Appendix

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL DEMETRIUS LAMAR GRAY, AKA Paul Gray, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 18-56507 D.C. Nos. 2:16-cv-09680-CBM 2:95-cr-00160-CBM-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Submitted November 12, 2020**
Pasadena, California

Before: CHRISTEN and WATFORD, Circuit Judges, and ROSENTHAL,*** District Judge.

Paul Gray timely appeals from the district court's denial of his motion to vacate his sentence under 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

§ 2253(a), and, reviewing de novo, *United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016) (en banc), we affirm.

1. The predicate offense for Gray's § 924(c) convictions, aggravated postal robbery in which he placed a mail carrier's "life in jeopardy by the use of a dangerous weapon," in violation of 18 U.S.C. § 2114(a), is a crime of violence.[1] The term "rob" in § 2114(a) means common-law robbery, *Carter v. United States*, 530 U.S. 255, 267 n.5 (2000), and common-law robbery is a crime of violence, *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019). Additionally, robbery that puts a "life in jeopardy by the use of a dangerous weapon" means "a holdup involving the use of a dangerous weapon actually so used . . . that the life of the person being robbed is placed in an objective sta[t]e of danger." *Wagner v. United States*, 264 F.2d 524, 530 (9th Cir. 1959); *see also United States v. Bain*, 925 F.3d 1172, 1177 (9th Cir. 2019). Putting a life in an objective state of danger requires the intentional use, attempted use, or threatened use of physical force, which makes it a crime of violence. 18 U.S.C. § 924(c)(3)(A). The Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), that § 924(c)'s residual clause is unconstitutionally vague, does not compel a different result. *See United States v. Burke*, 943 F.3d 1236,

[1] Because § 2114(a) is divisible, we use the modified categorical approach to determine the specific offense of conviction. *See Descamps v. United States*, 570 U.S. 254, 261–63 (2013).

1238 (9th Cir. 2019) (noting that *Davis* "is of no consequence" to the court's analysis of predicate offenses under the elements clause of § 924(c)).

2. Gray's § 924(c) convictions are not invalid because the jury was instructed that liability for the predicate offenses of aggravated postal robbery could be based on *Pinkerton* or aiding and abetting. A defendant found guilty based on aiding and abetting or *Pinkerton* liability is treated as if that defendant had committed the offense as a principal. *See* 18 U.S.C. § 2(a); *Ortiz-Magana v. Mukasey*, 542 F.3d 653, 659 (9th Cir. 2008); *United States v. Allen*, 425 F.3d 1231, 1234 (9th Cir. 2005). We have previously upheld § 924(c) convictions based on *Pinkerton* and aiding and abetting in *United States v. Gadson*, 763 F.3d 1189, 1214–17 (9th Cir. 2014) (conspiracy to distribute, and possession with intent to distribute, controlled substances), *Allen*, 425 F.3d at 1233–34 (bank robbery), and *United States v. Johnson*, 886 F.2d 1120, 1121–23 (9th Cir. 1989) (conspiracy to possess with intent to distribute cocaine). *See also Rosemond v. United States*, 572 U.S. 65, 67 (2014) (a defendant may be convicted under § 924(c) for aiding and abetting an armed drug sale if he "actively participated" in the predicate offense with "advance knowledge that a confederate would use or carry a gun during the crime's commission"). Since *Davis*, we have sustained § 924(c) convictions for robbery as a crime of violence. *See United States v. Dominguez*, 954 F.3d 1251, 1260–62 (9th Cir. 2020) (Hobbs Act robbery); *Burke*, 943 F.3d at 1238 (armed robbery involving controlled

substances). *Davis* does not compel a different result or a reexamination of *Pinkerton* or aiding-and-abetting liability when, as here, the defendant was convicted of the underlying substantive crimes of violence as well as conspiracy. Gray's § 924(c) convictions remain valid.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL GRAY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Case No. CV 16-09680 CBM
Case No. CR 95-00160 CBM

ORDER (1) DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE AND (2) GRANTING RESPONDENT'S MOTION TO DISMISS

The matters before the Court are Petitioner-Defendant Paul Gray's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 and the Government's Motion to Dismiss the § 2255 Motion.

I. BACKGROUND

A. Defendant's Conviction and Sentence

On September 21, 1995, Defendant was convicted after a jury trial of (1) conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371; (2) robbery of a postal letter carrier, in violation of 18 U.S.C. § 2114; (3) use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); (4) robbery of a postal letter carrier, in violation of 18 U.S.C. § 2114; (5) use of a firearm in relation to a crime of violence, in violation of 18

U.S.C. § 924(c); and (6) possession of stolen mail, in violation of 18 U.S.C. § 1708. (Dkt. No. 122-1,[1] Exs. D, A.) On December 11, 1995, the Court sentenced Defendant to 110 months imprisonment on counts 1, 2, 4, and 6, to run concurrently with each other and with a sentence previously imposed in Criminal Case No. 94-908. (Dkt. No. 122-1, Ex. B.) These counts, and the accompanying sentences, are not at issue in Defendant's present motion.

On each of counts 3 and 5 (use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)), the Court sentenced Defendant to the statutorily mandated term of 240 months,[2] ordered to run consecutively with each other and with the sentence imposed on counts 1, 2, 4, and 6.[3] (Dkt. No. 122-1, Ex. B.) Defendant's present motion challenges only these two counts.

B. Section 924(c) and the Court's Jury Instructions

Counts 3 and 5 of the indictment charged violations 18 U.S.C. § 924(c). At the time of the acts alleged in the Indictment, § 924(c) provided in pertinent part as follows:

> Whoever, during and in relation to any crime of violence … uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence …. be sentenced to imprisonment for five years….
>
> …

[1] Unless otherwise noted, all citations to docket entries refer to the docket in Criminal Case No. 2:95-00160.

[2] At the time, § 924(c) provided: "In the case of [a] second or subsequent conviction under this subsection, [the defendant] shall be sentenced to imprisonment for twenty years…." 18 U.S.C. § 924(c)(1). It is undisputed that Defendant had been "convicted of a prior Section 924(c) count and therefore the convictions at issue in this case were charged as second or successive convictions." (Dkt. No. 122 at 2 n.2.)

[3] Section 924(c) also provided: "Notwithstanding any other provision of law, … nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence … in which the firearm was used or carried." 18 U.S.C. § 924(c)(1).

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and
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> (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)(1), (3).

The Court instructed the jury on the elements necessary to find a violation of § 924(c). (Dkt. No. 122-1, Ex. C at Jury Instruction Nos. 21-23.) With respect to the term "crime of violence," the Court instructed the jury that "[t]he offense alleged in Counts Two and Four of the Indictment, robbery of a postal service letter carrier in violation of [18 U.S.C. § 2114], is a crime of violence." (Jury Instruction No. 22.) Accordingly, the Court instructed the jury that the following elements must be proved beyond a reasonable doubt in order to find Defendant guilty of violating § 924(c) as charged in Counts 3 and 5 of the indictment:

> First, the defendant committed the crime of robbery of a postal service carrier as charged in Counts Two and Four of the indictment; and
>
> Second, the defendant knowingly used or carried a firearm while committing the crime.

(Jury Instruction No. 21.)

Because the evidence at trial showed that Defendant's coconspirator, Calvin, committed the actual acts alleged in the indictment, the Court also instructed the jury on the *Pinkerton* theory of liability, under which a crime committed in furtherance of a conspiracy can be imputed to the coconspirators. (Jury Instruction No. 16.)

C. Defendant's Appeal

On December 21, 1995, Defendant appealed his convictions under § 924(c) arguing, among other things, that the Court improperly instructed the jury on the elements of that crime. First, Defendant argued that § 924(c) requires that the firearm be used or carried "in relation to" a crime of violence, not merely "while committing" the crime, as the Court had instructed. Second, Defendant argued that the Court's instruction on the meaning of "uses or carries a firearm" failed to require that the firearm be "actively employed," "immediately available for use," or carried "on or about the person." The Ninth Circuit agreed with both of these arguments, but found that the errors did not require reversal:

> There is overwhelming evidence that Calvin [Defendant's coconspirator] used and carried the gun "in relation to" the robberies. By sticking the gun in the side of one postal carrier and brandishing it at the other, Calvin actively employed the gun. There is also no question Calvin literally carried the gun to and from the robberies, satisfying the definition of "carry" in *Lopez* and *Henderson*. [Defendant] was properly liable for Calvin's use and carrying under a *Pinkerton* theory.

(Dkt. No. 73 at 4.)

D. Present § 2255 Motion

On August 12, 2016, Defendant filed an application with the Ninth Circuit to file a second or successive 28 U.S.C. § 2255 motion.[4] The application as originally presented argued that Defendant's § 924(c) sentences had been enhanced under § 2K2.4 of the U.S. Sentencing Guidelines, and that the § 2K2.4 enhancements were unconstitutional in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). On March 24,

[4] Defendant had previously filed two motions under 28 U.S.C. § 2255, both of which were denied. (Dkt. Nos. 87, 101.)

2017, Defendant filed a supplement to his application, arguing that the § 924(c) convictions themselves cannot stand in light of the Ninth Circuit's decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *aff'd sub nom. Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). On May 12, 2017, the Ninth Circuit granted Defendant's application, ordering that it be filed in this Court and processed as a section 2255 motion retroactively dating back to August 12, 2016. (Dkt. No. 112.)

On June 5, 2017, counsel from the Federal Public Defender's office appeared on behalf of Defendant and requested additional time to file an amended or supplemental motion under 28 U.S.C. § 2255. (Dkt. Nos. 115-117; *see also* Dkt. No. 119.) The Court granted the request. (Dkt. No. 118; *see also* Dkt. No. 120.) On September 12, 2017, Defendant, through counsel, filed a "Supplemental Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255." (Dkt. No. 122.) The supplemental motion does not mention Defendant's previous argument regarding § 2K2.4 of the U.S. Sentencing Guidelines,[5] pursuing only the challenge to the § 924(c) convictions themselves. All subsequent references to Defendant's arguments refer to the arguments made by Defendant's counsel on his behalf.

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a prisoner in federal custody may move the sentencing court to vacate, set aside, or correct his sentence if he claims the right to be released upon the ground that: (1) the sentence was imposed in violation of the United States Constitution or laws of the United States; (2) the court lacked jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

[5] Because § 924(c) mandated a sentence of exactly 20 years for each of Defendant's convictions under that subsection, the Court did not rely on § 2K2.4 in determining Defendant's sentence, rendering irrelevant any arguments relating to that provision.

If it "plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief," the Court must dismiss the motion. 28 U.S.C. § 2255 Proc. R. 4(b); *see also United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986). However, "an evidentiary hearing is required when the petitioner's allegations, if proven, would establish the right to relief." *Quezada v. Scribner*, 611 F.3d 1165, 1167 (9th Cir. 2010) (quoting *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir.1998)).

III. DISCUSSION

Petitioner argues that his § 924(c) convictions for use of a firearm in relation to a crime of violence can no longer stand, because neither armed postal robbery nor conspiracy to commit armed postal robbery constitutes a crime of violence under 18 U.S.C. § 924(c)(3)(B), in light of the Supreme Court's decision in *Johnson II*, which held unconstitutionally vague a provision with similar language in § 924(e)(2)(B).

A. Procedural Default

The Government argues that Petitioner's claim is procedurally defaulted because Petitioner failed to file his motion within the period prescribed under § 2255(f)(3). Section 2255(f)(3) requires in pertinent part that the motion be filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). Here, Petitioner asserts a right initially recognized by the Supreme Court on June 26, 2015 when it decided *Johnson II*.

Petitioner contends that he is entitled to equitable tolling because he was denied access to his legal materials for some period of time prior to the filing deadline. The Government contends that Petitioner was not denied access to his legal materials. This presents a factual dispute that would normally require an evidentiary hearing. *See Quezada v. Scribner*, 611 F.3d at 1167. However, for the

reasons below, the Court determines that—even assuming Petitioner could overcome any procedural default—Petitioner's claim fails on the merits as a matter of law.[6] Accordingly, an evidentiary hearing is unnecessary, as it "plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief…." 28 U.S.C. § 2255 Proc. R. 4(b).

B. Merits of Petitioner's Claim

Petitioner challenges his § 924(c) convictions. Section 924(c) applies to "[w]hoever, during and in relation to any crime of violence … uses or carries a firearm." Petitioner argues that these convictions are invalid because the language in § 924(c)(3)'s definition of a "crime of violence" is unconstitutionally vague. Section 924(c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (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).

Clause A above is generally referred to as § 924(c)(3)'s "elements clause," while Clause B is generally referred to as its "residual clause." Subsequent to the briefing in this case, the Supreme decided in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210-11 (2018), that a clause in 18 U.S.C. § 16(b), identical to § 924(c)(3)'s residual clause, is unconstitutionally vague. For the same reasons as in *Dimaya*,

[6] For the same reason, the Court need not reach the Government's alternative arguments regarding procedural default.

there is little doubt that § 924(c)(3)'s residual clause is also unconstitutionally vague. This does not end the inquiry, however. Petitioner does not contend that § 924(c)(3)'s elements clause is unconstitutionally vague. Accordingly, if the predicate offense upon which Petitioner's § 924(c) convictions were based "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," his § 924(c) convictions did not violate his due process rights.

Petitioner contends that his convictions cannot be sustained under § 924(c)(3)'s elements clause for two reasons, which are discussed in turn below.

1. Conspiracy Under § 924(c)(3)'s Elements Clause

First, Petitioner contends that his convictions cannot be sustained under § 924(c)(3)'s elements clause because conspiracy to commit postal robbery does not have as an element the use, attempted use, or threatened use of physical force. This is not, however, the conduct for which Petitioner was convicted under § 924(c). Counts 3 and 5 of the indictment—those charging a violation of § 924(c)—alleged that Defendant "knowingly used and carried a firearm during and in relation to a crime of violence, namely, the robbery of [a] postal letter carrier." Thus, Defendant's § 924(c) conviction was predicated on actual postal robbery, not merely conspiracy to commit postal robbery.

Petitioner appears to be arguing that, by instructing the jury that it could find Defendant guilty under a *Pinkerton* theory of coconspirator liability, the Court left open the possibility that the jury could find Defendant guilty under § 924(c) based solely on a conspiracy to commit postal robbery, instead of based on an actual postal robbery. This argument is unavailing for two reasons.

First, the Court's *Pinkerton* instruction only permitted the jury to find Defendant guilty of a crime charged in Counts 2 through 6 if it found, among other things, that "a member of the conspiracy … committed the crime charged." (Jury Instruction No. 16.) The Court's instruction on Counts 3 and 5, in turn,

required a finding that "the defendant committed the crime of robbery of a postal service carrier as charged in Counts Two and Four of the indictment" and that "the defendant knowingly used or carried a firearm while committing the crime." (Jury Instruction No. 21.) Thus, the jury could not find Defendant guilty under Counts 3 and 5 without finding that Defendant or his coconspirator did in fact commit the crime of robbery of a postal service carrier as charged in Counts 2 and 4. Second, the Ninth Circuit already rejected Defendant's argument that the jury might have improperly found Defendant guilty under § 924(c) without finding that the firearm was used or carried in relation to the robberies themselves, because "[t]here was overwhelming evidence that Calvin [Defendant's coconspirator] used and carried the gun 'in relation to' the robberies." (Dkt. No. 73 at 4.)

Thus, Defendant's convictions under § 924(c) were not for using or carrying a firearm during and in relation to a conspiracy, but for using or carrying a firearm during and in relation to robbery of a postal carrier, as charged in Counts 2 and 4 of the indictment. It is therefore irrelevant whether conspiracy to commit postal robbery constitutes a "crime of violence" under § 924(c)(3)'s elements clause.

2. Postal Robbery Under § 924(c)(3)'s Elements Clause

Petitioner also contends that his convictions cannot be sustained under § 924(c)(3)'s elements clause because robbery of a postal carrier under § 2114(a) does not have as an element the use, attempted use, or threatened use of physical force. In *United States v. Hasan*, the Ninth Circuit considered § 2114(a), and concluded that "'the use, attempted use, or threatened use of physical force against the person of another' is obviously an element of the offense established by this provision." 983 F.2d 150, 151 (9th Cir. 1992). Petitioner argues, however, that *Hasan* is no longer good law after the Supreme Court's and Ninth Circuit's decisions in *Johnson v. United States,* 559 U.S. 133 (2010) ("*Johnson I*"), *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Fernandez-Ruiz v. Gonzales*, 543 F.3d 1121 (9th Cir. 2006).

In *Johnson I*, the Supreme Court held that to qualify as a "crime of violence" under the elements clause of § 924(e)(2)(B)(i),[7] "an offense must have as an element the use, attempted use, or threatened use of violent physical force – 'that is, force capable of causing physical pain or injury to another person.'" *United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (quoting *Johnson I,* 559 U.S. at 140).

In *Leocal*, the Supreme Court held that Florida's driving-under-the-influence statute, which does not require proof of any particular mental state, cannot be a predicate crime of violence under 18 U.S.C. § 16(a)[8] because Section 16(a) requires a higher degree of intent than negligent or merely accidental conduct. 543 U.S. at 11.

In *Fernandez-Ruiz*, the Ninth Circuit analyzed whether a misdemeanor conviction under an Arizona domestic violence statute was a categorical crime of violence under 18 U.S.C. § 16(a). 466 F.3d at 1125. The Arizona statute required proof of intentional, knowing or reckless conduct. *Id*. The Ninth Circuit applied *Leocal* and concluded that "the reasoning of *Leocal* – which merely holds that using force negligently or less is not a crime of violence – extends to crimes involving reckless use of force," and therefore "the offense underlying Fernandez-Ruiz's 2003 misdemeanor domestic violence conviction was not a categorical crime of violence under 18 U.S.C. § 16(a)." *Id*. at 1129, 1132.

Petitioner argues that after *Johnson I*, *Leocal*, and *Fernandez-Ruiz*, crimes of violence under § 924(c)(3)'s elements clause require proof of *intentional* use or

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[7] 18 U.S.C. § 924(e)(2)(B)(i) provides, "the term 'violent felony' means any crime punishable by imprisonment of a term exceeding one year… that – (i) has as an element, the use, attempted use, or threatened use of physical force against the person of another…."

[8] 18 U.S.C. 16(a) provides, "The term 'crime of violence' means – (a) an offense that has as an element the use, attempted use, or threated use of physical force against the person or property of another…."

threatened use of *violent* physical force, and that robbery of a postal carrier under § 2114(a) does not meet these requirements.

To determine whether an offense qualifies as a "crime of violence" under § 924(c)(3)'s elements clause, the Ninth Circuit applies the "categorical approach" laid out in *Taylor v. United States*, 495 U.S. 575 (1990). *United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016). Under this approach, the Court looks not to the particular facts underlying the conviction, but "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of a crime of violence." *Id.* (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013)) (internal quotations omitted). The defendant's crime cannot be categorically a "crime of violence" if the statute of conviction punishes any conduct not encompassed by the statutory definition of a "crime of violence." *Id.* (citing *United States v. Piccolo*, 44 F.3d 1084, 1086-87 (9th Cir. 2006)).

The postal robbery statute states:

> A person who assaults any person having lawful charge, control, or custody of any mail matter…with intent to rob, steal, or purloin such mail matter … or robs or attempts to rob any person of such mail matter, … shall, for the first offense, be imprisoned not more than ten years; *and* if in effecting or attempting to effect such robbery *he wounds the person* … or *puts his life in jeopardy by the use of a dangerous weapon*, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

18 U.S.C. § 2114(a) (emphasis added).

Under 18 U.S.C. § 2114(a), a person may be imprisoned for up to ten years for either (1) robbing or attempting to rob, or (2) assaulting with the intent to rob, steal, or purloin. The statute additionally provides for imprisonment of up to twenty-five years for perpetrators who (1) wound the victim or (2) put the victim's

life in jeopardy "by use of a dangerous weapon." 18 U.S.C. § 2114(a). Thus, the statute actually defines several crimes by listing elements in the alternative. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) ("A single statute may list elements in the alternative and thereby define multiple crimes.").

Where, as here, a statute has a "divisible structure" that lists "elements in the alternative, and thereby define[s] multiple crimes," Courts may apply the modified categorical approach. *Id.* "Where a statute sets out separate punishment clauses, each adding further elements to the crime, the punishment clauses constitute separate and distinct criminal offenses, rather than one offense with different punishments." *United States v. Chapman*, 528 F.3d 1215, 1218 (9th Cir. 2008) (citing *Jones v. United States*, 526 U.S. 227, 252 (1999)).

Section 2114(a) describes two levels of offense subject to different punishments. First, the statute describes the basic version of the crime, punishable by ten years, which may be committed by robbing, attempting to rob, or assaulting with the intent to rob, steal, or purloin. 18 U.S.C. § 2114(a). Second, it describes an aggravated crime punishable by twenty-five years, which requires that, in the course of the basic offense, the offender (1) wound the victim or (2) put his life in jeopardy by use of a dangerous weapon. *Id.* Therefore, § 2114(a) is divisible into at least two parts, each defining a crime, making the modified categorical approach appropriate.

Under the modified categorical approach, the Court may look "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement) to determine what crime, with what elements a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. Here, the Counts of the indictment charging a violation of § 2114 specifically alleged that Petitioner "put in jeopardy the life of [the victim] by use of a dangerous weapon, namely, a handgun." (Suppl. Mot. to Vacate, Ex. A at 5.) The § 2114 instruction provided to the jury also required a finding that the defendant "made a display of force that reasonably

caused a person having lawful charge, control or custody of such mail to fear bodily harm by using a dangerous weapon." (*Id.*, Ex. C at 26.) Therefore, it is clear that Petitioner was convicted of the aggravated form of armed postal robbery.

Under § 2114(a), the aggravated crime expressly requires (1) force that is sufficient to "wound" or (2) the use of a dangerous weapon that "put's [the victim's] life in jeopardy." 18 U.S.C. § 2114(a). In particular, putting "life in jeopardy by use of a dangerous weapon" requires that the use of a dangerous weapon is "actually so used during the robbery that the life of the person being robbed is placed in an objective [state] of danger." *Wagner v. United States*, 264 F.2d 524, 530 (9th Cir. 1959). Therefore, the aggravated version of the crime satisfies § 924(c)(3)(A)'s requirement of including as an element "the use, attempted use, or threatened use of force capable of causing physical injury."

Further, Petitioner concedes that the standards for § 2114 are consistent with the standards applied to bank robbery under 18 U.S.C. § 2113. (Suppl. Mot. to Vacate at 17.) In *Carter v. United States*, the Supreme Court stated that the "presumption in favor of scienter demands" that § 2113(a) be read as a "general intent crime." 530 U.S. 255, 268 (2000). Thus, a "conviction under § 2113(a) requires *intentional* use or threatened use of force and therefore does not conflict with *Leocal* … or *Fernandez-Ruiz*." *United States v. Cross*, 691 Fed. App'x 312, 313 (9th Cir. 2017) (internal citations omitted) (emphasis added); s*ee also Pritchard*, 692 Fed. App'x at 352 ("[A] conviction under § 2113(a) & (d) requires a showing of general intent, and therefore requires that any 'intimidation' or threatened use of force be *intentional*.") (emphasis added).

In accordance with the reasoning of the Ninth Circuit, this Court finds that aggravated postal robbery under § 2114 is a "general intent" crime, with a conviction requiring the (1) *intentional* use of force sufficient to wound, or (2) *intentional* use of a deadly weapon that put's the victims life in jeopardy. Finding

this crime to be a crime of violence therefore does not conflict with *Leocal* or *Fernandez-Ruiz*.

Based on the foregoing, the Court finds that the § 2114(a) robberies upon which Petitioner's § 924(c) convictions were predicated fall within the elements clause of § 924(c)(3). The convictions therefore did not violate Petitioner's due process rights, and he is not entitled to relief under 28 U.S.C. § 2255. Accordingly, because it "plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief," the motion must be dismissed. 28 U.S.C. § 2255 Proc. R. 4(b).

C. Certificate of Appealability

Petitioner requests that the Court issue a certificate of appealability for his petition. In order to proceed with any appeal, a § 2255 petitioner must receive a certificate of appealability from the district court. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-51 (9th Cir. 2006). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "Where a district court has rejected the constitutional claims on the merits … the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484.

Here, the Ninth Circuit has not previously considered the level of force required for the prosecution to obtain a conviction on an aggravated § 2114(a) charge in relation to the level of force required to constitute a "crime of violence" under *Johnson I*. Furthermore, the Ninth Circuit has not addressed any *mens rea* requirements to obtain a § 2114(a) conviction in light of its decision in *Fernandez-*

Ruiz. Similar findings in other circuits[9] suggest that an aggravated § 2114(a) charge satisfies the elements clause of § 924(c)(3). Nevertheless, reasonable jurists could disagree regarding the construction of § 2114(a) and the requisite force and mens rea to obtain a conviction. Accordingly, a certificate of appealability is warranted.

IV. CONCLUSION

The Court **DENIES** Gray's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255; **GRANTS** the Government's Motion to Dismiss; and **GRANTS** Gray's request for a certificate of appealability.

IT IS SO ORDERED.

DATED: November 6, 2018

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

[9] While not yet addressed in the Ninth Circuit post-*Johnson I*, other Circuits have held that aggravated armed postal robbery under 18 U.S.C. § 2114 is categorically a "crime of violence" under the Elements Clause of § 924(c)(3)(A). *See United States v. Enoch*, 865 F.3d 575, 582 (7th Cir. 2017) ("The second part of 18 § 2114(a) constitutes a crime of violence as described in 18 U.S.C. § 924(c)."); *In re Watt*, 829 F.3d 1287, 1290 (11th Cir. 2016) (putting a postal worker's life in jeopardy by use of a firearm would fall under § 924(c)(3)(A)'s force clause).