No. _____

In the Supreme Court of the United States

ERNESTO ORDUNEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the
United Sates Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Ernesto Ordunez's sentence for was increased because he qualified as a career offender under U.S.S.G. § 4B1.1 That decision ultimately relied on two convictions (1) a 1998 federal conviction for possessing with intent to distribute marihuana; and (2) a 2008 conviction in state court of attempted child abuse in violation of New Mexico Statues § 30-6-1(D).

This case presets three issues for review:

(1) Whether an objection that a prior conviction is not a crime of violence and a district court's subsequent analysis of whether it meets the elements clause sufficiently preserves an argument that the prior conviction does not meet that clause;

(2) Whether attempted child abuse in New Mexico is a crime of violence;

and

(3) Whether the definition of a controlled substance for the purpose of the career offender enhancement looks at controlled substances at the time of the sentencing or the time of the previous conviction.

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PETITION FOR WRIT OF CERTIORARI

Ernesto Ordunez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 14, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 14, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "no person shall be … deprived of … liberty … without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner Ernesto Ordunez was found guilty after a guilty plea of conspiring to possess with intent to distribute more than five grams of methamphetamine, in violation of 21 U.S.C. § 841.

At sentencing Ordunez was determined, pursuant to the U.S. Sentencing Guidelines, to be a career offender, and his recommended sentence increased from 100-125 months to 188-235 months. The determination that Ordunez was a career offender was based on three previous convictions.

First, Ordunez was convicted in 1998 of possession with intent to distribute marihuana, in violation of 21 U.S.C. § 841. Second, Ordunez was convicted in 2008 of aggravated assault with a deadly weapon, in New Mexico state court, a violation of New Mexico Statues § 30-3-2(A). Third, Ordunez was charged in 2006 with intentional child abuse, in New Mexico state court, a violation of New Mexico Statutes § 30-6-1(D). He was convicted in 2008 of attempted child abuse.

The presentence investigation report classified those three convictions as qualifying predicates to determine that Ordunez was a career offender under U.S.S.G. § 4B1.1. Specifically, the report

found the marihuana conviction was a controlled substances offense and the two New Mexico convictions were crimes of violence.

Ordunez objected to the categorization of the two New Mexico convictions. He wrote, "Finally, Mr. Ordunez objects to the classification of the felonies in paragraphs 19(B)[, the child abuse conviction,] and 19(c)[, the aggravated assault conviction]. Mr. Ordunez asserts these felonies should not be classified as violent felonies."

The probation officer, who wrote the presentence report, responded to Ordunez's objections. First, the probation officer noted that Ordunez did not provide reasons "why the convictions should not be considered crimes of violence. Therefore, Probation will attempt to provide brief insight." The probation officer then went on to provide four paragraphs of analysis on the reasons the probation officer believed the two New Mexico convictions were crimes of violence.

At sentencing, Ordunez explicitly requested to persist in his objection. His explanation for why he wanted to persist in his objection was rooted in his belief that the New Mexico convictions did not qualify as crimes of violence but for reasons that were unclear and ultimately different than the reasons he urged on appeal:

> So here we are today. I made the objections and I guess as an officer of the court, I can't go forward with objections saying that I found anything that say it's not aggravated, but I still want to – oh, this is important.
>
> We did request the transcripts from New Mexico and we requested three different cases, I believe it was. And one of the cases, they couldn't find it because of the storage building had been vandalized. And that particular case wasn't there, so they couldn't find it. And so – but they did return two of the sentencing – the cases, I'm sorry. They are relevant to the PSR. So I would like to at least leave my objection in place in case something happens later on down the road.

The district court responded, "Sure." It overruled the objection based on the probation officer's report.

The district court's final determination was that Ordunez was a career offender and, based on other facts, had a Guideline sentence of 188-235 months. The district court sentenced Ordunez to the high end, 235 months' imprisonment. Ordunez appealed.

On appeal, Ordunez argued that neither of the New Mexico state convictions qualified as crimes of violence and that the district court plainly erred in finding that the marihuana conviction qualified as a controlled substances offense.

The Fifth Circuit found that Ordunez's objection was insufficient to trigger de novo review. "Although Ordunez objected to the characterization of his remaining qualifying offenses as crimes of

violence, he provided no reasons for this objection. … At sentencing, Ordunez's counsel appeared to argue the objection related to whether the underlying offenses were aggravated, but that they were unable to obtain the documents to make their argument." *Appendix* at 3.

The Fifth Circuit also held that Ordunez's argument—that his marihuana conviction was no longer a controlled substances offense, due to the 2018 change in the definition of marihuana to exclude hemp—was an open question and, therefore, not plain error by the district court. Finally, the Fifth Circuit held that the district court had not committed plain error in finding that Ordunez's attempted child abuse conviction was a crime of violence.

REASONS FOR GRANTING CERT

This case implicates multiple well defined circuit splits. Despite his objection at sentencing, the Fifth Circuit evaluated Ordunez's claim that his New Mexico child abuse conviction was not a crime of violence for plain error. The fact that the Fifth Circuit engaged in plain error, as opposed to de novo, review harmed Ordunez. It permitted the Fifth Circuit to ignore the fact that the crime it relied on to find him a career offender—New Mexico child abuse—could be committed recklessly and through inaction, conduct far lesser than that defined by this Court in *Borden* to qualify as a crime of violence. Finally, the Fifth Circuit declined to find, as the Ninth Circuit has, that district courts can no longer rely on the definition of a controlled substance at the time of sentencing, as opposed to when a defendant was convicted of the controlled substances offense, for purposes of plain error review.

The Circuits are split over whether a defendant preserves a claim for de novo review when he makes an objection, though employing different arguments than he ultimately uses on appeal, and the district court addresses the objection.

The Fifth Circuit found that Ordunez did not preserve his argument that New Mexico child abuse is not a crime of violence under the elements clause, U.S.S.G. § 4B1.2(a), when he: objected to

the categorization of his New Mexico offenses as violent felonies, received a ruling from the district court overruling his objection in part because the offenses met the elements cause, and received the explicit consent of the district court to persist in his objection for further review.

"A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b).

The Fifth Circuit's ruling deepens one circuit split and creates a second. First, some Courts of Appeals have held, pursuant to *Yee v. City of Escondido*, 503 U.S. 519 (1992), that a defendant who presents a claim in district court may advance different arguments on appeal than those presented to the district court in support of that claim. *See, e.g., United States v. Billups*, 536 F.3d 574, 577-78 (7th Cir. 2008). Second, some Courts of Appeals have held that a district court's ruling and analysis of an issue is sufficient evidence that a defendant adequately objected. *See, e.g., United States v. Prater*, 766 F.3d 501, 506-07 (6th Cir. 2014). The Fifth Circuit's holding in this case splits with both of those holdings.

A. The Fifth Circuit's ruling deepens an already existing split over whether parties are locked into the theory of their objection made in district court.

In *Yee,* this Court stated "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." 503 U.S. at 534. This Court adhered to its "traditional rule" that parties are no limited to the precise argument they made below but can make any argument in support of a claim that was properly presented in *Lebron v. National Railroad Passenger Corporation*, 513 U.S, 374, 379 (1995). And, in *Citizens United*, this Court reaffirmed its "practice" that "[o]nce a claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010).

Many Courts of Appeals have applied this rule to criminal cases to review arguments that vary from those presented in the district court, so long as they support the same claim. In *Billups*, the Seventh Circuit rejected the government's argument that it should review a challenge that a false imprisonment conviction is not a crime of violence. 536 F.3d at 577-78. The defendant had

urged a different ground in the Court of Appeals for why his previous conviction was not a crime of violence. *Id*. Relying on *Yee,* the Seventh Circuit held that his objection was sufficient to trigger *de novo* review of whether the prior conviction was a crime of violence. *Id*.

Other Circuits have followed that analysis, holding that the advancement of a claim—such as an objection to the Guidelines—preserves unasserted arguments in support of that claim. *See United States v. Collazo*, 2022 WL 1553168, at *3 (9th Cir. May 12, 2022); *United States v. Hope*, 28 F.4th 487, 494-95 (4th Cir. 2022) ("We have clarified that for purposes of *de novo* appellate review, it is sufficient for counsel to articulate an objection based on multiple theories … . Though Hope now adds more weight to his argument on appeal, the district court had an opportunity to evaluate his specific objection that his state convictions were not predicate offenses for the ACCA enhancement.").

On the other side of the split, there are two groups. One requires that the same theory underlying the claim be urged to the district court. *See United States v. Anderson*, 62 F.4th 1260, 1267 (10th Cir. 2017) ("He also argues that, based on *Yee*, … he is per-

mitted to raise this argument on appeal because it was encompassed by his general argument that there was no reasonable suspicion to stop him. As the government points out, however, we have rejected this construction of *Yee*."); *United States v. Joseph*, 730 F.3d 336, 341 (3d Cir. 2013) ("raising an issue [or claim] in the district court is insufficient to preserve for appeal all arguments bearing on that issue."). Another requires that the theories presented to the district court and the court of appeals be substantially similar. *United States v. Posey*, 2022 WL 17056662, at *5-7 (11th Cir. Nov. 17, 2022) (citing *United States v. Ramirez-Flores*, 743 F.3d 816, 821 (11th Cir. 2014) and *United States v. Weeks*, 711 F.3d 1255 (11th Cir. 2013)).

Here, the Fifth Circuit joined the side of the split requiring the same argument because Ordunez's counsel, at sentencing, "appeared to argue that the objection [to whether his prior convictions were crimes of violence] related to whether the underlying offenses were aggravated." *Appendix* at 3. Because this was a different ground than that urged on appeal, the Fifth Circuit reviewed the district court's findings for plain error.

This case represents an opportunity for the Court to resolve this deepening split and bring several circuit's in align with the reasoning in *Yee*.

B. *The Fifth Circuit's ruling creates a split over whether a defendant's objection that, in fact, causes the district court to analyze an issue is sufficient to preserve de novo review.*

A defendant preserves a claim of error by urging his "objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). The principal rationale for this rule is judicial economy. "There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal. LaFave, et al., 7 Crim. Proc. § 27.5(c) (4th ed. 2021) (quoting *State v. Applegate*, 39 Or. App. 17 (1979)).

Consistent with the rationales for the requirement to present an issue to the district court, the Sixth Circuit has held that a district court's analysis of an issue is sufficient evidence that a party

adequately raised that issue. In *Prater*, the Sixth Circuit addressed whether a defendant preserved his argument that his violations of New York law were not violent felonies when he objected "to his designation as an Armed Career Criminal under 18 U.S.C. § 924(e) and U.S.S.G. §4B1.4." 766 F.3d at 506-07. The Sixth Circuit held that the district court's decision to engage in the appropriate analysis—by finding that each violation of New York law was a violent felony for the purposes of the ACCA and citing to "cases that discuss whether certain crimes constitute violent felonies and crimes of violence"—showed that the defendant's objection was sufficient. *Id*. Specifically, the Sixth Circuit found, "there is no need to consider whether Prater's objection would have adequately apprised the trial court of the true basis of the objection because it *actually* apprised the trial court of such." *Id*. (emphasis in original).

Other Courts of Appeals have similarly found that the fact that an objection caused the district court to address an issue evinced that the parties had preserved the issue. *United States v. Grissom*, 525 F.3d 691, 695 (9th Cir. 2008) ("Despite the seeming facial inadequacy of the objection, we agree with the government that where the district court indicates that it understands the basis for

the objection and that further argument is not desired, and the record reflects this understanding, a general objection may suffice to preserve an issue for appeal."); *United States v. Rivera*, 365 F.3d 213, 214 (3d Cir. 2004) ("In Rivera's case, both the United States and the sentencing judge were on notice from Rivera's objections to the Presentence Report, filed by him with the court before, and not ruled upon until, the sentencing hearing, that he viewed the adoption of the probation officers' recommended departure from the plea agreement as 'repugnant to the plea agreement.' Accordingly, Rivera adequately (albeit not expertly) preserved his claim.").

The Circuits are split over whether a New Mexico child abuse conviction evinces sufficiently directed force to qualify as a crime of violence, a split unjustifiable in light of this Court's opinion in *Borden*.

Ordunez was convicted of child abuse – intentional (resulting in great bodily harm) in violation of N.M. Stat. Ann § 30-6-1(D). Due, in part, to this conviction he was categorized as a career offender because, the district court found, that New Mexico child abuse is a crime of violence under U.S.S.G. § 4B1.2(a). The district

court found, and the Fifth Circuit affirmed, that it is a crime of violence because it "has as an element the use, attempted use, or threatened use of physical force against the person of another.

It clearly does not. In New Mexico, "[a]buse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (2) tortured, cruelly confined or cruelly punished." N.M. Stat. Ann § 30-6-1(D)

This Court most recently discussed the elements clause of the crime of violence definition in *Borden v. United States*, 141 S. Ct. 1817 (2021). In that case, this Court addressed an identical definition of violent felony in 18 U.S.C. § 924(e)(2)(B)(i). The Court held that, the "phrase 'against another,' when modifying 'use of force,' demands that the perpetrator direct his action at, or target another individual." *Borden*, 141 S. Ct. at 1825. Accordingly, this Court concluded, that an offense with a mens rea of recklessness or negligence cannot be a crime of violence. *Id*. In the Fifth Circuit, Ordunez advanced two arguments: first, that New Mexico child abuse can be committed by permitting another to abuse a child, meaning it does not require that Ordunez directed any action at another individual; and second, that New Mexico child abuse can be committed recklessly.

A. Borden's analysis of the crime of violence definition excludes New Mexico child abuse because it can be committed by inaction.

New Mexico child abuse can be committed by inaction. "In using the term 'cause or permit,' the legislature intended to provide flexibility. Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur." *State v. Leal*, 723 P.2d 977, 980 (N.M. 1986). Because the New Mexico statute may be violated by failures to act as well as acts—like confinement of a child—that do not require directed force, Ordunez's conviction for violating it does not qualify as a crime of violence.

In addressing this argument, the Fifth Circuit considered how its jurisprudence on crimes of violence had been affected by this court's decisions. It recognized that it had previously held in an unpublished opinion, that the New Mexico child abuse statute can be violated without the use of force, as "a child could be cruelly confined without the use of force against the child. Without using any force, a child could be kept locked in a room without access to

food or water." *Appendix* at 6 (quoting *United States v. Torres-Reyes*, 444 F. App'x 828, 828 (5th Cir. 2011). But, the Fifth Circuit found that its subsequent jurisprudence had abrogated that finding and that this Court's decision in *Borden* did not clearly reinstate it:

> The reasoning in *Torres-Reyes*, however, relied upon this court's ruling in *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), which analyzed an analogous Texas statute. 444 F. App'x 828. *Calderon-Pena*, in turn, was overruled by *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc). *Reyes-Contreras* specifically overruled *Calderon-Pena*'s requirement of bodily contact for a crime of violence, holding that physical force extends to applications of force that are subtle or indirect. *Reyes-Contreras* was then abrogated in part by *Borden*. … It is accordingly unclear if the reasoning is still applicable. Because the current state of the law is neither clear nor obvious, this argument fails to satisfy the plain error standard.

Appendix at 7.

As argued in Section 1, *supra*, the Fifth Circuit erred in applying the plain error standard. Moreover, it is clear error to find that a crime of violence that can be committed by inaction contains an element of the use of force in light of *Borden*'s statement that the definition of a crime of violence "demands that the perpetrator direct his action at, or target another individual." 141 S. Ct. at 1825.

This Court should review the Fifth Circuit's decision to clarify the extent to which *Borden* changed the definition of a crime of violence.

B. Borden's requirement that a crime of violence be committed with recklessness or negligence excludes New Mexico child abuse.

Borden also recognized that a state law could not be considered a crime of violence if it could be committed with a mens rea of recklessness. *Id*. New Mexico child abuse may be committed with a mens rea of recklessness. *United States v. Zayas*, 802 F. App'x 355, 356 (10th Cir. 2020). Though he was charged with New Mexico child abuse, Ordunez pleaded down to a less severe crime: attempted child abuse. The Fifth Circuit relied on the lesser charge, attempt, holding that "attempt crimes require specific intent." *Appendix* at 7-8 (citing *State v. Herrera*, 33 P.3d 22, 27 (N.M. 2001)).

Members of this Court have noted the absurdity of punishing someone who has a prior conviction for a lesser offense (attempt) more harshly than someone who completed the offense. After *Borden*, "attempted and threatened assault and homicides will be covered under ACCA as violent felonies. But *actual* assaults and *actual* homicides that were committed recklessly will not be covered under ACCA. It seems incongruous to conclude that ACCA covers

attempts or threats to injure others that never get completed or carried out, but does not cover situations where an individual carries through with reckless conduct and leaves a victim in a hospital or graveyard. *Borden*, 141 S. Ct. at 1857 (Kavanaugh, J., dissenting).

The greater issue with the Fifth Circuit's opinion is that it failed to examine what the state offense necessarily meant. "To decide whether an offense satisfies the elements clause, courts use the categorical approach. Under that by-now-familiar method, applicable in several statutory contexts, the facts of a given case are irrelevant. The focus is instead on whether the elements of the statute of conviction meet the federal standard. Here, that means asking whether a state offense necessarily involves the defendant's use, attempted use, or threatened use of physical force against the person of another." *Borden*, 141 S. Ct. at 1822.

Ordunez was not originally charged with attempted child abuse; rather, he was charged with child abuse and pleaded down. The precise case cited by the Fifth Circuit, *Herrera*, clarified what that meant, "When a defendant, in the context of a plea bargain, enters a plea to a lesser offense that is reasonably related to the more serious charged offense, courts from other jurisdictions have

determined that the factual basis may support a finding that the defendant is guilty of either the crime charged or the crime which is the subject of the plea." *Herrera*, 33 P.3d at 26. Thus, the fact that Ordunez was charged with child abuse and pleaded down to attempted child abuse told the Fifth Circuit nothing about the mens rea: it expanded the elements that could have satisfied the conviction; it did not narrow them.

This Court should grant certiorari to clarify the extent to which attempt crimes narrow the elements a court may consider when employing the categorical approach, particularly when the state permits an attempt plea to be satisfied, as it did here, by the elements of the original crime charged.

The Circuits are split over whether *McNeill* requires district courts to determine whether the previous conviction was a controlled substances offense at the time of sentencing or the time of conviction.

This case presents a circuit split regarding this Court's categorical approach. Here, the categorical approach was used to calculate Ordunez's sentence under the Sentencing Guidelines. Under the Guidelines, defendants who have committed a prior "controlled substance offense" may receive an enhanced sentence. The Guidelines define a "controlled substance offense" as "an offense

under federal or state law" involving "a controlled substance." U.S.S.G. § 4B1.2(b). The Guidelines, however, do not define "controlled substance." Instead, courts look to controlled substance schedules, such as the federal Controlled Substances Act (CSA). Using the categorical approach, courts compare the schedule against the predicate to determine whether the defendant's prior offense involved a "controlled substance."

The problem: drug schedules change over time. For example, Ordunez's sentence was enhanced, in part, because he had received a prior federal conviction for possession with intent to distribute marihuana. Between Ordunez's marihuana conviction and his sentencing for the instant offense, the CSA's definition of marihuana changed, meaning his prior conviction no longer categorically matched the federal controlled substance schedule. This change caused the issue in this case: whether a sentencing court should consider the drug schedule in effect at the time when federal law imposes an additional consequence as a result of the previous conviction or the drug schedule in effect at the time of the previous conviction. The same question arises in the context of ACCA, with respect to the previous "serious drug offense" enhancement. 18 U.S.C. § 924(e).

The Circuits have adopted three different approaches based on divergent applications of *McNeill v. United States*, 563 U.S. 816 2011). *McNeill* concerned whether historic or contemporary law defines a predicate offense's elements for ACCA. Some circuits read *McNeill* narrowly and define the federal comparator for the Guidelines or ACCA based on drug schedules in effect when the federal consequences associated with the predicate attach, the "time-of-consequences approach." *See United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Abdulaziz*, 998 F.3d 519, 523-31 (1st Cir. 2021); *United States v. Gibson*, 55 F.4th 153, 162-67 (2d Cir. 2022); *United States V. Hope*, 28 F.4th 487, 505 (4th Cir. 2022); *United States v. Williams*, 48 F.4th 1225, 1130 (10th Cir. 2022). By contrast, two circuits read *McNeill* broadly and look to drug schedules from the time of the predicate offense, the "time-of-conviction approach." *United States v. Clark*, 46 F.4th 404, 408-09 (6th Cir. 2022); *United States v. Jackson*, 55 F.4th 846, 855 (11th Cir. 2022). Further, two circuits apply *McNeill* differently depending on whether the case involves ACCA or the Guidelines. Those circuits apply the time-of-consequences approach in ACCA cases, but the time-of-conviction approach for the Guidelines. *United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir.

2022); *United States v. Brown*, 47 F.4th 147 (3d. Cir. 2022), *cert. granted*, 143 S. Ct. 2458 (2023).

The Fifth Circuit has yet to weigh in on this split but has consistently held that a district court does not plainly err by using the time-of-conviction approach. *Appendix* at 5. This is a split with the Ninth Circuit's holding in *Bautista*, finding plain error when a district court employed the time-of-conviction approach. 989 F.3d at 705.

This Court has already granted review of two ACCA cases implicating the question presented, *Brown v. United States*, No. 22-6389 (May 15, 2023), and *Jackson v. United States*, No.22-6640 (May 15, 2023). This petition provides a clean vehicle to resolve the timing question for the purposes of the Guidelines to the extent the Court's decision in *Brown* and *Jackson* does not do so already. At minimum, this Court should hold this petition pending the resolution of *Brown* and *Jackson*.

CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
Counsel of Record for Petitioner
Dated: September 12, 2023