No. _____

In the Supreme Court
of the United States

MARK ANDRE GREEN,
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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether Texas state law aggravated assault by injury can be considered a crime of violence under the Sentencing Guidelines in light of this Court's holding in *Borden v. United States*, 141 S.Ct. 1817 (2021).
2. When the standard of review is contested, should an appellate court support its decision to select a certain level of review with legal analysis?

List of Parties

Mark Andre Green is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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Petition for a Writ of Certiorari

Mark Andre Green respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Green*, No. 22-10976 (5th Cir. June 6, 2023). Appendix A. The order denying Green's timely petition for panel rehearing is captioned as *United States v. Green*, No. 22-10976 (5th Cir. July 11, 2023). Appendix B.

Jurisdiction

The United States Court of Appeals for the Fifth Circuit entered its final judgment on July 11, 2023, when it denied Petitioner's timely petition for panel rehearing. This petition is timely filed 90 days of that date, *see* U.S. Sup. Ct. R. 13(3), and this Court's jurisdiction is therefore invoked under 28 U.S.C. § 1254(1).

Statement of the Case

After federal agents executed a search warrant and found firearms in his bedroom, Petitioner Mark Green was arrested for being a felon in possession of a firearm pursuant to a federal complaint. In August of 2021, the Government filed an indictment charging Mr. Green for being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g). Mr. Green submitted a factual resume admitting guilt to the charged offense on December 14, 2021. Shortly thereafter, Mr. Green pleaded guilty to the one-count § 922(g) indictment without a plea agreement, and the district court accepted his plea and adjudged him guilty. *United States v. Green*, No. 22-10976, 2023 WL 3843073, at *1 (5th Cir. June 6, 2023).

Mr. Green's prior felony convictions include a Texas state conviction for aggravated assault by threat with a deadly weapon related to a May 2003 arrest, and a Texas state conviction for aggravated assault by injury with a deadly weapon related to a September 2009 arrest. The underlying indictment and judicial confession for the September 2009 case indicate that Mr. Green was convicted of intentionally, knowingly, and recklessly causing bodily injury to the victim of that assault. *See* Tex. Penal Code §§ 22.01(a)(1), 22.02(a)(2).

In Mr. Green's presentence report, the probation officer determined that his base offense level was 26 because (a) the offense involved a semiautomatic firearm

with a large-capacity magazine and (b) Mr. Green had two prior felony convictions for "crimes of violence"—*i.e.*, the May 2003 and September 2009 Texas aggravated assault convictions. *See* U.S.S.G. § 2K2.1(a)(1). After reflecting additional increases and decreases to the base offense level, the PSR concluded that the advisory guidelines range was 151 to 188 months' imprisonment, based on a total offense level of 30 and a criminal history category of V. Because § 922(g) has a maximum imprisonment sentence of ten years, the PSR noted Mr. Green's guidelines term was capped at 120 months.

Mr. Green filed a number of objections to the PSR. Relevant to this petition, Mr. Green objected to the proposition that his 2009 Texas aggravated assault by injury conviction was a "crime of violence" and therefore used to increase his base offense level under § 2K2.1(a)(1). *Green*, 2023 WL 3843073, at *1. In the PSR addendum, the probation officer disagreed, stating that, regardless of *Borden*, Mr. Green's 2009 aggravated assault conviction was an enumerated offense in the guidelines and a Texas aggravated assault by injury charge still fell within the generic definition of that offense. *See United States v. Guillen-Alvarez*, 489 F.3d 197, 199-201 (5th Cir. 2007).

At sentencing, the district court agreed with the probation officer and overruled this objection. Due to the parties reaching an agreement concerning Mr.

Green's other objections to the PSR, the total offense level decreased to 25, with a new total guidelines range of 100 to 125 months. After hearing argument from both sides, the district court imposed a sentence of 108 months' imprisonment. Mr. Green timely filed a notice of appeal.

On appeal, Mr. Green argued that the district court erred in assigning an enhanced base offense level under § 2K2.1(a)(1) because his 2009 Texas state law conviction for aggravated assault by injury was not a crime of violence as defined by § 4B1.2. *See Green*, 2023 WL 3843073, at *1. As part of this argument, he challenged the Sentencing Commission's authority when it abandoned the crime of violence definition found in 18 U.S.C. § 16. *Id.* In its response, the Government rejected both arguments and claimed that Mr. Green's second argument—that the Commission lacked authority to define crime of violence—should be relegated to plain-error review. *Id.* at *1-2; Gov't Br. at 5-6, *United States v. Green*, No. 22-10976 (5th Cir. Feb. 27, 2023).

In its June 6, 2023, opinion, the Fifth Circuit denied relief and found that *Borden* "did not address recklessness in the context of enumerated offenses," and regardless, Texas aggravated assault had previously been deemed a crime of violence under the enumerated offense clause in U.S.S.G. § 2L1.2. *Green*, 2023 WL 3843073, at *1 (citing *Guillen-Alvarez*, 489 F.3d at 200-01). Agreeing with the Government,

the appellate court then quickly discarded Mr. Green's argument that the Sentencing Commission overstepped its authority by claiming it was limited to plain-error review, and Mr. Green failed to show any clear or obvious error. *Id.* at *1-2 (citing *United States v. Velasquez-Torrez*, 609 F.3d 743, 746 (5th Cir. 2010) (per curiam)). Mr. Green filed a petition for rehearing, asking the panel to reconsider the court's decision to apply plain-error review because it had supported that decision with a one-sentence conclusion and a case that wasn't on point. The petition was denied on July 11, 2023. *United States v. Green*, No. 22-10976 (5th Cir. July 11, 2023, pet. denied).

Reasons for Granting the Petition

1. **The Court should grant this petition and conclude that a Texas state law conviction for aggravated assault by injury cannot be considered a "crime of violence" under the Sentencing Guidelines in light of *Borden v. United States*, 141 S. Ct. 1817 (2021), and the Fifth Circuit Court of Appeals' decision otherwise conflicts with other circuit courts of appeals.**

Mr. Green argued at the district court that his prior conviction for Texas aggravated assault by injury could be committed recklessly, and therefore, could not be considered a crime of violence under *Borden v. United States*, 141 S. Ct. 1817 (2021). The district court disagreed, and the Fifth Circuit affirmed the judgment, relying on its opinion in *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007). This decision conflicts with this Court's precedent, Congress's expressed

intention, and other circuit courts of appeals' opinions. Because this claim is preserved, it is reviewed de novo. *See United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016).

a. The Sentencing Commission has continuously overstepped its authority by defining crime of violence in a way that conflicts with Congress's directives and this Court's precedent.

i. Over time, the Sentencing Commission abandoned 18 U.S.C. § 16's crime of violence definition.

In 1984, Congress passed the Comprehensive Crime Control Act, which led to the creation of the United States Sentencing Commission, an independent agency within the judicial branch. Comprehensive Crime Control Act of 1984, Pub. L. 98-472, Tit. II, 98 STAT. 1976. The Act's purpose was to reform and improve federal criminal laws and procedures, including areas "such as sentencing, bail, and drug enforcement." *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004). Among other directives, Congress mandated the Commission to ensure the promulgated guidelines specify at-or-near maximum prison sentences for defendants who had previously been convicted of two or more felony "crimes of violence." 98 STAT. at 2019; 28 U.S.C. § 944(h). Because this term, "crime of violence," was used throughout the Act, Congress expressly defined the term's meaning. *See* Sen. Rep. No. 98-225, n. 9, p. 307, 98th Cong., 2d Sess. (1984). The term "crime of violence" was defined as:

> An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

98 Stat. 2136; 18 U.S.C. § 16(a)-(b). By not including an enumerated offense clause within § 16, Congress left it up to the courts to determine which offenses met this definition. The text makes clear, however, that this definition was intended to be used for all other federal laws concerning crimes and criminal procedures. *See* Sen. Rep. No. 98-225, p. 307; *see also Leocal*, 543 U.S. at 6 ("Congress therefore provided in § 16 a general definition of the term 'crime of violence' to be used throughout the [Act].").

In the first version of the guidelines manual, effective November 1, 1987, the Commission inserted § 16's crime of violence definition into the career offender guidelines. *See* U.S.S.G. § 4B1.2(1) (1987) ("The term 'crime of violence' as used in this provision is defined under 18 U.S.C. § 16.'"). The commentary to the career offender guidelines also interpreted what crimes it believed met the statutory definition and included aggravated assault. U.S.S.G. § 4B1.2 comment, n.1 (1987).

This harmony between the guidelines and § 16 was short lived. Once Congress passed the Career Criminals Amendment Act, and in effect, expanded the Armed

Career Criminal Act, the Sentencing Commission decided that the definition of "violent felony" for armed career offenders would be the new "crime of violence" definition for all career offenders under § 4B1.2. U.S.S.G. App'x C, vol. I amend. 268 (1989) (clarifying definition of crime of violence used in amendment was derived from ACCA). This updated definition changed "crime of violence" to mean any offense under federal or state law punishable by imprisonment for a term exceeding one year that:

> [H]as as an element the use, attempted use, or threatened use of physical force against the person of another, or
> Is burglary of a dwelling, arson, or extortion, involves the use of explosives, or
> Otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(1)(i)-(ii) (1989). While this language was nearly identical to Congress's violent felony definition from the 1986 Act amending the ACCA, there was no congressional directive to the Commission to swap the 1986 Act's violent felony term for the 1984 Act's foundational crime of violence term. The 1989 guidelines commentary then enumerated several crimes, including aggravated assault, that the Commission interpreted to meet its new ACCA-inspired crime of violence definition. U.S.S.G. § 4B1.2, comment n.2 (1989).

As an agency of the judicial branch, *Mistretta v. United States*, 488 U.S. 361 (1989), the Commission lacked the authority to abandon § 16's crime of violence

definition in § 4B1.2. What's more, Congress specifically and comprehensively defined the crime of violence term for the Commission's use when promulgating guidelines. Although Congress granted the Commission broad authority to promulgate sentencing guidelines, that did not permit the Commission to ignore the statutory definition in § 16. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Nor did it allow the Commission to statute-swap, as it did in 1989 when it implemented ACCA's definition for gun-charge defendants to a term used for all federal criminal defendants.

Simply put, the Commission's policy choices cannot contravene a statute passed by Congress, and *Neal v. United States*, 516 U.S. 284 (1996), reflects this lasting principle. There, this Court discussed Congress's mandated 10-year mandatory minimum sentence for anyone convicted of trafficking in more than 10 grams of a "mixture or substance containing a detectable amount" of LSD under 21 U.S.C. § 841(b)(1)(A)(v). *Id.* at 285. Under the applicable statutory definition, the weight for sentencing purposes included the actual weight of the blotter paper that had absorbed the LSD. *Id.* Although this Court had previously affirmed that the statutory definition included the blotter paper's weight, *Chapman v. United States*, 500 U.S. 453 (1991), the Commission decided to amend § 2D1.1 to abandon that approach, consistent with the statutory definition, in favor of an 0.4 milligram

presumed weight approach. *Neal*, 516 U.S. at 287. Noting that the Commission "does not have the authority to amend a statute," this Court determined that even though the guidelines required a different method of calculating LSD weight, the method laid out in 21 U.S.C. § 841(b)(1) prevailed. *Id.* at 290, 296.

Similarly, here, the Commission's unauthorized overhaul of § 4B1.2's crime of violence definition was not consistent with Congress's definition originally set forth in § 16. As in *Neal*, this Court cannot let this stand.

ii. The Sentencing Commission's definition of crime of violence is incompatible with this Court's recent decisions.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court concluded that the phrase "physical force," used in § 16(a) and (b) suggested a "higher degree of intent than negligent or merely accidental conduct." *Id.* at 9, 11. After this holding, state or federal offenses requiring proof of a merely negligent mens rea concerning the use of force did not qualify as crimes of violence under § 16. *Id.* at 11. The Sentencing Commission made no amendments to § 4B1.2's crime of violence definition in light of this holding, however.

Over a decade later, in *Johnson v. United States*, 576 U.S. 591 (2015), this Court determined that ACCA's residual clause definition of "violent felony" suffered from unconstitutional vagueness. *Id.* Accordingly, post-*Johnson*, an offense could only qualify as a violent felony under ACCA's elements clause or under its

enumerated offenses clause, which included burglary, arson, extortion, or an offense involving the use of explosives. *See* 18 U.S.C. § 924(e)(2)(B)(i)-(ii). This holding prompted the Commission to amend its career offender guidelines because § 4B1.2's crime of violence definition came from § 924(e)(2)(B). But instead of removing the residual clause, the Commission, again, exceeded its authority and expanded the foundation's text, adding a number of new enumerated offenses. U.S.S.G. § 4B1.2(a)(2), Supplement to 2015 Manual (Aug. 1, 2016). The generic offense of aggravated assault was added to this list. *See id.* Even with this change, however, the crime of violence definition remained consistent with Congress's original crime of violence definition as set forth in § 16.

This changed for good once this Court announced its decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). There, this Court held that 18 U.S.C. § 16(b)—a residual clause—was unconstitutional. *Id.* at 1204. This decision meant that a state or federal offense could only be considered an 18 U.S.C. § 16 crime of violence under § 16(a), as qualified by *Leocal*. Then in *Borden v. United States*, 141 S. Ct. 1817 (2021), this Court answered the question it had previously reserved: whether an elements clause definition requiring the use of physical force against the person of another includes offenses criminalizing reckless conduct. *Id.* at 1825. In a plurality decision, this Court concluded this wasn't the case, and "an offense requiring the use of

physical force against the person of another entails a mental state beyond *mere recklessness*." *See United States v. Stoglin*, 34 F.4th 415, 419 (5th Cir. 2022).[1] Because this Court construes the elements clause of § 16 and ACCA congruently, *Borden*'s holding applies to 18 U.S.C. § 16(a), too. *United States v. Clark*, 49 F.4th 889, 891 (5th Cir. 2022).

In light of *Borden*, Texas aggravated assault by injury cannot qualify as a crime of violence under § 16(a) because it can be committed by a recklessly. *Id.*; *United States v. Gomez*, 23 F.4th 575 (5th Cir. 2022). The Fifth Circuit's decision to treat this Texas statute as a crime of violence under § 4B1.2 is now inconsistent not only with the statutory definition Congress originally gave to the Commission under 18 U.S.C. § 16, but also with the statutory definition found in § 924(e)(2)(B).

b. The circuit courts of appeals differing approaches on what constitutes a crime of violence

i. Fifth Circuit precedent

In *United States v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007), the Fifth Circuit held that convictions under the Tennessee aggravated assault statute may be treated as equivalent to the enumerated offense of aggravated assault found in U.S.S.G. § 2L1.2. *Id.* at 814. The court recognized that generic aggravated assault

[1] (cleaned up) (emphasis added).

required recklessness manifesting extreme disregarded for the value of human life, not ordinary recklessness. *Id.* at 816-17. Though the Tennessee statute permitted a conviction for causing serious bodily injury by ordinary recklessness, the Fifth Circuit found that difference to be "sufficiently minor" after reviewing the definition of aggravated assault found in Black's Law dictionary. *Id.* (citing Wayne R. Lafave, "Substantive Criminal Law," § 16.2(d); Black's Law Dictionary 162 (8th ed. 2004)). A few months after, the court decided *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007), in which it extended *Mungia-Portillo*'s holding to Texas's aggravated assault statute. *See Guillen-Alvarez*, 489 F.3d at 200-01.

Mungia-Portillo, and by extension, *Guillen-Alvarez*, determined that a federal criminal defendant's prior conviction for aggravated assault qualifies as a crime of violence, even if the offense was committed with ordinary recklessness. *See id.* This logic stands in sharp contention with this Court's recent directives, and even Fifth Circuit case law. For example, in *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013), the Fifth Circuit instructed courts to look to a majority of state statutes when defining common-law, generic offenses, like aggravated assault. *Id.* at 556. Legal dictionaries, according to the court, should be left primarily for non-common-law offenses. *Id.* at 544. *Mungia-Portilla*, however, relied on a Black's Law dictionary, along with the Model Penal Code, to define aggravated assault, instead of looking to

a survey of contemporary state statutes. 484 F.3d at 814. Had the court focused on the majority of state statutes, as encouraged by *Rodriguez*, it would've landed on a different generic definition of aggravated assault: About two-thirds of contemporary aggravated assault offenses require intentional or knowing causation of serious injury, not recklessness. *See United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015). The *Mungia-Portillo* court, however, refused to utilize this generic definition, casting aside any difference between this definition and the statutes as merely "minor." 484 F.3d at 816-17.

Relatedly, in *United States v. Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004), the defendant challenged the crime of violence designation afforded to his conviction for criminally negligent homicide. *Id.* at 640. While the district court maintained that the conviction amounted to the generic offense of manslaughter, the appellate court found that generic manslaughter required recklessness rather than criminal negligence, and this difference was substantial. *Id.* The Fifth Circuit then granted relief. *Id.* The difference between recklessness and criminal negligence is not greater than the difference between the mental states at issue here: ordinary and extreme recklessness. Illogically, these cases produced opposite results.

The Fifth Circuit does recognize, however, that "*Borden* governs what can (and can't) qualify as a crime of violence under the Sentencing Guidelines." *United*

States v. Bates, 24 F.4th 1017, 1018-19 (5th Cir. 2022) (citing *United States v. Greer*, 20 F.4th 1071, 1075 (5th Cir. 2021)). According to the court, *Borden* was an "intervening change in the law" and therefore, inconsistent precedent was abrogated. *United States v. Jackson*, 30 F.4th 269, 275 (5th Cir. 2022); *Bates*, 24 F.4th at 1019.[2] Even with these changes, Texas aggravated assault by injury is still considered a crime of violence in the Fifth Circuit, even though it fails to qualify under the most frequently used violent crime definitions: (1) aggravated felony under 8 U.S.C. § 1326(b)(2)[3]; (2) serious violent felony under 18 U.S.C. § 3559(c)(2)[4]; (3) crime of violence under 18 U.S.C. § 16[5]; (4) violent felony under ACCA.[6]

ii. Multiple circuit courts of appeals have rejected the Fifth Circuit's interpretation of *Borden* outright.

Other circuit courts of appeals have reviewed the holdings in *Mungia-Portilo* and *Guillen-Alvarez* and rejected the Fifth Circuit's approach. The Ninth Circuit, for example, held that the generic definition of aggravated assault required at least extreme recklessness, not ordinary recklessness. *United States v. Esparza-Herrera*,

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[2] *See, e.g, United States v. Kelley*, 40 F.4th 276, 286 (5th Cir. 2022) (Texas aggravated assault of a public servant not a crime of violence under § 2K2.1(a)); *Greer*, 20 F.4th at 1075 (Texas assault family violence by impeding breath not a crime of violence); *United States v. Fuentes-Rodriguez*, 22 F.4th 504, 505-06 (5th Cir. 2022) (Texas assault family violence no longer aggravated felony under 8 U.S.C. § 1326(b)(2)).
[3] *Gomez*, 23 F.4th at 577.
[4] *Stoglin*, 34 F.4th at 419.
[5] *Dimaya*, 138 S.Ct. at 1210; *Borden*, 141 S.Ct. at 1817; *Clark*, 49 F.4th at 891.
[6] *Johnson*, 576 U.S. at 591; *Borden*, 141 S.Ct. at 1817.

557 F.3d 1019, 1023-25 (9th Cir. 2009). In doing so, the court considered the Fifth Circuit's "common sense approach" and then rejected it in favor for the "categorical approach." *Id.* at 1023. Years later, the Ninth Circuit returned to the issue and determined that, to qualify as an enumerated offense, a prior aggravated assault conviction must be caused knowingly or intentionally. *Garcia-Jimenez*, 807 F.3d at 1087. In that decision, the Ninth Circuit surveyed the aggravated assault statute in each state and found a large majority required intentional conduct. *Id.* at 1086. The Fourth Circuit subsequently agreed with this analysis and held that Texas's aggravated assault statute therefore didn't qualify as a crime of violence. *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016).

The Sixth Circuit similarly found the mens rea of ordinary recklessness insufficient to qualify as the enumerated offense of aggravated assault found in U.S.S.G. § 4B1.2. *United States v. McFalls*, 592 F.3d 707, 716-17 (6th Cir. 2010). In its reasoning, the court commented on how the Fifth Circuit "tolerated a greater degree of variance" between generic offenses and state statutes. *United States v. Cooper*, 739 F.3d 873, 880 n.1 (6th Cir. 2014). And finally, the Eight Circuit reached the same conclusion in *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018), going as far as noting that the Fifth Circuit's analysis is "unpersuasive," even "on its own terms." *Id.* at 1096. The Eight Circuit discussed how there's a "long

tradition of treating ordinary and extreme-indifference recklessness differently," "in terms of both culpability and punishment." *Id.*

These cases highlight how other circuit courts have explicitly rejected the Fifth Circuit's reasoning. The varying approaches employed by the circuit courts creates an unjust split that negatively impacts federal criminal defendants depending on where they commit their crime.

c. This case presents an excellent opportunity to resolve this split.

This case provides an appropriate vehicle for this Court to resolve this circuit split. Mr. Green's prior conviction for Texas aggravated assault by injury should not have qualified as a crime of violence under § 4B1.2 based on this Court's previous holdings. Had Mr. Green been convicted of a federal crime in a different circuit, the outcome of his case may have been different. This casts doubt into the federal system and its goal of uniformity among the circuits.

Preserved in a written objection and through counsel's argument at sentencing, this error was not harmless. By including this 2009 aggravated assault by injury conviction as a crime of violence under § 2K2.1(a), Mr. Green's base offense level increased by four levels. Had the district court sustained his written objection, the final total offense level would've been 21, and based on a criminal history category of V, Mr. Green's guidelines range would've decreased to 70 to 87 months.

Even a sentence at the top end of that range would've reduced Mr. Green's sentence by 1.75 years (21 months). The district court also did not state that it would impose the same 108-month sentence if it had sustained Mr. Green's objection.

This Court should grant this petition.

2. The Court should grant this petition and conclude that circuit courts are required to support their decision of which standard of review is applicable with legal analysis.

Mr. Green objected in writing that his 2009 conviction for aggravated assault by injury was not a crime of violence under the guidelines due to the Supreme Court's ruling in *Borden*. This objection sufficiently preserved the issue that the Sentencing Commission lacked authority to abandon § 16. The Fifth Circuit erroneously concluded, however, that the issue needed to be reviewed under the plain-error standard because Mr. Green did not make a separate written objection to this sub-argument, without citing sufficient legal authority. *Green*, 2023 WL 3843073, at *1. After reasserting this claim in a petition for rehearing, the Fifth Circuit declined to review the issue. *United States v. Green*, No. 22-10976 (5th Cir. July 11, 2023, pet. denied).

a. The issue was sufficiently preserved.

This Court's "traditional rule" is that "once a federal claim is properly preserved, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (2005). "Parties are not confined [on appeal] to the same arguments which were advanced in the Courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). A separate or new argument in support of an objection is just that, an argument—a defendant can formulate any argument he likes in support of that objection on appeal. *Cf. Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *see also United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008) (rejecting government's plain error review argument when defendant supported his sentencing argument with a "new twist" and with additional authority on appeal); *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("We reject the government's [plain error review] contention because Pallares' argument is not a new claim; rather, it constitutes an alternative argument to support what has been his consistent claim from the beginning . . .").

The Fifth Circuit "has never required a party to express its objection in minute detail or ultra-precise terms." *United States v. Pineiro*, 470 F.3d 200, 204 (5th Cir. 2006); *but see United States v. Chavez-Hernandez*, 671 F.3d 494, 497-99 (5th Cir.

2005). And Mr. Green objected to the issue at the district court. The Fifth Circuit erroneously sided with the Government and bifurcated the argument into two parts, confusing his singular objection before the district court with arguments in support of that objection. But even if the Fifth Circuit construed the full briefing of his argument as raising different grounds, Mr. Green should be able to advance any new argument before this Court in support of his objection below. *Cf. Lebron*, 513 U.S. at 379.

In support of its position, the Fifth Circuit cited *United States v. Velasquez-Torrez*, 609 F.3d 743, 746 (5th Cir. 2010)[7], for the proposition that a PSR objection is reviewed for plain error if a party supports it with a different argument on appeal. *See Green*, 2023 WL 3843073, at *2. *Velasquez-Torrez*, however, does not establish that proposition and it is not analogous to Mr. Green's case. There, the appellant not only failed to make written objections to the PSR, but explicitly "affirmed that the PSR contained no mistakes." *Velasquez-Torrez*, 609 F.3d at 746-48. Mr. Green, on the other hand, objected at the district court and argued that, after *Borden*, § 4B1.1 could not support a four-level enhancement based upon Mr. Green's 2009 Texas aggravated assault by injury conviction. Further, the issue in *Velasquez-Torrez* was a factual one, and the lack of objection prevented the Government from the ability to

[7] (per curiam).

develop a countervailing record. Here, though, Mr. Green's objection is a pure legal argument, and the Government isn't prejudiced because the facts underlying the issue are not disputed. Because Mr. Green sufficiently preserved his objection, de novo review should apply.

b. Any court's decision on which standard of review is applicable should be backed by legal authority.

In this case, the standard of review was contested on direct appeal, and there is room for debate over whether the appellant's overarching objection should be reviewed de novo or under plain error. *United States v. Hernandez-Saenz*, 733 F. App'x 144, 147 (5th Cir. 2018). When the parties contest the standard of review, a legal issue, a reviewing court should support its decision more robustly than the one-sentenced conclusion the Fifth Circuit wrote in this case. *See Green*, 2023 WL 3843073, at *2; *see, e.g., United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017); *United States v. Salazar*, 743 F.3d 445, 448-50 (5th Cir. 2014); *United States v. Neal*, 578 F.3d 270, 272-73 (5th Cir. 2009). Otherwise, district courts will become bogged down by attorneys making countless arguments and sub-arguments with the goal of preserving all available issues.

Mr. Green is not suggesting that counsel need not make clear what issue he is objecting to. What he is suggesting, however, is that the Fifth Circuit's holding suggests competent attorneys need to articulate each sub-issue at the district court

level, looking towards how the issue will play out on direct appeal. This is an unrealistic and unworkable standard that places too heavy of a burden on trial counsel to think ahead to all possible arguments, or sub-arguments, the next attorney *may* need to make on appeal. This Court should therefore grant review to clarify this issue.

Conclusion

Accordingly, Petitioner respectfully requests this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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