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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gary Stephen Vogt,
10 Defendant/Movant,
11 v.
12 United States of America,
13 Respondent.
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No. CV-19-05873-PHX-DGC (MHB)
CR-12-1716-PHX-DGC
REPORT AND RECOMMENDATION

15 TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT
16 COURT:

17 On January 9, 2020, Defendant/Movant Gary Stephen Vogt, an inmate currently in
18 the custody of the U.S. Bureau of Prisons, filed an Amended Motion to Vacate, Set Aside
19 or Correct Sentence Under 28 U.S.C. § 2255, asserting that his conviction for possession
20 of a firearm during and in relation to a crime of violence, pursuant to 18 U.S.C. § 924(c) is
21 no longer constitutional based upon the Supreme Court’s decision in United States v.
22 Davis, ___ U.S. ___, 139 S. Ct. 2319 (2019).

23 In Davis, the Supreme Court held that 18 U.S.C. § 924(c)(3)(B), the “residual
24 clause” of § 924(c), is unconstitutionally vague. Movant’s underlying crime of violence
25 was maliciously damaging a building by means of an explosive, in violation of 18 U.S.C.
26 § 844(i) (the “844(i) crime”). Because that offense is a crime of violence under the residual
27 clause found unconstitutional in Davis, Movant asserts his conviction is also
28 unconstitutional.

Respondent filed a Response, in which it agrees with Movant that his conviction is unconstitutional under Davis. Respondent requests that the Court grant relief, and either reverse Movant's conviction, or substitute a conviction for the underlying § 844(i) crime in place of Movant's offense of conviction. Movant thereafter filed a Reply, in which he argues that his conviction should be reversed, citing a paragraph from his plea agreement that states: "[i]f the defendant's guilty plea or plea agreement is rejected, withdrawn, vacated or reversed at any time, this agreement shall be null and void, [] and any charges that have been dismissed because of this plea agreement shall automatically be reinstated."

Based upon the above, this Court will recommend that Movant's conviction be vacated, that the original charges be reinstated, and that the Court set a Status Hearing as soon as practical.¹

IT IS RECOMMENDED that Movant's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (doc. 8) be **GRANTED**, and that the Court vacate Movant's conviction and sentence, reinstate Movant's original charges, and set a Status Conference as soon as practical.

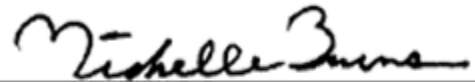
This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. **The parties shall have fourteen days²** from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the

¹ Movant's current projected release date is August 26, 2021. (Doc. 11 at 4.)

² **If the parties do not intend to file objections**, this Court suggests that they file a stipulation to that effect within seven (7) days of this Report and Recommendation.

1 district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,
2 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the
3 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
4 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's
5 recommendation. See Rule 72, Federal Rules of Civil Procedure.

6 Dated this 3rd day of December, 2020.

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Honorable Michelle H. Burns
United States Magistrate Judge
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