

APPENDIX

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purchased a methamphetamine precursor. Upon discovering their mutual concern, D'Alessandro and Peoples traveled to Lykins's home together on October 12, 2011.

When they arrived, Lykins permitted both of them to enter, and Peoples smelled an odor that he recognized as a fuel used to manufacture methamphetamine and informed D'Alessandro of this. Based on his suspicion of drug manufacturing, supported by Peoples's detection of the odor and the information that Lykins's wife had recently purchased the precursor, D'Alessandro decided to conduct a full search rather than a cursory "plain view" search, as was permitted under the terms of Lykins's supervised release. This search led to the discovery of extensive evidence of methamphetamine manufacturing and a .38-caliber revolver.

After a jury trial, Lykins was convicted of manufacturing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was sentenced to 262 months of imprisonment for the drug count to be served concurrently with a prison term of 120 months for the firearm conviction, and to six years of supervised release.

This court affirmed Lykins's conviction and sentence, rejecting his arguments that: (1) the district court erroneously denied his motion to suppress the evidence obtained from the search; (2) the district court erroneously permitted evidence of a prior conviction to be admitted into evidence under Federal Rule of Evidence 404(b); (3) he was prejudiced by the district court's mention of his motion to suppress when it instructed the jury that the legality of the search was not open for consideration; and (4) the district court was required to instruct the jury on the lesser included offense of simple possession of methamphetamine.

In August 2014, Lykins filed his pro se § 2255 motion to vacate, presenting eleven grounds for relief: (1) counsel performed ineffectively by failing to object to the "contradictory testimony" of D'Alessandro and Peoples and by inadequately cross-examining these witnesses; (2) the government failed to prove an unbroken chain of custody of the seized items; (3) the government tampered with the evidence, and the evidence from his search was co-mingled with evidence from an unrelated search; (4) the sentencing court failed to explain certain special conditions of his supervised release that were imposed for his 2004 conviction; (5) his Fifth Amendment rights were violated when the officers failed to give him warnings under *Miranda v.*

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Arizona, 384 U.S. 436 (1966) during the search; (6) Peoples testified both as an expert and a fact witness without the requisite cautionary jury instructions about his dual testimony; (7) the district court erroneously permitted evidence of his 2004 plea agreement; (8) the district court abused its discretion by notifying the jury that it had denied Lykins's motion to suppress; (9) the district court permitted a warrantless search in violation of his Fourth Amendment rights and improperly admitted into evidence the fruits of the illegal search; (10) the district court erred in failing to separate Peoples's expert testimony from his fact testimony; and (11) he established cause and prejudice for any procedural default that the district court may find. *stop*

In a motion to supplement his brief, Lykins argued that he should not have been considered a career offender under USSG § 4B1.2 after the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2557-59 (2015). The court appointed Lykins counsel, granted him leave to amend his motion to add the *Johnson* claim, and ordered briefing. The court otherwise rejected all of Lykins's claims. After the court ordered further briefing on the *Johnson* claim, it recognized that the Supreme Court, in *Beckles v. United States*, 137 S. Ct. 886 (2017), had since decided that the residual clause of USSG § 4B1.2(b) was not unconstitutionally vague, unlike the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See Johnson*, 135 S. Ct. at 2557-59. Therefore, the court concluded that the sentencing court had properly sentenced Lykins as a career offender after finding that his prior conviction of wanton endangerment was a qualifying violent felony. The court then denied the § 2255 motion in full and denied a COA.

To obtain a COA, Lykins must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Insofar as his claims were rejected on the merits, he must show 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).

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that

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jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Claims Litigated on Direct Appeal

The district court determined that Lykins's claims enumerated as one, eight, and nine had already been presented and resolved in this court's decision affirming his conviction and sentence. A § 2255 motion may not be used to relitigate issues that were denied on direct appeal except in extraordinary circumstances, such as when there has been an intervening change in the law. *See Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999).

On direct appeal, this court reviewed the testimony in detail, deferring to the district court's determination that D'Alessandro's testimony was credible and supported the district court's decision to deny Lykins's motion to suppress. The court then rejected Lykins's claim that any inconsistencies between the testimony by D'Alessandro and Peoples undermined a finding of probable cause. This court determined that the district court had abused its discretion when it revealed to the jury its denial of the suppression motion but concluded that the error was harmless because the district court had instructed that only D'Alessandro's credibility was at issue and not whether D'Alessandro had probable cause to search the residence.

These claims regarding the officers' testimony and the suppression motion were litigated and resolved in Lykins's direct appeal, and Lykins offers nothing new to support his claim that counsel was ineffective for failing to object to the "contradictory" testimony by D'Alessandro and Peoples. Moreover, Lykins presented no change in the law regarding these claims. Because Lykins has not alleged that any extraordinary circumstances exist to overcome the rule prohibiting relitigating issues raised on appeal, no reasonable jurist could debate the district court's denial of claims one, eight, and nine.

Lykins's seventh claim—that the district court erroneously permitted evidence of his 2004 plea agreement—was addressed and rejected by this court on direct appeal as well. This court determined that the evidence in Lykins's 2004 plea regarding his prior involvement in the manufacture of methamphetamine was properly admitted under Federal Rule of Evidence 404(b)

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to prove his intent to manufacture the substance in this case and his knowledge of that process. This court also determined that the prejudicial effect of introducing the prior bad acts did not outweigh their probative value and that the district court's limiting instruction also supported the district court's decision to allow the evidence. Therefore, this claim does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

Chain of Custody

In claims two and three, Lykins challenged the government's chain of custody of the seized evidence and accused the government of tampering with the evidence and possibly supplementing the evidence with contraband from an unrelated drug case. As the district court explained, Peoples's testimony unequivocally established that the evidence was properly secured and logged in. In addition, a Kentucky forensic specialist testified regarding the testing, marking, sealing, and initializing of the drug evidence, and an ATF agent testified about the receipt of the gun and ammunition that were seized. Lykins presented no evidence to support his bare allegation that the seized items had been mishandled or that the government tampered with or supplemented the evidence. Thus, reasonable jurists would not debate the district court's resolution of these two claims.

Conditions of Supervised Release

Lykins argued in ground four that the district court failed to adequately explain its reasons for imposing special conditions of supervised release when he was sentenced in 2004. As the district court found, this claim involved his first conviction and sentence and was unrelated to his current motion attacking his 2012 conviction and sentence. Therefore, reasonable jurists would not debate the district court's resolution of claim four.

Failure to Give *Miranda* Warning

In claim five, Lykins stated that the officers violated his Fifth Amendment rights when they failed to give him a *Miranda* warning at the time they searched his home. The district court determined that Lykins had procedurally defaulted this claim by failing to challenge the admissibility of his statements prior to trial. Moreover, Lykins failed to show any cause for the default or prejudice arising from it. In the alternative, the district court denied the claim on the

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merits because Lykins was not arrested or prevented from leaving his residence during the search, and there was no display of force that would imply he was being detained.

As Lykins acknowledged in his § 2255 motion, a defendant is entitled to *Miranda* warnings only if he is interrogated while in police custody. *See Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977). In determining whether an interrogation is custodial, this court considers “(1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual’s freedom of movement; and (4) whether the individual was told that he or she did not need to answer the questions.” *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010). A reasonable person in Lykins’s situation would not have felt unable to terminate questioning. Therefore, Lykins was not in custody for *Miranda* purposes. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). As a result, reasonable jurists would not debate the district court’s resolution of claim five.

Dual Testimony by Peoples

In claims six and ten, Lykins challenged the district court’s decision to allow Peoples to testify both as to facts and as an expert witness regarding his experience as an investigator in the area of methamphetamine manufacturing without proper jury instructions and without sufficiently defining the two types of testimony during the trial. The district court determined that Lykins had procedurally defaulted this claim and failed to present cause for this failure or prejudice to this case as a result.

The district court also rejected this claim on the merits. As the court explained, Peoples was not categorically prohibited from testifying as both a fact witness and an expert witness trained and certified on clandestine meth labs and methods of manufacturing the substance. *See United States v. Pritchett*, 749 F.3d 417, 430 (6th Cir. 2014). In this case, Peoples testified as to his experience and was then presented with another line of questioning about the search of the residence on October 12, 2011. This “clear demarcation” in Peoples’s testimony met the requirement of assuring that the jury would “give proper weight to each type of testimony.” *Id.* (quoting *United States v. Lopez-Medina*, 461 F.3d 724, 743 (6th Cir. 2006)). Moreover, the jury was given the Sixth Circuit’s Pattern Instruction on opinion testimony, “so the jurors had the tools for properly evaluating” Peoples’s opinion. *Id.* Finally, Lykins presents nothing to show

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that this dual testimony affected his “substantial rights or the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* Therefore, reasonable jurists would not debate the district court’s resolution of these two claims.

Claim of Showing Cause and Prejudice

Lykins claimed in ground eleven that he could show cause and prejudice if the court should determine that he had procedurally defaulted any claim. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The district court noted that Lykins presented this argument as a general proposition, arguing that his trial counsel’s performance “was so deficient and egregiously so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” However, Lykins failed to relate this claim to any particular issue or facts presented in his motion and cited only the general cause-and-prejudice standard for determining whether a habeas claim may be considered on the merits. Reasonable jurists would not debate the district court’s conclusion that Lykins’s general argument failed to show the requisite prejudice to excuse Lykins’s default of any issues as determined by the district court. *See Johnson v. Bradshaw*, 493 F. App’x 666, 669 (6th Cir. 2012).

Sentencing Under the Career Offender Guideline

The district court properly determined that *Beckles* dispensed with Lykins’s claim that he could not be considered a career offender under USSG § 4B1.2(a) based on his prior conviction of wanton endangerment. *See Beckles*, 137 S. Ct. at 895. Therefore, for the reasons stated by the district court in its second and final order denying the motion to vacate, reasonable jurists would not debate the district court’s resolution of this claim.

Accordingly, Lykins’s request for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX

B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL ACTION NO. 12-2-DLB-EBA

UNITED STATES OF AMERICA

PLAINTIFF

vs.

JUDGMENT

JAMES EDWARD LYKINS

DEFENDANT

In accordance with the Order entered contemporaneously with this Judgment, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, **IT IS ORDERED** and **ADJUDGED** as follows:

(1) Defendant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Doc. # 76) is **DENIED IN FULL**; and

(2) This matter is **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court's active docket.

This 19th day of July, 2017.



Signed By:

David L. Bunning *DB*

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL ACTION NO. 12-2-DLB-EBA

UNITED STATES OF AMERICA

PLAINTIFF

vs.

ORDER

JAMES EDWARD LYKINS

DEFENDANT

*** **

This matter is before the Court on one final remaining claim in Defendant Lykins' motion to vacate his sentence.¹ Lykins contends that the Supreme Court's *Johnson* decision retroactively excludes his prior wanton endangerment conviction from being used as a predicate offense under the guideline's career offender residual clause. After briefing was completed on that sole issue, the Court stayed the motion pending the Supreme Court's then-pending case of *Beckles v. United States*.

On March 6, 2017, the Supreme Court decided *Beckles*, which eliminated the *Johnson* case as a basis for a career offender guidelines challenge and held that the Federal Sentencing Guidelines, including Section 4B1.2(a)'s residual clause, are not subject to vagueness challenges under the due process clause. More specifically, the Supreme Court distinguished the residual clause in the career offender guideline from the

¹ By Order dated March 11, 2016, the Court disposed of all other claims raised in Lykins' § 2255 motion (Doc. # 93). However, in that same Order the Court permitted Lykins to raise the issue of whether he should still properly be categorized as a career offender after the *Johnson v. United States*, 135 S.Ct 2551 (2015) decision.

identically worded clause from the Armed Career Criminal Act (ACCA), which was found to be unconstitutionally vague in *Johnson*. Because the guidelines, unlike the ACCA, “merely guide” the Court in choosing—but do not “fix”—an appropriate sentence, they are “not subject to a vagueness challenge under the Due Process Clause.” *Beckles*, 137 S.Ct. 886, 892 (2017). The Magistrate Judge relies on *Beckles* in his Order recommending that the remaining claim in Lykins’ motion to vacate be denied (Doc. # 107).

In his objections at p. 2, Lykins relies upon a portion of this Court’s prior Order (Doc. # 93 at p. 7) in boldly stating that his “wanton endangerment conviction no longer counts as a predicate offense” (Doc. # 108). Unfortunately for Lykins, the Court’s prior statement in Doc. # 93 was based on the mistaken premise that *Beckles* would follow in line with *Johnson*, which we now know was not the case.

In this case, consistent with *Beckles*, Lykins was properly determined to be a career offender within the definition of the residual clause of U.S.S.G. § 4B1.2(a). In making that decision at sentencing, the Court stated –

The case law in both the Sixth Circuit and the U.S. Supreme Court indicate that a categorical approach should be used for district courts that are asked to review whether or not certain prior sentences qualify as predicate offenses for career offender purposes.

In fact, in determining whether a prior conviction qualifies as a crime of violence for career offender purposes, the Court must use that categorical approach and look only to the fact of the conviction and the statutory definition, not the facts underlying the offense, to determine whether that definition supports a conclusion that the conviction was a crime of violence. And I’ll cite to a couple of Sixth Circuit cases. The first one is U.S. v. Ruvalcaba, R-u-v-a-l-c-a-b-a, 627 F.3d 218 at page 221. That’s Sixth Circuit 2010 and United States vs. Barte, B-a-r-t-e-e, 529 F.3d 357, 359 Sixth Circuit 2008.

Under this approach, courts consider the offense generally. That is to say, they should examine it in terms of how the law defines the offense and not

in terms of how an individual offender might have committed it on a particular occasion. And that's *Begay v. United States*. *Begay* is B-e-g-a-y, 553 U.S. 137, 141 (2008).

In this case, the particular guideline Section 4B1.2(a) defines a crime of violence as an offense that warrants at least a year in prison and otherwise involves conduct that presents a serious potential risk of physical injury to another. That's the particular section of that guideline provision that applies here.

Under Kentucky law, "A person is guilty of wanton endangerment in the 1st degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." And that's KRS 508.060.

Wanton conduct occurs when a person is aware of a constant disregard of substantial and unjustifiable risk that will occur or that the circumstances exist. And that's in the definitional section, KRS 501.020, subparagraph (3). In order to constitute wanton conduct, "the risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

Applying that categorical approach to the defendant's wanton endangerment conviction in paragraph 54 of his presentence report, the Court concludes that the conviction itself does constitute a crime of violence for career offender purposes. In reaching this conclusion, the Court relies upon the Sixth Circuit's recent decision in the *United States v. Meeks* case, 664 F.3d at page 1067 (2012), where the Court concluded that a conviction for 1st degree wanton endangerment under Kentucky law in violation of KRS 508.060, the very same section that the defendant was found to be guilty of here, is a crime of violence. And that's at page 1068. In view of *Meeks*, the Court is compelled to overrule the defendant's objection, and *Meeks* does control.

Doc. # 71 at p. 9-11.

Based on these findings, the applicable case law cited therein, and consistent with *Beckles*, the Court's designation of Lykins as a career offender within the meaning of the residual clause of § 4B1.2(a) was constitutional. Accordingly,

IT IS ORDERED as follows:

1. Lykins' Objections (Doc. # 108) to the Magistrate Judge's March 22, 2017 Order are **overruled**;
2. That portion of the Court's prior Order (Doc. # 93 at p. 6-7) which concluded that Defendant's wanton endangerment conviction is not a valid predicate offense under the residual clause of U.S.S.G. § 4B1.2(a) is **vacated**;
3. The Magistrate Judge's March 22, 2017 Order (Doc. # 107) be, and hereby is, **adopted in full as the opinion of the Court**;
4. Lykins' Motion for Leave to Cite Supplemental Authority (Doc. # 111) is **denied as moot**;
5. Lykins' Motion to Vacate Pursuant to 28 U.S.C. § 2255 (Doc. # 76) is **denied in full**;
6. For the reasons set forth in the March 22, 2017 Order, as supplemented herein, the Court determines there would be no arguable merit for an appeal in this matter and, therefore, no certificate of appealability shall issue; and
7. This matter is hereby **dismissed with prejudice** and **stricken** from the Court's active docket.

This 19th day of July, 2017.



Signed By:

David L. Bunning

DB

United States District Judge

APPENDIX

F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL ACTION NO. 12-2-DLB-EBA

UNITED STATES OF AMERICA

PLAINTIFF

vs. ORDER ADOPTING REPORT AND RECOMMENDATION

JAMES EDWARD LYKINS

DEFENDANT

I. Introduction

This matter is before the Court on the Report and Recommendation (R&R) of United States Magistrate Judge Edward B. Atkins (Doc. # 89), wherein he recommends that the Court deny Defendant's Motion to Vacate, Set Aside or Correct his Sentence under 28 U.S.C. § 2255 (Doc. # 76). Defendant has filed objections to the R&R. (Doc. # 92). Most of Defendant's arguments can be denied in summary fashion, as they merely rehash the same issues already addressed in the R&R. However, the Court will grant Defendant's Motion for Leave to Amend his § 2255 Motion (Doc. #86), and schedule a hearing on one particular issue raised by Defendant – namely, whether he is still properly categorized as a career offender after the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551, 2557-59 (2015).

II. Analysis

Pursuant to 28 U.S.C. § 636(b)(1), a party may file written objections within fourteen days after being served with a copy of a magistrate judge's report and recommendation.

Objections must specifically challenge portions of the report or the proposed findings or recommendations. *Id.* If a party is properly informed of the consequences of failing to file an objection, “the party waives subsequent review by the district court . . . [by failing] to file an objection.” *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). Filing vague, general, or conclusory objections does not meet the specificity requirements and may be treated as a complete failure to file. *Zimmerman v. Cason*, 354 F. App’x 228, 230 (6th Cir. 2009) (citing *Cole v. Yukins*, 7 F. App’x 354, 356 (6th Cir. 2001)).

District courts within the Sixth Circuit have also held that, “an ‘objection’ that does nothing more than state a disagreement with a magistrate’s suggested resolution, or simply summarizes what has been presented before, is not an ‘objection’ as that term is used in this context.” See *VanDiver v. Martin*, 304 F. Supp. 2d 934, 938 (E.D. Mich. 2004); *Holl v. Potter*, No. C-1-09-618, 2011 WL 4337038, at *1 (S.D. Oh. Sept. 15, 2011) (holding that “objections that merely restate arguments raised in the memoranda considered by the Magistrate Judge are not proper, and the Court may consider such repetitive arguments waived.”). Such an “objection” fails to put the district court on notice of any potential errors in the Magistrate Judge’s Report and Recommendation. *VanDiver*, 304 F. Supp. 2d at 938.

By restating arguments already raised in his § 2255 Motion and thoroughly addressed in the Magistrate Judge’s R&R, Defendant is effectively asking this Court to reconsider that which the Magistrate Judge has already reviewed. “[This] duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrate Act.” *Howard v. Sec’y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991).

Defendant's conclusory objections notwithstanding, the Magistrate Judge's R&R sufficiently concluded that Defendant's § 2255 claims focused on the denial of the motion to suppress and the Court telling the jury about it, issues that were previously litigated by this Court and the Sixth Circuit. Absent a showing of "exceptional circumstances," an issue previously litigated may not be retried via § 2255 claim. *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999). Because Defendant has presented no such "exceptional circumstances" here, his § 2255 Motion is denied to the extent that he attempts to re-litigate these issues.

In his § 2255 Motion, Defendant also raises claims relating to: (1) the dual nature of Sheriff Peoples's testimony; (2) the failure to be read his *Miranda* rights when Probation Officer John D'Alessandro and Sheriff Peoples initially entered Defendant's home; and (3) ineffective assistance of counsel. The Magistrate Judge thoroughly reviewed and properly denied these claims, as the Court will briefly explain below.

First, the Magistrate Judge correctly concluded that the dual testimony of Sheriff Peoples was permissible. A witness is permitted to testify in a dual nature; that is, as a fact and expert witness. *United States v. Pritchett*, 749 F.3d 417, 430 (6th Cir. 2014). When testifying in a such a way, however, there must be "clear demarcation between fact testimony and expert opinion testimony." *United States v. Lopez-Medina*, 461 F.3d 724, 743 (6th Cir. 2006). However, this demarcation does not necessarily have to come in the form of a jury instruction, and failure to instruct the jury on the dual nature is not, by itself, sufficient to warrant reversal. *United States v. Martin*, 520 F.3d 656, 660 (6th Cir. 2008). So long as the fact and expert evidence are not "thoroughly intertwined," failure to provide the instruction is not reversible error. *Id.* at 659. Here, the record reflects that Sheriff

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Peoples's fact and expert testimony were clearly demarcated and not thoroughly intertwined. Moreover, the Court instructed the jury that it did not have to accept Sheriff Peoples's testimony. The instructions informed the jury that Sheriff Peoples was one of three experts, and that they were free to believe all, part, or none of his testimony.

The Court also concurs with the Magistrate Judge that there was no violation of Defendant's *Miranda* rights. For *Miranda* to be triggered, there must be a custodial interrogation. *Stansbury v. California*, 511 U.S. 318, 322 (1994). In this case, there was ample evidence that Sheriff Peoples's and Probation Officer D'Alessandro's presence and questioning of Defendant did not rise to the level of custodial interrogation. As noted in the R&R, Defendant continued cooking hamburgers during the course of his conversation with Peoples and D'Alessandro. (Doc. # 89 at 9). Defendant claims in his objections that he, personally, did not feel that he was free to go, but the subjective opinions of the parties to the interview are irrelevant for determining whether an interview was a custodial interrogation. *Id.* at 323. Instead, the standard is an objective one. *Id.* As indicated above, there was substantial objective evidence that Defendant was not subjected to a custodial interrogation.

Furthermore, the Magistrate Judge properly analyzed Defendant's ineffective assistance of counsel claims under the two-pronged *Strickland* test, and concluded that there was no prejudice to Defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1994). The only ineffective assistance of counsel argument that Defendant adequately raises is his counsel's failure to object to this Court's decision to deny the motion to suppress. However, the Sixth Circuit reviewed – and affirmed – the Court's denial of that motion. *United States v. Lykins*, 544 F. App'x 642, 647-49 (6th Cir. 2013). Thus, even if

Defendant's counsel would have objected, which was unnecessary, the outcome of the hearing and the appeal would have been the same, demonstrating a lack of prejudice.

III. Motion to Amend § 2255

Although the Magistrate Judge thoroughly addressed these issues, there is one more point that the Court needs to address. After his § 2255 Motion became ripe, Defendant filed a Motion for Leave to Amend so that the Court could consider the effect of the Supreme Court's holding in *Johnson*. (Doc. # 86). That case declared the residual clause of 18 U.S.C. §924(e), also known as the Armed Career Criminal Act (hereinafter "ACCA"), unconstitutional. *Johnson*, 135 S.Ct. at 2557-59. Here, Defendant was not convicted of being an armed career criminal; instead, he was convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). However, at sentencing, Defendant was found to be a career offender pursuant to U.S.S.G § 4B1.1. That sentencing provision is triggered when a defendant has two prior felony convictions that qualify as either a "crime of violence" or a "controlled substance offense," as defined in § 4B1.2. The language found in § 4B1.2's definition of "crime of violence" precisely mirrors the language of the violent-felony section of the ACCA, and includes the same residual clause.

The Sixth Circuit has since had the opportunity to consider the constitutionality of the residual clause of § 4B1.2 in *United States v. Alexander*, No. 15-3088, 2016 WL 640489 (6th Cir. February 18, 2016). Although that case was a direct appeal, rather than a petition for habeas corpus, the government did not challenge that § 4B1.2's residual clause is also unconstitutionally vague. *Id.* at *3.

Presuming that § 4B1.2's residual clause is unconstitutionally vague pursuant to *Johnson*, there are still two issues that need to be addressed. First, the Court must

determine whether that rule applies retroactively. If so, it must then consider whether the changed rule impacts Defendant.

Although the Sixth Circuit has not directly addressed whether this rule, as applied to § 4B1.2, is retroactive, it has spoken on the issue in the context of the ACCA's residual clause. The Sixth Circuit found that the new rule was substantive, and thus not barred by *Teague's* prohibition on retroactivity.¹ *In re Watkins*, 810 F.3d 375, 382-84 (6th Cir. 2015). The Court of Appeals reasoned that *Johnson* was retroactive because it "prohibits a certain category of punishment for a class of defendants based on their status [and] provides increased sentences for those defendants whose predicate offenses only qualify as such under the residual clause." *Id.* Defendant's sentence in this case clearly fits into the second half of *Beard's* definition, as his status as a career offender increased his category of punishment. Because the Circuit's reasoning in *Watkins* applies with equal force to § 4B1.2's residual clause, the Court finds that the *Johnson* rule is retroactively applicable to it as well.

The next question is whether Defendant's designation as a career offender was based upon § 4B1.2's now-constitutionally-impermissible residual clause. It was. Defendant's two prior predicate felonies were: (1) a federal manufacturing methamphetamine conviction in 2004; and (2) a wanton endangerment conviction from Kentucky state court in 1997. (Doc. # 71). *Johnson* and *Alexander* have not altered the controlled substance provision of § 4B1.1, leaving the manufacturing methamphetamine

1) The Sixth Circuit was relying on *Beard v. Banks*, 542 U.S. 406, 416-17 (2004). That case holds a new substantive rule is one that "forbid[s] punishment for certain primary conduct" or "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 416-17 & n.7 (quoted in *Watkins*, 810 F.3d at 382).

determine whether that rule applies retroactively. If so, it must then consider whether the changed rule impacts Defendant.

Although the Sixth Circuit has not directly addressed whether this rule, as applied to § 4B1.2, is retroactive, it has spoken on the issue in the context of the ACCA's residual clause. The Sixth Circuit found that the new rule was substantive, and thus not barred by *Teague's* prohibition on retroactivity.¹ *In re Watkins*, 810 F.3d 375, 382-84 (6th Cir. 2015). The Court of Appeals reasoned that *Johnson* was retroactive because it "prohibits a certain category of punishment for a class of defendants based on their status [and] provides increased sentences for those defendants whose predicate offenses only qualify as such under the residual clause." *Id.* Defendant's sentence in this case clearly fits into the second half of *Beard's* definition, as his status as a career offender increased his category of punishment. Because the Circuit's reasoning in *Watkins* applies with equal force to § 4B1.2's residual clause, the Court finds that the *Johnson* rule is retroactively applicable to it as well.

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conviction as a valid predicate. The wanton endangerment charge, however, was found to be a crime of violence pursuant to § 4B1.2's residual clause. (Doc. #71 at 10). At the time, Kentucky's wanton endangerment statute was held by the Sixth Circuit to be a crime of violence pursuant to § 4B1.2's residual clause. *United States v. Meeks*, 664 F.3d 1067, 1071 (6th Cir. 2012). However, in the wake of *Johnson*, this is no longer the case, and Defendant is entitled to a hearing to determine if he is still properly categorized as a career offender now that his wanton endangerment conviction is not a valid predicate.

IV. Conclusion

For the reasons stated herein, **IT IS ORDERED AND ADJUDGED** as follows:

- (1) The Magistrate Judge's Report and Recommendation (Doc. # 89) is **adopted** as findings of fact and conclusions of law, except for his recommendation that the Court deny Defendant's Motion for Leave to Amend (Doc. # 86);
- (2) Defendant's Objections (Doc. # 92) are **overruled**, except for his request for leave to amend his § 2255 Motion in light of *Johnson*;
- (3) Defendant's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 (Doc. # 79) is hereby **denied**, except as it applies to his designation as a career offender;
- (4) Defendant's Motion to Amend his § 2255 Motion (Doc. # 86) is **granted**;
- (5) The United States shall file a written response, **within thirty (30) days of the entry of this Order**, addressing *Johnson*, *Watkins*, and *Alexander* and their effect on Defendant's sentence. The United States shall also address whether Defendant is still properly categorized as a career offender; and

(6) The Court will appoint CJA counsel to represent Defendant in this matter, and schedule the filing of a response by subsequent order.

This 11th day of March, 2016.



Signed By:

David L. Bunning DB

United States District Judge

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