No. 18-3573

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC K. WATKINS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Eric K. Watkins, an Ohio prisoner proceeding pro se, seeks to appeal the district court's denial of his 28 U.S.C. § 2255 motion, and this court construes his notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). He also moves for appointment of counsel and to proceed in forma pauperis.

A federal jury found Watkins guilty of conspiracy, in violation of 18 U.S.C. § 371; armed robbery of a financial institution, in violation of 18 U.S.C. § 2113(a) and (d); using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and receiving, possessing, concealing, storing, or disposing of money taken or stolen from a credit union, in violation of 18 U.S.C. § 2113(c). The district court ultimately sentenced Watkins to a total of 360 months in prison. *See United States v. Watkins*, 450 F. App'x 511, 514 (6th Cir. 2011). This court dismissed Watkins's direct appeal for want of jurisdiction. *United States v. Watkins*, No. 06-3352 (6th Cir. Oct. 15, 2007) (order). After entry of a new judgment, this court affirmed his conviction but vacated his sentence and remanded for resentencing. *Watkins*, 450 F. App'x at 518. After resentencing, Watkins appealed again, and this court affirmed the district court's amended judgment. *United States v. Watkins*, No. 12-3365 (6th Cir. Oct. 31, 2012) (order).

In 2013, Watkins filed the present § 2255 motion, claiming ineffective assistance of trial counsel. He later moved to amend his motion to include a claim based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court granted that motion, but it later stayed the proceedings until the Supreme Court issued *Beckles v. United States*, 137 S. Ct. 886 (2017). After the stay lifted, Watkins's counsel moved to withdraw, citing his failure to argue that Watkins's robbery conviction was not a "crime of violence" and could not serve as a predicate for his § 924(c) conviction. A magistrate judge later granted that motion to withdraw and recommended that the district court deny all three of the claims presented in Watkins's filings. Watkins objected only to the recommendation concerning his ineffective assistance claim, but he also filed a motion for appointment of counsel for purposes of pursuing his "crime of violence" claim. The district court overruled Watkins's objections, denied his motion for new counsel, adopted the magistrate judge's recommendation to deny the § 2255 motion, and declined to issue a certificate of appealability.

This court will issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy that standard with respect to a claim rejected on the merits, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Watkins is not entitled to a certificate of appealability on any of his claims. For his first claim, Watkins alleged that trial counsel failed to have an expert review the fingerprint evidence. To prevail on a claim of ineffective assistance, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As the magistrate judge and the district court explained, Watkins did not establish prejudice because he failed to show how an expert would have assisted his defense and because the record established that trial counsel "made a reasonable strategic decision not to present the testimony of an expert" after researching the issue

and consulting an expert. Although Watkins argues that the district court should have considered the materials gathered by his post-conviction counsel—including depositions of trial counsel and an expert report—he never presented those to the district court in response to the government's arguments or the affidavit from trial counsel that the government presented. In the end, reasonable jurists would not debate the resolution of this claim.

In his second claim, Watkins challenged his career offender designation based on *Johnson*. But because that claim depended on *Johnson* extending to the advisory U.S. Sentencing Guidelines—an argument that the Supreme Court rejected in *Beckles*—reasonable jurists would not debate the denial of this claim.

And in a roundabout way, Watkins claimed that his robbery conviction was not a "crime of violence" and could not serve as a predicate for his § 924(c) conviction, relying on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Although this court will further consider a case involving § 924(c)'s residual clause in light of *Dimaya*, the outcome of that case will not affect this case. *See Johnson v. United States*, No. 17-7779, 2018 WL 928936 (June 25, 2018), *vacating and remanding United States v. Pembrook*, 876 F.3d 812 (6th Cir. 2017). That is because this court has already determined that § 2113 is divisible and that a violation involving force and violence or intimidation constitutes a "crime of violence" under § 924(c)'s force clause—not its residual clause—under the modified categorical approach. *See United States v. Henry*, 722 F. App'x 496, 500 (6th Cir. 2018), *cert. denied*, 2018 WL 1993518 (Oct. 1, 2018); *see also United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (holding that § 2113 conviction is a crime of violence under the sentencing guidelines). And as the district court explained, Watkins's robbery conviction was a crime of violence under § 924(c)'s force clause. As a result, the validity of § 924(c)'s residual clause has no bearing on this case, and reasonable jurists would not debate the district court's rejection of this claim.

Finally, Watkins also asked the district court and this court to appoint him new counsel. To the extent Watkins challenges the district court's decision, this court reviews for an abuse of

discretion. *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993). As the district court explained, Watkins had the assistance of counsel throughout most of its proceedings and the case did not require an evidentiary hearing and was not unduly complex. So the district court properly exercised its discretion. And for the same reasons, Watkins's pending motion for appointment of counsel for purposes of this appeal is denied.

Accordingly, Watkins's application for a certificate of appealability and his motion for appointment of counsel are **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: November 07, 2018

Mr. Eric K. Watkins
F.C.I. Elkton
P.O. Box 10
Lisbon, OH 44432

Re: Case No. 18-3573, *Eric Watkins v. USA*
Originating Case No.: 2:13-cv-01075; 2:04-cr-00119-1

Dear Mr. Watkins,

The Court issued the enclosed Order today in this case.

Sincerely,

s/Antoinette Macon
Case Manager
Direct Dial No. 513-564-7015

cc: Mr. David Joseph Bosley
Mr. Richard W. Nagel

Enclosure

No mandate to issue

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ERIC K. WATKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 2:13-cv-1075
Crim. No. 2:04-cr-119
Judge Algenon L. Marbley
Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

On January 17, 2018, the Magistrate Judge issued a *Report and Recommendation* recommending that this action be dismissed. (ECF No. 315.) Petitioner has filed an *Objection* to the Magistrate Judge's recommendation of dismissal of claim one. (ECF No. 321.) Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons that follow, Petitioner's *Objection* (ECF No. 321) is **OVERRULED.** The *Report and Recommendation* (ECF No. 315) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED.**

Petitioner's *Motion to Appoint Counsel* (ECF No. 320) is **DENIED.**

The Court **DECLINES** to issue a certificate of appealability.

Petitioner challenges his underlying convictions after a jury trial on conspiracy, in violation of 18 U.S.C. § 371; armed robbery of a financial institution, in violation of 18 U.S.C. § 2113(a) and (d); using a carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and receiving, possessing, concealing, storing, or disposing of money taken or stolen from a credit union, in violation of 18 U.S.C. § 2113(d). He asserts that he was denied the effective assistance of counsel because his attorney failed to hire or present testimony from a defense expert to challenge the prosecution's fingerprint evidence

(claim one); and that he was improperly sentenced as a career offender under U.S.S.G. § 4B1.1 in light of *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). The Government filed a motion to dismiss the latter claim in light of the Supreme Court's decision in *Beckles v. United States*, 137 S.Ct. 886, 895 (2017) (explaining that because the Sentencing Guidelines are advisory, they are "not subject to a vagueness challenge under the Due Process Clause and. . . [that] § 4B1.2(a)'s residual clause is not void for vagueness."). (ECF No. 306.) Petitioner does not object to the Magistrate Judge's recommendation that the *Government's Motion to Dismiss Claim Two* (ECF No. 306) be granted. Petitioner objects solely to the Magistrate Judge's recommendation of dismissal of his claim of the denial of the effective assistance of counsel. Petitioner objects to the dismissal of this claim prior to consideration of the depositions of defense counsel or report of the fingerprint expert. He requests the appointment of successor counsel to assist him in this regard. He raises no other basis for his objection to the Magistrate Judge's recommendation of dismissal of his claim of the denial of the effective assistance of counsel. Petitioner also requests that successor counsel be appointed to assist him in preserving a claim under the Supreme Court's pending decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted sub nom. Lynch v. Dimaya*, 137 S.Ct. 31 (Sept. 29, 2016).

Habeas corpus proceedings are considered to be civil in nature, and the Sixth Amendment does not guarantee the right to counsel in these proceedings. *Post v. Bradshaw*, 422 F.3d 419, 425 (6th Cir. 2005) (citing *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *Lemeshko v. Wrona*, 325 F.Supp.2d 778, 787 (E.D. Mich. 2004) (citing *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002)); *Tapia v. Lemaster*, 172 F.3d 1193, 1196 (10th Cir. 1999)). 18 U.S.C. § 3006A(a)(2)(B) provides, "[w]henever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible

person who is seeking relief under section 2241, 2254, or 2255 of title 28." "The decision to appoint counsel for a federal habeas petitioner is within the discretion of the court and is required only where the interests of justice or due process so require." *Mira v. Marshall*, 806 F.2d 636, 638 (6th Cir. 1986) (citations omitted). "[T]he Court has broad discretion in determining whether counsel should be appointed." *Valsadi v. Sheldon*, No. 3:11-cv-2014, 2014 WL 4956173, at *4 (N.D. Ohio Sept. 26, 2014) (citing *Childs v. Pellegrin*, 822 F.2d 1382, 1384 (6th Cir. 1987)). The appointment of counsel is mandatory only where the record indicates that an evidentiary hearing is required to resolve a petitioner's claims. Rule 8(c), Rules Governing Section 2255 Proceedings for the United States District Courts. In making the determination as to whether to exercise its discretion in appointing counsel on a petitioner's behalf, the Court should consider "the legal and factual complexity of the case, the petitioner's ability to investigate and present his claims, and any other relevant factors." *Mathhews v. Jones*, No. 5:13-cv-1850, 2015 WL 545752, at *3 (N.D. Ohio Feb. 10, 2015) (citations omitted). "Where the issues involved can be properly resolved on the basis of the state court record, a district court does not abuse its discretion in denying a request for court-appointed counsel." *Reeves v. Lee*, No. 1:13-cv-01026, 2016 WL 890950, at *2 (W.D. Tenn. March 8, 2016) (quoting *Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994)).

On October 31, 2013, represented by Attorney Gary Crim, Petitioner filed the *Motion to Vacate under 28 U.S.C. § 2255.*[1] (ECF No. 251.) On August 16, 2016, Petitioner amended the Motion to Vacate to include a claim under *Johnson*. The Court appointed Attorney Crim on Petitioner's behalf and stayed proceedings pending a decision from the United States Supreme

[1] On April 21, 2016, the Court counsel on Petitioner's behalf. Apparently Attorney Crim previously represented the Petitioner on a *pro bono* basis.

Court in *Beckles*. (ECF Nos. 290, 295.) On March 22, 2017, the Court terminated the stay. (ECF No. 305.) Attorney Crim requested to withdraw as counsel, citing as the basis for his withdrawal his failure to move to the Court to raise a third claim challenging Petitioner's conviction under 18 U.S.C. § 924(c). (ECF No. 311.) However, on September 29, 2017, the Court issued an *Opinion and Order* rejecting the potential viability of Petitioner's proposed third claim for relief, and directing Attorney Crim to notify the Court whether he intended to renew his request to withdraw as counsel, and to advise the Court regarding the status of Petitioner's first claim for relief. (ECF No. 313, PAGEID# 3145.) Counsel again requested to withdraw and indicated that the deposition of trial counsel had been taken in early April 2017 and that he did not anticipate further depositions. (ECF No. 314, PAGEID# 3148.) On January 17, 2018, the Magistrate Judge issued an *Order and Report and Recommendation* granting counsel's motion to withdraw, and recommending dismissal of the *Motion to Vacate under 28 U.S.C. § 2255* on the merits. (ECF No. 315.)

The record does not reflect that the interests of justice or due process require the continued appointment of counsel in these proceedings. Petitioner does not object to the Magistrate Judge's recommendation of the dismissal of his claim under *Johnson*. As to his claim of the denial of the effective assistance of counsel, Petitioner has had the benefit of counsel to assist him in the development of this claim since October 2013, the date that he initially filed the Motion to Vacate. Thus, Petitioner has had more than ample opportunity to submit the depositions of counsel, or any proposed fingerprint expert report, in support of his claim since that time, and nothing in the record indicates that he requires the continued assistance of counsel in order to do so. Moreover, the record does not indicate that an evidentiary hearing is required to resolve Petitioner's claims, or that this case is so unduly complex that he requires the

States v. Taylor, 814 F.3d 340, 375 (6th Cir. 2016), and this Court is bound by that decision. *See also United States v. Justice*, No. 3:09-cr-180(3); 3:16-cv-266, 2017 WL 1194736, at *5 (S.D. Ohio March 31, 2017) (noting that the Sixth Circuit has refrained from repudiating or modifying *Taylor*, and that the Supreme Court's decision in *Beckles* suggests that the Court intended to limit *Johnson* to the ACCA.)

For these reasons and for the reasons detailed in the Magistrate Judge's *Order and Report and Recommendation* (ECF No. 315), Petitioner's *Objection* (ECF No. 321) is **OVERRULED**. The *Order and Report and Recommendation* (ECF No. 315) is **ADOPTED** and **AFFIRMED**. The government's *Motion to Dismiss Claim Two* (ECF No. 306) is **GRANTED**. This action is hereby **DISMISSED**.

Petitioner's *Motion to Appoint Counsel* (ECF No. 320) is **DENIED**.

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher*, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal.)

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "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.'" *Slack v. McDaniel*, 529 U.S. 473, 484

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ERIK K. WATKINS,

Petitioner,

v.

Civil Action 2:13-cv-1075
Criminal Action 2:04-cr-119
Judge Algenon L. Marbley
Magistrate Judge Chelsey M. Vascura

UNITED STATES OF AMERICA,

Respondent.

ORDER and
REPORT AND RECOMMENDATION

Petitioner, a federal prisoner, brings this action in the form of a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 ("Motion to Vacate") (ECF Nos. 251, 282). This matter is before the Court to consider the Government's Motion to Dismiss Claim Two (ECF No. 306). For the reasons that follow, the Magistrate Judge **RECOMMENDS** that the Government's motion be **GRANTED** and that this action be **DISMISSED.**

Counsel's Motion to Withdraw (ECF No. 311) is **GRANTED.**

I. Facts and Procedural History

This Court has previously summarized the facts and procedural history of this case. *See* Opinion and Order (ECF No. 313); *see also United States v. Watkins*, 450 F. App'x 511 (6th Cir. 2011). As previously discussed, Petitioner challenges his underlying criminal convictions after a jury trial on conspiracy, in violation of 18 U.S.C. § 371; armed robbery of a financial institution, in violation of 18 U.S.C. § 2113(a) and (d); using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and receiving, possessing, concealing, storing, or disposing of money taken or stolen from a credit union, in violation of 18 U.S.C. § 2113(d). On October 29, 2013, Petitioner filed his Motion to Vacate, asserting that he

was denied the effective assistance of counsel because his attorney failed to hire or present testimony from a defense expert to challenge the fingerprint evidence submitted by the prosecution. (ECF No. 251). On August 16, 2016, Petitioner amended the Motion to Vacate to also assert that the Court improperly sentenced him as a career offender under U.S.S.G. § 4B1.1, based on his prior convictions for robbery and assault on a police officer, in light of *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (determining that the "residual clause" of 18 U.S.C. § 924(c)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague). The Court held this claim in abeyance pending a decision from the United States Supreme Court in *Beckles v. United States*, 137 S. Ct. 886, 895 (2017) (explaining that because the Sentencing Guidelines are advisory, they are "not subject to a vagueness challenge under the Due Process Clause and . . . [that] § 4B1.2(a)'s residual clause is not void for vagueness."). The Government has filed a Motion to Dismiss Claim Two based on the Supreme Court's decision in *Beckles*. (ECF No. 306).

On May 29, 2017, Petitioner's counsel filed a Motion to Withdraw proposing that he should have moved to amend the Motion to Vacate to raise an additional third claim for relief challenging the validity of Petitioner's conviction under 18 U.S.C. § 924(c) in Count 14, on the basis that the conviction on armed bank robbery, in violation of 18 U.S.C. § 2113, categorically does not constitute a crime of violence within the meaning of 18 U.S.C. § 924(c) by application of *Descamps v. United States*, 570 U.S. 254 (2013), and *Taylor v. United States*, 495 U.S. 575 (1990), and as further defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010). Petitioner also refers to the Supreme Court's decision in *Mathis v. United States,* 136 S. Ct. 2243 (2016), in support of this claim.

On September 29, 2017, the Court stayed these proceedings pending Petitioner's filing of a status report regarding, *inter alia,* counsel's intent to withdraw. *See* Opinion and Order (ECF No. 313.) In response, on October 30, 2017, counsel renewed the motion to withdraw and has indicated that no further briefing is anticipated in regard to the Government's Motion to Dismiss or in regard to Petitioner's claim of the denial of the effective assistance of counsel. (ECF No. 314).

II. Motion to Withdraw

Petitioner's Counsel has renewed the Motion to Withdraw so that Petitioner may further pursue the issues set forth in proposed claim three, outlined above. Counsel's renewed motion to withdraw (ECF No. 311) is **GRANTED**.

However, the Court finds that counsel has already adequately addressed the proposed amended claim three in the Motion to Withdraw and that no further briefing will be of assistance to the Petitioner. Moreover, for the reasons already addressed by this Court's Opinion and Order (ECF No. 313), this proposed claim fails to provide a basis for relief. Additionally, to the extent that Petitioner proposes to amend the Motion to Vacate to include a claim under *Mathis*, the United States Court of Appeals for the Sixth Circuit has held that *Mathis* does not retroactively apply to cases on collateral review. *See In re Conzelmann*, 872 F.3d 375, 376-77 (6th Cir. 2017). Also, Petitioner's proposed amendment to include a claim that his conviction on armed robbery categorically does not require violent conduct by application of *Descamps*, 570 U.S. at 2283, and as further defined in *Johnson*, 559 U.S. at 140, is barred under the provision of 28 U.S.C. § 2255(f), providing for a one-year statute of limitations on the filing of federal habeas corpus petitions. *See Murphy v. United States*, No. 2:16-cv-00560, 2:05-cr-00001(1), 2016 WL 4269079, at *3 (S.D. Ohio Aug. 15, 2016) (citing *United States v. Jefferson*, No. 3:05-cr-135,

2016 WL 3523849, at *2 (S.D. Ohio June 28, 2016) ("The *Johnson* decision does not make timely any claim of unconstitutional vagueness in a federal criminal statute filed within one year of *Johnson*.")).

III. The Government's Motion to Dismiss

A. Standard of Review

In order to obtain relief under 28 U.S.C. § 2255, a defendant must establish the denial of a substantive right or defect in the trial that is inconsistent with the rudimentary demands of fair procedure. *United States v. Timmreck*, 441 U.S. 780 (1979); *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir.1990) (*per curiam*). Relief under 28 U.S.C. § 2255 is available when a federal sentence was imposed in violation of the Constitution or laws of the United States, when the trial court lacked jurisdiction, or when the sentence was in excess of the maximum sentence allowed by law or is "otherwise subject to collateral attack." *United States v. Jalili*, 925 F.2d 889, 893 (6th Cir. 1991). Apart from constitutional error, the question is "whether the claimed error was a 'fundamental defect which inherently results in a complete miscarriage of justice,'" *Davis v. United States,* 417 U.S. 333, 346 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 428–429 (1962)); *see also Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2006).

B. Claim One

Petitioner asserts that he was denied the effective assistance of counsel because his attorneys failed to hire a defense expert to challenge the testimony presented by the Government's fingerprint experts. Petitioner contends that, had counsel done so, Petitioner would not have been convicted based on evidence that his fingerprint was found on the car of the credit union manager. (ECF No. 251, PAGEID ##2907-08).

In response, the Government has submitted an Affidavit from Susan Petit, one of Petitioner's former defense counsel. (ECF No. 280). Petitioner retained Ms. Petit and Joseph D. Reed to represent him in this case. The Affidavit states as follows:

> At the time of the trial both Mr. Reed and myself did extensive research on the standards and reliability, and the lack thereof fingerprint evidence. Fingerprint evidence was an issue in the case which directly related to our client. There had been a study published that questioned the reliability of fingerprint evidence do to the [sic]. We obtained a prepublication copy of Strengthening Forensic Science in the United States: A Path Forward, published by National Academies of Science.
>
> Prior to the trial my co-counsel located a fingerprint expert from Dayton, Ohio. The expert was still of the opinion that the recent challenges to the reliability of fingerprint evidence was misplaced. He would not have been helpful at trial because he di[d] no[t] disagree with the government experts. We made a strategic decision that the potential expert would hinder rather tha[n] help our defense of Mr. Watkins. We filed [M]otion in Limine (R. 103) to prohibit the government from introducing expert testimony regarding fingerprint evidence until the Court held a *Daubert* hearing.
>
> On April 22, 2005, the district Court held a *Daubert* Hearing as we requested. The government called one witness during the hearing, Robin Roggenbeck, a forensic scientist latent print examiner for the Ohio Bureau of Criminal Identification. Ms. Roggenbeck gave direct testimony as to the reliability of fingerprint evidence. Mr. Reed cross-examined Ms. Roggenbeck during the course of the hearing. After the conclusion of Ms. Roggenbeck's testimony the Court ruled that fingerprint testimony passes the test of scientific validity contemplated by *Daubert*. (R. 229, Tr. Daubert Hearing p. 37).
>
> Based on the ruling of the Court I compiled [a] notebook of all of our research on the fallibility of the fingerprint evidence that was to be introduced at trial. During the trial the government introduced the testimony of two forensic latent print examiners, the aforementioned Ms. Roggeneck and Mark Bryant of the Columbus Police Department. They both testified that the latent print that was recovered from the getaway vehicle matched the fingerprint of our client. Mr. Reed conducted a thorough cross examination of

> each witness and exposed the weaknesses in the government's evidence. We felt that this was the best trial strategy. We discussed that strategy with Mr. Watkins and he was in agreement.

(ECF No. 280, PAGEID ##2982-83).

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The standard for demonstrating a claim of ineffective assistance of counsel is composed of two parts:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). Scrutiny of defense counsel's performance is "highly deferential." *Id.* at 689.

With respect to the first prong of the *Strickland* test, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* To establish the second prong of the *Strickland* test, *i.e.*, prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because a petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the court determine that the petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

Petitioner has failed to meet the two-prong *Strickland* test. "In assessing deficient performance, reviewing courts must take care to avoid 'second-guessing' strategic decisions that

failed to bear fruit." *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) (citing *Strickland,* 466 U.S. at 689). "[C]ounsel's failure to call a fingerprint expert to challenge the prosecution's findings is not indicative of deficient performance where 'the petitioner's attorney likely concluded that his challenges would have been futile.'" *Wright v. United States*, No. 3:10cv174, 3:04cr003, 2011 WL 4852470, at *17 (S.D. Ohio May 20, 2011) (citing *Katschor v. Grayson*, No. 93-1009, 1993 WL 438636, at *4 (6th Cir. Oct. 28, 1993), *cert. denied*, 510 U.S. 1123 (1994)). Moreover, "[d]isagreements by a defendant with tactics and/or strategies will not support a claim of ineffective assistance of counsel" and "[v]ague or conclusory allegations are insufficient to establish the prisoner's burden that counsel's performance was deficient and that the defendant suffered prejudice as a result." *Unsworth v. Konteh*, No. 3:06-cv-1856, 2007 WL 4365402, at *9 (N.D. Ohio Dec. 10, 2007) (citing *Strickland*, 466 U.S. at 689; *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990); *United States v. Cronic*, 466 U.S. 648, 666 (1984)).

In this case, nothing in the record indicates that a defense expert would have assisted the defense. Under these circumstances, Petitioner cannot establish prejudice. "To present an ineffective assistance of counsel claim based on a failure to call a witness, a defendant must make an affirmative showing as to what the missing evidence would have been and prove that the witness' testimony would have produced a different result." *Malcum v. Burt*, 276 F. Supp. 2d 664, 679 (E.D. Mich. 2003) (citing *United States ex. rel. Jones v. Chrans*, 187 F. Supp. 2d 993, 1009 (N.D. Ill. 2002), *aff'd sub. nom. Jones v. Briley*, 49 F. App'x (7th Cir. 2002), *cert. denied*, 537 U.S. (2003)).

> In *United States v. Holt*, 85 F.3d 629 [table], 1996 WL 262466, at *9 (6th Cir.), cert. denied, 519 U.S. 906, 117 S. Ct. 265, 136 L.Ed.2d 189 (1996), the Sixth Circuit rejected the petitioner's ineffective assistance counsel of claim based on his trial counsel's failure even to hire a fingerprint expert, finding that the petitioner could not "show a reasonable probability that a different result

> would have obtained at trial." In so holding, that Court cited with approval *Hernandez v. Wainwright*, 634 F. Supp. 241, 248 (S.D. Fla.1986), aff'd, 813 F.2d 409 (11th Cir.1987), where the court rejected a similar claim because it "required unguided speculation into the value of omitted testimony by hypothetical witnesses." *Holt,* 1996 WL 262466, at *9.

Wright, 2011 WL 4852470, at *17. *See also Cowans v. Bagley*, 624 F. Supp. 2d 709, 788 (S.D. Ohio 2008) (absent any showing by the petitioner of the evidence that suggested experts would have provided to challenge or rebut the prosecution's fingerprint evidence, it is impossible to find that the Petitioner was prejudiced by counsel's failure to obtain experts). Petitioner has failed to establish the denial of the effective assistance of counsel.

Claim one is without merit.

C. Claim Two

Petitioner asserts that the Court improperly sentenced him as a career criminal under U.S.S.G. § 4B1.1 and § 4B1.2(a) of the advisory United States Sentencing Guidelines, *see PreSentence Investigation Report*, ¶ 50, based on his prior convictions of robbery and assault on a police officer. Petitioner argues that, under the reasoning of *Johnson*, the "residual clause" of § 4B1.1 of the United States Sentencing Guidelines likewise is constitutionally invalid, and his prior state court convictions therefore fail to qualify him for career offender status.

However, as discussed, on March 6, 2017, the United States Supreme Court held that the United States Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause, and that the residual clause in § 4B1.2(a) is, therefore, not void for vagueness. *Beckles,* 137 S. Ct. at 892. The Supreme Court reasoned that, unlike the ACCA,

> the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause. The residual clause in § 4B1.2(a)(2) therefore is not void for vagueness.

Id. at 892.

Beckles forecloses Petitioner's claim that he was improperly sentenced as a career offender under the advisory United States Sentencing Guidelines.

IV. Recommended Disposition

For the reasons set forth above, it is **RECOMMENDED** that the Government's Motion to Dismiss Claim Two (ECF No. 306) be **GRANTED** and that this action be **DISMISSED.**

The Motion to Withdraw (ECF No. 311) is **GRANTED.**

V. Procedure on Objections

If any party objects to this *Report and Recommendation*, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(B)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON, OHIO

UNITED STATES OF AMERICA

Plaintiff

v.

ERIC K. WATKINS

Defendant.

Case Nos. 2:04-cr-00119(1)
& 2:13-cv-01075

District Judge Algenon L. Marbley

Magistrate Judge

Counsel's Motion to Withdraw

Gary W. Crim moves to withdraw as counsel in this matter so that Watkins can pursue issues that present counsel failed to raise. *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013).

Memorandum in Support of Counsel's Motion to Withdraw

Watkins was originally indicted in July 2004. He went to trial on a Superseding Indictment filed in December 2004. (R. Nos. 1 & 37) He was tried on four counts: Count Eight, Conspiracy, 18 U.S.C. § 371; Count Thirteen, Armed Robbery of a Financial Institution, 18 U.S.C. §§ 2113(a) and (d); Count Fourteen, Using and Carrying of a Firearm During and in Relation to a Crime of Violence, 18 U.S.C. § 924(c)(I)(A)(ii); and Count Fifteen, Receiving, Possessing, Concealing, Storing, or Disposing of Money Taken or Stolen from a Credit Union, 18 U.S.C. § 2113(c). The jurors convicted Watkins on all four counts. Verdict, May 6, 2005, R. 135.

Watkins was finally sentenced on March 26, 2012. (Amended Judgment, R. 244) He was sentenced to concurrent terms of 60 months on Count Eight,

276 months on count Thirteen, 120 months on Count Fifteen; and a term of 84 months on Count Fourteen consecutive to the other counts. The sentence was the minimum for the Guideline Range for a Career Offender, Offense Level 37, Criminal History VI.

A. Watkins has a claim on the validity of his 18 U.S.C. § 924(c) offense

Watkins' 18 U.S.C. § 924(c) offense in Count Fourteen is predicated upon his conviction in Count Thirteen for violating 18 U.S.C. § 2113. However, 18 U.S.C. § 2113 does not meet the requirements for a crime of violence; 18 U.S.C. § 924(c) does not qualify as a proper predicate offenses under 18 U.S.C. § 924(c).

To determine whether a predicate offense qualifies as a crime of violence under § 924(c), courts use the categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). This approach requires that courts "look only to statutory definitions—i.e., the elements—of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a crime of violence. *Descamps*, 133 S. Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). In addition, under the categorical approach, a prior offense can only qualify as a crime of violence if the all of the criminal conduct covered by a statute—including the most innocent conduct matches or is narrower than the crime of violence definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the most innocent conduct penalized by a statute does not constitute a crime of violence, then the statute categorically fails to qualify as a crime of violence.

As a result, post-*Descamps*, for 18 U.S.C. § 2113 to qualify as a crime of violence under § 924(c)(3)'s force clause the offense must have an element of physical force. And physical force means *violent* force—that is strong physical force, which is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original).

Further, Section 924(c) provides as a definition for a crime of violence that a felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Like in *Johnson*, this type of residual clause does not comport with fair notice provisions of the Due Process clause, and Watkins' convictions fell under this now defunct provision.

Federal robbery of a financial institution pursuant to § 2113, does not meet this requirement because it can be accomplished through deceptive acts that do not require the use, attempted use, or threatened use of violent force.

18 U.S.C. § 2113(a) states in part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Thus, the statute may be violated by intimidation or by entering a bank. This falls far short of the physical force required to prove a crime of violence; therefore, pursuant to *Johnson*, the 18 U.S.C. § 924(c) conviction is constitutionally infirm.

In *United States v. McBride*, the Sixth Circuit held that 18 U.S.C. § 2113's intimidation clause qualifies as violent conduct with the use of physical force. It first held that intimidation equals force but went on to hold that the statute includes nonviolent offenses as well:

> We reject McBride's contention that daylight can be found between "intimidation" and "threatened use of physical force." Although McBride is correct that intimidation can be communicated by "words, demands, and gestures," so too with the threat of physical force, *Gilmore*, 282 F.3d at 402. Furthermore, even if we accept McBride's arguments that one can threaten to cause bodily injury that does not require physical force, *see, e.g., United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012) (considering poisoning), as discussed above, that is not the case with intimidation in the § 2113(a) context, which requires the threat to use physical force, not merely to cause bodily injury.
>
> Our rejection of McBride's *Johnson* argument should not be read as a complete endorsement of the government's position that a violation of § 2113(a) is categorically a crime of violence. In addition to bank robbery, the statute criminalizes "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank." That language could certainly encompass many nonviolent felonies. Section 2113(a) seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to commit any felony affecting it (e.g., such as mortgage fraud) on the other. If that is the case, then the modified categorical approach is necessary to determine whether a particular § 2113(a) conviction qualifies as a crime of violence. See *Descamps v. United States*, 133 S. Ct. 2276, 2285, 2289-90, 186 L. Ed. 2d 438 (2013). In any event, because McBride appears to concede that his prior convictions fall under the first set of elements listed in § 2113(a), that question is beyond the limited scope of our review.

United States v. McBride, No. 15-3759, 2016 U.S. App. LEXIS 10538, at *5-6 (6th Cir. June 10, 2016). In *United States v. McBride*, 2016 WL 3209496 (6th Cir. 2016), the Sixth Circuit held that 18 U.S.C. § 2113's intimidation clause

qualifies as violent conduct with the use of physical force. However, that case is currently pending further appellate review.

In *Mathis v. United States*, No. 15-6092, (June 23, 2016), the United States Supreme Court rejected an attempt to parse Iowa's burglary statute. The Supreme Court read the statute and held that because the statute included non-violent conduct, the government could not rely on such convictions to establish an Armed Career Criminal Act status. The Court said:

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

Id. At 17-18.

The same logic applies to § 2113(a) convictions. As noted above, the Sixth Circuit has determined that 2113(a) includes both violent and nonviolent behavior.

Watkins admits that in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), the Sixth Circuit held that 18 U.S.C. § 924 is in no way effected by the *Johnson* decision. However, in *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016), the Sixth Circuit held that the Immigration and Nationality Act's residual definition of crime of violence in 8 U.S.C.S. § 1101(a)(43)(F) and 18 U.S.C.S. § 16(b) is void for vagueness. The statutory language is the same as 18 U.S.C. § 924(c)(1)(D).

Finally, the United States Supreme Court heard arguments in *Sessions v. Dimaya*, Case No. 15-1498, on January 7, 2017, and a decision is expected by