

No. 19-7382

In the
Supreme Court of the United States

Tyrone Jemane Johnson,
Petitioner,
v.
United States of America,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

Gabriel Reyes
Counsel of Record
The Law Office of Gabriel Reyes, PLLC
2600 State Street
Dallas, Texas 75204
(214) 935-3288 (Telephone)
(214) 306-8141 (Fax)
gabriel@reyeslawpllc.com
Texas State Bar No. 24074946

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES CITED	ii
PETITIONER'S REPLY BRIEF	1
CONCLUSION.....	7

TABLE OF AUTHORITIES CITED

Cases

<i>Beckles v. United States</i> , 137 S.Ct. 886 (2017)	6
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	4
<i>Dorsey v. United States</i> , 567 U.S. 260, 270-272 (2012)	7
<i>Lawrence v. Charter</i> , 516 U.S. 163, 167 (1996)	8
<i>Stokeling v. United States</i> , 139 S.Ct. 544, 552 (2019)	3
<i>Stutson v. United States</i> , 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)	8
<i>United States v. Barcenas v. Yanez</i> , 826 F.3d 752, 756-757 (4th Cir. 2016)	6
<i>United States v. Castleman</i> , 572 U.S. 157, 167 (2014).....	3
<i>United States v. Cruz</i> , 691 Fed. Appx. 204, 205 (per curiam), <i>cert. denied</i> , 138 S. Ct. 411 (2017)	2
<i>United States v. Dunnigan</i> , 507 U.S. 87 (1993).....	7
<i>United States v. Favors</i> , 694 Fed. Appx. 281, 282 (5th Cir. 2017) (per curiam), <i>cert. denied</i> , 138 S. Ct. 668 (2018)	1
<i>United States v. Howell</i> , 838 F.3d 489, 499-502 (5th Cir. 2016).....	2
<i>United States v. Mendez-Henriquez</i> , 847 F.3d 214, 220-222 (5th Cir.).....	2
<i>United States v. Owen</i> , 700 Fed. Appx. 384, 384 (2017).....	1
<i>United States v. Shepherd</i> , 848 F.3d 425, 427-428 (5th Cir. 2017).....	1
<i>United States v. Voisine</i> , 136 S.Ct. 2272 (2016)	3
<i>United States v. Zamora-Alonso</i> , 693 Fed. Appx. 370, 371 (per curiam), <i>cert. denied</i> , 138 S. Ct. 486 (2017)	1

<i>Williams v. United States</i> , 503 U.S. 193 (1992).....	6
---	---

Statutes

Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2010).....	3
---	---

Other Authorities

Petitioner’s Reply Brief in <i>Ash v. United States</i> , No. 18-9639 (Nov. 1, 2019).....	4
---	---

Petitioner’s Reply Brief in <i>Bettcher v. United States</i> , No. 19-5652 (Nov. 19, 2019)....	4
--	---

U.S. Sentencing Commission, Report to the Congress: Career Offender Sentencing	
--	--

Enhancements 54 (August 2016)(declining to add a definition of enumerated

offenses, including “aggravated assault” because it believed “it ... best not to

disturb the case law that has developed over the years.”), available at

https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf	5
---	---

Regulations

USSG § 1B1.2(a)	4
-----------------------	---

USSG § 2K2.1	6
--------------------	---

USSG § 2L1.2.....	6
-------------------	---

USSG § 4B1.2(a)(1).....	3
-------------------------	---

USSG § 4B1.2(a)(2).....	1, 3, 6
-------------------------	---------

PETITIONER'S REPLY BRIEF

When the question presented in this case is considered alongside the important analysis that this Court will soon undertake in *Borden v. United States*, No. 19-5410¹, the government's main contention for promptly denying certiorari misses the mark. This case is not limited to a dispute between the Fifth and Fourth Circuit Courts of Appeal as to whether the Texas offense of aggravated assault qualifies under the enumerated clause at USSG § 4B1.2(a)(2). Instead, this case implicates whether petitioner is entitled to any review of the Fifth Circuit's precedent, given the impending decision in *Borden* and the Fifth Circuit's refusal to reconsider its holding that the Texas offense of aggravated assault falls within the enumerated clause by stating that it would reach the same conclusion under the force clause.² Until the issue of whether aggravated assault offenses with a mens rea of recklessness fall within or outside the Armed Career Criminal Act (ACCA) or

¹ In *Borden*, the Court will weigh whether a Tennessee aggravated assault statute that employs a mens rea of recklessness falls within the Armed Career Criminal Act's force clause.

² See *United States v. Shepherd*, 848 F.3d 425, 427-428 (5th Cir. 2017) (holding that Texas aggravated assault qualifies as a "crime of violence" under Section 4B1.2(a)(1)); *United States v. Owen*, 700 Fed. Appx. 384, 384 (2017) (per curiam); *United States v. Favors*, 694 Fed. Appx. 281, 282 (5th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 668 (2018); *United States v. Zamora-Alonso*, 693 Fed. Appx. 370, 371 (per curiam), cert. denied, 138 S. Ct. 486 (2017); *United States v. Cruz*, 691 Fed. Appx. 204, 205 (per curiam), cert. denied, 138 S. Ct. 411 (2017). See also, e.g., *United States v. Howell*, 838 F.3d 489, 499-502 (5th Cir. 2016) (holding that reckless conduct suffices under the elements clause of Section 4B1.2(a)), cert. denied, 137 S. Ct. 1108 (2017); *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-222 (5th Cir.) (same under the elements clause of former Section 2L1.2), cert. denied, 137 S. Ct. 2177 (2017).

USSG § 4B1.2’s force clause is resolved, the petitioner (and similarly situated defendants) cannot gain meaningful appellate review on the question of the generic offense.³ There is a fair probability that the Fifth Circuit would reconsider its ruling on the generic offense if this Court ruled that an aggravated assault offense committed with a mens rea of recklessness did not qualify under the force clause.

In deciding cases that implicate the ACCA’s crime of violence definition, this Court’s approach in recent years has been to assess the impact of its decision against the ongoing enforceability of the federal statute. “Where, as here, the applicability of a federal criminal statute requires a state conviction, we have repeatedly declined to construe the statute in a way that would render it inapplicable in many States.” *Stokeling v. United States*, 139 S.Ct. 544, 552 (2019)(citing *United States v. Castleman*, 572 U.S. 157, 167 (2014) and *United States v. Voisine*, 136 S.Ct. 2272 (2016)). Thus, if the Court in *Borden* decides that the force clause excludes crimes with the mens rea of recklessness, it will reach that result because most states require a higher mens rea for aggravated assault offense, and so, its decision will not impact prosecutions in the majority of federal districts. Such an indication would necessarily disturb the Fifth Circuit’s reasoning that a

³ The government cites seven other petitions to this Court for review on this same point. Gov’t Br. 6. Importantly, the dates of denial for those petitions all predate *Borden*’s grant of certiorari that issued on March 2, 2020.

Texas aggravated assault offense falls within the generic definition of an aggravated assault for purposes of the enumerated clause.⁴

This case presents the ideal vehicle for considering the question of whether the mens rea for a generic aggravated assault offense arising from USSG § 4B1.2(a)(2)'s enumerated clause is any different than that required for ACCA's force clause. It is timely, because this Court will likely measure the impact of its decision in *Borden* against the majority of state aggravated assault statutes; also, the petitioner has preserved the issue on direct appeal; and, as the government concedes, there is a circuit split directly on the issue. Gov't Br. 9.

This Court has several petitions pending that concern USSG § 4B1.2(a)(1), the guidelines' force clause. In each, the petitioners argue that the guidelines force clause should be considered concomitant with the ACCA force clause, mainly because the two provisions are identically worded and also because there is no real prohibition to this Court considering an issue of guidelines application. *See* Petitioner's Reply Brief in *Ash v. United States*, No. 18-9639 (Nov. 1, 2019)(*Ash* Reply); *see also*, Petitioner's Reply Brief in *Bettcher v. United States*, No. 19-5652 (Nov. 19, 2019)(*Bettcher* Reply). Similarly, the Court should grant certiorari in this case to consider the closely related question of whether an aggravated assault offense that fails to qualify under the ACCA's force clause based on a mens rea of

⁴ It is beyond dispute that the requisite mens rea for the Texas offense of aggravated assault is one of mere recklessness. The statute's plain language states that the offense of causing injury may be committed "intentionally, knowingly, or recklessly..." Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2010); *see also*, Gov't Br. 7.

recklessness can still qualify as a generic offense under the guidelines' enumerated clause.

It is not dispositive for this Court's consideration that this dispute centers on the interpretation of a guidelines provision. As the *Ash* Reply meticulously explains, the government's consistent citation to *Braxton v. United States*, 500 U.S. 344 (1991) overreads any limitations set forth in that case. *Ash* Reply 1-2. *Braxton* acknowledges that, because the Sentencing Commission has the statutory authority to amend the guidelines, as well as to make any such amendments retroactive, it can eliminate conflicts itself, thus potentially negating the need for this Court's intervention. 500 U.S. at 348. But in *Braxton* the Court did not resolve the conflict regarding the interpretation of USSG § 1B1.2(a) because the Sentencing Commission had undertaken a proceeding concerning that guideline. *Id.* at 348-349. Also, the case could be decided on other grounds—mainly, that the lower court had misapplied the relevant guidelines provision. *Id.* at 351.

Here, the Sentencing Commission has not acted to eliminate the growing disagreement among circuit courts as to what constitutes an enumerated aggravated assault. The circuit conflict has existed since 2010, without any sign of resolution. Pet. 5-7. Indeed, the Commission has expressly declined to resolve the division. *See* U.S. Sentencing Commission, Report to the Congress: Career Offender Sentencing Enhancements 54 (August 2016)(declining to add a definition of enumerated offenses, including “aggravated assault” because it believed “it [is] ... best not to disturb the case law that has developed over the years.”), available at

https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf. *Barcenas-Yanez*—wherein the Fourth Circuit explicitly rejected the Fifth Circuit’s holding that the Texas offense of aggravated assault qualifies as a generic offense—issued two months before the issuance of the Sentencing Commission’s report. *See United States v. Barcenas v. Yanez*, 826 F.3d 752, 756-757 (4th Cir. 2016) (Decision issued on June 21, 2016). The Commission has had ample opportunity to act, but it has failed to do so and now it cannot.⁵

In the past, this Court has granted certiorari in cases involving guidelines and closely related issues. In *Beckles v. United States*, 137 S.Ct. 886 (2017), this Court granted certiorari to address a void for vagueness challenge to the guidelines; in *Williams v. United States*, 503 U.S. 193 (1992) to resolve a guidelines conflict; and in *United States v. Dunnigan*, 507 U.S. 87 (1993), the Court acted upon the government’s request for a petition of certiorari to determine the applicability of a guidelines enhancement. *Ash* Reply 3-5. In *Dorsey v. United States*, 567 U.S. 260, 270-272 (2012) this Court granted certiorari in two separate cases to resolve the Fair Sentencing Act’s application, where one defendant was sentenced prior to the effective date of the Act’s guidelines amendments, and the other was sentenced after those amendments had gone into effect. *Ash* Reply 8. More recently, in *Bostock v. Clayton County*, No. 17-1681, it granted certiorari to determine whether discrimination based on sexual orientation is covered under Title VII, and granted

⁵ At present, the Commission does not have enough voting members to take action. *Ash* Reply 6.

certiorari in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107, to determine whether discrimination against transgender people is covered under Title VII. *Ash* Reply 8.

A similar approach is merited on the issue of the requisite mens rea for an aggravated assault offense to come within the ACCA's force clause and the generic definition of an aggravated assault. The enumerated clause affects defendants under more than one provision of the guidelines. As a case in point, petitioner was sentenced under USSG § 2K2.1—which cross references the “crime of violence” definition in USSG § 4B1.2, and so, imports the enumerated offense of aggravated assault. Other guidelines, such as USSG § 2L1.2, borrow the language of USSG § 4B1.2 word-for-word even if they don’t make an explicit cross reference. *See* USSG § 2L1.2, comment. (n.(2)(2018))(borrowing the definition from USSG § 4B1.2(a)(2)). Also, this guideline is imposed with much greater frequency than the Armed Career Criminal Act. *Ash* Reply 9.

At minimum, this Court should hold the case pending the disposition of *Borden* and any related cases so that it may consider a GVR order. “In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court’s insight before we rule on the merits, and alleviates the ‘potential for unequal treatment’ that is inherent in our inability to grant plenary review of all pending cases raising similar issues.”

Lawrence v. Charter, 516 U.S. 163, 167 (1996). This Court “regularly holds 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.” *Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Such an approach is fully merited in this case.

CONCLUSION

Petitioner desires a grant of certiorari in this case. But either a grant of certiorari or holding for a future GVR order would allow petitioner the possibility of meaningful judicial review.

Respectfully submitted this 29TH day of May, 2020.

/s/Gabriel Reyes
Gabriel Reyes
Counsel of Record
The Law Office of Gabriel Reyes, PLLC
2600 State Street
Dallas, Texas 75204
(214) 935-3288 (Telephone)
(214) 306-8141 (Fax)
gabriel@reyeslawpllc.com
Texas State Bar No. 24074946

Attorney for Petitioner