

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12779
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-20468-DLG,
1:95-cr-00787-DLG-2

CHARLES FOXX,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(September 4, 2018)

Before TJOFLAT, WILSON, and NEWSOM, Circuit Judges.

PER CURIAM:

Charles Foxx, a federal prisoner, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. The district court granted a

certificate of appealability on one issue: “[W]hether *Johnson*¹ applies to the Sentencing Guidelines’ career offender provisions when Movant was sentenced pre-*Booker*.”² As Foxx restates it, the issue on appeal is whether *Johnson* “renders void for vagueness the residual clause of the career-offender provision in the Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2), which was mandatory at the time of sentencing.”

This Court has already held that 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.” *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (per curiam).

Foxx first argues that *In re Griffin* does not bind this panel, as it was decided in the second or successive application context. This Court has recently proclaimed that our prior panel precedent rule applies to published second or successive orders (such as *In re Griffin*). See *United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018). Although this rule is subject to dissent within the Circuit, see, e.g., *In re Williams*, ___ F.3d ___, ___, 2018 WL 3640369, at *2–6 (11th Cir. 2018) (Wilson, J., specially concurring), it is the one that binds us, and we will follow it. See *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) (“Under the well-

¹ *Johnson v. United States*, 135 S. Ct. 2551 (2015).

² *United States v. Booker*, 543 U.S. 220 (2005).

established 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.”).

Next, Foxx argues that *Beckles v. United States*, 137 S. Ct. 886 (2017), undermines *In re Griffin* to the point of abrogation, freeing us from *In re Griffin*'s rule. However, Foxx admits that “*Beckles* did not squarely decide whether the mandatory Guidelines are susceptible to a vagueness challeng[e],” instead “repeatedly fram[ing] and analyz[ing] the issue” in the advisory context. But, “[i]n addition to 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.” *United States v. Kaley*, 579 F.3d 1246 (11th Cir. 2009). Therefore, we cannot deviate from *In re Griffin* given the current state of the law, and this forecloses Foxx's appeal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 16-20468-CIV-GRAHAM/WHITE
Case No. 95-787-CR-GRAHAM

CHARLES FOXX,

Movant

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

THIS CAUSE comes before the Court upon Petitioner Foxx's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Section 2255 Motion") [D.E. 1; D.E. 7; D.E. 8].

THE COURT has conducted a de novo review of the record and is otherwise fully advised in the premises.

THIS MATTER was referred to United States Magistrate Judge Patrick A. White, pursuant to 28 U.S.C. § 636 and the Local Magistrate Rules of the Southern District of Florida. Magistrate Judge White issued a post-Beckles¹ Report and Recommendation [D.E. 22], which recommends the following: (1)

¹ Beckles v. United States, __ U.S. __, __ S. Ct. __, 2017 WL 855781 (U.S. Mar. 6, 2017) (holding that the advisory Guidelines are not subject to a vagueness challenge under the Due Process clause and Guidelines Section 4B1.2(a)'s residual clause is not void for vagueness).

the Report recommending staying and administratively closing this case pending Beckles be vacated; and (2) that this motion to vacate be dismissed as time-barred. The Report and Recommendation also recommends that no certificate of appealability be issued, and the case be closed.

Pursuant to 28 U.S.C. § 636 and the Local Magistrate Rules of the Southern District of Florida, the Parties have 14 days after being served with a copy of the Report and Recommendation to serve and file written objections, if any, with the District Court.

THE PARTIES' OBJECTIONS AND RESPONSES

Foxx timely filed his Objection to ^{the} Magistrate's Report and Recommendation and Request for Certificate of Appealability ("Objections") [D.E. 23]. Therein, he argues the following: (1) his Section 2255 Motion is timely; (2) Beckles' holding only applies to Defendants sentenced under the advisory Guidelines as opposed to the mandatory Guidelines; (3) Beckles does not apply to his case because he was sentenced under the mandatory Guidelines; (4) In re Griffin, 823 F.3d 1350 (11th Cir. 2016) (concluding that the reasoning in United States v. Matchett, 802 F.3d 1185, 1193-95 (11th Cir. 2015), which declared that the advisory Guidelines, immune from vagueness challenges, also applied to the mandatory Guidelines) is not binding on this Court; and (5) this Court should grant a certificate of

appealability on the issue of whether Johnson² applies to defendants sentenced under the mandatory Guidelines, post-Beckles, in the context of an initial habeas petition.

Thereafter, the Government filed its Response to Movant's Objection to Report and Recommendation and Movant's Request for Certificate of Appealability [D.E. 24]. Therein, the Government contends that Foxx's Objections lack merit. Specifically, the Government claims the following: (1) Foxx's Section 2255 Motion is time-barred; (2) although Beckles held that the advisory Guidelines are not subject to a vagueness challenge under the Due Process clause and Guidelines Section 4B1.2(a)'s residual clause is not void for vagueness, there is no discernible distinction between Beckles' holding as it relates to the mandatory Guidelines; (3) In re Griffin is binding on this Court; and (4) the Court should not issue a certificate of appealability.

THE COURT'S RULING

After a careful review of the record, this Court affirms the Report and Recommendation to the extent that it recommends denying Foxx's Section 2255 Motion because it demonstrates an exhaustive review of the record and makes findings consistent with the law.

² Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551 (2015).

The Court, however, disagrees with the Report and Recommendations conclusion that a certificate of appealability should not be issued. In In re Griffin, the United States Court of Appeals for the Eleventh Circuit held that the mandatory Guidelines could not be voided for vagueness based on its ruling in Matchett. As Foxx was sentenced under the mandatory Guidelines, the Court appears bound to dismiss his Section 2255 Motion based on In re Griffin in addition to his motion being time-barred. In re Griffin, however, was decided before the Supreme Court of the United States resolved Beckles. The Supreme Court specifically framed, analyzed, and resolved Beckles in the context of the advisory Guidelines and did not extend its ruling to the mandatory Guidelines. See Beckles, 2017 WL, at *1-11.

As a threshold matter, reasonable jurists could debate whether Johnson applies to defendants sentenced under the mandatory Guidelines, post-Beckles, in the context of an initial habeas petition. See 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Buck v. Davis, __ U.S. __, 137 S. Ct. 759, 773 (2017) ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of

his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'"); Beckles, 2017 WL, at *18 n.4 (Sotomayor, J., concurring in the judgment) (The Supreme 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 (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. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.) (quotations omitted). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report and Recommendation [D.E. 22] is **AFFIRMED, ADOPTED, AND RATIFIED** to the extent that it recommends **DENYING** Foxx's Section 2255 Motion [D.E. 1; D.E. 7; D.E. 8] and is incorporated herein by reference. It is further

ORDERED AND ADJUDGED that Movant Foxx's Section 2255 Motion [D.E. 1; D.E. 7; D.E. 8] is **DENIED**. Lastly,

ORDERED AND ADJUDGED that a Certificate of Appealability shall issue in this case. The specific issue to be considered is whether Johnson applies to defendants sentenced under the

mandatory Guidelines, post-Beckles, in the context of an initial habeas petition.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st
day of April, 2017.

A handwritten signature in black ink, appearing to read 'DLG', is written over a horizontal line.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Judge White

All Counsel of Record