

APPENDIX

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENE MICHAEL DIULIO,

Defendant.

Case No. 2:93-cr-0259-LDG

ORDER

The defendant, Gene Michael Diulio, moves pursuant to 28 U.S.C. §2255 to vacate, set aside, or correct his sentence (ECF Nos. 131, 134). The Court sentenced the defendant as a career offender under the then-mandatory United Sentencing Guidelines §4B1.1. He argues this sentence must be vacated because, pursuant to the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), he can no longer be classified as a career offender. The United States opposes the motion (ECF No. 138). The Court will deny the motion as premature, pursuant to *United States v. Blackstone*, 903 F.3d 1020, 1022 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762, 204 L. Ed. 2d 1146 (2019).

As relevant to the instant matter, a motion brought pursuant to §2255 may be timely filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made

1 retroactively applicable to cases on collateral review.” *Id.* § 2255(f)(3). Diulio filed the
 2 present motion within one year of the Supreme Court’s decision in *Johnson*.

3 Diulio’s motion would be timely if *Johnson* recognized a new right applicable to the
 4 mandatory sentencing guidelines. In *Blackstone*, however, the Ninth Circuit held that
 5 “*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines
 6 on collateral review.” *Blackstone*, 903 F.3d at 1028. As in the present matter, *Blackstone*
 7 concerned a §2255 motion brought by a defendant sentenced under the mandatory
 8 Sentencing Guidelines as a career offender pursuant to §4B1.2. *Blackstone* cannot be
 9 distinguished from this matter.

10 “If the Court extends *Johnson* to a sentence imposed at a time when the Sentencing
 11 Guidelines were mandatory, then [the defendant] may be able to bring a timely motion
 12 under § 2255. As of now, however, [the defendant’s] motion is untimely.” *Id.* Accordingly,
 13 the Court must dismiss Diulio’s motion as premature.¹

14 Certificate of Appealability

15 To appeal this order, Diulio must receive a certificate of appealability. 28 U.S.C. §
 16 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1(a). To obtain that certificate, he
 17 “must make a substantial showing of the denial of a constitutional right, a demonstration
 18 that . . . includes showing that reasonable jurists could debate whether (or, for that matter,
 19 agree that) the petition should have been resolved in a different manner or that the issues

21 ¹ If Diulio’s motion was timely, the Court would deny the motion on its merits.
 22 Diulio’s underlying argument is that his convictions for federal armed bank robbery under
 23 18 U.S.C. §2113(a) and (d) do not qualify as crimes of violence pursuant to the “force
 24 clause” found in §4B1.2(a)(1) because bank robbery can be committed by “intimidation.”
 25 The Ninth Circuit considered this same argument in *United States v. Watson*, 881 F.3d
 26 782, 784 (9th Cir.), cert. denied, 139 S. Ct. 203, 202 L. Ed. 2d 139 (2018). The circuit court
 rejected the argument, holding that bank robbery is a crime of violence pursuant to the
 force clause defined at 18 U.S.C. §924(c). Given that the force clause in §4B1.2 is nearly
 identical in its language and structure to the force clause defined at 18 U.S.C. §924(c), the
 Court would find that Diulio’s federal convictions for armed bank robbery qualify as crimes
 of violence under the §4B1.2(a)(1) force clause.

presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation omitted). This standard is “lenient.” *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc). In the present matter, the Ninth Circuit’s decision in *Blackstone* precludes this Court from finding that reasonable jurists could debate whether (or, for that matter, agree that) Diulio’s motion was timely filed. Accordingly, the Court will not grant a certificate of appealability.

Therefore, for good cause shown,

THE COURT **ORDERS** that Defendant Gene Michael Diulio’s Motion to Stay (ECF No. 149) is DENIED as moot.


THE COURT FURTHER **ORDERS** that Defendant Gene Michael Diulio’s Motion for Leave to File Supplemental Authority (ECF No. 141) is GRANTED.

THE COURT FURTHER **ORDERS** that Defendant Gene Michael Diulio’s Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence (ECF Nos. 131, 134) is DENIED.

THE COURT FURTHER ORDERS that it DENIES Defendant Gene Michael Diulio a certificate of appealability.

THE COURT FURTHER ORDERS that the Clerk of Court is directed to enter a separate civil judgment denying Defendant Gene Michael Diulio’s § 2255 motion. The Clerk also shall file this order and the civil judgment in this case and in the related civil case number 2:16-cv-1532-LDG.

DATED this 31 day of January, 2020.


Lloyd D. George
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA

Plaintiff,

v.

Gene Michael Diulio

Defendant.

JUDGMENT

Case Number: 2:93-cr-00259-LDG

(Related case: 2:16-cv-01532-LDG)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of Plaintiff against Defendant and denying a Certificate of Appealability.

February 3, 2020

Date

DEBRA K. KEMPI

Clerk



/s/ J. Matott

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 1 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GENE MICHAEL DIULIO,

Defendant-Appellant.

No. 20-15563

D.C. Nos. 2:16-cv-01532-LDG
2:93-cr-00259-LDG-2

District of Nevada,
Las Vegas

ORDER

Before: WARDLAW and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APP 005