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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8
9 United States of America
10 Plaintiff,
11 v.
12 Vicente Rios-Rios,
13 Defendant.

CR-07-1264-PHX-EHC

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S OBJECTION
TO PRE-SENTENCE REPORT**

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15 The United States, through undersigned counsel, submits this response to the defendant's
16 objection to the pre-sentence report. The defendant has objected to the 16-level sentencing
17 enhancement assessed in paragraph 16 of the pre-sentence report; and, for the reasons set forth
18 in the accompanying Memorandum of Points and Authorities, the United States recommends that
19 the Court overrule the defendant's objection.

20 Respectfully submitted this 20th day of March 2006.

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1 **I. FACTS AND PROCEDURAL HISTORY**

2 On September 28, 2007, the defendant was arrested and charged with violating 8 U.S.C. §
3 1326 (a), enhanced by § 1326 (b)(1), Reentry after Deportation. The defendant subsequently
4 pleaded guilty by way of plea agreement. The pre-sentence report assessed the defendant a 16-
5 level increase under USSG §2L1.2(b)(1)(A) based on the defendant’s prior conviction for battery
6 under Florida Statute 784.07. PSR ¶13. The defendant filed an objection to the enhancement
7 arguing that the enhancement should be in the amount of 4 levels, not 16 levels. The objection
8 raises the issue of whether the available judicially noticeable documents support a conclusion
9 that the defendant’s battery conviction qualifies as a crime of violence under USSG
10 §2L1.2(b)(1)(A). The United States concedes that it does not possess the judicially noticeable
11 documents required to prove the defendant’s conviction for battery is a crime of violence.
12 However, the defendant does have another conviction, for aggravated assault under Florida
13 Statute 784.021, that does categorically qualify as a crime of violence.

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15 **II. LAW AND APPLICATION**

16 A “crime of violence” is any crime that “has as an element the use, attempted use, or
17 threatened use of physical force against the person of another.” USSG §2L1.2 comment.
18 (n.1(B)(iii). When determining whether the conviction in question qualifies as a crime of
19 violence, the Court should first look to the fact of the conviction and the statutory definition of
20 that conviction. *Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Lopez-Montanez*,
21 291 F.3d 926, 929 (9th Cir. 2005). When the language of the statute that forms the basis of the
22 conviction penalizes both conduct which qualifies as a crime of violence and conduct which
23 does not, the Court may then look to judicially noticeable facts to decide whether the conviction
24 meets the definition of a crime of violence. *United States v. Lopez-Montanez*, 291 F.3d at 931.

25 The United States agrees that the defendant’s battery conviction does not categorically
26 qualify as a crime of violence. A battery under Florida law includes intentionally touching
27 another person against his or her will. F.S. 784.03. Simply touching a person is not an act of

1 violence, and offensive touching is not tantamount to a crime of violence. See *Ortega-Mendez*
2 *v. Gonzales*, 450 F.3d 1010, 1017 (9th Cir. 2006). The available judicially noticeable facts in
3 the instant case are an information alleging that the defendant committed the battery by
4 “intentionally touching or striking” an officer and a judgment. These documents by themselves
5 do not conclusively establish that the defendant committed a violent act.

6 The probation department, however, discovered that the defendant does have another
7 conviction, for aggravated assault, and this conviction categorically qualifies as a crime of
8 violence. PSR ¶24. Florida defines the term “assault” as “an intentional, unlawful threat by word
9 or act to do violence to the person of another, coupled with an apparent ability to do so, and
10 doing some act which creates a well-founded fear in such other person that such violence is
11 imminent.” F.S. 784.011. This language tracks the 9th Circuit’s definition of an assault. See
12 *United States v. Lewellyn*, 481 F.3d 695, 697 (9th Cir. 2007)(the Court stated that the generic
13 definition of an assault includes the “threat to inflict injury upon the person of another which,
14 when coupled with an apparent present ability, causes a reasonable apprehension of immediate
15 bodily harm”). Under Florida law, an aggravated assault is an assault with a deadly weapon,
16 without the intent to kill, or an assault with an intent to commit a felony. F.S. 784.021.
17 Furthermore, an aggravated assault is among the offenses enumerated in the Sentencing
18 Guidelines’ definition of a crime of violence, USSG §2L1.2 comment. (n.(1)(B)(iii)); and, when
19 an offense is specifically enumerated in the application note to §2L1.2, the 9th Circuit has
20 “consistently drawn the conclusion that the offense is a *per se* crime of violence under the
21 Guidelines.” *United States v. Rodriguez-Guzman*, 506 F.3d 738, 740 (9th Cir. 2007) citing
22 *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir.2005).

1 **III. CONCLUSION**

2 The United States recommends that the Court overrule the defendant's objection. While the
3 defendant's battery conviction does not categorically qualify as a crime of violence, his
4 conviction for aggravated assault in paragraph 24 of the report is categorically a crime of
5 violence.

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7 Respectfully submitted this 20th day of March 2008.

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on March 20, 2008, I electronically transmitted the attached document
23 to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic
24 Filing to the following ECF registrants:

25 Juan Rocha
Attorney for Defendant

26 by: s/ Timothy F. Andrews
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