 368 (8th Cir. 1990). *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), addressed only the residual clause of § 924(e). Davis's claim that his sentence should have not been enhanced based on the enumerated-offenses clause does not rely on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *See* 28 U.S.C. § 2255(h), 2244(b)(2). *Mathis v. United States*, 136 S. Ct. 2243 (2016), did not announce a new rule of constitutional law."); *Howard v. United States*, No. 16-2335, Eighth Circuit Entry ID 4432899 (8th Cir. Aug. 2, 2016) (unpublished) ("The record available to this court for expedited consideration does not show clearly whether the sentencing court found that movant was an armed career criminal based on the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) or based on the enumerated clause of that section. If movant was sentenced based on the residual clause, then the new rule of constitutional law announced in *Johnson* and made retroactive by *Welch v. United States*, 136 S. Ct. 1257 (2016), supports a second or successive motion. If movant was sentenced based on the enumerated clause, then the decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), does not support a second or successive motion, because *Mathis* did not announce a new rule of constitutional law."); *Jordan v. United States*, No. 16-2507, Eighth Circuit Entry ID 4432940 (8th Cir. Aug. 2, 2016) (unpublished) (same); *Luker v. United States*, No. 16-2311, Eighth Circuit Entry ID 4433198

850 F.3d 677, 682 (4th Cir. 2017) (holding that, "when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in [*Johnson*], the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A).").

Movant's sentence is not called into question by *Johnson* because the court did not need to rely on the residual clause when it determined that movant qualified as an armed career criminal. Rather, the court could have relied on the enumerated-crimes clause because it included the specific crime of burglary. Indeed, although the court did not expressly state how the convictions qualified as predicate felonies, it is apparent that the court determined that movant qualified as an armed career criminal because each of his second degree burglary convictions qualified as an enumerated offense, that is, a "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii); *see also* PSR (Crim. Doc. No. 80) at ¶¶ 19 & 23. Regarding each enumerated offense, the undisputed facts in movant's pre-sentence report indicate that: (1) movant committed second degree burglary under Iowa law by

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(8th Cir. Aug. 2, 2016) (unpublished) (same); *Zoch v. United States*, No. 16-2289, Eighth Circuit Entry ID 4432889 (8th Cir. Aug. 2, 2016) (unpublished) (same); *Sutton v. United States*, No. 16-2278, Eighth Circuit Entry ID 4415705 (8th Cir. June 22, 2016) (unpublished) (concluding that authorization to file a second or successive motion for relief under § 2255 should be denied where petitioner asserted that, under the Supreme Court's decision in *Johnson* and its expected decision in *Mathis*, his prior Missouri conviction for Second Degree Burglary under Mo. Rev. Stat. § 569.170 could no longer qualify as a valid predicate offense to support the enhancement of his sentence as an armed career criminal and government asserted that petitioner was simply attempting to invoke *Johnson* in an effort to resuscitate his previously-rejected claim under *Descamps*); *Bradley v. United States*, No. 16-1528, Eighth Circuit Entry ID 4415661 (8th Cir. June 21, 2016) (unpublished) (concluding that authorization to file a second or successive motion for relief under § 2255 should be denied where petitioner asserted that his Illinois armed robbery conviction, Illinois attempted armed robbery conviction and Illinois robbery conviction did not constitute predicate felonies and, under the Supreme Court's decision in *Johnson* and its expected decision in *Mathis*, his prior Iowa third degree burglary conviction could no longer qualify as a valid predicate offense to support the enhancement of his sentence as an armed career criminal). Hence, the Eighth Circuit's approach appears to be consistent with the notion that the holdings in *Descamps* and/or *Mathis* are unrelated to the holding in *Johnson*.

burglarizing a hardware store on April 22, 1991; (2) movant committed second degree burglary under Iowa law by burglarizing a parts store on May 13, 1991; (3) movant committed second degree burglary under Iowa law by burglarizing a hardware store on April 21, 1991; (4) movant committed second degree burglary under Iowa law by burglarizing a middle school on March 3, 1991; and (5) movant committed second degree burglary under Iowa law by burglarizing a middle school on April 3, 1991. *See* PSR (Crim. Doc. No. 80) at ¶ 23.[2]

[2] In this collateral proceeding, the court finds that it is proper to consider the unobjected-to portions of the pre-sentence report. *Cf.* Fed. R. Crim. P. 32(i)(3) (stating that a court "may accept any undisputed portion of the presentence report as a finding of fact"); *United States v. Garcia-Longoria*, 819 F.3d 1063, 1067 (8th Cir. 2016) (finding that, because the pre-sentence report described prior offense conduct without stating its sources, the failure to object to conduct described in the pre-sentence report relieved the government of its obligation to introduce at sentencing the documentary evidence *Taylor* or *Shepard* requires); *United States v. Shockley*, 816 F.3d 1058, 1063 (8th Cir. 2016) (explaining that sentencing courts may not look to factual assertions within federal pre-sentence reports—even if the defendant failed to object to the reports—where the pre-sentence report indicates that the source of the information in the reports might have been from a non-judicial source); *United States v. Reliford*, 471 F.3d 913, 916 (8th Cir. 2006) ("[I]f the defendant fails to object to fact statements in the presentence investigation report (PSR) establishing that a prior offense was a violent felony conviction, the government need not introduce at sentencing the documentary evidence that *Taylor* and *Shepard* otherwise require."); *United States v. Bell*, 445 F.3d 1086, 1090 (8th Cir. 2006) (concluding that court properly considered fact recital that defendant did not contest); *United States v. Paz*, 411 F.3d 906, 909 (8th Cir. 2005) (explaining that facts in pre-sentence report are deemed admitted unless the defendant objects to those facts); *United States v. Rodamaker*, 56 F.3d 898, 902 (8th Cir. 1995) (stating that it is permissible to rely on unobjected-to facts in the pre-sentence report); *see also United States v. Chapman*, No. 16-1810, 2017 WL 3319287 (3d Cir. Aug. 4, 2017) (Jordan, J., concurring) (observing that the categorical approach impedes uniformity, interferes with the ability of courts to ensure that repeat, violent offenders receive the most severe sentences, requires judges to feign amnesia and leads to unusual questions of statutory interpretation). It is clear that the dimensions of the issues addressed during a criminal trial or change of plea and during a sentencing hearing are fundamentally different. Indeed, a sentencing hearing is not undertaken to convict a defendant for the alleged violation, and, therefore, it does not give rise to the full panoply of rights that are due a defendant at a trial or during a change of plea. Similarly, it is clear that the dimensions of issues addressed during collateral proceedings are fundamentally different. Having considered well-established precedent that emphasizes finality, well-established precedent that reiterates the limited scope of relief under § 2255 and the

At the time of movant's sentencing in 2012, legal authority would have supported the court's use of the modified categorical approach to assess whether movant's Iowa burglary convictions were violent felonies under the ACCA's enumerated-crimes clause.[3]

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likelihood of disparate treatment among individuals seeking collateral relief based on variables such as the number of offenses charged and convicted of, the litigation strategies previously pursued or the course chosen at the trial and appellate level and the availability of initial or subsequent collateral review, the court declines to adopt an expansive view of the law or proceed with eyes shut when conducting an ACCA analysis at this stage.

[3] When addressing whether a defendant qualified as an armed career criminal, the court considered whether burglary fell under the enumerated clause. *See, e.g.*, *United States v. Goldworth*, Case # 1:04-cr-00070-LRR (N.D. Iowa 2006) (explaining in a sentencing memorandum dated June 8, 2006, that a 1979 Iowa conviction for second degree burglary, a 1984 Iowa conviction for second degree burglary and a 2001 Iowa conviction for third degree burglary qualified as three predicate violent felonies under 18 U.S.C. § 924(e)(2)(B)(ii), *Taylor* and *Shepard*); *United States v. Griffith*, Case # 1:01-cr-00004-LRR (N.D. Iowa 2001) (agreeing that burglaries qualified as predicate violent felonies under 18 U.S.C. § 924(e)(2)(B)(ii)). Such approach is consistent with the Eighth Circuit's statement that, as of April of 2010, "it was settled in the Eighth Circuit that third-degree burglary in Iowa was a generic burglary and thus a violent felony under the enumerated-offenses clause of 18 U.S.C. § 924(e)." *Davis*, No. 16-2293, Eighth Circuit Entry ID 4518847 (citing *Stevens*, 149 F.3d at 749, and *Austin*, 915 F.2d at 368); *see also United States v. Voshell*, No. 96-2943, 1997 U.S. App. LEXIS 29 (8th Cir. Jan. 3, 1997) (per curiam) (concluding that a 1984 Iowa conviction for second degree burglary qualified as a violent felony because the state charging paper and judgment indicate that he pleaded guilty to a charge meeting *Taylor*'s generic definition of burglary); *United States v. Zoch*, Case # 5:11-cr-04031-LTS (N.D. Iowa 2012) (admitting trial information, plea agreement and judgment before deciding defendant qualified as an armed career criminal under the applicable law); *United States v. Jordan*, Case # 1:08-cr-00010-LRR (N.D. Iowa 2008) (considering post-plea agreement and permissible state court documents concerning prior predicates for purposes of the ACCA). Even when referring to the residual clause in the context of USSG §4B1.2, the Eighth Circuit hinged its holding in part on the generic definition of burglary in *Taylor*. *See United States v. Mohr*, 407 F.3d 898, 901-02 (8th Cir. 2005); *Stevens*, 149 F.3d at 749; *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Carpenter*, 11 F.3d 788, 791 (8th Cir. 1993). Further, nothing significantly undermined a court's ability to rely on burglary as an enumerated offense for purposes of the ACCA until the Supreme Court decided *Mathis*, which held that, "[b]ecause the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence." 136 S. Ct. at 2257.

Moreover, the record, which includes the undisputed facts in the pre-sentence report, indicates that all of movant's burglaries qualified as violent felonies under the enumerated-crimes clause. Because movant's burglary convictions qualified as a violent felonies under the still-valid enumerated-crimes clause of the ACCA, it necessarily follows that movant failed to demonstrate that his ACCA sentence is no longer valid in light of *Johnson*.

In sum, the only offense at issue here—burglary—is an enumerated offense, and, as such, it is unaffected by *Johnson*. *See, e.g.*, In re *Thomas*, 823 F.3d 1345, 1348-49 (11th Cir. 2016) (concluding that collateral review based on *Descamps* was unavailable and enhancement under the ACCA did not turn on the validity of the residual clause because conviction for breaking and entering qualified as generic burglary under the enumerated offenses clause); *Gabrio*, 2017 U.S. Dist. LEXIS 122242, at *9 ("Because [movant] had at least three prior violent-felony convictions that would have qualified him for the ACCA enhancement even in the absence of *Johnson*, he is not "rais[ing] a claim based on a right newly recognized by the Supreme Court and made retroactively applicable on collateral review." (quoting *United States v. Sonczalla*, No. 07-CR-187, 2016 U.S. Dist. LEXIS 123522, 2016 WL 4771064, at *2 (D. Minn. Sept. 12, 2016)) (second alteration in original)); *United States v. Holt*, No. 15-CV-11891, 2016 U.S. Dist. LEXIS 48063, at *9 (N.D. Ill. April 11, 2016) (concluding that Illinois burglary conviction constituted an enumerated offense because it aligned with generic burglary as defined by the Supreme Court in *Taylor*), *aff'd*, 843 F.3d 720 (7th Cir. 2016). Movant's sentence remains valid because he failed to demonstrate that his Iowa burglary convictions did not qualify as violent felonies under the enumerated-crimes clause and the court only relied on the residual clause. It matters not that, if the court sentenced movant today, *Mathis* would dictate a different sentence because movant is unable to apply rules of statutory construction that were not in effect at the time he was sentenced. *See Gabrio*, 2017 U.S. Dist. LEXIS 122242, at *10 (citing *United States v. Moreno*, No. 11-CR-178,

2017 U.S. Dist. LEXIS 29769, at *4 (D. Minn. Mar. 1, 2017)). Clearly, *Mathis* is the only mechanism through which to collaterally attack movant's armed career criminal designation, but relief is properly based only on *Johnson* because *Mathis* did not announce a new rule that is retroactively applicable to cases on collateral review.

V. CERTIFICATE OF APPEALABILITY

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on

procedural grounds without reaching the underlying constitutional claim, "the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, I find that movant failed to make the requisite "substantial showing" with respect to the claim that he raised in his motion pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his motion pursuant to 28 U.S.C. § 2255, movant may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

VI. CONCLUSION

For the reasons discussed above, movant's sentence is not subject to being challenged under *Johnson*. Accordingly, movant's second motion under 28 U.S.C. § 2255 is **denied**. A certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 22nd day of September, 2017.

Leonard T. Strand, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3502

Darwin Zoch

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:16-cv-04066-LTS)

JUDGMENT

Before COLLOTON, MURPHY and SHEPHERD, Circuit Judges.

The application for a certificate of appealability has been considered by the court and is denied. *See Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018).

Judge Colloton and Judge Shepherd file this order under Eighth Circuit Rule 47E.

December 04, 2018

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

/s/ Michael E. Gans