NO._____

In the Supreme Court of the United States

REGINALD GLENN,

PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

To be a "crime of violence" under the enumerated clause of U.S.S.G. §4B1.2(a)(2), an offense must have elements that match or are narrower than the elements of the "generic" version of an enumerated offense. *Descamps v. United States*, 570 U.S. 254, 257 (11th Cir. 2013). What is the *mens rea* of generic "aggravated assault" – ordinary recklessness, extreme indifference recklessness, knowledge, or something else?

Parties to the Proceeding

Petitioner, Reginald Glenn, was the Appellant in the Court of Appeals and the Defendant in the District Court.

Respondent, the United States of America, was the Appellee in the Court of Appeals, and the Plaintiff in the District Court.

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Reginald Glenn, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinion Below

The opinion of the court of appeals was not reported, but is available on Westlaw. *United States v. Reginald Glenn*, No. 19-13249, 2021 WL 4618075 (11th Cir., Oct. 6, 2021) (not reported in F. App'x.). A copy of the opinion is attached as Appendix A. The District Court made an oral ruling during the sentencing hearing, which is unreported. A transcript of the sentencing hearing is attached as Appendix B.

Jurisdiction

Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The court of appeals entered its decision affirming Mr. Glenn's conviction on October 6, 2021. He timely files this petition based on Supreme Court Rule 13.1.

Relevant Statutory And Constitutional Provisions

U.S.S.G. §2K2.1 sets the base offense level for knowingly possessing a firearm after being convicted of a felony in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). It provides, in pertinent part:

> (a) Base Offense Level (Apply the Greatest):
>
> > (4) 20, if--
> >
> > > (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; . . . .

Application Note One to §2K2.1 defines "crime of violence" by cross-referencing U.S.S.G. §4B1.2(a), stating:

> <"Crime of violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.>

U.S.S.G. §4B1.2(a) defines "crime of violence" as follows:

> (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).

Ga. Code Ann. § 16-5-21 (2015) proscribes "aggravated assault" in Georgia. At the time of the Petitioner's conviction of this offense, it stated, in pertinent part:

> (a) A person commits the offense of aggravated assault when he or she assaults:
>
> (1) With intent to murder, to rape, or to rob;
>
> (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; or
>
> (3) With any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation; or
>
> (4) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

Ga. Code Ann. § 16-5-20 (2015) proscribes "simple assault" in Georgia, stating, in pertinent part:

> (a) A person commits the offense of simple assault when he or she either:
>
> (1) Attempts to commit a violent injury to the person of another; or
>
> (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

18 U.S.C. § 922(g) proscribes the possession of a firearm by a convicted felon, stating, in pertinent part:

> (g) It shall be unlawful for any person–
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or

> ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstates or foreign commerce.

18 U.S.C. § 924(a)(2) criminalizes the knowing violation of § 922(g), stating, in pertinent part:

> (a) . . .
>
> (2) Whoever knowingly violations subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

Introduction

This case presents a 3-2-2 Circuit split on a recurring issue that impacts countless Guidelines calculations. An offense is a "crime of violence" under the enumerated clause of U.S.S.G. §4B1.2(a)(2) if its elements match or are narrower than those of the "generic" offense. Aggravated assault is an enumerated offense, but the Circuit Courts do not agree on its generic *mens rea*. The Eleventh Circuit found that Petitioner's Georgia aggravated assault conviction was generic, although it could be committed recklessly. App'x A at *2. The Third and Fifth Circuits agree that generic aggravated assault encompasses recklessness offenses. The Sixth and Eighth Circuits require "extreme indifference recklessness," and the Ninth Circuit requires "knowledge," while the Fourth Circuit requires at least the former, and likely the latter.

The resolution of question presented would likely have a substantial impact on Petitioner's sentence. The Eleventh Circuit's decision that Georgia aggravated assault was a crime of violence meant that Petitioner's base offense level was 20 under U.S.S.G. §2K2.1(a)(4)(A), instead of 12 under U.S.S.G. §2K2.1(a)(7). Given the Circuit split, Petitioner's sentencing range was about three times what it would have been in four other Circuits.

This case presents a simple vehicle for resolving this well-developed and consequential split. The issue was preserved, and the relevant facts and law are clear. This Court should grant certiorari.

Statement Of The Case

A. Legal Framework

Crimes of Violence. U.S.S.G. §2K2.1(a)(4)(A) sets the base offense level for the unlawful possession of a firearm at 20, if, *inter alia*, "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence . . . .[,]" as that term is defined in U.S.S.G. § 4B1.2. Section 4B1.2 has two clauses: the "force clause" of §4B1.2(a)(1) (also called the "elements clause"), and, at issue here, the "enumerated clause" of §4B1.2(a)(2).

Section 4B1.2(a)(2) enumerates eight offenses, including "aggravated assault." An offense qualifies as one of these enumerated offenses if all of its elements match (or are narrower than) the "generic" elements of the offense. *Descamps v. United States*, 570 U.S. 254, 257 (2013). This comparison requires using the "categorical approach," which entails focusing exclusively on the legal elements of the crime and ignoring the factual details underlying a particular conviction. In practice, this means that courts must "presume" the prior conviction at issue was predicated on the least culpable conduct legally sufficient to show each element, and then consider whether that conduct would establish the corresponding generic element. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

A "generic" offense means "the offense as commonly understood." *Id.* To determine the elements of generic aggravated assault, courts consider how "the criminal codes of most States," as well as the Model Penal Code and legal treatises, define the offense. *Taylor v. United States*, 495 U.S. 575, 598 (1990). It may also

consider "reliable dictionaries." *Esquivel-Quintana v. Sessions*, __U.S.__, __,137 S. Ct. 1562, 1569 (2017).

Georgia Aggravated Assault. Georgia defines aggravated assault as a simple assault plus one of several aggravating factors. *Guyse v. State*, 286 Ga. 574, 576, 690 S.E.2d 406, 409 (2010). The generic aggravating factor relevant here is "[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury[.]" Ga. Code Ann. §16-5-21(a)(2); *see* R32 at 6 (indictment underlying Petitioner's Georgia aggravated assault conviction). A person can commit Georgia simple assault in two ways: "attempt[ing] to commit a violent injury to the person of another[,]" or "commit[ting] an act which places another in reasonable apprehension of immediately receiving a violent injury[.]" Ga. Code Ann. §16-5-20(a).

The Eleventh Circuit has held "a conviction under Georgia's aggravated assault statute can be predicated on a *mens rea* of recklessness." *United States v. Moss*, 920 F.3d 752, 759 (11th Cir. 2019), *aff'd en banc*, 4 F.4th 1292 (2021). It thus held Georgia aggravated assault could not qualify as a violent felony under the ACCA force clause, *see* 18 U.S.C. § 924(e)(2)(B)(i), in light of this Court's decision in *Borden v. United States*, __U.S.__, 141 S.Ct. 1817 (2021). *Moss* did not address whether Georgia aggravated assault qualifies under the enumerated clause of §4B1.2(a)(2).

State law confirms that Georgia aggravated assault with a deadly weapon does not require a specific intent with respect to the victim. In *Smith v. State*, 280 Ga. 490, 491-92, 629 S.E.2d 816, 818 (2006), the Georgia Supreme Court explained:

> The crime of aggravated assault, as alleged, is established by the reasonable apprehension of harm by the victim of an assault by a firearm rather than the assailant's intent to injure. All that is required is that the assailant intend to commit the act which in fact places another in reasonable apprehension of injury, not a specific intent to cause such apprehension.

See also Patterson v. State, 299 Ga. 491, 493, 789 S.E.2d 175, 177 (2016) (noting "multiple" rulings that simple assault does not require a specific intent); *Rhodes v. State*, 257 Ga. 368, 369, 359 S.E.2d 670, 672 (1987) (recounting legislative history of Georgia aggravated assault). Georgia courts have found sufficient evidence of aggravated assault with a deadly weapon based only on a defendant's reckless driving. *See, e.g., Kirkland v. State*, 282 Ga. App. 331, 332, 638 S.E.2d 784, 785 (2006) (state proved aggravated assault because officer reasonably feared serious injury when defendant reacted to officer's reaching into his car and shooting him by hitting the gas, causing the car to drag officer); *Cline v. State*, 199 Ga. App. 532, 533, 405 S.E.2d 524, 525 (1991) (state proved aggravated assault when defendant hit patrol car during high speed chase).

Generic Aggravated Assault in the Eleventh Circuit. In *United States v. Palomino Garcia*, 606 F. 3d 1317, 1334 (11th Cir. 2010), the Eleventh Circuit defined generic aggravated assault as "a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon." *Id*. at 1331-32. It declined to decide whether "the generic offense of aggravated assault requires a mental state greater than mere recklessness," because the Arizona offense in that case was overbroad in other ways. *Id*. at 1334 n.14.

In *United States v. Morales-Alonso*, 878 F. 3d 1311, 1318-19 (11th Cir. 2018), it held that Georgia aggravated assault's deadly weapon aggravator matched the generic "deadly weapon." Although its analysis was limited to the deadly weapon issue, subsequent panels have declined to consider the *mens rea* of generic aggravated assault – each time concluding that *Morales-Alonso* had found Georgia aggravated assault to be generic, and that it could not reconsider this decision under the prior panel precedent rule. *See, e.g.*, *United States v. Ellis*, 736 F. App'x 855, 859 (11th Cir. June 13, 2018); *United States v. Huling*, 741 F. App'x 702, 704 (11th Cir. July 10, 2018), *cert. denied*, 139 S. Ct. 1200 (2019); *United States v. Reid*, 754 F. App'x 846, 851 (11th Cir. Nov. 2, 2018); *United States v. Patmon*, 750 F. App'x 902, 905 (11th Cir. Oct. 5, 2018), *cert. denied*, 139 S. Ct. 1219 (Feb. 9, 2019); *United States v. Davis*, 718 F. App'x 946, 952 (11th Cir. 2018); *United States v. Berry*, 808 F. App'x 857, 859-60 (11th Cir. 2020).

Even after *Moss*, 920 F.3d at 759, recognized that Georgia aggravated assault contains a recklessness *mens rea*, the panel below held that the prior panel precedent rule foreclosed any consideration of whether this intervening construction of Georgia law meant Georgia aggravated assault was non-generic. *Glenn*, 2021 WL 4618075, at *2. It thus reaffirmed that Georgia aggravated assault – an offense that can be committed with ordinary recklessness – is generic aggravated assault. *Id*. at *3.

B. Factual Background

Mr. Glenn pleaded guilty to possessing a firearm by a convicted felon in violation of 18 U.S.C. §§ 924(a)(2) & 922(g)(1). R22[1]. Prior to his sentencing, the U.S. Probation Office prepared a presentence investigation report ("PSR"). R23. It advised that his offense level should be 20 under U.S.S.G. §2K2.1(a)(4)(A), because he had a prior felony conviction of a crime of violence. *Id*. at 4. It noted in his criminal history a prior Georgia conviction for aggravated assault. *Id*. at 7-8. It added two levels because the firearm he possessed was stolen, and subtracted three for acceptance of responsibility, arriving at a total offense level of 19. *Id*. at 4-5. With a criminal history category of III, his advisory imprisonment range was 37 to 46 months. *Id*. at 11.

Mr. Glenn objected to his base offense level. R24. He argued that Georgia aggravated assault, Ga. Code Ann. § 16-5-21 (2008), did not qualify as a "crime of violence" under either the force clause or the elements clause. *Id*. Relevant here, he argued it did not qualify under the enumerated clause because it was broader than "generic" aggravated assault. It was, he contended, "effectively a strict liability crime." *Id*. at 8. Elsewhere, he quoted that Georgia aggravated assault requires only a " 'general intent . . . to commit an act that placed another in reasonable apprehension of immediate violent injury[,]' " with no intent as to the consequences of that act. *Id*. at 12 (quoting *Guyse*, 286 Ga. at 577, 690 S.E.2d at 409). In contrast, "generic aggravated assault requires some level of intent that is greater than mere recklessness." *Id*. at 5.

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[1] Petitioner cites to the electronic record before the Eleventh Circuit, available through CM/ECF, as "R[document number] at [page number]."

The government responded that *Morales-Alonso*, 878 F.3d at 1320, bound the District Court to reject Mr. Glenn's argument. R28 at 2. Even if it did not, the government argued that Georgia simple assault still "require[d] intentional or volitional conduct[,]" which, "when combined with the aggravating factor of a deadly weapon," ensured that the state must prove " 'a general intent to injure.' " *Id*. at 4 (underlining omitted) (quoting *Guyse*, 286 Ga. at 577).

At the sentencing hearing, defense counsel sought to distinguish *Morales-Alonso*, chiefly on the ground that *Morales-Alonso* did not address the *mens rea* of Georgia aggravated assault. *Id*. App. B (sentencing transcript) at 8:17-24. The District Court paraphrased "[y]ou are arguing that their ultimate conclusion would have been different had there been a lawyer there making the argument that you are making today which is that they should look at it as simple assault plus an aggravated factor." *Id*. at 9: 15-19. It asked "[d]oesn't the case law say that when the Eleventh Circuit or the Court of Appeals specifically makes a determination that – as they did here – then it doesn't matter whether it could have been a different determination had somebody theoretically made another argument?" *Id*. at 10: 7-9. It concluded "I think I'm bound by *Morales-Alonso*[,] which I think clearly holds that for guideline purposes crime of violence . . . includes a Georgia aggravated assault conviction in this case, which is a conviction for aggravated assault using a deadly weapon[.]" *Id*. at 10: 19-25.

Mr. Glenn appealed this decision to the Eleventh Circuit Court of Appeals, arguing that Georgia aggravated assault required only recklessness or a general

intent, so it did not qualify as a crime of violence under either the enumerated clause or the force clause of §4B1.2(a). The government responded with a motion for summary affirmance, claiming this disposition was appropriate "because binding precedent altogether forecloses [his] appeal." Mot. for Summ. Af'm, *United States v. Glenn*, 19-13249, *4 (11th Cir. Jul. 13, 2020). Mr. Glenn filed a response to the government's motion. He argued that the prior panel precedent rule did not foreclose his argument because "*Morales-Alonso* did not consider the *mens rea* issue, and [it] could not resolve an unraised issue *sub silentio*." Resp. to Mot. for Summ. Af'm, *United States v. Glenn*, 19-13249, *6 (11th Cir. July 23, 2020).

The court of appeals stayed the appeal pending *Borden*, __U.S.__, 141 S.Ct. 1817, and *Moss*, 928 F.3d 1340. After those cases were decided, without further briefing, it summarily affirmed. It held that it was bound by *Morales-Alonso* to find Mr. Glenn's aggravated assault conviction qualified as a crime of violence under the enumerated clause. App. A, at *5. It concluded "the fact that we did not address Glenn's *mens rea* argument does not undermine *Morales-Alonso*'s binding effect." *Id*. It further found that neither *Moss*, nor *Borden*, had "undermined to the point of abrogation" *Morales-Alonso*, since those cases only concerned the ACCA force clause, and *Morales-Alonso* concerned the §4B1.2 enumerated clause. *Id*. at *6.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SPLIT OVER THE *MENS REA* OF "AGGRAVATED ASSAULT" IN U.S.S.G. §4B1.2(a)(2).

Seven courts of appeal have found that three different mental states mark the least culpable *mens rea* necessary for an offense to qualify as generic aggravated assault under U.S.S.G. §4B1.2(a)(2). The Third and Fifth Circuits have explicitly found generic aggravated assault incorporates ordinary recklessness. *See United States v. McQuilkin*, 97 F.3d 723 (3d Cir. 1996); *United States v. Mungia-Portillo*, 484 F. 3d 813, 816-17 (5th Cir. 2007). The Eleventh Circuit has found, in separate opinions, that Georgia aggravated assault can be committed with recklessness, *Moss*, 920 F.3d at 759, and that it qualifies as generic aggravated assault. *Morales-Alonso*, 878 F.3d at 1318.

The Sixth and Eighth Circuits have held that generic aggravated assault requires that the defendant act "recklessly under circumstances manifesting extreme indifference to the value of human life[.]" *United States v. McFalls*, 592 F. 3d 707, 717 (6th Cir. 2010); *United States v. Schneider*, 905 F.3d 1088, 1093-1094 (8th Cir. 2018). These decisions relied on the Model Penal Code's aggravated assault definition, and its distinction between ordinary and extreme indifference recklessness. *See* 2 Am. Law. Inst., MODEL PENAL CODE & COMMENTARIES §§ 210.2 cmt.4, 211.1(2)(a) & 211.1 cmt.4 (1980).

The Ninth Circuit held that generic aggravated assault requires at least knowledge, based on "two-thirds of the states, the common law, federal law, and at least one treatise[.]" *United States v. Garcia-Jimenez*, 807 F. 3d 1079, 1087 (9th Cir.

2015). The Fourth Circuit agreed in dicta that extreme indifference recklessness offenses did not qualify, and held that aggravated assault offenses that require only ordinary recklessness, *United States v. Barcenas-Yanez*, 826 F. 3d 752, 758 (4th Cir. 2016), or culpable negligence, *United States v. Simmons*, 917 F.3d 312, 315 (4th Cir. 2019), were not generic.

A. In the Third, Fifth And Eleventh Circuits, Generic Aggravated Assault Requires At Least Ordinary Recklessness.

The Third Circuit first addressed the issue in 1996. It acknowledged that a Pennsylvania aggravated assault conviction stemming from a DUI causing an accident, "was based on a finding of recklessness." *McQuilkin*, 97 F.3d at 726-727. It found this conviction was for a "crime of violence," believing that to look beneath the "aggravated assault" label would be tantamount to "examin[ing] the actual conduct underlying the offense," which the categorical approach forbade. *Id*. at 727.

The Fifth Circuit, eschewing the categorical approach in favor of a "common sense approach," held that " 'mere' recklessness" suffices, in *Mungia-Portillo*, 484 F.3d at 814. Mr. Mungia-Portillo's sentence was enhanced based on a prior conviction for Tennessee aggravated assault, which, like Georgia's offense, incorporated the elements of its simple assault statute. *Mungia-Portillo*, 484 F. 3d at 814. Tennessee simple assault applied to those who "recklessly cause[d] bodily injury to another[.]" Tenn. Code § 39-13-101(a)(1). To determine whether Tennessee aggravated assault was generic, the Fifth Circuit consulted the Model Penal Code, which defined aggravated assault to require "a kind of 'depraved heart' recklessness[.]" *Id*. at 816-

17 (citation omitted.) Tennessee aggravated assault did not contain this language, but the Fifth Circuit found it qualified as a crime of violence anyways. It reasoned "the fact that the Tennessee statute defines 'reckless' differently than the Model Penal Code is not fatal, and . . . this difference in definition [was] sufficiently minor." *Id*. at 817.

The Eleventh Circuit found that Georgia aggravated assault had a generic "deadly weapon" aggravator in *Morales-Alonso*, 878 F.3d at 1318, and that it contained a recklessness *mens rea* in *Moss*, 920 F.3d at 759. When faced with the argument that this recklessness *mens rea* rendered Georgia aggravated assault non-generic, it has repeatedly deferred to *Morales-Alonso*'s holding as foreclosing any consideration of the issue. *See*; *Huling*, 741 F. App'x at 704; *Reid*, 754 F. App'x at 851; *Patmon*, 750 F. App'x at 905. In the decision below, the panel acknowledged that Georgia aggravated assault can be committed with recklessness, and reaffirmed that it was generic. App'x A at *2.

B. In the Sixth and Eighth Circuits, Generic Aggravated Assault Requires At Least Extreme Indifference Recklessness.

The Model Penal Code outlines the difference between ordinary recklessness and extreme indifference recklessness. *See* M.P.C. §§ 210.2 cmt. 4, at 22, & 211.1 cmt. 4, at 189. Extreme indifference recklessness was "adapted from the definition of murder" and "its meaning is discussed in the commentary to that section." M.P.C. § 211.1 cmt. 4, at 189. The commentary to murder specified "extreme indifference" recklessness "should be treated as murder," while "the less extreme recklessness should be punished as manslaughter.' M.P.C. § 210.2 cmt. 4, at 22. Hence, in *United*

States v. Esparza-Herrera, 557 F. 3d 1019, 1024 (9th Cir. 2009), the Ninth Circuit rejected the Fifth Circuit's conclusion that the difference between these two mental states was immaterial, finding an Arizona aggravated assault offense that could rest on "ordinary recklessness" non-generic. *Id*.; *see* Ariz. Rev. Stat. Ann. § 13-1204(A)(11).

The Sixth Circuit likewise found generic aggravated assault required a *mens rea* greater than ordinary recklessness. *McFalls*, 592 F. 3d at 709, 716-17.[2] It found that South Carolina "assault and battery of a high and aggravated nature" was not generic because it included aggravating factors that did not necessarily require extreme indifference recklessness, "such as 'infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, [and] a difference in gender.' " *Id*. (quoting *State v. Fennell*, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000)); *see* S.C. Code Ann. § 16-11-310(2).

As well, the Eighth Circuit found generic aggravated assault requires at least extreme indifference recklessness. *Schneider*, 905 F. 3d at 1095. In addition to the Model Penal Code and a survey of state statutes, it relied on LaFave and Blackstone, stating "[a]t common law, a person who killed another recklessly was guilty of manslaughter, but someone who committed the exact same act with extreme-indifference recklessness was guilty of murder." *Id*. at *5 (citing 2 W. LaFave,

[2] *United States v. Verwiebe*, 874 F. 3d 258 (6th Cir. 2017), held that *Voisine v. United States*, __ U.S. __, 136 S. Ct. 2272, 2280 (2016), had abrogated *McFalls*, based on other grounds. Neither *Verwiebe* nor *Voisine* concerned generic aggravated assault under §4B1.2(a)(2). *Voisine* was about the force clause used to define "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9), and *Verwiebe* was about the force clause of §4B1.2(a)(1). This Court then abrogated *Verwiebe* in *Borden*, 141 S.Ct. 1817.

Substantive Criminal Law §14.4, at 593-604 (3d ed. 2018); 4 William Blackstone, *Commentaries on the Laws of England* 199-201 (1769)). It concluded "[t]he traditional view is alive and well. In all but one of the jurisdictions that define extreme-indifference recklessness as the minimum mental state for aggravated assault, ordinary recklessness gives rise to simple assault. Extreme-indifference recklessness also still divides murder from manslaughter in many states." *Id*. at 1096. It thus found a North Dakota aggravated assault offense that could rest on reckless driving was non-generic.

C. In the Ninth Circuit, Generic Aggravated Assault Requires At Least Knowledge.

The Ninth Circuit again addressed the *mens rea* of generic aggravated assault in *Garcia-Jimenez*, 807 F. 3d at 1085. It confined its *Esparza-Herrera* holding to the proposition that "ordinary recklessness" aggravated assault offenses *were not* generic. *Id*. It had not held that extreme indifference recklessness aggravated assault offenses *were* generic. *Id*. Now faced with a New Jersey aggravated assault offense that a person could violate by "recklessly" causing serious bodily injury "to another, . . . under circumstances manifesting extreme indifference to the value of human life," N.J. Stat. Ann. § 2C:12-1(b)(1), the court conducted a new 50-state survey. Based on this survey, it concluded "[t]hirty-three states and the District of Columbia do not punish as aggravated assault offenses committed with only extreme indifference recklessness[,]" while "[s]eventeen states and the Model Penal Code do punish aggravated assaults committed with extreme indifference recklessness (or a lesser level of *mens rea*)." *Id*. It found, based on "the weight of authority," that New

Jersey aggravated assault was broader than the generic "aggravated assault" enumerated in U.S.S.G. §4B1.2(a)(2).

The Ninth Circuit counted Georgia aggravated assault as one of the states that requires more than extreme indifference recklessness. *Id*. at 1085. It reasoned:

> where a statute permits conviction for reckless conduct, but only within a provision that incorporates a further narrowing element, such as the use of a deadly weapon—so that the provision does not punish the reckless causing of serious bodily injury, without more – the statute is treated as requiring a *mens rea* of more than extreme indifference recklessness.

Id. at 1085, n.5. The Ninth and Eleventh Circuit thus disagree about the mental state required to commit Georgia aggravated assault. *Moss*, 920 F.3d at 759. Georgia's construction of its aggravated assault statute should resolve this split, as it reveals examples in which its deadly weapon aggravator did not preclude a *mens rea* of ordinary recklessness. *See, e.g., Kirkland*, 282 Ga. App. at 332, 638 S.E.2d at 785.

D. In the Fourth Circuit, Generic Aggravated Assault Requires At Least Extreme Indifference Recklessness, And Possibly a More Exacting *Mens Rea*.

In *Barcenas-Yanez*, 826 F. 3d at 755, 758, the Fourth Circuit addressed a Texas offense that defines aggravated assault as "us[ing] or exhibit[ing] a deadly weapon during the commission of [an] assault," Tex. Penal Code § 22.02(a)(2), and defines "assault" as, *inter alia*, "intentionally, knowingly *or recklessly* caus[ing] bodily injury to another[.]" Tex Penal Code § 22.01(a)(1) (italics added.) It found "inclusion of a mere reckless state of mind renders the statute broader than the generic offense." *Id*. at 756. For support, it quoted " '[t]hat 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 756-757 (quoting *Garcia-Jimenez*, 807 F. 3d 1079, 1086) (italics added). Since the Texas offense did not involve extreme indifference recklessness, this statement was dicta.

In *United States v. Simmons*, 917 F.3d 312, 315 (4th Cir. 2019), it again suggested in dicta that extreme indifference recklessness aggravated assault offenses are not generic. But the offense in that case – North Carolina assault with a deadly weapon on a government official – could be committed with culpable negligence. *Id*. at 319; *see* N.C. Gen. Stat. § 14-34.2; *State v. Jones*, 353 N.C. 159, 165, 538 S.E.2d 917, 923 (2000). It explained "culpable negligence's 'focus on *thoughtless* disregard' renders it 'a lesser standard of culpability than recklessness, which requires at least 'a *conscious* disregard of the risk.' " *Id*. (quoting *United States v. Vinson*, 805 F.3d 120, 126 (4th Cir. 2015)) (italics from *Vinson*.) Whatever the status of extreme indifference recklessness offenses in the Fourth Circuit, ordinary recklessness offenses do not qualify as a crime of violence under the §4B1.2(a)(2).

E. The Ninth Circuit's Definition Best Reflects Aggravated Assault In a Substantial Majority of Jurisdictions.

This Court should grant certiorari in order to determine a uniform generic definition of aggravated assault. It should ultimately adopt the Ninth Circuit's conclusion in *Garcia-Jimenez*, 807 F. 3d at 1086. By enumerating "aggravated assault," the Sentencing Commission "meant . . . the generic sense in which the term is now used *in the criminal codes of most States*." *Taylor*, 495 U.S. 575, 595 (italics

added). The Ninth Circuit's construction of generic aggravated assault best reflects the consensus of "most States," as it turned on a fifty-state survey indicating that "a substantial majority of U.S. jurisdictions require more than extreme indifference recklessness to commit aggravated assault." *Garcia-Jimenez*, 807 F. 3d at 1086.

II. THIS CASE PRESENTS A SOUND VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

Petitioner's case presents an ideal vehicle for deciding the generic *mens rea* to "aggravated assault," as enumerated in U.S.S.G. §4B1.2(a)(2). The relevant facts of this case are simple and undisputed. The issue was preserved in the District Court and in the Court of Appeals. Both courts addressed the enumerated clause question. The District Court recognized the issue, discussing it with the parties at sentencing, but ultimately found itself bound by *Morales-Alonso*, 878 F.3d 1311. Likewise, the Eleventh Circuit panel acknowledged that Georgia aggravated assault can be committed with recklessness, but found it to be generic aggravated assault based on *Morales-Alonso*.

The facts and relevant law squarely implicate the Circuit split. The elements of Petitioner's predicate conviction of Georgia aggravated assault are clear. Georgia courts have repeatedly and recently outlined the elements of Georgia aggravated assault, and specifically emphasized that the state does not have to prove any mental state with regard to the consequences of an act, as long as the defendant commits an act that triggers a reasonable fear of the victim. *Kirkland*, 282 Ga. App. at 332, 638 S.E.2d at 785. The Eleventh Circuit has construed Georgia aggravated assault to

incorporate a recklessness *mens rea* in recent, binding precedent. *Moss*, 920 F.3d at 759. This *mens rea* contradicts the *mens rea*'s accepted as "generic" in four of the seven Circuits to consider the issue.

This split is well-defined. In published opinions, the Fourth, Sixth, Eighth, and Ninth Circuits each have defined the *mens rea* of generic aggravated assault differently than the Third, Fifth, and Eleventh Circuits. These decisions are unambiguous and the split is obvious. They cover all of the sources relevant to defining generic aggravated assault, including the aggravated assault offenses of every United States jurisdiction, the Model Penal Code, and well-known treatises.

Petitioner's Guidelines sentencing range depends on the answer to the question presented. If his Georgia aggravated assault conviction was not for a crime of violence, the Guidelines would recommend a significantly lower sentence. His base offense level would be 12 under U.S.S.G. §2K2.1(a)(7), making his total offense level 11, and his advisory guidelines range of 12 to 18 months, instead of 37 to 46 months. Given the "anchor[ing]" role that the advisory Guidelines' range continues to play in sentencing, a lower recommendation would likely result in a substantially lower sentence. *Peugh v. United States,* 569 U.S. 530, 549 (2013).

III. THE MENS REA REQUIRED OF GENERIC AGGRAVATED ASSAULT IS AN IMPORTANT AND RECURRING ISSUE.

Every jurisdiction in the country has an aggravated assault offense, and, as the Ninth Circuit's fifty-state survey reveals, at least seventeen states' aggravated assault offenses are broader than the majority. It is difficult to know precisely how

many sentences are impacted by U.S.S.G. §4B1.2(a)(2), which is cross-referenced in numerous guidelines. But the issue has arisen frequently enough to generate opinions in seven courts of appeal, and seven opinions in the Eleventh Circuit alone in recent years. *See Huling*, 741 F. App'x. at 704; *Patmon*, 750 F. App'x. at 904; *Ellis*, 736 F. App'x. at 857; *Reid*, 754 F. App'x. at 851; *Davis*, 718 F. App'x at 952; *Berry*, 808 F. App'x 857, 859-60; *Glenn*, App. A.

The question presented is of great consequence. As Petitioner's case demonstrates, §4B1.2(a) substantially – sometimes drastically – increases the sentencing range recommended by the Guidelines. Petitioner's recommended sentencing range was about triple what it otherwise would be, based on a prior offense that would not have increased his base offense level in the Fourth, Sixth, Ninth, and Tenth Circuits. This discrepancy is neither fair nor justified. A grant of certiorari is necessary to ensure the courts apply U.S.S.G. §4B1.2(a)(2) uniformly across the country.

This Court recently resolved a Circuit split over whether a recklessness *mens rea* satisfies the force clause that defines "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i). *Borden*, 141 S.Ct. 1817. It could not resolve whether state aggravated assault offenses with a recklessness *mens rea* qualify as an enumerated crime of violence, since ACCA does not enumerate aggravated assault. This case presents a timely occasion to decide this related issue. Because the record in the case and the decisions below provide a perfect vehicle for determining the least culpable *mens rea* required for an offense to qualify as generic aggravated assault, this court should grant certiorari.

CONCLUSION

For the reasons above, Petitioner Glenn respectfully requests this Court grant his petition for writ of certiorari.

s/ Jonathan R. Dodson
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IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____

REGINALD GLENN,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

PROOF OF SERVICE

I, Jonathan R. Dodson, do swear or declare that on this date, February 3rd, 2022, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached *Motion for Leave to Proceed in Forma Pauperis* and *Petition for a Writ of Certiorari* on each party in the above-captioned proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, properly addressed to each, with first-class postage prepaid.

The name and address of those served are as follows:

The Honorable Noel Francisco, Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Subscribed and sworn to
before me this 3rd day of
February, 2022.

JONATHAN R. DODSON- Affiant

Holly McDavid
NOTARY PUBLIC – STATE OF GEORGIA