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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

9  
10 Steven Christopher Chaney,

11 Petitioner,

12 v.

13 JT Shartle,

14 Respondent.

No. CV-16-00647-TUC-RCC

**ORDER**

15 Before the Court is a March 1, 2018, Report and Recommendation (“R&R”) from  
16 Magistrate Judge Bernardo P. Velasco (Doc. 50) recommending this Court deny  
17 Petitioner’s Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §  
18 2241 (Doc. 19)(“the Petition”). Petitioner filed a timely objection to the R&R<sup>1</sup> (Doc. 51)  
19 which has been fully briefed (Doc. 52). Additionally, Petitioner filed a notice alerting  
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21 <sup>1</sup> In spite of the fact that he is represented by counsel, on March 29, 2018 and April 4,  
22 2018, after Respondent had responded to Petitioner’s timely filed objection, Mr. Chaney  
23 independently filed two pleadings purporting to supplement the objection filed by his  
24 attorney. See Docs. 54, 55. By and through these supplemental pleadings, Petitioner  
25 raises additional objections to the R&R. *Id.* The Court will disregard these supplemental  
26 pleadings as untimely objections. See Fed. R. Civ. P. 72(b)(2)(“within 14 days after  
27 being served with a copy of the recommended disposition, a party may serve and file  
28 specific written objections to the proposed findings and recommendations.”).  
Additionally, the Court notes that Petitioner requested (Doc. 13) and was granted  
appointment of counsel in this matter (Doc. 4). Under Rule 83.3 of the Local Rules of  
Civil Procedure for this District, whenever a party is represented by an attorney, that  
party cannot thereafter appear or act in that party’s own behalf unless certain conditions  
are met. L.R. Civ. 83.3(c). Those conditions have not been met in this case. *Id.*  
Although the Court may exercise its discretion to hear a represented party in open court,  
the Court declines to do so here. *See, id.*

1 this Court to a Sixth Circuit matter examining whether Kentucky second-degree burglary  
2 categorically qualifies as generic burglary under the ACCA's enumerated-offenses clause  
3 – the same issue presented in the instant matter. Doc. 53 (citing *United States v. Malone*,  
4 No. 17-5727, 2018 WL 2107179, at \*3 (6th Cir. May 8, 2018)).

5 The Court has considered the foregoing and, for the following reasons, accepts and  
6 adopts the R&R's findings of fact and conclusions of law. As such, the Court will also  
7 deny the Petition.

#### 8 **A. LEGAL STANDARD**

9 The duties of the district court in connection with an R&R are set forth in Rule 72  
10 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). The district court  
11 may “accept, reject, or modify the recommended disposition; receive further evidence; or  
12 return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3); 28  
13 U.S.C. § 636(b)(1). The Court will not disturb a Magistrate Judge's Order unless his  
14 factual findings are clearly erroneous or his legal conclusions are contrary to law. 28  
15 U.S.C. § 636(b)(1)(A). “[T]he magistrate judge's decision ... is entitled to great deference  
16 by the district court.” *United States v. Abonce-Barrera*, 257 F.3d 959, 969 (9th Cir.2001).

17 In the event a party objects to an R&R, “[a] judge of the [district] court shall make  
18 a de novo determination of those portions of the [R&R] to which objection is made.” 28  
19 U.S.C. § 636(b)(1); *see Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). However, on its  
20 face, Section 636(b)(1) “does not . . . require any review at all . . . of any issue that is not  
21 the subject of an objection.” *Thomas*, 474 U.S. at 149; *see also*, Fed. R. Civ. P. 72(b)(3)  
22 (“The district judge must determine de novo any part of the magistrate judge's disposition  
23 that has been properly objected to.”).

#### 24 **B. BACKGROUND**

25 The factual and procedural background of this case is thoroughly detailed in the  
26 introduction of the R&R. Doc. 50 at 1-4. Petitioner's objection to the R&R does not  
27 concern these findings. See Doc. 51. As such, and by reference, this Court accepts and  
28 adopts the introduction section of the R&R.

1     **C.     DISCUSSION**

2             Magistrate Judge Velasco’s R&R recommends this Court find, as a threshold  
3 matter, that the Petition was properly brought under § 2241 (by way of 28 U.S.C. §  
4 2255(e) (“the escape hatch provision”)). Doc. 50 at 4-13. Petitioner’s objection  
5 explicitly endorses this recommendation. See Doc. 51 at 2, 4 (also arguing that this Court  
6 should issue a certificate of appealability in the event it should disagree with the  
7 Magistrate’s recommendation). There being no objection to Judge Velasco’s disposition  
8 of this matter, this Court is not obliged to review it. Nonetheless, this Court has reviewed  
9 this portion of the R&R (and associated briefs from the parties) and finds it to be  
10 thoroughly well-reasoned. This Court therefore accepts and adopts this section and  
11 concludes that the Petition was properly brought under § 2241.

12             Turning to the merits of the petition, Chaney’s sole, substantive objection to the  
13 R&R concerns Judge Velasco’s determination that second-degree burglary, as defined by  
14 Kentucky Revised Statutes (“K.R.S.”) § 511.030(1), categorically qualifies as generic  
15 burglary for purposes of sentencing enhancement pursuant to the Armed Career Criminal  
16 Act’s (“ACCA”) enumerated-offenses clause. According to Petitioner, Judge Velasco’s  
17 reasoning is flawed because it “disregards binding precedent in light of authoritative  
18 interpretations of state law.” Doc. 51 at 2.

19             As an initial point, the Court observes that Petitioner’s objection merely reasserts  
20 the same points argued in favor of his Second Amended Petition. See Docs. 19 at ¶ 40;  
21 41 at 3-5. The Court further observes that, despite his insistence that the Sixth Circuit  
22 would endorse his position, that circuit has not adopted the argument he continues to  
23 pursue by and through his objection. See Doc. 56; see also, *United States v. Maloney*,  
24 No. 17-5727, 2018 WL 2107179 (6th Cir. May 8, 2018).

25             Having considered the issue de novo, and for the reasons outlined below, the  
26 Court finds it is in agreement with the R&R’s analysis of K.R.S. § 511.030, as compared  
27 to generic burglary. Doc. 50 at 17 – 20. Incidentally, the Court agrees with the Sixth  
28 Circuit’s disposition in *Maloney*.

1           The argument Petitioner pursues by and through his objection is two-fold. First,  
2 he suggests that the Kentucky Supreme Court has issued decisions which, “show a  
3 realistic probability that Kentucky second-degree burglary is overbroad” when compared  
4 to generic burglary. Doc. 51 at 2-3, citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183,  
5 193 (2007). More specifically, Petitioner argues that cases issued by the Kentucky high  
6 court suggest that the use of the term “dwelling” in the Kentucky second-degree burglary  
7 necessarily implicates the statutory definition of “building,” and that, because the latter  
8 term encompasses vehicles and movable enclosures, the Supreme Court’s decision in  
9 *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016), should compel this Court to find  
10 that Kentucky second-degree burglary is broader than generic burglary.

11           The Court has examined these cases and finds that Kentucky case law does not, in  
12 fact, support Petitioner’s position. See, e.g., *Soto v. Commonwealth*, 139 S.W.3d 827,  
13 869 (Ky. 2004)(finding that while K.R.S. 511.010(1) defines “building,” K.R.S.  
14 511.010(2) “separately defines a ‘dwelling’ as ‘a building which is usually occupied by a  
15 person lodging therein,’ indicating that ‘building’ encompasses a broader category of  
16 structures than ‘dwelling.’ ”); *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000)  
17 (concluding, per the statutory definitions, that “every dwelling is a building, but every  
18 building is not a dwelling.”).

19           Second, Petitioner complains that Judge Velasco’s analysis inappropriately draws  
20 support from *United States Moody*, No. 5:13-cr-133-KKC-HAI, 2017 WL 2434788 (E.D.  
21 Ky. Mar. 9, 2017), *adopted by* 2017 WL 2434535 (E.D. Ky. Jun. 5, 2017). *Id.* at 2-3. In  
22 that case, an Eastern District of Kentucky magistrate judge considering the same statute  
23 of conviction at issue in this case recommended, as Judge Velasco did, that the district  
24 court should find that it categorically qualified as generic burglary. *Id.* *Moody*,  
25 Petitioner argues, was subsequently undercut by *United States v. Stitt*, 860 F.3d 854, 858-  
26 59 (6<sup>th</sup> Cir. 2017), in which the Sixth Circuit, sitting en banc, held that Tennessee  
27 aggravated-burglary does not categorically qualify as generic burglary. *Id.* at 3.

28           However, as Petitioner himself observed, the Sixth Circuit has, even more

1 recently, confronted “the very question that [Petitioner’s] petition presents – whether, in  
2 the wake of *Stitt*, Kentucky’s second-degree burglary statute qualifies as a generic  
3 burglary and thus a ‘violent felony’ under ACCA.” Doc. 53 at. 3. And in that case,  
4 *United States v. Malone*, the Sixth Circuit was aligned with *Moody* and Judge Velasco in  
5 so far as it held that Kentucky second-degree burglary does so qualify. No. 17-5727,  
6 2018 WL 2107179 at \*3 (6th Cir. May 8, 2018).

7 In sum, and for the reasons discussed in the R&R, this Court finds Petitioner’s  
8 180-month sentence, which was predicated on his three prior convictions for Kentucky  
9 second-degree burglary, was not inappropriately enhanced under the ACCA.


10 **IT IS ORDERED:**

11 1. Magistrate Judge Velasco’s Report and Recommendation (**Doc. 50**) is hereby  
12 **ACCEPTED and ADOPTED** as the findings of fact and conclusions of law by this  
13 Court over Petitioner’s objection.

14 2, Petitioner’s Second Amended Petition for Writ of Habeas Corpus (**Doc. 19**) is  
15 **DENIED**.

16 3. The Clerk of the Court shall enter judgment accordingly and close its file in this  
17 case.

18 Dated this 24th day of May, 2018.

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23 Honorable Raner C. Collins  
24 Chief United States District Judge  
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