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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Duane Thomas Lee,  
10                   Movant-Defendant,  
11 v.  
12 USA,  
13                   Respondent-Plaintiff.  
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No. CV-16-08138-PCT-JAT  
CR-05-594-PCT-JAT

**ORDER**

15 **I. Claim in this case**

16           Movant has summarized the claim in this case as follows: “Mr. Lee is before the  
17 Court challenging his conviction under 18 U.S.C. § 924(c) for discharging a firearm  
18 during and in relation to a crime of violence under *Johnson v. United States*, 135 S. Ct.  
19 2551 (2015), on the ground that the predicate crime in his case, second-degree murder in  
20 violation of 18 U.S.C. § 1111, is not a ‘crime of violence’ under § 924(c)(3) in the wake  
21 of *Johnson*.” (Doc. 29 at 1).

22 **II. Procedural History**

23           Pending before the Court is the second Report and Recommendation (R&R)  
24 issued by the Magistrate Judge recommending that the Motion to Vacate, Set Aside or  
25 Correct Sentence (“Motion”) in this case be denied. After the first R&R was issued, the  
26 Supreme Court decided *Class v. United States*, 138 S.Ct. 798 (2018). After the second  
27 R&R was issued, the Ninth Circuit Court of Appeals decided *United States v. Blackstone*,  
28 No. 17-55023, 2018 WL 4344096 (9th Cir. Sept. 12, 2018).

1 In the first R&R the Magistrate Judge recommended that this Court find that  
2 Movant has waived his right to bring this Motion via his plea agreement. (Doc. 23 at 6-  
3 9). Following the supplemental briefing on *Class*, this Court (mistakenly) believed that  
4 the parties agreed that Petitioner’s waiver did not preclude his Motion in this case. (Doc.  
5 31). This Court re-referred this case to the Magistrate Judge for a second R&R. In  
6 preparing the second R&R, the Magistrate Judge (correctly) determined that the parties  
7 were not in agreement on whether *Class* impacted Respondent’s waiver arguments.  
8 Thus, in the second R&R, the Magistrate Judge again recommends that this Court find  
9 that Movant waived his ability to bring this motion via his plea agreement,  
10 notwithstanding *Class*. (Doc. 35 at 9-16). Movant objected to this recommendation.

11 In the second R&R, the Magistrate Judge went on, in the event this Court  
12 disagreed regarding the waiver bar, to analyze Movant’s Motion. In that analysis, the  
13 R&R recommended that this Court find the Motion was timely. However, following the  
14 Ninth Circuit Court of Appeals decision in *Blackstone*, the Government argues that the  
15 Motion is not timely.<sup>1</sup> Movant suggests that he will argue that *Blackstone* is wrongly  
16 decided on appeal, and also argues that he is subject to an exception from *Blackstone*’s  
17 conclusion.

18 Assuming neither Movant’s waiver, nor the time bar, prevent the Court from  
19 reaching the merits of the Motion, the second R&R ultimately concludes that Movant  
20 should be given relief as to his conviction on Count Two. (Doc. 35 at 48). The  
21 Government objects to this recommendation. (Doc. 39).

### 22 **III. Review of R&R**

23 This Court “may accept, reject, or modify, in whole or in part, the findings or  
24 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that  
25 the district judge must review the magistrate judge’s findings and recommendations *de*  
26 *novo if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d

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28 <sup>1</sup> The Government’s position throughout the pendency of the Motion has been  
that it is untimely; however, the Government now argues the issue is definitively resolved  
by *Blackstone*.

1 1114, 1121 (9<sup>th</sup> Cir. 2003) (*en banc*) (emphasis in original). Both Movant and the  
2 Government filed objections to the R&R. (Docs. 36 and 39). Further, at the Court’s  
3 request, each filed a supplemental brief. (Docs. 41 and 42).

#### 4 **IV. Motion**

##### 5 **A. Waiver**

6 As discussed above, the first issue this Court must address is whether Movant  
7 waived his ability to bring this Motion via his plea agreement. The R&R concludes that  
8 Movant expressly waived his ability to bring this Motion. (Doc. 35 at 9-16).  
9 Specifically, the R&R notes that the plea agreement included the following: “The  
10 defendant further waives...(3) any right to collaterally attack defendant’s conviction and  
11 sentence under Title 28, United States Code, Section 2255.” (Doc. 35 at 9).

12 Movant argues that the type of § 2255 motion he is bringing is non-waivable; thus,  
13 even the express waiver language of his plea agreement would not bar this Motion. (Doc.  
14 36). Specifically, Movant argues: 1) a guilty plea does not implicitly waive any claim  
15 that goes to the government’s ability to bring charges in the first instance; and 2) a waiver  
16 cannot be enforced against a claim that a sentence or conviction is unconstitutional.  
17 (Doc. 36 at 2).

18 Conversely, the Government argues that Movant’s express waiver should be  
19 enforced. (Doc. 39 at 2-3). However, the Government then basically concludes that the  
20 distinctions drawn in *Class* between Constitutional claims and statutory claims are very  
21 difficult to apply in practice; thus, the Government encourages the Court to decide the  
22 Motion in this case on a ground other than waiver.<sup>2</sup> (Doc. 39 at 3). Nonetheless, the  
23 Government argues that what the Supreme Court found to not be waived by Mr. Class  
24 was a Constitutional challenge, and the Government argues that what Movant in this case  
25 brings is a statutory challenge; thus, Movant’s claim is waivable and was in fact waived.  
26 (Doc. 30 at 3).

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28 <sup>2</sup> Similarly, in responding to this Court’s request for supplemental briefing  
regarding the impact of the *Class* decision, the Government encouraged this Court to  
decide the Motion in this case on grounds other than waiver. (Doc. 30 at 4).

1           The first issue the Court must decide with respect to waiver is whether *Class*  
2 controls this Court’s analysis. The second R&R finds *Class* to be distinguishable from  
3 this case because in *Class* the defendant merely pleaded guilty, he did not waive any  
4 rights to appeal or challenge his conviction. (Doc. 35 at 14-16). The court in *Class*  
5 found that Mr. Class’s plea did not contain an express waiver of the right to appeal. 138  
6 S.Ct. at 807-808.

7           Here, as recounted in the R&R, the plea was not silent as to waiver. The waiver  
8 was express. The Court agrees with the R&R that, even post-*Class*, express waivers of  
9 Constitutional rights are enforceable. (Doc. 35 at 14-16). In other words, this Court  
10 finds that the holding of *Class* is limited to pleas that have no express waivers.

11           Having determined that *Class* did not change the state of the law, the Court must  
12 determine whether Movant’s waiver barred his claim in this case even pre-*Class*. As  
13 indicated above, the first R&R concluded that said waiver did bar the claim in this case,  
14 and Movant objected to this conclusion. The second R&R reaches the same conclusion.  
15 (Doc. 35 at 10-13). Movant again objects and argues that he is challenging his sentence,  
16 not his conviction. Movant makes this distinction, presumably, because waivers as to  
17 sentencing issues frequently are unenforceable (because they come after the plea) but  
18 waivers as to conviction issues (even Constitutional issues) are enforceable because they  
19 were knowable at the time of the plea. *See generally* (Doc. 35 at 10-13).

20           The R&R rejects Movant’s characterization that he is challenging his sentence and  
21 not his conviction. (Doc. 35 at 12-13). The nuances of when a Movant is challenging a  
22 conviction verses a sentence come from *United States v. Bibler*, 495 F.3d 621, 624 (9th  
23 Cir. 2007), which stated that a guilty plea waiver would not be enforced if the sentence  
24 violates the law (among other reasons not relevant here). *Id.* at 624. *Bibler* went on to  
25 state “A sentence is illegal if it exceeds the permissible statutory penalty for the crime or  
26 violates the Constitution.” *Id.* Here, Movant is arguing that his sentence violates the  
27 Constitution if the statute under which he is convicted is itself unconstitutional. (Doc. 24  
28 at 2).

1           The R&R reaches a persuasive conclusion that this is not a sentencing claim  
2 because, if this type of Constitutional challenge not to the sentence, but to the conviction,  
3 counts as a “sentencing” claim, all Constitutional challenges to convictions would not be  
4 waivable. Clearly, such a result is inconsistent with a myriad of Supreme Court cases  
5 which found that Constitutional challenges to convictions were waived by pleading  
6 guilty. (Doc. 35 at 10-13 (discussing various cases finding both implicit and express  
7 waivers to be enforceable)). In other words, the logical result of Movant’s broad  
8 interpretation of what is a sentencing claim is that any claim challenging the conviction is  
9 a claim that the sentence is “illegal.” This Court agrees with the R&R that Movant’s  
10 theory of what qualifies as a sentencing claim would ultimately make the majority of  
11 waivers unenforceable. Given that courts have routinely held that waivers are  
12 enforceable, this Court will not go against the weight of this authority to find Movant did  
13 not waive this claim.

14           As a result, the Court finds Movant’s current claim to be barred by his express  
15 waiver in his plea agreement and the Motion will be denied and dismissed on this basis.

16           **B. Statute of Limitations**

17           This Court addressed whether Movant waived the ability to bring this Motion as  
18 an initial inquiry because such question potentially impacted Movant’s standing to be  
19 before this Court. Alternatively, the Government has argued that the statute of  
20 limitations also bars Movant’s Motion. The Court will now consider this alternative basis  
21 for dismissal.

22           The R&R concluded that the Motion in this case is not barred by the statute of  
23 limitations because of the exception in 28 U.S.C. § 2255(f)(3).<sup>3</sup> (Doc. 35 at 16-23).  
24 However, as noted above, after the R&R issued, the Ninth Circuit Court of Appeals  
25 decided *United States v. Blackstone*, No. 17-55023, 2018 WL 4344096 (9th Cir. Sept. 12,

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27           <sup>3</sup> Neither party objected to the R&R’s conclusion that the Motion was filed more  
28 than one year after Movant’s conviction became final and that under the general one-year  
statute of limitations the Motion is untimely. (Doc. 35 at 16-17). Thus, the only issue  
was whether Movant qualified for an exception to that general rule.

1 2018). As further noted above, the Government argues in its supplemental brief that  
2 *Blackstone* is directly on point, and resultantly makes Movant’s Motion untimely. (Doc.  
3 42). The Court agrees with the Government that *Blackstone* is directly on point and bars  
4 Movant’s motion.<sup>4</sup>

5 Movant attempts to distinguish *Blackstone* in two ways. First, he argues  
6 *Blackstone* is wrongly decided in light of existing Supreme Court precedent. (Doc. 41 at  
7 3). This Court cannot rule that binding Ninth Circuit precedent is wrongly decided;  
8 therefore, this distinction fails.

9 Second, Movant argues he is actually innocent, which would allow his Motion to  
10 be timely. (Doc. 41 at 3). However, Movant has never argued factual innocence in this  
11 case. (Indeed, he has argued that he is bringing a sentencing claim; although the Court  
12 has rejected this argument.) At best, Movant has argued legal innocence by making a  
13 constitutional challenge to the statute of conviction. For the reasons stated in *Bousley v.*  
14 *United States*, 523 U.S. 614, 623 (1998) (requiring factual innocence not legal  
15 insufficiency); *Muth v. Fondren*, 676 F.3d 815, 819 (9th Cir. 2012) (same); and *Marrero*  
16 *v. Ives*, 682 F.3d 1190, 1193 (9th Cir. 2012) (holding that a purely legal claim is not  
17 equivalent to factual innocence and therefore is not actual innocence for purpose of the  
18 exception to the statute of limitation), this legal theory does not meet the actual innocence  
19 exception to the statute of limitation.

20 Thus, because *Blackstone* is controlling, and directly on point, the Court  
21 alternatively will dismiss this Motion because it is barred by the statute of limitation.

## 22 **V. Conclusion**

23 Because the Court has concluded that the Motion in this case is barred for two  
24 procedural reasons, the Court will not reach the remainder of the R&R recommendations  
25 regarding the merits of this case. Based on the foregoing,

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27 <sup>4</sup> Specifically, *Blackstone* held that: “The Supreme Court has not recognized that  
28 § 924(c)’s residual clause is void for vagueness in violation of the Fifth Amendment.”  
*United States v. Blackstone*, No. 17-55023, 2018 WL 4344096, at \*7 (9th Cir. Sept. 12,  
2018). As a result, *Blackstone*’s motion did not qualify for the exception to the statute of  
limitations in 28 U.S.C. § 2255(f)(3). *Id.* at \*6-7.

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**IT IS ORDERED** that the R&R (Doc. 35) is modified as indicated above and accepted. The Motion is denied and dismissed, with prejudice, and the Clerk of the Court shall enter judgment accordingly.

**IT IS FURTHER ORDERED** that a certificate of appealability and leave to proceed in forma pauperis on appeal are denied because denial of the Motion is based on a plain procedural bar and jurists of reason would not find this Court's procedural rulings debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 9th day of October, 2018.

