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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Harry McCabe, Sr.,

10 Movant/Defendant,

11 v.

12 USA,

13 Respondent/Plaintiff.
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No. CV-16-08131-PCT-JAT (ESW)
CR-12-8135-PCT-JAT-1

ORDER

15 Pending before the Court is Movant's motion to vacate, set aside or correct
16 sentence ("Motion"). Movant was convicted of four Counts in 2013. (Doc. 1 at 1).
17 Movant challenges two of his four convictions in his motion. (Doc. 1 at 3; Doc. 26 at 2).
18 Specifically, Movant challenges his convictions on Counts 3 and 4. (Doc. 26 at 2).

19 On January 30, 2018, the Magistrate Judge to whom this case was assigned issued
20 a Report and Recommendation (R&R) recommending that the Motion be denied with
21 respect to Count 3 and stayed with respect to Count 4. Movant objected to the R&R.
22 The Government agrees with the ultimate conclusion of the R&R as to Count 3, but
23 preserved additional arguments; for example the Government argues that the entire
24 Motion is untimely. (Doc. 30 at 2 n.1).

25 With respect to Count 4, the R&R recommended this case be stayed until the
26 United States Supreme Court issues a decision in *Dimaya* (which occurred on April 17,
27 2018) and the Ninth Circuit Court of Appeals issues a decision in *Begay*. Movant objects
28 to Counts 3 and 4 being addressed separately, arguing "The outcome of count 3 should be

1 addressed similarly to that of count 4. The matter should be stayed pending the decision
2 of the United States Supreme Court in *Dimaya* and the Ninth Circuit decision in *Begay*.”
3 (Doc. 29 at 3).

4 At this point, given that *Dimaya* has now been decided, the Court believes it
5 would be more efficient to address the entire motion at the same time. Further, this
6 approach is Movant’s preference for having his case decided. Thus, the Court will reject
7 the R&R. However, by this Order, the Court is not making any substantive ruling on any
8 aspect of this case (or the objections).

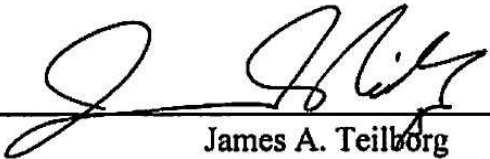
9 The Court will not stay this case pending the outcome of *Begay* and will instead
10 leave to the Magistrate Judge’s determination whether, given the holding of *Dimaya*, this
11 case should still be stayed pending the outcome of *Begay*. Based on the foregoing,

12 **IT IS ORDERED** that the Report and Recommendation (Doc. 26) is rejected.

13 **IT IS FURTHER ORDERED** that this matter is re-referred to Magistrate Judge
14 Eileen S. Willett pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure
15 for further proceedings and a further report and recommendation.

16 Dated this 23rd day of April, 2018.

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James A. Teiborg
Senior United States District Judge