APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11701-C

IN RE: KENNY BLANC,

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, TJOFLAT and HULL, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Kenny Blanc 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 our determination

that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

A grand jury charged Blanc, along with two codefendants, with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 1); conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 2); attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count 3); conspiracy to use, carry, and possess a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) and (o) (Count 4); carrying and possessing a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 5); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 2 (Count 6). The indictment alleged that the conspiracies charged in Counts 1, 2, and 4 occurred from approximately November 17, 2014, through December 3, 2014. It also alleged that the charges in Counts 3, 5, and 6 occurred on or about December 3, 2014. Notably, the indictment alleged that the § 924(c) charge in Count 5 related to Counts 1 through 3.

Pursuant to a plea agreement, Blanc agreed to plead guilty to Counts 1 and 5 in exchange for the government's promise to seek the dismissal of the remaining counts. The agreement stated that Count 5 charged Blanc with "knowingly using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes."

In a separate factual proffer that was signed by Blanc and his attorney, the government asserted that the evidence would establish the following at trial. On November 17, 2014, an undercover law enforcement officer met with Blanc and discussed a plan to commit an armed

robbery of at least 15 to 20 kilograms of cocaine from a drug stash house that was protected by 2 armed guards. Blanc expressed his willingness to perform the robbery. Blanc discussed the details of the plan with one of his codefendants and the undercover officer in a series of meetings and phone calls. On December 3, 2014, Blanc, along with his two codefendants and the undercover officer, met at an undercover facility to make final preparations for the robbery that they planned to commit that same day. Blanc and a codefendant would go inside the stash house, where they would proceed to tie up the guards and knock the undercover officer to the ground, and another codefendant would serve as the getaway driver. One of Blanc's codefendants stated that "he was not going to mess around when he entered the stash house." Following Blanc's arrest, law enforcement recovered a loaded revolver in the vehicle that he and his codefendants had driven to the undercover facility, a loaded pistol on the person of one of his codefendants, and approximately 20 rounds of ammunition.

At the change-of-plea hearing, Blanc confirmed that he understood that Count 5 charged him with "using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes." The government stated that the elements of Count 5 were that Blanc

> did use and carry with his codefendants a firearm during the commission of a violent crime, that is the Hobbs Act robbery that is alleged in Count 1, and/or did possess a firearm in furtherance of that same crime of violence, which would be the conspiracy to commit a Hobbs Act robbery as to Count 1.

Blanc's counsel confirmed that the government's recitation was accurate.

Blanc confirmed with the district court that he had read the plea agreement before signing it, fully discussed it with his counsel, and understood its terms. He also confirmed that he had read the factual proffer, signed it, and agreed with its contents. The district court adopted the

factual proffer. After accepting Blanc's guilty plea, the district court stated that he was "adjudged guilty of Count 5, knowingly using and carrying a firearm during and in relation to a crime of violence and drug trafficking crime and possessing a firearm in furtherance of such crimes."

The district court sentenced Blanc to a total of 180 months' imprisonment, consisting 120 months as to Count 1 and 60 months as to Count 5, to run consecutively to Count 1. The judgment stated that Count 5 was a conviction for "Use of a firearm during the commission of a crime of violence drug trafficking."

In 2016, Blanc filed his original § 2255 motion, in which he challenged his § 924(c) conviction based in part on *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied Blanc's motion on the merits.

In his application, Blanc indicates that he wishes to raise three claims in a second or successive § 2255 motion. First, he argues that his § 924(c) conviction must be vacated because conspiracy to commit Hobbs Act robbery is no longer a crime of violence and cannot serve as a predicate offense following the Supreme Court's invalidation of § 924(c)(3)'s residual clause in *United States v. Davis*, 139 S. Ct. 2319 (2019). For the same reason, he contends that the conspiracy charge cannot serve as a predicate for his career offender enhancement under the Sentencing Guidelines in light of *Davis*. In addition to *Davis*, Blanc cites *Johnson*; *Napue v. Illinois*, 360 U.S. 264 (1959); *Communist Party of U.S. v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 845 (2019); and *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017).

Second, Blanc argues that his trial counsel was ineffective for incorrectly advising him that his guideline imprisonment range would be 180 months or less if he pled guilty when in fact it was

262 to 327 months' imprisonment. He asserts that he was prejudiced by his counsel's advice because he had cognizable defenses to the charges against him and would not have pled guilty if he had known the correct guideline range. He cites *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000), and *United States v. Brown*, 640 F. App'x 752 (10th Cir. 2016). In addition, he contends that his counsel was ineffective for failing to lodge an objection at trial regarding his possession of drugs and firearms. He cites to *United States v. Bestwina*, 329 F. App'x 148 (9th Cir. 2009), and *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003).

Third, Blanc argues that his post-conviction counsel was ineffective because he failed to raise the issue of the possible retroactivity of an amendment to the Sentencing Guidelines during his § 2255 proceeding despite having knowledge of the amendment. Quoting from a report and recommendation ("R&R") written by the magistrate judge in his § 2255 proceeding, he asserts that the amendment affected the definition of "crime of violence" for purposes of the career offender enhancement.

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. The Court resolved a circuit split on the issue, rejecting the position that § 924(c)(3)(B)'s residual clause could remain constitutional if read to encompass a case-specific, conduct-based approach, rather than a categorical approach. *Id.* at 2325 & n.2, 2332-33. The Court in *Davis* emphasized that there was no "material difference" between the language or scope of § 924(c)(3)(B) and the residual clauses struck down in *Johnson* and *Dimaya*, and, therefore, concluded that § 924(c)(3)(B) was unconstitutional for the same reasons. *Id.* at 2326, 2336.

In *In re Hammoud*, we recently resolved several preliminary issues with respect to successive applications involving proposed *Davis* claims. 931 F.3d 1032, 1036-37 (11th Cir. 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 "new"—in that it extended *Johnson* and *Dimaya* to a new statutory context and its result was not necessarily "dictated by precedent." *Id.* at 1038. 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, particularly 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 1038-39 (quoting *Tyler v. Cain*, 533 U.S. 656, 662-64, 666 (2001)).

More recently, in *In re Navarro* we addressed a *Davis*-based successive application where the applicant pled guilty to a § 924(c) count tied to multiple predicate offenses. 931 F.3d 1298, 1300 (11th Cir. 2019). Through a factual proffer, Navarro admitted that he, along with others, had planned to rob cocaine from a stash house. *Id.* at 1300. We noted that, although Navarro ultimately pled 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 the Hobbs Act conspiracy and drug-trafficking offenses and that those offenses were "inextricably intertwined." *Id.* at 1302 & n.2; *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). Consequently, 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*, 931 F.3d at 1302. In so doing, we distinguished Navarro's case from our precedent in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016) (granting a successive application where an indictment charging a § 924(c) violation listed multiple predicate offenses, at least one of which potentially implicated § 924(c)(3)(B)'s residual clause, and the jury returned a general guilty verdict), because, unlike in *Gomez*, Navarro pled guilty and there was no uncertainty as to which of the three predicate crimes actually supported the § 924(c) conviction. *Id.* at 1303 n.4.

A claim that was presented in a prisoner's original § 2255 motion must be dismissed. *See* 28 U.S.C. § 2244(b)(1) (providing that a claim presented in a successive application under 28 U.S.C. § 2254 must be dismissed if it was filed in a prior "application"); *Randolph v. United States*, 904 F.3d 962, 964-65 (11th Cir. 2018) (holding that the bar under § 2244(b)(1) applies to claims that were raised in a prisoner's first § 2255 motion).

Here, Blanc cannot make a *prima facie* showing that his § 924(c) conviction and sentence is unconstitutional under *Davis*. *See* 28 U.S.C. § 2244(b)(3)(C); *Jordan*, 485 F.3d at 1357-58. As an initial matter, although the government stated at Blanc's change-of-plea hearing that the § 924(c) charge in Count 5 related only to the Hobbs Act conspiracy charge in Count 1, the record otherwise consistently shows that the § 924(c) charge was predicated on Counts 1 through 3. Notably, Blanc confirmed at the hearing that he understood that the § 924(c) charge was predicated on a crime of violence and drug trafficking crimes when the district court recited the

charges against him. Also, Blanc confirmed that he had read, discussed, and understood the plea agreement, which stated that Count 5 was predicated on a crime of violence as well as a drug trafficking crime.

Similar to *Navarro*, Blanc's § 924(c) conviction in Count 5 was independently supported by the drug trafficking charges in Counts 2 and 3 even though he only pled guilty to Counts 1 and 5. *See Navarro*, 931 F.3d at 1302, 1303 & n.4. The indictment and factual basis for Blanc's plea establish that the charges in Counts 1 through 3 were based on a plan by Blanc and his co-conspirators to commit an armed robbery of a guarded drug stash house on December 3, 2014, and divide the stolen drugs. In addition, the factual basis shows that two firearms were recovered from Blanc and his co-conspirators upon their arrest. Thus, the Hobbs Act conspiracy in Count 1 and the drug trafficking charges in Counts 2 and 3 were "inextricably intertwined" as predicate offenses for the § 924(c) charge. *See id.* at 1302 & n.2. Accordingly, Blanc's § 924(c) conviction falls outside of the scope of *Davis* because it can be independently supported by the drug trafficking charges in Count 2 and 3, which remain valid predicate offenses under § 924(c)(2) even after *Davis*. *See* 18 U.S.C. § 924(c)(2) (defining "drug trafficking crime" separately from "crime of violence"); *Davis*, 139 S. Ct. at 2324-25, 2336.

Blanc's related challenge to his career offender designation is without merit because the Supreme Court's holding in *Davis* concerned § 924(c)(3)'s residual clause, not the Sentencing Guidelines. *See Davis*, 139 S. Ct. at 2324-25, 2336. Moreover, the Guidelines are not susceptible to Fifth Amendment vagueness challenges. *Beckles v. United States*, 137 S. Ct. 886, 892, 895 (2017) (determining that the Guidelines are not subject to void-for-vagueness challenges and upholding the defendant's sentence as a career offender, U.S.S.G. § 4B1.1, that he had challenged under *Johnson*).

We dismiss Blanc's application to the extent that he seeks to challenge his § 924(c) conviction based on *Johnson* because he previously raised that claim in his original § 2255 motion. *Randolph*, 904 F.3d at 964-65. The other Supreme Court cases that Blanc cites—*Napue* and *Communist Party of U.S.*—offer him no support because both were decided prior to the filing of his original § 2255 motion in 2016 and so were not "previously unavailable." *See* 28 U.S.C. § 2255(h)(2). The remaining cases—*Eason*, *Camp*, and *O'Connor*—do not support his claim because they were not decided by the Supreme Court. *Id.*

In addition, Blanc cannot make a *prima facie* showing as to his ineffective assistance of counsel claims. As to his claim that his trial counsel was ineffective, the cases that he cites—*McCoy*, *Brown*, *Bestwina*, and *Banuelos*—offer no support because they were not decided by the Supreme Court. *Id.* Moreover, as caselaw, those decisions do not qualify as "newly discovered evidence." *See id.* § 2255(h)(1). Blanc does not cite any law to support his claim that his postconviction counsel was ineffective.

The magistrate judge's R&R does not support Blanc's claim that his postconviction counsel was ineffective for failing to recognize the significance of an amendment to the Guidelines because he participated in his § 2255 proceeding where the R&R was issued. *Cf. United States v. Calderon*, 127 F.3d 1314, 1352 (11th Cir. 1997) (determining, in the context of a motion for a new trial, that an off-the-record exchange between a juror and the judge was not newly discovered where the defendant was present for the exchange and so "he obviously would have known of the factual basis upon which his motion . . . was based," even if he did not immediately realize its possible legal implications); *see also In re Anderson*, 396 F.3d 1336, 1338 (11th Cir. 2005) (stating that a movant's own recent discovery of indictment and sentencing defects did not constitute newly discovered evidence under § 2255).

Accordingly, because Blanc 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 DISMISSED in part and DENIED in part.

MARTIN, Circuit Judge, dissenting in part and concurring in part:

I would grant Mr. Blanc's application as to his claim under United States v. Davis, 588 U.S. ___, 139 S. Ct. 2319 (2019). The record is not clear-cut as to whether Mr. Blanc's 18 U.S.C. § 924(c) conviction was predicated solely on conspiracy to commit Hobbs Act robbery, or whether his conviction was also supported by drug trafficking predicates. At this preliminary stage, I would grant his application to file a second or successive motion and allow his claim to proceed in the District Court.

Mr. Blanc pled guilty to two offenses. The first was conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951. But we cannot be entirely confident of the nature of Mr. Blanc's second conviction under 18 U.S.C. § 924(c).

At the change-of-plea hearing, the government said Mr. Blanc was pleading guilty to a § 924(c) violation for "us[ing] and carry[ing] . . . a firearm during the commission of a violent crime, that is the Hobbs Act robbery . . . [and] possess[ing] a firearm in furtherance of that same crime of violence, which would be the conspiracy to commit a Hobbs Act robbery." The government did not mention any drug trafficking predicates in its recitation of the elements of § 924(c). Mr. Blanc's counsel confirmed this understanding. Under this interpretation of Mr. Blanc's guilty plea, he would be entitled to relief under Davis. See Brown v. United States, 942 F.3d 1069, 1076 (11th Cir. 2019) (per curiam) (holding that

conspiracy to commit Hobbs Act robbery is not a crime of violence supporting a § 924(c) conviction).

By contrast, Mr. Blanc's plea agreement and his factual proffer referenced the drug trafficking charges brought against him. The plea agreement stated that he was pleading guilty to violating § 924(c) for "knowingly using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes." The plea colloquy between the trial court and Mr. Blanc echoed this language. Under this understanding of Mr. Blanc's guilty plea, Blanc could not receive Davis relief because his § 924(c) conviction was separately predicated on drug trafficking crimes. See In re Navarro, 931 F.3d 1298, 1303 (11th Cir. 2019) (per curiam).

In both Brown and Navarro, our Court applied Davis to guilty pleas in which parties and sources agreed on the predicate offenses for the defendant's § 924(c) conviction. See 942 F.3d at 1073 (examining the written plea agreement, the plea colloquy, and the government's recitation of the elements of § 924(c), which all reflected conspiracy to commit Hobbs Act robbery as the sole predicate crime); 931 F.3d at 1302 (looking to the factual proffer and the plea agreement, which both reflected drug trafficking predicates). But our Court has not addressed the circumstance in which the record contains two different affirmative statements about the § 924(c) conviction and its consequences.

Mr. Blanc deserves careful consideration of the conflicting descriptions of his guilty plea in the record. His consecutive five-year sentence for violating § 924(c) hangs in the balance. While it may well be that Mr. Blanc is bound by the terms of his written plea agreement, neither Navarro nor Brown address the unique circumstances of his case. Thus, I would grant Mr. Blanc's application and let the District Court consider his Davis claim in the first instance.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14294-A

IN RE: KENNY BLANC,

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, GRANT, and HULL, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Kenny Blanc 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
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> (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).

I. BACKGROUND

A. Indictment, Plea and Sentence

In 2014, a grand jury charged Blanc with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 1); conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 2); attempt to possess with intent to distribute cocaine, in violation of §§ 841(b)(1)(A) and 846 (Count 3); conspiracy to use, carry, and possess a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) and (o) (Count 4); carrying and possessing a firearm in furtherance of a crime of violence, "that is, a violation of Title 18, United States Code, Section 1951, as set forth in Count 1, . . . and during and in relation to a drug trafficking crime, that is, a violation of Title 21, United States Code Section 846, as set forth in Counts 2 and 3," in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 5); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 2 (Count 6). (Emphasis added.) The indictment alleged that the conspiracies charged in Counts 1, 2, and 4 occurred from approximately November 17, 2014, through December 3, 2014. It also alleged that the charges in Counts 3, 5, and 6 occurred on or about December 3, 2014.

Blanc pled guilty to Counts 1 and 5 with a plea agreement. The plea agreement stated that Count 5 charged Blanc with "knowingly using and carrying a firearm during and in relation

to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes."

Blanc also agreed to a separate factual proffer that described the facts in support of Counts 1 and 5 as follows. On November 17, 2014, an undercover law enforcement officer met with Blanc and discussed a plan to commit an armed robbery of at least 15 to 20 kilograms of cocaine from a drug stash house that was protected by 2 armed guards. Blanc expressed his willingness to perform the robbery and discussed the details of the plan with one of his codefendants and the undercover officer in a series of meetings and phone calls. A few weeks later, on December 3, 2014, Blanc, along with his two codefendants and the undercover officer, met at an undercover facility to make final preparations for the robbery that they planned to commit that same day. Blanc and a codefendant would go inside the stash house, where they would tie up the guards and knock the undercover officer to the ground, and another codefendant would serve as the getaway driver. One of Blanc's codefendants stated that "he was not going to mess around when he entered the stash house." Following Blanc's arrest, law enforcement recovered a loaded revolver in the vehicle that he and his codefendants had driven to the undercover facility, a loaded pistol on the person of one of his codefendants, and approximately 20 rounds of ammunition.

At the plea hearing, Blanc confirmed with the district court that he understood that Count 5 charged him with "using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes." The government stated that the elements of Count 5 were that Blanc

> did use and carry with his codefendants a firearm during the commission of a violent crime, that is the Hobbs Act robbery that is alleged in Count 1, and/or did possess a firearm in furtherance of that same crime of violence, which would be the conspiracy to commit a Hobbs Act robbery as to Count 1.

Blanc's counsel confirmed that the government's recitation was accurate.

Blanc confirmed that he had fully read and discussed with counsel both the plea agreement and the factual proffer before signing them. Blanc also confirmed that he agreed with the factual proffer, and the district court adopted it. After accepting Blanc's guilty plea, the district court stated that he was "adjudged guilty of Count 5, knowingly using and carrying a firearm during and in relation to a crime of violence and drug trafficking crime and possessing a firearm in furtherance of such crimes."

The district court sentenced Blanc to a total of 180 months' imprisonment, consisting of a 120-month term as to Count 1 and a 60-month term as to Count 5, to run consecutively to the term on Count 1. The judgment stated that Count 5 was a conviction for "Use a [sic] firearm during the commission of a crime of violence [sic] drug trafficking." On direct appeal in 2015, Blanc challenged the district court's calculation of his advisory guidelines range. This Court affirmed.

B. Original § 2255 Motion

In 2016, Blanc filed his original § 2255 motion, which challenged his § 924(c) conviction in Count 5 based in part on *Johnson v. United States*, 576 U.S. 591 (2015). Blanc argued that he was "actually innocent" of his § 924(c) conviction on Count 5 because conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence as defined in § 924(c)(3) after *Johnson*. The district court denied the motion on the merits, because, among other reasons, Blanc had "pled guilty to using a firearm during and in furtherance of both a crime of violence and a drug trafficking crime." Both the district court and this Court declined to issue a certificate of appealability.

C. Prior Successive Application

In May 2020, Blanc filed a successive application challenging his § 924(c) conviction in Count 5 under *United States v. Davis*, 139 S. Ct. 2319 (2019). As relevant, he argued that his § 924(c) conviction was predicated on conspiracy to commit Hobbs Act robbery, which he asserted was no longer a crime of violence and could not serve as a predicate offense following the Supreme Court's invalidation of § 924(c)(3)'s residual clause in *Davis*.

This Court denied Blanc's application, reasoning that, as to his *Davis* claim, Blanc had failed to make a *prima facie* showing that his § 924(c) conviction was unconstitutional. Relying on *In re Navarro*, 931 F.3d 1298 (11th Cir. 2019), we concluded that: (1) Blanc's § 924(c) conviction in Count 5 was independently supported by the drug trafficking charges in Counts 2 and 3; (2) the indictment and factual basis showed that Blanc planned to rob a drug stash house and that firearms were recovered upon Blanc's arrest; and (3) the Hobbs Act conspiracy and the drug trafficking charges in Counts 1 through 3 were "inextricably intertwined" as predicate offenses for Blanc's § 924(c) conviction in Count 5 and, therefore, that conviction fell outside of *Davis*'s scope, as follows:

> Here, Blanc cannot make a *prima facie* showing that his § 924(c) conviction and sentence is unconstitutional under *Davis*. *See* 28 U.S.C. § 2244(b)(3)(C); *Jordan*, 485 F.3d at 1357-58. As an initial matter, although the government stated at Blanc's change-of-plea hearing that the § 924(c) charge in Count 5 related only to the Hobbs Act conspiracy charge in Count 1, the record otherwise consistently shows that the § 924(c) charge was predicated on Counts 1 through 3. Notably, Blanc confirmed at the hearing that he understood that the § 924(c) charge was predicated on a crime of violence and drug trafficking crimes when the district court recited the charges against him. Also, Blanc confirmed that he had read, discussed, and understood the plea agreement, which stated that Count 5 was predicated on a crime of violence as well as a drug trafficking crime.
>
> Similar to *Navarro*, Blanc's § 924(c) conviction in Count 5 was independently supported by the drug trafficking charges in Counts 2 and 3 even though he only pled guilty to Counts 1 and 5. *See Navarro*, 931 F.3d at 1302,

> 1303 & n.4. The indictment and factual basis for Blanc's plea establish that the charges in Counts 1 through 3 were based on a plan by Blanc and his co-conspirators to commit an armed robbery of a guarded drug stash house on December 3, 2014, and divide the stolen drugs. In addition, the factual basis shows that two firearms were recovered from Blanc and his co-conspirators upon their arrest. Thus, the Hobbs Act conspiracy in Count 1 and the drug trafficking charges in Counts 2 and 3 were "inextricably intertwined" as predicate offenses for the § 924(c) charge. *See id.* at 1302 & n.2. Accordingly, Blanc's § 924(c) conviction falls outside of the scope of *Davis* because it can be independently supported by the drug trafficking charges in Count[s] 2 and 3, which remain valid predicate offenses under § 924(c)(2) even after *Davis*. *See* 18 U.S.C. § 924(c)(2) (defining "drug trafficking crime" separately from "crime of violence"); *Davis*, 139 S. Ct. at 2324-25, 2336.

II. CURRENT APPLICATION

In his present application filed on November 11, 2020, Blanc again proposes to raise a claim based on *Davis* that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3). He contends that, at his plea hearing, the government recited the elements of Counts 1 and 5, and, when addressing the predicate offenses for the § 924(c) offense in Count 5, the government mentioned only the conspiracy offense in Count 1. Blanc notes that he has raised this claim previously and that it relies on a new rule of constitutional law as announced in *Davis*. He attached to his application a copy of Judge Martin's partial dissent and concurrence to the denial of his most recent successive application in May 2020.

On June 24, 2019, the Supreme Court in *Davis* extended its holdings in *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), 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. 931 F.3d 1032, 1036-37 (11th Cir.

2019). First, we held that *Davis*, like *Johnson*, announced a new rule of constitutional law within the meaning of § 2255(h)(2). *Id.* at 1038. 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, particularly the Court's holding in *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016). *Id.* at 1038-39 (quoting *Tyler v. Cain*, 533 U.S. 656, 662-64, 666 (2001)). Additionally, we also 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 1039-40.

More recently, in *In re Navarro* we addressed a *Davis*-based successive application where the applicant pled guilty to a § 924(c) count tied to multiple predicate offenses. 931 F.3d at 1300. Through a factual proffer, Navarro admitted that he, along with others, had planned to rob cocaine from a stash house. *Id.* We noted that, although Navarro ultimately pled 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 the Hobbs Act conspiracy and the drug-trafficking offenses and that those offenses were "inextricably intertwined." *Id.* at 1302 & n.2; *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). Consequently, 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*, 931 F.3d at 1302. In so doing, we distinguished Navarro's case from our precedent in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016) (granting a successive application where an indictment charging a § 924(c) violation listed multiple predicate offenses, at least one of which potentially implicated § 924(c)(3)(B)'s residual clause, and the jury returned a general guilty verdict), because, unlike in *Gomez*, Navarro pled guilty and there was no uncertainty as to which of the three predicate crimes actually supported the § 924(c) conviction. *Id.* at 1303 n.4.

A. *Prima Facie* Case Ruling

Here, Blanc's current application, like his May 2020 application, cannot make a *prima facie* showing that his § 924(c) conviction and sentence on Count 5 is unconstitutional under *Davis*. *See* 28 U.S.C. § 2244(b)(3)(C); *Jordan*, 485 F.3d at 1357-58. While the government prosecutor stated at one point during Blanc's plea hearing that his § 924(c) charge in Count 5 was predicated on "the Hobbs Act robbery that is alleged in Count 1," the record otherwise consistently shows that the § 924(c) charge was predicated not just on the Hobbs Act conspiracy charged in Count 1 but also on the drug trafficking charges in Counts 2 and 3. Notably, the record establishes that Count 5 was supported by all three predicate offenses, as alleged in the indictment. At the plea hearing, the district court explicitly advised Blanc that the § 924(c) offense in Count 5 was predicated on "a crime of violence *and a drug trafficking crime*" when it recited the charges against Blanc, and Blanc confirmed that he understood. Blanc also confirmed to the district court that he had read, discussed with his attorney, and understood the plea agreement, which stated that Count 5 was predicated on "a crime of violence *and a drug trafficking crime*."

As in *In re Navarro*, Blanc's § 924(c) conviction "is fully supported by his drug-trafficking crimes, and it therefore is outside the scope of *Davis*." *See* 931 F.3d at 1302. Blanc's indictment and written factual proffer, which Blanc signed and confirmed was accurate, established that Blanc committed the drug trafficking crimes in Counts 2 and 3 and that he carried and possessed a firearm during and in relation to those drug offenses. *See id.* According to the proffer, Blanco conspired with several others to commit armed robbery of a guarded drug stash house on December 3, 2014, and then divide the stolen 15 to 20 kilograms of cocaine among the conspirators and that on the day of the planned robbery, when the conspirators met at a gas station and were arrested, a search of the conspirators and their vehicle uncovered two firearms and ammunition. These facts are sufficient to support both the conspiracy and attempt drug offenses charged in Counts 2 and 3, both of which qualify as drug trafficking crimes that could support Blanc's § 924(c) conviction. *See id.* Also, as in *In re Navarro*, it is difficult to imagine how Blanc "could have admitted to facts supporting conspiracy to commit Hobbs Act robbery without simultaneously admitting facts supporting one or both of the drug trafficking crimes." *See id.* at 1302 & n.2. Thus, Blanc's "three predicate crimes identified in the indictment seem inextricably intertwined, given the planned robbery underlying the charge for conspiracy to commit Hobbs Act robbery was the robbery of a drug stash house." *See id.*

In short, as this Court already explained in denying Blanc's May 2020 application, his § 924(c) conviction on Count 5 is independently supported by the drug trafficking crimes in Counts 2 and 3, which remain valid predicate offenses under §924(c)(2) even after *Davis*. *See* 8 U.S.C. § 924(c)(2) (defining "drug trafficking crime" separately from "crime of violence"); *Davis*, 139 S. Ct. at 2324, 2336. Thus, like the applicant in *In re Navarro*, Blanc cannot make a *prima facie*

showing of a *Davis* claim and any application by Blanc raising this claim must be denied on that basis.

B. Alternative Rulings

Alternatively, to the extent that Blanc's claim in this November 2020 successive application can be construed as a challenge to our earlier order denying his May 2020 successive application, his application is denied because such orders are not subject to reconsideration. *See* 28 U.S.C. § 2244(b)(3)(E). In any event, we have examined Blanc's claim again and still conclude, for the reasons outlined above, that he still fails to make a *prima facie* showing. Alternatively, too, we have held that "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. And unlike *In re Hammoud*, Blanc raised his current *Davis* claim in his most recent successive application. *See In re Hammoud*, 931 F.3d at 1039-40. Specifically, in his May 2020 application, Blanc challenged the constitutionality of his § 924(c) conviction as predicated on conspiracy to commit Hobbs Act robbery in light of *Davis*. Thus, because Blanc reasserts his *Davis* claim now, we deny his application as barred by *In re Baptiste* because he raised the same claim in his most recent May 2020 successive application. *See In re Baptiste*, 828 F.3d at 1339-40.

Accordingly, we DENY Blanc's November 2020 successive application as he cannot and has not made a *prima facie* showing as to his Davis claim as to Count 5.

MARTIN, Circuit Judge, concurring in judgment:

I continue to believe that we should have granted Mr. Blanc's prior application as to his claim under United States v. Davis, 588 U.S. __, 139 S. Ct. 2319 (2019). See In re Blanc, Case No. 20-11701, ECF No. 4: 11–13 (Martin, J., dissenting in part and concurring in part). However, as the panel holds, because Mr. Blanc's current application presents his Davis claim for a second time, that claim now is barred by In re Baptiste, 828 F.3d 1337 (11th Cir. 2016). Baptiste held that "the federal habeas statute requires us to dismiss a claim that has been presented in a prior application" to file a § 2255 motion. Id. at 1339. I have stated my view that Baptiste has no basis in the text of the habeas statute:

> Baptiste was construing 28 U.S.C. § 2244(b)(1), which says any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Of course, [] § 2255 motions . . . are filed by federal prisoners [and] § 2255 motions are certainly not brought "under section 2254," which governs petitions filed by state prisoners. But the Baptiste panel ruled that even though § 2244(b)(1) does not mention § 2255 motions, it applies to them anyway, since "it would be odd [] if Congress had intended to allow federal prisoners" to do something state prisoners can't do.

In re Clayton, 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin, J., concurring). And

> Baptiste is inconsistent with the statute in a second way. The text of the habeas statute shows that it requires courts to dismiss only claims that were already presented in an actual § 2255 motion, as opposed to a mere request for certification of a successive § 2255 motion. Both § 2244 and § 2254 distinguish between "applications" (which are the § 2254 petitions and § 2255 motions filed in district courts) and "motions" (which are the earlier request for certification filed in a court of appeals). Baptiste assumes that "motion" and "application" mean the same thing, even though Congress carefully distinguished the two. When Congress uses different words in this way, courts must presume those words mean different things.

In re Anderson, 829 F.3d 1290, 1296 (11th Cir. 2016) (Martin, J., dissenting). Justice Kavanaugh has suggested the same. See Avery v. United States, 589 U.S. __, 140 S. Ct. 1080, 1080 (2020) (Kavanaugh, J., respecting the denial of certiorari) (citing Baptiste as having "interpreted the statute to cover applications filed . . . by federal prisoners under § 2255, even though the text of the law refers only to § 2254"). And my colleagues have articulated other problems with Baptiste. See In re Jones, 830 F.3d 1295, 1297 (11th Cir. 2016) (Rosenbaum and Jill Pryor, J.J., concurring).

I am concerned that Baptiste is blocking relief to prisoners who ask us to take a second look at their case after we got it wrong the first time. Nevertheless, Baptiste is binding precedent in this circuit, so Mr. Blanc will not be allowed to present his claim to a District Court for an examination of whether his § 924(c) conviction is legal.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11701-C

In re: KENNY BLANC,

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, TJOFLAT, and HULL, Circuit Judges.

BY THE PANEL:

Kenny Blanc, a federal prisoner serving a 180-month sentence since 2015, has filed with this Court a "Motion to Certify Question of Law to the U.S. Supreme Court." Blanc filed this "Motion to Certify" in case number 20-11701-C, which was his second application to file a successive 28 U.S.C. § 2255 motion. This Court denied Blanc's second application on May 22, 2020.

Certification is rarely used, with only four certified questions accepted by the Supreme Court in the last 65 years. *See In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015). Certification is particularly inappropriate here because Blanc raised the possibility of certification 14 months after this Court issued its final decision on this second application.

This would be a one-sentence order but for the fulsome dissent. Thus, we take time (1) to place this Motion to Certify in the context of the lengthy history of Blanc's cases and (2) to show why his Motion fails for multiple reasons.

I. BACKGROUND

A. Guilty Plea, Conviction and Direct Appeal

In 2014, a six-count indictment charged Blanc and two codefendants with conspiring to commit Hobbs Act robbery (Count 1); conspiring to distribute and possess with intent to distribute cocaine (Count 2); attempting to possess with intent to distribute cocaine (Count 3); conspiring to use, carry and possess a firearm in furtherance of a crime of violence and a drug trafficking crime (Count 4); carrying and possessing a firearm in furtherance of a crime of violence and a drug trafficking crime (Count 5); and being a felon in possession of a firearm (Count 6). As to the 18 U.S.C. § 924(c) firearm offense in Count 5, the indictment alleged that the predicate crimes were the Hobbs Act robbery in Count 1 and the drug trafficking crimes in Counts 2 and 3.

Pursuant to a plea agreement, Blanc pled guilty to the Hobbs Act robbery conspiracy in Count 1 and to the § 924(c) firearm offense in Count 5. At the plea hearing, Blanc confirmed that: (1) he understood that his firearm offense in Count 5 charged him with "using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes" (emphasis added); (2) he had fully read and discussed with counsel both the plea agreement and the factual proffer; and (3) he agreed with the factual proffer.[1] After accepting Blanc's plea, the district court adjudged Blanc guilty of "Count 5, knowingly using and carrying a firearm during and in relation to a crime of violence

[1] The stipulated factual proffer stated that Blanc and others agreed to rob 15 to 20 kilograms of cocaine from a Mexican drug cartel's stash house and then divide the stolen drugs. On the day of the planned robbery, Blanc and others met at a prearranged location to travel to the stash house and were arrested. A search of their vehicles and persons found, among other things, two loaded firearms and ammunition.

and drug trafficking crime and possessing a firearm in furtherance of such crimes." (Emphasis added).

Blanc is serving 120 months' imprisonment on his Hobbs Act robbery conspiracy conviction (Count 1) and a consecutive 60 months' imprisonment on his firearm conviction (Count 5). On direct appeal, this Court affirmed Blanc's sentence. *See United States v. Blanc*, 631 F. App'x 860 (11th Cir. 2015). The Supreme Court denied Blanc's petition for a writ of certiorari. *See Blanc v. United States*, 136 S. Ct. 2038 (2016).

His instant Motion to Certify addresses only his firearm conviction in Count 5.

B. Original § 2255 Motion

In 2016, Blanc filed a 28 U.S.C. § 2255 motion to vacate his sentence that challenged his career offender enhancement under the Sentencing Guidelines and his § 924(c) firearm conviction based on *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015). The district court denied Blanc's § 2255 motion because (1) *Johnson* did not apply to the Guidelines, *Beckles v. United States*, 580 U.S. ___, 137 S. Ct. 886 (2017); and (2) his § 924(c) firearm conviction remained valid because Blanc pled guilty to using a firearm during a drug trafficking crime, as well as a crime of violence.

C. 2017 Application for Leave to File Successive § 2255 Motion

In 2017, Blanc filed his first application for leave to file a second or successive § 2255 motion. Blanc challenged his career offender status under the Guidelines, citing *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276 (2013). This Court denied Blanc's application because neither Supreme Court decision announced a new rule of constitutional law within the meaning of 28 U.S.C.

§ 2255(h)(2) or was made retroactive to cases on collateral review. *See In re Kenny Blanc*, No. 17-12893, slip op. at 3-4 (11th Cir. July 12, 2017).

D. 2020 Second Application for Leave to File Successive § 2255 Motion

In May 2020, Blanc filed his second application for leave to file a successive § 2255 motion. This time Blanc raised a challenge to his § 924(c) conviction in Count 5 based on *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019). We denied Blanc's application.[2] We stated that "Blanc's § 924(c) conviction falls outside of the scope of *Davis* because it can be independently supported by the drug trafficking charges in Count 2 and 3, which remain valid predicate offenses under § 924(c)(2) even after *Davis*. *See* 18 U.S.C. § 924(c)(2) (defining "drug trafficking crime" separately from "crime of violence"); *Davis*, 139 S. Ct. at 2324-25, 2336." *In re Kenny Blanc*, No. 20-11701, slip. op. at 8 (11th Cir. May 22, 2020).

Blanc also raised a *Davis*-based challenge to his career offender designation, which we denied because *Davis*'s holding did not apply to the Guidelines under *Beckles*. *Id.*

E. 2020 Third Application for Leave to File a Successive § 2255 Motion

In November 2020, Blanc filed a third successive application in which he raised the same *Davis* challenge to his § 924(c) conviction in Count 5. In December 2020, this Court denied Blanc's application. *See In re Kenny Blanc*, No. 20-14294 (11th Cir. December 10, 2020). We again explained that Blanc's "§ 924(c) conviction in Count 5 is independently supported by the

[2] As background, in the order denying Blanc's second application, we first held that *Davis*, like *Johnson* before it, announced a new rule of constitutional law that applied retroactively. *In re Kenny Blanc*, No. 20-11701, slip op. at 6 (11th Cir. May 22, 2020) (following *In re Hammoud*, 931 F.3d 1032, 1038-39 (11th Cir. 2019)). *Davis* held that § 924(c)(3)(B)'s residual clause is unconstitutionally vague. *See Davis*, 139 S. Ct. at 2324-25, 2336.

drug trafficking crimes in Counts 2 and 3, which remain valid predicate offenses under §924(c)(2) even after *Davis*." *Id.*, slip op. at 9.

F. Motion to Certify a Question to the Supreme Court

On August 4, 2021, 14 months after this Court denied Blanc's second successive application, Blanc filed in that same case (No. 20-11701) the current Motion to Certify. Blanc asks this Court to certify a question about the correct application of the "prima facie showing" standard required by 28 U.S.C. § 2244(b)(3)(C) in order to authorize a successive § 2255 motion.

II. DISCUSSION

We deny Blanc's Motion to Certify for several reasons. First, certification of questions pursuant to 28 U.S.C. § 1254(2) rests solely in the discretion of the courts of appeals and cannot be invoked by a party as a matter of right. *See* 28 U.S.C. § 1254.

Second, even construing Blanc's motion as a "suggestion to certify," his request—made more than a year after this Court denied his second successive application—comes too late. Certification is appropriate only when "instructions are desired" by a court of appeals, *see id.* § 1254(2), and it "seeks instruction for the proper decision of a case." *See* Sup. Ct. R. 19(1). Here, however, this Court was already able to make, and already made, a decision on Blanc's application. Even accepting *arguendo* Blanc's argument that we have the authority and discretion to certify a question "at any time," we decline to do so in this particular case. *See Cella v. Brown*, 144 F. 742, 765 (8th Cir. 1906) ("Questions should not be certified after the case has been decided."); *Andrews v. Nat'l Foundry & Pipe Works, Ltd.*, 77 F. 774, 778 (7th Cir. 1897) (stating that certification "is done before we decide, and only upon our own motion"). The phrase "at any time" in the statute indicates that a court of appeals may resort to certification if, at any time during the pendency of a case, it determines that Supreme Court instruction is desired

to properly decide the case. Here, however, we were able to properly decide Blanc's application without Supreme Court instruction. And, given finality concerns, exercise of our certification discretion—especially in a second successive-application case and filed 14 months after that second successive-application case was decided—is not warranted.

Third, "[t]he Supreme Court has discouraged the use of this certification procedure" in § 1254(2). *See In re Hill*, 777 F.3d at 1225. The Supreme Court "has admonished that the certification procedure is proper only in 'rare instances,'" "has accepted certified questions only four times" in the last 65 years and has not accepted any certified questions in 40 years, since *Iran National Airlines Corporation v. Marschalk Company*, 453 U.S. 919, 101 S. Ct. 3154 (1981).[3] *See id.* (quoting *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957)). This case is not one of those "rare circumstances."

Fourth, our Court correctly defines the requisite "prima facie showing" in § 2244(b)(3)(C) the same way as other circuits do. For example, the Seventh Circuit in *Bennett v. United States* interpreted the "prima facie showing" to mean "a sufficient showing of possible merit to warrant a fuller exploration by the district court." 119 F.3d 468, 469 (7th Cir. 1997). This Court, like other circuits, has expressly adopted the Seventh Circuit's standard. *See In re Holladay*, 331 F.3d 1169, 1173-74 (11th Cir. 2003) (holding the requisite showing "as being a sufficient showing of possible merit to warrant a fuller exploration by the district court" (quotation marks omitted)); *see, e.g., Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (same); *Reyes-Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001) (same).

[3] For example, the dissent cites *United States v. Seale*, 577 F.3d 566, 568, 571 (5th Cir. 2009) (en banc), where the en banc Fifth Circuit certified a legal question to the Supreme Court in a two-conviction kidnapping case with a life sentence. Dissent at 11 n.1. The Supreme Court in effect denied certification, stating "[t]he question certified by the United States Court of Appeals for the Fifth Circuit is dismissed." 558 U.S. 985, 130 S. Ct. 12 (2009).

As this Court's Chief Judge has explained, "every other numbered circuit" has adopted this well-established standard. *United States v. St. Hubert*, 918 F.3d 1174, 1186 (11th Cir. 2019) (W. Pryor, J., statement respecting denial of rehearing en banc). This standard "is not blind to the merits" and does not "require[] courts of appeals to close their eyes to the impossibility of relief." *Id.* at 1185-86. Under *Holladay*'s sensible regime, a prisoner cannot discharge his prima facie burden by merely citing a retroactively applicable Supreme Court case like *Davis*. For example, if a prisoner invoked *Davis* but had no § 924(c) conviction, this Court surely would deny him leave. Yet such a denial implicates the claim's "merits," in that it requires consulting the record and analyzing whether *Davis* makes a difference in the case. The same applies for cases where binding precedent establishes that the prisoner's predicate offense qualifies as a crime of violence under the elements clause of § 924(c)(3)(A), or where multiple predicates—including drug trafficking crimes—support a single § 924(c) charge, and some of those predicates are unaffected by *Davis*. In all of these hypotheticals (the last of which describes Blanc's own case), it is crystal clear that the prisoner has failed to "show a reasonable likelihood that he would benefit from the new rule he seeks to invoke." *St. Hubert*, 918 F.3d at 1187 (quotation marks omitted).[4]

[4] The dissent repeats statements from earlier opinions criticizing this Court's approach to successive applications. Dissent at 14-15. The dissent fails to note that in all *pro se* application cases in our Circuit, our Court's Staff Attorney's Office prepares legal memoranda addressing the issues and federal public defenders often file memoranda supporting applications. *St. Hubert*, 918 F.3d at 1179-80 (Tjoflat, J, concurring in the denial of rehearing en banc). Blanc's current Motion to Certify is filed by the Federal Public Defender for the Southern District of Florida.

Contrary to the dissent, applicants are not limited to 100 words. Rather, our Court's instructions to the application form provided to *pro se* applicants plainly state that "[s]eparate exhibits and memoranda of legal authorities may be attached to the form," and that "[t]o raise any additional claims, use the "Additional Claim" pages attached at the end of this application, which may be copied as necessary." There is no page limit, much less a word limit, to such *pro se* successive applications.

Fifth, even Blanc does not actually challenge the articulation of the governing standard which multiple circuits follow. Rather, he challenges the application of § 2244(b)(3)(C)'s prima facie showing standard to the particular facts of his case. That is not a question appropriately certified to the Supreme Court. *See* Sup. Ct. R. 19(1) ("Only questions or propositions of law may be certified, and they shall be stated separately and with precision."); *Pflueger v. Sherman*, 293 U.S. 55, 57-58, 55 S. Ct. 10, 11 (1934) ("The certificate fails to conform to the requirement that questions submitted must be questions of law and not mixed questions of law and fact, and not such as involve or imply conclusions or judgment by the Court upon the effect of facts adduced in the cause, and must be distinct and definite."); *United States v. Mayer*, 235 U.S. 55, 66, 35 S. Ct. 16, 18 (1914) (explaining that a "definite and clean-cut question of law" is properly certified, but a mixed question of law and fact or a question "of objectionable generality, which, instead of presenting distinct propositions of law, cover unstated matters 'lurking in the record,'" is not). To the extent Blanc argues that circuits have diverged in their application of *Bennett*, that too involves a mixed question of law and fact not appropriately certified.

For all these reasons, we deny Blanc's Motion to Certify.[5]

[5] As the government also points out, numerous recent certiorari petitions have flagged the prima facie showing issue for the Supreme Court's attention, albeit in a slightly different posture. Blanc has not identified an issue that, absent certification, will evade Supreme Court review. On the contrary, parties have offered the Supreme Court several chances to weigh in on the prima facie question, and it has declined to do so. Even when this Court authorizes an applicant to file a successive application in the district court, the fact remains that, once the successive § 2255 motion is in the district court, that court still has to rule on whether the prisoner has shown that his claims satisfied the requirements of § 2255(h). And that district court ruling is subject to direct appeal and a later petition for a writ of certiorari. Thus, an authorized successive § 2255 motion would present an opportunity for the Supreme Court at least to weigh in on the prima facie standard for successive applications.

MARTIN, Circuit Judge, dissenting:

A court of appeals may authorize a second or successive 28 U.S.C. § 2255 petition "only if it determines that the [petition] makes a prima facie showing" that it contains, as relevant here, "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See 28 U.S.C. §§ 2244(b)(3)(C), 2255(h)(2). This is the "gatekeeping" function performed by appeals court judges governing successive review of convictions. See Felker v. Turpin, 518 U.S. 651, 657, 116 S. Ct. 2333, 2337 (1996) (quotation marks omitted). Kenny Blanc, a federal prisoner, asks us to certify a question to the United States Supreme Court about the proper standard to be applied for determining whether a prima-facie case has been made at the gatekeeping stage. For the reasons discussed here, I would grant Mr. Blanc's motion to certify this question to the Supreme Court.

I

Mr. Blanc was convicted and sentenced under 18 U.S.C. § 924(c), which prohibits the possession of a firearm in furtherance of a crime of violence or drug trafficking crime. He later asked our Court for leave to file a second or successive § 2255 petition. Mr. Blanc said his § 924(c) conviction was unlawful under the Supreme Court's decision in United States v. Davis, 588 U.S. __, 139 S. Ct. 2319 (2019). Mr. Blanc argued that, under Davis, conspiracy to commit Hobbs Act robbery could not serve as a predicate offense for his § 924(c) conviction.

My colleagues on this panel denied Mr. Blanc leave to file a second or successive § 2255 petition, saying he could not "make a prima facie case that his § 924(c) conviction and sentence is unconstitutional under Davis." My colleagues recognized that "the government stated at Blanc's change-of-plea hearing that the § 924(c) charge . . . related only to the Hobbs Act conspiracy charge." Nevertheless, the majority said the record otherwise showed Mr. Blanc's

§ 924(c) conviction was predicated on drug-trafficking charges, which remained valid predicate offenses.

I dissented from the majority's denial of Mr. Blanc's motion to file a second or successive petition. Given the "conflicting descriptions of his guilty plea in the record," I observed it was "not clear-cut as to whether Mr. Blanc's 18 U.S.C. § 924(c) conviction was predicated solely on conspiracy to commit Hobbs Act robbery, or whether his conviction was also supported by drug trafficking predicates." Thus at that "preliminary stage," which requires the petitioner to make only "a prima facie showing," I would have allowed Mr. Blanc to bring his second or successive § 2255 petition and "let the District Court consider his Davis claim in the first instance." See 28 U.S.C. § 2244(b)(3)(C).

II

Mr. Blanc now asks our panel to certify a question to the Supreme Court. See 28 U.S.C. § 1254(2); Sup. Ct. R. 19. According to Mr. Blanc, when determining whether to authorize a second or successive § 2255 petition, this Court "routinely denies authorization" by deciding the petition on the merits. In contrast, "other circuits grant authorization without regard to the merits." Mr. Blanc thus says "the circuits have diverged in their prima facie review" at the gatekeeping stage. Although certiorari review by the Supreme Court is the ordinary method of resolving a conflict among the courts of appeals, Mr. Blanc points out that the legal question at issue here is "uniquely immune from certiorari review." That's because once a court of appeals denies a petitioner leave to file a second or successive § 2255 petition, that decision "shall not be the subject . . . for a writ of certiorari." See 28 U.S.C. § 2244(b)(3)(E). Thus, Mr. Blanc says certification by this Court to the Supreme Court on the proper prima-facie standard at the

gatekeeping stage is "not only warranted but essential," because he has no other option available to him to seek correction of this Circuit's erroneous standard.

I would grant Mr. Blanc's motion to certify this question to the Supreme Court. I've taken other opportunities to express my concerns about this issue. See, e.g., United States v. St. Hubert, 918 F.3d 1174, 1199–1210 (11th Cir. 2019) (Martin, J., dissenting from the denial of rehearing en banc); In re Williams, 898 F.3d 1098, 1105–10 (11th Cir. 2018) (Martin, J., specially concurring). I briefly recount those concerns here to explain why I believe this question warrants certification to the Supreme Court.[1]

[1] The majority suggests there are three procedural barriers to granting Mr. Blanc's motion. This is wrong, wrong, and wrong.

First, the majority says certification to the Supreme Court "rests solely in the discretion of the courts of appeals and cannot be invoked by a party as a matter of right." Maj. Op. at 5. But Mr. Blanc does not say we must certify the question. Instead, he moves for certification because he thinks we "should certify" the question—thus leaving it to our discretion. I agree with the "better view" that "counsel may move for or suggest certification." United States v. Seale, 577 F.3d 566, 571 (5th Cir. 2009) (en banc) (per curiam) (quotation marks omitted).

Second, the majority says Mr. Blanc's motion to certify "comes too late" because this Court already issued a decision on his motion to file a second or successive petition. Maj. Op. at 5. However, the certification statute says certification may occur "at any time." 28 U.S.C. § 1254(2). While the majority acknowledges that clear statutory language, it flouts the statute by limiting certification to "the pendency of a case." Maj. Op. at 5. The fact that courts of appeals can sua sponte rehear this type of case, see St. Hubert, 918 F.3d at 1181 (Tjoflat, J., concurring in the denial of rehearing en banc), and the Supreme Court has answered a certified question pending rehearing in the court of appeals, Moody v. Albemarle Paper Co., 417 U.S. 622, 622–24, 94 S. Ct. 2513, 2513–14 (1974) (per curiam), demonstrates that an initial panel decision does not bar subsequent certification. To the contrary, certification remains an option to allow the Court to "seek[] instruction for the proper decision of a case." Sup. Ct. R. 19(1).

Third, the majority says Mr. Blanc "challenges the application of [the] prima facie showing standard to the particular facts of his case," which it says "is not a question appropriately certified to the Supreme Court." Maj. Op. at 8. This misstates Mr. Blanc's position. Throughout his motion, Mr. Blanc addresses the "prima facie standard" more broadly. Indeed, Mr. Blanc expressly asks this Court to certify a "question of law" regarding the prima-facie standard generally, not as applied to his case.

First, I would certify this question to the Supreme Court so that the Court can resolve a "split among circuits about how to perform the gatekeeping function." Williams, 898 F.3d at 1109 (Martin, J., specially concurring). Compare, e.g., In re Hubbard, 825 F.3d 225, 229, 233 (4th Cir. 2016) (stating a petitioner "only needs to show that he presents a claim that relies on a qualifying new rule of constitutional law," as "merits issue[s]" are "for the district court to [determine] following a more detailed briefing" (quotation marks omitted and alteration adopted)), with, e.g., In re Gordon, 827 F.3d 1289, 1292 (11th Cir. 2016) (per curiam) ("[I]t is not enough for a federal prisoner to merely cite [a new constitutional rule] as the basis for his claims; he also must make a prima facie showing that he . . . falls within the scope of the new substantive rule[.]").[2] If Mr. Blanc's case was before another circuit court, he would have been allowed to file a second or successive § 2255 petition because, based on Davis, his claim "relies on a qualifying new rule of constitutional law." Hubbard, 825 F.3d at 229 (quotation marks omitted and alteration adopted).

Second, I would certify this question to the Supreme Court because the existing circuit split cannot be resolved on certiorari review. When a court of appeals denies leave to file a second or successive § 2255 petition, the decision "shall not be appealable and shall not be the subject . . . for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E); see Felker, 518 U.S. at 658–59, 116 S. Ct. at 2337 ("Section 2244(b)(3)(E) prevents this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or by writ of certiorari."). "In light of this limitation," as well as the circuit split, this issue is "the proper subject for certifying a question to the Supreme Court about the correct application of the prima facie showing

[2] The majority downplays this circuit split by noting this Court has facially adopted the same prima-facie standard adopted by other courts of appeals. Maj. Op. at 6–7. However, as Hubbard and Gordon reveal, the circuits are split over how to employ that standard.

standard." Williams, 898 F.3d at 1110 (Martin, J., specially concurring). In Felker, three justices, including one sitting justice, recognized that the Supreme Court retains jurisdiction to review certified questions concerning the gatekeeping stage, including if, as here, "the courts of appeals adopted divergent interpretations of the gatekeeper standard." See Felker, 518 U.S. at 667, 116 S. Ct. at 2341–42 (Souter, J., concurring). The government has likewise acknowledged that the statutory bar on certiorari review "does not mean that federal postconviction litigants are altogether without recourse to [the Supreme] Court" because "[c]ourts of appeals in Section 2255 proceedings might under exceptional circumstances certify questions to [the Supreme] Court." Brief for the United States in Opposition at 17, Webster v. United States, No. 10-150 (Oct. 29, 2010).

The majority's attempts to assert that this issue will not, "absent certification, . . . evade Supreme Court review" are unavailing. Maj. Op. at 8 n.5. The majority relies on the government's position that "numerous recent certiorari petitions have flagged the prima facie showing issue for the Supreme Court's attention." Id. But by the government's own admission, those petitions for certiorari concerned the propriety of precedential orders on motions for leave to file a second or successive habeas petition. They did not and could not directly present the issue we could certify in this case. The majority also suggests that the Supreme Court could "weigh in on" the prima-facie standard used by a court of appeals on certiorari review of a second or successive habeas petition. Id. However, once a court of appeals authorizes a second or successive habeas petition, any review of the petition in the Supreme Court would concern the merits of that petition, not the standard used by the court of appeals to allow that petition.

Finally, I would certify this question to the Supreme Court because the otherwise unreviewable circuit split raises two important issues. First, this Court's practice of reaching the

merits at the gatekeeping stage is prone to error and can create bad law. The orders issued by this Court at the gatekeeping stage are "typically decided on an emergency thirty-day basis, with under 100 words of argument (often written by a pro se prisoner), without any adversarial testing whatsoever, and without any available avenue of review." Williams, 898 F.3d at 1101 (Wilson, J., specially concurring) (emphasis added)[3]; see id. at 1101–04. This approach is "fraught with hazard and subject to error." In re Leonard, 655 F. App'x 765, 778–79 (11th Cir. 2016) (per curiam) (unpublished) (Martin, J., concurring). Despite this, our Court has held that "law established in published three-judge orders" issued at the gatekeeping stage is "binding precedent on all subsequent panels of this Court." United States v. St. Hubert, 909 F.3d 335, 346 (11th Cir. 2018), overruled in part on other grounds by Davis, 139 S. Ct. 2319. In short, when this Court reaches the merits at the gatekeeping stage, the Court establishes binding precedent without the procedures normally followed in deciding cases. One sitting justice has questioned whether this practice is consistent with due process. St. Hubert v. United States, 140 S. Ct. 1727, 1728 (2020) (Sotomayor, J., respecting the denial of certiorari). Justice Sotomayor noted that our Court does not ordinarily grant oral argument or receive individualized briefs at the gatekeeping stage. Id. at 1729. "Making matters worse," our Court "often decides the merits of the habeas claims" at the gatekeeping stage, even though that's not "the statutory question." Id. As such, "the Eleventh Circuit is significantly out of step with other courts." Id.

[3] The majority seems to think I've forgotten that motions for second or successive habeas petitions can be longer than 100 words and that sometimes public defenders file memoranda supporting such motions. Maj. Op. at 7 n.4. I haven't. My point here is that such motions are "typically" decided with less than 100 words of argument and without the assistance of a lawyer. See Williams, 898 F.3d at 1101 (Wilson, J., specially concurring). I emphasize the word "typically" so that the reader does not miss what escapes the majority.

Second, when this Court "unnecessarily and prematurely" reaches the merits at the gatekeeping stage, the result is that "prisoners sentenced in Alabama, Florida and Georgia may be serving illegal sentences for which they have no remedy." St. Hubert, 918 F.3d at 1210 (Martin, J., dissenting from the denial of rehearing en banc). Consider Mr. Blanc's case. Had this panel authorized his second or successive § 2255 petition, the District Court would have considered his petition on the merits. If the District Court denied relief, he could have appealed to this Court and ultimately petitioned for certiorari. That's three possible levels of review on the merits of Mr. Blanc's petition, which is appropriate for someone who may be serving an unlawful sentence. But because the majority decided the merits at the gatekeeping stage, Mr. Blanc's petition was limited to only one level of review that was insulated from any further review by the Supreme Court or en banc scrutiny.

III

I recognize the "certification process has all but disappeared in recent decades." United States v. Seale, 558 U.S. 985, 985, 130 S. Ct. 12, 13 (2009) (Stevens, J., respecting the dismissal of the certified question). But it remains necessary to "serve[] a valuable, if limited, function." Id. Certification of this question would provide for review of an otherwise unreviewable circuit split affecting the liberty of scores of prisoners. As such, and contrary to the majority, I firmly believe this is one of the "rare instances" where certification is proper. See Wisniewski v. United States, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957) (per curiam). I respectfully dissent.