

A P P E N D I X

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FILED: March 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7105
(4:11-cr-00013-MSD-DEM-1)
(4:16-cv-00079-MSD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LARRY HAILEY

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-7105

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LARRY HAILEY,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Mark S. Davis, District Judge. (4:11-cr-00013-MSD-DEM-1; 4:16-cv-00079-MSD)

Submitted: February 28, 2018

Decided: March 13, 2018

Before GREGORY, Chief Judge, and TRAXLER and WYNN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Larry Hailey, Appellant Pro Se. Eric Matthew Hurt, Brian James Samuels, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Larry Hailey seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2255 (2012) motion and denying his Fed. R. Civ. P. 59(e) motion. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Hailey has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We also deny Hailey's request to place this appeal in abeyance pending the Supreme Court's decision in *Sessions v. Dimaya*, No. 15-1498 (argued Oct. 2, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: May 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7105
(4:11-cr-00013-MSD-DEM-1)
(4:16-cv-00079-MSD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LARRY HAILEY

Defendant - Appellant

M A N D A T E

The judgment of this court, entered March 13, 2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

A P P E N D I X

" B "

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

LARRY HAILEY,

Petitioner,

v.

Civil No. 4:16cv79
Criminal No. 4:11cr13

UNITED STATES OF AMERICA,

Respondent.

FINAL ORDER

This matter is before the Court on a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed by Larry Hailey ("Petitioner"). ECF No. 35. Petitioner's motion, which was filed with the assistance of counsel, relies on Johnson v. United States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct. 1257 (2016), to challenge Petitioner's classification as a "career offender" under the United States Sentencing Guidelines. Also before the Court are Petitioner's pro se motion seeking to hold this case in abeyance pending the Supreme Court's resolution of Sessions v. Dimaya, 137 S. Ct. 31 (2016), ECF No. 40, and his pro se motion seeking leave to supplement his § 2255 motion, ECF No. 41.

After this matter was held in abeyance for more than six months based on a motion previously filed by the Government, ECF Nos. 38-39,

on March 6, 2017, the Supreme Court issued its decision in Beckles v. United States, 137 S. Ct. 886 (2017), holding that unlike the Armed Career Criminal Act ("ACCA") analyzed in Johnson, the "advisory [sentencing] Guidelines are not subject to vagueness challenges under the Due Process Clause." Id. at 890. In light of the Beckles ruling, on April 25, 2017, this Court lifted the stay in this case and ordered the Government to file an answer to Petitioner's § 2255 motion. ECF No. 42.

On May 9, 2017, the Government filed a motion to dismiss Petitioner's § 2255 motion. ECF No. 43. Relying on Beckles, the Government's motion to dismiss asserts both that Petitioner's § 2255 motion should be dismissed as untimely¹ and that it should be denied because Beckles renders Petitioner's Guideline challenge "meritless." Id. For the reasons stated in the Government's motion to dismiss,² the Court GRANTS such motion, ECF No. 43, and Petitioner's § 2255 motion is hereby DISMISSED as untimely and is alternatively DENIED on the merits, ECF No. 35.

Petitioner's separately-filed motion requesting that the Court continue to hold this case in abeyance pending the Supreme Court's

¹ While it is undisputed that Petitioner's § 2255 motion was filed within the timeframe established by Johnson and Welch for ACCA claims: (1) Petitioner does not advance an ACCA claim; and (2) Beckles establishes that Petitioner's Guidelines challenge cannot benefit from the holdings in Johnson/Welch. Accordingly, because Petitioner's § 2255 motion was filed several years after his conviction and sentence became final, such motion is untimely.

² Petitioner's counsel has not filed a brief in opposition to dismissal and the time for filing has long-since expired. Similarly, Petitioner has not attempted to submit a pro se brief explaining how his claim survives Beckles.

ruling in Dimaya is DENIED as Beckles forecloses any relief in the instant case based on: (1) the nature of Petitioner's offense of conviction; and (2) the fact that Petitioner's § 2255 motion advances a Guidelines-based challenge. ECF No. 40. Petitioner's motion for leave to supplement his § 2255 motion is DENIED as futile because Petitioner's § 2255 motion is untimely, rendering his later-in-time supplemental arguments similarly untimely.³ ECF No. 41.

Finding that the procedural basis for dismissal of Petitioner's § 2255 motion is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is DENIED. 28 U.S.C. § 2253(c)(2); see R. Gov. § 2255 Proc. for U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-85 (2000). Petitioner is ADVISED that he is permitted to seek a certificate of appealability from the United States Court of Appeals for the Fourth Circuit, and he may do so by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia, 23510, within sixty (60) days from the date of this Order.

³ The Court notes that it has carefully reviewed Petitioner's supplemental arguments contained in ECF No. 41, and the Court alternatively finds that even if the motion to supplement is granted and Petitioner's proposed supplement is fully considered, his newly advanced arguments do not alter this Court's finding that Petitioner's § 2255 motion lacks merit in light of Beckles.

The Clerk is DIRECTED to forward a copy of this Final Order to counsel for Petitioner and to the U.S. Attorney's Office in Newport News, Virginia.

IT IS SO ORDERED.



Mark S. Davis
United States District Judge

Norfolk, Virginia
July 14, 2017

AO 450 Judgments in a Civil Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

LARRY HAILEY,

Petitioner,

v.

CIVIL NO. 4:16cv79
[ORIGINAL CRIMINAL NO. 4:11cr13]

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

[X] **Decision by Court.** This action came on for decision before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Petitioner's § 2255 motion is hereby DISMISSED as untimely and is alternatively DENIED on the merits, ECF No. 35. Petitioner's separately-filed motion requesting that the Court continue to hold this case in abeyance pending the Supreme Court's ruling in Dimaya is DENIED, ECF No. 40. Petitioner's motion for leave to supplement his § 2255 motion is DENIED, ECF No. 41. Certificate of appealability is DENIED.

July 17, 2017

Date

FERNANDO GALINDO, CLERK

By: _____ /s/
Lara Dabbene, Deputy Clerk