

NO.

**IN THE
SUPREME COURT OF THE UNITED STATES**

JESSE CAREY,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit*

PETITION FOR WRIT OF CERTIORARI

Carl J. Poveromo
Rinaldi & Poveromo, P.C.
520 Spruce Street
P.O. Box 826
Scranton, PA 18501-0826
(570) 346-7441
cjp@lawinpa.com

Attorney for Petitioner,
Jesse Carey

QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit misapplied the law and rendered a decision in conflict with other federal courts of appeals by holding that Petitioner's third-degree robbery conviction substantially corresponds to the generic definition of robbery and constitutes a crime of violence under the enumerated offense clause of the sentencing guidelines?

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OPINIONS BELOW

The Memorandum and Order of the District Court, *United States v. Carey*, No. 3:CR-18-037, 2020 WL 2086659 (April 30, 2020), sustaining the government's objection to the presentence investigation report and classifying Petitioner as a career offender, is set forth in the Appendix at A-1. The District Court's judgment of sentence entered on August 12, 2020, is set forth in the Appendix at A-24. The Third Circuit's opinion, *United States v. Carey*, No. 20-2723, 2021 WL 2936741 (July 13, 2021), affirming Petitioner's judgment of sentence, is set forth in the Appendix at A-31.

JURISDICTION

This is a federal criminal prosecution involving federal drug charges. The Order of the United States Court of Appeals was filed on July 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 18 United States Code Appendix § 4B1.1, 18 U.S.S.G., § 4B1.1. Career

Offender provides:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

As defined in Section 18 United States Code Appendix § 4B1.2, 18 U.S.S.G. § 4B1.2(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).

Title 18, Pennsylvania Consolidated Statutes § 3701 provides:

(a) Offense defined. --

(1) A person is guilty of robbery if, in the course of committing a theft, he:

* * *

(v) physically takes or removes property from the person of another by force however slight; . . .

STATEMENT OF THE CASE

On February 6, 2018, a federal grand jury returned an Indictment against Petitioner, Jesse Carey (“Carey”). It charges that on or about August 5, 2017, Carey possessed with intent to deliver cocaine in violation of 21 U.S.C. § 841(a)(1). On February 26, 2018, Carey pled not guilty to the Indictment, and he was detained pending trial.

On June 15, 2018, the District Court granted Carey’s motion for completing a pre-plea presentence investigation report (“PSR”). The pre-plea PSR initially determined that Carey qualifies as a career offender under § 4B1.1 of the United States Sentencing Guidelines (the “Guidelines”) with a total offense level of 29 and a criminal history category of VI, for a guideline imprisonment range of 151 to 188 months. Although it was anticipated Carey would plead guilty to the Indictment and move for immediate sentencing, he neither entered into a plea agreement with the government nor pled guilty to the Indictment.

On May 14, 2019, a federal grand jury returned a two-count Superseding Indictment against Carey. Count 1 of the Superseding Indictment charges on January 12, 2017, Carey possessed with intent to distribute cocaine, fentanyl, and heroin in violation of 21 U.S.C. § 841(a)(1). On that date, the Plymouth Borough Police Department in Plymouth, Pennsylvania, obtained a search warrant for Carey's residence and, while it was being executed, Carey arrived in a vehicle and parked in the driveway. When Carey tried to reverse and flee, police officers removed him from the car and detected an odor of marijuana. They searched Carey and found in his possession \$2,086.00 in U.S. currency, which included \$80.00 in serialized currency from a controlled buy, and a small quantity of marijuana. A search of his vehicle resulted in the seizure of a clear bag containing .18 grams of heroin, 8 baggies containing 2.0 grams of cocaine, an aerosol can, containing 12.02 grams of cocaine, and drug paraphernalia.

Count 2 of the Superseding Indictment charges on August 5, 2017, Carey possessed with intent to distribute cocaine and heroin in violation of 21 U.S.C. § 841(a)(1). On that date, Carey entered the Mount Airy Casino Resort in Mount Pocono, Pennsylvania, and security personnel asked him to produce identification. When Carey provided a counterfeit Connecticut driver's license, security personnel escorted him to a security office and contacted the Pennsylvania State Police ("PSP"). Before PSP arrived, Carey pushed a security officer and attempted to

flee. As he was running, Carey was apprehended and a black sock fell out of his pocket, containing three baggies with 46.97 grams of cocaine and twenty-nine packets of heroin weighing .68 grams. On May 17, 2019, Carey pled not guilty to the Superseding Indictment, and the District Court continued his pretrial detention.

On December 19, 2019, Carey pled guilty to Count 1 of the Superseding Indictment amended to charge possession with intent to distribute cocaine and heroin only. A jury trial on Count 2 of the Superseding Indictment was scheduled for January 6, 2020; however, before jury selection, Carey pled guilty to the remaining charge of the possession with intent to distribute cocaine and heroin. The District Court accepted Carey's guilty plea and ordered a revised PSR. The revised PSR determined that Carey is not a career offender, and that Carey has a total offense level of 12 and a criminal history category of VI. Based on these findings, the revised PSR concluded that Carey's guideline imprisonment range was 30 to 37 months.

On March 2, 2020, the government filed a Sentencing Memorandum wherein it objected to the revised PSR on the ground that Carey qualified as a career offender under § 4B1.1 of the Guidelines because his prior conviction of third-degree robbery in Pennsylvania is a crime of violence under U.S.S.G. § 4B1.2(a). In its Sentencing Memorandum, the government argued Carey has a total offense level of 30 and a criminal history category VI which yields a

guideline imprisonment range of 168 to 210 months. On April 1, 2020, Carey filed a Reply to the Government's Sentencing Memorandum which maintained the Probation Office had correctly determined Carey was not a career offender. The government filed a response to Carey's Sentencing Memorandum on April 14, 2020.

By Memorandum and Order dated April 30, 2020, the District Court sustained the government's objections to the PSR, determined that Carey qualifies as a career offender under U.S.S.G. § 4B1.1 and found that his total offense level is 30 and his criminal history category is VI, which yields an advisory guideline range of 168-210 months' imprisonment. Due to his classification as a career offender, Carey's guideline imprisonment range increased by 138 months (11.5 years).

On August 12, 2020, the District Court sentenced Carey because of his guilty pleas to two counts of possession with intent to distribute cocaine and heroin in violation of 21 U.S.C. § 841(b)(1)(C) and ordered him to be committed to the Bureau of Prisons for a term of 144 months. The term consists of 144 months' imprisonment on each count of the Superseding Indictment to run concurrently.¹

¹ Although the District Court sentenced Carey below the enhanced guideline range of 168-210 months' imprisonment, his sentence of 144 months' imprisonment still exceeds the low end of the otherwise applicable guideline range of 30 to 37 months' imprisonment by 114 months (9.5 years).

On August 21, 2020, Carey filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit from the judgment of sentence. On July 13, 2021, the Third Circuit held that Carey's conviction for Pennsylvania third-degree robbery constitutes a crime of violence under the enumerated-offense clause of the Sentencing guidelines and affirmed his judgment of sentence.

ARGUMENT

THE THIRD CIRCUIT MISAPPLIED THE LAW AND RENDERED A DECISION IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS BY HOLDING THAT PETITIONER'S PENNSYLVANIA THIRD-DEGREE ROBBERY CONVICTION SUBSTANTIALLY CORRESPONDS TO THE DEFINITION OF GENERIC ROBBERY AND CONSTITUTES A CRIME OF VIOLENCE UNDER THE "ENUMERATED OFFENSE" CLAUSE OF THE GUIDELINES.

Under the Guidelines,

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2(a).

The Guidelines define a "crime of violence" as any felony offense under state or federal law that:

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another [the "elements" clause], 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) [the “enumerated offense” clause].

U.S.S.G. § 4B1.2(a)

Here, the District Court sentenced Carey as a career offender based on his prior conviction for Pennsylvania third-degree robbery, in violation of 18 Pa. C.S. § 3701(a)(1)(v), a felony of the third degree punishable by a maximum of seven years’ imprisonment and/or a \$15,000 fine. 18 Pa. C.S. §§ 1101 and 1103(3). Under § 3701(a)(1)(v), “[a] person is guilty of robbery if, in the course of committing a theft ... he physically takes or removes property from the person of another by force however slight.” Although Carey maintains the District Court erred in concluding his conviction for Pennsylvania third-degree robbery constitutes a crime of violence under both the elements clause and the enumerated offense clause of U.S.S.G. § 4B1.2(a), the Third Circuit analyzed the enumerated offense clause only and concluded “Carey is a career offender because third-degree Pennsylvania robbery is a ‘robbery’ within the meaning of that clause.”

The enumerated offense clause (§ 4B1.2(a)(2)) lists “robbery” as a crime of violence. When the Guidelines specifically list an offense, the courts “compare the elements of the crime of conviction to the generic form of the offense as defined by the States, learned treatises, and the Model Penal Code.” United States v. Marrero,

677 F.3d 155, 165 (3d Cir. 2012) (quoting United States v. Lockley, 632 F.3d 1238,

1242 (11th Cir. 2011)), *vacated on other grounds*, 570 U.S. 929, 133 S.Ct. 2732 (2013). The defendant’s prior conviction qualifies as a crime of violence if “the statutory definition of the prior conviction ‘substantially corresponds’ to the generic definition of the offense.” *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143 (1990)). If, however, the “statute sweeps more broadly than the generic crime,” the prior conviction will not qualify. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013).

The generic definition of robbery is taking property from another person or from the immediate presence of another person by force or by intimidation. *United States v. McCants*, 952 F.3d 416 (3d Cir. 2020). Relying on its decision in *United States v. Graves*, 877 F.3d 494 (3d Cir. 2017), that generic robbery requires for conviction no more than *de minimis* force to compel the victim to part with his property, the Third Circuit erroneously held Carey’s conviction for Pennsylvania third-degree robbery constitutes a crime of violence under the enumerated-offense clause of the Guidelines. By holding that generic robbery requires no more than *de minimis* force, the Third Circuit misapplied the law and entered a decision in conflict with other federal courts of appeals.

Every Circuit to adopt a definition of generic robbery, except the Third Circuit, has found generic robbery to require force above *de minimis* force to require the victim to part with his or her property. In *United States v. Jones*, 878

F.3d 10, 18 (2d Cir. 2017), the Second Circuit defined generic robbery as “the taking of property from another person or from the immediate presence of another person by force or intimidation.” The Second Circuit stated this is the definition adopted by all fifty states. *Id.*

In *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 1572, 200 L.Ed.2d 761 (2018), the Fourth Circuit held that generic robbery is defined as misappropriation of property under circumstances involving immediate danger to person. In concluding generic robbery requires the application of something more than minimal force, the Fourth Circuit stated, “[J]ust like generic robbery committed through the use of force, to commit robbery by force in North Carolina, the defendant must do more than stealthily pickpocket or suddenly snatch; he must direct a degree of force towards the victim beyond the minimum necessary to remove the item from the victim's grasp.” *Id.* at 159.

In *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006) (abrogated on other grounds), the Fifth Circuit stated the generic form of robbery “may be thought of as aggravated larceny,” containing at least the elements of “misappropriation of property under circumstances involving [immediate] danger to the person.” The Fifth Circuit noted the majority of states require property to be taken from a person or a person's presence by means of force or putting in fear. *Id.*

Other circuit courts have agreed with the Fifth’s Circuit’s definition of generic robbery. In *United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017), the Sixth Circuit held that generic robbery requires the application of more than the minimal use of force. Instead, generic robbery constitutes the “misappropriation of property under circumstances involving immediate danger to the person.” *Id.* at 734. In *United States v. House*, 825 F.2d 381, 887 (8th Cir. 2016), the Eighth Circuit described generic robbery as “aggravated larceny, or the misappropriation of property under circumstances involving immediate danger to the person.” And, in *United States v. Molinar*, 881 F.3d 1064, 1071 (9th Cir. 2018), the Ninth Circuit adopted the Fifth Circuit’s definition of generic robbery which described the crime as “aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the *person*.”

The Eleventh Circuit also requires the application of more than *de minimis* force for generic robbery. In *United States v. Lockley*, 632 F.3d 1238, 1243 (11th Cir. 2011), vacated on other grounds, 570 U.S. 929, 133 S.Ct. 2732 (2013), the Eleventh Circuit held generic robbery is “the taking of property from another person or from the immediate presence of another person by force or intimidation.”

To resolve a conflict among the federal courts and to ensure justice is served in the present case, the Court should address whether a conviction for generic robbery requires more than *de minimis* force. Unless the Court addresses this

important issue and defines the elements of generic robbery, defendants who happen to be sentenced within the Third Circuit's jurisdiction may face sentences significantly longer than defendants sentenced in other federal courts.

Besides straying from consensus and entering a decision in conflict with other federal courts, the Third Circuit's conclusion that Pennsylvania third-degree robbery substantially corresponds to generic robbery is simply incorrect. In Pennsylvania, a third-degree robbery may be sustained where a person takes or removes property from another person by force, however, slight, which force may be actual or constructive. *McElrath v. Commonwealth*, 405 Pa. Super. 431, 592 A.2d 740 (1991). The prevailing rule is that the snatching or sudden taking of property from the person of another does not involve such force as to constitute robbery. Under Pennsylvania law, however, purse snatching has been characterized as the most common crime intended to fall within the scope of third-degree robbery. *Commonwealth v. Moore*, 343 Pa. Super. 242, 494 A.2d 447 (1985). Pennsylvania third-degree robbery is broader than the definition of generic robbery because it criminalizes purse snatching and taking property of another by surprise.

Regarding force in robbery, a learned treatise teaches:

The line between robbery and larceny from the person (between violence and lack of violence) is not always easy to draw. The "snatching" cases, for instance, have given rise to some dispute. The great weight of authority,

however, supports the view that there is not sufficient force to constitute robbery when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking. On the other hand, when the owner, aware of an impending snatching, resists or when, the thief's first attempt being ineffective to separate the owner from his property, a struggle for the property is necessary before the thief can get possession thereof, there is enough force to make the taking robbery. Taking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery; but if the pickpocket or his confederate jostles the owner, or if the owner, catching the pickpocket in the act, struggles unsuccessfully to keep possession, the pickpocket's crime becomes robbery. To remove an article of value, attached to the owner's person or clothing, by a sudden snatching or by stealth is not robbery unless the article in question (e.g., an earring, pin, or watch) is so attached to the person or his clothes as to require some force to effect its removal.

Wayne R. LaFave, Substantive Criminal Law § 20.3(d)(1) (footnotes omitted); *Accord* 4 Wharton's Criminal Law § 465 (15th ed.) (The taking of property of another by surprise, as by sudden snatching does not constitute robbery); 67 Am. Jur. 2d Robbery § 30 (Mere snatching or sudden taking of property from the person of another does not in itself involve such force, violence, or putting in fear as will constitute robbery. Thus, purse snatching is not a "robbery" if no force was used other than that necessary to take the victim's purse. The snatching or grabbing of property without resistance by the victim amounts to theft rather than robbery) (footnotes omitted); Peter J. Guthrie, Annotation, Purse Snatching as Robbery or Theft, 42 A.L.R. 3rd 1381 (1972) (Under the rule prevailing in most jurisdictions, "the mere snatching or sudden taking of property

from the person of another does not in itself involve such force, violence or putting in fear as will constitute robbery...”).

Applying the generic definition of force to this case, Pennsylvania robbery is not coextensive with generic robbery. Rather, Pennsylvania broadly penalizes conduct that would not constitute generic robbery. A review of the decisional law discloses third-degree robbery includes robbery by the sudden snatching or taking of property from the person of another in addition to robbery by force and intimidation. For example, in *Commonwealth v. Brown*, 506 Pa. 169, 176, 484 A.2d 738, 741 (1984), the defendant, who grabbed a purse hanging off of the victim’s arm and ran away with it, was convicted of robbery under Section 3701(a)(1)(v). In affirming the defendant’s conviction, the Pennsylvania Supreme Court stated, “It is clear to us that any amount of force applied to a person while committing theft brings the act within the scope of robbery under § 3701(1)(a)(v) [sic] The degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property in, on or about his body.” *Id.*

In *Commonwealth v. McNair*, 376 Pa. Super. 604, 546 A.2d 688 (1988), the defendant was convicted of robbery when he followed the victim into a parking garage, ran toward her and snatched her tote bag and purse. The Superior Court of Pennsylvania affirmed defendant’s conviction stating, “that the Commonwealth

established beyond a reasonable doubt [the defendant] applied constructive force against the victim sufficient to support a conviction for robbery.” *Id.* at 690.

Again, in *Commonwealth v. Bedell*, 954 A.2d 1209, 1210, 1213-15 (Pa. Super. 2008), the defendant snatched a wallet from the victim’s hand and fled. After pleading guilty to robbery, he moved to withdraw his guilty plea because he entered the plea unknowingly. In affirming the order denying post-conviction relief, the Superior Court of Pennsylvania held a factual basis existed for defendant’s guilty plea to robbery under 18 Pa. C.S. § 3701(a)(1)(v) even though the victim offered no resistance, and the defendant used no force other than the force necessary to snatch the wallet, because the victim was aware of the taking.

In *Commonwealth v. Washington*, 2017 WL 3379437 (Pa. Super. August 7, 2017), the victim was walking on the street while openly counting approximately \$150 in cash. The defendant approached her, snatched the cash from her hands, and ran away. In support of the defendant’s argument that the evidence was insufficient to convict him of third-degree robbery under 18 Pa. C.S. § 3701(a)(1)(v), he relied on statements the victim made following the robbery which indicated she was not harmed during the incident and the defendant had made physical contact only with the money he took from her. The defendant maintained that he did not apply either actual or constructive force to the victim’s person in taking possession of her property, and that she did not express fear

during the encounter. However, the Superior Court of Pennsylvania concluded that to obtain the cash the victim held on her person, the defendant utilized force to separate her from her property, and therefore, affirmed his robbery conviction.

In *Commonwealth v. Bloodsaw*, 2017 WL 3587143 (Pa. Super. August 21, 2017), the victim exited a store, carrying a black plastic bag containing a PlayStation 3 gaming console, six video games, and two controllers, when the defendant approached on his bicycle, grabbed the black plastic bag out of the victim's hands, and rode away. Following his conviction, the defendant appealed on the ground the evidence could not support his conviction of robbery under 18 Pa. C.S. § 3701(a)(1)(v) because no force was used in taking the bag. But the Superior Court of Pennsylvania held the evidence was sufficient to support the defendant's robbery conviction because the victim was aware of the taking which was accompanied by some force, however slight.

The Pennsylvania appellate courts' decisions in *Brown*, *McNair*, *Bedell*, *Washington*, and *Bloodsaw* implicitly recognize victims do not part with their property willingly, even if they do not resist or struggle with a thief, and therefore, deem the physical energy or effort necessary to snatch the property sufficient to support a third-degree robbery conviction. These cases demonstrate that Pennsylvania third-degree robbery, under 18 Pa. C.S. § 3701(a)(1)(v), allows for conviction on a much broader basis than the generic form of robbery because it

includes the snatching and sudden taking of property from the person of an unsuspecting, and therefore, non-resistant victim, by surprise. Taking property from the person of another by surprise, as by a sudden snatching, does not involve even the minimal force necessary to meet the generic offense of robbery. Third-degree robbery in Pennsylvania can be accomplished with no application of force directly to the victim, and with no resistance by or injury to the victim.

Because Pennsylvania third-degree robbery sweeps more broadly than the generic crime, Carey's conviction under Section 3701(a)(1)(v) does not qualify as a crime of violence under the enumerated offense clause of § 4B1.2(a)(2). Therefore, the Third Circuit erred in holding the District Court had correctly classified Carey as a career offender because his prior conviction for third-degree robbery in Pennsylvania does not qualify as a crime of violence under the Guidelines.

CONCLUSION

For all the foregoing reasons, the Petitioner, Jesse Carey, respectfully requests this Honorable Court to grant this petition and issue a Writ of Certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,
RINALDI & POVEROMO, P.C.

BY: s/Carl J. Poveromo
Carl J. Poveromo, Esquire
PA Attorney I.D. # 44713
P.O. Box 826
520 Spruce Street
Scranton, PA 18501-0826
(570) 346-7441
Court-Appointed CJA Counsel
for Petitioner, Jesse Carey

CERTIFICATE OF BAR MEMBERSHIP

I, Carl J. Poveromo, Esquire, hereby certify that I am a member of the Bar of this Court.

Respectfully submitted,
RINALDI & POVEROMO, P.C.

Date: August 5, 2021

BY: s/Carl J. Poveromo
Carl J. Poveromo, Esquire
Court-Appointed CJA Counsel
for Petitioner, Jesse Carey

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. 3:CR-18-037
JESSE CAREY, : (JUDGE MANNION)
Defendant :

MEMORANDUM

Pending before the court are the government's objections, ([Doc. 167](#)), to the final Presentence Investigation Report ("PSR"), ([Doc. 176](#)), prepared by the United States Probation Office as to the defendant Jesse Carey ("Carey"). The objections have been fully briefed in the parties' sentencing memoranda and are ripe for this court's review. For the reasons that follow, the government's objections to the final PSR will be **SUSTAINED**.

I. BACKGROUND

Since the court set forth the facts and procedural history of this case in its prior memoranda, it need not repeat it herein. Pertinent here, on February 6, 2018, Carey was indicted on one count of possession with intent to distribute a controlled substance, namely, cocaine. He was arraigned and entered a plea of not guilty. Through his first appointed counsel, Carey filed an unopposed motion requesting the court order a pre-plea presentence

investigation and request for immediate sentencing after disclosure of the presentence report. ([Doc. 32](#)). The motion was granted on June 15, 2018. ([Doc. 34](#)).

After the court appointed Carey new counsel at his request, the final presentence report was issued on April 2, 2019. ([Doc. 56](#)). On May 14, 2019, however, Carey was charged in a Superseding Indictment with two counts of possession with intent to distribute controlled substances—namely, cocaine and a mixture of heroin and fentanyl in Count 1, and cocaine and heroin in Count 2. ([Doc. 61](#)). Carey again pleaded not guilty. At Carey's request, the court reappointed his first attorney.

Eventually, Carey chose to proceed *pro se*, and with the assistance of standby counsel, he separately entered a guilty plea to Count 1 of the Superseding Indictment and a conditional guilty plea pursuant to [Federal Rule of Criminal Procedure 11\(a\)\(2\)](#), reserving his right to appeal the denial of his motions to suppress. ([Doc. 131](#); [Doc. 144](#)). Shortly thereafter, Carey filed a motion to withdraw his guilty plea, ([Doc. 147](#)), and, subsequently, a motion to withdraw the motion to withdraw his guilty plea, ([Doc. 164](#)). The court denied those motions by separate memorandum and order. Additionally, at Carey's

insistence, the court granted his standby counsel's motion to withdraw. ([Doc. 162](#)).

On February 25, 2020, the Probation Office issued a revised draft PSR. (Doc. 166). On March 6, 2020, the government filed its objections in a sentencing memorandum. ([Doc. 167](#)). Out of an abundance of caution, the court *sua sponte* convened a presentence hearing on March 6, 2020, to discuss what the court anticipated would be a sentencing issue with respect to Carey's career offender status. ([Doc. 168](#)). Given the complicated nature of the issue, the court asked Carey if he would accept representation by CJA Attorney Carl Poveromo for the purposes of briefing the issue. Carey declined the court's invitation. Nevertheless, for purposes of aiding the court in analyzing the issue, the court appointed Attorney Poveromo as standby counsel and asked that he prepare a defense brief on the issue. ([Doc. 173](#)).¹

The final presentence report was filed on April 1, 2020. ([Doc. 176](#)). In contrast to the first PSR which found that Carey was a career offender pursuant to §4B1.1 of the United States Sentencing Guidelines ("Guidelines"), the revised PSR concludes that Carey is not a career offender.

¹ As with the prior appointment of standby counsel, the court made clear that Carey could confer, or not confer, with Attorney Poveromo as he saw fit.

Accordingly, the PSR finds that Carey's offense level is 12 and his criminal history category is VI, resulting in an advisory guideline range of 30 to 37 months imprisonment. ([Doc. 176](#), [¶170](#)).² By contrast, the government contends that, with the career offender enhancement, Carey's offense level would be 30,³ his criminal history category would remain VI, and his guideline range would be 168 to 210 months imprisonment.

On April 1, 2020, Carey, through his standby counsel, filed a sentencing memorandum in support of the second PSR. ([Doc. 179](#)). On April 14, 2020, the government filed a response to Carey's sentencing memorandum. ([Doc. 180](#)). The matter is now ripe for this court's review.

² The prior PSR determined that Carey's guideline range was 151 to 188 months imprisonment, based upon an offense level of 29 (with a three-level reduction for acceptance of responsibility), and a criminal history category of VI. ([Doc. 56](#)).

³ This offense level reflects a two-level reduction for acceptance of responsibility. It is the government's position that a further deduction for acceptance of responsibility is not warranted since Carey did not plead guilty to Count 2 until the morning of trial, just prior to jury selection. The United States Probation Office agrees that, should the court find that Carey is a career offender, the total offense level would be 30, his criminal offense level would remain VI, and the guideline range would be 168 to 210 months imprisonment. ([Doc. 177](#)).

II. DISCUSSION

Under the Guidelines,

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

[U.S.S.G. §4B1.1\(a\)](#).

The parties do not disagree that the first two criteria apply. As to the third, the parties agree that Carey's 2007 conviction in New Jersey for manufacturing and distributing cocaine is a qualifying prior offense. However, the parties disagree as to whether Carey's 2015 conviction in Luzerne County for third-degree robbery is a qualifying prior offense. Accordingly, the issue presently before the court is whether a conviction for third-degree robbery under Pennsylvania Statute, [18 Pa.C.S. §3701\(a\)\(1\)\(v\)](#), constitutes a crime of violence under §4B1.2(a) of the Guidelines. If so, the Guidelines call for Carey to be sentenced as a career offender pursuant to §4B1.1.

The enhancement for career offenders requires that the defendant have two or more prior felony convictions that are either a crime of violence or a controlled substances offense. [U.S.S.G. §4B1.1\(a\)](#). A "crime of violence" is

any state or federal offense punishable by more than one year in prison that either:

- (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\(a\)](#) (emphasis added).

To determine whether a prior state court conviction constitutes a federally defined crime of violence, the court must apply the categorical approach which involves comparing the elements of the state offense with elements of the “generic” crime. [United States v. Graves, 877 F.3d 494, 501 \(3d Cir. 2017\)](#). A conviction will qualify as a crime of violence only if the elements of the state offense are “the same as, or narrower than, those of the generic offense.” *Id.* (internal quotation marks omitted). If, however, the state offense allows for conviction on a broader basis than the generic offense, it will not qualify as a crime of violence. *Id.*

Here, because Pennsylvania’s robbery statute at issue is divisible, [United States v. Peppers, 899 F.3d 211, 232 \(3d Cir. 2018\)](#), the court will

apply the modified categorical approach, which permits the 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 v. United States*, 570 U.S. 254, 262 (2013). These documents, referred to as “Shepard documents,” include the charging document, guilty plea allocution, jury instructions, and judgment of conviction. *United States v. McCants*, 952 F.3d 416, 427 (3d Cir. 2020).

Here, a review of the Luzerne County docket records shows that Carey pleaded guilty to third-degree robbery under (a)(1)(v) of the Pennsylvania robbery statute.⁴ ([Doc. 167, at 16](#), 20-21). Therefore, the court must consider whether Carey’s conviction is a qualifying prior offense under either the “elements” or “enumerated offense” clause of §4B1.2(a) of the Guidelines. See *McCants*, 952 F.3d at 428 (analyzing New Jersey’s robbery statute under both the elements and enumerated clauses). The prior conviction is a crime of violence only if the state crime’s elements “are the same as, or narrower than, those of the generic offense.” *United States v. Brown*, 765 F.3d 185, 189 (3d Cir. 2014).

⁴ Notably, the parties do not disagree that Carey was convicted under subsection 3701(a)(1)(v).

Under the elements clause of §4B1.2(a)(1) of the Guidelines, a conviction qualifies if it “has as an element the use, attempted use, or threatened use of physical force against the person of another.” [U.S.S.G. §4B1.2\(a\)\(1\)](#). The Third Circuit has held that the “use of physical force . . . involves the intentional employment of something capable of causing physical pain or injury to another person, regardless of whether the perpetrator struck the victim's body.” [Chapman, 866 F.3d at 133](#) (internal quotation marks omitted).

Subsection (a)(1)(v) of the Pennsylvania robbery statute states that “[a] person is guilty of robbery if, in the course of committing a theft, he . . . physically takes or removes property from the person of another by force however slight.” [18 Pa.C.S §3701\(a\)\(1\)\(v\)](#).

In *McCants*, the Third Circuit cited the parties agreed upon definition of generic robbery as “the taking of property from another person or from the immediate presence of another person by force or by intimidation,” and reaffirmed its earlier holding that robbery “requires no more than *de minimis* force.” [McCants, 952 F.3d at 428-29](#) (quoting [Graves, 877 F.3d at 503](#)). Thus, the question here is whether the Pennsylvania statute’s requirement

that the perpetrator employ force “however slight” is broader than the federal generic requirement of “no more than *de minimis* force.”

As noted, the government disagrees with the PSR’s finding that the conviction at issue does not qualify as a crime of violence. The government acknowledges that in *Peppers*, the Third Circuit held that section (a)(1)(v) of Pennsylvania’s robbery statute did not qualify as a crime of violence under the Armed Career Criminal Act (“ACCA”) and, further, that the Supreme Court previously held that the phrase “physical force” under the ACCA’s identical elements clause requires “violent force”—to wit, “force capable of causing physical pain or injury to another person.” ([Doc. 167, at 12](#)) (quoting *Peppers*, [899 F.3d at 233-34](#)). However, the government notes that the analysis under the ACCA differs from the analysis under the Guidelines, since the Guidelines list robbery as an enumerated offense and, therefore, the court need not consider whether the offense qualifies under the ACCA’s elements clause. Moreover, the government argues the recent Supreme Court case *Stokeling v. United States*, [139 S.Ct. 544 \(2019\)](#), in which the Court clarified its prior holding regarding “physical force,” casts doubt on the present validity of *Peppers*. Accordingly, the government contends that third-degree robbery is

definitively a crime of violence under the enumerated clause of §4B1.2(a)(2) and likely qualifies under the elements clause of §4B1.2(a)(1) as well.

In contrast, Carey argues that robbery “by force however slight” does not have as an element the use, attempted use, or threatened use of physical force against another. Carey argues that *Peppers*’s treatment of the statute under the ACCA applies equally here and remains good law. Carey specifically cites the following holding in *Peppers*:

[T]he Pennsylvania robbery statute criminalizes “physically tak[ing] or remov[ing] property from the person of another *by force however slight[.]*” 18 Pa. [C.S.] §3701(a)(1)(v) (emphasis added). Because that has been interpreted to include “any amount of force applied to a person while committing a theft[,]” including the mere “use of threatening words or gestures, and operates on the mind,” and because “[t]he degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property,” Pennsylvania’s robbery statute suffers from the same issues the Supreme Court identified with Florida’s battery statute in *Johnson* 2010. Both laws proscribe the merest touching, which is insufficient conduct to meet the “physical force” requirement under the ACCA’s elements clause.

Peppers, 899 F.3d at 211 (3d Cir. 2018) (some internal citations omitted).

Carey argues that the Supreme Court’s recent holding in *Stokeling*, instead of casting doubt on *Peppers*, confirms its holding. In *Stokeling*, the Supreme Court held that Florida’s robbery statute which involved takings from

a person with “the use of force, violence, assault, or putting in fear,” qualified as an ACCA predicate offense. *Id.* at 549 (quoting [Fla.Stat. §812.12\(1\)](#)). In particular, Carey cites *Stokeling*’s reiteration of the Court’s prior holding that “force” within the meaning of the ACCA “suggest[s] a degree of power that would not be satisfied by the merest touching.” [139 S.Ct. at 548](#) (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010)). Carey argues that, in so holding, the Court clarified that statutes which require force sufficient to overcome the victim’s resistance qualify but statutes requiring only the mere snatching of property, like Pennsylvania’s third-degree robbery, do not.

Carey cites *Commonwealth v. Brown*, as the “lead case” defining Pennsylvania robbery, wherein the Pennsylvania Supreme Court upheld a defendant’s third-degree robbery conviction for grabbing a purse hanging off the victim’s arm and running away with it, noting, “It is clear to us that *any amount of force* applied to a person while committing theft brings the act within the scope of robbery under [section 3701(a)(1)(v)].” [484 A.2d 738, 741 \(Pa.1984\)](#) (emphasis added). Given this holding, Carey argues that Pennsylvania’s third-degree robbery statute broadly penalizes conduct that does not constitute generic robbery because generic robbery, unlike section

(a)(1)(v), requires more force than merely snatching property without resistance by a victim.

Carey cites other cases in which Pennsylvania courts upheld third-degree robbery convictions for purse snatching or the sudden taking of property, arguing that, because such a crime does not require even *de minimis* force, it sweeps more broadly than generic robbery and cannot be a qualifying prior offense. See *Commonwealth v. McNair*, 546 A.2d 688 (Pa. 1988) (upholding a defendant's robbery conviction where he followed the victim into a parking garage, ran toward her, and physically removed her purse from her person); *Commonwealth v Bedell*, 954 A.2d 1209 (Pa.Super. 2008) (upholding a defendant's robbery conviction where he snatched a wallet from the victim's hand using no force other than that necessary to snatch the wallet and fled). *Commonwealth v. Bloodsaw*, No. 3101 EDA 2017, 2017 WL 3587143 (Pa.Super. Aug. 21, 2017) (upholding a robbery conviction where the defendant rode up to a victim on his bicycle and grabbed a bag out of the victim's hand). Thus, Carey argues that, by virtue of the fact that a mere snatching of property from a victim's hand can constitute third-degree robbery, it is the precise type of crime that *Stokeling* held was not an

ACCA predicate crime and, therefore, it is not a qualifying crime of violence under the elements clause.

In its response, the government disagrees with Carey's interpretation of *Stokeling*, arguing that it established a low threshold of force and relied largely on the common law definition of robbery which did not distinguish between gradations of violence. Specifically, in defining "force," *Stokeling* relied on the common law holding that "violence" was traditionally interchangeable with "force" and that any act which "physically overcame a victim's resistance, 'however slight' that resistance might be, [] necessarily constituted violence." *Stokeling*, 139 S.Ct. at 550. Therefore, because *Stokeling* indicates that force however slight still qualifies as force, the government contends that third-degree robbery qualifies as a crime of violence under the elements clause.

The government further argues that the Pennsylvania cases cited by Carey, upon closer inspection, do not establish that Pennsylvania third-degree robbery sweeps more broadly than federal generic robbery because in each case the court focused its ruling on the fact that force was indeed used. In *Brown*, for example, the court held that the taking of the purse from the victim's arm by the defendant qualified as robbery because it was a "harmful touching of the person, accompanied with sufficient force to compel

the victim to part with the conscious control of her property.” [484 A.2d at 742](#). In *McNair*, the government notes that the court upheld the conviction because the defendant used force against the victim, which can be actual or constructive, by “intimidat[ing] and instill[ing] in the victim a fear that she would be harmed,” thereby compelling her to give up her bags. [McNair, 546 A.2d at 690](#). Similarly, the government observes that the court in *Bloodsaw* upheld the defendant’s conviction for third-degree robbery, reasoning that by grabbing the bag out of the victim’s hand, the defendant used sufficient force, albeit slight, to be convicted of third-degree robbery. [Bloodsaw, 2017 WL 3587143, at *2](#). Finally, in *Bedell*, the government states that the court upheld a defendant’s third-degree robbery conviction for snatching a wallet from the victim’s hand and fleeing, after which the victim chased the defendant, who threw the wallet at the victim. [954 A.2d at 1215](#). There, the court emphasized that the victim was fully aware of the taking of the wallet and that the wallet was taken with some force. *Id.*

The government additionally emphasizes that Pennsylvania case law is replete with examples of the appellate courts overturning third-degree robbery convictions where the property was not taken by force but by stealth. See, e.g., [Commonwealth v. Williams, 550 A.2d 579 \(Pa.Super.1988\)](#)

(overturning a defendant's robbery conviction where the defendant rolled over an unconscious, intoxicated victim to remove his wallet, since the victim was not aware of the theft); *Commonwealth v. Windell*, 529 A.2d 1115 (Pa.Super. 1987) (reversing the defendant's robbery conviction because the defendant took a coin purse from the victim's person without the victim's knowledge); *Commonwealth v. Smith*, 481 A.2d 1352 (Pa.Super. 1984) (overturning a defendant's robbery conviction where he removed a pack of cigarettes from the pocket of a blind person, who was unaware of the theft, concluding that there was no force used). Therefore, given that Pennsylvania courts have consistently required *some* use of force for a third-degree robbery conviction, and because *Stokeling* holds that any use of force is sufficient for purposes of the identical elements clause of the ACCA, the government argues that Carey's robbery conviction qualifies under the elements clause of the Guidelines.

The court agrees with the government that, given the recent holding in *Stokeling*, Pennsylvania's third-degree robbery statute qualifies as a crime of violence under the elements clause of the Guidelines insofar as robbery by taking the property of another by force "however slight" is still sufficient force and does not sweep more broadly than the generic *de minimis* force. Like the

Florida robbery statute that *Stokeling* determined had an element of force, Pennsylvania's third-degree robbery requires force against a person which can be minimal, or however slight, so long as it is sufficient to overcome a victim's resistance. See *Brown*, 484 A.2d at 741 ("The degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property in, on or about his body.").

In *Peppers*, the Third Circuit reversed its prior holding in *United States v. Cornish*, 103 F.3d 302, 309 (3d Cir.1997), that "any conviction for robbery under the Pennsylvania robbery statute, regardless of degree, has an element the use of force against the person of another." However, *Peppers* did so relying on the Supreme Court's discussion of "physical force" in *Johnson*—to wit, "'physical force' means violence force—that is, force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140. More recently, however, in *Stokeling*, the Court clarified its holding in *Johnson*, stating that "*Johnson* did not purport to establish a force threshold so high as to exclude even robbery from ACCA's scope." *Stokeling*, 139 S.Ct. at 553. Emphasizing that *Johnson* was analyzing a misdemeanor battery statute, *Stokeling* instead clarified,

The nominal contact that *Johnson* addressed involved physical force that is different in kind from the

violent force necessary to overcome resistance by a victim. The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the “unwanted” nature of the physical contact itself suffices to render it unlawful.

By contrast, the force necessary to overcome a victim’s physical resistance is inherently “violent” in the sense contemplated by *Johnson*, and “suggest[s] a degree of power that would not be satisfied by the merest touching.” 559 U.S., at 139. This is true because robbery that must overpower a victim’s will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself “capable of causing physical pain or injury.” *Id.*, at 140. Indeed, *Johnson* itself relied on a definition of “physical force” that specifically encompassed robbery: “[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim.” *Id.*, at 139, (quoting Black’s Law Dictionary 717 (9th ed. 2009); emphasis added). *Robbery thus has always been within the “category of violent, active crimes” that Congress included in ACCA.*

Stokeling, 139 S.Ct. at 553 (emphasis added). With respect to the definition of “force” or “violence”⁵ in the elements clause of the ACCA, (which is identical to the elements clause of the Guidelines), the Court noted that they got their

⁵ In a detailed analysis, the Court explained that “common-law authorities frequently used the terms ‘violence’ and ‘force’ interchangeably.” *Stokeling*, 139 S.Ct. at 550.

meaning from traditional common law, whereby “[i]f an act physically overcame a victim’s resistance, ‘however slight’ that resistance might be, it necessarily constituted [force or] violence.” [139 S.Ct. at 550](#).

Here, given *Stokeling*’s holding that “the ‘force’ required for common-law robbery [is] sufficient to justify an enhanced sentence under the [ACCA],” logically, the force required for common-law robbery would also justify an enhanced sentence under the identical elements clause of the Guidelines. Thus, because Pennsylvania’s third-degree robbery statute is plainly derived from the common-law definition of robbery as overcoming a victim’s resistance “however slight,” and because “[o]vercoming a victim’s resistance [is] *per se violence* against the victim, even if it ultimately caused minimal pain or injury,” the court finds that Carey’s robbery conviction qualifies as a prior crime of violence under the elements clause Guidelines. *Id.* at 553.

The result is the same under the enumerated offense clause, which lists robbery as a crime of violence.⁶ “When the Guidelines specifically list an offense, [the court must] compare the elements of the crime of conviction to the generic form of the offense as defined by the States, learned treatises,

⁶ As the government observes, like the current Guidelines, the 2016 Guidelines in effect when Carey committed the robbery in 2017 listed robbery as an enumerated offense.

and the Model Penal Code.” *McCants*, 952 F.3d at 428 (internal quotation marks omitted). The prior conviction qualifies as a crime of violence if “the statutory definition of the prior conviction substantially corresponds to the generic definition of the offense.” *Id.*

The generic definition of robbery is “the taking of property from another person or from the immediate presence of another person by force or by intimidation,” which “requires no more than *de minimis* force.” *Id.* at 428-29 (internal quotation marks omitted); see also *United States v. Payo*, No. 2:17-cr-211-1, 2019 WL 235112, at *5 (W.D.Pa. Jan.16, 2019) (“The Court in *Graves* also held that ‘generic federal robbery is defined as it is in the majority of state robbery statutes, without the requirement of more than *de minimis* force.’ 877 F.3d at 504”).

Carey argues that under the generic definition of robbery, a defendant must do more than snatch property from the person of another; he must direct a degree of force towards the victim beyond the minimum necessary to remove the item from the victim’s grasp. Carey acknowledges that in *Graves*, the Third Circuit held that generic robbery requires no more than *de minimis* force to compel the victim to part with his property, but argues that this holding

was in error since every other Circuit to adopt a definition of generic robbery has found that it requires some level of force above *de minimis*.

The government, by contrast, argues that *Graves* is and remains the law of this Circuit, and notes that *Graves*'s holding was recently reaffirmed in *McCants*.⁷ See *McCants*, 952 F.3d at 428-29 ("We held in *Graves* that 'generic robbery requires no more than *de minimis* force' to meet [the generic robbery] definition." (quoting *Graves*, 877 F.3d at 503)).

The court agrees with the government that Pennsylvania's third-degree robbery statute criminalizes substantially the same conduct as generic robbery and therefore is a qualifying offense under the enumerated clause. As the above discussion of Pennsylvania case law shows, third-degree robbery does indeed require force "however slight" that is sufficient to remove property from a conscious victim, which substantially aligns *Stokeling*'s definition of generic robbery with the Third Circuit's holding that generic

⁷ Although *McCants* was decided after *Stokeling*, the *McCants* Court, which addressed whether a New Jersey robbery statute constituted a predicate crime of violence under elements and enumerated clauses of §4B1.2(a) of the Guidelines, did not address the Supreme Court's holding in *Stokeling*. Significantly, however, *McCants* did observe that New Jersey's robbery statute, by requiring the threat of bodily injury, involved more force than *de minimis* force and theoretically was narrower than the federal generic definition of robbery. 952 F.3d at 429.

robbery requires taking by no more than “*de minimis*” force. The court is unable to find any instance, either in practice or in theory, whereby a defendant’s use of force “however slight” would not also constitute *de minimis* force.

Accordingly, in light of the finding that Carey’s robbery conviction qualifies as a crime of violence under both the elements and enumerated clauses of §4B1.2(a) of the Guidelines, the court finds that Carey qualifies as a career offender and his criminal offense level is 32. The court agrees with the government that only a two-level deduction for acceptance of responsibility is appropriate in light of Carey’s choice to plead guilty to Count 2 on the morning of trial. Therefore, Carey’s offense level is appropriately calculated at 30, his criminal history category is VI, and his advisory guideline range is 168-210 months.

III. CONCLUSION

For the reasons set forth above, the government’s objections to the final PSR are **SUSTAINED**, ([Doc. 167](#)), and the court finds that Carey qualifies as career offender under §4B1.1 of the Guidelines. Accordingly, Carey’s total offense level is 30, his criminal history category is VI, and his advisory

guideline range is 168-210 months imprisonment. An appropriate order shall issue.

s/ *Malachy E. Mannion*

MALACHY E. MANNION
United States District Judge

DATE: April 30, 2020

18-037-05

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : :

v. : CRIMINAL NO. 3:CR-18-037

JESSE CAREY, : (JUDGE MANNION)

Defendant : :

ORDER

For the reasons set forth in the court's memorandum of this same day,

IT IS HEREBY ORDERED THAT:

(1) The government's objections to the PSR, ([Doc. 167](#)), are

SUSTAINED;

(2) Carey qualifies as a career offender under U.S.S.G. §4B1.1;

and,

(3) Carey's total offense level is 30, his criminal category is VI,

and his advisory guideline range is 168-210 months

imprisonment.

s/ Malachy E. Mannion

MALACHY E. MANNION

United States District Judge

DATE: April 30, 2020

18-037-05-ORDER

UNITED STATES DISTRICT COURT

Middle District of Pennsylvania

UNITED STATES OF AMERICA

v.

JESSE CAREY

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:18-CR-37

USM Number: 76256-067

Carl Poveromo, Esq.

Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s) One (1) and Two (2) of the Superseding Indictment pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(b)(1)(C)	Possession With Intent to Distribute Cocaine and Heroin	8/5/2017	1
21 U.S.C. § 841(b)(1)(C)	Possession With Intent to Distribute Cocaine and Heroin	8/5/2017	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

 The defendant has been found not guilty on count(s) _____ Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/12/2020

Date of Imposition of Judgment

Signature of Judge

Malachy E. Mannion, U.S. District Judge

Name and Title of Judge

8/17/20

Date

DEFENDANT: JESSE CAREY
CASE NUMBER: 3:18-CR-37

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: One Hundred Forty-Four (144) Months. This term consists of terms of One Hundred Forty-four (144) months imprisonment on each count, to run concurrently.

The court makes the following recommendations to the Bureau of Prisons:
that the defendant be allowed to serve his sentence at a facility proximal to his family located in Northeastern Pennsylvania.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:
 at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JESSE CAREY
CASE NUMBER: 3:18-CR-37

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Four (4) years. This term consists of terms of four (4) years on each of Counts 1 and 2, to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JESSE CAREY
CASE NUMBER: 3:18-CR-37

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines or special assessments.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JESSE CAREY
CASE NUMBER: 3:18-CR-37

ADDITIONAL SUPERVISED RELEASE TERMS

You must not unlawfully possess a controlled substance;

You must participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.) which could include an evaluation and completion of any recommended treatment;

You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the probation officer and follow the instructions on the prescription;

You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods;

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.) which could include an evaluation and completion of any recommended treatment. You must take all mental health medications that are prescribed by your treating physician;

You must participate in a gambling addiction treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.) which could include an evaluation and completion of any recommended treatment; and

You must not engage in any form of gambling (including, but not limited to, lotteries, on-line wagering, sports betting) and you must not enter any casino or other establishment where gambling is the primary purpose (e.g., horse race tracks, off-track betting establishments).

DEFENDANT: JESSE CAREY

CASE NUMBER: 3:18-CR-37

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$ 200.00	\$	\$	\$	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ 0.00	\$ 0.00
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Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JESSE CAREY
CASE NUMBER: 3:18-CR-37

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 200.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
IT IS ORDERED that the defendant shall pay to the Clerk, U.S. District Court, a special assessment of \$100 on each of Counts 1 and 2, for a total of \$200, due immediately. THE COURT FINDS that the defendant does not have the ability to pay a fine.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2723

UNITED STATES OF AMERICA

v.

JESSE CAREY,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-18-cr-00037-001)
District Judge: Honorable Malachy E. Mannion

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 29, 2021

Before: PHIPPS, NYGAARD, and ROTH, *Circuit Judges.*

(Opinion Filed: July 13, 2021)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PHIPPS, *Circuit Judge*.

Jesse Carey pleaded guilty to two federal drug offenses and was sentenced as a career offender based on two of his prior state-court convictions. He disputes that the second of those prior offenses qualifies as a “crime of violence” under section 4B1.2(a) of the United States Sentencing Guidelines. If that prior conviction – for third-degree Pennsylvania robbery, *see* 18 Pa. Cons. Stat. § 3701(a)(1)(v) – does not constitute a crime of violence under the Guidelines, then Carey would not qualify as a career offender. In that case, the Guidelines range for his sentence would drop dramatically – from 168 to 210 months down to 30 to 37 months. For the reasons below, on *de novo* review, *see* *United States v. Chapman*, 866 F.3d 129, 131 (3d Cir. 2017), we hold that third-degree Pennsylvania robbery is a crime of violence under the Guidelines, and we will affirm Carey’s below-Guidelines sentence of 144 months.

I.

Carey’s two federal convictions in the District Court relate to drug-dealing activity in Northeast Pennsylvania. *See* 18 U.S.C. § 3231 (conferring district courts with original jurisdiction over cases arising under federal criminal law).

For the first of those convictions, Carey found the police as much as they found him. While officers were executing a search warrant on Carey’s home in Plymouth, Pennsylvania, Carey drove a purple Nissan Maxima into the driveway, only to reverse in a failed attempt to flee. Upon detaining him, police searched Carey and his vehicle,

discovering heroin, cocaine, marijuana, \$2,086 in cash, drug paraphernalia, and three cellphones.

A few months later, Carey committed another federal drug crime. As he attempted to enter Mount Airy Casino, Carey produced an identification that casino security personnel doubted. As they began to escort him to the security office, Carey pushed a security officer to get away, but he was taken down. In that scuffle, a black sock containing baggies of cocaine and heroin fell from his pocket. A later search of Carey's person yielded a digital scale, \$9,777 in cash, two cellphones, and a fraudulent United States passport.

Based on those events, a federal grand jury in Scranton returned a superseding indictment against Carey for two counts of possession with intent to distribute narcotics in violation of 21 U.S.C. § 841(a)(1). Through an open plea, Carey pleaded guilty to both counts. The Presentence Investigation Report recommended a Sentencing Guidelines range of 30 to 37 months' imprisonment based on an offense level of 12 and a Category VI criminal history. Carey's Category VI criminal history – the highest category – reflected several prior adult criminal convictions. Some of those were violations of New Jersey law: for manufacturing and distributing cocaine; unlawful possession of a handgun; possession or use of a controlled substance; theft; and aggravated assault of a correctional officer. Others were offenses under Pennsylvania law: for third-degree robbery and escape from work release.

Two of Carey's prior state convictions caught the Government's attention. Those were his prior New Jersey conviction for manufacturing and distributing cocaine and his third-degree Pennsylvania robbery conviction. The Government asserted that manufacturing and distributing cocaine, in violation of New Jersey law, constitutes a controlled-substance offense under the Guidelines. *See U.S.S.G. § 4B1.2(b).* It similarly viewed third-degree Pennsylvania robbery as a crime of violence under the Guidelines. *See id. § 4B1.2(a).* Based on that assessment of those two prior offenses, the Government argued that Carey should be sentenced as a career offender – a designation that would increase his sentence to a Guidelines range between 168 and 210 months' imprisonment. Carey did not contest the New Jersey conviction as a controlled-substance offense, but he disputed that third-degree Pennsylvania robbery constitutes a crime of violence.

The District Court determined that third-degree Pennsylvania robbery constitutes a crime of violence under the Guidelines. It reached that conclusion by analyzing third-degree Pennsylvania robbery under both the elements clause and the enumerated-offense clause of the crime-of-violence Guidelines provision. *See U.S.S.G. § 4B1.2(a)(1)* (elements clause); *id. § 4B1.2(a)(2)* (enumerated-offense clause). With that understanding, the District Court used the higher Guidelines range as the baseline but then varied downward because Carey was a low-level drug dealer rather than a kingpin. Ultimately, Carey received a below-Guidelines prison sentence of 144 months, which he timely appealed. *See 28 U.S.C. § 1291; 18 U.S.C. § 3742.*

II.

The Guidelines impose three requirements for career-offender status. *See* U.S.S.G. § 4B1.1. The first two are not in dispute here: Carey was eighteen at the time of his current convictions, and his current convictions were each for a “controlled substance offense,” which is one way of satisfying the second career-offender element. *Id.* § 4B1.1(a). The third element requires at least two prior felony convictions that each qualify as either a controlled-substance offense or a crime of violence. *See id.* On appeal, Carey does not challenge that his prior felony conviction for manufacturing and distributing cocaine in violation of New Jersey law constitutes a controlled-substance offense. But he argues that his prior Pennsylvania conviction for third-degree robbery is not a crime of violence under the Guidelines.

On this record, Carey’s status as a career offender hinges on whether third-degree Pennsylvania robbery satisfies either the elements clause or the enumerated-offense clause of the crime-of-violence Guidelines provision. *See* U.S.S.G. § 4B1.2(a). Looking only at the enumerated-offense clause, Carey is a career offender because third-degree Pennsylvania robbery is a “robbery” within the meaning of that clause. *Id.* § 4B1.2(a)(2).

The crime-of-violence analysis starts with the elements of the prior conviction. Here, the Pennsylvania statute criminalizing robbery lists elements in the alternative, and by so doing, it defines multiple robbery crimes. *See* 18 Pa. Cons. Stat. § 3701(a)(1); *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *United States v. Peppers*, 899 F.3d 211, 232 (3d Cir. 2018). For such a “divisible” statute, a court may review judicial

record evidence to ascertain a defendant's precise prior conviction. *Descamps v. United States*, 570 U.S. 254, 262 (2013); *see also Shepard v. United States*, 544 U.S. 13, 20 (2005). The state-court record shows that Carey pleaded guilty to third-degree robbery in violation of 18 Pa. Cons. Stat. § 3701(a)(1)(v).

The next analytical step evaluates whether “the prior conviction substantially corresponds to the generic definition of the [enumerated] offense.” *United States v. McCants*, 952 F.3d 416, 428 (3d Cir. 2020) (citation and quotation marks omitted). Here, the Guidelines enumerate robbery as an offense. *See* U.S.S.G. § 4B1.2(a)(2). Thus, the precise question becomes whether third-degree Pennsylvania robbery substantially corresponds to the generic robbery offense. To commit third-degree robbery under Pennsylvania law, a person must “in the course of committing a theft, . . . physically take[] or remove[] property from the person of another *by force however slight*.” 18 Pa. Cons. Stat. § 3701(a)(1)(v) (emphasis added). By comparison, an accepted federal generic definition of robbery is “the taking of property from another person or from the immediate presence of another person by force or by intimidation.” *McCants*, 952 F.3d at 428–29 (citation omitted). Critically, “generic robbery requires no more than *de minimis* force.” *United States v. Graves*, 877 F.3d 494, 503 (3d Cir. 2017). These articulations are similar, and Pennsylvania’s requirement of “force however slight” substantially corresponds to the *de minimis* force needed for the generic offense. *Compare Commonwealth v. Brown*, 484 A.2d 738, 741 (Pa. 1984) (defining “force however slight” to encompass “any amount of force applied to a person while committing

a theft,” including both actual and constructive force), *with Graves*, 877 F.3d at 503 (defining “*de minimis* force” to require no injury to the victim). Accordingly, Carey’s conviction for third-degree Pennsylvania robbery constitutes a crime of violence under the enumerated-offense clause of the Sentencing Guidelines. *See* U.S.S.G. § 4B1.2(a)(2).

* * *

Carey’s conviction for third-degree robbery in Pennsylvania, coupled with his prior conviction for a controlled-substance offense, renders him eligible for the career-offender enhancement. The District Court applied that enhancement, and we will accordingly affirm Carey’s judgment of sentence.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2723

UNITED STATES OF AMERICA,

v.

JESSE CAREY,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-18-cr-00037-001)
District Judge: Honorable Malachy E. Mannion

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
April 29, 2021

Before: PHIPPS, NYGAARD, and ROTH, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record on appeal from the United States District Court for the Middle District of Pennsylvania and was submitted on April 29, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the United States District Court for the Middle District of Pennsylvania entered on August 18, 2020, be and the same is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 13, 2021