No. 19-7337

IN THE

SUPREME COURT OF THE UNITED STATES

KINNEY LEE PALMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR REHEARING

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Reason for Granting the Petition for Rehearing

There is a reasonable probability of a different result if the defendant/Petitioner prevails in *Borden v. United States*, 19-373 , __U.S.__, __S.Ct.__, 2019 WL 6042320 (November 15, 2019)(granting *certiorari*).

On March 2, 2020, the Supreme Court granted certiorari in *Charles Borden Jr. v. United States*, 19-5410, ___ U.S. ___, ___ S. Ct. ___, 2020 WL 981806 (March 2, 2020) (granting *certiorari)*. In his initial petition for certiorari, Petitioner Palmer asked this Court to hold his petition pending *Walker v. United States*, 19-373 ___ U.S. ___, ___ S. Ct. ___, 2019 WL 6042320 (November 15, 2019) (granting *certiorari*). However, on January 22, 2020, Petitioner Walker died. On January 27, 2020, this Court dismissed Walker's petition due to his death. It appears this Court has granted certiorari in *Borden* to address a nearly identical issue that was raised in *Walker.* If this Court rules in favor of the petitioner in *Borden* there is a reasonable probability that the court below would have ruled differently on the issue preserved by Petitioner Palmer at the trial court and on appeal.

Guideline 4A1.1(c) ordinarily requires that multiple sentences for offenses sentenced in the same court at the same time be counted as a single sentence for the purpose of determining a federal criminal defendant's sentencing guidelines, absent an intervening arrest between the offenses. 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]. The conclusion that Texas aggravated assault qualifies as a "crime of violence" may be called into question by this Court's resolution of *Charles Borden Jr. v. United States*, 19-5410, ___ U.S. ___, ___ S. Ct. ___, 2020 WL 981806 (March 2, 2020) (granting *certiorari)*. In *Borden*, this Court has been asked to decide whether the Tennessee offense of aggravated assault 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 *Borden v. United States*, 19-5410, at pp. 6-20 (July 24, 2019).

Petitioner was convicted of three aggravated assault offenses that occurred on the same date, that were sentenced on the same date and that were not separated by intervening arrests (the Petitioner was arrest for all three offenses on the same date). *See* (ROA.268-270). These three offenses ordinarily would have counted as one criminal history point as related cases pursuant to USSG §4A1.1(c) . However, the PSR assessed two additional points. It reasoned that the three assault convictions were crimes of violence, and therefore, each prior assault conviction counted for one point, regardless that they were related. *See* USSG §4B1.2

It is true that two of Petitioner's three prior convictions for aggravated assault cannot be committed by reckless conduct (the offense of threatening bodily injury must be knowing and intentional to satisfy the Texas aggravated assault statute), but as will be explained, *Borden* remains relevant to the Fifth Circuit's understanding of the force clause with regard to these two prior convictions. One of the three prior convictions was for an aggravated assault causing bodily injury, which can be committed recklessly under Texas law. *See* Tex. Penal Code §22.01. Accordingly, Borden's challenge to whether a statute that has a reckless *mens res* can qualify as a crime of violence for ACCA purposes directly affects whether Petitioner's third conviction can qualify as a

crime of violence.

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, 910 F.3d 169, 168 (5th Cir. 2018).* However, 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 prior 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 *Borden* has argued that *Voisine* should not apply to the force clause in ACCA because ACCA and §921(a)(33) use different language and have distinct goals. *See* Brief for the Petitioner in *Borden v. United States*, No. 19-5410, pp.17- 21 (Filed July 24, 2019) (Hereinafter cited as *Borden* Petition for Certiorari) In this respect, *Borden* has noted textual differences between §921(a)(33) and ACCA's force clause, specifically that §921(a)(33) lacks the phrase "against the person of another," and that this omission broadens the scope of its definition. *See Borden* Petition for Certiorari, at p.19. The ACCA and §4B1.2 both contain this additional phrase, "against the person of another," . *See* 18 U.S.C. §924(e)(2)(B)(i); USSG §4B1.2(a)(1). As such, a victory for the defendant/Petitioner in *Borden* 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*.

A decision by this Court in *Borden* 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). A finding that a state's aggravated assault statute falls outside of ACCA's definition of a "violent felony" would probably also 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)"). To the extent that *Borden* 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] Further, there is a division among the lower courts as to whether Texas aggravated assault satisfies the "generic definition" of that offense. *See United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007); and *United States v. Espzrza-Herrera*, 557 F.3d 1019 (9th Cir. 2009). A decision in *Borden* could shed light on that dispute.

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 *Borderr*, this Court should grant certiorari, vacate the judgment below, and remand.

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[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).

CONCLUSION

Petitioner respectfully submits that this Court should grant rehearing, vacate the order denying *certiorari* and hold this case pending *Borden*. In the alternative, Petitioner asks this Court to hold this rehearing petition pending the outcome in *Borden.*

Respectfully submitted this 9th day of March, 2020.

/s/ Christopher A. Curtis
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CERTIFICATE OF COUNSEL PURSUANT TO RULE 44.2

This petition for rehearing is restricted to the grounds specified in Supreme Court Rule 44.2 It is presented in good faith and not for delay.

/s/ Christopher A. Curtis
Christopher A. Curtis
Counsel of Record

March 9, 2020