No. 23-5604

In the Supreme Court of the United States

ERNESTO ORDUNEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Reply Brief for the Petitioner

SHANE O'NEAL
O'NEAL LAW
101 E. Avenue B
Alpine, Texas 79830
(713) 516-3505
shane@shaneoneallaw.com

Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

United States Sentencing Guidelines

No. 23-5604

In the Supreme Court of the United States

ERNESTO ORDUNEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Reply Brief for the Petitioner

Petitioner, Ernesto Ordunez, objected to his classification as a career offender. One of the reasons he gave for his objection was that his conviction for attempted child abuse in New Mexico was not a "violent felony." That objection triggered the district court to analyze that statute under the modified categorical approach and find that Ordunez was convicted of a crime of violence because the offense had a force element. Though Ordunez did not engage with the district court's analysis overruling his objection at sentencing, he sought and received permission from the district court to persist

in his objection. Splitting with holdings of the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits, the Fifth Circuit held that Ordunez's claim that he was not a career offender, on the ground that his attempted child abuse conviction was not a crime of violence, must be reviewed under a plain error standard.

The Fifth Circuit's refusal to review *de novo*, despite Ordunez's objection and the district court's analysis, increased his recommended sentence by 110 months. Had the Fifth Circuit properly reviewed Ordunez's challenge, it would have found that the *Shepard* documents showed Ordunez pleaded his charged offense of child abuse down to a lesser-included charge of attempted child abuse. New Mexico law permits a plea to a lesser included offense to be satisfied by a factual basis that meets either the originally-charged offense or the lesser included. New Mexico child abuse may be committed recklessly. Thus, this Court's decision in *Borden* requires that, in New Mexico, when a person pleads down from child abuse to attempted child abuse, he has not been convicted of a crime of violence. Accordingly, this Court should, as it has with many unpublished opinions, exercise its jurisdiction to correct the Fifth Circuit's error.

1. The Fifth Circuit's choice not to publish its decision does not insulate it from this Court's review.

The government relies extensively, in multiple sections of its response (Br. in Opp. 10-11, 12), on the Fifth Circuit's choice not to publish. It should be noted, at the outset, that the Fifth Circuit has solidly taken a side in the split that Ordunez invokes in a published decision. *See, e.g., United States v. Narez-Garcia*, 819 F.3d 146, 150 (5th Cir. 2016) (applying plain error review to an argument against a crime-of-violence categorization because a different argument was urged below).

More important, an unpublished decision may both (a) create a circuit split and (b) warrant this Court's review.

The only reason the government gives for denying the petition based on the absence of publication is that an unpublished case lacks precedential value in the Fifth Circuit. (Br. in Opp. at 10). This Court has rejected that argument, "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987).

This Court has previously cited unpublished decisions when defining a circuit split. *See, e.g. Johnson v. United States*, 529 U.S. 694, 698, nn. 2-3 (2000) (citing *United States v. Sandoval*, 69 F.3d 531 (1st Cir. 1995) (unpublished)). The Court also regularly grants petitions to correct unpublished decisions. *See, e.g., Dunn v. Reeves*, 594 U.S. 731 (2021); *Mata v. Lynch*, 576 U.S. 143 (2015) (reversing Fifth Circuit's unpublished opinion).

There are strong reasons to reject the government's argument that nonpublication should factor in to this Court's decision to grant the petition. "Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 U.S. 1017, 1020 n.1 (1991) (Blackman, J., dissenting from denial of certiorari). The fact that the Fifth Circuit chose not to publish the opinion affirming the over nine-year increase in Ordunez's sentence will be of little comfort to him during that time.[1]

---

[1] The career-offender enhancement increased the high-end of Ordunez's Guideline sentence from 125 to 235 months' imprisonment, which the district court imposed.

Further, to the extent that a Court of Appeals decides not to publish a decision that meets its criteria for publication, that is an additional reason for this Court to grant the petition. "[T]he decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review." *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari and analyzing whether the Fourth Circuit's Local Rule for publication required the opinion to be published). The Fifth Circuit's local rules call for publication of opinions that establish a new rule, apply an established rule to significantly different facts, or create a conflict of authority with other circuits or within the circuit. 5th Cir. R. 47.5.1. As explained below, this opinion met those criteria.

2. This case falls well within the circuit split over whether a general objection is sufficient to preserve a supporting argument not urged to the district court.

Ordunez objected to his classification as a career offender. One of the grounds that he urged supporting that objection was that New Mexico child abuse is not a crime of violence. His objection met Rule 51(b)'s requirements. Fed. R. Crim. P. 51(b).

The government does not deny that there is a circuit split over the proper standard of review when a party makes a claim and supports that claim on appeal with an argument not presented to the district court. *Compare United States v. Castillo*, 36 F.4th 431, 435, n.1 (2d Cir. 2022); *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022); *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008); *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018); *with United States v. Rios-Hernandez*, 645 F.3d 456, 462 (1st Cir. 2011); *United States v. Joseph*, 730 F.3d 336, 341 (3d Cir. 2013); *Narez-Garcia*, 819 F.3d at 150; *United States v. Anderson*, 62 F.4th 1260, 1267 (10th Cir. 2017); *United States v. Ramirez-Flores*, 743 F.3d 816, 821 (11th Cir. 2014). Other circuits have explicitly avoided deciding this issue. *United States v. Williams*, 80 F.4th 85, 89 n.2 (1st Cir. 2023); *United States v. Prater*, 766 F.3d 501, 507 (6th Cir. 2014).

Instead, the government highlights that Ordunez's general objection that his conviction was not a crime of violence was not supported by a more developed argument; the government then attempts to distinguish *Hope* and *Billups* because, in those cases, the defendant made a specific argument before the district court that he later abandoned in favor of a different argument under the same

claim and grounds before the appellate court. (Br. in Opp. 11-12). The government does not explain how a specific, yet different argument than that ultimately raised on appeal better informs a district court of a party's objection and the grounds for it. Normally, courts favor a general objection over a specific objection when the argument supporting the specific objection shifts on appeal. *See, e.g., United States v. McCall*, 553 F.3d 821 (5th Cir. 2008) (a general motion for acquittal pursuant to Rule 29 preserves all challenges to the sufficiency of the evidence in a criminal jury trial, but when a defendant asserts specific grounds in support of the motion, he waives all others).

Had Ordunez made his general objection in other circuits, his argument would have been subject to *de novo* review. *United States v. Boyd*, 5 F.4th 550, 556 (4th Cir. 2021) ("[A] general objection can suffice so long as context makes the finer, more specific bases obvious."); *Walton*, 881 F.3d at 771 ("[I]t is claims that are deemed waived or forfeited, not arguments.").

If there were any doubt that Ordunez's general objection was sufficient to alert the district court to the need to analyze New Mexico child abuse under the modified categorical approach and elements clause, it was resolved by the district court's undertaking of

that analysis. "[T]here is no need to consider whether" an objection was sufficient when "it *actually* apprised the trial court" of the true basis of the objection. *Prater*, 766 F.3d at 507 (emphasis in the original).

The government argues that the record indicates that neither "the Probation Office nor the district court understood the legal basis for petitioner's objection or addressed that objection." (Br. in Opp. 13-14). The district court explicitly permitted Ordunez to persist in his objection. D. Ct. Doc. 66, at 6. That was after the probation officer discussed Ordunez's objection and responded by applying the modified categorical approach to determine that Ordunez's child abuse conviction had a force element. D. Ct. Doc. 46-1, at 2. If the district court was unclear about Ordunez's objection, it would have inquired further before ruling on it and permitting him to persist in his argument to preserve it for appeal. Instead, the district court was aware of Ordunez's objection and confident, though mistaken, in its response.

The district court's analysis of Ordunez's objection showed that he sufficiently objected. *Prater*, 766 F.3d at 506-07; *United States v. Rivera*, 365 F.3d 213, 214 (3d Cir. 2004); *United States v. Grissom*,

525 F.3d 691, 695 (9th Cir. 2008). The Fifth Circuit's opinion here split with those published opinions.

Ordunez's objection caused the district court to "defend[its] decision" and gave the court of appeals "the benefit of [the district court's] explanation." *United States v. Simmons*, 587 F.3d 348, 357 (6th Cir. 2009). The district court was not required "to guess whether a challenge [was] being mounted" or what Ordunez "wish[ed] to contest." *United States v. Aleman*, 832 F.2d 143, 145 (11th Cir. 1987).

3. A proper application of the modified categorical approach demonstrates that Ordunez's conviction did not have a force element.

Prior to the commencement of this federal case, Ordunez was indicted for New Mexico child abuse. 5th Cir. Doc. 49. He accepted a plea to the lesser offense of attempted child abuse. 5th Cir. Doc. 49. "When a defendant, in the context of a plea bargain, enters a plea to a lesser offense … , 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." *State v. Herrera*, 33 P.3d 22, 28 (N.M. Ct. App. 2001). New Mexico child abuse may be committed recklessly. *United States v. Zayas*, 802 F. App'x 355 (10th Cir. 2020). Thus, the fact that Ordunez was convicted of attempted child

abuse, pursuant to a plea decreasing the severity of his charge after an indictment for actual child abuse, shows that his offense could have been committed recklessly, meaning it is not categorically a crime of violence. *Borden v. United States*, 593 U.S. 420, 429 (2021).

The government suggests that Ordunez's position is that "the elements of the charged crime (child abuse), not the elements of the crime of conviction (attempted child abuse), should govern the categorical approach." (Br. in Opp. at 19-20). The government is close but ultimately mistaken. Ordunez's argument is that the procedure described in *Herrera* for pleading to the lesser offense of attempt in New Mexico widens, not narrows, the elements that can ultimately satisfy Ordunez's crime of conviction. To illustrate:

Elements that can satisfy a plea to attempted New Mexico child abuse following an indictment for actual child abuse:		
Elements of New Mexico child abuse: Knowingly, intentionally, or **recklessly** causing or permitting a child to be tortured, cruelly confined, or cruelly punished.	or	Elements of attempted New Mexico child abuse: Knowingly or intentionally causing or permitting a child to be tortured, cruelly confined, or cruelly punished.

N.M. Stat. Ann. § 30-6-1 (D); *Herrera*, 33 P.3d at 28. Thus, the "acts criminalized" by "the statute of conviction" include reckless acts and therefore do not entail the kind of force described in the elements clause of U.S.S.G. § 4B1.2(a)(1). *Borden*, 593 U.S. at 424.

The Fifth Circuit examined only the elements of attempted child abuse. By improperly narrowing the relevant elements, the Fifth Circuit failed to follow this Court's precedent in *Borden*. That error, in addition to the Circuit split defined above, warrant this Court's review by granting the petition.

The government concedes (Br. in Opp. 16-17) that this case implicates yet another circuit split, whether a statute that criminalizes "acts of omission," like starving a child to death, include a force element. *Compare United States v. Harris*, 68 F.4th 140 (3d Cir. 2023) *with United States v. Peeples*, 879 F.3d 282, 287 (8th Cir.), cert. denied, 138 S. Ct. 2640 (2018); *United States v. Jennings*, 860 F.3d 450, 459-60 (7th Cir. 2017), *cert. denied*, 583 U.S. 1077 (2018); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir.), *cert. denied*, 580 U.S. 1021 (2016). The government ignores that New Mexico child abuse goes quite a bit further than withholding food.

The New Mexico child abuse statute criminalizes acts includes permitting another to withhold food. Because "abuse will frequently

occur in the home," making it difficult to prove beyond a reasonable doubt that one particular parent caused the abuse, the statute is phrased broadly to permit prosecution of both parents regardless of "who actually inflicted the abuse." *State v. Leal*, 723 P.2d 977, 980 (N.M. 1986). That expansive definition of child abuse is fundamentally at odds with this Court's understanding of force as an element because "the use of physical force against the person of another" "demands that the perpetrator direct his action at, or target, another individual." *Borden*, 593 U.S. at 430. The intentionally broad aim of New Mexico's child abuse statute cannot be reconciled with the strict requirements of an enhanced punishment for having committed crimes of violence.

This case, therefore, provides the Court another opportunity to resolve a disagreement over the definition of a crime of violence. The government correctly notes that this is a case dealing with the interpretation of crime of violence, as used in the Guidelines (Br. in Opp. 17-18), but the circuits apply this Court's cases on the definition of a crime of violence with equal force across that term's appearance in both statutes and the Guidelines. *See, e.g. United States v. Greer*, 20 F.4th 1071, 1075 (5th Cir. 2021) (applying *Borden* to U.S.S.G. § 4B1.2(a)).

The government primarily urges this Court not to examine these questions because the Fifth Circuit did not decide them, when employing plain error review. The government is correct that the Fifth Circuit did not engage these underlying questions despite Ordunez's preserved objection, showing the harm of subjecting him to plain error review and giving the Court an additional reason to grant the petition as to the first question presented. Further, because the categorization of New Mexico child abuse was fully briefed by the parties below and is purely a legal question, well developed by the record, there is no reason the Court should not decide it while also examining whether Ordunez's objection was sufficient.

CONCLUSION

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

Alternatively, Petitioner asks the Court to grant the petition, vacate the judgment of the Fifth Circuit, and remand for *de novo* review of whether the New Mexico child abuse conviction is a crime of violence in light of *Borden*.

s/ Shane O'Neal
Counsel of Record for Petitioner
Dated: March 4, 2024