No. --

IN THE

SUPREME COURT OF THE UNITED STATES

CLIFFORD GENE WALLACE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas offense of aggravated assault by threat is a "crime of violence" under USSG §4B1.2?
2. Whether the Texas offense of aggravated robbery by threat is a "crime of violence" under USSG §4B1.2?

PARTIES

Clifford Gene Wallace is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Clifford Gene Wallace respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Wallace,* No. 18-11356, 774 Fed. Appx. 223 (5th Cir. August 2, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appendix B]. The written judgment of conviction and sentence was issued October 9, 2018, and is also provided in the Appendix to the Petition. [Appendix A].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on August 2, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND FEDERAL SENTENCING GUIDELINES INVOLVED

Federal Sentencing Guideline 4B1.2 provide:

> (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).
> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
> (c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony

convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Tex. Penal Code §22.01 provides:

(a) A person commits an offense if the person:
(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
(1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant;
(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:
(A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or
(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth;
(3) a person who contracts with government to perform a service in a facility as defined by Section 1.07(a)(14), Penal Code, or Section 51.02(13) or (14), Family Code, or an employee of that person:
(A) while the person or employee is engaged in performing a service within the scope of the contract, if the actor knows the person or employee is authorized by government to provide the service; or
(B) in retaliation for or on account of the person's or employee's performance of a service within the scope of the contract;
(4) a person the actor knows is a security officer while the officer is performing a duty as a security officer;
(5) a person the actor knows is emergency services personnel while the person is providing emergency services;
(6) a pregnant individual to force the individual to have an abortion; or
(7) a person the actor knows is pregnant at the time of the offense.
(b-1) Notwithstanding Subsection (b), an offense under Subsection (a)(1) is a felony of the third degree if the offense is committed:
(1) while the actor is committed to a civil commitment facility; and
(2) against:
(A) an officer or employee of the Texas Civil Commitment Office:

(i) while the officer or employee is lawfully discharging an official duty at a civil commitment facility; or
(ii) in retaliation for or on account of an exercise of official power or performance of an official duty by the officer or employee; or
(B) a person who contracts with the state to perform a service in a civil commitment facility or an employee of that person:
(i) while the person or employee is engaged in performing a service within the scope of the contract, if the actor knows the person or employee is authorized by the state to provide the service; or
(ii) in retaliation for or on account of the person's or employee's performance of a service within the scope of the contract.
(b-2) Notwithstanding Subsection (b)(1), an offense under Subsection (a)(1) is a felony of the second degree if the offense is committed against a person the actor knows is a peace officer or judge while the officer or judge is lawfully discharging an official duty or in retaliation or on account of an exercise of official power or performance of an official duty as a peace officer or judge.
(b-3) Notwithstanding Subsection (b)(2), an offense under Subsection (a)(1) is a felony of the second degree if:
(1) the offense is committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code;
(2) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, or 21.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; and
(3) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.
(c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor, except that the offense is:
(1) a Class A misdemeanor if the offense is committed under Subsection (a)(3) against an elderly individual or disabled individual, as those terms are defined by Section 22.04;
(2) a Class B misdemeanor if the offense is committed by a person who is not a sports participant against a person the actor knows is a sports participant either:
(A) while the participant is performing duties or responsibilities in the participant's capacity as a sports participant; or
(B) in retaliation for or on account of the participant's performance of a duty or responsibility within the participant's capacity as a sports participant; or
(3) a Class A misdemeanor if the offense is committed against a pregnant individual to force the individual to have an abortion.
(d) For purposes of Subsection (b), the actor is presumed to have known the person assaulted was a public servant, a security officer, or emergency services personnel if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant or status as a security officer or emergency services personnel.
(e) In this section:
(1) “Emergency services personnel” includes firefighters, emergency medical services personnel as defined by Section 773. 003, Health and Safety Code, emergency room personnel, and other individuals who, in the course and scope of employment or as a volunteer, provide services for the benefit of the general public during emergency situations.

(2) Repealed by Acts 2005, 79th Leg., ch. 788, § 6.
(3) "Security officer" means a commissioned security officer as defined by Section 1702.002, Occupations Code, or a noncommissioned security officer registered under Section 1702.221, Occupations Code.
(4) "Sports participant" means a person who participates in any official capacity with respect to an interscholastic, intercollegiate, or other organized amateur or professional athletic competition and includes an athlete, referee, umpire, linesman, coach, instructor, administrator, or staff member.
(f) For the purposes of Subsections (b)(2)(A) and (b-3)(2) :
(1) a defendant has been previously convicted of an offense listed in those subsections committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if the defendant was adjudged guilty of the offense or entered a plea of guilty or nolo contendere in return for a grant of deferred adjudication, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision; and
(2) a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed.
(g) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

Tex. Penal Code §22.02 provides:

(a) A person commits an offense if the person commits assault as defined in § 22.01 and the person:
(1) causes serious bodily injury to another, including the person's spouse; or
(2) uses or exhibits a deadly weapon during the commission of the assault.
(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if:
(1) the actor uses a deadly weapon during the commission of the assault and causes serious bodily injury to a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code;
(2) regardless of whether the offense is committed under Subsection (a)(1) or (a)(2), the offense is committed:
(A) by a public servant acting under color of the servant's office or employment;
(B) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant;
(C) in retaliation against or on account of the service of another as a witness, prospective witness, informant, or person who has reported the occurrence of a crime; or
(D) against a person the actor knows is a security officer while the officer is performing a duty as a security officer; or
(3) the actor is in a motor vehicle, as defined by Section 501.002, Transportation Code, and:
(A) knowingly discharges a firearm at or in the direction of a habitation, building, or vehicle;
(B) is reckless as to whether the habitation, building, or vehicle is occupied; and
(C) in discharging the firearm, causes serious bodily injury to any person.

(c) The actor is presumed to have known the person assaulted was a public servant or a security officer if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant or status as a security officer.
(d) In this section, "security officer" means a commissioned security officer as defined by Section 1702.002, Occupations Code, or a noncommissioned security officer registered under Section 1702.221, Occupations Code.

Tex. Penal Code §29.02 provides:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
(1) intentionally, knowingly, or recklessly causes bodily injury to another; or
(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.
(b) An offense under this section is a felony of the second degree.

Tex. Penal Code §29.03 provides:

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
(1) causes serious bodily injury to another;
(2) uses or exhibits a deadly weapon; or
(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:
(A) 65 years of age or older; or
(B) a disabled person.
(b) An offense under this section is a felony of the first degree.
(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Clifford Gene Wallace pleaded guilty to one count of possessing a firearm after having sustained a prior felony conviction, and one count of possessing marijuana with intent to distribute it. *See* (Record in the Court of Appeals, at 45-41).

A Presentence Report (PSR) calculated an aggregate Guideline range of 130-162 months imprisonment, *see* (Record in the Court of Appeals, at 192), which range was adopted by the court, *see* (Record in the Court of Appeals, at 102). The Guideline range stemmed from a base offense level of 26 on USSG §2K2.1. *See* (Record in the Court of Appeals, at 171-172). The court applied this elevated base offense level because the court determined that Petitioner had previously sustained two convictions for "crimes of violence" and possessed a firearm capable of accepting a large-capacity magazine. *See* (Record in the Court of Appeals, at 171-172).

In particular, the court treated Petitioner's Texas convictions for aggravated robbery and aggravated assault on a public servant with a deadly weapon both as crimes of violence. *See* (Record in the Court of Appeals, at 172). The indictments and judicial confession related to the aggravated robbery conviction showed that the defendant threatened imminent bodily injury with a deadly weapon during a theft. *See* (ROA.201-202). The same documents in the assault showed that the defendant threatened injury with a deadly weapon against a public servant. *See* (Record in the Court of Appeals, at 209-210).

Acknowledging that his claim was foreclosed by *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007), Petitioner objected to the PSR's conclusion that Texas aggravated assault constitutes a crime of violence. *See* (Record in the Court of Appeals, at 213). The district court overruled the objection and imposed an aggregate sentence of 146 months, representing 120 months on the firearm count, and 26 months on the marijuana offense. *See* (Record in the Court of Appeals, at 102, 112).

B. Proceedings on Appeal

Petitioner appealed, contending that neither his aggravated assault conviction nor his aggravated robbery conviction constituted "crimes of violence" under USSG 4B1.2. As for the aggravated assault, he argued that it lacked the "use, attempted use, and threatened use of physical force against the person of another" because it could be committed without direct confrontation between the perpetrator and victim. Further, he argued that the generic, enumerated offense of "aggravated assault" could not be committed by mere threats. His offense, as shown by his judicial records, involved threatened injury, not actual injury.

The court of appeals rejected this contention as foreclosed by *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007), which holds that Texas aggravated assault is always equivalent to the generic, enumerated form of the offense, and by *United States v. Shepherd*, 848 F.3d 425 (5th Cir. 2017), which reaffirmed *Guillen-Alvarez*. *See* [Appendix B, at p.2].

As for the aggravated robbery conviction, Petitioner contended that it lacked the use, attempted use, or threatened use of physical force as an element, and that it did not amount to the generic, enumerated form of "robbery," because it did not require the perpetrator to overcome the resistance of the victim. The court of appeals rejected that contention as foreclosed by *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), which holds that aggravated robbery with a deadly weapon has the threatened use of physical force as an element, and by *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (*en banc*), *abrogated on other grounds by Esquivel-Quintana v. Sessions*, —— U.S. ——, 137 S. Ct. 1562 (2017), which holds that Texas robbery is equivalent to the generic, enumerated form of "robbery." *See* [Appendix B, at p.2].

REASON FOR GRANTING THE PETITION

The case should be held until this Court rules on the Petitions in *Combs v. United States*, 19-5908 (Filed September 9, 2019), *Walker v. United States*, 19-373 (Filed September 19, 2019), *Burris v. United States*, 19-6186 (Filed October 3, 2019) and/or any forthcoming case that may shed light on the appropriate treatment of Petitioner's prior Texas offenses under USSG §4B1.2.

Guideline 2K2.1 provides for an elevated base offense level when the defendant has sustained a "crime of violence," as defined by USSG §4B1.2. *See* USSG §2K2.1(a). The base offense level is further elevated when the defendant has sustained two such crimes. *See* USSG §2K2.1(a) Guideline 4B1.2 defines "crime of violence" as follows:

> (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).

USSG §4B1.2. The opinion below holds that Petitioner had two such convictions, one for the Texas offense of aggravated assault, and one for the Texas offense of aggravated robbery. See [Appendix B, at pp.1-3]. The opinion's conclusions as to both convictions are called into question by pending Petitions.

1. There is a reasonable probability that pending petitions will cause the court of appeals to reach a different conclusion as to the classification of Petitioner's aggravated assault offense.

The opinion below's conclusion that Texas aggravated assault qualifies as a "crime of violence" may be called into question by this Court's resolution of the pending Petitions in *Combs v. United States*, 19-5908 (Filed September 9, 2019), and *Walker v. United States*, 19-373 (Filed September 19, 2019).

Combs asks this Court to decide whether the Texas aggravated assault statute possesses as an element "the use, attempted use, or threatened use of physical force against the person of another" within the meaning of 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA). *See* Petition for Certiorari in *Combs v. United States*, 19-5908, at i (Filed September 9, 2019). Specifically, it asks the Court to decide whether reckless infliction of injury and other means of causing injury through indirect means such as the transmission of disease or electronic images have as an element the "use of physical force against the person of another." *See id.* Although the case arises from the ACCA context, the language of the "force clause" in ACCA is identical to that of §4B1.2, ***compare*** 18 U.S.C. §924(e)(2)(B)(i) ***with*** USSG §4B1.2(a)(1), and precedents construing these two provisions have been applied interchangeably by the court below, *see United States v. Serna*, 309 F.3d 859, 864 (5th Cir.2002).

Combs involves a defendant convicted of aggravated assault by causing injury, rather than by mere threat of it. *See* Petition for Certiorari in *Combs v. United States*, 19-5908, at 8 (Filed September 9, 2019). But any holding that indirect means of injury – viruses, images, etc... – do not constitute "the use of physical force against the person of another," would necessarily imply that threats of such injuries likewise do not constitute "the threatened use of force against the person of another." *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-277 (5th Cir. 2010), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.3d 169, 180, 183-186 (5th Cir. 2018)(*en banc*). *Combs* accordingly holds a strong potential to take Petitioner's aggravated assault offense outside §4B1.2's force clause.

Walker may have a similar effect. That case asks the Court to decide whether the Texas offense of robbery by bodily injury falls within ACCA's "force clause," and, in particular, whether reckless offenses have as an element "the use of physical force against the person of another." Petition for Certiorari in *Walker v. United States*, 19-373, at p. I (Filed September 19, 2019). Petitioner's offense cannot be committed by reckless conduct (threats must be knowing and intentional to satisfy the Texas aggravated assault statute), *see* Tex. Penal Code §22.01, but as will

be explained, *Walker* remains relevant to the Fifth Circuit's understanding of the force clause. For more than a decade, the court below held that "the use of physical force against the person of another" required both intentional conduct and the direct infliction of injury. *See United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004)(*en banc*), *overruled by United States v. Reyes-Contreras, supra*; *United States v. Villegas-Hernandez*, 468 F.3d 874, 878-879 (5th Cir. 2006), *overruled by United States v. Reyes-Contreras, supra*; *United States v. Herrera-Alvarez*, 753 F.3d 132, 139 (5th Cir. 2014), *overruled by United States v. Reyes-Contreras, supra*; *United States v. Johnson*, 286 F. App'x 155, 157 (5th Cir. 2008) (unpublished), *overruled by United States v. Reyes-Contreras, supra*; *United States v. De La Rosa*, 264 F. App'x 446, 447-449 (5th Cir. 2008) (unpublished), *overruled by United States v. Reyes-Contreras, supra*. Reckless offenses and offenses that could be satisfied by indirect inflictions of injury (such as poison or trickery) were held not to qualify. *See Vargas-Duran*, 356 F.3d at 606.

This Court's decisions in *Castleman v. United States*, 572 U.S. 157 (2014) and *Voisine v. United States*, __U.S.__, 136 S.Ct. 2272 (2016), undermined these holdings. These two cases construed the definition of "misdemeanor crime of domestic violence" found in 18 U.S.C. §921(a)(33). *Castleman*, 572 U.S. at 159; *Voisine*, 136 S.Ct. at 2276. That definition includes "an offense that ... has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon..." 18 U.S.C. §921(a)(33). *Castleman and Voisine* held that the "use of force" could include indirect mechanisms of force, *see Castleman*, 572 U.S. at 170, and reckless inflictions of bodily injury, *see Voisine*,136 S.Ct. at 2280.The Fifth Circuit then held *Castleman* and *Voisine* broadly applicable, and accordingly held that all provisions referring to "the use of physical force against the person of another" encompassed reckless offenses and the indirect use of force. *See Reyes-Contreras*, 910 F.3d at 180, 183-186.

If the *Walker* petition (which the government has joined, *see* Brief for the United States in *Walker v. United States*, No. 19-373, at p.14 (Filed October 21, 2019)) is granted, Walker is likely to ask this Court to confine *Voisine* to §921(a)(33). In this respect, he has noted textual differences

between §921(a)(33) and ACCA's force clause. *See* Petition for Certiorari in *Walker v. United States*, No. 19-373, at pp.7-8 (Filed October 21, 2019). Specifically, the petitioner in *Walker* has noted that §921(a)(33) lacks the phrase "against the person of another," and that this omission broadens the scope of its definition. *See* Petition for Certiorari in *Walker v. United States*, No. 19-373, at p.7 (Filed October 21, 2019)("While the ACCA's force clause limits 'violent felon[ies]' to offenses that require the use of physical force 'against the person of another,' the provision at issue in *Voisine* has no such restriction."). ACCA and §4B1.2 do contain this additional phrase. *See* 18 U.S.C. §924(e)(2)(B)(i); USSG §4B1.2(a)(1), As such, a victory for the defendant in *Walker* would show that ACCA and identically worded provisions were intended to capture a narrower universe of assaultive offenses than §921(a)(33), at issue in *Castleman* and *Voisine*.

That holding would significantly undermine Fifth Circuit law. Certainly, the phrase "against the person of another" tends to exclude offenses in which injury is not purposefully inflicted, as accidents are not typically understood to be committed "against" anyone. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).The phrase likewise tends to exclude offenses that require no physical contact against the body, *i.e*. "the person," of another, such as the offenses committed by deceipt or the transmission of images. In its natural usage, the phrase also tends to exclude offenses that require no unconsented contact "against" the person, such as the transmission of sexually transmitted diseases. Those kinds of offenses may be prosecuted as aggravated assaults in Texas. *See, e.g., Billingsley v. State,* No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App. – Eastland 2015, pet. ref'd)(HIV); *Padieu v. State,* 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. App.—Dallas Dec. 30, 2010, pet. ref'd)(HIV); *State v. Zakikhani*, Case No. 1512289 (Crim. Dist. Ct. No. 176, Harris Co., Tex. June 20, 2018)(HIV);*United States v. Burris*, 896 F.3d 320, 331 (5th Cir. 2018), *withdrawn*, 908 F.3d 152 (5th Cir. Nov. 14, 2018)(citing Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co., Tex.)(strobing images). *Walker* thus may also take the offense outside of §4B1.2's force clause.

It is true that the definition of "crime of violence" in §4B1.2 includes "aggravated assault" as an enumerated offense. *See* USSG §4B1.2(a)(2). Further, Texas aggravated assault has been held to satisfy the "generic definition" of that offense. *See United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007). But that precedent may have to be reevaluated in light of *Combs*, *Walker*, or a similar potential authority. A finding that Texas aggravated assault falls outside of ACCA's definition of a "violent felony" would probably remove it from §4B1.2's definition of "crime of violence." The Sentencing Commission has said in a Reason for Amendment that the "crime of violence" definition found in §4B1.2 was "derived from 18 U.S.C. §924(e)." *See* USSG Manual, App. C, Amendment 268, Reason for Amendment (Nov. 1, 1989)("The definition of crime of violence used in this amendment is derived from 18 U.S.C. §924(e)"). This is clearly reflected in the structure of §4B1.2, which contains the same "force clause," and which was amended to strike its "residual clause" precisely when this Court declared ACCA's residual clause unconstitutional in *Johnson v. United States*, 135 S.Ct. 2551 (2016). ***Compare*** USSG §4B1.2(a)(1) ***with*** 18 U.S.C. §924(e)(2)(B)(i); ***compare*** *Johnson*, *supra* (striking the residual clause from ACCA), ***with*** USSG Manual, Appx. C, Amendment 798 (August 1, 2016)(striking identically worded residual clause from §4B1.2). To the extent that *Combs* or *Walker* takes Petitioner's offense outside of ACCA, it is reasonably probable that he could prevail in a challenge to Fifth Circuit precedent equating his offense to the offense of "aggravated assault" enumerated in §4B1.2.[1]

[1]Indeed, Fifth Circuit precedent that places Texas aggravated assault by threat within the generic definition of "aggravated assault" has long been vulnerable to challenge. The Fifth Circuit has consistently employed a generic definition of "aggravated assault" that simply does not include mere threats of harm. *United States v. Sanchez-Ruedas*, 452 F.3d 409, 413 (5th Cir. 2006); *accord United States v. Fierro-Reyna*, 466 F.3d 324, 328 (5th Cir. 2006); *United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006); *United States v. Mungia-Portillo*, 484 F.3d 813, 816 (5th Cir. 2007); *United States v. Esparza-Perez*, 681 F.3d 228, 231 (5th Cir. 2012); *United States v. Torres-Jaime*, 821 F.3d 577, 582 (5th Cir. 2016).

2. There is a reasonable probability that pending petitions will cause the court of appeals to reach a different conclusion as to the classification of Petitioner's aggravated robbery offense.

The pending Petitions in *Burris v. United States*, 19-6186 (Filed October 3, 2019), and *Walker*, *supra*, may undermine the conclusion of the court below as to Petitioner's Texas aggravated robbery conviction. Both *Burris* and *Walker* ask this Court to decide whether the Texas offense of robbery possesses as an element "the use of physical force against the person of another" within the meaning of ACCA. *See* Petition for Certiorari in *Burris v. United States*, 19-6186, at i (Filed October 3, 2019); Petition for Certiorari in *Walker v. United States*, 19-373, at p. 10 (Filed September 19, 2019). Any resulting authority will thus deal directly with robberies as Texas defines them. Further, it will address a definitional provision (ACCA's definition of "violent felony") with significant parallels to §4B1.2's definition of "crime of violence." And even if the holding of *Burris* and/or *Walker* does not directly impact the rationale employed below, issuance of favorable *dicta* will be treated as effectively binding below. *See Gearlds v. Entergy Servs., Inc*., 709 F.3d 448, 452 (5th Cir. 2013). The issues before the Court in *Burris* and *Walker* are so closely related to the instant case that prudence suggests disposition of the instant case should be deferred until they are resolved.

Burris certainly bears significant potential to remove the Texas offense of aggravated robbery from the "force clause." The petitioner in *Burris* has argued that Texas robbery falls outside ACCA's definition of 'violent felony" because it "does not even 'require interaction between the accused and the purported victim.'" Petition for Certiorari in *Burris v. United States*, 19-6186, at p1. (Filed October 3, 2019)(quoting *Howard v. State*, 333 S.W.3d 137, 138-140 (Tex. Crim. App. 2011)). As such, he has argued that Texas robbery lacks any requirement that the defendant "overcome the victim's resistance" as required by this Court's recent decision in *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019). Petition for Certiorari in *Burris v. United States*, 19-6186, at p1. (Filed October 3, 2019)(quoting *Stokeling*, 139 S.Ct. at 550). Notably, the case *Burris* relies on to show this aspect of Texas robbery – *Howard* – in fact addresses Texas aggravated robbery by threat,

the very offense at issue here. *See Howard,* S.W.3d at 138. Accordingly, embrace of Burris's argument by this Court would very likely take Petitioner's offense outside ACCA's "force clause."

Walker is also promising for Petitioner's cause in this regard. As noted above, *Walker* holds the potential to undermine Fifth Circuit precedent equating threatened injury to the threatened use of force against the person of another. Aggravated robbery is such an offense.[2] *See* Tex. Penal Code §§29.02, 29.03.

Finally, "robbery," like "aggravated assault" has been named by §4B1.2 in the definition of "crime of violence." *See* USSG §4B1.2(a)(2). And the Fifth Circuit has held that Texas robbery constitutes the enumerated, generic offense of "robbery." *See United States v.*

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[2]The opinion below cited *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017) in support of its decision to deny relief as to the aggravated robbery conviction. See [Appendix B, at p.2]. *Lerma* held that aggravated robbery with a deadly weapon is a distinct offense falling within ACCA's definition of a "violent felony." See *Lerma*, 877 F.3d at 630, 634-36. Specifically, it held that the structure of the aggravated robbery statute demonstrates a legislative intent to define the use of a deadly weapon as an element of a distinct offense, and not merely one way or means of committing a single offense. *See id.* at 633-634. It thus held it unnecessary to consider whether other forms of aggravated robbery, such as commission of robbery against a senior or disabled victim, necessarily encompass the use or threatened use of force. *See id.* Notably, it rejected the defendant's reliance on *Woodard v. State*, 294 S.W.3d 605, 608-609 (Tex. App. – Houston [1st Dist.] 2009]), a Texas case that expressly denies the defendant any right to jury unanimity on the question of whether he committed aggravated robbery by deadly weapon, serious bodily injury, or by robbing a senior or disabled victim. *See Lerma*, 877 F.3d at 634, n.4.

Since the opinion below, however, the *en banc* court below has reinstated a portion of its prior opinion in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018)(en banc), *vacated by* __U.S.__, 139 S.Ct. 2712 (June 17, 2019), *reinstated in part by* __F.3d __, 2019 WL 5288154 (October 18, 2019), addressing the divisibility of statutes for the purposes of criminal history enhancement. *See Herrold*, 2019 WL 5288154, at *3. Specifically, the reinstated portion of *Herrold* holds that a state statute is not divisible if a state court has held that the defendant lacks a right to unanimous verdict as to the means by which he committed the offense. *See Herrold*, 883 F.3d at 522-523. Moreover, it held that jury unanimity, *vel non*, trumps any inferences to be drawn from statutory structure in deciding the divisibility question. *See Herrold*, 883 F.3d at 522-523. This is plainly correct under Supreme Court precedent. *See Mathis v. United States*, __U.S.__, 136 S.Ct. 2243, 2256 (2016). Because *Woodard* flatly holds that a defendant has no right to jury unanimity on the question of how his aggravated robbery was committed (i.e. by deadly weapon, or by robbing a senior or disabled victim), *see Woodard*, 294 S.W.3d at 608-609, *Herrold* unquestionably overrules *Lerma*. Importantly, the *Herrold* opinion had been vacated by this Court at the time of the opinion below – the relevant portion was reinstated before the filing of the instant Petition.

For these reasons, this Court may assume that the defendant's aggravated robbery offense criminalizes threatening a senior or disabled victim with bodily injury in the course of a theft, and ignore the allegation of a deadly weapon. *See* Tex. Penal Code §29.03. Aggravated robbery committed in this way no more requires threatened force than does Texas simple robbery.

Santiesteban-Hernandez, 469 F.3d 376, 380-381 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547-63 (5th Cir. 2013) (*en banc*), *abrogated on other grounds by Esquivel-Quintana v. Sessions*, __U.S.__, 137 S. Ct. 1562, 1568 (2017). But as noted above, it is likely that the Commission intended its definition of "crime of violence" to be largely co-extensive with ACCA's definition of "violent felony." So it is also likely that a victory for either Burris or Walker would cause the court below to re-evaluate its precedent regarding Texas robbery and generic or enumerated "robbery" under §4B1.2.

Indeed, this Court's recent decision in *Stokeling* would all but demand re-evaluation of this precedent. *Stokeling* held that ACCA's force clause – identical to the force clause found in §4B1.2 – was modeled after "common law robbery." *Stokeling*, 139 S.Ct. at 550 (quoting J. Bishop, Criminal Law § 1156, p. 862 (J. Zane & C. Zollman eds., 9th ed. 1923)). Both *Stokeling*, *see id.* at 552, and the court below, *see Santiesteban-Hernandez*, 469 F.3d at 380, have recognized that "common law robbery" is the predominant form of the offense within contemporary state codes. As such, if this Court holds that Texas robbery falls outside ACCA's "force clause," it will necessarily hold that it is broader than the prevailing, generic definition of "robbery" employed by the states. That will effectively overrule *Santiesteban-Hernandez*, *supra*, cited below for the proposition that Texas robbery is equivalent to generic, enumerated robbery. See [Appendix B, at p.2].

3. Requested relief

This Court "regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). The application of ACCA's definition of "violent felony" to Texas assaultive and robbery offenses may be shortly before the Court. These cases "involve the same issue" as Petitioner's. The instant case should be held, and in the event of favorable authority in *Walker*, *Combs*, or *Burris*, this Court should grant certiorari, vacate the judgment below, and remand.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 31st day of October, 2019.

/s/ Kevin Joel Page
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