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

9 Andrew Acosta,

10 Petitioner,

11 v.

12 USA,

13 Respondent.  
14

No. CV-16-4587-PHX-GMS (DKD)

**REPORT AND RECOMMENDATION**

15 TO THE HONORABLE G. MURRAY SNOW, U.S. DISTRICT JUDGE:

16 In case 03-CR-00075, Andrew Acosta was sentenced under Section 4B1.2(b) of  
17 the U.S. Sentencing Guidelines, a residual clause with similar wording to the Armed  
18 Career Criminal Act. (Doc. 6 at 9-10, ¶¶ 11-16) The United States Court of Appeals for  
19 the Ninth Circuit granted Andrew Acosta's application for authorization to file a second  
20 or successive 28 U.S.C. § 2255 motion because he made a *prima facie* showing for relief  
21 under *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), held to be retroactive under *Welch v. U.S.*,  
22 136 S.Ct. 1257 (2016). (Doc. 6 at 1) Subsequently, the U.S. Supreme Court concluded  
23 in *Beckles v. U.S.*, 137 S.Ct. 886 (2017), that Sentencing Guidelines are not subject to a  
24 void for vagueness challenge under the Fifth Amendment Due Process clause. As a  
25 result, Acosta's Section 2255 motion cannot stand.

26 **IT IS RECOMMENDED** that Andrew Acosta's Motion to Vacate, Set Aside or  
27 Correct Sentence be denied. (Doc. 1)  
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1           **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and  
2 leave to proceed *in forma pauperis* on appeal be denied because Petitioner has not made a  
3 substantial showing of the denial of a constitutional right.

4           This recommendation is not an order that is immediately appealable to the Ninth  
5 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules  
6 of Appellate Procedure, should not be filed until entry of the district court's judgment.  
7 The parties shall have fourteen days from the date of service of a copy of this  
8 recommendation within which to file specific written objections with the Court. *See*, 28  
9 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter,  
10 the parties have fourteen days within which to file a response to the objections. Failure  
11 timely to file objections to the Magistrate Judge's Report and Recommendation may  
12 result in the acceptance of the Report and Recommendation by the district court without  
13 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir.2003).  
14 Failure timely to file objections to any factual determinations of the Magistrate Judge will  
15 be considered a waiver of a party's right to appellate review of the findings of fact in an  
16 order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule  
17 72, Federal Rules of Civil Procedure.

18           Dated this 12th day of March, 2018.

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David K. Duncan  
United States Magistrate Judge