

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jose Dominguez-Rojas,
10 Movant/Defendant

11 v.

12 United States of America,
13 Respondent/Plaintiff.
14

No. CV-16-02179-PHX-SRB(BSB)
CR-06-00381-PHX-SRB
ORDER

15 Movant/Defendant, Jose Dominguez-Rojas, pled guilty to Possession of a Firearm
16 in Connection with a Crime of Violence and was sentenced to 84 months in prison on June
17 18, 2009. He filed a *pro se* Motion to Vacate on June 30, 2016 based on the Supreme
18 Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Counsel was appointed,
19 an Amended Motion was filed on September 12, 2016 and the now pending Second
20 Amended Motion to Vacate, Set Aside, or Correct Sentence Under 28 USC § 2255 was
21 filed on January 5, 2017. The case was then stayed pending the Supreme Court's decision
22 in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). After the Supreme Court issued its decision
23 in *Dimaya*, the Government filed its Response arguing that Movant's Motion is untimely
24 because it was not filed within one year of his conviction as required by 28 U.S.C. §
25 2255(f).

26 The Magistrate Judge issued her Report and Recommendation on December 19,
27 2018 concluding that the Ninth Circuit's opinion in *United States v. Blackstone*, 903 F.3d
28 1120 (9th Cir. 2018) controls and compels the conclusion that Movant's Motion is untimely

1 because it was filed more than one year after Movant’s conviction became final. The
2 Magistrate Judge recommended that Movant’s Motion be denied as untimely and that a
3 Certificate of Appealability also be denied. Movant filed timely written objections on
4 December 19, 2018. The Government responded on January 9, 2019.

5 Movant’s argument that his Motion is timely depends on whether the one year
6 statute of limitations from the date his conviction became final in 28 U.S.C. § 2255(f)(1)
7 applies or whether Movant had one year from “the date on which the right asserted was
8 initially recognized by the Supreme Court, if that right has been newly recognized by the
9 Supreme Court and made retroactively applicable to cases on collateral review” as
10 provided in 28 U.S.C. § 2255(f)(3). If § 2255(f)(1) applies the Magistrate Judge correctly
11 concluded that *Blackstone* foreclosed Movant’s timeliness argument. In *Blackstone*, the
12 defendant argued, as Movant does here, that the residual clause in 28 U.S.C. § 924(c) was
13 void for vagueness in light of *Johnson*. *Blackstone* held that *Johnson* did not recognize
14 that the § 924(c) residual clause was void for vagueness and, therefore, did not announce a
15 new right made retroactive to cases on collateral review. *Blackstone*’s motion was
16 therefore untimely because it was not filed within a year of the date his conviction became
17 final. Following the holding in *Blackstone*, the Magistrate Judge found that § 2255(f)(3)
18 did not apply “because the Supreme Court has not recognized the right [Movant] seeks to
19 assert – that § 924(c)’s ‘residual clause’ is unconstitutionally vague.” (Doc. 21,
20 R. & R. at 7.)

21 In his Objections, Movant recognizes that this Court is bound by *Blackstone* but
22 nevertheless requests that the Court reject the Magistrate Judge’s recommendation to deny
23 his motion as untimely. The Government’s Response argues that, because the Court is
24 bound by *Blackstone*, Movant’s motion must be denied. Movant also requests that, because
25 a Petition for Rehearing is pending in *Blackstone* and the Court of Appeals has required
26 the Government to file a response, a Certificate of Appealability should be granted. The
27 Government’s Response states that it takes no position on the certification of an appeal.

28 This Court is bound by the holding in *Blackstone*. That holding compels the

1 conclusion that Movant's motion is untimely.

2 IT IS ORDERED overruling Movant's Objections to the Report and
3 Recommendation of the Magistrate Judge.

4 IT IS FURTHER ORDERED adopting the Report and Recommendation of the
5 Magistrate Judge as the Order of this Court. (Doc. 21)

6 IT IS FURTHER ORDERED denying Movant's Second Amended Motion to
7 Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 as untimely. (Doc. 7)

8 IT IS FURTHER ORDERED granting a Certificate of Appealability because the
9 opinion in *Blackstone* is not yet final. Had the Mandate issued in *Blackstone* a Certificate
10 of Appealability would have been denied.

11 IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly.

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13 Dated this 22nd day of January, 2019.

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Susan R. Bolton
United States District Judge

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