**No. _____**

IN THE

# Supreme Court of the United States

**UNISES CHAPOTIN,**
***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**
***Respondent*.**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

**MICHAEL CARUSO**
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# APPENDIX

## APPENDIX

# APPENDIX A-1

[DO NOT PUBLISH]

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 21-10586

Non-Argument Calendar

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UNISES CHAPOTIN,

Petitioner-Appellant,

*versus*

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket Nos. 1:16-cv-21965-JEM,
1:04-cr-20305-JEM-3

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Before JORDAN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

Unises Chapotin, 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 him a certificate of appealability on the following three issues: (1) whether sentences under the former mandatory pre-*Booker*[1] sentencing guidelines are subject to a void-for-vagueness challenge; (2) whether published orders issued in the context of applications for leave to file second or successive motions to vacate are binding upon district courts in determining an initial motion to vacate; and (3) whether the district court erred in applying the reasonable probability harmless error review standard to the *Stromberg*[2] error in his trial, and whether the court erred in determining that the *Stromberg* error was harmless. After review, we affirm.

## I. Background

We described the facts of this case in Chapotin's direct appeal as follows:

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[1] *United States v. Booker*, 543 U.S. 220 (2005).

[2] In *Stromberg v. California*, the Supreme Court held that where a jury returns a general verdict which may have been based on any of several grounds, one of which is constitutionally invalid, and it is "impossible to say" on which ground the jury rested its verdict, "the conviction cannot be upheld." 283 U.S. 359, 368 (1931).

> Unises Chapotin was among a group of men who agreed to rob a drug courier of a large quantity of cocaine. The operation was planned so it would appear to the supplier of cocaine that an actual robbery, known in the illegal drug business as a "rip-off," had occurred, when in fact the drug courier was in on the robbery. Unbeknownst to Chapotin and his confederates, one of the participants was a confidential informant, the disgruntled drug courier was actually a government agent, and the drugs and the supplier were fictitious.
>
> Chapotin became involved in the operation at the last minute because another intended participant was a no-show. On the day the robbery was to occur, Chapotin was picked up in a car driven by an uninvolved party and occupied by co-conspirators Oscar Torres and Jorge Moreno. The group then drove to a restaurant parking lot, where Torres, Moreno and Chapotin were picked up in a vehicle driven by the confidential informant, known by the first name "Ulises" (not to be confused with Chapotin's first name, "Unises"). Torres was seated in the front passenger seat, Moreno was sitting in the back seat behind the driver, and Chapotin was sitting in the back seat behind Torres. The parties drove to a warehouse area to pick up a van which was to be used to transport the drugs following the robbery. Upon arriving there, they were arrested.

*United States v. Chapotin*, 173 F. App'x 751, 752 (11th Cir. 2006) (unpublished). Chapotin was charged with conspiracy to possess

with intent to distribute cocaine in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) (Count 1); conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count 2); conspiracy to carry a firearm during and in relation to, or to possess a firearm in furtherance of, a crime of violence and/or a drug trafficking crime in violation of 18 U.S.C. § 924(o) (Count 3); attempted possession of cocaine with intent to distribute it in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) (Count 4); carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence and/or a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count 5); and possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count 8). Importantly, Counts 3 and 5 specified that the predicates for those counts were the offenses "set forth in Counts 1, 2, and 4."

The jury instructions for Chapotin's § 924(c) charge in Count 5 provided that it was a crime to "carry a firearm during and in relation to or possess a firearm in furtherance of a federal *drug trafficking crime, crime of violence, or both*." (emphasis added). The instructions explained that, to find Chapotin guilty, the jury had to find beyond a reasonable doubt that he "committed a *drug trafficking offense or crime of violence* charged in Counts 1, 2, or 4 of the indictment." The instructions also provided that it was not necessary for the government to prove that Chapotin violated the law in both of those ways. Rather, it was sufficient if the government proved either one of those ways beyond a reasonable doubt, and the jury had to unanimously agree upon the way in

which Chapotin committed the violation. The jury instructions for Count 3—the § 924(o) count—were materially identical. The jury found Chapotin guilty on all counts, but did not specify whether the predicate for Counts 3 and 5 was Count 1, 2, or 4 alone or a combination of those Counts.

Applying the then mandatory 2004 Sentencing Guidelines,[3] the district court determined that Chapotin was a career offender under U.S.S.G. § 4B1.1 based on two prior qualifying crime of violence convictions—(1) Florida battery on a law enforcement officer, and (2) Florida aggravated assault with a deadly weapon.[4] Chapotin argued that his criminal history score of VI, which was based on his career-offender status, overrepresented his criminal history, and so he requested a downward departure. The district court agreed to depart downward to a category V, which resulted in a guidelines range of 324 to 405 months' imprisonment, plus a consecutive term of 60 months' imprisonment.[5] The district court

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[3] In 2005, the Supreme Court held that the Sixth Amendment right to a trial by jury was violated where, under a mandatory guidelines scheme, a defendant's sentence was increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury. *Booker*, 543 U.S. at 233–37. Following *Booker*, the guidelines scheme is now advisory. *Id.* at 245.

[4] Chapotin unsuccessfully objected to the career-offender enhancement, arguing, in relevant part, that his conviction for battery on a law enforcement officer was not a crime of violence.

[5] Chapotin faced a statutory maximum of life imprisonment.

imposed a total sentence of 384 months' imprisonment followed by five years of supervised release.[6]

On direct appeal, we reversed Chapotin's conviction for possession of a firearm by a convicted felon because there was insufficient evidence to support it, but affirmed his other convictions and sentences. *Chapotin*, 173 F. App'x at 752–53. The district court entered an amended judgment in 2006.

Nine years later, the Supreme Court struck down the residual clause in the Armed Career Criminal Act's ("ACCA") definition of a violent felony as unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591, 597–602 (2015). Thereafter, the Supreme Court held that *Johnson* announced a new substantive rule that applied retroactively to cases on collateral review. *Welch v. United States*, 578 U.S. 120, 127–30, 134–35 (2016).

Chapotin in turn filed his first *pro se* 28 U.S.C. § 2255 motion to vacate sentence in 2016. He argued that the residual clause in the mandatory guidelines' crime of violence definition—which was virtually identical to the ACCA's residual clause—was unconstitutionally vague, and that he no longer qualified as a

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[6] Specifically, the district court imposed concurrent terms of 324 months' imprisonment for Counts 1 and 4, 240 months' imprisonment as to Counts 2 and 3, and 120 months as to Count 8, plus a consecutive term of 60 months' imprisonment as to Count 5. Notably, the district court explained that it would have imposed the same sentence even without the mandatory guidelines framework.

career offender because his conviction for battery of a law enforcement officer no longer qualified as a crime of violence post-*Johnson*. He also argued that his § 924(c) conviction (Count 5) for possession of a firearm in relation to a crime of violence and/or a drug trafficking crime was unconstitutional, because conspiracy to commit Hobbs Act Robbery—the purported crime of violence—was no longer a crime of violence post-*Johnson*. The district court appointed counsel to represent Chapotin, and counsel filed supplemental briefing.

The government opposed the § 2255 motion, arguing that *Johnson* had no effect on the guidelines, and, therefore, Chapotin's career-offender challenge was not cognizable, was untimely and procedurally barred, and was foreclosed by our decision in *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016), in which 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." It also argued that Chapotin procedurally defaulted his § 924(c) challenge because he failed to raise it at trial or on direct appeal. Finally, it argued that his claims failed on the merits.

Chapotin filed a motion to hold the district court proceedings in abeyance pending the Supreme Court's decision in *Beckles v. United States*, No. 15-8544, which involved a *Johnson*-based challenge to the career-offender provision of the advisory sentencing guidelines. The district court granted the motion.

Subsequently, in *Beckles*, the Supreme Court held that the advisory guidelines are not subject to a vagueness challenge under the Due Process Clause, and, therefore, the residual clause of the career-offender guideline's definition of "crime of violence" was not void for vagueness. *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). *Beckles* did not address vagueness challenges in the context of the mandatory guidelines scheme.

Additionally, while Chapotin's § 2255 motion was pending in the district court, the Supreme Court extended its holding in *Johnson* to 18 U.S.C. § 16(b)'s residual clause, and 18 U.S.C. § 924(c)'s residual clause, holding that those clauses were also unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (addressing § 16(b)'s residual clause); *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (addressing § 924(c)).

Following supplemental briefing by the parties on the effect of *Beckles* and *Davis*,[7] a magistrate judge issued a report and recommendation ("R&R"), recommending that Chapotin's § 2255 motion be denied.

First, the magistrate judge concluded that Chapotin's career-offender challenge was not cognizable because his sentence was

[7] In his supplemental briefing, Chapotin also argued that both his § 924(o) conviction (Count 3) and § 924(c) conviction (Count 5) must be vacated in light of *Davis* and because there was a *Stromberg* error in that the general verdict did not specify whether the jury convicted him of possessing a firearm during and in relation to the crime of violence of the drug trafficking crimes.

less than the statutory-maximum. The magistrate judge also concluded that the career-offender claim was foreclosed by *Griffin*, and rejected Chapotin's argument that *Beckles* had abrogated *Griffin*.

Second, the magistrate judge concluded that Chapotin's § 924(c) challenge failed because he did not prove by a preponderance of the evidence that his § 924(c) and § 924(o) convictions were based on the now invalid crime of violence predicate—conspiracy to commit Hobbs Act robbery (Count 2)—and not on the still-valid predicate drug-trafficking crimes in Counts 1 or 4. The magistrate judge found that, even though there was a *Stromberg* error in Chapotin's case, the error was harmless.

Nevertheless, the magistrate judge recommended that a certificate of appealability (COA) issue on the following: (1) whether sentences under the former mandatory pre-*Booker* sentencing guidelines are subject to a void-for-vagueness challenge; (2) whether published orders issued in the context of applications for leave to file second or successive motions to vacate are binding upon district courts in determining an initial motion to vacate; and (3) whether the district court erred in applying the reasonable probability harmless error review standard to the *Stromberg* error, and whether the court erred in determining that the *Stromberg* error in this case was harmless.

Chapotin objected to the R&R, arguing that his career-offender claim was cognizable and was not foreclosed by *Griffin*, which he maintained was wrongly decided and abrogated by

*Beckles*. He further argued that applying *Griffin* to all movants, even though *Griffin* arose in the context of an application for leave to file a second or successive § 2255 motion, violated the Due Process Clause. He also maintained that his career-offender challenge was timely. With regard to his *Davis*-based challenge, Chapotin asserted that the district court applied the wrong standard, that the *Stromberg* error was not harmless, that his §§ 924(c) and (o) convictions were unconstitutional, and that he established cause and prejudice and actual innocence to overcome any procedural default.[8]

The district court adopted the R&R.[9] Nevertheless, the district court agreed with the magistrate judge's recommendation to issue a COA on the three issues specified "[g]iven the complexities and legal controversy concerning the issues in this case."

## II. Standard of Review

"When we review the denial of a motion to vacate a sentence . . . we review legal conclusions *de novo* and findings of

[8] The government also filed objections to the R&R because the R&R failed to discuss the procedural arguments that it had raised related to timeliness and procedural default.

[9] The district court also concluded that Chapotin's career-offender challenge was untimely and that both Chapotin's career-offender and § 924 challenges were procedurally defaulted.

fact for clear error." *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (en banc) (quotation omitted).

## III. Discussion

### A. Issues 1 and 2

The first two issues are related: (1) whether sentences under the former mandatory sentencing guidelines are subject to a void-for-vagueness challenge, and (2) whether published orders issued in the context of applications for leave to file second or successive motions to vacate are binding upon district courts in determining an initial motion to vacate. Therefore, we address them together.

Chapotin argues that the district court erred in denying his career-offender challenge based on *Griffin*. He maintains that *Griffin* was wrongly decided and regardless has been undermined to the point of abrogation by *Beckles* and *Dimaya*. Relatedly, he argues that *Griffin* should not be binding outside of the second or successive application context, and that our decision to the contrary in *United States v. St. Hubert*[10] was wrongly decided. Chapotin's argument is unpersuasive.

Following the Supreme Court's decision in *Johnson*, we 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

[10] 909 F.3d 335 (11th Cir. 2018), overruled in part on other grounds by *Davis*, 139 S. Ct. 2319, and *United States v. Taylor*, 142 S. Ct. 2015 (2022).

guidelines. 802 F.3d 1185, 1193–96 (11th Cir. 2015). Thereafter, in *Griffin*, in denying an application for leave to file a second or successive motion under § 2255, we extended *Matchett*'s holding 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.*

The Supreme Court in *Beckles* subsequently adopted the same view of vagueness challenges to the advisory guidelines, 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. at 895. *Beckles* did not address whether the vagueness doctrine applies to the mandatory guidelines.

Under the prior-panel-precedent rule, "a prior panel's holding 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*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). The holding of the first panel to address an issue is binding, even if a later panel

concludes that the prior case was wrongly decided.[11] *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998).

Chapotin argues that we are not bound by *Griffin* because it has been abrogated by the Supreme Court's decision in *Beckles* and *Dimaya*. "To conclude that we are not bound by a prior holding in light of a Supreme Court case, we must find that the case is 'clearly on point' and that it 'actually abrogate[s] or directly conflict[s] with, as opposed to merely weaken[s], the holding of the prior panel.'" *United States v. Dudley*, 5 F.4th 1249, 1265 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1376 (2022) (quoting *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009)).

Although *Beckles* touched on the distinction between the mandatory and advisory guidelines when it held that the advisory guidelines were not subject to a vagueness challenge, *see Beckles*, 137 S. Ct. at 894, it did not abrogate *Griffin* because it did not decide or squarely address whether the vagueness doctrine applies to the mandatory guidelines. Instead, *Beckles* left "open the question" of whether the pre-*Booker* mandatory guidelines could be subject to a vagueness challenge. *Id.* at 903 n.4 (Sotomayor, J., concurring in the judgment).

Similarly, the Supreme Court's decision in *Dimaya* did not abrogate *Griffin*. Like *Beckles*, *Dimaya* did not decide or squarely address whether the vagueness doctrine applies to the mandatory

[11] Thus, Chapotin's argument that *Griffin* was wrongly decided is unavailing.

guidelines scheme. *See generally* 138 S. Ct. 1204. Indeed, *Dimaya* did not involve the guidelines at all, but rather a challenge to 18 U.S.C. § 16(b)'s residual clause. *See id.*

Accordingly, because *Beckles* and *Dimaya* are not "clearly on point" and do not directly conflict with *Griffin*, we remain bound by *Griffin*.

Now we turn to Chapotin's second issue. In an attempt to overcome *Griffin*, he argues that published decisions, like *Griffin*, that are issued in the context of an application for leave to file a second or successive § 2255 motion should not be binding in other types of proceedings such as an initial § 2255 proceeding. However, we have repeatedly rejected this argument, and have held that published three-judge orders issued in the successive application context are binding precedent in our circuit. *See, e.g.*, *Steiner v. United States*, 940 F.3d 1282, 1293 n.4 (11th Cir. 2019) (rejecting argument that decisions issued in the successive application context are not binding in an initial § 2255 proceeding based on prior-panel-precedent rule); *St. Hubert*, 909 F.3d at 345 (holding that decisions published in the successive application context were binding in a direct appeal); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (holding that "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 other words, published three-judge orders issued under [28 U.S.C.] § 2244(b) are binding precedent in our circuit.").

Accordingly, *Griffin* squarely forecloses Chapotin's career-offender claim, and we are bound to apply *Griffin*. Thus, the district court did not err in denying this claim.[12]

**B. Issue 3**

Chapotin argues that his §§ 924(c) and (o) convictions are invalid post-*Davis* because conspiracy to commit Hobbs Act robbery (Count 2) is no longer a qualifying crime of violence and it is possible the jury relied on the invalid predicate for the §§ 924(c) and (o) convictions, and the district court applied the wrong standard in assessing whether the *Stromberg* error in his case was harmless. Chapotin concedes that his argument essentially fails under our decision in *Granda v. United States*[13] which issued after the district court denied Chapotin's § 2255 motion, but he maintains that *Granda* was wrongly decided. For the reasons that follow, we conclude that Chapotin cannot prevail on this claim.

Section 924(c) criminalizes the use or carrying of a firearm in furtherance of a crime of violence or drug trafficking crime, and provides for a separate, mandatory consecutive sentence. 18

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[12] Because we conclude that *Griffin* forecloses Chapotin's career-offender claim, we do not address the parties' arguments related to the issues of timeliness and procedural default. *See Dallas v. Warden*, 964 F.3d 1285, 1307 (11th Cir. 2020), *cert. denied*, 142 S. Ct. 124 (2021) (explaining that "a federal court may skip over the procedural default analysis if a claim would fail on the merits in any event").

[13] 990 F.3d 1272 (11th Cir. 2021), *cert. denied* 142 S. Ct. 12333 (2022).

U.S.C. § 924(c)(1). For purposes of § 924(c), "crime of violence" is defined as a felony offense that either:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

*Id.* § 924(c)(3)(A)–(B). In relevant part, § 924(o) provides that "[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both." 18 U.S.C. § 924(o).

Section 924(c)(3)(A) is known as the elements clause, and subsection (B) is known as the residual clause. *Davis*, 139 S. Ct. at 2323–24. In *Davis*, the Supreme Court extended its holdings in *Johnson* and *Dimaya* to § 924(c) and held that § 924(c)'s residual clause is unconstitutionally vague. 139 S. Ct. at 2336. We then held that *Davis* announced a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *In re Hammoud*, 931 F.3d 1032, 1038–39 (11th Cir. 2019). We also held post-*Davis* that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause of § 924(c) and, thus, is not a valid predicate for a § 924(c) charge. *Brown v. United States,* 942 F.3d 1069, 1075–76 (11th Cir. 2019).

In *Granda*, the defendant was convicted of conspiracy to use or carry a firearm during and in relation to a crime of violence or a drug-trafficking crime, in violation of § 924(o). 990 F.3d at 1284. The indictment listed five possible predicates for the § 924(o) offense—three crimes of violence and two drug-trafficking crimes. *Id.* at 1284–85. One of the listed crimes of violence, conspiracy to commit Hobbs Act robbery, was not a valid predicate post-*Davis*. *Id.* at 1285. The jury instructions provided that the jury could find Granda guilty if they found "beyond a reasonable doubt that 'the object of the unlawful plan was to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, one of the federal drug trafficking crimes, or one of the federal crimes of violence, or both, as charged in counts 1, 2, 3, 4, or 5 of the Superseding Indictment.'" *Id.* The jury returned a general verdict. *Id.* It was thus impossible to tell from the indictment, jury instructions, or the general verdict which count or combination of counts the jury relied on for the § 924(o) offense. *Id.* Following *Davis*, Granda filed a § 2255 motion, arguing, in relevant part, that because the court could not definitely rule out the possibility that the jury relied on an invalid predicate, his § 924(o) conviction had to be vacated. *Id.* We disagreed.

We explained that collateral relief for a *Davis*-based claim is proper only if the court has "grave doubt" about whether a trial error had a "substantial and injurious effect or influence" in determining the verdict. *Id.* at 1292 (quotation omitted); *see also Foster v. United States*, 996 F.3d 1100, 1107 (11th Cir.), *cert. denied*,

142 S. Ct. 500 (2021) ("On collateral review, the harmless error standard mandates that relief is proper only if the . . . court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." (quotation omitted)). A petitioner must show more than a reasonable possibility that the error was harmful, and we will grant relief "only if the error 'resulted in actual prejudice'" to the petitioner. *Granda*, 990 F.3d at 1292 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Under this standard, the reviewing court must ask directly whether the error substantially influenced the jury's verdict. *Id.* at 1293. Thus, it is not enough for a movant to show that the jury *may* have relied on the now-invalid residual clause; he must show a "substantial likelihood" that the jury *did* rely on that subsection. *Id.* at 1288. We concluded that "[t]he inextricability of the alternative predicate crimes compel[led] the conclusion that the error Granda complain[ed] about . . . was harmless." *Id.* at 1292–96. Additionally, we rejected the argument that a *Stromberg* error is not subject to the harmless error standard and that *Stromberg* precludes relying on an alternative valid predicate when conducting a harmless error analysis. *Id.* at 1293–94.

Like Granda, Chapotin's § 924(c) and § 924(o) convictions had multiple possible predicate offenses—conspiracy to commit Hobbs Act robbery and two drug-trafficking offenses—and these predicate offenses were "inextricably intertwined" as they arose from the same planned robbery. The jury returned a general

verdict, and neither the indictment nor the jury instructions indicate which count or combination of counts the jury relied on for the § 924(c) and § 924(o) offenses. Although conspiracy to commit Hobbs Act robbery is no longer a valid predicate post-*Davis*, on this record, there can be no grave doubt about whether the inclusion of the invalid predicate had a substantial influence in determining the jury's verdict. The objective of the robbery conspiracy was to obtain cocaine from the drug courier. *Chapotin*, 173 F. App'x at 751. Thus, the jury could not have found that Chapotin's gun use or possession (or his conspiracy to do those things) was connected to his conspiracy to commit Hobbs Act robbery without also finding at that same time that the gun offenses were connected to his conspiracy and attempted possession with intent to distribute cocaine that he planned to procure from the robbery. In other words, "[t]he inextricability of the alternative predicate crimes compel the conclusion that the error [Chapotin] complains about . . . was harmless."[14] *Granda*, 990 F.3d at 1292; *see also Foster*, 996 F.3d at 1107–08 (applying *Granda* to a § 2255 movant's § 924(o) and § 924(c) convictions and holding that any error from the inclusion of an invalid predicate was harmless because the alternative predicate offenses were inextricably intertwined).

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[14] Because we conclude that Chapotin's *Davis* challenge fails on the merits, we do not reach the parties' arguments concerning procedural default. *Dallas*, 964 F.3d at 1307.

Although Chapotin argues that *Granda* was wrongly decided, as explained previously there is no wrongly decided exception to our prior-panel-precedent rule. *Steele*, 147 F.3d at 1318. Accordingly, we affirm the district court's denial of Chapotin's § 2255 motion.

AFFIRMED.

# APPENDIX A-2

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21965-CIV-MARTINEZ/REID
(04-20305-CR-MARTINEZ)

UNISES CHAPOTIN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

**THE MATTER** was referred to the Honorable Lisette M. Reid, United States Magistrate Judge, for a Report and Recommendation on Movant's motion to vacate pursuant to 28 U.S.C. § 2255. (DE 31). Magistrate Judge Reid filed a Report and Recommendation ("R&R") concluding that Plaintiff's Motion should be denied but that a certificate of appealability should issue. (DE 33). Movant and the Government filed objections. The Court having reviewed the R&R and record in this case *de novo*, including the supplements of the parties, it is hereby

**ORDERED AND ADJUDGED** that United States Magistrate Judge Reid's well-reasoned Report and Recommendation (DE 33) is **AFFIRMED** and **ADOPTED**. The Motion (DE 1) is **DENIED**. The Court further agrees with the Government that (1) Movant's career offender claim is untimely because *Johnson v. United States*, 576 U.S. 591 (2015), invalidated only a specific provision of the Armed Career Criminal Act and did not start a new one-year clock permitting Movant to bring an independent vagueness challenge; and (2) that Movant's career offender and § 924(c) claims were procedurally defaulted because Movant failed to raise either claim in the district court before or during his criminal trial or on direct appeal.

Given the complexities and legal controversy concerning the issues in this case, the Court agrees with Judge Reid that a certificate of appealability is appropriate and accordingly **GRANTED**.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 18th day of December, 2020.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

# APPENDIX A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21965-CV-MARTINEZ
(04-20305-CR-MARTINEZ)
MAGISTRATE JUDGE REID

UNISES CHAPOTIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

**REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

## I. Introduction

This matter is before the Court on Movant's Motion to Vacate, filed pursuant to 28 U.S.C. § 2255. [ECF No. 6]. This cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and S.D. Fla. Admin. Order 2019-2. [ECF No. 31].

Movant, **Unises Chapotin**, is a federal prisoner currently serving a 384-month term of imprisonment as a career offender pursuant to U.S.S.G. § 4B1.2(a)(2), following his conviction by a jury in **Case No. 04-20305-CR-MARTINEZ**. In the Motion, Movant's main argument is that his sentence as a career offender is unconstitutional because § 4B1.2(a)(2) is void for vagueness pursuant to the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), which invalidated a nearly identical clause in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), on vagueness grounds. Movant's terse *pro se* claim can also be liberally construed to allege that his Count 5 conviction for use of a firearm in furtherance of a crime of violence and a drug trafficking crime is invalid because conspiracy to commit Hobbs Act robbery

does not constitute a crime of violence after *Johnson*. Upon review of the pleadings, the supplemental briefing, and the record in the underlying criminal case, the Undersigned **RECOMMENDS** that the Motion to Vacate be **DENIED**, but that a Certificate of Appealability by issued, as further discussed below.

## II. Factual and Procedural History

Movant was a last-minute addition to a group of three men who agreed to rob a drug courier of his cocaine. *See United States v. Chapotin*, 173 F. App'x 751, 752 (11th Cir. 2006) (*per curiam*). What made the robbery unique was that the drug courier was in on the scheme himself and - unbeknownst to Movant and the rest of his group - was a confidential informant for the Government. *Id*. The plan was to make it look to the courier's supplier like the courier had been robbed, when he actually was working with Movant's group to steal the cocaine to later sell themselves. *Id*.

On the day of the planned operation, Movant was picked up in a car by his two co-defendants and driven to a restaurant parking lot. *Id*. At the restaurant, they were all picked up by the courier and brought to a nearby warehouse to pick up a van they were going to use to transport the cocaine following the robbery. *Id*. Upon their arrival at the warehouse, they were arrested. *Id*.

Movant and his co-defendants were charged with: (1) conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 1); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 2); conspiracy to possess a firearm in furtherance of a crime of violence and a drug trafficking crime, as set forth in Counts 1, 2, and 4, in violation of 18 U.S.C. § 924(o) (Count 3); attempted possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846 (Count 4); use of a firearm in furtherance of a crime of violence and a drug trafficking crime, as set forth in Counts 1, 2, and 4,

in violation of 18 U.S.C. § 924(c)(1)(A) (Count 5). [CR-ECF No. 16]. Each of the three defendants were also separately charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), so only Count 8 applied to Movant. [*Id*. at 5].

Right before trial, Movant's two co-defendants both pleaded guilty to Counts 1 and 5, while Movant chose to go to trial. After a three-day trial, the jury found Movant guilty as charged, however the verdict was a general verdict that did not specify the predicate crimes underlying Movant's § 924 convictions in Counts 3 and 5. [CR-ECF No. 84].

After trial, Movant was sentenced as a career offender to a 384-month term of imprisonment. [CR-ECF No. 123]. Movant appealed, and on appeal the Eleventh Circuit reversed his § 922(g)(1) conviction in Count 8 based on insufficient evidence to convict him and affirmed all other aspects of Movant's conviction. *See Chapotin*, 173 F. App'x at 752-53, *cert. denied*, 549 U.S. 916 (2006). On September 8, 2006, Movant received an amended judgment, but his 384-month term of imprisonment remained unchanged. [CR-ECF No. 187].

To briefly summarize the extensive history of this collateral challenge to his sentence, in 2004, Movant was sentenced as a career offender under what was then the mandatory sentencing guidelines. Shortly thereafter, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that mandatory application of the guidelines was unconstitutional, and that the guidelines were effectively advisory for the sentencing court to consider when determining the appropriate sentence for a convicted defendant. However, *Booker* was not made retroactive to cases on collateral review, so it did not provide Movant any relief in challenging his sentence. *See Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005).

About a decade later, the Supreme Court decided *Johnson*, which overruled previous longstanding precedent and represented a significant and retroactive change in the law. *See Mays*

*v. United States*, 817 F.3d 728, 736-37 (11th Cir. 2016) (*per curiam*). Invoking the new rule in *Johnson*, Movant filed this Motion to Vacate, which argues that because *Johnson* invalidated the residual clause of the ACCA, it also invalidated the identically-worded U.S.S.G. § 4B1.2(a)(2), the residual clause of the pre-*Booker* mandatory career offender guidelines. [ECF No. 6].

Respondent argued, among other things, that Movant's challenge to his sentence was not cognizable on collateral review, because *Johnson* did not apply to challenges to the sentencing guidelines, and because Movant was sentenced to less than the statutory maximum of life imprisonment. [ECF No. 13] (citing *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (holding that the post-*Booker* advisory guidelines were not subject to a vagueness challenge); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016) (holding the pre-*Booker* mandatory guidelines were not subject to a vagueness challenge)). Acknowledging that his argument appeared to be foreclosed by binding Eleventh Circuit precedent, Movant filed an unopposed Motion to stay this case while the Supreme Court decided yet another potentially relevant case, *Beckles v. United States*, 580 U.S. ___, 137 S. Ct. 886 (2016). [ECF No. 15]. The Court granted the stay and administratively closed this case pending the *Beckles* decision. [ECF No. 17].

However, the Supreme Court in *Beckles* did not solve the issue now before this Court, because it solely dealt with the post-*Booker* advisory guidelines, not the pre-*Booker* mandatory guidelines that Movant was sentenced under in 2004. Thus, *Beckles* left in place the Eleventh Circuit's prior holding in *Griffin*, which was fatal to Movant's argument. *See Robinson v. United States*, 773 F. App'x 520, 522-23 (11th Cir. 2019) (*per curiam*) (holding under the prior panel precedent rule, that *Griffin* foreclosed the movant's challenge to the mandatory career offender guidelines) (quoting *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009)).

After *Beckles*, the Court lifted the stay and referred this case to Magistrate Judge Patrick White for report and recommendation on the Motion to Vacate and on whether Movant should be granted a Certificate of Appealability. [ECF No. 25]. Before issuing a report, Magistrate Judge White retired, and the case was referred to the Undersigned.

While this was taking place, the Supreme Court decided yet another potentially relevant case to Movant's Motion, *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019), which held another nearly identical residual clause, 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague. Accordingly, the Undersigned Ordered the parties to file supplemental briefing on what effect, if any, *Davis* had on this case. [ECF No. 26]. Now that such briefing has been completed [ECF Nos. 27, 28], this matter is ripe for review by the Court.

## III. Discussion

### A. Movant's Claims

Because Movant was *pro se* when he filed his Motion to Vacate, the Court should liberally construe his claims. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). In so doing, Movant argues in his Motion: (1) that his sentence enhancement under the career offender guidelines was unconstitutional because he lacked the predicate convictions; and (2) that his conviction under 18 U.S.C. § 924(c) is invalid because conspiracy to commit Hobbs Act robbery does not constitute a crime of violence. [ECF No. 6 at 10]. Through counsel, Movant later argues that his convictions in both Counts 3 and 5 must be vacated. [ECF No. 27].

### B. Standard of Review

Under 28 U.S.C. § 2255, federal prisoners may seek relief from the court that imposed their sentence if: (1) "the sentence was imposed in violation of the Constitution or laws of the United States," (2) "the court was without jurisdiction to impose such sentence," (3) "the sentence was in

excess of the maximum authorized by law," or (4) the sentence "is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a) (alteration added). It is a movant's burden to show by a preponderance of the evidence that he is entitled to relief. *See Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017).

C. Analysis of Movant's Claims

**Claim 1: Movant's Career Offender Enhancement Was Unconstitutional**

Movant's first claim is that his sentence enhancement under the career offender guidelines was unconstitutional because he lacked the predicate convictions after *Johnson*. [ECF No. 6 at 10]. Respondent argues that this claim is not cognizable because Movant's sentence was less than the statutory maximum of life imprisonment, and a sentencing error cannot be challenged absent either a showing of actual innocence, or vacatur of a prior conviction. [ECF No. 13 at 3-4] (citing *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014)). Respondent is correct, and in any event Movant's claim fail on the merits because it foreclosed by still-binding Eleventh Circuit precedent in *Griffin*, and Movant's argument that *Beckles* abrogated *Griffin* is incorrect. *See Robinson*, 773 F. App'x at 522-23.

In *Johnson*, the Supreme Court expressly limited its holding to the residual clause of the ACCA. *See Johnson*, 576 U.S. at 606. While the holding in *Johnson* has been greatly expanded since Movant filed his Motion to Vacate, *see, e.g., Davis, supra*, the Supreme Court in *Beckles* left open whether vagueness principles apply to the pre-*Booker* mandatory guidelines, only deciding that *Johnson* did not apply to the post-*Booker* advisory guidelines. *See Beckles*, 580 U.S. at ___, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in judgment). As such, Movant's argument that *Beckles* abrogated *Griffin* fails because for a Supreme Court decision to overcome the prior panel 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." *Kaley*, 579 F.3d at 1255. While *Beckles* does mention the distinction between the mandatory and advisory guidelines, it left open the possibility that *Griffin* could still be valid and declined to address the advisory guidelines. Thus, it cannot be said that *Beckles* has abrogated *Griffin*, or that there is direct conflict between the two.

Movant also argues that *Griffin* does not control because it was decided in the context of an application for leave to file a second or successive motion to vacate. [ECF No. 21]. However, after raising this argument, the Eleventh Circuit has subsequently held in another case that published orders deciding applications for leave to file second or successive motions to vacate are binding. *See United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018). As such, the Eleventh Circuit's holding in *Griffin*, that *Johnson* does not apply to pre-*Booker* mandatory guidelines, remains controlling on all district courts in the Eleventh Circuit. Accordingly, Movant's claim should be denied on the merits.

**Claim 2: Movant's § 924 Convictions Are Unconstitutional**

Next, Movant's claim that his Count 5 conviction for use of a firearm in furtherance of a crime of violence and a drug trafficking crime is invalid under *Johnson*, merits discussion. [ECF No. 6 at 3, 10]. In 2016, when Respondent filed its Response, it correctly noted that the Supreme Court in *Johnson* expressly limited its holding to the residual clause of the ACCA, and that it did not impact the validity of the § 924(c)(3)(B) residual clause. [ECF No. 13]. If this case were decided in 2016, that would be the end of it and this claim would be easily denied.

Since then, however, the Supreme Court has extended its void-for-vagueness holding in *Johnson* to § 924(c)(3)(B). *See Davis*, 588 U.S. at ___, 139 S. Ct. at 2324-25. In addition, the Eleventh Circuit has also held that, after *Davis*, conspiracy to commit Hobbs Act robbery no longer qualifies as a crime of violence. *See United States v. Brown*, 942 F.3d 1069, 1074-75 (11th Cir.

2019). Thus, if Movant can prove by a preponderance of the evidence that his Count 5 § 924(c) conviction was based on conspiracy to commit Hobbs Act robbery, and not on the still valid predicate drug trafficking crimes, he would be entitled to relief on this claim. *See In re Cannon*, 931 F.3d 1236, 1243 (11th Cir. 2019). However, Movant cannot meet his burden to do so, and this claim should be denied.

Movant fails to meet his burden because his Motion to Vacate provides no evidence one way or the other as to which predicate offense the jury relied upon. However, in Movant's supplemental briefing, counsel argues in the alternative that because the verdict did not specify whether the jury convicted him of using the firearm in furtherance of the Hobbs Act conspiracy or the drug trafficking crimes, both his Count 3 and Count 5 § 924 convictions must be vacated pursuant to *Stromberg v. California*, 283 U.S. 359, 368 (1931). [ECF No. 27]. Nevertheless, even if Movant were able to prove a *Stromberg* error, his claim would still fail because, as Respondent points out, the objective of Movant's Hobbs Act conspiracy was to steal cocaine and later distribute it.

The Supreme Court has clarified that *Stromberg* errors are not structural errors that require automatic reversal. *See Hedgpeth v. Pulido*, 555 U.S. 57, 60-61 (2008). Rather, *Stromberg* errors are instructional errors that are subject to a harmless error test. The harmless error review is a standard applied to the record's facts, not a burden borne by a movant. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) ("[W]e think it conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens (e.g., 'Do I believe the party has borne its burden of showing . . . ?')" (first alteration added)).

In the habeas context, an error is not harmless if there is "more than a reasonable possibility" the error contributed to the conviction or sentence. *Al-Amin v. Warden, Ga. Dep't of Corr.*, 932 F.3d 1291, 1299 (11th Cir. 2019) (quotation marks and citation omitted). "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the [movant] must win." *O'Neal*, 513 U.S. at 436. (alteration added). "Grave doubt" means "the matter is so evenly balanced that [the judge] feels [herself] in virtual equipoise as to the harmlessness of the error." *Id*. at 435 (alterations added; quotation marks omitted). The "risk of doubt" is on the Government. *Id*. at 439.

A movant can show an entitlement to habeas relief following a *Stromberg* error in two ways. First, the movant can show that the jury more likely than not convicted based solely on the invalid theory of guilt, because under those circumstances there is little doubt the error fatally infected the verdict. *See Cannon*, 931 F.3d at 1243 (11th Cir. 2019); *see also Brown*, 942 F.3d at 1074-75. Second, a movant can show *Stromberg* error and the Court, upon review of the record, including the indictment, closing arguments, jury instructions, and specific factual findings by the jury, determines the jury as likely solely relied on the invalid theory of guilt as not, and therefore the error was not harmless. *See O'Neal*, 513 U.S. at 435 (instructing courts that when the evidence is evenly balanced, the risk of doubt is on the state); *see also Adams v. Wainwright*, 764 F.2d 1356, 1362 (11th Cir. 1985) (determining on which predicate offense a jury likely relied "by examining the jury instructions and the closing arguments made at trial and asking whether, under the circumstances, the jury could only have [relied on an invalid predicate]" (alteration added)).

There was a *Stromberg* error in Movant's underlying criminal case. The jury was instructed that it could convict Movant on Counts 3 and 5 based on several grounds, including the now-

invalidated predicate crime of violence of conspiracy to commit Hobbs Act robbery in Count 2, and the jury returned a general verdict. This mean that the jury could have relied upon the invalid predicate. However, Movant does not show that it is more likely than not that the conviction was based solely on the invalid theory of guilt. *See Cannon*, 931 F.3d at 1243. As such, Movant can only prevail if the Court, upon a review of the entire record, determines that the jury just as likely solely relied upon the invalid theory of guilt as not, and therefore the *Stromberg* error was not harmless. *See O'Neal*, 513 U.S. at 435; *see also Al-Amin*, 932 F.3d at 1299.

Here, the record leaves the Undersigned with no doubt that the *Stromberg* error is harmless, and that Movant is not entitled to relief. The jury was instructed that Movant could be found guilty if he possessed a firearm in furtherance of a drug trafficking crime, a crime of violence, or both. [CR-ECF No. 81 at 17, 23]. The jury was further instructed that it was not required that the Government prove that Movant violated the law in both ways, but that they must unanimously agree on which way he violated the law if it was not violated in both ways. [*Id*. at 17-20, 23-24].

The jury convicted Movant on all counts beyond a reasonable doubt. The general jury verdict convicting on all counts is evidence the jury accepted the prosecution's theory of the case. *See Adley v. United States*, No. 16-22907-CIV-ALTONAGA, 2020 U.S. Dist. LEXIS 188577 at *23-25 (S.D. Fla. Oct. 9, 2020) (citing *United States v. von NotHaus*, No. 09-cr-27, 2014 U.S. Dist. LEXIS 158935, 2014 WL 5817559, at *4 (W.D.N.C. Nov. 10, 2014) ("The [general] jury verdict reflects that the fact finders accepted the Government's evidence and theory." (alteration added; footnote call number omitted)); *Acevedo v. Adams*, No. cv 09-6505, 2011 U.S. Dist. LEXIS 21152, 2011 WL 837891, at *10 (C.D. Cal. Jan. 11, 2011) ("The [guilty] verdicts [] reflect that the jury accepted the prosecution's theory and rejected the defense theory[.] (alterations added)), *R. & R. adopted*, 2011 U.S. Dist. LEXIS 21159, 2011 WL 836672 (C.D. Cal. Feb. 28, 2011)).

It is thus extremely unlikely the jury convicted on Counts 3 or 5 solely on conspiracy to commit Hobbs Act robbery. Another reason why it is so unlikely is because the conspiracy to commit Hobbs Act robbery appears inextricably intertwined with the drug crimes for which Movant was also convicted. For example, Movant's Indictment described the Hobbs Act conspiracy in Count 2 as one where "the defendants did plan to take cocaine from individuals they believed to be engaged in narcotics trafficking." [CR-ECF No. 16 at 2]. Given this record, "it is difficult to see how a jury would have concluded [Movant] was guilty of using a firearm during and in furtherance of the [Hobbs Act conspiracy] without at the same time also concluding that he did so during and in furtherance of the underlying drug [] predicates." *Cannon*, 931 F.3d at 1243 (alterations added).

Because there is no reasonable probability the jury relied solely on conspiracy to commit Hobbs Act robbery in convicting Movant on either Count 3 or Count 5, the *Stromberg* instructional error permitting that unlikely possibility is harmless. Harmless constitutional errors do not warrant habeas relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Thus, Movant's claim should be denied.

D. Certificate of Appealability

A movant seeking to appeal a district court's final order denying his motion to vacate has no absolute entitlement to appeal and must obtain a Certificate of Appealability to do so. *See* 28 U.S.C. § 2253(c)(1); *see also Harbison v. Bell*, 556 U.S. 180, 183 (2009). The Court should issue a Certificate of Appealability only if the movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a movant's constitutional claims on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v.*

*McDaniel*, 529 U.S. 473, 484 (2000). Upon review of the record, a Certificate of Appealability should be granted because reasonable jurists would find the above assessment of the constitutional claims debatable.

The first issue a Certificate of Appealability should be granted on is whether sentences under the then mandatory pre-*Booker* sentencing guidelines are subject to a vagueness challenge. While the Eleventh Circuit has expressly held after *Johnson* that they are not subject to such a challenge in *Griffin*, reasonable jurists, including judges on the Eleventh Circuit, continue to debate the correctness of *Griffin*, and the Supreme Court's decision in *Beckles* did not conclusively settle this question one way or the other. *See, e.g.*, *In re Sapp*, 827 F.3d 1334, 1337 (11th Cir. 2016) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring) (writing "separately to explain why we believe *Griffin* is deeply flawed and wrongly decided"); *In re McCall*, 826 F.3d 1308, 1310 (11th Cir. 2016) (Martin, J., concurring) (opining that *Griffin* was "wrongly decided"). Thus, a Certificate of Appealability should be issued as to whether sentences under the mandatory guidelines are subject to a vagueness challenge.

The court should also grant a Certificate of Appealability on the issue of the precedential weight of published opinions in the context of applications for second or successive motions to vacate. While the Eleventh Circuit has recently held in *St. Hubert* that published orders deciding applications for leave to file second or successive motions to vacate are binding, the Eleventh Circuit declined to rehear the case *en banc* over considerable dissent from Judges Wilson, Martin, Rosenbaum, and Jill Pryor. *See St. Hubert*, 909 F.3d at 346, *rehearing denied*, 918 F.3d 1174, 1196-1213 (11th Cir. 2019) (Wilson, Martin, Jill Pryor, and Rosenbaum, JJ., dissenting from denial of rehearing *en banc*), *cert. denied*, ___ U.S. ___, 140 S. Ct. 1727 (2020). In addition, in concurring in the Supreme Court's denial of certiorari in *St. Hubert*, Justice Sotomayor pointed

out what she believed to be due process concerns regarding the Eleventh Circuit's handling of applications for second or successive motions to vacate. *See* ___ U.S. at ___, 140 S. Ct. at 1727-30 (Sotomayor, J., concurring in the denial of certiorari). Thus, reasonable jurist could find the determination of this issue debatable and a Certificate of Appealability should be issued as to the question of whether published orders deciding applications for leave to file second or successive motions to vacate are binding upon district courts in determining first filed motions to vacate.

Finally, a Certificate of Appealability should be granted on whether the Court erred in applying the reasonable probability harmless error review standard to the *Stromberg* error, and whether the Court erred in determining the *Stromberg* error in Movant's underlying criminal case was harmless. Movant cites to *Parker v. Sec'y, Dep't of Corr.*, 331 F.3d 764, 779 (11th Cir. 2003), for the proposition that *Stromberg* "forbids … a conclusion that a constitutional error is harmless because of the availability of another, independent basis for the jury's verdict." However, this ruling appears to have been abrogated by *Hedgpeth*, though the Eleventh Circuit has not expressly acknowledged this. Thus, because reasonable jurists may find these determinations debatable, a Certificate of Appealability should be issued as to whether the Court applied the correct standard, and whether the Court's determination that the error in Movant's case was harmless was correct.

## IV. Recommendations

Based on the above, it is **RECOMMENDED** that the Motion to Vacate be **DENIED**, but that a Certificate of Appealability be issued as described above.

Objections to this Report may be filed with the District Judge within fourteen days of receipt of a copy of the Report. Failure to do so will bar a *de novo* determination by the District Judge of anything in the Report and Recommendation and will bar an attack, on appeal, of the

factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1)(C); *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985).

**SIGNED** this 6th day of November, 2020.

UNITED STATES MAGISTRATE JUDGE

cc: **All Counsel of Record via CM/ECF**; and

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