

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

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6
7 August Term, 2011

8
9 (Argued: March 8, 2012 Decided: August 29, 2012)

10
11 Docket No. 10-1400-cr

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13
14 UNITED STATES OF AMERICA,

15
16 *Appellee,*

17
18 -v.-

19
20 RAUL REYES, AKA RAOUL REYES, AKA RICO REYES, AKA PAUL REYES,
21 AKA RAUL VASQUEZ REYES, AKA RAULI REYES, AKA JAIME COLON,
22 AKA JAIME RODRIGUEZ,

23
24 *Defendant-Appellant.*

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27
28 Before:

29
30 KATZMANN, WESLEY, *Circuit Judges*, UNDERHILL, *District*
31 *Judge.**

32
33 Appeal from a judgment of the United States District
34 Court for the Southern District of New York (Preska, J.),
35 entered on April 12, 2010, pursuant to which the defendant-
36 appellant was sentenced to a term of imprisonment of 188
37 months.

38
39 VACATED and REMANDED.

*The Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

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4 MARY ANNE WIRTH, Bleakley Platt & Schmidt, LLP,
5 White Plains, NY, *for Defendant-Appellant*.
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7 JENNIFER E. BURNS, Assistant United States Attorney
8 (Justin Anderson, Assistant United States
9 Attorney, *on the brief*), *for* Preet Bharara,
10 United States Attorney for the Southern
11 District of New York, New York, NY.
12
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14
15 PER CURIAM:

16 Defendant-Appellant Raul Reyes pleaded guilty to one
17 count of bank robbery in violation of 18 U.S.C. § 2113. The
18 district court sentenced Reyes as a "career offender" under
19 United States Sentencing Guideline ("U.S.S.G." or
20 "Guidelines") § 4B1.1(a). In doing so, however, the
21 district court adopted inconsistent findings in the
22 Probation Department's Presentence Report ("PSR") regarding
23 Reyes's prior convictions. This case raises an issue of
24 first impression in our Circuit-whether a district court may
25 rely on a PSR's description of a defendant's pre-arrest
26 conduct that culminated in a prior conviction to determine
27 whether that prior conviction constitutes one for a "crime
28 of violence" under U.S.S.G. § 4B1.2(a)(1), where the
29 defendant makes no objection to the PSR's description. We

1 hold that it may not. We therefore vacate the sentence
2 imposed by the district court and remand for proceedings
3 consistent with this opinion.

4 **Background**

5 The facts are largely undisputed. On July 28, 2008,
6 Reyes robbed a bank in Manhattan. After threatening an
7 employee with what appeared to be an explosive device, Reyes
8 absconded with approximately \$14,000. Without the benefit
9 of a plea agreement, Reyes pleaded guilty to one count of
10 bank robbery in violation of 18 U.S.C. § 2113(a) and (d).

11 Shortly before Reyes pleaded guilty, the government
12 submitted a letter pursuant to *United States v. Pimentel*,
13 932 F.2d 1029, 1034 (2d Cir. 1991). That letter outlined
14 the government's position on the application of the
15 Guidelines to Reyes's case. As relevant here, the
16 government stated that, in its view, Reyes was a "career
17 offender" under U.S.S.G. § 4B1.1(a) because he had been
18 convicted of two previous "crimes of violence"—battery on a
19 law enforcement officer in violation of Florida Statute
20 section 784.07, and robbery in violation of Florida Statute
21 section 812.13. As a "career offender" convicted of two
22 prior crimes of violence and facing a charge that carried a

1 maximum of 25 years' imprisonment, Reyes would have his
2 offense level elevated to level 34. Contemplating a 3-level
3 reduction for acceptance of responsibility under U.S.S.G.
4 § 3E1.1 and that Reyes would be placed in Criminal History
5 Category VI, the government advocated for a Guidelines range
6 of 188 to 235 months' imprisonment.

7 The Probation Department prepared a PSR in advance of
8 Reyes's sentencing. The PSR begins by correctly summarizing
9 the government's *Pimentel* letter and its conclusion that
10 Reyes was a career offender under U.S.S.G. § 4B1.1. In
11 paragraph 47 of the report, however, the PSR states
12 inarticulately that Reyes was a career offender because he
13 had "at least two prior felony convictions of either a crime
14 of violence." PSR ¶ 47. Then, in paragraph 86, the PSR
15 states that Reyes is a career offender under the Guidelines
16 because he "has prior felony convictions involving a crime
17 of violence and a controlled substance offense." PSR ¶ 86.
18 The PSR later repeats this statement in its "recommendation"
19 section.

20 Although the PSR never explicitly identifies the prior
21 convictions on which it relies to classify Reyes as a career
22 offender, it lists the following, among several other

1 convictions, in detailing Reyes's criminal history: (1) a
2 January 2009 conviction in Puerto Rico for a "controlled
3 substance offense"; (2) a May 2005 Florida conviction for
4 robbery; and (3) a May 2005 Florida conviction for battery
5 on a law enforcement officer. The PSR also provides a
6 description of the conduct underlying Reyes's 2005 battery
7 conviction. It states, "On March 19, 2004, the defendant
8 was detained at Falkenburg Road Jail when he caused a
9 disturbance in the pod. A detention deputy responded and
10 spoke with the defendant. The defendant then struck the
11 deputy in the nose with a closed fist." PSR ¶ 73. The PSR
12 does not provide the source of this information.

13 On April 7, 2010, Reyes appeared before the district
14 court for sentencing. In his sentencing memorandum, Reyes's
15 counsel did not object to the facts contained in the PSR,
16 the PSR's classification of Reyes as a career offender, or
17 the PSR's calculation of the Guidelines range. Indeed, at
18 the sentencing hearing, Reyes's counsel noted that he had
19 "[n]o objections to the facts or the [G]uidelines
20 calculations" set forth in the PSR. App. 47. In the
21 absence of an objection, the district court accepted the
22 PSR's findings, including those that contained inaccuracies

1 and inconsistencies regarding which crimes served as
2 predicates for the career offender enhancement.

3 The government noted that Reyes had a "very long and
4 very violent criminal history" and highlighted for the
5 district court a number of Reyes's prior offenses, including
6 both his 2005 robbery conviction and his 2005 conviction for
7 battery on a law enforcement officer. App. 50. The
8 district court then sentenced Reyes to 188 months'
9 incarceration. The court characterized Reyes's "very
10 lengthy and very violent criminal history" as the "driving
11 force" behind the sentence. App. 52. The district court
12 did not, however, specifically discuss Reyes's status as a
13 career offender.

14 Reyes timely appealed the district court's judgment.
15 In January 2011, Reyes filed an appellate brief in this
16 Court. In his brief, he claims that the district court
17 committed plain error in adopting the PSR's conclusions
18 regarding his status as a career offender under U.S.S.G.
19 § 4B1.1. Specifically, he argues that (1) he does not have
20 a prior conviction for a controlled substance offense that
21 counts towards his classification as a career offender;(2)
22 under the Supreme Court's decision in *Johnson v. United*

1 *States*, 130 S. Ct. 1265 (2010), a Florida battery conviction
2 does not necessarily constitute a "crime of violence"; and
3 (3) there was insufficient evidence in the record to
4 determine whether his particular battery conviction
5 constituted a conviction for a "crime of violence." In
6 support of the latter point, Reyes contends that the
7 district court was not entitled to rely on the PSR's
8 uncontested description of his pre-arrest conduct that
9 resulted in his conviction for battery of a law enforcement
10 officer to determine whether the battery was a "crime of
11 violence." He notes that this Court left open that question
12 in *United States v. Rosa*, 507 F.3d 142, 156 (2d Cir. 2007).

13 In April 2011, the government moved to remand for
14 resentencing in light of *Johnson*. A panel of this Court
15 rebuffed the government's request. The panel directed the
16 government to file a brief addressing

17 (1) whether Reyes's failure to object to the facts
18 contained in his [PSR] describing the offense
19 conduct underlying his prior conviction for
20 battery of a law enforcement officer constituted
21 an admission of those facts; (2) whether a
22 sentencing court may use such an admission to find
23 that a prior offense constitutes a 'crime of
24 violence' under U.S.S.G. § 4B1.2(a)(1); and (3) if
25 so, whether the district court committed plain
26 error in adopting the PSR's conclusion that Reyes
27 qualified as a career offender.
28

1 *United States v. Reyes*, No. 10-1400-cr (2d Cir. Aug. 2,
2 2011) (motion order). Following our directive, the
3 government argues that vacatur of Reyes's sentence is
4 inappropriate and that his sentence should be affirmed.

5 **Discussion**

6 Because Reyes failed to object below to his
7 classification as a career offender under U.S.S.G. § 4B1.1,
8 we review his classification as such for plain error only.
9 *See United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003).
10 Plain error exists where (1) the district court committed
11 error; (2) the error is plain; (3) the error affects the
12 defendant's substantial rights; and (4) the error seriously
13 affects the "fairness, integrity or public reputation of
14 judicial proceedings." *United States v. Greer*, 631 F.3d
15 608, 612 (2d Cir. 2011).

16 Pursuant to U.S.S.G. § 4B1.1(a), a defendant is a
17 career offender if:

18 (1) the defendant was at least eighteen years old
19 at the time the defendant committed the instant
20 offense of conviction; (2) the instant offense of
21 conviction is a felony that is either a crime of
22 violence or a controlled substance offense; and
23 (3) the defendant has at least two prior
24 convictions of either a crime of violence or a
25 controlled substance offense.
26
27

1 As is relevant here, the Guidelines define a "crime of
2 violence" as an offense punishable by imprisonment exceeding
3 one year that "has as an element the use, attempted use, or
4 threatened use of physical force against the person of
5 another." U.S.S.G. § 4B1.2(a)(1). The "crime of violence"
6 convictions must be sustained prior to the defendant
7 committing the offense for which he is being sentenced.
8 U.S.S.G. § 4B1.2(c).

9 Here, the district court committed an error that was
10 plain-it adopted findings in the PSR that conclude that
11 Reyes is a career offender because he has convictions for
12 both a crime of violence and a controlled substance offense.
13 PSR ¶ 86. Reyes sustained the controlled substance offense
14 *after* he committed the instant offense. Therefore, that
15 conviction was not a proper predicate offense for the
16 application of the career offender enhancement. See
17 U.S.S.G. § 4B1.2(c).

18 But to prevail on plain error review, Reyes must do
19 more than show that the district court committed an obvious
20 error. He must further demonstrate that the error affected
21 his "substantial rights"-i.e., that it "affected the outcome
22 of the district court proceedings." *United States v.*

1 *Marcus*, 628 F.3d 36, 42 (2d Cir. 2010) (internal quotation
2 marks omitted). That decision turns on whether Reyes's 2005
3 Florida conviction for battery on a law enforcement officer
4 constitutes a conviction for a "crime of violence" under the
5 Guidelines. And that inquiry is determined by whether a
6 sentencing court may rely on a PSR's uncontested description
7 of Reyes's pre-arrest conduct that resulted in his prior
8 conviction for battery on a law enforcement officer to
9 decide that the prior conviction is one for a "crime of
10 violence" under U.S.S.G. § 4B1.2(a)(1). We hold that it may
11 not.

12
13 Florida Statute section 784.07 criminalizes battery
14 committed on a law enforcement officer. In Florida, battery
15 occurs when a person (1) "[a]ctually and intentionally
16 touches . . . another person against the will of the other";
17 (2) "intentionally . . . strikes another person against the
18 will of the other"; or (3) "[i]ntentionally causes bodily
19 harm to another person." Fla. Stat. § 784.03(1)(a). The
20 slightest unwanted intentional physical contact constitutes
21 battery under Florida law. *Johnson*, 130 S. Ct. at 1269-70
22 (citing *State v. Hearn*, 961 So.2d 211, 218 (Fla. 2007)).
23 Therefore, battery on a law enforcement officer, if

1 accomplished only by "actually and intentionally
2 touch[ing]," does not constitute a "crime of violence" under
3 U.S.S.G. § 4B1.2 because it does not involve the "use of
4 physical force," as that phrase is interpreted by the
5 Supreme Court. *Id.* at 1269-73.¹

6 To ascertain whether Reyes's conviction for battery on
7 a law enforcement officer constitutes a conviction for a
8 "crime of violence," we employ a two-step "modified
9 categorical approach." *See Walker*, 595 F.3d at 443; *United*
10 *States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008). The
11 first step requires the court to determine "whether the
12 statute of the prior conviction criminalizes conduct that
13 falls exclusively" within the Guidelines' definition of
14 "crime of violence." *See Savage*, 542 F.3d at 964. If so,
15 the inquiry ends. But if the statute of conviction also
16 criminalizes conduct that does not fall within the

¹*Johnson* dealt with sentence enhancements under the Armed Career Criminal Act ("ACCA"). The ACCA's definition of "violent felony" is identical in all material respects to U.S.S.G § 4B1.2(a)'s definition of "crime of violence." *See United States v. Walker*, 595 F.3d 441, 443 n.1 (2d Cir. 2010); *United States v. Palmer*, 68 F.3d 52, 55 (2d Cir. 1995). Therefore, cases interpreting the ACCA's definition of "violent felony" are highly persuasive in interpreting the Guidelines' definition of "crime of violence." *Walker*, 595 F.3d at 443 n.1. Many of the cases cited in this opinion deal with the ACCA, not the Guidelines.

1 Guidelines' definition of a "crime of violence," the
2 government must demonstrate that the conviction
3 "necessarily" rested on facts identifying the conviction as
4 one for a "crime of violence." *Walker*, 595 F.3d at 444
5 (internal quotation marks omitted).

6 When a court is required to look beyond the statutory
7 definition of a prior offense to determine whether it
8 constitutes a "crime of violence," its inquiry is
9 circumscribed. Generally, a sentencing court must limit
10 itself "to examining the statutory definition, charging
11 document, written plea agreement, transcript of plea
12 colloquy, and any explicit factual finding by the trial
13 judge to which the defendant assented." *Shepard v. United*
14 *States*, 544 U.S. 13, 16 (2005); see *Johnson*, 130 S. Ct. at
15 1273. This general limitation on the sentencing court's
16 inquiry is driven by U.S.S.G. § 4B1.1(a)'s focus on the
17 defendant's prior conviction, rather than the conduct
18 underlying the conviction, as well as a need to avoid
19 collateral trials. See *Taylor v. United States*, 495 U.S.
20 575, 600-01 (1990) (analyzing nearly identical language in
21 the ACCA); see also *Shepard*, 544 U.S. at 23 (same). "[T]he
22 critical issue is whether the judicial record of the

1 defendant's prior conviction establishes that his guilty
2 plea 'necessarily admitted [facts demonstrating that his
3 conviction was for a crime of violence].'" *United States v.*
4 *Baker*, 665 F.3d 51, 56 (2d Cir. 2012) (quoting *Shepard*, 544
5 U.S. at 26) (brackets in original).

6 The problem here is that the government submitted no
7 evidence demonstrating that Reyes's conviction for battery
8 on a law enforcement officer under Florida Statute section
9 784.07 necessarily rested on anything but the slightest
10 unwanted physical contact. The government admits as much,
11 but seeks safe harbor in the defendant's failure to object
12 to the PSR's description of Reyes's pre-arrest conduct that
13 culminated in his conviction for battery of a law
14 enforcement officer. The PSR states-without providing the
15 source of its information-that Reyes struck a detention
16 deputy in the face with a closed fist while incarcerated at
17 the Falkenburg Road Jail in Florida. The government argues
18 that because Reyes failed to object to that description, he
19 admitted facts that establish that his battery offense
20 involved the use of "physical force" and thus constituted a
21 "crime of violence" under U.S.S.G. § 4B1.2(a).

1 As a general matter, reliance on a federal PSR's
2 factual description of a defendant's pre-arrest conduct to
3 determine whether a prior offense constitutes a "crime of
4 violence" under U.S.S.G. § 4B1.2(a)(1) is prohibited. See
5 *Rosa*, 507 F.3d at 156; *Palmer*, 68 F.3d at 59. This is
6 because "a current presentence report prepared for a
7 sentencing court presented with the enhancement issue would
8 ordinarily be a surrogate for the elaborate factfinding
9 process regarding the defendant's prior offenses that was
10 criticized in *Taylor*." *Palmer*, 68 F.3d at 59 (internal
11 quotation marks omitted) (emphasis removed). However, in
12 *United States v. Rosa*, this Court left open the question of
13 whether "a sentencing court may look to a PSR prepared for
14 that case to determine the underlying facts of a previous
15 conviction when the defendant fails to object to the PSR's
16 findings" in order to ascertain whether a defendant's prior
17 offense constituted a "crime of violence." 507 F.3d at
18 156.²

²*Rosa* is an ACCA case, and thus the *Rosa* court was tasked with determining whether a prior offense constituted a "violent felony," not a "crime of violence." However, as noted in footnote 1, the ACCA's definition of "violent felony" and U.S.S.G. § 4B1.2(a)'s definition of "crime of violence" are identical in all material respects.

1 The government urges us to hold that such reliance is
2 proper. In support of its argument, the government contends
3 that uncontested descriptions of the circumstances
4 underlying prior convictions found in a PSR are similar to
5 the sources enumerated by the *Shepard* Court. It also points
6 out that use of those descriptions does not implicate the
7 collateral trial or fairness concerns that animate the
8 limits inherent in the modified categorical approach.
9 Further, the government claims that reliance on an
10 uncontested portion of the PSR is permissible because it is
11 well established that undisputed portions of the PSR may be
12 accepted as fact by a sentencing court.

13 We have little trouble concluding that a sentencing
14 court may not rely on a PSR's description of a defendant's
15 pre-arrest conduct that resulted in a prior conviction to
16 determine that the prior offense constitutes a "crime of
17 violence" under U.S.S.G. § 4B1.2(a)(1), even where the
18 defendant does not object to the PSR's description. It is
19 true, as the government notes, that collateral trial
20 concerns are not implicated by that reliance. But
21 collateral trial concerns are not the only concerns
22 animating the modified categorical approach. U.S.S.G.

1 § 4B1.1's language clearly focuses on the defendant's
2 conviction, not the defendant's conduct in a particular
3 case. See *Taylor*, 495 U.S. at 600-01 (interpreting nearly
4 identical language in the ACCA).

5 It is impossible on this record to know whether Reyes's
6 conviction necessarily rested on the "intentionally strikes"
7 or "intentionally causes bodily harm" prongs—rather than the
8 "intentionally touches" prong—of the battery statute. At
9 most, the PSR's description tells us what Reyes did, not the
10 specific provision of the Florida statute for which he was
11 convicted. Even if Reyes did punch the corrections officer
12 in the face, he could have pleaded guilty to battery on a
13 law enforcement officer by simply admitting that he touched
14 the corrections officer in an unwanted manner. If that were
15 the case, the conviction would rest on facts not involving
16 the "use of physical force" and thus the offense would not
17 be a "crime of violence" under the Guidelines. See *Johnson*,
18 130 S. Ct. at 1269-73. For this reason, reliance on the
19 PSR's uncontested description of pre-arrest conduct that
20 resulted in a defendant's prior conviction to determine
21 whether that prior conviction constitutes one for a crime of
22 violence is improper.

1 The district court's error in sentencing Reyes as a
2 career offender on this record affected his substantial
3 rights because it resulted in an elevated offense level
4 under the Guidelines. We must vacate the sentence imposed
5 by the district court and remand for proceedings consistent
6 with this opinion. On remand, the district court shall
7 provide the government with an opportunity to introduce
8 evidence demonstrating that Reyes's battery conviction was a
9 "crime of violence" under U.S.S.G. § 4B1.2(a).³

³The easiest way, and the only one explicitly approved by our case law, for the government to prove the nature of Reyes's prior battery conviction on remand is to use *Shepard*-approved sources. We leave for another day the question of whether *Shepard*-approved sources are the only kinds of evidence that may be introduced for such a purpose, or whether the parties may stipulate (either explicitly or by failing to object) to the nature of a prior conviction for Guidelines purposes. See, e.g., *United States v. Aviles-Solarzano*, 623 F.3d 470, 475 (7th Cir. 2010) (suggesting that parties may stipulate to the nature of a defendant's prior conviction for Guidelines purposes).

In the event that the government is unable to establish that the career offender enhancement under U.S.S.G. § 4B1.1(a) is warranted (and thus Reyes's offense level is not automatically elevated to level 34), we note that the PSR incorrectly applied separate enhancements under U.S.S.G. § 2B3.1(b)(2)(E) for brandishing a dangerous weapon and U.S.S.G. § 2B3.1(b)(2)(F) for making a death threat during the offense. Only one enhancement under U.S.S.G. § 2B3.1(b)(2) may be employed. See *United States v. Triplett*, 104 F.3d 1074, 1082 (8th Cir. 1997); *United States v. Farrier*, 948 F.2d 1125, 1127 (9th Cir. 1991); see also *United States v. Murray*, No. 97-6735, 1999 WL 187192, at *4 (4th Cir. Apr. 6, 1999) (unpublished).

1 A final point. Although a sentencing court may not
2 rely on a PSR's description of pre-arrest conduct that
3 resulted in a prior conviction to determine whether that
4 prior conviction constitutes a crime of violence under the
5 Guidelines, a sentencing court can consider that conduct
6 under 18 U.S.C. § 3553(a) when fashioning the defendant's
7 sentence. Such conduct may be probative of the "history and
8 characteristics of the defendant." 18 U.S.C. § 3553(a).

9 **Conclusion**

10 The district court's judgment of April 12, 2010, which
11 sentenced the defendant to 188 months' imprisonment, is
12 hereby VACATED. The case is REMANDED for resentencing
13 proceedings consistent with this opinion.