APPENDIX

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

ROBERT WILSON, Movant, vs. UNITED STATES OF AMERICA Respondent.	No. C16-1020-LRR No. CR04-1004-LRR **ORDER REGARDING** **28 U.S.C. § 2255 MOTION**

I. INTRODUCTION

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

II. FACTS

In January 2005, a jury convicted the movant of (1) interference with commerce by violence (robbery) under the Hobbs Act, in violation of 18 U.S.C. § 1951(a) (count 1); (2) using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count 2); and (3) being a felon in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count 3) (criminal docket no. 160). The court ordered a pre-sentence report to be prepared and it was finalized on May 13, 2005 (criminal docket no. 210). The parties filed sentencing memoranda (criminal docket nos. 223 & 225). During the sentencing hearing on June 30, 2005, the court found that the movant had two prior convictions for "serious violent felonies" to mandate a life sentence

under 18 U.S.C. § 3559 for the Hobbs Act robbery conviction (criminal docket no. 228 & criminal docket no. 234 at 43-47).[1] The court also imposed a concurrent life sentence on the felon in possession of firearms count (count 3) (criminal docket no. 228 & criminal docket no. 234 at 48), finding that the movant was subject to an enhanced sentence pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), based on his 1988 Illinois conviction for residential burglary (criminal docket no. 210 at 13, ¶ 45(C), at 20, ¶ 79; criminal docket no. 234 at 48), his 1992 Illinois conviction for armed robbery (criminal docket no. 210 at 13, ¶ 45(D), at 21, ¶ 80; criminal docket no. 234 at 48), his 2000 Iowa conviction for domestic abuse assault with injury[2] (criminal docket no. 210 at 13, ¶ 45(F), at 26, ¶ 85; criminal docket no. 234 at 48) and his 2001 Iowa conviction for assault causing serious injury (criminal docket no. 210 at 13, ¶ 45(G), at 27, ¶ 87; criminal docket no. 234 at 48-49). Finally, the court imposed a consecutive term of life imprisonment on the § 924(c) count (criminal docket no. 228).

On appeal, the movant challenged, among other things, the court's finding that movant had two prior convictions for "serious violent felon[ies]" under 18 U.S.C. § 3559(c)(1)(A)(i). The Eighth Circuit Court of Appeals agreed with the movant that the

---

[1] One of the prior convictions was a 1998 Illinois burglary conviction under a statute that did not require proof that movant used violence, threats of violence, or possessed a weapon. The other was a 1992 Illinois armed robbery conviction. *See United States v. Dobbs*, 449 F.3d 904, 913 (8th Cir. 2006).

[2] In the government's response to the movant's pro se application for authorization to file a second motion under § 2255, the government conceded that Iowa domestic abuse causing bodily injury did not qualify as a violent felony under the ACCA because it is classified under Iowa law as an aggravated misdemeanor, punishable by not more than two years' imprisonment. *See* Iowa Code sections 708.2A and 903.1(2); 18 U.S.C. § 921(a)(20) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include . . . any State offense classified by the terms of the State as a misdemeanor and punishable by a term of imprisonment of two years or less."). (Case No. 15-2709, Eighth Circuit Entry ID 4307398 at 5 n.4.) Therefore, the court's discussion below will be limited to the Illinois residential burglary conviction, the Illinois armed robbery conviction and the Iowa assault causing serious injury conviction.

burglary conviction did not qualify as a serious violent felony under 18 U.S.C. § 3559 and thus held that § 3559 and the mandatory life sentence under that section were inapplicable to the movant. *Dobbs*, 449 F.3d at 913-14. The Eighth Circuit affirmed the judgment of conviction, vacated the life sentence imposed on the movant and remanded for resentencing without application of § 3559. *Id.* at 914.

The movant was resentenced on January 23, 2007 (criminal docket no. 277). At the sentencing hearing, the parties agreed as to the sentencing guidelines range (criminal docket no. 287 at 6-9).[3] The parties did not discuss the court's prior determination that the movant qualified as an armed career criminal under the ACCA, and the court did not revisit the issue. The court found that the uncontested sentencing guidelines range was 360 months to life on counts 1 and 3 (criminal docket no. 278; criminal docket no. 287 at 7-9). After denying the movant's motion for a downward variance (criminal docket no. 287 at 14), the court sentenced the movant to 240 months' imprisonment on count 1 and 360 months' imprisonment on count 3, to run concurrently (criminal docket no. 278; criminal docket no. 287 at 16-17). In addition, the court imposed a mandatory, consecutive 84-month sentence under § 924(c)(1)(A)(ii), bringing the movant's total sentence to 444 months' imprisonment (*id.*). This sentence was identical to that of his co-defendant in the robbery who had a less extensive criminal history (criminal docket no. 287 at 14-15).

The Eighth Circuit affirmed the movant's sentence on appeal. *United States v. Wilson*, 254 F. App'x 561, 562 (8th Cir. 2007) (unpublished). The United States Supreme Court granted the movant's petition for a writ of certiorari and remanded the case to the Eighth Circuit for further consideration in light of *Gall v. United States*, 552 U.S. 38 (2007). *Wilson v. United States*, 555 U.S. 801 (2008). On remand, the Eighth Circuit affirmed the movant's sentence. *United States v. Wilson*, 364 F. App'x 312 (8th

[3] The parties submitted sentencing memoranda (criminal docket nos. 272 & 273), and the movant filed a motion for a downward variance (criminal docket no. 274).

Cir. 2010) (unpublished). In 2013, the court denied the movant's first motion to vacate, set aside or correct his sentence under § 2255.

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 v. United States*, 493 F.3d 960, 963 (8th Cir. 2007) (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 § 2255 Proceedings (specifying scope of § 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 the movant has three prior qualifying convictions to be subject to an enhanced sentence under the ACCA, 18 U.S.C. § 924(e)(1). The movant argues that his prior Illinois residential burglary conviction, Illinois armed robbery conviction and Iowa assault causing serious injury conviction do not qualify as predicate felonies and, therefore, his sentence on count 3 exceeds the non-ACCA statutory maximum. The government argues that relief is not available under § 2255 because the movant failed to establish that the court relied on the residual clause addressed in *Johnson* and it does not matter that, if sentenced today, the movant would no longer be subject to the enhanced ACCA statutory range of punishment because *Descamps v. United States*, 570 U.S. 254, 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 the movant's sentence. Finally, the government argues that the movant is not entitled to relief because even if the movant were entitled to be re-sentenced, the court could lawfully

re-impose the same sentence under *Sun Bear*, 644 F.3d 700, and *Olten v. United States*, 565 F. App'x 558 (8th Cir. 2014).[4]

Under the ACCA, a defendant convicted of being a felon in possession of a firearm faces a 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[5]; (2) the enumerated-crimes clause; and (3) and the residual clause.

In *Johnson,* the Supreme Court addressed the constitutionality of the residual clause; the Supreme 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." ___ U.S. ___, 135 S. Ct. at 2557. Shortly after

---

[4] It is possible that *Sun Bear* and *Olten* should not be applied to the movant's sentence. In *Harlow v. United States*, 720 F. App'x 805 (8th Cir. 2018) (unpublished), the Eighth Circuit Court of Appeals held that a movant who had been unconstitutionally sentenced under the ACCA was entitled to resentencing, even though the combined sentences for his convictions (15 years on Count 1 (§ 922(g)) and 8 months on Count 2 (18 U.S.C. § 3146)) could lawfully be re-imposed upon resentencing (indeed, the district court concluded that it would have re-imposed the same sentence). The Eighth Circuit concluded that the possibility of re-imposing the same sentence does not cure the harm of an unconstitutional sentence. *Id.* at 807 (citing *Gray v. United States*, 833 F.3d 919, 922 (8th Cir. 2016)). However, the court need not determine what effect *Harlow* has on the movant's sentence given the resolution of the issues discussed below.

[5] After the movant was sentenced, the Supreme Court clarified that the level of force required is "violent force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271 (2010) ("*Curtis Johnson*").)

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. ___ U.S. ___, 136 S. Ct. 1257, 1265 (2016). 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 Supreme Court, however, clarified that the ACCA's other two clauses, namely, the elements clause and the enumerated-crimes clause, remain viable. *Johnson*, ___ U.S. ___, 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.").

The Eighth Circuit Court of Appeals has very recently held that a movant is required "to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement."[6] *Walker v. United States*, ___ F.3d ___, No. 16-4284, 2018 WL 3965725, at *3 (8th Cir. Aug. 20, 2018). The *Walker*

[6] The Eighth Circuit adopted the approach of the First, Tenth and Eleventh Circuits, which require a movant to show that it is more likely than not that the residual clause provided the basis for an ACCA sentence. *Walker*, ___ F.3d ___, 2018 WL 3965725, at *2 (citing *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018), *cert. denied*, No. 17-1251, ___ U.S. ___, 138 S. Ct. 2678, ___ L. Ed. 2d ___, 2018 WL 1243146 (June 25, 2018); *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017)). By contrast, the Fourth and Ninth Circuits have concluded that a claim for collateral relief "relies on" *Johnson*'s new rule and satisfies § 2255 if the sentencing court "may have" relied on the residual clause. *See United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). To support this approach, the Ninth Circuit drew an analogy to the *Stromberg* rule, which requires a conviction to be set aside when a general jury verdict may rest on an unconstitutional ground. *Geozos*, 870 F.3d at 896 (citing *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931)). For its part, the Fourth Circuit expressed concern about treating similarly situated defendants differently on the basis of the sentencing court's "discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682.

court emphasized that, "[u]nder the longstanding law of this circuit, a movant bears the burden of showing that he is entitled to relief under § 2255." *Id.* (citing *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969) (per curiam)). "The mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive motion." *Id.* (citing *Washington*, 890 F.3d at 896 (explaining why *Stromberg* should be confined to general jury verdicts); *Dimott*, 881 F.3d at 241 (same)).

The Eighth Circuit stated that "[w]hether the residual clause provided the basis for an ACCA enhancement is a factual question for the district court." *Id.* (citing *Beeman*, 871 F.3d at 1224 n.5 (stating that the basis for an enhancement is "a historical fact")). The Eighth Circuit explained:

> Where the record or an evidentiary hearing is inconclusive, the district court may consider "the relevant background legal environment at the time of . . . sentencing" to ascertain whether the movant was sentenced under the residual clause. *Washington*, 890 F.3d at 896; *see also United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017) (explaining that "the relevant background legal environment is, so to speak, a 'snapshot' of what the controlling law was at the time of sentencing"), *cert. denied*, ___ U.S. ___, 138 S. Ct. 1696, 200 L. Ed. 2d 956 (2018). In some cases, the legal background at the time of sentencing will establish that the enhancement was necessarily based on the residual clause. *See, e.g., United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017) (stating that precedent established that one of the requisite predicate convictions "could have applied only under the residual clause"). By contrast, "[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." *Beeman*, 871 F.3d at 1222. Moreover, as the Tenth Circuit emphasized in *Washington*, it is not enough for [a movant] to show that "the background legal environment at the time of [the movant's] sentencing reveals 'the residual clause offered the path of least analytical resistance.'" *Washington*, 890 F.3d at 898-99.

Walker, 2018 WL 3965725, at *3.

It makes no difference whether the movant's prior convictions would count as a predicate if the court sentenced the movant today. *See In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016) (explaining that "*Johnson* does not serve as a portal to assert a *Descamps* claim"); *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); *Headbird v. United States*, 813 F.3d 1092, 1097 (8th Cir. 2016) (*Descamps* not retroactively applicable); *United States v. Forrest*, No. 4:08-cr-3125, 2017 WL 6205790, at *2 (D. Neb. Dec. 6, 2017) ("[I]t would be grossly unjust to allow *Johnson* and *Welch* to serve as a "portal" for the application of essentially unrelated series of non-retroactive cases like *Mathis* and *Descamps*."); *United States v. Gabrio*, No. 01-CR-165, 2017 WL 3309670 at *4 (D. Minn. Aug. 2, 2017) (*Mathis* and *Descamps* have not been made retroactively applicable to cases on collateral review); *Davis v. United States*, No. 1:08-cr-74, 2017 WL 1477126, at *2 (E.D. Mo. Apr. 25, 2017) (noting that "several courts have held that *Descamps* and *Mathis* are not retroactively applicable to cases on collateral review") (citing *In re Thomas*, 823 F.3d 1345 (11th Cir. 2016), *Ezell v. United States*, 778 F.3d 762 (9th Cir. 2015), and *Dawkins v. United States*, 829 F.3d 549 (7th Cir. 2016)).[7] Therefore, the

[7] The court notes that the Eighth Circuit Court of Appeals has not directly addressed the relationship between *Johnson* and *Descamps/Mathis* with respect to an initial § 2255 motion. It has addressed, however, *Mathis* in the context of authorizing a second or successive § 2255 motion. The Eighth Circuit's approach appears to be consistent with the notion that the holdings in *Descamps* and *Mathis* are unrelated to the holding in *Johnson*. The court has explained as follows in denying a second or successive motion:

> 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.

Davis v. United States, No. 16-2293, Eighth Circuit Entry ID 4518847 (8th Cir. Mar. 31, 2017) (unpublished). Similarly:

> 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.

Howard v. United States, No. 16-2335, Eighth Circuit Entry ID 4432899 (8th Cir. Aug. 2, 2016) (unpublished); *see also 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 (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 when the petitioner asserted that, under the Supreme Court's decision in *Johnson* and its expected decision in *Mathis*, his prior conviction 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

movant's argument that *Descamps* and/or *Mathis* may dictate a different sentence is unavailing, because the movant is unable to apply rules of statutory construction that were not in effect at the time he was sentenced. *See Zoch v. United States*, No. C16-4066-LTS, 2017 WL 6816543, at *3 (N.D. Iowa Sept. 22, 2017); *Howard v. United States*, No. C16-2048-LRR, 2017 WL 6816544, at *3 (N.D. Iowa Sept. 15, 2017); *Hunt v. United States*, No. C14-3058-LRR, 2017 WL 6815040, at *5 (N.D. Iowa Sept. 15, 2017); *Jordan v. United States*, No. C15-0105-LRR, 2017 WL 4103574, at *2 (N.D. Iowa Sept. 15, 2017), *certificate of appealability denied*, No. 17-3509, 2018 WL 2228180 (8th Cir. Mar. 22, 2018); *Gabrio*, 2017 WL 3309670, at *4 (citing *United States v. Moreno*, No. 11-cr-178, 2017 WL 811874, at *4 (D. Minn. Mar. 1, 2017)).

Here, given the court did not specify which clause of the ACCA provided the basis for the movant's ACCA enhancement, the movant must show by a preponderance of the evidence that the residual clause led the court to apply the ACCA enhancement. The movant has failed to do so, and thus, the movant's sentence is not called into question by *Johnson*. At the time of the movant's sentencings, the court did not need to rely on the residual clause to determine that the movant qualified as an armed career criminal. Rather, the court could have relied on the enumerated-crimes clause because it includes the specific crime of burglary and on the elements clause because it addresses armed robbery and assault causing serious injury. Indeed, although the court did not expressly state how the convictions qualified as predicate felonies, it is apparent that the court determined that the movant qualified as an armed career criminal because his Illinois residential burglary conviction qualified as an enumerated offense, that is, a "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii), and his Illinois armed robbery conviction and his Iowa assault causing serious injury conviction qualified as "violent felonies" under the

---

no longer qualify as a valid predicate offense to support the enhancement of his sentence as an armed career criminal).

elements clause, *see* 18 U.S.C. § 924(e)(2)(B)(i) (*see* criminal docket no. 210 at 16-17, ¶ 67).

At the time of movant's sentencings in 2005 and 2007, legal authority would have supported the court's use of the modified categorical approach to assess whether the movant's Illinois residential burglary conviction[8] was a violent felony under the ACCA's enumerated-crimes clause.[9] Indeed, case law in effect when the court sentenced the movant indicates that the movant's Illinois residential burglary conviction qualified as a predicate offense under the enumerated clause. *See, e.g.*, *United States v. Barrett*, 80 F. App'x 486, 487 (7th Cir. Oct. 31, 2003); ("[Illinois] Residential burglary is unquestionably a violent felony under § 924(e)."); *United States v. King*, 62 F.3d 891, 896 (7th Cir. 1995) (holding that Illinois' 720 ILCS 5/19-3 (the relevant statute) to be an enumerated offense under the ACCA, further noting that the elements of said statute correspond to the elements of generic burglary outlined in *Taylor v. United States*, 495

---

[8] In Illinois, "[a] person commits residential burglary who knowingly and without authority enters the dwelling place of another with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a). (This version of the statute was in effect from 1982 to 2001 and was applied when movant was convicted in 1988.) Another statute defines "dwelling":

> (a) Except as otherwise provided in subsection (b) of this Section, "dwelling" means a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence.
>
> (b) For the purposes of Section 19-3 of this Code, "dwelling" means a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.

720 ILCS 5/2-6. (This statutory provision has defined the term "dwelling" since 1987.) *See Shields v. United States*, 885 F.3d 1020, 1023 (7th Cir. 2018).

[9] The court notes that nothing significantly undermined its ability to rely on residential burglary as an enumerated offense for purposes of the ACCA until the Supreme Court decided *Mathis*.

U.S. 575, 599, 110 S. Ct. 2143, 2159, 109 L. Ed. 2d 607 (1990))[10]; *see also United States v. Maxwell*, 363 F.3d 815, 821 (8th Cir. 2004) (determining that both of the Illinois burglary statutes "720 ILL. COMP. STAT. 5/19-1, 5/19-3 (2001) . . . include all the generic elements of burglary defined in *Taylor*.").[11]

Moreover, the record indicates that the movant's Illinois residential burglary conviction would have qualified as a violent felony under the enumerated-crimes clause when movant was sentenced. *See* 18 U.S.C. § 924(e)(2)(B)(i). The undisputed facts in

---

[10] Post-*Johnson*, the Seventh Circuit continued to hold that Illinois' residential burglary statute under 720 ILCS 5/19-3 is a non-divisible, enumerated and general burglary charge; it "satisfies the ruling in *Taylo*r that "a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime . . . having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Dawkins v. United States*, 809 F.3d 953, 955 (7th Cir. 2016) (quoting *Taylor*, 495 U.S. at 599, 110 S. Ct. 2143). Post-*Mathis*, the Seventh Circuit continues to hold that Illinois residential burglary corresponds to generic burglary for purposes of the ACCA. *See Shields*, 885 F.3d at 1022; *Smith v. United States*, 877 F.3d 720, 722, 724 (7th Cir. 2017). The court acknowledges that it is not bound by the Seventh Circuit's decisions and that the Eighth Circuit may resolve the issue differently than the Seventh Circuit under *Mathis*. *See, e.g.*, *United States v. Sims*, 854 F.3d 1037 (8th Cir. 2017) (holding that Arkansas's residential burglary statute, which criminalized burglary of vehicles where people lived or that were customarily used for overnight accommodations, swept more broadly than generic burglary, which criminalized only burglaries of buildings or structures, and thus, the defendant's prior convictions for residential burglary under Arkansas law did not qualify as predicate violent felony offenses under the ACCA), *cert. granted*, 138 S. Ct. 1592, 200 L. Ed. 2d 776 (2018). It makes no difference, however, whether the movant's prior convictions would count as a predicate if the court sentenced the movant today.

[11] The Illinois residential burglary statute referenced in *Maxwell* varied slightly from the version of the statute applicable to the movant. *See* 720 ILCS 5/19-3 (2001) ("A person commits residential burglary who knowingly and without authority enters *or knowingly and without authority remains within* the dwelling place of another, *or any part thereof*, with the intent to commit therein a felony or theft." (amendments indicated in italics)). But those amendments do not change the court's analysis. Furthermore, the statute defining "dwelling" did not change.

the movant's pre-sentence report indicate that the movant committed residential burglary under Illinois law by "breaking into 1423 Lorel, by kicking in the porch door, bending down the burglar bars, and kicking in a panel of the back door to gain entry" (criminal docket no. 210 at 20-21, ¶ 79).[12] In addition, the indictment states that the movant,

[12] 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*, 866 F.3d 129, 137-38 (3d Cir. 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 likelihood of disparate treatment among individuals seeking collateral relief based on variables such as the number of offenses charged and convicted

"knowingly and without authority entered the dwelling place of [the victim] with the intent to commit therein a theft in violation of Chapter 38, Section 19-3(A), of the Illinois Revised Statutes 1985, as amended, and contrary to the Statute, and against the peace and dignity of the same people of the state of Illinois" (criminal docket no. 227-3). Finally, the certified statement of conviction provides that on August 5, 1988, the movant pleaded guilty to residential burglary in violation of Illinois law (criminal docket no. 227-2 at 19).

Regarding the movant's Illinois armed robbery conviction, legal authority at the time of the movant's sentencings would have supported the court's use of the categorical approach to assess whether that conviction was a violent felony under the ACCA's elements clause. The Illinois armed robbery statute in effect at the time of the movant's robbery included an element of force: "A person commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon." 38 Ill. Comp. Stat. Ann. § 18-2 (1992). Section 18-1(a) provided: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." *See United States v. Dickerson*, 901 F.2d 579, 584-85 (7th Cir. 1990) (Illinois armed robbery qualifies as a predicate violent felony under the ACCA)[13]; *see also Dobbs*, 449

---

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.

[13] The Seventh Circuit revisited *Dickerson* in light of *Curtis Johnson* and reaffirmed that "Illinois courts require sufficient force for robbery convictions to be predicate violent felonies." *Shields*, 885 F.3d at 1024; *see also United States v. Chagoya-Morales*, 859 F.3d 411, 421-22 (7th Cir. 2017) (reviewing state-court definition of force in Illinois robbery statute underlying aggravated robbery and concluding that robbery required "'force' . . . sufficient to constitute a 'crime of violence'")); *see also Browning v. United States*, 723 F. App'x 343, 344 (7th Cir. 2018) (unpublished). The Seventh Circuit observed that Illinois state courts interpret armed robbery as requiring sufficient

F.3d at 913 (noting that while "18 U.S.C. § 3559(c)(3)(A) expressly exempts from the definition of 'serious violent felony' robberies that do not involve the use of a firearm or dangerous weapon," *"[n]o similar exception exists under § 924(e)(2)(B) or U.S.S.G. § 4B1.2(a)(2), both of which clearly encompass robbery as a qualifying offense*." (emphasis added)). Indeed, in his initial sentencing memorandum, the movant withdrew his objection to ¶ 80 in the pre-sentence report and acknowledged that the armed robbery conviction qualified as a predicate offense under the ACCA (criminal docket no. 225 at 5). Moreover, the record indicates that the movant's armed robbery conviction would have qualified as a violent felony under the elements clause when the movant was sentenced. The information provides that the movant, "by use of force and by threatening the imminent use of force while armed with a dangerous weapon, took a wallet and jewelry from the person or presence of [the victim], in violation of Chapter 28, Section 18-2-A of the Illinois Revised Statutes 1989 as amended, and contrary to the Statute, and against the peace and dignity of the same people of the state of Illinois" (criminal docket no. 227).

Finally, at the time of the movant's sentencings, the court could have employed the modified categorical approach to assess whether the movant's Iowa assault causing serious injury conviction[14] was a violent felony under the ACCA's elements clause.

---

force to satisfy *Curtis Johnson*—that is, more than slight force. *See Shields*, 885 F.3d at 1024; *Chagoya-Morales*, 859 F.3d at 422.

[14] The movant was convicted in 2001 of assault causing serious injury, in violation of Iowa Code §§ 708.1 and 708.2(4). These statutes provided as follows:

> A person commits an assault when, without justification, the person does any of the following:
>
> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

Although it is not clear which subsection of the assault statute, Iowa Code § 708.1, the movant was convicted of violating, the undisputed facts in the pre-sentence report indicate that the victim and the movant "got into an argument and [the victim] tried to leave, however, [the movant] convinced her to come back into the residence. At that time, they continued to argue and [the movant] punched her in the face several times causing her nose to be broken and left eye to be swollen and bloody" (criminal docket no. 210 at 27, ¶ 87). Because the record demonstrates that the movant was convicted of conduct that unquestionably involved the use of force, the court could have determined that the movant's Iowa assault conviction qualified under the ACCA's elements clause.[15]

> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
>
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1 (2001). A person who commits an assault, as defined in § 708.1, "and who causes serious injury," is guilty of a class D felony. Iowa Code § 708.2(4) (2001). Serious injury" was defined as:

> a. Disabling mental illness.
>
> b. Bodily injury which does any of the following:
>
> (1) Creates a substantial risk of death.
>
> (2) Causes serious permanent disfigurement.
>
> (3) Causes protracted loss or impairment of the function of any bodily member or organ.
>
> c. Any injury to a child that requires surgical repair and necessitates the administration of general anesthesia.

Iowa Code section 702.18 (2004).

[15] The undisputed facts in the PSR indicate that the movant used sufficient force to satisfy *Curtis Johnson*—that is force capable of causing physical pain or injury to another person.

In sum, at the time of the movant's sentencings, one of the offenses at issue here—Illinois residential burglary—qualified as an enumerated offense, and, as such, it is unaffected by *Johnson*. *See, e.g.*, *In re Thomas*, 823 F.3d at 1348-49 (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 WL 3309670 at *4 ("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 WL 4771064, at *2 (D. Minn. Sept. 12, 2016)) (second alteration in original)); *United States v. Holt*, No. 15-cv-11891, 2016 WL 1407713 at **3-4 (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). Further, two of the offenses—Illinois armed robbery and Iowa assault causing serious injury—fell under the elements clause, and, consequently, they are unaffected by *Johnson*. Neither the relevant background legal environment nor the materials before the court reveal that the sentencing court more likely than not used the residual clause for any of the convictions in sentencing the movant. Thus, the movant has not established by a preponderance of the evidence that his motion relies on *Johnson*. Pursuant to the cases cited herein, it is inconsequential that, if the court sentenced the movant today, *Descamps/Mathis* would dictate a different sentence. *See Gabrio*, 2017 WL 3309670, at *4 (citing *Moreno*, 2017 WL 811874, at *2).

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 justice or 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, 123 S. Ct. 1029, 154 L.Ed.2d 931 (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, 123 S. Ct. 1029 (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, 123 S. Ct. 1029 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L.Ed.2d 542 (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, 120 S. Ct. 1595.

Having thoroughly reviewed the record in this case, the court finds that the 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, the 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, the movant's sentence is not subject to being challenged under *Johnson*. Accordingly, the movant's successive motion under 28 U.S.C. § 2255 is denied. Additionally, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 29th day of August, 2018.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3319

Robert Wilson, Jr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:16-cv-01020-LRR)

JUDGMENT

Before LOKEN, GRUENDER, and BENTON, Circuit Judges.

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

March 26, 2019

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

/s/ Michael E. Gans