

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION NO. 02-662-1
 :
 DOUGLAS EDWARDS, :
 :
 Defendant. :

MEMORANDUM OPINION

Smith, J.

July 27, 2017

After conviction of one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), the movant was sentenced as an armed career criminal under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1), due to two prior serious drug offenses and a prior violent felony: aggravated assault in violation of 18 Pa. C.S. § 2702(a)(4). In June 2016, he filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, claiming that pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015) (“*Johnson 2015*”), his Pennsylvania aggravated assault conviction no longer qualifies as a violent felony under the ACCA. Because 18 Pa. C.S. § 2702(a) is a divisible statute, the modified categorical approach applies in determining whether Edwards’s prior conviction of aggravated assault qualifies as a predicate violent felony under the ACCA. Applying the modified categorical approach, the subsection of § 2702(a) of which Edwards was convicted categorically qualifies as a predicate violent felony. Thus, even in light of *Johnson 2015*, Edwards was properly subjected to the ACCA’s armed career criminal enhancement, and the court will deny his motion to correct, modify, or vacate his sentence.

I. BACKGROUND

In 2003, a jury convicted the movant, Douglas Edwards (“Edwards”), of one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). *See Gov.’s Resp. to Def.’s Mot. Under 28 U.S.C. § 2255 at 1* (“Gov.’s Resp.”), Doc. No. 249; Gov.’s Sentencing

Mem. at 1, Doc. No. 149. Under the ACCA, a defendant convicted under § 922(g) who has three previous convictions for violent felonies or serious drug offenses is subject to an enhanced sentence of not less than fifteen years without the possibility of parole. 18 U.S.C. § 924(e)(1). At the time of his conviction, Edwards had two prior convictions for serious drug offenses and one prior conviction for second-degree aggravated assault in violation of 18 Pa. C.S. § 2702(a). *See* Gov.’s Supp. Sentencing Mem. at 3, Doc. No. 155. The aggravated assault conviction qualified as a violent felony as defined by the ACCA, 18 U.S.C. § 924(e)(2)(B), and Edwards accordingly received the enhanced sentence for armed career criminals.¹ Gov.’s Resp. at 2. On June 17, 2016, Edwards filed the instant motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, claiming that pursuant to *Johnson* 2015, his aggravated assault conviction no longer qualifies as a predicate violent felony under the ACCA. Doc. No. 241. After Edwards filed his motion, the court stayed the case pursuant to Chief Judge Petrese B. Tucker’s administrative order mandating that all cases seeking collateral relief based on *Johnson* 2015 be stayed to give parties time to prioritize the motions. Doc. No. 242. By agreement of the parties the court lifted the stay on April 11, 2017, once Edwards was prepared to proceed on the motion. Doc. No. 248. Both parties have filed briefs detailing their positions, and the court heard oral argument on the motion on July 13, 2017. Doc. Nos. 247, 249, 254, 261. Thus, Edwards’s motion pursuant to § 2255 is ripe for disposition.

II. DISCUSSION

In *Johnson* 2015, the Supreme Court held that the residual clause of the ACCA’s definition of a violent felony was unconstitutionally vague, 135 S. Ct. at 2563, and Edwards contends that his aggravated assault conviction does not fit within the ACCA’s surviving definition of a violent felony. Prior to *Johnson* 2015, the ACCA defined a violent felony as: “any crime punishable by

¹ The Honorable Mary A. McLaughlin, now retired, sentenced Edwards on June 3, 2005. Doc. No. 195.

imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; 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.*” 18 U.S.C. § 924(e)(2)(B) (emphasis added). The italicized clause in the definition is the residual clause struck down in *Johnson* 2015. *See* 135 S. Ct. at 2555-56. Thus, the relevant remaining portion of the ACCA after *Johnson* 2015 defines a violent felony as “any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). Courts have come to refer to this clause as the ACCA’s “elements clause.” *See Welch v. United States*, 136 S. Ct. 1257, 1261 (2016) (“Subsection (i) of [section 924(e)(2)(B)] is known as the elements clause.”).

In order to determine whether *Johnson* 2015 requires a sentence modification, the court must determine first whether the Pennsylvania aggravated assault offense under which Edwards was convicted is divisible or indivisible. If the statute is indivisible, the court must apply the categorical approach to determine whether the offense qualifies as a violent felony under the ACCA. *Mathis v. United States*, 136 S. Ct. 2243, 2245-46 (2016). If the statute is divisible, the court must apply the modified categorical approach to determine whether the offense qualifies as a violent felony. *Id.*; *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013). The difference between the two approaches is significant because under the traditional categorical approach, “[s]entencing courts may ‘look only to the statutory definitions’—*i.e.*, the elements—of a defendant’s prior offenses, and *not* ‘to the particular facts underlying those convictions.’” *Descamps*, 133 S. Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Thus, under the categorical approach, the court would look at 18 Pa. C.S. § 2702(a) as a whole to determine whether a conviction under that statute is categorically a violent felony. *See Mathis*, 136 S. Ct. at 2248. Under the modified categorical

approach, the focus of the inquiry is still on the elements rather than the facts of the prior conviction, but it allows a sentencing court “to examine a limited class of documents to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.” *Descamps*, at 133 S. Ct. at 2284. Thus, under the modified categorical approach, the court would determine of which subsection of 18 Pa. C.S. § 2702(a) Edwards was convicted, and then determine whether a conviction under that specific subsection categorically qualifies as a violent felony.

Edwards contends that the court should apply the categorical approach because the Pennsylvania aggravated assault statute is indivisible. Mem. of Law in Supp. of Motion to Correct Sentence Under 28 U.S.C. § 2255 (“Movant’s Mem.”) at 8-13, Doc. No. 247. Applying the categorical approach, Edwards contends that the court must find that the aggravated assault conviction does not have as an element the use, attempted use, or threatened use of physical force, and that it is thus not a predicate violent felony under the ACCA. *Id.* at 12-15. Thus, he contends that the court must find that he no longer qualifies as an armed career criminal and modify his sentence accordingly. The government disagrees, and contends that the court must apply the modified categorical approach because the statute is divisible, Gov.’s Resp. at 5-6, and that applying that approach leads to the conclusion that the specific subsection of the Pennsylvania aggravated assault statute of which Edwards was convicted *does* have as an element the use, attempted use, or threatened use of physical force. *Id.* at 7-13. Edwards contends that even if the court applies the modified categorical approach, the court must conclude that the specific subsection of the Pennsylvania aggravated assault statute of which Edwards was convicted does not necessarily require the use or attempted use of physical force for conviction, and thus that he still no longer qualifies as an armed career criminal under the ACCA as it currently stands. Movant’s Mem. at 14-15.

A. Divisibility

The first step in determining whether the prior conviction is a predicate violent felony under the ACCA is determining whether the statute criminalizing the prior offense is indivisible or divisible. If the statute is indivisible, the court applies the categorical approach in determining whether the prior conviction is a predicate violent felony. If the statute is divisible, the court applies the modified categorical approach. *Mathis*, 136 S. Ct. at 2245-46.

At the time of Edwards’s aggravated assault offense, 18 Pa. C.S. § 2702(a), the statute under which Edwards was convicted, stated:

- (a) A person is guilty of aggravated assault if he:
- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
 - (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer or firefighter (or other designated person) in the performance of duty;
 - (3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer (or other designated person) in the performance of duty;
 - (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;
 - (5) attempts to cause or intentionally or knowingly causes bodily injury to [school officials] while acting in the scope of his or her employment or because of his or her employment relationship to the school;

Id. Further, subsection (b) of the statute grades each offense listed in subsection (a) as either a felony in the first degree or a felony in the second degree. *Id.* at § 2702(b).

A criminal statute is indivisible if, rather than listing “multiple elements disjunctively, [it] instead . . . enumerates various factual means of committing a single element.” *Mathis*, 136 S. Ct. at 2249. The *Mathis* court provided the following example of an indivisible crime:

To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a “deadly weapon” as an element of a crime and further provides that the use of a “knife, gun, bat, or similar weapon” would all qualify. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors concluded that the defendant used a

knife while others concluded he used a gun, so long as all agreed that the defendant used a deadly weapon.

Id. (internal quotation marks and citations omitted).

A statute is divisible where it “list[s] elements in the alternative, and thereby define[s] multiple crimes.” *Id.* The *Mathis* court provided the following example of a divisible crime:

Suppose, for example, that the California law noted above had prohibited ‘the lawful entry or the unlawful entry’ of a premises with intent to steal, so as to create two different offenses, one more serious than the other. . . . A sentencing court thus requires a way of figuring out which of the alternative elements listed—lawful entry or unlawful entry—was integral to the defendant’s conviction (that is, which was necessarily found or admitted).

Id. Thus, the key to determining whether the statute at hand is divisible or indivisible is deciding whether the items listed in subsections 18 Pa. C.S. § 2702(a)(1) through (a)(5) are elements of different crimes or means of committing the same crime. “If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. . . . Conversely, if a statutory list is drafted to offer ‘illustrative examples,’ then it includes only a crime’s means of commission.” *Id.* at 2256 (citations omitted).

On its face, 18 Pa. C.S. § 2702(a) does not define different means of committing aggravated assault; that is, it does not “spell[] out various factual ways of committing some component of the offense.” *Id.* at 2249. The subsections are not merely illustrative examples of how one might commit aggravated assault. Rather, § 2702(a) defines different crimes, and each crime has different elements. For example, each subsection has a different *mens rea* element—a defendant who acts recklessly could be guilty of aggravated assault under § 2702(a)(1), but not aggravated assault under § 2702(a)(4). Further, § 2702(b) grades each subsection differently, supporting the government’s contention that § 2702(a) lists different crimes with different elements, rather than different means of committing the same crime. *See id.* at 2256.

This is consistent with *United States v. Brown*, 765 F.3d 185 (3d Cir. 2014), in which the Third Circuit held that Pennsylvania’s terroristic threats statute was divisible. That statute, 18 Pa. C.S. § 2706(a), prohibits:

communicat[ing], either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another; (2) cause evacuation of a building, place of assembly or facility of public transportation; or (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

Id. Because the statute is “phrased in the disjunctive” and describes “three variations of the same offense,” the court held that “the statute is divisible into subsections (a)(1), (a)(2), and (a)(3).” *Brown*, 765 F.3d at 192. Similar to the aggravated assault statute at hand, the terroristic threats statute lists multiple different crimes that require different *mens rea* elements, rather than illustrative examples of means of committing the same crime.

Edwards emphasizes the fact that the Supreme Court has stated that whether a particular fact or circumstance is an element or a means of committing a crime depends on whether the jury must unanimously agree on that fact or circumstance to convict. *Movant’s Mem.* at 3 (citing *Mathis*, 136 S. Ct. at 2248-50; *Descamps*, 133 S. Ct. at 2288). He argues that because a jury need not unanimously find which subsection of 18 Pa. C.S. § 2702(a) a defendant violated, and need only agree that the “aggravation” element is satisfied, the subsections constitute different means of satisfying the aggravation element rather than different crimes with different elements. *Movant’s Mem.* at 9-11. He points to two unpublished, non-precedential Superior Court cases in which the Commonwealth of Pennsylvania charged defendants with aggravated assault, and in which neither the bills of information nor jury verdicts specified which subsection of the statute applied. *Movant’s Mem.* at 10-11 (citing *Commonwealth v. Cassell*, No. 1300 EDA 2015, 2016 WL 6135379 (Pa.

Super. Oct. 21, 2016); *Commonwealth v. Moore*, No. 1247 EDA 2013, 2015 WL 7078781 (Pa. Super. June 4, 2015)).²

While Edwards is correct in contending that the Supreme Court has discussed looking at what a jury must unanimously find to determine whether a statute is divisible or indivisible, finding that the aggravated assault statute is a single, indivisible crime is inconsistent with the way other Pennsylvania district courts and state courts have generally viewed the statute. In *United States v. Lewis*, No. 15-CR-368, 2017 WL 368088, at *2 (E.D. Pa. Jan. 25, 2017), the court held that the aggravated assault statute is divisible because “[e]ach subsection of the statute criminalizes different conduct, with different elements that need to be met, rather than listing different means of meeting the same elements.” *Id.*; see also *United States v. Fisher*, No. CR 01-769-01, 2017 WL 1426049, at *4 (E.D. Pa. Apr. 21, 2017) (finding the statute is divisible based on *Lewis*); *United States v. Weygandt*, No. CR 9-324, 2017 WL 818844, at *1 (W.D. Pa. Mar. 2, 2017) (same); *United States v. Barfield*, No. CR 09-93, 2017 WL 771253, at *4 (W.D. Pa. Feb. 28, 2017) (same). Further, as the court explained in *Lewis*, Pennsylvania courts have held that the Commonwealth must prove different elements for convictions under different subsections of 18 Pa. C.S. § 2702(a). *Lewis*, 2017 WL 368088, at *2 (citing *Commonwealth v. Rhoades*, 8 A.3d 912, 918 (Pa. Super. 2010) (holding that two subsections of § 2702 do not “share identical statutory elements”); *Commonwealth v. Taylor*, 500 A.2d 110, 114 (Pa. Super. 1985) (“[T]he proof required for subsection (a)(1) and subsection (a)(4) [of § 2702] is substantially different.”), *aff’d*, 531 A.2d 1111 (Pa. 1987)). Further, it is not clear that a jury need not unanimously decide which subsection of 18 Pa. C.S. § 2702(a) a defendant violated; in fact, the Pennsylvania Suggested Standard Criminal Jury Instructions, which are non-binding but persuasive, include separate instructions for each subsection of the statute. See

² In *Cassell*, while the bill of information did not specify the one subsection with which the defendant was being charged, it did list four of the subsections of which the defendant could be convicted. *Cassell*, 2016 WL 6135379, at *3. Thus, it did not cite to § 2702(a) as generally as Edwards argues.

2 Pennsylvania Bar Institute, *Pennsylvania's Suggested Standard Criminal Jury Instructions* §§ 2702A-2702L (3d ed. 2016).

For the foregoing reasons, the court holds that 18 Pa. C.S. § 2702(a) is divisible because it delineates separate crimes with separate elements. As such, the court will apply the modified categorical approach in disposing of Edwards's § 2255 motion.

B. The Prior Conviction Under the ACCA's Definition of a Violent Felony

Applying the modified categorical approach, the court may look at documents approved by the Supreme Court in *Shepard v. United States*, 544 U.S. 13, 16 (2005) to determine which subsection of a divisible statute the defendant violated. *Mathis*, 136 S. Ct. at 2249. Thus, the court can look at “the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented” to determine which subsection of 18 Pa. C.S. § 2702(a) Edwards violated, and then determine whether a conviction under that subsection qualifies as a violent felony. *Descamps*, 133 S. Ct. at 2284; *Brown*, 765 F.3d at 189-90 (quoting *Shepard*, 544 U.S. at 16).

The trial judge indicated at Edwards's sentencing for aggravated assault that Edwards knowingly, intelligently, and voluntarily entered into an *Alford* plea of guilty as to count seven of the bill of information. Exhibit A to Movant's Mem. at 2, Doc. No. 247-1. Count seven of the bill of information specifically cites a violation of 18 Pa. C.S. § 2702(a)(4). *Id.* at 1. Section 2702(a)(4) states that a person is guilty of aggravated assault if he “attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.” 18 Pa. C.S. § 2702(a)(4). Thus, under the modified categorical approach, the court must consider the elements of § 2702(a)(4) in determining whether Edwards pleaded guilty to a predicate violent felony under the ACCA.

Without the residual clause struck down in *Johnson* 2015, § 924(e)(2)(B) of the ACCA defines a violent felony as: “any crime punishable by imprisonment for a term exceeding one year .

. . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives.” 18 U.S.C. § 924(e)(2)(B). Thus, in this case, Edwards’s prior aggravated assault conviction is a violent felony if it falls under the elements clause; that is, if it has as an element the use, attempted use, or threatened use of physical force against the person of another.

Edwards contends that the “bodily injury” element of 18 Pa. C.S. § 2702(a)(4) does not necessarily require the use of physical force because (1) bodily injury could be inflicted by countless methods such as poisoning or urging someone to hurt themselves, and (2) “deadly weapon” is defined broadly enough to include poison in Pennsylvania, and thus someone who can be convicted under § 2702(a)(4) without necessarily using physical force by using the deadly weapon of poison to inflict bodily injury. Movant’s Mem. at 13-15. Thus, because the bodily injury element of § 2702(a)(4) does not necessarily require actual physical force, Edwards contends that the subsection is not categorically a violent felony. The government contends that causing or attempting to cause bodily injury requires the use of physical force as defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010) (“*Johnson 2010*”) and thus that § 2702(a)(4) fits the ACCA’s definition of a violent felony.³ Gov.’s Resp. at 7.

The ACCA does not define physical force, but the Supreme Court provided a definition in *Johnson 2010*. In *Johnson 2010*, the Court declined to construe the term “physical force” under ACCA’s elements clause as encompassing the definition of physical force under the common law crime of battery—mere offensive touching. 559 U.S. at 139. Thus, the Court held that the term “physical force” requires more than mere offensive touching, and instead “means violent force—

³ The government also cites *United States v. Castleman*, 134 S. Ct. 1405 (2014), which held that “the knowing or intentional causation of bodily injury necessarily involves the use of physical force.” *Id.* at 1414. The *Castleman* Court, however, was interpreting the statute that prohibits individuals with prior misdemeanor crimes of domestic violence from possessing firearms, 18 U.S.C. § 922(g)(9), and stated that its ruling would not affect the ACCA’s definition of a violent felony. 134 S. Ct. at 1410-11. Further, the *Castleman* Court did not reach the question of “whether or not the causation of bodily injury necessarily entails violent force.” *Id.* at 1413. Thus, the court does not find *Castleman* to be persuasive in this case.

that is, force capable of causing physical pain or injury to another person.” *Id.* at 140. Applying this definition of physical force, the central question in this case is whether the “causing or attempting to cause bodily injury” element of 18 Pa. C.S. § 2702(a)(4) requires violent force “capable of causing physical pain or injury to another person.” Clearly it does. One cannot intentionally or knowingly cause or attempt to cause bodily injury without using some sort of force *capable of causing injury*. Even if one might be able to inflict bodily injury in a multitude of ways, such as poisoning, the Supreme Court’s definition of physical force encompasses all such intentional and knowing conduct that causes bodily injury.⁴

While the Third Circuit has not yet addressed this issue in a precedential opinion, courts of appeal in other circuits have similarly applied *Johnson* 2010’s definition of physical force to conclude that assault statutes that require the infliction of bodily injury or physical harm without explicitly requiring physical force qualify as violent felonies under the ACCA’s elements clause. For example, in *United States v. Vinton*, 631 F.3d 476, 485-86 (8th Cir. 2011), the Eighth Circuit, applying the modified categorical approach, held that a subsection of Missouri’s second-degree assault statute requiring “[a]ttempt[ing] to cause or knowingly caus[ing] physical injury to another person by means of a deadly weapon or dangerous instrument” qualified as a predicate violent

⁴ Edwards cites two cases to support his contention that bodily injury does not require physical force. Both cases are inapposite. The first, *United States v. Otero*, 502 F.3d 331, 336 (3d Cir. 2007), is a Third Circuit case in which the court stated in dicta that the Pennsylvania simple assault statute which says that a person is guilty of assault if he “attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another” does not require the “use of force” when “causing bodily injury.” Movant’s Mem. at 5, 13. That case was a habeas corpus case based on ineffective assistance of counsel where the petitioner contended that his attorney failed to object to the conviction’s classification as a violent felony under the ACCA. In analyzing the ineffective assistance claim, the Third Circuit said: “Initially we note that, on its face, the Pennsylvania simple assault statute does not require the ‘use of force’ when ‘causing bodily injury.’” Not only is this statement pure dicta, but *Otero* was decided prior to *Johnson* 2010. Because the court relies on *Johnson* 2010’s definition of physical force, *Otero* is of no assistance in this case.

The second case on which Edwards relies is *Commonwealth v. Thomas*, 867 A.2d 594, 597 (Pa. Super. 2005), in which the Pennsylvania Superior Court rejected equating bodily injury to the use of force. Movant’s Mem. at 5; Movant’s Reply Mem. at 11, Doc. No. 254. While Edwards’s interpretation of *Thomas* may be correct, it is irrelevant here because the case at hand requires an interpretation of the ACCA, a federal statute, rather than of Pennsylvania’s aggravated assault statute. Thus, the Pennsylvania Superior Court’s interpretation of Pennsylvania’s aggravated assault statute is not binding on the court. *Johnson* 2010, 559 U.S. at 138 (“The meaning of ‘physical force’ in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court’s interpretation of a similar—or even identical—state statute.”).

felony based on *Johnson* 2010. Other circuits, including the Sixth and Seventh Circuits, have come to the same conclusion. *See, e.g., Hill v. Werlinger*, 695 F.3d 644, 649-50 (7th Cir. 2012) (holding that subsection of Illinois battery statute requiring intentionally or knowingly without legal justification and by any means causing bodily harm to an individual qualified as a predicate violent felony under the elements clause based on *Johnson* 2010); *United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012) (holding that Ohio aggravated assault statute requiring causing serious physical harm qualified as a predicate violent felony under the elements clause based on *Johnson* 2010).

Further, while several courts within this circuit have held that 18 Pa. C.S. § 2702(a)(4) is categorically a violent felony, no court within the circuit has held that § 2702(a)(4) is *not* categorically a violent felony. In *United States v. Harris*, 205 F. Supp. 3d 651 (M.D. Pa. 2016), for example, the court held that § 2702(a)(1) is not a qualifying predicate violent felony because it criminalizes only reckless conduct and thus can be committed by an act of omission. *Id.* at 671-72; *see also Bennett v. United States*, No. 16-2039, 2017 WL 2857620, at *19 (1st Cir. July 5, 2017); *United States v. Golden*, 854 F.3d 1256, 1258 (11th Cir. 2017); *Tran v. Gonzales*, 414 F.3d 464, 470 (3d Cir. 2005) (holding that for a defendant to use or threaten force within the meaning of the elements clause, the defendant must act with the specific intent to use force, and not mere recklessness). The *Harris* court recognized in contrast, however, that § 2702(a)(4) is a qualifying predicate violent felony because it requires intentional or knowing behavior. *Harris*, 205 F. Supp. 3d at 672. Consistently, the Third Circuit and other district courts within the circuit have specifically held that § 2702(a)(4) is a predicate violent felony under the ACCA. *See United States v. Pitts*, 655 F. App'x 78, 81 (3d Cir. 2016); *United States v. Toomer*, No. CR 01-573, 2017 WL 1508842, at *4 (E.D. Pa. Apr. 27, 2017); *Barfield*, 2017 WL 771253, at *4; *Lewis*, 2017 WL 368088, at *3; *see also United States v. Gorny*, 655 F. App'x 920, 925 (3d Cir. 2016) (“[I]t would not be plain error to determine that the causation of bodily injury necessarily requires the use of

force capable of causing bodily injury—that is, ‘violent force.’”).⁵ While the cases cited are non-precedential, and thus do not bind the court, the court concludes that based on those persuasive cases, and the lack of cases reaching the conclusion for which Edwards advocates, the law in this circuit supports categorizing 18 Pa. C.S. § 2702(a)(4) as a violent felony under the *Johnson* 2010 definition of physical force.

C. Certificate of Appealability

To be entitled to a certificate of appealability, Edwards has to show that, *inter alia*, reasonable jurists would debate whether this court was correct in this ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (“To obtain a COA under § 2253, a habeas petitioner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes a showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement further.” (internal citations and question marks omitted)). The court does not find that a reasonable jurist would disagree with the court’s assessment of the movant’s claims; accordingly, the court will not issue a certificate of appealability.

III. CONCLUSION

Because 18 Pa. C.S. § 2702(a) lists various crimes, and each of those crimes requires for conviction proof of different elements, the statute is divisible and the modified categorical approach applies in determining whether Edwards’s prior conviction qualifies as a predicate violent felony under the ACCA. Using the modified categorical approach, it appears that Edwards pleaded guilty to “attempting to cause or intentionally or knowingly causing bodily injury to another with a deadly weapon” in violation of § 2702(a)(4), and that subsection qualifies as a violent felony under the

⁵ The court recognizes, as Edwards points out, that *Gorny* arguably misapplied *Castleman* and analyzed the issue before the court under a plain error standard of review. Movant’s Reply Mem. at 8. The court thus relies on that case only to the extent that it applied the *Johnson* 2010 definition in recognizing that § 2702(a)(4) requires the use or attempted use of physical force.

ACCA. Thus, even in light of *Johnson* 2015, the court properly sentenced Edwards as an armed career criminal and, accordingly, the court will deny his motion to correct, modify, or vacate his sentence.

A separate order follows.

BY THE COURT:

/s/ Edward G. Smith
EDWARD G. SMITH, J.