

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

James E. Lykins — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James E. Lykins
(Your Name)

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QUESTION(S) PRESENTED

I. The issue subsuming all other issues raised in appeal is whether the district court failed to adequately state in open court as required by Sixth Circuit Court of Appeals stare decisis its reason(s) and rationale for imposing three (3) "special conditions" of supervised release when sentencing Appellant Lykins on October 25, 2004, resulting in **plain error** and an **abuse of discretion** egregiously affecting his substantial rights.

II. A secondary issue is whether the district court committed **plain error** and an **abuse of discretion** when it denied Lykins' motion to suppress the evidence seized at his residence as a direct result of the unmistakable and improper "stalking horse" search conducted by Sheriff Craig Peoples where U.S.P.O. John D'Alessandro did not have reasonable and articulable suspicion to direct the extensive search of Lykins' home.

III. The third issue challenges the district court's erroneous characterization and implementation of Lykins' conviction in Kentucky state court for third degree assault as a crime of violence for career offender enhancement purposes.

IV. The district court committed plain and reversible error when it employed Lykins' previous conviction for the facially ambiguous wanton endangerment statute as a "crime of violence" and predicate offense to sentence Lykins as a career offender.

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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APPENDIX D	Exhibit setting forth Amendment to the United States Sentencing Guidelines dated January 21, 2016, effective January 21, 2016.
APPENDIX E	Order from the Sixth Circuit Court of Appeals denying Appellant's Petition For Rehearing dated 12/16/2013.
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at USA v. Lykins, Case No. 544 Fed.Appx. 642 (2013) and Case No. 17-5831 (2018); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at USA v. Lykins, 2:12-cr-00002 7/20/2017; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 7, 2018 (2255) and November 21, 2013 (Direct Appeal)

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12/16/2013, and a copy of the order denying rehearing appears at Appendix E.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including June 23, 2018 (date) on April 19, 2018 (date) in Application No. Appendix C. Extension Granted on 4/19/2018.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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STATEMENT OF THE CASE

Appellant Lykins was initially charged in Pendleton County, Kentucky state court following a warrantless search of his residence on October 12, 2011, by Pendleton County Sheriff Craig Peoples and United States Probation Officer ("hereinafter, U.S.P.O.") John D'Alessandro. Subsequently, a Preliminary Hearing was conducted by judicial officers on October 25, 2011. The previously indicated warrantless search of Appellant Lykins' residence can be directly attributed to a condition of his federal supervised release stemming from his conviction for Conspiracy to Manufacture Methamphetamine in 2004. Appellant Lykins was released from federal prison in 2009 and commenced his term of supervised release by U.S.P.O. D'Alessandro.

Sometime in September of 2011, it is alleged that U.S.P.O. D'Alessandro received an anonymous letter suggesting that he perform a check of Appellant Lykins. Presumably at the same time, Pendleton County Sheriff, Craig Peoples, had been investigating Appellant and his wife Christa for possible involvement with the manufacturing of methamphetamine and had just recently received notification via the National Precursor Log Exchange (NPLEx) report that Christa Lykins had just purchased a methamphetamine precursor at a nearby Kroger pharmacy. It has been inferred in court testimony that Sheriff Peoples then contacted U.S.P.O. D'Alessandro and both men traveled to Lykins' residence together on October 12, 2011 to conduct a search of the residence under the guise of a "home visit."

Upon their arrival at Lykins' home, both men were voluntarily permitted to enter the residence when, according to Sheriff Peoples questionable account of what transpired after entering the residence, it was alleged that Sheriff Peoples detected a chemical, metallic odor that caused him to suspect that a methamphetamine lab was or had been in the residence. U.S.P.O.D'Alessandro also claimed he too detected an odor, albeit unknown, and decided to search Lykins' residence, rather than merely conduct a home inspection.

Based on Sheriff Peoples dubious suspicion of drug manufacturing, U.S.P.O.D'Alessandro elected to conduct a full search without the necessary search warrant or authorization from his direct supervisor rather than perform a perfunctory "plain view" search, as was permitted under the terms and conditions of Lykins' supervised release. The search led to the discovery of evidence of alleged methamphetamine manufacturing and a .38-caliber revolver.

On January 12, 2012, Appellant Lykins was indicted by a federal grand jury sitting in the Eastern District of Kentucky, Covington Division, for Manufacturing Methamphetamine, Felon in Possession of a Firearm and the Use of a Firearm in Furtherance of a Drug Trafficking Offense. On April 4, 2012, a Suppression Hearing was conducted pursuant to defense counsel's Motion to Suppress Evidence obtained in the warrantless search of Lykins' residence. A hearing was conducted before Honorable David L. Bunning, U.S. District Judge at which time the parties submitted briefs, thereupon, the Court overruled the Motion to Suppress.

After a jury trial, Appellant 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 a term of six (6) years of federal supervised release.

The Sixth Circuit Court of Appeals affirmed Lykins' 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 then 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 evi-

dence 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. 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' 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' expert testimony from his fact testimony; and (11) he established cause and prejudice for any procedural default that the district court may find.

In a motion to supplement his brief, Lykins argued that he should not have been considered a career offender under U.S.S.G. § 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 Lykin'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 U.S.S.G. § 4B1.2(b) was not unconsti-

tutionally 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.

REASONS FOR GRANTING THE PETITION

- A. THE U.S. DISTRICT COURT FAILED TO ADEQUATELY STATE IN OPEN COURT, AS MANDATED BY PRECEDENT CIRCUIT STARE DECISIS, ITS RATIONALE FOR IMPOSING THREE (3) SPECIAL CONDITIONS OF SUPERVISED RELEASE WHEN SENTENCING APPELLANT LYKINS ON OCTOBER 25, 2004, RESULTING IN "PLAIN ERROR" AND AN "ABUSE OF DISCRETION" PERNICIOUSLY AFFECTING HIS SUBSTANTIAL RIGHTS.

Appellant Lykins respectfully submits that the three (3) "special conditions" of his supervised release imposed by the district court have had a discernable bearing and egregious impact on the instant case. For all intents and purposes, these three (3) special conditions of supervised release included in Appellant's 2004 conviction and sentence provided U.S.P.O. D'Alessandro and Sheriff Peoples unfettered access to his residence absent "probable cause."

Significantly, the district court's failure to openly advise Appellant Lykins during his sentencing hearing the specific reason(s) for imposing the "special conditions" of his supervised release, relegated the "special conditions" null and void and inapplicable! Appellant Lykins submits that imposing the special conditions as part of the judgment, when the court failed to address the three (3) special conditions as part of its oral pronouncement of sentence, constituted an abuse-of-discretion in the present case.

Appellant Lykins asserts that the district court's error in failing to explain its reasons for applying the "special conditions" of supervised release adversely affected his substantive rights. See United States v. Inman, 666 F.3d at 1001, 1004 (6th Cir. 2012)

(citing Gunter, 620 F.3d at 645). The essence of this ground involves determining "whether the district court adequately stated in open court at the time of sentencing its rationale for mandating any special conditions of supervised release." See United States v. Swanson, 209 F.Appx 522, 524 (6th Cir. 2006). Standard conditions of supervised release are deemed included in the oral sentence, unless the district court specifically states otherwise. See United States v. Jones, 696 F.3d 932, 938 (9th Cir. 2012); see also United States v. Cruz-Nagera, 454 F.App'x 371 (5th Cir. 2011)(per curiam).

The district court's failure to explain its rationale for imposing special conditions of supervised release affected the outcome of the district court proceedings because there is a reasonable probability that the district court may not have imposed the conditions if it had fulfilled its obligation to explain the basis for the conditions or at least made sure that the record illuminated the basis for the conditions. See United States v. Perazza-Mercado, 553 F.3d 65, 79, (1st Cir. 2009). Thus, it must be concluded that the district court's failure to explain the reasons for the special conditions of supervised releases affected Lykins' substantive rights which caused his freedom to be compromised.

In the instant case, Lykins meets and overcomes the burden of persuasion to make a specific showing of prejudice. See United States v. Jones, 108 F.3d 668, 672 (6th Cir. 1997)(citing United States v. Olano, 507 U.S. 725, 734-35, 113 S.Ct. 1770, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Given the lack of any explanation for the imposition of the special conditions, and given the absence

of any evidence in the record justifying the basis for the special conditions, it "may have had 'substantial influence' on the outcome of the proceeding." See Bank of Nova Scotia v. United States, 328 U.S. 750, 758-65 (1946).

Therefore, a district court's error affects a defendant's substantial rights where the error affected the outcome of the district court proceedings, insofar as the error may have had a substantial influence on the outcome of the proceedings. See United States v. Lane, 474 U.S. 438, 454-64 (1986).

Lykins further contends that under plain error review, it will be demonstrated that the district court's error seriously affected the fairness, integrity, or public reputation of the proceedings. A sentencing error leading to a more severe sentence diminished the integrity and public reputation of the judicial system as well as diminished the fairness of the criminal sentencing system. See United States v. Oliver, 397 F.3d 369, 380 (6th Cir. 2005).

For the reasons articulated herein Appellant Lykins further advances the proposition that the search of his residence was not conducted pursuant to the "special conditions" of his supervised release and must be deemed by this Court to be unlawful, illegal and unconstitutional. Further, this can be directly attributed to the fact the district court egregiously failed to advise Appellant Lykins as to the reason(s) why it was imposing any special conditions by oral pronouncement at his sentencing hearing in 2004.

A standard condition of supervised release that requires a defendant to "permit a Probation Officer to visit him or her at any time, at home or elsewhere, and permit confiscation of any contraband observed in plain view of the Probation Officer," doesn't allow law enforcement officers such as Sheriff Craig Peoples to conduct warrantless searches on the basis of reasonable suspicion of a violation of supervised release. See United States v. Hill, 776 F.3d 243 (4th Cir. 2014).

The Fourth Circuit stressed that this condition authorizes "home visits"-**"not warrantless searches"** of homes. "[L]aw enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition." The Fourth Circuit decided the standard federal condition of supervised release is distinguishable from the conditions at issue in United States v. Knights, and Samson v. California, 547 U.S. 843, 79 Cr1. 332 (2006) in terms of its impact on privacy expectations.

The condition in Knights required the probationer to submit to searches of his person, property, residence or vehicle "with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The condition in Samson made the parole subject to search or seizure by any peace officer "with or without a search warrant and with or without cause."

"In contrast, any supervision condition to which Appellant Lykins agreed to, not the "special condition" the district court

surreptitiously imposed on an unwitting Lykins during his sentencing hearing in the methamphetamine case in 2004 requiring him (Lykins) to submit to a Probation Officer's home visit and further allowed an officer to confiscate contraband in "plain view," the Fourth Circuit said, "But no condition authorized warrantless searches."

In both Knights and Samson, the fact central to the Court's holding was that the search conditions were, in the words of those opinions, "clearly expressed" and the defendants were "unambiguously" aware of it," the Fourth Circuit said.

Significantly, the question which remains to be answered by the U.S. district court and Sixth Circuit Court of Appeals is "why was Appellant Lykins originally charged in Pendleton County State Court if in fact the full-fledged search of the residence by Sheriff Peoples was conducted at the specific direction of U.S. Probation Officer John D'Alessandro due to a purported special condition of Appellant's FEDERAL SUPERVISED RELEASE?" Why wasn't Appellant immediately charged and placed in federal custody since a firearm was recovered during the search? Clearly there were procedural and jurisdictional violations of Appellant's constitutionally protected rights. Both Probation Officer D'Alessandro and Sheriff Peoples readily conceded and testified to the fact the "search" was a result of Appellant Lykins' special condition of supervised release. There was no reason for him to be taken into state custody.

- B. THE U.S. DISTRICT COURT COMMITTED PLAIN ERROR AND AN ABUSE OF DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS, THUS PERMITTING THE GOVERNMENT TO ADMIT EVIDENCE UNLAWFULLY OBTAINED FROM LYKINS' RESIDENCE AS A RESULT OF THE UNAPT INFLUENCE IMPOSED UPON U.S.P.O. JOHN D'ALESSANDRO BY SHERIFF CRAIG PEOPLES ACTUATING A "STALKING HORSE" SEARCH UNDER THE GUISE OF A HOME INSPECTION.

The reality of the situation that will never be revealed or admitted to by Officer D'Alessandro or Sheriff Peoples unfolded something like this. On October 12, 2011 at approximately 1:00 pm, Sheriff Peoples received a NPLeX notice that Appellant's estranged wife, Christa Lykins, had purchased a possible methamphetamine precursor (ephedrine). Well aware of the fact Appellant had a previous conviction in 2004 for Conspiracy to Manufacture and Distribute Methamphetamine, Sheriff Peoples hurriedly placed a telephone call to Officer D'Alessandro to inform him of Mrs. Lykins' purchase and to coordinate an "extensive search" of Appellant's property. Having illusions of apprehending Appellant right in the middle of a "cook," U.S.P.O. D'Alessandro rushed out of the Probation Office without advising Senior U.S. Probation Officer Jerry Heringer of his plan of action, nor did he secure the required or necessary written approval from his immediate supervisor in order to execute an all-encompassing search.

The point of the matter is, Officer D'Alessandro was well aware of the fact and cognizant that the search he and Sheriff Peoples were going to effectuate at Appellant's residence required adherence to the U.S. Probation Office's General Rules for Searches. Section E, paragraph one, expressly states:

A search shall be conducted only upon the written approval of an application for such search. The application shall be in writing, shall be reviewed to the probation officer's supervisor, and shall be approved in writing by the chief probation officer of the district of his or her designee, which may be the officer's supervisor. The application shall be approved prior to the officer's seeking consent or, in the case of a search pursuant to search condition, prior to the search.

Upon entering Lykins' residence Sheriff Peoples allegedly smelled a breath of a "metallic smell" associated with the manufacturing of methamphetamine. The question which begs to be answered is why didn't Officer D'Alessandro smell anything? The answer is quite simple. There wasn't any smell other than the cooking of hamburgers and Sheriff Peoples was simply using this so-called "metallic smell" as an excuse to search the residence. Better yet, Sheriff Peoples had previously testified in open court he had Appellant under investigation for the manufacture of methamphetamine and saw this as a prime opportunity to search the residence.

Appellant Lykins' principal contention is that the supervised release search was a ruse for the police investigation because the probation officer acted as a "stalking horse" for the police simply to evade the Fourth Amendment's warrant and probable-cause requirements. See United States v. Martin, 25 F.3d 293, 296 (6th Cir. 1994).

Second, Lykins challenges his probation officer's search of his residence and contends that the evidence in that search should

have been suppressed. There is little doubt that Sheriff Peoples simply used U.S.P.O. D'Alessandro as a means of searching his residence without the requirement of a warrant. See United States v. Williams, 962 F.2d 1218, 1221 (6th Cir. 1992). Moreover, it is impermissible for a parole or probation search to serve as subterfuge for a criminal investigation.

Notably, court records and numerous court transcripts will undeniably demonstrate that Lykins' U.S.P.O. was clearly acting purely at the direction of Sheriff Peoples as a "stalking horse" to help the police evade the Fourth Amendment warrant requirement. See United States v. Harper, 928 F.2d 894, 896 (9th Cir. 1991).

A search may be justified under the "special needs" doctrine, which permits warrantless searches "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987)(quotation marks omitted). Pursuant to this doctrine, a probation officer may conduct a search so long as he complies with a policy that requires sufficient justification for the search. See United States v. Henry, 429 F.3d 603, 608 (6th Cir. 2005).

Unlike in the general Fourth Amendment reasonableness context, an officer's "actual motivations" in conducting a special needs search "do matter." Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)(quotation marks omitted). A law enforcement officer cannot use the special-needs doctrine as a "stalking horse"

simply to evade the Fourth Amendment's usual warrant and probable cause requirements. See, e.g., United States v. Watts, 67 F.3d 790, 794 (9th Cir. 1995), rev'd on other grounds, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).

Numerous courts have questioned whether a stalking horse argument can succeed following the Supreme Court's ruling in United States v. Knights, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). See United States v. Penson, 141 F. App'x 406, 410 n.2 (6th Cir. 2005). However, since this Court explicitly held post-Knights that the special-needs exception "remains a legitimate basis for justifying" a search of a probationer, see United States v. Herndon, 501 F.3d 683, 688 (6th Cir. 2007), it follows that an officer's motivations still matter when the government relies on that theory to justify a search. Appellant argues that the search of his home was invalid following the "stalking horse" argument.

Contrary to the dubious and questionable assertions of U.S.P.O. D'Alessandro regarding Appellant's purported oral consent to search, the state preliminary hearing transcripts demonstrate the cross-examination testimony of Sheriff Peoples that indisputably belie Officer D'Alessandro's version of the events. See State Pre.Hng.Trans., pg. 19, lines 7-25. Specifically, lines 13-17 of page 19 explicitly state the following. "Okay. So neither of you asked for any kind of consent to the search?" "I conducted the search, yes." "And no no consent was ever obtained from Mr. Lykins?" "No written consent." Importantly, this is an exact excerpt taken from the transcripts.

According to Sheriff Peoples, Probation Officer D'Alessandro advised Mr. Lykins, "that he--due to their guidelines, you know, how they're worded I'm not for sure, but that he had the ability to search Mr. Lykins' residence and informed him of that." And Mr. Lykins did not disagree or say no, get out of my house or anything like that. See State Pre.Hng.Trans., pg. 19, lines 23-25, pg. 20, lines 1-6.

Simply put, the cross-examination responses of Sheriff Peoples definitively conclude that the full-blown unrestricted search of Appellant's residence was conducted without oral or written consent or a warrant issued by a judge, but was conducted under the federal guidelines. See State Pre.Hng.Trans., pg. 20, lines 7-9.

Furthermore, Sheriff Peoples even went so far as to testify during Appellant's jury trial in district court that he had accompanied Officer D'Alessandro to Appellant's residence for one reason and one reason only. "I was there for support and to assist in the search of the residence. See Tr.Tran., pg.44, lines 9-10. This disclosure by Sheriff Peoples irrefutably contradicts Officer D'Alessandro's mendacious contentions and testimony during Appellant's Suppression Hearing and his jury trial that there was never any premeditated intentions of conducting an intensive search of Appellant's residence.

When reviewing Sheriff Peoples' testimony in both state and federal courts, there is no doubt whatsoever that Officer D'Ales-

sandro had every intention of executing a thorough, in-depth and exhaustive search of Appellant's residence, shed or any curtilage.

Simply put, Appellant Lykins respectfully maintains that the all-inclusive and unlimited search of his residence by Sheriff Peoples at the direction of Probation Officer John D'Alessandro of his residence on October 12, 2011 was unquestionably and unequivocally conducted in violation of Appellant's Fourth and Fourteenth Amendment rights. Not only was the search conducted without a valid search warrant, it was also conducted in clear violation of the United States Probation Office's Guidelines, Regulations, Rules and Directives implemented for United States Probation Officers such as John A. D'Alessandro to scrupulously adhere to when supervising or monitoring ex-prisoners serving an undischarged term of imprisonment, probation or supervised release.

Finally, Lykins zealously challenges, albeit respectfully, his probation officer's full-blown extensive search of his residence and contends that the evidence seized in that search should have been suppressed. He contends that Sheriff Peoples used his Probation Officer as a means of searching his residence without the requirement of a warrant in order to usurp and circumvent the requirements dictated by the Fourth Amendment of the United States Constitution regarding searches of an individual's residence.

C. LYKINS' PRIOR CONVICTION FOR ASSAULT IN THE THIRD DEGREE IS NOT A "CRIME OF VIOLENCE" UNDER THE AMENDED GUIDELINES.

Appellant Lykins' prior conviction for assault in the third degree is not a "crime of violence" under the Guidelines, and therefore cannot serve as a predicate offense for the imposition of career offender penalties. As a threshold matter, his assault third degree conviction was not described in his Presentence Investigation Report at ¶¶ 35, 45 (listing the convictions both for assault in the third degree and wanton endangerment, but describing only the wanton endangerment conviction as a "crime of violence"). Indeed, in the Addendum to the Presentence Report, the Probation Officer explicitly agreed that Appellant Lykins' conviction for Assault in the Third Degree was not a crime of violence:

"Should the Court grant the defendant's objections and determine his prior conviction for Wanton Endangerment is not a crime of violence, he would not be a career offender. Lykins has a prior conviction for Assault in the Third Degree, however, the probation officer determined that this offense is not a crime of violence."

Addendum to Presentence Report at 27 (emphasis added).

Furthermore, in the time that has elapsed since Appellant Lykins was originally sentenced, the applicable guideline has changed. The career offender guideline, § 4B1.2, has been amended by the Sentencing Commission and took effect August 1, 2016. Amended Guideline attached as Appendix D Under the amended guideline:

"The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that:

- (1) Has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) Is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 21 U.S.C. § 841(c)." § 4B1.2(a) (emphasis added).

These definitions of "crime of violence," which will be examined in reverse order, are inapplicable to Mr. Lykins' Kentucky conviction for assault in the third degree.

I. Assault in the third degree is not "aggravated" assault.

Mr. Lykins has not been convicted of any of the enumerated offenses in § 4B1.2(a). The only charge listed in that guideline that could arguably serve as a predicate offense is aggravated assault; but Mr. Lykins does not have a prior conviction for "aggravated" assault. Rather, his prior conviction is for assault in the third degree - i.e., simple assault.

The term "aggravated assault" is not defined in the guideline, but Merriam-Webster's dictionary defines "aggravate" as "to make worse, more serious, or more severe." Mr. Lykins' prior assault conviction does not meet this definition, because assault in the

third degree is the least severe type of felony assault charge recognized under Kentucky law.

Under Kentucky's statutory scheme of criminal offenses, assault in the third degree is a Class D felony, which is an offense punishable by not less than one nor more than five years in prison. KRS § 508.025(2); KRS § 508.020, a Class C felony punishable by not less than five nor more than ten years in prison; and assault in the first degree, KRS § 508.010, a Class B felony punishable by not less than ten nor more than 20 years in prison. KRS § 532.060(2).

Because assault in the third degree is the least serious type of felonious assault recognized in Kentucky, it is properly viewed as simple assault. Therefore, Mr. Lykins' prior conviction for assault in the third degree cannot be considered "aggravated assault" under the enumerated offenses clause of U.S.S.G. § 4B1.2(a).

II. Assault in the third degree is not a crime of violence under the force clause.

The Kentucky crime of assault in the third degree is committed when a person "recklessly, or with a deadly weapon or dangerous instrument, intentionally causes or attempts to cause physical injury" to a person specified in the statute. KRS § 508.025(1)(a)(emphasis added). The Sixth Circuit has repeatedly emphasized that in order to qualify as a "crime of violence" under the force clause, the use or attempted use of physical force must involve more than reckless conduct. United States v. Evans, 699 F.3d 858, 863 (6th Cir. 2012) ("[I]n order to qualify as a 'crime of violence' the use or attempted

use of physical force must involve more than negligent or reckless conduct"); United States v. McMurray, 653 F.3d 367, 374-75 (6th Cir. 2011)("[W]e conclude that the 'use of physical force' clause of the ACCA....requires more than reckless conduct").

Because a Kentucky conviction for assault in the third degree may involve an element of reckless conduct, it cannot be considered a "crime of violence" under the Guidelines. Moreover, the United States has previously asserted arguments, albeit incorrectly, that Appellant Lykins' designation as a career offender is supported by his manufacturing methamphetamine conviction and a prior Kentucky conviction for assault in the third degree. The United States contends that the assault third conviction qualifies as a crime of violence under U.S.S.G. § 4B1.2.

In his 28 U.S.C. § 2255 supplemental brief, Appellant Lykins explained why the conviction for assault in the third degree is not a "crime of violence," and that, as a result, there is no second predicate offense to support a career offender designation. He gave the following reasons in support:

- 1) His assault in the third degree conviction was not mentioned in his presentence investigation report as a potential predicate offense;
- 2) In the addendum to the presentence report, his probation officer agreed that the conviction for assault in the third degree was not a crime of violence;

- 3) Since Johnson, the career offender guideline, § 4B1.2 has been amended to redefine "crime of violence." The amended definition includes both an "enumerated offenses clause" and a "force clause." Appellant Lykins' conviction for assault in the third degree does not qualify under either clause because that clause only lists aggravated assault, and assault in the third degree is more properly characterized as simple assault. And it does not qualify under the force clause because in Kentucky, assault in the third degree can be committed "recklessly." The Sixth Circuit has repeatedly emphasized that in order for an offense to qualify as a crime of violence under a force clause, the use or attempted use of physical force must involve more than reckless conduct. United States v. Evans, 699 F.3d 858, 863 (6th Cir. 2012); United States v. McMurray, 653 F.3d 367, 674-75 (6th Cir. 2011).

Because he has only one qualifying predicate offense, Appellant Lykins' guidelines were inappropriately calculated when the Court sentenced him as though he were a career offender. When a defendant is sentenced under an incorrect guidelines range, the error most often is sufficient to show a reasonable probability of a different outcome absent the error, and is a substantial infringement of the defendant's rights. See Molina-Martinez v. United States, 136 S.Ct. 1338, 1345 (2016). Thus, Lykins' rights were violated here when he was improperly sentenced as a career offender, and he is entitled to be resentenced using a correctly calculated guidelines range.

While the Appellant acknowledges that this Court is bound by the Supreme Court's Beckles decision, he respectfully points out

that under Molina-Martinez, he is entitled to have his guidelines range correctly calculated. Given that his prior convictions for wanton endangerment and assault in the third degree are not considered crimes of violence under the Sentencing Guidelines, he is entitled to be resentenced under the correctly-calculated guidelines.

Of critical import to the instant case and can be corroborated by conducting a cursory review of Appellant Lykins federal Presentence Investigation Report ("PSR") prepared by U.S.P.O. Laura A. Shannon, page 12 paragraph 54, will conclusively demonstrate Lykins was not assessed any criminal history points for the Assault in the Third Degree. Accordingly, the Assault in the Third Degree offense combined with the Wanton Endangerment cannot be employed by the United States as a predicate offense for career offender purposes. See Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); see also United States v. Amos, 496 F. App'x 517, 519 (6th Cir. 2012); United States v. Brady, 988 F.2d 664 (6th Cir. 1993).

A just result in this case would be to sentence Appellant Lykins under the correctly-calculated Guidelines range - i.e., one in which he is not deemed a career offender. Therefore, he respectfully requests to be resentenced so that the Court can evaluate the Guidelines' definition of "crime of violence," which encompasses neither assault in the third degree or wanton endangerment. This is the appropriate resolution of his case, because he is not a career offender under the Guidelines as written. If

the career offender designation goes away, his anticipated guidelines range would likely call for a sentence that is less than half of the 262 month sentence he is presently serving.

D. THE U.S. DISTRICT COURT COMMITTED PLAIN AND REVERSIBLE ERROR WHEN IT EMPLOYED LYKINS' PREVIOUS CONVICTION FOR THE FACIALLY AMBIGUOUS WANTON ENDANGERMENT STATUTE AS A "CRIME OF VIOLENCE" AND PREDICATE OFFENSE TO SENTENCE LYKINS AS A CAREER OFFENDER.

At his sentencing hearing, Appellant Lykins was found to be a career offender pursuant to U.S.S.G. § 4B1.1. The district court determined, albeit in error, that his record contained two predicate felonies that qualified him as a career offender. Those predicate offenses included 1) a federal conviction in 2004 for manufacturing methamphetamine and 2) a Kentucky conviction in 1997 for wanton endangerment.

Appellant Lykins readily conceded the point that manufacturing methamphetamine unquestionably remains a valid predicate offense for career offender purposes. However, the district court previously determined that in the wake of Johnson v. United States, 135 S.Ct 2551, 2557-59 (2015), the wanton endangerment conviction no longer counts as a predicate offense. Accordingly, the district court correctly concluded that Appellant Lykins was entitled to a hearing to determine if he is still properly categorized as a career offender. It instructed the United States to brief the relevant issues in light of Johnson. Thereupon, the United States reached the misguided conclusion, as did the district court, that wanton endangerment still qualifies as a crime of violence pursuant to § 4B1.2's residual clause.

Court records in Grant County, Kentucky will conclusively reveal and demonstrate that on September 24, 1997, Appellant

Lykins was sentenced to three and a half (3 1/2) years imprisonment for both his wanton endangerment (Case No. 97-CK-00092) and his assault in the third degree (Case No. 97-00092). Further, the evidence in the above-cited cases will also reveal there were not any intervening arrest between the two offenses, therefore, the district court should have treated Lykins' previous felony convictions in Grant County, Kentucky state court as a single conviction pursuant to U.S.S.G. § 4A1.2(a)(2), and as a result, conclude that Lykins does not qualify as for the career offender enhancement.

An extremely relevant and pertinent factor that must also be considered by this Court is the fact Lykins entered into a plea in the aforementioned Grant County state case in which the Court imposed a three and a half (3 1/2) year sentence. However, after serving only 180 days in the Grant County Detention Center, Appellant was placed on "shock probation" by the sentencing court. See **Presentence Investigation Report**, page 12.

The relevance of the imposed sentence and the manner in which the court ordered it served is the indisputable fact that in the Commonwealth of Kentucky "violent offenders" are not placed on shock probation and must serve 85% of their sentence in a Kentucky Department of Corrections penitentiary. Simply put, in the Commonwealth of Kentucky a Class D felony is not considered or characterized violent.

Quite simply, Lykins' previous convictions for wanton endanger-

ment and assault in the third degree should not be considered "separate" offenses because both sentences were imposed upon Lykins on the same day and were ordered to run concurrently.

Also section 4A1.2(a)(2), which provides instructions for computing criminal history pursuant to § 4A1.1, explains that "[i]f there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence.

Because first degree wanton endangerment does not include the use, attempted use, or threatened use of physical force as one of its elements, and because it does not include burglary of a dwelling, arson, extortion, or the use of explosives, Lykins' dispute focuses on whether a conviction for wanton endangerment falls within the residual clause of § 4B1.2(a)(2) as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). Not every crime that presents a serious potential risk of physical injury to another falls within the residual clause. Begay v. United States, 553 U.S. 137, 142-43, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008).

In Begay, the Supreme Court held that although drunk driving posed a serious potential risk of physical injury, it did not fall within the residual clause because it was a strict liability crime, and did not involve the purposeful, violent, or aggressive conduct

of the examples. Id. at 144-45. In light of Begay, courts have held that application of the residual clause of § 4B1.2(a)(2) should be guided by two inquiries: "One, does the crime present a serious potential risk of violence akin to the listed crimes? Two, does the crime involve the same kind of 'purposeful, violent, and aggressive conduct' as the listed crimes?" United States v. Ford, 560 F.3d 420, 421 (6th Cir. 2009)(citations omitted).

The Supreme Court has recently suggested that Begay's "purposeful, violent, and aggressive conduct" inquiry should be limited to crimes based on strict liability, negligence, and recklessness because it is not based on statutory language and is often redundant with the inquiry into risk. Sykes v. United States, 131 S.Ct. 2267, 2275-76, 180 L.Ed.2d 60 (2011). In other cases, levels of risk will generally divide crimes that qualify as crimes of violence from those that do not. Id. at 2275 ("In general, levels of risk divide crimes that qualify from those that do not.") See also United States v. McMurray, 653 F.3d 367, 377 n.9 (6th Cir. 2011) (noting that Sykes retreated to some degree from Begay's "purposeful, violent, and aggressive" standard.

In determining whether a prior conviction is a "crime of violence," courts should apply a "categorical approach, looking to the statutory definition of the offense and not the particular facts underlying the conviction." United States v. Gibbs, 626 F.3d 344, 352 (6th Cir. 2010)(citing Taylor v. United States, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). However, "[i]f

it is possible to violate the statute in a way that would constitute a crime of violence and in a way that would not, the court may consider the indictment, guilty plea, or similar documents to determine whether they necessarily establish the nature of the prior conviction." Id. (citing Shepard v. United States, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)).

Lykins respectfully asserts that Kentucky's wanton endangerment statute is not a categorically violent felony under the ACCA and Career Offender Guidelines, and that the district court erred by going beyond the categorical approach to determine whether a conviction based on a facially ambiguous statute was a violent felony under the ACCA and Career Offender Guidelines. Because Kentucky's wanton endangerment statute involves a substantial risk of death or serious physical injury to another, and requires proof of a mental state with a higher level of culpability than crimes involving recklessness, negligence or strict liability, it should not have qualified or been employed by the district court as a violent felony under the Career Offender Guidelines residual clause.

Contrary to the erroneous assertions of the United States, Appellant did not attempt to prevent, impede or obstruct a law enforcement officer from effectuating his arrest by using or threatening to use force or violence against the officer. The fact is, the United States has immensely inflated, exaggerated and embellished the true facts when claiming that Lykins intentionally caused, or attempted to cause physical injury to the police of-

ficer by being reckless with an alleged deadly weapon or dangerous instrument, to wit: a 2 door Chevrolet Beretta sedan.

Appellant Lykins respectfully concedes he did not exhibit, demonstrate or manifest extreme indifference to the value of human life when he was operating the above-described vehicle and a police officer, of his own fruition **dove headfirst through the open window into Lykins' vehicle**. This particular circumstance, standing alone, does not demonstrate **mens rea** necessary to support a first degree wanton endangerment in the state of Kentucky.

Appellant Lykins zealously submits, albeit respectfully that the wanton conduct occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exist. Ky.Rev.Stat.Ann. § 501.020(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.

By definition, "wanton" conduct involves more criminal intent than "reckless" conduct. A person acts recklessly when he fails to perceive a substantial and unjustifiable risk that the result would occur or the circumstances exist. Ky.Rev.Stat.Ann. § 501.020(4). Thus, under the circumstances described above, it was the law-enforcement officer's conduct that was wanton, not Appellant Lykins. The conduct and behavior of Appellant Lykins does not satisfy a conviction of Wanton Endangerment under the Kentucky Revised Statute.

It is respectfully requested that the Court find that the trial and appellate courts erred by not suppressing the evidence found in the search of the home of Appellant Lykins on October 12, 2011. Upon finding the above Courts erred the Petition for Writ of Certiorari should be granted and the case remanded for dismissal of all charges. In addition, the district court committed plain error and an abuse of discretion when utilizing Lykins' previous state convictions for third degree assault and wanton endangerment as predicate offenses for the career offender enhancement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Lykins

Date: June 14, 2018