

NO. 17-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2017

OMAR RAMONE VEREEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

STEPHEN C. GORDON*
Assistant Federal Public Defender
150 Fayetteville Street Mall, Suite 450
Raleigh, North Carolina 27601
(919) 856-4236

*Counsel for Petitioner

QUESTION PRESENTED

Whether the writ should issue so that this Court may determine whether the United States Court of Appeals for the Fourth Circuit has decided an important issue of federal law—that is, whether the North Carolina crime of assault with a deadly weapon with intent to kill is a “crime of violence” for purposes of U.S.S.G. § 4B1.2—in a way that conflicts with a decision by the Supreme Court of the State of North Carolina, *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (N.C. 2000).

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Omar Ramone Vereen

TABLE OF CONTENTS

QUESTION PRESENTED.	i
LIST OF PARTIES TO PROCEEDING BELOW.	ii
TABLE OF CASES, STATUTES, AND AUTHORITIES	iv
OPINION BELOW.	1
JURISDICTIONAL GROUNDS.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE.	4
MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW.	6
REASON FOR GRANTING THE WRIT.....	6
 BY AFFIRMING PETITIONER’S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY THE NORTH CAROLINA SUPREME COURT.	
CONCLUSION.	10
APPENDIX:	
Appendix 1: <i>United States v. Omar Ramone Vereen</i> , No. 15-4678, 2017 U.S. App. LEXIS 15040 (4th Cir. Aug. 14, 2017) (<i>per curiam</i> ; unpublished).	

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

<i>Beckles v. United States</i> , ____ U.S. ____, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).....	7
<i>Johnson v. United States</i> , ____ U.S. ____, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)	7
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975).....	6
<i>State v. Christy</i> , 26 N.C. App. 57, 215 S.E.2d 154 (N.C. Ct. App. 1975).....	8
<i>State v. Coble</i> , 351 N.C. 448, 527 S.E.2d 45 (N.C. 2000).....	8
<i>State v. Cope</i> , 204 N.C. 28, 30, 167 S.E. 456 (N.C. 1933).....	9
<i>State v. Daniel</i> , 333 N.C. 756, 429 S.E.2d 724, 729 (N.C. 1993).....	8
<i>State v. Eason</i> , 242 N.C. 59, 65, 86 S.E.2d 774 (N.C. 1955).....	9
<i>State v. Ferguson</i> , 261 N.C. 558, 135 S.E.2d 626 (N.C. 1964).....	8
<i>State v. Irwin</i> , 55 N.C. App. 305, 285 S.E.2d 345 (N.C. Ct. App. 1982).....	8
<i>State v. Jones</i> , 353 N.C. 159, 538 S.E.2d 917 (N.C. 2000).....	iii, 9
<i>State v. McGill</i> , 314 N.C. 633, 336 S.E.2d 90 (N.C. 1985).....	9
<i>State v. Weston</i> , 273 N.C. 275, 159 S.E.2d 883 (N.C. 1968).....	9

<i>United States v. Gardner</i> , 823 F.3d 793 (4th Cir. 2016).....	7
<i>United States v. Peterson</i> , 629 F.3d 432 (4th Cir. 2011).....	8
<i>United States v. Vereen</i> , No. 15-4678, 2017 U.S. App. LEXIS 15040 (4th Cir. Aug. 14, 2017) (<i>per curiam</i> ; unpublished).....	6-8
<i>United States v. Vinson</i> , 805 F.3d 120 (4th Cir. 2015).....	8-9

STATUTES AND AUTHORITIES

18 U.S.C. § 922(g)(1).	4-6
18 U.S.C. § 924(c).....	4-5
21 U.S.C. § 841(a)(1).....	4-5
28 U.S.C. § 1254(1).....	2
U.S.S.G. § 2K2.1.....	4-6
U.S.S.G. § 3D1.2.	4-5
U.S.S.G. § 4B1.2 (2015).	<i>passim</i>
U.S.S.G. § 4B1.2 (2016).	7
Model Penal Code § 2.02.....	8
Model Penal Code § 211.1.....	8

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on August 14, 2017.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence (Appendix 1, *infra*) is found at No. 15-4678, 2017 U.S. App. LEXIS 15040 (4th Cir. Aug. 14, 2017)(*per curiam*) and is unpublished.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on August 14, 2017. (Appendix 1, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 4B1.2 (2015) provides in pertinent part that:

(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).

STATEMENT OF THE CASE

According to the government, on the night of October 17, 2013, police in Fayetteville, North Carolina, pulled over a truck for speeding. (J.A. 31, 62). Before stopping, the driver waived and pointed with his hand. (J.A. 62). Petitioner, a passenger in the truck, got out and ran as the vehicle slowed down. (J.A. 31, 62). During the ensuing foot chase, officers saw Petitioner crouching down in vegetation, with something in his hand. (J.A. 31, 62). When the police ordered him to drop the object, Petitioner started running again. (J.A. 31, 62). He ultimately fell down and was arrested after a struggle. (J.A. 31, 62).

One of Petitioner's pockets held 2.4 grams of crack cocaine split into thirteen baggies. (J.A. 31, 62). He also had 23.7 grams of marijuana contained in two baggies, less than one gram of MDMA (or "Molly"), and \$225 in cash. (J.A. 31, 62). In the bushes where Petitioner had stooped during the chase, police found a stolen revolver. (J.A. 31-32, 62). The driver of the truck claimed Petitioner had held him at gunpoint, threatening to kill him if he stopped the truck. (J.A. 62). Law enforcement never corroborated that accusation. (J.A. 62).

A federal grand jury later indicted Petitioner for possession of a firearm by a felon, possession with intent to distribute marijuana and crack cocaine, and possession of a firearm in furtherance of drug trafficking crime. 18 U.S.C. § 922(g)(1), 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 924(c). (J.A. 11-12). Initially, Petitioner pled not guilty to the charges, but on April 30, 2015, he appeared in United States District Court and changed his plea to guilty. (J.A. 5 #22, 15, 30-31, 53).

Following the second arraignment, the probation officer calculated Petitioner's imprisonment range under the sentencing guidelines. His convictions for violating § 922(g) and

§ 841(a) grouped. *See* U.S.S.G. §§ 3D1.2(c) and (d). (J.A. 66 ¶42). For those grouped offenses, the probation officer used U.S.S.G. § 2K2.1 to achieve a guideline range. (J.A. 66 ¶43). On the ground that one of Petitioner’s prior North Carolina convictions, assault with a deadly weapon with intent to kill, qualified as a “crime of violence,” the probation officer set the base offense level at 20. *See* U.S.S.G. § 2K2.1(a)(4)(A). (J.A. 63 ¶13, 67 ¶43). That level increased by 2 because the gun had been stolen. U.S.S.G. § 2K2.1(b)(4)(A). (J.A. 67 ¶44). With a three level reduction for acceptance of responsibility and a criminal history category of III, Petitioner faced an imprisonment range under the guidelines of 37 to 46 months. (J.A. 64 ¶16, 67 ¶50, 68 ¶¶ 51, 52 and 55). Section 924(c), in turn, required a minimum consecutive term of 60 months on top of the sentence for the two other offenses. (68 ¶57). Petitioner did not object to the guideline calculation. (J.A. 70).

Petitioner’s case came on for sentencing on November 2, 2015. (J.A. 40). Early in the hearing, the court found the guideline imprisonment ranges to be 37 to 46 months for the § 922(g) and §841(a) convictions, and a consecutive 60 months for the § 924(c) offense. (J.A. 43). The government ultimately requested that the court sentence Petitioner to 46 months, the top of the guideline range, for the felon in possession and drug trafficking convictions, and the court did so. (J.A. 47-48). With 60 months added under § 924(c), Petitioner’s total imprisonment term was 106 months. (J.A. 47-48, 53).

Petitioner appealed his sentence to the United States Court of Appeals for the Fourth Circuit. (J.A. 58). In that forum, he argued, among other things, that the district court plainly erred by deeming as a “crime of violence” his prior North Carolina conviction for assault with a deadly weapon with intent to kill. (hereinafter “AWDWIK”). The Court of Appeals determined

that Petitioner's offense met the definition under § 2K2.1(a)(4)(a). Specifically, the Fourth Circuit said AWDWIK satisfied § 4B1.2's "force clause" as well as its "residual clause." *United States v. Vereen*, No. 15-4678, 2017 U.S. App. LEXIS 15040 *5 and n.1 (4th Cir. Aug. 14, 2017) (*per curiam*; unpublished).

**MANNER IN WHICH THE FEDERAL QUESTION
WAS RAISED AND DECIDED BELOW**

The question whether Petitioner's AWDWIK offense qualified as crimes of violence under U.S.S.G. § 4B1.2 was presented to the Fourth Circuit. The Court of Appeals affirmed Petitioner's sentence. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASONS FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER'S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY THE NORTH CAROLINA SUPREME COURT.

U.S.S.G. § 2K2.1(a)(6) (2015) sets a base offense level of 14 for people convicted of violating 18 U.S.C. § 922(g)(1). When the offender is held to have sustained a prior conviction for a "crime of violence," the base offense level jumps to 20, and this is what happened to Petitioner. *See* U.S.S.G. § 2K2.1(a)(4)(A).

At the time of Petitioner's sentencing, U.S.S.G. § 4B1.2(a) (2015) defined the term "crime of violence," and, under that definition, a violent crime could be created in one of three ways. Section 4B1.2(a) said that:

(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 burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Under the former version of § 4B1.2, a “crime of violence,” consequently, either (1) involved force, (2) was one of four specifically identified offenses, or (3) involved conduct potentially hazardous to another person. Over time, each of these prongs had taken on a name: the “force clause,” the “enumerated offenses,” and the “residual clause.”¹ See *United States v. Gardner*, 823 F.3d 793, 801-02 (4th Cir. 2016). *Johnson v. United States*, a case involving the Armed Career Criminal Act’s “violent felony” definition—one that mirrors almost word for word the guidelines “crime of violence” definition--struck down the definition’s third prong, the residual clause, for vagueness. ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). In *Beckles v. United States*, this Court declined to extend *Johnson* to § 4B1.2’s residual clause, holding that the sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause. ___ U.S. ___, 137 S. Ct. 886, 888, 197 L. Ed. 2d 145, 148 (2017). Consequently, both the force clause and the residual clause are at issue in this case.

Petitioner argued to the Fourth Circuit that whether a court was deciding if a given crime met the force clause and/or the residual clause, Petitioner argued in the Fourth Circuit, a *mens rea* greater than recklessness was required for the that crime. *Vereen*, 2017 U.S. App. LEXIS

¹The Sentencing Commission, after Petitioner’s sentencing, removed the residual clause. See U.S.S.G. § 4B1.2 (2016).

15040 **3-4 and n.1. Petitioner drew his argument from the Fourth Circuit’s holding in *United States v. Vinson*, 805 F.3d 120, 125 (4th Cir. 2015) that “for conduct to constitute a ‘use’ of force . . . the conduct must involve a *mens rea* more culpable than recklessness.” *Id.* at *4 (citation omitted). In his brief to the Fourth Circuit, Petitioner noted that the commentary to § 4B1.2(a) identified aggravated assault as a crime of violence. *See* U.S.S.G. § 4B1.2, comment. (n.1). The Model Penal Code, Petitioner continued, defined aggravated assault in relevant part as an “attempt[] to cause serious bodily injury to another” or causing “such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.” Model Penal Code § 211.1(2)(a). Under that formulation, Petitioner argued, aggravated assault required a *mens rea* no lower than recklessness, which is a “conscious[] disregard[] [of] a substantial and unjustifiable risk that the material element exists or will result from [the] conduct.” Model Penal Code § 2.02(2)(c); *see also United States v. Peterson*, 629 F.3d 432, 436 (4th Cir. 2011).

The Fourth Circuit noted that *Vinson* had involved a case of misdemeanor assault on a female, and that with respect to “an assault offense with an intent to kill element, and North Carolina courts have repeatedly observed that AWDWIK ‘has, as an element, specific intent to kill.’” *Vereen*, 2017 U.S. App. LEXIS 15040 at **4-5 (citing *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45, 49 (N.C. 2000); *State v. Ferguson*, 261 N.C. 558, 135 S.E.2d 626, 628 (N.C. 1964); *State v. Irwin*, 55 N.C. App. 305, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982); *State v. Christy*, 26 N.C. App. 57, 215 S.E.2d 154, 155 (N.C. Ct. App. 1975); *State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724, 729 (N.C. 1993)). The Fourth Circuit had said in *Vinson*, however, that the North Carolina common law embraces three definitions of assault that differ from each other but that

have the same *mens rea*: culpable negligence. 805 F.3d at 124, 126. For that proposition, the Court of Appeals quoted a North Carolina Supreme Court decision that said culpable negligence satisfies the “actual intent” required for, among other crimes, assault with a deadly weapon with intent to kill. *Id.* at 126; *see State v. Jones*, 353 N.C. 159, 164-66, 538 S.E.2d 917, 923 (2000). Petitioner argued that necessarily then, because “North Carolina law permits convictions for . . . assault . . . in cases where the defendant's conduct does not rise even to the level of recklessness,” ADWIK did not categorically match aggravated assault.” *Vinson*, 805 F.3d at 126.

The Fourth Circuit dismissed Petitioner’s citation to *Jones*, calling *dicta* that case’s discussion of the *mens rea* required in assault cases under North Carolina law. In *Jones*, the North Carolina Supreme Court said this:

It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner. *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 779 (1955). Thus, a driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of [assault with a deadly weapon with inflicting serious injury] provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied. *Id.* at 65, 86 S.E.2d at 778. Culpable or criminal negligence has been defined as “such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933)). Moreover, “an intentional, wilful or wanton violation of a statute . . ., designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.” *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92-93 (1985) (quoting *Cope*, 204 N.C. at 31, 167 S.E. at 458 (1933)).

Accordingly, Petitioner respectfully submits that by dismissing as “*dicta*” the above-quoted language from the North Carolina Supreme Court, the Fourth Circuit has decided an important federal question—whether the North Carolina crime of AWDWIK is a “crime of

violence” for purposes of U.S.S.G. § 4B1.2—in a way that conflicts with the State Supreme Court’s definition of assault crimes. For these reasons, Petitioner respectfully submits that the writ issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 13th day of November, 2017.

Respectfully submitted,

/s/ Stephen C. Gordon

STEPHEN C. GORDON

Assistant Federal Public Defender

150 Fayetteville Street Mall, Suite 450

Raleigh, North Carolina 27601