No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RODRIGO ESCOBEDO-CORONADO,
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 WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

KAYLA GASSMANN
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Does the federal generic aggravated assault offense require more than a merely reckless *mens rea*, as determined by the Fourth, Sixth and Ninth Circuits and supported by a 50-state survey of state codes, or can it be committed with mere recklessness, as the Fifth Circuit has held?

PARTIES TO THE PROCEEDINGS

All parties to the Fifth Circuit proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

TABLE OF CONTENTS – (Cont'd)

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (Cont'd)

Page

CASES – (Cont'd)

STATUTES AND RULES

SENTENCING GUIDELINES

TABLE OF CITATIONS – (Cont'd)

Page

SENTENCING GUIDELINES – (Cont'd)

MISCELLANEOUS

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A.

JURISDICTION

The judgment and opinion was entered on November 13, 2018. *See* Appendix A. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES PROVISION INVOLVED

USSG § 2L1.2 (2015) provides in pertinent part:

§ 2L1.2. <u>Unlawfully Entering or Remaining in the United States</u>

(a) Base offense level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

a conviction for a felony that is. . . (ii) a crime of violence. . . increase by 16 levels if the conviction receives criminal history points under Chapter 4. . . .

* * *

Application Notes:

* * *

1. *Application of Subsection (b)(1).—*

(B) Definitions.—For purposes of subsection (b)(1):

* * *

(iii) "Crime of violence" means any of the following under federal, state or local law: . . . aggravated assault. . . .

STATEMENT OF THE CASE

Petitioner is a noncitizen who was deported but later found in the United States after returning without authorization. Petitioner pleaded guilty to illegal reentry following deportation, in violation of 8 U.S.C. § 1326.

Under the pre-November 1, 2016 Sentencing Guidelines, a person who is convicted of illegal reentry faces a 16-level Guideline sentencing enhancement if he had, prior to his deportation, a felony conviction for a "crime of violence." USSG § 2L1.2(b)(1)(A)(ii) (2015). The definition of "crime of violence" in the application note lists several enumerated offenses that qualify, including "aggravated assault." USSG § 2L1.2, comment. (n.(1)(B)(iii)) (2015).

Prior to petitioner's sentencing hearing, the United States Probation Office prepared a presentence report ("PSR") to assist the district court in sentencing. The PSR recommended application of a 16-level crime of violence enhancement under § 2L1.2(b)(1)(A)(ii) (2015), based on petitioner's pre-deportation Texas conviction for aggravated assault under Tex. Penal Code § 22.02. The PSR determined that a conviction for Texas aggravated assault qualifies as a "crime of violence." Petitioner objected to the enhancement, arguing that the Texas offense was broader than federal generic aggravated assault because it can be committed recklessly and is indivisible as to state of mind. The district court applied the 16-level enhancement, substantially increasing petitioner's recommended sentencing range.

Petitioner timely appealed to the United States Court of Appeals for the Fifth

Circuit. On appeal, he raised the same challenge to the 16-level crime of violence enhancement, arguing that Texas aggravated assault is not the equivalent of generic aggravated assault because it can be committed with a merely reckless mens rea. He acknowledged, however, that his argument was foreclosed by controlling Fifth Circuit precedent.

The Fifth Circuit affirmed the conviction and sentence. *See* Appendix A. The court held that petitioner's challenge to the 16-level enhancement was foreclosed by the court's prior decisions holding that Texas aggravated assault qualifies as generic aggravated assault. *See, e.g., United States v. Guillen-Alvarez*, 489 F.3d 197, 198 (5th Cir. 2007).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The definition of federal generic aggravated assault presents an important question warranting this Court's consideration.

A. The circuits are divided on whether generic aggravated assault includes offenses committed with a merely reckless state of mind.

Petitioner received a substantial sentencing enhancement based on the lower courts' determination that his prior Texas conviction for aggravated assault under Tex. Penal Code § 22.02 qualifies as generic "aggravated assault." In Texas, aggravated assault can be committed by the reckless causation of bodily injury, which is aggravated by either the causation of serious bodily injury or the use or exhibition of a weapon. *See* Tex. Penal Code §§ 22.01, 22.02. The aggravated assault offense is not divisible as to mens rea or the aggravating factors, and thus cannot be narrowed to one that would exclude a reckless assault. *See Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016); *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008); *see generally Mathis v. United States*, 136 S. Ct. 2243 (2016).

The circuits are divided on the question of whether an assault that can be committed recklessly is included within the federal generic definition of aggravated assault. The Fourth, Sixth, and Ninth Circuits have held that generic aggravated assault does not include offenses that were committed with a merely reckless state of mind. *See United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015); *United States v. Cooper*, 739 F.3d 873, 880 & n.1 (6th Cir. 2014); *United States v. McFalls*, 592 F.3d 707, 716-717 (6th Cir. 2010); *United States*

v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009). By contrast, the Fifth Circuit has held that generic aggravated assault does include purely reckless offenses. *See United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007); *United States v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007); *see also United States v. Shepherd*, 848 F.3d 425, 427-28 (5th Cir. 2017) (reaffirming *Guillen-Alvarez*).

To justify its outlier position, the Fifth Circuit has relied on the Model Penal Code to define generic aggravated assault, holding that the generic offense includes ordinary recklessness. *See Mungia-Portillo*, 484 F.3d at 814, 816-17. Subsequently, in *Guillen-Alvarez*, 489 F.3d at 200-01, the Fifth Circuit extended its holding to the Texas aggravated assault statute and held that even if it assumed that an aggravated assault under § 22.02 was committed recklessly, the offense is equivalent to generic aggravated assault. The court reaffirmed these precedents in petitioner's case.

Three other circuits have rejected this holding. In *Esparza-Herrera*, the Ninth Circuit held that the federal generic definition of aggravated assault required at least extreme recklessness, and that ordinary recklessness was not included in the generic offense. *See Esparza-Herrera*, 557 F.3d at 1023-1025. It expressly rejected the Fifth Circuit's contrary reasoning. *See id.* at 1023. Similarly, the Sixth Circuit has found ordinary recklessness insufficient to qualify as the enumerated offense of aggravated assault found in USSG § 4B1.2. *See McFalls*, 592 F.3d at 716-717. Later, in *Cooper*, the Sixth Circuit continued to follow *McFalls*, and cited and rejected the Fifth Circuit's contrary authority. *See Cooper*, 739 F.3d at 880 n.1.

In *Garcia-Jimenez*, the Ninth Circuit extended *Esparza-Herrera* to conclude that generic aggravated assault does not include even extreme recklessness. *See Garcia-Jimenez*, 807 F.3d at 1085-86. The court conducted a survey of all 50 states' aggravated assault and battery offenses, and found that 33 states and the District of Columbia "do not punish as aggravated assault offenses committed with only extreme-indifference recklessness." *Id.* at 1085 & nn.5 & 6. "That a substantial majority of U.S. jurisdictions require more than extreme indifference recklessness to commit aggravated assault is a compelling indication that the federal generic definition of aggravated assault also requires more than that mental state." *Id.* at 1086. The court thus held that no prior conviction for aggravated assault would qualify as generic aggravated assault unless it required that serious bodily injury be caused knowingly or intentionally. *See id.*

In *Barcenas-Yanez*, the Fourth Circuit considered whether Tex. Penal Code § 22.02—the same statute at issue in petitioner's case—is equivalent to generic aggravated assault, and held that "inclusion of a mere reckless state of mind renders the statute broader than the generic offense." *Barcenas-Yanez*, 826 F.3d at 756 (citation omitted). *Barcenas-Yanez* relied on the Ninth Circuit's 50-state survey in *Garcia-Jimenez*, 807 F.3d at 1086, for the federal definition of generic aggravated assault.

There is thus a clear circuit split on the definition of generic aggravated assault, with the Fourth, Sixth, and Ninth Circuits all holding that the generic offense does not include merely reckless assaults, and the Fifth Circuit holding to the contrary. Specifically with regard to Texas aggravated assault, the Fourth and Fifth Circuits have split on whether the

Texas offense qualifies as generic aggravated assault. Maintaining the split between the Fifth and Ninth Circuits is particularly unjustifiable. That split produces disparate sentences based on geography alone, and thus results in drastically different outcomes for similarly situated criminal defendants in the two circuits that span the lion's share of the United States border with Mexico and, consequently, adjudicate the largest proportion of illegal-reentry proceedings in the nation.[1]

In short, if petitioner had been prosecuted for illegal reentry within the geographical limits of the Fourth, Sixth, or Ninth Circuits, his offense would not qualify as generic aggravated assault. In the Fifth Circuit, however, it did. As a result, unlike similarly situated defendants in other circuits with identical prior convictions, petitioner was subject to a drastically increased Guidelines range and received a longer prison term.

B. The federal generic definition of aggravated assault is an important question of federal sentencing law with significant consequences for petitioner, and for criminal defendants in other cases.

Years of imprisonment turn on the question presented. Substantial enhancements under the Sentencing Guidelines in illegal-reentry and career-offender cases turn on the definition of generic aggravated assault. The applicability of those enhancements should not depend on the circuit in which a person is prosecuted.

---

[1] In fiscal year 2013, 18,498 federal illegal-reentry cases were prosecuted in the United States. U.S. Sentencing Commission, *Illegal Reentry Offenses*, at 8 (Apr. 2015). Of the top five districts adjudicating these cases, two were located in the Fifth Circuit—Southern Texas (3,853, or 20.8%) and Western Texas (3,200, or 17.3%)—two were located in the Ninth—Arizona (2,387, or 12.9%) and Southern California (1,460, or 7.9%)—and one was located in the Tenth—New Mexico (2,837, or 15.3%). *Id.* at 9. Combined, these five districts made up 74.2% of all illegal-reentry cases. *Id.*

The enumerated offense of aggravated assault triggers a 16-level Guideline enhancement for illegal re-entry defendants found in the United States before November 1, 2016, as it did for petitioner. *See* USSG § 2L1.2, cmt. (n.(1)(B)(iii) (2015)). In the typical reentry case where the defendant receives a three-level adjustment for acceptance of responsibility, a 16-level increase in the defendant's range more than doubles the minimum of the Guideline range in every criminal history category. *See* USSG § 2L1.2; USSG Ch. 5A.

The operation of the crime of violence enhancement in this case illustrates the significance of the issue. Petitioner was subject to a substantially enhanced sentencing range based on his previous Texas conviction for aggravated assault. Because of the aggravated assault determination, petitioner's sentencing range was increased from, at most, 33 to 41 months, to 77 to 96 months, and he was sentenced within that range to 84 months of imprisonment. The determination thus effectively added four years to petitioner's sentence.

Although USSG § 2L1.2 has now been amended to eliminate the crime of violence enhancement, this does not reduce the need for a uniform national definition of aggravated assault. As petitioner's case illustrates, the earlier Guideline may still be applied to illegal-reentry defendants found in the country before November 1, 2016. *See Peugh v. United States*, 133 S.Ct. 2072, 2078 (2013).

Moreover, a previous aggravated assault conviction is also used as a career-offender predicate under the current version of USSG § 4B1.2, where "aggravated assault" remains

an enumerated offense in § 4B1.2's definition of "crime of violence." *See* USSG § 4B1.2(a)(2). That Guideline is of immense practical impact: the Commission has been instructed to recommend a sentence "at or near" the statutory maximum for defendants who have been thrice convicted of a controlled substance offense or "crime of violence." 28 U.S.C. § 994(h). The Commission uses § 4B1.2 to define "crime of violence" for this purpose, and has promulgated sizable increases in the defendant's offense level and a mandatory criminal history category of VI when the defendant is subject to its provisions. *See* USSG § 4B1.1.

This Court should not hesitate to exercise its certiorari power to resolve this circuit split on the interpretation of the Guidelines, because the Sentencing Commission has indicated that it does not intend to address the split. This Court has previously stated that it might be "more restrained and circumspect" in exercising certiorari power to resolve conflicts regarding Guideline interpretation, due to the Sentencing Commission's authority to revise the Guidelines. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). But that concern carries less force in the circumstances of this case, where the Sentencing Commission has recently considered and declined to clarify the generic definition of enumerated crimes of violence, including aggravated assault.

In its 2016 report to Congress, the Sentencing Commission stated that it considered adding definitions of all the enumerated offenses to § 4B1.2, but ultimately added definitions for just two offenses: "forcible sex offense" and "extortion." It did not add definitions for the remaining enumerated offenses, including aggravated assault, because

the Commission determined that "it was best not to disturb the case law that has developed over the years." U.S. Sentencing Commission, Report to the Congress: Career Offender Sentencing Enhancements 54 (August 2016), *available at https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements*. Thus, the Commission has made clear that it does not intend to revise the Guidelines to address the split on the definition of generic aggravated assault. Only this Court can address that entrenched split.

C. The Fifth Circuit erred by continuing to rely on the Model Penal Code to define the federal generic offense of aggravated assault, when the results of a 50-state survey dictate a different generic definition.

Finally, the Fifth Circuit's definition of generic aggravated assault not only conflicts with multiple other circuits, but it is also incorrect.

In *Guillen-Alvarez* and *Mungia-Portillo*, the Fifth Circuit relied only on the Model Penal Code to define generic aggravated assault, *see Guillen-Alvarez*, 489 F.3d at 200; *Mungia-Portillo*, 484 F.3d at 817. In *Mungia-Portillo*, 484 F.3d at 814, the Fifth Circuit recognized that the Model Penal Code definition requires an aggravated assault offense to be committed with recklessness manifesting extreme disregard for the value of human life, rather than ordinary recklessness. *See id.* at 816-817; *see also* Model Penal Code § 211.1. Yet the Fifth Circuit found that the Tennessee statute at issue, which encompassed causing serious injury by ordinary recklessness, presented only a "minor" difference from the Model Penal Code definition. *See id.* The Fifth Circuit reaffirmed the holding that generic aggravated assault includes mere recklessness in *Guillen-Alvarez*, 489 F.3d at 200, as well

as in petitioner's case.

But the correct definition of the generic offense of aggravated assault can be found in the analysis of the Ninth and Fourth Circuits. In *Garcia-Jimenez*, the Ninth Circuit reviewed all 50 states' aggravated assault and battery offenses, and found that 33 states and the District of Columbia "do not punish as aggravated assault offenses committed with only extreme-indifference recklessness." *Garcia-Jimenez*, 807 F.3d at 1085 & nn.5 & 6. As that court held, the fact that a majority of states require a *mens rea* higher than recklessness also indicates that the federal generic definition requires more than recklessness. *See id.* at 1086. The Fourth Circuit also adopted this definition of the generic offense when it held that Tex. Penal Code § 22.02 is broader than generic aggravated assault because it includes "a mere reckless state of mind." *Barcenas-Yanez*, 826 F.3d at 756.

The Fifth Circuit's continued reliance on the Model Penal Code to define the generic aggravated assault offense, *see Guillen-Alvarez*, 489 F.3d at 200; *Mungia-Portillo*, 484 F.3d at 817, where the majority of state statutes deviate from the Code, *see Garcia-Jimenez*, 807 F.3d at 1086-87, is irreconcilable with this Court's holding in *Taylor v United States*, 495 U.S. 575, 598 (1990), that the meaning of an enumerated offense in federal law is "the generic sense in which the term is now used in the criminal codes of most States." Accordingly, where the current treatment of an offense in the majority of states does not "approximate[] that" found in the Model Penal Code, *see Taylor*, 495 U.S. at 598-99 & n.8, because a majority of states have deviated from the Code, the Code is no longer a

reliable indicator of the "contemporary" meaning of an offense. *See Garcia-Jimenez*, 807 F.3d at 1086-87.

Under this Court's instructions in *Taylor* regarding the categorical approach, the majority of the states' modern treatment of an enumerated offense is a better indicator of the "contemporary meaning" of a generic offense, *Taylor*, 495 U.S. at 598, than secondary sources like the Model Penal Code. The Model Penal Code, and other secondary sources such as treatises, are only useful as compilations or reviews of the states' actual treatment of offenses, and thus as proxies for what the majority of modern states do. The Model Penal Code is relevant to the extent that it is an indicator of how many or most states treat a particular offense. It has not been used—and should not be used—as a source with independent authority to define an offense, without reference to modern state codes. *See Garcia-Jimenez*, 807 F.3d at 1086-87.

Notably, in *Taylor*, this Court used the Model Penal Code and Professor LaFave's treatise only as indicators of the majority of states' treatment of burglary, not as sources with independent definitional authority. *See Taylor*, 495 U.S. at 598-99 & n.8 (citing Professor LaFave's treatise for its discussion of "modern states" and "the prevailing view in the modern codes," and noting that current usage in the states "approximates that" usage found in the Model Penal Code). And, of course, in *Taylor*, this Court ultimately adopted the definition of generic burglary that "roughly correspond[ed] to the definitions of burglary in a majority of States' criminal codes." *Id.* at 589; *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 (2017) ("As in other cases where we have applied the

categorical approach, we look to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor."); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007) (interpreting "theft" in the Immigration and Nationality Act according to "the generic sense in which. . . 'theft' is now used in the criminal codes of most States"). Indeed, this Court reiterated that emphasis just this term in *United States v. Stitt*, 139 S. Ct. 399 (2018), holding that the "building or structure" element of generic burglary encompassed vehicles adapted for overnight accommodation primarily because the majority of states defined their burglary statutes to do the same. *See id.* at 406, 408.

And even the other sources of the contemporary meaning of a generic offense typically relied on by this Court support that the Fifth Circuit incorrectly defines generic aggravated assault. Contrary to *Mungia-Portillo*'s statement that "LaFave's treatise makes no special note of the degree of the mental culpability typical of an aggravated battery," *Mungia-Portillo*, 484 F.3d at 816-17, Professor LaFave's treatise now also provides that a "higher degree of battery" often depends on whether "the defendant inflicts serious bodily injury," and that most state statues of this type "***require also that this higher level of harm have been intentionally or knowingly done***." Wayne R. LaFave, Substantive Criminal Law § 16.2 (2d ed.) (October 2016 Update) (emphasis added). Texas aggravated assault, of course, can be committed by the reckless causation of serious bodily injury.

In sum, as multiple other circuits have already held, the federal generic definition of aggravated assault requires more than the mere reckless causation of bodily injury. The Fifth Circuit's holding to the contrary is erroneous. Because that error is also in conflict

with other circuits, it warrants this Court's review.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to resolve the circuit split regarding the definition of the federal generic offense of aggravated assault.

Date: January 29, 2019

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By _____
KAYLA GASSMANN
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40067
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
November 13, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RODRIGO ESCOBEDO-CORONADO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:16-CR-1311-1

Before BENAVIDES, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Rodrigo Escobedo-Coronado appeals his 84-month sentence imposed following his guilty plea conviction for illegal reentry. He argues on appeal that the district court erred by imposing a 16-level enhancement under the crime of violence provision of U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2015). Escobedo-Coronado contends that Texas aggravated assault is broader than generic aggravated assault. He concedes that his argument is foreclosed by *United*

* 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.

States v. Guillen-Alvarez, 489 F.3d 197 (5th Cir. 2007), but he argues that *Guillen-Alvarez* is contrary to other circuit decisions on this issue. This court is bound by its own precedent unless and until it is altered by the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986). Accordingly, the district court's judgment is AFFIRMED.