APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13788
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22608-JIC,
1:03-cr-20226-JIC-8

COREY KIRKPATRICK STERLING,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(October 18, 2018)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Corey Sterling appeals from the district court's order denying his 28 U.S.C. §2255 motion to vacate. This Court granted Sterling a certificate of appealability

on two issues: (1) whether the district court erred in denying Sterling's claim that he was unconstitutionally sentenced under the then-mandatory sentencing guidelines in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (2) whether *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), which denied an application for a second or successive motion under § 2255, is binding precedent on the merits of Sterling's § 2255 motion. Because *Griffin* answers the first question in the negative, and because *Griffin* is binding precedent in this collateral proceeding based on our recent decision in *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018), we affirm the denial of Sterling's § 2255 motion.[1]

To briefly recap the legal background, the Armed Career Criminal Act ("ACCA") requires a prison sentence of at least fifteen years for a defendant who is convicted of unlawfully possessing a firearm and who has at least three prior convictions for either violent felonies or serious drug offenses. In *Johnson*, the Supreme Court held that a portion of the ACCA's definition of "violent felony"—commonly called the residual clause—was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557–58, 2563. The Court then made that new rule retroactive, making clear that it applies to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

[1] When reviewing the district court's denial of a § 2255 motion, we review questions of law *do novo* and findings of fact for clear error. *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (*en banc*).

Like the ACCA, the Sentencing Guidelines also provide enhanced penalties for recidivist offenders. Specifically, the "career offender" guideline substantially increases the guideline range of a defendant who, among other requirements, has at least two prior convictions for crimes of violence or controlled-substance offenses. U.S.S.G. § 4B1.1(a). At the time of Sterling's sentencing, and until quite recently, the guidelines defined the term "crime of violence" in materially similar terms as the term "violent felony" in the ACCA, including the residual-clause language that *Johnson* invalidated in the ACCA. *See* U.S.S.G. § 4B1.2(a) (2002).

Following *Johnson*, this Court held in *United States v. Matchett* that *Johnson* did not render the residual clause of the career-offender guideline unconstitutional because the vagueness doctrine does not apply to advisory guidelines. 802 F.3d 1185, 1194–96 (11th Cir. 2015). The Supreme Court subsequently adopted that same view in *Beckles v. United States*, holding that "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness." 137 S. Ct. 886, 895 (2017).

Neither *Matchett* nor *Beckles* addressed whether the vagueness doctrine applies to mandatory guidelines. *See id.* at 903 n.4 (Sotomayor, J., concurring) (noting that the Court's adherence to the distinction between mandatory and advisory rules leaves open the question whether defendants sentenced under the

mandatory guidelines may mount vagueness attacks on their sentences). Because Sterling was sentenced before *United States v. Booker*, 543 U.S. 220 (2005), when the guidelines were still mandatory, *Matchett* and *Beckles* left open the possibility that Sterling could challenge the residual clause of the mandatory guidelines on vagueness grounds.

That brings us to *Griffin*. In *Griffin*, which denied an application for a second or successive motion under § 2255, we extended the holding of *Matchett* to the mandatory guidelines. 823 F.3d at 1354 ("[T]he logic and principles established in *Matchett* also govern our panel as to Griffin's guidelines sentence when the Guidelines were mandatory."). We 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." *Id.*

Sterling concedes that *Griffin*, if binding, forecloses his *Johnson*-based vagueness challenge to the mandatory guidelines. To avoid that outcome, he argues that *Griffin* is not binding for two reasons: (1) it was decided in the context of an application to file a second or successive § 2255 motion, so it's not binding precedent outside of that context; and (2) *Beckles*, which was decided after *Griffin*, undermines *Griffin* to the point of abrogation. Both arguments are unavailing.

First, we recently held in *St. Hubert* that "law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions are binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks." 883 F.3d at 1329. Under *St. Hubert*, which was decided on direct appeal, we are bound by *Griffin*'s holding that *Johnson* does not apply to the residual clause of the mandatory career-offender guideline, even if we may believe that *Griffin* was wrongly decided. *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (*en banc*) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong.").

Second, the Supreme Court's decision in *Beckles* does not abrogate *Griffin* because *Beckles* did not decide or address whether the vagueness doctrine applies to the mandatory guidelines. For a Supreme Court decision to overcome the prior-precedent rule, it must be "squarely on point" and "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, 1255 (11th Cir. 2009). Because *Beckles* is not "squarely on point" and does not directly conflict with *Griffin*, we remain bound by *Griffin*.

In sum, we affirm the district court's denial of Sterling's § 2255 motion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13788-E

COREY KIRKPATRICK STERLING,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

After a guilty plea, Corey Kirkpatrick Sterling was sentenced to 262-months imprisonment.[1] Mr. Sterling's sentence resulted from a calculation that relied upon United States Sentencing Guideline § 4B1.1 (2003), known as the career-offender guideline. His sentence was imposed before Booker v. United States, when the Sentencing Guidelines were still mandatory. 543 U.S. 220, 233–34 (2005).

[1] Mr. Sterling's sentence was later reduced to 196-months after the government moved for a reduction under Federal Rule of Criminal Procedure 35.

On June 24, 2016, Mr. Sterling filed his first 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. He contended that he was sentenced under the residual clause of the mandatory career-offender guideline, § 4B1.2(a), which, in his view, is unconstitutionally vague under Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015). In his briefs, Mr. Sterling argued that Johnson's holding applies because the mandatory guidelines under which he was sentenced "fix[ed] the permissible range of sentences." See Beckles v. United States, 580 U.S. __, 137 S. Ct. 886, 892 (2017).

A magistrate judge issued a Report and Recommendation ("R&R"), recommending that Mr. Sterling's § 2255 motion be denied or, alternatively, dismissed as untimely. The District Court adopted the R&R over Mr. Sterling's objections. The District Court concluded that Mr. Sterling's vagueness challenge to the residual clause of the then-mandatory career-offender guideline was foreclosed by In re Griffin, 823 F.3d 1350 (11th Cir. 2016). The District Court also denied Mr. Sterling a certificate of appealability ("COA"). Mr. Sterling now seeks a COA from this Court.

Mr. Sterling says a COA is warranted because reasonable jurists could debate: (1) whether the District Court erred by denying his claim that he was improperly sentenced under the then-mandatory Guidelines as a career offender in light of Johnson; and (2) whether published orders in the context of applications

for leave to file second or successive habeas motions are binding outside of that context.

To obtain a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The requirement is satisfied if a petitioner shows that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotation omitted). When reviewing a denial of a § 2255 motion, we review "findings of fact for clear error and questions of law de novo." Rhode v. United States, 583 F.3d 1289, 1290 (11th Cir. 2009) (per curiam).

As is well known, in Johnson, the Supreme Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557–58, 2563. Since Johnson, prisoners have challenged sentences based on similar clauses in a number of other statutes as well as the Sentencing Guidelines. In one of those challenges, this Court held that the residual clause of the advisory career-offender sentencing guideline was not subject to vagueness challenges. United States v. Matchett, 802 F.3d 1185, 1196 (11th Cir. 2015). This Court's holding in Matchett was later adopted by the Supreme Court in Beckles, 137 S. Ct. at 890.

After Matchett, but before Beckles, this Court extended the rule in Matchett (made in the context of an application for a second or successive § 2255 motion) to vagueness challenges directed at sentences imposed at the time when Sentencing Guideline sentences were mandatory. See Griffin, 823 F.3d at 1356. This Court said in In re Lambrix, that published decisions ruling on applications for second or successive petitions have precedential effect in this circuit. 776 F.3d 789, 794 (11th Cir. 2015). But, as I've explained before, "Lambrix was itself a published decision in the context of an application to file a second or successive motion. And reasonable jurists could debate whether any conclusion about the reach of Lambrix outside of the second or successive application context is dicta, and therefore non-binding." Gibson v. United States, No. 16-16584, slip op. at *6 (11th Cir. Mar. 8, 2017); see also United States v. Birge, 830 F.3d 1229, 1233 (11th Cir. 2016) ("A decision can hold nothing beyond the facts of that case" (alterations omitted)).

There are many reasons to doubt whether rulings on applications for second or successive § 2255 motions are binding precedent outside that context. For one, when a second or successive application is granted, our holdings are not binding on district courts in the proceedings that follow. Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007). This Court has been explicit in holding that nothing in our rulings on second or successive applications "shall bind the merits

panel" on a future appeal. In re Moss, 703 F.3d 1301, 1303 (11th Cir. 2013). And, as a prudential matter, our rulings on applications for second or successive petitions do not reflect the considered judgment that our binding published opinions do. The applications are almost always uncounseled. Neither do the applications include briefs. Indeed, the form used by prisoners forbids the inclusion of briefs. Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence, U.S. Court of Appeals Eleventh Circuit (last updated Feb. 2017), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Form2255APP_FEB17.pdf. And the statute requires us to decide these applications within thirty days. 28 U.S.C. § 2244(b)(3)(D). "It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison." United States v. Seabrooks, 839 F.3d 1326, 1350 (11th Cir. 2016) (Martin, J., concurring).

Because reasonable jurists could debate whether Griffin is binding outside the context of second or successive applications, reasonable jurists could also debate whether Johnson invalidated the mandatory application of the career offender guideline's residual clause. At least four judges of this Court have expressed the view that the residual clause of the mandatory career-offender

guideline is unconstitutionally vague. See In re Sapp, 827 F.3d 1334, 1339 (11th Cir. 2016) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring) (explaining why "Johnson applies with equal force to the residual clause of the mandatory career offender guideline"); In re McCall, 826 F.3d 1308, 1310 (11th Cir. 2016) (Martin, J., concurring) (saying that Griffin was "wrongly decided).

It is true that since our decisions in Matchett and Griffin, the Supreme Court decided Beckles. Beckles held that the residual clause of the advisory career-offender guideline is not subject to vagueness challenge under the Due Process Clause. See Beckles, 137 S. Ct. at 890. However, Beckles did not address whether a challenge to the mandatory application of the career-offender guideline could be subject to a vagueness challenge, id. at 903 n.4 (Sotomayor, J., concurring in the judgment). Its reasoning depends on the advisory nature of the Guidelines at the time Mr. Beckles was sentenced. Id. at 893–94. The reasoning of Beckles allows a vagueness challenge to the mandatory Guidelines because the mandatory Guidelines "fix[ed] the permissible range of sentences." Id. at 892; see Sapp, 827 F.3d at 1338 (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring) ("The principle underlying Matchett—that the advisory Guidelines do not fix sentences because district courts are permitted, and indeed obligated, to exercise discretion in sentencing—simply does not map onto the mandatory Guidelines in any way").

Reasonable jurists could debate the District Court's assessment of Mr. Sterling's constitutional claim. See Slack, 529 U.S. at 484, 120 S. Ct. at 1604. As a result, Mr. Sterling's motion for COA is **GRANTED** on the following issues:

1. Whether the District Court erred in denying Mr. Sterling's claim that he was unconstitutionally sentenced under the then-mandatory Sentencing Guidelines in light of Johnson v. United States, 135 S. Ct. 2551 (2015); and
2. Whether In re Griffin, 823 F.3d 1350 (11th Cir. 2016), which denied an application for a second or successive motion under 28 U.S.C. § 2255, is binding precedent on the merits of Mr. Sterling's § 2255 motion.

UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22608-CIV-COHN/SELTZER
(CASE NO. 03-20226-CR-GOLD)

COREY KIRKPATRICK STERLING,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE is before the Court upon the Report of Magistrate Judge [DE 12] ("Report") submitted by United States Magistrate Judge Barry S. Seltzer regarding Movant Corey Kirkpatrick Sterling's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 1] ("§ 2255 Motion") and the Government's Motion to Reopen Proceedings and Request to Deny Petitioner's § 2255 Motion [DE 11] (collectively, "Motions"). Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a *de novo* review of the Motions, the Report, Movant's Objections [DE 16], and the record in this case, and is otherwise advised in the premises. Upon careful consideration, the Court will adopt the Report, overrule Movant's Objections, grant the Government's Motion, and deny the § 2255 Motion, or alternatively, dismiss it as time-barred.

As detailed in the Report, Movant pled guilty to conspiracy with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and 846 (Count 1). The United States Probation Office determined in its Presentence Investigation Report ("PSI") that Movant was a career offender under

U.S.S.G. § 4B1.1(a) based on his prior Florida state convictions for robbery, battery on a law enforcement officer, and aggravated battery on a pregnant woman. Since Movant was sentenced in 2003, the guidelines were mandatory. With the career-offender enhancement and a reduction for acceptance, Movant's total offense level was 34. The Court sentenced Movant at the low-end of the guidelines range to 262 months imprisonment, five years of supervised release, and a $100 assessment. The Court entered the Judgment on December 22, 2003. Movant did not file an appeal. On February 28, 2005, the Court granted the Government's Rule 35 Motion and reduced Movant's term of imprisonment to 196 months, which was below the guidelines range.

On June 24, 2016, Movant filed the instant § 2255 Motion seeking relief under Johnson v. United States, 135 S. Ct. 2551 (2015). DE 1. On July 25, 2016, the Court stayed and administratively closed the case pending the United States Supreme Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017). DE 10. After the Supreme Court issued its Beckles opinion, the Government timely moved to reopen the case and deny the § 2255 Motion. DE 11.

The issue presented in the § 2255 Motion is whether a career-offender enhancement under U.S.S.G. § 4B1.2(a) that was imposed when the sentencing guidelines were mandatory is subject to a vagueness challenge following the Supreme Court's decision in Johnson. The Court must conclude that it is not. As explained in the Report, the Eleventh Circuit held in In re Griffin, 823 F.3d 1350, 1354–55 (11th Cir. 2016), that the vagueness doctrine, upon which Johnson invalidated the Armed Career Criminal Act's residual clause, does not apply to the mandatory sentencing guidelines. Beckles did not address whether the mandatory sentencing guidelines are subject to a

vagueness challenge, see Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring), and thus, Griffin remains the law of this Circuit. Because the Court is bound by Griffin, it must find that Johnson is inapplicable to Movant's claim for relief. Judge Seltzer concludes that for this reason the Motion should be denied on the merits, or alternatively, dismissed as time-barred. The Court agrees with Judge Seltzer's reasoning and analysis and will adopt his Report in full.

Movant objects to the Report on the ground that Griffin was wrongly decided. He argues that the reasoning of Beckles supports his position that the mandatory guidelines may be challenged under the vagueness doctrine. However, Griffin is still controlling precedent in this Circuit. The Court therefore would be bound by Griffin even if it agreed with Movant that the case was "deeply flawed and wrongly decided." In re Sapp, 827 F.3d 1334, 1337 (11th Cir. 2016) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring).[1] Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. The Report of Magistrate Judge [DE 12] is **ADOPTED** in its entirety.
2. Movant's Objections [DE 16] are **OVERRULED**.
3. Government's Motion to Reopen Proceedings and Request to Deny Petitioner's § 2255 Motion [DE 11] is **GRANTED**.
4. The stay of this action pending a decision in Beckles [DE 10] is **LIFTED**.
5. The Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 1] is **DENIED** on the merits, or alternatively, **DISMISSED** as time-barred.

[1] The Court does not cite the Sapp concurrence to suggest that Griffin was wrongly decided, but rather to emphasize the Court's duty to follow clearly controlling Eleventh Circuit precedent.

6. A certificate of appealability is **DENIED**. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may now seek a certificate of appealability from the Eleventh Circuit.

7. The Clerk of Court is directed to **CLOSE** this case for all purposes and **DENY as moot** all pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of June, 2017.

Copies provided to:
United States Magistrate Judge Barry S. Seltzer
Counsel of record via CM/ECF
Corey Kirkpatrick Sterling (*pro se*)