APPENDIX

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

MICHAEL FRANKLIN EINFELDT, Movant, vs. UNITED STATES OF AMERICA Respondent.	No. C16-2051-LRR No. CR94-2019-LRR **ORDER REGARDING** **28 U.S.C. § 2255 MOTION**

I. INTRODUCTION

The matter before the court is the movant's second 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 second § 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

On September 11, 1996, a jury found the movant guilty of count 1, interference with commerce by an attempted robbery in violation of 18 U.S.C. § 1951, count 2, conspiracy to interfere with commerce by robbery in violation of 18 U.S.C. § 1951, count 3, use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) and count 4, felon in possession of a firearm a violation of 18 U.S.C. § 922(g)(1) (criminal docket no. 168; criminal docket no. 233; criminal docket no. 233-2 at 1-5). The amended and final presentence report was filed on March 5, 1997 (criminal docket no. 233-2). The parties filed sentencing memoranda (criminal docket nos. 223, 225, 229 & 230). During the sentencing hearing on March 5, 1997, the court determined 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 a 1968 Arkansas conviction for burglary, a 1971 Iowa conviction for robbery without aggravation and a 1974 federal conviction for bank robbery (criminal docket no. 233-2 at 16, ¶ 68, at 17, ¶ 74, at 19, ¶ 76; criminal docket no. 240 at 70-78).[1] The court calculated a sentencing guideline range of 262 to 327 months' imprisonment based on a total adjusted offense level of 34 and a criminal history category VI (criminal docket no. 233-2 at 29-30, ¶ 120; criminal docket no. 240 at 82). The movant was also subject to a mandatory five-year consecutive sentence for his conviction on count 3 under 18 U.S.C. § 924(c) (criminal docket no. 233-2 at 29, ¶ 119; criminal docket no. 240 82-83). The court sentenced the movant to a total term of 336 months' imprisonment (criminal docket no. 233).[2] The Eighth Circuit Court of Appeals affirmed the movant's conviction and sentence on direct appeal. *United States v. Einfeldt*, 138 F.3d 373, 375 (8th Cir. 1998). In 2000, the court denied the movant's first motion to vacate, set aside or correct his sentence under § 2255 (criminal docket no. 251).

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

[1] On October 30, 2017, the Eighth Circuit granted authorization for the movant to pursue a successive § 2255 petition "as to Argument I-E 'Iowa Robbery Without Aggravation,' as set out in his 'Supplemental Brief in Support of SOS Petition' filed with this Court on January 31, 2017" (criminal docket no. 254). Therefore, the court's discussion below will be limited to the 1971 Iowa robbery without aggravation conviction.

[2] The court sentenced the movant to 240 months' imprisonment on count 1 and 36 months' imprisonment on count 2, to be served consecutively; 276 months' imprisonment on count 4, to be served concurrently with the sentences in counts 1 and 2; and 60 months' imprisonment on count 3, to be served consecutively to counts 1, 2 and 4 (criminal docket no. 233).

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 Iowa robbery without aggravation conviction does not qualify as a predicate felony and, therefore, his sentence on count 4 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); or under the concurrent sentence doctrine pursuant to *United States v. Olunyolo*, 10 F.3d 578, 581 (8th Cir. 1993).[3]

[3] It is possible that *Sun Bear*, *Olten* and *Olunyolo* 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

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[4]; (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 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

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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.

[4] 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*").)

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."[5] *Walker v. United States*, ___ F.3d ___, No. 16-4284, 2018 WL 3965725, at *3 (8th Cir. Aug. 20, 2018). The *Walker* 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)).

[5] 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.

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. S*ee, 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, ___ F.3d ___, 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)).[6] Therefore, the

[6] 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

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,

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

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 sentencing, the court did not need to rely on the residual clause to determine that the movant qualified as an armed career criminal. Rather, at the time of the movant's sentencing, legal authority would have supported the court's use of the categorical approach to assess whether his robbery conviction was a violent felony under the ACCA's elements clause.[7] *See, e.g.*, *United States v. Leeper*,

[7] At the time the movant committed the Iowa robbery offense, the relevant criminal statutes read:

> 711.1 Definition—Punishment. If any person with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense, as is provided in sections 711.2 and 711.3.
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> 711.2 Robbery with aggravation. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if, being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed, he shall be imprisoned in the penitentiary for a term of twenty-five years.
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> 711.3 Robbery without aggravation. If such offender commits the robbery otherwise than is mentioned in section 711.2, he shall be imprisoned in the penitentiary not exceeding ten years.

Iowa Code §§ 711.1, 711.2, 711.3 (1971).

964 F.2d 751, 753 (8th Cir. 1992) (because use or threatened use of force is an element of robbery, a person convicted of robbery has been convicted of a crime of violence within the meaning of the career offender guidelines (citing *United States v. Wright*, 957 F.2d 520, 521 (8th Cir. 1992)).[8] The movant has not shown the controlling law when he was sentenced would have required the court to rely on the residual clause to find his conviction for robbery without aggravation was a violent felony. *See Walker*, ___ F.3d ___, 2018 WL 3965725, at *3.

Additionally, the level of force required to sustain a conviction for simple robbery under Iowa Code section 711.1 (1971) satisfies the requirement of physical force under

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The pre-sentence report indicates that the movant was charged with robbery with aggravation based on the following:

> Des Moines police reports reveal that November 19, 1970, at approximately 5:15 p.m., John Lyon was working at Williams Pharmacy as a pharmacist. At that time, an individual entered the south door of the pharmacy, leaped over the prescription counter and waived a revolver-type gun in Lyon's face and informed him this was a robbery. This individual had a nylon stocking pulled over his head. The pharmacist was forced to lie down behind the counter while the defendant obtained money from the cash register.
>
> During the robbery, the pharmacist was asked about narcotics maintained by the pharmacy, and a .32 automatic revolver maintained under the pharmacy counter was also stolen. The robber left the store with money from the cash register but did not take any of the narcotics maintained by the pharmacy. The Des Moines Police Department was called and investigated the scene of the robbery. Police dusted for fingerprints and found a latent palm print and fingerprints which were later indentified as belonging to the defendant

(criminal docket no. 232-2 at 17-18, ¶ 74). The jury found the movant guilty of robbery without aggravation (*id.* at 18, ¶ 74).

[8] The force clause of the ACCA is substantively identical to the force clause of § 4B1.2, and the Eighth Circuit treats the two clauses "as interchangeable." *United States v. Boose*, 739 F.3d 1185, 1187 n.1 (8th Cir. 2014).

§ 924(e)(2)(B)(i)—"force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. The plain language of the Iowa simple robbery statute, Iowa Code section 711.1 (1971), indicates that more than de minimis force is required. The statute provided: "If any person with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery." Iowa Code section 711.1 (1971). Even when focusing on the minimum conduct criminalized by that statute, it appears from Iowa case law that it required more than minimal force because the power of the owner to retain his or her property has been overcome by the use of actual force or the threat of imminent force. *See State v. Taylor*, 140 Iowa 470, 118 N.W. 747 (Iowa 1908); *State v. Miller*, 83 Iowa 291, 49 N.W. 90 (Iowa 1891); *State v. Carr*, 43 Iowa 418 (Iowa 1876); *see also State v. Fonza*, 254 Iowa 630, 635, 118 N.W.2d 548, 551 (1962) ("Robbery is an offense involving violence or the threat of violence."). *Cf. United States Lamb*, 847 F.3d 928, 930 (8th Cir. 2017) (reasserting that Michigan unarmed robbery convictions were ACCA violent felonies); *United States v. Taylor*, No. CR1591JNELIB1, 2017 WL 506253, at *4 (D. Minn. Feb. 7, 2017) (determining that Minnesota simple robbery is a violent felony for purposes of the ACCA because it has as an element the use, attempted use or threatened use of force capable of causing physical pain or injury); *United States v. Tirrell*, 120 F.3d 670, 680 (7th Cir. 1997) (finding that the Michigan crime of unarmed robbery, the definition of which included the disjunctive phrase "putting in fear," qualified as a violent felony under the ACCA because "putting in fear constitutes threatening the use of physical force.").

Moreover, it is just as likely that the sentencing court relied on the elements clause as the residual clause. After all, the addendum to the PSR classified the Iowa robbery offense as a crime of violence under the force clause of the career offender guidelines. *See* criminal docket no. 232-2 at 35 ("The probation office believes the Iowa Code definition of Robbery [Iowa Code § 711.1] meets the definition of a crime of violence as established by USSG § 4Bl.2(1)(i)."). At the sentencing hearing, the court referenced

the PSR and found that the elements of the robbery conviction qualified as a predicate offense:

> The 197[1] conviction at Paragraph 74 was prosecuted as an aggravated robbery, as we've talked about at the last hearing, basically means armed robbery or use of a dangerous weapon in connection with a robbery. The Defendant was found guilty of a lesser included offense of robbery without aggravation. And as the Presentence Report sets forth, the definition of robbery with and without aggravation and—basically 711.1 of the Iowa Code is the generic definition of robbery, which is "when any person with force or violence or by putting in fear steals and takes from the person of another any property that is subject of larceny, he is guilty of robbery." Then 711.2 goes on to define robbery with aggravation, which basically requires that the robbery be committed with a dangerous weapon. And then 711.3 indicates the penalty if it's robbery without a dangerous weapon, which is what the Defendant was convicted of, as I understand it, in the Paragraph 74 offense. But . . . in any event, under both the statute and the guideline, robbery is a qualifying offense, and therefore, clearly qualifies

(criminal docket no. 240 at 70-71). Accordingly, the movant cannot meet his burden for securing habeas relief on that record.

In sum, at the time of the movant's sentencing, the only offense at issue here—Iowa robbery without aggravation—fell under the elements clause, and, consequently, it is 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 the Iowa robbery conviction in sentencing the movant. *See Walker*, ___ F.3d ___, 2018 WL 3965725, at *3. Thus, the movant has not established by a preponderance of the evidence that his motion relies on *Johnson*. *See Walker*, ___ F.3d ___, 2018 WL 3965725, at *3. 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 Zoch*, 2017 WL 6816543, at *3; *Howard*, 2017 WL 6816544, at *3; *Hunt v. United States*, 2017 WL 6815040, at *5; *Jordan*, 2017 WL 4103574, at *2; *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 second motion under 28 U.S.C. § 2255 is denied. Additionally, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 7th day of September, 2018.

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3344

Michael Franklin Einfeldt

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:16-cv-02051-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.

April 03, 2019

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

/s/ Michael E. Gans