

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

UNITED STATES OF AMERICA

v.

BRIAN MCNEAL,
Defendant.

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CRIMINAL ACTION NO. 13-16

MEMORANDUM OPINION

Rufe, J.

September 26, 2017

Defendant Brian McNeal objects to the Probation Office’s Supplemental Report for his resentencing. Specifically, Defendant asserts that his prior conviction for second-degree aggravated assault under 18 Pa. Cons. Stat. § 2702(a) does not qualify as a predicate “crime of violence” under U.S.S.G. § 4B1.2 and, accordingly, should not serve as the basis for the elevated offense level prescribed in § 2k2.1(a)(2). For the reasons that follow, the Court holds that Defendant’s conviction for aggravated assault does qualify as a “crime of violence” under § 4B1.2 and will apply § 2k2.1(a)(2) in calculating Defendant’s guidelines range.

I. BACKGROUND

In 2013, Defendant was convicted by a jury of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and sentenced to 210 months’ imprisonment. At the time, Defendant had one prior conviction for a serious drug offense, two prior convictions for first-degree robbery under 18 Pa. Cons. Stat. § 3701(a), and one prior conviction for second-degree aggravated assault under 18 Pa. Cons. Stat. § 2702(a). Because there was no real dispute at the time that Defendant’s robbery and assault convictions qualified as “violent offenses” under the “residual clause” of the Armed Career Criminal Act (“ACCA”),¹ the Court found during

¹ 18 U.S.C. § 924(e)(1).

Defendant's original sentencing proceeding that he was subject to the 15-year mandatory minimum and sentencing enhancement outlined by the statute for any defendant who violates § 922(g) and has three previous convictions for "a violent felony or a serious drug offense."

In 2016, the Supreme Court invalidated the ACCA's residual clause as unconstitutionally vague.² Defendant filed a timely Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255, asserting that, in the absence of the residual clause, his robbery and aggravated assault convictions no longer qualified as "violent felonies" under the remaining "force clause"³ of the ACCA. The Court agreed that Defendant's two robbery convictions were no longer "violent felonies," and granted Defendant's motion and vacated his sentence.⁴

In advance of Defendant's resentencing, the Probation Office prepared a Supplemental Report. Although the Supplemental Report removes the sentencing enhancement under the ACCA (which prescribed a total offense level of 33 during Defendant's original sentencing), the report continues to calculate Defendant's base offense level as 24 under U.S.S.G. § 2K2.1(a)(2), which applies when a defendant previously had "two felony convictions of either a crime of violence or a controlled substance offense."

Defendant filed a Memorandum in Aid of Re-Sentencing, objecting to the Probation Office's calculation of his offense level. Defendant asserts that § 2K2.1(a)(2) does not apply because neither his assault conviction nor his armed robbery convictions qualify as "crimes of violence" as defined under § 4B1.2. In the absence of any predicate "crimes of violence,"

² *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

³ 18 U.S.C. § 924(e)(2)(B)(i). The ACCA also contains an "enumerated offenses" clause that was not at issue because it applies only to burglary, arson, extortion, or crimes involving the use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii).

⁴ Doc Nos. 103, 104. Because the Court's findings with respect to the robbery convictions left the Defendant with less than three prior convictions for "a violent felony or a serious drug offense," the Court declined to address whether Defendant's aggravated assault conviction remained a "violent offense" under the ACCA.

Defendant would receive a base offense level of 20 under § 2K2.1(a)(4) based upon his prior drug offense alone.⁵

In response, the Government does not contend that Defendant's robbery convictions are "crimes of violence" for purposes of § 4B1.2, but argues that Defendant's prior conviction for aggravated assault is a "crime of violence" under § 4B1.2 that justifies the application of § 2K2.1(a)(2). The Court heard argument during Defendant's re-sentencing hearing on September 11, 2017, and continued the hearing so that the issue could be fully considered.

II. DISCUSSION

Because the parties do not dispute the role of Defendant's prior robbery convictions or his prior drug offense in the calculation of his guidelines sentence, the Court directs its analysis solely to whether Defendant's prior conviction for second-degree aggravated assault under 18 Pa. Cons. Stat. § 2702(a) qualifies as a "crime of violence" under U.S.S.G. § 4B1.2.

A. U.S.S.G. § 4B1.2

Section 4B1.2, as effective November 1, 2016,⁶ defines a "crime of violence" as "any offense under federal or state law, 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 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).

⁵ During argument, Defendant's counsel represented that he was not contesting that his prior drug offense qualified as a "serious drug offense" under § 4B1.2.

⁶ The parties agree that the Court should apply the current amended version of § 4B1.2, which omitted the "residual clause" from subsection (ii) and includes "aggravated assault" as an enumerated offense. At argument, counsel for Defendant disclaimed any *ex post facto* concerns regarding application of the latest version of the sentencing guidelines.

Subsection (i) (the “force clause”) applies to a predicate offense that requires the “use of physical force,” (whether actual, attempted, or threatened) as an essential element. Subsection (ii) (the “enumerated offenses clause”) applies to a predicate offense whose elements “substantially corresponds” to, and does not “sweep[] more broadly than,” the “generic definition” of one of the listed crimes.⁷

In determining whether a prior conviction falls under either of these clauses, courts have employed the “categorical” and “modified categorical” approaches outlined in the ACCA context.⁸ Typically, under the categorical approach, courts may “look only to the statutory definitions –*i.e.*, the elements—of a defendant’s prior offenses,” and consider whether “the least culpable conduct necessary to sustain conviction under the statute” falls within either clause of § 4B1.2.⁹ However, when the court is confronted with a statute that is “divisible,”—that is, when the statute “comprises multiple, alternative versions of the crime,” a modified categorical approach applies.¹⁰ Under this approach, a court may look beyond the elements of an offense to a limited set of judicial records, such as the charging document and the plea agreement and colloquy, to determine the elements of the crime of conviction.¹¹ A statute is only divisible if it

⁷ *United States v. Marrero*, 743 F.3d 389, 399-400 (3d Cir. 2014) (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990); *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)).

⁸ *United States v. Gorny*, 655 F. App’x 920, 924 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2107 (2017) (citing *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps*, 133 S. Ct. at 2281; *United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009); and *United States v. Brown*, 765 F.3d 185, 191 (3d Cir. 2014)). Authority interpreting the definition of “violent felony” under the ACCA has generally been applied to the definition of “crime of violence” under U.S.S.G § 4B1.2 in the Third Circuit because of the similarity in language of the two provisions. *See Gorny*, 655 F. App’x at 924; *Hopkins*, 577 F.3d at 511; *United States v. Fisher*, No. 01-769-01, 2017 WL 1426049, at *4 n. 4 (E.D. Pa. Apr. 21, 2017). Notably however, while “aggravated assault” is an enumerated offense in § 4B1.2, it is not an enumerated offense under the ACCA.

⁹ *Mathis*, 136 S. Ct. at 2251; *Gorny*, 655 F. App’x at 924; *United States v. Dahl*, 833 F.3d 345, 350 (3d Cir. 2016).

¹⁰ *Descamps*, 133 S. Ct. at 2284.

¹¹ *Shepard v. United States*, 544 U.S. 13, 26 (2005).

lists elements of crimes disjunctively, rather than merely enumerating “various factual means of committing a single element.”¹²

B. Pennsylvania’s Aggravated Assault Statute

At the time Defendant was convicted of second-degree felony assault, that crime was defined under 18 Pa. Cons. Stat. § 2702(a) as follows:

- (a) Offense defined. A person is guilty of aggravated assault [in the second degree] if he:
 - ...
 - (3) attempts to cause or intentionally or knowingly causes bodily injury to [a police officer or other designated officer] in the performance of duty . . . ;
 - (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon; or
 - (5) attempts to cause or intentionally or knowingly causes bodily injury to [a designated school employee] while acting in the scope of his or her employment or because of his or her employment relationship to the school . . .
 - ...

18 Pa. Cons. Stat. § 2702(a) (as amended July 6, 1995, eff. Sept. 5, 1995).¹³

The parties agree that the bill of information relating to Defendant’s prior aggravated assault conviction shows that Mr. McNeal was charged with “attempt[ing] to cause or intentionally or knowingly caus[ing] bodily injury to another with a deadly weapon,” as outlined in § 2702(a)(4).¹⁴

¹² *Mathis*, 136 S. Ct. at 2249.

¹³ Subsection 2702(b) specified that subsections (a)(3), (a)(4), and (a)(5) were second-degree offenses, while subsections (a)(1), and (a)(2) (omitted here) were first degree offenses.

¹⁴ *See* Doc. No. 95, Ex. A at 4.

1. Second-Degree Aggravated Assault under 18 Pa. Con. Stat. § 2702(a) is Divisible

The parties disagree over the divisibility of second-degree assault under § 2702(a). The Government maintains that the statute is divisible because each subsection of § 2702(a) defines a separate criminal offense with its own elements. Defendant contends that the crime of second-degree aggravated assault is a single indivisible offense essentially comprising two elements— 1) simple assault and 2) “aggravation.” Under Defendant’s interpretation, the factual circumstances outlined in subsections (a)(3), (a)(4), and (a)(5) of § 2702, including the nature of the victim and the use of a deadly weapon, merely define alternative means for satisfying the aggravation element.

The Supreme Court in *United States v. Mathis* suggested procedures for assessing whether a list contained in an alternatively-phrased statute consists of elements or means.¹⁵ First, a court may look to state law authorities, including the decisions of the state court and the text of the statute.¹⁶ If a state’s highest court has ruled directly on whether a list contains methods or elements, then that determination is dispositive.¹⁷ The language of the statute also can resolve the issue if it expressly identifies “which things must be charged and which need not be,” or if it assigns different punishments to the listed alternatives (making them elements under *Apprendi v. New Jersey*¹⁸), or conversely, lists the alternatives as “illustrative examples.”¹⁹ The central inquiry is whether, in order to convict, a jury would be required to find each fact

¹⁵ *Mathis*, 136 S. Ct. at 2256.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 530 U.S. 466 (2000).

¹⁹ *Id.* (internal quotation marks and citation omitted)

“unanimously and beyond a reasonable doubt.”²⁰ Post-*Mathis*, the Third Circuit has on multiple occasions used suggested jury instructions to show what a statute “require[s] the jury to unanimously agree on.”²¹ If state law fails to provide clear answers, the sentencing court is also permitted to “peek” at the record of the prior conviction itself for “the sole and limited purpose of determining whether the listed items are elements of the offense.”²²

In asserting that second-degree aggravated assault under § 2702(a) is indivisible, Defendant points to two non-precedential state court cases, *Commonwealth v. Moore* and *Commonwealth v. Cassell*, in which the defendants were charged in bills of information that listed § 2702(a) generally, without identifying any specific subsection.²³ Defendant contends these cases show that the Commonwealth of Pennsylvania need not charge, and a jury need not unanimously find, that a defendant’s conduct falls within a particular subsection of § 2702(a).

In *Cassell*, the Superior Court of Pennsylvania, on collateral appeal, examined whether the bill of information appropriately “notified the defendant of the crime with which he is charged,” and concluded that the language in the information, “specifically directed Appellant’s attention to the F2 aggravated assault offense defined in section 2702(a)(3),” and “the record demonstrates that . . . his counsel explicitly acknowledged in closing arguments that the F2 aggravated assault charge was applicable, and then explained why the evidence failed to

²⁰ *Descamps*, 133 S. Ct. at 2288. See *Mathis*, 136 S. Ct. at 2248-50.

²¹ *United States v. Steiner*, 847 F.3d 103, 119 (3d Cir. 2017) (citation omitted) (burglary statute indivisible); accord *United States v. Henderson*, 841 F.3d 623, 629 (3d Cir. 2016) (controlled substance act divisible); see also *United States v. Singleton*, No. 10-cv-578, 2017 WL 1508955, at *6 (E.D. Pa. Apr. 26, 2017).

²² *Mathis*, 136 S. Ct. at 2256-57.

²³ *Com. v. Cassell*, No. 1300 EDA 2015, 2016 WL 6135379, at *2 (Pa. Super. Ct. Oct. 21, 2016); *Com. v. Moore*, No. 1247 EDA 2013, 2015 WL 7078781, at *3-4 (Pa. Super. Ct. June 4, 2015). The Third Circuit has held that the federal courts may look to unpublished state court decisions as persuasive authority when ascertaining state law. *Kerrigan v. Otsuka Am. Pharm., Inc.*, 560 F. App’x 162, 166 n. 4 (3d Cir. 2014).

demonstrate that Appellant had attempted to cause bodily injury to [the victim police officer].”²⁴ In *Moore*, the trial court “did not specify under which subsection of the aggravated assault statute (18 Pa.C.S.A. § 2702) it convicted [the defendant].”²⁵ However, on collateral appeal, the Superior Court evaluated whether there was “sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt,” and found that “the evidence presented at trial was sufficient to convict [the defendant] of aggravated assault pursuant to 18 Pa.C.S.A. § 2702(a)(6).”²⁶

Contrary to Defendant’s assertions, these cases demonstrate that Pennsylvania state courts are required to ensure that a defendant is provided sufficient notice of the specific subsection of § 2702(a) being charged and that the evidence is sufficient to meet every element of the offense listed, indicating that the statute lists alternative elements, not means. Additional Pennsylvania cases support this conclusion. In *Commonwealth v. Skiba*, the Superior Court held that the trial court appropriately instructed the jury when he “stated that the defendant was charged with two counts of aggravated assault, 18 Pa.C .S. §§ 2702(a)(1) and 2702(a)(4), respectively” and “for each of said offenses, the court . . . defined each of the elements for each count” and “advised the jury that their verdicts must be unanimous.”²⁷ In *Commonwealth v. Rhoades*, the court found that subsections 2702(a)(1) and 2702(a)(4) did not share identical statutory elements because “subsection (4) requires that the assault be caused or attempted ‘with a deadly weapon,’ an element not found in 2702(a)(1).”²⁸ Moreover, as Defendant acknowledges, the Pennsylvania Suggested Standard Criminal Jury Instructions provide separate

²⁴ *Id.* at *2-3

²⁵ *Moore*, 2015 WL 7078781, at *1.

²⁶ *Id.* at *3-4.

²⁷ *Com. v. Skiba*, No. 995 WDA 2012, 2013 WL 11253809, at *27 (Pa. Super. Ct. Sept. 18, 2013).

²⁸ *Com. v. Rhoades*, 8 A.3d 912, 918 (Pa. Super. Ct. 2010).

instructions, identifying each of the elements, for aggravated assault under subsection 2702(a)(4), subsection 2702(a)(3), and subsection 2702(a)(4).²⁹ Each of these state law authorities indicate that the subsections of § 2702(a) define separate crimes with distinct elements.³⁰

The Court of Appeals for the Third Circuit has held, in a non-precedential opinion, that a court may properly apply the modified categorical approach to § 2702(a) because the statute is divisible.³¹ In *United States v. Gorny*, the defendant was convicted with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and the district court applied a higher base offense level based on the defendant's prior convictions for aggravated assault and attempted aggravated assault under subsections (a)(1) and (a)(4) of 18 Pa. Cons. Stat. § 2702. On appeal, the court found no plain error with the district court's determination that defendant's conviction under § 2702(a)(4) was a "crime of violence" under § 4B1.2 after applying a modified categorical approach to determine "which subsection of Pennsylvania's *divisible* aggravated assault statute" was violated.³² Since *Gorny*, multiple district courts have similarly concluded that § 2702(a) is divisible.³³

²⁹ See Criminal Instructions Subcommittee, Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 15.2702C-G (Revised 1983).

³⁰ In this case, the record of Defendant's own aggravated assault conviction record does not suggest otherwise. The Court in *Mathis* noted that if, for example, an indictment and jury instructions references "one alternative term to the exclusion of all others," that "indicates that the statute contains a list of elements, each one of which goes toward a separate crime." *Mathis*, 136 S. Ct. at 2257. Here, the bill of information specifically recited the terms outlined in § 2702(a)(4), to the exclusion of the alternatives in subsections (a)(3) and (a)(5), in charging Mr. McNeal with second degree aggravated assault. (Doc. No. 95, Ex. A at 4.) In a separate paragraph of the same count, the bill of information also recites the elements of first degree aggravated assault under § 2702(a)(1)), but the record is clear that Defendant was convicted of the second-degree offense.

³¹ *Gorny*, 655 F. App'x at 927.

³² *Id.* at 924 (emphasis added).

³³ *United States v. Bailey*, No. 4-24, 2017 WL 2720281, at *2 (W.D. Pa. June 23, 2017) ("Pennsylvania's aggravated assault and robbery statutes have been held divisible, and subject to a modified categorical approach"); *United States v. Weygandt*, No. 09-324, 2017 WL 2480740, at *1 (W.D. Pa. June 8, 2017) ("Here, the applicable version of Pennsylvania's Aggravated Assault Statute at the time of defendant's offense is divisible."); *United States v. Toomer*, No. 01-573, 2017 WL 1508842, at *3 (E.D. Pa. Apr. 27, 2017) ("Because our Court of Appeals has already

In view of the foregoing, the Court finds that Defendant’s second-degree aggravated assault conviction under 18 Pa. Cons. Stat. § 2702(a) is divisible.

2. 18 Pa. Con. Stat. § 2702(a)(4) is a “crime of violence”

Defendant contends that even if Pennsylvania’s aggravated second-degree assault statute is divisible, subsection § 2704(a)(4) of the statute, which applies when a defendant “attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon” does not fall under the “force clause” because “bodily injury” can be caused through passive conduct, even when it involves a deadly weapon. Multiple courts have rejected that position in the context of U.S.S.G. § 4B1.2 and the ACCA.³⁴ Nevertheless, the Court need not reach the question of whether a conviction under § 2702(a)(4) fits within the force clause of U.S.S.G. § 4B1.2 because the Court finds that the offense falls squarely within the generic definition of “aggravated assault” under the enumerated offenses clause of § 4B1.2.

To determine the elements of a generic offense, courts may look to the definition of the crime used by the states, learned treatises, and the Model Penal Code.³⁵ As Defendant acknowledges, the “generic, contemporary meaning” of aggravated assault “involves a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or *the use of a deadly weapon.*”³⁶ This generic, contemporary meaning is outlined in the Model Penal Code definition for aggravated assault:

determined that this statute is divisible, we use the modified categorical approach to identify the relevant subsections applied”); *United States v. Barfield*, No. 09-93, 2017 WL 771253, at *4 (W.D. Pa. Feb. 28, 2017) (“18 Pa.C.S. § 2702, which has been held divisible [is] subject to a modified categorical approach.”); *United States v. Lewis*, No. 15-368, 2017 WL 368088, at *2-3 (E.D. Pa. Jan. 25, 2017) (“Pennsylvania’s aggravated assault statute, 18 Pa. Cons. Stat. § 2702, is a divisible statute that lists multiple crimes.”).

³⁴ *Gorny*, 655 F. App’x at 927; *Bailey*, 2017 WL 2720281, at *2; *Toomer*, 2017 WL 1508842, at *3.

³⁵ *Taylor v. United States*, 495 U.S. 575, 598 (1990); *Marrero*, 743 F.3d 389, 399 (3d Cir. 2014).

³⁶ *United States v. Palomino Garcia*, 606 F.3d 1317, 1331-32 (11th Cir. 2010) (emphasis added, internal quotations omitted). See also *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1178 (9th Cir. 2012); *United States v.*

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.³⁷

This is entirely consistent with the language of § 2702(a)(4). Defendant has not presented any argument for why, if § 2702(a) is divisible, § 2702(a)(4) would not fall squarely within the definition of generic aggravated assault. Indeed, any conviction under the elements of § 2704(a)(4) would necessarily meet the scienter and culpable act requirements of generic aggravated assault as outlined in the Model Penal Code.³⁸

Accordingly, the Court finds that Defendant's second-degree aggravated assault conviction under § 2702(a)(4) falls within the generic offense of "aggravated assault", and therefore qualifies as a "crime of violence" pursuant to U.S.S.G. § 4B1.2.

Gastelum-Laurean, 370 F. App'x 938, 941 (10th Cir. 2010); *United States v. Fierro-Reyna*, 466 F.3d 324, 329 (5th Cir. 2006).

³⁷ Model Penal Code § 211.1, *Assault*. See also *United States v. Rede-Mendez*, 680 F.3d 552, 556-57 (6th Cir. 2012) ("We have recognized the Model Penal Code definition of aggravated assault as the generic definition for the purpose of deciding whether a crime with that label is a crime of violence, at least in states which have merged the crimes of assault and battery."); *United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006) ("Our primary source for the generic contemporary meaning of aggravated assault is the Model Penal Code.").

³⁸ The Pennsylvania definition of deadly weapon is consistent with the Model Penal Code definition of "deadly weapon." Pennsylvania defines a "deadly weapon" as "[a]ny firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury." 18 Pa. Cons. Stat. § 2301. The Model Penal Code defines "deadly weapon" as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury." Model Penal Code § 210.0(4).

III. CONCLUSION

For the foregoing reasons, the Court holds that Defendant's prior conviction for aggravated assault under 18 Pa. Cons. Stat. § 2702(a)(4) is a "crime of violence" under § 4B1.2, and will apply a base offense level of 24 in calculating Defendant's guidelines sentence.

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

UNITED STATES OF AMERICA

v.

BRIAN MCNEAL,
Defendant.

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CRIMINAL ACTION NO. 13-16

ORDER

AND NOW, this 26th day of September 2017, upon consideration of Defendant's Memorandum in Aid of Resentencing (Doc. No. 107), the Government's Sentencing Memorandum (Doc. No. 108), and the parties' earlier submissions related to Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, and for the reasons stated in the accompanying memorandum opinion, it is hereby **ORDERED** that Defendant's objection to the Supplemental Report for his resentencing is **OVERRULED**, and the Court will apply a base offense level of 24 in calculating Defendant's guidelines sentence.

IT IS SO ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.