

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13657
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22246-DLG,
1:97-cr-00554-DLG-1

PAUL LEWIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(May 9, 2018)

Before WILSON, JORDAN, and NEWSOM, Circuit Judges.

PER CURIAM:

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

Lewis was convicted in 1998 of one count of conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846, and one count of using and carrying a firearm during and in relation to a drug trafficking crime and crime of violence, in violation of 18 U.S.C. § 924(c). He received a career offender enhancement under Section 4B1.2(a) of the United States Sentencing Guidelines, which were mandatory at that time, based on prior Florida convictions for burglary of an unoccupied dwelling, false imprisonment, aggravated assault with a firearm, robbery with a firearm, and resisting arrest with violence. He was sentenced to 420 months. In 2016, he filed this Section 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 Section 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 binding precedent from this Court and denied his motion. This is Lewis'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 Lewis’s argument that Section 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 three-judge orders decided in the second or successive context “are binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks.” *United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018). 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 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
MIAMI DIVISION

**CLOSED
CIVIL
CASE**

Case No. 16-22246-CIV-GRAHAM/WHITE
Case No. 97-554-CR-GRAHAM

PAUL LEWIS,

Movant

vs.

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

THIS CAUSE comes before the Court upon the Government's Motion to Dismiss Movant's Petition Based Upon Beckles v. United States, __ U.S. __, 2017 WL 855781 (2017) ("Motion to Dismiss") [D.E. 10].

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. 11], 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 unopposed motion to hold the case in abeyance [D.E. 8] be denied as moot; (2) the Report and Recommendation [D.E. 9] recommending staying and administratively closing this case pending Beckles be vacated; (3) the Government's Motion to Dismiss [D.E. 10] be granted; and (4) 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

Lewis timely filed his Objections to the Magistrate Judge's Report and Recommendation ("Objections") [D.E. 14]. Therein, he argues the following: (1) his Amended Section 2255 Motion [D.E. 7] 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.

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 Lewis' Amended Section 2255 Motion because it demonstrates an exhaustive review of the record and makes findings consistent with the law.

The Court, however, disagrees with the Report and Recommendation's 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 Lewis was sentenced under the mandatory Guidelines, the Court appears bound to dismiss his Amended 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

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

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. 11] is **AFFIRMED, ADOPTED, AND RATIFIED** to the extent that it recommends **DENYING** Lewis' Amended Section 2255 Motion [D.E. 7] and is incorporated herein by reference. It is further

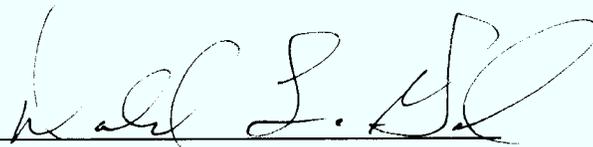
ORDERED AND ADJUDGED that the Government's Motion to Dismiss [D.E. 10] is **GRANTED**, and Movant Lewis' Amended Section 2255 Motion [D.E. 7] is **DENIED**. It is further

ORDERED AND ADJUDGED that the unopposed motion to hold the case in abeyance [D.E. 8] is **DENIED AS MOOT**. It is further

ORDERED AND ADJUDGED that the Report and Recommendation [D.E. 9] is **VACATED**. Lastly, it is

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. The Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of June, 2017.


DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Judge White

All Counsel of Record