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

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10 Shawn Tyrone Percy,  
11                   Petitioner,  
12 v.  
13 USA,  
14                   Respondent.

No. CV-16-02066-PHX-DGC  
**ORDER**

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17         Magistrate Judge Deborah M. Fine has issued a Report and Recommendation that  
18 the Court deny Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28  
19 U.S.C. § 2255 (Doc. 1). Doc. 26 ("R&R"). Petitioner filed an objection (Doc. 27) and  
20 the government replied (Doc. 28). The Court will adopt the R&R.

21 **I. Background.**

22         On October 7, 1999, Petitioner Shawn Tyler Percy was found guilty by a jury of  
23 second degree murder in violation of 18 U.S.C. § 1111, and discharging a firearm during  
24 and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii).  
25 Doc. 1, ¶ 9. Petitioner was sentenced to 280 months in prison, consisting of 160 months  
26 on the murder count and 120 months on the § 924(c) count. *Id.*

27         On June 26, 2016, Petitioner, through counsel, filed a Motion to Vacate, Set  
28 Aside, or Correct Sentence under 28 U.S.C. § 2255. *Id.* Petitioner asserts that his

1 sentence is unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Id.*  
2 In *Johnson*, the Supreme Court held that the residual clause in the definition of a “violent  
3 felony” in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (“ACCA”), is  
4 unconstitutionally vague. 135 S. Ct. at 2557. Petitioner argues that his sentence under 18  
5 U.S.C. § 924(c)(1)(A)(iii) is likewise unconstitutional. Doc. 1. Petitioner’s sentence  
6 expiration date on the second degree murder charge alone (not considering the § 924(c)  
7 sentence) was July 7, 2016. Doc. 11.

8 On September 6, 2016, the government sought a stay of these proceedings pending  
9 the Supreme Court’s decision in *Sessions<sup>1</sup> v. Dimaya*, No. 15-1498 (cert. granted Sept.  
10 29, 2016), and the Ninth Circuit’s decision in *United States v. Begay*, No. 14-10080.  
11 Doc. 5. On December 12, 2016, the Court denied the stay request. Doc. 18.

12 The government subsequently filed a limited answer to Petitioner’s motion,  
13 arguing that: (1) the motion is untimely, and (2) the motion is procedurally barred.  
14 Doc. 20. On April 13, 2017, Judge Fine issued an R&R concluding that Petitioner’s  
15 motion is not untimely but is procedurally barred, and recommending that the Court deny  
16 the motion. Doc. 26.

## 17 **II. Standard of Review.**

18 The Court must undertake de novo review of those portions of the R&R to which  
19 specific objections are made. The Court may accept, reject, or modify, in whole or in  
20 part, the findings or recommendations. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

## 21 **III. Analysis.**

22 Petitioner argues that his motion is not procedurally barred, and asks the Court to  
23 grant his motion or grant Petitioner a certificate of appealability. Doc. 27.

### 24 **A. Procedural Default.**

25 “Where a defendant has procedurally defaulted a claim by failing to raise it on  
26 direct review, the claim may be raised in habeas only if the defendant can first  
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28 <sup>1</sup> Renamed from “*Lynch*” following the appointment of the new Attorney General.

1 demonstrate either cause and actual prejudice, or that he is actually innocent.” *Bousley v.*  
2 *U.S.*, 523 U.S. 614, 622 (1998) (internal quotation marks and citations omitted).

3 Cause may be shown when a claim is “novel.” *See Reed v. Ross*, 468 U.S. 1, 15  
4 (1984). A claim can be considered novel where a Supreme Court decision: (1) “explicitly  
5 overrule[s] one of [the Court’s] precedents”; (2) “may overtur[n] a longstanding and  
6 widespread practice to which th[e] Court has not spoken, but which a near-unanimous  
7 body of lower court authority has expressly approved”; or (3) when the Court  
8 “disapprove[s] a practice th[e] Court arguably has sanctioned in prior cases.” *Id.* at 17.  
9 In *Johnson*, the Supreme Court expressly overruled its own precedent: “We hold that  
10 imposing an increased sentence under the residual clause of the Armed Career Criminal  
11 Act violates the Constitution’s guarantee of due process. Our contrary holdings in *James*  
12 [*v. United States*, 550 U.S. 192 (2007)] and *Sykes* [*v. United States*, 564 U.S. 1 (2011)]  
13 are overruled.” 135 S. Ct. at 2557.

14 In her R&R, Judge Fine found that Petitioner’s claim was novel under the first  
15 condition set forth in *Ross*. Doc. 26 at 6-7. Neither party objects to this finding.

16 Next, a petitioner must establish prejudice. To establish prejudice, a petitioner  
17 must “demonstrate[e] ‘not merely that the errors . . . [in the proceedings] created a  
18 possibility of prejudice, but that they worked to his actual and substantial disadvantage,  
19 infecting his entire [proceedings] with error of constitutional dimensions.’” *United States*  
20 *v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007). Petitioner must show a “reasonable  
21 probability” that, without the error, the result of the proceedings would have been  
22 different. *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

23 In the R&R, Judge Fine concluded that second degree murder remains a crime of  
24 violence after the U.S. Supreme Court’s decision in *Johnson* and after *Fernandez-Ruiz*,  
25 466 F.3d at 1129 and its Ninth Circuit progeny. Doc. 26 at 7-12. Thus, Judge Fine  
26 concluded that Petitioner was unable to show that he suffered actual prejudice.

27 Petitioner objects to Judge Fine’s conclusion that second degree murder remains a  
28 crime of violence. Doc. 27. Petitioner argues that if second degree murder is properly

1 categorized as not being a crime of violence, he can establish prejudice as required by  
2 step two. *Id.*

3 **B. Is Second Degree Murder a Crime of Violence?**

4 Judge Fine summarized Petitioner’s argument as follows:

5 Movant contends that second-degree murder pursuant to 18 U.S.C. § 1111  
6 is not a “crime of violence” under the force clause because the crime can be  
7 committed through the reckless use of force, which he argues does not  
8 comport with the force clause of § 924(c)(3)(A), citing *Fernandez-Ruiz*,  
9 466 F.3d at 1129. (Doc. 1 at 3, Doc. 25 at 5) Movant asserts that after  
10 *Fernandez-Ruiz*, Ninth Circuit case law requires that applicable statutory  
11 definitions of a “crime of violence” do not include crimes involving the  
12 reckless use of force. (Doc. 1 at 3, Doc. 25 at 5-7)

13 Doc. 26 at 7-8.

14 The Ninth Circuit has explained that before its decision in *Fernandez-Ruiz*, it was  
15 “well established in this circuit that crimes involving the reckless use of force could be  
16 crimes of violence[,] based on the conclusion that ‘recklessness requires conscious  
17 disregard of a risk of a harm that the defendant is aware of.’” *Fernandez-Ruiz*, 466 F.3d  
18 at 1126 (quoting *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001)).  
19 But after the U.S. Supreme Court’s decision in *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004),  
20 the Ninth Circuit reversed direction in *Fernandez-Ruiz*. *Id.* The *Fernandez-Ruiz* court  
21 recognized that the *Leocal* Court reserved the question of whether crimes of violence  
22 may include the reckless use of force. *Id.* at 1127-29. But the Ninth Circuit concurred  
23 with decisions from the Third and Fourth Circuits that the “reasoning of *Leocal* – which  
24 merely holds that using force negligently or less is not a crime of violence – extends to  
25 crimes involving the reckless use of force.” *Id.* at 1127-29. The Ninth Circuit found the  
26 Third Circuit’s opinion in *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005), persuasive.  
27 *Id.* *Oyebanji* addressed the conviction of a Nigerian citizen under New Jersey law for  
28 vehicular homicide. *Id.* at 1129. The state conviction required proof of recklessness,  
defined in part as “‘consciously disregard[ing] a substantial and unjustifiable risk that [a]  
material element [of an offense] exists or will result from [the actor’s] conduct.’” *Id.*  
(quoting *Oyebanji*, 418 F.3d at 263 n. 4, in turn quoting N.J. Stat. Ann. § 2C:2-2(3)).

1 *Oyebanji* concluded that “even though New Jersey’s definition of recklessness involved  
2 conscious disregard of a substantial and unjustifiable risk, the reckless use of force was  
3 not sufficiently ‘intentional’ to prevent an offense from being accidental.” *Fernandez-*  
4 *Ruiz*, 466 F.3d at 1129. The Ninth Circuit found that the petitioner’s misdemeanor  
5 domestic violence conviction was not a categorical crime of violence under 18 U.S.C.  
6 § 16(a). *Id.* at 1132. The Ninth Circuit held that “[i]n light of *Leocal*, we expressly  
7 overrule our cases holding that crimes of violence under 18 U.S.C. § 16 may include  
8 offenses committed through the reckless, or grossly negligent, use of force.” *Id.*

9 Since its decision in *Fernandez-Ruiz*, the Ninth Circuit has attempted to clarify its  
10 position on crimes of violence. In *Covarrubias Teposte v. Holder*, 632 F.3d 1049 (9th  
11 Cir. 2011), the Ninth Circuit considered whether a petitioner’s California state felony  
12 conviction for shooting at an inhabited dwelling or vehicle was categorically a crime of  
13 violence and thus an aggravated felony that would make the petitioner, an alien,  
14 removable. *Id.* at 1051. The Ninth Circuit characterized its holdings on the definition of  
15 a crime of violence in U.S.C. §16, post *Fernandez-Ruiz*, as follows:

16 We have since interpreted the en banc decision in *Fernandez-Ruiz* to mean  
17 that “reckless uses of force is not sufficient to support a finding of  
18 commission of a crime of violence within the meaning of § 16(b).” *Malta-*  
19 *Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007). “The effect of  
20 our holdings is that in order to be a predicate offense under either 18 U.S.C.  
21 § 16 approach, the underlying offense must require proof of an *intentional*  
22 use of force or a substantial risk that force will be *intentionally* used during  
its commission.[”] *United States v. Gomez-Leon*, 545 F.3d 777, 787 (9th  
Cir. 2008). Thus our precedent seems squarely to place crimes motivated  
by intent on a pedestal. While pushing off other very dangerous and violent  
conduct that, because not intentional, does not qualify as a “crime of  
violence.”

23 *Id.* at 1053 (emphasis in original).

24 Petitioner argues *Covarrubias Teposte* recognizes a “bright-line rule between  
25 crimes that require intentional conduct, which can be crimes of violence, and crimes  
26 through ‘very dangerous and violent conduct’ that nevertheless is not intentional, which  
27 are not crimes of violence.” Doc. 27 at 4. Judge Fine rejected Petitioner’s argument:

28 While Movant argues his second-degree murder conviction is not a “crime  
of violence” because that crime can be committed “merely recklessly,” in

1 fact, the lowest *mens rea* applicable to § 1111 second-degree murder  
2 requires that the act be committed “recklessly with extreme disregard for  
3 human life,” a higher standard than mere recklessness. With regard to  
4 second-degree murder, the Ninth Circuit has recognized this higher  
5 standard approaches “a state of intentionality.” See *United States v.*  
6 *Pineda-Doval*, 614 F.3d 1019, 1039 (9th Cir. 2010) (noting it had held that  
7 “merely reckless driving cannot provide the basis for a second-degree  
8 murder conviction” because “something more” was needed “to establish  
9 the malice aforethought necessary to prove second-degree murder”); *United*  
10 *States v. Lesina*, 833 F.2d 156, 159 (9th Cir. 1987) (stating that “disregard  
11 for human life becomes more callous, wanton or reckless, and more  
12 probative of malice aforethought, as it approaches a mental state  
13 comparable to deliberation and intent”); *United States v. Celestine*, 510  
14 F.2d 457, 459 (9th Cir. 1975) (“Malice aforethought . . . embraces the state  
15 of mind with which one intentionally commits a wrongful act without legal  
16 justification or excuse. It may be inferred from circumstances which show  
17 ‘a wanton and depraved spirit, a mind bent on evil mischief without regard  
18 to its consequences’”); and *United States v. Wilson* (where the Ninth Circuit  
19 noted the trial court “distinguished between mere recklessness and  
20 recklessness with extreme disregard for human life”); *U.S. v. Wilson*, 221 F.  
21 App’x 551, 553 (9th Cir. 2007).

22 Doc. 26 at 10-11.

23 The Ninth Circuit has not applied the rule of *Fernandez-Ruiz* and its progeny to  
24 the crime of second degree murder. Rather, since *Fernandez-Ruiz* was decided in 2006,  
25 the Ninth Circuit has explicitly stated that second degree murder is a crime of violence.  
26 See, e.g., *United States v. Begay*, 567 F.3d 540, 552 (9th Cir. 2009), *overruled on other*  
27 *grounds*, 673 F.3d 1038 (9th Cir. 2011) (“Both first- and second-degree murder constitute  
28 crimes of violence”); *United States v. J.J.*, 704 F.3d 1219, 1222 (9th Cir. 2013) (“In this  
case, there is no question that . . . second degree murder, if committed by an adult, would  
be a felony crime of violence.”). The opinions in *United States v. Begay* and *United*  
*States v. J.J.* were each filed after that in *Fernandez-Ruiz*, and *United States v. J.J.* was  
filed after the opinion in *Covarrubias v. Teposte*.

23 Additionally, Ninth Circuit precedent upholds convictions for second-degree  
24 murder under 18 U.S.C. § 1111 and corresponding convictions under § 924(c)(1)(A). See  
25 *United States v. Houser*, 130 F.3d 867, 868 (9th Cir. 1997); *United States v. Andrews*, 75  
26 F.3d 552, 553 (9th Cir. 1996); *United States v. Wilson*, 221 Fed. App’x. at 552.

27 In the R&R, Judge Fine concluded as follows:

28 The Ninth Circuit case law following *Fernandez-Ruiz* does not specifically  
discuss whether second-degree murder qualifies as a crime of violence, and

1 the court has not overruled its opinions expressly stating that second-degree  
2 murder is a crime of violence. Faced with a choice between: (1) the  
3 *Fernandez-Ruiz* line of cases in which the Ninth Circuit found that  
4 “recklessness” is an insufficient state of mind to qualify an offense as a  
5 crime of violence, but in which the Circuit has not yet directly addressed  
6 whether the heightened state of mind of “recklessness with extreme  
7 disregard for human life” is likewise insufficient; and (2) the  
8 contemporaneous direct statements in *United States v. J.J.* and *United  
9 States v. Begay* that second-degree murder is a crime of violence, the  
10 Magistrate Judge recommends a finding that the latter authority prevails.

11 Doc. 26 at 11-12. The Court agrees.

12 Ninth Circuit case law is clear that second degree murder requires a higher degree  
13 of culpability than the plain recklessness found insufficient in *Fernandez-Ruiz*. *See, e.g.,*  
14 *Pineda-Doval*, 614 F.3d at 1040 (“second degree murder require[s] a finding of extreme  
15 recklessness evincing disregard for human life, not simple recklessness.”); *Lesina*, 833  
16 F.2d at 159 (“disregard for human life becomes more callous, wanton or reckless, and  
17 more probative of malice aforethought, as it approaches a mental state comparable to  
18 deliberation and intent.”); *Celestine*, 510 F.2d at 459. This heightened standard differs  
19 from the standard found incapable of supporting a crime of violence in *Fernandez-Ruiz*.

20 Because second degree murder requires a higher degree of recklessness than the  
21 Ninth Circuit found insufficient for a crime of violence in *Fernandez-Ruiz*, and multiple  
22 Ninth Circuit cases, including cases decided since *Fernandez-Ruiz*, have held that second  
23 degree murder is a crime of violence, the Court finds that second degree murder is a  
24 crime of violence for purposes of § 924(c) and will adopt Judge Fine’s recommendation.

25 **IT IS ORDERED:**

- 26 1. The Court adopts Judge Fine’s Report and Recommendation (Doc. 26).
- 27 2. Plaintiff’s Motion to Vacate, Set Aside, or Correct Sentence Under 28  
28 U.S.C. § 2255 (Doc. 1) is **denied**.

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3. The Court grants a Certificate of Appealability because dismissal of the  
Petition may be debatable among jurists of reason.

Dated this 3rd day of July, 2017.



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David G. Campbell  
United States District Judge