APPENDIX

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APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11704

In re: MICHAEL S. BOWE,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before WILSON, GRANT, and ED CARNES, Circuit Judges.

ED CARNES, Circuit Judge:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Michael S. Bowe has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate,

set aside, or correct his federal sentence, *see* 28 U.S.C. § 2255. Authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357–58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

Section 2244 of title 28 provides that "[a] claim presented in a second or successive habeas corpus application under [§]2254 that was presented in a prior application *shall be dismissed*." 28 U.S.C. § 2244(b)(1) (emphasis added). In *In re Baptiste*, we concluded that § 2244(b)(1) also applies to federal prisoners seeking to file a second or successive application under § 2255. 828 F.3d 1337, 1339–40 (11th Cir. 2016). We have since stated that § 2244(b)(1)'s

requirement — to dismiss a claim raised in a prior application — is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277–78 (11th Cir. 2016). And we have also explained that a "claim" remains the same under § 2244(b)(1) so long as "[t]he basic thrust or gravamen of [the applicant's] legal argument is the same." *In re Hill*, 715 F.3d 284, 294 (11th Cir. 2013) (quoting *Babbitt v. Woodford*, 177 F.3d 744 (9th Cir. 1999)).

Because the only claim that Bowe brings in this second or successive application is one he has brought in other second or successive applications, we lack jurisdiction to consider it.

I.

In 2008, a federal grand jury charged Bowe with conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951(a) (Count One), attempt to commit Hobbs Act robbery, 18 U.S.C. §§ 1951(a) and 2 (Count Two), and the use, brandishing, or discharge of a firearm during and in relation to a crime of violence, "that is, a violation of Title 18, [U.S.C. §] 1951(a) as set forth respectively in Counts One and Two," 18 U.S.C. § 924(c)(1)(A) (Count Three). Bowe later pleaded guilty and was sentenced, in 2009, to a total term of 288 months imprisonment, which included a mandatory 120-month consecutive sentence for his § 924(c) conviction. Bowe did not appeal.

In 2016 Bowe filed an initial § 2255 motion in which he argued that his § 924(c) conviction was no longer valid in light of *Johnson v. United States*, 576 U.S. 591 (2015). The district court

denied that motion, concluding that Bowe's attempted Hobbs Act robbery conviction categorically qualifies as a crime of violence under § 924(c)(3)(A). Bowe sought to appeal that ruling, but we denied him a certificate of appealability, noting that his claim was foreclosed by circuit precedent. Bowe thereafter unsuccessfully sought *certiorari* review. *Bowe v. United States*, 584 U.S. 945 (2018).

In 2019 Bowe filed an application for certification to file a second or successive § 2255 motion. He again argued that his § 924(c) conviction was invalid, this time based on the Supreme Court's then-recent decision in *United States v. Davis*, 588 U.S. 445, 470 (2019), which held that the residual clause of § 924(c)(3)(B) is unconstitutionally vague. We denied Bowe's application, noting that he had not made a *prima facie* showing that his § 924(c) conviction and sentence were unconstitutional under *Davis* because, under our precedent at the time, attempted Hobbs Act robbery still qualified as a crime of violence under the elements clause of § 924(c)(3)(A).

In 2022 Bowe filed another application to file a second or successive § 2255 motion in this Court. He argued that the Supreme Court had announced a new rule of constitutional law in *United States v. Taylor*, 596 U.S. 845 (2022), and that, under it, his conviction for attempted Hobbs Act robbery was no longer a crime of violence under § 924(c). We denied Bowe's second application in part and dismissed it in part, concluding that, to the extent Bowe's second application was based again on *Davis*, we lacked jurisdiction because he had raised a *Davis* claim in his 2019 successive

application, and, in addition, we concluded that *Taylor* did not announce a new rule of constitutional law under § 2255(h)(2).

Later that year, Bowe filed yet another application for certification to file a successive § 2255 motion, again basing it on *Davis* and *Taylor*. He also filed a motion for initial hearing *en banc*. He argued that our *Baptiste* holding that § 2244(b)(1) applies to claims presented by federal prisoners in second or successive § 2255 motions, *see* 828 F.3d at 1339–40, should be overruled because it was contrary to the plain text of § 2244(b)(1). We dismissed that application (his third one) because *Baptiste* did compel the conclusion that Bowe was barred from bringing any claim based on *Davis* or *Taylor*, since he had raised those claims in earlier successive applications. We also denied Bowe's petition for initial hearing *en banc,* the procedural vehicle with which he sought to get rid of *Baptiste*.

In 2023 Bowe filed an original petition for writ of habeas corpus in the Supreme Court under 28 U.S.C. § 2241(a). *See In re Bowe*, 601 U.S. —, 144 S. Ct. 1170 (2024) (statement of Sotomayor, J., joined by Jackson, J., respecting the denial of the original petition for a writ of habeas corpus). In his original petition Bowe argued that § 2244(b)(1)'s bar against raising claims in a second or successive application that had been presented in a prior application applies only to challenges by state prisoners under § 2254, not to challenges of federal prisoners under § 2255. *See id.* at 1170. The Supreme Court denied that petition in February 2024. *Id.*

In the application before us, Bowe states that he wishes to bring one claim in a second or successive § 2255 motion. He

contends that he is actually innocent of his § 924(c) conviction in light of the Supreme Court's decision in *Davis* and argues that neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under § 924(c). Bowe concedes that his application does not rely on newly discovered evidence, *see generally* § 2255(h)(1). He argues instead that his application is based on the proposition that *Davis* is a new rule of constitutional law made retroactive by the Supreme Court, and he cites as support *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019).

Bowe acknowledges that, because we previously denied him authorization based on *Davis*, his application is "foreclosed" by *Baptiste*. For that reason, he has filed a petition for initial hearing *en banc* asking the *en banc* court to overrule the *Baptiste* decision. In the alternative, he has filed a motion to certify the following question of law to the United States Supreme Court under 28 U.S.C. § 1254(2): "whether Section 2244(b)(1) applies to a claim presented in a second or successive motion to vacate filed under Section 2255."

II.

As Bowe concedes, the binding precedent of the *Baptiste* decision deprives us of jurisdiction to grant him the relief he seeks.

Baptiste requires us to dismiss a claim presented in a federal prisoner's second or successive habeas corpus application if it was presented in a previous second or successive § 2255 application. 828 F.3d at 1339–40. And § 2244(b)(1)'s bar is jurisdictional. *In re*

Bradford, 830 F.3d at 1277–78. "[L]aw 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 is binding precedent on *all* subsequent panels of this Court." *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *abrogated in part on other grounds by United States v. Taylor*, 596 U.S. at 851. And under our prior panel precedent rule, we are bound to follow prior binding precedent unless and until it is overruled by the Supreme Court or this Court sitting *en banc*. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016).

We lack jurisdiction over this application, which presents a *Davis* claim, because Bowe presented the same claim in a prior successive application which we denied. 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1339–40; *In re Bradford*, 830 F.3d at 1277–78. Because neither *Baptiste* nor *Bradford* has been overruled or abrogated by the Supreme Court or by this Court sitting *en banc*, we must apply them here. *St. Hubert*, 909 F.3d at 346; *White*, 837 F.3d at 1228. Accordingly, we dismiss for lack of jurisdiction Bowe's application for a certificate to file a second or successive § 2255 motion.[1]

We also deny Bowe's motion to certify to the United States Supreme Court the question of whether *Baptiste* is correct. The

[1] Lacking jurisdiction, we don't mean to imply anything about whether Bowe's *Davis* claim has any merit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

certification of a question from a court of appeals to the Supreme Court, and its acceptance of a certified question, is an extremely rare procedural device. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (dismissing a certified question and explaining that certification is appropriate only in "rare instances"). The Supreme Court has accepted only four certified questions since 1946, and none in the last forty-three years. *See* Stephen M. Shapiro et al., *Supreme Court Practice* ch. 9, § 1 (11th ed. 2019). The Court certainly does not encourage courts of appeals to try using the procedure. *See In re Hill*, 777 F.3d 1214, 1225–26 (11th Cir. 2015) (noting that the "Supreme Court has discouraged the use of this certification procedure" and declining to certify a question arising from proceedings on an application to file a successive § 2254 petition). All of which led one Justice to observe a decade-and-a-half ago that "it is a newsworthy event these days when a lower court even tries for certification." *United States v. Seale*, 558 U.S. 985 (2009) (Stevens, J., respecting dismissal of certified question); *see also* Shapiro et al., *supra,* ch. 9, § 1.

We won't cause a newsworthy event and stir up the bloggers and podcasters by asking the Court to accept a certified question from a court of appeals for only the fifth time in 78 years. After all, Bowe has made the Supreme Court aware of this issue, and aware of his § 2244(b)(1) argument, and aware of his desire to get the Court to decide it. *See In re Bowe*, 144 S. Ct. at 1170 (statement of Sotomayor, J., joined by Jackson, J., respecting the denial of his original petition for a writ of habeas corpus). While "[t]he standard

for [the Supreme] Court's consideration of an original habeas petition is a demanding one," *id.* at 1171, it is no more demanding than the standard for considering a question certified by a federal appellate court, as the last four decades of non-use of that procedure demonstrates.

Perhaps the matter will be settled in the future. *See id.* ("I would welcome the invocation of this Court's original habeas jurisdiction in a future case where the petitioner may have meritorious § 2255 claims."); *see also Avery v. United States*, 140 S. Ct. 1080, 1081 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari) ("In a future case, I would grant certiorari to resolve the circuit split on this question of federal law.").

APPLICATION DISMISSED FOR LACK OF JURISDICTION; MOTION TO CERTIFY DENIED.[2]

[2] No Judge of this Court in regular active service having requested that the Court be polled on Bowe's petition for hearing *en banc*, that petition will be denied in a separate order. *See* Fed. R. App. P. 35.

APPENDIX B

144 S.Ct. 1170
Supreme Court of the United States.

IN RE Michael BOWE

No. 22-7871
|
Decided February 20, 2024

Opinion
The petition for a writ of habeas corpus is denied.

Statement of Justice SOTOMAYOR, with whom Justice JACKSON joins, respecting the denial of the petition for a writ of habeas corpus.

**1 Under § 2244(b)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court must dismiss a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application." 28 U.S.C. § 2244(b)(1). State prisoners seek federal postconviction relief under § 2254. Federal prisoners seek postconviction relief under § 2255. This petition raises the question whether § 2244(b)(1)'s bar, which explicitly references only § 2254, also applies to a claim by a *federal* prisoner who brings a successive challenge to his conviction under § 2255.

The Government agrees with Bowe that § 2244(b)(1)'s plain language covers only challenges by state prisoners under § 2254. Three Circuits now agree with that interpretation. See *Jones v. United States*, 36 F.4th 974, 982 (CA9 2022) ("The plain text of § 2244(b)(1) by its terms applies only to state prisoners' applications"); *In re Graham*, 61 F.4th 433, 438 (C.A.4 2023); *Williams v. United States*, 927 F.3d 427, 434 (C.A.6 2019). But six Circuits disagree. See *Winarske v. United States*, 913 F.3d 765, 768–769 (C.A.8 2019); *In re Bourgeois*, 902 F.3d 446, 447 (C.A.5 2018); *In re Baptiste*, 828 F.3d 1337, 1339–1340 (CA11 2016); *United States v. Winkelman*, 746 F.3d 134, 135–136 (C.A.3 2014); *Gallagher v. United States*, 711 F.3d 315 (C.A.2 2013); *Taylor v. Gilkey*, 314 F.3d 832, 836 (C.A.7 2002).

Justice KAVANAUGH has previously expressed his desire for this Court to resolve this split. *Avery* v. *United States*, 589 U. S. ——, ——, 140 S.Ct. 1080, 1081, 206 L.Ed.2d 488 (2020) (statement respecting denial of certiorari). I now join him. There is a reason, however, that this is the first case to reach the Court presenting this question since he welcomed petitions on the split in *Avery*. There are considerable structural barriers to this Court's ordinary review via certiorari petition.

A petition cannot reach this Court from the three Circuits that read § 2244(b)(1) to apply only to state prisoners. Before a federal prisoner can file a second or successive habeas § 2255 motion, a court of appeals must certify it. See 28 U.S.C. § 2255(h). When a federal prisoner files a second or successive § 2255 motion that raises an issue he has raised previously, neither the court of appeals nor the district court will apply § 2244(b)(1)'s bar. If the court of appeals certifies the motion, the district court will decide it on the merits. The Government, because it agrees that § 2244(b)(1) applies only to state prisoners, will not seek certiorari and the question will be left behind.

A petition cannot reach this Court from the six Circuits that apply § 2244(b)(1) to both state and federal prisoners either. In those Circuits, the court of appeals will apply § 2244(b)(1)'s bar and deny certification to any second or successive § 2255

motion that raises an issue the prisoner has previously raised. Neither the Government nor the prisoner can seek review of that interpretation of § 2244(b)(1) from this Court, however, because AEDPA separately bars petitions for certiorari stemming from "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application." § 2244(b)(3)(E).

**2 *1171 Here, the Eleventh Circuit denied Bowe authorization to file his successive § 2255 motion based on § 2244(b)(1). Faced with § 2244(b)(3)(E)'s bar on petitioning for review of that denial in this Court, Bowe instead invokes this Court's jurisdiction to entertain original habeas petitions under § 2241(a). The standard for this Court's consideration of an original habeas petition is a demanding one. A petitioner must show both that "adequate relief cannot be obtained in any other form or from any other court" and "exceptional circumstances warrant the exercise of the Court's discretionary powers." Rule 20.4(a). Whether Bowe has met that demanding standard here is questionable, because it is not clear that, absent § 2244(b)(1)'s bar, the Eleventh Circuit would have certified his § 2255 motion.

The Circuit split, however, is still an important issue for this Court to consider in a more appropriate case. I would welcome the invocation of this Court's original habeas jurisdiction in a future case where the petitioner may have meritorious § 2255 claims. The Government also suggests that a court of appeals seeking clarity could certify the question to this Court. In the meantime, in light of the demanding standard for this Court's jurisdiction over original habeas petitions, I encourage the courts of appeals to reconsider this question en banc, where appropriate. *

All Citations

601 U.S. ----, 144 S.Ct. 1170 (Mem), 2024 WL 674656, 218 L.Ed.2d 67, 2024 Daily Journal D.A.R. 1379, 30 Fla. L. Weekly Fed. S 42

Footnotes

* For instance, it may be unnecessary to revisit the question en banc where statements from prior cases examining § 2244(b)(1)'s bar are dicta, rather than holdings. See, *e.g.*, *Williams v. United States*, 927 F.3d 427, 435–436 (C.A.6 2019) (revisiting the § 2244(b)(1) analysis after concluding that statements from two published prior cases were unreasoned dicta); *King v. Brownback*, 601 U. S. ——, ——, 144 S.Ct. 10, 11, 217 L.Ed.2d 199 (2023) (statement of SOTOMAYOR, J., respecting denial of certiorari) (noting different avenues for lower courts to reconsider the application of a statutory bar).

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-12278-A

IN RE: MICHAEL BOWE,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: JORDAN, GRANT, and ED CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Michael Bowe has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v.*

Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357–58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

Bowe is a federal prisoner serving a 288-month sentence for conspiracy to commit Hobbs Act Robbery, attempt to commit Hobbs Act Robbery, and use of a firearm during a crime of violence.

In 2016, Bowe filed his original § 2255 motion, which the district court denied with prejudice. Subsequently, in 2019, Bowe filed an application seeking permission to file a successive § 2255 motion. There, his single claim was that, in light of *United States v. Davis*,[1] the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague and, therefore, his conviction under § 924(c)(3)(B) was unconstitutional. We denied his application.

Recently, Bowe filed another application where he sought permission to file a successive § 2255 motion based on *United States v. Taylor*, No. 20-1459 (U.S. June 21, 2022). There, he argued that the Supreme Court announced a new rule of constitutional law in *Taylor*, and under *Taylor*, an attempted Hobbs Act Robbery was not a crime of violence, so his sentence was unlawful. Bowe also argued that, under both *Davis* and *Taylor*, he did not have a substantive offense that supported the imposed § 924(c) enhancement. On July 15, 2022, we denied his application in part as to the *Taylor* claim and dismissed his application in part as to the *Davis* claim.

[1] *United States v. Davis*, 139 S. Ct. 2319 (2019).

In his present application, and now represented by counsel, Bowe seeks to raise one claim in a successive § 2255 motion. Bowe argues that he is actually innocent of his § 924(c) conviction, in light of the Supreme Court's decision in *Davis*. Bowe asserts that conspiracy to commit Hobbs Act robbery does not satisfy the "crime of violence" definition in § 924(c) in light of *Davis*, and now, under *Taylor*, attempt to commit Hobbs Act robbery also does not satisfy the elements clause of § 924(c), so he is actually innocent of his § 924(c) offense. He admits that he raised this same claim in a prior application for leave to file a successive § 2255 motion, but also states that his claim relies on a new rule of constitutional law, as announced in *Davis*.

Additionally, Bowe filed a petition for initial hearing *en banc*. He argues that we should hear his case *en banc* and overrule *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016). Bowe contends that, by its plain terms, § 2244(b)(1) applies only to state prisoners seeking relief under § 2254, not federal prisoners seeking relief under § 2255. He asserts that, when we attempted to justify *Baptiste* in *In re Bradford*, 830 F.3d 1273 (11th Cir. 2016), we failed to explain how a § 2255 motion could be certified as provided in § 2244(b)(1). Bowe argues that *en banc* hearing is warranted because two circuits disagree with our holding that § 2244(b)(1) applies to federal prisoners, so we should reconsider our precedent. He asserts that *Davis* prejudices him now because his § 924(c) offense is no longer a federal crime. Bowe contends that an *en banc* review is uncommon, but not unauthorized, as we have held that § 2244(b)(3)(E) allows us to *sua sponte* hear his case *en banc*. Finally, he argues that, even though § 2244(b)(3)(D) requires us to resolve a request to file a successive application within 30 days, we have taken longer in unusual cases, so we can do so here, too.

We must dismiss a claim presented in an application to file a second or successive § 2255 motion that was presented in a prior application or in an original § 2255 motion. *See* 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1339-40. We have clarified that this bar is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016).

Under the prior panel precedent rule, we are bound by prior published decisions that have not been overruled by the Supreme Court or us *en banc*. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012).

Here, Bowe's proposed claim does not satisfy the statutory criteria in § 2255(h). 28 U.S.C. § 2255(h)(1), (2). Bowe is barred from bringing any claim based on *Davis* to argue that his sentence is unconstitutional because he previously raised the same claim in his 2019 successive application, and we rejected it. 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1340. Additionally, to the extent that Bowe mentions *Taylor* in this application, he is barred from bringing another claim based on *Taylor*, as we recently denied his previous application based on *Taylor*. 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1340.

Finally, because Bowe's present application based on *Davis* is jurisdictionally barred, and we are bound by prior panel precedent, his petition for an initial hearing *en banc* is denied. *Romo-Villalobos*, 674 F.3d at 1251; 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1340. Accordingly, his application for leave to file a second or successive motion is hereby DISMISSED, and his motion for an initial hearing *en banc* is DENIED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12989-B

IN RE: MICHAEL BOWE,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: ED CARNES, Chief Judge, NEWSOM, and GRANT, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Michael Bowe has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the

application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

As a brief factual background, Bowe was charged with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1), attempted Hobbs Act robbery, in violation of § 1951(a) and 18 U.S.C. § 2 (Count 2), and using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3). Notably, the indictment alleged that the § 924(c) count was predicated on his conspiracy-to-commit-Hobbs-Act-robbery charge in Count 1 and his attempted-Hobbs-Act-robbery charge in Count 2.

Bowe pleaded guilty pursuant to a written plea agreement, which reiterated that his § 924(c) conviction was predicated on Counts 1 and 2. At the change-of-plea hearing, the government gave the following factual proffer in support of Bowe's plea agreement. Bowe met with his codefendants, and they agreed to rob an armored car. The next morning, they got into a van and drove around looking for a suitable armored car. They pulled up alongside an armored car parked at a bank ATM, and Bowe exited the van carrying a rifle and shot the armored car's driver and security guard. The codefendants left in the van, Bowe ran away on foot, and all were eventually arrested. Bowe admitted to having committed the conduct described in the factual proffer and pled guilty. The court accepted his guilty plea and sentenced him to a total of 288 months in prison, consisting of concurrent 168-month sentences on Counts 1 and 2, and a consecutive 120-month sentence on Count 3.

In 2016, Bowe filed his original § 2255 motion, in which he argued that his § 924(c) conviction was no longer valid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court dismissed the motion as time-barred. In his application now before us, Bowe contends that § 924(c)(3)(B) is unconstitutional in light of the new rule of constitutional law announced by the Supreme Court in *United States v. Davis*, 139 S. Ct. 2319 (2019). And he argues that his § 924(c) conviction, which was based on conspiracy to commit Hobbs Act robbery, is therefore invalid. In making his argument, Bowe cites *Johnson*, and *Sessions v. Dimaya*, 138 S. Ct. 2251 (2018), as well as several other Supreme Court and circuit court decisions.[1]

On June 24, 2019, the Supreme Court in *Davis* extended its holdings in *Johnson* and *Dimaya* to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. *Davis*, 139 S. Ct. at 2324-25, 2336.

In *In re Hammoud*, we recently resolved several preliminary issues with respect to successive applications involving proposed *Davis* claims. No. 19-12458, manuscript op. at 4 (11th Cir. July 23, 2019). First, we held that *Davis*, like *Johnson*, announced a new rule of constitutional law within the meaning of § 2255(h)(2), as the rule announced in *Davis* was both "substantive"—in that it "restricted for the first time the class of persons § 924(c) could punish and, thus, the government's ability to impose punishments on defendants under that statute"—and

[1] Bowe's reliance on the Supreme Court's decisions in *Sessions v. Dimaya*, 138 S. Ct. 2251 (2018), and *Johnson*, 135 S. Ct. 2551, is misplaced. Those cases involved 18 U.S.C. § 16(b) and the Armed Career Criminal Act, respectively, not § 924(c). Bowe's current claim is best interpreted as a *Davis* claim. And to the extent that he relies on any other cited case as a new rule of constitutional law, his reliance is misplaced because none is a newly available retroactive decision of the Supreme Court. *See* 28 U.S.C. § 2255(h)(2).

was "new"—in that it extended *Johnson* and *Dimaya* to a new statutory context and that its result was not necessarily "dictated by precedent." *Id.* at 6-7. Second, we held that, even though the Supreme Court in *Davis* did not expressly discuss retroactivity, the retroactivity of *Davis*'s rule was "necessarily dictated" by the holdings of multiple cases, namely, the Court's holding in *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016), that *Johnson*'s substantially identical constitutional rule applied retroactively to cases on collateral review. *Id.* at 7-8 (quoting *Tyler v. Cain*, 533 U.S. 656, 662-64, 666 (2001)). And we clarified that *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016) (holding that, under 28 U.S.C. § 2244(b)(1), a federal prisoner's claim raised in a prior successive application shall be dismissed), does not bar new *Davis* claims, as *Davis* was a new constitutional rule "in its own right, separate and apart from (albeit primarily based on) *Johnson* and *Dimaya*." *Id.* at 8-10.

More recently, in *In re Navarro* we addressed a *Davis*-based successive application where the applicant pleaded guilty to a § 924(c) count tied to multiple predicate offenses. No. 19-12612, manuscript op. at 2-4, 6-8 (11th Cir. July 30, 2019). We noted that, although Navarro ultimately pleaded guilty only to conspiracy to commit Hobbs Act robbery and a § 924(c) violation, his plea agreement and the attendant factual proffer more broadly established that his § 924(c) conviction was predicated both on Hobbs Act conspiracy and drug-trafficking crimes. *Id.* at 7; *see also United States v. Frye*, 402 F.3d 1123, 1127-28 (11th Cir. 2005) (holding that § 924(c) does not require that the defendant be convicted of, or even charged with, the predicate offense, and the factual proffer in support of the defendant's guilty plea can establish that he committed the underlying predicate offense). Because it was apparent from the record that Navarro's § 924(c) conviction was independently supported by his drug-trafficking crimes, we

concluded that his conviction fell outside the scope of *Davis*, which invalidated only § 924(c)(3)(B)'s residual clause relating to crimes of violence. *Navarro*, No. 19-12612, manuscript op. at 7-8.

The rule we applied in *In re Navarro* applies to Bowe's application. He cannot make a *prima facie* showing that his § 924(c) conviction and sentence are unconstitutional under *Davis*. *See, e.g.*, 28 U.S.C. § 2244(b)(3)(C); *Jordan*, 485 F.3d at 1357-58. The predicate offenses for Bowe's § 924(c) conviction were conspiracy to commit Hobbs Act robbery in Count 1 and attempted Hobbs Act robbery in Count 2. While there is no published decision from this Court on whether conspiracy to commit Hobbs Act robbery otherwise qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause, we have held that attempted Hobbs Act robbery does qualify under the elements clause. *See United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019). That remains true even after *Davis*.

Bowe pleaded guilty and agreed to a factual proffer that showed that his § 924(c) conviction was fully supported by his attempted Hobbs Act robbery charge in Count 2. Like in *Navarro*, because the facts supporting Bowe's guilty plea show that his § 924(c) conviction was fully supported by the attempted Hobbs Act robbery crime in Count 2, he cannot make a *prima facie* showing that his § 924(c) conviction is unconstitutional in light of *Davis*. *See Navarro*, No. 19-12612, manuscript op. at 7-8; *see also* 18 U.S.C. § 924(c)(2); *Davis*, 139 S. Ct. at 2324-25, 2336. As a result, because Bowe has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is DENIED.