No. _____

In the Supreme Court of the United States

JACOB ALLEN ADAIR, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

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QUESTIONS PRESENTED FOR REVIEW

Whether—in contravention of this Court's precedent and every other circuit—the Fifth Circuit's approach allowing for variations between a given offense and a generic offense violates the demands of the categorical analysis in *Taylor* and *Descamps*?

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JACOB ALLEN ADAIR, Petitioner,

v.

UNITED STATES OF AMERICA

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

Petitioner Jacob Allen Adair 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 October 26, 2021.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are:

- *United States v. Adair,* 7:20-cr-00303-DC-1 (W.D. Tex. 2020)
- *United States v. Adair*, 16 F.4th 469, No. 21-50218 (5th Cir. 2021)

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OPINION BELOW

The decision of the court of appeals is published at *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021), and a copy of that opinion is attached to this petition as Pet. App. A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on October 26, 2021. This petition is filed within 90 days after that decision. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The following are reproduced at Pet. App. B–D:

- United States Sentencing Guidelines (U.S.S.G.) §2K2.1
- U.S.S.G. §4B1.1
- U.S.S.G. §4B1.2

STATEMENT

Jacob Allen Adair was charged with, and pleaded guilty to, being a felon in possession of a firearm. Over Adair's objection, the district court applied a Sentencing Guidelines' enhancement for possessing that firearm subsequent to a felony "crime of violence" conviction. U.S.S.G. §2K2.1(a)(4)(A). The Guidelines define a crime of violence as a felony containing the actual, attempted, or threatened use of force ("the force clause"), or a felony categorically matching certain generic crimes—robbery among them ("the enumerated clause"). *See* U.S.S.G. §2K2.1, comment. (n.1); U.S.S.G. §4B1.2(a)). The alleged "crime of violence" here was Adair's prior conviction for Texas robbery.

Adair appealed. On appeal, Adair argued that Texas robbery failed to satisfy the force clause after this Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021) (plurality op.), because it could be committed with only a recklessness mens rea. He also argued that Texas robbery was not generic robbery, because Texas robbery allows the reckless causation of injury or force, as opposed to generic robbery, which requires the intentional or knowing use of force.

The Fifth Circuit affirmed. The court acknowledged that after *Borden,* Texas robbery no longer satisfies the force clause. *See United States v. Adair*, 16 F.4th 469, 470 (5th Cir. 2021). But it

held that Texas robbery constituted generic robbery. In so holding, the court relied on its decision in *Santiesteban-Hernandez*, which observed that generic robbery and Texas robbery have different mens rea requirements for the use of force. *Id.* at 471 (citing *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 381 (5th Cir. 2006)). The court noted that a "majority of states focus on an act of force in articulating the requisite level of immediate danger," whereas Texas robbery focuses "on the realization of the immediate danger through actual or threatened bodily injury[.]" *Santiesteban-Hernandez*, 469 F.3d at 381. Nevertheless, the Fifth Circuit still found that "the difference [was] not enough to remove the Texas statute from the family of offenses commonly known as 'robbery.'" *Id*. Thus, relying on this decision, the Fifth Circuit held that the district court properly enhanced Adair for his "crime of violence" conviction.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit has repeatedly misapplied this Court's decisions in *Taylor* and *Descamps* to allow state offenses, which are not categoric matches to generic offenses, to nonetheless qualify as generic offenses.

The categorical approach governs whether a given offense constitutes a "generic offense" for determining enhancements under the Armed Career Criminal Act, the Sentencing Guidelines, and the Immigration and Nationality Act. This Court in *Taylor* stressed the importance of a "formal categorical approach," where courts "look only to the statutory definitions" when determining a generic offense. *Taylor v. United States*, 495 U.S. 575, 600 (1990). If the relevant statute has the same elements as, or is narrower than, the generic crime, then the prior conviction can serve as a predicate for an enhancement. *Descamps v. United States*, 570 U.S. 254, 261 (2013) (citing *Taylor*, 495 U.S. at 600). "But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a [] predicate[.]" *Id.*

The Fifth Circuit has adopted a method that conflicts with the formal categorical approach described in *Taylor* and *Descamps*. Instead, as it did below here, the Fifth Circuit follows a "common sense approach," that allows non-categorical matches to qualify as generic offenses as long as the variations are "minor." *United*

States v. Herrera, 647 F.3d 172, 176 (5th Cir. 2011) (citation omitted). This approach violates *Taylor* and *Descamps*.

Adair's case is but one of many examples of the Fifth Circuit using the flawed "common sense approach." In a particularly egregious example, an en banc Fifth Circuit expressed outright hostility to the categorical approach in *United States v. Rodriguez*, 711 F.3d 541, 556 (5th Cir. 2013) (en banc). The court observed that "wide variations in prohibited conduct under state codes make it difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements." *Id*. In other words, the court opined that applying the categorical approach is impossible. Therefore, in defining the generic offense at issue—statutory rape—the Fifth Circuit left it to state law to define the age-of-consent requirement. *Id*. at 561.

Judge Dennis dissented. Judge Dennis observed that "no other court has adopted the unprecedented, variable interpretation of that predicate [generic offense] that the majority invents today." *Id*. at 574 (Dennis J., dissenting). Judge Dennis further observed that "[i]t is not this court's place to overrule *Taylor's* approach to defining generic predicate offenses[.]" *Id*. Judge Dennis concluded

by critiquing the majority for ignoring *Taylor's* demands as unworkable. *Id*. at 577–78.

Tellingly, this Court abrogated the precise holding of *Rodriguez*—the generic definition of the age of consent—in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). In fact, in *Esquivel-Quintana*, the Government advanced essentially the same approach as the Fifth Circuit in *Rodriguez*: that the state of conviction defines the generic offense. *Id*. at 1570. The Court criticized this argument, stating that it "turns the categorical approach on its head" and that under "the Government's preferred approach, there is no 'generic' definition at all." *Id*. Despite this decision clearly abrogating the Fifth Circuit's reasoning, the Fifth Circuit has held steadfast to the "common sense approach" applied in *Rodriguez*. *See United States v. Escalante*, 933 F.3d 395, 404–05 (5th Cir. 2019) (noting the remainder of *Rodriguez* remains good law); *see, e.g.*, *United States v. Alvarado-Martinez*, 713 F. App'x 259, 263 (5th Cir. 2017) (applying the "common sense" approach after *Esquivel-Quintan*).

Similarly, in *Torres-Jaime*, the Fifth Circuit analyzed Georgia aggravated assault. *United States v. Torres-Jaime*, 821 F.3d 577, 579 (5th Cir. 2016). The court observed that generic aggravated

assault required an intentional attempt to cause serious bodily injury or causing "injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life," *id.* at 582, and the Georgia offense could be committed with only a negligent state of mind. *See id.* at 587 (Costa, J., dissenting) (collecting Georgia cases). Nonetheless, the court found that the Georgia statute still fell within the generic definition. *Id.* at 585; *see also United States v. Sanchez-Ruedas*, 452 F.3d 409, 414 (5th Cir. 2006) (holding the same for California's aggravated assault statute, even though an individual need not intend any harm to be convicted of California aggravated assault).

Judge Costa dissented. *Torres-Jaime*, 821 F.3d at 586 (Costa, J., dissenting). He criticized the majority for ignoring the demands of *Taylor* and *Descamps*. *Id.* Judge Costa further pointed out that, due to Georgia allowing a negligent state of mind in committing an assault, this removed Georgia's assault statute from the generic definition. *Id.* at 587–88.

Finally, in *Santiesteban-Hernandez*—the decision the Fifth Circuit relied on to affirm Adair's sentence—the court analyzed Texas robbery, and observed that generic robbery and Texas robbery have different "use of force" requirements. *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 381 (5th Cir. 2006). The

court noted that a "majority of states focus on an act of force in articulating the requisite level of immediate danger," whereas Texas focuses "on the realization of the immediate danger through actual or threatened bodily injury[.]" *Id.* Even though this definition changed the purposeful use of force or intimidation (generic robbery) into any realization of harm if committed recklessly (Texas robbery), the Fifth Circuit still found that "the *difference is not enough* to remove the Texas statute from the family of offenses commonly known as 'robbery.'" *Id.* (emphasis added).

At their core, these Fifth Circuit decisions rest on the proposition that an offense can differ from a generic offense—even regarding an element as significant as whether a defendant intended to injure someone—and still constitute that generic offense. This type of "close enough" or "minor variation" analysis defies the categorical analysis in *Taylor* and *Descamps*, which requires "in no uncertain terms, that a state crime cannot qualify as [a] … predicate if its elements are broader than those of a listed generic offense." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). This Court should grant certiorari to resolve these errors and ensure that defendants in the Fifth Circuit receive the benefit of this Court's well-established jurisprudence.

II. The Fifth Circuit is the only circuit ignoring the demands of *Taylor* and *Descamps*.

Not only is the Fifth Circuit controverting Supreme Court precedent, no other circuit has adopted its "unprecedented, variable interpretation" of generic offenses. *Rodriguez*, 711 F.3d at 574 (Dennis J., dissenting). As the Eighth Circuit observed, the Fifth Circuit is alone in applying a "common sense approach" to allow offenses which are "close enough" to satisfy the categorical approach. *United States v. Schneider*, 905 F.3d 1088, 1096 (8th Cir. 2018); *see also id.* ("This so-called 'common sense approach,' … is not what the Supreme Court has instructed us to do.").

As it has done repeatedly, the Fifth Circuit has strayed from the appropriate legal standard and constructed its own idiosyncratic standard. In these situations, this Court has granted certiorari to reverse the practice. *See, e.g.*, *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020) (preservation of substantive-reasonableness challenges); *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) (plain-error review under the Sentencing Guidelines); *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (funding for expenses "reasonably necessary for the representation of the defendant"); *Buck v. Davis*, 137 S. Ct. 759 (2017) (certificates of appealability); *Molina-Martinez v. United States*, 578 U.S. 189 (2016) (plain-error review under the Sentencing Guidelines).

In short, in contravention of this Court's jurisprudence, and in conflict with every other circuit, the Fifth Circuit has failed to correctly apply *Taylor* and *Descamps*. This has affected the Fifth Circuit's approach to numerous situations, from the Armed Career Criminal Act to the Sentencing Guidelines to the Immigration and Nationality Act—creating a deep-seeded circuit split. This Court should grant certiorari to correct the conflict.

III. This case presents an ideal opportunity to remedy the Fifth Circuit's errors under *Taylor* and *Descamps*.

Despite this Court in *Esquivel-Quintana*, 137 S. Ct. at 1568, abrogating the Fifth Circuit's approach to the categorical analysis—and despite *Taylor* and *Descamps* clear holdings—the Fifth Circuit has held steadfast to its "common sense" approach. And it continues to express outright hostility to this Court's holdings: "the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad." *Escalante*, 933 F.3d at 406.

Adair's case is but one of many casualties of this "common sense" approach. *See, e.g.*, *Torres-Jaime*, 821 F.3d at 579 (5th Cir. 2016); *Sanchez-Ruedas*, 452 F.3d at 414. He asked the Fifth Circuit to apply the approach in *Taylor* and *Descamps* to determine that his robbery conviction was not generic robbery. Instead, the

Fifth Circuit relied on its previous cases that provide for a "common sense approach," allowing for "minor" variations between a given offense and the generic offense. *Adair*, 16 F.4th at 471 (relying on *Santiesteban-Hernandez*, 469 F.3d at 379). That—like the many examples above—was error under *Taylor* and *Descamps*. This Court should therefore grant certiorari to correct this error.

CONCLUSION

FOR THESE REASONS, Adair asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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