No. _____

In the Supreme Court of the United States

Ángel Forteza-García,

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

No. 21-1214

ÁNGEL FORTEZA-GARCÍA,

Petitioner - Appellant,

v.

UNITED STATES,

Respondent - Appellee.

Before

Barron, Chief Judge,
Gelpí, Montecalvo, Rikelman, and Aframe

Circuit Judges.

ORDER OF COURT

Entered: July 8, 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:
Juan Carlos Reyes-Ramos, Joshua K. Handell, Ricardo A. Imbert-Fernández, Rachel Brill, Franco L. Pérez-Redondo, Kevin Lerman, Robert M. Fitzgerald

Appendix B

United States Court of Appeals
For the First Circuit

No. 21-1214

ÁNGEL FORTEZA-GARCÍA,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

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

[Hon. Raúl M. Arias-Marxuach, U.S. District Judge]

Before

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

Franco L. Pérez-Redondo, with whom Rachel Brill, Federal Public Defender, District of Puerto Rico, Héctor L. Ramos-Vega, Interim Federal Public Defender, District of Puerto Rico, 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 Ricardo A. Imbert-Fernández, Assistant United States Attorney, were on brief, for appellee.

Appendix B

March 3, 2025

Appendix B

BARRON, Chief Judge. Ángel Forteza-García appeals the District Court's denial of his 28 U.S.C. § 2255 petition for post-conviction relief, in which he seeks relief from his conviction under 18 U.S.C. § 924(j). That provision makes it a crime to "cause the death of a person through the use of a firearm" in the course of violating 18 U.S.C. § 924(c), which in turn criminalizes using or carrying a firearm "during and in relation to any crime of violence." Forteza based his petition on United States v. Davis, 588 U.S. 445 (2019), which held unconstitutionally vague a portion of the definition of a "crime of violence" in § 924(c). Forteza contends that, in consequence of Davis, the predicate conviction for his § 924(j) offense does not qualify as a "crime of violence," and thus that his conviction for that offense is unconstitutional. We disagree and affirm.

I.

Section 924(c) makes it a crime to use or carry a firearm "during and in relation to any crime of violence or drug trafficking crime . . . for which the [perpetrator] may be prosecuted in a court of the United States," or to possess a firearm in furtherance of any such crime of violence or drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). Section 924(j) criminalizes anyone who, in the course of committing a violation of § 924(c), "causes the death of a person through the use of a firearm," with different penalties depending on whether that

killing would qualify as murder or manslaughter under federal law. Id. § 924(j).

So, to prove that a defendant has committed a violation of § 924(j), the government must prove not only that a killing occurred through the use of a firearm, but also that the killing occurred in the course of the defendant committing a "crime of violence or drug trafficking crime" within the meaning of § 924(c). The relevant definition of "crime of violence" for § 924(c) is set forth in § 924(c)(3). It provides that such a crime includes any felony offense that, under what is known as the force clause, "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or that, under what is known as the residual clause, "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." Id. § 924(c)(3).

Forteza's § 924(j) conviction stems from an indictment that was handed up in the District of Puerto Rico in March 2003. The indictment charged him with five counts, though only two are relevant to this appeal.

The first relevant count ("Count One") charged Forteza with "aiding and abetting" a violation of 18 U.S.C. § 2114(a). Although often referred to as the federal mail robbery statute because it criminalizes the robbery of custodians of United States

mail, § 2114(a) also criminalizes the robbery of any person who has "lawful charge" of "any money or other property of the United States." 18 U.S.C. § 2114(a); see Garcia v. United States, 469 U.S. 70, 72-73 (1984). The violation was alleged to have involved the assault of a government informant, who possessed money provided by the government for the purpose of effecting a controlled purchase of a firearm, with the intent to rob him. This count further alleged that the victim of the assault was "wounded" and his life was "put . . . in jeopardy" when he was shot several times and ultimately died.

The other count that is relevant to this appeal ("Count Three") charged Forteza with "aiding and abetting" a violation of § 924(j). It did so by alleging that the violation of § 2114(a) described in Count One was committed by the use or carrying of a firearm during the incident, and that "in the course of that crime of violence," the victim was "unlawfully killed . . . through the use of a firearm."

Forteza pleaded guilty in September 2003 only to Count Three, which had charged him with the § 924(j) offense. In exchange for his guilty plea, the government agreed to drop the remaining four charges -- including the § 2114(a) charge -- and to recommend a sentence below the maximum term authorized for a violation of § 924(j). Forteza was then sentenced to 324 months in prison, followed by five years of supervised release.

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Forteza unsuccessfully appealed his conviction and sentence. United States v. Fortez[a]-García, Nos. 04-1215, 04-1398, 04-1216, 04-2458, 2006 WL 4399664 (1st Cir. Sept. 8, 2006). He then filed a petition for post-conviction relief under 28 U.S.C. § 2255 in the District of Puerto Rico in 2006.

The petition alleged that Forteza's conviction and sentence were unconstitutional due to prosecutorial and judicial misconduct and his having received ineffective assistance of counsel. The petition was denied. Forteza does not appear to have appealed that ruling.

In 2017, however, Forteza filed an application for permission to file a second petition for post-conviction relief under § 2255. He did so on the ground that his § 924(j) conviction was unconstitutional under intervening precedent of the Supreme Court of the United States in Davis, which was decided in 2019. There, the Court held that the portion of § 924(c)(3)'s "crime of violence" definition which encompassed 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" was unconstitutionally vague. Davis, 588 U.S. at 470.

This Court granted that application in 2020. Forteza thereafter filed the petition that is at issue in this appeal.

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Forteza's petition alleges that, in consequence of Davis, his § 2114(a) offense can only properly support his § 924(j) conviction if it qualifies as a "crime of violence" under § 924(c)(3)(A)'s force clause. But, the petition further alleges, that offense does not so qualify, because § 2114(a) does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" that is required under § 924(c)(3)(A).

The District Court rejected this argument on the ground that the § 2114(a) offense of which Forteza had been convicted does have as an element the use of force contemplated by § 924(c)(3)(A). Forteza-García v. United States, No. 20-1145, 2021 WL 784875, at *6 (D.P.R. Feb. 26, 2021). In so ruling, the District Court also noted that any argument that Forteza's predicate offense would not so qualify under the force clause because he had been an accomplice to that offense, rather than a principal, was foreclosed by binding First Circuit precedent. Id. Finally, the District Court denied Forteza a certificate of appealability (COA) on his claim. Id.

Forteza requested a COA from this Court. We granted the request with respect to his claim that his § 924(j) conviction was unconstitutional under Davis.

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) (citation omitted). "The question of whether an offense qualifies as a crime of violence is a quintessentially legal one[.]" United States v. Martinez, 762 F.3d 127, 133 (1st Cir. 2014) (citation omitted). The question of which offense serves as the defendant's purported predicate offense under the categorical approach, however, is a question of fact. Pereida v. Wilkinson, 592 U.S. 224, 238 (2021). Because this is a question of fact that we review for clear error, we will only disturb the District Court's findings if, after reviewing the whole record, we are left with "a strong, unyielding belief that a mistake has been made." See United States v. Fitzpatrick, 67 F.4th 497, 502 (1st Cir. 2023) (quoting United States v. Cintrón-Echautegui, 604 F.3d 1, 6 (1st Cir. 2010)).

III.

Forteza agrees that he can succeed on his Davis-based challenge to the denial of his petition only if he can demonstrate that the § 2114(a) offense underlying his § 924(j) conviction does not have "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); see Mathis v. United States, 579 U.S. 500, 504

(2016); United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017); see also United States v. Collymore, 61 F.4th 295, 297 (2d Cir. 2023) (explaining that "because an element of an offense under section 924(j)(1) is that the defendant was 'in the course of a violation of [§ 924(c)],'" a predicate that does not qualify for the purposes of § 924(c) cannot qualify as a predicate for the purposes of § 924(j)). But although Forteza contends that he can demonstrate just that, we conclude that he has failed to do so.

A.

Section 2114(a)[1] 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) sets out at least two separate offenses -- a simple form of the offense and an aggravated

[1] Section 2114 also contains a second provision, subsection (b), but no party contends that this subsection was the basis of Forteza's § 2114 offense.

form of it. Taylor, 848 F.3d at 492 (explaining that statutes which list multiple elements in the alternative are "divisible" 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' agreement, however, ends there with respect to the nature and number of offenses that § 2114 delineates.

As Forteza sees it, the text from § 2114(a) that is quoted above sets out only two offenses. The first offense, in his view, is a single, indivisible, simple variant of a § 2114(a) offense, which is defined only by the text that precedes the semicolon in that statute. The second offense, in his view, is also a single, indivisible offense, but it is defined by all the text following the semicolon, which sets forth an aggravated variant of the § 2114(a) offense. As a result, he contends that, although the aggravated form of the § 2114(a) offense can be committed by wounding or placing the life of a custodian of federal property in jeopardy in the course of committing simple § 2114(a), it also can be committed by committing the simple form of the § 2114(a) offense more than once. Forteza then argues that, because the simple form of mail robbery set forth in § 2114(a) can be committed without using the force required under § 924(c)(3), that § 2114(a) offense does not qualify as a "crime of violence" under the definition of a "crime of violence" that provision sets

forth. And he goes on to argue that it follows that, because the aggravated variant of the § 2114(a) offense can be committed by merely committing the simple variant of the § 2114(a) offense twice, the aggravated form of the § 2114(a) offense also fails to qualify as a "crime of violence" that could support his § 924(j) conviction.

According to the government, however, the text in § 2114(a) that precedes the semicolon sets out three distinct simple variants of the § 2114(a) offense: the first predicated on robbery of a custodian of federal property, the second predicated on assault of that custodian with intent to rob, and the third predicated on attempted robbery of that custodian. The government then goes on to contend that the text after the semicolon sets out two distinct aggravated variants of the § 2114(a) offense. The first of those offenses, according to the government, is for an offense in which a person wounds the custodian while committing the simple § 2114(a) offense. The second of those offenses, according to the government, is for an offense in which a person places that custodian's life in jeopardy by the use of a dangerous weapon. Finally, the government argues that the remaining text after the semicolon sets forth not a separate § 2114(a) offense but merely a sentencing factor, which enhances the sentence for any § 2114(a) offense -- whether a simple or aggravated variant of

such an offense -- based on the defendant having violated § 2114(a) more than once.

From this premise, the government argues that each of the robbery-, wounding-, and placing-life-in-jeopardy-based § 2114(a) offenses has as an element the use of force that is required for an offense to qualify as a "crime of violence" under § 924(c)(3)(A). As a result, in the government's view, so long as Forteza's predicate § 2114(a) offense was for one of these kinds of § 2114(a) offenses, it was for an offense that suffices to support Forteza's § 924(j) conviction because it was for a "crime of violence" within the meaning of § 924(c)(3).

Against this backdrop, we begin with Forteza's contention that, because it is not clear from the record whether his predicate offense was based on the simple or aggravated variant of the § 2114(a) offense,[2] the District Court was obliged to treat his predicate offense as being for the simple rather than the aggravated form of the offense and thus to conclude that it did not qualify as a "crime of violence." Because we conclude that

[2] The government contends that Forteza's challenge to the District Court's finding that he was convicted of aggravated mail robbery is "underdeveloped" and thus waived. But, because we find the "simplest way to decide" Forteza's challenge on this ground is to proceed to the merits, we do so here. See, e.g., United States v. Grullon, 996 F.3d 21, 32 (1st Cir. 2021) (quoting United States v. McCullock, 991 F.3d 313, 322 (1st Cir. 2021)).

there is no merit to this contention, we then proceed to address Forteza's fallback contentions.

B.

Forteza begins with the point that the only count of his indictment that he pleaded guilty to was Count Three, which charged him with violating § 924(j). See United States v. Faust, 853 F.3d 39, 53 (1st Cir. 2017) (holding that a court may look to a defendant's "charging document, written plea agreement, transcript of [their] plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented," to determine which offense under a divisible statute formed the basis of the defendant's predicate (quoting Shepard v. United States, 544 U.S. 13, 16 (2005))). Count Three, to which he pleaded guilty, alleges that Forteza and his codefendants:

> [A]iding and abetting each other, did willfully, intentionally, and unlawfully possess, use or carry a firearm during and in relation to a crime of violence, . . . that is, assaulting an individual who lawfully had charge, control, or custody of money of the United States, with intent to rob, steal, or purloin said money, as set forth in COUNT ONE herein, which is realleged and incorporated by reference herein, . . . and, in the course of that crime of violence, the defendants herein unlawfully killed [the victim] with malice and aforethought through the use of a firearm, . . . by knowingly, willfully, deliberately and maliciously and with premeditation shooting [the victim] with a firearm thus causing his death . . . .

Forteza argues that, because there is no reference in this count to any potentially aggravating element (or elements) of § 2114(a) -- that is, to wounding the victim, placing his life in jeopardy, or committing more than one § 2114(a) offense -- the count does not make clear that the predicate offense underlying his § 924(j) conviction was for anything other than the simple form of the § 2114(a) offense. Thus, he contends, the District Court was required to treat his predicate § 2114(a) offense as if it were for the less serious form of the offense and so was for a simple rather than an aggravated form of the § 2114(a) offense.

Moreover, Forteza contends that the District Court's contrary conclusion is mistaken insofar as it rests on the references in the text quoted above from Count Three to a firearm and to the shooting and killing of the victim. He contends that those references in the text of Count Three do not establish that he pleaded guilty to any element (or elements) of having wounded or placed the life of the victim in jeopardy with respect to an aggravated form of a § 2114(a) offense. Instead, he contends, those references were made with respect to establishing that he pleaded guilty to the elements of the § 924(j) offense, which requires that the government establish the death of a victim caused by a firearm.

Finally, Forteza disputes that the text of Count One of the indictment -- the count charging his § 2114(a) offense -- is

incorporated into the text of Count Three. But, he contends, even if that text from Count One is in fact incorporated into Count Three, the text of Count One does not itself reference any particular aggravating element of § 2114(a). Thus, he contends that text cannot support the conclusion that, because the record establishes that he pleaded guilty to Count Three, the record establishes that his predicate § 2114(a) offense was for an aggravated rather than a simple form of that offense.

Forteza, however, is not correct about the contents of the text of Count One. That text does specifically allege that, in the course of committing the § 2114(a) violation, he and his codefendants "wounded [the victim], the custodian of said money and put [the victim's] life in jeopardy, by shooting [him] several times and causing his death." (Emphasis added). The underlined portions of that text clearly reference the portion of § 2114(a)'s text that describes wounding or placing a victim's life in jeopardy by the use of a dangerous weapon. See 18 U.S.C. § 2114(a).

Forteza, therefore, can only succeed in arguing that the record is not clear as to the nature of his predicate § 2114(a) offense if the language in Count One concerning his § 2114(a) offense is not incorporated by reference into the count to which he pleaded guilty, which is Count Three. But, although the District Court did not make any explicit finding as to whether the language of Count One was incorporated into Count Three, the record

makes clear that the language of Count One was so incorporated. See Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982) (holding that appellate courts should remand to the district court to make "missing findings . . . unless the record permits only one resolution of the factual issue").

Count Three -- the § 924(j) count to which Forteza pleaded guilty -- states that the crime of violence underlying the § 924(j) charge is "assaulting an individual who lawfully had charge, control, or custody of money of the United States, with intent to rob, steal, or purloin said money, as set forth in COUNT ONE [of the indictment] herein, which is realleged and incorporated by reference herein." (Emphasis added). In addition, at the change-of-plea hearing, the sentencing judge confirmed that the predicate offense underlying the § 924(j) charge was the § 2114(a) charge "as [was] further described in the main count of the indictment, [C]ount [O]ne."

Forteza does argue that this conclusion is foreclosed by the language in the plea agreement that states that the agreement "constitutes the complete Plea Agreement between the United States, the defendant, and the defendant's counsel," and further that the "United States has made no promises or representations except as set forth in writing in this plea agreement and deny [sic] the existence of any other term and conditions not stated herein." But that is not so. The language of Count One is part

of -- and so within the four corners of -- the plea agreement itself precisely because it is expressly incorporated into Count Three by that count's plain terms.[3] It is thus clear that Forteza's predicate § 2114(a) offense was based on his having aided and abetted a violation of § 2114(a) that involved placing the life of the victim in jeopardy by the use of a dangerous weapon and wounding that victim. Thus, it is clear from the record that his § 2114(a) offense was for an aggravated rather than a simple form of that offense, such that his challenge based on the offense having been for a simple form of that offense necessarily fails.

c.

Forteza does separately contend that the aggravated form of § 2114(a) is indivisible as between wounding, placing life in jeopardy, and the repeated commission of the simple form of the § 2114(a) offense. Thus, he contends that even the aggravated form of the § 2114(a) offense charged in Count One does not qualify as a "crime of violence," precisely because the simple form of that offense does not. But we have rejected this exact argument in Rojas-Tapia v. United States, __ F.4th __ [slip op. at 18-22] (1st Cir. 2024) [Nos. 20-1514, 20-1735].[4] Nor does Forteza develop

[3] Though Forteza is correct that the transcript of the change-of-plea colloquy did not contain any mention of a wounding or placing-life-in-jeopardy aggravator of § 2114(a), he makes no argument that this should trump any explicit reference to such aggravators in the incorporated language of the plea agreement.

[4] Because we reject Forteza's argument about the indivisible

any other argument as to why we must conclude that the District Court was wrong to hold that the aggravated variant of the § 2114(a) offense with which he was charged would qualify as a crime of violence under § 924(c)'s force clause. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (deeming issue waived where party makes no "effort at developed argumentation").

D.

There remains, then, only Forteza's final ground for challenging his § 924(j) conviction. Here, he contends that, even if his predicate § 2114(a) offense would qualify as a crime of violence under § 924(c)'s force clause when committed by a principal, it does not so qualify here because he committed that offense as an aider and abettor. See 18 U.S.C. § 2 ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). But we have also rejected this argument in Rojas-Tapia. See Rojas-Tapia, __ F.4th at __ [slip op. at 26-35]. We thus must reject this aspect of his challenge to the District Court's decision to deny his habeas petition as well.

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nature of the aggravated form of the § 2114(a) offense on the merits, we need not address the government's contentions that he waived this argument both below and on appeal. See, e.g., Grullon, 996 F.3d at 32.

Appendix B

IV.

The decision of the District Court is **affirmed**.

Appendix C

United States Court of Appeals
For the First Circuit

No. 21-1214

ÁNGEL FORTEZA-GARCÍA,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

ERRATA SHEET

The opinion of this court issued on March 3, 2025, is amended as follows:

On page 6, line 11, "2017" is replaced with "2016".

On page 6, line 15, "Davis, which was decided in 2019" is replaced with "Johnson v. United States, 576 U.S. 591 (2015) (Johnson II)".

On page 6, line 16, "There" is replaced by "While that application was pending". Then ", based on Johnson II," is inserted between "held" and "that".

Appendix D

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

UNITED STATES OF AMERICA, **Plaintiff,** v. ANGEL FORTEZA-GARCIA, **Defendant.**	**CIVIL. NO. 20-1154 (RAM)**

OPINION AND ORDER

RAÚL M. ARIAS-MARXUACH, District Judge

Pending before the Court is Petitioner Angel Forteza-García's *Second Motion to Vacate, Set Aside or Correct Sentence* ("*Second Motion*") pursuant to 28 U.S.C. § 2255. (Docket No. 2). The Assistant Federal Public Defender also filed a *Memorandum of Law in Support of Petitioner's 28 U.S.C. § 2255 Motion* ("*Memorandum in Support*") filed on Defendant's behalf. (Docket No. 13). While the Assistant Federal Public Defender has competently presented Petitioner's case, having considered the arguments of the parties, the Court **DENIES** Petitioner's *Second Motion*. (Docket Nos. 2, 13, 16 and 17). No certificate of appealability shall issue as the *Second Motion* fails to make a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2). In accordance with Rule 22(b)(1) of the Federal Rules of Appellate

Procedure, Petitioner may still seek a certificate directly from the United States Court of Appeals for the First Circuit ("First Circuit").

I. BACKGROUND

A. Criminal Case No. 03-cr-0073-2 (JAF)[1]

On March 12, 2003 a Grand Jury returned the original indictment in Case No. 03-cr-0073-2 (JAF). (Docket No. 7). The 6-count indictment charged Petitioner Angel Forteza-García ("Petitioner" or "Forteza-García") and co-defendants Angel Forteza-García and David Gómez-Olmeda with robbing and murdering A.V.G., a confidential informant. Id.

On September 24, 2003, Petitioner plead guilty to Count Three of the original Indictment in Criminal Case no. 03-cr-0073-2 pursuant to a plea agreement. (Docket Nos. 7 and 124). Count Three charged Petitioner and his co-defendants with a violation of 18 U.S.C. §§ 924(c)(3) and 924 (j) and 2 in the course of committing a violation of Title 18 U.S.C. § 2114 (robbery of mail or any money or property of the United States). Id.

Judgment was entered against Forteza-García on January 15, 2004 and he was sentenced to Three-Hundred Twenty-Four (324) months of imprisonment and five (5) years of supervised release. (Docket No. 187).

[1] Any reference to a docket entry in this section will only refer to docket entries in Criminal Case No. 03-0073-2.

Appendix D

B. Civil Case No. 20-01154 (RAM)

In the *Memorandum in Support*, Petitioner posits that his conviction under 18 U.S.C. §§ 924(c) and 924(j) and 2 for unlawfully possessing, using, or carrying a firearm in relation to a crime of violence resulting in murder as defined in 18 U.S.C. § 1111 must be vacated. (Docket No. 13 at 1). Petitioner avers that the predicate crime underlying the Section 924(c) and (j) and 2 convictions, 18 U.S.C. 2114(a) (assault and robbery of money or property of the United States or "postal robbery"), is not "a crime of violence" under Section 924(c)(3)(A) (the "force clause"). Id. at 1-2. Petitioner argues that: (a) postal robbery does "not *necessarily* require as an element, the actual, threatened, or attempted use of force[,]" and (b) the least culpable form of postal robbery criminalizes "rather minimal" force not "capable of causing physical pain or injury to another person." Id. at 8-13.

The Government responds that 18 U.S.C. § 2114 is a "crime of violence" because according to multiple Circuit Courts, the word "rob" in the statute refers to common-law robbery which requires force or violence. (Docket No. 16 at 6-8). The Government also argues that Petitioner's Section 924(c) conviction is predicated on the "aggravated modality" of 18 U.S.C. 2114(a). Id. at 8. Lastly, the Government points to case law from the United States District Court for District of Puerto Rico ("District of Puerto Rico") and other United States Circuit Courts of Appeals which

have concluded that 18 U.S.C. § 2114(a)'s "aggravated modality" is a "crime of violence." Id. at 9-10.

The Court need not determine whether robbery or assault in the first part of 18 U.S.C. § 2114(a) constitute "crimes of violence." Nor must it determine whether the offense in 18 U.S.C. § 2114(a) is not a "crime of violence" under 18 U.S.C. 924(c)(3)(B) (the "residual clause") because the Supreme Court of the United States has already declared the residual clause void for vagueness. *See* United States v. Davis, 139 S. Ct. 2319 (2019). Instead, for the following reasons explained below, the Court holds that the predicate offense in this case is 18 U.S.C. § 2114(a)'s "aggravated offense" which *is* a "crime of violence" under Section 924(c)(3)(A)'s "force clause."

First, 18 U.S.C. § 2114(a) is a divisible statute with an aggravated offense that provides for enhanced penalties when a victim is wounded, or the victim's life is put in jeopardy using a dangerous weapon. Persuasive precedent from several United States Courts of Appeals and the District of Puerto Rico have held that the aggravated offense in 18 U.S.C. § 2114(a) **constitutes a "crime of violence"** under Section 924(c)(3)(A)'s "force clause."

Second, applying the modified categorical approach by examining the Indictment, the Plea Agreement, and the plea colloquy confirms that Petitioner **plead guilty** to the aggravated offense in 18 U.S.C. § 2114(a).

Appendix D

II. STANDARD OF REVIEW

Under 28 U.S.C. § 2255, a prisoner in custody under a sentence of a Federal Court may move the Court that imposed the sentence to vacate, set aside or correct the sentence:

> [U]pon 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.

A petitioner's post-conviction request for relief "must show that his sentence 'reveal[s] fundamental defects which, if uncorrected, will result in a complete miscarriage of justice.'" Gandia-Maysonet v. United States, 2020 WL 5646457, at *2 (D.P.R. 2020) (quoting Lebron Ortiz v. United States, 2015 WL 2400746, at *2 (D.P.R. 2015)). Thus, the petitioner bears the burden of establishing the defect. Id.

Likewise, "[w]hen a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing." U.S. v. McGill, 11 F.3d 223, 225 (1st Cir. 1993) (citations omitted). To determine whether the petitioner has met this burden, "the court must take many of petitioner's factual averments as true," but it need not "give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets." Id. (citation omitted). A hearing on such a petition "generally is not necessary when a §

2255 motion (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case." Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974). Simply put, a Section 2255 motion "'may be denied without a hearing as to those allegations which, if accepted as true, entitle the movant to no relief, or which need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible.'" McGill, 11 F.3d at 226 (quoting Shraiar v. United States, 736 F.2d 817, 818 (1st Cir. 1984)) (internal quotation omitted).

III. DISCUSSION

No hearing has been requested or is necessary in this case because the *Petition* presents **only legal issues** and does not require resolving any disputed factual issues. *See* Gandia-Maysonet, 2020 WL 5646457, at *2 (quoting Miller v. United States, 564 F.2d 103, 106 (1st Cir. 1977)) ("Where there are no disputed facts crucial to the outcome, leaving only questions of law, [§] 2255 does not require a hearing; the motion may be decided [...] without oral presentation").

A. Section 924 (C)(3)(A) and the approaches to analysis of whether a predicate offense is a "crime of violence".

Section 924(c)(1) provides for enhanced penalties to:

> [A]ny 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[.]

18 U.S.C. § 924(c)(1). Furthermore, Section 924(c)(3) contains two definitions of the statutory term "crime of violence." A "crime of violence" is one that:

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

18 U.S.C. § 924 (c)(3). Section 924(c)(3)(A) is known as the "**force clause**". *See* United States v. Rose, 896 F.3d. 104, 106 (1st Cir. 2018). Whereas section 924(c)(3)(B) is known as the "residual clause." Id. The Court need not dwell on subsection "B" as it has been declared unconstitutional. *See* Davis, 139 S. Ct. at 2336.

As explained by the First Circuit, the first step in determining whether a statute is a "crime of violence" under Section 924(c)(3)(A)'s force clause, is to ascertain "whether the criminal statute of the predicate offense is indivisible or divisible." King v. United States, 965 F.3d 60, 65 (1st Cir. 2020). An indivisible statute contains a "single, indivisible set of elements[,]" instead of containing alternative elements, "that criminalizes a broader swath of conduct than the relevant generic

offense." Descamps v. United States, 570 U.S. 254, 258 (2013). This indivisible statute may also "enumerate[] various factual means of committing a single element." United States v. Faust, 853 F.3d 39, 52 (1st Cir. 2017); *see also* Mathis v. United States, 136 S.Ct. 2243, 2249 (2016) (providing hypothetical examples of indivisible statutes). Conversely, a statute is considered "divisible" when it "sets out one or more elements of the offense in the alternative[,]" thereby "listing potential offense elements." Descamps, 570 U.S. at 257, 260. A "divisible" statute therefore "comprises multiple, alternative versions of the crime." Id. at 262. Moreover, when "statutory alternatives carry different punishments, then . . . they must be elements." Mathis, 136 S.Ct. at 2256.

To determine whether an indivisible statute is a "crime of violence," courts apply a "categorical approach" that considers "the elements of the crime of conviction, **not the facts of how it was committed**, and assess[es] whether violent force is an element of the crime." United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017) (emphasis added). However, for divisible statutes, courts use a "modified categorical approach." This approach is used when certain "alternative elements require the use, attempted use, or threatened use of physical force while others do not[.]" King, 956 F.3d at 66. It consists of analyzing a limited set of *Shepard* documents "such as the charging documents, plea

agreements, plea colloquies, jury instructions, and verdict forms [...] to determine which of the statute's alternative elements formed the basis of the prior conviction." United States v. Delgado-Sánchez, 849 F.3d 1, 8 (1st Cir. 2017) (quoting United States v. Castro-Vazquez, 802 F.3d 28, 35 (1st Cir. 2015). The objective of looking at those documents is to "determine which of the enumerated alternatives within the statute constituted the actual crime of conviction." King, 965 F.3d at 66 (citation omitted). These documents also help the sentencing court to "compare[] only this specific offense with the relevant generic offense." United States v. Burghardt, 939 F.3d 397, 406 (1st Cir. 2019) (citing Mathis, 136 S.Ct. at 2249). Moreover, "under the modified categorical approach, if the crime of conviction involves the use, attempted use, or threatened use of physical force against the person or property of another, then the offense qualifies a crime of violence under § 924(c)'s force clause." King, 965 F.3d at 66 (citation omitted).

B. The aggravated offense in 18 U.S.C. § 2114(a) is a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(A)'s force clause.

Forteza-García contends that "basic postal robbery," 18 U.S.C. § 2114(a), the underlying crime to his 924(c)(3) conviction, , is not a "crime of violence" for purposes of 924(c)(3)(A)'s force clause because it purportedly criminalizes "rather minimal force" that does not require "force capable of causing physical pain or

injury to another person." (Docket No. 13 at 10-12). The Court disagrees. 18 U.S.C. § 2114(a) *is* a divisible statute with an aggravated offense that is categorically a predicate "crime of violence" under Section 924(c)(3)(A)'s force clause. Application of the modified categorical approach leads to the conclusion that Forteza-García plead guilty to 18 U.S.C. § 2114(a)'s **aggravated offense.**

The postal robbery statute provides that:

> 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**.(Emphasis added).

18 U.S.C. § 2114(a). While the First Circuit has not weighed in on the issue, multiple United States Courts of Appeals have concluded that **18 U.S.C. § 2114(a) is a divisible statute.** As the highlighted text after the semicolon shows, the statute provides for an increased penalty of imprisonment of up to twenty-five years when in the course of the assault or robbery the defendant: (1) wounds

the person having custody of property of the United States; *or* (2) puts the person's life in jeopardy by the use of a dangerous weapon. *See* United States v. Bryant, 949 F.3d 168, 174 (4th Cir. 2020); Knight v. United States 936 F.3d 495, 498-99 (6th Cir. 2019); United States v. Enoch, 865 F.3d 575, 5801-81 (7th Cir. 2017), cert. denied 138 S.Ct. 1015 (2018); United States v. Thomas, 703 F. App'x 72, 78 (3d Cir. 2017) (affirming appellant's § 924(c) conviction because "the jury had an adequate factual basis to conclude that § 2114(a), committed while using and carrying a firearm, is a crime of violence."); In re Watts, 829 F.3d 1287, 1289-90 (11th Cir. 2016).

Other judges in the District of Puerto Rico have reached the same conclusion. *See* Rojas-Tapia v. United States, 2020 WL 3690398, at *5 (D.P.R. 2020). The Court held therein that "Circuit Courts have determined that 18 U.S.C. § 2114(a) carries a 'separate aggravated offense that includes the wounding **or putting the victim's life in jeopardy by the use of dangerous weapon**.'" Id. (emphasis in original); *see also*, Rojas-Tapia v. United States, 458 F.Supp. 3d 111, 119-121 (D.P.R. 2020). The Court further notes that Petitioner and the Government **agree** that **we are dealing with a divisible statute**. (Docket Nos. 13 at 8-9, 12; 16 at 8).

The aggravated offense in 18 U.S.C. § 2114(a) is "crime of violence" for Section 924 purposes because "wounding" and putting a victim's life "in jeopardy" with a "dangerous weapon" are

elements that entail "the use, attempted use, or threatened use of physical force against the person." 18 U.S.C. § 924(c)(3)(A). The Seventh Circuit Court of Appeals ("Seventh Circuit") reached a similar conclusion in United States v. Enoch when it concluded that the second part of 18 U.S.C. § 2114(a) is a crime of violence under Section 924(c)(3)'s force clause in a case involving brandishing of a weapon. *See* Enoch, 865 F.3d at 582. As aptly put by the Seventh Circuit:!

> We cannot see how a defendant can brandish a gun in such a manner as to put the life of a victim in jeopardy **without** committing an offense that "has as an element the use, attempted use, or threatened use of physical force against the person and property of another."

Id. (quoting 18 U.S.C. § 924(c)(3)(A)) (emphasis added). *See also* United States v. Dowd, 451 F.3d 1244, 1252 n.8 (11th Cir. 2006) (holding that the aggravated § 2114(a) violations stemming from the fact that the appellant placed the victim's life in jeopardy by using a dangerous weapon "undisputedly describes a crime of violence."); Rojas-Tapia, 2020 WL 36960398, at *5 (holding that Petitioner's conviction under 18 U.S.C. § 2114(a) was a "crime of violence" under Section 924(c)'s force clause because he used firearms and placed the lives of postal employees in danger).

Pursuant to the modified categorical approach, the Court reviewed the Indictment, the Plea Agreement, and the plea colloquy.

(Case No. 03-cr-0073-2, Docket Nos. 7, 124 and 232). These documents show that the predicate offense underlying Forteza-García's Section 924(c) conviction is 18 U.S.C. § 2114(a)'s aggravated offense because Petitioner agreed to plead guilty to the elements of "wounding" and putting A.V.G.'s life "in jeopardy" with a "dangerous weapon" in the course of assaulting A.V.G with the intent to rob, steal or purloin money of the United States that's was within A.V.G.'s custody. (Case No. 03-cr-0073-2, Docket No. 232 at 18). Thus, Forteza-García's Section 924(c) and (j) convictions are valid.

In the Plea Agreement, Petitioner plead guilty to Count Three of the original Indictment which states that Petitioner and his co-defendants:

> [A]aiding and abetting each other, and, aided and abetted by others to the Grand Jury unknown, **did willfully, intentionally and unlawfully possess, use or carry a firearm during and in relation to a crime of violence…that is assaulting an individual who lawfully had charge, control, or custody of money of the United States, with intent to rob, steal, or purloin said money, as set forth in COUNT ONE herein, which is realleged and incorporated by reference herein, an offense that they could be prosecuted in a court of the United States as a violation to Title 18, United States Code, Section 2114, and, in the course of that crime of violence, the defendants herein unlawfully killed A.V.G., with malice aforethought through the use of a firearm,** which is murder, as defined, in Title 19 United States Code Section 1111, by knowingly, willfully, deliberately and maliciously and with premeditation shooting

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A.V.G. with a firearm thus causing his death, all in violation of Title 18 United States Code Section 924 (j) and 2.

(Case No. 03-cr-0073-2, Docket No. 7 at 2-3; 124 at 1-2) (emphasis added). The Indictment charged Petitioner and his co-defendants with possessing and using a dangerous weapon, that is the firearm, during the assault, robbery and killing of A.V.G. who had charge, control, or custody of money of the United States. (Docket No. 7 at 2-3). To state the obvious, a firearm *is* a dangerous weapon because "as used or attempted to be used, [it] may endanger the life of or inflict great bodily harm on a person." Taylor, 848 F.3d at 493-494; *see also* Rojas-Tapia, 2020 WL 3960398, at *6 (identifying a 9mm pistol, a .40 caliber semi-automatic Glock pistol, and a semi-automatic AK-47 type assault rifle as "dangerous weapons."). **Thus, Count Three stated all of the elements of a violation of 18 U.S.C.§ 2114(a)'s aggravated offense.** (Case No. 03-cr-0073-2, Docket Nos. 124 at 1-2; 232 at 17-18). In particular, the Transcript of the September 24, 2003 Change of Plea reflects where Petitioner was read Count Three by the Court and he acknowledged the charges. (Case No. 03-cr-0073-2, Docket No. 232 at 10, 17-18, 26).

By pleading guilty to Count Three, Petitioner plead guilty to the aggravated offense in 18 U.S.C. § 2114(a) because the indictment alleged that A.V.G. was wounded (mortally) and his life

was placed in jeopardy (taken) with a dangerous weapon in the course of assaulting and robbing him while he had custody of money belonging to the United States. Moreover, even though Petitioner did not plead guilty to Count One of the Indictment, that is a violation to 18 U.S.C. § 20114(a), the plea colloquy demonstrates that Petitioner agreed to plead guilty to a charge wherein he admitted to having been involved in the assault, killing and robbing of A.V.G. with a firearm. Id. at 18, 26, 30-31. Similarly, during the plea colloquy and after the Government's proffer of the factual basis for Count Three, the Court asked Petitioner whether he accepted his involvement in the killing and robbing of A.V.G. and Petitioner replied in the affirmative "Yes." Id. at 40. Thus, **Petitioner admitted to having committed the predicate offense.** As stated by several United States Courts of Appeals "[b]y its plain language, section 924 does not require that a defendant be convicted of, or even charged with, the predicate offense to be found guilty of using or carrying a firearm in relation to the predicate offense." United States v. Frye, 402 F.3d 1123, 1127 (11th Cir. 2005). *See also* United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990) ("[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate."); Harris v. United States, 2013 WL 12450621, at *3 (M.D. Fla. 2013) ("[A] defendant does not have to be convicted of, or even charged with, the predicate offense to be found guilty of

using or carrying a firearm in relation to the predicate offense. Section 924 requires only that the crime of violence be one that "may be prosecuted.")

Petitioner also contends that the Court should focus on the least culpable conduct captured by the aggravated modality of 18 U.S.C. § 2114(a), a "simple robbery" which he argues is not a crime of violence. (Docket No. 13 at 12-13). But, the whole point of engaging in the modified categorical approach in the face of a divisible statute is to determine "if the crime of conviction involves the use, attempted use, or threatened use of physical force against the person or property of another," thereby "qualifyi[ng] as a crime of violence under § 924(c)'s force clause." King, 965 F.3d at 66. As shown above, Petitioner's conviction included the element of "wounding" and "placing the person's life in jeopardy through the use of a dangerous weapon" which undoubtedly qualifies his 18 U.S.C. § 2114(a)'s aggravated offense as a "crime of violence."

Lastly, First Circuit precedent precludes any potential argument that "aiding and abetting" a "crime of violence" does not satisfy 924(c)'s force clause. According to First Circuit case law, 18 U.S.C. § 2 "makes an aider and abettor 'punishable as the principal,' and thus no different for purposes of the categorical approach than one who commits the substantive offense." United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018) (citation

omitted). *See also* Gonzales v. Duenas Alvarez, 549 U.S. 183, 189 (2007) ("[E]very jurisdiction—all States and the Federal Government—has 'expressly abrogated the distinction' among principals and aiders and abettors".); Ocasio-Ruiz v. United States, 2020 WL 4437858, at *9 n. 15 (D.P.R. 2020) ("[T]he fact that Petitioner was charged as an "aider an abettor" does nothing to change the underlying crime's category of "crime of violence".); Rojas-Tapia, 2020 WL 36960398, at *5 (holding that "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."). The Court sees no reason to rule any differently in the case at bar.

C. No certificate of appealability will be issued.

28 U.S.C.A. § 2253(c)(2) establishes that a District Court judge may only issue a certificate of appealability of a section 2255 proceeding "if the applicant has made a substantial showing of the denial of a constitutional right." In this case, the Court will not issue a certificate of appealability because Petitioner has failed to make such a showing. *See* Morales Torres v. United States, 2019 WL 4744217 at *3 (D.P.R. 2019) (denying certificate of appealability in a case dismissing Section 2255 petition because Hobbs Act Robbery is a predicate crime of violence under Section 924 (c)'s force clause).

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IV. CONCLUSION

Based on the foregoing, Petitioner Angel Forteza-García's *Second Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255* (Docket No. 2) is **DENIED**. Judgment of dismissal **WITH PREJUDICE** will be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 26th day of February 2021.

S/ RAÚL M. ARIAS-MARXUACH
United States District Judge