

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KINNEY LEE PALMER,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 4:17-CR-00088-Y(1)

Megan J. Fahey, assistant U.S. attorney

KINNEY LEE PALMER

Cody Cofer, attorney for the defendant

On September 6, 2017, the defendant, Kinney Lee Palmer, entered a plea of guilty to count one of the one-count indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:


<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 U.S.C §§ 2252(a)(2) and 2252(b)(1)	Receipt of a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct	May 23, 2015	1

The defendant is sentenced as provided in pages two through four of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 for count one of the one-count indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed September 6, 2018.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed September 7, 2018.

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IMPRISONMENT

The defendant, Kinney Lee Palmer, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 115 months on count one of the one-count indictment. The sentence shall run consecutively to any sentences that may be imposed for the defendant's state probation violations in case nos. 1448826D, 1448827D, and 1448829D; and for an additional state crime in case no. 1482858D, all pending in the 372nd Judicial District Court, Tarrant County, Texas.

The Court recommends that the defendant be placed in the Institution Residential Drug Abuse Treatment Program, if qualified; and in a facility where he can be evaluated and, if needed, treated for the defendant's alleged post-traumatic stress disorder, bipolar disorder, manic depression, and anxiety.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of ten years on count one of the one-count indictment.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer in a manner and frequency directed by the Court or probation officer;
- (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) support the defendant's dependents and meet other family responsibilities;
- (5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- (7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and
- (13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

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not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the probation officer;

report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense;

have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer;

have no contact with the victim(s), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victims;

participate and comply with the requirements of the Computer and Internet Monitoring Program, contributing to the cost of the monitoring in an amount not to exceed \$40 per month. The defendant shall consent to the probation officer's conducting ongoing monitoring of his/her computer/computers. The monitoring may include the installation of hardware and/or software systems that allow evaluation of computer use. The defendant shall not remove, tamper with, reverse engineer, or circumvent the software in any way. The defendant shall only use authorized computer systems that are compatible with the software and/or hardware used by the Computer and Internet Monitoring Program. The defendant shall permit the probation officer to conduct a preliminary computer search prior to the installation of software. At the discretion of the probation officer, the monitoring software may be disabled or removed at any time during the term of supervision;

neither possess nor have under his/her control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use;

participate in sex-offender treatment services as directed by the probation officer until successfully discharged, which services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month;

participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month; and

refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because none of the victims have been identified.

FORFEITURE

Under 18 U.S.C. § 2253, the Court orders that defendant's interest in the following property is condemned and forfeited to the United States: one LG cellular phone, model #LGMS345, IMEI 351608071423649 and one 32GB Sandisk Micro-SD memory card.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States marshal

BY _____
deputy marshal

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-11250
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 17, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KINNEY LEE PALMER,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-88-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Kinney Lee Palmer appeals the 115-month, within-guidelines sentence imposed by the district court following his guilty-plea conviction for receiving child pornography. He argues that the district court erred by (1) denying a U.S.S.G. § 3E1.1(b) reduction, which reduction the Government opposed, and (2) imposing two criminal history points under U.S.S.G. § 4A1.1(e) on the ground that two of Palmer's convictions for aggravated assault under Texas

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

law constituted crimes of violence as defined by U.S.S.G. § 4B1.2(a). Palmer correctly concedes that the latter argument is foreclosed by our binding precedent in *United States v. Guillen-Alvarez*, 489 F.3d 197, 199-200 (5th Cir. 2007). See *United States v. Setser*, 607 F.3d 128, 131 (5th Cir. 2010).

In reviewing a district court’s denial of a § 3E1.1(b) adjustment, we review the district court’s interpretation of the guideline de novo and its factual findings under a “standard even more deferential than a purely clearly erroneous standard.” *United States v. Silva*, 865 F.3d 238, 244 (5th Cir. 2017) (internal quotation marks and citation omitted). Under that more deferential standard, a defendant must “show that the district court’s denial of a reduction for acceptance of responsibility was without foundation.” *United States v. Lord*, 915 F.3d 1009, 1020 (5th Cir. 2019).

“[A] defendant who pleads guilty, initially admitting the conduct underlying his guilty plea, but then later attempts to withdraw his plea, asserting innocence, does not demonstrate ‘sincere contrition’ for purposes of § 3E1.1.” *Id.* (citations omitted). In attempting to distinguish *Lord*, Palmer repeatedly insists that he did not assert his innocence in either of his motions to withdraw his guilty plea; however, the record confutes his representations and plainly reflects that he asserted his innocence in both motions.

While the district court (and, to some extent, the Government) focused on the resources spent by the Government in responding to Palmer’s post-plea motions, the fact remains that the Government validly opposed the § 3E1.1(b) reduction because, inter alia, Palmer’s motions to withdraw his guilty plea were inconsistent with his acceptance of responsibility. See *id.* We need not consider Palmer’s argument under *United States v. Castillo*, 779 F.3d 318, 324 (5th Cir. 2015), that the Government’s expenditure of resources on post-plea litigation cannot support the denial of a § 3E1.1(b) reduction; even if Palmer

were correct, remand would be futile since we cannot force the Government to move for a § 3E1.1(b) reduction when it has cited a valid reason for refusing to do so. *See United States v. Alvarez*, 210 F.3d 309, 310 (5th Cir. 2000).

We AFFIRM the judgment of the district court. The Federal Public Defender is cautioned not to misrepresent the record in his brief.