No. 20-6407

In the Supreme Court of the United States

Jonathan Wallace Gomez,
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

REPLY TO BRIEF IN OPPOSITION

Taylor Wills Edwards "T.W." Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Statutes

Federal Cases

United States Sentencing Guidelines Manual

Model Penal Code

Other Authorities

REPLY TO BRIEF IN OPPOSITION

I. If the Court sides with the petitioner in *Borden*, this case presents an opportunity to kill two birds with one stone.

a. The Sentencing Commission has consistently failed to address the circuit split at the heart of the second question presented. In light of its persistent failure, this Court should step in and resolve the conflict on the merits.

The government's initial points are unpersuasive. Sure enough, the Sentencing Commission can resolve for itself whether generic "aggravated assault," as used in Section 4B1.2 of the Guidelines Manual, includes crimes with a *mens rea* of mere recklessness. Brief for the United States in Opposition at 6. On this point, however, the government ignores the obvious—the Commission's repeated failure to act. The split at issue is over 12 years old, and the Commission has consistently avoided it. The government then compounds the error by overlooking the Commission's position on the precise issue presented, which deferred to the various circuit courts of appeals. Those courts have not resolved the split in the years since. This Court should.

The conflict at issue is deep and persistent. On April 17, 2007, the Fifth Circuit held as follows: "[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." *See United States v. Mungia-Portillo*, 484 F.3d 813, 813, 817 (5th Cir. 2007). On February 25, 2009, the Ninth Circuit came out the other way. *United States v. Esparza-Herrera*,

557 F.3d 1019, 1019, 1025 (9th Cir. 2009) ("Under the categorical approach, aggravated assault requires a *mens rea* of at least recklessness 'under circumstances manifesting extreme indifference to the value of human life.'"). Twelve years have passed since the Ninth Circuit's decision, and in that time, two other circuit courts of appeals have joined the fray. *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). Both sided with the Ninth Circuit. *Schneider*, 905 F.3d at 1095; *Barcenas-Yanez*, 826 F.3d at 756.

The Commission has done nothing to address the split. Since February 25, 2009, it has amended the Guidelines Manual 87 times. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL App. C, Amend. 726, at 311 (Supp. Nov. 1, 2011) (noting the effective date for amendment 726—November 1, 2009); U.S. SENTENCING COMM'N, GUIDELINES MANUAL App. C, Amend. 813, at 198 (Supp. Nov. 1, 2018) (noting the effective date for amendment 813—November 1, 2018). The term "aggravated assault" remains undefined. *Compare* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 4B1.2 cmt. n.1 (Nov. 1, 2009), *with* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 4B1.2(a)(1) (Nov. 1, 2018).

The Commission could have—but did not—address the split in 2016. That year, it added to Section 4B1.2's commentary definitions for two enumerated "crimes of violence"—"forcible sex offense" and "extortion." U.S. SENTENCING COMM'N, GUIDELINES MANUAL App. C, Amend. 798, at 118-19 (Supp. Nov. 1, 2018). "The amended guideline," it noted, "continues to rely on existing case law for

purposes of defining the remaining enumerated offenses." *Id*. at 123. The Commission thus saw fit to leave in place "the case law that ha[d] developed over the years" concerning the term "aggravated assault." *See id*. That case law was in conflict then and remains in conflict today.

This context dramatically undercuts the government's initial arguments against certiorari. The Commission has repeatedly failed to act. That it has expressed interest in addressing other aspects of Section 4B1.2, *see* Brief for the United States in Opposition at 7, cannot excuse its failure to resolve the split presented here. Nor is the Commission well equipped to address the split in the near future. It currently lacks a "quorum of voting members," *Longoria v. United States*, 141 S. Ct. 978, 979 (2021), and that has been the case for years now, U.S. SENTENCING COMM'N, GUIDELINES MANUAL, ANNUAL REPORT 2-3 (2018). Even at full strength, it accepted the relevant split as the lesser of two evils and chose not to define the term "aggravated assault" to avoid "new litigation." U.S. SENTENCING COMM'N, GUIDELINES MANUAL App. C, Amend. 798, at 123 (Supp. Nov. 1, 2018). That is unfair to defendants subject to the Fifth Circuit's minority position, and in light of the Commission's repeated failure to act, the unresolved split presents a "compelling reason[]" to grant certiorari in this case. *See* Rule 10, RULES OF THE SUPREME COURT OF THE UNITED STATES.

b. Certiorari would also allow this Court to address the methodological error underlying the Fifth Circuit's minority position.

The Fifth Circuit's errors extend beyond the merits. In defining generic "aggravated assault," the Eighth and Ninth Circuits appropriately surveyed state criminal codes and identified the Texas version of the offense as an outlier. *Schneider*, 905 F.3d at 1095 n.4 (citing TEX. PENAL CODE § 22.02); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 n.7 (9th Cir. 2015) (citing TEX. PENAL CODE § 22.02). The Fifth Circuit avoided this analysis, *see Mungia-Portillo*, 484 F.3d at 817 n.3, and has instead repeatedly identified the Model Penal Code 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)).

That approach finds no support in this Court's authority. Although a "multijurisdictional analysis . . . is not required by the categorical approach," a survey of "state criminal codes" may "offer[] useful context." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 n.3 (2017). Along those lines, this Court has consistently used state criminal codes to establish such context. *Esquivel-Quintana*, 137 S. Ct. at 1571; *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007); *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 410 (2003); *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)). It has cited the MPC on occasion, but those

citations merely provided additional reinforcement for a position already supported by a survey of state criminal laws. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1571; *Voisine*, 136 S. Ct. at 2280; *Scheidler v. National Organization for Women, Inc.*, 537 U.S. at 410; *Taylor*, 495 U.S. at 598 n.8; *Perrin*, 444 U.S. at 45 n.11. This is not surprising. After all, the "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)). The MPC, on the other hand, is a prescriptive document designed 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)). State law provides an objective basis from which to infer a generic crime's ordinary meaning. The MPC does not.

Certiorari thus offers a two-for-one special. The Fifth Circuit misapplied the categorical approach, and in doing so, staked out a minority position on a persistent circuit split. *See Schneider*, 905 F.3d at 1095. This case offers the Court an opportunity to address both errors. In resolving the merits, the Court must also clarify the application of the categorical approach.

CONCLUSION

Petitioner respectfully requests the Court to 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 April 6, 2021.

/s/ Taylor Wills Edwards "T.W." Brown
Taylor Wills Edwards "T.W." Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

Attorney for Petitioner