

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

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>JUAN RAMOS</b>	<b>CRIMINAL ACTION</b>  <b>NO. 08-695-1</b>
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**MEMORANDUM RE: DEFENDANT’S CAREER OFFENDER STATUS**

**Baylson, J.**

**September 11, 2017**

This Court was required to impose a new sentence on the Defendant because under the holding in Johnson v. United States, his sentence pursuant to the Armed Career Criminal Act, 18 U.S.C. §§ 922(g) and 924(e), was improper.

1. Background

The Court scheduled a sentencing and called for a new presentence report. The Court further received resentencing memoranda from the Government (ECF 59) and from the Defendant.

At the hearing, the Defendant made a very forceful and persuasive presentation that his behavior in prison was outstanding, he maintained strong family ties, and that if and when released, there were outstanding prospects for Defendant to succeed in the re-entry process.

The Government took the position that because one of Defendant’s prior convictions in State Court was for aggravated assault, which qualified as a “crime of violence,” he therefore qualified as a career offender, under the Sentencing Guidelines, Section 4B1.2. Defense counsel asserted that Defendant’s conviction under Pennsylvania law did not qualify as a “crime of violence.” The PSR does not make such a recommendation.

The Guideline range for Defendant, if the prior State Court conviction was “crime of violence,” would have been 188-235 months, based on an offense level of 31 and a criminal history category of VI, plus a five-year consecutive sentence required by 18 U.S.C. § 924(c), for a total of 248-295 months.

At the sentencing hearing, after reviewing both sentencing memoranda, the Court felt that the question was a difficult one and indicated that the Court would apply the “rule of lenity” and reject the Government’s position of the Guideline range, and sentenced Defendant within the Guideline range proposed by Defendant, for 105 months.

When the Court recently learned that the Government had filed an appeal, the Court determined to look in more detail of the governing law.

The Court acknowledges that it erred in relying on the rule of lenity, which generally only applies for statutory construction, and is seldom applied even then. See, e.g., Maracich v. Spears, 133 S. Ct. 2191 (2013).

Any ambiguity that might be found in the Sentencing Guidelines’ provision for “crime of violence” has not been held by any court to be subject to the rule of lenity.

After further review of the matter and the applicable case law, the Court will now find that given the Pennsylvania jurisprudence behind the term “aggravated assault,” that the Defendant has the better argument. Thus, unless the Third Circuit requires acceptance of the Government’s position, if this matter is remanded, the Court would conclude that the crime of violence provision of the Guidelines did not apply and an appropriate sentence would be within the Guideline range of 97-106 months.

However, if the Third Circuit adopts the Government's position, and the matter is remanded, the Court believes there is sufficient justification, legally and factually, that the Court would grant a downward variance from the Guidelines calculation, and impose a lesser sentence.

2. Analysis

Defendant's aggravated assault conviction cannot be a predicate offense for career offender status because it does not qualify as a "crime of violence" as that term is defined in § 4B1.2(a) of the Sentencing Guidelines:

- (a) The term "crime of violence" means any offense under federal or state law, 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, or
  - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2.

To determine whether a state conviction qualifies as a predicate offense pursuant to U.S.S.G. § 4B1.2(a)(2), courts compare the elements of the crime of conviction to those of a generic offense of that kind, but "if the crime of conviction covers any more conduct than the generic offense," it cannot qualify as a predicate offense. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (construing term "crime of violence" in the Armed Career Criminal Act). See also United States v. Hopkins, 577 F.3d 507, 511 (3d Cir. 2009) (considering ACCA jurisprudence authoritative).

The first step is to determine whether the statute is divisible—in other words, whether the statute sets forth multiple alternative elements, "thereby defin[ing] multiple crimes." Mathis, 136 S. Ct. at 2249. Rather than splitting up the statute into its constituent subparts, Pennsylvania case law reveals a certain flexibility in charging, and trial court practices, with respect to

identifying which particular subsection of statute applies. See Com. v. Moore, No. 1247 EDA 2013, 2015 WL 7078781, at \*4 (Pa. Super. Jun. 4, 2015); Com. v Cassell, No. 1300 EDA 2015, 2016 WL 6135379 at \*3 (Pa. Super. Oct. 21, 2016) (criminal information cited “generally” to 18 Pa. Cons. Stat. §2702(a) “without identifying the specific, applicable subpart of that provision”). In Moore, for instance, the defendant was still disputing what subsection of the aggravated assault statute he was convicted for—which the trial court had never specified—when he appealed the denial of his post-conviction petition. Pennsylvania courts thus are unambiguous that a conviction is for aggravated assault, but sometimes fail to specify what was aggravating about that particular offense.

Defendant is correct that the Pennsylvania second-degree felony aggravated assault statute, considered categorically, covers a broader swath of conduct than the generic offense. See 18 Pa Cons. Stat. § 2702(a). In 1998, when Defendant was convicted in state court, one could acquire a second-degree aggravated assault conviction by any of the following:

- (3) attempt[ing] to cause or intentionally or knowingly caus[ing] bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty;
- (4) attempt[ing] to cause or intentionally or knowingly caus[ing] bodily injury to another with a deadly weapon;
- (5) attempt[ing] to cause or intentionally or knowingly caus[ing] bodily injury to a teaching staff member, school board member or other employee, including a student employee, of any elementary or secondary publicly-funded educational institution, any elementary or secondary private school licensed by the Department of Education or any elementary or secondary parochial school while acting in the scope of his or her employment or because of his or her employment relationship to the school;
- (6) attempt[ing] by physical menace to put any of the officers, agents, employees or other persons enumerated in subsection (c), while in the performance of duty, in fear of imminent serious bodily injury;

18 Pa. Stat. and Cons. Stat. Ann. § 2702(a) (1998). By contrast, the Model Penal Code model aggravated assault statute, describing the generic crime, encompasses a much more limited range of conduct:

- (2) **Aggravated Assault.** A person is guilty of aggravated assault if he:  
(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or  
(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Model Penal Code § 211.1.

Defendant’s aggravated assault conviction likewise cannot qualify under the elements clause of the career offender guideline, U.S.S.G. § 4B1.2(a)(1), because the relevant statute does not actually require force. Pennsylvania courts have held, construing a different subsection of the aggravated assault statute, that “evidence of the use of force or the threat of force is not an element of the crime of aggravated assault.” Com. v. Thomas, 867 A.2d 594, 597 (2005) (finding sufficient evidence to sustain conviction under statutory subsection that required proof only of “serious bodily injury”). Moreover, neither force nor bodily injury is necessary to violate § 2702(a)(6), which requires only “physical menace” putting an officer “in fear of imminent serious bodily injury.”

For these reasons, the Court considers Defendant to lack the two necessary predicate convictions to be considered a career offender under the Guidelines.

**BY THE COURT:**

*/s/ Michael M. Baylson*

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**MICHAEL M. BAYLSON**  
**United States District Court Judge**