

18-163

United States v. Scott

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5 August Term, 2018
6

7 (Argued: January 10, 2019

Decided: March 31, 2020)

8
9 Docket No. 18-163
10

11
12
13 UNITED STATES OF AMERICA,
14

15 *Appellant,*
16

17 v.
18

19 GERALD SCOTT,
20

21 *Defendant-Appellee.*
22
23

24
25 Before: LEVAL, POOLER, and RAGGI, *Circuit Judges.*
26

27 The United States appeals from an opinion and order of the United States
28 District Court for the Southern District of New York (Laura T. Swain, *J.*) vacating
29 Gerald Scott's sentence and resentencing him to time served. The district court
30 held that because New York first-degree manslaughter can be committed by

1 omission, it cannot serve as a predicate felony for the sentencing enhancements
2 prescribed in the Armed Career Criminal Act (“ACCA”) or the Career Offender
3 Sentencing Guideline. We hold that the district court properly concluded that
4 New York first-degree manslaughter is not a predicate crime of violence because
5 it can be committed by omission and therefore without the use of force, as
6 defined in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). We also hold that
7 New York first-degree manslaughter does not match any of the generic offenses
8 enumerated in the Career Offender Guideline. We therefore affirm the district
9 court’s vacatur of Scott’s sentence under ACCA and its decision to resentence
10 Scott to time served.

11 Affirmed. Judge Leval joins in Judge Pooler’s opinion for the Court and
12 also concurs by a separate opinion, in which Judge Pooler joins.

13 Judge Raggi dissents in a separate opinion.

14
15 _____
16 WON S. SHIN, Assistant United States Attorney (Sarah
17 K. Eddy, Catherine E. Ghosh, Assistant United States
18 Attorneys), for Geoffrey S. Berman, United States
19 Attorney for the Southern District of New York, NY, for
Appellant.

1 MATTHEW B. LARSEN, Assistant Federal Defender,
2 Federal Defenders of New York, Inc., New York, NY, *for*
3 *Defendant-Appellee*.
4

5 POOLER, *Circuit Judge*:

6 The United States appeals from an opinion and order of the United States
7 District Court for the Southern District of New York (Laura T. Swain, *J.*) vacating
8 Gerald Scott's sentence and resentencing him to time served based on his service
9 of only eleven years of imprisonment. The district court held that because New
10 York first-degree manslaughter can be committed by omission, it cannot serve as
11 a predicate felony for the sentencing enhancements prescribed in the Armed
12 Career Criminal Act ("ACCA") or the Career Offender Sentencing Guideline. We
13 hold that the district court properly concluded that New York first-degree
14 manslaughter is not a predicate crime of violence because it can be committed by
15 complete inaction and therefore without the use of force, as defined in *Curtis*
16 *Johnson v. United States*, 559 U.S. 133 (2010). We also hold that New York first-
17 degree manslaughter does not match any of the generic offenses enumerated in
18 the Career Offender Guideline. We therefore affirm the district court's vacatur of
19 Scott's sentence under ACCA and its decision to resentence Scott to time served.

BACKGROUND

On October 10, 2007, Gerald Scott pled guilty to Hobbs Act robbery in violation of 18 U.S.C. §§ 1951, 2 (“Count I”); brandishing a weapon during Hobbs Act robbery in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 2 (“Count III”); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(e) (“Count IV”). Judge Swain sentenced Scott to a term of 151 months’ imprisonment on Count I to be served concurrently with a term of 180 months on Count IV, followed by a consecutive term of 84 months on Count III.

Scott’s ACCA conviction on Count IV, which is the focus of this appeal, was based on the following predicate offenses: a 1983 conviction for New York robbery in the first degree and two 1988 convictions for New York manslaughter in the first degree. In the course of these crimes, Scott shot and killed one victim and stabbed another to death. These prior convictions subjected him to a mandatory sentence of 180 months on Count IV.¹

¹ Judge Raggi devotes much of her opinion to detailing the violent savagery of Scott’s conduct in both his present and his predicate offenses. We do not disagree that Scott is deserving of serious punishment. Nonetheless, we must point out

1 On April 26, 2010, Scott filed a habeas petition to vacate his conviction,
2 arguing that he received ineffective assistance of counsel. Judge Swain denied
3 that motion. In November 2016, Scott received this Court's permission to file a
4 successive habeas petition in light of *Samuel Johnson v. United States*, 135 S. Ct.
5 2551 (2015).

6 The district court granted Scott's successive habeas petition, finding Scott's
7 convictions for New York manslaughter were not violent felonies so that Scott
8 was ineligible for an ACCA sentence. The district court reasoned that based on
9 decisions of the New York Court of Appeals, "first degree manslaughter can be
10 committed in New York State by omission and thus without using force." *United*
11 *States v. Scott*, No. 06 CR 988-LTS, 2017 WL 2414796, at *2 (S.D.N.Y. June 2, 2017).

that these observations in Judge Raggi's opinion are wholly irrelevant to the question before us. The Supreme Court has ruled that it is irrelevant to the applicability of ACCA whether the particular defendant acted with violence in the commission of the crimes. *See Villanueva v. United States*, 893 F.3d 123, 127-28 (2d Cir. 2018) (citing *Descamps v. United States*, 570 U.S. 254 (2013)). The applicability of ACCA instead turns, as relevant here, on whether under the governing law the crimes necessarily require violent action. If a crime is capable of being committed without the use of physical force, the fact that a defendant acted with the most horrifying violence in the commission of that crime has no bearing on whether the defendant is punishable under ACCA.

1 The court thus held that Scott was “not subject to the career offender
2 enhancement under ACCA” and vacated his sentence for recalculation. *Id.* at *3.

3 At the resentencing hearing, the district court considered whether Scott
4 could be sentenced under the Career Offender Guideline, U.S.S.G. § 4B1.1.

5 Relying on its analysis above, the district court determined that New York first-
6 degree manslaughter was not a “crime of violence” under the force clause of the
7 Career Offender Guideline for the same reasons it was not a crime of violence
8 under ACCA’s identical force clause. The district court also rejected the

9 government’s argument that the Career Offender Guideline applies to Scott
10 under the enumerated-offenses clause because New York first-degree

11 manslaughter criminalizes the same conduct as generic murder, voluntary
12 manslaughter, or aggravated assault in the Guideline’s enumerated-offenses

13 clause. Having decided that the Career Offender Guideline could not apply, the
14 district court calculated Scott’s sentencing range at 121 to 130 months. At the

15 time of the hearing, Scott had served approximately 134 months of his sentence—
16 four months above the Guidelines range’s upper boundary. The district court

1 therefore sentenced Scott to time served and five years of supervised release.

2 Scott is out on supervised release.

3 **DISCUSSION**

4 On appeal, the government argues that Scott qualifies for ACCA's 180-
5 month mandatory minimum sentence because New York first-degree
6 manslaughter is a crime of violence that "has as an element the use, attempted
7 use, or threatened use of physical force against the person of another." 18 U.S.C.
8 § 924(e)(2)(B)(i). In the alternative, the government argues that Scott should be
9 sentenced under the Career Offender Guideline because New York first-degree
10 manslaughter criminalizes the same conduct as the generic offenses of murder,
11 voluntary manslaughter, or aggravated assault, which are enumerated crimes of
12 violence in the Guideline. Scott responds that the minimum criminal conduct
13 required to commit New York first-degree manslaughter does not have as an
14 element the "use" of force because the crime can be committed by omission—
15 otherwise put, by doing nothing. He also argues that a majority of states do not
16 criminalize the conduct that New York first-degree murder penalizes as first-

1 degree manslaughter as generic murder, voluntary manslaughter, or aggravated
2 assault.

3 **I. New York First-Degree Manslaughter Is Not a Crime of Violence**
4 **Under the Force Clause of 18 U.S.C. § 924(e)**

5 ACCA sets a mandatory minimum sentence of “not less than fifteen years”
6 for criminal defendants who have at least three prior convictions for “a violent
7 felony or a serious drug offense.” 18 U.S.C. § 924(e)(1). As relevant here, the
8 statute defines a “violent felony” as “any crime punishable by imprisonment for
9 a term exceeding one year” that “has as an element the use, attempted use, or
10 threatened use of physical force against the person of another.” *Id.*
11 § 924(e)(1)(B)(i).

12 The question before us is whether New York first-degree manslaughter
13 satisfies that definition. New York Penal Law lists three criminal acts for which a
14 person may be found “guilty of manslaughter in the first degree.” N.Y. Penal
15 Law § 125.20. First, the statute holds a person liable for first-degree manslaughter
16 who “with intent to cause serious physical injury to another person, . . . causes
17 the death of such person or of a third person.” *Id.* § 125.20(1). Second, the statute

1 criminalizes causing the death of another person “under the influence of extreme
2 emotional disturbance,” *id.* § 125.20(2). Third, the statute makes it illegal to, with
3 intent to cause physical injury, “create[] a grave risk of serious physical injury to
4 a person less than eleven years old” that causes their death. *Id.* § 125.20(4).

5 Where a statute, like New York’s first-degree manslaughter statute,
6 “criminalize[s] multiple acts in the alternative,” we refer to the statute as
7 “divisible” and apply the “modified categorical approach” to determine whether
8 a conviction under the statute can serve as a predicate offense for a federal
9 sentence enhancement. *United States v. Jones*, 878 F.3d 10, 16 (2d Cir. 2017); *accord*
10 *Descamps v. United States*, 570 U.S. 254, 261-62 (2013); *see also United States v.*
11 *Castillo*, 896 F.3d 141, 149-50 (2d Cir. 2018) (determining New York Penal Law
12 § 125.20 is “a state statute [that] criminalizes multiple acts in the alternative” and
13 thus requires the modified categorical approach (alterations and internal
14 quotations marks omitted)). Under that approach, we first look to “a limited class
15 of documents” to determine of which act the defendant was convicted. *Id.*
16 “[L]ook[ing] only to the statutory definitions—i.e., the elements—of [that portion
17 of the statute], and *not* to the particular underlying facts,” *Hill*, 890 F.3d at 55

(alterations and internal quotation marks omitted), we then ask whether those elements can be satisfied by conduct that might reach beyond the parameters of ACCA. If so, we ask whether there is “a realistic probability, not a theoretical possibility,” that the statute would be applied in that manner. *Id.* at 56. Unless “the state statute . . . on its face extends to conduct beyond the definition of the corresponding federal offense,” see *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018), we require that in either the defendant’s case or another case “the courts in fact did apply the statute” in that manner, *Hill*, 890 F.3d at 56. The proposition that a state statute can apply to conduct beyond the application of ACCA cannot be based on mere “flights of fancy” or “the application of legal imagination.” *Id.* at 56. With those realistic readings of the statute in mind, we then determine whether “the state statute sweeps more broadly” than ACCA, in which case a conviction under the state statute cannot serve as an ACCA predicate. *Stuckey v. United States*, 878 F.3d 62, 67 (2d Cir. 2017) (internal quotation marks omitted). A statute that penalizes activity that does not require the use of force thus “cannot count as a predicate ‘violent felony’ [under the force clause] for the ACCA’s fifteen-year mandatory minimum.” *Id.*

1 The government has provided two certificates of disposition establishing
2 that both of Scott’s manslaughter convictions were under New York Penal Law
3 § 125.20(1), which penalizes a person who “[w]ith intent to cause serious physical
4 injury to another person, . . . causes the death of such person or of a third
5 person.” We therefore consider only Section 1 of New York Penal Law § 125.20,
6 and ask whether the minimum criminal conduct required for conviction under
7 this provision falls within ACCA.

8 **A. The Minimum Criminal Conduct that New York First-**
9 **Degree Manslaughter Requires Is an Omission Despite a**
10 **Duty to Act**

11 The district court determined that the minimum criminal conduct required
12 for a defendant to be held liable under New York Penal Law § 125.20(1) is a
13 failure to act in the face of a duty to do so, with the intent to cause serious
14 physical injury, which failure causes death. The government argues that the
15 district court’s conclusion was erroneous because criminal liability for New York
16 first-degree manslaughter attaches only when a person is *complicit* in the
17 commission of an act that sets harm into motion and then fails to act to stop that
18 harm from killing another. We reject the government’s strained argument

1 because the New York Court of Appeals has explicitly held that New York first-
2 degree manslaughter can be committed by omission.

3 The New York Court of Appeals has clearly and emphatically asserted on
4 two occasions that New York first-degree manslaughter may be committed by a
5 defendant's failure to act. First, in *People v. Steinberg*, 29 N.Y.2d 673 (1992), the
6 Court of Appeals considered whether the first-degree manslaughter conviction
7 of a father who had both physically abused his six-year-old daughter and then
8 failed to secure medical care for her resultant serious injuries, which ultimately
9 caused her death, was sustainable on either basis. New York's highest court
10 "found no defect in the prosecution's legal theory" that the "defendant
11 performed both acts of commission (striking [the daughter]) and acts of omission
12 (failure to obtain medical care), each with intent to cause serious physical injury,
13 and that such acts caused [the daughter's] death." *Id.* at 680-81. In so finding, the
14 Court of Appeals held that Steinberg's "acts of omission" (the failure to secure
15 medical care) would have been sufficient to sustain the manslaughter conviction,
16 even if he had not inflicted the injuries that required medical attention. *Id.*

17 Steinberg had argued in his defense that "failure to obtain medical care for a

1 child cannot, as a matter of law, support the *mens rea* element of first degree
2 manslaughter . . . unless defendant has medical expertise, and would thereby
3 know that serious injury will result from a lack of medical attention.” *Id.* at 680.
4 The court rejected that argument. It explained: “The Penal Law provides that
5 criminal liability may be based on an omission, which is defined as the failure to
6 perform a legally imposed duty. Parents have a nondelegable affirmative duty to
7 provide their children with adequate medical care. Thus, *a parent’s failure to fulfill*
8 *that duty can form the basis of a homicide charge.*” *Id.* (emphasis added) (citations
9 omitted). While acknowledging that it relied upon cases involving prosecutions
10 for reckless manslaughter and criminally negligent homicide in reaching this
11 conclusion, the court repeated, “the failure to obtain medical care can also
12 support a first degree manslaughter charge, so long as there is sufficient proof of
13 the requisite *mens rea*—intent to cause serious physical injury.” *Id.*

14 The Court of Appeals reaffirmed this conclusion in *People v. Wong*, 81
15 N.Y.2d 600 (1993). The prosecution in *Wong* charged an infant’s two caretakers,
16 Eugene and Mary Wong, with first-degree and second-degree manslaughter. *Id.*
17 at 606. There, the infant died from shaken baby syndrome after one of the Wongs

1 shook the infant and both of the Wongs subsequently failed to seek medical care
2 for the infant. *Id.* The prosecution contended that even though only one of the
3 defendants had shaken the child, both defendants were liable for first-degree
4 manslaughter. *Id.* The prosecution could not prove which of the two defendants
5 had shaken the infant and, for want of this proof, argued that a defendant who
6 had no role in the harmful *act* could be held liable for first-degree manslaughter
7 based on a failure to act. The defendants were convicted on all counts, and the
8 Appellate Division reversed the convictions for first-degree manslaughter as
9 against the weight of the evidence on the issue of intent to cause serious bodily
10 injury. As to the second-degree manslaughter convictions, the Court of Appeals
11 made clear “that the People’s theory against the ‘passive’ defendant is legally
12 sound” because in *Steinberg*, it had “held that parents have an affirmative duty to
13 provide their children with adequate medical care and that, under certain
14 circumstances, the failure to perform that duty can form the basis of a homicide
15 charge.” *Id.* at 607. That is, “a person in the position of the ‘passive’ defendant
16 here may be held criminally liable for failing to seek emergency medical aid for a
17 seriously injured child.” *Id.* at 608. The court ultimately reversed the defendants’

1 convictions because of “the absence of proof from which the jury could infer that
2 the ‘passive’ defendant was even aware that the infant had been violently
3 shaken,” and therefore needed medical care. *Id.* at 609.

4 The Government argues that, notwithstanding the explicit statement of the
5 Court of Appeals in *Steinberg* that “the failure to obtain medical care can . . .
6 support a first degree manslaughter charge,” 79 N.Y.2d at 680, that case “does
7 not stand for the proposition that a pure omission without any active use of force
8 would suffice to ground a conviction under Section 125.20(1).” Appellant’s Br. at
9 26. It imports great significance to the court’s phrase: “so long as there is
10 sufficient proof of the requisite *mens rea*.” The Government contends that an
11 affirmative act of violence—such as defendant Steinberg’s striking the victim
12 prior to his withholding of medical care—is necessary to establish the *mens rea* of
13 intent to cause serious physical harm. It thus argues that, notwithstanding the
14 court’s statement that failure to obtain medical care is sufficient for a conviction
15 of first-degree manslaughter, the need to establish *mens rea* effectively requires a
16 preceding act of violence on the part of the defendant. Judge Raggi argues for
17 similar reasons that the *Steinberg* defendant’s acts of violence and acts of

1 omission were “inextricably linked,” so that the case cannot establish a realistic
2 probability that New York courts would apply the manslaughter statute to acts
3 of omission alone.

4 We disagree. A defendant’s intent to cause serious physical harm to the
5 victim can be established in many ways other than that defendant’s preceding act
6 of violence, including most obviously the defendant’s having observed (or
7 having been told of) the infliction of violence on the child by another, or the
8 defendant’s statement of intention to inflict harm. Although the facts in *Steinberg*
9 happened to include a preceding act of violence by the defendant, the court’s
10 independent analysis of inaction makes clear that a failure to act would be alone
11 sufficient to sustain a conviction where the required *mens rea* was shown.

12 Nothing in that discussion suggests the defendant’s inaction must be linked to
13 that defendant’s affirmative act of violence; indeed everything in that discussion
14 supports the contrary.

15 The Government and Judge Raggi also argue that, because the defendants’
16 convictions in *Wong* were reversed due to insufficiency of evidence of either
17 defendant’s awareness of the fact that the child had been shaken, the court’s

1 discussion of the sufficiency of inaction was dictum, and therefore the case
2 cannot show a realistic probability that a New York conviction for first-degree
3 manslaughter based on omission alone would be sustained.

4 The argument that *Wong*'s dictum is inadequate to show "realistic
5 probability" is both irrelevant (as the proposition was a holding in *Steinberg*) and
6 exaggerates the meaning of our precedents requiring a "realistic probability" of
7 application of a statute beyond the scope of ACCA. We have stated that a
8 "realistic probability" requires that "the courts did in fact apply" the statute in
9 the manner considered, as opposed to a mere "flight of fancy" or explanation of
10 "the legal imagination." *Hill*, 890 F.3d at 56. For the proposition that New York
11 courts would apply the first-degree manslaughter statute to inaction in the face
12 of a duty to act, we do not rely on a flight of fancy or of legal imagination. We
13 rely on the carefully considered and subsequently repeated assertion of that
14 proposition by the highest court of New York. In *Steinberg*, the Court so held,
15 explicitly sustaining the defendant's conviction on the basis of inaction
16 (notwithstanding the court's recognition that the conviction would also be
17 sustained on another basis). In *Wong*, furthermore, the Court of Appeals

1 described its prior statement in *Steinberg* as a holding. In view of the *Steinberg*
2 holding by the state's highest court, coupled with the Court's emphatic
3 reaffirmance of the same proposition in *Wong*, it appears to us that a New York
4 trial court would be compelled to conclude that first-degree manslaughter can be
5 satisfied by inaction, and we are compelled in this case to construe New York
6 law following what New York's highest court has explicitly held.

7 *Wong* additionally contradicts Judge Raggi's assertion that no defendant
8 has been "actually prosecuted" under an omission theory. As we noted earlier,
9 the government in *Wong* "argued . . . that the People's case rested on the theory
10 that each defendant was independently liable for [the child's] death because one
11 of them had shaken the baby while the other had stood by and failed to
12 intervene." 81 N.Y.S.2d at 606. *Wong* thus establishes not only that a defendant
13 may be convicted for first-degree manslaughter based on omission, but also that
14 New York has actually prosecuted defendants under this theory.

15 In short, these two decisions from New York's highest court are more than
16 sufficient to establish a realistic probability that New York first-degree
17 manslaughter could be applied to a defendant who intentionally causes death by

1 an act of omission in the face of a duty to protect the victim from a perceived
2 harm. New York's highest court "did in fact apply" the first-degree
3 manslaughter statute to the facts of a particular case. *See Hill*, 890 F.3d at 56.

4 Judge Raggi acknowledges that the standard is whether there is a "realistic
5 probability" that the courts would accept omission as the basis of a first-degree
6 manslaughter conviction. *Hill*, 890 F.3d at 56. That standard requires that the
7 courts "in fact did [so] apply the statute." *Id.* Nonetheless, in her reasoning, she
8 converts that standard into whether the courts of New York have in fact *affirmed*
9 a manslaughter conviction based on omission. Notwithstanding that in both
10 *Steinberg* and *Wong*, cases in which the manslaughter charge was (as an
11 alternative) predicated on omission, New York's highest court expressly stated
12 that omission alone would support liability, Judge Raggi asserts that there is no
13 such realistic probability because in neither case did the Court of Appeals affirm
14 a conviction predicated on inaction without complicity in any action. By doing
15 so, Judge Raggi has effectively converted the requirement of "realistic

probability” to a requirement of actual affirmance of a manslaughter conviction based on omission alone, a reading that has no basis in our case law.²

Accordingly, we consider whether a crime committed by omission is a violent felony under ACCA’s force clause.³

² Judge Raggi also notes, correctly, that by the time the case reached the Court of Appeals, *Wong* involved only convictions for second-degree manslaughter, which requires proof only of recklessness, rather than the first-degree manslaughter statute at issue here, which requires proof of intent to cause serious physical injury. But this fact does not disturb our conclusion that New York’s highest court has applied the first-degree manslaughter statute to omission. *Steinberg* expressly upheld a first-degree manslaughter conviction on the theory that the defendant’s knowing inaction in circumstances in which he had a duty to act to protect the victim constituted the crime. *Wong* relied on that ruling, characterizing it as a holding.

³ We are puzzled furthermore by Judge Raggi’s argument that there is no realistic probability that New York courts would apply first-degree manslaughter to a parent who, with intent to cause serious injury to his or her child, causes death by refusing to provide needed medical care (without a preceding act of violence), but would apply it to a parent who causes death by striking his child. Judge Raggi herself asserts that it “makes no sense” to impose criminal liability on one who acts, sprinkling poison on the victim’s food with intention to cause death but not on one who, knowing that the victim’s food is poisoned and with the same intention, passively allows the victim to ingest the poison. We do not disagree with Judge Raggi that the two cases should be treated alike so long as the words of the governing statute allow that. The New York Court of Appeals appears to agree as well, and that is why the Court held that first-degree manslaughter liability applies to one who kills by inaction as well as to one who

B. New York First-Degree Manslaughter Sweeps More Broadly than 18 U.S.C. § 924(e)

We must decide whether a crime that can be committed by omission “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). The government, relying on *United States v. Castleman*, 572 U.S. 157 (2014), argues that where a defendant’s omission causes a serious injury, force is implicit in the inaction and thus the omission constitutes a use of force. Scott counters that ACCA’s text requires an *active* deployment of force that an omission, by nature, cannot effectuate and that *Castleman* cannot be read to hold that a defendant who commits nothing more than a culpable omission (without any affirmative act) uses force.

The Supreme Court articulated the standard for what constitutes the use of “physical force” sufficient to satisfy Section 924(e) in *Curtis Johnson v. United States*, 559 U.S. 133. Contrary to the position stated by Justice Alito in dissent that “ACCA uses ‘violent felony’ as a term of art with a wider meaning than the

kills by act of violence (assuming *mens rea* in both cases). We therefore cannot see why Judge Raggi finds it improbable that New York courts would impose manslaughter liability on one who kills by inaction.

1 phrase may convey in ordinary usage,” *see id.* at 148 (Alito, J., dissenting), the
2 majority of the Supreme Court concluded that the term “physical force” is to be
3 given its “ordinary meaning,” *id.* at 138 (majority opinion). The Court explained
4 that “force” means “strength or energy; *active* power; *vigor*; often an unusual
5 degree of strength or energy[;] power to affect strongly in physical relations; . . .
6 power, violence, compulsion, or constraint exerted upon a person” and that
7 “physical force” means “power, violence, or pressure directed against a person
8 or thing[;] . . . *force consisting in a physical act*, esp. a violent act directed against a
9 robbery victim.” *Id.* at 139 (emphasis added) (alterations and internal quotation
10 marks omitted). The Court distilled the term’s ordinary meaning into a now-
11 indelible phrase: “*violent* force—that is, force capable of causing physical pain or
12 injury to another person.” *Id.* at 140. The Court’s reliance on the ordinary
13 meaning to shape its conception of “physical force” communicates that only an
14 active crime constitutes a “violent felony” under ACCA. *See also Stokeling v.*
15 *United States*, 139 S. Ct. 544, 553 (2019) (noting that a conviction must be “within
16 the ‘category of violent, *active* crimes’ that Congress included in ACCA”).

1 The Government and Judge Raggi argue that the Supreme Court's
2 subsequent decision in *Castleman*, 572 U.S. 157, as well as our later decision in
3 *Villanueva*, 893 F.3d 123 (2d Cir. 2018), compel the conclusion that a crime of
4 manslaughter that may be committed by a failure to act necessarily involves the
5 "use of force" as defined under the ACCA force clause. They rely principally on
6 *Castleman's* statement that "the knowing or intentional causation of bodily injury
7 necessarily involves the use of physical force," 572 U.S. at 169, from which they
8 conclude that a defendant who causes death by inaction necessarily uses force.

9 What was said in *Castleman* and *Villanueva* must be considered in the light
10 of the facts of those cases. In *Castleman*, the Supreme Court considered whether a
11 Tennessee statute, which made it a crime to "intentionally, knowingly or
12 recklessly cause bodily injury to another" qualified as a misdemeanor crime of
13 domestic violence under a different statute, 18 U.S.C. § 921(a)(33)(A)(ii), because
14 it involved "the use or attempted use of physical force." The defendant argued,
15 as relevant here, that the offense did not categorically involve "the use or
16 attempted use of physical force" because it could be accomplished through the
17 indirect application of force, such as by sprinkling poison into a beverage. The

1 Supreme Court rejected that argument. First, it concluded that, in contrast to the
2 ACCA definition of force established in *Curtis Johnson*, the “use of physical force”
3 under § 921(a)(33)(A) is satisfied by “the degree of force that supports a
4 common-law battery conviction.” 572 U.S. at 168.⁴ Second, the Court concluded
5 that this definition of force “encompasses even its indirect application.” *Id.* at 170.
6 The Court explained that the “use of force” in the poisoning example “is not the
7 act of sprinkling the poison; it is the act of employing poison knowingly as a
8 device to cause physical harm. That the harm occurs indirectly, rather than
9 directly (as with a kick or punch), does not matter.” *Id.* at 171. Similarly, shooting
10 a victim with a gun is no less a use of force “because it is the bullet, not the
11 trigger, that actually strikes the victim.” *Id.*

⁴ The Supreme Court explicitly cabined its consideration of common-law force to Section 921(a)(33)(A), noting the principle that “a common-law term of art should be given its established common-law meaning, except where that meaning does not fit.” *Id.* at 163 (internal quotation marks omitted) (citing *Johnson*, 559 U.S. at 139). The Court acknowledged that it did not rely on the common-law meaning of “force” when interpreting the definition of “violent felony,” explaining that there the meaning did not fit; with Section 921(a)(33)(A), on the other hand, the meaning did fit, so reliance was proper. *Id.*

1 Later, in *Villanueva*, 893 F.3d 123, this Circuit considered whether an
2 offense of first-degree assault that could be accomplished by poisoning qualified
3 as a violent felony under the ACCA force clause. Extending the Supreme Court’s
4 reasoning in *Castleman* to the context of ACCA, we concluded the statute did
5 qualify as a violent felony. We found persuasive *Castleman*’s “explanation of why
6 sprinkling poison constitutes use of physical force even if the offender does not
7 hit or even touch the victim,” noting the example of pulling the trigger of a gun.
8 *Id.* at 129; *cf. Hill*, 832 F.3d at 144 (concluding in light of *Castleman* that Hobbs Act
9 robbery is a crime of violence under § 924(c)(3)(A), notwithstanding that it may
10 be committed by indirect application of force).

11 Accordingly, both *Castleman* and *Villanueva* were addressed to the question
12 whether a low level of force that produces a violent result can qualify as use of
13 force under ACCA. Neither addressed, much less resolved, the question before
14 us, namely, whether the failure to act—by one who has a duty to act to protect

1 the victim—constitutes a “use of physical force” under ACCA.⁵ *See* 18 U.S.C.
 2 § 924(e)(2)(B)(i); *cf. United States v. Mayo*, 901 F.3d 218, 228-29 (3d Cir. 2018)
 3 (recognizing that neither *Castleman*, nor subsequent Third Circuit case law
 4 applying *Castleman* to the ACCA context, addressed the issue of crime by
 5 omission). Unlike New York first-degree manslaughter, the acts discussed in
 6 *Castleman* and *Villanueva* require *some* action that initiates a harmful consequence.
 7 By contrast, a defendant who commits a crime by omission definitionally takes
 8 no action and thus initiates nothing. This might occur, for example, when the
 9 mandatory caretaker defendant observes that the victim has, entirely through
 10 natural causes, entered into a condition that urgently requires administration of

⁵ That these decisions do not address our case is reinforced by the fact that both parties point to language from our opinion in *Villanueva*, which is apparently capacious enough to address the issue of crime by omission, but which would resolve the issue in opposite directions. *Compare Villanueva*, 893 F.3d at 128 (“[T]he inquiry as to ‘force,’ for federal law purposes, focuses on the causation of a consequence, rather than the physical act of initiating an action that leads to a consequence”) *and id.* (“[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force.” (quoting *Castleman*, 572 U.S. at 169)) *with id.* at 129 (describing *Castleman* as holding “that *initiating*, however gently, a consequence that inflicts injury constitutes the use of physical force” (emphasis added)).

1 medical help and, with intention to harm the victim, the defendant fails to
2 summon such help. As we read *Castleman* and *Johnson*, this scenario would not
3 constitute ACCA's required "use of physical force."

4 Judge Raggi also argues that we conflate "physical force" itself with the
5 "use" of such force. It is true, as Judge Raggi notes, that the Supreme Court said
6 in *Castleman* that "use" "conveys the idea that the thing being used (here,
7 'physical force') has been made the user's instrument." *Castleman*, 572 U.S. at 170-
8 71. She further notes that, in the example of a person who kills his victim by
9 poison, the Supreme Court explained that the "use of force" is not the "act of
10 sprinkling the poison; it is *the act of* employing poison knowingly as a device to
11 cause physical harm." *Id.* at 171 (internal quotation marks and brackets omitted)
12 (emphasis added). Under *Castleman*'s reading of the term "use," Judge Raggi
13 argues, because someone guilty of New York first-degree manslaughter must
14 have intended to cause at least serious physical injury, he "must be said to have
15 intentionally used the force causing death as his instrument without regard to
16 whether he did so by commission or omission."

1 To the extent that Judge Raggi argues that *Castleman* compels her reading,
2 she overstates the holding of that case, which explicitly did not reach the
3 question whether “causation of bodily injury necessarily entails violent force [for
4 ACCA purposes].” *Id.* at 167. As to the poison example, the Supreme Court’s
5 analysis does not compel Judge Raggi’s conclusion. It is at most ambiguous.
6 There, the Court explained that the use of force was “the *act* of employing
7 poison.” *Id.* at 171 (emphasis added). It did not contemplate a situation in which
8 a person stands by, taking no action whatsoever, and allows a physical harm to
9 occur with the intent to cause serious physical injury, and thus it cannot be said
10 to have answered the question whether such a situation constitutes “use” of the
11 injury-causing force.

12 We conclude that a crime that may be committed by complete inaction
13 does not have “as an element the use . . . of physical force against the person of
14 another,” under the meaning of ACCA. *See* 18 U.S.C. § 924(e)(B)(i). We consider
15 the example of a person having a legal duty to provide care to another who, with
16 intent to cause serious physical harm, fails to seek medical help when his ward
17 requires it. Notwithstanding the Government’s and Judge Raggi’s respectable

1 argument that, by availing himself or taking advantage of the preexisting force
2 that affected the ward, that the person did “use . . . physical force,” that
3 conclusion does not, as Judge Raggi suggests, follow from *Castleman*.

4 Judge Raggi further argues that it “makes no sense” to distinguish
5 between a defendant who, “intent on killing or seriously injuring another person
6 . . . himself sprinkled [poison] in a victim’s drink,” and one who, with the same
7 intentions and a “legal duty to intervene, . . . stood by and let the person imbibe
8 what defendant knew was a poisoned drink.” If Judge Raggi’s argument
9 depends on the notion that the two cases involve the same degree of moral
10 culpability, we do not disagree that both defendants are equally morally
11 culpable. Perhaps a perfectly constructed criminal law would treat them
12 identically. But what determines whether two defendants who have acted
13 differently but with similar degrees of moral culpability will be treated the same
14 or differently is the language of the statutes that cover their cases.

15 Notwithstanding Judge Raggi’s reasonable argument that a few words in
16 *Castleman* could be read broadly to mean that “use of violent force” includes

1 doing nothing, neither the statute nor the Supreme Court's interpretation of it
2 clearly communicates such a meaning.

3 In addition, to the extent that it may be seen as a close question whether
4 "use of physical force" includes crimes committed by omission, the burden is on
5 the government to show that a prior conviction counts as a predicate offense for
6 the purpose of an ACCA sentence enhancement. *See United States v. Savage*, 542
7 F.3d 959, 964 (2d Cir. 2008). Moreover, the rule of lenity, which "requires
8 ambiguous criminal laws to be interpreted in favor of the defendants subject to
9 them," *United States v. Santos*, 553 U.S. 507, 514 (2008), requires construing that
10 ambiguity in the defendant's favor. *See also Johnson v. United States*, 529 U.S. 695,
11 713 n.13 (2000) (noting that lenity applies "when the equipoise of competing
12 reasons cannot otherwise be resolved").

13 We therefore hold that New York first-degree manslaughter is not a crime
14 of violence under the force clause of ACCA because it can be committed by
15 inaction, while the ordinary meaning of the terms of ACCA are not satisfied by
16 inaction. The district court's vacatur of Scott's ACCA sentence under 18 U.S.C.
17 §§ 922(g)(1) and 924(e) is thus affirmed.

1 **II. A Prior Conviction for New York First-Degree Manslaughter Is**
2 **Not a Crime of Violence Pursuant to the Career Offender**
3 **Guideline**

4 The government also appeals the district court's interpretation of the
5 Career Offender Guideline as not applicable to New York first-degree
6 manslaughter. The Career Offender Guideline considers as a "career offender" a
7 defendant who at eighteen years of age or more committed an offense of
8 conviction "that is a felony [and is] either a crime of violence or a controlled
9 substance offense," and "ha[s] at least two prior felony convictions of either a
10 crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a).
11 Classification as a career offender typically results in a significantly higher
12 Guidelines sentencing range than would otherwise apply. The Career Offender
13 Guideline defines a "crime of violence" as:
14 any offense under federal or state law, punishable by imprisonment
15 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).

Id. § 4B1.2(a). The first clause of the Guideline, the “force clause,” is identical to the force clause in ACCA. *Compare id.* (defining “crime of violence” as involving “use, attempted use, or threatened use of physical force against the person of another”), *with* 18 U.S.C. § 924(e)(2)(B)(i) (defining “violent felony” as involving “use, attempted use, or threatened use of physical force against the person of another”). Accordingly, our analysis of whether New York first-degree manslaughter comes within the definition of a crime of violence under ACCA’s force clause is pertinent in answering whether the offense is a crime of violence under the force clause of the Career Offender Guideline. The Supreme Court in *Curtis Johnson* specified that in interpreting ACCA, the phrase “physical force” carries its “ordinary meaning.” *See* 559 U.S. at 138. We see no reason why the same phrase in the Career Offender Guideline should not also be interpreted in accordance with its ordinary meaning. We conclude that, pursuant to its

1 ordinary meaning, the phrase “has as an element the use of physical force”
2 similarly does not apply to an offense that may be committed by taking no action
3 whatsoever.

4 The Government argues that, even if the force clause does not apply, New
5 York first-degree manslaughter is a crime of violence under the Career Offender
6 Guideline’s “enumerated-offenses clause.” It argues that New York first-degree
7 manslaughter matches the generic offenses of murder, voluntary manslaughter,
8 or aggravated assault.

9 “Where the basis for categorizing a prior conviction as a crime of violence
10 is that the offense is specifically enumerated as such in the Career Offender
11 Guideline or its commentary, we undertake the categorical approach by
12 comparing the state statute to the generic definition of the offense.” *Jones*, 878
13 F.3d at 18. We determine the “generic” definition of the offense by looking to the
14 “sense in which the term is now used in the criminal codes of most States.”
15 *Taylor v. United States*, 495 U.S. 575, 598 (1990). To carry out this obligation, we
16 may “consult other sources, including federal criminal statutes, the Model Penal
17 Code, scholarly treatises, and legal dictionaries,” in addition to the state codes

1 themselves. *Castillo*, 896 F.3d at 150 (footnotes omitted). If New York first-degree
 2 manslaughter “has the same elements” or is narrower than the generic Career
 3 Offender Guideline analog, “the prior conviction can serve as a [Career
 4 Offender] predicate.” *Descamps*, 570 U.S. at 261. If, however, the state statute
 5 “sweeps more broadly than the generic crime,” the crime of conviction cannot
 6 serve as a Career Offender predicate. *Id.* We apply this exhaustive approach to
 7 determine whether New York first-degree manslaughter is the equivalent of or
 8 narrower than the generic crimes of murder, voluntary manslaughter, or
 9 aggravated assault.

10 **A. New York First-Degree Manslaughter Is Not Generic**
 11 **Voluntary Manslaughter**

12 As the government concedes, only a minority of states penalize the
 13 conduct of New York first-degree manslaughter as “murder” or “manslaughter.”
 14 The government nonetheless raises the novel argument that the offense qualifies
 15 as an enumerated crime of violence because the conduct it describes “is
 16 penalized in a majority of states as *either* ‘murder’ or ‘voluntary manslaughter,’”
 17 and those states can be aggregated to form a majority. Appellant’s Br. at 41

(emphasis added). It clarifies in its reply brief that its claim is that those states that penalize this conduct as “murder” should be counted as states in which the New York statute fits the “lesser crime” of manslaughter. The government identifies no authority that has interpreted the enumerated offenses clause in this manner. In support, it cites to *Taylor* for the proposition that “courts should disregard . . . ‘labels’ in applying the categorical approach.” *Id.* at 47 (citing *Taylor*, 495 U.S. at 590). It further notes that in *Taylor*, the Court held that the generic definition of burglary encompasses both “aggravated burglaries” and “run-of-the-mill burglaries,” and argues that here, murder should be treated as an aggravated form of “voluntary manslaughter.” Appellant’s Reply Br. at 17-18.

We find this “aggregation” argument unpersuasive. It may be true that the conduct in the New York statute “is penalized in a majority of states as either ‘murder’ or ‘voluntary manslaughter.’” Appellant’s Br. at 41. Nonetheless, according to the government’s own account, a majority of States (30) *do not* penalize that conduct as “murder,” and a majority of States (42) *do not* penalize that conduct as “voluntary manslaughter.” Under our case law, the statute does not fit any of the generic crimes. *See Castillo*, 896 F.3d at 152. To the extent that

1 the government attempts to find support in *Taylor* for its novel approach, that
2 reliance is misplaced. Far from holding that “courts should disregard . . . ‘labels’
3 in applying the categorical approach,” Appellant’s Br. at 47, *Taylor* held that an
4 enumerated offense in Section 924(e) refers to “the generic sense in which the
5 term is now used in the criminal codes of most States.” 495 U.S. at 598.

6 Moreover, an interpretation of “voluntary manslaughter” that includes
7 States in which the State offense would qualify as murder, on the basis that
8 “voluntary manslaughter” is a lesser-included crime of murder, would render
9 entirely superfluous Congress’s inclusion of the separate crime of “murder,”
10 because such states would necessarily count as states in which the offense in
11 question qualifies as “voluntary manslaughter.” See *Duncan v. Walker*, 533 U.S.
12 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word
13 of a statute.” (internal quotation marks omitted)); see also *Marx v. Gen. Revenue*
14 *Corp.*, 578 U.S. 371, 386 (2013) (“[T]he canon against surplusage is strongest when
15 an interpretation would render superfluous another part of the same statutory
16 scheme.”). The government’s analogy of murder to the inclusion of “aggravated
17 burglary” under “burglary” is thus inapt, among other potential reasons, because

1 Congress did not include a separate crime of “aggravated burglary” in addition
2 to “burglary,” whereas it *did* include the crime “murder” in addition to
3 “voluntary manslaughter.”

4 For these reasons, we reject the government’s proposed “aggregation”
5 approach. In any event, it is certainly not the clear meaning of the Guideline to
6 allow aggregation of states that treat manslaughter as one of the enumerated
7 crimes with those that treat manslaughter as another. The rule of lenity therefore
8 bars adding punitive consequences based on an interpretation that is not clearly
9 communicated.

10 The government makes two additional arguments as to why the New York
11 statute fits the generic crime of voluntary manslaughter, notwithstanding the fact
12 that it identifies only eight states in which its *mens rea* requirement of “intent to
13 do serious injury” is sufficient.

14 First, the government points to a treatise stating, “The usual view of
15 voluntary manslaughter . . . presupposes an intent to kill (*or perhaps an intent to do*
16 *serious injury* or to engage in very reckless conduct).” LaFave, Substantive Crim.
17 L. § 15.2(a)) (emphasis added). We do not find that an equivocal (“perhaps”)

1 statement in a law treatise, supported by a citation to only one state court case
2 addressing the law of only that state, to be sufficient to carry the government's
3 burden in demonstrating that the New York statute fits the generic crime of
4 voluntary manslaughter. Moreover, although there is no requirement that the
5 government expressly identify a majority of states in order to establish the
6 meaning of a generic crime, and although courts may consult sources other than
7 state codes including "scholarly treatises" in doing so, *see Castillo*, 896 F.3d at 150,
8 we find the government's reliance on this treatise particularly unavailing in light
9 of the fact that it has undertaken an apparently exhaustive attempt to identify
10 state criminal codes under which the New York statute would qualify as
11 "voluntary manslaughter," and yet came up only with a small minority.

12 Second, the government points to our decision in *Castillo*, in which we held
13 that "the generic definition of 'manslaughter' includes the unlawful killing of
14 another human being recklessly." *Id.* at 152. We explained:

15 [C]ommon law manslaughter . . . served as "a sort of catch-all
16 category . . . [for] homicides which are not bad enough to be murder
17 but which are too bad to be no crime whatever. Manslaughter was
18 later subdivided into voluntary and involuntary varieties. Voluntary
19 manslaughter was the intentional killing "in a heat of passion upon

adequate provocation,” and involuntary manslaughter was an unintentional killing caused by “criminal negligence” or “recklessness,” or during the commission of an unlawful act not amounting to a felony.

Id. at 151 (citing LaFave, Substantive Crim. L. §§ 15.1, 15.4). Relying on this passage, the government argues that the New York statute qualifies as voluntary manslaughter because, “Plainly, a violation of Section 125.20(1) . . . is not ‘unintentional killing caused by criminal negligence or recklessness.’” In making this statement, the government seems to assume that because the New York statute is not involuntary manslaughter, it must be voluntary manslaughter. We are not persuaded. It could equally be said that, plainly, Section 125.20(1)—which criminalizes causing death with the intent to cause serious physical injury—includes conduct beyond “intentional killing ‘in a heat of passion upon adequate provocation.’” *See Castillo*, 896 F.3d at 151. It is clear that the New York statute covers circumstances beyond provocation. Reliance on this passage in *Castillo* is thus unavailing. We conclude that the government has failed to carry its burden in showing that Scott’s conviction fits the generic crime of voluntary manslaughter.

**B. New York First-Degree Manslaughter Is Not Generic
Aggravated Assault**

The government also argues that New York first-degree manslaughter penalizes conduct that would be generic aggravated assault in “[v]irtually every state.” Appellant’s Br. at 49. We reject this argument because the government has not demonstrated that most states would penalize an omission as assault.

“The government bears the burden of showing that a prior conviction counts as a predicate offense for the purpose of a sentencing enhancement.”

United States v. Savage, 542 F.3d 959, 964 (2d Cir. 2008). Here, however, the government has not identified a single state that has actually punished a defendant’s failure to act as aggravated assault. Instead, the government relies on three sources to establish that a failure to act could be so punished: the treatise *American Jurisprudence*, the Model Penal Code, and LaFave’s treatise. These three sources do not carry the government’s burden.

The government’s citations to *American Jurisprudence* and the Model Penal Code are inapposite because they do not address the question of whether an omission may be punished as assault. The portion of *American Jurisprudence* upon

1 which the government relies concerns only the sufficiency of an indirect
 2 application of force to qualify as battery and has no bearing on whether battery
 3 can be committed by omission. 6 Am. Jur. 2d Assault & Battery § 6 (“The force
 4 used in a common law battery need not be applied directly to the body of the
 5 victim.”). The government then points this Court to the Model Penal Code for the
 6 general proposition that a person can be held liable for a culpable omission, but it
 7 fails to explain how these provisions constitute a statement that battery can be
 8 committed by omission. *See* Model Penal Code § 1.13 (defining “conduct,” in
 9 relevant part, as “an action or omission and its accompanying state of mind”); *id.*
 10 § 2.01 (requiring liability to be “based on conduct that includes a voluntary act or
 11 the omission to perform an act of which [a person] is physically capable”).⁶ These

⁶ By contrast, *American Jurisprudence* states that assault and battery require an overt act. In a section titled “Necessity and scope of overt act for criminal assault or battery,” the treatise states, “[C]ommission of the offense of assault requires *an overt act* intended to place the victim in fear or apprehension of bodily harm.” *Id.* § 21 (footnote omitted) (emphasis added) (citing state cases to establish that an overt act is necessary for the commission of assault and battery). “[T]here must be *some physical action* that, under all the circumstances of the incident, are [sic] sufficient to induce a reasonable apprehension by the victim that physical injury is imminent.” *Id.* § 23 (emphasis added). We find this discussion of omission in

1 provisions provide little guidance on whether a majority of states would
 2 criminalize a failure to act as aggravated assault.

3 Lastly, the government relies on LaFave to support its argument that a
 4 majority of states would criminalize New York first-degree manslaughter as
 5 aggravated assault. Judge Raggi, in support of this argument, points to a few
 6 cases cited by LaFave that involve assaults by omission. Our directive under
 7 *Taylor v. United States* is to look to “the generic sense in which the term is now
 8 used in the *criminal codes of most States*.” 495 U.S. at 598 (emphasis added). The
 9 few cases cited by Judge Raggi fall far short of showing that assault may be
 10 committed by omission in *most* states. The treatise therefore has limited
 11 persuasive value both because it cites only a few examples and because it is the
 12 sole source of support for the government’s contention.⁷ Given the government’s

the specific context of assault and battery to be more persuasive than a general statement of criminal law principles that does not refer to that context. *Cf.* *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (noting the “commonplace” interpretive canon “that the specific governs the general”).

⁷ Indeed, *Wharton’s Criminal Law*, also lacking citation, reaches the opposite conclusion regarding omission that LaFave does: “[I]n addition, of course, [the defendant] must perform an act evincing such intent [to cause contact to the

1 failure to cite *any* state code that criminalizes an omission as aggravated assault,
2 we decline to rest our decision today on a treatise that cites only a few cases of
3 assault by omission.

4 We hold that New York first-degree manslaughter does not fit the generic
5 definitions of murder, voluntary manslaughter, or aggravated assault, and we
6 therefore affirm the district court's conclusion that Scott cannot be sentenced
7 under the Career Offender Sentencing Guideline.

8 CONCLUSION

9 The State of New York has prosecuted New York first-degree
10 manslaughter based on a defendant's failure to act. We hold that because a
11 defendant can commit New York first-degree manslaughter without taking any
12 action, a defendant so convicted cannot be said to have used force sufficient to
13 trigger ACCA's sentencing enhancements or the force clause of the Career
14 Offender Guideline. We also hold that New York first-degree manslaughter is
15 not a match to the generic offenses of murder, voluntary manslaughter, or

person of another], but falling short of consummation." 2 *Wharton's Criminal Law*
§ 179.

1 aggravated assault and therefore does not satisfy the enumerated-offenses clause
2 of the Career Offender Guideline. The order and judgment of the district court is
3 therefore AFFIRMED.