APPENDIX

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

JAMES A. TURNER, Movant, vs. UNITED STATES OF AMERICA Respondent.	No. C16-2050-LTS (No. CR04-2012-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 United States Supreme Court's decision in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). The Government disputes that movant is entitled to relief under § 2255.

II. FACTS

In June 2004, movant plead guilty to two counts: (1) possession with intent to distribute approximately 162 grams of marijuana within 1,000 feet of a park after having been previously convicted of a felony drug offense, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 851 and 860 (Count 1); and (2) being a felon in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count 2). Crim. Doc. No. 50. The sentencing court ordered a presentence investigation, and the amended and final presentence report was filed on January 19, 2005. Crim. Doc. No. 75-1. The parties

filed sentencing memoranda. Crim. Doc. Nos. 54, 59, 73 and 77. During the sentencing hearing on January 25, 2005, the court determined movant was subject to an enhanced sentence pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), based on two 1987 Iowa convictions for second degree robbery while armed with a dangerous weapon (Crim. Doc. No. 75-1 at ¶ 55) and a 1991 conviction for possession with intent to deliver cocaine (*Id.* at ¶ 57).[1] The court calculated a sentencing guideline range of 210 to 262 months imprisonment based on a total adjusted offense level of 32 and a criminal history category VI. Crim. Doc. Nos. 75-1 at ¶¶ 44, 87; 86 at 26, 36. The court sentenced movant to a term of 210 months imprisonment on each count, to be served concurrently. Crim. Doc. No. 80.

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 § 2255, a federal prisoner must establish:

> [T]hat the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such

[1] The court also considered whether movant's 1986 Iowa conviction for second degree burglary (Crim. Doc. No. 75-1 at ¶ 54; Crim. Doc. No. 86 at 6) qualified as a predicate offense under the ACCA. It appears that the court did not decide the issue:

> So we don't reach the—I think you had a real good argument on the burglary of the automobile. I'd go with you on that. But to me it's a moot question because of the way the 8th Circuit has interpreted the armed career criminal section that's at issue involving the [other] predicate offenses here.

Crim. Doc. No. 86 at 6. In any event, the Government does not contest the argument that the burglary conviction, which involved vehicles, was likely not a crime of violence either in 2005 or today. *See Taylor v. United States*, 495 U.S. 575, 598 (1990) (describing the categorical approach and defining generic burglary as "any crime, regardless of its exact definition or label, having basic elements of unlawful or unprivileged entry into, or remaining in, *a building or structure*, with intent to commit a crime."). Likewise, movant agrees that the 1991 conviction for possession with intent to deliver cocaine qualifies as an ACCA predicate offense. Therefore, my discussion below will be limited to the two second degree armed robbery convictions.

> sentence, or that the sentence was in excess of the maximum authorized by law or [that the judgment or sentence] is otherwise subject to collateral attack.

Id.; *see also* Rule 1 of the Rules Governing § 2255 Proceedings (specifying scope of § 2255). If any of the four grounds are established, the court is required "to vacate and set aside the judgment and [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).

Congress "intended [§ 2255] 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)). Section 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:

> 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.

United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996) (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987)); *see also Sun Bear*, 644 F.3d at 704 ("[T]he scope of a § 2255 collateral attack . . . is severely limited[.]"). A collateral challenge under § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) ("[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal." (collecting cases)). 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 had three prior, qualifying convictions such that he was subject to an enhanced sentence under the ACCA. Movant argues that his two prior Iowa second degree armed robbery 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 § 2255 because (1) movant failed to establish that the court relied on the residual clause addressed in *Johnson* and (2) the Supreme Court's holdings in *Descamps v. United States*, 570 U.S. 254 (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. Finally, the Government argues that movant is not entitled to relief because even if 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).[2]

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:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

[2] It is possible that *Sun Bear*, *Olten* and *Olunyolo* should not be applied to movant's sentence. In *Harlow v. United States*, ___ Fed. App'x ___, No. 16-4048, 2018 WL 1989945 (8th Cir. Apr. 27, 2018), 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 *2 (citing *Gray v. United States*, 833 F.3d 919, 922 (8th Cir. 2016). However, I need not determine what effect *Harlow*—a brief, unpublished decision—has on movant's sentence given my resolution of the issues discussed below.

> (ii) is burglary, arson, or extortion, involves use of explosives or 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 held that the residual clause was unconstitutionally vague: "We are convinced 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. Increasing a defendant's sentence under the clause denies due process of law." 135 S. Ct. at 2557. In *Welch v. United States*, the Supreme Court held that *Johnson* announced a substantive rule that applied retroactively on collateral review. 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 § 924(e)(2)(B)'s invalidated residual clause. However, the Supreme Court clarified 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."). *Johnson* and *Welch* negate the use of a felony *unless* it qualifies as an ACCA predicate without relying on the residual clause. *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016) ("[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." (citing *Welch*, 136 S. Ct. at 1268)).

A movant must prove that he or she 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) (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). If the court cannot determine whether a movant's prior convictions qualified as violent felonies pursuant to the residual clause, which would render a sentence subject to challenge under *Johnson*, or pursuant to the elements clause or the enumerated-crimes clause, which would not render a sentence subject to challenge, the court must deny relief under § 2255. *See Moore*, 830 F.3d at 1273; *accord In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016); *but see United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("[W]hen 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)." (emphasis added)). Thus, if movant's second degree armed robbery convictions qualified as violent felonies under the elements clause at the time of sentencing, the resulting sentence is not subject to attack—even if they also qualified under the residual clause. *See Hires*, 825 F.3d at 1303; *accord Zoch v. United States*, No. C16-4066-LTS, 2017 WL 6816543, at *3 (N.D. Iowa Sept. 22, 2017).[3]

[3] Although I follow my earlier decision in *Zoch* on the issue of whether a movant must establish that they were convicted under the residual clause, and not one of the surviving clauses, I acknowledge that this issue appears to be the subject of considerable debate. For example, the Eleventh Circuit reversed itself on this issue between various panels of the Court in *Moore*, 830 F.3d at 1303, *Hires*, 825 F.3d at 1303, and *Chance*, 831 F.3d 1335, 1339-41 (11th Cir. 2016), before adopting a "more likely than not test" which lessens the movant's burden of proof on this issue:

> To prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If 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 clause.

Beeman v. United States, 871 F.3d 1215, 121-22 (11th Cir. 2017). Meanwhile, the Fourth, Fifth, and Ninth Circuits have taken an approach that seems to require no proof at all that the movant's sentence was enhanced pursuant to the residual clause, at least where the district court

In *Descamps*, decided two years before *Johnson*, the Supreme Court held that a sentencing court "may use the modified [categorical] approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." 570 U.S. at 278. In *Mathis*, a post-*Johnson* decision, the Court explained:

> For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

136 S. Ct. at 2257. However, it appears that *Descamps* and *Mathis* do not apply retroactively. *See United States v. Taylor*, 672 F. App'x 860, 861-64 (10th Cir. 2016)

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was not clear. *See Winston*, 850 F.3d at 682-685 (stating "[w]e will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(B) an offense qualified as a violent felony," and proceeding to analyze movant's convictions under *Descamps* and *Mathis*); *United States v. Taylor*, 873 F.3d 476, 481-82 (same); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (same). The Eighth Circuit has not yet decided this issue, but the District Courts for North Dakota and Eastern Missouri have followed the approach of the Fourth, Fifth, and Ninth Circuits. *See, e.g. Eaton v. United States*, No. 1:16-cv-135, 1:10-cr-011, 2017 WL 3037435, at *2 (D.N.D. Jul. 18, 2017) ("The movant need not show he was sentenced under the residual clause to maintain a Section 2255 claim under *Johnson*. A movant may rely on the new rule of constitutional law announced in *Johnson* if his sentence *may* have been predicated on the now void residual clause." (internal citations omitted)); *Stoner v. United States*, No. 1:16-CV-156 CAS, 2017 WL 2535671, at *4 (E.D. Mo. Jun 12, 2017) (rejecting "the government's unsupported argument that movant was sentenced under the ACCA's enumerated clause" where "the indictment, the PSR, and the sentencing transcript in the underlying criminal case . . . do not mention the specific basis for movant's sentence under the ACCA." (internal citations omitted)). Meanwhile, district courts in Minnesota, Michigan and Alabama have issued decisions consistent with *Zoch*. *See, e.g. United States v. Gabrio*, No. 01-CR-165, 2017 WL 3309670 at *4 (D. Minn. Aug. 2, 2017); *Traxler v. United States*, No. 16-CV-747, 2016 WL 4536329 (W.D. Mich. Aug. 31, 2016); *Ziglar v. United* States, No. 16-CV-463, 2016 WL 4257773 (M.D. Ala. Aug. 11, 2016). Of course, the unpublished and non-precedential decisions in the Eighth Circuit (discussed further in footnote 4 below) suggest the Eighth Circuit is not likely to side with the Fourth, Fifth, and Ninth Circuits on this issue.

(*Johnson* did not impact sentence imposed because prior burglary convictions qualified under enumerated-crimes clause and *Mathis* did not announce a new rule that applies retroactively to cases on collateral review); *Hires*, 825 F.3d at 1303 (explaining that "*Johnson* does not serve as a portal to assert a *Descamps* claim").[4] Therefore, movant's

[4] The Eighth Circuit Court of Appeals has not directly addressed the relationship between *Johnson* and *Descamps/Mathis* with respect to an initial § 2255 motion. However, it has addressed *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);

argument that *Descamps* and/or *Mathis* may dictate a different sentence is unavailing, because movant is unable to apply rules of statutory construction that were not in effect at the time he was sentenced. *See 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, movant's sentence is not called into question by *Johnson* because the court did not need to rely on the residual clause to determine that movant qualified as an armed career criminal. Rather, the court could have relied on the elements clause to determine that second degree armed robbery was a crime of violence. Although the court did not expressly state how the convictions qualified as predicate felonies, at the time of movant's sentencing in 2005, legal authority would have supported the court's use of the categorical approach to assess whether movant's Iowa robbery convictions were violent felonies under the ACCA's elements clause. *See, e.g., United States v. Leeper*, 964 F.2d 751, 754 (8th Cir. 1992) (citing *United States v. Wright*, 957 F.2d 520 (8th Cir. 1992)). Indeed, movant stipulated at the time of sentencing that the robberies were predicate offenses, and disputed only whether they should be counted separately. *See* Crim. Doc. Nos. 75-1 at ¶ 5; 84 at 6-7.

Moreover, the record, which includes the undisputed facts in the presentence report, also indicates that all of movant's robbery convictions would have qualified as violent felonies under the elements clause when movant was sentenced. *See* 18 U.S.C. § 924(e)(2)(B)(i); *see also* Crim. Doc. No. 75-1 at ¶ 55. Regarding the robbery offenses, the undisputed facts in movant's presentence report indicate that: (1) movant committed

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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) (same).

armed second degree robbery under Iowa law by ordering the victim to remove money from a convenience store safe, and then locking the victim in the trunk of a car, while carrying a sawed-off shotgun, on August 16, 1986; and (2) movant committed armed second degree robbery under Iowa law by ordering two victims to put money in a bag and then locking them into the trunk of a car, while carrying a sawed-off shotgun, on August 19, 2016. *Id.*[5] Because movant's robbery convictions qualified as a violent felonies under the still-valid elements 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—robbery—is crime of violence under the elements clause, and, as such, 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 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

[5] I have considered well-established precedent that emphasizes finality, reiterates the limited scope of relief under § 2255 and the likelihood of disparate treatment among individuals seeking collateral relief, and the availability of initial or subsequent collateral review. Thus, I find it appropriate to consider the un-objected to portions of the presentence report. *United States v. Garcia-Longoria*, 819 F.3d 1063, 1067 (8th Cir. 2016) (finding that, because the presentence report described prior offense conduct without stating its sources, the failure to object to conduct described in the presentence report relieved the government of its obligation to introduce at sentencing the documentary evidence *Taylor* or *Shepard* requires); *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."); s*ee also* 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").

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)). Movant's petition will be denied.

V. CERTIFICATE OF APPEALABILITY

In a § 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); Fed. R. App. P. 22(b). *See also 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); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). 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)).

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 § 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 "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 has made a "substantial showing" with respect to the claim that he raised in his § 2255 motion. Specifically, I find that there is substantial debate on the issue of whether a movant must conclusively establish that the sentencing court relied on the residual clause to determine that a prior conviction is an ACCA crime of violence. As the Eighth Circuit Court of Appeals has not decided this issue, and there appears to be differing views within the district courts of the Eighth Circuit as well as between the circuits, a certificate of appealability will issue as to this claim.

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 issue** in accordance with the discussion above.

IT IS SO ORDERED.

DATED this 11th day of May, 2018.

Leonard T. Strand, Chief Judge

United States Court of Appeals
For the Eighth Circuit

No. 18-2478

James Alton Turner, Jr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Northern District of Iowa - Waterloo

Submitted: June 10, 2019
Filed: July 23, 2019
[Unpublished]

Before GRUENDER, ARNOLD, and STRAS, Circuit Judges.

PER CURIAM.

James Turner appeals the district court's[1] denial of his 28 U.S.C. § 2255 petition challenging his designation as an armed career criminal. *See* 18 U.S.C. § 924(e)(1). We affirm.

[1] The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

In June 2004, Turner pleaded guilty to (1) knowingly and intentionally possessing with intent to distribute approximately 1,162 grams of marijuana within 1,000 feet of a park after having been previously convicted of a felony drug offense, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 851, and 860; and (2) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The sentencing court determined that, based on prior felony convictions, Turner was subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"). *See* 18 U.S.C. § 924(e)(1) (imposing a mandatory minimum sentence of fifteen years for defendants convicted of being a felon in possession of a firearm with three or more prior convictions for a "violent felony" or a "serious drug offense"). It sentenced him to 210 months' imprisonment.

On December 7, 2017, we granted Turner's petition for authorization to file a successive motion under § 2255 challenging the ACCA enhancement to his sentence. In support of his motion, Turner argued before the district court that he was not subject to the enhancement because his prior convictions were not "violent felon[ies]" under the ACCA. Specifically, he claimed that "[w]here, as here, the record is silent as to which clause of 18 U.S.C. § 924(e)(2)(B) the [sentencing] court relied upon to find [he] had at least three prior convictions that qualified as violent felonies, it should be presumed that the court relied upon the residual clause." And because the Supreme Court held the residual clause to be unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), he contended that his prior convictions were not ACCA predicate offenses and that his sentence should be vacated. *See Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (concluding that *Johnson* announced a "new rule" that is retroactive on collateral review).

The district court denied Turner's motion, declining to presume that the sentencing court relied on the residual clause and holding instead that "[a] movant must prove that he or she was sentenced using the residual clause." But it "acknowledge[d] that this issue appears to be the subject of considerable debate" and

that "[t]he Eighth Circuit has not yet decided this issue." Given this uncertainty, the district court issued a certificate of appealability on the narrow question of "whether a movant must conclusively establish that the sentencing court relied on the residual clause to determine that a prior conviction is an ACCA crime of violence." Turner appealed.

Soon thereafter, we decided *Walker v. United States* and concluded that, before a district court can proceed to the merits of a § 2255 motion, a movant relying on *Johnson* must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." 900 F.3d 1012, 1015 (8th Cir. 2018). Because *Walker* controls and addresses the only question presented in this appeal, we affirm.[2] *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.").

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[2] We decline to address Turner's other challenges to the district court's denial of his § 2255 petition because they are outside the certificate of appealability. *See Pruitt v. United States*, 233 F.3d 570, 572-73 (8th Cir. 2000) ("In a section 2255 petition, appellate review is limited to the issues specified in the certificate.").