In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-11704

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In re: MICHAEL S. BOWE,

Petitioner.

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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)

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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
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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 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

[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).

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., 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.