

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC STEVEN SILVERSMITH

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO
PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA United States Postal Service: July 18, 2023

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APPENDIX A

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

v.

Isaac Steven Silversmith

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)

Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153 and 1111, CIR - Second Degree Murder, a Class A Felony offense, a lesser included offense as charged in Count 1 of the Indictment; Title 18, U.S.C. §924(c), Use of a Firearm During a Crime of Violence, a Class A Felony offense, a lesser included offense as charged in Count 2 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED THIRTY-FIVE (235) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 2, said counts to run consecutively to each other and concurrently with the sentence imposed in Maricopa County Superior Court Case Number CR-2011-11764-001-DT, with credit for 591 days of time served in this case. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and mental health counseling. The Court further recommends that the defendant be placed in an institution in the southwestern region of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: \$0.00 RESTITUTION: To be determined

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the victim(s) in the amount(s) to be determined at a restitution hearing.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

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- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
2. You shall abstain from all use of alcohol or alcoholic beverages.
3. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
4. You are prohibited from owning, maintaining or using a firearm.
5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.
8. You shall pay any outstanding monetary restitution imposed by the Court.
9. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.

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10. You shall provide all financial documentation requested by the probation officer.
11. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**

DATED this 13th day of December, 2013.



James G. Carr
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the
institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____
Deputy Marshal

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

v.

Isaac Steven Silversmith

**AMENDED (to add § 5G1.3(b) verbiage)
JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)
Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153 and 1111, CIR - Second Degree Murder, a Class A Felony offense, a lesser included offense as charged in Count 1 of the Indictment; Title 18, U.S.C. §924(c), Use of a Firearm During a Crime of Violence, a Class A Felony offense, a lesser included offense as charged in Count 2 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED THIRTY-FIVE (235) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 2, said counts to run consecutively to each other and concurrently with the sentence imposed in Maricopa County Superior Court Case Number CR-2011-11764-001-DT, with credit for 591 days of time served in this case pursuant to § 5G1.3(b) . Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and mental health counseling. The Court further recommends that the defendant be placed in an institution in the southwestern region of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: \$0.00 RESTITUTION: To be determined

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the victim(s) in the amount(s) to be determined at a restitution hearing.

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If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

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- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
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- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
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- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
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4. You are prohibited from owning, maintaining or using a firearm.
5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
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THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**

DATED this 12th day of March, 2014.



James G. Carr
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the
institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____
Deputy Marshal

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

AMENDED (to add restitution)

v.

Isaac Steven Silversmith

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)
Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

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CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: \$0.00 RESTITUTION: \$250,000.00

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

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The defendant shall pay restitution in the total amount of \$250,000.00 to parents Lucille and Martin Valenzuela, for lost future income and funeral expenses related to their son, Jesse M.A. Thomas. The deceased victim in this matter. Payment shall be made as set forth in the Stipulated Settlement Order to issue.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

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SUPERVISED RELEASE

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- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

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- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
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- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
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- 1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
- 2. You shall abstain from all use of alcohol or alcoholic beverages.
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- 4. You are prohibited from owning, maintaining or using a firearm.
- 5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
- 6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
- 7. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.

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10. You shall provide all financial documentation requested by the probation officer.
11. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**

DATED this 14th day of January, 2015.


Honorable Roslyn O. Silver
Senior United States District Judge

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, the institution
designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____
Deputy Marshal

APPENDIX B

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

8
9 Isaac Steven Silversmith,
10 Defendant/Movant,
11 v.
12 United States of America,
13 Plaintiff/Respondent.

No. CV-20-01421-ROS (MHB)

No. CR-12-00371-PHX-ROS

REPORT AND RECOMMENDATION

14
15 TO THE HONORABLE ROSYLN O. SILVER, U.S. DISTRICT COURT JUDGE:

16 On July 1, 2020, Movant Isaac Steven Silversmith, an inmate confined in the United
17 States Bureau of Prisons filed¹ a *pro se* Motion to Vacate, Set Aside or Correct Sentence
18 Under 28 U.S.C. § 2255 (“2255 motion”). (Doc. 1.) The Court denied the 2255 motion
19 with leave to amend, as Movant’s pleading was not in the proper format. (Doc. 3.) On
20 August 3, 2020, Movant filed an Amended *pro se* 2255 Motion. (Doc. 5.) On June 10,
21 2021, the Court appointed counsel to represent Movant. (Doc. 12.) On September 23,
22 Movant through counsel filed a Second Amended 2255 motion. (Doc. 19.) In Movant’s
23 2255 motions he claims that his conviction for Use of Firearm During a Crime of violence
24 pursuant to 18 U.S.C. § 924(c) is invalid because the predicate crime, second-degree
25 murder in violation of 18 U.S.C. §§ 1153 and 1111 is not a crime of violence. He also

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27 ¹ This is the date that Movant placed his motion in the prison mailing system for mailing.
28 (Doc. 1 at 4.) That is the operative date of filing, although the motion was not docketed until July 17, 2020. See, *Huizar v. Cary*, 273 F.3d 1220, 1223 (9th Cir. 2001) (applying “prison mailbox rule” in construing filing date).

1 claims that his counsel was ineffective in not raising the claim. (*Id.*)

2 In his Second Amended 2255 motion, Movant cited as authority United States v.
 3 Borden, __ U.S. __; 141 S.Ct. 1817 (2021), in which the Supreme Court held that a crime
 4 carrying a *mens rea* of recklessness does not constitute a “violent” felony for purposes of
 5 18 U.S.C. § 924(c)(3)(A) but left open the question of whether a crime carrying a *mens*
 6 *rea* of extreme recklessness would. Movant also cited as authority United States v. Begay,
 7 a case in which a Ninth Circuit three-judge panel majority held that second-degree murder
 8 is not a crime of violence. Begay, 934 F.3d 1033 (9th Cir. 2019).

9 On November 18, 2021, Respondent filed an Unopposed Motion to Stay
 10 Proceedings Pending Resolution of Proceedings in *United States v. Begay*, No. 14-10080.
 11 (Doc. 23.) As stated in the motion, on October 27, 2021, the Ninth Circuit Court of Appeals
 12 ordered that Begay be reheard *en banc* pursuant to Federal Rule of Appellate Procedure
 13 35(a) and Circuit Rule 35-3. (*Id.*) The three-judge panel opinion in Begay was therefore
 14 vacated², thus rendering the question of whether second-degree murder is a crime of
 15 violence pending before the *en banc* Court. The parties agreed that “because Begay
 16 concerns the same question presented in Movant’s 2255 proceedings,” the matter should
 17 be stayed until a decision is rendered. (*Id.*) The Court granted the motion and stayed the
 18 proceedings pending the Begay decision. (Doc. 24.)

19 On May 5, 2022, the Ninth Circuit Court of Appeals issued its *en banc* decision in
 20 Begay and issued its Mandate on May 27, 2022.³ On May 27, 2022, this Court issued an
 21 Order that the parties filed a status report and show cause as to why the 2255 proceedings
 22 should not be dismissed in light of the decision. (Doc. 25.) Movant filed a Response on
 23 June 21, 2022, in which Movant indicated no opposition to a lifting of the Court’s Stay
 24 Order and agreed that the Court “may proceed with its decision.” (Doc. 27.) Plaintiff
 25 furthermore stated that “[a]dmitedly, the *Begay* decision would appear to foreclose relief

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 27 ² United States v. Begay, 15 F.4th 1254 (9th Cir. 2021) (mem.).

28 ³ The *en banc* Court held that second-degree murder constitutes a crime of violence
 pursuant to 18 U.S.C. 924(c)(3). United States v. Begay, 33 F.4th 1081 (9th Cir. 2022).

1 (at least in this Circuit) at this time. However, for the reasons articulated in Circuit Judge
 2 Ikuta's dissent, Movant believes the Begay case was wrongly decided, and therefore,
 3 wishes to preserve his claim for further appellate review." (Id.)

4 Because the Ninth Circuit's *en banc* decision in Begay forecloses relief as to
 5 Movant's claims, this Court will recommend that Movant's Second Amended 2255 motion
 6 be denied and dismissed with prejudice.

7 **IT IS RECOMMENDED** that the Court lift its Stay Order. (Doc. 24.)

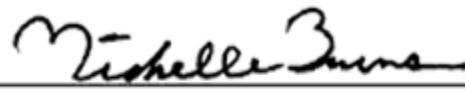
8 **IT IS FURTHER RECOMMENDED** that Movant's Second Amended Motion
 9 Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal
 10 Custody (Doc. 19) be **DENIED AND DISMISSED WITH PREJICE**.

11 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
 12 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition
 13 is justified as the Petitioner has not demonstrated a substantial showing of the denial of a
 14 constitutional right.

15 This recommendation is not an order that is immediately appealable to the Ninth
 16 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
 17 Appellate Procedure, should not be filed until entry of the district court's judgment. **The**
 18 **parties shall have fourteen days** from the date of service of a copy of this
 19 recommendation within which to file specific written objections with the Court. See 28
 20 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the
 21 parties have fourteen days within which to file a response to the objections. Pursuant to
 22 Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District
 23 of Arizona, objections to the Report and Recommendation may not exceed seventeen (17)
 24 pages in length. Failure timely to file objections to the Magistrate Judge's Report and
 25 Recommendation may result in the acceptance of the Report and Recommendation by the
 26 district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,
 27 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the
 28 Magistrate Judge will be considered a waiver of a party's right to appellate review of the

1 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's
2 recommendation. See Rule 72, Federal Rules of Civil Procedure.

3 Dated this 6th day of July, 2022.

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6 Honorable Michelle H. Burns
7 United States Magistrate Judge

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APPENDIX C

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56 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
89 Isaac Steven Silversmith,
10 Petitioner,
11 v.
12 United States of America,
13 Respondent.
14

No. CV-20-01421-PHX-ROS

ORDER

Before the Court is Movant Isaac Steven Silversmith's Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255. (Doc. 19). The § 2255 Motion argues Silversmith's conviction for use of a firearm during a crime of violence pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(c), is invalid because the predicate offense, second-degree murder in violation of 18 U.S.C. § 1111, is not a "crime of violence" in light of *Borden v. United States*, 141 S.Ct. 1817 (2021). (Doc. 19 at 3-12). In *Borden*, the Supreme Court held a crime requiring a mens rea of mere recklessness is not a "violent felony" within the meaning of a different subsection of the ACCA, § 924(e). See *Borden*, 141 S.Ct. at 1834. *Borden* expressly left open the question whether a mens rea of "extreme recklessness"—the mens rea element for second-degree murder in violation of 18 U.S.C. § 1111(a)—could constitute a crime of violence. *Id.* at 1825 n.4.

On October 27, 2021, the Ninth Circuit ordered en banc rehearing in *United States v. Begay* and vacated a panel opinion that held second-degree murder is not a crime of violence. *Begay*, 15 F.4th 1254 (9th Cir. 2021), *vacating* 934 F.3d 1033 (9th Cir. 2019).

1 On November 19, 2021, the Court stayed proceedings in this matter pending resolution of
2 *Begay*. (Doc. 24). On May 5, 2022, the Ninth Circuit sitting en banc held second-degree
3 murder is a crime of violence within the meaning of the ACCA. *Begay*, 33 F.4th 1081,
4 1093 (9th Cir. 2022) (en banc).

5 On May 27, Magistrate Judge Michelle H. Burns issued an Order requiring
6 Silversmith to show cause why this action should not be dismissed in light of *Begay*. (Doc.
7 26). In his response, Silversmith states he “does not oppose the lifting of the Stay Order
8 so that this Court may proceed with its decision” and admits “the *Begay* decision would
9 appear to foreclose relief (at least in this Circuit) at this time.” (Doc. 27). Judge Burns
10 accordingly issued a Report and Recommendation (“R&R”) recommending that the Court
11 lift the stay and deny and dismiss Silversmith’s § 2255 Motion with prejudice. (Doc. 28 at
12 3).

13 The Court finds the R&R accurately recounts the facts and law of this case. The
14 R&R will therefore be adopted.

15 Accordingly,

16 **IT IS ORDERED** the Report and Recommendation (Doc. 28) is **ADOPTED**.

17 **IT IS FURTHER ORDERED** the stay ordered on November 19, 2021 (Doc. 24)
18 is lifted.

19 **IT IS FURTHER ORDERED** Movant Isaac Steven Silversmith’s Motion to
20 Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 (Doc. 19) is **DENIED**
21 **WITH PREJUDICE**. The Clerk of Court is directed to close this matter.

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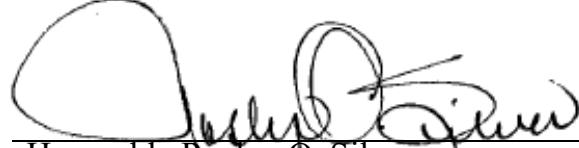
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1 **IT IS FURTHER ORDERED** a Certificate of Appealability is **DENIED** because
2 this ruling is justified by *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en
3 banc) and because Silversmith has not made a substantial showing of the denial of a
4 constitutional right. Jurists of reason would not find this ruling debatable.

5 Dated this 15th day of July, 2022.

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9 Honorable Roslyn O. Silver
10 Senior United States District Judge

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Isaac Steven Silversmith,
10 Petitioner,
11 v.
12 United States of America,
13 Respondent.
14

NO. CV-20-01421-PHX-ROS
CR-12-00371-PHX-ROS
JUDGMENT

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation
18 of the Magistrate Judge as the order of this court. Movant's motion pursuant to 28 U.S.C.
19 2255 to vacate, set aside or correct a sentence is denied with prejudice. The civil action
20 opened in connection is hereby dismissed.

21 Debra D. Lucas
22 District Court Executive/Clerk of Court

23 July 18, 2022

24 By s/ W. Poth
25 Deputy Clerk

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APPENDIX D

LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.

Michael J. Bresnahan, Esquire (Arizona Bar No. 009415)
1761 E. McNair Drive, Ste. 101
Tempe, Arizona 85283-5002
(480) 345-7032
Attorney for Movant-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

Isaac Steven Silversmith, Movant-Appellant, vs. United States of America, Respondent-Appellee.	No. 22-16154 D.C. No: 2:20-cv-01421-PHX-ROS-MHB D.C. No: 2:12-cr-00371-ROS-1 District of Arizona, Phoenix MOTION FOR CERTIFICATE OF APPEALABILITY
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COMES NOW the Movant-Appellant, Isaac Steven Silversmith, by and through the undersigned attorney, and pursuant to FRAP 22 and Circuit Rule 22-1, hereby moves this court for a certificate of appealability, all for the reasons set forth in the accompanying memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 31st day of August, 2022, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnahan
Attorney for Movant-Appellant

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 CASE HISTORY

3 Movant, Isaac Steven Silversmith (“Silversmith”), is challenging his March
4 12, 2014 conviction for possession of a firearm in relation to or in furtherance of a
5 crime of violence, and aiding and abetting, in violation of 18 U.S.C. §§ 2 and
6 924(c)(1)(A)(i), in Case number 2:12-cr-00371-ROS-1, in the United States
7 District Court for the District of Arizona. The sentencing Court's address is 401
8 West Washington Street, Phoenix, Arizona 85003.

9 On February 22, 2012, the Grand Jury approved an indictment against
10 Silversmith alleging, as follows:

11 a. Count One: First degree murder, in violation of 18 U.S.C. §§ 1111(a)
12 and 1153; and

13 b. Count Two: discharging a firearm during and in relation to a crime of
14 violence, in violation of 18 U.S.C. § 924(c) and (j) (Doc. 1)¹

15 On September 4, 2013, Silversmith pled guilty to the lesser included offense
16 in Count One of the indictment: CIR-second degree murder, in violation of 18
17 U.S.C. §§ 1111 and 1153; and the lesser included offense in Count 2 of the
18 indictment: use of firearm during a crime of violence, in violation of 18 U.S.C.
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27 ¹ Unless otherwise indicated with a “CV” preceding the docket number, all
28 citations in this document to the docket refer to the record in the related criminal
case.

1 § 924(c).

2 On December 16, 2013, the district court sentenced Silversmith to 235
3 months in prison on Count 1, and to a consecutive term of 60 months in prison on
4 Count 2. (Docs. 89, 95, 117) (Appendix B, hereto) Silversmith did not appeal his
5 conviction or sentence.

6 On July 12, 2020, Silversmith filed a *pro se* motion to vacate, set aside, or
7 correct sentence under 28 U.S.C. § 2255 in the instant case by placing the motion
8 in the prison mailing system. (CV Doc. 1) (Appendix C, hereto) The district court
9 denied that motion with leave to amend (CV Doc. 3), and Silversmith filed an
10 amended *pro se* motion on August 3, 2020. (CV Doc. 5) (Appendix D, hereto)
11 On June 10, 2021, this Court entered an order appointing counsel to represent
12 Silversmith, and granted Silversmith leave to file a second amended motion under
13 28 U.S.C. § 2255, which he filed on September 23, 2021. (CV Doc. 19)
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(Appendix E, hereto)

20 In his second amended motion under 28 U.S.C. § 2255, Silversmith adopted
21 all of the facts and arguments in his two *pro se* motions, and argued that under
22 *United States v. Davis*, 139 S.Ct. 2319 (2019), and *Borden v. United States*, 141
23 S.Ct. 1817 (2021), second degree murder, under 18 U.S.C. § 1111(a), is not a
24 “crime of violence” for 18 U.S.C. §§ 924(c) sentencing purposes. Silversmith
25 noted that in *Davis*, the Supreme Court held that the “residual clause” in
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noted that in *Davis*, the Supreme Court held that the “residual clause” in

1 § 924(c)(3) was unconstitutionally vague *Id.* at 2336. Consequently, no predicate
2 “crime of violence”, as that phrase is used in § 924(c)(3), could be based solely
3 upon that clause. He further noted that in *Borden*, a plurality of the Supreme Court
4 (Justices Kagan, Breyer, Sotomayor and Gorsuch) concluded that a criminal
5 offense (in that case, reckless aggravated assault under Tennessee law) with a
6 *mens rea* of recklessness does not qualify as a “violent felony” under the ACCA’s
7 elements clause. In reaching that conclusion, the plurality focused on the phrase
8 “against another”, holding that that phrase, when modifying a volitional action like
9 the “use of force”, demands that the perpetrator direct his force at another
10 individual. Reckless conduct, according to the plurality, is not aimed in that
11 prescribed manner. Citing *Leocal v. Ashcroft*², the plurality affirmed that when
12 read against the words “use of force”, the “against” phrase – the definition’s
13 “critical aspect” – suggests a higher degree of intent than (at least) negligence.
14 The plurality also noted that the ordinary meaning of the term “violent felony” –
15 which the elements clause defines – also informs this construction. Citing *Leocal*
16 *v. Ashcroft* and *Johnson v. United States*,³ the plurality noted that, in those
17 decisions, the Court had construed the terms “violent felony” and “crime of
18 violence” to mark out a narrow category of violent, active crimes that are best
19 understood to involve a purposeful or knowing mental state – a deliberate choice
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28 ² *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

3 *Johnson v. United States*, 559 U.S. 133 (2010).

1 of wreaking harm on another, rather than mere indifference to risk. Citing *Begay*
2 *v. United States*,⁴ the plurality went on note that classifying reckless crimes as
3 “violent felonies” would also conflict with the ACCA’s purpose – that is, to
4 address the special danger created when a particular type of offender – a violent
5 criminal – possesses a gun, adding that an offender who has repeatedly committed
6 “purposeful, violent, and aggressive” crimes poses an uncommon danger of using
7 a gun deliberately to harm a victim. The plurality distinguished the holding in
8 *Voisine v. United States*⁵ by observing that the relevant statute there was not a
9 “violent felony”, but, rather, a misdemeanor crime of domestic violence. It
10 focused not on those convicted of serious felony offenses, but, instead, of garden-
11 variety assault or battery misdemeanors – including acts that one might not
12 characterize as violent in a nondomestic context. Acknowledging that some states
13 recognize mental states (often called “depraved heart” or “extreme recklessness”)
14 between reckless and knowledge, the plurality declined to address whether
15 offenses with those mental states fall within the elements clause. Justice Thomas,
16 concurring in the judgment, concluded that the ACCA’s elements clause did not
17 encompass Borden’s conviction for reckless aggravated assault. He concluded that
18 a crime that can be committed through mere recklessness does not have as an
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⁴ *Begay v. United States*, 553 U.S. 137 (2008).

⁵ *Voisine v. United States*, 136 S.Ct. 2272 (2016).

1 element the “use of physical force” because that phrase has a well-understood
2 meaning applying only to intentional acts designed to cause harm. Thus, he
3 departed from the plurality by focusing on the “use of force” clause, rather than the
4 “against the person of another” clause, of 18 U.S.C.
5 § 924(e)(2)(i) to reach his decision.

6
7 While Silversmith’s § 2255 motion was pending, this Court handed down its
8 decision in *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022), vacating 934
9 F.3d 1033 (9th Cir. 2019). There, the *en banc* Court affirmed Randly Irvin Begay’s
10 convictions for second-degree murder (18 U.S.C. §§ 1111(a) and 1153), and for
11 discharging a firearm during a crime of violence (18 U.S.C. § 924(c)), vacated the
12 district court’s order of mandatory restitution, and remanded, in a case in which a
13 divided three-judge panel had earlier agreed with Begay’s argument that second-
14 degree murder can be committed recklessly, and, therefore, does not qualify as a
15 crime of violence for purposes of § 924(c). Judges Ikuta and Wardlaw issued
16 partial dissents that will be discussed, *infra*.

17
18 In his § 2255 motion, Silversmith argued that his § 2255 motion was timely
19 filed. It was not until *Davis* that the Supreme Court squarely held that the residual
20 clause in § 924(c)(3) is unconstitutionally vague. *See, e.g., James v. United States*,
21 550 U.S. 192 (2007) (Florida’s attempted burglary statute qualified as a “violent
22 felony” under the (similarly worded) “residual clause” found in 18 U.S.C. §
23 924(e)); *United States v. Spencer*, 724 F.3d 133 (9th Cir. 2013) (the similarly-
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1 worded “residual clause in U.S.S.G. § 4B1.2(a)(2) was not unconstitutionally
2 vague). *Davis* was published on June 24, 2019, one year and 18 days prior to
3 Silversmith filing his initial § 2255 motion.⁶ However, the Supreme Court, did not
4 state that *Davis* was retroactive in *Davis*. It was not until *In re Hammond*, 931
5 F.3d 1032, 38-39 (11th Cir. 2019) (decided on July 23, 2019), that a Circuit Court
6 of Appeals opined that *Davis* announced a new rule of constitutional law made
7 retroactive to cases on collateral review by the Supreme Court. Other Circuits
8 eventually followed suit. *See, e.g., King v. United States*, 965 F. 3d 60, 64 (1st Cir.
9 2020); *United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019); *In re Franklin*,
10 950 F.3d 909, 910-11 (6th Cir. 2020); *United States v. Brown*, 936 F.3d 109, 1097-
11 101 (10th Cir. 2019). As a practical matter, the start date for the statute of
12 limitations under 28 U.S.C. § 2255(f)(3) would arguably be the earlier of the date
13 on which the Supreme Court declared the newly asserted right retroactive to cases
14 on collateral review, or the date on which a published opinion to that effect
15 emanated from a federal court within the district, or, in the case of circuit court
16 opinion, the Circuit, in which the claim arose. Silversmith is not aware of any
17 district court decisions from the District of Arizona, or circuit court decisions from
18 the Ninth Circuit Court of Appeals, that were handed down more than one year
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27 6 The effective date of Silversmith’s initial filing is July 12, 2020, as that was the
28 date his initial motion was placed in the prison mailing system. (CV Dkt. 1) *See*
Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010) (applying prison mailbox rule
to pro se habeas petition).

1 prior to Silversmith filing his initial § 2255 motion holding that *Davis* declared a
2 newly asserted right retroactive to cases on collateral review. Any other reading of
3 § 2255(f)(3) would invite unfair and inconsistent outcomes – for example, where
4 there is no *controlling* precedent regarding retroactively of a Supreme Court case
5 during much or all of the year following the decision in that case. In that instance
6 (mostly) *pro se* litigants, with little or no access to legal materials or counsel,
7 would be expected to navigate the often complex legal landscape concerning
8 possible retroactively without a clear road map. For these reasons, and to the
9 extent that Silversmith’s claim relies on the holding in *Davis*, Silversmith argued
10 his claim should be deemed timely under 28 U.S.C. § 2255(f)(3).

14 Silversmith further argued that his motion was timely under 28 U.S.C. §
15 2255(f)(2), as the Bureau of Prisons facility at which he was housed on the date
16 the *Davis* decision was published (June 24, 2019), through the date that
17 Silversmith filed his initial § 2255 motion, did not permit inmates to have access
18 to the prison law library, or to other prison-based legal resources due to the Covid-
19 pandemic. This was arguably unconstitutional. *See e.g.*, *Bounds v. Smith*, 430
20 U.S. 817, 827 (1977) (“fundamental constitutional right of access to the courts
21 requires prison authorities to assist inmates in the preparation of filing of
22 meaningful legal papers by providing prisons with adequate law libraries or
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1 adequate assistance from persons trained in the law.”),⁷ and constituted a
2 government-imposed impediment to Silversmith timely researching, drafting and
3 filing a *Davis*-based claim *pro se*.
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5 In his motion, Silversmith also asserted that he was actually innocent of the
6 § 924(c) charge - a third ground to avoid the one-year statute of limitations.
7 Actual innocence has been deemed a gateway through the barrier caused by the
8 statute of limitations. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). Under
9 *Davis and Borden*, Silversmith is actually innocent of the § 924(c) count because
10 the predicate offense is not a crime of violence, and while the government may
11 argue that a showing of factual innocence, rather than legal innocence, is required
12 as a gateway through the statute of limitations barrier, the Ninth Circuit Court of
13 Appeals, in *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020), has seemingly done away
14 with that distinction, at least in the context of a 28 U.S.C. § 2241 claim.
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17 In his § 2255 motion, Silversmith argued that he is actually innocent of the §
18 924(c) charge, and his innocence thus provides a gateway through the statute of
19 limitations.
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22 A fourth ground argued by Silversmith to avoid the one-year statute of
23 limitations is found in the Equitable Tolling Doctrine. He noted that after the
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28 ⁷ That decision was later narrowed somewhat by *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (defendant has no abstract, freestanding right to a “law library” or legal assistance”, but, must, nevertheless be afforded an adequate opportunity to present claimed violations of fundamental unconstitutional rights to the Courts.

1 one-year statute of limitations has passed, this Court may consider a § 2255
2 motion to vacate, set aside, or correct a sentence if the petitioner establishes
3 eligibility for equitable tolling by showing: (1) That he has been pursuing his
4 rights diligently; and (2) that some extraordinary circumstance stood in his way
5 and prevented timely filing. *United States v. Buckles*, 647 F.3d 883, 889 (9th Cir.
6 2011). *See, also, United States v. Kimber*, 591 F. App'x 578 (9th Cir. 2015). If a
7 movant makes a good-faith allegation that would, if true, entitle him to equitable
8 tolling, then he is entitled to an evidentiary hearing on the issue of equitable
9 tolling. *Ray v. Lamperi*, 465 F.3d 964, 969 (9th Cir. 2006). Silversmith was
10 incarcerated at a federal Bureau of Prisons (“BOP”) facility continuously from the
11 date the *Davis* decision was handed down until the date he filed his initial § 2255
12 motion. During January 2020, the BOP facility at which Silversmith was housed
13 implemented “lock down” policies designed to protect inmates from the spread of
14 the COVID-19 virus within the prison. Those policies included suspending inmate
15 access to the prison law library and other legal assistance programs. The
16 suspension of that access continued up to and through the date of the filing of
17 Silversmith’s initial § 2255 motion. “Deprivation of legal materials is the type of
18 external impediment for which we have granted equitable tolling.” *Waldron-*
19 *Ramsey v. Pacbolke*, 556 F.3d 1008, 1013 (9th Cir. 2009). During that period of
20 time, Silversmith did not have ready and meaningful access to legal materials. He,
21 nevertheless, diligently pursued the claims he now brings by availing himself of
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1 what scant information was, and became, available during the time frame in issue.

2 In the instant case, the one-year statute of limitations should be suspended during
3 that period of time Silversmith was denied access to the resources needed to press
4 his claim. *See United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991). (“Principles of
5 equitable tolling usually dictate that when a time bar has been suspended and then
6 begins to run again upon a later event, the time remaining on the clock is
7 calculated by subtracting from the full limitations period whatever time ran before
8 the clock was stopped.”). Silversmith, who is not formally trained in the law,
9 diligently pursued his claim despite not having access to legal materials and legal
10 assistance for a significant period of time following the *Davis* decision.

11 Silversmith argued that even if Silversmith’s motion was untimely vis-a-vis
12 *Davis*, *Borden* arguably established a new rule of constitutional law, made
13 retroactive to cases on collateral review by the Supreme Court that provides an
14 additional ground for relief. Under *Teague*, a new rule will be applied
15 retroactively only if: (1) It is substantive, in that it alters the range of conduct or
16 class of people that the law punishes, or; (2) it is a watershed rule of criminal
17 procedure. *Teague v. Lane*, 489 U.S. 288, 370 (1989). The question then is
18 whether *Borden* spawned a watershed rule, or even a new rule. To qualify as a
19 watershed rule of criminal procedure, the rule must meet two requirements: (1)
20 Infringement of the rule would seriously diminish the likelihood of obtaining an
21 accurate conviction; and (2) the rule must alter our understanding of the bedrock
22

1 procedural elements essential to the fairness of a proceeding. *Tyler v. Cain*, 533
2 U.S. 656, 665 (2001). The decision in *Borden* arguably meets both prongs of the
3 *Teague* test. It is clear from the dissent in *Borden* that the rule announced by the
4 plurality (i.e., that an offense that can be committed through mere recklessness
5 cannot be a “violent felony” under the ACCA) was both substantive, and a
6 watershed rule of criminal procedure. Indeed, the dissenting opinion in *Borden*
7 included the following passage:
8

9
10 In my view, the Court’s decision disregards bedrock
11 principles and longstanding terminology of criminal law,
12 misconstrues ACCA’s text, and waves away the Court’s
13 own recent precedent. The Court’s decision overrides
14 Congress’s judgment about the danger posed by recidivist
15 violent felons who unlawfully possess firearms and
16 threaten further violence.
17

18 *Id.* at 1838.

19 For cases supporting the notion that *Borden* announced a new substantive
20 rule, retroactive under *Teague*, see *United States v. Toki*, 23 F.4th 1277, 1280 (10th
21 Cir. 2022); *In re Albertie*, 2021 U.S.App. LEXIS 26162, at *7 (11th Cir. August
22 30, 2021) (“*Borden* announced a new rule of substantive law that is retroactively
23 applicable under *Teague* [and the Suspension Clause] to cases on collateral
24 review.”).

25 In his § 2255 motion, Silversmith argued that because *Davis* and *Borden*,
26 arguably, have been made retroactive to cases that are final on direct review, and
27 his motion was filed within the time frame provided under 28 U.S.C. § 2255, his
28

1 motion was timely. He argued that any claim by the government that he
2 procedurally defaulted his claims for relief by failing to timely raise them on direct
3 review must fail, as Silversmith can demonstrate cause and actual prejudice, and
4 that he is actually innocent. *Bousely v. United States*, 523 U.S. 614, 622 (1998).
5 Cause exists when a claim is “novel”. *See Reed v. Ross*, 468 U.S. 1, 15 (1984). A
6 claim is considered novel where a Supreme Court decision (1) “explicitly
7 overrule[s] one of the Court’s precedents”, or (2) “may overturn[n] a longstanding
8 and widespread practice to which th[e] Court has not spoken, but which a near-
9 unanimous body of lower court authority has expressly approved”, or (3)
10 “disapprove[s] a practice that th[e] Court arguably has sanctioned in prior cases”.
11
12 *Id.* at 17. The Supreme Court’s decisions in *Davis* and *Borden* meet that test.
13

14
15 In his motion, Silversmith also noted that a claim of actual innocence
16 survives the dual procedural challenges of timeliness and procedural default. *See*
17
18 *McQuiggen v. Perkins*, 133 S.Ct. 1924 (2013); *Murray v. Carrier*, 477 U.S. 478,
19
20 496 (1986); *Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 126
21
22 (2006).

23 Finally, in his second amended § 2255 motion, Silversmith posited, in the
24 alternative, that to the extent that his claim would have been colorable in a
25 pretrial/pre-plea proceeding, or on direct appeal, his attorney’s failure to raise the
26 issue of whether second degree murder is categorically a crime of violence
27 constitutes prejudicial ineffective assistance of counsel. Effective trial and
28

1 appellate counsel arguably would have concluded that second degree murder was
2 not a “crime of violence” for § 924(c) purposes, and would have so-advised
3 Silversmith. So-advised, Silversmith would not have pled guilty to the § 924(c)
4 charge, and/or would have sought to have his § 924(c) conviction and sentence
5 reversed on direct appeal.
6

MAGISTRATE JUDGE'S RULING

9 On July 7, 2022, the assigned Magistrate Judge (“MJ”) recommended that
0
the district court deny relief, and dismiss the motion with prejudice.

In her brief Report and Recommendation (“R & R”), the MJ summarily concluded that *Begay, supra*, foreclosed relief as to Silversmith’s claim. (CV Doc. 28) (Appendix F, hereto)

6 On July 18, 2022, the district court, relying on *Begay, supra*, summarily
7 adopted the MJ’s R & R, denied relief, and dismissed Silversmith’s motion with
8 prejudice. (CV Doc. 29) (Appendix G)

Neither the MJ nor the district court judge addressed the issue of whether Silversmith's claim was timely.

23 On August 1, 2022, a timely Notice of Appeal was filed. (Doc. 132)
24
(Appendix H)

ARGUMENT

27 Silversmith reasserts, and incorporates herein, all arguments made in his §
28 2255 motions, and described herein, regarding the timeliness of his claims.

1 Regarding the merits of Silversmith's claim for relief, to determine whether
2 an offense is a "crime of violence" under the "force clause" (also referred to as the
3 "elements clause") in § 924(c)(3), courts have used an inquiry known as the
4 "categorical" approach. They look to whether the statutory elements of the
5 predicate offense necessarily require the use, attempted use, or threatened use of
6 physical force. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 7-10, (2004) (interpreting
7 the materially identical text in 18 U.S.C. § 16(a)); *United States v. McNeal*, 818
8 F.3d 141, 151-52 (4th Cir. 2016) (interpreting § 924(c)(3)(A)). This approach is
9 "categorical" because courts consider only the crime as defined, not the particular
10 facts in the case. *See, e.g., United States v. Mathis*, 136 S.Ct. 2243, 2248 (2016);
11 *United States v. Oca*, 655 F.3d 915, 928 (9th Cir. 2011); *McNeal*, 818 F.3d at 152;
12 *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). The courts refer
13 to the "force clause" inquiry as the *elements-based* categorical approach, because
14 it begins and ends with the offense's elements. When a statute defines an offense
15 in a way that allows for both violent and nonviolent means of commission, that
16 offense is not "categorically" a crime of violence under the force clause. *Id.* If the
17 statute is indivisible, the analysis ends there, and there can be no conviction under
18 § 924(c). *Valencia v. Lynch*, 798 F.3d 1193, 1196 (9th Cir. 2015). Here, the
19 predicate statute, second degree murder, under 18 U.S.C. § 1111(a), is indivisible.
20
21

22 In light of the plurality decision in *Borden*, *supra*, and for the reasons set
23 forth in Judge Sandra Ikuta's partial dissent in *Begay*, *supra*, Silversmith posits
24
25

1 that *Begay* was wrongly decided, and second degree murder, under 18 U.S.C. §§
2 1111(a) and 1153, is not, categorically, a crime of violence for purposes of
3 sentencing under 18 U.S.C. § 924(c), and is indivisible. Therefore, Silversmith's §
4 924(c) conviction must be vacated, and the case remanded for resentencing.
5

6 Second degree murder, under 18 U.S.C. § 1153 and 1111, can be committed
7 through recklessness. The elements of second-degree murder are that the
8 defendant (1) "unlawfully kill[ed] a human being" (2) "with malice aforethought."
9 18 U.S.C. § 1111(a); Ninth Circuit Model Criminal Jury Instruction 8.108.
10 "[M]alice aforethought covers four different kinds of mental states: (1) intent to
11 kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless
12 indifference); and (4) intent to commit a felony." *See United States v. Pineda-*
13 *Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010). As such, second-degree murder may
14 be committed recklessly—with a depraved heart mental state—and need not be
15 committed willfully or intentionally. *See United States v. Houser*, 130 F.3d 867,
16 871-72 (9th Cir. 1997) ("Malice aforethought does not require an element of
17 willfulness if the existence of that malice is inferred from the fact that defendant
18 acted recklessly with extreme disregard for human life."). It is, arguably, of no
19 consequence that the recklessness required for second-degree murder must be
20 "extreme" and goes beyond ordinary recklessness. In *United States v. Gomez-*
21 *Leon*, 545 F. 3d 777 (9th Cir. 2008), the Ninth Circuit made clear that, in order to
22 constitute a crime of violence, "the underlying offense must require proof of an
23

1 intentional use of force or a substantial risk that force will be *intentionally* used
2 during its commission" *Id.* at 787." "[O]ur precedent seems squarely to place
3 crimes motivated by intent on a pedestal, while pushing off other very dangerous
4 and violent conduct that, because not intentional does not qualify as a 'crime of
5 violence.'" *Covarrubias v. Holder*, 632 F. 3rd 1049, 1053 (9th Cir. 2011).
6 Second-degree murder also does not involve a "substantial risk that force will be
7 *intentionally* used during its commission." *See Gomez-Leon*, 545 F.3d at 787. In
8 *Covarrubias*, the Ninth Circuit held that a California offense prohibiting the
9 malicious and willful discharge of a firearm at an inhabited dwelling was not a
10 "crime of violence" because it could be committed recklessly, not just
11 intentionally. *Covarrubias*, 632 F.3d at 1053 – 55. Although the Ninth Circuit
12 conducted its analysis under § 16(b), because the BIA rested its decision on
13 subsection (b), *id.* at 1052, the analysis regarding intent bears upon either
14 subsection of § 16, and by analogy, 18 U.S.C. § 924(c)(3)(A). *See*, e.g., *Gomez-*
15 *Leon*, 545 F.3d at 787 (requiring intentional use of force for a crime of violence
16 under either subsection of § 16); *United States v. Benally*, 843 F. 3d 350, 354 (9th
17 Cir. 2016). In contrast to crimes like burglary that can be committed only
18 intentionally, "with a crime committed recklessly, it is unlikely that the reckless
19 actor will, in response to external events, form an intent to use force in furtherance
20 of his crime." *Covarrubias*, 632 F.3rd at 1055. "Classic examples of second-
21 degree murder include shooting a gun into a room that the defendant knows to be
22

1 occupied, a game of Russian roulette, and driving a car at very high speeds along a
2 crowded main street..." *United States v. Pineda-Doval*, 614 F.3d 1019, 1039 (9th
3 Cir. 2010). The risk that a crime could escalate to the use of intentional force is,
4 arguably, no more substantial for a defendant who recklessly kills than it is for a
5 defendant who recklessly shoots at a house.

7 The majority in *Begay* held that second degree murder required the *mens*
8 *rea* of malice aforethought, and extreme indifference toward human life, and,
9 therefore, was necessarily oppositional. *Begay*, 33 F.4th at 1093. In her partial
10 dissent in *Begay*, Judge Ikuta correctly noted that under *Borden*, “[t]he phrase
11 ‘against another’, when modifying the ‘use of force’, demands that the perpetrator
12 direct his action at, or target, another individual,” citing *Borden* at 141 S.Ct. at
13 1825, and, thus, concluded that second degree murder, under § 1111(a), does not
14 qualify as a crime of violence because it does *not* necessarily include the element
15 of targeting, and, therefore, is not an act *against another*, as required under 18
16 U.S.C. § 924(c)(3)(A). *Id.* at 1102. Judge Ikuta correctly noted that “to convict a
17 defendant of depraved heart murder, the government needs to show only that the
18 defendant engaged in conduct (that resulted in the death of a human being) with
19 the mental state of depraved heart or reckless indifference,” and that targeting was
20 not necessary. *Id.* at 1102. Judge Wardlaw joined Judge Ikuta in that regard in his
21 partial dissent from the majority.
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1 While *Borden* did not directly address the question of whether depraved
2 heart murder falls within the force clause of 18 U.S.C. § 924(c)(3)(A), *see id.* at
3 1825 n.4, its reasoning makes clear that an offense which does not require proof
4 that the perpetrator “direct[ed] his action at, or target[ed] another individual” does
5 not fall within the force clause, because such an offense does not involve the use
6 of force “against another”. *Id.* at 1825.
7

8 And while *Borden* specifically addressed the force clause of the ACCA, it
9 would appear to have applicability to the similarly-worded provisions of 18 U.S.C.
10 § 924(c)(3)(A). The ACCA provides sentence enhancements for felons who
11 commit crimes with firearms if they are convicted of certain crimes three or more
12 times. The qualifying prior felonies must be either “violent felonies” or “serious
13 drug offenses”. 18 U.S.C. § 924(e)(2). Section 924(e)(2)(B) provides the
14 definition of a “violent felony”:
15

16 the term “violent felony” means any crime
17 punishable by imprisonment for a term exceeding
18 one year, or any act of juvenile delinquency
19 involving the use or carrying of a firearm, knife, or
20 destructive device that would be punishable by
21 imprisonment for such term if committed by an adult,
22 that—
23

24 (i) has as an element the use, attempted use, or
25 threatened use of physical force against the
26 person of another; or
27 (ii) is burglary, arson, or extortion, involves use of
28 explosives, or otherwise involves conduct that

1 presents a serious potential risk of physical
2 injury to another;

3 Thus, the only difference between the language of 18 U.S.C. § 924(c)(3)(A) and
4 18 U.S.C. 924(e)(2)(B)(i) is that under the former, the use of force against either
5 the person *or* property of another can constitute a “crime of violence”, a distinction
6 seemingly unimportant under *Borden*. *See Davis*, 139 S. Ct. at 2325 (stating the
7 two statutes “bear more than a passing resemblance” to each other).

8 Under 28 U.S.C. § 2255, a petitioner is entitled to relief if, *inter alia*, the
9 judgement violates the Constitution or laws of the United States, the court lacked
10 jurisdiction to enter judgement, or the sentence exceeded the maximum allowed by
11 law. Because second degree murder under 18 U.S.C. § 1111(a) does not qualify as
12 a crime of violence under either § 924(c)(3)(A) or § 924(c)(3)(B) (in light of *Davis*
13 and *Borden*), Silversmith’s § 924(c) conviction is unconstitutional, and must be
14 vacated.

15 Even assuming, *arguendo*, that depraved heart murder could qualify as a
16 crime of violence if, *as a practical matter*, defendants were charged under that
17 statute only when the defendant’s conduct was directed at, or targeted, another
18 individual, such is not the case. For depraved heart murder cases not requiring
19 targeting, *see, e.g.*, *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984); *United*
20 *States v. Merritt*, 961 F.3d 1105 (5th Cir. 2020); *United States v. Sheffey*, 57 F.3d
21 1419 (6th Cir. 1995); *Pineda-Doval, supra*.

1 CONCLUSION
2

3 In light of the Supreme Court's decisions in *Davis* and *Borden*, the district
4 court erred in ruling that second degree murder under 18 U.S.C. § 1111(a) is a
5 crime of violence for sentencing purposes under 18 U.S.C. § 924(c). Moreover,
6 this Court's decision in *Begay* was wrongly decided. Therefore, Silversmith's
7 sentence under § 924(c) is unconstitutional. Silversmith's § 2255 motion was
8 timely, and should be granted.

9 Silversmith has made a substantial showing of the denial of a constitutional
10 right. 28 U.S.C. 2253(c)(2). Moreover, he has demonstrated that jurists of reason
11 could disagree with the district court's resolution of his constitutional claims, and
12 that jurists could conclude the issues presented are adequate to deserve
13 encouragement to proceed further. *Miller-El v. Campbell*, 537 U.S. 322, 327
14 (2003).

15 While a three-judge panel may be foreclosed by *Begay* from granting relief,
16 Silversmith nevertheless brings his claim for possible reconsideration by the full
17 Court, and/or to preserve his claim for possible consideration by the Supreme
18 Court.

19
20 RESPECTFULLY SUBMITTED this 31st day of August, 2022, by
21

22 ***MICHAEL J. BRESNEHAN, P.C.***

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28 s/ Michael J. Bresnehan

Attorney for Movant/Appellant

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Isaac Steven Silversmith
Reg. No. 67817-308
USP Pollock
P.O. BOX 2099
Pollock, LA 71467

Description of Document(s) (required for all documents):

MOTION FOR CERTIFICATE OF APPEALABILITY

Signature s/Michael J. Bresnahan **Date** 8/31/22

(use "s/[typed name]" to sign electronically-filed documents)

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APPENDIX A



*REDACTED FOR
PUBLIC DISCLOSURE*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CR '12 0371 PHX ROS MB
INDICTMENT

United States of America,

Plaintiff,

v.

Isaac Steven Silversmith,

Defendant.

VIO: 18 U.S.C. §§ 1153 and 1111
(CIR-First Degree Murder)
Count 1

18 U.S.C. §924(c) and (j)
(Discharge of a Firearm During a
Crime of Violence Causing
Death)
Count 2

THE GRAND JURY CHARGES:

COUNT 1

On or about February 17, 2010, in the District of Arizona, within the confines of the Salt River Pima-Maricopa Indian Reservation, Indian Country, defendant, ISAAC STEVEN SILVERSMITH, an Indian, did, with premeditation and malice aforethought, willfully kill and murder Jesse Thomas.

In violation of Title 18, United States Code, Sections 1153 and 1111.

COUNT 2

On or about February 17, 2010, in the District of Arizona, defendant, ISAAC STEVEN SILVERSMITH, did discharge a firearm, that is, a handgun, during and in relation to a crime of violence, that is, CIR-First Degree Murder as alleged in Count 1 of this indictment, a felony prosecutable in a Court of the United States, and caused the death of Jesse Thomas through the discharge of the said firearm.

1 In violation of Title 18, United States Code, Section 924(c) and (j).
2

3
4
5 A TRUE BILL
6

7 s/
8 FOREPERSON OF THE GRAND JURY
9 Date: February 22nd, 2012
10

11 ANN BIRMINGHAM SCHEEL
12 Acting United States Attorney
13 District of Arizona
14

15 s/
16 THOMAS C. SIMON
17 Assistant U.S. Attorney
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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America

v.

Isaac Steven Silversmith

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)
Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153 and 1111, CIR - Second Degree Murder, a Class A Felony offense, a lesser included offense as charged in Count 1 of the Indictment; Title 18, U.S.C. §924(c), Use of a Firearm During a Crime of Violence, a Class A Felony offense, a lesser included offense as charged in Count 2 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED THIRTY-FIVE (235) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 2, said counts to run consecutively to each other and concurrently with the sentence imposed in Maricopa County Superior Court Case Number CR-2011-11764-001-DT, with credit for 591 days of time served in this case. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and mental health counseling. The Court further recommends that the defendant be placed in an institution in the southwestern region of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 **FINE:** \$0.00 **RESTITUTION:** To be determined

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the victim(s) in the amount(s) to be determined at a restitution hearing.

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If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

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USA vs. Isaac Steven Silversmith

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- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
2. You shall abstain from all use of alcohol or alcoholic beverages.
3. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
4. You are prohibited from owning, maintaining or using a firearm.
5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.
8. You shall pay any outstanding monetary restitution imposed by the Court.
9. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.

CR 12-00371-001-PHX-ROS
USA vs. Isaac Steven Silversmith

Page 4 of 4

10. You shall provide all financial documentation requested by the probation officer.
11. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**



DATED this 13th day of December, 2013.

James G. Carr
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the
institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal _____ By: _____ Deputy Marshal _____

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

v.

Isaac Steven Silversmith

**AMENDED (to add § 5G1.3(b) verbiage)
JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)
Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153 and 1111, CIR - Second Degree Murder, a Class A Felony offense, a lesser included offense as charged in Count 1 of the Indictment; Title 18, U.S.C. §924(c), Use of a Firearm During a Crime of Violence, a Class A Felony offense, a lesser included offense as charged in Count 2 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED THIRTY-FIVE (235) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 2, said counts to run consecutively to each other and concurrently with the sentence imposed in Maricopa County Superior Court Case Number CR-2011-11764-001-DT, with credit for 591 days of time served in this case pursuant to § 5G1.3(b) . Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and mental health counseling. The Court further recommends that the defendant be placed in an institution in the southwestern region of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 **FINE:** \$0.00 **RESTITUTION:** To be determined

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the victim(s) in the amount(s) to be determined at a restitution hearing.

CR 12-00371-001-PHX-ROS
USA vs. Isaac Steven Silversmith

Page 2 of 4

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

CR 12-00371-001-PHX-ROS
USA vs. Isaac Steven Silversmith

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- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
2. You shall abstain from all use of alcohol or alcoholic beverages.
3. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
4. You are prohibited from owning, maintaining or using a firearm.
5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.
8. You shall pay any outstanding monetary restitution imposed by the Court.
9. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.

CR 12-00371-001-PHX-ROS
USA vs. Isaac Steven Silversmith

Page 4 of 4

10. You shall provide all financial documentation requested by the probation officer.
11. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**

DATED this 12th day of March, 2014.



James G. Carr
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the
institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal _____ By: _____ Deputy Marshal _____

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

AMENDED (to add restitution)

v.

Isaac Steven Silversmith

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)
Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153 and 1111, CIR - Second Degree Murder, a Class A Felony offense, a lesser included offense as charged in Count 1 of the Indictment; Title 18, U.S.C. §924(c), Use of a Firearm During a Crime of Violence, a Class A Felony offense, a lesser included offense as charged in Count 2 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED THIRTY-FIVE (235) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 2, said counts to run consecutively to each other and concurrently with the sentence imposed in Maricopa County Superior Court Case Number CR-2011-11764-001-DT, with credit for 591 days of time served in this case pursuant to § 5G1.3(b). Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and mental health counseling. The Court further recommends that the defendant be placed in an institution in the southwestern region of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: \$0.00 RESTITUTION: \$250,000.00

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

CR 12-00371-001-PHX-ROS
USA vs. Isaac Steven Silversmith

Page 2 of 4

The defendant shall pay restitution in the total amount of \$250,000.00 to parents Lucille and Martin Valenzuela, for lost future income and funeral expenses related to their son, Jesse M.A. Thomas. The deceased victim in this matter. Payment shall be made as set forth in the Stipulated Settlement Order to issue.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

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USA vs. Isaac Steven Silversmith

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- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
2. You shall abstain from all use of alcohol or alcoholic beverages.
3. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
4. You are prohibited from owning, maintaining or using a firearm.
5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.

CR 12-00371-001-PHX-ROS
USA vs. Isaac Steven Silversmith

Page 4 of 4

8. You shall pay any outstanding monetary restitution imposed by the Court.
9. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.
10. You shall provide all financial documentation requested by the probation officer.
11. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**



Honorable Roslyn O. Silver
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

By: _____
United States Marshal _____
Deputy Marshal _____

APPENDIX C

United States District Court
District of ArizonaIsaac Steven Silversmith
defendant

v.

No.Cr12-00371-001-PHX-
ROS

CV-20-1421-PHX-ROS-MHB

CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY *[Signature]* DEPUTY

JUL 17 2020

FILED
RECEIVED
LODGED
COPY

United States of America

Motion under 28 U.S.C 2255 to vacate,
set aside, or correct sentence by a
person in Federal custodyThe Defendant entered a plea of guilty on
09/04/2013 to counts 1 and 2 of the indictment.The defendant petitioning the court to hear
this untimely motion, due to the circumstances
that had incurred since 2020.The defendant argues that the attorney was
ineffective by not objecting to the plea of
924 (C), and not entering a conditional guilty
plea.

Pursuant to Davis, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019) declares that 2nd degree murder likewise cannot constitute a crime of violence under the residual clause, 18 U.S.C. 924(c)(3)(B).

Because the Supreme Court declared 18 U.S.C. 924(c)(3)(B) unconstitutionally vague, the appellate court need only determine whether second degree murder constitutes a crime of violence under the "elements clause" in subsection (A).

The defendant's crime cannot be a categorical "crime of violence" if the conduct proscribed by the statute of conviction is broader than the conduct encompassed by the statutory definition of a "crime of violence".

Movant's attorney didn't explain that 924(c) was (or is) unconstitutionally vague. 1111 murder statute is ambiguous for the 924(c) element clause which only need to be satisfied as to "crime of violence".

Movant's counsel failed to inform him that this new ruling has been pass by the Supreme Court.

Movant petitioning the court to adhere to the unconstitutional applies of 924(c) which cannot support the conviction of the 18 U.S.C 1111 statute.

Summary

The 9th Circuit held that 2nd-degree murder (18 U.S.C. 1111 and 1153) is not a crime of violence that can support an 18 U.S.C. 924(c) conviction. The Court held that because 2nd-degree murder can be committed recklessly, it does not categorically constitute a "crime of violence" under the elements clause (924(c)(3)(A)), and under Supreme Court's June 24 U.S. v. Davis decision, the crime likewise cannot constitute a crime of violence under the residual clause. *Begay v. U.S.*, 2019 U.S. App. LEXIS 25194 (9th Cir. Aug. 22, 2019).

I declare under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C 2255 was placed in the prison mailing system on 7 12 2020
(mon, date, year)

Executed on 7-11-20 (date)

Steve Barnes

Signature of Movant

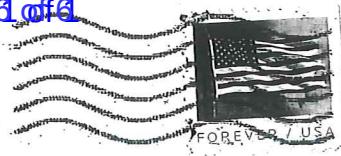
Isaac Silversmith H-1712-208
United States Penitentiary
U. S. P. - Pollock
P.O. Box 2099
Pollock, LA 71467

Case 22-20461-Doc#12680-657 Filed 07/17/20, Page 6 of 6

(44 of 99)

SHREVEPORT LA 7100

14 JUL 2020 PM21



RECEIVED

JUL 17 2020

CLERK OF THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DISTRICT OF ARIZONA
Clerk of U.S. District Court
Suite 130, 401 West Washington Street, 5PC1
Phx, AZ 85003-2218

A-068

APPENDIX D

Isaac Steven Silversmith #67817-308
 Name and Prisoner/Booking Number

Pollock USP
 Place of Confinement

P.O. Box 2099
 Mailing Address

Pollock, LA, 71467
 City, State, Zip Code

✓

FILED	LODGED
RECEIVED	COPY
AUG 03 2020	
CLERK U S DISTRICT COURT	
DISTRICT OF ARIZONA	
BY	DEPUTY

✓

(Failure to notify the Court of your change of address may result in dismissal of this action.)

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

United States of America,

Plaintiff,

v.

Isaac Steven Silversmith
 (Full name of Movant. Include the name under
 which you were convicted.)

Defendant/Movant.

No. CR 12-00371-PHX-Ros
 (Enter your criminal case number)

No. CV 20-01421-PHX (MHB)
 (To be supplied by the Clerk)

**MOTION UNDER 28 U.S.C. § 2255
 TO VACATE, SET ASIDE OR
 CORRECT SENTENCE BY A
 PERSON IN FEDERAL CUSTODY**

1. (a) Name and location of court that entered the judgment of conviction you are challenging: In The United States District Court For The District Of Arizona
- (b) Criminal docket or case number: 2:20-cv-01421-Ros-MHB
2. Date of judgment of conviction: Friday, December 13, 2013
3. In this case, were you convicted on more than one count or crime? Yes No
4. Identify all counts and crimes for which you were convicted and sentenced in this case:
Count 1 Title 18, U.S.C. § 1153 and 1111, CIR - Second Degree Murder
Count 2 Title 18, U.S.C. § 924(c), Use of a firearm During a Crime of Violence

5. Length of sentence for each count or crime for which you were convicted in this case: Two hundred Thirty-Five (235) Months On Count 1 and Sixty (60) Months On Count 2

6. (a) What was your plea?
Not guilty
Guilty
Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or charge, and a not guilty plea to another count or charge, give details: _____

(c) If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

7. Did you appeal from the judgment of conviction? Yes No

If yes, answer the following:

(a) Date you filed: _____
(b) Docket or case number: _____
(c) Result: _____
(d) Date of result: _____
(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

8. Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

9. Other than the direct appeals listed above, have you filed any other petitions, applications or motions concerning this judgment of conviction in any court? Yes No

If yes, answer the following:

(a) First petition, application or motion.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding: _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(b) Second petition, application or motion.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding: _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(c) Did you appeal the action taken on your petition, application or motion?

(1) First petition: Yes No

(2) Second petition: Yes No

(d) If you did not appeal from the action your petition, application or motion, explain why you did not:

10. For this motion, beginning on the next page, **state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States.** Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.

GROUND ONE: The defendant Petitioning The Court to hear this Untimely motion, due to the Circumstances that had incurred since 2020. The defendant argues that the attorney was ineffective by not objecting to the 924 (C)(3)(A) element clause that it was ambiguous to the 18U.S.C 1111 Statute. the murder Statute contains an element of recklessness which make the element clause vague

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

The 9th Circuit rendered that 2nd-Degree Murder is NOT a "crime of violence" that can support an 18 U.S.C 924(C) conviction. The Court held that because 2nd-Degree Murder can be committed recklessly, it does not categorically constitute a "crime of violence" under the elements clause (924(C)(3)(A)), and under Supreme Court's June 24, 2019 U.S. v Davis decision, the crime likewise cannot constitute a crime of violence under the residual clause.

Regay v. U.S. 2019 U.S. APP. LEXIS 25196 (9th Cir Aug 22, 2019)
The Defendant's Crime cannot be a Categorical a Crime of violence if the conduct proscribed by the Statute of conviction is broader than the conduct ~~encompassed~~ by the Statutory definition of a "crime of violence"

Mark's attorney never explain that 924(C) was (and still is) Unconstitutionally vague. 18 U.S.C 1111 Murder Statute is ambiguous for the 924(C) element clause.

The Supreme Court declared 18 U.S.C 924(C)(3)(B) Unconstitutionally vague, the appellate court need only determine whether Second degree murder constitutes a crime of violence under the Element clause in subsection (A)

(b) Did you present the issue raised in Ground One to the court of appeals? Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

GROUND TWO: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground Two to the court of appeals? Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

GROUND THREE: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground Three to the court of appeals? Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

GROUND FOUR: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground Four to the court of appeals? Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

Please answer these additional questions about this motion:

11. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes No

If yes, give the date of filing, the name and location of the court, the docket or case number, the type of proceeding, and the issues raised: _____

12. Do you have any future sentence to serve after you complete the sentence imposed by the judgment you are challenging? Yes No

If yes, answer the following:

(a) Name and location of the court that imposed the sentence to be served in the future: _____

(b) Date the sentence was imposed: _____

(c) Length of the sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition or application that challenges the judgment or sentence to be served in the future? Yes No

13. TIMELINESS OF MOTION: If your judgment of conviction challenged in this motion became final more than one year ago, you must explain why the one-year statute of limitations in 28 U.S.C. § 2255 does not bar your motion.* Pollock has been on lockdown since Jan. for the COVID-19 pandemic, so therefore inmates haven't had a chance to have access to the law library to maintain updated on current law.

*Section 2255 provides in part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction becomes final;

- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

14. Movant asks that the Court grant the following relief: To Vacate, Set aside, or
Correct Sentence under the newly discovered evidence
of Boggay / Davis

or any other relief to which Movant may be entitled. (Money damages are not available in § 2255 cases.)

I declare under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 7.29.20 (month, day, year).

David J. Davis

Signature of Movant

Signature of attorney, if any

Date

APPENDIX E

LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.

Michael J. Bresnahan, Esquire (Arizona Bar No. 009415)
1761 E. McNair Drive, Ste. 101
Tempe, Arizona 85283-5002
(480) 345-7032
Attorney for Movant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Isaac Steven Silversmith,

Movant,

VS.

United States of America,

Respondent.

No: 2:20-cv-01421-PHX-ROS-MHB

No: 2:12-cr-00371-ROS-1

Second Amended Motion To
Vacate, Set Aside, Or Correct
Sentence Under 28 U.S.C. § 2255

(Evidentiary Hearing Requested)

BACKGROUND DATA

1. Movant, Isaac Steven Silversmith (“Silversmith”), is challenging his March 12, 2014 conviction for Possession of a Firearm in Relation to or in Furtherance of a Crime of Violence, and Aiding and Abetting, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(i), in Case number 2:12-cr-00371-ROS-1, in the United States District Court for the District of Arizona. The sentencing Court's address is 401 West Washington Street, Phoenix, Arizona 85003.

2. On February 22, 2012, the Grand Jury approved an indictment against Silversmith alleging, as follows:
 - a. Count One: First Degree Murder, in violation of 18 U.S.C. §§ 1153 and 1111; and
 - b. Count Two: Discharging a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 924(c) and (j) (Dkt.#1)¹
3. On September 4, 2013, Silversmith pled guilty to the lesser included offense in Count One of the indictment: CIR-Second Degree Murder, in violation of 18 U.S.C. §§ 1153 and 1111; and the lesser included offense in Count 2 of the indictment: Use of Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924 (c).
4. On December 16, 2013, the Court sentenced Silversmith to 235 months in prison on Count 1, and to a consecutive term of 60 months in prison on Count 2. (Dkt. ## 89, 95, 117)(Exhibit 1, hereto)
5. Silversmith did not appeal his conviction or sentence to the Ninth Circuit Court of Appeals.
6. On July 12, 2020, Silversmith filed a *pro se* motion to vacate, set aside, or

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28 |¹ Unless otherwise indicated, All citations in this document to the docket refer to the
record in the related criminal case.

1 correct sentence under 28 U.S.C. § 2255 in the instant case by placing the
2 motion in the prison mailing system. The district court denied that motion
3 with leave to amend (CV Dkt. 3), and Silversmith filed an amended
4 motion on August 3, 2020 (CV Dkt. 5). On June 10, 2021, this Court
5 entered an order appointing counsel to represent Silversmith, and granted
6 Silversmith leave to file a second amended motion under 28 U.S.C. §
7 2255. Silversmith adopts and incorporates herein the factual allegations
8 and legal arguments set forth in his initial and amended *pro se* motions in
9 this cause. (CV Dkt. ## 1,5)

13 **Ground for Relief - Conviction Under 18 U.S.C. § 924(c)**

14 **Invalid Under *United States v. Davis and Borden v. United States***

16 7. Under 18 U.S.C. § 924(c)(3), a "crime of violence" is defined as a crime
17 that is a felony, and:

19 A. Has as an element the use, attempted use, or threatened use of
20 physical force against the person or property of another, 18 U.S.C. §
21 924(c)(3)(A); or

23 B. that by its nature involves a substantial risk that physical force against
24 the person or property of another may be used in the course of
25 committing the offense, 18 U.S.C. § 924(c)(3)(B).

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8. The first prong of this definition is known as the "force clause." The second prong of this definition ("that by its nature involves. . .") is known as the "residual clause."
9. On June 24, 2019, the Supreme Court, in *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019), held that the "residual clause" in § 924(c) was unconstitutionally vague. Consequently, no predicate "crime of violence", as that phrase is used in § 924(c)(3), could be based solely upon that clause.
10. To determine whether an offense is a "crime of violence" under the "force clause" in § 924(c)(3)(A), courts use an inquiry known as the "categorical" approach. They look to whether the statutory elements of the predicate offense necessarily require the use, attempted use, or threatened use of physical force. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 7-10, (2004) (interpreting materially identical text in 18 U.S.C. § 16(a)); *United States v. McNeal*, 818 F.3d 141, 151-52 (4th Cir. 2016) (interpreting § 924(c)(3)(A)). This approach is "categorical" because courts consider only the crime as defined, not the particular facts in the case. *See, e.g., United States v. Mathis*, 136 S.Ct. 2243, 2248 (2016); *United States v. Oca*, 655 F.3d 915, 928 (9th Cir. 2011); *McNeal*, 818 F.3d at 152; *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). The courts refer

to the “force clause” inquiry as the *elements-based* categorical approach, because it begins and ends with the offense’s elements. When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not “categorically” a crime of violence under the “force clause”. *Id.* If the statute is indivisible, the analysis ends there, and there can be no conviction under § 924(c).

Valencia v. Lynch, 798 F.3d 1193, 1196 (9th Cir. 2015). If the statute is divisible, then the court may look to a narrow category of documents to determine which offense the defendant committed. *United States v. Watson*, 881 F.3d 768, 772 (9th Cir. 2018). See, also, *Shepard v. United States*, 544 U.S. 13, 19-23 (2005) (discussing relevant documents).

11. On June 10, 2021, the Supreme Court issued its decision in *Borden v. United States*, 769 Fed. Appx. 266 (2021). In *Borden*, a plurality of the Court, (Justices Kagan, Breyer, Sotomayor and Gorsuch) concluded that a criminal offense with a *mens rea* of recklessness does not qualify as a “violent felony” under the ACCA’s elements clause. In reaching that conclusion, the plurality focused on the phrase “against another”, holding that that phrase, when modifying a volitional action like the “use of force”, demands that the perpetrator direct his force at another individual. Reckless conduct, according to the plurality, is not aimed in that

1 prescribed manner. Citing *Leocal v. Ashcroft*², the plurality affirmed that
2 when read against the words “use of force”, the “against” phrase – the
3 definition’s “critical aspect” – suggests a higher degree of intent than (at
4 least) negligence. The plurality also noted that the ordinary meaning of
5 the term “violent felony” – which the elements clause defines – also
6 informs this construction. Citing *Leocal v. Ashcroft* and *Johnson v. United*
7 *States*,³ the plurality noted that in those decisions, the Court had construed
8 the terms “violent felony” and “crime of violence” to mark out a narrow
9 category of violent, active crimes that are best understood to involve a
10 purposeful or knowing mental state – a deliberate choice of wreaking harm
11 on another, rather than mere indifference to risk. Citing *Begay v. United*
12 *States*,⁴ the plurality went on note that classifying reckless crimes as
13 “violent felonies” would also conflict with the ACCA’s purpose – that is
14 to address the special danger created when a particular type of offender – a
15 violent criminal – possesses a gun, adding that an offender who has
16 repeatedly committed “purposeful, violent, and aggressive” crimes poses
17 an uncommon danger of using a gun deliberately to harm a victim. The
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² *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

³ *Johnson v. United States*, 559 U.S. 133 (2010).

⁴ *Begay v. United States*, 553 U.S. 137 (2008).

1 plurality distinguished the holding in *Voisine v. United States*⁵ by
2 observing that the relevant statute there was not a “violent felony”, but,
3 rather, a misdemeanor crime of domestic violence. It focused not on those
4 convicted of serious felony offenses, but, instead, of garden-variety assault
5 or battery misdemeanors – including acts that one might not characterize
6 as violent in a nondomestic context. Acknowledging that some states
7 recognize mental states (often called “depraved heart” or “extreme
8 recklessness”) between reckless and knowledge, the plurality declined to
9 address whether offenses with those mental states fall within the elements
10 clause.⁶ Justice Thomas, concurring in the judgment, concluded that the
11 ACCA’s elements clause did not encompass Borden’s conviction for
12 reckless aggravated assault. Importantly, Justice Thomas concluded that a
13 crime that can be committed through mere recklessness does not have as
14 an element the “use of physical force” because that phrase has a well-
15 understood meaning applying only to intentional acts designed to cause
16 harm. Thus, he departed from the plurality by focusing on the “use of

²⁵ 5 *Voisine v. United States*, 136 S.Ct. 2272 (2016).

25 6 The Ninth Circuit has held that reckless conduct will sustain a conviction under §
26 113(a)(6). *United States v. Loera*, 923 F. 2d 725, 730 (9th Cir. 1991). So has the
27 Tenth Circuit, *United States v. Zunie*, 444 F. 3d 1230, 1235 (10th Cir. 2006), the
28 Sixth Circuit, *United States v. Verwiebe*, 874 F.3d 258,264 (6th Cir. 2017), and the
 Eighth Circuit, *United States v. Ashley*, 225 F.3d 907, 911 (8th Cir. 2000).

1 force" clause, rather than the "against the person of another" clause, of 18
2 U.S.C. § 924(e)(1) to reach his decision – a distinction arguably
3 unimportant in determining the viability of *United States v. Begay*, (9th Cir.
4 No. 14-10080),⁷ and the merits of movant's claim in the instant case.

5 12. Second degree murder, under 18 U.S.C. § 1153 and 1111, can be
6 committed through recklessness. While we await the outcome of *United*
7 *States v. Begay*, other Circuit precedent supports the notion that second
8 degree murder is not a "crime of violence" under §924(c)(3)(A.). The
9 elements of second-degree murder are that the defendant (1) "unlawfully
10 kill[ed] a human being" (2) "with malice aforethought." 18 U.S.C. §
11 1111(a); Ninth Circuit Model Criminal Jury Instruction 8.108. "[M]alice
12 aforethought covers four different kinds of mental states: (1) intent to kill;
13 (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless
14 indifference); and (4) intent to commit a felony." *See United States v.*
15 *Pineda-Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010). As such, second-
16 degree murder may be committed recklessly—with a depraved heart
17 mental state—and need not be committed willfully or intentionally. *See*
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⁷ *Begay* is pending a petition to review *en banc*. In *Begay*, the Panel held that second degree murder, under 18 U.S.C. § 1153 and 1111, can be committed through recklessness. It is, therefore, not a crime of violence under the elements clause (18 U.S.C. § 924(c)(3)(A)), notwithstanding the fact that the recklessness required must be "extreme", and goes beyond mere recklessness.

1 Although the Ninth Circuit conducted its analysis under § 16(b), because
2 the BIA rested its decision on subsection (b), *id.* at 1052, the analysis
3 regarding intent bears upon either subsection of § 16, and by analogy, 18
4 U.S.C. § 924(c)(3), *See, e.g., Gomez-Leon*, 545 F.3d at 787 (requiring
5 intentional use of force for a crime of violence under either subsection of §
6 16); *United States v. Benally*, 843 F. 3d 350, 354 (9th Cir. 2016). In
7 contrast to crimes like burglary that can be committed only intentionally,
8 “with a crime committed recklessly, it is unlikely that the reckless actor
9 will, in response to external events, form an intent to use force in
10 furtherance of his crime.” *Covarrubias*, 632 F.3rd at 1055. “Classic
11 examples of second-degree murder include shooting a gun into a room that
12 the defendant knows to be occupied, a game of Russian roulette, and
13 driving a car at very high speeds along a crowded main street...” *United*
14 *States v. Pineda-Doval*, 614 F.3d 1019, 1039 (9th Cir. 2010). For purposes
15 of this analysis, these examples are substantively indistinguishable from
16 the offense—“Shooting at an Inhabited Dwelling or Vehicle”—that the
17 Ninth Circuit held was not categorically a crime of violence in *Covarrubis*.
18
19 This risk that a crime could escalate to the use of intentional force is,
20
21 arguably, no more substantial for a defendant who recklessly kills than it is
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23 for a defendant who recklessly shoots at a house. While *Borden*
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1 specifically addressed the force clause of the ACCA, it would appear to
2 have applicability to the similarly-worded provisions of 18 U.S.C. §
3 924(c)(3)(A). The ACCA provides sentence enhancements for felons who
4 commit crimes with firearms if they are convicted of certain crimes three
5 or more times. The qualifying prior felonies must be either “violent
6 felonies” or “serious drug offenses”. 18 U.S.C. §924(e)(2). Section
7 924(e)(2)(B) provides the definition of a “violent felony”:
8

9 (B) the term “violent felony” means any crime
10 punishable by imprisonment for a term exceeding
11 one year, or any act of juvenile delinquency
12 involving the use or carrying of a firearm, knife, or
13 destructive device that would be punishable by
14 imprisonment for such term if committed by an adult,
15 that—
16 (i) has as an element the use, attempted use, or
17 threatened use of physical force against the
18 person of another; or
19 (ii) is burglary, arson, or extortion, involves use of
20 explosives, or otherwise involves conduct that
21 presents a serious potential risk of physical
22 injury to another;

23 Thus, the only difference between the language of 18 U.S.C. §
24 924(c)(3)(A) and 18 U.S.C. 924(e)(2)(B) is that under the former, the use
25 of force against either the person or property of another can constitute a
26 “crime of violence”, a distinction seemingly unimportant under *Borden*.
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1 See *Davis*, 139 S. Ct. at 2325 (stating the two statutes “bear more than a
2 passing resemblance” to each other).

3 13. Under 28 U.S.C. §2255, a petitioner is entitled to relief if, *inter alia*, the
4 judgement violates the Constitution or laws of the United States, the court
5 lacked jurisdiction to enter judgement, or the sentence exceeded the
6 maximum allowed by law. Because Count two of the indictment was
7 based on Count One of the indictment (as amended), and Count One (as
8 amended) does not qualify as a “crime of violence” under either §
9 924(c)(3)(A) or § 924(c)(3)(B) (in light of *Borden* and *Davis*),
10 Silversmith’s conviction is unconstitutional, and must be vacated.
11

12 14 **Affirmative Defenses Can Be Overcome**

13 14. Because *Davis* announced a new substantive limitation on the
14 government’s ability to punish a criminal defendant, it arguably applies
15 retroactively to Silversmith’s case, which is final on direct review.
16 Title 28, Section 2255(f) provides a one-year statute of limitations for filing
17 a motion under that Section. The limitations period runs from:
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19 19 (1) The date on which the judgement of conviction becomes final;
20 20 (2) The date on which the impediment to making a motion created
21 21 by governmental action in violation of the Constitution or laws of the
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3 (3) The date on which the right asserted was initially recognized
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5 by the Supreme Court, if that right has been newly recognized by the
6 Supreme Court and made retroactively applicable to cases on collateral
7 review; or
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9 (4) The date on which the facts supporting the claim or claims
10 presented could have been discovered through the exercise of due
11 diligence.
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13 It was not until *Davis* that the Supreme Court squarely held that the
14 residual clause in §924(c)(3) is unconstitutionally vague. *See, e.g., James*
15 *v. United States*, 550 U.S. 192 (2007) (Florida’s attempted burglary statute
16 qualified as a “violent felony” under the (similarly worded) “residual
17 clause” found in 18 U.S.C. §924(e)); *United States v. Spencer*, 724 F.3d
18 133 (9th Cir. 2013) (the similarly-worded “residual clause in U.S.S.G. §
19 4B1.2(a)(2) was not unconstitutionally vague). *Davis* was published on
20 June 24, 2019, one year and 18 days prior to Silversmith filing his initial
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26 8 The effective date of Silversmith's initial filing is July 12, 2020, as that was the
27 date his initial motion was placed in the prison mailing system. (CV Dkt. 1) *See*
28 *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) (applying prison mailbox rule to
pro se habeas petition).

1 newly asserted right retroactive to cases on collateral review, and, as
2 earlier noted, the Ninth Circuit Court of Appeals has yet to speak to the
3 issue. Any other reading of §2255(f)(3) would invite unfair and
4 inconsistent outcomes – for example, where there is no *controlling*
5 precedent regarding retroactively of a case during much or all of the year
6 following the decision in that case. In that instance (mostly) *pro se*
7 litigants, with little or no access to legal materials or counsel, would be
8 expected to navigate the often very complex legal landscape concerning
9 possible retroactively without a clear road map. For these reasons, and to
10 the extent that Silversmith’s claim relies on the holding in *Davis*, his claim
11 should be deemed timely under 28 U.S.C. §2255(f)(3). A second ground
12 for timeliness would be 28 U.S.C. § 2255(f)(2). As asserted in
13 Silversmith’s first amended §2255 motion (CV Dkt. 5), the Bureau of
14 Prisons facility at which he was housed on the date the *Davis* decision was
15 published (June 24, 2019), through the date that Silversmith filed his initial
16 §2255 motion, did not permit inmates to have access to the prison law
17 library or to other prison-based legal resources due to the Covid-19
18 pandemic. This was arguably unconstitutional (*See e.g., Bounds v. Smith*,
19 430 U.S. 817, 827 (1977)) (“fundamental constitutional right of access to
20 the courts requires prison authorities to assist inmates in the preparation of
21 §2255 motions.”). As asserted in Silversmith’s initial §2255 motion, the Bureau
22 of Prisons’ failure to provide inmates with access to the prison law library
23 and other prison-based legal resources violated the fundamental constitutional
24 right of inmates to have access to the courts. The Bureau of Prisons’ failure
25 to provide inmates with access to the prison law library and other prison-based
26 legal resources violated the fundamental constitutional right of inmates to have
27 access to the courts. The Bureau of Prisons’ failure to provide inmates with access
28 to the prison law library and other prison-based legal resources violated the
fundamental constitutional right of inmates to have access to the courts.

1 filing of meaningful legal papers by providing prisons with adequate law
2 libraries or adequate assistance from persons trained in the law.”)⁹, and
3 constituted a government-imposed impediment to Silversmith timely
4 researching, drafting and filing a *Davis*-based claim *pro se*. A third ground
5 to avoid the one-year statute of limitations would be actual innocence
6 regarding the §924(c) count. Actual innocence has been deemed a gateway
7 through the barrier caused by the statute of limitations. *McQuiggin v.*
8 *Perkins*, 133 S.Ct. 1924, 1928 (2013). Under *Davis* and *Borden*,
9 Silversmith is actually innocent of the §924(c) count because the
10 underlying offense is not a crime of violence, and while the government
11 may argue that a showing of factual innocence, rather than legal innocence,
12 is required as a gateway through the statute of limitations barrier, the Ninth
13 Circuit Court of Appeals, in *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020) has
14 seemingly done away with that distinction, at least in the context of a 28
15 U.S.C. §2241 claim. In *Allen*, the defendant contended that he was
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23 9 That decision was later narrowed somewhat by *Lewis v. Casey*, 518 U.S. 343, 351 (1996)
24 (defendant has no abstract, freestanding right to a “law library” or legal assistance”, but,
25 must, nevertheless be afforded an adequate opportunity to present claimed violations of
26 fundamental unconstitutional rights to the Courts. The tools the constitution requires to be
27 provided “are those that the inmates need in order to attack their sentences, directly or
28 collaterally, and in order to challenge the conditions of their confinement. *Id.* at 355. To
prevail on a *Bounds* violation, the actual injury the inmate must demonstrate is that the
alleged shortcomings in the prison library or legal assistance program have hindered or are
presently hindering his efforts to pursue a non-frivolous legal claim *Id.* at 351.

1 “actually innocent” of being a career offender under U.S.S.G. §§4B1.1 and
2 4B.2 because his prior marijuana conviction was no longer considered a
3 “controlled substance offense” under U.S.S.G. §§4B1.2. The district court
4 denied Allen’s request to resentence him as a non-career offender,
5 concluding that his claim of actual innocence has a claim of legal rather
6 than factual innocence, and was, therefore, not colorable under §2241.
7

8 There, the Ninth Circuit held, in pertinent part, as follows:

9 Allen does not challenge the validity of his conviction
10 11 for sales of marijuana under Connecticut General Statue
12 13 21a-277(a). But he contends under *Mathis* and
13 14 *Descamps*, which apply retroactively, that his conviction
14 15 under that statute is not a conviction for a predicate
15 16 crime. That is, Allen claims that he is actually innocent
16 17 of a crime that would qualify him for career offender
17 18 status and is therefore actually innocent of the sentence
18 19 that was imposed.

20 In *Marrero*, we held that a prisoner seeking resentencing
21 22 based on non-retroactive changes to the treatment of
22 23 related predicate crimes under the Sentencing Guidelines
23 24 did not present a claim of actual innocence. 682 F.3d at
24 25 1194. *Marrero* did not contend that he was innocent of
25 26 the felonies that qualified as crimes of violence or
26 27 controlled substance offenses under U.S.S.G. § 4B1.2.
27 28 Nor did he contend that he was improperly classified as
28 29 a career offender at the time he was sentenced. Rather,
29 30 he claimed that he was “‘actually innocent’ of being a
30 31 career offender” because under non-retroactive
31 32 amendments to the Sentencing Guidelines, two of his
32 33 prior convictions would now be treated as related, rather
33 34 than separate, predicate crimes. *Id.* at 1193. We held
34 35 that the fact that his two prior offenses might be related

1 under non-retroactive current law “ha[d] nothing to do
2 with factual innocence.” *Id.*

3 In *Marrero*, we left open the “question whether a
4 petitioner may ever be actually innocent of a noncapital
5 sentence for the purpose of qualifying for the escape
6 hatch.” *Id.* at 1193. We now reach that question and
7 hold that Allen has made a claim of actual innocence that
8 permits jurisdiction over his § 2241 petition. If Allen
9 prevails on the merits of his claim that his Connecticut
10 marijuana conviction was not a predicate conviction for
11 career offender status under the Guidelines, the factual
12 predicate for his mandatory sentencing enhancement did
not exist. That is, he is actually innocent of the
enhancement. In that case, it is beyond dispute that he is
not, and was not, a career offender *See Stephens*, 464 F.
3d at 899.

13 *Id.* at 1188. Silversmith is actually innocent of the §924(c) charge.

14 His innocence thus provides a gateway through the statute of
15 limitations. A fourth ground to avoid the one-year statute of
16 limitations is found in the Equitable Tolling Doctrine. After the
17 one-year statute of limitations has passed, this Court may consider
18 a § 2255 motion to vacate, set aside, or correct a sentence if the
19 petitioner establishes eligibility for equitable tolling by showing:

20 (1) That he has been pursuing his rights diligently; and (2) that
21 some extraordinary circumstance stood in his way and prevented
22 timely filing. *United States v. Buckles*, 647 F.3d 883, 889 (9th Cir.
23 2011). *See, also*, *United States v. Kimber*, 591 F. App’x 578 (9th
24 2011).

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1 Cir. 2015). If a movant makes a good-faith allegation that would,
2 if true, entitle him to equitable tolling, then he is entitled to an
3 evidentiary hearing on the issue of equitable tolling. *Ray v.*
4 *Lamperi*, 465 F.3d 964, 969 (9th Cir. 2006). Silversmith was
5 incarcerated at a Federal Bureau of Prisons facility continuously
6 from the date the *Davis* decision was handed down until the date
7 he filed his initial §2255 motion. During January 2020, the BOP
8 facility at which Silversmith was housed implemented “lock
9 down” policies designed to protect inmates from the spread of the
10 COVID-19 virus within the prison. Those policies included
11 suspending inmate access to the prison law library and other legal
12 assistance programs. The suspension of that access continued up
13 to and through the date of the filing of Silversmith’s initial §2255
14 motion. “Depravation of legal materials is the type of external
15 impediment for which we have granted equitable tolling.”
16 *Waldron-Ramsey v. Pacbolke*, 556 F.3d 1008, 1013 (9th Cir. 2009)
17 (citing *Lott v. Mueller*, 304 F.3d 918, 924-25)(9th Cir. 2002)); See
18 also, *Roy* 465 F. 3d at 973-75; *Whalen/Hunt v. Early*, 233 F.3d
19 446, 1148 (9th Cir. 2000) (*en banc*) (*per curiam*). During that
20 period of time Silversmith did not have ready and meaningful
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1 access to legal materials. He, nevertheless, diligently pursued the
2 claims he now brings by availing himself of what scant
3 information was, and became, available during the time frame in
4 issue. In the instant case, the one-year statute of limitations should
5 be suspended during that period of time Silversmith was denied
6 access to the resources needed to press his claim. *See United*
7 *States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991). (“Principles of equitable
8 tolling usually dictate that when a time bar has been suspended and
9 then begins to run again upon a later event, the time remaining on
10 the clock is calculated by subtracting from the full limitations
11 period whatever time ran before the clock was stopped.”).

12 Silversmith, who is not formally trained in the law, diligently
13 pursued his claim despite not having access to legal materials and
14 legal assistance for approximately five of the twelve months
15 following the *Davis* decision.

16 15. Even if Silversmith’s motion was untimely vis a vis *Davis*, *Borden*
17 established a new rule of constitutional law, arguably made retroactive to
18 cases on collateral review by the Supreme Court that provides an
19 additional ground for relief. Under *Teague*, a new rule will be applied
20 retroactively only if: (1) It is substantive, in that it alters the range of
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1 conduct or class of people that the law punishes or; (2) it is a watershed
2 rule of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 370 (1989).
3 The question then is whether *Borden* spawned a watershed rule, or even a
4 new rule. To qualify as a watershed rule, a new rule must meet two
5 requirements: (1) Infringement of the rule would seriously diminish the
6 likelihood of obtaining an accurate conviction; and (2) the rule must alter
7 our understanding of the bedrock procedural elements essential to the
8 fairness of a proceeding. *Tyler v. Cain*, 533 U.S. 656, 665 (2001). The
9 decision in *Borden* arguably does both. It is clear from the dissent in
10 *Borden* that the rule announced by the plurality (i.e., that an offense that
11 can be committed through mere recklessness can not be a “violent
12 felony” under the ACCA) was a watershed rule of criminal procedure.
13 Until *Borden*, the Supreme Court had not squarely addressed whether
14 reckless felony offenses would satisfy the ACCA’s elements clause.
15 Indeed, the dissenting opinion in *Borden* included the following passage:
16

17 In my view, the Court’s decision disregards bedrock
18 principles and longstanding terminology of criminal
19 law, misconstrues ACCA’s text, and waves away
20 the Court’s own recent precedent. The Court’s
21 decision overrides Congress’s judgment about the
22 danger posed by recidivist violent felons who
23 unlawfully possess firearms and threaten further
24 violence.
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The *Borden* decision makes clear that offenses that require no more than a *mens rea* of recklessness can not be a “crime of violence” under the nearly identical 18 U.S.C. §924(c).

16. The District Court arguably has the authority to make retroactively determinations. *See Brian R. Means, Made retroactively applicable to cases on collateral review, Federal Habeas Manual § 9A:30 (May 2019)*(detailing cases).
17. Because *Davis*, and *Borden*, arguably have been made retroactive to cases that are final on direct review, and this motion is being filed within the time frame provided under 28 U.S.C. § 2255(f)(3), the motion is timely. *See Dodd v. United States*, 545 U.S. 353 (2005).
18. Any claim by the government that Silversmith procedurally defaulted his claims for relief by failing to timely raise them on direct review must fail, as Silversmith can demonstrate cause and actual prejudice, and that he is actually innocent. *Bousely v. United States*, 523 U.S. 614, 622 (1998). Cause exists when a claim is “novel”. *See Reed v. Ross*, 468 U.S. 1, 15 (1984). A claim is considered novel where a Supreme Court decision: (1) “explicitly overrule[s] one of the Court’s precedents”; (2) “may overturn[n] a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court authority has

1 expressly approved”; or (3) “disapprove[s] a practice that th[e] Court
2 arguably has sanctioned in prior cases”. *Id.* at 17. The Supreme Court’s
3 decisions in *Davis* and *Borden* meet that test. Moreover, a claim of actual
4 innocence survives the duel procedural challenges of timeliness and
5 procedural default. *See McQuiggen v. Perkins*, 133 S.Ct. 1924 (2013);
6 *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Schlup v. Delo*, 513 U.S.
7 298 (1995); *House v. Bell*, 547 U.S. 126 (2006). The Supreme Court’s
8 decisions in *Davis* and *Borden* *supra*, gave rise to Silversmith’s claim of
9 actual innocence. Both the *Davis* and the *Borden* decisions were novel,
10 and announced new substantive rules. *Hammond*, 931 F.3d at 1039.

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12 19. Finally, Silversmith posits, in the alternative, that to the extent that his
13 claim would have been colorable in a pretrial/pre-plea proceeding, or on
14 direct appeal, his attorney’s failure to raise the issue of whether second
15 degree murder is categorically a crime of violence constitutes prejudicial
16 ineffective assistance of counsel. Effective trial and appellate counsel
17 arguably would have concluded that second degree murder was not a
18 “crime of violence” for §924(c) purposes, and would have so-advised
19 Silversmith. So advised, Silversmith would not have pled guilty to the
20 §924(c) charge, and/or would have sought to have his §924(c) conviction
21 and sentence reversed on district appeal.

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No Summary Dismissal Before the Government Answers

20. As Silversmith has already explained, *Davis* and *Borden* arguably render
his § 924(c) conviction invalid. Nothing on the face of this motion, any
attached exhibits, and the record of prior proceedings discloses that the
government will rely on any particular affirmative defense in response to
this motion. *Cf.* R. Governing Sec. 2255 Cases 4(b) (describing when a
district court may summarily dismiss a § 2255 motion); *United States v.*
Withers, 638 F.3d 1055, 1064 (9th Cir. 2011) (citing *Insyxiengmay v.*
Morgan, 403 F.3d 657, 665 (9th Cir. 2005)) (suggesting that a § 2255
petitioner need not anticipate affirmative defenses in his initial motion).

21. The government's affirmative defenses are not jurisdictional in the sense
that the Court must reach the issue even if no party raises it. *See United*
States v. Jacobo Castillo, 496 F.3d 947, 954 (9th Cir. 2007) (*en banc*).
Rather, the government may waive reliance on its affirmative defenses by
failing to assert them in a timely fashion. *See United States v. Tercero*,
734 F.3d 979, 981 (9th Cir. 2013) (citing *Norwood v. Vance*, 591 F.3d
1062, 1068 (9th Cir. 2010)).

22. The Supreme Court has held that district courts may raise affirmative
defenses, *sua sponte*, in habeas cases. *See Day v. McDonough*, 547 U.S.
198, 209 (2006), but before doing so, the court "must accord the parties

1 fair notice and an opportunity to present their positions." *Id.* at 210. Thus,
2 at the screening stage, this Court may not rely on the collateral-attack
3 waiver (or any other affirmative defense) to dismiss this motion. The
4 Court should therefore call for a response to this motion from the
5 government.

7 **Prayer for Relief**
8

9 23. In light of *Davis and Borden*, Silversmith's conviction under 18 U.S.C. §
10 924(c) is unconstitutional. Alternatively, Silversmith's trial counsel was
11 ineffective, depriving Silversmith's of his Sixth Amendment right to
12 counsel, and his Fifth Amendment right to due process, thus rendering his
13 § 924(c) conviction unconstitutional. Accordingly, Silversmith
14 respectfully asks the Court to:
15
16 a. Call for a response from the government;
17
18 b. vacate his § 924(c) conviction and sentence; and
19
20 c. grant him such other and further relief as is just and practicable.

21
22 Respectfully submitted this 23rd day of September, 2021.

23 ***MICHAEL J. BRESNEHAN, P.C.***
24

25 s/ Michael J. Bresnehan
26

27 Attorney for Movant, Isaac Steven Silversmith
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CERTIFICATE OF SERVICE

X I hereby certify that on September 23, 2021, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Honorable Roslyn O. Silver
United States District Court Judge

Honorable Michelle H. Burns
United States District Court Judge

Thomas C. Simon
Asst. U.S. Attorney

X I hereby certify that on September 23, 2021, I served the attached document by Mail on the following, who is not a registered participant of the ECF System:

Isaac Steven Silversmith
Defendant

s/ Michael J. Bresnahan

EXHIBIT 1

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

v.

Isaac Steven Silversmith

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 12-00371-001-PHX-ROS

Patricia Gitre (CJA)
Attorney for Defendant

USM#: 67817-308

THE DEFENDANT ENTERED A PLEA OF guilty on 09/04/2013 to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1153 and 1111, CIR - Second Degree Murder, a Class A Felony offense, a lesser included offense as charged in Count 1 of the Indictment; Title 18, U.S.C. §924(c), Use of a Firearm During a Crime of Violence, a Class A Felony offense, a lesser included offense as charged in Count 2 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED THIRTY-FIVE (235) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 2, said counts to run consecutively to each other and concurrently with the sentence imposed in Maricopa County Superior Court Case Number CR-2011-11764-001-DT, with credit for 591 days of time served in this case. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and mental health counseling. The Court further recommends that the defendant be placed in an institution in the southwestern region of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: \$0.00 RESTITUTION: To be determined

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the victim(s) in the amount(s) to be determined at a restitution hearing.

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USA vs. Isaac Steven Silversmith

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If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2, said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

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USA vs. Isaac Steven Silversmith

Page 3 of 4

- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
2. You shall abstain from all use of alcohol or alcoholic beverages.
3. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
4. You are prohibited from owning, maintaining or using a firearm.
5. You shall not contact the deceased victim's mother, Lucille Valenzuela, and the probation officer will verify compliance.
6. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.
8. You shall pay any outstanding monetary restitution imposed by the Court.
9. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.

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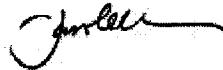
10. You shall provide all financial documentation requested by the probation officer.
11. You shall not be involved with gang activity, possess any gang paraphernalia or associate with any person affiliated with a gang.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons. The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Friday, December 13, 2013**



James G. Carr
Senior United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the
institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____
Deputy Marshal

APPENDIX F

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Isaac Steven Silversmith,
10 Defendant/Movant,
11 v.
12 United States of America,
13 Plaintiff/Respondent.

No. CV-20-01421-ROS (MHB)

No. CR-12-00371-PHX-ROS

REPORT AND RECOMMENDATION

14
15 TO THE HONORABLE ROSYLN O. SILVER, U.S. DISTRICT COURT JUDGE:

16 On July 1, 2020, Movant Isaac Steven Silversmith, an inmate confined in the United
17 States Bureau of Prisons filed¹ a *pro se* Motion to Vacate, Set Aside or Correct Sentence
18 Under 28 U.S.C. § 2255 (“2255 motion”). (Doc. 1.) The Court denied the 2255 motion
19 with leave to amend, as Movant’s pleading was not in the proper format. (Doc. 3.) On
20 August 3, 2020, Movant filed an Amended *pro se* 2255 Motion. (Doc. 5.) On June 10,
21 2021, the Court appointed counsel to represent Movant. (Doc. 12.) On September 23,
22 Movant through counsel filed a Second Amended 2255 motion. (Doc. 19.) In Movant’s
23 2255 motions he claims that his conviction for Use of Firearm During a Crime of violence
24 pursuant to 18 U.S.C. § 924(c) is invalid because the predicate crime, second-degree
25 murder in violation of 18 U.S.C. §§ 1153 and 1111 is not a crime of violence. He also

26
27 ¹ This is the date that Movant placed his motion in the prison mailing system for mailing.
28 (Doc. 1 at 4.) That is the operative date of filing, although the motion was not docketed until July 17, 2020. See, *Huizar v. Cary*, 273 F.3d 1220, 1223 (9th Cir. 2001) (applying “prison mailbox rule” in construing filing date).

1 claims that his counsel was ineffective in not raising the claim. (*Id.*)

2 In his Second Amended 2255 motion, Movant cited as authority United States v.
3 Borden, __ U.S. __; 141 S.Ct. 1817 (2021), in which the Supreme Court held that a crime
4 carrying a *mens rea* of recklessness does not constitute a “violent” felony for purposes of
5 18 U.S.C. § 924(c)(3)(A) but left open the question of whether a crime carrying a *mens*
6 *rea* of extreme recklessness would. Movant also cited as authority United States v. Begay,
7 a case in which a Ninth Circuit three-judge panel majority held that second-degree murder
8 is not a crime of violence. Begay, 934 F.3d 1033 (9th Cir. 2019).

9 On November 18, 2021, Respondent filed an Unopposed Motion to Stay
10 Proceedings Pending Resolution of Proceedings in *United States v. Begay*, No. 14-10080.
11 (Doc. 23.) As stated in the motion, on October 27, 2021, the Ninth Circuit Court of Appeals
12 ordered that Begay be reheard *en banc* pursuant to Federal Rule of Appellate Procedure
13 35(a) and Circuit Rule 35-3. (*Id.*) The three-judge panel opinion in Begay was therefore
14 vacated², thus rendering the question of whether second-degree murder is a crime of
15 violence pending before the *en banc* Court. The parties agreed that “because Begay
16 concerns the same question presented in Movant’s 2255 proceedings,” the matter should
17 be stayed until a decision is rendered. (*Id.*) The Court granted the motion and stayed the
18 proceedings pending the Begay decision. (Doc. 24.)

19 On May 5, 2022, the Ninth Circuit Court of Appeals issued its *en banc* decision in
20 Begay and issued its Mandate on May 27, 2022.³ On May 27, 2022, this Court issued an
21 Order that the parties filed a status report and show cause as to why the 2255 proceedings
22 should not be dismissed in light of the decision. (Doc. 25.) Movant filed a Response on
23 June 21, 2022, in which Movant indicated no opposition to a lifting of the Court’s Stay
24 Order and agreed that the Court “may proceed with its decision.” (Doc. 27.) Plaintiff
25 furthermore stated that “[a]dmitedly, the Begay decision would appear to foreclose relief

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27 ² United States v. Begay, 15 F.4th 1254 (9th Cir. 2021) (mem.).

28 ³ The *en banc* Court held that second-degree murder constitutes a crime of violence
pursuant to 18 U.S.C. 924(c)(3). United States v. Begay, 33 F.4th 1081 (9th Cir. 2022).

1 (at least in this Circuit) at this time. However, for the reasons articulated in Circuit Judge
2 Ikuta's dissent, Movant believes the Begay case was wrongly decided, and therefore,
3 wishes to preserve his claim for further appellate review." (Id.)

4 Because the Ninth Circuit's *en banc* decision in Begay forecloses relief as to
5 Movant's claims, this Court will recommend that Movant's Second Amended 2255 motion
6 be denied and dismissed with prejudice.

7 **IT IS RECOMMENDED** that the Court lift its Stay Order. (Doc. 24.)

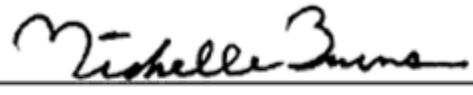
8 **IT IS FURTHER RECOMMENDED** that Movant's Second Amended Motion
9 Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal
10 Custody (Doc. 19) be **DENIED AND DISMISSED WITH PREJICE**.

11 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
12 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition
13 is justified as the Petitioner has not demonstrated a substantial showing of the denial of a
14 constitutional right.

15 This recommendation is not an order that is immediately appealable to the Ninth
16 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
17 Appellate Procedure, should not be filed until entry of the district court's judgment. **The**
18 **parties shall have fourteen days** from the date of service of a copy of this
19 recommendation within which to file specific written objections with the Court. See 28
20 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the
21 parties have fourteen days within which to file a response to the objections. Pursuant to
22 Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District
23 of Arizona, objections to the Report and Recommendation may not exceed seventeen (17)
24 pages in length. Failure timely to file objections to the Magistrate Judge's Report and
25 Recommendation may result in the acceptance of the Report and Recommendation by the
26 district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,
27 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the
28 Magistrate Judge will be considered a waiver of a party's right to appellate review of the

1 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's
2 recommendation. See Rule 72, Federal Rules of Civil Procedure.

3 Dated this 6th day of July, 2022.

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6 Honorable Michelle H. Burns
7 United States Magistrate Judge

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APPENDIX G

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

8
9 Isaac Steven Silversmith, No. CV-20-01421-PHX-ROS
10 Petitioner,
11 v.
12 United States of America,
13 Respondent.
14

ORDER

15 Before the Court is Movant Isaac Steven Silversmith's Motion to Vacate, Set Aside
16 or Correct Sentence Under 28 U.S.C. § 2255. (Doc. 19). The § 2255 Motion argues
17 Silversmith's conviction for use of a firearm during a crime of violence pursuant to the
18 Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(c), is invalid because the
19 predicate offense, second-degree murder in violation of 18 U.S.C. § 1111, is not a "crime
20 of violence" in light of *Borden v. United States*, 141 S.Ct. 1817 (2021). (Doc. 19 at 3-12).
21 In *Borden*, the Supreme Court held a crime requiring a mens rea of mere recklessness is
22 not a "violent felony" within the meaning of a different subsection of the ACCA, § 924(e).
23 See *Borden*, 141 S.Ct. at 1834. *Borden* expressly left open the question whether a mens
24 rea of "extreme recklessness"—the mens rea element for second-degree murder in
25 violation of 18 U.S.C. § 1111(a)—could constitute a crime of violence. *Id.* at 1825 n.4.

26 On October 27, 2021, the Ninth Circuit ordered en banc rehearing in *United States*
27 *v. Begay* and vacated a panel opinion that held second-degree murder is not a crime of
28 violence. *Begay*, 15 F.4th 1254 (9th Cir. 2021), *vacating* 934 F.3d 1033 (9th Cir. 2019).

1 On November 19, 2021, the Court stayed proceedings in this matter pending resolution of
2 *Begay*. (Doc. 24). On May 5, 2022, the Ninth Circuit sitting en banc held second-degree
3 murder is a crime of violence within the meaning of the ACCA. *Begay*, 33 F.4th 1081,
4 1093 (9th Cir. 2022) (en banc).

5 On May 27, Magistrate Judge Michelle H. Burns issued an Order requiring
6 Silversmith to show cause why this action should not be dismissed in light of *Begay*. (Doc.
7 26). In his response, Silversmith states he “does not oppose the lifting of the Stay Order
8 so that this Court may proceed with its decision” and admits “the *Begay* decision would
9 appear to foreclose relief (at least in this Circuit) at this time.” (Doc. 27). Judge Burns
10 accordingly issued a Report and Recommendation (“R&R”) recommending that the Court
11 lift the stay and deny and dismiss Silversmith’s § 2255 Motion with prejudice. (Doc. 28 at
12 3).

13 The Court finds the R&R accurately recounts the facts and law of this case. The
14 R&R will therefore be adopted.

15 Accordingly,

16 **IT IS ORDERED** the Report and Recommendation (Doc. 28) is **ADOPTED**.

17 **IT IS FURTHER ORDERED** the stay ordered on November 19, 2021 (Doc. 24)
18 is lifted.

19 **IT IS FURTHER ORDERED** Movant Isaac Steven Silversmith’s Motion to
20 Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 (Doc. 19) is **DENIED**
21 **WITH PREJUDICE**. The Clerk of Court is directed to close this matter.

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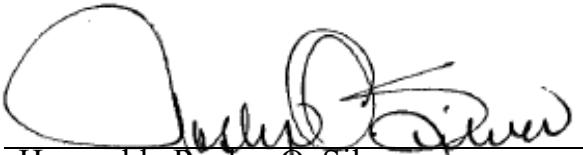
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1 **IT IS FURTHER ORDERED** a Certificate of Appealability is **DENIED** because
2 this ruling is justified by *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en
3 banc) and because Silversmith has not made a substantial showing of the denial of a
4 constitutional right. Jurists of reason would not find this ruling debatable.

5 Dated this 15th day of July, 2022.

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8 
9 Honorable Roslyn O. Silver
10 Senior United States District Judge

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APPENDIX H

LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.

1 Michael J. Bresnehan, Esquire
2 1761 E. McNair Drive, Ste. 101
3 Tempe, Arizona 85283-5002
4 (480) 345-7032
5 State Bar No.: 009415
6 mbresnehan@hotmail.com
7 Attorney for Petitioner

8
9
10 IN THE UNITED STATES DISTRICT COURT
11
12 DISTRICT OF ARIZONA

13 Isaac Steven Silversmith,

14 No: CR12-00371-PHX-ROS

15 No: CV20-01421-PHX-ROS

16 Petitioner,

17 vs.
18
19 NOTICE OF APPEAL

20 United States of America,

21 Respondent.

22
23 COMES NOW the petitioner, Isaac Steven Silversmith, by and through the
24 undersigned attorney, and pursuant to FRAP 4(b)(1)(A)(i), hereby gives notice of his
25 appeal to the United States Court of Appeals for the Ninth Circuit from the final Order
26 (Doc. 131) in case number CR12-00371-PHX-ROS denying petitioner's Motion To
27 Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255, in the United States
28 District Court, District of Arizona, on July 18, 2022.

29 Pursuant to Ninth Circuit Rule 4-1(a) & (b), and 18 U.S.C. § 3006A(d)(7), the
30 undersigned attorney, who was appointed under the Criminal Justice Act to represent
31 defendant in the district court, continues his representation on appeal under the Criminal
32 Justice Act, and defendant may appeal *in forma pauperis* without payment of fees and
33 costs and without filing the affidavit required by 28 U.S.C. §1915(a).

1

2 RESPECTFULLY SUBMITTED this 1st day of August, 2022, by

3

4 ***MICHAEL J. BRESNEHAN, P.C.***

5

6 s/ Michael J. Bresnehan

7

8 Attorney for Petitioner

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16 **CERTIFICATE OF SERVICE**

17

18 X I hereby certify that on August 1, 2022, I electronically transmitted the attached
19 document to the Clerk's Office using the ECF System for filing and transmittal of a Notice
20 of Electronic Filing to the following ECF registrants:

21

22 Hon. Roslyn O. Silver
Senior United States District Court Judge

23

24 Thomas C. Simon
Asst. U.S. Attorney

25

26 X I hereby certify that on August 1, 2022, I served the attached document by Mail on the
27 following, who is not a registered participant of the ECF System:

28

29 Isaac Steven Silversmith
Petitioner

30

31 s/ Michael J. Bresnehan

APPENDIX E

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 24 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISAAC STEVEN SILVERSMITH,

Defendant-Appellant.

No. 22-16154

D.C. Nos. 2:20-cv-01421-ROS
2:12-cr-00371-ROS-1

District of Arizona,
Phoenix

ORDER

Before: SILVERMAN and H.A. THOMAS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.