IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12432-J

TERRANCE ROBINSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

In order to appeal the district court's dismissal of his counseled 28 U.S.C. § 2255 motion to vacate his sentence, Terrance Robinson, a federal prisoner, moves for a certificate of appealability ("COA"). Robinson is serving a 262-month sentence after being convicted by a jury of attempt to possess with intent to distribute cocaine, and conspiracy to possess with intent to distribute cocaine. Robinson appealed, and we affirmed his convictions and sentences.

In the instant § 2255 motion, he raised one claim—that his enhanced sentence as a career offender under the Sentencing Guidelines, U.S.S.G. § 4B1.1, was illegal in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck down the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), as unconstitutionally vague. Specifically, he asserted that he was sentenced under the residual clause of the career-offender guideline based, in part, on his prior South Carolina conviction for assault and battery of a high and

aggravated nature, which no longer qualified as a "crime of violence" under § 4B1.1 after *Johnson*. He argued that *Johnson*'s holding as to the residual clause of the ACCA applied with equal force to the identically worded residual clause of the Guidelines. Finally, he conceded that his career-offender enhancement was also based upon his prior conviction for trafficking cocaine, which he was not challenging.

The district court stayed proceedings pending the Supreme Court's opinion in *Beckles v. United States*, 137 S. Ct. 886 (2017), in which the Court would decide whether *Johnson*'s holding applied to the Guidelines. After the *Beckles* decision was issued, the court lifted the stay and allowed Robinson to file a supplemental brief in support of his § 2255 motion. In his brief, Robinson argued that, while the *Beckles* court held that *Johnson* does not apply to the Guidelines in cases where the defendant was sentenced under the advisory guideline system established in *United States v. Booker*, 543 U.S. 220 (2005), it explicitly declined to address whether *Johnson* applied to pre-*Booker* sentences, like the sentence imposed against Robinson in 2000. He conceded that we held, in *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), that *Johnson* does not apply to the pre-*Booker*, mandatory guideline system, but argued that *Griffin* was wrongly decided.

After the government's response, the district court denied Robinson's § 2255 motion, concluding that *Griffin* and *Beckles* foreclosed any argument that *Johnson* applied to his pre-*Booker* sentence and that his conviction for assault and battery no longer qualified as a "crime of violence" under the career-offender guideline. The court also denied him a COA. Robinson has filed a counseled notice of appeal, and now seeks a COA.

In his counseled COA motion before this Court, Robinson again concedes that we held in *Griffin* that *Johnson* does not permit a vagueness challenge to the imposition of a pre-*Booker*

career-offender sentence. However, he argues that the *Beckles* decision has undermined *Griffin* to the point of abrogation, and, alternatively, that he still warrants a COA in order to preserve his *Johnson* claim for *en banc* review by this Court.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a § 2255 motion on the merits, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). We will not issue a COA "where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

Pursuant to the ACCA, any person who violates 18 U.S.C. § 922(g), and has 3 previous convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is often referred to as the "elements clause," while the second prong contains both the "enumerated crimes clause" and what is often called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

Alternatively, § 4B1.1 of the Guidelines provides that a defendant is classified as a career offender if he (1) was at least 18 years old at the time of the offense of conviction; (2) the offense

of conviction was either a crime of violence or a controlled-substance offense; and (3) he had at least two prior felony convictions of either a crime of violence or a controlled-substance offense. U.S.S.G. § 4B1.1(a). The 2000 Guidelines Manual defined "crime of violence" as any offense under federal or state law that is punishable by imprisonment for more than one year and:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a).

In June 2015, the Supreme Court held in *Johnson* that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. 135 S. Ct. at 2557-58, 2563. Two months later, we held that the vagueness doctrine, upon which the Supreme Court invalidated the ACCA's residual clause in *Johnson*, did not similarly apply to advisory Guidelines. *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015). Then, in *Welch v. United States*, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. 1257, 1264-65, 1268 (2016).

Later, in *Griffin*, we held that an applicant seeking leave to file a second or successive § 2255 motion raising a *Johnson*-based challenge to his career-offender enhancement, which was imposed when the Guidelines were mandatory, did not make a *prima facie* showing that his claim satisfied the criteria of § 2255(h)(2) because he was not sentenced under the ACCA or beyond the statutory maximum for his crime. 823 F.3d at 1354-56. We reasoned that the Guidelines, whether advisory or mandatory, cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to limit and assist the sentencing

judge's discretion. *Id.* at 1354; *see also In re Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (noting that we are bound by the holding of *Griffin*).

In March 2017, the Supreme Court held in *Beckles* that the advisory Guidelines are not subject to a vagueness challenge under the Due Process Clause, such that the career-offender guideline's residual clause, § 4B1.2(a)(2), is not void for vagueness. 137 S. Ct. at 890, 895. Specifically, the Court distinguished the career-offender guideline and the ACCA by noting that, while the ACCA fixes a permissible range of sentences, the Guidelines merely guide the exercise of a court's discretion in choosing a sentence within the statutory range. *Id.* at 892. After highlighting the "long history of discretionary sentencing," which included much wider statutory ranges of sentences, the Court stated that it "has never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Id.* at 893 (quotations omitted). Then, the Court noted that "the system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible," and concluded that "[i]f a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be." *Id.* at 894. Moreover, the Court stated that the advisory Guidelines did not implicate the twin concerns underlying the void-for-vagueness doctrine: notice and arbitrary enforcement. *Id.* at 894-95.

Here, reasonable jurists would not debate whether Robinson's prior conviction for assault and battery still qualifies post-*Johnson* as a "crime of violence" under the Guidelines, on the ground that *Johnson* invalidated the residual clause of the career-offender guideline for a pre-*Booker* sentence. In this case, Robinson was sentenced as a career-offender under the Guidelines, not under the ACCA, and we have held that *Johnson* does not apply to the

career-offender guideline, whether under the advisory or the mandatory guideline system. *See Griffin*, 823 F.3d at 1354-56; *Sapp*, 827 F.3d at 1336.

Robinson's argument that *Griffin* was wrongly decided is unconvincing. *See In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (explaining that "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*"). While Robinson claims that *Beckles* has undermined *Griffin*'s holding to the point of abrogation, the majority in *Beckles* did not explicitly rule on pre-*Booker* sentences under the mandatory Guidelines. *See Beckles*, 137 S. Ct. at 890-95. Nothing in *Beckles* undermines our binding holding in *Griffin* that *Johnson* does not apply to the Guidelines, whether advisory or mandatory, and a footnote in a concurring opinion referring the issue does not change this result. *See Griffin*, 823 F.3d at 1354-56; *Sapp*, 827 F.3d at 1336; *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (noting that the majority's holding left open the question of whether vagueness challenges could be brought against pre-*Booker* sentences).

Because Robinson does not challenge his prior conviction for trafficking cocaine and reasonable jurists would not debate the district court's denial of his *Johnson* claim as to his prior conviction for assault and battery, he still has two qualifying predicate convictions under the career-offender guideline, and he cannot make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Hamilton*, 793 F.3d at 1266. Therefore, his COA motion is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE