IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17761-J

IN RE: DWIGHT CARTER,

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 HULL, MARCUS, and MARTIN, Circuit Judges

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Dwight Carter 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).

In his application, Carter indicates that he wishes to raise one claim in a second or successive § 2255 motion. Carter asserts that his claim relies upon a new rule of constitutional law. Specifically, in his claim he asserts that his increased sentence under 18 U.S.C. § 924(c) based on Hobbs Act robbery is invalid because § 924(c) is unconstitutionally vague, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the violent felony definition in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague and that imposing an increased sentence under that provision, therefore, violated due process.

I. THE ACCA

The ACCA, 18 U.S.C. § 924(e), 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
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> (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 sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

II. *JOHNSON* AND § 924(c)(3)(B)

On June 26, 2015,[1] the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a prior criminal conviction and how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at 2563. In *Welch*, the Supreme Court thereafter held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016).

In light of the Supreme Court's holdings in *Johnson* and *Welch*, federal prisoners who can make a *prima facie* showing that they previously were sentenced, at least in part, in reliance on the ACCA's now-voided residual clause are entitled to file a second or successive § 2255 motion in the district court. *See In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016). However, merely alleging a basis that meets § 2255(h)'s requirements in the abstract only "represent[s] the minimum showing" necessary to file a successive § 2255 motion because, under § 2244(b)(3)(C),

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[1]In *Dodd v. United States*, 545 U.S. 353, 357 (2005), the Supreme Court held that the one-year statute of limitations in § 2255(f)(3) begins to run on the date that the Court initially recognizes a new right, not the date on which that right subsequently is held to be retroactive to cases on collateral review. The limitations period thus began to run on Carter's *Johnson* claim on June 26, 2015. Mr. Carter's application is dated December 22, 2016 and was filed on December 29, 2016. Thus, it is barred by the statute of limitation absent equitable tolling. Because Mr. Carter's application fails in any event, we do not address whether in Mr. Carter's case this Court should consider *sua sponte* the timeliness bar or how to do so. *See In re Jackson*, 826 F.3d 1343, 1350 (11th Cir. 2016) (stating that courts should reserve the authority to consider timeliness *sua sponte* for exceptional cases).

the applicant also must make "a *prima facie* showing that the application satisfies the requirements of this subsection." *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Accordingly, it appears that it is not enough for a federal prisoner to simply identify *Johnson* as the basis for the claim or claims he seeks to raise in a second or successive § 2255 motion, as he also must show that he falls within the scope of the new substantive rule announced in *Johnson*. *See, e.g., id.*; 28 U.S.C. § 2244(b)(3)(C).

Distinct from the provision in § 924(e), § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence or a drug-trafficking crime. 18 U.S.C. § 924(c)(1). For the purposes of § 924(c), "crime of violence" means an offense that is a felony and:

> (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) (emphasis added). For purposes of this order, the former clause is referred to as the "use-of-force" clause in § 924(c)(3)(A) and the latter clause as the "risk-of-force" clause in § 924(c)(3)(B). At times the "risk-of-force" clause in § 924(c)(3)(B) has been called a residual clause, too. But as explained below, the more appropriate name for § 924(c)(3)(B) is "risk-of-force" clause because its text is materially different from the residual clause in the ACCA's § 924(e)(2)(B), which lists four enumerated crimes with a catchall "otherwise involves" ending.

Three Circuits—the Eighth, Second, and Sixth—have described § 924(c)(3)(B) as a "risk-of-force" clause and held that the void-for-vagueness holding in *Johnson* does not apply to

§ 924(c)(3)(B)'s "risk-of-force" clause. *See United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016), *petition for cert. filed* (U.S. Dec. 30, 2016) (No. 16-7373); *United States v. Hill*, 832 F.3d 135, 145-49 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016), *petition for cert. filed* (U.S. Oct. 12, 2016) (No. 16-6392). On the other hand, the Seventh Circuit has concluded that *Johnson* does apply to § 924(c)(3)(B). *See United States v. Cardena*, 842 F.3d 959, 995-99 (7th Cir. 2016) (stating that *Johnson* applies, but that the underlying Illinois kidnapping convictions qualified as crimes of violence under the "use-of-force" clause in § 924(c)(3)(A) under plain error review where the defendants had not shown the outcome would have been different). The Seventh Circuit reasoned that § 924(c)(3)(B) "is virtually indistinguishable from the clause in *Johnson* that was found to be unconstitutionally vague." *Id.* at 996.

In contrast, in concluding that *Johnson* does not apply to § 924(c)(3)(B), the Eighth, Second, and Sixth Circuits have found and analyzed significant material textual differences between the definition of "crime of violence" in § 924(c)(3)(B) (a contemporaneous felony 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") and the definition of "violent felony" in the ACCA's § 924(e)(2)(B) (a prior felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another"). The Sixth Circuit explained why this significant difference in the text matters, stating:

> There are significant differences making the definition of "crime of violence" in § 924(c)(3)(B) narrower than the definition of "violent felony" in the ACCA residual clause. Whereas the ACCA residual clause merely requires conduct "that presents a serious potential risk of physical injury to another," § 924(c)(3)(B) requires the risk "that *physical force* against the person or property of another may be used *in the course of* committing the offense." Risk of physical

> force against a victim is much more definite than risk of physical injury to a victim. Further, by requiring that the risk of physical force arise "in the course of" committing the offense, the language of § 924(c)(3)(B) effectively requires that the person who may potentially use physical force be the offender. Moreover, § 924(c)(3)(B) requires that the felony be one which "by its nature" involves the risk that the offender will use physical force. None of these narrowing aspects is present in the ACCA residual clause.

Taylor, 814 F.3d at 376-77 (citation omitted). The Sixth Circuit also found that "[a]nother independently compelling difference between the language in § 924(c)(3)(B) and the ACCA residual clause is the textual link in the [ACCA] clause by the word 'otherwise' to four enumerated but diverse crimes" of burglary, arson, extortion or crimes that involve the use of explosives. *Id.* at 377. The Sixth Circuit emphasized why this textual difference is important, stating:

> The *Johnson* Court explained that by using the word "otherwise," "the [ACCA] residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." The Court further explained that gauging the level of risk required was difficult because the four listed crimes "are 'far from clear in respect to the degree of risk each poses.'" Unlike the ACCA, § 924(c)(3)(B) does not complicate the level-of-risk inquiry by linking the "substantial risk" standard, through the word otherwise, "to a confusing list of examples." As a result, § 924(c)(3)(B) does not require analogizing the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosives.

Id. (citations omitted). Furthermore, in ACCA cases, the federal courts are considering prior crimes (more often from state courts) that are not even remotely connected to the instant federal firearm offense before the federal court. *Id.* (stating that "unlike the ACCA residual clause, § 924(c)(3)(B) does not allow courts to consider 'physical injury [that] is remote from the criminal act'" (alteration in original)). In stark contrast, in § 924(c)(3)(B) cases, federal courts are considering contemporaneous federal crimes charged in the same federal indictment and force that occurred "in the course of committing the offense." *Id.*

The Second Circuit and the Eighth Circuit have agreed with the Sixth Circuit's analysis in *Taylor* and held *Johnson* does not apply to the risk-of-force clause in § 924(c)(3)(B) given the material differences in the text of the ACCA and § 924(c)(3)(B). *See Hill*, 832 F.3d at 146-48 (emphasizing the text of the risk-of-force clause in § 924(c)(3)(B) differs in material ways from the ACCA's residual clause and explaining various reasons why); *Prickett*, 839 F.3d at 699-700 (same). The Eighth Circuit, like the Second Circuit in *Taylor*, also stressed that "the ACCA residual clause is linked to a confusing set of examples that plagued the Supreme Court in coming up with a coherent way to apply the clause, whereas there is no such weakness in § 924(c)(3)(B)." *Prickett*, 839 F.3d at 699 (quotation marks omitted). Similar to the Sixth Circuit, the Eighth Circuit explained the textual-link problem in the ACCA's residual clause that is not present in § 924(c)(3)(B), stating:

> The ACCA residual clause contains a "textual link . . . by the word 'otherwise' to four enumerated but diverse crimes." The ACCA residual clause's use of the word "otherwise" "force[d] courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives.'" But § 924(c)(3)(B) does not "link[ ] the 'substantial risk' standard, through the word otherwise, 'to a confusing list of examples.'" Therefore, courts need not "analogiz[e] the level of risk involved in a defendant's conduct to burglary, arson, extortion or the use of explosives."

Id. at 699-700 (quoting in part *Taylor*, 814 F.3d at 377) (citations omitted, alterations in original).

Similarly, the Second Circuit determined that the Supreme Court in *Johnson* was focused on "[t]wo features of the [ACCA] residual clause [that] conspire[d] to make it unconstitutionally vague." *Hill*, 832 F.3d at 145 (quotation marks omitted) (first alteration in original). Those two features created a "double-layered uncertainty embedded in the clause's operation," which required courts (1) "to estimate the potential risk of physical injury posed by 'a judicially imagined "ordinary case" of [the] crime'" and (2) "to consider how this risk of injury compared to the risk

posed by the four enumerated crimes," which were themselves "'far from clear in respect to the degree of risk each posed.'" *Id.* (quoting in part *Johnson*, 135 S. Ct. at 2557-58). The Second Circuit reasoned that it was the combined effect of these two uncertainties that rendered the ACCA's residual clause unconstitutionally vague, stating:

> It was these twin ambiguities—"*combining* indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony"—that offended the Constitution. [*Johnson*, 135 S. Ct.] at 2558 (emphasis added); *see also id.* at 2560 (observing that "[e]ach of the uncertainties in the residual clause may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guesswork'" (quoting *United States v. Evans*, 333 U.S. 483, 495, 68 S. Ct. 634, 92 L. Ed. 823 (1948))).

Id. at 146. The Second Circuit emphasized that the risk-of-force clause in § 924(c)(3)B) "contains no mystifying list of offenses and no indeterminate 'otherwise' phraseology—a defining feature of the ACCA's residual clause" that caused "an additional layer of uncertainty" and were largely to blame for the residual clause's confusion in *Johnson*. *Id.*

Given the split in the Circuits, a threshold question perhaps is whether *Johnson*'s void-for-vagueness ruling as to the ACCA's residual clause should be extended to § 924(c)(3)(B). However, we need not, and do not, reach or decide that issue here because there is an alternative and independent ground that alone resolves Carter's application. Even if *Johnson*'s vagueness doctrine applies to the risk-of-force clause in § 924(c)(3)(B), Carter's challenge to his § 924(c) sentence on Count 3 still fails because his companion conviction on Count 2 (Hobbs Act robbery) constitutes a crime of violence under the "use of force" clause in § 924(c)(3)(A). We explain why below.

III. CARTER'S CONVICTIONS AND SENTENCES

Carter was charged with and convicted of violations of the Hobbs Act, 18 U.S.C. § 1951(a), and other drug and firearm offenses arising out of the robbery and murder of an armored vehicle security guard, Carlos Alvarado, at the Dadeland Mall. Specifically, Carter was charged in the same superseding indictment with conspiring to commit Hobbs Act robbery "by participating in a plan to take cash, checks, and property from the presence and custody of a Dunbar security guard at the Dadeland Mall, against such person's will, by means of actual and threatened force, violence *and* fear of injury to such person," in violation of 18 U.S.C. § 1951(a) (Count 1); committing Hobbs Act robbery "by taking cash, checks, and property from the presence and custody of a Dunbar security guard at the Dadeland Mall, against such person's will and by means of actual and threatened force, violence *and* fear of injury to such person," in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 2); carrying and using a firearm "during and in relation to a crime of violence" and possessing a firearm "in furtherance of a crime of violence, . . . *as set forth in Count 1 and Count 2* of this Superseding Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A), *and in the course of such violation caus[ing] the death of a person, Carlos Alvarado, through the use of a firearm, which killing was a murder*," in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(j)(1) and 2 (Count 3); conspiring to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine and a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count 4); possessing with intent to distribute a mixture and substance containing a detectable amount of cocaine and a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count 5); and possessing a firearm in furtherance

of a drug trafficking crime, as set forth in Counts 4 and 5, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 6). (Emphasis added).

Following a jury trial, Carter was convicted on all six counts. The jury verdict form as to Count 3 read as follows:

> as to Count 3:
> GUILTY ___√___ NOT GUILTY _____
> (If you find the Defendant not guilty of Count 3, do not answer the next question. If you find the Defendant guilty as to Count 3, you must unanimously determine whether, during the course of violating Count 3, the Defendant caused the death of Carlos Alvarado through the use of a firearm and whether the killing was murder as defined in these instructions.)
> as to whether murder resulted from the Count 3 violation of the law:
> YES, murder did result ___√___ NO, murder did not result _____

At sentencing, the district court imposed maximum sentences on all six counts, with all six sentences to run consecutively to each other, resulting in an aggregated prison term of life plus 105 years, as follows: consecutive 20-year sentences on Counts 1, 2, 4 and 5, a consecutive life sentence on Count 3, and a consecutive 25-year sentence on Count 6.

Carter did not raise a constitutional challenge to his § 924(c) sentences in Counts 3 and 6, either on direct appeal or in his first § 2255 motion. Rather, Carter now challenges his § 924(c) sentences on Counts 3 and 6 based on *Johnson*.

IV. CARTER'S § 924(c) CLAIM AS TO COUNT 3

With respect to Count 3, both the conspiracy to commit Hobbs Act robbery in Count 1 and the substantive Hobbs Act robbery in Count 2 were charged as underlying offenses for Carter's conviction under 18 U.S.C. § 924(c) and (j). Count 2 of Carter's indictment charged that he committed a robbery by taking property from the Dunbar security guard at Dadeland Mall against his will and "by means of actual *and* threatened force *and* fear of injury *to such person*."

(Emphasis added.) On Count 3, the jury specifically found Carter guilty under § 924(c) and (j) because during the robbery Carter had caused the death of a victim through the use of a firearm and the killing was murder.[2]

A. Circuit Precedent Regarding § 924(c)(3)(A)

Although this Court has not decided yet whether or not conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under § 924(c), *In re Pinder*, 824 F.3d 977, 979 n.1 (11th Cir. 2016); *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016), it has held that Hobbs Act robbery and aiding and abetting Hobbs Act robbery constitute crimes of violence under the "use of force" clause in § 924(c)(3)(A), *In re Saint Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). The Hobbs Act defines robbery, in relevant part, as the taking of personal property "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1).

In *Pinder*, the § 924(c) count charged a companion conviction for conspiracy to commit Hobbs Act robbery. 824 F.3d at 979 & n.1. Because it was not clear both whether *Johnson* applied to § 924(c)(3)(B)'s risk-of-force clause and whether conspiracy to commit Hobbs Act robbery qualified as a crime of violence under § 924(c), this Court concluded that the applicant had made a prima facie case that *Johnson* impacted the validity of his § 924(c) conviction. *Id.*

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[2]Section 924(j) provides:

A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. § 924(j)(1)-(2). Thus, an element of Carter's conviction in Count 3 was that he used the firearm to cause the death of the victim during the Hobbs Act robbery crimes in Counts 1 and 2.

Therefore, the *Pinder* Court granted the application and left "the merits of Pinder's claim to the District Court to decide in the first instance." *Id.*

In contrast, in *Saint Fleur*, the § 924(c) count charged a companion conviction for substantive Hobbs Act robbery. 824 F.3d at 1340. That is, "unlike *Pinder*, [the *Saint Fleur*] case involve[d] the actual commission of a Hobbs Act robbery." *Id.* at 1341 n.2. The *Saint Fleur* Court noted that the law was unsettled about whether *Johnson* even applied to § 924(c)(3)(B)'s risk-of-force clause because (1) the language of the ACCA's residual clause and § 924(c)(3)(B)'s risk-of-force clause are "different," and (2) the two sentencing provisions appear to serve different purposes *Id.* at 1340 & n.1.[3] The Court concluded, however, that it was unnecessary in Saint Fleur's case to decide the *Johnson* issue as to the § 924(c)(3)(B) risk-of-force clause or, as in *Pinder*, to grant the application so the district court could do so in the first instance because, even if *Johnson* applied to § 924(c)(3)(B)'s "risk of force" clause, "Saint Fleur's companion conviction for Hobbs Act robbery, which was charged in the same indictment as the § 924(c) count, clearly qualifie[d] as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." *Id.* at 1340.

The *Saint Fleur* Court reached this conclusion by examining the "indictment and the judgment," and in particular the companion Hobbs Act robbery offense that was charged in the indictment, as follows:

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[3] As this Court noted in *Saint Fleur* and *Colon*, "the ACCA § 924(e) sentence enhancement and the § 924(c) penalty each appear to serve a different statutory purpose. *Compare* 18 U.S.C. § 924(c) (providing for a consecutive term of imprisonment for defendants who use a firearm during a concurrent and simultaneous crime of violence or drug trafficking crime), *with* 18 U.S.C. § 924(e) (providing for an enhanced term of imprisonment for a § 922(g)(1) conviction of a felon in possession of a firearm who had three past convictions for a violent felony or serious drug offense)." *See Saint Fleur*, 824 F.3d at 1340 n.1; *Colon*, 826 F.3d at 1304 n.2.

> Specifically, Saint Fleur pled guilty to Count 4, which charged that Saint Fleur did affect commerce "by means of robbery," as the term robbery is defined in 18 U.S.C. § 1951(b)(1). "The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." *Id.* § 1951(b)(1). Count 4 further charged Saint Fleur with, and Saint Fleur pled guilty to, committing robbery "by means of actual and threatened force, violence, and fear of injury." Thus, the elements of Saint Fleur's § 1951 robbery, as replicated in the indictment, require the use, attempted use, or threatened use of physical force "against the person or property of another." *See id.*; 18 U.S.C. § 924(c)(3)(A).

Id. at 1340-41. Because the Hobbs Act robbery charged in Count 4 satisfied the § 924(c)(3)(A) use-of-force clause, the Court concluded that "Saint Fleur's sentence would be valid even if *Johnson* makes the § 924(c)(3)(B) residual clause unconstitutional." *Id.*at 1341; *see also In re Gordon*, 827 F.3d 1289, 1294 (11th Cir. 2016) (explaining that *Saint Fleur* does not conflict with *Pinder* because *Pinder* involved a companion conviction for conspiracy to commit Hobbs Act robbery and *Saint Fleur* involved a companion conviction for substantive Hobbs Act robbery).

B. Other Circuits' Precedent Regarding § 924(c)(3)(A)

Decisions from three other Circuits show Saint Fleur, our binding precedent here, is correct. The Second, Seventh, and Ninth Circuits have all held that Hobbs Act robbery categorically is a crime of violence under the "use-of-force" clause in § 924(c)(3)(A). *See United States v. Anglin*, ___ F.3d ___, No. 15-3625, 2017 WL 359666, at *7 (7th Cir. Jan. 25, 2017) (stating "Hobbs Act robbery is a 'crime of violence' within the meaning of § 924(c)(3)(A)" and "[i]n so holding, we join the unbroken consensus of other circuits to have resolved this question"); *United States v. Hill*, 832 F.3d 135, 140-41 (2d Cir. 2016); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016) (unpublished). Further, these circuits rejected the argument that some

Hobbs Act robberies committed by means of fear of injury would not qualify as involving a substantial risk of the use of physical force.

The Seventh Circuit in *Anglin* rejected a defendant's claim that a robbery could hypothetically put a "victim in fear of injury" without using or threatening force. *Anglin*, 2017 WL 359666, at *7. Applying the categorical approach, the Seventh Circuit concluded that "[c]ommitting such an act necessarily requires using or threatening force," relying on several Seventh Circuit precedents. *Id.* (citing *United States v. Armour*, 840 F.3d 904, 907 (7th Cir. 2016) (holding Indiana robbery, which can be accomplished by "putting any person in fear," satisfied the identical "use, attempted use, or threatened use of force" requirement in U.S.S.G. § 4B1.2(a)(1)) and *United States v. Duncan*, 833 F.3d 751, 758 (7th Cir. 2016) ("In the ordinary case, robbery by placing a person in fear of bodily injury under Indiana law involves an explicit or implicit threat of physical force and therefore qualifies as a violent felony under § 924(e)(2)(B)(i).")).

In *Hill*, the Second Circuit similarly rejected the defendant's argument that Hobbs Act robberies by means of putting the victim in fear can be done without "the use, attempted use, or threatened use of physical force." *Hill*, 832 F.3d at 140-41. Hill contended "that a perpetrator could rob a victim by putting him in fear of injury to his property through non-forceful means," offering hypotheticals such as threatening to throw paint on the victim's house or to spray paint his car if money was not turned over. *Id.* at 141. Applying the categorical approach, the Second Circuit rejected the defendant's contention, concluding that Hill's various hypotheticals still involved the use or threatened use of physical force, even if that force was directed to property as opposed to a person. *Id.* at 142. The Second Circuit pointed out force in § 924(c)(3)(A) "means

no more nor less than force capable of causing . . . *injury to property*." *Id.* (emphasis added). The Second Circuit reviewed additional indirect-force hypotheticals posed by the defendant, but found the hypotheticals were insufficient because the defendant did not point to (1) any case in the Second Circuit where the courts applied the Hobbs Act *robbery* statute to such facts; or (2) even a "realistic probability" that the statute would reach such conduct. *Id.* at 142-43.[4]

Here, Carter's indictment in Count 2 charged that Carter had robbed the security guard by all of the means of Hobbs Act robbery, to wit, "actual and threatened force, violence, *and* fear of injury" to that person. Thus, we need not look solely to the means of "fear of injury" to the person. But even if we do, we conclude, as the Second, Seventh, and Ninth circuits have, that "fear of injury" to the person necessarily requires the threatened use of physical force and thus Hobbs Act robbery constitutes a crime of violence under § 924(c)(3)(A). *See Hill*, 832 F.3d at 140-44; *Anglin*, 2017 WL 359666, at *7; *Howard*, 650 F. App'x at 468; *see also In re Sams*, 830

[4]We note that the Supreme Court's decision in *Johnson v. United States* ("*Curtis Johnson*"), 559 U.S. 133, 130 S. Ct. 1265 (2010), construed the ACCA's elements clause, § 924(e)(2)(B)(i), not the risk-of-force clause in § 924(c)(3)(B), which is at issue here. Even assuming *arguendo* that *Curtis Johnson* is relevant to the construction of § 924(c)(3)(B), the Second Circuit explained why the Supreme Court in *Curtis Johnson* (evaluating whether a simple battery was a violent felony) declined to construe "physical force" in § 924(e)(2)(B)(i) in line with the common law definition of simple battery, which deemed the element of force to be satisfied by mere touching without injury or risk of injury. *Hill*, 832 F.3d at 141-42 (explaining that the Supreme Court in *Curtis Johnson* "did *not* construe § 924(e)(2)(B)(i) to require that a particular quantum of force be employed or threatened to satisfy its physical force requirement" but rather to require only force that is "capable of causing physical pain or injury to another person"). Similarly, this Court has rejected an argument that Florida robbery, which requires only an act that puts the victim in fear of death or great bodily harm, fails to satisfy *Curtis Johnson*'s "physical force" requirement. *See United States v. Lockley*, 632 f.3d 1238, 1244-45 (11th Cir. 2011) (explaining that it is "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force"); *see also United States v. Fritts*, 841 F.3d 937, 940-41 (11th Cir. 2016) (pointing out that "*Lockley* was decided after and cited *Curtis Johnson*").

F.3d 1234, 1238-39 (11th Cir. 2016) (concluding 18 U.S.C. § 2113(a) bank robbery "by intimidation" categorically and necessarily requires the threatened use of physical force and qualifies as a crime of violence under § 924(c)(3)(A)) (following *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016), which concluded "[b]ank robbery under § 2113(a), 'by intimidation,' requires the threatened use of physical force"). Accordingly, Carter's challenge to his § 924(c) sentence on Count 3 fails for this reason too.

C. *Gomez*

Further, our decision in *Gomez* is helpful too. In *Gomez*, the defendant's § 924(c) count charged four separate companion convictions. Specifically, the defendant in *Gomez* was charged in Counts 1 and 2 with conspiracy to possess with intent to distribute cocaine, in Count 3 with conspiracy to commit Hobbs Act robbery, in Count 4 with attempted Hobbs Act robbery, and in Count 5 with carrying and possessing a firearm "in relation to a crime of violence *and* a drug trafficking crime." *Gomez*, 830 F.3d at 1226-27 (emphasis added). For the companion convictions, Count 5 specifically referred to all four crimes as charged in Counts 1, 2, 3, and 4. *Id.* The jury convicted Gomez of all five counts using a general verdict form. *See id.*

In *Gomez*, this Court noted that a "duplicitous count" like Gomez's Count 5 poses several dangers, including that the jury "may convict a defendant without unanimously agreeing on the same offense." *Id.* at 1227 Count 5 charged Gomez with carrying and possessing the firearm "during two drug trafficking offenses and an attempted Hobbs Act robbery *on the same day*, as well as an ongoing conspiracy to commit Hobbs Act robbery *that lasted two weeks*." *Id.* (emphasis added). Because Count 5 charged multiple companion crimes and the jury had entered a general verdict, our Court could not determine during which companion crime the jury found

Gomez carried and possessed the firearm, or even whether the jury had unanimously agreed upon one companion crime, as follows:

> It is certainly possible that the government may have presented evidence that Gomez "possessed" a firearm at some point during the ongoing Hobbs Act conspiracy. *But, the evidence may likewise have shown that he left that firearm at home for the drug trafficking crimes, or the attempted robbery. And we can't know what, if anything, the jury found with regard to Gomez's connection to a gun and these crimes.* That is because the jurors had multiple crimes to consider in a single count, so they could have convicted Gomez of the § 924(c) offense without reaching unanimous agreement on during which crime it was that Gomez possessed the firearm. Or, they could have unanimously agreed that he possessed a firearm at some point during the Hobbs Act conspiracy, but not during the drug trafficking crime. Either way, a general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of [the] predicate offenses, or guilty of conspiring during some and not others.

Id. (emphasis added). In other words, in light of the general verdict and "[t]he way Gomez's indictment is written, [the *Gomez* Court could] only guess which predicate the jury relied on." *Id.* at 1228. Because the jury "may have found that Gomez only 'possessed' a firearm during his Hobbs Act conspiracy" or his attempted Hobbs Act robbery offenses, and it is "unsettled in our precedents" whether those companion crimes, unlike substantive Hobbs Act robbery, qualify as crimes of violence under the use-of-force clause of § 924(c)(3)(A), the *Gomez* Court followed *Pinder* and granted Gomez's application for the district court to decide these questions in the first instance. *Id.*

D. Carter's Companion Crimes

In Carter's case, the companion crimes for Carter's § 924(c) and (j) firearm offense in Count 3 were a conspiracy to commit Hobbs Act robbery of a Dunbar security guard at the Dadeland Mall, Count 1, and also a completed Hobbs Act robbery of that security guard at the Dadeland Mall, Count 2. Thus, this case is distinguishable from *Pinder*, in which the only

charged companion crime was a Hobbs Act conspiracy. Rather, as in *Saint Fleur*, Carter was charged with, and convicted of, committing the substantive offense of Hobbs Act robbery "by means of actual and threatened force, violence, and fear of injury" to the victim. Under *Saint Fleur*, Carter's underlying offense in Count 2 clearly qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.

More importantly, unlike in *Gomez*, here we know from the indictment and the special verdict form what the jury unanimously agreed upon with respect to the Carter's use of the firearm in Count 3. Specifically, we know that the jury unanimously agreed: (1) that Carter not only conspired to rob, but in fact did rob the security guard of cash, checks and property "by means of actual and threatened force, violence, and fear of injury" to the security guard; and (2) that Carter "through the use of the firearm" murdered the security guard. Given the jury's findings, we know the jury unanimously agreed that Carter used the firearm during the Hobbs Act robbery charged in Count 2 to kill the security guard. This is not a case in which the jury could have found that Carter possessed and used his firearm at some point during the ongoing robbery conspiracy, but then "left that firearm at home" for the actual robbery of the security guard. *Cf. Gomez*, 830 F.3d at 1227. In other words, we need not speculate about whether the jury unanimously relied upon Count 2 to convict Carter of Count 3.

Given the forgoing, Carter's conviction and sentence on Count 3 would be valid regardless of whether the conspiracy to commit Hobbs Act robbery charged in Count 1 qualifies as a crime of violence under § 924(c) and regardless of whether *Johnson*'s holding applies to the risk-of-force clause in § 924(c)(3)(B).

V. CARTER'S § 924(c) CLAIM AS TO COUNT 6

Additionally, any challenge to Carter's conviction under § 924(c) in Count 6 based on *Johnson* also fails. Carter was charged with and convicted of conspiracy and possession with intent to distribute mixtures and substances containing detectable amounts of cocaine and cocaine base under 21 U.S.C. §§ 841(a) and 846. These crimes charged in Counts 4 and 5 were the underlying offenses for Carter's conviction under 18 U.S.C. § 924(c) in Count 6. Because Carter's predicate offenses were drug trafficking crimes and not crimes of violence, his conviction on Count 6 is unaffected by *Johnson*. Therefore, even if the risk-of-force clause in § 924(c)(3)(B) is unconstitutional after *Johnson*, Carter's sentence on Count 6 remains valid.

VI. CONCLUSION

Accordingly, because Carter 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 hereby DENIED.

MARTIN, Circuit Judge, dissenting:

I believe Dwight Carter has made a prima facie showing that he may be entitled to relief under Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), for his conviction under Count 3. I would grant his application. I cannot agree with the analysis of the Majority, and regret the fact that what I view as an earlier mistake by this Court also bars Mr. Carter from the review to which I believe he is entitled.

Although I wish I could say there was something that we or another court could do to correct these mistakes, but there is not. Mr. Carter is barred by statute from asking this panel to reconsider its decision. The statute also prevents him from asking this Court to convene en banc and fix the mistakes or even requesting that the Supreme Court take a look at his case.

I. Mr. Carter's Count 3 Conviction

As is relevant here, Mr. Carter was charged with conspiracy to commit Hobbs Act robbery in Count 1 and Hobbs Act robbery in Count 2. In Count 3, he was charged with carrying and using a firearm "during and in relation to a crime of violence" and possessing a firearm "in furtherance of a crime of violence" in violation of 18 U.S.C. § 924(c)(1)(A) "as set forth in Counts 1 and 2." Count 3 also

charged Mr. Carter with violating 18 U.S.C. § 924(j)(1) and (2) in the course of his violations in Counts 1 and 2.

As the Majority correctly recognizes, we must evaluate whether the underlying offense for Mr. Carter's § 924(c) conviction qualifies as a "crime of violence" in light of the Supreme Court's decision in Johnson. Although this Court has said that Hobbs Act robbery is a crime of violence, it has not yet determined whether conspiracy to commit Hobbs Act robbery qualifies. See In re Saint Fleur, 824 F.3d 1337, 1340–41 (11th Cir. 2016); In re Pinder, 824 F.3d 977, 979 n.1 (11th Cir. 2016). Because Count 3 referred to both of these crimes, it is impossible to tell from the jury's verdict on Count 3 whether the jury unanimously agreed that it related to any one particular underlying offense. See In re Gomez, 830 F.3d 1225, 1227 (11th Cir. 2016). And because we have yet to decide whether conspiracy to commit Hobbs Act robbery constitutes a "crime of violence" for the purposes of 18 U.S.C. § 924(c) in light of Johnson, Mr. Carter has shown he may be entitled to relief for his conviction in Count 3. See Pinder, 824 F.3d at 979 n.1.

The Majority says this case is not controlled by our precedent in Gomez because the jury found that in the course of the § 924(c) violation, the security guard was murdered "through the use of the firearm." Because the jury made this finding, the Majority concludes the jury must have unanimously found that Mr. Carter used

the firearm during the Hobbs Act robbery, and not the conspiracy to commit Hobbs Act robbery, to commit the murder.

But I believe that's wrong for two reasons. First, the jury convicted Mr. Carter of the § 924(c) violation in Count 3 before convicting him of the § 922(j) violation in the same count. Like Gomez, the § 924(c) violation relied upon multiple counts—one of which this Court has held may not be a "crime of violence" in light of Johnson. We cannot speculate as to which conviction—Count 1 or 2—the jury relied upon when they unanimously agreed Mr. Carter was guilty of a § 924(c) violation. As a result, we must analyze whether Mr. Carter's crime is "within the ambit of 18 U.S.C. § 924(c)[,] . . . a question . . . we must answer 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." United States v. McGuire, 706 F.3d 1333, 1336 (11th Cir. 2013) (O'Connor, J.) (citation omitted). Simply put, the jury's later § 924(j) finding has no bearing on this analysis.[1]

Second, and in any event, the jury's verdict form does not support the Majority's conclusion. The jury found: (1) that Mr. Carter "caused" the death of the security guard; and (2) that the killing was a murder. Because of this key word,

[1] And even if it did, we must still follow the categorical approach and not consider "the actual facts of [the defendant's] conduct." McGuire, 705 F.3d at 1336. Under that approach, we look to the elements of § 924(j). That statute refers back to the 924(c) conviction, which could have relied on the Hobbs Act robbery, or anyone in the conspiracy having used the firearm. We simply do not know.

"caused," Gomez dictates the ruling on Mr. Carter's motion. This Court held in Gomez that the Supreme Court's decision in Alleyne v. United States, 570 U.S. ___, 133 S. Ct. 2151 (2013), requires a unanimity that "[a]n indictment that lists multiple predicates in a single § 924(c) count" lacks. 830 F.3d at 1227.

Like Gomez, the jury's verdict in Mr. Carter's case is too general to discern whether the jury unanimously relied on the Hobbs Act robbery itself or the conspiracy to commit the robbery. See id. ("[A] general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of predicate offenses, or guilty of conspiring during some and not others."). It's true that the jury could have been saying it was the Hobbs Act robbery crime that caused the killing. But it's just as possible the jury was saying it was the conspiracy that caused the killing—that the planning and decision to use a firearm caused the murder. Or both. We simply cannot know. Just like it is unclear whether the jury was referencing Count 1, Count 2, or both when convicting Mr. Carter of the § 924(c) violation, so too is it unclear which Count the jury referenced when it convicted Mr. Carter of "causing" death in violation of § 922(j).

Although the Majority says "we need not speculate," their decision necessarily relies on speculation. As this Court held in Gomez, "[i]t's possible that

we can make a guess based on the PSI or other documents from [the defendant's] trial or sentencing. But Alleyne expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence." 830 F.3d at 1228. This precedent notwithstanding, the Majority's ruling today relies on a guess about what the jury did.

II. This Court's Mistake in Saint Fleur

Beyond the Majority's reliance on guesswork to analyze what the jury did in Mr. Carter's case, it also relies on this Court's precedent in Saint Fleur that Hobbs Act robbery is a "crime of violence" for the purposes of § 924(c). Though I joined this Court's holding in Saint Fleur at the time, I now believe I was mistaken in doing so.

The Saint Fleur panel held that Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. § 924(c)(3)(A), without citing any caselaw or other authority on that crime. The Supreme Court has held that the term "physical force" as used in § 924(c)(3)(A) requires "violent force" which means "strong physical force" or "force capable of causing physical pain or injury to another person." Curtis Johnson v. United States, 559 U.S. 133, 139, 130 S. Ct. 1265, 1270 (2010) (quotation omitted). Of course, any given defendant's crime may have involved "physical force" as described by Curtis Johnson. But the

actual facts of Mr. Carter's convictions have no legal relevance to determining of whether the crime he was convicted of is a "crime of violence" under § 924(c)'s elements clause. Again, this analysis is a question "we must answer 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." McGuire, 706 F.3d at 1336.

Pursuant to this categorical approach, if Hobbs Act robbery can be committed without "the use, attempted use, or threatened use of physical force," then that crime obviously can't have "as an element the use, attempted use, or threatened use of physical force." In my haste to rule in Saint Fleur, I overlooked the possibility that Hobbs Act robbery can be committed without the type of force described in Curtis Johnson. For example, the Eleventh Circuit's pattern jury instructions show that a jury can convict a defendant of Hobbs Act robbery so long as it believes the defendant "took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future." 11th Cir. Pattern Jury Instructions 70.3 (emphasis added). This "causing the victim to fear harm" can include causing fear of "financial loss," which "includes . . . intangible rights that are a source or element of income or wealth." Id.; see also United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 281 (3d Cir.

1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible property").

It also bears repeating that Hobbs Act robbery can be committed "by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1). Even though this language says Hobbs Act robbery can be committed either with violence or mere intimidation, "our inquiry can't end with simply looking at whether the statute is written disjunctively (with the word 'or'). The text of a statute won't always tell us if a statute is listing alternative means or definitions, rather than alternative elements." United States v. Lockett, 810 F.3d 1262, 1268 (11th Cir. 2016). Mathis v. United States, 579 U.S. ___, 136 S. Ct. 2243(2016), tells us what to do when faced with an alternatively phrased statute:

> The first task for a sentencing court . . . is [] to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.

Id. at 2256. Mathis examined the distinction between the elements which define a crime and the means by which it can be committed in reference to a statute's use of the word "burglary." But this distinction may be even more significant for

§ 924(c)'s "elements clause." The "elements clause" expressly requires a particular kind of "element"—the use, attempted use, or threatened use of physical force against the person or property of another. The law has long been clear that alternative means in a federal criminal statute are not alternative "elements." See, e.g., Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999). And again, whether a crime is "within the ambit of 18 U.S.C. § 924(c) . . . is a question . . . we must answer 'categorically'—that is, by reference to the elements of the offense." McGuire, 706 F.3d at 1336 (emphasis added).

If Saint Fleur is wrong (I think it is),[2] Mr. Carter's § 924(c) sentence may be unlawful for this reason as well. And all Mr. Carter asks us to do is let him present his case to a District Court to look at his sentence to be sure it is legal.

III. Our System of Judicial Review

I wish I could say I knew of another way for Mr. Carter to find relief or have our mistakes corrected. But he, like many other petitioners, is confined to a process of judicial review that is limited indeed. When this Court reviews applications from prisoners seeking to file second or successive habeas petitions, the statute requires us to decide whether an applicant has made a prima facie showing that his claim involves "a new rule of constitutional law, made retroactive to cases on

[2] At the very least, Johnson creates enough uncertainty about this question that it would be prudent to allow district courts to decide this question in the first instance. I recognize, though, that Saint Fleur prevents them from doing so.

collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).[3]

Mr. Carter is serving a sentence imposed by a federal court. He filed his application form pro se, without the benefit of advocacy or argument from a lawyer. His claims were not fully briefed. Indeed, the application form we required him to file forbids him from filing any brief (or attachment).[4] Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence, U.S. Ct. of Appeals Eleventh Circuit (last updated Jan. 2, 2001), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/ Form2255APP.pdf. We are required by statute to rule on Mr. Carter's application within just thirty days. 28 U.S.C. § 2244(b)(3)(D). This short deadline and the lack of advocacy can lead to the types of mistakes I made in Saint Fleur and that I believe the Majority makes in Mr. Carter's case today.

This is concerning because the statute does not allow Mr. Carter to ask this panel to reconsider its decision, or ask this Court to convene en banc to correct a mistake. See id. § 2244(b)(3)(E). Neither can he ask the Supreme Court to step in and correct our mistake. See id. And this Court has ruled that if something

[3] The statute also allows the filing of a second or successive habeas petition if a prima facie showing is made that the claim relies on "newly discovered evidence" that "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1).

[4] This rule does not apply to petitioners facing a sentence of death.

changes—for example, this Court determines Hobbs Act robbery is not a "crime of violence"—we can't consider a new application from Mr. Carter on these grounds because he already made substantively the same claims in the application we are ruling on now. See In re Baptiste, 828 F.3d 1337 (11th Cir. 2016). As a result of this system, just two judges can make a decision binding precedent for all second or successive applicants in Georgia, Florida, and Alabama, even if every single other judge on this Court were to disagree.

I dissent from the Majority's ruling that Mr. Carter has failed to make a prima facie showing. I would allow him to file a petition in the District Court so that his case can be reviewed on the merits.

Additional material from this filing is available in the Clerk's Office.