IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12854-C

IN RE: CONGHAU TO,

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 MARTIN, JILL PRYOR, and BRANCH, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Conghau To 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 under 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 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).

We must dismiss a claim that was presented in a prior application to file a second or successive § 2255 motion. *See* 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016). "[A] claim is the same where the basic gravamen of the argument is the same, even where new supporting evidence or legal arguments are added." *In re Baptiste*, 828 F.3d at 1339. The bar on previously presented claims is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016). In *In re Hammoud*, we clarified that *In re Baptiste* does not bar new claims under *United States v. Davis*,[1] as *Davis* was a new constitutional rule "in its own right, separate and apart from (albeit primarily based on) *Johnson* and *Dimaya*." 931 F.3d 1032, 1039-40 (11th Cir. 2019).

To was convicted of one count each of racketeering, in violation of 18 U.S.C. § 1962(c) (Count One); conspiracy to engage in a pattern of racketeering activity, in violation of § 1962(d) (Count Two); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count Three), attempted Hobbs Act robbery, in violation of § 1951(a) (Count Four); two counts of substantive Hobbs Act robbery, in violation of § 1951(a) (Counts Five and Six); and three counts of using a firearm during and in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts Seven, Eight, and Nine). Notably, the indictment alleged that each of the § 924(c) counts related only to one of the attempted or substantive Hobbs Act robbery offenses in

[1] *United States v. Davis*, 139 S. Ct. 2319, 2323, 2336 (2019).

Counts Four, Five, and Six. To was sentenced to a total of life imprisonment plus a consecutive 540-month sentence for the § 924(c) convictions.

In 1999, To filed his original § 2255 motion, which the district court denied on the merits. In 2016, To filed an application for leave to file a successive § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In his application, he argued that his § 924(c) convictions were unconstitutional in light of *Johnson* because conspiracy to commit Hobbs Act robbery was not a crime of violence under § 924(c)(3)(A)'s elements clause. He also argued that his racketeering convictions were predicated on his conspiracy, attempted, and substantive Hobbs Act robbery convictions and that those convictions were no longer crimes of violence in light of *Johnson*. We granted To's application as to the § 924(c) conviction predicated on attempted Hobbs Act robbery, reasoning that attempted Hobbs Act robbery might not have categorically qualified as a crime of violence under § 924(c)(3)(A)'s elements clause. We denied To's application as to his remaining claims.

To then filed an authorized second § 2255 motion in the district court that presented his claim that his § 924(c) conviction predicated on attempted Hobbs Act robbery was unconstitutional in light of *Johnson* because attempted Hobbs Act robbery did not qualify as a crime of violence under § 924(c)(3)(A)'s elements clause. The district court denied the motion. We declined to issue a certificate of appealability, noting that the Supreme Court had granted certiorari in *Davis* but explaining that, regardless, attempted Hobbs Act robbery was a crime of violence under § 924(c)(3)(A)'s elements clause.

In April 2020, To filed a successive application under *Davis*. To contended that his conspiracy convictions did not categorically qualify as crimes of violence under § 924(c)(3)(A)'s

elements clause and, in light of *Davis*, the § 924(c) convictions predicated on those conspiracy convictions must be vacated. He appeared to assert that his attempted and substantive Hobbs Act robbery convictions also were not valid predicates because they were the basis of his conspiracy charges and were presented to the jury under a theory that essentially required a finding that there was a conspiracy. To contended that his racketeering convictions were also essentially conspiracy convictions and, thus, were no longer crimes of violence that could support his § 924(c) convictions. Finally, To appeared to assert that his racketeering convictions, themselves, were invalid because they essentially were the same as the Hobbs Act convictions. He stated that his claim relied on a new rule of constitutional law as announced in *Davis*.

We denied To's application, reasoning that To's § 924(c) convictions were actually predicated only on substantive and attempted Hobbs Act robbery and not on either of his conspiracy convictions. And, because we had previously held that both of those offenses categorically qualify as crimes of violence under § 924(c)(3)(A)'s elements clause, we concluded that To had failed to make a prima facie showing of entitlement to relief under *Davis* as to his § 924(c) convictions. As to his challenges to his racketeering convictions, we concluded that those convictions did not serve as predicates for any of To's § 924(c) convictions and, even if they had, *Davis* did not address the racketeering statute.

In his present application, To first asserts that he has newly discovered evidence showing that his indictment wrongly referred to a murder and that another person was convicted and sentenced for that murder in state court in 1995. Liberally construing his application, he contends that Count One of his indictment identified murder in violation of Florida law as racketeering act 2(b) but cited a Florida statute prohibiting conspiracy to commit robbery rather than murder. To

explains that he obtained the text of the Florida statutes in May 2019 because the statutes were not otherwise accessible through the prison's law library. He also asserts that robbery, rather than murder, was listed on the verdict form as racketeering act 2(b) of Count One, which constituted fraud. To argues that, as a result, he was convicted of robbery rather than murder but was unconstitutionally sentenced with an enhancement for the murder.

Second, To contends that he is actually innocent of his § 924(c) convictions because, based on the text of § 1951(a), Hobbs Act robbery cannot be a crime of violence under § 924(c)(3)(A)'s elements clause. He appears to rely on *Curtis Johnson v. United States*, 559 U.S. 133 (2010) for support. To also asserts that *In re Baptiste* does not apply to successive applications. He argues that this claim relies on newly discovered evidence, including "misinterpretations of the law" and conflicting court opinions on the matter. To contends that his § 924(c) convictions and resulting consecutive sentences are thus unconstitutional.

To attached to his application copies of invoices from 2019 showing payment for retrieval of the Florida statutes at issue as well as copies of the statutes themselves.

To's first claim does not satisfy the statutory criteria in § 2255(h) because it relies neither on a new rule of constitutional law nor newly discovered evidence of innocence. *See* 28 U.S.C. § 2255(h). Liberally construed, the newly discovered evidence To purports to present is primarily the Florida statutes he claims were cited in his indictment and jury verdict. But statutes are not evidence and, even if they were, the Florida statutes do not in any way show To's actual, factual innocence of his racketeering convictions or the racketeering acts alleged therein. *See In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997). Nor does the purported new evidence that a codefendant was convicted in state court of the murder that was a predicate for To's racketeering

convictions because To was not convicted of murder and his convictions did not require proof that he personally committed murder. *See United States v. To*, 144 F.3d 737, 740-43 & n.5 (11th Cir. 1998) (affirming To's conviction on Count One, which included as racketeering act 2(b) the murder to which his codefendant confessed and that To "helped orchestrate"). And to the extent that To challenges the enhancement of his sentence based on that murder, that claim is not cognizable under § 2255(h)(1). *See In re Dean*, 341 F.3d 1247, 1248 (11th Cir. 2003) (holding that the newly discovered evidence exception does not apply to claims of sentencing error).

As to To's second claim, unlike *In re Hammoud*, To raised substantially the same challenges—albeit under *Davis*—to his § 924(c) convictions and predicate offenses in his most recent successive application. *Cf. In re Hammoud*, 931 F.3d at 1039-40. Specifically, in his most recent application, To challenged his § 924(c) convictions predicated on Hobbs Act robbery on the ground that Hobbs Act robbery no longer qualified as a crime of violence post-*Davis*. Although To now relies on the text of § 1951(a) in support of his argument rather than *Davis*, "the basic gravamen of the argument is the same," even though To changed the legal authority in support of his argument. *See In re Baptiste*, 828 F.3d at 1339. Thus, To's second claim is barred under *In re Baptiste* because he raised the same claim in his most recent successive application. *See id.* at 1339-40.

Accordingly, we DISMISS To's application in part as barred by *In re Baptiste*, as it presents a claim he previously presented. To's remaining claim does not satisfy the statutory criteria in § 2255(h), so we DENY his application as to that claim.

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