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3 **NOT FOR PUBLICATION**  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 Derrick L. McCreary,  
10 Movant/Defendant,  
11 v.  
12 United States of America,  
13 Respondent/Plaintiff.  
14

No. CV-16-04585-PHX-SRB  
CR-04-00313-3-SRB  
**ORDER**

15 Movant/Defendant Derrick L. McCreary (“Defendant”) brought this Motion to  
16 Vacate, Set Aside, or Correct Sentence (Doc. 3) pursuant to 28 U.S.C. § 2255. The matter  
17 was referred to Magistrate Judge Michelle H. Burns for a Report and Recommendation  
18 (Doc. 6) on February 22, 2017. On August 17, 2018, Judge Burns issued a Report and  
19 Recommendation (“R. & R.”) (Doc. 16), recommending that the current stay be lifted and  
20 that Defendant’s motion be denied and dismissed with prejudice. She further  
21 recommended that a Certificate of Appealability and leave to proceed *in forma pauperis*  
22 on appeal be denied because Defendant has not made a substantial showing of the denial  
23 of a constitutional right. Defendant timely filed his objection. (*See* Doc. 17, Obj. to R. &  
24 R. (“Obj.”).) Having reviewed the matter de novo, the Court now adopts the Report and  
25 Recommendation and denies and dismisses Defendant’s § 2255 motion with prejudice.

26 The Ninth Circuit transferred this matter to this Court following Defendant’s  
27 successful application to file a second or successive § 2255 motion. (R. & R. at 1.)  
28 Following a jury trial, Defendant was convicted of conspiracy, armed bank robbery, and

1 brandishing a firearm during the commission of a crime of violence. (*Id.* (citing 18  
2 U.S.C. §§ 371, 2113(a), (d), 924(c)(1)(A)(ii).) He was then sentenced to 600 months’  
3 imprisonment. (*Id.*) After his conviction was affirmed on appeal, Defendant filed several  
4 § 2255 motions, all of which were denied. (*Id.* at 1–2.)

5 This motion challenges the validity of Defendant’s firearm convictions. He argues  
6 that the Supreme Court’s decision in *Johnson v. United States*,<sup>1</sup> which found the residual  
7 clause of § 924(e) unconstitutionally vague, necessarily extends to the similarly worded  
8 residual clause of § 924(c)—namely, its definition of “crime of violence.” (*Id.* at 2.)

9 On March 20, 2017, Judge Burns entered a stay “pending [the] Ninth Circuit’s  
10 decision in *United States v. Begay*, No. 14-10080, and the Supreme Court’s decision in  
11 *Lynch v. Dimaya*, No. 15-1498 (cert. granted Sept. 29, 2016).” (Doc. 11, Mar. 20, 2017  
12 Order.) Following the Supreme Court’s decision in *Dimaya*,<sup>2</sup> the Government moved to  
13 lift the stay because a recent Ninth Circuit decision deeming armed bank robbery a crime  
14 of violence under § 924(c) made it unnecessary to wait for a decision in *Begay*. (R. & R.  
15 at 2 (citing *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018).) Judge Burns  
16 agreed, rejecting Defendant’s argument that the stay should remain in place pending an  
17 anticipated appeal to the Supreme Court. (*Id.* at 3.) She in turn recommended that the stay  
18 be lifted and the § 2255 motion be denied and dismissed with prejudice, and Defendant  
19 timely objected. But that objection is now moot.

20 A federal prisoner is entitled to relief from his sentence if it was “imposed in  
21 violation of the United States Constitution or the laws of the United States, . . . was in  
22 excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28  
23 U.S.C. § 2255(a). A district court “must make a de novo determination of those portions  
24 of the report . . . to which objection is made,” and “may accept, reject, or modify, in  
25 whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C.  
26 § 636(b)(1)(C). A court need only review those portions objected to by a party, meaning  
27 it can adopt all other portions without further review. *See United States v. Reyna–Tapia*,

28 <sup>1</sup> 135 S. Ct. 2551 (2015).

<sup>2</sup> *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

1 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

2 The crux of Defendant's objection is that the stay should remain in place until  
3 appellate remedies in *Watson* are fully exhausted. (Obj. at 4–5.) And it has. The Supreme  
4 Court denied certiorari on October 1, thus leaving the Court bound by the Ninth Circuit's  
5 earlier holding. *See Watson v. United States*, \_\_ S. Ct. \_\_, 2018 WL 3223705, at \*1 (U.S.  
6 Oct. 1, 2018). Defendant offers no other reason to maintain the stay. The Court  
7 accordingly overrules Defendant's objection and adopts the Report and Recommendation  
8 that § 2255 relief be denied.

9 **IT IS ORDERED** overruling Defendant's Objection to the Magistrate Judge's  
10 Report and Recommendation (Doc. 17).

11 **IT IS FURTHER ORDERED** adopting the Report and Recommendation (Doc.  
12 16).

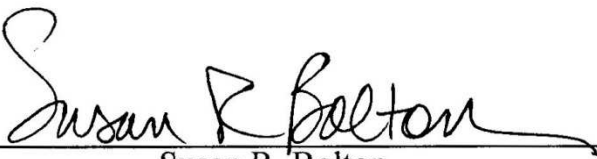
13 **IT IS FURTHER ORDERED** granting the Government's Motion to Vacate Stay  
14 (Doc. 14).

15 **IT IS FURTHER ORDERED** denying the Motion to Vacate, Set Aside or  
16 Correct Sentence (Doc. 3).

17 **IT IS FURTHER ORDERED** denying a Certificate of Appealability and leave to  
18 proceed *in forma pauperis* on appeal because Movant has not made a substantial showing  
19 of the denial of a constitutional right.

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

21  
22 Dated this 15th day of October, 2018.

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27 Susan R. Bolton  
28 United States District Judge