No. _____

In the
Supreme Court of the United States

José M. Rojas-Tapia,

Petitioner,

v.

United States of America,

Respondent.

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

Appendix

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Appendix A

United States Court of Appeals
For the First Circuit

Nos. 20-1514
20-1735

JOSÉ M. ROJAS-TAPIA,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Barron, Chief Judge,
Gelpí, Montecalvo, Rikelman, and Aframe
Circuit Judges.

ORDER OF COURT

Entered: July 9, 2025

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Rachel Brill, Eleonora Concepcion Marranzini, Franco L. Pérez-Redondo, Kevin Lerman, Robert M. Fitzgerald, Thomas F. Klumper, Juan Carlos Reyes-Ramos, David Christian Bornstein, Joshua K. Handell, Jessica Ellen Earl

Appendix B

United States Court of Appeals
For the First Circuit

Nos. 20-1514,
20-1735

JOSÉ M. ROJAS-TAPIA,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Pérez-Giménez, U.S. District Judge]
[Hon. Daniel R. Domínguez, U.S. District Judge]

Before

Barron, Chief Judge,
Montecalvo and Aframe, Circuit Judges.

Robert Fitzgerald, Assistant Federal Public Defender with whom Rachel Brill, Federal Public Defender, District of Puerto Rico, Héctor L. Ramos-Vega, Interim Federal Public Defender, District of Puerto Rico, Franco L. Pérez-Redondo, Assistant Federal Public Defender, Supervisor, Appeals Division, and Kevin E. Lerman, Research and Writing Attorney, were on brief, for Appellant.

Joshua K. Handell, with whom W. Stephen Muldrow, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Thomas F. Klumper, Assistant United States Attorney, Senior Appellate Counsel, were on brief, for Appellee.

Appendix B

March 3, 2025

Appendix B

BARRON, Chief Judge. José M. Rojas-Tapia appeals the denial of his 28 U.S.C. § 2255 petitions for post-conviction relief, which he filed in the District of Puerto Rico. The first petition challenges his convictions under 18 U.S.C. § 924(c), while the second petition challenges the application of the Armed Career Criminal Act ("ACCA") to his sentences for his two convictions under 18 U.S.C. § 922(g). We affirm.

I.

A.

Rojas's convictions and sentences stem from his October 2000 guilty pleas to charges set forth in two indictments that were handed up in the District Court of Puerto Rico in December 1999 and March 2000. The first indictment contained six counts, each of which pertained to Rojas's alleged participation in a robbery of what his plea agreement referred to as the Levittown Post Office. The second indictment contained five counts, each of which pertained to Rojas's alleged participation in a robbery of what his plea agreement referred to as the Sabana Seca Post Office.

As relevant here, the first indictment charged Rojas with one count of "aiding and abetting" an assault of employees of the Levittown Postal Service with the intent to rob them of U.S. currency and other property of the United States, and in so doing, placing those employees' lives in jeopardy by the use of dangerous weapons. The count alleged that this conduct was in violation of

the federal mail robbery statute, 18 U.S.C. § 2114(a), and 18 U.S.C. § 2, which states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal," 18 U.S.C. § 2(a).

Rojas was also charged in this indictment with two counts of violating § 924(c), which criminalizes the carrying or use of a firearm during a "crime of violence." 18 U.S.C. § 924(c). These counts identified the Levittown robbery alleged in Count One as the predicate "crime of violence."

Also relevant to this appeal is the fourth count of this indictment, which charged Rojas with violating § 922(g) by (during the federal mail robbery alleged in Count One) possessing a firearm. Section 922(g) provides, as relevant here, that it shall be unlawful for any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g).[1]

The second indictment charged Rojas with one count of "aiding and abetting" an assault of employees of the Sabana Seca Post Office with the intent to rob them of U.S. currency and other

[1] The other counts in this indictment are not relevant to this appeal. They charged Rojas with, during the course of the robbery, possessing a firearm in a federal facility and attempting to kill a police officer, in violation of 18 U.S.C. §§ 930(b)-(c) and 2.

property of the United States, and in so doing, putting those employees' lives in jeopardy by the use of dangerous weapons. Here, too, the charge alleged that Rojas had engaged in the conduct in violation of 18 U.S.C. § 2114(a) and 18 U.S.C. § 2. In addition, Rojas was charged in this indictment with two counts of using or carrying a firearm during the robbery, in violation of § 924(c). Each of the § 924(c) counts identified the predicate "crime of violence" as the Sabana Seca robbery charged in Count One of that same indictment. And, as relevant to this appeal, Rojas also was charged in this indictment with one count of violating § 922(g), based on his having been in possession of a firearm during the Sabana Seca robbery while having previously committed three felonies.[2]

B.

Rojas pleaded guilty to the six counts related to the alleged robbery of the Levittown Post Office and the five counts related to the alleged robbery of the Sabana Seca Post Office. The resulting eleven convictions stemming from the two indictments were then consolidated for purposes of sentencing. At sentencing, Rojas received concurrent sentences for the convictions on the counts contained in the two indictments that were based on the

[2] This indictment also charged Rojas with one count not relevant to his appeal, which was for possessing a firearm in a federal facility during the robbery, in violation of 18 U.S.C. §§ 930(b) and 2.

same statutory sections. But Rojas successfully appealed his sentences for his convictions and was resentenced on January 19, 2005. At his resentencing, he received a combined prison sentence of 262 months for all his convictions other than his § 924(c) convictions. He also received a combined, consecutive 420-month prison sentence for his § 924(c) convictions. Thus, in total, he received a prison sentence of 682 months.

In being sentenced for his § 922(g) convictions, Rojas was subjected to § 924(e) of the ACCA. The ACCA provides that an individual convicted under § 922(g) who also "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, . . . shall be fined under this title and imprisoned not less than fifteen years." 18 U.S.C. § 924(e)(1). The definition of "violent felony" for the purposes of the ACCA encompasses offenses that are covered by its force clause, which reaches a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 924(e)(2)(B)(i). The definition also encompasses crimes that "involve[] use of explosives," a list of enumerated offenses ("burglary, arson, or extortion"), and crimes that would constitute "violent felon[ies]" under the residual clause. Id. § 924(e)(2)(B)(ii). That latter clause defines a "violent felony" to include felonies that "otherwise involve[] conduct that

presents a serious potential risk of physical injury to another." Id. The decision to subject Rojas to the enhanced sentence under ACCA was based on his having three prior felonies at the time of his possession of the firearm in question.

c.

Rojas did not challenge any of his convictions on direct appeal. Nor did he file a direct appeal from the sentences that he received when he was re-sentenced. In 2017, however, he filed the two habeas petitions in the District of Puerto Rico under 28 U.S.C. § 2255 that are before us in this appeal and that take aim at many of those convictions as well as his sentences.

One petition challenged the § 924(c) convictions and ACCA-based sentence stemming from the robbery of the Levittown Postal Service employees ("Levittown Petition"). The other petition challenged the § 924(c) convictions and ACCA-based sentence stemming from the robbery of the Sabana Seca Postal Service employees ("Sabana Seca Petition").

Judge Daniel R. Domínguez was assigned to the Levittown Petition, while Judge Juan M. Pérez-Giménez was assigned to the Sabana Seca Petition. In each petition, Rojas argued that, under Johnson v. United States, 576 U.S. 591 (2015) (Johnson II), his § 924(c) convictions could not stand, because his statutory offense of conviction for aiding and abetting the violation of § 2114(a) does not qualify as a "crime of violence."

Section 924(c) defines a "crime of violence" to include any felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," id. § 924(c)(3)(A), although the Supreme Court of the United States has clarified that this force must be "violent force capable of causing physical pain or injury." United States v. Faust, 853 F.3d 39, 50-51 (1st Cir. 2017) (citing Johnson v. United States, 559 U.S. 133, 140 (2010) (Johnson I)). In addition, the definition of a "crime of violence" for purposes of § 924(c) has a residual clause, which defines as a "crime of violence" any felony "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)(B).

In contending that his § 924(c) convictions must be overturned under Johnson II, Rojas pointed out that the Supreme Court held in that case that the residual clause of the ACCA's definition of a "violent felony," which defined such an offense to include "any felony that 'involves conduct that presents a serious potential risk of physical injury to another,'" was unconstitutionally vague. 576 U.S. at 593 (quoting 18 U.S.C. § 924(e)(2)(B)). Rojas argued that Johnson II's logic extended to the parallel residual clause in § 924(c), notwithstanding that § 924(c)'s residual clause defines what qualifies as a "crime of

violence" rather than what qualifies as a "violent felony." Rojas thus contended based on Johnson II that a predicate offense for a § 924(c) conviction would qualify as a "crime of violence" only if it were encompassed by § 924(c)'s force clause. He then further argued that § 924(c)'s force clause encompassed neither of the federal mail robbery offenses of which he had been convicted, notwithstanding that each of his convictions for those offenses was alleged to be the respective "crime of violence" for each of his § 924(c) convictions.

In addition to challenging his § 924(c) convictions based on Johnson II, Rojas's petitions also challenged his sentences for his convictions under § 922(g) on the ground that, given Johnson II, the sentences had been improperly enhanced based on the ACCA. Rojas rested his petitions as to those sentences on the ground that he had not previously been convicted of three predicate "violent felonies" or "serious drug offenses," given that Johnson II had rendered unconstitutional the residual clause of the ACCA's definition of a violent felony. Rojas argued in this regard that his predicate convictions under Puerto Rico law for robbery, robbery of a vehicle, kidnapping, escape, murder, and attempted murder no longer qualified as violent felonies because they did not meet the stringent requirements of the ACCA's force clause.

Appendix B

Each of Rojas's § 2255 petitions for habeas relief was denied in a separate order, which was accompanied by a separate opinion. The analysis in each of these opinions, however, was quite similar.

Each opinion noted that, while the habeas petition at issue was pending, the Supreme Court had held in United States v. Davis, 588 U.S. 445 (2019), that the logic of Johnson II extended to the definition of "crime of violence" that applies to § 924(c). Nonetheless, each opinion concluded that the federal mail robbery offense underlying the § 924(c) convictions at issue in the relevant habeas petition qualified as a "crime of violence" under the force clause of the definition of a "crime of violence" for purposes of § 924(c).

As to the claims set forth in each petition that concerned the relevant ACCA-enhanced sentence, Judge Domínguez, who heard the Levittown Petition, explained that, under United States v. Báez-Martinez, 950 F.3d 119 (1st Cir. 2020), Rojas's prior convictions for attempted murder and second-degree murder under Puerto Rico law both qualified as "violent felon[ies]" under the force clause of the ACCA's definition of a "violent felony." Judge Pérez-Giménez, who heard the Sabana Seca Petition, reached the same conclusion based on a previous District of Puerto Rico opinion that he had written.

The judges each also ruled that Rojas's convictions for armed carjacking under Puerto Rico law qualified as convictions for "violent felon[ies]" under the force clause of the ACCA's definition of a "violent felony." The judges then each also held that those predicate Puerto Rico law convictions -- in conjunction with Rojas's previous conviction for a "serious drug offense" -- supported his ACCA-enhanced sentence.

In their respective orders denying Rojas's petitions, each judge expressly declined to issue a Certificate of Appealability ("COA") on any of Rojas's claims. Rojas nonetheless appealed the denials of his request for a COA to this Court, and the appeals were consolidated. Rojas then filed a single request for a COA on each of the claims that he presented below in his two petitions. This Court granted the request with respect to his claims that his § 924(c) convictions cannot stand under Davis and Johnson II because his convictions for federal mail robbery under § 2114(a) do not qualify as convictions for a "crime of violence." However, this Court denied his request for a COA with respect to his remaining claims.

II.

"When reviewing a district court's denial of a § 2255 petition, we review the district court's legal conclusions de novo and any factual findings for clear error." Lassend v. United States, 898 F.3d 115, 122 (1st Cir. 2018). "The determination of

whether a prior conviction qualifies as a predicate offense . . . is a legal question subject to de novo review." United States v. Pakala, 568 F.3d 47, 54 (1st Cir. 2009) (emphasis omitted). As to the question of what offense the defendant was convicted of committing, Rojas seems to contend that this question, too, is a legal question and thus one that is subject to de novo review. This argument is foreclosed, however, by the Supreme Court's decision in Pereida v. Wilkinson, which held that the question of "what crime the defendant was convicted of committing," for the purposes of applying the categorical approach, see infra Section III, is "a question of fact." 592 U.S. 224, 238 (2021).

III.

We start with Rojas's challenge to the denial of his petitions challenging his § 924(c) convictions. Because of the Supreme Court's decision in Davis, this challenge has merit so long as Rojas can show that the predicate mail robbery conviction under § 2114(a) for each of his § 924(c) convictions was not for an offense that has "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3). If he can make that showing, then he will have shown that the government has not proved that he used a firearm during the commission of a "crime of violence" with respect to the underlying § 924(c) charges.

To decide whether Rojas has made the required showing about his federal mail robbery convictions, we apply what is known as the "categorical approach." Mathis v. United States, 579 U.S. 500, 504 (2016). We thus must assess the elements of the offense that is claimed to qualify as the "crime of violence" for a defendant's § 924(c) conviction to see if those elements are encompassed within the force clause of § 924(c)'s definition of a "crime of violence." Id. (explaining that "the categorical approach" "focus[es] solely" on the elements of a crime, which, at a plea hearing, "are what the defendant necessarily admits when he pleads guilty"). In other words, we must focus on the elements of the claimed predicate offense rather than on the conduct that the defendant engaged in to commit that offense. See United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017).

Here, the offense that is claimed to be the predicate "crime of violence" is the offense of federal mail robbery under § 2114(a), of which Rojas was convicted as an aider and abettor under 18 U.S.C. § 2. Accordingly, we must decide whether Rojas is right that neither of the federal mail robbery offenses under § 2114(a) to which he pleaded guilty has "as an element the use of force or threatened use of force," because, given Davis, if neither does, then neither of his convictions for those offenses can serve as the predicate conviction for a "crime of violence" under § 924(c). As we will explain, however, we conclude that Rojas is

not right on that score, because his convictions under § 2114(a) were for offenses that have such an element, at least given our existing precedent.

A.

Section 2114(a)[3] provides as follows:

> (a) Assault.--A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, 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 having custody of such mail, money, or other property of the United States, 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).

The parties agree that § 2114(a) does not set forth a single offense, as they agree that it is divisible into the separate offenses of simple mail robbery and aggravated mail robbery. See Taylor, 848 F.3d at 492 (explaining that statutes which list multiple elements in the alternative are "divisible"

[3] Section 2114 contains a second provision, subsection (b), criminalizing "[r]eceipt, possession, concealment, or disposal of property" obtained in violation of § 2114(a). 18 U.S.C. § 2114(b). Though Rojas's plea agreement and indictments only identify his predicates as violations of § 2114 without specifying a particular subsection of that statute, neither party contends that subsection (b) formed the basis of Rojas's § 924(c) convictions.

into separate offenses under the categorical approach, meaning that some forms of the offense may have as an element the requisite force while other forms of the offense may not). The parties further agree that the elements of the offense (or potentially, offenses) of simple mail robbery under § 2114(a) are set forth before the semicolon in the text quoted above. And the parties agree that the portion of the text following the semicolon that refers to wounding or placing a postal worker's life in jeopardy by the use of a dangerous weapon does not describe the offense of "simple mail robbery" but instead sets forth the separate offense of aggravated mail robbery. However, in the government's view, the text following the semicolon in § 2114(a) sets forth a "wounding" offense of aggravated mail robbery that is a separate and distinct offense from the "placing life in jeopardy" offense of aggravated mail robbery. Moreover, the government further contends that the text following the semicolon that describes the repeated commission of simple mail robbery sets forth a sentencing factor rather than a distinct offense in its own right.

The parties therefore are in agreement that the offense (or offenses) of simple mail robbery carries (or carry) a maximum sentence of ten years imprisonment and requires (or require) proof that the defendant "assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or

purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States." 18 U.S.C. § 2114(a). As a result of this shared understanding, the parties also agree that the simple mail robbery offense (or offenses) that § 2114(a) sets forth need not be proved by showing that the defendant, "in effecting or attempting to effect [a simple mail robbery]," "wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon." And the parties agree, too, that the offense or offenses of simple mail robbery need not be proved by showing that the defendant has committed "a subsequent [simple mail robbery]."

At this point, though, the parties' arguments begin to diverge in ways that are relevant to this appeal. We therefore turn to their points of disagreement.

B.

For starters, Rojas contends -- contrary to the government -- that it is not clear whether his conviction for each federal mail robbery offense under § 2114(a) was for an offense of simple mail robbery under that provision or for an offense of aggravated mail robbery under that provision. As a result, Rojas argues that we must proceed on the understanding that each of his convictions for federal mail robbery under § 2114(a) was for the

offense of simple mail robbery, which he contends the force clause in § 924(c)'s definition of a "crime of violence" does not encompass because the offense of simple mail robbery under § 2114(a) does not have as an element the requisite use of force. He thus contends that his petitions must be granted as to his § 924(c) convictions for this reason alone.

We agree with the government, however, that the record contradicts this assertion about the nature of his underlying § 2114(a) convictions. The record makes clear that Rojas pleaded guilty to two counts under § 2114(a) -- one in each separate indictment -- and that each count was for assaulting postal employees. Moreover, his plea agreements make clear that the maximum term of imprisonment Rojas faced for each of his § 2114(a) convictions was twenty-five years. Given that the offense of simple mail robbery for which, in making this argument, Rojas contends he was convicted carries a maximum penalty of ten years in prison, it is clear that Rojas's predicate mail robbery offenses under § 2114(a) were necessarily grounded in the text of § 2114(a) that follows the semicolon in that statute, rather than any offense of simple robbery that is set forth before the semicolon.[4]

[4] Insofar as Rojas appears to contend in his reply brief that it is not clear whether the predicate crimes of violence underlying his § 924(c) convictions -- "to wit: assaulting employees of the [Levittown and Sabana Seca] Postal Service[s]" -- are the § 2114(a) convictions to which he also pleaded guilty, that argument is waived. See Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d

We also see no merit in Rojas's fallback ground for challenging his § 924(c) convictions. Here, he contends that aggravated mail robbery is a single offense that may be committed by various means, one of which is by repeatedly committing simple mail robbery. And, he further contends, the repeated commission of simple mail robbery does not require force as defined by § 924(c)'s force clause. Thus, Rojas argues that his § 924(c) convictions cannot stand even if he had been convicted of aggravated rather than simple mail robbery under § 2114(a), because even aggravated mail robbery does not qualify as a "crime of violence" after Davis. But, even accepting Rojas's contention that simple mail robbery is not a "crime of violence," this ground for challenge still fails, because it rests on the mistaken premise that aggravated mail robbery under § 2114(a) is a single offense, of which the repeated commission of simple mail robbery is but one means of committing it.

As the Supreme Court has explained, for a statute's alternatively listed items to be means of committing a single offense, rather than elements that specify distinct offenses, the alternatives must "enumerate[] various factual means of committing

25, 29 (1st Cir. 2015) ("Our precedent is clear: we do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief.").

a single element." Mathis, 579 U.S. at 506. For example, a statute that has as an element the use of a "dangerous weapon" might also list a "knife, gun, bat, or similar weapon" as factual means illustrating "diverse means of satisfying [that] single element . . . ." See id. So, too, might a statute list "any building, structure, [or] land, water, or air vehicle" as factual means of satisfying a single "locational element." See id. at 507 (alteration in original) (emphasis omitted) (first quoting Iowa Code § 702.12 (2013)); see also id. at 518 (citing favorably to United States v. Howard, 742 F.3d 1334, 1348 (11th Cir. 2014), for its holding that a statute that listed "any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein" and "any railroad box car or other rail equipment or trailer or tractor trailer or combination thereof" merely provided "non-exhaustive examples of items that qualify as a 'structure' and thus count as a 'building'" for the purpose of defining the element of "building" in an Alabama burglary statute).

In arguing that the repeated commission of simple mail robbery is just a means of committing aggravated mail robbery -- and so not a distinct offense in its own right -- Rojas points out that this Court has never expressly held that a jury would have to find that a defendant wounded a mail carrier, as opposed to placing that mail carrier's life in jeopardy, or vice versa, to convict that defendant for aggravated mail robbery. Cf.

id. at 504, 506 (holding that, "[a]t a trial" elements are "what the jury must find beyond a reasonable doubt to convict," but that, when a statutory list "merely specifies diverse means of satisfying a single element," a jury need not unanimously agree on which means the defendant used to commit that element). He also notes that § 2114(a) does not establish distinct punishments for the three alternatives listed following § 2114(a)'s semicolon -- wounding, placing a victim's life in jeopardy, and repeatedly committing simple mail robbery. Cf. id. at 518 ("If statutory alternatives carry different punishments, then under Apprendi[v. New Jersey, 530 U.S. 466 (2000)] they must be elements."). Finally, he contends that the relevant documents in the proceedings below do not identify any of the three alternatives to the exclusion of the others. Cf. id. at 519 ("[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements.").

We agree, however, with the government -- and all other circuits to have addressed the issue -- that § 2114(a) does not set forth the offense of aggravated mail robbery as a single offense with means that include the repeated commission of simple mail robbery. See, e.g., United States v. Buck, 23 F.4th 919, 925 (9th Cir. 2022); Pannell v. United States, 115 F.4th 154, 160-61 (2d Cir. 2024). Notably, each of the examples that the Supreme

Court has given for when alternatives in a criminal statute are merely means of committing the offense rather than distinct offenses is an example that sets forth an element specifying a type of conduct and then factual means of carrying out that conduct. However, there is no single element referenced in § 2114(a) of which "wound[ing]," "put[ting] [a mail carrier's] life in jeopardy by the use of a dangerous weapon," and committing "a subsequent [simple mail robbery] offense," 18 U.S.C. § 2114(a), would be just means.

In that respect, § 2114(a) is like the provision that was at issue in United States v. McCants, 952 F.3d 416, 426 (3d Cir. 2020). There, the Third Circuit rejected a similar argument that a set of statutory alternatives were means, rather than elements. In doing so, the Third Circuit explained that the argument failed because the statute in question "state[d] no overarching genus of which [the alternatives] [were] species." Id.

Rojas's counsel at oral argument did contend that the alternatives of wounding, placing a life in jeopardy, and repeatedly committing the offense of simple mail robbery is each properly understood to identify a means of satisfying the single element of "enhanced culpability." But this purported element does not appear in the text of § 2114(a). And, while the assertedly indivisible statute in Chambers v. United States, 555

U.S. 122, 126 (2009) also lacked any named element to which the asserted listed means were claimed to relate, the Court there considered the similarity (or dissimilarity) of the behavior described by each asserted alternative means in order to determine whether the asserted alternative means were "variations on a single theme . . . together constituting a single category" and so a single offense, or were too dissimilar from one another to support the conclusion that they were alternative means of committing a single offense rather than separate offenses.

That same logic applies here and reinforces the conclusion that it does not make sense to read an implied umbrella element of "enhanced culpability" into § 2114(a). The behaviors described in the listed alternatives here -- at least when comparing committing simple mail robbery twice to wounding a victim or using a dangerous weapon to place a mail worker's life in jeopardy -- are, like the alternatives in Chambers, materially different in nature and in the types of risk each poses. Cf. United States v. Allred, 942 F.3d 641, 650 (4th Cir. 2019) ("Put simply, the behavior typically underlying the causation of bodily injury 'differs so significantly' from that underlying damage to property that those statutory phrases cannot plausibly be considered alternative means." (quoting Chambers, 555 U.S. at 126)).

Further, this conclusion comports with the structure of § 2114(a). Unlike the examples provided by the Supreme Court in Mathis, the alternatives listed in the statute at issue here are each separated by the disjunctive "or," 18 U.S.C. § 2114(a), which supports the notion that each alternative stands on its own rather than as an illustration of an "overarching genus." See McCants, 952 F.3d at 426.

Finally, although the First Circuit has not issued model jury instructions on § 2114(a), the two circuits to have done so both identify wounding and placing a victim's life in jeopardy by use of a dangerous weapon as elements that must be proven to a jury beyond a reasonable doubt, without identifying the recidivist provision in a similar way. See Pattern Crim. Jury Instr. 7th Cir. § 2114(a) at 870 (2023 ed.); Pattern Crim. Jury Instr. 11th Cir. O77 (2024); see also United States v. Bain, 874 F.3d 1, 30 (1st Cir. 2017) ("There are a number of different ways of distinguishing elements from means, including looking at . . . relevant model jury instructions . . . ."). Moreover, contrary to Rojas's contention that the indictment and the plea agreement do not "speak plainly" on the question of divisibility, the two indictments under which Rojas was charged allege that Rojas committed simple mail robbery, "and while committing said offense, did put [postal workers'] lives in jeopardy by the use of dangerous weapons." And his plea agreements then use the same language,

thereby making it clear that the prosecutors in Rojas's case did "referenc[e] one alternative term to the exclusion" of the other two provisions -- namely, recidivating or wounding a postal carrier. Mathis, 579 U.S. at 519.

Thus, we reject Rojas's argument that the alternatives listed after the semicolon in § 2114(a) -- wounding a mail carrier, placing their life in jeopardy by use of a dangerous weapon, and recidivating -- are merely means of committing a single, indivisible offense of aggravated mail robbery.[5]

D.

This last point also suffices to resolve any arguable dispute between the parties over whether the District Court documents "speak plainly" as to which variant of the offense of aggravated mail robbery formed Rojas's predicate offenses. It is clear that each of Rojas's convictions for federal mail robbery under § 2114(a) was based on his having pleaded guilty to the offense of aggravated mail robbery through putting the lives of postal employees in jeopardy by the use of dangerous weapons while

[5] Given our reasons for rejecting Rojas's contention that the language beyond the semicolon sets forth alternative means of committing a single, indivisible offense, we need not decide here whether the portion of that language concerning the repeated commission of simple mail robbery constitutes a separate offense or a mere sentencing factor, or whether the language concerning wounding and placing a postal worker's life in jeopardy constitutes a single, indivisible aggravated mail robbery offense, or two distinct such offenses.

committing a simple mail robbery. As such, we do not disturb any of the factual findings on that score that were made below, and so proceed on the understanding that Rojas was convicted only of a variant of aggravated mail robbery that does not implicate the language in § 2114(a) that concerns the repeated commission of simple mail robbery.[6]

Moreover, Rojas does not dispute that the offense of aggravated mail robbery -- if not susceptible of being committed by means of repeatedly committing simple mail robbery -- qualifies as a "crime of violence" under the force clause of § 924(c)'s definition of a "crime of violence." And he fails to do so, notwithstanding that each of the judges below held that such an offense can so qualify in denying his respective petitions and that all our sister circuits to have addressed the question thus far have reached the same conclusion as the judges below did here. See Pannell, 115 F.4th at 162; United States v. Bryant, 949 F.3d 168, 180 (4th Cir. 2020); United States v. Castro, 30 F.4th 240, 248 (5th Cir. 2022); Knight v. United States, 936 F.3d 495, 501

[6] Because we hold that Rojas was convicted of aggravated § 2114(a) mail robbery due to his having placed in jeopardy, by the use of a dangerous weapon, the lives of the postal service employees, we need not address Rojas's argument that a recidivist version of aggravated mail robbery would not be a crime of violence, nor do we address his closely related argument that simple mail robbery is not a crime of violence. For the same reason, we do not pass on the parties' arguments as to whether simple mail robbery under § 2114(a) is further divisible into separate offenses.

(6th Cir. 2019); United States v. Enoch, 865 F.3d 575, 580 (7th Cir. 2017); Buck, 23 F.4th at 928. Thus, any such contention is waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

E.

Accordingly, we need only address Rojas's final ground for contending that, under Johnson II, his federal mail robbery convictions under § 2114(a) were not for an offense that qualifies as a "crime of violence" under § 924(c), such that his convictions cannot stand. This contention rests on the fact that, in his view, he was convicted of committing aggravated mail robbery as an aider and abettor rather than as a principal, as he contends that the force clause of § 924(c)'s definition of a "crime of violence" does not encompass the offense of aggravated mail robbery under § 2114(a) when it is premised on aiding and abetting the commission of that offense. And that is so, he contends, even if the offense of aggravated mail robbery under § 2114(a) does not have as a means of committing it the repeated commission of simple mail robbery under that provision.[7]

[7] Because we hold in the government's favor on this issue, we need not address the government's argument that the question of accomplice liability was not fairly raised in Rojas's application for a COA. See Doe v. Town of Lisbon, 78 F.4th 38, 44-45 (1st Cir. 2023) (holding that, when a case poses a question of statutory, rather than Article III, jurisdiction, "the question of jurisdiction need not be resolved if a decision on the merits will favor the party challenging the court's jurisdiction" (citation

In addressing this last aspect of Rojas's challenge to his § 924(c) convictions, we are not writing on a blank slate. As noted above, 18 U.S.C. § 2 states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Our precedent makes clear, however, that this provision does not create a separate offense of aiding and abetting a federal crime. Rather, it identifies a theory of liability for the commission of every federal offense to which § 2 applies. See United States v. Sanchez, 917 F.2d 607, 611 (1st Cir. 1990) (holding that aiding and abetting under § 2 "is not a separate offense" from the underlying substantive offense itself); see also id. (holding that the government need not refer to § 2 in charging documents when it wants to pursue an aiding-and-abetting theory); Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998) ("[I]f [a statutory provision] constitutes a separate crime, then the Government must write an indictment that mentions the [separate crime's] additional element[s] . . . .").

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and internal quotation marks omitted)); 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255."). We also need not address the government's argument that Rojas was in fact convicted as a principal, rather than an accomplice, because for the reasons we explain, that distinction makes no difference under our precedent for purposes of determining whether the offense qualifies as a "crime of violence" under § 924(c).

Moreover, against that backdrop, we held in Lassend that whether a defendant is convicted of a predicate "crime of violence" as a principal or an accomplice makes no difference under the categorical approach. 898 F.3d at 130 ("[The definition of a predicate offense of conviction] focuses on the elements of the crime of conviction, not on the particular act committed by the defendant or the circumstances of his conviction. What matters for the force clause, then, is whether a felony's legal definition involves violent force, not whether a particular individual actually employed or intended to employ violent force in committing that felony."). We reaffirmed that holding in United States v. García-Ortiz, 904 F.3d 102 (1st Cir. 2018), stating that 18 U.S.C. § 2 "makes an aider and abettor 'punishable as a principal,' and thus no different for purposes of the categorical approach than one who commits the substantive offense" by his own hand. Id. at 109 (quoting 18 U.S.C. § 2).

This approach also accords with the approach taken by every sister circuit to date. See, e.g., Medunjanin v. United States, 99 F.4th 129, 135 (2d Cir. 2024) (per curiam); United States v. Stevens, 70 F.4th 653, 662 (3d Cir. 2023); United States v. Draven, 77 F.4th 307, 316-18 (4th Cir. 2023); United States v. Hill, 63 F.4th 335, 363 (5th Cir. 2023); Nicholson v. United States, 78 F.4th 870, 880 (6th Cir. 2023); United States v. Worthen, 60 F.4th 1066, 1069-70 (7th Cir. 2023); Kidd v. United

States, 929 F.3d 578, 581 (8th Cir. 2019) (per curiam); United States v. Eckford, 77 F.4th 1228, 1236-37 (9th Cir. 2023); United States v. Deiter, 890 F.3d 1203, 1214-16 (10th Cir. 2018); United States v. Wiley, 78 F.4th 1355, 1363-65 (11th Cir. 2023); United States v. Smith, 104 F.4th 314, 323 (D.C. Cir. 2024). Indeed, at least one of our sister circuits -- in rejecting a similar argument -- has stated that, if we adopted the position Rojas asks us to take today, no federal crime could qualify as a predicate under the force clause, because any federal conviction can rest on accomplice liability, whether or not a guilty plea or jury instructions make that basis explicit. See Worthen, 60 F.4th at 1070-71; Sanchez, 917 F.2d at 611; see also United States v. Cammorto, 859 F.3d 311, 316 (4th Cir. 2017) (rejecting an argument on the grounds that it would "mean that no federal offense could be treated as a predicate offense for purposes of [the] ACCA, the Sentencing Guidelines, the Immigration and Nationality Act, or any other statute under which courts use the categorical approach."); cf. Voisine v. United States, 579 U.S. 686, 695-96 (2016) (declining to read a statutory provision under the categorical approach such that it would not have been operative in more than half of the country at the time of passage).

Rojas offers no response to this last concern about the practical consequences of our adopting his position. Nor does he dispute that Lassend and García-Ortiz rejected the aiding and

abetting-based theory for why an offense does not qualify as a "crime of violence" that he raises today, or that, as the government notes, a rule of law announced by a panel of this Court is generally binding on subsequent panels. See United States v. Whindleton, 797 F.3d 105, 113 (1st Cir. 2015). Nonetheless, he points out that we have recognized a narrow exception to this general rule under the law-of-the-circuit doctrine when "[a]n existing panel decision [is] undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court . . . ," id. at 113 (alterations in original) (quoting United States v. Rodriguez-Pacheco, 475 F.3d 434, 441 (1st Cir. 2007)), or "when 'authority that postdates the original decision, although not directly controlling, . . . nevertheless offer[s] a compelling reason for believing that the former panel, in light of new developments, would change its collective mind,'" United States v. Guerrero, 19 F.4th 547, 550 (1st Cir. 2021) (alterations in original) (quoting United States v. Guzmán, 419 F.3d 27, 31 (1st Cir. 2005)). And he contends that the Supreme Court's recent decision in Taylor fits the bill.

To make this case, Rojas emphasizes the fact that Taylor expressly states that the focus of the categorical approach is on whether "the offense requires proof of the defendant's use of force or threatened use of force." See United States v. Taylor, 596 U.S. 845, 856 (2022) (emphasis added). Rojas then notes that under

Rosemond v. United States, 572 U.S. 65, 71 (2014), "a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." Thus, he contends that it follows that a conviction for aiding and abetting a crime of violence does not require proof that the defendant himself used, attempted, or threatened to use force.[8]

In so arguing, Rojas concedes that Taylor concerned attempted Hobbs Act robbery and did not consider whether accomplice liability has any effect on the application of the categorical approach to the force clause in § 924(c)'s definition of a "crime of violence." See Taylor, 596 U.S. at 848. Rojas nonetheless contends that the Court's decision in Taylor was "the last in a relentless line of cases, starting with [the Court's first categorical approach case,] Taylor v. United States, 495 U.S. 575 (1990), eschewing a focus on anything but whether an offense

[8] Rojas premises his argument, in part, on the arguably lesser requirements for finding an accomplice liable under § 2 at the time of his conviction. See United States v. Evans-García, 322 F.3d 110, 114 (1st Cir. 2003) (holding an accomplice liable for a principal's actions if they merely "consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal") (citation omitted). As we will explain, the evidence required to convict a defendant for aiding and abetting a crime does not impact our analysis of accomplice liability under the categorical approach, so our analysis in this case holds for defendants convicted under § 2, regardless of whether their conviction occurred before or after Rosemond was decided.

requires a defendant attempt to use, use, or threaten to use violent force."

We recognize that "a good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same . . . ." Mathis, 579 U.S. at 514. It is also true that some of the language in the more-recent Taylor opinion does appear, when read in isolation, to support Rojas's view. For example, the recent Taylor majority said the following: "[Section 924(c)(3)(A)] speaks of the 'use' or 'attempted use' of 'physical force against the person or property of another.' Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property." Taylor, 596 U.S. at 856 (emphasis added) (quoting 18 U.S.C. § 924(c)(3)(A)).

We are also mindful of the Court's instruction, however, that "[t]he language of an opinion is not always to be parsed as though . . . dealing with language of a statute," and instead "must be read with a careful eye to context" in light of the discrete case or controversy to which the opinion was addressed. Nat'l Pork Prods. Council v. Ross, 598 U.S. 356, 373-74 (2023) (citation omitted). Considering Taylor with this admonition in

mind, we conclude that Taylor does not suffice to permit us to disregard our holdings in Lassend and García-Ortiz.

Taylor had no occasion to address the question of whether the defendant in committing the offense must have personally engaged in conduct that satisfied all the elements of attempted Hobbs Act robbery, rather than merely have aided and abetted the principal in engaging in such conduct. See 596 U.S. at 849-51. Instead, that case required the Court to address only the question of whether, to commit attempted Hobbs Act robbery, force needed to be used at all. See id. at 851. As a result, the Court had no reason to consider there whether the defendant might be deemed to have used the requisite force by virtue of having been an accomplice to an offense that, when committed by the principal, involves the use of such force. We thus have no basis for concluding that, in Taylor, the Court meant to make a significant statement about whether a conviction premised on an aiding and abetting theory of liability is encompassed by the force clause in § 924(c)'s definition of a "crime of violence."

We also are reluctant to conclude that the Court meant to do any such thing, given the legal backdrop against which the question of Taylor's import here arises. In that regard, we have held that 18 U.S.C. § 2 describes a theory of liability for committing an offense, rather than a distinct offense in its own right. See Sanchez, 917 F.2d at 611. Moreover, the text of

§ 924(c)'s force clause does not clearly compel the conclusion that it encompasses convictions for predicate offenses only when the defendant has been convicted of the predicate as a principal. Indeed, the force clause only requires that a qualifying offense "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). And a defendant who pleads guilty to a predicate as an accomplice admits that someone whom he aided or abetted committed every element of the predicate. See United States v. Loder, 23 F.3d 586, 590 (1st Cir. 1994) ("In order to find a defendant guilty of aiding and abetting, the government must show . . . that the principal committed [every element of] the underlying substantive crime."). Finally, every circuit to address this issue post-Taylor has similarly concluded that Taylor does not require the understanding of § 924(c)'s force clause that Rojas asks us to endorse. See, e.g., Medunjanin, 99 F.4th at 134-36; Stevens, 70 F.4th at 662; Draven, 77 F.4th at 317-19; Hill, 63 F.4th at 363; Nicholson, 78 F.4th at 878-82; Worthen, 60 F.4th at 1069-70; Eckford, 77 F.4th at 1236-37; Wiley, 78 F.4th at 1363-65.

We therefore conclude that our decisions in Lassend and García-Ortiz remain binding on us as a panel. Accordingly, we must reject Rojas's contention that his convictions for aggravated mail robbery as an accomplice do not qualify as convictions for

crimes of violence because his accomplice status rendered his predicates beyond the reach of § 924(c)'s force clause. As a result, we must reject this ground for challenging the District Courts' denials of his request for federal habeas relief as to his § 924(c) convictions.

IV.

We address Rojas's final argument briefly. Here, he contends, as he did below, that his sentences for his convictions under § 922(g), which criminalizes being a felon in possession of a firearm, were improperly enhanced pursuant to the ACCA based on his prior Puerto Rico law convictions. Specifically, he argues that the sentence enhancement he received under 18 U.S.C. § 924(e)(1) and U.S.S.G. § 2k2.1(a)(1)(B) only applies to him if he had previously been convicted of some combination of three qualifying crimes of violence or serious drug offenses and he contends that he was not, because his past convictions do not include three such qualifying offenses.

As we already have noted, however, each of the judges below in denying his respective habeas petitions, as well as a prior panel of this court, denied Rojas's application for a COA on this issue. Because Rojas does not raise any new arguments that were not before that original panel, we see no reason to overturn that panel's decision. Accordingly, we decline to reach the merits of Rojas's arguments on this score. See Peralta v. United States,

597 F.3d 74, 83 (1st Cir. 2010) ("The general rule is that 'a court of appeals should not consider the merits of an issue advanced by a habeas petitioner unless a COA first has been obtained with respect to that issue.'" (emphasis omitted) (quoting Bui v. DiPaolo, 970 F.3d 232, 237 (1st Cir. 1999))).

V.

For the foregoing reasons, the judgments are **affirmed**.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

José Rojas-Tapia,

Petitioner

v.

United States of America,

Respondent.

CIVIL NO. 17-1758 (PG)
Related Crim. No. 99-385 (PG)

CIVIL NO. 17-1759 (DRD)
Related Crim. No. 99-309 (DRD)

OPINION AND ORDER

Before the court is Petitioner Jose Rojas-Tapia's ("Petitioner" or "Rojas-Tapia") motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. See Docket No. 1. Petitioner argues that his conviction and sentence should be vacated because the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was declared unconstitutionally vague in Johnson v. United States ("Johnson II"), 135 S. Ct. 2551 (2015). He also argues that the residual clause of Section 924(c) for which he was convicted, as well as the pre-Booker[1] Career Offender guideline's residual clause[2] under which he was sentenced, are both invalid under Johnson II. For these reasons, Rojas-Tapia requests that this court vacate his convictions and sentences, and resentence him accordingly. The United States opposed each of Petitioner's arguments. See Docket No. 18.

For the reasons discussed as follows, the court **DENIES** Petitioner's motion to vacate.

[1] United States v. Booker, 543 U.S. 220 (2005) (holding that the U.S. Sentencing Guidelines are advisory).
[2] USSG § 4B1.2(a)(2).

Appendix C

I. BACKGROUND

In 1999, Rojas-Tapia was charged in two separate indictments for robbing postal offices and putting his victims' lives in jeopardy through the use of dangerous weapons. The first indictment was filed in September of 1999 (Criminal Case No. 99-309 (DRD)). It charged the petitioner with six counts based on events that took place on September 2, 1999, namely: (1) aiding and abetting in an assault on postal employees with the intent to rob, jeopardizing lives in the commission of the offense by using dangerous weapons in violation of 18 U.S.C. § 2114(a) and 2 (Count One); (2) using and carrying firearms during and in relation to the crime charged in Count One, in violation of 18 U.S.C. §§ 924(c) and 2 (Counts Two and Three); (3) possessing firearms in a federal facility, in violation of 18 U.S.C. §§ 930(b) and 2 (Count Four); (4) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(e) (Count Five); and (5) attempting to kill police officer Luis Castro in the course of possessing firearms in a federal facility, in violation of 18 U.S.C. §§ 930(c) and 2 (Count Six). See *Presentence Investigation Report*, Crim. No. 99-385 (PG), Docket No. 66 at pages 1-2.

The second indictment was filed on December 27, 1999. The charges brought therein were in relation to another postal office robbery that occurred on August 10, 1999. Petitioner was charged in this subsequent criminal case, 99-cr-385(PG), with the following: (1) aiding and abetting in an assault on postal employees with the intent to rob, jeopardizing lives during the commission of the offense by using dangerous weapons in violation of 18 U.S.C. §§ 2114(a) and 2 (Count One); (2) using and carrying firearms during and in relation to the crime charged in Count One in violation of 18 U.S.C. §§ 924(c) and 2 (Count Two and Three); (3) possessing firearms in a federal facility in violation of 18 U.S.C. §§ 930(b) and 2 (Count Four); and (4) being

a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(e) (Count Five). See id. pg. 1-2.

Both criminal cases were consolidated for plea and sentence. Rojas-Tapia plead guilty to all counts on October 20, 2000. See id. pg. 3. On October 10, 2001, the court sentenced Rojas-Tapia in Crim. No. 99-385 (PG) to 262 months as to Count 1, 60 months as to Count 4, and 180 months as to Count 5, all to be served concurrently with each other and concurrently with Counts 1, 4 and 5 in Crim. No. 99-309 (DRD). See Crim. No. 99-385 (PG), Docket No. 99 at pg. 2. The court also sentenced him to 84 months for Count 2 and 120 months for Count 3, to be served consecutively to the term of imprisonment imposed in Crim. No. 99-309 (DRD), for a resulting total of 382 months. See id. at pg. 3. For the counts in Crim. No. 99-309 (DRD), the court sentenced Rojas-Tapia to 262 months as to Count 1, 60 months as to Count 4 and 180 months as to Count 5, all to be served concurrently with each other and with counts 1, 4, 5 in Crim. No. 99-385 (PG). See Crim. No. 99-309 (DRD), Docket No. 268 at pg. 2. For Counts 2 and 3, the Court added 300 months to be served concurrently with each other but consecutively to the sentence imposed on the remaining counts. See id. pg. 3. Petitioner was sentenced to a total of **682 months** (382 + 300) of imprisonment.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2255, a federal prisoner may move to vacate, set aside, or correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C § 2255(a); Hill v. United States, 368 U.S. 424, 426-427 (1962); Ellis v. United States, 313 F.3d 636, 641 (1st Cir. 2002).

III. DISCUSSION

On December 21, 2018, Rojas-Tapia filed the above-captioned motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 attacking his conviction and sentence. See Docket No. 1. In his petition, Rojas-Tapia argues that his sentences violate due process and are no longer authorized by law. See Docket No. 1 at pg. 1. Specifically, Rojas-Tapia claims that pursuant to Johnson II: (1) he no longer qualifies as an Armed Career Criminal because his prior convictions are not "violent felonies" under the ACCA's force clause, (2) he is not guilty of Counts Two and Three of both criminal cases since they no longer qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(B)'s unconstitutional residual clause, and (3) he no longer qualifies for an enhanced base offense level of 26 under USSG 2K2.1(a)(1), because absent the unconstitutional residual clause in USSG § 4B1.2(a)(2), his prior convictions are no longer "crimes of violence." See Docket No. 1 at pg. 1-2.

A. ACCA Enhancement under 18 U.S.C. § 924(e)

Under the ACCA, a defendant may be convicted as a career criminal for the possession of a firearm when the offender has three or more prior convictions for a violent felony or a serious drug offense. See 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by imprisonment for a term exceeding one year, that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," (the force clause), or (2) "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated offenses clause). 18 U.S.C. § 924(e)(2)(B). With regards to the force clause at issue here, the term "physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." United States v. Starks, 861 F.3d 306, 314 (1st Cir. 2017) (citing Johnson v. United States ("Johnson I"), 559 U.S. 133, 140 (2010)).

To determine whether a defendant's prior conviction for a certain crime satisfies the force clause, courts must apply the "categorical approach." See Starks, 861 F.3d at 315. "This means that a prior conviction will either count or not based solely on the fact of conviction rather than on facts particular to the individual defendant's case." United States v. Faust, 853 F.3d 39, 50 (1st Cir. 2017) (citing Taylor v. United States, 495 U.S. 575, 602 (1990) (finding that "the only plausible interpretation" of the ACCA is that "it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense"). "The categorical or modified categorical approach 'applies not just to jury verdicts, but also to plea agreements.'" United States v. Mohamed, 920 F.3d 94, 101 (1st Cir. 2019) (citing Descamps v. United States, 570 U.S. 254, 262-63 (2013)).

Rojas-Tapia has various prior convictions that could be enough to trigger the ACCA's enhancement provision, starting with a serious drug offense, as well as several violent felonies. These shall be discussed in turn.

1. *Serious Drug Offense*

The relevant definition of "serious drug offense" under the ACCA is "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). It stems from the Presentence Report in this case that Petitioner was previously convicted of violating Article 401 of the Puerto Rico Controlled Substances Law.[3] See *PSR*, Crim. No. 99-385 (PG), Docket No. 66 at ¶ 61. Section 2401 of said statute states that "... it shall be unlawful for any person knowingly or intentionally: (1) to ...

[3] P.R. LAWS ANN. tit. 24, § 2401.

possess with the intent to ... distribute ... a controlled substance." P.R. LAWS ANN. tit. 24, § 2401. Violating § 2401 carries a maximum term of imprisonment of 20 years. See id. Specifically, Rojas-Tapia was charged with possessing with the intent to distribute 256 capsules of cocaine (approximately one ounce of cocaine) on July 28, 1996. See id. at ¶ 61. On January 14, 1997, Rojas-Tapia pled guilty to this charge and was sentenced. Id.

Since the Petitioner was convicted under state law for possessing cocaine with the intent to distribute, and that crime carried a maximum penalty of more than 10 years of imprisonment, the conviction qualifies as a serious drug offense under the ACCA. See Fagan v. United States, 256 F. Supp.3d 53, at 56 (D. Mass. 2017) ("The relevant statute here ... allows for a maximum possible penalty of ten years' incarceration, and, thus, fits comfortably in the ambit of serious drug offense as that term is defined in 18 U.S.C § 924(e)(2)(A)(ii).").[4]

2. *Puerto Rico Murder and Attempted Murder*

In April of 1997, Rojas-Tapia was charged with the murder of a police officer and four attempted murders. See *PSR*, Crim. No. 99-385 (PG), Docket No. 66 at ¶ 64. In February 3, 1998, Rojas-Tapia pled guilty and was sentenced to 99 years for each charge. See id.; Dockets No. 18-2, 18-3.

In his motion to vacate, Petitioner advances several arguments to conclude that murder and attempted murder, as defined by Puerto Rico law, are not violent felonies pursuant to the ACCA's force clause. See Docket No. 1 at pages 18, 21-22. But the undersigned has previously rejected identical assertions. "Contrary to Petitioner's argument, ... Puerto Rico case law

[4] At any rate, as argued by the government in its response, Rojas-Tapia has failed to develop any argument suggesting that this prior conviction would not qualify as a predicate offense. Hence, "the argument is waived for lack of development." United States v. Brown, 945 F.3d 597, 602 (1st Cir. 2019) (citing United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")).

establishes that murder and attempted murder categorically fit the requirements set forth by the ACCA's force clause." Hernandez-Favale v. United States, No. CR 96-070 (PG), 2018 WL 3490797, at *2 (D.P.R. July 18, 2018) (finding murder under Puerto Rico law requires violent acts capable of causing injury to another person). For reasons of brevity, the court incorporates herein the analysis laid down in Hernandez-Favale and rejects Petitioner's contention for the reasons set forth therein.

3. Puerto Rico Carjacking

It also stems from the Presentence Report that Petitioner was previously convicted of two armed carjackings in violation of Article 173B of the Puerto Rico Penal Code.[5] See *PSR*, Crim. No. 99-385 (PG), Docket No. 66 at ¶¶ 64-65; Dockets No. 18-4, 19. Robbery of a vehicle, as defined by Article 173B of the Puerto Rico Penal Code, required the same elements as robbery under Article 173[6] and added two elements: (1) the use of a deadly weapon, and (2) the taking of a motor vehicle. See P.R. LAWS ANN. tit. 33, § 4279B (repealed 2004).

Petitioner argues that his conviction for robbery of a vehicle under Article 173B "does not categorically qualify as a violent felony" and that his "use of a deadly weapon is not dispositive" of the issue. See Docket No. 1 at p. 15. Rojas-Tapia relies on the Ninth's Circuit's holding in United States v. Parnell,[7] where the Court reasoned that just because a person is armed, it does not mean that he or she has used the weapon or threatened to use it. See Parnell, 818 F.3d at

[5] P.R. LAWS ANN. tit. 33, § 4279B.
[6] "Every person who unlawfully appropriates for himself personal property belonging to another, whether taking them from his person or from the person having possession thereof, or in his immediate presence and against his will, by means of violence or intimidation, shall be punishable [in accordance with the remainder of the statute.]" P.R. LAWS ANN. tit. 33, § 4279.
[7] United States v. Parnell, 818 F.3d 974, 980-981 (9th Cir. 2016) (holding courts may not presume an implied threat to use a weapon from a defendant's mere possession of it, for purposes of determining whether the force clause of the ACCA has been satisfied).

980 ("The mere fact an individual is armed, however, does not mean he or she has used the weapon, or threatened to use it, in any way.").

In contrast, the government argues that "the required use of a deadly weapon satisfies the requirement of use of force or threatened use of force." Docket No. 18 at page 9. The government supports its argument citing the First Circuit's holding in Taylor, where the Court stated that an enhanced offense adding "the element of a dangerous weapon **imports** the 'violent force' required by Johnson into the otherwise overbroad simple assault statute." Taylor, 848 F.3d at 494 (citation omitted) (emphasis ours). In Taylor, the Court defined a deadly or dangerous weapon as "any object which, as used or attempted to be used, may endanger the life of or inflict great bodily harm on a person." The court agrees with the government.

In fact, the undersigned has previously rejected the argument Petitioner raises now. In Hernandez-Favale, the court found petitioner's identical argument meritless. To that effect, the Puerto Rico carjacking statute was distinguished from the offense in question in Parnell because "[t]he Massachusetts armed robbery statute at issue in Parnell merely required that the person be armed with a dangerous weapon, thus it did not require the use of the weapon, contrary to the statute at issue in this case." Hernandez-Favale, 2018 WL 3490797, at *4. As more recently stated by Chief Judge Gustavo A. Gelpí, "contrary to the armed robbery statute in Parnell, the plain language of Article 173-B suggests that the person who violates the carjacking statute must commit the crime 'using an object capable of causing grave bodily injury[.]'P.R. Laws Ann. Tit. 33, § 4279bP.R. Laws Ann. Tit. 33, § 4279b." Rodriguez-Mendez v. United States, No. CR 05-0340(CCC-GAG), 2020 WL 1181980, at *3 (D.P.R. Mar. 11, 2020)("After examining Taylor, and using a categorical approach, the Court holds that the carjacking element requiring the use of a

deadly or dangerous weapon imports the 'violent force' required by Johnson into the robbery statute.") (citing Taylor, 848 F.3d at 494). [8]

> Therefore, by requiring as an element of the offense the use of a deadly weapon, Puerto Rico's robbery of a motor vehicle statute clearly requires the use, attempted use, or threatened use of physical force against the person of another, and said offense falls within the meaning of a "violent felony" pursuant to 18 U.S.C. 924(e)(2)(B)(i).

Hernandez-Favale, 2018 WL 3490797, at *4. Considering the foregoing, the court once again agrees with the government's stance and finds the robbery of a vehicle as defined by Puerto Rico law is a violent felony for purposes of the ACCA's force clause.

The court has found that Petitioner's previous offenses of first degree murder, attempted murder, and robbery of a vehicle are all violent felonies as defined by the ACCA. Accordingly, the court concludes that between the serious drug offense and the violent felonies, Rojas-Tapia has more than enough prior convictions to qualify for the career offender enhancement under the ACCA.[9] Rojas-Tapia motion is thus **DENIED** on those grounds.

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[8] For purposes of this Order, the court adopts the categorical approach analysis set forth in Rodriguez-Mendez v. United States, No. CR 05-0340(CCC-GAG), 2020 WL 1181980 (D.P.R. Mar. 11, 2020).

[9] Petitioner also argues that his sentence is unlawful because Johnson II invalidates the identically-worded residual clause of the Career Offender guideline, USSG § 4B1.2(a)(2), which at the time of his pre-Booker sentence was mandatory. He claims he no longer qualifies for an enhanced base offense level because, absent the residual clause, his prior convictions no longer qualify as "crimes of violence" under the Guidelines. See Docket No. 1 at pages 31-37. But Petitioner's argument is unavailing for the same reasons set forth in this section. The court has deemed several of his prior convictions are indeed violent felonies, and thus, he would qualify as a career offender under the force clause of USSG § 4B1.2(a)(1). See United States v. Dancy, 640 F.3d 455, 466 n.9 (1st Cir. 2011) ("We have held that 'the terms "crime of violence" under the career offender Guideline and "violent felony" under the ACCA are nearly identical in meaning, so that decisions construing one term inform the construction of the other.'"). As a result, "this Court need not address the merits of Petitioner's Johnson claim (here, whether Johnson applies to Petitioner's pre-Booker sentence); Petitioner would not be entitled to relief ... ." Brichetto v. United States, No. 2:03-CR-00024-GZS, 2018 WL 4305750, at *7 (D. Me. Sept. 10, 2018) (citing United States v. Hall, No. 2:02-cr-00063-DBH (D. Me. Dec. 21, 2017) (Recommended Decision, ECF No. 79 at 5; Order Affirming, ECF No. 80) (noting the issue of whether Johnson invalidates the pre-Booker sentencing guidelines residual clause has not been decided, but it need not be resolved in Hall's case, because regardless of how the Court ruled on the issue, the petitioner would qualify as a career offender under the force clause); Hall v. United States, 2017 WL 6045423 (D. Me. Dec. 6, 2017) (recommended decision)). Petitioner's motion is thus **DENIED** on those grounds as well.

B. Crime of Violence under 18 U.S.C. § 924(c)

In his motion, Rojas-Tapia also argues that this court should vacate his convictions and sentences for Counts Two and Three of both criminal cases. As previously set forth, Counts Two and Three in both 99-309(DRD) and 99-385(PG) charged Petitioner with violations to 18 U.S.C. § 924(c) for using and carrying firearms during and in relation to the crime charged in Count One, to wit, aiding and abetting in an assault on postal employees with the intent to rob, jeopardizing lives during the commission of the offense by using dangerous weapons in violation of 18 U.S.C. § 2114(a) and 2. Petitioner claims that under the principles set forth in Johnson II, Section 924(c)'s residual clause should also be deemed invalid and that the "crime of violence" charged alongside the 924(c) violations – aiding and abetting postal robbery – fails to categorically qualify as a crime of violence under the statute's "force clause" contained in 18 U.S.C. § 924(c)(3)(A). As such, without 924(c)'s residual clause, Rojas-Tapia claims he is not guilty of Counts Two and Three in either criminal case, and his convictions and sentences on those counts must be vacated. See Docket No. 1 at pages 1-2.

Section 924(c)(1)(A) provides for a sentencing enhancement when a defendant, during and in relation to any crime of violence, uses or carries a firearm or possesses a firearm in furtherance of such crime of violence. See 18 U.S.C. § 924(c)(1)(A). The statute defines "crime of violence" as 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.A. § 924(c)(3). Subsection (A) of the definition is "commonly referred to as the 'force clause' or 'element clause.' The other definition is ... referred to as the 'residual clause.'" Arocho-

Mercado v. United States, No. CR 14-107-1 (ADC), 2020 WL 624200, at *1 (D.P.R. Feb. 10, 2020).

The court first notes that after Petitioner and the government filed their motion and response, respectively, the Supreme Court held that the residual clause contained in Section 924(c)(3)(B) is indeed unconstitutionally vague. See United States v. Davis, 139 S.Ct. 2319, 2336 (2019). Hence, with 924(c)'s residual clause gone, the court must determine whether the predicate offense underlying Counts Two and Three in both criminal cases qualifies as a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A).

The predicate offense in this case is aiding and abetting in an assault against postal employee with the intent to rob in violation of 18 U.S.C. § 2114(a), which states as follows:

> (a) Assault.--A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, 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 having custody of such mail, money, or other property of the United States, 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.A. § 2114(a) (emphasis ours). Rojas-Tapia was charged with the latter version of this offense because he jeopardized the lives of the postal employees by the use of dangerous weapons. See *PSR*, Crim. No. 99-385 (PG), Docket No. 66. at ¶¶ 1-2. As previously stated, "[t]o assess whether a predicate crime qualifies as a 'crime of violence' under the force clause of § 924(c), we apply a categorical approach." United States v. Cruz-Rivera, 904 F.3d 63, 66 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1391, 203 L. Ed. 2d 623 (2019).

On the one hand, Petitioner argues that postal robbery in violation of 18 U.S.C. § 2114, or aiding and abetting one, does not require the use, attempted use, or threatened use of physical force, and thus, fails to qualify as a crime of violence under Section 924(c)(3)'s force clause. See Docket No. 1 at pages 28-31. In contrast, the government notes that "Rojas-Tapia was convicted of § 2114(a) with the aggravator that he 'put li[ves] in jeopardy by the use of dangerous weapons,'"[10] which, as stated in Taylor, imports the violent force element required by Johnson. The government bolsters its argument with a string citation of "persuasive authority that postal robbery qualifies as a crime of violence under § 924(c)'s force clause." Docket No. 18 at page 11. The court agrees with the latter.

After applying the categorical approach to the predicate offense to determine whether it constitutes a "crime of violence" for purposes of § 924(c)(3), the Fourth, Sixth, Seventh and Eleventh Circuits, as well as other district courts, have held that because the statute is divisible,[11] "the additional life-in-jeopardy-with-a-dangerous-weapon element" transforms an assault in violation of 18 U.S.C. § 2114(a) into a crime of violence under the Section 924(c)(3)'s force clause. United States v. Bryant, 949 F.3d 168, 180 (4th Cir. 2020) (assault with intent to rob, steal, or purloin a postal employee by placing their life in jeopardy by using a dangerous weapon in violation of 18 U.S.C. § 2114(a) is categorically a crime of violence under § 924(c)'s force clause because the additional "life-in-jeopardy-with-a-dangerous-weapon element" transforms such an assault into a crime of violence); Knight v. United States, 936 F.3d 495 (6th Cir. 2019) (holding that assault and robbery of a postal employee under § 2114(a) constituted a "crime of violence" because it satisfied the elements clause of § 924(c)(3)); United States v. Enoch, 865 F.3d 575, 580 (7th Cir. 2017) (finding Section 2114(a) is a divisible statute with two distinct parts

[10] Docket No. 18 at page 12.
[11] Divisibility shall be discussed *infra*.

with separate elements and sentences and concluding that the second part of the statute constitutes a crime of violence after applying the modified categorical approach); In re Watts, 829 F.3d 1287, 1289-90 (11th Cir. 2016). See also Moody v. United States, No. 1:07-CR-00139-MAT, 2020 WL 529281, at *8 (W.D.N.Y. Feb. 3, 2020) ("[T]he aggravated offense under 18 U.S.C. § 2114(a) ... constitutes a crime of violence under the elements clause of § 924(c)(3)(A), which has not been affected by Johnson II or Davis."); McDuffie v. United States, No. 1:16-CV-775 (LMB), 2019 WL 3949303, at *5 (E.D. Va. Aug. 21, 2019) (finding that § 2114(a) is a divisible statute and enhanced portion qualifies as a crime of violence under the force clause); Dorsey v. United States, No. 1:16-CV-738 (LMB), 2019 WL 3947914, at *4 (E.D. Va. Aug. 21, 2019), *appeal dismissed*, 797 F. App'x 798 (4th Cir. 2020) (finding that divisible offense underlying Dorsey's § 924(c) conviction, to wit, the enhanced portion of § 2114(a) for which he was convicted, qualifies as a crime of violence under the force clause); Buck v. United States, No. CR-95-00386-PHX-SRB, 2018 WL 6111787, at *5 (D. Ariz. Nov. 1, 2018), *report and recommendation adopted*, No. CR-95-00386-PHX-SRB, 2018 WL 6110938 (D. Ariz. Nov. 21, 2018) (relying on Enoch to hold that § 2114(a) is divisible and is a crime of violence under the elements clause of § 924(c)(3)(A)); Williams v. United States, No. C16-5559 BHS, 2017 WL 1166141, at *6 (W.D. Wash. Mar. 29, 2017) (holding that § 2114(a) is divisible and that "the aggravated form of § 2114(a) robbery necessarily includes as an element the use, attempted use, or threatened use of force capable of causing physical pain or injury").

In most of these cases, the courts have first determined that Section 2114(a) is a divisible statute, and thus, that the application of the modified categorical approach is appropriate when determining whether the statute of conviction qualifies as a crime of violence under the force clause. See also Gray v. United States, Nos. CV 16-9680 & CR 95-160, 2018 WL 8838797, at *6 (C.D. Cal. Nov. 6, 2018) ("Section 2114(a) describes two levels of offense subject to different

punishments.... Therefore, [it] is divisible into at least two parts, each defining a crime, making the modified categorical approach appropriate."). Divisible statutes are "those 'that contain several different crimes, each described separately ... ." Mohamed, 920 F.3d at 101 (citing Moncrieffe v. Holder, 569 U.S. 184, 191 (2013)).

> If a statute is divisible, then we apply the modified categorical approach: we consult a limited category of documents known as "Shepard Documents" — including the indictment or information and the jury instructions — to figure out which version of the crime the defendant was charged with committing, then we consider what those elements require.

Taylor, 848 F.3d at 492.

In his motion, Petitioner disregards the issue of the statute's divisibility and the application of the modified categorical approach. Instead, he limits his analysis to the "general robbery" component of the statute for purposes of arguing that the offense is not a crime of violence. See Docket No. 1 at pages 28-30. But as pointed out by the government in its opposition, Petitioner was convicted of the aggravated version of the crime in the second clause of Section 2114(a), which carries an enhanced maximum penalty, because he put the lives of postal employees in jeopardy by the use of dangerous weapons, to wit, a pistol and a semi-automatic AK-47 type of assault rifle. See Docket No. 18 at pages 11-12.

"A deadly or dangerous weapon is 'any object which, as used or attempted to be used, may endanger the life of or inflict great bodily harm on a person.'" Taylor, 848 F.3d at 493–94 (citing United States v. Sanchez, 914 F.2d 1355, 1358 (9th Cir. 1990)). As previously set forth, to satisfy the force clause in Section 924(c)(3)(A), the predicate offense in question must be a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). "The Supreme Court has defined 'physical force' in a similarly-worded statute as 'violent force—that is, force capable of causing physical

pain or injury to another person.'" United States v. Seams, No. CR 14-049 S, 2017 WL 2982962, at *3 (D.R.I. July 12, 2017) (citing Johnson v. United States ("Johnson I"), 559 U.S. 133, 140 (2010)). Hence, "the element of a dangerous weapon imports the 'violent force' required by Johnson into the otherwise overbroad simple assault statute... [T]his enhancement necessarily requires the use or threat of force capable of causing physical pain or injury to another." Taylor, 848 F.3d at 494 (citation omitted). The same logic applies to Petitioner's case. So, after careful review of the relevant caselaw, the undersigned is persuaded that § 2114(a) is indeed divisible, and that upon application of the modified categorical approach, the aggravated version of the crime for which Petitioner was convicted is a crime of violence under the elements clause in § 924(c)(3)(A).[12]

Finally, Rojas-Tapia seeks to vacate his conviction for Counts Two and Three in both criminal cases on the grounds that he was charged with bank robbery as an aider and abettor, which "does not require the use, attempted use, or threatened use of violent physical force. Therefore, the offense does not categorically qualify under the force clause." See Docket No. 1 at pages 31. However, Petitioner's argument is unavailing because this court has already held that the underlying criminal act was a crime of violence and "[f]ederal law ... says that a person who aids or abets the commission of a federal crime 'is punishable as a principal.'" United States v. Rodriguez-Torres, 939 F.3d 16, 43 (1st Cir. 2019) (citing 18 U.S.C. § 2). See also United States v. Garcia-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018) (where aiding and abetting a Hobbs Act robbery can categorically constitute a "crime of violence" under the force clause of the ACCA, an aider and abettor is punishable as a principal, and thus no different for purposes of the categorical approach than one who commits the substantive offense).

[12] The court need not discuss here whether the first clause of the statute is a crime of violence.

Pursuant to all of the foregoing, the court finds that Petitioner's offense of conviction qualifies as a crime of violence under § 924(c)(3)'s elements clause. As a result, the court **DENIES** Petitioner's request to vacate his convictions under § 924(c).

IV. CONCLUSION

For all the reasons stated above, Rojas-Tapia's request for relief under 28 U.S.C. § 2255 (Docket No. 1) is hereby **DENIED**. The case is **DISMISSED WITH PREJUDICE**. Judgment shall be entered accordingly.

V. CERTIFICATE OF APPEALABILITY

It is further ordered that no certificate of appealability should be issued in the event that the Petitioner files a notice of appeal because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

In San Juan, Puerto Rico, May 1, 2020.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PEREZ-GIMENEZ
SENIOR U.S. DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE ROJAS-TAPIA, Petitioner, v. **UNITED STATES OF AMERICA**, Respondent.	**Civil No.**: 17-1759 (DRD) Related Crim. Case Nos. 99-309 (DRD); 99-385 (PG)

OPINION AND ORDER

Pending before the Court is Mr. José Rojas-Tapia's ("Petitioner") *Motion to Vacate Sentence Under 28 U.S.C. § 2255* ("*Motion to Vacate*"). *See* Civil Case No. 17-1759, Docket No. 1. Petitioner argues that his sentence and corresponding convictions must be vacated since the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*") invalidated the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii) after determining that it was unconstitutionally vague. Furthermore, Petitioner asserts that *Johnson II*'s reasoning should be applied to also invalidate the residual clauses contained in 18 U.S.C. § 924 (c) and the "pre-*Booker*" Career Offender Guidelines which were used to sentence and convict him as well. After careful examination, the Court hereby **DENIES** Petitioner's *Motion to Vacate*.

I. Relevant Background

For events that took place on September 2, 1999, Petitioner was charged for robbing postal offices and placing his victims' lives in jeopardy through the use of dangerous weapons. To that end, on September 29, 1999 a Grand Jury returned a six-count indictment against Petitioner in Criminal Case No. 99-309. Specifically, Petitioner was charged for: one count of aiding and

abetting in an assault on postal employees with the intent to rob, jeopardizing lives in the commission of the offense by using dangerous weapons in violation of 18 U.S.C. § 2114(a) (Count One); two counts of aiding and abetting in using and carrying firearms during and in relation to the crime charged in Count One, in violation of 18 U.S.C. §§ 924(c) (Counts Two and Three); one count of aiding and abetting in possessing firearms in a federal facility, in violation of 18 U.S.C. §§ 930(b) (Count Four); one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(e) (Count Five); and one count of aiding and abetting in attempting to kill police officer Luis Castro in the course of possessing firearms in a federal facility, in violation of 18 U.S.C. §§ 930(c) (Count Six). *See* Criminal Case No. 99-309 at Docket Nos. 16 and 35.

Later, on December 27, 1999 a second indictment was filed against Petitioner. *See* Criminal Case No. 99-385 at Docket No. 7. The charges in this case were related to another separate postal office robbery that occurred on August 10, 1999. Specifically, Petitioner was charged for the following: one count of aiding and abetting in an assault on postal employees with the intent to rob, jeopardizing lives during the commission of the offense by using dangerous weapons in violation of 18 U.S.C. §§ 2114(a) (Count One); two counts of aiding and abetting in using and carrying firearms during and in relation to the crime charged in Count One in violation of 18 U.S.C. §§ 924(c) (Count Two and Three); one count of aiding and abetting in possessing firearms in a federal facility in violation of 18 U.S.C. §§ 930(b) (Count Four); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(e) (Count Five). *Id.*

The referenced cases were eventually consolidated. Petitioner plead guilty to all counts on October 20, 2000. *See* Criminal Case No. 99-309 at Docket Nos. 135 and 136. Consequently, on October 10, 2001, the Court in Criminal Case No. 99-309 entered a *Judgment* sentencing Petitioner to the following imprisonment terms: 262 months as to Count One; 60 months as to Count Four

and 10 months as to Count Five. *See* Criminal Case No. 99-609, Docket No. 204 at 2.[1] Furthermore, as additional imprisonment terms, the Court imposed 300 months as to Count Two and 300 months as to Count Three; said terms were to be served concurrently with each other.[2] *Id*. As to Criminal Case No. 99-385, on the same date, the Court sentenced Petitioner to 262 months as to Count One, 60 months as to Count Four, and 180 months as to Count Five, all to be served concurrently with each other and concurrently with Counts One, Four and Five in Criminal Case No. 99-309. *See* Criminal Case No. 99-385, Docket No. 99 at 2. In this case, the Court also sentenced Petitioner to 84 months for Count Two and 120 months for Count Three, to be served consecutively to the term of imprisonment imposed in Criminal Case No. 99-309. *Id*. at 3.

II. Standard of Review

Pursuant to § 2255, a prisoner prevails on his motion to vacate, set aside, or correct a sentence if the petitioner proves one of the following: (i) "the sentence was imposed in violation of the Constitution or laws of the United States," (ii) "the court was without jurisdiction to impose such sentence," (iii) "the sentence was in excess of the maximum authorized by law," or (iv) the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). *See*, *also*, Hill v. United States, 368 U.S. 424, 426-427 (1962); Ellis v. United States, 313 F.3d 636, 641 (1st Cir. 2002).

III. Discussion

In his *Motion to Vacate*, Petitioner contends that, pursuant to the Supreme Court's decision in *Johnson II* he: (A) no longer qualifies as an Armed Career Criminal because his prior convictions are not "violent felonies" under the ACCA's force clause; (B) is not guilty of Counts

[1] The Court ordered that the imprisonment terms in Criminal Case No. 99-309 for counts 1, 4, and 5 were to be served concurrently with each other and concurrently with counts 1, 4 and 5 in Criminal Case No. 99-385.
[2] Petitioner filed a notice of appeal as to said *Judgments* and, eventually, the First Circuit vacated "the drug testing and treatment conditions of supervised release" and remanded the case to the District Court for proceedings consistent with its ruling and its determination pertaining to said matter in *United States v. Melendez-Santana*, 353 F.3d 93 (1st Cir. 2003). On February 1, 2005, *Amended Judgments* were entered in both cases. *See* Criminal Case No. 99-309 at Docket No. 268 and Criminal Case No. 99-385 at Docket No. 99.

Two and Three of both criminal cases since they no longer qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(B)'s residual clause; and (C) no longer qualifies for an enhanced base offense level of 26 under USSG 2K2.1(a)(1), because absent the residual clause in USSG § 4B1.2(a)(2), his prior convictions are no longer "crimes of violence." *See* Docket No. 1 at 1-2.

A. ACCA

The ACCA mandates a minimum sentence of fifteen years for qualifying defendants who violate Section 922 (g). *See* 18 U.S.C. § 924 (e)(1). A defendant qualifies under this section if he "has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another." *See* 18 U.S.C. § 924(e)(1).

On the other hand, a "violent felony" signifies

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another […][3]

18 U.S.C. § 924(e)(2)(B). Furthermore, the Supreme Court has stated that the term "physical force" "means violent force—that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010). "Thus, the question is whether the predicate offense contains as an element violent force capable of causing physical pain or injury." United States v. Starks, 861 F.3d 306, 314 (1st Cir. 2017).

The Supreme Court has established a "categorical approach" to determine whether a defendant's prior conviction satisfies the force clause. *See* Taylor v. United States, 495 U.S. 575,

[3] Pursuant to *Johnson II*, the residual clause of Section 924 (e)(1) -which encompasses any felony that "involves conduct that presents a serious potential risk of physical injury to another"- was declared unconstitutional on the basis of vagueness. Johnson v. United States, 135 S. Ct. 255 (2015).

588 (1990). Under the categorical approach, the sentencing court is required "to look only to the fact of conviction and the statutory definition of the prior offense". Taylor v. United States, *supra*, at 588. "This means that a prior conviction will either count or not based solely on the fact of conviction rather than on facts particular to the individual defendant's case." United States v. Faust, 853 F.3d 39, 50 (1st Cir. 2017).[4]

Further, the Court must note that "[t]he categorical or modified categorical approach 'applies not just to jury verdicts, but also to plea agreements.'" *United States v. Mohamed*, 920 F.3d 94, 101 (1st Cir. 2019) (*citing* Descamps v. United States, 570 U.S. 254, 262-63 (2013)).

B. Petitioner's federal conviction for aiding and abetting a postal robbery qualifies as a "crime of violence" under the force clause of the ACCA.

Petitioner contends that, pursuant to *Johnson II*, the residual clause of 18 U.S.C. § 924 (c) ("Section 924 (c)") should be deemed invalid. Consequently, he reasons that, absent said residual clause, the underlying criminal offense -Count One (aiding and abetting a postal robbery)- to Counts Two and Three of both criminal cases no longer qualifies as a "crime of violence" under Section 924 (c).

In its relevant part, Section 924 (c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" shall face an additional punishment provided for such crime of violence or drug trafficking crime. 18 U.S.C. § 924 (c).

[4] *See*, *also*, United States v. Holloway, 630 F.3d 252, 256 (1st Cir.2011) ("we may consider only the offense's legal definition, forgoing any inquiry into how the defendant may have committed the offense."); United States v. Whindleton, 797 F.3d 105, 108 (1st Cir. 2015).

Appendix D

After Petitioner filed its *Motion to Vacate* -and the government filed its corresponding *Opposition*- the Supreme Court ruled that the residual clause contained in Section 924 (c) is unconstitutionally vague. *See* United States v. Davis, 139 S.Ct. 2319, 2336 (2019). Therefore, the Court must determine whether the underlying offense related to Counts Two and Three qualifies as a "crime of violence" under the force clause of Section 924 (c).

Specifically, the charge for aiding and abetting a postal robbery was made under 18 U.S.C. § 2114 (a) which states:

> (a) Assault.--A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, 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 having custody of such mail, money, or other property of the United States, 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.

Essentially, Petitioner contends that violating 18 U.S.C. § 2114 (a) does not require the use, attempted use, or threatened use of violent and intentional force. In opposition, the Government argues that Petitioner's admitted facts surrounding the aiding and abetting of the postal robbery by accepting that he: (1) "put his victims' lives in jeopardy by the use of dangerous weapons"; and (2) "shot at police officers, injuring one of them, during the Levittown robbery and pointed firearms at the Sabana Seca [post office] employees". Case No. 17-1759, Docket No. 10 at 11. Said contentious are easily corroborated by reviewing the *Plea Agreement* executed between the Government and Petitioner. To that end, the Court notes that as to Criminal Case No. 99-309 the "Version of Facts" subscribed by Petitioner was as follows:

> Specifically, as to criminal case number 99-309 (CCC), on or about September 2, 1999, the defendants Jose Rojas-Tapia aka, "Goldy" (ROJAS), Luis A1berto Pastrana-Cancel (PASTRANA), Jose Alberto Maldonado-Carrillo

(MALDONADO), Carlos Rodriguez (RODRIGUEZ), Dennis Castro-Rodriguez (CASTRO) and others, aiding and abetting each other did assault Levittown Postal employees who had lawful charge, custody and control of United States currency and other property of the United States, with the intent to rob, steal, and purloin said currency, and other property of the United States and while committing said offense, did put their lives in jeopardy by the use of dangerous weapons, that is, a 9mm pistol and a .40 caliber semi-automatic Glock pistol,
model 23, bearing serial number BVY178US and an arsenal semi-automatic AK-47 type of assault rifle, model SA 93, caliber 7.62x39, bearing serial number BA36021. All in violation of Title 18, United States Code, Sections 2114, 922(g), 924 (c) and (e), 930(b), and 2. ROJAS, PASTRANA, MALDONADO, RODRIGUEZ and CASTRO did also intentionally attempt to kill Luis Castro, a Puerto Rico Police officer and other officers, in the course of possessing firearms in a federal facility, as previously described, all in violation of Title 18, United States Code, Sections 930(c) and 2.

The defendants planned the robbery of the Levittown Post Office and prior to arriving there, they prepared a vehicle with tinted windows at the residence of RODRIGUEZ, as well as had a switch vehicle available. Specifically, on the afternoon of September 2, 1999, ROJAS and the above named defendants attempted to rob the Levittown Post Office of thirty-six thousand, four hundred and seventy-eight dollars ($36,478.00). Access inside the rear door of the post office was gained; as PASTRANA was dressed in a postal uniform, acquired through the use of ex-postal service worker RODRIGUEZ' postal identification. The defendants were armed and threatened the lives of and/or posed a threat to employees, the general public and children in a school next to the post office. Thus, lives were threatened not only inside the Post Office, but outside as well, and, in particular, when the defendants exited the post office and engaged -in a gun battle with several local police officers. Luis Castro, a local police officer was injured. ROJAS, along with PASTRANA, ran into the home of an elderly person where she was caring for a newborn grandson and a college age grandson and held them hostage, at gunpoint, until the police arrived and rescued them.

Docket No. 135, Version of Facts at 1-2.[5] Considering the referenced admitted facts, the Government reasons that the robbery in the instant case necessarily involved the use, attempted

[5] Furthermore, the Court notes that the *Indictment* specifically stated the following as to Count one:

> On or about September 2, 1999, in the District of Puerto Rico, and within the jurisdiction of this Court, defendants, **[1] LUIS ALBERTO PASTRANA-CANCEL, [2] JOSE ALBERTO MALDONADO-CARRILLO, [3] JOSE M. ROJAS-TAPIA, [4] CARLOS RODRIGUEZ** and others to the Grand Jury unknown, aiding and abetting each other, did assault employees, Nancy E. Rosa-Diaz, Rafael J. Maldonado, Iris Reyes, and Rafael Medina-Hernandez of the Levittown Postal Service having lawful charge, custody and control of United States currency, and other property of the United States, with intent to rob, steal and purloin said currency, and other property of the United States and while committing said offense, did put their lives in jeopardy by the use of dangerous

use, or threatened use of physical force, making it a "crime of violence" under Section 924 (c)'s force clause. Although the First Circuit has yet to determine whether 18 U.S.C. § 2114 (a) is a crime of violence, the Court notes that various other Circuits that have already decided the matter.

First, it has been determined that said statute is "divisible".[6] Specifically, the Circuit Courts have determined that 18 U.S.C. § 2114 (a) carries a "separate aggravated offense" which includes the wounding **of the victim or putting the victim's life in jeopardy by the use of a dangerous weapon**. *See*, *e.g.*, Knight v. United States, 936 F.3d 495, 498–99 (6th Cir. 2019). The Court finds that the same reasoning should be applied to the instant case.[7]

Second, after applying the corresponding "modified categorical approach", the Fourth, Sixth, Seventh and Eleventh Circuits have concluded that when this "separate aggravated offense" is present, 18 U.S.C. § 2114 (a) is to be regarded as a "crime of violence" pursuant to Section 924 (c)'s force clause. *See*, *e.g.*, In re Watt, 829 F.3d 1287 (11th Cir. 2016); United States v. Enoch, 865 F.3d 575 (7th Cir. 2017); Knight v. United States, *supra*; United States v. Bryant, 949 F.3d 168, 180 (4th Cir. 2020). The Court finds that said conclusion should be applied in the instant case.

> weapons, that is, a 9mm pistol and .40 caliber semi-automatic Glock pistol, model 23, bearing serial number BVY17US, and an arsenal semi-automatic AK-47 type of assault rifle, model SA 93, caliber 7.26 x 39, bearing serial Number BA360217. All in violation of Title 18, United States Code, Section 2114 and 2.

Criminal Case No. 99-309, Docket No. 16 and 35.

[6] The term "divisible" is used since "[a] single statute may list elements in the alternative, and thereby define multiple." Mathis v. United States, 136 S. Ct. 2243, 2249, 195 L. Ed. 2d 604 (2016). When faced with these types of statutes, the Courts employ a "modified" categorial approach. To that end, "sentencing court looks to a limited class of documents (for example, **the indictment**, jury instructions, or **plea agreement** and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* (emphasis provided). "The court can then compare that crime, as the categorical approach commands,' with the pertinent ACCA definitions." United States v. Mulkern, 854 F.3d 87, 91 (1st Cir. 2017).

[7] The Court notes that, conveniently, Petitioner decided not to cite the complete language of 18 U.S.C. § 2114 (a) complete; that is, Petitioner left out the section of the statute that the Circuit Courts have categorized as the "separate aggravated offence".

Appendix D

As previously referenced, the First Circuit in *United States v. Taylor* determined that a "deadly or dangerous weapon is 'any object which, as used or attempted to be used, may endanger the life of or inflict great bodily harm on a person.'" United States v. Taylor, 848 F.3d 476 (1st Cir. 2017) (*citing* United States v. Whindleton, 797 F.3d 105, 114 (1st Cir. 2015)) at 493–494. Consequently, "the element of a dangerous weapon imports the 'violent force' required by Johnson into the otherwise overbroad simple assault statute… [T]his enhancement necessarily requires the use or threat of force capable of causing physical pain or injury to another." *Id*. Consequently, by applying the reasoning in *Taylor*, a conviction under the "separate aggravated offense" of 18 U.S.C. § 2114 (c) is a "crime of violence" under Section 924 (c)'s force clause.

In the instant case, the record shows that Petitioner's plea agreement was accepted with the Government's version of facts. *See*, Criminal Case No. 99-309, Docket No. 135; Case No. 99-385, Docket No. 39. That being the case, it is clear that Petitioner plead guilty to a set of facts that constituted the "separate aggravated offense" of 18 U.S.C. § 2114 (a); that is, in violating said statute, Petitioner placed the lives of postal employees in jeopardy by using dangerous weapons - specifically, a 9mm pistol, a .40 caliber semi-automatic Glock pistol, and a semi-automatic AK-47 type assault rifle. *Id*.[8] Hence, the Court finds that Petitioner's conviction under 18 U.S.C. § 2114 (a) constitutes a "crime of violence" under Section 924 (c)'s force clause which undoubtedly supports Counts Two and Three.

On the other hand, Petitioner contends his conviction under said statute did not qualify under the force clause since he was charged as an "aider and abettor". *See* Case No. 17-1759, Docket No. 1 at 30. However, albeit in the context of different offenses, the First Circuit has determined that "aiding and abetting the commission of a crime of violence is

[8] Certainly, Petitioner *Plea Agreement* is one of the documents that may be used by the Courts when employing the "modified categorical approach". *See* Shepard v. United States, 544 U.S. 13, 16 (2005).

a crime of violence itself." *See*, *e.g.*, United States v. Garcia-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208, 203 L. Ed. 2d 232 (2019) ("[W]e therefore hold that because the offense of Hobbs Act robbery has as an element the use or threatened use of physical force capable of causing injury to a person or property, a conviction for Hobbs Act robbery categorically constitutes a "crime of violence" under section 924(c)'s force clause."); United States v. Rodriguez-Torres, 939 F.3d 16, 43 (1st Cir. 2019) ("[f]ederal law … says that a person who aids or abets the commission of a federal crime 'is punishable as a principal."); United States v. Mitchell, 23 F.3d 1, 2–3 (1st Cir. 1994). The Court finds that the same reasoning applies in the instant case; consequently, since the "separate aggravated offense" of 18 U.S.C. § 2114 (a) is a "crime of violence", the "aiding and abetting" conviction against Petitioner constitutes a "crime of violence" in itself.

Pursuant to the above, Petitioner's contention as this matter is meritless.

C. Petitioner's prior convictions qualify him as an Armed Career Criminal under the ACCA.

The record for the instant case reveals that Petitioner had an extensive criminal record under Puerto Rico law. To that end, the *Presentence Report* shows that Petitioner had been sentenced to imprisonment approximately 10 times for violations to: Puerto Rico's Penal Code (robbery, kidnaping, murder, second degree murder, attempted murder, armed carjacking, escape and conspiracy), Puerto Rico's Controlled Substances Law, and Puerto Rico's Firearms Law. *See* Criminal Case No. 99-385, Docket No. 66.[9]

As previously stated, in order to qualify as a Armed Career Criminal under the ACCA, a defendant must possess "three previous convictions ... for a violent felony or a serious drug

[9] In performing this analysis, the Court references the *Presentence Report* since a court "may accept *any* undisputed portion of the presentence report as a finding of fact." Fed. R. Crim. P. 32(i)(3)(A).

offense, or both, committed on occasions different from one another." *See* 18 U.S.C. § 924(e)(1). The Court finds that at least three of Petitioner's previous convictions under Puerto Rico law qualify him as an Armed Career Criminal pursuant to the ACCA.[10]

a. Petitioner was convicted for a serious drug offense pursuant to Puerto Rico Law.

The *Presentence Report* reveals that Petitioner was previously convicted for violating Article 401 of Puerto Rico's Controlled Substances Law. *See* Criminal Case No. 99-385, Docket No. 66 at ¶ 61, Civil Case No. 17-1759, Docket No. 10-1 (*Judgment* entered by the Court of First Instance of Puerto Rico for Criminal Case No. FSC96G0365). Specifically, on July 28, 1996, Petitioner was charged with possession with intent to distribute 256 capsules of cocaine. *Id*.

Article 401 of Puerto Rico's Controlled Substances Law states that "[…] it shall be unlawful for any person knowingly or intentionally: (1) to […] possess with the intent to […] distribute […] a controlled substance." P.R. Laws Ann. tit. 24, § 2401. Furthermore, pursuant to said statute, a violation of Section 2401 carries a maximum term of imprisonment of 20 years. *Id*. On January 14, 1997, Petitioner pled guilty to this charge and was sentenced accordingly. *See* Case No. 17-1759, Docket No. 10-1.[11]

The ACCA defines the term "serious drug offense" as

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, **distributing**, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), **for which a maximum term of imprisonment of ten years or more is prescribed by law**

[10] The Court acknowledges that Petitioner argued that most of said convictions under Puerto Rico's Penal Code do not constitute "violent felonies" pursuant to the ACCA's force clause. However, the Court finds that it is not necessary to delve into every single one of Petitioner's prior convictions, since there are at least three of them that qualify as either a "serious drug offence" or a "violent felony" for purposes of the ACCA. Therefore, Court's analysis will focus on these.

[11] The Court notes that Petitioner was also known as Mr. José M. Agosto Rosa. *See, e.g.,* Case No. 17-1759, Docket 10-2.

18 U.S.C.A. § 924 (e) (2) (A) (i)-(ii) (emphasis provided). In his *Motion to Vacate*, Petitioner did not contest that said prior conviction does not qualify as a "serious drug offense" under the ACCA. Consequently, the Government argued that Petitioner waived said defense. *See*, *for example*, United States v. Brown, 945 F.3d 597, 602 (1st Cir. 2019) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")).

Regardless of the possible waiver of Petitioner's defenses as to this matter, the Court finds that Petitioner's conviction under Puerto Rico law for possessing cocaine with the intent to distribute -which carried a maximum penalty of over 10 years of imprisonment- falls squarely under the definition of "serious drug offense" provided by the ACCA.[12] Hence, said conviction under Puerto Rico's Controlled Substances Law counts as a previous conviction for purposes of qualifying him as an Armed Career Criminal pursuant to the ACCA.

b. Petitioner was convicted for violent offenses pursuant to Puerto Rico Law.

i. Murder, Second-Degree Murder and Attempted Murder.

The *Presentence Report* shows that Petitioner was previously charged, under Article 83 of Puerto Rico's Penal Code, with the murder of a police officer and four attempted murders during events that transpired on or about April 5, 1997. *See* Criminal Case No. 99-385, Docket No. 66 at ¶ 64, Civil Case No. 17-1759 at Docket 10-2 (*Judgment* entered by the Court of First Instance of Puerto Rico for Criminal Case No. KVI97G0094) and 10-3 (*Judgments* entered by the Court of First Instance of Puerto Rico for Criminal Cases Nos. KVI970090, KVI97G0091, KVI97G0092, KVI97G0093). On February 3, 1998, Petitioner pled guilty and was sentenced as a habitual criminal to 99 years for each charge. *Id.*

[12] The First Circuit has determined that the "categorial approach" is equally applicable when evaluating controlled substance offenses. *See*, *e.g.*, United States v. Bryant, 571 F.3d 147, 157 (1st Cir. 2009).

Furthermore, the *Presentence Report* shows that Petitioner was charged -as an aider and abettor- with second-degree murder of an individual within the Commonwealth of Puerto Rico's Regional Detention Center on or about May 28 or May 29, 1997. *See* Criminal Case No. 99-385, Docket No. 66 at ¶ 66. Said Report also states that on April 4, 1998 he plead guilty and was sentenced to a prison term of 30 years. *Id*.

Petitioner contends that his "murder, attempted murder, and second-degree murder convictions do not qualify as violent felonies under the ACCA's force clause". Civil Case No. 17-1759, Docket No. 1 at 18. Specifically, Petitioner argues that: (1) Puerto Rico's murder can be accomplished by omission and reckless behavior and does not require specific intent to kill; (2) the conviction may rest on a theory of non-violent behavior; and (3) "the Commonwealth of Puerto Rico prosecuted non-violent conduct such as aiding and abetting murder, instigating murder, procuring murder, and accessory before the fact to murder, indistinctly form the substantive offense". *Id*. at 18.

As correctly identified by Petitioner, at the time of his conviction, the Puerto Rico Penal Code defined murder as "the killing of a human being with malice aforethought." P.R. Laws Ann. tit. 33, § 4001 (repealed June 18, 2004); *see*, *also*, ~~Pueblo v. Lucret Quiñones~~, 11 P.R. Offic. Trans. 904, 927, 929 (1981). As to what constitutes a first-degree murder, the Puerto Rico Penal Code established that it was defined as:

> (A)Any murder which is perpetrated by means of *poison*, lying in wait or torture or any willful, deliberate, and premeditated killing of which is committed in the preparation, or attempt to perpetrate, arson, rape, sodomy, robbery, robbery of a motor vehicle, burglary, kidnapping, destruction, mayhem or escape constitutes murder in the first degree.
>
> (B)The death of a member of the Police Force or of a Penal Guard who is in performance of his duties, which is caused as a result of the commission or intent to commit a felony or the concealment of it.

P.R. Laws Ann. tit. 33 § 4002 (repealed June 18, 2004). Furthermore, the Puerto Rico Penal Code stated that "[a]ll other murders shall be deemed as second-degree murders." *Id*. To that end, second-degree murder is "any unlawful killing with malice aforethought that is not first-degree murder." United States v. Baez-Martinez, 258 F. Supp. 3d 228, 232 (D.P.R. 2017).

Recently, the First Circuit ruled that convictions for second-degree murder and attempted murder, pursuant to the Puerto Rico Penal Code applicable to Petitioner's convictions, constitute "violent felonies" under the ACCA. *See* United States v. Baez-Martinez, 950 F.3d 119, 124 (1st Cir. 2020). [13] Hence, Petitioner's separate convictions for attempted murder and second-degree murder undoubtedly count as previous convictions for purposes of qualifying him as an Armed Career Criminal pursuant to the ACCA.

ii. Petitioner's conviction for robbery of a vehicle pursuant to Puerto Rico Law.

Finally, the *Presentence Report* also evinces that Petitioner was previously charged and convicted on various occasions for armed carjacking's in violation of Article 173-B of the Puerto Rico Penal Code. *See* Criminal Case No. 99-385, Docket No. 66 at ¶¶ 64-65; Civil Case No. 17-1759, Docket No. 10-4 (*Judgment* entered by the Court of First Instance of Puerto Rico for Criminal Case No. KPD97G1426). As to said convictions, Petitioner contends that robbery under Article 173-B of Puerto Rico's Penal code "does not categorically qualify as a violent felony". Case No. 17-1759, Docket 1 at 15.

[13] The Court notes that the First Circuit has yet to decide whether Puerto Rico's Penal Code general murder or murder in the first-degree constitute "violent felonies" for purposes of satisfying the ACCA's three-predicate-felony rule. However, since Petitioner's other convictions for attempted murder and second-degree murder suffice for purposes of determining his qualification as an Armed Career Criminal; it is unnecessary for the Court to determine whether his murder convictions constitute "violent felonies" pursuant to the ACCA. However, the Court notes that other Judges of this District Court have, in fact, concluded that Puerto Rico's general murder does qualify as a "violent felony" under the ACCA. *See*, *e.g.*, Hernandez-Favale v. United States, 2018 WL 3490797, at *2 (D.P.R. July 18, 2018).

In an attempt to substantiate his contention, Petitioner notes that Puerto Rico's Supreme Court has not discussed whether the robbery of a vehicle pursuant to Article 173-B Puerto Rico's Penal Code has an element of "violence" or "violence force". Consequently, Petitioner invites the Court to source Puerto Rico's case law as to the interpretation of the elements that constitute Puerto Rico's general robbery. To that end, Petitioner argues that "Puerto Rico robbery can be committed through the use of 'slight force' or by instilling fear of harm to someone's property. Robbery of a vehicle requires the same amount of physical force, or lack thereof". Civil Case No. 17-1759, Docket No. 1 at 15. Further, Petitioner references Ninth Circuit case law, specifically *United States v. Parnell*, 818 F.3d 974, 980-981 (9th Cir. 2016), for the proposition that Article 173-B's requirement of the use of a deadly weapon is not dispositive for purposes of the analysis.[14]

At the time of his conviction, Puerto Rico's Penal Code established that a robbery was defined as

> Every person who unlawfully appropriates for himself personal property belonging to another, whether taking them from his person or from the person having possession thereof, or in his immediate presence and against his will, by means of violence of intimidation, shall be punishable.

P.R. Laws Ann. Tit 33, § 4279. On the other hand, the robbery of a vehicle as defined by Article 173 (B) of the Puerto Rico Penal Code, required the aforementioned elements for robbery under Article 173 and added two elements, which were: (1) **the use of an object capable of causing grave bodily injury**, and (2) the taking of a motor vehicle. *See* P.R. Laws Ann. tit. 33, § 4279b

[14] The Court finds that *Parnell* is inapposite to substantiate Petitioner's argument since said case dealt with a Massachusetts armed robbery statute that did not require **the use** of an "object capable of causing grave bodily injury" as a necessary element of the crime. *See* United States v. Parnell, 818 F.3d 974, 980 (9th Cir. 2016) ("There is a material difference between the presence of a weapon, which produces a risk of violent force, and the actual or threatened use of such force. Only the latter falls within ACCA's force clause.") On the contrary, as previously explained, Puerto Rico's robbery of a vehicle establishes **the use** of "an object capable of causing grave bodily injury" as an element of the crime. P.R. Laws Ann. Tit 33, § 4279 (repealed June 18, 2004).

(repealed June 18, 2004). Therefore, "the carjacking statute in Article 173-B enhances the robbery statute in Article 173 by adding a deadly or dangerous weapon element to the crime." Rodriguez-Mendez v. United States, 2020 WL 1181980, at *3 (D.P.R. Mar. 11, 2020).

In its *Opposition*, the Government contends that the required use of a deadly weapon as an element of the crime, "satisfies the requirement of use of force or threatened use of force". Case No. 17-1759, Docket No. 10 at 10. To support its contention, the Government relies on a First Circuit precedent in *United States v. Taylor*, where the Circuit Court determined that "the element of a dangerous weapon imports the 'violent force' required by Johnson into the otherwise overbroad simple assault statute." Taylor, 848 F.3d at 494.

The Court agrees with the Government's contention and applies the First Circuit's reasoning in *Taylor*. The Court finds that the inclusion of the **use** of "an object capable of causing grave bodily injury" as an element to Article 173-B, makes Puerto Rico's robbery of a vehicle statute "fall[] within the meaning of a "violent felony" pursuant to 18 U.S.C. 924(e)(2)(B)(i)". Hernandez-Favale v. United States, 2018 WL 3490797, at *4 (D.P.R. July 18, 2018); *see*, *also*, Rodriguez-Mendez v. United States, *supra*; Rojas-Tapia v. United States, 2020 WL 2096153 (D.P.R. May 1, 2020). To that end, Petitioners convictions under Puerto Rico's Penal Code for the robbery of a vehicle count as previous convictions for purposes of qualifying him as an Armed Career Criminal pursuant to the ACCA.

Pursuant to the above, Petitioner's past criminal record under Puerto Rico law has one (1) serious drug offence and, at least, two (2) additional convictions that qualify as "violent felonies" under the force clause of the ACCA.[15] Consequently, the Court finds that Petitioner has, at least,

[15] Specifically, as previously discussed, Petitioner was convicted for violating Article 401 of Puerto Rico's Controlled Substances Law. *See* Criminal Case No. 99-385, Docket No. 66 at ¶ 61, Civil Case No. 17-1759, Docket No. 10-1 (*Judgment* entered by the Court of First Instance of Puerto Rico for Criminal Case No. FSC96G0365). Also, Petitioner was convicted under Article 83 of Puerto Rico's Penal Code, with the murder of a police officer and four attempted

three (3) prior convictions that qualify him as an Armed Career Criminal under the ACCA; therefore, his *Motion to Vacate* is **DENIED** on said grounds.

D. Petitioner's increased base offense level under previous Sentencing Guidelines.

Finally, Petitioner argues that *Johnson II* also invalidated the residual clause of the Career Offender guideline. Consequently, Petitioner contends that he no longer qualifies for the enhanced base offense level of 26, under USSG § 2K2.1(a)(1), since "absent the residual clause, his prior convictions are no longer 'crimes of violence'". Case No. 17-1759, Docket No. 1 at 31.

Neither the Supreme Court nor the First Circuit have determined whether defendants sentenced prior to *United States v. Booker*, 543 U.S. 220 (2005), "may mount vagueness attacks on their sentences." Beckles v. United States, 137 S.Ct. 886, 903 n.4 (2017) (holding that, in light their advisory nature, the post Booker Sentencing Guidelines are not subject to due process vagueness challenges). However, the Court finds that it is unnecessary to make said determination in the instant case.

Ignoring the prior Career Offender guideline's residual clause, to qualify as career offender Petitioner had to have two prior felony convictions that qualify as a crime of violence under said Guideline's force clause or the numerated offenses clause. It is necessary to note that the First Circuit has ruled that "'the terms 'crime of violence' under the career offender Guideline and 'violent felony' under the ACCA are nearly identical in meaning, so that decisions construing one term inform the construction of the other.'" *See* United States v. Dancy, 640 F.3d 455, 466 n.9 (1st Cir. 2011). Consequently, pursuant to the discussion in Section C of this *Opinion and Order* it is

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murders. *See* Criminal Case No. 99-385, Docket No. 66 at ¶ 64, Civil Case No. 17-1759 at Docket 10-2 (*Judgment* entered by the Court of First Instance of Puerto Rico for Criminal Case No. KVI97G0094) and 10-3 (*Judgments* entered by the Court of First Instance of Puerto Rico for Criminal Cases Nos. KVI970090, KVI97G0091, KVI97G0092, KVI97G0093). Finally, Petitioner was convicted -on various occasions- for armed carjacking's in violation of Article 173-B of the Puerto Rico Penal Code. *See* Criminal Case No. 99-385, Docket No. 66 at ¶¶ 64-65; Civil Case No. 17-1759, Docket No. 10-4 (*Judgment* entered by the Court of First Instance of Puerto Rico for Criminal Case No. KPD97G1426).

clear that Petitioner had various prior convictions (*e.g.*, murder, second degree murder, attempted murder and armed carjacking) that constitute crimes of violence under ACCA;[16] hence the Court finds that said prior convictions pertaining to crimes of violence also qualify as crimes of violence pursuant to the Career Offender Guideline and therefore could have been used to satisfy the requirements for imposing the enhanced base offense level.

Therefore, Petitioners arguments as to this matter are also meritless.

IV. Conclusion

Pursuant to the above, the effects of *Johnson II* do not affect the validity of Petitioner's sentence and convictions in Criminal Case No. 99-309. Consequently, Petitioner's *Motion to Vacate* is hereby **DENIED**.

It is further ordered that no certificate of appealability be issued in the event that the petitioner files a notice of appeal because there is no substantial showing of the denial of a constitutional or statutory right within the meaning of 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

In San Juan, Puerto Rico, on July 13, 2020.

S/Daniel R. Domínguez
Daniel R. Domínguez
United States District Judge

[16] Furthermore, although not considered when making the analysis included in this *Opinion and Order*, the Court wished to note that Petitioner has -at least- six (6) prior convictions under Puerto Rico law for robbery in which said crime was committed while possessing and/or using a firearm. *See* Criminal Case No. 99-385, Docket No. 66 at ¶¶ 58-63 (*Judgments* entered by the Court of First Instance of Puerto Rico for Criminal Case No. G89-1975-91; G89-2668-69; G89-2547-49; FPD96G0798-800; FPD96G0794; and FPD96G0796).