

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12531
Non-Argument Calendar

D.C. Docket Nos. 2:16-cv-14258-DMM; 2:01-cr-14001-DMM-1

CARLOS WILSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 2, 2018)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and ANDERSON, Circuit
Judges.

PER CURIAM:

Carlos Wilson appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence.

Wilson pleaded guilty in 2001 to one count of possession with intent to distribute more than five grams of crack cocaine in violation of 18 U.S.C. § 841(a)(1). He received a career offender enhancement under § 4B1.2(a) of the United States Sentencing Guidelines, which were mandatory at that time, based on prior Florida convictions for burglary and second degree murder. He was sentenced to 235 months. In 2016 he filed this § 2255 motion, his first, on the ground that the Supreme Court's decision in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), which invalidated the Armed Career Criminal Act's residual clause as unconstitutionally vague, also invalidated the identically-worded residual clause in § 4B1.2(a) of the guidelines. He acknowledged the Supreme Court's holding in Beckles v. United States, 580 U.S. ___, 137 S. Ct. 886, 890 (2017), that the advisory guidelines are not subject to vagueness challenges, but argued that Beckles does not apply here because he was sentenced when the guidelines were mandatory. The district court rejected that argument based on prior panel precedent and denied his motion. This is Wilson's appeal.

We have held that “[t]he Guidelines — whether mandatory or advisory — cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing

judge.” In re Griffin, 823 F.3d 1350, 1354 (11th Cir. 2016). That decision forecloses Wilson’s argument that § 4B1.2(a) is unconstitutionally vague in light of Johnson. See Smith v. GTE Corp., 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) (“[Under the] prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel’s holding is overruled by the Court sitting en banc or by the Supreme Court.”). His argument that In re Griffin is not binding because it involved an application to file a second or successive petition under 28 U.S.C. § 2255 fails because “our prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions.” In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015).¹ And his argument that Beckles undermines In re Griffin to the point of abrogation also fails because, as he admits, Beckles did not address whether the mandatory guidelines are subject to a vagueness challenge. See Beckles, 137 S. Ct. at 890. Because Beckles is not directly on point, In re Griffin remains binding. See United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009) (“In addition to

¹ He argues that In re Lambrix is off point because it involved a second or successive application and as a result could not address whether published second or successive decisions are binding outside of that context. But we “could” and did address that issue. We held that published second or successive decisions are to be treated as normal prior panel precedents without exception. See In re Lambrix, 776 F.3d at 794 (“[A] prior panel’s holding in a published three-judge order issued under § 2244(b) is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.”) (emphasis added) (quotation marks omitted).

being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.”).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:16-CV-14258-MIDDLEBROOKS/LYNCH
(01-CR-14001)

CARLOS WILSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING REPORT AND DENYING MOTION TO VACATE SENTENCE
UNDER § 2255**

THIS CAUSE is before the Court on a Report and Recommendation issued by Magistrate Judge Frank J. Lynch, Jr. on Movant's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. (DE 25). Movant filed Objections to the Report (DE 26), to which the Government responded (DE 27).

On March 8, 2001, Movant pled guilty to one count of possession with intent to distribute more than 5 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). A presentence investigation report ("PSI") was disclosed. Probation advised that Movant qualified as a career offender based on convictions for Florida Burglary of a Dwelling and Florida Second Degree Murder. The PSI calculated Movant's guideline range as 188 to 235 months. On July 26, 2001, Movant was sentenced to 235 months. He appealed his judgment and that appeal was denied. This is Movant's first motion to vacate pursuant to § 2255.

Movant seeks relief pursuant to *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2557 (2015), in which the Supreme Court held that the residual clause of the Armed Career

Criminal Act violates due process as it “denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557. The residual clause can no longer support a defendant’s classification as an armed career criminal. On April 18, 2016, the Supreme Court decided *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), which held that the newly established right recognized in *Johnson* is retroactive to cases on collateral review.

The residual clause language in the Armed Career Criminal Act is identical to the language in the residual clause of U.S.S.G. § 4B1.2(a)(2), the career offender enhancement of the Sentencing Guidelines. In *Beckles v. United States*, ___ U.S. ___, 137 S. Ct. 886 (2017), the Supreme Court determined that discretionary Sentencing Guidelines cannot be unconstitutionally vague, and thus *Johnson* does not apply to the career offender enhancement under the Guidelines. However, the Supreme Court did not answer whether *Johnson* applies to those sentenced before *United States v. Booker*, 543 U.S. 220 (2005), when the Guidelines were mandatory.¹

Movant was sentenced pre-*Booker*, in 2001. Although *Beckles* does not directly address whether Movant can raise a vagueness challenge to his career offender enhancement, I agree with the Report’s recommendation that he cannot. The Report cites to *In Re: Marvin Griffin*, 823 F.3d 1350 (11th Cir. 2016), in which a panel of the Eleventh Circuit denied an application to

¹ Justice Sotomayor recognized this in a footnote to her concurrence:

The Court’s adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)—that is, during the period in which the Guidelines did “fix the permissible range of sentences,” *ante*, at 892—may mount vagueness attacks on their sentences. See Brief for Scholars of Criminal Law, Federal Courts, and Sentencing as *Amici Curiae* 33–34. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.

137 S. Ct. at 903 n.4 (J. Sotomayor, concurrence).

file a second motion to vacate. There, the panel found that the Eleventh Circuit's reasoning in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), "also govern[s] our panel as to Griffin's guidelines sentence when the Guidelines were mandatory." The panel explained

The Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge. [*Matchett*] at 1195. The limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. The Guidelines do not define illegal conduct: they are directives to judges for their guidance in sentencing convicted criminals, not to citizens at large. *Id.* at 1195–96. Due process does not mandate notice of where, within the statutory range, the guidelines sentence will fall.

Indeed, a defendant's due process rights are unimpaired by the complete absence of sentencing guidelines. The Constitution does not require sentencing guidelines in noncapital cases. *Id.* at 1194. Because there is no constitutional right to sentencing only under guidelines, the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. *Id.* at 1194–95. Before Congress enacted the Guidelines, the federal government had indeterminate sentencing. *Id.* at 1195. Even vague guidelines cabin discretion more than no guidelines at all.

823 F.3d at 1354-55.² The panel also highlighted the between an ACCA sentence and a mandatory Guidelines sentence for a career offender:

When the ACCA's residual clause is applied and the challenged sentence exceeds the unenhanced statutory maximum because of the ACCA's residual clause, then *Johnson* requires the district court to reduce the enhanced sentence to at least the unenhanced applicable statutory maximum. In stark contrast, whether the Guidelines are mandatory or advisory, the district court, even without the invalidated residual clause, could still impose a sentence within the same statutory penalty range and indeed the same sentence as before. In fact, in former mandatory guidelines cases, the resentencing would now be under an even more discretionary advisory system that would permit the district court to impose the same sentence.

Id. at 1355.

Movant argues that a panel's decision on an application for leave to file a second or

² See also *Beckles*, 137 S. Ct. at 894 (explaining that "the system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible").

successive motion to vacate is not binding. However, “the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.” *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) (en banc). “[P]ublished three-judge orders issued under § 2244(b) are binding precedent in our circuit.” *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (“[O]ur prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions.”).

Even assuming that *In Re: Marvin Griffin* is not binding, I find its reasoning persuasive, especially in light of the Supreme Court’s majority opinion in *Beckles*. In *Beckles*, the Supreme Court explained that it “has invalidated two kinds of criminal laws as ‘void for vagueness’: laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses.” 137 S. Ct. at 892 (emphasis in original). Where the Sentencing Guidelines do not alter the statutory minimum or maximum penalties for a crime, it is difficult to conceive how the mandatory nature of a Guideline range between those statutory penalties somehow makes their application subject to a vagueness challenge.³ *See id.* at 893 (“More specifically, our cases have never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered.”). Accordingly, the career offender provisions of the Sentencing

³ Movant argues that the mandatory Guideline range effectively amended the statutory minimum and maximum penalties. According to the plea agreement, the statutory minimum penalty was 5 years and the statutory maximum was 40 years. (Case No. 01-cr-14001, DE 17). *See also* 21 U.S.C. § 841(b)(1)(B) (eff. Feb. 1, 2000 - Nov. 1, 1002). Here, Movant was sentenced to 235 months, which was at the high end of the Guideline range (188-235 months). That sentence suggests that he was not affected by a range that was higher than the statutory minimum. In other words, had the Court desired to sentence Movant to the statutory minimum, but felt compelled by the Guidelines to sentence within the Guideline range, it would have likely sentenced Movant to the low end of the Guideline range. But for the mandatory Guideline, it is possible that the Court would have sentenced Movant to a higher sentence, up to the statutory maximum of 40 years. It is also possible that the Court sentenced Movant exactly as it did, had the Guidelines been advisory.

Guidelines, even pre-*Booker*, do not suffer the constitutionality infirmity that the residual clause of the Armed Career Criminal Act did.⁴

After a *de novo* review of the record, the Report, the Objections, and the Response to the Objections, I adopt the Report's recommendation that Movant's motion should be denied.

I also adopt the Report's recommendation that a certificate of appealability should be issued. Pursuant to § 2253(c)(2), a district court may only issue a certificate of appealability when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Finding that Movant has made such a showing, I grant Movant a certificate of appealability on the following issue: whether *Johnson* applies to the Sentencing Guidelines' career offender provisions when Movant was sentenced pre-*Booker*.

It is **ORDERED AND ADJUDGED**:

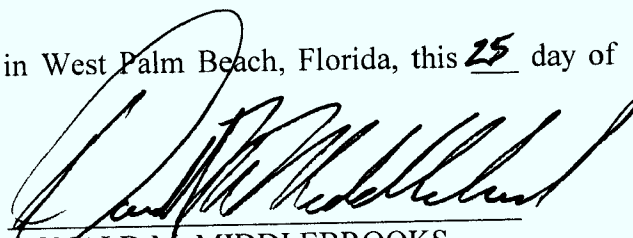
(1) The Report (DE 25) is **ADOPTED**.

(2) The Amended Motion to Vacate (DE 4) is **DENIED**.

(3) A certificate of appealability is **GRANTED** on the following issue: whether *Johnson* applies to the Sentencing Guidelines' career offender provisions when Movant was sentenced pre-*Booker*.

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 25 day of April, 2017.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

⁴ *Booker* does not apply retroactively to cases on collateral review. *Varela v. United States*, 400 F.3d 864 (11th Cir. 2005).