

No. \_\_\_\_\_

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In the Supreme Court of the United States

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**Jonathan Wallace Gomez,**  
*Petitioner,*

v.

**United States of America,**  
*Respondent*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

- I. Whether a criminal offense defined to include the reckless causation of bodily injury has as an element the use, attempted use, or threatened use of physical force against the person of another.
- II. Whether the generic, contemporary definition of “aggravated assault” includes an offense defined to include the reckless causation of bodily injury.

## **PARTIES TO THE PROCEEDING**

Petitioner, Jonathan Wallace Gomez, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was Plaintiff-Appellee.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Jonathan Gomez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The Fifth Circuit's unpublished opinion can be found in the Federal Appendix at 810 F. App'x 338. I have also attached the opinion as Appendix A. *See Pet. App. A1-A2.* The district court did not publish its rulings, but I have attached its judgment as Appendix B. *See Pet. App. B1-B7.*

### **JURISDICTION**

The Court of Appeals issued its panel opinion on June 23, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT PROVISIONS**

Section 4B1.1 of the United States Sentencing Guidelines Manual singles out for severe punishment criminal defendants with “at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 4B1.1(a)(3) (Nov. 1, 2018).

Section 4B1.2 provides a two-part definition for the term “crime of violence.” First, the definition includes “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.” USSG § 4B1.2(a)(1). Second, “any offense under federal or state law, punishable by

imprisonment for a term exceeding one year, that . . . is . . . aggravated assault” also qualifies as a “crime of violence.” USSG § 4B1.2(a)(2).

#### **LIST OF PROCEEDINGS BELOW**

1. *United States v. Jonathan Wallace Gomez*, Case No. 5:19-CR-016-H, United States District Court for the Northern District of Texas. Judgment and sentence entered on September 13, 2019. (Appendix B).
2. *United States v. Jonathan Wallace Gomez*, 810 F. App’x 331 (5th Cir. 2020), Case No. 19-11068. Judgment affirmed on June 23, 2020. (Appendix A).

## STATEMENT OF THE CASE

The Fifth Circuit Court of Appeals recently affirmed the petitioner's sentence, which turned on his classification as a "career offender." Mr. Gomez pleaded guilty to a pair of federal crimes, *see* (ROA.124-25), and his presentence report labeled him a "career offender," (ROA.139). To qualify for this classification, Mr. Gomez must have at least two prior "crime of violence" convictions. *See* (ROA.139) (citing U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 4B1.1(a)(3) (Nov. 1, 2018)). The PSR identified two, and one was a prior aggravated-assault conviction from Lubbock County, Texas. (ROA.138). Mr. Gomez objected. (ROA.162). At sentencing, the district court overruled the objection, and for two reasons, classified the prior assault conviction as a "crime of violence." (ROA.108). First, it ruled that the prior aggravated-assault conviction constituted generic "aggravated assault." (ROA.108) (citing *United States v. Villasenor-Ortiz*, 675 F. App'x 424, 427-28 (5th Cir. 2017)). Second, it ruled that the prior conviction had as an element the use of force. (ROA.108) (citing *United States v. Gomez Gomez*, 917 F.3d 332, 334 (5th Cir. 2019)). The career-offender classification resulted in a suggested term of imprisonment somewhere between 262 and 327 months. (ROA.140) (citing USSG § 4B1.1(c)(3)). The district court imposed a 264-month term of imprisonment. (ROA.117). Mr. Gomez appealed and challenged both of the district court's "crime of violence" rulings. Appellant's Initial Brief at 7-12, *United States v. Jonathan Gomez*, No. 19-11068 (5th Cir. Jan. 28, 2020). Binding precedent in the Fifth Circuit foreclosed

those questions in the government's favor, and the court of appeals affirmed the sentence in an unpublished opinion. Pet. App. A1-A2.

## REASONS FOR GRANTING THIS PETITION

**I. The Fifth Circuit affirmed the sentence imposed on two grounds. One is currently before the Court in *Borden v. United States*. The second is subject to a circuit split.**

**a. The Court should hold this petition pending its decision in *Borden*.**

This Court has already granted review in *Borden v. United States*, cert. granted, No. 19-5410 (Mar. 2, 2020). There, it will address whether an aggravated-assault offense defined to include the reckless causation of serious bodily injury, *see* TENN. CODE ANN. § 39-13-102(a)(1)(B) (citing TENN. CODE ANN. § 39-13-101(a)(1)), “has as an element the use, attempted use, or threatened use of physical force against the person of another,” *see* 18 U.S.C. § 924(e)(2)(B). Mr. Borden argued that an offense committed recklessly could not so qualify, but the Sixth Circuit Court of Appeals held otherwise. *United States v. Borden*, 769 F. App’x 266, 267 (6th Cir. 2019). This Court granted review to clear up a circuit split on the question.

*Compare United States v. Hodge*, 902 F.3d 420, 426 (4th Cir. 2018) (reckless conduct insufficient to constitute use of force against the person of another); *United States v. Rose*, 896 F.3d 104, 110 (1st Cir. 2018) (same), *with United States v. Burris*, 920 F.3d 942, 951 (5th Cir. 2019) (reckless conduct sufficient to constitute use of force against the person of another); *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018) (same); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (same);

*United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017) (same); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (same).

In part, this petition turns on the same split. The career-offender provision applied below uses the same language at issue in *Borden*. Compare 18 U.S.C. § 924(e)(2)(B) (defining the term “violent felony” to include crimes that have “as an element the use, attempted use, or threatened use of physical force against the person of another”), with USSG § 4B1.1(a)(3) (defining the term “crime of violence” to include offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another”). This case, in turn, presents the same question. The petitioner’s presentence report identified a prior aggravated-assault conviction from Lubbock County, Texas, as a “crime of violence.” (ROA.138). Like the statute at issue in *Borden*, the Texas Penal Code defines aggravated assault to include the reckless causation of serious bodily injury. TEX. PENAL CODE § 22.02(a)(1) (citing TEX. PENAL CODE § 22.01(a)(1)). Mr. Gomez has repeatedly argued that such conduct did not have as an element the use of force against another, but the Fifth Circuit had already come out the other way. In *United States v. Burris*, it held that “reckless conduct constitutes the use of physical force.” See 920 F.3d at 952.

The Court should hold this petition pending its decision in *Borden*. If a criminal offense that can be committed recklessly *does not* have as an element the use of force against another, the Fifth Circuit got *Burris* wrong. Given *Borden*’s

potential relevance to an issue advanced at the district court level and on direct appeal, the Court should hold this petition pending its decision in that case.

- b. If the Court sides with the petitioner in *Borden*, it should then grant certiorari in this case. Certiorari would allow the Court to resolve a circuit split concerning the generic definition of “aggravated assault.”**

A reversal in *Borden* would be necessary but insufficient to support reversal here. The Guidelines Manual also defines the term “crime of violence” to include generic “aggravated assault.” USSG § 4B1.2(a)(2). In overruling the petitioner’s career-offender objection, the district court found that his prior aggravated-assault conviction constituted the generic version of the same. (ROA.108) (citing *United States v. Villasenor-Ortiz*, 675 F. App’x 424, 427-28 (5th Cir. 2017)). *Borden* would leave that finding untouched.

The district court’s ruling—and the precedent upon which it was based—is nevertheless subject to a circuit split. In *United States v. Mungia-Portillo*, the Fifth Circuit considered an aggravated-assault statute defined to include reckless causation of bodily injury. 484 F.3d 813, 815 (5th Cir. 2007) (citing TENN. CODE ANN. § 39-13-102(a)(1)(A)). The defendant drew a contrast between mere recklessness, which would support a conviction under the statute in question, and recklessness “under circumstances manifesting extreme indifference to the value of human life.” *Id.* at 816-17 (quoting MODEL PENAL CODE § 211.2 (AM. LAW INST. 1985)). The second standard came from the Model Penal Code, which the defendant held up as an example of generic “aggravated assault.” *Id.* at 816. The Fifth Circuit dismissed the difference as “sufficiently minor” and held “that a defendant’s mental

state in committing an aggravated assault, whether exhibiting ‘depraved heart’ recklessness or ‘mere’ recklessness, is not dispositive of whether the aggravated assault falls within or outside the plain, ordinary meaning of the enumerated offense of aggravated assault.” *Id.* at 817. The Fifth Circuit later applied the holding from *Mungia-Portillo* to the statute at issue here. *See United States v. Guillen-Alvarez*, 489 F.3d 197, 200-01 (5th Cir. 2007). The panel below relied on this authority to affirm the district court’s ruling. Pet. App. A2 (citing *Guillen-Alvarez*, 489 F.3d at 200-01). Three circuit courts of appeals—the Fourth, Eighth, and Ninth—have come out the other way. *See United States v. Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018); *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1085 (9th Cir. 2015). Each has held that the generic, contemporary definition of “aggravated assault” requires a more culpable *mens rea* than mere recklessness. *Schneider*, 905 F.3d at 1095; *Barcenas-Yanez*, 826 F.3d at 756; *Garcia-Jimenez*, 807 F.3d at 1085.

The Eighth Circuit harshly criticized the Fifth’s minority position. For one, it ignored this Court’s guidance on the categorical approach. This Court “ha[s] often held, and in no uncertain terms, that a state crime cannot qualify as [a] . . . predicate if its elements are broader than those of a listed generic offense.” *Schneider*, 905 F.3d at 1095 (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016)). In *Mungia-Portillo*, however, the Fifth Circuit “did not even attempt to uncover the elements of the generic offense.” *Id.* Instead, “[i]t considered only whether the Tennessee statute had the two most common features of aggravated

assault and more or less ignored any others.” *Id.* (citing *Mungia-Portillo*, 484 F.3d at 816-17). According to the Eighth Circuit, the Fifth had also mischaracterized the difference between “ordinary and extreme-indifference recklessness” as “minor.” *Id.* (quoting *Mungia-Portillo*, 484 F.3d at 817). “[T]here is,” after all, “a long tradition of treating” those states of mind “differently, in terms of both culpability and punishment.” *Id.*

It gets worse from there. The Fifth Circuit, for example, has repeatedly identified the MPC as its “primary source for the ordinary meaning’ of aggravated assault.” *See, e.g., United States v. Torres-Jaime*, 821 F.3d 577, 582 (5th Cir. 2016) (quoting *United States v. Hernandez-Rodriguez*, 788 F.3d 193, 197 (5th Cir. 2015)). Given that approach, it “decline[d]” in *Mungia-Portillo* “to exhaustively survey all state codes.” *See* 484 F.3d at 817 n.3. This Court, by contrast, has repeatedly looked to state codes to define generic offenses and for good reason—state codes are an objective source and allow for a descriptive conclusion. *See, e.g., Taylor v. United States*, 495 U.S. 575, 598 (1990) (citing *Perrin v. United States*, 444 U.S. 37, 45 (1979); *Nardello v. United States*, 393 U.S. 286, 289 (1969)); *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 (2017); *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016). The MPC, on the other hand, is a prescriptive document. The American Law Institute drafted it in an effort to “stimulate” and “assist” legislative efforts to “appraise the content of the penal law by a contemporary reasoned judgment.” Herbert Wechsler, *Foreword* to MODEL PENAL CODE at xi (AM. LAW INST. 1985)). Its purpose is thus “critical and reformist,” rather than

descriptive. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 950 (1999). Without reference to state criminal codes, it is simply impossible to know whether the MPC's definitions correspond to the ordinary, contemporary meaning of "aggravated assault" or any other crime. The Fifth Circuit's overreliance on the MPC is also anti-democratic. The individual "States possess primary authority for defining and enforcing the criminal law." *United States v. Rodriguez*, 711 F.3d 541, 556 (5th Cir. 2013) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). A survey of state criminal codes validates this principle by tying a generic crime's definition to legislative choices, rather than judicial fiat. *See id.* (citing *Taylor*, 495 U.S. at 593-94 ; *Perrin*, 444 U.S. at 43-45; *Nardello*, 393 U.S. at 296). The Fifth Circuit's approach ignores those choices and aggrandizes the power of the federal judiciary at the expense of state legislatures.

The Court should clean up the Fifth Circuit's mess. After *Borden*, the district court's generic-offense finding may be the only ruling underlying the petitioner's career-offender classification. The Fifth Circuit has staked out a minority position on that issue, *see Schneider*, 905 F.3d at 1095-96 (citing *Barcenas-Yanez*, 826 F.3d at 758; *United States v. Esparza-Herrera*, 557 F.3d 1019, 1025 (9th Cir. 2009)), and by granting certiorari, this Court could resolve the pending split. Certiorari would also allow this Court to correct the Fifth Circuit's overreliance on the Model Penal Code.

## CONCLUSION

Petitioner respectfully submits that the Court should hold this petition pending its decision in *Borden v. United States*. If the Court sides with the petitioner in *Borden*, it should then grant certiorari in this case to clear up a circuit split concerning the generic, contemporary definition of the term “aggravated assault.”

Respectfully submitted November 18, 2020.

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