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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

9 TERRY LAMELL EZELL,

10 Petitioner,

11 v.

12 UNITED STATES OF AMERICA,

13 Respondent.

CASE NO. C17-255RSM

ORDER DENYING PETITIONER'S
MOTION UNDER 28 U.S.C. § 2255

14 **I. INTRODUCTION**

15 Before the Court is Petitioner's second or successive 28 U.S.C. § 2255 Motion to
16 Vacate, Set Aside, or Correct Sentence. Dkt. #1. Petitioner Terry Lamell Ezell challenges the
17 262-month sentence imposed on him by this Court following his conviction for possession of
18 cocaine base with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and
19 841(b)(1)(B)(iii) and felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and
20 924(e). *Id.* at 4. Petitioner challenges his sentence on the basis that the United States Supreme
21 Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to
22 his case and requires that the Court resentence him. This is Mr. Ezell's fourth § 2255 motion;
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1 all of his prior § 2255 motions were denied. *Id.* at 5-7. After full consideration of the record,
2 and for the reasons set forth below, the Court DENIES Mr. Ezell’s § 2255 motion.

3 **II. BACKGROUND**

4 Mr. Ezell was charged in his underlying criminal case with possession of crack cocaine
5 with Intent to Distribute, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(iii) (Count 1);
6 carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C.
7 §924(c) (Count 2); and being a felon in possession of a firearm as an armed career criminal, in
8 violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count 3). Case No. 2:05-cr-00273-RSM, Dkt.
9 #79. On March 10, 2008, following a bench trial, the Court acquitted Mr. Ezell of Count 2, but
10 convicted him of the remaining charges. Case No. 2:05-cr-00273-RSM, Dkts. #108 and #112.

11 Mr. Ezell’s sentencing took place on July 11, 2008. Case No. 2:05-cr-00273-RSM,
12 Dkt. #118. Given the amount of crack cocaine at issue in Count 1, Ezell faced a 5-year
13 mandatory minimum sentence, and a maximum sentence of 40 years. 21 U.S.C.
14 §841(b)(1)(B)(iii) (2005). Mr. Ezell’s felon-in-possession charge in Count 3 normally carries a
15 10-year maximum sentence. 18 U.S.C. §924(a)(2). However, if subject to sentencing under
16 ACCA, Ezell faced a 15-year mandatory minimum, and a maximum sentence of life. 18
17 U.S.C. §924(e)(1).

18 In its sentencing memoranda the government urged that Mr. Ezell’s criminal history
19 rendered him a career offender under the Guidelines, given his conviction of a controlled
20 substance offense in Count 1. Case No. 2:05-cr-00273-RSM, Dkts. #114 and #116. The
21 government also argued Mr. Ezell was subject to sentencing under the ACCA for his felon-in-
22 possession conviction in Count 3. *Id.* To qualify as a career offender, a defendant must have
23 two prior convictions for a “crime of violence or a controlled substance offense,” USSG
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1 §4B1.1(a), while a defendant needs three prior convictions for “a violent felony or a serious
2 drug offense” to qualify for sentencing under ACCA. 18 U.S.C. §922(e)(1).

3 The government identified four prior Washington State convictions that met these
4 definitions:

- 5 1) 1994 conviction for Assault in the Second Degree and Burglary in the First Degree;
- 6 2) 1991 conviction for Assault in the Second Degree;
- 7 3) 1987 conviction for Burglary in the Second Degree, involving a personal residence;
- 8 4) 1987 conviction for Burglary in the Second Degree, involving a church.

9 Case No. 2:05-cr-00273-RSM, Dkts. #114 and #116. Mr. Ezell’s 1994 second-degree assault
10 conviction was for assault with a deadly weapon, in violation of RCW 9A.36.021(1)(c), and his
11 1991 second-degree assault conviction was for an intentional assault resulting in substantial
12 bodily harm, in violation of RCW 9A.36.021(1)(a). The government argued that Mr. Ezell’s
13 assault convictions were categorically violent felonies/crimes of violence under the elements
14 clause of ACCA and USSG §4B1.2(a)(1), and also argued, in the alternative, that these
15 convictions were qualifying predicates under ACCA’s and Former USSG §4B1.2(a)(2)’s
16 residual clauses. Case No. 2:05-cr-00273-RSM, Dkt. #114 at 4-5, 8-9, 13-14. Regarding Mr.
17 Ezell’s burglary convictions, the government argued the *Shepard* documents showed these
18 convictions matched ACCA’s generic definition of burglary under the modified categorical
19 approach, and also argued that they were violent felonies under ACCA’s residual clause. *Id.* at
20 5-8, 9-12. The government further argued that the 1994 first-degree burglary conviction and
21 the 1987 second-degree burglary conviction involving a residence matched Former USSG
22 §4B1.2(a)(2)’s generic crime of burglary of a dwelling under the modified categorical
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1 approach, and the 1987 second-degree burglary conviction involving a church was a crime of
2 violence based on the residual clause. *Id.* at 13-14.

3 At sentencing, the Court determined that Ezell should be sentenced under the ACCA
4 and as a career offender. Case No. 2:05-cr-00273-RSM, Dkts. #130 at 33. The Court
5 determined Ezell's second-degree assault convictions were categorically crimes of
6 violence/violent felonies, *id.* at 29, and, after reviewing the *Shepard* documents, the Court
7 found Ezell's second-degree burglary convictions qualified under the modified categorical
8 approach, *id.* at 29-33. While the Court made these rulings "for the reasons basically set out in
9 the probation officer's presentence report, and the government's memorandum," *id.* at 33, the
10 Court did not explicitly rely on the residual clause, nor did the Court make any findings about
11 Ezell's first-degree burglary conviction, *see id.* at 29-33.

12 Adopting the Probation Office's calculation, the Court set Mr. Ezell's total offense level
13 at 34 and placed him in Criminal History Category VI, resulting in an advisory Guidelines
14 range of 262 to 327 months. *Id.* at 33. The Court imposed a 262-month prison term, followed
15 by 5 years of supervised release. *Id.* at 36-38. A little over two weeks later the Court entered
16 an amended judgment clarifying that concurrent 262-month sentences had been imposed on
17 Counts 1 and 3. Case No. 2:05-cr-00273-RSM, Dkt. #123.

18 Mr. Ezell subsequently filed his direct appeal arguing, *inter alia*, that the Court erred in
19 finding his two second-degree burglary convictions were violent felonies, and thus that the
20 ACCA-enhanced sentence imposed on Count 3 was illegal. *See* Opening Brief, *United States*
21 *v. Ezell*, 9th Cir. Case No. 08-30265. Mr. Ezell did not dispute that he was properly found to
22 be a career offender for Guidelines purposes, nor did he claim there was any problem with the
23 concurrent 262-month sentence imposed on Count 1. *See id.* On June 15, 2009, the Ninth
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1 Circuit affirmed Mr. Ezell’s conviction and sentence. *United States v. Ezell*, 337 F. App’x 623
2 (9th Cir. 2009). The Court held that, applying the “modified categorical approach,” it was clear
3 Ezell’s second-degree burglary convictions “were generic burglaries of ‘buildings’ under the
4 ACCA.” *Id.* at 624. As such, the Court “conclude[d] that he is an armed career offender under
5 the ACCA.” *Id.* The Supreme Court denied Ezell’s petition for certiorari. 559 U.S. 917
6 (2010).

7 Mr. Ezell has subsequently filed several §2255 petitions, all of which have been denied.

8 In June of 2016, based on the U.S. Supreme Court decisions in *Johnson, supra*, and
9 *Welch v. United States*, 136 S. Ct. 1257 (2016), Mr. Ezell filed the instant § 2255 motion with
10 this Court. Dkt. #1. The Ninth Circuit authorized this second or successive § 2255 motion on
11 February 17, 2017. Dkt. #5.

12 III. DISCUSSION

13 A. Legal Standard

14 A motion under 28 U.S.C. § 2255 permits a federal prisoner in custody to collaterally
15 challenge his sentence on the grounds that it was imposed in violation of the Constitution or
16 laws of the United States, or that the Court lacked jurisdiction to impose the sentence or that the
17 sentence exceeded the maximum authorized by law. A petitioner seeking relief under § 2255
18 must file his motion with the one-year statute of limitations set forth in § 2255(f). That section
19 provides, *inter alia*, that a motion is timely if it is filed within one year of the underlying
20 judgment or “the date on which the right asserted was initially recognized by the Supreme
21 Court, if that right has been newly recognized by the Supreme Court and made retroactively
22 applicable to cases on collateral review.” § 2255(f).

1 28 U.S.C. §2244(b)(4) provides that “[a] district court shall dismiss any claim presented
2 in a second or successive application that the court of appeals has authorized to be filed unless
3 the applicant shows that the claim satisfies the requirements of this section.” This statute
4 applies in §2255 proceedings, *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164 (9th Cir.
5 2000), and precludes the Court from granting relief on any claim not based on a new rule of
6 constitutional law made retroactive to cases on collateral review by the Supreme Court, unless
7 petitioner is making a claim of actual innocence of the crime of conviction. *See* 28 U.S.C.
8 §§2244(b)(2), 2255(h)(2); *Villa-Gonzalez*, 208 F.3d at 1164.

9 **B. Mr. Ezell’s Motion**

10 Mr. Ezell has filed a second or successive § 2255 petition, and does not claim he is
11 actually innocent of his narcotics or felon-in-possession convictions.¹ Dkt. #1. Therefore, the
12 Court must determine whether his claims are based on a new rule of constitutional law made
13 retroactive to cases on collateral review by the Supreme Court.

14 As noted above, Petitioner’s motion to vacate cites the Supreme Court’s decision in
15 *Johnson v. United States, supra*. In *Johnson*, the Supreme Court ruled on a section of the
16 Armed Career Criminal Act (“ACCA”) known as the “residual clause,” which provided a
17 definition of “violent felony.” Under the ACCA, a defendant convicted of being a felon in
18 possession of a firearm faces a mandatory minimum sentence of 15 years if he has three prior
19 convictions for “violent felonies.” 18 U.S.C. § 924(e)(1). The ACCA residual clause provided
20 that a violent felony was one that “otherwise involves conduct that presents a serious potential
21 risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the Supreme

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23 ¹ Mr. Ezell does, however claim that he is “actually innocent of being an Armed Career
24 Criminal” and “actually innocent of the designation as a career offender under the Sentencing
Guidelines.” Dkt. #1 at 9 and 12.

1 Court held that this clause was “unconstitutionally vague.” 135 S. Ct. at 2557. In doing so, the
2 Court necessarily found the clause “vague in all its applications,” *id.* at 2561, and concluded
3 that “[i]ncreasing a defendant’s sentence under the clause denies due process of law,” *id.* at
4 2557. Subsequently, in *Welch v. United States*, the Court held that *Johnson* applies
5 retroactively to defendants whose sentences were enhanced under the ACCA’s residual clause.
6 136 S. Ct. at 1265.

7 **a. Count 1 Career Offender Enhancement**

8 The Government argues that Mr. Ezell’s sentence under Count 1 was not based on the
9 residual clause and that this is fatal to his claim. Rather, the Court deemed his prior assault
10 convictions to be categorical crimes of violence under USSG §4B1.2(a)(1)’s elements clause,
11 and his burglary convictions were found to meet the definition of “burglary of a dwelling” in
12 Former USSG 4B1.2(a)(2) by employing the modified categorical approach. Dkt. #8 at 15.
13 The Government argues that “while Ezell advances a variety of arguments for why, in light of
14 *Descamps* and *Mathis*, his predicate convictions purportedly do not qualify as crimes of
15 violence under USSG §4B1.2(a)(1)’s elements clause or as the enumerated offense of ‘burglary
16 of a dwelling’ under Former USSG §4B1.2(a)(1) [citing Dkt. #3 at 16-36], these claims cannot
17 be a basis for relief in this second §2255 motion.... [because] *Descamps* and *Mathis* are cases
18 about statutory construction, not constitutional holdings, and thus claims based on those
19 decisions are not cognizable in a second §2255 motion.” *Id.* (citing 28 U.S.C.
20 §§2244(b)(2)(A), 2244(b)(4), 2255(h)(2); *Ezell*, 778 F.3d at 766-67). On Reply, Mr. Ezell
21 argues that “the mere fact that a claim rests on *Johnson II* does not mean that courts should
22 ignore Supreme Court precedent and forego the three-part analysis outlined in *Descamps* and
23 *Mathis*.” Dkt. #12 (citing *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867-68 (9th Cir. 2015)).
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1 The Government also argues that even if Mr. Ezell could demonstrate that the Court
2 relied on Former USSG §4B1.2(a)(2)'s residual clause when evaluating his predicate
3 convictions, he would still not have a viable *Johnson* claim pertaining to his career offender
4 adjudication for Count 1 given *Beckles v. United States*, 137 S. Ct. 886 (2017), which holds
5 that *Johnson* does not invalidate the residual clause in Former USSG §4B1.2(a)(2). On Reply,
6 Mr. Ezell concedes this point and drops this claim as to his career offender enhancement. Dkt.
7 #12 at 1 n.1. Accordingly, Mr. Ezell will not be resentenced as to Count 1.

8 **b. Count 3 ACCA Enhancement**

9 The Government begins by noting that this challenge is “academic” because even if
10 successful on this claim, Mr. Ezell would still face the concurrent 262-month sentence imposed
11 for his narcotics conviction, Count 1. Dkt. #8 at 16. The Government argues that it should fail
12 regardless because:

13 The record makes clear the Court did not rely on ACCA’s residual
14 clause in evaluating Ezell’s burglary convictions, but rather relied
15 on the *Shepard* documents and the modified categorical approach,
16 and a fair reading of the record also supports the conclusion that
17 the Court found Ezell’s assault convictions are categorically
18 violent felonies under ACCA’s elements clause. And, even if Ezell
19 could show the Court relied on the residual clause in evaluating his
20 assault convictions, any such error would be harmless because
21 those convictions are indeed violent felonies under ACCA’s
22 elements clause.

23 *Id.* at 18.

24 The Government argues that Petitioner’s motion is procedurally barred because he failed
to raise this issue at sentencing or on direct appeal. *Id.* (citing *United States v. Mejia-Mesa*, 153
F.3d 925, 929 (9th Cir. 1998); *Bousley v. United States*, 523 U.S. 614, 622 (1998)). Petitioner’s
claim is thus procedurally defaulted unless he can “show both (1) ‘cause’ excusing his double
procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.”

1 *Id.* (citing *United States v. Frady*, 456 U.S. 152, 168 (1982)). The Government argues there was
2 no “cause” based on ineffective assistance of counsel because Petitioner’s current claim was
3 futile at the time. *Id.* at 18-19. The Government next goes on to argue at length that Mr. Ezell
4 cannot show that the ACCA’s residual clause played a prejudicial role at his sentencing, and that
5 he is required to meet this burden to proceed. Dkt. #8 at 22 (citing, *inter alia*, *Simmons v.*
6 *Blodgett*, 110 F.3d 39, 42 (9th Cir. 1997); *Williams v. United States*, C16-0939RSM, Dkt. #12 at
7 5-7; *In re Henry*, 757 F.3d 1151, 1162 (11th Cir. 2014)). The Government argues that:

8 With respect to Ezell’s two second-degree burglary predicates, the
9 record is crystal clear: the Court conducted a modified categorical
10 analysis on the record and concluded, after reviewing the *Shepard*
11 documents, that these convictions were violent felonies because
12 they met ACCA’s generic definition of burglary. CR_130 at 29-
13 32.² The Court never mentioned the residual clause when
14 evaluating these convictions, and the Ninth Circuit’s ruling on
15 Ezell’s direct appeal confirms the Court’s ruling was that these
16 convictions “qualify as ‘burglaries’ under the modified categorical
17 approach.” *Ezell*, 337 F. App’x at 624.

18 *Id.* at 24. Although the Court reviewed presentencing reports that mentioned the residual clause,
19 the Government argues that “[b]ecause the Court expressly ruled that Ezell’s burglary
20 convictions were violent felonies because they met ACCA’s generic definition of burglary under
21 a modified categorical analysis, the Court’s actual ruling shows the Court did not rely on the
22 residual clause in evaluating those convictions.” *Id.* at 25. The Government goes on to argue
23 that, even if Mr. Ezell could show that the Court relied on the residual clause, any such error
24 would be harmless, thus barring Mr. Ezell’s §2255 claim. *Id.* (citing *United States v. Montalvo*,
331 F.3d 1052, 1057-58 (9th Cir. 2003)). The Government argues that Mr. Ezell must show, but

² Case No. 2:05-cr-00273-RSM, Dkt. #130 at 29-32.

1 cannot, that the prior convictions at issue do not independently qualify as violent felonies under
2 another provision of the ACCA. *Id.* at 26-37.

3 Mr. Ezell argues that he can show cause and actual prejudice. Dkt. #12 at 3-9 (citing,
4 *inter alia*, *Bousley v. United States*, 523 U.S. 614, 622 (1998), and *Reed v. Ross*, 468 U.S. 1, 16
5 (1984)). Mr. Ezell argues that he should be able to proceed on an actual innocence claim, not
6 because he can show factual innocence, but because he “is ‘actually innocent[of being an armed
7 career criminal because he received a sentence, and was improperly designated as an armed
8 career criminal, for which he was statutorily ineligible.” *Id.* at 9-11. Mr. Ezell argues that the
9 Court should apply the same logic as it did in *Kilgore v. United States*, 2016 WL 7180306, at *4-
10 *5 (W.D. Wash. Dec. 9, 2016), to find that Petitioner does not bear the burden to prove reliance
11 on the residual clause when the record was silent. *Id.* at 23. Mr. Ezell argues why his *Johnson*
12 claim is not academic given the recent holding in *Dean v. United States*, 137 S. Ct. 1170 (2017).

13 The Court agrees with Mr. Ezell that he can show cause and prejudice to get over the first
14 procedural bar cited by the Government based on this Court’s prior reading of *Bousley* and *Reed*.
15 However, the Government is also correct that Mr. Ezell must still show that the ACCA’s residual
16 clause played a prejudicial role at his sentencing, and that he has failed to do. *See Simmons*,
17 *supra*. Although the Court has applied the *Brecht/O’Neal*³ standard in prior cases where it was
18 unclear if the Government relied on the now-unconstitutional residual clause, *see Kilgore supra*,
19 this case is factually distinct. The record is silent on whether the Court explicitly considered the
20 residual clause at sentencing. Although the Court agrees with Petitioner that the benefit of the
21 doubt should accrue to the Petitioner, unlike in *Kilgore*, there is no doubt that the Court could

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24 ³ *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *O’Neal v. McAninch*, 513 U.S. 432, 436 (1995).

1 have reached the guidelines range conclusion that it did without reliance on the now-
2 unconstitutional residual clause for the reasons stated by the Government. Mr. Ezell’s actual-
3 innocence-without-factual-innocence argument is not supported by Ninth Circuit precedence and
4 will not serve to overcome the lack of prejudice above.

5 **c. Certificate of Appealability**

6 A defendant may not appeal a decision denying a motion under 28 U.S.C. §2255
7 without obtaining a certificate of appealability. 28 U.S.C. §2253(c)(1)(B). The decision
8 whether to grant a certificate of appealability must be made by this Court in the first instance.
9 *See* Ninth Circuit Rule 22-1(a); *see also* Fed. R. App. P. 22(b)(1). To obtain a certificate of
10 appealability, the defendant must show “that jurists of reason would find it debatable whether
11 the petition states a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, 529
12 U.S. 473, 484 (2000). If any of the defendant’s claims are found procedurally defective, he
13 must also show “that jurists of reason would find it debatable whether the district court was
14 correct in its procedural ruling.” *Id.*

15 Given the potential application of the *Brecht/O’Neal* standard above and Mr. Ezell’s
16 arguments why his motion is not academic, the Court finds that Mr. Ezell has advanced a
17 colorable claim for relief, upon which reasonable jurists could disagree, and that he is therefore
18 entitled to a certificate of appealability.

19 **IV. CONCLUSION**

20 Having considered Petitioner’s motion, Respondent’s answer thereto, and the remainder
21 of the record, the Court hereby finds and ORDERS:

- 22 1. Petitioner’s Motion under § 2255 (Dkt. #1) is DENIED.
23 2. Petitioner is GRANTED a Certificate of Appealability in this matter.
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1 3. The Clerk of the Court is directed to forward a copy of this Order to Petitioner and
2 all counsel of record.

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4 DATED this 8 day of August 2017.

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7 RICARDO S. MARTINEZ
8 CHIEF UNITED STATES DISTRICT JUDGE
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