Appendix

APPX. A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-14046-B

IN RE: DWIGHT CARTER, SR.,

Petitioner.

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

Before: JORDAN, ROSENBAUM, and BRASHER, Circuit Judges.

BY THE PANEL:

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

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

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 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 raised in a successive application that was presented in an initial § 2255 motion or a prior application to file a second or successive § 2255 motion. *See* 28 U.S.C. § 2244(b)(1); *see also In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016) (interpreting § 2244(b)(1) to bar claims previously raised in a prior unsuccessful federal successive application); *Randolph v. United States*, 904 F.3d 962, 964 (11th Cir. 2018). "[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. This requirement in § 2244(b)(1)—to dismiss a claim that was raised in a prior application—is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016). 28 U.S.C. § 2244(b)(3)(E) provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." We have concluded that § 2244(b)(3)(E) prohibits an applicant from filing "what amounts to a motion for reconsideration under the guise of a separate and purportedly 'new' application when the new application is the same as the old one." *Baptiste*, 828 F.3d at 1340.

We have held that "law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255

motions is binding precedent on *all* subsequent panels of this Court." *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *overruled in part on other grounds by United States v. Davis*, 139 S. Ct. 2319 (2019) and *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). And, under this Court's prior panel precedent rule, we are bound to follow prior binding precedent until it is overruled by the Supreme Court or this Court sitting *en banc*. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016).

Carter is a federal prisoner serving a life-plus 105-year total sentence for Hobbs Act robbery, conspiracy to commit Hobbs Act robbery, possession of a firearm in connection with a crime of violence resulting in murder, conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, and possession of a firearm in furtherance of a drug-trafficking crime.

As a brief factual background, a federal grand jury originally charged Carter in a superseding indictment with conspiring to commit Hobbs Act robbery, in violation of in violation of 18 U.S.C. § 1951(a) (Count l); substantive Hobbs Act robbery, in violation of 18 U.S.C. §§ 195l(a) and 2 (Count 2); and carrying and using a firearm during a crime of violence, "as set forth in Count 1 and Count 2," in violation of 18 U.S.C. § 924(c)(l)(A) (Count 3). Count 3 further charged that, "in the course of this violation, [the defendants] caused the death of a person, Carlos Alvarado, through the use of a firearm, which killing was a murder, as defined in 18 U.S.C. § 1111." Carter also was charged with three other drug and firearm charges in Counts 4, 5, and 6, which are not relevant to the instant application.

Carter was charged with a codefendant, Emmanuel Maxime, on each of the three relevant counts in the superseding indictment.

Carter and Maxime proceeded to trial separately. At Carter's trial, in regard to Count 3, the district court instructed the jury that it could find Carter guilty if it found that he committed the crime of violence charged in Count 1 or Count 2, and that he carried a firearm during the commission of that offense. The jury returned a guilty verdict on each count. Notably, the jury found Carter guilty of Count 3, and specifically found that, during the course of violating Count 3, he caused the death of Carlos Alvarado through the use of a firearm, and that the killing was murder.

The district court later sentenced Carter to serve the statutory maximum terms for all 6 counts, with each sentence set to run consecutively to each other, resulting in an aggregate prison term of life plus 105 years: 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. The court entered a judgment to this effect in 2010. Carter appealed, but we affirmed his convictions. *See United States v. Carter*, 484 F. App'x 449 (11th Cir. 2012) (unpublished).

In 2014, Carter, proceeding *pro se*, filed his original § 2255 motion, arguing that he received ineffective assistance of counsel in various respects, which the district court denied on the merits. Carter appealed, but a single judge of this Court declined to issue a certificate of appealability ("COA").

In 2016, Carter, proceeding *pro se*, twice filed applications for leave to file second or successive § 2255 motions with this Court, both of which were denied.

In June 2019, Carter filed a third application for leave to file a second or successive § 2255 motion, arguing that his § 924(c) conviction was unlawful in light of the Supreme Court's

decision in *Davis*, which invalidated § 924(c)(3)(B)'s residual clause. We denied Carter's third application as well.

Later, a different panel of this Court granted Carter's codefendant Maxime's application on the grounds that Maxime had made a *prima facie* showing that his § 924(c) conviction may have been unconstitutional under *Davis*.

Thereafter, in January 2020, Carter filed a fourth successive application which sought to raise two claims in a second or successive § 2255 motion. In his first claim, he argued that his conviction and sentence for the § 924(c) charge (Count 3) were unlawful, given this Court's ruling on Maxime's application. In his second claim, Carter again asserted that his § 924(c) conviction in Count 3 was unconstitutional under *Davis*.

A panel of this Court later dismissed Carter's fourth successive application in part and dismissed it in part. The panel denied Carter's first claim, noting that this Court's ruling on Maxime's application did not qualify has a new rule of constitutional law under 28 U.S.C. § 2255(h)(2) and did not rely on newly discovered evidence. Next, it dismissed Carter's second, *Davis*-based, claim because it raised the same claim that he had raised in his third application.

In his instant application, his fifth, Carter states that he wishes to bring one claim in a second or successive § 2255 motion—that his "conviction and sentence on (Count 3) [are] unlawful because [they are] partially predicated on conspiracy to commit Hobbs Act Robbery which is not a crime of violence under § 924(c) and [because] it was obtained thr[ough] a general verdict." Carter concedes that he does not rely on newly discovered evidence, but he asserts, instead, that he relies on a new rule of constitutional law established in *Davis*. He also argues that *In re Baptiste* does not bar his current application, because this Court's decision on his first

Davis claim was "clearly erroneous and would work manifest injustice if not corrected." He also explains that *Baptiste* did not limit this Court's power to "*sua sponte* rehear" its prior orders that were erroneously denied. Second, he argues the law-of-the-case doctrine does not bar his instant application because the prior decision was clearly erroneous. He also argues that he is "similarly situated" to his codefendant Maxime, as well as the defendants in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), and *In re Cannon*, 931 F.3d 1236 (11th Cir. 2019), who were permitted to file successive § 2255 petitions.

Finally, Carter argues that if he is not allowed to file a successive § 2255 petition based on Davis, his Equal Protection rights under the Fourteenth Amendment will be violated. In support he cites *Teague v. Lane*, 489 U.S. 288 (1989). Because he presented the same evidence as Maxime in support of his application to file a successive § 2255, he argues, he likewise established a *prima facie* case of the existence of the grounds under 28 U.S.C. § 2255(h) and he should be given the chance to file a successive application under § 2255 motion.

The former Fifth Circuit held, in a multi-defendant direct appeal, that while "[o]rdinarily [it] would limit each defendant's appeal to the issues raised in his brief . . . [it could] suspend the Federal Rules of Appellate Procedure "for good cause shown[.]" *United States v. Gray*, 626 F.2d 494, 497 (5th Cir. 1980).[1] "Believing it anomalous to reverse some convictions and not others when all defendants suffer from the same error, [we may] consider[s] the arguments [of co-defendants] to be adopted [on appeal] . . . . " *Id.*; *see also United States v. Stowers*, 32 F.4th 1054, 1062 (11th Cir. 2022) (same). However, we have never applied this rule from *Gray* in the context

[1] Decisions issued by the former Fifth Circuit are binding upon this Court. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1210 (11th Cir. 1981) (*en banc*).

of two separate successive applications filed by codefendants which were decided by different panels previously.

While Carter claims that he wishes to bring one claim in a second or successive application, his application presents various arguments, some of which he has raised before.

First, to the extent Carter is relying on *Davis* as a new rule of constitutional law which made retroactive on collateral review which entitles him to file a second or successive § 2255 motion, he has made that claim twice before. Accordingly, this claim must be dismissed. 28 U.S.C. § 2244(b)(1); *see also Baptiste*, 828 F.3d at 1339. And, despite Carter's arguments, we are bound to apply *Baptiste* unless it is overruled by this Court sitting *en banc* or by the Supreme Court. *St. Hubert*, 909 F.3d at 346, *overruled in part on other grounds by Davis*, 139 S. Ct. 2319 and *Taylor*, 142 S. Ct. at 2020 (holding that law established in published three-judge orders is binding precedent on subsequent panels of this Court); *White*, 837 F.3d at 1228 (noting that this Court is bound to follow prior binding precedent until it is overruled by the Supreme Court or this Court sitting *en banc*).

Second, to the extent Carter is relying on this Court's ruling on his codefendant Maxime's case to justify granting him relief, he made an identical argument in his fourth successive application. Thus, any claim in this respect is also barred and must be dismissed. 28 U.S.C. § 2244(b)(1); *see also Baptiste*, 828 F.3d at 1339.

Third, to the extent that Carter's application, by raising an Equal Protection argument and citing, among other things, *Teague*, presents a new and different claim than he previously has presented in his applications, we must deny it for failing to satisfy the statutory criteria.

Carter concedes that his application does not rely on newly discovered evidence, and his application does not present any in any event. Moreover, the cases Carter cites in support of his putative Equal Protection claim, including *Teague*, are either not new, as they were decided before he filed his initial § 2255 petition in 2014 or are not decisions of the Supreme Court. *See Teague*, 489 U.S. at 288 (decided before Carter's initial petition); *Gomez*, 830 F.3d at 1225; *Cannon*, 931 F.3d at 1236 (decisions of this Court). Accordingly, these cases cannot establish "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2); *see also In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000) ("For a new rule to be retroactive, the Supreme Court must make it retroactive to cases on collateral review."). And to the extent Carter's claim implicates the former Fifth Circuit's decision in *Gray*, 626 F.2d at 497—in that he argues that he should receive the same benefit his codefendant Maxime received—we have never applied that rule in the successive application context.

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 IN PART, DISMISSED IN PART.[2]

[2] We also DENY Carter's motions: (1) that we *sua sponte* reopen and reconsider the denial of his prior successive application in 11th Cir. Case No. 19-12456; and (2) that we certify questions of federal law to the U.S. Supreme Court under 28 U.S.C. § 1254(2).

APPX. B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12456-B

IN RE: DWIGHT CARTER, SR.,

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: MARCUS, MARTIN, and HULL, Circuit Judges.

BY THE PANEL:

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

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

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 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

In 2010, a federal grand jury charged Carter in a six-count superseding indictment with, as relevant here: (1) conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count One); (2) substantive Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Count Two); and (3) carrying and using a firearm during and in relation to a crime of violence, "as set forth in Count 1 and Count 2," and "in the course of this violation caus[ing] the death of a person, Carlos Alvarado, through the use of a firearm, which killing was a murder as defined in Title 18 United States Code Section 1111," all in violation of 18 U.S.C. §§ 924(c)(1)(A), (j)(1), and 2 (Count Three).[1]

At trial, in regard to Count Three, the district court instructed the jury that, to find Carter guilty of violating § 924(c), they had to find (1) "that [Carter] committed the crime of violence which is charged in Count I or Count II of the indictment," and (2) "that during the commission of that offense, [Carter] knowingly carried or used a firearm in relation to that crime of violence."

[1]The superseding indictment also charged Carter with conspiracy to possess with intent to distribute cocaine and cocaine base (Count Four), possession with intent to distribute cocaine and cocaine base (Count Five), and possessing a firearm in furtherance of a drug trafficking crime (Count Six). None of these offenses are at issue in the present application.

The district court further instructed that, if the jury found Carter guilty of Count Three, they would be "further required to unanimously determine if [Carter], during the course of this violation, violated section J of 924 by causing the death of a person through the use of the firearm and if the killing was a murder as defined in 18 USC Section 1111."

The jury found Carter guilty as charged on all six counts of the superseding indictment. As to Count Three, the verdict form contained a special instruction directing the jury that, if they found Carter guilty of Count Three, they must determine whether Carter "caused the death of Carlos Alvarado through the use of a firearm and whether the killing was murder," and providing a space for the jury to answer "yes" or "no" "as to whether murder resulted from the Count 3 violation of the law." In response to this special instruction, the jury circled and checked the answer reading: "YES, murder did result."

The district court sentenced Carter to a total term of life imprisonment plus 105 years, consisting of consecutive statutory maximum sentences on all six counts. Specifically, the district court sentenced Carter to: (1) consecutive 20-year sentences on Counts One, Two, Four, and Five; (2) a consecutive life sentence on Count Three; and (3) a consecutive 25-year sentence on Count Six. Carter appealed, and in 2012 this Court affirmed his convictions and sentences. *See United States v. Carter*, 484 F. App'x 449, 452, 463 (11th Cir. 2012), *cert. denied* 568 U.S. 1149 (2013).

In 2014, Carter filed his original 28 U.S.C. § 2255 motion, raising nine claims of ineffective assistance of trial and appellate counsel. In 2015, the district court denied Carter's original § 2255 motion on the merits, and this Court denied him a certificate of appealability. In May 2016, Carter filed his first application for leave to file a successive § 2255 motion in this Court, arguing that his § 924(c) firearm conviction in Count Three was no longer valid in light of

Johnson v. United States, 135 S. Ct. 2551 (2015). This Court denied Carter's motion as premature because his petition for a writ of *certiorari* as to the denial of his original § 2255 motion was still pending in the Supreme Court.

In December 2016, Carter filed a second application for leave to file a successive § 2255 motion in this Court, again arguing that his § 924(c) conviction in Count Three was invalid in light of *Johnson*. This Court denied Carter's December 2016 application, concluding that even if *Johnson*'s holding invalidating the Armed Career Criminal Act's ("ACCA") residual clause applied to § 924(c)'s residual clause, Carter's § 924(c) conviction in Count Three remained valid because his Hobbs Act robbery conviction in Count Two qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See In re Carter*, No. 16-17761, slip op. at 8-18 (11th Cir. Feb. 13, 2017). Specifically, this Court determined that although Carter's indictment listed both the Hobbs Act conspiracy in Count One and substantive Hobbs Act robbery in Count Two as predicate offenses for the § 924(c) firearm charge in Count Three, the special verdict form made clear that the jury relied on the substantive Hobbs Act robbery in Count Two to convict Carter of the § 923(c) charge in Count Three. *See id.* at 16-18.

II. DISCUSSION

In his present application, Carter seeks to raise one claim in a second or successive § 2255 motion. Carter asserts that his § 924(c) conviction and sentence in Count Three is unlawful in light of the Supreme Court's recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Specifically, Carter argues that his § 924(c) offense in Count Three referenced both conspiracy to commit Hobbs Act robbery in Count One and substantive Hobbs Act robbery in Count Two. Carter contends that, because the trial court did not ask the jury to specify which predicate

conviction it relied upon to convict him, it is impossible to determine which predicate the jury used. Carter maintains that Hobbs Act conspiracy is not a valid predicate crime of violence without § 924(c)(3)(B)'s residual clause, and in light of the jury's "general verdict," it is impossible to conclude that his Hobbs Act conspiracy conviction in Count One did not have a "substantial and injurious effect" on his § 924(c) conviction in Count Three. In support of his claim, Carter cites *Davis*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), *Welch v. United States*, 136 S. Ct. 1257 (2016), and *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016).

In *Davis*, decided on June 24, 2019, the Supreme Court 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 ACCA and § 16(b), is unconstitutionally vague. *Davis*, 588 U.S. at __, 139 S. Ct. at 2336. In doing so, the Supreme Court resolved a circuit split, rejecting the position (advocated for by the government in *Davis* and adopted by this Court and two other federal circuit courts) that § 924(c)(3)(B)'s residual clause could be saved from unconstitutionality if read to encompass a conduct-specific, rather than a categorical, approach. *See id.* at __, __, 139 S. Ct. at 2325 & n.2, 2332-33. The *Davis* Court emphasized that there was no "material difference" between the language or scope of § 924(c)(3)(B) and the residual clauses invalidated in *Johnson* and *Dimaya*, and therefore concluded that § 924(c)(3)(B)'s residual clause must suffer the same fate. *See id.* at __, __, 139 S. Ct. at 2326, 2336.

Recently, in *In re Hammoud*, __ F.3d __, 2019 WL 3296800, at *3-4 (11th Cir. July 23, 2019), this Court held that *Davis* announced a new substantive rule of constitutional law that has been made retroactive by the Supreme Court for purposes of successive motions under § 2255(h)(2). The Court in *Hammoud* reasoned that *Davis*, like *Johnson* before it, announced a

new substantive rule because it narrowed the scope of § 924(c), extended *Johnson* and *Dimaya* to a new statute and context, and "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." *Id.* at *3. The Court further determined that "taken together, the Supreme Court's holdings in *Davis* and *Welch* 'necessarily dictate' that *Davis* has been 'made' retroactive to criminal cases that became final before *Davis* was announced." *Id.* at *4. Thus, under *In re Hammoud*, a federal prisoner who can make a *prima facie* showing that his § 924(c) conviction is unconstitutional under *Davis* because it was based on § 924(c)'s residual clause is entitled to file a second or successive § 2255 motion. *See id.* at *5 (granting movant's application because he made the requisite *prima facie* showing that his conviction may have relied on § 924(c)'s residual clause).

Here, the problem for Carter is that he cannot make the necessary *prima facie* showing that his § 924(c) conviction in Count Three is unconstitutional under *Davis*. This is so because, as we explained in our prior order denying Carter's December 2016 application, the special jury verdict in Carter's case sufficiently establishes that his § 924(c) conviction in Count Three was predicated upon his commission of a qualifying crime of violence under § 924(c)'s elements clause. *See, e.g.*, 28 U.S.C. § 2244(b)(3)(C); *Jordan*, 485 F.3d at 1357-58. Though our February 2017 order explains why the special verdict form precludes Carter's claim, we take the time to recount and expand upon that analysis again below.

In *In re Gomez*, this Court granted an applicant leave to file a second or successive § 2255 motion raising a *Johnson*-based challenge to his § 924(c) conviction where: (1) the § 924(c) count listed four predicate offenses (conspiracy to commit Hobbs Act robbery, attempted Hobbs Act

robbery, and two drug trafficking crimes); (2) our precedents had not yet indicated whether a conspiracy to commit Hobbs Act robbery or an attempted Hobbs Act robbery qualified under the elements clause; and (3) for several reasons, it was unclear which crime or crimes served as the predicate offense for Gomez's conviction under § 924(c). 830 F.3d at 1226-28. The Court concluded that Gomez had made a *prima facie* showing that his § 924(c) conviction might implicate § 924(c)'s residual clause and *Johnson*. *Id.* at 1228.

Unlike *Gomez*, which involved a general jury verdict as to the § 924(c) count, this case involves a special verdict form as to the § 924(c) charge in Count Three on which the jury unanimously agreed that Carter, "through the use of a firearm," murdered the victim of the substantive Hobbs Act robbery charged in Count Two. Carter's contention that his jury returned a "general verdict" is factually baseless. To be sure, the jury's special verdict response does not directly answer the precise question presented here, namely, whether the § 924(c) count related to the Hobbs Act conspiracy in Count One, the substantive Hobbs Act robbery offense in Count Two, or both. Nevertheless, the jury's response to the special verdict instruction makes clear that Carter's § 924(c) offense involved the use of the firearm in the commission of the murder of the Hobbs Act robbery victim. Thus, the special verdict form shows the jury concluded that Carter used the firearm during the substantive Hobbs Act robbery charged in Count Two to kill the victim, and we need not "guess" about whether the jury relied on Count One or Count Two to convict Carter of the § 924(c) charge in Count Three. *See In re Gomez*, 830 F.3d at 1227-28.

This is also especially true since the district court's jury instructions make reference to only one victim and make reference to that victim only in the two relevant counts, Counts Two and Three—requiring the jury to find, in Count Two, whether the defendant "took the property against

the victim's will," and in Count Three, whether, during or in relation to a crime of violence, the defendant used a firearm and "the victim, Carlos Alvarado, was killed." The instructions also provide, in Count Three, that "[i]t's a Federal crime to murder another person while committing the crime of robbery." This language makes clear that the jury must have contemplated, and must have found unanimously, in Count Three that the defendant used a firearm "during and in relation to" the Hobbs Act robbery, and thus, that Count Two is the predicate offense the jury relied upon in Count Three. And because we have already held that substantive Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause, which remains valid even after *Davis*, Carter cannot show that the Supreme Court's invalidation of § 924(c)(3)(B)'s residual clause in *Davis* has any bearing on the constitutionality of his § 924(c) conviction and sentence in Count Three. *See In re Saint Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016).[2]

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 § 2255 motion is hereby DENIED. Because we deny Carter's application, his motion for appointment of counsel is DENIED AS MOOT.

[2]Other circuits have likewise held that substantive Hobbs Act robbery qualifies as a crime of violence under the elements clause in § 924(c)(3)(A). *See United States v. Barrett*, 903 F.3d 166, 174 (2d Cir. 2018); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1064-66 (10th Cir. 2018); *Diaz v. United States*, 863 F.3d 781, 783-84 (8th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847 F.3d 847, 848-49 (7th Cir. 2017).

MARTIN, Circuit Judge, dissenting:

Today's ruling makes three times that this panel has denied Dwight Carter permission to file a second or successive § 2255 petition. See In re Carter, No. 16-17761 (11th Cir. Feb. 13, 2017); In re Carter, No. 16-13115 (11th Cir. June 29, 2016). I have dissented each time and must again. As before, the panel majority relies on its interpretation of the verdict form in Mr. Carter's case. In re Carter, No. 16-17761, slip op. at 18. But the majority opinion's interpretation of the verdict form is, in my view, no more than a "guess about what the jury did." Id., slip op. at 24 (Martin, J., dissenting). And the Supreme Court does not permit judicial guesses to substitute for what a jury must find unanimously. See Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 2155 (2013). I would grant Mr. Carter's application and give him the district court review he has long sought.

Relevant here, Mr. Carter was charged with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). The § 924(c) charge was Count 3 of the indictment. The indictment identified the crimes of violence underlying the § 924(c) charge as the conspiracy and the substantive Hobbs Act robbery. Count 3 also charged Mr. Carter with causing the death of a person in a way that constitutes murder through the use of a firearm in the course of violating § 924(c), in violation of 18 U.S.C.

§ 924(j)(1). A jury convicted Mr. Carter of all counts, and it specifically found that "murder resulted from the Count 3 violation of the law."

When deciding whether a particular crime counts as a crime of violence under § 924(c), we are required to use the categorical approach. See United States v. Davis, 588 U.S. __, 139 S. Ct. 2319, 2327 (2019). To do this, we "disregard how the defendant actually committed his crime." Id. at 2326. Instead, we "may look only to the statutory definitions—i.e., the elements—of a defendant's prior offenses." Descamps v. United States, 570 U.S. 254, 261, 133 S. Ct. 2276, 2284 (2013) (quotation marks omitted). The Supreme Court recently held interpreting § 924(c)'s residual clause by way of the categorical approach violates the constitutional prohibition on vague laws. Davis, 139 S. Ct. at 2336.

This Court has never decided whether conspiracy to commit Hobbs Act robbery counts as a crime of violence under the § 924(c) residual clause or the elements clause. See In re Pinder, 824 F.3d 977, 979 n.1 (11th Cir. 2016). But two of our sister circuits have said conspiracy counts under the now defunct residual clause. United States v. Simms, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc); United States v. Davis, 903 F.3d 483, 485–86 (5th Cir. 2018), aff'd in part and vacated in part on other grounds by 139 S. Ct. at 2336. If this Court adopts the approach of those circuits, Mr. Carter may be entitled to relief. This is because we cannot tell whether his conspiracy conviction or his Hobbs Act robbery conviction

served as the predicate for his § 924(c) conviction. The jury form never required the jury to decide that issue. See In re Gomez, 830 F.3d 1225, 1227 (11th Cir. 2016). As a result, Mr. Carter's conviction may well rest on a law the Supreme Court has ruled unconstitutionally vague.

The majority opinion says Mr. Carter is not entitled to relief because the jury found that a murder resulted from Mr. Carter's violation of Count 3.[1] The majority opinion says this finding means "the jury unanimously agreed that Carter, 'through the use of a firearm,' murdered the Hobbs Act robbery victim." Maj. Op. at 6. But that simply is not what the verdict form says. It says that murder "resulted," not that Mr. Carter did it. And in any event this finding does not preclude relief for the two reasons I pointed out in one of my earlier dissents. In re Carter, No. 16-17761, slip op. at 22–24 (Martin, J., dissenting).

"First, the jury convicted Mr. Carter of the § 924(c) violation before convicting him of the § 922(j) violation in the same count." Id. at 22. Because the § 924(c) violation relied upon multiple counts, it is not clear from the verdict form whether the jury unanimously agreed that it related to any one of the underlying offenses. We may not guess whether the conspiracy conviction or the Hobbs Act robbery conviction served as the predicate, and we must employ the categorical

[1] In my view, this issue goes to the merits of Mr. Carter's § 2255 motion and should be left for the District Court to resolve in the first instance. See United States v. St. Hubert, 918 F.3d 1174, 1206–07 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing en banc).

approach to determine whether Mr. Carter's crime is "within the ambit of 18 U.S.C. § 924(c)." Id. (quotation marks omitted). Davis adds only more doubt to the question of whether conspiracy, one of the possible predicate offenses, comes within § 924(c)'s ambit. For that reason, the predicate offense supporting Mr. Carter's conviction may be one that is not a crime of violence at all.

On top of that, the jury found Mr. Carter "caused" the death of a security guard and that the death was a murder. This does not necessarily mean Mr. Carter committed the murder. "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." Id. at 23. And we are not permitted to review the facts to come to our own decision about that.

I regret that the majority opinion has once again denied Mr. Carter's application at this stage of preliminary review. The statute "restricts us to deciding whether [he] has made out a prima facie case of compliance with the § 2244(b) requirements." Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007). All this requires is "a sufficient showing of possible merit to warrant fuller exploration by the district court." In re Holladay, 331 F.3d 1169, 1173 (11th Cir.

2003) (quotation marks omitted). I believe Mr. Carter has made that showing, so I would allow him to proceed.

APP. C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10066-G

IN RE: DWIGHT CARTER, SR.,

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, JORDAN and HULL, Circuit Judges.

BY THE PANEL:

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

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

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 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).

Carter raises two arguments in this application. First, he claims his conviction under 18 U.S.C. § 924(C)(1)(A) is unconstitutional under *In re Maxime*, No. 19-1426 (11th Cir. Nov. 20, 2019). Second, he argues his conviction is illegal in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

Carter's first claim is without merit because *In re Maxime* does not qualify as a new rule of constitutional law, *see* 28 U.S.C. § 2255(h)(2), and his claim does not otherwise rely on any newly discovered evidence, *id.* § 2255(h)(1). Because Carter has failed to make a *prima facie* showing under either of the grounds set forth in 28 U.S.C. § 2255(h), his first claim is DENIED. Carter's second claim fails because it raises the same claim for relief that Carter brought in his June 2019 application for leave to file a second or successive habeas petition, and we have held that we lack jurisdiction over claims that an inmate has raised in a prior application. *See In re Baptiste*, 828 F.3d 1337, 1339–40 (11th Cir. 2016). Carter's second claim is therefore DISMISSED for lack of jurisdiction.

MARTIN, Circuit Judge, concurring in judgment:

On three prior occasions, we have denied Dwight Carter, Sr., permission to file a second or successive § 2255 petition, and I have dissented each time. See In re Carter, 19-12456 (11th Cir. July 26, 2019); In re Carter, No. 16-17761 (11th Cir. Feb. 13, 2017); In re Carter, No. 16-13115 (11th Cir. June 29, 2016). Today however, I must concur in this judgment denying relief to Mr. Carter, because his claim is identical to one he raised in his failed June 2019 application.[1] Our decision in In re Baptiste, 828 F.3d 1337 (11th Cir. 2016) (per curiam) requires that we dismiss Mr. Carter's petition because he seeks the same relief he was denied in his June 2019 application. See id. at 1339. I write separately, however, to explain why Mr. Carter should have been allowed to present his Davis claim to a district court. I also write separately to again express my concern that this Circuit's precedent in Baptiste wrongly prevents us from correcting this court's orders that erroneously denied Mr. Carter relief.

I.

Mr. Carter was charged with, among other things, conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); substantive

1 I also concur in the panel's determination that Mr. Carter's first claim—that his conviction is invalid in light of *In re Maxime*, No. 19-14246 (11th Cir. Nov. 20, 2019)—must be denied because it does not rely on a new rule of constitutional law.

Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 2); and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3). In addition to the § 924(c) charge, Count 3 also charged that Mr. Carter, while using or carrying a firearm, caused the death of a person in a way that constitutes murder, in violation of § 924(j)(1). The indictment clarified that the § 924(c) offense charged in Count 3 was predicated on both conspiracy to commit Hobbs Act robbery as charged in Count 1 and substantive Hobbs Act Robbery as charged in Count 2.

Although Mr. Carter was found guilty on all counts, the verdict form did not require the jury to decide whether his § 924(c) conviction was predicated on conspiracy to commit Hobbs Act robbery, substantive Hobbs Act robbery, or both. Our court's rule is that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)'s elements clause, see Brown v. United States, 942 F.3d 1069, 1075–76 (11th Cir. 2019) (per curiam), so it may very well be that the jury convicted Mr. Carter of violating § 924(c) based on what is no longer a valid predicate offense. See In re Gomez, 830 F.3d 1225, 1227 (11th Cir. 2016) (per curiam) (granting application where it was unclear from the verdict form which crime was the predicate for the § 924(c) conviction, and at least one such charge

may not have been a valid predicate). On these facts, Mr. Carter has made a prima facie showing that his § 924(c) conviction is unconstitutional in light of Davis.

The panel that rejected Mr. Carter's June 2019 application did not allow his claim to proceed. Carter, No. 19-12456, slip op. at 6-8. It held that substantive Hobbs Act robbery was necessarily a predicate for Count 3 because "the jury concluded that Carter used the firearm during the substantive Hobbs Act robbery charged in Count Tw to kill the victim." Id. at 7. That is not true, of course, because the verdict form only says that Mr. Carter "caused" the murder of the robbery victim, not that he did it. And a jury finding that Mr. Carter caused a murder does not preclude him from obtaining relief for the reasons I have articulated in my previous dissents to our orders denying Mr. Carter's applications. See Carter, No. 19-12456, slip op. at 11–12 (Martin, J., dissenting); Carter, No 16-17761, slip op. at 22–24 (Martin, J., dissenting).

First, the jury convicted Mr. Carter of the § 924(c) violation before it convicted him of the § 922(j) violation in the same count. It is therefore not clear from the verdict form whether the jury based its § 924(c) conviction on the fact that Mr. Carter caused the death of the robbery victim, as charged under § 922(j). Second, the fact that Mr. Carter "caused" the death of a security guard, and that death was a murder, does not mean Mr. Carter committed the murder. "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." Carter, No. 16-17761, slip op. at 23 (Martin, J., dissenting).

II.

Despite this, Mr. Carter's claim is barred by Baptiste, which 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. 828 F.3d at 1339. In light of Baptiste, I must concur in the judgment. And I must do so despite 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). My colleagues have articulated other problems with our analysis in Baptiste. See In re Jones, 830 F.3d 1295, 1297 (11th Cir. 2016) (Rosenbaum and Jill Pryor, J.J., concurring).

Today's panel opinion is an example of how Baptiste blocks relief to prisoners who ask us to take a second look at their case after we got it wrong the first time. It requires, for instance, that we dismiss Mr. Carter's application even though two of the three judges on this panel believe Carter should be allowed to proceed with a second or successive habeas petition raising his claim under Davis. See Concurring Op. of Jordan, J., at 1. Mr. Carter's case demonstrates how the rule in Baptiste stands in the way of enhanced justice. Our denial of relief to Mr. Carter comes only two months after a separate three-judge panel granted a second

or successive petition brought by Mr. Carter's coconspirator, Emmanuel Maxime, based on the same claim as Mr. Carter asserts here. See In re Maxime, No. 19-14246, slip op. at 2, 5–6 (11th Cir. Nov. 20, 2019). Mr. Maxime's application raised precisely the same Davis claim at issue here, on materially indistinguishable facts. Id. This means that this Court has issued diametrically opposing orders on identical claims concerning precisely the same factual circumstances. It also means that, as of today, five judges of this court agree that the Davis claim Mr. Carter raises in his application is one that should entitle him to file a second or successive § 2255 petition. Nonetheless, our decision in Baptiste will produce the anomalous result that Mr. Carter is barred from having his petition heard in the District Court.

It is with great reluctance that I concur in the judgment.

JORDAN, Circuit Judge, concurring in the judgment.

Had I been on the panel reviewing his prior application, I would have voted to allow Mr. Carter to file a second or successive motion to vacate as to his conviction under 18 U.S.C. § 924(c). *See In re Carter*, No. 19-12456, at 9-13 (July 26, 2019) (Martin, J., dissenting). Given all that has transpired, however, I reluctantly agree that Mr. Carter's current application should be denied.

HULL, Circuit Judge, concurring in the judgment:

Given this is Carter's fourth application to file a successive § 2255 motion, it is helpful to set forth the procedural background and more fully why this Court properly denies Carter's instant fourth application.

I. BACKGROUND

As a brief factual background, a superseding six-count indictment charged Carter with conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); substantive Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 2); and carrying and using a firearm during a crime of violence, "as set forth in Count 1 and Count 2," in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3). Count 3 further charged that, "in the course of this violation, [Carter] caused the death of a person, Carlos Alvarado, through the use of a firearm, which killing was a murder, as defined in 18 U.S.C. § 1111." The charges arose out of the robbery and murder of a Dunbar armored vehicle security guard, Carlos Alvarado, at the Dadeland Mall. Carter also was charged with three additional drug and firearm charges, which are not relevant to the current application.

At trial, in regard to Count 3, the trial court instructed the jury that it could find Carter guilty if it determined that he committed the crime of violence charged in Count 1 or Count 2, and that Carter carried a firearm during the commission of that offense. To that extent, the jury returned a guilty verdict on each count. However, the jury was asked a special verdict question as to Count 3 that 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_____

As shown, the jury determined that during the course of committing the offense in Count 3, Carter caused the death of Carlos Alvarado through the use of a firearm. Carlos Alvarado was the victim of both the substantive Hobbs Act robbery in Count 2 and the conspiracy to commit Hobbs Act robbery in Count 1. The district court sentenced Carter to: (1) consecutive 20-year sentences on Counts 1, 2, 4, and 5; (2) a consecutive life sentence on Count 3; and (3) a consecutive 25-year sentence on Count 6.

Carter appealed, and in 2012 this Court affirmed his convictions and sentences. *See United States v. Carter*, 484 F. App'x 449, 452 (11th Cir. 2012), *cert. denied*, 568 U.S. 1149 (2013). This Court summarized how Carter committed both the substantive robbery and the murder, as follows:

> Carlos Alvarado was employed in Miami-Dade County, Florida, as a security guard stationed aboard a Dunbar armored truck transporting cash collections made from various retail establishments. . . . .
>
> . . . .
>
> As Carlos Alvarado approached the exit of The Express after making his collections, Carter and Emmanuel Maxime rushed into the store with firearms in their hands, yelling at Alvarado to drop his bag and get on the ground. Instead, Alvarado reached for his holstered weapon and Carter responded by shooting him at least eight or nine times. Four of the shots found their mark, the last three having been fired after Alvarado had fallen to the floor. Carter then grabbed Alvarado's Dunbar bag and he and Maxime fled the scene making a successful getaway. An hour later, Carlos Alvarado was pronounced dead at the hospital. .

Id. at 452-53 (emphasis added). The trial evidence included several eyewitnesses' testimony, Carter's own videotaped confession to being the shooter, and store surveillance camera video

evidence.[1] *Id.*

II. PRIOR SUCCESSIVE APPLICATIONS

In 2014, Carter filed his original § 2255 motion, raising nine claims of ineffective assistance of trial and appellate counsel. In 2015, the district court denied Carter's original § 2255 motion on the merits, and this Court denied him a certificate of appealability. In May 2016, Carter filed his first application for leave to file a successive § 2255 motion in this Court, arguing that his § 924(c) firearm conviction in Count 3 was no longer valid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court denied Carter's motion as premature because his petition for a writ of certiorari as to the denial of his original § 2255 motion was still pending in the Supreme Court.

In December 2016, Carter filed a second application for leave to file a successive § 2255 motion in this Court, again arguing that his § 924(c) conviction in Count 3 was invalid in light of *Johnson*. This Court denied Carter's December 2016 application, concluding that even if *Johnson*'s holding invalidating the Armed Career Criminal Act's ("ACCA") residual clause applied to § 924(c)'s residual clause, Carter's § 924(c) conviction in Count 3 remained valid

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[1] One concurring colleague makes this argument: "the fact that Mr. Carter 'caused' the death of a security guard, and that death was a murder, does not mean Mr. Carter committed the murder. '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.'" *See supra* Martin, J. concurring at 5-6.

Respectfully, the question is not which crime—Hobbs Act conspiracy or Hobbs Act robbery—caused the killing. Rather, Carter, as the shooter, caused the killing "through the use of a firearm," in violation of §924(c) and (j), and the § 924(c) question is whether Carter's use of the firearm was "during and in relation to a crime of violence" as set forth in Counts 1 and 2. The only evidence the jury had was that Carter used the firearm during the actual Hobbs Act robbery itself and it is not remotely possible that the jury found Carter used it only during the conspiracy.

because his Hobbs Act robbery conviction in Count 2 qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See In re Carter*, No. 16-17761, slip op. at 8018 (11th Cir. Feb. 13, 2017). Specifically, this Court determined that although Carter's indictment listed both the Hobbs Act conspiracy in Count 1 and substantive Hobbs Act robbery in Count 2 as predicate offenses for the § 924(c) firearm charge in Count 3, the special verdict form made clear that the jury relied on the substantive Hobbs Act robbery in Count 2 to convict Carter of the § 924(c) charge in Count 3. *See id.* at 16-18.

III. DENIAL OF CARTER'S JUNE 2019 *DAVIS*-BASED SUCCESSIVE APPLICATION

In June 2019, Carter filed another application for leave to file a second or successive § 2255 motion, arguing that his § 924(c) conviction was unlawful in light of the U.S. Supreme Court's invalidation of § 924(c)(3)(B)'s residual clause in *United States v. Davis*, 139 S. Ct. 2319 (2019). He argued that his § 924(c) offense in Count 3 was predicated upon both his conspiracy to commit Hobbs Act robbery charge in Count 1 and his substantive Hobbs Act robbery charge in Count 2, and contended that, because the jury rendered a "general verdict" that did not specify which predicate conviction it relied upon to convict him, it was impossible to determine which predicate the jury used. He concluded that, because his Hobbs Act conspiracy charge in Count 1 was not a valid predicate offense in light of *Davis*'s invalidation of § 924(c)(3)(B)'s residual clause, he made a *prima facie* showing that *Davis* may have invalidated his § 924(c) conviction in Count 3.

This Court denied Carter's successive application, determining that he could not make a *prima facie* showing that his § 924(c) conviction in Count 3 was unconstitutional under *Davis* because the special verdict form in his case showed that the jury unanimously agreed that Carter

"through the use of a firearm" murdered the victim of the Hobbs Act robbery charged in Count 2. Specifically, although we noted that Carter's verdict form did not directly answer the precise question of which count his § 924(c) charge in Count 3 was predicated upon, we nevertheless rejected his contention that his case involved only a "general verdict" and concluded that, because the special verdict form for Count 3 showed that the jury found that Carter used the firearm in the commission of the murder of the Hobbs Act robbery victim, it was clear that the jury relied at least on the substantive Hobbs Act robbery charge in Count 2 to convict Carter of the § 924(c) charge in Count 3. Further, we stated that our conclusion was bolstered by the jury instructions, as they only made reference to the victim in Counts 2 and 3.

IV. CARTER'S CODEFENDANT MAXIME'S *DAVIS*-BASED SUCCESSIVE APPLICATION

Three months later, in October 2019, Carter's codefendant, Emmanuel Maxime, filed an application for leave to file a second or successive § 2255 motion, raising the same argument as Carter that his § 924(c) conviction was unlawful in light of *Davis*'s invalidation of § 924(c)(3)(B)'s residual clause. Maxime's case involved the same indictment as Carter's, and identically worded jury instructions and jury verdict form as was used in Carter's case. There was, however, a set for Carter and a separate set for Maxime. On November 20, 2019, a different panel of this Court granted Maxime's application on the grounds that Maxime had made a *prima facie* showing that his § 924(c) conviction may be unconstitutional under *Davis* because (1) Maxime's indictment predicated his § 924(c) conviction upon both Hobbs Act conspiracy and Hobbs Act robbery, (2) Hobbs Act conspiracy was no longer a crime of violence in light of *Davis*'s invalidation of § 924(c)(3)(B)'s residual clause, and (3) Maxime's jury had returned a general jury verdict. Unlike the order in Carter's case, the decision in Maxime's case did not mention, or otherwise

address, the specific jury question or language in the jury's verdict form related to Maxime's § 924(c) conviction in Count 3.

V. CARTER'S INSTANT *DAVIS*-BASED SUCCESSIVE APPLICATION

In his present application, Carter seeks to raise two related claims in a second or successive § 2255 motion. In his first claim, he seeks to argue that his conviction and sentence for the § 924(c) charge in Count 3 is unlawful in light of *In re Maxime*, No. 19-14246 (11th Cir. Nov. 20, 2019), the order granting his codefendant Maxime's *Davis*-based successive application. Carter argues that, because that decision determined that Maxime had made a *prima facie* showing, we should likewise determine in this case that Carter made a *prima facie* showing, as his and Maxime's cases involved (1) the same exact superseding indictment, (2) identical jury instructions, and (3) identical jury verdicts. Further, Carter argues that denying his application while granting Maxime's application violates the basic principles of justice that (1) like cases should be decided alike and (2) similarly situated defendants should be treated the same. He asserts that *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016), does not bar this "*Maxime*" claim, as the basic gravamen of his instant claim is different from the *Davis* claim he had raised in his June 2019 application that his jury had returned a general verdict that did not specify the predicate offense for his § 924(c) conviction.

In his second claim, Carter again asserts that his § 924(c) conviction in Count 3 is unconstitutional under *Davis*. Carter again argues that the two decisions denying his application, but granting Maxime's application, conflict, as they independently concluded that (1) Carter had failed to make a *prima facie* showing because his case involved a special jury verdict, and (2) Maxime had made a *prima facie* showing because his case involved a general jury verdict,

retroactively applicable Supreme Court decisions. *See* 28 U.S.C. § 2255(h)(2). Lastly, to the extent that Carter relies on the exhibits that he attached to his application as newly discovered evidence, none qualifies because (1) the trial transcripts and superseding indictments were items from his and Maxime's underlying criminal proceedings, and, thus, are not new, and (2) the decisions in *In re Maxime* and *In re Williams* are not evidence, as they have nothing to do with Carter's individual innocence of his underlying convictions. *See id.* § 2255(h)(1).

Accordingly, the Court properly dismisses Claim Two for lack of jurisdiction and denies Claim One 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