

IN THE SUPREME COURT OF THE UNITED STATES

---

JONATHAN WALLACE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ELIZABETH B. PRELOGAR  
Acting Solicitor General  
Counsel of Record

NICHOLAS L. MCQUAID  
Acting Assistant Attorney General

FINNUALA K. TESSIER  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

---

---

QUESTION PRESENTED

Whether aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West 2014), qualifies as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Gomez, No. 19-cr-16 (Sept. 13, 2019)

United States Court of Appeals (5th Cir.):

United States v. Gomez, No. 19-11068 (June 23, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 20-6407

JONATHAN WALLACE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 338.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2020. The petition for a writ of certiorari was filed on November 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of carjacking, in violation of 18 U.S.C. 2119(1), and on one count of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. B1. He was sentenced to 180 months of imprisonment on the carjacking count and 84 months of imprisonment on the Section 924(c) count, to be served consecutively and to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A2.

1. In January 2019, petitioner went to a car dealership in Lubbock, Texas. Presentence Report (PSR) ¶ 11. He told a salesperson that he was interested in purchasing a truck and asked for the keys. Ibid. The salesperson informed petitioner that he was required to complete an application in order to test drive the truck. Ibid. After petitioner insisted, the salesperson gave him the keys so that he could start the truck and "see how it sounded." Ibid. Petitioner again asked to drive the truck, and the salesperson reiterated that he could not. Ibid. Petitioner then pointed a gun at the salesperson. PSR ¶ 12. Petitioner informed the salesperson that the gun was loaded, directed the salesperson to turn around and walk toward an adjacent fence, and threatened to shoot the salesperson if he turned back around. Ibid. The salesperson complied, and petitioner drove the truck away. PSR

¶ 13. After petitioner left, the salesperson called the police and gave them the location of the truck using its GPS tracker. Ibid. The police located petitioner, and he admitted that he had a gun. PSR ¶ 14. Petitioner told police officers that he did not intend to harm anyone and that he had obtained the gun to protect himself from someone. Ibid.

A federal grand jury returned an indictment charging petitioner with one count of carjacking, in violation of 18 U.S.C. 2119(1); one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c); and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-3. Petitioner pleaded guilty to the carjacking and Section 924(c) counts pursuant to a written plea agreement in which the government agreed to dismiss the felon-in-possession count. C.A. ROA 123-130.

2. The Probation Office's presentence report enhanced petitioner's base offense level under Sentencing Guidelines §§ 2K2.1(a) and 4B1.2(a), based on petitioner's prior convictions for robbery, in violation of Tex. Penal Code Ann. § 29.01 (West 2012), and aggravated assault, in violation of Tex. Penal Code Ann. § 22.02(a) (West 2014), both of which the report classified as "crime[s] of violence." PSR ¶¶ 24, 29. Section 4B1.2(a) defines a "crime of violence" to include a felony that is one of several enumerated crimes, including "aggravated assault," or that "has as an element the use, attempted use, or threatened use of

physical force against the person of another.” Sentencing Guidelines § 4B1.2(a)(1)-(2). After applying the Guidelines’ career-offender provisions, the Probation Office calculated an advisory Guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 34, 92.

At sentencing, petitioner argued that his prior conviction for Texas aggravated assault did not qualify as a crime of violence under the Guidelines. C.A. ROA 107, 166. The district court overruled his objection, determining that the conviction “qualifies as a generic aggravated assault under the guidelines.” Id. at 108 (citing United States v. Villasenor-Ortiz, 675 Fed. Appx. 424 (5th Cir.) (per curiam), cert. denied, 138 S. Ct. 128 (2017)). The court determined in the alternative that “[a]ggravated assault in Texas also has as an element of the offense the use of force.” Ibid. (citing United States v. Gomez Gomez, 917 F.3d 332 (5th Cir. 2019), petition for cert. pending, No. 19-5325 (filed Aug. 26, 2019)). The court ultimately sentenced petitioner to 264 months of imprisonment. Id. at 117.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A2. It observed that it had previously determined that convictions for Texas aggravated assault qualify as crimes of violence under the Guidelines. Id. at A2 (citing United States v. Guillen-Alvarez, 489 F.3d 197, 200-201 (5th Cir.), cert. denied, 552 U.S. 967 (2007); United States

v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017); Gomez Gomez, 917 F.3d at 333-334).

#### ARGUMENT

Petitioner renews (Pet. 6-9) his contention that his prior Texas conviction for aggravated assault does not qualify as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a). This Court has recently and repeatedly denied certiorari on that issue, and the unpublished decision below does not conflict with any decision of this Court or implicate any conflict in the courts of appeals warranting this Court's review.

1. The court below has determined that a conviction under Tex. Penal Code § 22.02(a) (West 2014) qualifies as a conviction for the enumerated offense of aggravated assault and is thus a crime of violence under the Guidelines. See United States v. Guillen-Alvarez, 489 F.3d 197, 199-201 (5th Cir.), cert. denied, 552 U.S. 967 (2007); United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017). Petitioner's challenge to that determination, which is alone sufficient to support the judgment below, raises an issue exclusive to the interpretation of the advisory Guidelines and does not warrant review. This Court has recently and repeatedly denied review in other cases involving whether Texas aggravated assault, as well as aggravated-assault offenses in



other States, qualify as crimes of violence under the Guidelines.<sup>1</sup> The same result is appropriate here.

a. Typically, this Court leaves issues of Guidelines application to the Sentencing Commission, which is charged by Congress with “periodically review[ing] the work of the courts” and making “whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.” Braxton v. United States, 500 U.S. 344, 348 (1991). Because the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) (“The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.”); Buford v. United States, 532 U.S. 59, 66 (2001) (“Insofar as greater uniformity is necessary, the Commission can provide it.”).

---

<sup>1</sup> See, e.g., Johnson v. United States, 141 S. Ct. 137 (No. 19-7382); Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169); Martinez-Cerda v. United States, 138 S. Ct. 1696 (2018) (No. 17-7173) (classification of Texas aggravated assault as a crime of violence under former Sentencing Guidelines § 2L1.2 (2015)); Saucedo-Rios v. United States, 138 S. Ct. 1694 (2018) (No. 17-6562) (same); Martinez-Rivera v. United States, 138 S. Ct. 1693 (2018) (No. 17-6338) (same); Saldierna-Rojas v. United States, 137 S. Ct. 2269 (2017) (No. 16-8536) (same for Georgia aggravated assault); Cervantes-Sandoval v. United States, 137 S. Ct. 2266 (2017) (No. 16-8192) (same); Hernandez-Cifuentes v. United States, 137 S. Ct. 2264 (2017) (No. 16-7689) (same).

Adherence to that longstanding practice is especially warranted here. The Commission has devoted considerable attention in recent years to the "statutory and guideline definitions relating to the nature of a defendant's prior conviction," including the Guidelines' definition of a "'crime of violence.'" 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). In 2016, the Commission amended the definition of a "crime of violence" in Section 4B1.2(a), see Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016), and eliminated an analogous "crime of violence" provision in Section 2L1.2, see Sentencing Guidelines App. C Supp., Amend. 802 (Nov. 1, 2016). The Commission also continues to study "the impact of such definitions on the relevant statutory and guideline provisions" and to work "to resolve conflicting interpretations of the guidelines by the federal courts." 81 Fed. Reg. at 37,241; see 83 Fed. Reg. 30,477, 30,477-30,478 (June 28, 2018). The Commission's decision not to specifically define the term "aggravated assault" in its most recent amendment to Section 4B1.2(a) does not preclude the Commission from addressing that issue in the future.

b. Petitioner's assertion of a circuit conflict is overstated. Section 22.01 of the Texas Penal Code criminalizes assault, defined to include "intentionally, knowingly, or recklessly caus[ing] bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1) (West 2013). Section 22.02 classifies an assault as "[a]ggravated" if the defendant "causes serious bodily

injury” to the victim or “uses or exhibits a deadly weapon during the commission of the assault.” Id. § 22.02(a)(1)-(2). The court below has thus correctly recognized that the crime defined by Section 22.02(a) qualifies as “aggravated assault” for purposes of the “crime of violence” definition in Sentencing Guidelines § 4B1.2(a). Guillen-Alvarez, 489 F.3d at 199-201; Shepherd, 848 F.3d at 427-428.

Petitioner maintains (Pet. 6-9) that the Fourth, Eighth, and Ninth Circuits have held that generic aggravated assault does not include offenses that may be committed with a mens rea of recklessness. But although multi-state surveys by the Eighth and Ninth Circuits appear to have viewed the Texas offense as requiring a lesser mens rea than the one those courts ascribed to generic aggravated assault, see United States v. Schneider, 905 F.3d 1088, 1095 n.4 (8th Cir. 2018); United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 n.7 (9th Cir. 2015), neither of those courts of appeals has directly confronted a case involving the question whether Section 22.02(a) of the Texas Penal Code constitutes generic aggravated assault, see Schneider, 905 F.3d at 1092 (North Dakota offense); Garcia-Jimenez, 807 F.3d at 1087 (New Jersey offense). And although the Fourth Circuit decided that question differently from the court below, see United States v. Barcnas-Yanez, 826 F.3d 752, 756-757 (2016), the Fourth Circuit’s disagreement with the Fifth Circuit on the proper classification

of a Texas offense under a provision of the Guidelines does not warrant this Court's review.

2. Petitioner also contends (Pet. 4-6) that his conviction for Texas aggravated assault does not independently qualify as a "crime of violence" under the Sentencing Guidelines because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1). Because the court of appeals determined that the offense here qualifies as a "crime of violence" because it constitutes generic "aggravated assault" under Sentencing Guidelines § 4B1.2(a)(2), see Pet. App. A2; see also C.A. ROA 108, the outcome of this case does not depend on whether assault committed with a mens rea of recklessness requires the "use of physical force" for purposes of the alternative "crime of violence" definition in Sentencing Guidelines § 4B1.2(a)(1). Accordingly, no need exists to hold this petition for a writ of certiorari pending resolution of Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), which involves the classification of offenses committed with a mens rea of recklessness under a similarly worded provision of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i). See Pet. 6 (acknowledging that "[a] reversal in Borden would be necessary but insufficient to support reversal here").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Acting Solicitor General

NICHOLAS L. MCQUAID  
Acting Assistant Attorney General

FINNUALA K. TESSIER  
Attorney

MARCH 2021