

No. --

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IN THE  
SUPREME COURT OF THE UNITED STATES

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KINNEY LEE PALMER,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

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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?

PARTIES

Kinney Lee Palmer 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, Kinney Lee Palmer 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Palmer*, No. 18-11250, 780 Fed. Appx. 179 (5th Cir. October 17, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appendix B]. The written judgment of conviction and sentence was issued September 7, 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The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on October 17, 2019.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.

## **STATEMENT OF THE CASE**

### **A. Proceedings in District Court**

Petitioner Kinney Palmer pleaded guilty to one count of receiving child pornography. *See* (ROA.48-51). A Presentence Report (PSR) concluded that Mr. Palmer's offense level should be 28, and his criminal history score should be eight, resulting in a criminal history category of IV. *See* (ROA.270, 277). In calculating the criminal history score, Probation assessed one point for each of three Texas prior convictions for aggravated assault. *See* (ROA.269-270). All of those convictions arose from the same incident, and produced a sentence on the same day. *See* (ROA.269-270). At least two of them resulted from an allegation and admission that Petitioner threatened another with bodily injury using a deadly weapon. *See* (ROA.297-298). They were counted separately under USSG §4A1.1(e), because Probation regarded them as “crimes of violence” under USSG §4B1.2. *See* (ROA.269-270); USSG §4A1.1(e). The defense objected to this characterization, but conceded that the issue was foreclosed by circuit precedent. *See* (ROA.289-294)

At sentencing, the district court overruled the criminal history objection, *see* (ROA.234), but awarded a two point reduction for acceptance of responsibility, *see* (ROA.236, 245). The Guideline range was thus held to be 92-115 months. *See* (ROA.247). Mr. Palmer received the high end of this range: 115 months imprisonment. *See* (ROA.251).

### **B. Proceedings on Appeal**

Petitioner appealed, contending, *inter alia*, his aggravated assault convictions did not constitute “crimes of violence” under USSG §4B1.2, and accordingly need not have been assessed separate criminal history points under USSG §4A1.1(e). Specifically, he argued that the Texas offense of aggravated assault by threat 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 (5<sup>th</sup> Cir. 2007). *See* [Appendix B, at pp.1-2].

**REASON FOR GRANTING THE PETITION**

**There is a reasonable probability of a different result if the defendant/Petitioner prevails in *Walker v. United States*, 19-373, \_\_U.S.\_\_, \_\_S.Ct.\_\_, 2019 WL 6042320 (November 15, 2019)(granting certiorari).**

Guideline 4A1.1(c) ordinarily requires that multiple sentences for offenses sentenced in the same court at the same time, and for offenses that are not separated by an intervening arrest, be counted as a single sentence for the purpose of determining a federal criminal defendant's sentencing guidelines. But USSG §4A1.1(e) requires that such sentences be separately counted if they are for "crimes of violence," as defined by USSG §4B1.2. *See* USSG §4A1.1(e). 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's aggravated assault convictions – involving the prong of the statute that forbids intentional or knowing threats of bodily injury and the use or exhibition of a deadly weapon – satisfy this definition. *See* [Appendix B, at pp.1-2]. That conclusion that Texas aggravated assault qualifies as a "crime of violence" may be called into question by this Court's resolution of *Walker v. United States*, 19-373, , \_\_U.S.\_\_, \_\_S.Ct.\_\_, 2019 WL 6042320 (November 15, 2019)(granting certiorari).

In *Walker*, this Court has been asked 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 (5<sup>th</sup> 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.

The defendant/Petitioner in *Walker* has asked this Court to confine *Voisine* to §921(a)(33). *See* Brief for the Petitioner in *Walker v. United States*, No. 19-373, pp.30-38 (Filed January 6, 2020) (hereafter “*Walker* Merits Brief”), available at

[https://www.supremecourt.gov/DocketPDF/19/19-373/127563/20200106111237674\\_Walker%20brief%20for%20petitioner.pdf](https://www.supremecourt.gov/DocketPDF/19/19-373/127563/20200106111237674_Walker%20brief%20for%20petitioner.pdf), last visited January 14, 2020. In this respect, he has noted textual differences between §921(a)(33) and ACCA's force clause. *See Walker* Merits Brief, at p.33. 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 id* ("The text and context of the ACCA's force clause differ from those of the provision at issue in *Voisine* in critical respects...In the words of *Voisine*, while the word 'use' alone 'is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct,' the phrase 'use \* \* \* against the person of an-other' is not." )(quoting *Voisine*, 136 S. Ct. at 2279)(internal citation omitted). 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/Petitioner 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 deceit 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.)(strobining 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 (5<sup>th</sup> Cir. 2007). But that precedent may have to be reevaluated in light of *Walker*. 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 *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.<sup>1</sup>

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<sup>1</sup>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 (5<sup>th</sup> Cir. 2006); *accord United States v. Fierro-Reyna*, 466 F.3d 324, 328 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 2007); *United States v. Esparza-Perez*, 681 F.3d 228, 231 (5<sup>th</sup> Cir. 2012); *United States v. Torres-Jaime*, 821 F.3d 577, 582 (5<sup>th</sup> Cir. 2016).

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.” *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). The application of ACCA’s definition of “violent felony” to Texas aggravated assault offenses is clearly affected by a case before the Court. The instant case should be held, and in the event of favorable authority in *Walker*, 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 15<sup>th</sup> day of January, 2020.

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