

APPENDIX

B

MICHAEL BRADLEY WESTOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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U.S. DISTRICT COURT
DISTRICT OF WYOMING
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MICHAEL BRADLEY WESTOVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:16-CV-0112-SWS

(Criminal Case No. 2:04-CR-0171-CAB)

ORDER DISMISSING PETITION TO VACATE SENTENCE

This matter comes before the Court on Michael Bradley Westover's *Petition to Vacate Sentence* pursuant to 28 U.S.C. § 2255. Specifically, Westover seeks to have his sentence under the Armed Career Criminal Act ("ACCA") vacated in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Because the holding in *Johnson* is not applicable to Petitioner's ACCA sentence, his § 2255 motion based on *Johnson* must be dismissed.

BACKGROUND

On May 15, 2006, Westover pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).¹ (CR Case ECF Nos. 21,

¹ Westover was charged by Indictment with two counts of being a felon in possession of a firearm, one count for conspiracy to use of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(n), and one count of use of a firearm during and in relation to a drug trafficking crime and aiding and abetting in violation of § 924(c)(1)(A)(i). (CR Case ECF No. 21.) These other charges were dismissed at sentencing.

124.) The subsequent Presentence Report (“PSR”) determined that because of his six prior convictions for violent felonies or controlled substance offenses, Westover qualified as an Armed Career Criminal (PSR ¶ 20). Westover’s prior convictions included three separate burglary convictions from Laramie County, Wyoming, one conviction for delivery of cocaine, and two separate escape-related convictions. *Id.* Accordingly, Westover was subject to a 15-year mandatory minimum sentence (as opposed to a 10-year maximum) pursuant to 18 U.S.C. § 924(e).² (PSR ¶¶ 60, 61.) The probation officer did not expressly state whether the previous burglary convictions qualified as ACCA predicate offenses under the “enumerated offenses” clause or the “residual” clause of the statute’s definition of “violent felony.” *See* 18 U.S.C. § 924(e)(2)(B)(ii) (defining “violent felony” to include “any crime punishable by imprisonment for a term exceeding one year . . . that . . . is *burglary*, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*”) (emphasis added).

On June 27, 2006, Westover submitted objections to the PSR. (PSR Addendum.) Among other things, Westover objected to being sentenced under the ACCA because one of his 1985 Wyoming burglary convictions from Laramie County (Docket No. 17-193)

² Pursuant to the ACCA, a person who violates section 922(g) and has three previous convictions “for a violent felony or a serious drug offense, or both, . . . shall be . . . imprisoned not less than fifteen years” 18 U.S.C. § 924(e)(1).

did not involve burglary of a dwelling and did not involve a threat of violence (*id.* at i).³

In rejecting the objection, the Probation Officer responded as follows:

In Docket Number 17-193, Westover was convicted of two counts of Burglary. Count 1 involved a residential burglary at 1310 Summit, Cheyenne, Wyoming, on September 27, 1984. Court records clearly indicate he was convicted of both Count 1 and 2. **In determining whether a prior burglary conviction qualifies as a predicate felony for an Armed Career Criminal enhancement, any generic burglary qualifies, and the analysis is not limited to burglaries of dwellings. See *Taylor v. United States*, [495 U.S. 575,] 110 S. Ct. 2143 (1990).**

(PSR Addendum at ii) (emphasis added).

On July 28, 2006, Westover appeared for sentencing. (CR Case ECF No. 131.) At that time, he did not press the objection he had previously made to the PSR's determination that his prior burglary convictions were "generic burglaries" for ACCA purposes, acknowledging the mandatory minimum of 180 months pursuant to Westover's qualification as an armed career offender. (Sent. Tr. at 5-10) (CR Case ECF No. 181). The court ultimately sentenced Westover to the ACCA's mandatory minimum 180 months imprisonment, to be followed by a 5-year term of supervised release. *Id.* at 24. The Judgment reflecting that sentence was entered August 1, 2006 (CR Case ECF No. 132). Westover did not file an appeal.

Now, more than ten years later, Westover filed the instant motion under 28 U.S.C. § 2255, contending that the United States Supreme Court's June 2015 decision in *Johnson v. United States*, *supra*, which held the ACCA's residual clause unconstitutional,

³ The burglary convictions to which Petitioner was referring are summarized in the PSR at ¶ 27. The charging documents and judgments related to those convictions are attached to Westover's *Petition* as well as to Respondent's brief.

invalidates his ACCA sentence. In response, the Government argues the motion is both untimely and procedurally barred and further lacks merit.

DISCUSSION

Section 2255 of the federal habeas corpus statutes allows a federal prisoner to challenge a sentence “imposed in violation of the Constitution or laws of the United States, . . . in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). A motion for post-conviction relief under § 2255 is subject to a one-year limitation period that generally runs from “the date on which the judgment of conviction becomes final.” *Id.* § 2255(f)(1). *See also Clay v. U.S.*, 537 U.S. 522, 524 (2003). Where the defendant does not file an appeal, the criminal conviction becomes final upon the expiration of the time in which to take a direct appeal. *United States v. Prows*, 448 F.3d 1223, 1227-28 (10th Cir. 2006). Because Mr. Westover’s time in which to take a direct appeal expired on or about August 15, 2006,⁴ his present § 2255 motion was filed well beyond the one-year limitation period as calculated from when his conviction became final.

In an effort to circumvent the limitation period, Westover claims his motion is timely in light of the Supreme Court’s issuance of *Johnson v. United States* on June 26, 2015. *Johnson* held that a portion of the ACCA’s definition of “violent felony” referred to as the “residual clause” – which defines a “violent felony” to include a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to

⁴ Prior to the 2009 amendments to the Federal Rules of Appellate Procedure, Rule 4(b)(1) required a notice of appeal in a criminal case to be filed within 10 business days after the entry of judgment.

another” (18 U.S.C. § 924(e)(2)(B)(ii)) – was unconstitutionally vague and therefore violated the Due Process Clause of the Fifth Amendment. 135 S. Ct. at 2557. *Johnson* was made retroactive to cases on collateral review by *Welch v. United States*, 136 S. Ct. 1257 (2016). Section 2255(f) allows a federal prisoner to bring a motion to vacate a sentence within one year of “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.” 28 U.S.C. § 2255(f)(3).

Westover’s argument is unavailing, however, because his sentence was not enhanced pursuant to the ACCA’s residual clause. Other than simply citing *Johnson*, Westover makes no showing in his *Petition* as to how or why *Johnson* and the residual clause apply to his sentencing. Instead, he argues that his burglary convictions cannot qualify as violent felonies under the enumerated offenses clause based upon the principles set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), which are not new and have little to do with the holding in *Johnson*.⁵ Apart from the residual clause at issue in *Johnson*, the ACCA’s definition of “violent felony” also includes certain enumerated offenses – *burglary*, *arson*, *extortion*, or any crime involving the use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii) (“enumerated offenses clause”). *Johnson* made clear that its decision did “not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.” 135 S. Ct. at 2563. And so, where

⁵ Petitioner also argues his escape-related convictions cannot qualify as violent felonies after *Johnson*. Because Petitioner plainly had four other convictions properly counted as violent felonies (three burglaries and one serious drug offense), without reference to the residual clause, whether his escape-related convictions were appropriately counted matters not to the Court’s analysis.

the sentencing court relied on enumerated offenses and not the residual clause, a defendant's sentence is unaffected by *Johnson*. See *Stanley v. United States*, 827 F.3d 562, 565 (7th Cir. 2016) ("*Johnson* does not have anything to do with the elements clause of . . . the [ACCA], and § 2255(f)(3) therefore does not afford prisoners a new one-year period to seek collateral relief on a theory that the elements clause does not apply to a particular conviction."); *Belk v. United States*, No. 16-765, 2016 WL 1587223 (2nd Cir. Apr. 19, 2016) (denying leave to file successive § 2255 motion, reasoning in part that there is "no evidence that Petitioner's sentence was enhanced under the provision of the ACCA that was found unconstitutional in *Johnson*"); *Traxler v. United States*, No. 1:16-CV-747, 2016 WL 4536329, at *5 (W.D. Mich. Aug. 31, 2016) ("If Movant was sentenced under the enumerated-offenses clause, even improperly so, then *Johnson's* invalidation of the residual clause does not affect his sentence."), *appeal docketed*, No. 16-2280 (6th Cir. Sept. 14, 2016).

Here, the record establishes that the sentencing court relied on the enumerated offenses clause – not the residual clause – in counting Westover's burglary convictions as violent felonies for purposes of imposing the ACCA enhancement.⁶ In *Taylor v. United States*, the Supreme Court was "called upon to determine the meaning of the word 'burglary' as it is used [in the enumerated offenses clause of] 18 U.S.C. § 924(e)." 495 U.S. at 577. "[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime . . . having the basic elements of unlawful or

⁶ It is important to note that, in addition to Petitioner's three burglary convictions, he also had a conviction for a serious drug offense (delivery of cocaine) which separately counted toward the necessary three prior convictions for application of § 924(e)'s enhancement. See 18 U.S.C. § 924(e)(2)(A)(ii); PSR ¶ 29.

unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Id.* at 599. In rejecting Westover’s objection that one of his burglaries should not count because it did not involve a dwelling or threat of violence, the PSR Addendum cited *Taylor* in support of the finding that “any generic burglary qualifies, and the analysis is not limited to burglaries of dwellings.” (PSR Addendum at ii.) Westover did not pursue any objection to his qualification as an armed career criminal at sentencing, and the sentencing court accepted the PSR’s findings and recommendations in imposing the ACCA-enhanced sentence. *See United States v. McGehee*, 672 F.3d 860, 874 (10th Cir. 2012) (where defendant makes no objections to the PSR’s findings and recommendations, district court is free to adopt those findings and recommendations); *United States v. Harris*, 447 F.3d 1300, 1306 (10th Cir. 2006) (absent objection to the PSR, the district court may accept any undisputed portion as a finding of fact). The record contains no mention of, or reference to, the “residual clause.”

Westover argues he need only show the sentencing court *could have* relied on the residual clause in counting his burglary convictions under the ACCA and, where the record is unclear which clause the sentencing court applied, the reviewing court must determine anew whether the crimes for which a particular defendant was previously convicted were ACCA predicates after *Johnson*. The Court disagrees with Westover’s characterization of the applicable burden here. Where a defendant objects to a proposed enhancement at sentencing or challenges a sentence enhancement on direct appeal, the burden of proof is on the government to establish by a preponderance of the evidence that the enhancement is appropriate. *See United States v. Delossantos*, 680 F.3d 1217, 1219

(10th Cir. 2012); *United States v. Johnson*, 130 F.3d 1420, 1430 (10th Cir. 1997). However, at the collateral review stage, the burden is no longer on the government. Rather, the burden is on the defendant to demonstrate that his sentence was imposed in violation of the Constitution or laws of the United States. *See United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000); *Stanley*, 827 F.3d at 566 (defendant seeking collateral review must produce evidence demonstrating entitlement to relief). Therefore, Westover bears the burden of showing the sentencing court counted his previous burglary convictions as ACCA predicates under the residual clause. *See In re Moore*, 830 F.3d 1268, 1272-73 (11th Cir. 2016) (“the district court cannot grant relief in a § 2255 proceeding unless the movant meets his burden of showing that he is entitled to relief, and in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence”). Westover has not attempted to make such a showing, however, arguing only theoretically that the sentencing court *could have* relied on the residual clause given the state of the law at the time of his sentencing (citing Circuit cases finding California’s, Florida’s, Ohio’s and Washington’s burglary statutes qualified under ACCA’s or Guidelines’ residual clauses). (Pet’r’s Reply Br. at 4.)

Westover’s argument ignores that, at the time of his sentencing in 2006, his prior convictions properly counted under the ACCA’s enumerated offenses clause. By that time, *Taylor v. United States* had long established that, for purposes of a § 924(e) sentence enhancement, an offense constitutes “burglary” if either its statutory definition substantially corresponds to “generic” burglary (“an unlawful or unprivileged entry into .

. . a building or other structure, with intent to commit a crime”), “or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.” 495 U.S. at 598, 602.⁷ Citing *Taylor*, the Tenth Circuit Court of Appeals subsequently determined, “Where there is no doubt that a defendant’s prior convictions actually represent conduct within the federal definition of burglary, it is appropriate for the court to count the prior conviction toward enhancement.” *United States v. Barney*, 955 F.2d 635, 640 (10th Cir. 1992). “So [], if [a] defendant pled guilty to charges supported by informations which satisfy *Taylor*’s [generic] definition, those convictions could properly count toward enhancement.” *Id.*⁸

In *Barney*, the Tenth Circuit specifically considered Wyoming’s burglary statute, recognizing that, because Wyoming Statute § 6-3-301 includes *vehicles*, it defines burglary more broadly than does *Taylor*. *Id.* at 639. Nevertheless, the appellate court concluded that, where enhancement is sought on the basis of a guilty plea, *Taylor* allows

⁷ “We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense. This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.” *Taylor*, 495 U.S. at 602.

⁸ Just over one year prior to Petitioner’s sentencing, the Tenth Circuit confirmed, “[W]hen determining whether a prior conviction resulting from a guilty plea is a violent felony for purposes of the ACCA, a court is limited to an examination of the language of the statute of conviction, ‘the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant . . . , or to some comparable judicial record of this information.’” *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005) (quoting *Shepard v. U.S.*, 544 U.S. 13, 26 (2005) (addressing what documents sentencing court can properly consider to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary)). See also *United States v. Gonzales*, 558 F.3d 1193, 1197-98 (10th Cir. 2009) (information and plea colloquy established defendant’s Wyoming burglary conviction was a “burglary” for purposes of § 924(e)).

a sentencing court to look to the underlying indictment or information “to determine whether the defendant was charged with and admitted conduct which falls without question within the ambit of *Taylor’s* generic definition.” *Id.* Thus, given the state of the law at the time of Westover’s sentencing, it was appropriate for the district court to “go beyond the mere fact of conviction” to determine whether he was charged and convicted only with a burglary of “a building or other structure;” if so, then the prior burglary conviction could be counted as a predicate offense of “burglary” under the enumerated offenses clause of § 924(e)(2)(B)(ii). *See Taylor*, 495 U.S. at 602. As set forth above, the record establishes that is exactly what the sentencing court did.

Here, the PSR identified three Wyoming burglary convictions which directly correspond with the enumerated offense of burglary. The PSR restated the specific nature of the charges as set forth in the respective Informations. Count One of the Laramie County, Wyoming District Court Information from Docket No. 17-193 charged Westover with “unlawfully and feloniously, without authority from [] the owner or occupant, *enter a dwelling* located at 1310 Summit Drive, Laramie, County, Wyoming, with intent to commit larceny or a felony therein” on or about September 27, 1984 (PSR ¶ 27; ECF No. 1 at 12) (*italicized emphasis added*); Count Two charged Westover with “unlawfully and feloniously, without authority from [] the owner or occupant, *enter High School III, a building* located at 2201 Morrie, Cheyenne, Laramie County, Wyoming, with intent to commit larceny or a felony therein” on September 20, 1984 (*id.*) (*italicized emphasis added*). The Laramie County, Wyoming District Court Information from Docket No. 17-271 charged Westover with “unlawfully and feloniously, without

authority from [the owner or occupant], *enter a building* located at 3304 Sheridan, Cheyenne, Laramie County, Wyoming, with intent to commit larceny or a felony therein” on March 31, 1985 (PSR ¶ 28; ECF No. 1 at 16) (*italicized emphasis added*). Westover pled guilty to the “crime[s] charged in the Information[s].” (ECF No. 1 at 13, 17.)

The record makes no reference to the residual clause, nor does it contain any discussion or analysis to suggest the sentencing court ever even considered whether Westover’s prior burglary convictions might fall under the residual clause. *See James v. United States*, 550 U.S. 192, 202 (2007) (in determining whether an offense falls within the scope of ACCA’s residual clause, court must consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision), *overruled by Johnson*, 135 S. Ct. 2551 (2015). There was and is no doubt Westover’s previous burglary convictions actually represent conduct within the generic definition of burglary. Thus, given the state of the law at the time of his sentencing, it was appropriate for the sentencing court to count the burglary convictions toward the ACCA enhancement as “burglary” predicates through the enumerated offenses clause. Westover cites no case law existing at the time of his sentencing suggesting that a Wyoming burglary qualified as an ACCA “violent felony” predicate offense under the *residual* clause. There is no record evidence to suggest the sentencing court considered Westover’s burglary convictions to count, even in the alternative, as residual clause offenses, nor does

Westover cite authority to support a finding that the Wyoming burglaries would have *necessarily* or *only* qualified under the residual clause.⁹

Again, there is simply no indication in this case that the residual clause played any part in Westover's sentencing. Because his underlying convictions were counted as ACCA predicate "burglary" offenses under the enumerated offenses clause, Westover cannot rely on *Johnson* to cure the untimeliness of his § 2255 motion. See *Stanley, supra*, 827 F.3d at 565; *Haugabook v. U.S.*, No. 8:15-cv-1756-T-24TBM, 2015 WL 4605750, at *3 (M.D. Fla. July 30, 2015); *United States v. Sonczalla*, Crim. No. 07-187 (RHK), 2016 WL 4771064, at *2 (D. Minn. Sept. 12, 2016) (§ 2255 petitioner cannot rely upon *Johnson* for relief from the one-year limitation period where his prior burglary convictions qualified as violent felonies under the enumerated offenses clause, not the residual clause); *Traxler, supra*, 2016 WL 4536329, at *5 ("if *Johnson* does not affect Movant's sentence, then he has a statute of limitations problem, because he is not raising a claim based on a right 'that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review'").

Westover does not argue the sentencing court actually relied on the residual clause or that the law, as it existed at the time of his sentencing, would have precluded the court from sentencing him under the enumerated clause of the ACCA. Instead, he argues that

⁹ Petitioner asserts that, in some circumstances, sentencing courts could have relied on any one of the three ACCA clauses to count a conviction as a "violent felony," so sentencing courts are often silent as to which clause a certain predicate falls under. Thus, as his argument goes, trial counsel had no incentive to object or seek clarification of the record as to which clause applied "because such crimes would have nearly always qualified under the residual clause." (Pet'r's Reply Br. at 5.) The Court is unpersuaded. In addition to Petitioner's failure to cite any authority in support of such a proposition, this record isn't silent as to which clause Petitioner's burglaries qualified under.

because the sentencing court *could have* relied on the residual clause, this Court should apply the principle established in *Zant v. Stephens*, 462 U.S. 862 (1983) – that a defendant demonstrates constitutional error by simply showing that the jury was provided with an unconstitutional alternative. By analogy, Westover argues, the sentencing court in this case had an unconstitutional alternative – reliance on the residual clause. (Pet’r’s Reply Br. at 6-7) (citing *United States v. Ladwig*, No. 2:03-CR-232-RHW, 2016 WL 3619640, at *3 (E.D. Wash. June 28, 2016)). Westover asserts once this error has been established, the Court must determine whether the error was prejudicial by re-examining whether his burglary convictions qualify as violent felonies after *Johnson*. Westover’s argument in this regard rests entirely on application of the law as it exists *today*, ten and one-half years following his sentencing. The Court is unpersuaded.

Westover relies primarily on *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), and *Mathis v. U.S.*, 136 S. Ct. 2243 (2016), in support of his claim that his previous burglary convictions do not qualify today as violent felonies under the enumerated offenses clause. The Southern District of Florida rejected similar arguments in determining whether a defendant could bring a second or successive § 2255 motion based on *Johnson* where no explicit findings were made on the record at the time of sentencing as to whether the residual, enumerated or elements clause applied to the movant’s predicate offenses.¹⁰ In *Gregory King v. U.S.*, the Florida District Court recognized that “*Descamps* and *Mathis*

¹⁰ Like § 2255(f)(3), which provides that the one-year period of limitations for bringing a § 2255 motion can begin anew when the Supreme Court newly recognizes the right asserted and makes that right “retroactively applicable to cases on collateral review,” § 2255(h) allows the filing of a second or successive motion based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2).

are not retroactive for purposes of a second or successive 2255 because they are not new rules of constitutional law made retroactive by the Supreme Court,” and concluded those cases “should not be applied retroactively to determine whether a movant has been sentenced under the residual clause.” --- F. Supp. 3d ---, No. 16-22261-CIV-LENARD/WHITE, 2016 WL 4487785, at *8-9 (S.D. Fla. Aug. 24, 2016). “*Descamps* cannot be used to ‘re-litigate whether a prior [predicate offense]’ qualifies under the elements or enumerated clauses and [] a movant’s sentence could be affirmed even if the predicate offenses ‘would [not] count were [the defendant] being sentenced today.’” *Id.* at *8 (quoting *In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016)). Ultimately, then, the court determined the movant must “show that the sentencing record or controlling law (as it existed at the time of sentencing) establishes that he was sentenced under the residual clause in violation of *Johnson*.” *Id.* at *10. See also *Ziglar v. U.S.*, --- F. Supp. 3d ---, No. 2:16-CV-463-WKW, 2016 WL 4257773, at *14 (M.D. Ala. Aug. 11, 2016) (defendant, as the § 2255 movant on a second petition, failed to show that, at the time of sentencing, his convictions for burglary did not count as violent felonies under the ACCA’s enumerated-crimes clause, and “he cannot use *Johnson* as the portal to rely upon *Descamps*, which the Supreme Court has not declared retroactive, to invalidate his ACCA-enhanced sentence”).

The foregoing analysis applies equally to an otherwise untimely § 2255 motion asserting a right “newly recognized by the Supreme Court” pursuant to § 2255(f)(3). Neither *Mathis* nor *Descamps* has been made “retroactively applicable to cases on collateral review,” so neither may be used to establish a *Johnson* claim by invalidating a

sentence enhancement which was, based upon the law existing at the time of sentencing, properly imposed pursuant to the enumerated offenses clause. *See Leon King v. U.S.*, 610 F. App'x 825, 828-29 (11th Cir. 2015) (because it did not announce a new rule, *Descamps* does not apply retroactively on collateral review to make a § 2255 motion timely under § 2255(f)(3)); *Meza v. U.S.*, No. 8:16-CV-737-T-30AEP, 2016 WL 1704095, at *2 n.1 (M.D. Fla. Apr. 28, 2016) (*Johnson* cannot be used to save an otherwise untimely § 2255 relying on *Descamps* to challenge validity of ACCA sentence enhancement). “Regardless of how the Court would sentence [Petitioner] with the benefit of *Descamps* and *Mathis* today, the relevant question is how the Court *did* in fact sentence him.” *Traxler, supra* at *5. Undermining all of Westover’s arguments here is the fact that the record is not silent – the sentencing court counted his prior burglary convictions under the ACCA’s enumerated-offenses clause.

CONCLUSION

This Court has previously stated *Johnson* is not “some type of magical elixir” that somehow allows a § 2255 movant to circumvent well-established timeliness rules.¹¹ Rather, to be entitled to relief under *Johnson*, a movant must show that the sentencing record or controlling law at the time of sentencing establishes the movant’s sentence was enhanced under the ACCA’s residual clause. Absent such a showing, a movant cannot rely on *Johnson* as a time machine to make an otherwise untimely motion timely under § 2255(f)(3). Because Westover has not shown, and cannot show, his sentence was

¹¹ *Driscoll v. U.S.*, No. 1:16-CV-082-SWS (D. Wyo. Oct. 11, 2016) (*Order Dismissing Pet. to Vacate Sent.* at 14).

enhanced under the residual clause, *Johnson* is inapplicable and his § 2255 motion is therefore time-barred.¹² Accordingly, it is hereby

ORDERED that Mr. Westover's *Petition to Vacate Sentence* pursuant to 28 U.S.C. § 2255 is **DISMISSED** as untimely.

CERTIFICATE OF APPEALABILITY

An appeal from a final order in a § 2255 proceeding may not be taken unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability ("COA") may issue only if petitioner "has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). "This standard requires 'a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *United States v. Keyes*, 280 F. App'x 700, 701 (10th Cir. 2008) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Given that courts across the country are analyzing the issues raised in this case in varying ways, the Court finds that "jurists of reason would find it debatable whether [this Court] is correct in its procedural ruling." *Keyes*, 280 F. App'x at 701.

THEREFORE, it is hereby

¹² See *United States v. Keyes*, 280 F. App'x 700, 702 (10th Cir. 2008) (where § 2255 movant relies on Supreme Court case irrelevant to his conviction, § 2255(f)(3) has no application and motion is properly dismissed as untimely).

ORDERED that Petitioner is granted a certificate of appealability regarding the issue of *Johnson's* applicability to his sentence enhancement.

Dated this 3rd day of February, 2017.



Scott W. Skavdahl
United States District Judge