

APPENDIX

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MICHAEL LEE SNYDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

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IN THE UNITED STATES DISTRICT COURT
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FOR THE DISTRICT OF WYOMING

MICHAEL LEE SNYDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Civil Case No. 16-CV-058-J
[Criminal Case No. 04-CR-118-J]

ORDER DENYING 28 U.S.C. § 2255 PETITION

Michael Lee Snyder (“Petitioner”) seeks to have his Armed Career Criminal Act (“ACCA”) sentence vacated in light of the United States Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held the “residual clause” of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutional. *Johnson v. United States*, 135 S. Ct. 2557. He filed a *pro se* request seeking appointment of counsel on October 15, 2015. [Crim. Doc. 53]. Petitioner subsequently filed, through counsel, on March 30, 2016, a formal 28 U.S.C. § 2255 Petition to Vacate Sentence and For Immediate Release. [Doc. 10].

The Court having reviewed Petitioner’s formal Petition and subsequent pleadings, as well as the file herein, and being otherwise fully advised, FINDS said Petition should be DENIED.

BACKGROUND

Petitioner was originally charged by indictment on May 19, 2004, with having unlawfully possessed a firearm as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). [Presentence Report (“PSR”), p. 1; p. 3 ¶ 1]. He entered a guilty plea to the charge on December 21, 2004, based on a plea agreement which provided the United States would recommend a three offense level reduction in his Sentencing Guidelines calculation to reflect his acceptance of responsibility, and would also recommend he receive a sentence at the bottom of the relevant sentencing range under the Guidelines. [Crim. Doc. 27, pp. at 7-8 ¶ 13(f)]. The United States further agreed it would allow Petitioner the opportunity to provide substantial assistance to it, and, if he did so, it would consider filing a motion on his behalf for an appropriate reduction in his sentence pursuant to U.S.S.G. § 5K1.1. [Crim. Doc. 27, pp. 7, 8 ¶ 13(f)].

A presentence report was prepared following acceptance of Petitioner’s guilty plea. The PSR, in calculating his advisory Guidelines sentencing range, determined he qualified as an armed career criminal under 18 U.S.C. § 924(e), thus his offense level should be 33 as required by U.S.S.G. § 4B1.4(b)(3)(B). [PSR, p. 7 ¶ 15]. The PSR reached this conclusion, as required by § 924(e), based on the fact Petitioner had previously sustained two distinct convictions for violent felonies, *i.e.*, burglary of a residence. The details of each burglary, as described in the PSR, clearly indicate both convictions involved inhabited buildings or

structures, not automobiles. [PSR, p. 7 ¶ 15; p. 13 ¶ 36 (Petitioner's 1995 conviction for burglary in Laramie County, Wyoming); and p. 7 ¶ 15; p. 18 ¶ 48 (Petitioner's 2004 conviction for burglary in Laramie County, Wyoming)]. He also had one prior conviction for a serious drug offense, *i.e.*, unlawful distribution of marijuana. [PSR, p. 7 ¶ 15; p. 12 ¶ 30 (Petitioner's 1994 conviction in Laramie County, Wyoming)].¹

Chapter Four Enhancements: Pursuant to U.S.S.G. § 4B1.4(a), the defendant is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) as an armed career criminal. He *has sustained two convictions for Burglary of two residences*, and a conviction of a controlled substance offense, Delivery of Marijuana. Accordingly, the base offense level is 33 pursuant to U.S.S.G. § 4B1.4(b)(3)(B).

[PSR, p. 7 ¶ 15]. (emphasis supplied).

The PSR also determined Petitioner's criminal history score was 19, which placed him in Criminal History Category VI. [PSR, p. 19 ¶ 52]. The PSR thus concluded, based on those determinations, Petitioner's advisory Guidelines range was 168-210 months. His effective

¹ The care with which the PSR differentiated between offenses which might contribute to the application of the ACCA, and those which would not, is illustrated by the fact that in addition to his two residential burglaries, which the PSR clearly did count for ACCA purposes, Petitioner also had a prior conviction for automobile burglary, which the PSR plainly did not count for ACCA purposes. [PSR, p. 18 ¶ 49].

Guidelines range, however, was 180 months (15 years) to 210 months in light of the § 924(e) mandatory minimum of 15 years imprisonment. [PSR, p. 25 ¶ 86].²

The completed PSR was circulated to both Petitioner and the United States for objections or comment. The United States had no comment or objection, however, Petitioner was specifically concerned with the PSR proposal he qualified for ACCA sentencing. His objection, however, had nothing to do with *Johnson*-related matters. Rather, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he argued none of his convictions were countable for ACCA purposes because his prior burglaries and his drug trafficking offense had neither been alleged in his indictment nor proven to a jury beyond a reasonable doubt. [PSR, Addendum, p. i].

The PSR Addendum rejected Petitioner's objection, noting *Apprendi* did not require a jury determination for statutory sentencing enhancements based upon prior convictions. The Addendum further noted Petitioner was eligible for a sentence under the ACCA based on his prior drug distribution conviction and his prior "two convictions for Burglary of a

² The PSR calculations show but for his qualifying as an armed career criminal, Petitioner's adjusted offense level was 28, and after subtracting three levels for acceptance of responsibility, his total offense level would have been 25. [PSR, p. 7 ¶¶ 14, 16]. Since he fell into Criminal History Category VI [PSR, p. 19 ¶ 52], his Guidelines sentencing range would have been 110-137 months imprisonment (*see* U.S.S.G. Sentencing Table).

residence.” [PSR, Addendum, p. i]. No mention was made either in the PSR itself, or in the Addendum, about the possible relevance of the ACCA residual clause.

Petitioner appeared for sentencing on March 1, 2005. [Doc. 4]. He reiterated his *Apprendi*-based objection to his being sentenced under the ACCA without a jury first having made “beyond a reasonable doubt” findings concerning his prior residential burglary and drug distribution felony convictions. [Doc. 4]. He did not claim his prior residential burglary convictions failed to satisfy the requirements for generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), as reaffirmed in *Shepard v. United States*, 544 U.S. 13 (2005). Nor did he demand the United States produce the charging documents associated with those convictions in order to prove, under *Taylor* and *Shepard*, in fact his residential burglary convictions met the requirements of generic burglary under *Taylor*. And he never suggested the Wyoming burglary statute, Wyo. Stat. § 6-3-301(a), was indivisible, and thus categorically insufficient as a matter of law for purposes of the ACCA.

The Court sentenced Petitioner to the statutorily required 180 months imprisonment less seven plus months pursuant to U.S.S.G. § 5G1.3(b) to account for time served for a state offense which had been fully accounted for in the determination of his offense level, and for which the Federal Bureau of Prisons would not otherwise give him credit. [Doc. 4].

Petitioner filed an appeal from his sentence, arguing his enhanced 15 year prison sentence was based on judge-made findings concerning the existence of prior convictions he

had sustained, and therefore, by virtue of *United States v. Booker*, 543 U.S. 220 (2005), such findings must be made by a jury, not a judge. The Court of Appeals rejected his argument. *United States v. Snyder*, 158 Fed. Appx. 942, 943-944 (10th Cir. 2005). The United States Supreme Court subsequently denied *certiorari*. *Snyder v. United States*, 547 U.S. 1050 (2006) (mem.).

APPLICABLE LEGAL PRINCIPLES

Section 2255 entitles a prisoner to relief “[i]f the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.” 28 U.S.C. § 2255(b). The standard of review applied to § 2255 motions is stringent. “Only if the violation constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure can § 2255 provide relief.” *United States v. Gordon*, 172 F.3d 753, 755 (10th Cir. 1999) (internal quotations omitted). The Court presumes the proceedings which led to a Petitioner’s conviction were correct. *Parke v. Raley*, 506 U.S. 20, 29, 30 (1992).

“Section 2255 is not available to test the legality of matters which should have been raised on appeal.” *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994). “A defendant who fails to present an issue on direct appeal is barred from raising the issue in a § 2255

motion, unless he can show cause for his procedural default and actual prejudice resulting from the alleged errors, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed.” *United States v. Allen*, 16 F.3d at 378. “[I]f the government raises procedural bar, the courts must enforce it and hold Petitioner's claims procedurally barred unless cause and prejudice or a miscarriage of justice is shown.” *United States v. Allen*, 16 F.3d at 378.

A petitioner, in order to establish “cause,” must show there existed some external impediment which prevented the raising of a claim during the original proceedings in the case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). A petitioner could show “cause” by demonstrating the claim was so novel that its legal basis was not reasonably available to petitioner’s counsel. *Reed v. Ross*, 468 U.S. 1, 16 (1984). Neither ignorance nor inadvertence are, however, sufficient in this regard, nor does a failure to recognize the factual or the legal basis for the claim. *Reed v. Ross*, 468 U.S. at 16.

DISCUSSION

Petitioner, in his formal § 2255 request through counsel, contends his fifteen year sentence under the ACCA was unconstitutional as it was based, in part, on his prior Wyoming burglary convictions. He claims those burglary convictions do not meet the requirements for “generic burglary” as established in *Taylor v. United States*, 495 U.S. 575 (1990), and as reaffirmed in *Shepard v. United States*, 544 U.S. 13 (2005), and in *Descamps*

v. United States, 133 S.Ct. 2276 (2013). He therefore argues his prior burglary convictions could be counted as “violent felonies” under the ACCA only under the “residual clause,” which includes in the § 924(e) definition of “violent felonies” crimes which “otherwise involve[] conduct that presents a serious potential risk of physical injury to another ...” 18 U.S.C. § 924(e)(2)(B).

Petitioner thus, in summary, asserts, since *Johnson v. United States* determined the residual clause was unconstitutionally vague, his fifteen year ACCA sentence is likewise unconstitutional. And since the Supreme Court has determined its decision in *Johnson* should be retroactive, *see Welch v. United States*, 578 U.S. ___, 136 S.Ct. 1257 (2016), he is entitled to have his fifteen year sentence set aside and resentenced under 18 U.S.C. § 922(g)(1) without reference to the ACCA prescribed mandatory minimum fifteen year sentence.

ACCA & Johnson

The ACCA imposes a mandatory minimum sentence of fifteen years for anyone who violates 18 U.S.C. § 922(g), and has three prior convictions for a “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e)(1). The ACCA has traditionally defined a violent felony through three separate provisions, sometimes referred to as the “elements” clause, “enumerated” clause, and “residual” clause. *Johnson v. United States*, 135 S.Ct. at 2555-2556; and 18 U.S.C. § 924(e)(2)(B)(i)(ii). The elements clause defines a violent felony as one which “has as an element the use, attempted use, or threatened use of physical force against

the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). The enumerated clause provides a violent felony “is a burglary, arson, or extortion, [or] involves use of explosives.” 18 U.S.C. § 924(e)(2)(B)(ii). Finally, the residual clause provided a violent felony is one which “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). Each clause, over time, has been the subject of extensive litigation and discussion as to their precise meaning.³ Most recently in *Johnson v. United States*, the Supreme Court declared the “residual clause” unconstitutional, but left untouched the “elements” and “enumerated” clauses. *Johnson v. United States*, 135 S.Ct. at 2563.

The Supreme Court, in *Johnson*, was specifically concerned with the ACCA residual clause which, along with its “elements clause” and “enumerated offenses” clause, seeks to define, or describe, the universe of prior convictions which might constitute violent felonies for purposes of triggering the Act’s enhanced penalty scheme. The “residual clause,” which directly follows the “enumerated offenses” clause, defines a violent felony, in part, as one

³ The “elements” clause and its meaning was discussed in *Johnson v. United States*, 559 U.S. 133 (2010), and its progeny. The “enumerated” clause has been extensively detailed in *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); and *Descamps v. United States*, 133 S.Ct. 2276 (2013). The “residual clause” was extensively discussed in *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*, 564 U.S. (2011); and *Johnson v. United States*, 135 S. Ct. 2551 (2015).

which “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii).

The Court concluded imposing an increased sentence under the ACCA residual clause violates the Due Process Clause, finding the residual clause impermissibly vague on its face. The Court held the government violates the Fifth Amendment due process guarantee “by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S. Ct. at 2556. “The prohibition of vagueness in criminal statutes,” the Court explained, “is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process.” *Johnson v. United States*, 135 S.Ct. at 2556-2557 (internal quotation marks omitted) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Further, “[t]hese principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Johnson v. United States*, 135 S. Ct. at 2557.

The Court found the ACCA residual clause to be unconstitutionally vague.

By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Johnson v. United States, 135 S. Ct. at 2558. The Court explained the residual clause requires courts to assess whether a crime presents a serious potential risk of injury in light of a list of enumerated crimes which are “far from clear in respect to the degree of risk each poses.” *Johnson v. United States*, 135 S. Ct. at 2558 (internal quotation marks omitted) (*quoting Begay v. United States*, 553 U.S. 137, 143 (2008)). Further, the ACCA “inclusion of burglary and extortion under the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act,” however, the statute gives no indication of “how remote is too remote.” *Johnson v. United States*, 135 S. Ct. at 2559. The Court found the inability of its own cases to develop a “principled and objective standard” demonstrated the residual clause’s “hopeless indeterminacy.” *Johnson v. United States*, 135 S. Ct. at 2558. The Court thus concluded “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson v. United States*, 135 S. Ct. at 2557. The Court accordingly held the residual clause is “vague in all its applications.” *Johnson v. United States*, 135 S. Ct. at 2561 (rejecting the government’s reliance on the “existence of some clearly risky crimes” to “save the residual clause”). The Court also overruled its decisions in *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 131 S. Ct. 2267 (2011), in which it had previously rejected arguments or suggestions in dissenting

opinions the residual clause was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. at 2562, 2563.

The Court explicitly noted, however, its decision “does not call into question application of the [ACCA] to *** the remainder of the Act’s definition of a violent felony,” including a felony offense which “has as an element the use, attempted use, or threatened use of physical force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i), and a felony offense which “is burglary, arson, or extortion, [or] involves use of explosives,” 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S. Ct. at 2563. It also does not affect the ACCA definition of “serious drug offense.” 18 U.S.C. § 924(e)(2)(A).

The Supreme Court subsequently concluded, in *Welch v. United States*, 136 S.Ct. 1257 (2016), the decision in *Johnson* “has retroactive effect . . . in cases on collateral review.” *Welch v. United States*, 136 S.Ct. at 1265.

28 U.S.C. § 2255

A federal prisoner may seek to have his sentence vacated, set aside, or corrected “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255. Relief under § 2255 is provided only for jurisdictional

or constitutional claims or errors which reveal “a fundamental defect which inherently results in a complete miscarriage of justice.” *United States v. Addonizio*, 442 U.S. 178, 185 (1979).

Timeliness

A one year period of limitation applies to § 2255 motions, and runs from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by government action in violation of the constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

A defendant’s conviction, for purposes of applying the one year limitation period established by § 2255, is final when the district court has filed its judgment and when the defendant’s right to further appeal said judgment has been exhausted. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987); *United States v. Prows*, 448 F.3d 1223, 1227-12128 (10th Cir. 2006); *United States v. Burch*, 202 F.3d 1274, 1278 (10th Cir. 2000). Petitioner’s direct appeal was decided November 25, 2005. *United States v. Snyder*, 158 Fed. Appx. at 942. His

petition for *certiorari* with the United States Supreme Court was denied March 27, 2006. *Snyder*, 547 U.S. 1050. His conviction was thus final, for purposes of § 2255's one year limitation period, on March 27, 2006. *United States v. Prows*, 448 F.3d 1223, 1227-1228 (10th Cir. 2006); *United States v. Wilson*, 631 Fed. Appx. 623, 624 (10th Cir. 2015). The time for Petitioner to have filed a first motion under § 2255 would have expired on March 27, 2007. Petitioner, nonetheless, asserts his motion is timely as provided by § 2255(f)(3), claiming his right to relief was newly recognized and made retroactive by the Supreme Court June, 2015, decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). [Doc. 10, pp. 15, 16; Doc. 18, pp. 2-5].

The United States takes no issue with respect to the timeliness of Petitioner's motion *vis a vis Johnson*. His problem, however, is, aside from merely citing *Johnson v. United States* and reciting its holding *vis a vis* the constitutionality of the ACCA's "residual clause," Petitioner, in none of his pleadings, "utters so much as a peep" to explain how *Johnson* has any application whatsoever to the facts of *his* case.

The actual facts of record in this matter offer no basis whatsoever for the notion the sentence Petitioner received was based on the ACCA's "residual clause," rather than its "enumerated offenses clause." Burglary is an enumerated offense under the ACCA, and Petitioner's criminal history included three of them, two of which were characterized by the PSR as residential burglaries. [PSR, p. 13 ¶ 36; p. 18 ¶ 48]. The PSR, in light of these two

residential burglary convictions, as well as a prior serious drug offense, concluded Petitioner was subject to ACCA sentencing. [PSR, p. 7 ¶ 15]. In reaching this conclusion, the PSR made absolutely no reference to the “residual clause.”

It is also important to note, in further support of the conclusion these burglary convictions were counted under the enumerated clause, not the “residual clause,” the PSR *only counted these two residential burglary convictions* for ACCA purposes. It *did not count* Petitioner’s prior automobile burglary conviction under the very same statute, clearly recognizing, under *Taylor v. United States*, vehicle burglaries do not count for ACCA purposes.

Petitioner made absolutely no objection to the PSR characterization of his residential burglary convictions as violent felonies under the ACCA, other than his *Apprendi* claim. The PSR writer, in the PSR Addendum, after rejecting Petitioner’s *Apprendi* claim, reiterated the PSR’s finding Petitioner qualified for ACCA sentencing in part *because of* his prior residential burglary convictions. [PSR, Addendum, p. i].

The same is true with respect to Petitioner’s sentencing hearing. He never objected to the PSR characterization of his prior convictions as “residential burglaries,” and he never argued residential burglary convictions under Wyoming law were in some way categorically insufficient for purposes of the ACCA’s “enumerated clause.” He simply renewed his *Apprendi* claim, and argued nothing more.

This Court, at sentencing, did not delve into the intricacies, under *Taylor v. United States*, as to whether Petitioner's burglary convictions were, in fact, "generic burglaries" as a categorical matter. And, in fact, such a discussion was not necessary. A district court, when defendant fails to interpose objections to the PSR's findings and recommendations, may simply adopt those findings and recommendations without subjecting them to further scrutiny. *United States v. McGehee*, 672 F.3d 860, 874-875 (10th Cir. 2012) (citing *United States v. Robertson*, 568 F.3d 1203, 1214 (10th Cir. 2009)); see also *United States v. Turner*, 624 Fed. Appx. 624, 626-627 (10th Cir. 2015) (defendant who failed to object to PSR's characterization of his prior conviction as serious drug offense for ACCA purposes could not later claim in § 2255 motion the sentencing court committed error by not insisting government provide *Shepard* documents before accepting PSR's characterization) (citing *United States v. Harris*, 447 F.3d 1300, 1306 (10th Cir. 2006)). And this is what happened with Petitioner.

The one phrase, which never appears, in fact, is never even referred to, throughout Petitioner's entire sentencing process, is "residual clause." There is nary a whisper in the record suggesting Petitioner's prior residential burglaries qualify as ACCA "violent felonies" only by virtue of the "residual clause." Indeed, Petitioner's motion contains no suggestion to the contrary.

We have thus come full circle and returned to the question which initiated the foregoing discussion, *i.e.*, whether Petitioner's motion is barred by § 2255(f)'s one year limitation period. Petitioner asserts his claim is within the limitation period by invoking § 2255(f)(3) and *Johnson v. United States*. There is no evidence whatsoever to suggest he was actually sentenced on the basis of the "residual clause," therefore *Johnson* is not applicable. Said decision does not allow a challenge to *every* ACCA sentence, regardless of its basis. And as the Supreme Court noted, its invalidation of the residual clause in *Johnson* left wholly undisturbed both the ACCA's "enumerated clause" and its "elements clause." *Johnson v. United States*, 135 S.Ct. at 2563.

The language of § 2255(f)(3) specifically states the one year limitations period begins when the Supreme Court recognized a new right, and said right has been made retroactive. The decision *Johnson v. United States* recognized a new right only as to the ACCA residual clause. The "retroactivity" allowed by the Supreme Court decision in *Welch v. United States*, could therefore only apply to a residual clause claim for relief. The *Johnson v. United States* decision is not applicable to Petitioner's sentence, therefore § 2255(f)(3) is likewise inapplicable.

Petitioner's motion, to have been timely, must have been filed within a year of when his conviction became final, *i.e.*, a year following the United States Supreme Court denial

of *certiorari* in his case. Said period expired in March, 2007. Petitioner's motion, as first filed in late 2015 - is thus eight plus years too late.

Petitioner, in a response to the United States timeliness argument, basically asserts the phrase "residual clause" need not appear in the record in order for his claim for relief to be considered a *Johnson* claim. The Wyoming burglary statute, in addition, is "non-generic," thus its use to enhance Petitioner's sentence clearly had to have been done under the residual clause. The Supreme Court held *Johnson* claims relied on a new and retroactive rule of constitutional law, and thus Petitioner's motion, which sets out a *Johnson* claim, is timely pursuant to 22 U.S.C. § 2255(F)(3). [Doc. 18, pp. 2-5].

Equitable Tolling

Petitioner makes no mention of, and thus apparently does not seek, equitable tolling. A discussion, nevertheless, of the concept seems appropriate in light of the possibility it may be deemed important in the context of further judicial review.

It is possible some extraordinary circumstance may unfairly impede a defendant's ability to file a timely § 2255 motion. Where such occurs, and a defendant demonstrates he nonetheless exercised due diligence in at least trying to file a timely motion, his failure to timely file may be excused under the doctrine of equitable tolling. *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008). A petitioner, however, to take advantage of equitable tolling, must demonstrate "(1) that he has been pursuing his rights diligently; and (2) that some

extraordinary circumstance stood in his way” which precluded his compliance with the limitation period. *Yang v. Archuleta*, 525 F.3d at 928; *San Roman v. Vaughn*, 442 Fed. Appx. 365, 368 (10th Cir. 2011). He may also invoke equitable tolling if he makes a convincing showing he is “actually innocent” of the crimes for which he was convicted. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000); *Perry v. McKune*, 381 Fed. Appx. 850, 852 (10th Cir. 2010).

Petitioner has failed to satisfy any of the equitable tolling requirements. He has, in fact, not even alluded to the existence of any extraordinary circumstance which stood in the way of his being able to file a timely § 2255 motion, nor has he alleged any facts which might demonstrate his due diligence. He rather simply asserts he is actually “innocent” of being subject to the ACCA by claiming his burglary convictions do not qualify as a violent felony, and in doing so, does not challenge his guilt of the underlying federal offense, or even the underlying predicates. He merely claims he should not have been sentenced under the ACCA. [Doc. 10, pp. 3, 4, 14, 15]. His assertion is not a valid actual innocence claim, and does not support any equitable tolling.

It is well accepted actual proven innocence may exempt a petitioner from the timeliness requirements set forth in the habeas statutes. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). This limited remedy requires a petitioner to show no reasonable jury, in light of new evidence, would have found him guilty beyond a reasonable doubt. *McQuiggin*

v. Perkins, 133 S.Ct. at 1928. However, “actual innocence means ‘factual innocence,’” and “‘a person cannot be actually innocent of a noncapital sentence.’” *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007)). Courts, as such, have consistently rejected arguments such as Petitioner’s, finding actual innocence provides equitable tolling *only* where “actual innocence” is proven with respect to the underlying criminal conduct, and not in regard to the procedural regularities of a sentence. Thus, “actual innocence” of a noncapital sentence cannot toll the one year filing requirement contained in § 2255. *Laurson v. Leyba*, 507 F.3d at 1232; *Davis v. Ledezma*, 393 Fed. Appx, 564, 566 (10th Cir. 2010). See generally *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Petitioner is claiming actual innocence only as to his sentence. He is not making a true actual innocence claim, and, therefore, does not qualify for equitable tolling. The Tenth Circuit has recognized, “[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs. [As such, it is] to be applied sparingly.” *Yang v. Archuleta*, 525 F.3d at 929 (internal citations omitted). The one-year limitation period applicable to Petitioner must be measured solely from the date on which his conviction and sentence were final, *i.e.*, within a year following the United States Supreme Court denial of *certiorari* in his case. Said period expired in March, 2007. There is no valid

basis for equitable tolling and his motion is more than eight years late. It must accordingly be dismissed as untimely.

Procedural Default

Petitioner's motion is also procedurally barred under *United States v. Frady*, 456 U.S. 152 (1982). A § 2255 motion may not test the legality of matters which could have been resolved before this Court in the first instance, or on direct appeal. *United States v. Frady*, 456 U.S. at 165; *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993); *United States v. Turner*, 624 Fed. Appx. 624, 626 (10th Cir. 2015). A defendant who fails to raise an issue before this Court, or on direct appeal, may present it in a § 2255 motion only if he can demonstrate cause for his procedural default, and either actual prejudice from the alleged errors, or a fundamental miscarriage of justice will occur if his claim is not addressed. *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994); *United States v. Geiner*, 443 Fed. Appx. 378, 381 (10th Cir. 2011). Moreover, where the United States raises the procedural bar issue in response to a defendant's § 2255 motion, the court is obliged to address the issue and, if appropriate, dispose of the case on said basis. *United States v. Allen*, 16 F.3d at 379.

A defendant, in order to establish "cause," and thus obtain an exception from procedural default, must show there existed some external impediment which prevented him from raising the claim during the original proceedings in his case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986); *Gonzales v. Hartley*, 396 Fed. Appx. 506, 508

(10th Cir. 2010). A defendant could show “cause” by demonstrating his non-compliance was the product of some kind of governmental or official interference, or his claim was so novel its legal basis was not reasonably available to his counsel. *Murray v. Carrier*, 477 U.S. at 488. *See, also, Reed v. Ross*, 468 U.S. 1, 16 (1984); *United States v. Wiseman*, 297 F3d. 975, 979 (10th Cir. 2002). Neither ignorance nor inadvertence are sufficient, however, in this regard, nor is a failure to recognize the factual or the legal basis for the claim.⁴ *Murray v. Carrier*, 477 U.S. at 487-488.

The *sine qua non* of Petitioner’s § 2255 motion is the argument his two prior residential burglary convictions under the Wyoming burglary statute do not meet the requirements of generic burglary as the United States Supreme Court defined the term in *Taylor v. United States*. He argues this is the correct conclusion whether one employs *Taylor*’s strict categorical test, or whether one employs the somewhat more flexible “modified” categorical approach also approved by *Taylor* and expanded upon - in the guilty plea context - by *Shepard v. United States*. And he contends, based on those arguments, and the Supreme Court decision in *Johnson v. United States*, his ACCA sentence must be

⁴ A claim of ineffective assistance of counsel can overcome the procedural bar rules of § 2255. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993). Such a claim, however, cannot negate the one year filing requirements. In any event, Petitioner has not made an ineffective assistance claim herein.

vacated, since presumably the only other way his prior residential burglary convictions could be counted for ACCA purposes would be under the now defunct “residual clause.”

Petitioner’s argument does not lend any support to his petition as it is procedurally barred under *United States v. Frady*. There is nothing at all about his current challenges to the viability of his prior residential burglary convictions for purposes of the ACCA which could excuse his failure to assert those very same challenges before this Court during his initial sentencing proceedings. Petitioner was sentenced in March, 2005, fourteen plus years **after** *Taylor* was decided, thus his claim his burglary convictions did not satisfy the *Taylor* definition for “generic burglary” was obviously “ripe” for consideration at sentencing. He did not, however, raise such a claim at sentencing, and has failed to provide **any** excuse for such failure, never mind an excuse which might come close to satisfying the *Frady* “cause” requirement.

Petitioner likewise didn’t raise such a claim on direct appeal, and has, as well, failed to raise it in any context until now, eleven plus years after he was sentenced. He provides no credible explanation for this lapse, save for one abbreviated suggestion his procedural default might be excused because he was “actually innocent” of being an “armed career criminal.”

A claim of “actual innocence,” in order to serve as an excuse under either the procedural bar rules or § 2255’s one year limitation period, must relate to a defendant’s or petitioner’s “factual innocence” of the underlying, predicate crime, not simply to his “legal

ineligibility” regarding his non-capital sentence. *Laurson v. Leyba*, 507 F.3d at 1232; *United States v. Richards*, 5 F.3d 1369, 1371-1372 (10th Cir. 1993); *Jones v. Martin*, 622 Fed. Appx. 738, 740 (10th Cir. 2015).

Let’s presume for the moment the Tenth Circuit decision in *Richards* and *Leyba* didn’t wholly foreclose Petitioner’s “actual innocence” claim as a matter of law. It is, nevertheless, abundantly clear for such an “innocence” claim to be at all cognizable, it must be grounded on a showing he was factually innocent of the convictions which gave rise to his ACCA eligibility, *i.e.*, innocent of at least one of his underlying Wyoming burglary convictions or his serious drug offense. *Selsor v. Kaiser*, 22 F.3d 1029, 1035-1036 (10th Cir. 1994). *See also United States v. Pettiford*, 612 F.3d 270, 282-285 (4th Cir. 2010); *Cristin v. Brennan*, 281 F.3d 404, 420-422 (3rd Cir. 2002).

Petitioner has failed to make any such showing. He has not so much as claimed, never mind provided facts to demonstrate, either he was in fact not convicted of any of the predicate offenses, or he was otherwise factually innocent of them. *United States v. Pettiford*, 612 F.3d at 283-84 (*citing United States v. Maybeck*, 23 F.3d 888, 892-894 (4th Cir. 1994)). He simply claims this Court **legally erred** in sentencing him under the ACCA because his prior residential burglary convictions somehow failed to pass muster under *Taylor*, *Shepard*,

Descamps and *Johnson*.⁵ Such an assertion, without more, is simply not enough to excuse what is otherwise a clear procedural default.

Petitioner has not demonstrated cause for his procedural default with respect to his motion, and since the United States has not waived its objections to said default, his petition is subject to dismissal on this basis alone, if for no other reason. *United States v. Allen*, 16 F.3d at 379.

Even if, for the sake of argument, Petitioner could somehow overcome the procedural barriers outlined above, his section 2255 request, cannot, as explained hereafter, be granted. One significant barrier concerns the burden of proof. A defendant, in the usual case, when he or she appears for sentencing in the first instance, the burden of proof is on the United States to establish by a preponderance of the evidence an enhancement under the ACCA is applicable. *United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir. 2012); *United States v. McMahon*, 91 F.3d 1394, 1397 (10th Cir. 1996). We are, however, well beyond the initial sentencing stage. The burden, when we reach the collateral review phase of a case, is no longer on the United States, but rather it is on the defendant/petitioner to demonstrate the facts which establish his conviction or sentence were obtained in violation of the Constitution

⁵ In respect to his current *Johnson* claim, it is worth noting there is in this record nothing at all in regard to the possible relevance of the ACCA's residual clause until Petitioner filed his original *Johnson* motion late in 2015.

or laws of the United States. *See United States v. Bedford*, 628 F.3d 1232, 1236-1237 (10th Cir. 2010); *United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000).

Petitioner has failed to fulfilled this required burden. A central premise of his petition seems to be his sentence “must” have somehow been based on the “residual clause” since his prior burglary convictions were “obviously” not countable as generic burglaries under *Taylor/Shepard*. His factual premise for application of the “residual clause” in his case is not, however, based on any record facts. It is at **best** grounded on nothing more than conjecture, speculation, and surmise, and plainly, such conjecture, *et al* is not a substitute for a sufficient evidence-based showing, and likewise not a basis on which a defendant can satisfy his burden of proof for purposes of § 2255. *Smallwood v. Gibson*, 191 F.3d 1257, 1279 n.14 (10th Cir. 1999); *United States v. Summers*, 601 Fed. Appx 755, 756 (10th Cir. 2015). This is simply another reason why Petitioner’s motion cannot be granted.

Burglary Under the ACCA

The final barrier to Petitioner’s claim is a simple lack of merit.

Petitioner contends the Wyoming statute under which his residential burglary convictions were rendered was not a “divisible” statute as said term was most recently defined by the Court in *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013). He therefore suggests, as a further basis for setting aside his ACCA sentence, those

convictions were, as a matter of law, categorically disqualified from being considered a qualifying burglary under *Taylor v. United States*.

There are two distinct problems with such an argument, both of which are fatal. First, such a claim is subject to § 2255(f)(1)'s one year limitation period, as measured from when his conviction became final. *United States v. Tenderholt*, 587 Fed. Appx 505, 505-506 (10th Cir. 2014)(since *Descamps* did not create any new right, it did not have the effect of restarting the limitation period established by § 2255(f)(1)). Petitioner's "one year" period, as discussed previously herein, expired the better part of a decade ago.⁶ And, as also discussed previously, Petitioner has not established any basis for applying the doctrine of equitable tolling to his motion. Any claim Petitioner may be making under, or with reference to *Descamps*, is barred.

There is, as well, an even more straightforward basis for rejecting Petitioner's claim of "indivisibility" with respect to the Wyoming burglary statute. Said statute has already been determined by the Tenth Circuit to be fully divisible *vis a vis Taylor/Shepard*. *United States v. Gonzales*, 558 F.3d 1193, 1197-1198 (10th Cir. 2009). Petitioner's assertion the Wyoming

⁶ Even if *Descamps* did restart the one year period for defendants properly invoking it, said period, as measured from June, 2013, when the case was decided, obviously expired well over a year prior to Petitioner filing of his § 2255 motion in October, 2015.

burglary statute is indivisible, and therefore his ACCA sentence is unlawful, in light of the unambiguous language in *Gonzales*, is obviously incorrect.

There is, in addition, a further reason why Petitioner's "residual clause" claim lacks any merit. The Wyoming burglary statute, because it covers burglaries of both buildings and structures *and* vehicles, is not categorically a generic burglary statute under *Taylor v. United States*. *United States v. Gonzales*, 558 F.3d at 1197-1198. Petitioner's speculation, and it is only speculation, postulates since the Wyoming statute does not meet the generic burglary standard because it extends to vehicles, his sentence must have been based on an unspoken determination by this Court it at least satisfies the residual clause. Such theory is clearly faulty in light of the simply fact there is no basis in the law to conclude the Wyoming statute, if it is, in fact, not divisible, could satisfy the "residual clause." Indeed, in a similar case concerning a burglary statute which, like the Wyoming law, forbade burglaries of both buildings and vehicles, the U.S. District Court for the Northern District of Oklahoma determined the non-generic statute could not meet the requirements of the "residual clause":

A felony conviction falls under the residual clause if the crime charged is roughly similar, in kind as well as in degree of risk posed, to the enumerated examples of violent felonies in § 924(e)(2)(B)(ii). *United States v. Scoville*, 561 F.3d 1174, 1180 (10th Cir.2009). Although the Oklahoma second-degree burglary statute is similar in kind to generic burglary, it does not involve a similar degree of risk. Both *James v. United States*, 550 U.S. 192, 202 (2007), and *Taylor* employed broad language to describe the risks involved in

burglary. *James*, 550 U.S. at 203; *Taylor* 495 U.S. at 588, 597. However, burglary of places included in Oklahoma's second-degree burglary statute, such as various types of automobiles and vending machines, was excluded from the generic definition of burglary. To hold that, regardless of exclusion from the generic definition, Oklahoma's second degree burglary statute falls within the residual clause would render the definition of generic burglary in *Taylor* irrelevant. *Cf. United States v. Livingston*, 442 F.3d 1082, 1087 (8th Cir.2006)(“it requires something more than breaking and entering a vehicle to meet the ‘otherwise’ prong [of the ACCA] ... if not, breaking and entering a vehicle would fit the burglary prong, a proposition rejected by the Supreme Court in *Taylor* and *Shepard*”).

United States v. Cartwright, 2011 WL 1326659 n.6 (N.D. Okla. Apr. 5, 2011) (unpublished); affirmed *United States v. Cartwright*, 678 F3d. 907 (10th Cir. 2012); cert. denied *Cartwright v. United States*, 133 S.Ct 452 (October 9, 2012).

The same point was made, as noted by the court in *Cartwright*, by the Eighth Circuit in *United States v. Livingston*, 442 F.3d 1082 (8th Cir. 2006):

The Supreme Court distinguished burglary of a vehicle from burglary of a building, though it left open the possibility that an offense similar to generic burglary of a building or structure might fit the “otherwise” prong under § 924(e). *See Taylor*, 495 U.S. at 600 n. 9, 110 S.Ct. 2143. “[I]n order to fall under the ‘otherwise’ clause, a breaking and entering offense must contain elements truly comparable to those of a burglary-comparable enough that the offense poses an equivalent risk of physical injury.” *United States v. Peterson*, 233 F.3d 101, 110 (1st Cir.2000) (parenthetical description omitted). But it requires something more than breaking and entering a vehicle to meet

the “otherwise” prong in this case-if not, breaking and entering a vehicle would fit the burglary prong, a proposition rejected by the Supreme Court in *Taylor* and *Shepard*. There are no additional elements to the breaking or entering of a vehicle offense that make a substantial portion of its convictions as inherently likely to result in physical harm as the risk of physical injury stemming from the burglary of a building.

* *

We hold that breaking or entering a vehicle for purposes of committing a theft under Arkansas law is not a violent felony for purposes of the ACCA. We therefore vacate the sentence imposed by the district court and remand for resentencing.

United States v. Livingston, 442 F.3d at 1087.

An additional reason for including the foregoing analysis in *Cartwright* and *Livingston* is to highlight one further fallacy in Petitioner’s argument. His claim appears to rest on his assertion his prior residential burglary convictions fall short of meeting the requirements for generic burglary under *Taylor*, therefore his ACCA sentence must have been based on this Court’s alleged unspoken and unexplained determination the prior convictions could still be counted for ACCA purposes under the “residual clause.”

It is actually more than plausible, however, as explained by *Cartwright* and *Livingston*, a burglary statute which fails to comport with the requirements for “generic burglary” under *Taylor* because of its over breadth, will likely fail as well to satisfy the residual clause. Petitioner’s apparent core theory in support of his petition, however, would

suggest even if the Court were to conclude [incorrectly] Petitioner's two prior residential burglary convictions could not properly be counted as violent felonies under the standards for generic burglary under *Taylor* and *Shepard*, it would nevertheless find, [again incorrectly and *sub silentio*,] the Wyoming statute categorically qualified as a violent felony under the residual clause, and Petitioner could therefore be sentenced under the ACCA.

Such a theory completely lacks substance, and any merit, particularly as it once again is grounded on nothing more than conjecture. Indeed, to the extent counting Petitioner's residential burglary convictions as enumerated violent felonies for ACCA purposes would have somehow constituted legal error, the most plausible explanation for Petitioner's ensuing ACCA sentence is the court simply misapplied *Taylor*. This is not, however, his claim. He instead postulates after *sua sponte* recognizing the *Taylor* defect in counting those convictions as generic burglaries, this Court then, somewhat illogically as illustrated by *Cartwright* and *Livingston*, concluded the Wyoming statute nevertheless satisfied the requirements of the "residual clause." The Court then sentenced Petitioner accordingly, without explaining its decision on the record to Petitioner or the United States.

Petitioner is perhaps contending his burglary convictions should not have been counted as violent felonies for ACCA purposes because they failed to satisfy

Taylor/Shepard's requirements for generic burglary.⁷ The appropriate remedy for such an assertion was to object to the PSR and its proposal to sentence him under the ACCA, and then to appeal, if necessary. And, barring success in that manner, he could have filed a timely § 2255 motion in regard to the issue. What he cannot do, however, is challenge his

⁷ The United States Supreme court, on June 23, 2016, issued its decision in *Mathis v. United States*, 575 U.S. ____, 136 S.Ct. 2243, 2250 (2016). The Court held a conviction under Iowa's burglary statute, which made it an offense to enter a "building, structure, or land, water, or air vehicle" without permission and with the intent to commit theft or other crime, *see, IA Code*, 702-12 (2013), could not be used as a predicate offense for purposes of imposing an enhanced sentence under the ACCA. *Mathis v. United States*, 136 S.Ct. at 2250 This was so, the Court explained, because the description of the various places which could be burgled did not describe different and separate offenses, but instead simply different means by which a single indivisible statute could be violated.

The Court, as with its earlier decision in *Descamps*, made clear its decision in *Mathis* involved only a straight forward application of its ACCA precedents dating back to *Taylor* in 1990. *Mathis v. United States*, 136 S.Ct. at 2251-2252 By its terms, therefore, it is, like *Descamps*, not a decision likely to be retroactively applicable to cases on collateral review such as the instant one. *See, e.g. United States v. Tenderholt*, 587 Fed. Appx. at 506.

In any event, the Tenth Circuit Court of Appeals has previously determined the Wyoming burglary statute is fully divisible, *See United States v. Gonzales*, 558 F.3d at 1196. The United States has not found a decision of the Wyoming Supreme Court which would challenge said conclusion which is obviously different from the situation present in *Mathis*, where an Iowa Supreme Court decision had previously determined the Iowa burglary statute was indivisible. And as Justice Alito noted in his dissent, it appears the Iowa Supreme Court decision is *sui generis* in so holding. *Mathis*, Slip. Op., at 4-5 (Alito, J., dissenting).

The United States therefore does not believe *Mathis* retroactively alters the legal landscape in a fundamental way as to make Petitioner's otherwise meritless claims suddenly viable.

straightforward ACCA sentence almost twelve years after it was imposed based on a new Supreme Court decision which hasn't even a tangential application to his case.

CONCLUSION AND ORDER

The § 2255 motion by Petitioner, as analyzed herein, is without merit and must, therefore, be denied. The files and record before the Court conclusively establish Petitioner is not entitled to any relief, accordingly, an evidentiary hearing is not required. *United States v. Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988)(no hearing required where § 2255 motion may be resolved on review of record before the Court).

A certificate of appealability (COA) may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner, for the reasons set forth herein, cannot make the required showing, and a COA should not issue.

IT IS THEREFORE HEREBY ORDERED Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate Sentence and for Immediate Release [Doc. 10], is **DENIED**;

IT IS FURTHER HEREBY ORDERED the Motion for Hearing by Petitioner [Doc. 11] is **DENIED**; and

IT IS FINALLY ORDERED a certificate of appealability **shall not issue**, and **all pending motions**, if any, are **denied as moot**.

Dated this 17th day of ~~September~~ ^{October}, 2016.



ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

Meredith B. Esser
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MICHAEL SNYDER,	)	
	)	NOTICE OF APPEAL
Movant,	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	D.C. No. 2:04-cr-00118-ABJ
	)	Civil No. 2:16-cv-00058-ABJ
Respondent.	)	

Michael Snyder, through counsel, hereby files this Notice of Appeal to the Tenth Circuit Court of Appeals, and appeals the Order Denying Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (ECF 66 in D.C. No. 2:04-cr-00118-ABJ and ECFs 19 and 20 in Civil No. 2:16-cv-00058-ABJ) which was entered on October 11, 2016.

Respectfully submitted,
VIRGINIA L. GRADY
Federal Public Defender

s/ Meredith Esser
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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

David Kubichek, United States Attorney
Email: david.kubichek@usdoj.gov

Jason Conder, United States Attorney
Email: Jason.Conder@usdoj.gov

s/ Meredith Esser
Meredith Esser

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
For The District of Wyoming



Stephan Harris
Clerk of Court

Maggie Botkins
Chief Deputy Clerk

October 12, 2016

Elisabeth A. Shumaker, Clerk of Court
United States Court of Appeals for the 10th Circuit
Byron R. White Courthouse
1823 Stout Street
Denver, Colorado 80257

Re: *United States of America v Michael Lee Snyder*
District Court Case Number: 04CR118-ABJ
Notice of Appeal filed: October 11, 2016
CJA Appointment

Dear Ms. Shumaker:

Attached are documents filed in connection with the Notice of Appeal in this case, which will constitute the preliminary record on appeal:

- Copy of the district court docket entries.
- Copy of the notice of appeal.
- Copy of the district court's final judgment or order(s) from which the appeal is taken, as follows:

10/11/2016 Order Denying Motion to Vacate (2255) (Doc. 66)

If any thing further is required, please let me know.

Sincerely,

STEPHAN HARRIS
Clerk of Court

By: /s/ Deany Fondren
Deputy Clerk

Attachment(s)

The procedures and appeals packet may be obtained from our website at <http://www.wyd.uscourts.gov>

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
2016 OCT 11 PM 2:10
CLERK
CHIEF CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MICHAEL LEE SNYDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Civil Case No. 16-CV-058-J
[Criminal Case No. 04-CR-118-J]

ORDER DENYING 28 U.S.C. § 2255 PETITION

Michael Lee Snyder (“Petitioner”) seeks to have his Armed Career Criminal Act (“ACCA”) sentence vacated in light of the United States Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held the “residual clause” of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutional. *Johnson v. United States*, 135 S. Ct. 2557. He filed a *pro se* request seeking appointment of counsel on October 15, 2015. [Crim. Doc. 53]. Petitioner subsequently filed, through counsel, on March 30, 2016, a formal 28 U.S.C. § 2255 Petition to Vacate Sentence and For Immediate Release. [Doc. 10].

The Court having reviewed Petitioner’s formal Petition and subsequent pleadings, as well as the file herein, and being otherwise fully advised, FINDS said Petition should be DENIED.

BACKGROUND

Petitioner was originally charged by indictment on May 19, 2004, with having unlawfully possessed a firearm as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). [Presentence Report (“PSR”), p. 1; p. 3 ¶ 1]. He entered a guilty plea to the charge on December 21, 2004, based on a plea agreement which provided the United States would recommend a three offense level reduction in his Sentencing Guidelines calculation to reflect his acceptance of responsibility, and would also recommend he receive a sentence at the bottom of the relevant sentencing range under the Guidelines. [Crim. Doc. 27, pp. at 7-8 ¶ 13(f)]. The United States further agreed it would allow Petitioner the opportunity to provide substantial assistance to it, and, if he did so, it would consider filing a motion on his behalf for an appropriate reduction in his sentence pursuant to U.S.S.G. § 5K1.1. [Crim. Doc. 27, pp. 7, 8 ¶ 13(f)].

A presentence report was prepared following acceptance of Petitioner’s guilty plea. The PSR, in calculating his advisory Guidelines sentencing range, determined he qualified as an armed career criminal under 18 U.S.C. § 924(e), thus his offense level should be 33 as required by U.S.S.G. § 4B1.4(b)(3)(B). [PSR, p. 7 ¶ 15]. The PSR reached this conclusion, as required by § 924(e), based on the fact Petitioner had previously sustained two distinct convictions for violent felonies, *i.e.*, burglary of a residence. The details of each burglary, as described in the PSR, clearly indicate both convictions involved inhabited buildings or

structures, not automobiles. [PSR, p. 7 ¶ 15; p. 13 ¶ 36 (Petitioner's 1995 conviction for burglary in Laramie County, Wyoming); and p. 7 ¶ 15; p. 18 ¶ 48 (Petitioner's 2004 conviction for burglary in Laramie County, Wyoming)]. He also had one prior conviction for a serious drug offense, *i.e.*, unlawful distribution of marijuana. [PSR, p. 7 ¶ 15; p. 12 ¶ 30 (Petitioner's 1994 conviction in Laramie County, Wyoming)].¹

Chapter Four Enhancements: Pursuant to U.S.S.G. § 4B1.4(a), the defendant is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) as an armed career criminal. He *has sustained two convictions for Burglary of two residences*, and a conviction of a controlled substance offense, Delivery of Marijuana. Accordingly, the base offense level is 33 pursuant to U.S.S.G. § 4B1.4(b)(3)(B).

[PSR, p. 7 ¶ 15]. (emphasis supplied).

The PSR also determined Petitioner's criminal history score was 19, which placed him in Criminal History Category VI. [PSR, p. 19 ¶ 52]. The PSR thus concluded, based on those determinations, Petitioner's advisory Guidelines range was 168-210 months. His effective

¹ The care with which the PSR differentiated between offenses which might contribute to the application of the ACCA, and those which would not, is illustrated by the fact that in addition to his two residential burglaries, which the PSR clearly did count for ACCA purposes, Petitioner also had a prior conviction for automobile burglary, which the PSR plainly did not count for ACCA purposes. [PSR, p. 18 ¶ 49].

Guidelines range, however, was 180 months (15 years) to 210 months in light of the § 924(e) mandatory minimum of 15 years imprisonment. [PSR, p. 25 ¶ 86].²

The completed PSR was circulated to both Petitioner and the United States for objections or comment. The United States had no comment or objection, however, Petitioner was specifically concerned with the PSR proposal he qualified for ACCA sentencing. His objection, however, had nothing to do with *Johnson*-related matters. Rather, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he argued none of his convictions were countable for ACCA purposes because his prior burglaries and his drug trafficking offense had neither been alleged in his indictment nor proven to a jury beyond a reasonable doubt. [PSR, Addendum, p. i].

The PSR Addendum rejected Petitioner's objection, noting *Apprendi* did not require a jury determination for statutory sentencing enhancements based upon prior convictions. The Addendum further noted Petitioner was eligible for a sentence under the ACCA based on his prior drug distribution conviction and his prior "two convictions for Burglary of a

² The PSR calculations show but for his qualifying as an armed career criminal, Petitioner's adjusted offense level was 28, and after subtracting three levels for acceptance of responsibility, his total offense level would have been 25. [PSR, p. 7 ¶¶ 14, 16]. Since he fell into Criminal History Category VI [PSR, p. 19 ¶ 52], his Guidelines sentencing range would have been 110-137 months imprisonment (*see* U.S.S.G. Sentencing Table).

residence.” [PSR, Addendum, p. i]. No mention was made either in the PSR itself, or in the Addendum, about the possible relevance of the ACCA residual clause.

Petitioner appeared for sentencing on March 1, 2005. [Doc. 4]. He reiterated his *Apprendi*-based objection to his being sentenced under the ACCA without a jury first having made “beyond a reasonable doubt” findings concerning his prior residential burglary and drug distribution felony convictions. [Doc. 4]. He did not claim his prior residential burglary convictions failed to satisfy the requirements for generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), as reaffirmed in *Shepard v. United States*, 544 U.S. 13 (2005). Nor did he demand the United States produce the charging documents associated with those convictions in order to prove, under *Taylor* and *Shepard*, in fact his residential burglary convictions met the requirements of generic burglary under *Taylor*. And he never suggested the Wyoming burglary statute, Wyo. Stat. § 6-3-301(a), was indivisible, and thus categorically insufficient as a matter of law for purposes of the ACCA.

The Court sentenced Petitioner to the statutorily required 180 months imprisonment less seven plus months pursuant to U.S.S.G. § 5G1.3(b) to account for time served for a state offense which had been fully accounted for in the determination of his offense level, and for which the Federal Bureau of Prisons would not otherwise give him credit. [Doc. 4].

Petitioner filed an appeal from his sentence, arguing his enhanced 15 year prison sentence was based on judge-made findings concerning the existence of prior convictions he

had sustained, and therefore, by virtue of *United States v. Booker*, 543 U.S. 220 (2005), such findings must be made by a jury, not a judge. The Court of Appeals rejected his argument. *United States v. Snyder*, 158 Fed. Appx. 942, 943-944 (10th Cir. 2005). The United States Supreme Court subsequently denied *certiorari*. *Snyder v. United States*, 547 U.S. 1050 (2006) (mem.).

APPLICABLE LEGAL PRINCIPLES

Section 2255 entitles a prisoner to relief “[i]f the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.” 28 U.S.C. § 2255(b). The standard of review applied to § 2255 motions is stringent. “Only if the violation constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure can § 2255 provide relief.” *United States v. Gordon*, 172 F.3d 753, 755 (10th Cir. 1999) (internal quotations omitted). The Court presumes the proceedings which led to a Petitioner’s conviction were correct. *Parke v. Raley*, 506 U.S. 20, 29, 30 (1992).

“Section 2255 is not available to test the legality of matters which should have been raised on appeal.” *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994). “A defendant who fails to present an issue on direct appeal is barred from raising the issue in a § 2255

motion, unless he can show cause for his procedural default and actual prejudice resulting from the alleged errors, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed.” *United States v. Allen*, 16 F.3d at 378. “[I]f the government raises procedural bar, the courts must enforce it and hold Petitioner's claims procedurally barred unless cause and prejudice or a miscarriage of justice is shown.” *United States v. Allen*, 16 F.3d at 378.

A petitioner, in order to establish “cause,” must show there existed some external impediment which prevented the raising of a claim during the original proceedings in the case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). A petitioner could show “cause” by demonstrating the claim was so novel that its legal basis was not reasonably available to petitioner’s counsel. *Reed v. Ross*, 468 U.S. 1, 16 (1984). Neither ignorance nor inadvertence are, however, sufficient in this regard, nor does a failure to recognize the factual or the legal basis for the claim. *Reed v. Ross*, 468 U.S. at 16.

DISCUSSION

Petitioner, in his formal § 2255 request through counsel, contends his fifteen year sentence under the ACCA was unconstitutional as it was based, in part, on his prior Wyoming burglary convictions. He claims those burglary convictions do not meet the requirements for “generic burglary” as established in *Taylor v. United States*, 495 U.S. 575 (1990), and as reaffirmed in *Shepard v. United States*, 544 U.S. 13 (2005), and in *Descamps*

v. United States, 133 S.Ct. 2276 (2013). He therefore argues his prior burglary convictions could be counted as “violent felonies” under the ACCA only under the “residual clause,” which includes in the § 924(e) definition of “violent felonies” crimes which “otherwise involve[] conduct that presents a serious potential risk of physical injury to another ...” 18 U.S.C. § 924(e)(2)(B).

Petitioner thus, in summary, asserts, since *Johnson v. United States* determined the residual clause was unconstitutionally vague, his fifteen year ACCA sentence is likewise unconstitutional. And since the Supreme Court has determined its decision in *Johnson* should be retroactive, *see Welch v. United States*, 578 U.S. ___, 136 S.Ct. 1257 (2016), he is entitled to have his fifteen year sentence set aside and resentenced under 18 U.S.C. § 922(g)(1) without reference to the ACCA prescribed mandatory minimum fifteen year sentence.

ACCA & Johnson

The ACCA imposes a mandatory minimum sentence of fifteen years for anyone who violates 18 U.S.C. § 922(g), and has three prior convictions for a “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e)(1). The ACCA has traditionally defined a violent felony through three separate provisions, sometimes referred to as the “elements” clause, “enumerated” clause, and “residual” clause. *Johnson v. United States*, 135 S.Ct. at 2555-2556; and 18 U.S.C. § 924(e)(2)(B)(i)(ii). The elements clause defines a violent felony as one which “has as an element the use, attempted use, or threatened use of physical force against

the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). The enumerated clause provides a violent felony “is a burglary, arson, or extortion, [or] involves use of explosives.” 18 U.S.C. § 924(e)(2)(B)(ii). Finally, the residual clause provided a violent felony is one which “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). Each clause, over time, has been the subject of extensive litigation and discussion as to their precise meaning.³ Most recently in *Johnson v. United States*, the Supreme Court declared the “residual clause” unconstitutional, but left untouched the “elements” and “enumerated” clauses. *Johnson v. United States*, 135 S.Ct. at 2563.

The Supreme Court, in *Johnson*, was specifically concerned with the ACCA residual clause which, along with its “elements clause” and “enumerated offenses” clause, seeks to define, or describe, the universe of prior convictions which might constitute violent felonies for purposes of triggering the Act’s enhanced penalty scheme. The “residual clause,” which directly follows the “enumerated offenses” clause, defines a violent felony, in part, as one

³ The “elements” clause and its meaning was discussed in *Johnson v. United States*, 559 U.S. 133 (2010), and its progeny. The “enumerated” clause has been extensively detailed in *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); and *Descamps v. United States*, 133 S.Ct. 2276 (2013). The “residual clause” was extensively discussed in *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*, 564 U.S. (2011); and *Johnson v. United States*, 135 S. Ct. 2551 (2015).

which “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii).

The Court concluded imposing an increased sentence under the ACCA residual clause violates the Due Process Clause, finding the residual clause impermissibly vague on its face. The Court held the government violates the Fifth Amendment due process guarantee “by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S. Ct. at 2556. “The prohibition of vagueness in criminal statutes,” the Court explained, “is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process.” *Johnson v. United States*, 135 S.Ct. at 2556-2557 (internal quotation marks omitted) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Further, “[t]hese principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Johnson v. United States*, 135 S. Ct. at 2557.

The Court found the ACCA residual clause to be unconstitutionally vague.

By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Johnson v. United States, 135 S. Ct. at 2558. The Court explained the residual clause requires courts to assess whether a crime presents a serious potential risk of injury in light of a list of enumerated crimes which are “far from clear in respect to the degree of risk each poses.” *Johnson v. United States*, 135 S. Ct. at 2558 (internal quotation marks omitted) (*quoting Begay v. United States*, 553 U.S. 137, 143 (2008)). Further, the ACCA “inclusion of burglary and extortion under the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act,” however, the statute gives no indication of “how remote is too remote.” *Johnson v. United States*, 135 S. Ct. at 2559. The Court found the inability of its own cases to develop a “principled and objective standard” demonstrated the residual clause’s “hopeless indeterminacy.” *Johnson v. United States*, 135 S. Ct. at 2558. The Court thus concluded “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson v. United States*, 135 S. Ct. at 2557. The Court accordingly held the residual clause is “vague in all its applications.” *Johnson v. United States*, 135 S. Ct. at 2561 (rejecting the government’s reliance on the “existence of some clearly risky crimes” to “save the residual clause”). The Court also overruled its decisions in *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 131 S. Ct. 2267 (2011), in which it had previously rejected arguments or suggestions in dissenting

opinions the residual clause was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. at 2562, 2563.

The Court explicitly noted, however, its decision “does not call into question application of the [ACCA] to *** the remainder of the Act’s definition of a violent felony,” including a felony offense which “has as an element the use, attempted use, or threatened use of physical force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i), and a felony offense which “is burglary, arson, or extortion, [or] involves use of explosives,” 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S. Ct. at 2563. It also does not affect the ACCA definition of “serious drug offense.” 18 U.S.C. § 924(e)(2)(A).

The Supreme Court subsequently concluded, in *Welch v. United States*, 136 S.Ct. 1257 (2016), the decision in *Johnson* “has retroactive effect . . . in cases on collateral review.” *Welch v. United States*, 136 S.Ct. at 1265.

28 U.S.C. § 2255

A federal prisoner may seek to have his sentence vacated, set aside, or corrected “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255. Relief under § 2255 is provided only for jurisdictional

or constitutional claims or errors which reveal “a fundamental defect which inherently results in a complete miscarriage of justice.” *United States v. Addonizio*, 442 U.S. 178, 185 (1979).

Timeliness

A one year period of limitation applies to § 2255 motions, and runs from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by government action in violation of the constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

A defendant’s conviction, for purposes of applying the one year limitation period established by § 2255, is final when the district court has filed its judgment and when the defendant’s right to further appeal said judgment has been exhausted. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987); *United States v. Prows*, 448 F.3d 1223, 1227-12128 (10th Cir. 2006); *United States v. Burch*, 202 F.3d 1274, 1278 (10th Cir. 2000). Petitioner’s direct appeal was decided November 25, 2005. *United States v. Snyder*, 158 Fed. Appx. at 942. His

petition for *certiorari* with the United States Supreme Court was denied March 27, 2006. *Snyder*, 547 U.S. 1050. His conviction was thus final, for purposes of § 2255's one year limitation period, on March 27, 2006. *United States v. Prows*, 448 F.3d 1223, 1227-1228 (10th Cir. 2006); *United States v. Wilson*, 631 Fed. Appx. 623, 624 (10th Cir. 2015). The time for Petitioner to have filed a first motion under § 2255 would have expired on March 27, 2007. Petitioner, nonetheless, asserts his motion is timely as provided by § 2255(f)(3), claiming his right to relief was newly recognized and made retroactive by the Supreme Court June, 2015, decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). [Doc. 10, pp. 15, 16; Doc. 18, pp. 2-5].

The United States takes no issue with respect to the timeliness of Petitioner's motion *vis a vis Johnson*. His problem, however, is, aside from merely citing *Johnson v. United States* and reciting its holding *vis a vis* the constitutionality of the ACCA's "residual clause," Petitioner, in none of his pleadings, "utters so much as a peep" to explain how *Johnson* has any application whatsoever to the facts of *his* case.

The actual facts of record in this matter offer no basis whatsoever for the notion the sentence Petitioner received was based on the ACCA's "residual clause," rather than its "enumerated offenses clause." Burglary is an enumerated offense under the ACCA, and Petitioner's criminal history included three of them, two of which were characterized by the PSR as residential burglaries. [PSR, p. 13 ¶ 36; p. 18 ¶ 48]. The PSR, in light of these two

residential burglary convictions, as well as a prior serious drug offense, concluded Petitioner was subject to ACCA sentencing. [PSR, p. 7 ¶ 15]. In reaching this conclusion, the PSR made absolutely no reference to the “residual clause.”

It is also important to note, in further support of the conclusion these burglary convictions were counted under the enumerated clause, not the “residual clause,” the PSR *only counted these two residential burglary convictions* for ACCA purposes. It *did not count* Petitioner’s prior automobile burglary conviction under the very same statute, clearly recognizing, under *Taylor v. United States*, vehicle burglaries do not count for ACCA purposes.

Petitioner made absolutely no objection to the PSR characterization of his residential burglary convictions as violent felonies under the ACCA, other than his *Apprendi* claim. The PSR writer, in the PSR Addendum, after rejecting Petitioner’s *Apprendi* claim, reiterated the PSR’s finding Petitioner qualified for ACCA sentencing in part *because of* his prior residential burglary convictions. [PSR, Addendum, p. i].

The same is true with respect to Petitioner’s sentencing hearing. He never objected to the PSR characterization of his prior convictions as “residential burglaries,” and he never argued residential burglary convictions under Wyoming law were in some way categorically insufficient for purposes of the ACCA’s “enumerated clause.” He simply renewed his *Apprendi* claim, and argued nothing more.

This Court, at sentencing, did not delve into the intricacies, under *Taylor v. United States*, as to whether Petitioner’s burglary convictions were, in fact, “generic burglaries” as a categorical matter. And, in fact, such a discussion was not necessary. A district court, when defendant fails to interpose objections to the PSR’s findings and recommendations, may simply adopt those findings and recommendations without subjecting them to further scrutiny. *United States v. McGehee*, 672 F.3d 860, 874-875 (10th Cir. 2012) (citing *United States v. Robertson*, 568 F.3d 1203, 1214 (10th Cir. 2009)); see also *United States v. Turner*, 624 Fed. Appx. 624, 626-627 (10th Cir. 2015) (defendant who failed to object to PSR’s characterization of his prior conviction as serious drug offense for ACCA purposes could not later claim in § 2255 motion the sentencing court committed error by not insisting government provide *Shepard* documents before accepting PSR’s characterization) (citing *United States v. Harris*, 447 F.3d 1300, 1306 (10th Cir. 2006)). And this is what happened with Petitioner.

The one phrase, which never appears, in fact, is never even referred to, throughout Petitioner’s entire sentencing process, is “residual clause.” There is nary a whisper in the record suggesting Petitioner’s prior residential burglaries qualify as ACCA “violent felonies” only by virtue of the “residual clause.” Indeed, Petitioner’s motion contains no suggestion to the contrary.

We have thus come full circle and returned to the question which initiated the foregoing discussion, *i.e.*, whether Petitioner's motion is barred by § 2255(f)'s one year limitation period. Petitioner asserts his claim is within the limitation period by invoking § 2255(f)(3) and *Johnson v. United States*. There is no evidence whatsoever to suggest he was actually sentenced on the basis of the "residual clause," therefore *Johnson* is not applicable. Said decision does not allow a challenge to *every* ACCA sentence, regardless of its basis. And as the Supreme Court noted, its invalidation of the residual clause in *Johnson* left wholly undisturbed both the ACCA's "enumerated clause" and its "elements clause." *Johnson v. United States*, 135 S.Ct. at 2563.

The language of § 2255(f)(3) specifically states the one year limitations period begins when the Supreme Court recognized a new right, and said right has been made retroactive. The decision *Johnson v. United States* recognized a new right only as to the ACCA residual clause. The "retroactivity" allowed by the Supreme Court decision in *Welch v. United States*, could therefore only apply to a residual clause claim for relief. The *Johnson v. United States* decision is not applicable to Petitioner's sentence, therefore § 2255(f)(3) is likewise inapplicable.

Petitioner's motion, to have been timely, must have been filed within a year of when his conviction became final, *i.e.*, a year following the United States Supreme Court denial

of *certiorari* in his case. Said period expired in March, 2007. Petitioner's motion, as first filed in late 2015 - is thus eight plus years too late.

Petitioner, in a response to the United States timeliness argument, basically asserts the phrase "residual clause" need not appear in the record in order for his claim for relief to be considered a *Johnson* claim. The Wyoming burglary statute, in addition, is "non-generic," thus its use to enhance Petitioner's sentence clearly had to have been done under the residual clause. The Supreme Court held *Johnson* claims relied on a new and retroactive rule of constitutional law, and thus Petitioner's motion, which sets out a *Johnson* claim, is timely pursuant to 22 U.S.C. § 2255(F)(3). [Doc. 18, pp. 2-5].

Equitable Tolling

Petitioner makes no mention of, and thus apparently does not seek, equitable tolling. A discussion, nevertheless, of the concept seems appropriate in light of the possibility it may be deemed important in the context of further judicial review.

It is possible some extraordinary circumstance may unfairly impede a defendant's ability to file a timely § 2255 motion. Where such occurs, and a defendant demonstrates he nonetheless exercised due diligence in at least trying to file a timely motion, his failure to timely file may be excused under the doctrine of equitable tolling. *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008). A petitioner, however, to take advantage of equitable tolling, must demonstrate "(1) that he has been pursuing his rights diligently; and (2) that some

extraordinary circumstance stood in his way” which precluded his compliance with the limitation period. *Yang v. Archuleta*, 525 F.3d at 928; *San Roman v. Vaughn*, 442 Fed. Appx. 365, 368 (10th Cir. 2011). He may also invoke equitable tolling if he makes a convincing showing he is “actually innocent” of the crimes for which he was convicted. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000); *Perry v. McKune*, 381 Fed. Appx. 850, 852 (10th Cir. 2010).

Petitioner has failed to satisfy any of the equitable tolling requirements. He has, in fact, not even alluded to the existence of any extraordinary circumstance which stood in the way of his being able to file a timely § 2255 motion, nor has he alleged any facts which might demonstrate his due diligence. He rather simply asserts he is actually “innocent” of being subject to the ACCA by claiming his burglary convictions do not qualify as a violent felony, and in doing so, does not challenge his guilt of the underlying federal offense, or even the underlying predicates. He merely claims he should not have been sentenced under the ACCA. [Doc. 10, pp. 3, 4, 14, 15]. His assertion is not a valid actual innocence claim, and does not support any equitable tolling.

It is well accepted actual proven innocence may exempt a petitioner from the timeliness requirements set forth in the habeas statutes. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). This limited remedy requires a petitioner to show no reasonable jury, in light of new evidence, would have found him guilty beyond a reasonable doubt. *McQuiggin*

v. Perkins, 133 S.Ct. at 1928. However, “actual innocence means ‘factual innocence,’” and “‘a person cannot be actually innocent of a noncapital sentence.’” *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007)). Courts, as such, have consistently rejected arguments such as Petitioner’s, finding actual innocence provides equitable tolling *only* where “actual innocence” is proven with respect to the underlying criminal conduct, and not in regard to the procedural regularities of a sentence. Thus, “actual innocence” of a noncapital sentence cannot toll the one year filing requirement contained in § 2255. *Laurson v. Leyba*, 507 F.3d at 1232; *Davis v. Ledezma*, 393 Fed. Appx, 564, 566 (10th Cir. 2010). See generally *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Petitioner is claiming actual innocence only as to his sentence. He is not making a true actual innocence claim, and, therefore, does not qualify for equitable tolling. The Tenth Circuit has recognized, “[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs. [As such, it is] to be applied sparingly.” *Yang v. Archuleta*, 525 F.3d at 929 (internal citations omitted). The one-year limitation period applicable to Petitioner must be measured solely from the date on which his conviction and sentence were final, *i.e.*, within a year following the United States Supreme Court denial of *certiorari* in his case. Said period expired in March, 2007. There is no valid

basis for equitable tolling and his motion is more than eight years late. It must accordingly be dismissed as untimely.

Procedural Default

Petitioner's motion is also procedurally barred under *United States v. Frady*, 456 U.S. 152 (1982). A § 2255 motion may not test the legality of matters which could have been resolved before this Court in the first instance, or on direct appeal. *United States v. Frady*, 456 U.S. at 165; *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993); *United States v. Turner*, 624 Fed. Appx. 624, 626 (10th Cir. 2015). A defendant who fails to raise an issue before this Court, or on direct appeal, may present it in a § 2255 motion only if he can demonstrate cause for his procedural default, and either actual prejudice from the alleged errors, or a fundamental miscarriage of justice will occur if his claim is not addressed. *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994); *United States v. Geiner*, 443 Fed. Appx. 378, 381 (10th Cir. 2011). Moreover, where the United States raises the procedural bar issue in response to a defendant's § 2255 motion, the court is obliged to address the issue and, if appropriate, dispose of the case on said basis. *United States v. Allen*, 16 F.3d at 379.

A defendant, in order to establish "cause," and thus obtain an exception from procedural default, must show there existed some external impediment which prevented him from raising the claim during the original proceedings in his case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986); *Gonzales v. Hartley*, 396 Fed. Appx. 506, 508

(10th Cir. 2010). A defendant could show “cause” by demonstrating his non-compliance was the product of some kind of governmental or official interference, or his claim was so novel its legal basis was not reasonably available to his counsel. *Murray v. Carrier*, 477 U.S. at 488. *See, also, Reed v. Ross*, 468 U.S. 1, 16 (1984); *United States v. Wiseman*, 297 F3d. 975, 979 (10th Cir. 2002). Neither ignorance nor inadvertence are sufficient, however, in this regard, nor is a failure to recognize the factual or the legal basis for the claim.⁴ *Murray v. Carrier*, 477 U.S. at 487-488.

The *sine qua non* of Petitioner’s § 2255 motion is the argument his two prior residential burglary convictions under the Wyoming burglary statute do not meet the requirements of generic burglary as the United States Supreme Court defined the term in *Taylor v. United States*. He argues this is the correct conclusion whether one employs *Taylor*’s strict categorical test, or whether one employs the somewhat more flexible “modified” categorical approach also approved by *Taylor* and expanded upon - in the guilty plea context - by *Shepard v. United States*. And he contends, based on those arguments, and the Supreme Court decision in *Johnson v. United States*, his ACCA sentence must be

⁴ A claim of ineffective assistance of counsel can overcome the procedural bar rules of § 2255. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993). Such a claim, however, cannot negate the one year filing requirements. In any event, Petitioner has not made an ineffective assistance claim herein.

vacated, since presumably the only other way his prior residential burglary convictions could be counted for ACCA purposes would be under the now defunct “residual clause.”

Petitioner’s argument does not lend any support to his petition as it is procedurally barred under *United States v. Frady*. There is nothing at all about his current challenges to the viability of his prior residential burglary convictions for purposes of the ACCA which could excuse his failure to assert those very same challenges before this Court during his initial sentencing proceedings. Petitioner was sentenced in March, 2005, fourteen plus years **after** *Taylor* was decided, thus his claim his burglary convictions did not satisfy the *Taylor* definition for “generic burglary” was obviously “ripe” for consideration at sentencing. He did not, however, raise such a claim at sentencing, and has failed to provide **any** excuse for such failure, never mind an excuse which might come close to satisfying the *Frady* “cause” requirement.

Petitioner likewise didn’t raise such a claim on direct appeal, and has, as well, failed to raise it in any context until now, eleven plus years after he was sentenced. He provides no credible explanation for this lapse, save for one abbreviated suggestion his procedural default might be excused because he was “actually innocent” of being an “armed career criminal.”

A claim of “actual innocence,” in order to serve as an excuse under either the procedural bar rules or § 2255’s one year limitation period, must relate to a defendant’s or petitioner’s “factual innocence” of the underlying, predicate crime, not simply to his “legal

ineligibility” regarding his non-capital sentence. *Laurson v. Leyba*, 507 F.3d at 1232; *United States v. Richards*, 5 F.3d 1369, 1371-1372 (10th Cir. 1993); *Jones v. Martin*, 622 Fed. Appx. 738, 740 (10th Cir. 2015).

Let’s presume for the moment the Tenth Circuit decision in *Richards* and *Leyba* didn’t wholly foreclose Petitioner’s “actual innocence” claim as a matter of law. It is, nevertheless, abundantly clear for such an “innocence” claim to be at all cognizable, it must be grounded on a showing he was factually innocent of the convictions which gave rise to his ACCA eligibility, *i.e.*, innocent of at least one of his underlying Wyoming burglary convictions or his serious drug offense. *Selsor v. Kaiser*, 22 F.3d 1029, 1035-1036 (10th Cir. 1994). *See also United States v. Pettiford*, 612 F.3d 270, 282-285 (4th Cir. 2010); *Cristin v. Brennan*, 281 F.3d 404, 420-422 (3rd Cir. 2002).

Petitioner has failed to make any such showing. He has not so much as claimed, never mind provided facts to demonstrate, either he was in fact not convicted of any of the predicate offenses, or he was otherwise factually innocent of them. *United States v. Pettiford*, 612 F.3d at 283-84 (*citing United States v. Maybeck*, 23 F.3d 888, 892-894 (4th Cir. 1994)). He simply claims this Court **legally erred** in sentencing him under the ACCA because his prior residential burglary convictions somehow failed to pass muster under *Taylor, Shepard*,

Descamps and *Johnson*.⁵ Such an assertion, without more, is simply not enough to excuse what is otherwise a clear procedural default.

Petitioner has not demonstrated cause for his procedural default with respect to his motion, and since the United States has not waived its objections to said default, his petition is subject to dismissal on this basis alone, if for no other reason. *United States v. Allen*, 16 F.3d at 379.

Even if, for the sake of argument, Petitioner could somehow overcome the procedural barriers outlined above, his section 2255 request, cannot, as explained hereafter, be granted. One significant barrier concerns the burden of proof. A defendant, in the usual case, when he or she appears for sentencing in the first instance, the burden of proof is on the United States to establish by a preponderance of the evidence an enhancement under the ACCA is applicable. *United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir. 2012); *United States v. McMahon*, 91 F.3d 1394, 1397 (10th Cir. 1996). We are, however, well beyond the initial sentencing stage. The burden, when we reach the collateral review phase of a case, is no longer on the United States, but rather it is on the defendant/petitioner to demonstrate the facts which establish his conviction or sentence were obtained in violation of the Constitution

⁵ In respect to his current *Johnson* claim, it is worth noting there is in this record nothing at all in regard to the possible relevance of the ACCA's residual clause until Petitioner filed his original *Johnson* motion late in 2015.

or laws of the United States. *See United States v. Bedford*, 628 F.3d 1232, 1236-1237 (10th Cir. 2010); *United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000).

Petitioner has failed to fulfilled this required burden. A central premise of his petition seems to be his sentence “must” have somehow been based on the “residual clause” since his prior burglary convictions were “obviously” not countable as generic burglaries under *Taylor/Shepard*. His factual premise for application of the “residual clause” in his case is not, however, based on any record facts. It is at **best** grounded on nothing more than conjecture, speculation, and surmise, and plainly, such conjecture, *et al* is not a substitute for a sufficient evidence-based showing, and likewise not a basis on which a defendant can satisfy his burden of proof for purposes of § 2255. *Smallwood v. Gibson*, 191 F.3d 1257, 1279 n.14 (10th Cir. 1999); *United States v. Summers*, 601 Fed. Appx 755, 756 (10th Cir. 2015). This is simply another reason why Petitioner’s motion cannot be granted.

Burglary Under the ACCA

The final barrier to Petitioner’s claim is a simple lack of merit.

Petitioner contends the Wyoming statute under which his residential burglary convictions were rendered was not a “divisible” statute as said term was most recently defined by the Court in *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013). He therefore suggests, as a further basis for setting aside his ACCA sentence, those

convictions were, as a matter of law, categorically disqualified from being considered a qualifying burglary under *Taylor v. United States*.

There are two distinct problems with such an argument, both of which are fatal. First, such a claim is subject to § 2255(f)(1)'s one year limitation period, as measured from when his conviction became final. *United States v. Tenderholt*, 587 Fed. Appx 505, 505-506 (10th Cir. 2014)(since *Descamps* did not create any new right, it did not have the effect of restarting the limitation period established by § 2255(f)(1)). Petitioner's "one year" period, as discussed previously herein, expired the better part of a decade ago.⁶ And, as also discussed previously, Petitioner has not established any basis for applying the doctrine of equitable tolling to his motion. Any claim Petitioner may be making under, or with reference to *Descamps*, is barred.

There is, as well, an even more straightforward basis for rejecting Petitioner's claim of "indivisibility" with respect to the Wyoming burglary statute. Said statute has already been determined by the Tenth Circuit to be fully divisible *vis a vis Taylor/Shepard*. *United States v. Gonzales*, 558 F.3d 1193, 1197-1198 (10th Cir. 2009). Petitioner's assertion the Wyoming

⁶ Even if *Descamps* did restart the one year period for defendants properly invoking it, said period, as measured from June, 2013, when the case was decided, obviously expired well over a year prior to Petitioner filing of his § 2255 motion in October, 2015.

burglary statute is indivisible, and therefore his ACCA sentence is unlawful, in light of the unambiguous language in *Gonzales*, is obviously incorrect.

There is, in addition, a further reason why Petitioner's "residual clause" claim lacks any merit. The Wyoming burglary statute, because it covers burglaries of both buildings and structures *and* vehicles, is not categorically a generic burglary statute under *Taylor v. United States*. *United States v. Gonzales*, 558 F.3d at 1197-1198. Petitioner's speculation, and it is only speculation, postulates since the Wyoming statute does not meet the generic burglary standard because it extends to vehicles, his sentence must have been based on an unspoken determination by this Court it at least satisfies the residual clause. Such theory is clearly faulty in light of the simply fact there is no basis in the law to conclude the Wyoming statute, if it is, in fact, not divisible, could satisfy the "residual clause." Indeed, in a similar case concerning a burglary statute which, like the Wyoming law, forbade burglaries of both buildings and vehicles, the U.S. District Court for the Northern District of Oklahoma determined the non-generic statute could not meet the requirements of the "residual clause":

A felony conviction falls under the residual clause if the crime charged is roughly similar, in kind as well as in degree of risk posed, to the enumerated examples of violent felonies in § 924(e)(2)(B)(ii). *United States v. Scoville*, 561 F.3d 1174, 1180 (10th Cir.2009). Although the Oklahoma second-degree burglary statute is similar in kind to generic burglary, it does not involve a similar degree of risk. Both *James v. United States*, 550 U.S. 192, 202 (2007), and *Taylor* employed broad language to describe the risks involved in

burglary. *James*, 550 U.S. at 203; *Taylor* 495 U.S. at 588, 597. However, burglary of places included in Oklahoma's second-degree burglary statute, such as various types of automobiles and vending machines, was excluded from the generic definition of burglary. To hold that, regardless of exclusion from the generic definition, Oklahoma's second degree burglary statute falls within the residual clause would render the definition of generic burglary in *Taylor* irrelevant. *Cf. United States v. Livingston*, 442 F.3d 1082, 1087 (8th Cir.2006)(“it requires something more than breaking and entering a vehicle to meet the ‘otherwise’ prong [of the ACCA] ... if not, breaking and entering a vehicle would fit the burglary prong, a proposition rejected by the Supreme Court in *Taylor* and *Shepard*”).

United States v. Cartwright, 2011 WL 1326659 n.6 (N.D. Okla. Apr. 5, 2011) (unpublished); affirmed *United States v. Cartwright*, 678 F3d. 907 (10th Cir. 2012); cert. denied *Cartwright v. United States*, 133 S.Ct 452 (October 9, 2012).

The same point was made, as noted by the court in *Cartwright*, by the Eighth Circuit in *United States v. Livingston*, 442 F.3d 1082 (8th Cir. 2006):

The Supreme Court distinguished burglary of a vehicle from burglary of a building, though it left open the possibility that an offense similar to generic burglary of a building or structure might fit the “otherwise” prong under § 924(e). *See Taylor*, 495 U.S. at 600 n. 9, 110 S.Ct. 2143. “[I]n order to fall under the ‘otherwise’ clause, a breaking and entering offense must contain elements truly comparable to those of a burglary-comparable enough that the offense poses an equivalent risk of physical injury.” *United States v. Peterson*, 233 F.3d 101, 110 (1st Cir.2000) (parenthetical description omitted). But it requires something more than breaking and entering a vehicle to meet

the “otherwise” prong in this case-if not, breaking and entering a vehicle would fit the burglary prong, a proposition rejected by the Supreme Court in *Taylor* and *Shepard*. There are no additional elements to the breaking or entering of a vehicle offense that make a substantial portion of its convictions as inherently likely to result in physical harm as the risk of physical injury stemming from the burglary of a building.

* *

We hold that breaking or entering a vehicle for purposes of committing a theft under Arkansas law is not a violent felony for purposes of the ACCA. We therefore vacate the sentence imposed by the district court and remand for resentencing.

United States v. Livingston, 442 F.3d at 1087.

An additional reason for including the foregoing analysis in *Cartwright* and *Livingston* is to highlight one further fallacy in Petitioner’s argument. His claim appears to rest on his assertion his prior residential burglary convictions fall short of meeting the requirements for generic burglary under *Taylor*, therefore his ACCA sentence must have been based on this Court’s alleged unspoken and unexplained determination the prior convictions could still be counted for ACCA purposes under the “residual clause.”

It is actually more than plausible, however, as explained by *Cartwright* and *Livingston*, a burglary statute which fails to comport with the requirements for “generic burglary” under *Taylor* because of its over breadth, will likely fail as well to satisfy the residual clause. Petitioner’s apparent core theory in support of his petition, however, would

suggest even if the Court were to conclude [incorrectly] Petitioner's two prior residential burglary convictions could not properly be counted as violent felonies under the standards for generic burglary under *Taylor* and *Shepard*, it would nevertheless find, [again incorrectly and *sub silentio*,] the Wyoming statute categorically qualified as a violent felony under the residual clause, and Petitioner could therefore be sentenced under the ACCA.

Such a theory completely lacks substance, and any merit, particularly as it once again is grounded on nothing more than conjecture. Indeed, to the extent counting Petitioner's residential burglary convictions as enumerated violent felonies for ACCA purposes would have somehow constituted legal error, the most plausible explanation for Petitioner's ensuing ACCA sentence is the court simply misapplied *Taylor*. This is not, however, his claim. He instead postulates after *sua sponte* recognizing the *Taylor* defect in counting those convictions as generic burglaries, this Court then, somewhat illogically as illustrated by *Cartwright* and *Livingston*, concluded the Wyoming statute nevertheless satisfied the requirements of the "residual clause." The Court then sentenced Petitioner accordingly, without explaining its decision on the record to Petitioner or the United States.

Petitioner is perhaps contending his burglary convictions should not have been counted as violent felonies for ACCA purposes because they failed to satisfy

Taylor/Shepard's requirements for generic burglary.⁷ The appropriate remedy for such an assertion was to object to the PSR and its proposal to sentence him under the ACCA, and then to appeal, if necessary. And, barring success in that manner, he could have filed a timely § 2255 motion in regard to the issue. What he cannot do, however, is challenge his

⁷ The United States Supreme court, on June 23, 2016, issued its decision in *Mathis v. United States*, 575 U.S. ____, 136 S.Ct. 2243, 2250 (2016). The Court held a conviction under Iowa's burglary statute, which made it an offense to enter a "building, structure, or land, water, or air vehicle" without permission and with the intent to commit theft or other crime, *see, IA Code*, 702-12 (2013), could not be used as a predicate offense for purposes of imposing an enhanced sentence under the ACCA. *Mathis v. United States*, 136 S.Ct. at 2250 This was so, the Court explained, because the description of the various places which could be burgled did not describe different and separate offenses, but instead simply different means by which a single indivisible statute could be violated.

The Court, as with its earlier decision in *Descamps*, made clear its decision in *Mathis* involved only a straight forward application of its ACCA precedents dating back to *Taylor* in 1990. *Mathis v. United States*, 136 S.Ct. at 2251-2252 By its terms, therefore, it is, like *Descamps*, not a decision likely to be retroactively applicable to cases on collateral review such as the instant one. *See., e.g. United States v. Tenderholt*, 587 Fed. Appx. at 506.

In any event, the Tenth Circuit Court of Appeals has previously determined the Wyoming burglary statute is fully divisible, *See United States v. Gonzales*, 558 F.3d at 1196. The United States has not found a decision of the Wyoming Supreme Court which would challenge said conclusion which is obviously different from the situation present in *Mathis*, where an Iowa Supreme Court decision had previously determined the Iowa burglary statute was indivisible. And as Justice Alito noted in his dissent, it appears the Iowa Supreme Court decision is *sui generis* in so holding. *Mathis*, Slip. Op., at 4-5 (Alito, J., dissenting).

The United States therefore does not believe *Mathis* retroactively alters the legal landscape in a fundamental way as to make Petitioner's otherwise meritless claims suddenly viable.

straightforward ACCA sentence almost twelve years after it was imposed based on a new Supreme Court decision which hasn't even a tangential application to his case.

CONCLUSION AND ORDER

The § 2255 motion by Petitioner, as analyzed herein, is without merit and must, therefore, be denied. The files and record before the Court conclusively establish Petitioner is not entitled to any relief, accordingly, an evidentiary hearing is not required. *United States v. Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988)(no hearing required where § 2255 motion may be resolved on review of record before the Court).

A certificate of appealability (COA) may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Petitioner, for the reasons set forth herein, cannot make the required showing, and a COA should not issue.

IT IS THEREFORE HEREBY ORDERED Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate Sentence and for Immediate Release [Doc. 10], is **DENIED**;

IT IS FURTHER HEREBY ORDERED the Motion for Hearing by Petitioner [Doc. 11] is **DENIED**; and

IT IS FINALLY ORDERED a certificate of appealability **shall not issue**, and **all pending motions**, if any, are **denied as moot**.

Dated this 17th day of October, 2016.


ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE