No. 24-5438

IN THE
Supreme Court of the United States

MICHAEL BOWE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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**Counsel of Record*

Petition for Writ of Certiorari Filed: August 29, 2024
Certiorari Granted: January 17, 2025

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[filed August 14, 2008]

UNITED STATES OF AMERICA vs. MICHAEL S. BOWE, COURTNEY J. GRIFFIN, RANDY LEE SAMPSON, and CORNELIUS A. WILLIAMS, Defendants.	**CASE NO. 08-80089-CR-MIDDLEBROOKS/JOHNSON** 18 USC § 924(c)(1)(A) 18 USC § 924(c)(1)(A)(i) 18 USC § 924(c)(1)(A)(ii) 18 USC § 924(c)(1)(A)(iii) 18 USC § 1951(a) 18 USC § 1951(b)(1) and (b)(3) 18 USC § 2

INDICTMENT

The Grand Jury charges that:

COUNT ONE

On or about July 30, 2008, in Palm Beach County, in the Southern District of Florida, the defendants,

MICHAELS. BOWE,
COURTNEY J. GRIFFIN,
RANDY LEE SAMPSON, and
CORNELIUS A. WILLIAMS

did knowingly and willfully combine, conspire, confederate, and agree with persons known and unknown to the Grand Jury, to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), which robbery would thereby obstruct, delay, or affect commerce or the movement of any article or commodity in commerce, in that the defendants did unlawfully plan to take or obtain prop-

erty, that is, United States currency, from a Loomis armored car, belonging to The Loomis Company, headquartered in Irving, Texas, a business engaged in interstate commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), from the person or presence of an employee of The Loomis Company, against the employee's will, by means of actual or threatened force, violence, or fear of injury to said person; in violation of Title 18, United States Code, Section 1951(a).

COUNT TWO

On or about July 30, 2008, in Palm Beach County, in the Southern District of Florida, the defendants,

MICHAEL S. BOWE,
COURTNEY J. GRIFFIN,
RANDY LEE SAMPSON, and
CORNELIUS A. WILLIAMS

did knowingly and willfully attempt to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), which robbery would thereby obstruct, delay, or affect commerce or the movement of any article or commodity in commerce, in that the defendants did unlawfully attempt to take or obtain property, that is, United States currency, from a Loomis armored car, belonging to The Loomis Company, headquartered in Irving, Texas, a business engaged in interstate commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), from the person or presence of an employee of The Loomis Company, against the employee's will, by means of actual or threatened force, violence, or fear of injury to said person; in violation of Title

18, United States Code, Section 1951(a) and Title 18, United States Code, Section 2.

COUNT THREE

On or about July 30, 2008, in Palm Beach County, in the Southern District of Florida, the defendants,

MICHAEL S. BOWE,
COURTNEY J. GRIFFIN,
RANDY LEE SAMPSON, and
CORNELIUS A. WILLIAMS

did knowingly use, carry, brandish or discharge one or more firearms during and in relation to a crime of violence, for which the defendants may be prosecuted in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951(a) as set forth respectively in Counts One and Two of this Indictment.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 924(c)(1)(A)(i), (ii) and (iii).

A TRUE BILL

[Redacted]
FOREPERSON

[handwritten signature]
R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

[handwritten signature]
NANCY VORPE QUINLAN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA vs. MICHAEL S. BOWE, et al., Defendants.	**CASE NO. _____** **CERTIFICATE OF TRIAL ATTORNEY** **Superseding Case Information:**
Court Division: (Select one) __ Miami __ Key West __ FTL X WPB __ FTP	New Defendant(s) Yes ___ No___ Number of New Defendants___ Total Number of Counts ___

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
3. Interpreter: (Yes or No) No
   List language and/or dialect _____
4. This case will take 5 days for the parties to try.
5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	X	Petty	___
II	6 to 10 days	___	Minor	___
III	11 to 20 days	___	Misdem.	___
IV	21 to 60 days	___	Felony	___
V	61 days and over	___		

6. Has this case been previously filed in this District Court? (Yes or No) ____
   If yes:
   Judge: ____ Case No. ____
   (Attach copy of dispositive order)
   Has a complaint been filed in this matter?
   (Yes or No) Yes
   If yes:
   Magistrate Case No. 08-8208-AFV
   Related Miscellaneous numbers: N/A
   Defendant(s) in federal custody as of 07/30/08
   Defendant(s) in state custody as of N/A
   Rule 20 from the ____ District of ____
   Is this a potential death penalty case?
   (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ___Yes X No

[handwritten signature]
NANCY VORPE QUINLAN
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No./Court No. 0593532

*Penalty Sheet(s) attached

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: MICHAEL S. BOWE

Case No: _____

Count #: 1

18 USC § 1951(a); conspiracy to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine; up to 3 years Supervised Release.

Count #: 2

18 USC § 1951(a); attempt to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine; up to 3 years Supervised Release.

Count #: 3

18 USC §§ 924(c)(1)(A), 924(c)(1)(A)(i), (ii), & (iii); use of firearms(s) during a violent crime.

***Max. Penalty**: Not less than 10 years and up to life, which term is to run consecutive to any sentence received on Count One or Count 2, $250,000 fine, up to 5 years Supervised Release.

Count #: 4

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: COURTNEY J. GRIFFIN

Case No: _____

Count #: 1

18 USC § 1951(a); conspiracy to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine; up to 3 years Supervised Release.

Count #: 2

18 USC § 1951(a); attempt to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine; up to 3 years Supervised Release.

Count #: 3

18 USC §§ 924(c)(1)(A), 924(c)(1)(A)(i), (ii), & (iii); use of firearms(s) during a violent crime.

***Max. Penalty**: Not less than 10 years and up to life, which term is to run consecutive to any sentence received on Count One or Count 2, $250,000 fine, up to 5 years Supervised Release.

Count #: 4

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: RANDY LEE SAMPSON

Case No: _____

Count #: 1

18 USC § 1951(a); conspiracy to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine.

Count #: 2

18 USC § 1951(a); attempt to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine.

Count #: 3

18 USC §§ 924(c)(1)(A), 924(c)(1)(A)(i), (ii), & (iii); use of firearms(s) during a violent crime.

***Max. Penalty**: Not less than 10 years and up to life, which term is to run consecutive to any sentence received on Count One or Count 2, $250,000 fine, up to 5 years Supervised Release.

Count #: 4

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: CORNELIUS A. WILLIAMS

Case No: _____

Count #: 1

18 USC § 1951(a); conspiracy to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine.

Count #: 2

18 USC § 1951(a); attempt to commit Hobbs Act robbery.

***Max. Penalty**: 0-20 Years Imprisonment; $250,000 Fine.

Count #: 3

18 USC §§ 924(c)(1)(A), 924(c)(1)(A)(i), (ii), & (iii); use of firearms(s) during a violent crime.

***Max. Penalty**: Not less than 10 years and up to life, which term is to run consecutive to any sentence received on Count One or Count 2, $250,000 fine, up to 5 years Supervised Release.

Count #: 4

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[filed Oct. 30, 2008]

UNITED STATES OF AMERICA Plaintiff, vs. MICHAEL S. BOWE, Defendant.	Case No. 08-80089-CR-MIDDLEBROOKS

PLEA AGREEMENT

The United States of America and MICHAEL S. BOWE (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to Counts One, Two and Three of the Indictment. Count One charges that the defendant did knowingly and willfully combine, conspire and agree with others to commit robbery, which robbery would delay the movement of any article or commodity in commerce, in that the defendant planned to unlawfully take United States currency from a Loomis Armored car, against the employee's will by means of actual or threatened force, violence or fear of injury to said person, in violation of Title 18, United States Code, Section 1951(a).

Count Two charges that the defendant did knowingly and willfully attempt to commit a robbery of an employee of the Loomis Company by means of actual or threatened violence or fear of injury to said person, in violation of Title 18, United States Code, Section 1951(a).

Count Three charges that the defendant and others did knowingly use, carry, brandish or discharge one or more firearms during and in relation to a crime of violence, for which the defendant may be prosecuted in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951(a) as set forth respectively in Counts One and Two of the Indictment, all in violation of Title 18, United States Code, Section 924(c)(1)(A) and 924(c)(1)(A)(i), (ii) and (iii).

2. The defendant is aware that the sentence will be imposed by the court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the court relying in part on the results of a Pre-Sentence Investigation by the court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant under-

stands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

3. The defendant also understands and acknowledges that as to Counts One and Two, the court may impose a statutory maximum term of imprisonment of up to 20 years, followed by a term of supervised release of up to 3 years. In addition to a term of imprisonment and supervised release, the court may impose a fine of up to $1,000,000.00 (one million dollars) and may impose restitution. With respect to Count Three, the Court must impose a minimum mandatory term of 10 years up to life in prison, to run consecutively to any sentence received on Counts One or Two. In addition to a term of imprisonment, the Court may impose a term of supervised release of up to 5 years and a fine of up to $250,000.00, and the Court must impose restitution under Title 18, United States Code, Section 3663(A).

4. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this agreement, a special assessment in the amount of $100.00 as to each count of conviction, that is a total of $300.00 will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the court and the probation office of all facts pertinent to the sentencing pro-

cess, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

6. The United States and the defendant agree that, although not binding on the probation office or the court, they will jointly recommend that the court impose a sentence within the advisory sentencing guideline range produced by application of the Sentencing Guidelines. Although not binding on the probation office or the court, the United States and the defendant further agree that, except as otherwise expressly contemplated in this Plea Agreement, they will jointly recommend that the court neither depart upward nor depart downward under the Sentencing Guidelines when determining the advisory sentencing guideline range in this case.

7. The United States agrees that it will recommend at sentencing that the court reduce by two levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the defendant's offense level is determined to be 16 or greater, the government will make a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the defendant has assisted authorities in the investigation or prosecution of his

own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. The United States, however, will not be required to make this motion if the defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

8. The defendant agrees that he/she shall cooperate fully with this Office by:

(a) providing truthful and complete information and testimony, and producing documents, records and other evidence, when called upon by this Office, whether in interviews, before a grand jury, or at any trial or other court proceeding;

(b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings, and at meetings, as may be required by this Office; and

(c) if requested by this Office, working in an undercover role to contact and negotiate with sources of oxycodone and other controlled substances, others suspected and believed to be involved in criminal misconduct, under the supervision of, and in compliance with, law enforcement officers and agents.

9. This Office reserves the right to evaluate the nature and extent of the defendant's cooperation and to make the defendant's cooperation, or lack thereof, known to the court at the time of sentencing. If in the sole and unreviewable judgment of this Office the defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the court's downward departure from *the advisory sentence* calculated under the Sentencing Guidelines, this Office may at or before sentencing make a motion consistent with the intent of Section 5K1.1 of the Sentencing Guidelines prior to sentencing, or Rule 35 of the Federal Rules of Criminal Procedure subsequent to sentencing, reflecting that the defendant has provided substantial assistance and recommending that the defendant's sentence be reduced from the advisory sentence suggested by the Sentencing Guidelines. The defendant acknowledges and agrees, however, that nothing in this Agreement may be construed to require this Office to file any such motion(s) and that this Office's assessment of the nature, value, truthfulness, completeness, and accuracy of the defendant's cooperation shall be binding insofar as the appropriateness of this Office's filing of any such motion is concerned.

10. The defendant understands and acknowledges that the Court is under no obligation to grant the motion(s) referred to in paragraph 9 of this agreement should the government exercise its discretion to file any such motion. The defendant also understands and acknowledges that the court is under no obligation to reduce the defendant's sentence because of the defendant's cooperation.

SENTENCING APPEAL WAIVER

11. The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or a variance from the guideline range that the court establishes at sentencing. The defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that he/she has discussed the appeal waiver set forth in this agreement with his/her attorney. The defendant further agrees, together with the United States, to request that the district court enter a specific finding that the defendant's waiver of his/her right to appeal the sentence to be imposed in this case was knowing and voluntary.

12. The defendant is aware that the sentence has not yet been determined by the court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the government, or the probation of-

fice, is a prediction, not a promise, and is not binding on the government, the probation office or the court. The defendant understands further that any recommendation that the government makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the defendant may not withdraw his/her plea based upon the court's decision not to accept a sentencing recommendation made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

13. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Date: 10/30/08 By: [handwritten signature]
NANCY VORPE QUINLAN
ASSISTANT UNITED STATES ATTORNEY

Date: 10/30/08 By: [handwritten signature]
THOMAS GARLAND, ESQUIRE
ATTORNEY FOR DEFENDANT

Date: 10/30/08 By: [handwritten signature]
MICHAEL S. BOWE
DEFENDANT

United States District Court
Southern District of Florida
WEST PALM BEACH DIVISION

[filed April 10, 2009]

UNITED STATES OF AMERICA v. MICHAEL BOWE	**JUDGMENT IN A CRIMINAL CASE** *****AMENDED***** Case Number: 08-80089-CR USM Number 73176-004 Counsel For Defendant: Thomas Garland Counsel for the United States: Nancy Vorpe Quinlan Court Reporter: Karl Shires

The defendant pleaded guilty to Count(s) one-three of the Indictment. The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1951(a)	Conspiracy To Commit Hobbs Act Robbery	7/30/2008	One
18 U.S.C. § 1951(a)	Attempt To Commit Hobbs Act Robbery	7/30/2008	Two
18 U.S.C. § 924(c)(l)(A)	Use, Carry, Brandish, or Discharge One Or More Firearms During and In Relation To A Crime of Violence	7/30/2008	Three

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
1/16/2009

[handwritten signature]
DONALD M. MIDDLEBROOKS
United States District Judge

April 10, 2009

DEFENDANT: MICHAEL BOWE
CASE NUMBER: 08-80089 CR

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **288 Months**. This term consists of 168 concurrent months as to counts one and two, and 120 consecutive months as to count 3.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that defendant be designated to a facility in South or Central Florida.

The Court further recommends that defendant participate in the 500 hour drug treatment program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**. This term consists of 3 concurrent years as to counts one and two, and 5 concurrent years as to count three..

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defend ant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Association Restriction - The defendant is prohibited from associating with or visiting any of the co-defendants in this case while on probation/supervised release.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	**Total Fine**	**Total Restitution**
$300.00	$0.00	**$202,518.86**

Restitution with Imprisonment -

It is further ordered that the defendant shall pay restitution in the amount $202,518.86. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR

job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$300.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

Michael Bowe, Randy Lee Sampson, Courtney Griffin, Cornelius Williams: 08-80089-CR-DMM: $202,518.86.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
[filed June 19, 2017]

MICHAEL S BOWE, Movant, v. UNITED STATES OF AMERICA, Respondent.	CASE NO.: 16-81002-Civ-MIDDLEBROOKS (08-80089-Cr-MIDDLEBROOKS) MAGISTRATE JUDGE PATRICK A. WHITE **REPORT OF MAGISTRATE JUDGE**

I. Introduction

The movant, a federal prisoner, currently confined at the Estill Federal Correctional Institution in Estill, South Carolina, has filed this §2255 motion challenging his conviction and sentence entered after a guilty plea in case no. **08-80089-Cr-Middlebrooks**. He seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015) (hereinafter, "Samuel Johnson"), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257, ___, L.Ed.2d ___ (2016).

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B), (C); S.D. Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing §2255 Cases in the United States District Courts.

Presently before the court is the Petitioner's motion to vacate (Cv DE# 1, 7, 11, 19) and the government's response in opposition (Cv DE# 9, 18).

II. Claims

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519 (1972), the movant argues that his conviction for possession of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §924(c)(1)(A) is no longer lawful in light of Samuel Johnson v. United States, 135 S.Ct. 2551 (2015) which the United States Supreme Court held to apply retroactively to cases on collateral review in Welch v. United States, 136 S.Ct. 1257 (2016).

III. Procedural History

On August 14, 2008, Movant and his co-defendants were indicted for conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (count 1); attempted Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (count 2); and using, carrying, brandishing or discharging one or more firearms in relation to a crime of violence, namely, conspiracy to commit and attempted Hobbs Act robbery, in violation of 18 U.S.C. §924(c)(1)(A)(i)(ii) and (iii) (count 3). (CR DE# 18) On October 30, 2008, Movant pled guilty as charged. (CR DE# 52, 59).

Prior to sentencing, a PSI was prepared which reveals as follows. The base offense level was set at 20 because the offense involved robbery, U.S.S.G. §2B3.1(a). (PSI ¶51). Because the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, the offense level was increased two levels,

§2B3.1(b)(1). (PSI ¶52). Because the victim sustained permanent or life threatening bodily injury, the offense level was increased by six levels, §2B3.1(b)(3)(C). (PSI ¶53). Because the loss was more than $250,000, but not more than $800,000, the offense level was increased three levels, §2B3.1(b)(7)(D). (PSI ¶54). Because the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, the offense level was increased by four levels, §3B1.1(a). (PSI ¶56). The offense level was decreased three levels due to Petitioner's acceptance of responsibility. (PSI ¶60-61). The total offense level was set at 32. (PSI ¶62).

The PSI next determined that the movant had eight criminal history points and a criminal history category of IV. (PSI ¶69).

Statutorily, as to both Counts One and Two, the term of imprisonment was 0 to 20 years, 18 U.S.C. §1951(a); as to Count Three, a term of imprisonment of 10 years under 18 U.S.C. §924(c)(1)(A)(iii) was to run consecutive to any other term of imprisonment. (PSI ¶99). Based on a total offense level of 32 and a criminal history category of IV, the guideline imprisonment range was 168 to 210 months. As to Count Three, a term of imprisonment of 10 years under 18 U.S.C. §924(c)(1)(A)(iii) was to run consecutive to any other term of imprisonment. (PSI ¶100).

On **January 22, 2009**, Movant was sentenced to 288 months' imprisonment. (CR DE# 72, 76).

Petitioner did not file a direct appeal. Thus, the judgment became final on **February 5, 2009,** when

the 14-day period for prosecuting a direct appeal expired.[1]

Therefore, for purposes of the federal limitations period, the movant had one year from the time his conviction became final on **February 5, 2009,** or no later than **February 5, 2010,** within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

The movant waited approximately **seven years** from the time his conviction became final on **February 5, 2009** until he returned to this court, filing the

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[1] Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999); Murphy v. United States, 634 F.3d 1303, 1307 (11th Cir. 2011). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). The movant was sentenced before the effective date of the amendment, thus he had **ten** days, **excluding** Saturdays and Sundays, within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

instant motion on **June 13, 2016.**[2] (Cv-DE#1). This court issued an order appointing counsel and setting a briefing schedule. (Cv DE# 5). The parties have complied with the court's briefing schedule and the case is now ripe for review. (Cv DE# 1, 7, 9, 11, 19, 18).

IV. Threshold Issues

A. Timeliness

As narrated previously, the movant's judgment of conviction became final on **February 5, 2009.** The movant had until **February 5, 2010,** to timely file his §2255 motion. Movant failed to timely file the instant petition, which he did not file until **June 13, 2016**.

However, on **June 26, 2015,** the United States Supreme Court held that the ACCA's residual clause—defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"—is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551, 2563 (2015). The Su-

[2] "Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

preme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). Then, on **April 18, 2016**, the Supreme Court announced that Samuel Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

Petitioner takes the position that the Petition is timely as it was filed within one year of the Supreme Court's issuance of Samuel Johnson on June 26, 2015. In order to determine whether the petition is timely, this court must determine whether Samuel Johnson applies to Petitioner's conviction for possession of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §924(c)(1)(A).

B. Procedural Bar

The government contends that, even if Samuel Johnson applies to 18 U.S.C. §924(c)(3)(B), Petitioner is procedurally barred from raising this argument because he is raising it for the first time in the instant proceedings. (CV DE# 9:3-6). According to the government, Petitioner cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural-default rule. (Id.).

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989).

It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal inno-

cence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) ("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. Samuel Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice would result from finding a procedural default here because, as set forth below, regardless of whether Samuel Johnson applies to §924(c)'s residual clause, Petitioner's companion charge for **attempted Hobbs Act robbery** categorically qualifies as a "crime of violence" under §924(c)'s elements clause. Accordingly, Movant cannot establish cause-and-prejudice to overcome the procedural bar.

V. Discussion

Because, this Court's conclusion that Movant's claims are procedurally barred turns on whether Movant's companion charge for attempted Hobbs Act Robbery still categorically qualifies as a "crime of violence" after Samuel Johnson, the Court must address this issue. However, since the Court concludes that it does, the Court need not address the unsettled question of whether Samuel Johnson invalidates

§924(c)'s residual clause. See United States v. Mottaz, 476 U.S. 834, 848, n.11, 106 S. Ct. 2224, 2233, 90 L. Ed. 2d 841 (1986) ("In light of our conclusion that the District Court's jurisdiction . . . rested on §1346(f) . . . , we need not reach the difficult and unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated."); see also Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

Title 18 U.S.C. §924(c)(1)(A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of violence" as any felony that

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
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> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c)(3). As such, §924(c)(3) contains a "residual clause," very similar to the residual clause

declared unconstitutionally vague in Samuel Johnson.[3]

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means *violent* force—that is, force capable of causing physical pain or injury to another person." Samuel Johnson, 559 U.S. 133, 140 (2010). As the Supreme Court has noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence" in 18 U.S.C. §16, which is very similar to §924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another, "suggests a category of violent, active crimes . . .").

In addition, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also

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[3] The ACCA's residual clause that was held to be unconstitutionally vague in Samuel Johnson defines "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii).

United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;") (citing Leocal, supra). While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the statutory elements of state crimes. Samuel Johnson, 599 U.S. at 138. A federal court which applies state law is bound to adhere to the decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir. 1983).

To determine whether a past conviction is for a "violent felony" under the ACCA, and thus whether a conviction qualifies as a "crime of violence" for purposes of §924(c), assuming Samuel Johnson extends to §924(c), courts use what has become known as the "categorical approach." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). To determine if an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause in §924(c)(3)(A), the court would have to determine if aiding and abetting carjacking has an element of "force capable of causing physical pain or injury to another person" as contemplated by Samuel Johnson and its progeny. See Samuel Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,[4] to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the categorical approach demands: [analyze] the elements of the crime of conviction." Id.

The modified categorical approach does not apply, however, when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. When a defendant was convicted of a so-called "'indivisible statute'—i.e., one not containing alternative elements—that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying offense. Id. at 2281-82.

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of the conviction, whether assisted by Shepard documents or not, and

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[4] In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2011) (quoting Samuel Johnson, 559 U.S. at 137).

Finally, in Mathis v. United States, — U.S. —, 136 S. Ct. 2243 (2016), the Court was most recently called upon to determine whether federal courts may use the modified categorical approach to determine if a conviction qualifies when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. 136 S. Ct. at 2247-48. The Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

Here, the Court need not conduct the above analysis to determine whether, as a threshold matter, the substantive Hobbs Act statute is divisible or indivisible. The court will address substantive Hobbs Act Robbery before turning to whether attempted to commit Hobbs Act Robbery constitutes a crime of violence. The Court need not conduct the above analysis, regardless of whether it may employ a modified

categorical approach or is limited to the categorical approach, to determine whether Movant's companion charge for attempted Hobbs Act Robbery still qualifies as a "crime of violence" for purposes of §924(c) after Samuel Johnson. That is because the Eleventh Circuit has resolved this issue. Specifically, in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), in the context of an application for leave to file a second or successive motion under §2255, the Court considered whether Samuel Johnson impacts a robbery charge under the Hobbs Act, 18 U.S.C. §1951(a), and a separate firearm charge during and in relation to a "crime of violence" in violation of §924(c). The Eleventh Circuit denied the application, stating:

> But we need not decide, nor remand to the district court, the §924(c)(3)(B) residual clause issue in this particular case because even if Johnson's rule about the ACCA residual clause applies to the §924(c)(3)(B) residual clause, [defendant's] claim does not meet the statutory criteria for granting this § 2255(h) application. This is because [defendant's] companion conviction for Hobbs Act robbery, which was charged in the same indictment as the §924(c) count, clearly qualifies as a "crime of violence" under the use-of-force clause in §924(c)(3)(A).

824 F.3d at 1340.

It is axiomatic that federal district courts are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015) (citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985)). Courts are, however, generally only bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114,

1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" Id. Finally, under the prior panel precedent rule, the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (citations omitted).[5]

Here, regardless of whether the Eleventh Circuit in Saint Fleur should have undertaken a determination of whether Saint Fleur's Hobbs Act conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that Saint Fleur's Hobbs Act conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a second or successive §2255 motion was denied on that basis. As such, Saint Fleur holds that Hobbs Act robbery is a "crime of violence" for purposes of §924(c),

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[5] "While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." Garrett v. University of Alabama at Birmingham Bd. of Trustees, 344 F.3d 1288, 1292 (11th Cir. 2003).

see Kaley, 579 F.3d at 1253 n.10 (the holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result), and this Court is thus bound by it. In re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

Importantly, attempted Hobbs Act robbery also qualifies as a violent felony under the "use of force" clause of 924(c), just as substantive Hobbs Act robbery does. The plain language of the force clause states that a violent felony is a crime that "has as an element the use, **attempted** use, or threatened use of physical force. . . ." 18 U.S.C. §924(c)(A) (emphasis added). Numerous Circuit Courts—including the Eleventh Circuit—have concluded that various state statutes qualify as a crime of violence under the ACCA's elements clause. See United States v. Lockley, 632 F.3d 1238, 1244-45 (11th Cir. 2011) ("Hence, under either definition, Florida's robbery statute is indeed generic, and Lockley's *attempted* robbery conviction categorically qualifies as the second predicate offense for the career offender enhancement."); United States v. Mansur, 375 Fed.Appx. 458, 463 (6th Cir. 2010) ("[Defendant] argues that his prior conviction for *attempted* robbery does not qualify as a crime of violence and, consequently, that his enhanced sentence under 18 U.S.C. §924(e) was improper. However, because [defendant's] armed robbery conviction qualifies as a violent felony under the first and third (residual clause) prongs of 18 U.S.C. §924(e)(2)(B), it is a violent felony and the district court's determination was proper."). Hence, Hobbs Act robbery and attempted Hobbs Act robbery are categorically "crimes of violence." See also, Myrthil v. United States, S.D.

Fla. 16-22647-Cv-Cooke, DE# 13, 19, (District Court order adopting Magistrate Judge's Report which specifically held that attempted Hobbs Act Robbery constituted a crime of violence).

Because Petitioner's companion charge for **attempted Hobbs Act robbery** categorically qualifies as a "crime of violence" under §924(c)'s elements clause, his petition is not timely and is procedurally barred.

VI. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, "[A] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different

manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller–El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the Chief Judge in objections.

VII. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DENIED, that no certificate of appealability issue, and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 19th day of June, 2017.

[handwritten signature]
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[filed July 25, 2017]

MICHAEL S. BOWE, Movant, vs. UNITED STATES OF AMERICA Respondent.	CASE NO.:16-CV-81002-MIDDLEBROOKS/WHITE (08-CR-80089)

ORDER ADOPTING REPORT AND DENYING MOTION TO VACATE SENTENCE UNDER §2255

THIS CAUSE comes before the Court upon the Report and Recommendation issued by Magistrate Judge Patrick A. White on June 19, 2017 (DE 20). Movant filed a Motion to Vacate pursuant to § 2255 (DE 1, "Motion"), seeking relief in light of *Johnson v. United States,* 135 S. Ct. 2551 (2015). The Report recommends denying Movant's Motion to Vacate and recommends that a certificate of appealability not be issued. Movant filed objections to the Report. (DE 21).

Movant challenges his 18 U.S.C. § 924(c) conviction based on *Johnson.* Without addressing the constitutionality of the so-called residual clause (or "risk-of-force" clause) found in § 924(c)(3)(B), the Report finds that his § 924(c) conviction—which is based on attempted Hobbs Act robbery—is a crime of violence under § 924(c)(3)(A) without reliance on § 924(c)(3)(B).[1]

[1] After the Report was issued, the Eleventh Circuit held in *Ovalles v. United States*, ___ F.3d ___, 2017 WL 2829371 (11th

Upon a careful, *de novo* review of the record, the Court agrees with the Report's recommendation to deny the Motion to Vacate. I also agree that a certificate of appealability should not be issued.

Accordingly,

It is **ORDERED AND ADJUDGED:**

(1) The Report (DE 20) is **ADOPTED.**

(2) The Motion to Vacate (DE 1) is **DENIED.**

(3) A Certificate of Appealability is **DENIED.**

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT.**

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 25 day of July, 2017.

[handwritten signature]
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

Cir. June 30, 2017), that *Johnson* does not apply to § 924(c)(3)(B) and thus the risk-of-force clause of § 924(c)(3)(B) "remains valid." As of the date of this Order, the mandate in *Ovalles* has been withheld.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[filed Dec. 20, 2017]

No. 17-14275-K

MICHAEL S. BOWE,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Michael Bowe moves for a certificate of appealability ("COA"), in order to appeal the denial of his counseled 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Bowe must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Because Circuit precedent forecloses Bowe's claim, he has not met this standard, and his motion for a COA is DENIED.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[filed Aug. 23, 2019]

No. 19-12989-B

IN RE: MICHAEL BOWE,
Petitioner.

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

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

BY THE PANEL:

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

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

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

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

Bowe pleaded guilty pursuant to a written plea agreement, which reiterated that his § 924(c) conviction was predicated on Counts 1 and 2. At the change-of-plea hearing, the government gave the following factual proffer in support of Bowe's plea agreement Bowe met with his codefendants, and they agreed to rob an armored car. The next morning, they got into a van and drove around looking for a suitable armored car. They pulled up alongside an armored car parked at a bank ATM, and Bowe exited the van carrying a rifle and shot the armored car's driver and security guard. The codefendants

left in the van. Bowe ran away on foot, and all were eventually arrested. Bowe admitted to having committed the conduct described in the factual proffer and pled guilty. The court accepted his guilty plea and sentenced him to a total of 288 months in prison, consisting of concurrent 168-month sentences on Counts 1 and 2, and a consecutive 120-month sentence on Count 3.

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

On June 24, 2019, the Supreme Court in *Davis* extended its holdings in *Johnson* and *Dimaya* to § 924(c) and held that § 924(c)(3)(B)'s residual

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

clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. *Davis*, 139 S. Ct. at 2324-25, 2336.

In *In re Hammoud*, we recently resolved several preliminary issues with respect to successive applications involving proposed *Davis* claims. No. 19-12458, manuscript op. at 4 (11th Cir. July 23, 2019). First, we held that *Davis*, like *Johnson*, announced a new rule of constitutional law within the meaning of § 2255(h)(2), as the rule announced in *Davis* was both "substantive"—in that it "restricted for the first time the class of persons § 924(c) could punish and, thus, the government's ability to impose punishments on defendants under that statute"—and was "new"—in that it extended *Johnson* and *Dimaya* to a new statutory context and that its result was not necessarily "dictated by precedent." *Id.* at 6-7. Second, we held that, even though the Supreme Court in *Davis* did not expressly discuss retroactivity, the retroactivity of *Davis's* rule was "necessarily dictated" by the holdings of multiple cases, namely, the Court's holding in *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016), that *Johnson's* substantially identical constitutional rule applied retroactively to cases on collateral review. *Id.* at 7-8 (quoting *Tyler v. Cain*, 533 U.S. 656, 662-64, 666 (2001)). And we clarified that *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016) (holding that, under 28 U.S.C. § 2244(b)(1), a federal prisoner's claim raised in a prior successive application shall be dismissed), does not bar new *Davis* claims, as *Davis* was a new constitutional rule "in its own right, separate and apart from (albeit primarily based on) *Johnson* and *Dimaya*." *Id.* at 8-10.

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

The rule we applied in *In re Navarro* applies to Bowe's application. He cannot make a *prima facie* showing that his § 924(c) conviction and sentence are unconstitutional under *Davis*. *See, e.g.*, 28 U.S.C. § 2244(b)(3)(C); *Jordan*, 485 F.3d at 1357-58. The predicate offenses for Bowe's § 924(c) conviction were conspiracy to commit Hobbs Act robbery in Count 1 and attempted Hobbs Act robbery in Count 2. While there is no published decision from this Court on whether conspiracy to commit Hobbs Act robbery otherwise qualifies as a crime of violence

under § 924(c)(3)(A)'s elements clause, we have held that attempted Hobbs Act robbery does qualify under the elements clause. *See United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019). That remains true even after *Davis*.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[filed July 15, 2022]

No. 22-12211-A

IN RE: MICHAEL BOWE,
Petitioner.

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

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

BY THE PANEL:

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

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder 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 also Jordan v.Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357–58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

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

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

In his present application and attached pages, Bowe seeks to raise one claim in a successive § 2255 motion. Bowe argues that the Supreme Court announced a new rule of constitutional law in *United States v. Taylor*, No. 20-1459 (U.S. June 21, 2022), and under *Taylor*, an attempted Hobbs Act Robbery is not a crime of violence. He states that his sentence is unlawful because the district court imposed a 120-month consecutive sentence based on his conviction

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

for an attempted Hobbs Act robbery, but attempted Hobbs Act robbery is not a crime of violence. He seeks the retroactive application of *Taylor* to his case. Also, Bowe argues that, pursuant to both *Davis* and *Taylor*, he does not have a substantive offense that supports the imposed § 924(c) enhancement. Finally, he seeks a modification of his sentence so that his sentence on each count runs concurrently with one another, which would result in his immediate release.

In *Taylor*, the Supreme Court recently resolved a circuit split and held that attempted Hobbs Act robbery does not qualify as a predicate crime of violence under § 924(c)(3)(A)'s "elements clause," which "covers offenses that have as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Taylor*, No. 20-1459, manuscript op. at 2-3, 5-6. At the outset, the Court noted that, under the applicable categorical approach, the facts of a particular defendant's case are immaterial because the "only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Id.* at 3.

The Court then explained that, to prove attempted Hobbs Act robbery, the government must show that the defendant intended to unlawfully take or obtain personal property by means of actual or threatened force and completed a "substantial step" toward that end. *Id.* at 4. However, the Court noted that, while the government would have to show that the defendant took an "unequivocal" and "significant" step towards committing robbery, the government

need not show that the defendant actually used, attempted to use, or even threatened to use force, as required by § 924(c). *Id.* at 4-5. The Court stressed that "an intention to take property by force or threat, along with a substantial step toward achieving that object, . . . is just that, no more." *Id.* at 4. For example, the Court elaborated, a defendant who was apprehended before reaching his robbery victim could be convicted of attempted Hobbs Act robbery, even though he has not yet engaged in threatening conduct, so long as the government had other evidence of his intent and a substantial step. *Id.* at 5. Therefore, the Court concluded that attempted Hobbs Act robbery was not a crime of violence under the text of § 924(c)(3)(A). *Id.* at 6.

In so holding, the Supreme Court rejected the government's argument, adopted by us in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), that, because a completed Hobbs Act robbery qualifies as a crime of violence, an attempted Hobbs Act robbery must qualify as well. *Id.* at 6-7 (citing *St. Hubert*, 909 F.3d at 352-53). The Court emphasized that the "elements clause does not ask whether the defendant committed a crime of violence *or* attempted to commit one," but rather "asks whether the defendant *did* commit a crime of violence." *Id.* at 7 (emphasis in original). The Court concluded that, had Congress intended the elements clause to encompass attempted crimes of violence, it could have explicitly included attempt in its definition. *Id.* Ultimately, the Court affirmed the Fourth Circuit's decision to reverse and remand Taylor's enhanced sentence. *Id.* at 3, 14.

In *Davis*, the Supreme Court previously struck down § 924(c)(3)(B)'s residual clause, which defined a crime of violence as any crime that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," as unconstitutionally vague under the due process and separation of powers principles. *Davis*, 139 S. Ct. at 2324-25, 2336.

We must dismiss a claim presented in an application to file a second or successive § 2255 motion that was presented in a prior application or in an original § 2255 motion. *See* 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016). We have clarified that this bar is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016).

Here, Bowe's proposed claim does not satisfy the statutory criteria in § 2255(h). 28 U.S.C. § 2255(h)(1), (2). The Supreme Court in *Taylor* did not announce a new rule of constitutional law, but rather interpreted, as a matter of statutory analysis, the meaning of the term "crime of violence" in § 924(c), and more specifically, the proper application of the "elements clause" in § 924(c)(3)(A) and whether it covered attempt offenses like attempted Hobbs Act robbery. *See Taylor*, No. 20-1459, manuscript op. at 2-7. The Court did not hold, or otherwise suggest, that the elements clause was unconstitutionally vague or overbroad, like it had done with regard to § 924(c)(3)(B)'s "residual clause" in *Davis*. *See id.* The Court's interpretation of a substantive criminal statute, using established rules of statutory construction, cannot announce a new rule of constitutional law

under § 2255(h). *In re Blackshire*, 98 F.3d 1293, 1293-94 (11th Cir. 1996). Thus, Bowe's reliance on *Taylor* as a new rule of constitutional law is misplaced.

Additionally, Bowe is barred from bringing any claim based on *Davis* to argue that his sentence is unconstitutional because he previously raised the same claim in his 2019 successive application, and we rejected it. 28 U.S. C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1340.

Accordingly, because Bowe has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DENIED in part and DISMISSED in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[filed Aug. 3, 2022]

No. 22-12278-A

IN RE: MICHAEL BOWE,
Petitioner.

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

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

BY THE PANEL:

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

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
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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 also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357–58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

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

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

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

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

fense that supported the imposed § 924(c) enhancement. On July 15, 2022, we denied his application in part as to the *Taylor* claim and dismissed his application in part as to the *Davis* claim.

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

Additionally, Bowe filed a petition for initial hearing *en banc*. He argues that we should hear his case *en banc* and overrule *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016). Bowe contends that, by its plain terms, § 2244(b)(1) applies only to state prisoners seeking relief under § 2254, not federal prisoners seeking relief under § 2255. He asserts that, when we attempted to justify *Baptiste* in *In re Bradford*, 830 F.3d 1273 (11th Cir. 2016), we failed to explain how a § 2255 motion could be certified as provided in § 2244(b)(1). Bowe argues that *en banc* hearing is warranted because two circuits disagree with our holding that § 2244(b)(1) applies to federal prisoners, so we should reconsider our precedent. He asserts that *Davis* prejudices him now because his § 924(c)

offense is no longer a federal crime. Bowe contends that an *en banc* review is uncommon, but not unauthorized, as we have held that § 2244(b)(3)(E) allows us to *sua sponte* hear his case *en banc*. Finally, he argues that, even though § 2244(b)(3)(D) requires us to resolve a request to file a successive application within 30 days, we have taken longer in unusual cases, so we can do so here, too.

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

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

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

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

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

MICHAEL S. BOWE	PETITIONER
V.	CIVIL ACTION NO. 3:22CV515 HTW-LGI
WARDEN UNKNOWN BOULETT	RESPONDENT

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Before the Court is Petitioner Michael Bowe's Motion to Voluntarily Dismiss his petition. Bowe filed the instant petition pursuant to 28 U.S.C. § 2241, seeking to utilize the saving clause of § 2255(e) to challenge his sentence based on *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) and *United States v. Taylor*, 142 S. Ct. 2015, 213 L. Ed. 2d 349 (2022). Bowe contends that these cases establish new rules of statutory interpretations that undermine his sentence and convictions—an argument previously rejected in his §2255 proceedings by both his sentencing court and the circuit court of appeals.[1] Respondent moved to dismiss the petition for lack of jurisdiction asserting that Petitioner's claim fails to satisfy the saving clause of § 2255(e). Petitioner at first opposed the motion, but now seeks to voluntarily dismiss his petition based on the United States Supreme Court's recent decision in *Jones v. Hendrix*,

[1] *See In re Michael Bowe*, No. 22-12278-A (11th Cir. Aug. 3, 2022); *In re Michael Bowe*, No. 22-12211-A (11th Cir. July 15, 2022); *In re Michael Bowe*, No. 19-12989-B.

599 U.S. — 143 S. Ct. 1857, — L.Ed.2d — (June 22, 2023), which significantly changed the landscape for petitioners seeking to bring a § 2241 petition via the saving clause of § 2255(e).

A federal prisoner may seek post-conviction relief under either § 2241 or § 2255, but the mechanisms are distinct. *St. Junius v. Boyle*, 729 F. App'x 326 (5th Cir. 2018) (citation omitted). A § 2241 petition "is used to challenge the manner in which a sentence is executed," such as the computation of custody credits and parole eligibility, and it is properly brought in the district of incarceration. *Id.* A § 2255 petition is "the primary means of collaterally attacking a federal sentence," and is properly brought in the district of conviction. *Robinson v. United States*, 812 F.3d 476 (5th Cir. 2016) (internal quotation marks and citation omitted). Section 2255 strictly limits second or successive motions unless certain enumerated conditions are met.

In the past, however, the Fifth Circuit and other circuits have considered what the *Jones* Court describes as an AEDPA "workaround." That is, if a petitioner could show that a § 2255 remedy was "inadequate and ineffective" because (i) his claim was "based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense"; and, (ii) the claim "was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion," he could proceed under the saving clause of § 2255(e). *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001), *abrogated by Jones v. Hendrix*, 143 S. Ct. 1857 (2023). The Supreme Court has now made

clear, however, that "the saving clause does not authorize such an end-run around AEDPA" abrogating *Reyes-Requena* and similar circuit court decisions. *Jones*, 143 S. Ct. at 1860. Rather, the only two conditions in which a second or successive § 2255 motion may proceed are expressly outlined in § 2255(h): either (1) newly discovered evidence of innocence; or (2) a new, retroactive rule of constitutional law. *Jones*, 143 S. Ct. at 1867 (citing 28 U.S.C. § 2255(h)). The Court explained that "[t]he inability of a prisoner with a statutory claim to satisfy [these] conditions does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all." *Jones*, 143 S. Ct. at 1869. A prisoner, such a Bowe, "asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition" may not proceed under the saving clause.

Because Petitioner rightly concedes that *Jones* forecloses his claim, the undersigned recommends that the motion to voluntarily dismiss be granted and the petition be dismissed with prejudice for lack of jurisdiction.

NOTICE OF RIGHT TO APPEAL/OBJECT

Pursuant to Rule 72(a)(3) of the Local Uniform Civil Rules of the United States District Courts for the Northern District of Mississippi and the Southern District of Mississippi, any party may serve and file written objections within 14 days after being served with a copy of this Report and Recommendation. Within 7 days of the service of the objection, the opposing party must either serve and file a response

or notify the District Judge that he or she does not intend to respond to the objection.

The parties are hereby notified that failure to file timely written objections to the proposed findings, conclusions, and recommendations contained within this report and recommendation, shall bar that party from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, except upon grounds of plain error. 28 U.S.C. § 636, Fed. R. Civ. P. 72(b) (as amended, effective December 1, 2009); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

Respectfully submitted on August 29, 2023.
s/ LaKeysha Greer Isaac
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

MICHAEL S. BOWE	PETITIONER
vs.	CIVIL ACTION NO. 3:22-CV-515-HTW-LGI
WARDEN UNKNOWN BOULETT	RESPONDENT

ORDER ADOPTING REPORT AND RECOMMENDATION

BEFORE THIS COURT is the Report and Recommendation of United States Magistrate Judge LaKeysha Greer Isaac **[Docket no. 12]**. In her Report and Recommendation, filed on August 29, 2023, Magistrate Judge Isaac recommended that Petitioner Michael S. Bowe's motion to voluntarily dismiss his petition [Docket no.10] be granted and this case be dismissed with prejudiceMagistrate Judge Isaac directed the parties to file any objections to her recommendation within fourteen (14) days. To date, no objection has been filed.

Based upon the findings and recommendation contained in the Report and Recommendation **[Docket no. 12]**, this court finds it well-taken. Magistrate Judge Isaac carefully considered the submissions of the parties, the record, and relevant law, and crafted a well-versed Report and Recommendation. Therefore, this court hereby ADOPTS the Report and Recommendation of the Magistrate Judge as the order of this court.

IT IS THEREFORE ORDERED THAT the Petitioner Michael S. Bowe's Motion to dismiss his §2241 Petition [Docket no. 10] hereby is granted. Accordingly, this action is hereby **DISMISSED** with prejudice.

SO ORDERED this the 8th day of February, 2024.

/s/HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[filed June 27, 2024]

No. 24-11704

IN RE: MICHAEL BOWE,
Petitioner.

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

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

ED CARNES, Circuit Judge:

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

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

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

Section 2244 of title 28 provides that "[a] claim presented in a second or successive habeas corpus application under [§]2254 that was presented in a prior application *shall be dismissed*." 28 U.S.C. § 2244(b)(1) (emphasis added). In *In re Baptiste*, we concluded that § 2244(b)(1) also applies to federal prisoners seeking to file a second or successive application under § 2255. 828 F.3d 1337, 1339–40 (11th Cir. 2016). We have since stated that § 2244(b)(1)'s requirement—to dismiss a claim raised in a prior application—is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277–78 (11th Cir. 2016). And we have also explained that a "claim" remains the same under § 2244(b)(1) so long as "[t]he basic thrust or gravamen of [the applicant's] legal argument is the same." *In re Hill*, 715 F.3d 284, 294 (11th Cir. 2013) (quoting *Babbitt v. Woodford*, 177 F.3d 744 (9th Cir. 1999)).

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

I.

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

In 2016 Bowe filed an initial § 2255 motion in which he argued that his § 924(c) conviction was no longer valid in light of *Johnson v. United States*, 576 U.S. 591 (2015). The district court denied that motion, concluding that Bowe's attempted Hobbs Act robbery conviction categorically qualifies as a crime of violence under § 924(c)(3)(A). Bowe sought to appeal that ruling, but we denied him a certificate of appealability, noting that his claim was foreclosed by circuit precedent. Bowe thereafter unsuccessfully sought *certiorari* review. *Bowe v. United States*, 584 U.S. 945 (2018).

In 2019 Bowe filed an application for certification to file a second or successive § 2255 motion. He again argued that his § 924(c) conviction was invalid, this time based on the Supreme Court's then-recent decision in *United States v. Davis*, 588 U.S. 445, 470 (2019), which held that the residual clause of § 924(c)(3)(B) is unconstitutionally vague. We denied Bowe's application, noting that he had not made a

prima facie showing that his § 924(c) conviction and sentence were unconstitutional under *Davis* because, under our precedent at the time, attempted Hobbs Act robbery still qualified as a crime of violence under the elements clause of § 924(c)(3)(A).

In 2022 Bowe filed another application to file a second or successive § 2255 motion in this Court. He argued that the Supreme Court had announced a new rule of constitutional law in *United States v. Taylor*, 596 U.S. 845 (2022), and that, under it, his conviction for attempted Hobbs Act robbery was no longer a crime of violence under § 924(c). We denied Bowe's second application in part and dismissed it in part, concluding that, to the extent Bowe's second application was based again on *Davis*, we lacked jurisdiction because he had raised a *Davis* claim in his 2019 successive application, and, in addition, we concluded that *Taylor* did not announce a new rule of constitutional law under § 2255(h)(2).

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

banc, the procedural vehicle with which he sought to get rid of *Baptiste*.

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

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

Bowe acknowledges that, because we previously denied him authorization based on *Davis*, his application is "foreclosed" by *Baptiste*. For that reason, he has filed a petition for initial hearing *en banc* asking the *en banc* court to overrule the *Baptiste* decision. In

the alternative, he has filed a motion to certify the following question of law to the United States Supreme Court under 28 U.S.C. § 1254(2): "whether Section 2244(b)(1) applies to a claim presented in a second or successive motion to vacate filed under Section 2255."

II.

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

Baptiste requires us to dismiss a claim presented in a federal prisoner's second or successive habeas corpus application if it was presented in a previous second or successive § 2255 application. 828 F.3d at 1339–40. And § 2244(b)(1)'s bar is jurisdictional. *In re Bradford*, 830 F.3d at 1277–78. "[L]aw established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on *all* subsequent panels of this Court." *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *abrogated in part on other grounds by United States v. Taylor*, 596 U.S. at 851. And under our prior panel precedent rule, we are bound to follow prior binding precedent unless and until it is overruled by the Supreme Court or this Court sitting *en banc*. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016).

We lack jurisdiction over this application, which presents a *Davis* claim, because Bowe presented the same claim in a prior successive application which we denied. 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1339–40; *In re Bradford*, 830 F.3d at 1277–

78. Because neither *Baptiste* nor *Bradford* has been overruled or abrogated by the Supreme Court or by this Court sitting *en banc*, we must apply them here. *St. Hubert*, 909 F.3d at 346; *White*, 837 F.3d at 1228. Accordingly, we dismiss for lack of jurisdiction Bowe's application for a certificate to file a second or successive § 2255 motion.[1]

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

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

respecting dismissal of certified question); *see also* Shapiro et al., *supra,* ch. 9, § 1.

We won't cause a newsworthy event and stir up the bloggers and podcasters by asking the Court to accept a certified question from a court of appeals for only the fifth time in 78 years. After all, Bowe has made the Supreme Court aware of this issue, and aware of his § 2244(b)(1) argument, and aware of his desire to get the Court to decide it. *See In re Bowe*, 144 S. Ct. at 1170 (statement of Sotomayor, J., joined by Jackson, J., respecting the denial of his original petition for a writ of habeas corpus). While "[t]he standard for [the Supreme] Court's consideration of an original habeas petition is a demanding one," *id.* at 1171, it is no more demanding than the standard for considering a question certified by a federal appellate court, as the last four decades of non-use of that procedure demonstrates.

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

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

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

IN THE UNITED STATES COURT OF APPEALS
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Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h)

Before: WILLIAM PRYOR, Chief Judge, and WILSON, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, BRASHER, and ABUDU, Circuit Judges.*

No Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, the Petition for Hearing En Banc is DENIED. *See* FRAP 35.

* Judge Jordan recused himself from this case and did not participate.