

No. _____

In the
Supreme Court of the United States

Alton Young,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
from the United States Court of
Appeals for the Fifth Circuit
Fifth Circuit Case No. 16-60790

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court stated that a defendant who uses the categorical approach, in a hypothetical manner, must demonstrate by a “realistic probability” that the state has applied the statute in that nongeneric manner.

The Fifth Circuit has interpreted the *Duenas- Alvarez* rule as requiring a concrete example of the exact same statute applied nongenerically, as a matter of law, in every case, even when the statute’s plain language is categorically broader than the federal statute; by contrast, the First, Third, Sixth, Ninth, and Eleventh Circuits have interpreted *Duenas-Alvarez* as not requiring a concrete example when the state statute is plainly broader on its face. Which approach is correct?

PARTIES TO THE PROCEEDING

Petitioner is Alton Young, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alton Young seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The petitioner, Mr. Alton Young, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 6, 2017. The Opinion and Judgment are attached hereto as composite Appendix 1.

The opinion of the Court of Appeals for the Fifth Circuit is published and can be found at *United States v. Alton Young*, 872 F.3d 742 (5th Cir. 2017). A copy of the published Opinion is attached as Appendix 3.

The district court entered a Judgment reflecting this sentence on November 21, 2016. A copy of the Judgment is attached hereto as Appendix 2.

JURISDICTION

The Fifth Circuit affirmed the district court's judgment on October 6, 2017. No petition for rehearing or en banc hearing was filed. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules.

STATUTORY AND GUIDELINES PROVISIONS

This petition involves three statutes, two federal and one state: 34 U.S.C. § 20911¹; Miss. Code Ann. 97-5-23; and U.S.S.G. § 2A3.5.

The statutes and Guidelines provide, in relevant part:

Tier I sex offender – 34 U.S.C. § 20911(2)

The term “tier I sex offender” means a sex offender other than a tier II or tier III sex offender.

Tier III sex offender – 34 U.S.C. § 20911(4)

The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

- (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or
 - (ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;
- (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
- (C) occurs after the offender becomes a tier II sex offender.

34 U.S.C. § 20911(2) and (4).

* * *

“Sexual contact” is defined as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”

18 U.S.C. § 2246(3).

* * *

¹ Effective September 1, 2017, 42 U.S.C. § 16911 was transferred to 34 U.S.C. § 20911. *See* 42 U.S.C. § 16911. The relevant substance of the statute remained the same.

(1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, or with any object, any child under the age of sixteen (16) years, with or without the child's consent, or a mentally defective, mentally incapacitated or physically helpless person as defined in Section 97-3-97, shall be guilty of a felony. . .

Miss. Code. Ann. § 97-5-23.

* * *

(a) Base Offense Level (Apply the greatest):

- (1) 16, if the defendant was required to register as a Tier III offender;
- (2) 14, if the defendant was required to register as a Tier II offender;
- (3) 12, if the defendant was required to register as a Tier I offender.

U.S.S.G. § 2A3.5

STATEMENT OF THE CASE

In 2009, Alton Young sustained a felony conviction in Tippah County, Mississippi, for touching a child for lustful purposes in violation of Miss. Code Ann. § 97-5-23. By virtue of that conviction, he was required to register as a sex offender.

On April 20, 2016, a federal grand jury indicted Mr. Young on one count of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). Mr. Young pled guilty on August 4, 2016. Before the sentencing hearing, defense counsel objected to the pre-sentence report's classification of Mr. Young as a Tier III sex offender under the Sex Offender Registration and Notification Act (SORNA).

In the written objection, defense counsel contended that Mr. Young should have been classified as a Tier I sex offender, rather than Tier III, by arguing that his

underlying sex offense was broader than the generic definition called for under 34 U.S.C. § 20911(4)². Following Supreme Court precedent, *Taylor v. United States*, 495 U.S. 575 (1990), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), defense counsel laid out the analytical framework that would determine Mr. Young’s tier classification.

At the sentencing hearing, the district court heard oral argument from defense counsel and the prosecution’s response. Defense counsel maintained its position that the categorical approach was the proper method for determining Mr. Young’s tier classification based on his prior conviction. The Fifth Circuit had not directly ruled on the issue of whether the categorical approach applied to SORNA tier classifications; every other Circuit that had addressed the issue ruled that it did.

After explaining its position on tier classification, and arguing that the Mississippi statute criminalizes a broader range of behavior than the federal statute, the prosecution responded. The prosecutor cited *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014), to bolster its position that the Fifth Circuit had previously ruled in favor of looking at the circumstances of the offense, rather than the statutory elements of the conviction. The prosecution favored the circumstance approach because it believed that disregarding the facts and circumstances of the offense would “frustrate SORNA’s broad intent.” In fact, the prosecution argued that the federal statute was actually broader than Mississippi statute because the intent requirement under the federal statute could be to abuse, humiliate, degrade, arouse or gratify sexual desires of a person, whereas § 97-5-23 required only an intent to touch for a lustful purpose or

² Mr. Young’s prior conviction was under Mississippi Code Annotated § 97-5-23(1) for “touching a child for lustful purposes.”

depraved sexual desires.

After hearing from the prosecution, defense counsel rebutted the prosecution's argument by reiterating that the categorical approach limits statute comparison to elements only, and that the First, Fourth, Ninth, and Tenth Circuits had upheld the categorical approach in determining a sex offender's tier classification. Defense counsel also distinguished *Gonzalez-Medina* from the facts of this case.

The district court overruled the objection to the PSR and found in favor of the prosecution. The district court provided no factual or legal analysis.

Accordingly, the court sentenced Mr. Young, using the Tier III base offense level of 16 (total offense level 13) and criminal history category III, to 24 months' imprisonment, the high end of the guidelines range, and five years of supervised release. A timely Notice of Appeal followed after the Judgment was entered.

On appeal, defense counsel argued that the categorical approach was the appropriate method to compare Miss. Code Ann. § 97-5-23 against federal abusive sexual contact. Because § 97-5-23 stated that "any body part," along with the required intent, would satisfy a conviction under the statute, it was facially and categorically broader than abusive sexual contact due to the federal statute's plain language limiting a conviction to six different body parts.³

After filing his initial brief, the Fifth Circuit issued an en banc decision, *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017), *cert. denied*, No. 17-5054, 2017

³ Defense counsel also argued that Mr. Young's conviction was not categorically similar to aggravated sexual abuse, under 42 U.S.C. § 16911(4)(A)(i), which the prosecution conceded in its reply brief. Defense counsel also raised an age of the victim issue in the Fifth Circuit, but is not raising that argument for purposes of this cert petition.

WL 2855255, at *1 (U.S. Dec. 4, 2017), but before the Government filed its Reply. The prosecution, therefore, relied heavily on *Castillo-Rivera* and *Duenas-Alvarez*, arguing that Mr. Young had not established a realistic probability that Mississippi courts would actually apply § 97-5-23 more broadly than federal abusive sexual contact, while essentially conceding the categorical approach was the correct method for comparison of the statutes.

Defense counsel, at oral argument, maintained its position that the categorical approach was appropriate, and, that *Castillo-Rivera* and *Duenas-Alvarez* did not apply. Because the plain language of Miss. Code. § 97-5-23 clearly stated “any body part” was sufficient for conviction, the statute was facially broader than federal abusive sexual contact’s enumerated list of body parts. The *Castillo-Rivera* minority, led by Judge Dennis, is how Mr. Young tailored his argument against the seemingly misplaced *Duenas-Alvarez* language requiring defense counsel to present a concrete example to support its position.

The Fifth Circuit affirmed the district court’s finding that Mr. Young be classified as a Tier III offender, applying *Castillo-Rivera* to the facts of the case.

Mr. Young, Petitioner, now seeks review by this Court to settle the entrenched circuit split over the recently decided en banc decision, *United States v. Castillo-Rivera*, which applied *Duenas-Alvarez* in a broad manner that effectively abolished the categorical approach in favor of the prosecution, and to reach the merits of his argument, in order to determine whether Miss. Code. Ann. § 97-5-23 is categorically broader, by its plain language, than abusive sexual contact under 34 U.S.C. § 20911(4).

REASONS FOR GRANTING THIS PETITION

I. A distinct and clear circuit split exists as to how *Gonzalez v. Duenas-Alvarez* should be interpreted and applied, with at least five Circuit Courts disagreeing with the Fifth Circuit’s application in *Castillo-Rivera*.

Before a United States district court and a Fifth Circuit panel, Alton Young has been making one consistent argument: Miss. Code § 97-5-23, by its plain language, is broader than federal abusive sexual contact. *See United States v. Alton Young*, 872 F.3d 742, 746 (5th Cir. 2017). Before the district court, the argument revolved around the categorical or circumstance-specific approach. Before the Fifth Circuit, due to the issuance of its en banc *Castillo-Rivera*⁴ opinion, the issue evolved into whether *Castillo-Rivera* applied to Mr. Young’s case and whether Mr. Young lost his case because no concrete examples were provided to support his contention that the Mississippi statute was nongeneric. The first question asked during oral argument by the Fifth Circuit was, “If we apply our en banc decision in *Castillo-Rivera* case, do you have anything, any specific examples that you would use to say its not just theoretical?” Not two minutes later did the Fifth Circuit ask, “But you lose if we apply *Castillo-Rivera* here because you don’t have any examples?”

The Fifth Circuit’s primary concern rested squarely on whether *Castillo-Rivera* and *Duenas-Alvarez* applied to Mr. Young’s case, because if so, then Mr. Young would lose the case regardless of the analytical method used. As Mr. Young failed to provide a state court case to bolster his position that shoulder rubbing, any type of fetish, or french kissing would satisfy Miss. Code § 97-5-23, but not abusive sexual contact, the

⁴ On December 4, 2017, the United States Supreme Court denied certiorari in *Castillo-Rivera v. United States*, 17-5054.

Fifth Circuit affirmed the Tier III classification. *Young*, 872 F.3d at 747 (“In fact, Young could not identify even a single case in which Mississippi has done so. And the cases Young provided are from different states and involve different statutes. We do not find these persuasive”) (internal citations omitted). The manner in which the Fifth Circuit has applied *Duenas-Alvarez* in *Castillo-Rivera* and its requirement that defendants must demonstrate a “realistic probability” that the state would apply its statute to conduct in the broader, nongeneric way, has never been applied elsewhere in the manner the Fifth Circuit seeks.

This case is an ideal vehicle to resolve whether the Fifth Circuit has stretched *Duenas-Alvarez* further than was intended by this Court. Confusion surrounding “concrete example” cases could be dispelled and clarity could be given on how to apply *Duenas-Alvarez*. A live controversy exists, as Mr. Young will suffer from a number of collateral consequences while on supervised release, including increased frequency of registration and a longer duration of registration.⁵ See 34 U.S.C. § 20915(a) and (b)(2).

Further, while Sentencing Guidelines provision § 2A3.5 is important to Mr. Young’s initial issue, whether he is a Tier I or Tier III offender: the issue presented to this Court pertains to the circuit split created by the Fifth Circuit’s application of Supreme Court precedent in *Duenas-Alvarez* and statutory interpretation. In short, the Fifth Circuit has misapplied *Duenas-Alvarez* and has done so in a way that will

⁵ As of December 22, 2017, Mr. Young was released from Bureau of Prison’s custody. See Fed. Bureau of Prisons, *Find an Inmate*, <https://www.bop.gov/inmateloc/> (January 3, 2018) (search for register number 17942-042);

erroneously expose untold defendants to an increased sentence.

A The Fifth Circuit’s en banc holding in *Castillo-Rivera* puts it squarely at odds with the First, Third, Sixth, Ninth, and Eleventh Circuits.

In *Gonzales v. Duenas-Alvarez*, this Court explained that, when making an argument that a state statute is categorically broader than the generic offense, a party should demonstrate a “realistic probability” that the state would apply its statute to conduct in the broader, nongeneric way. 549 U.S. 183, 193 (2007). This Court further explained that a party may show a realistic probability by providing an example—from the party’s own case or another from the state—in which the state did, in fact, apply the statute in a nongeneric manner. *Id.* In *Castillo-Rivera*, the issues involved the Texas felon in possession and the federal felon in possession statutes and the definition of firearms, not SORNA tier classification. *See* 853 F.3d 218.

Eight of the fifteen judges of the Fifth Circuit, sitting en banc, believed that *Castillo-Rivera* failed to provide adequate case examples as required under *Duenas-Alvarez*. *Castillo-Rivera*, 853, F.3d at 222-26. It was of no import to the majority that *Castillo-Rivera*’s example case, *Boston v. State*, No. 05-96-00832-CR, 1998 WL 19938 (Tex. App.—Dallas Jan. 22, 1998), turned on the same definition of “firearm” that he was complaining of. *Id.* (“The Supreme Court has instructed that, to carry his burden, a defendant must point to a case ‘in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues’ . . . *Boston* is not such a case.”).

The other seven judges, however, felt that Castillo-Rivera adequately satisfied the *Duenas-Alvarez* requirement. *Id.* at 237-45. In doing so, the dissent accused the majority of relying “on its own distorted version of *Duenas-Alvarez*’s rule, stretching it far beyond its original meaning.” *Id.* at 237 (Dennis, J., dissenting). The dissenting judges interpreted the *Duenas-Alvarez* requirement less rigidly, as only necessary when serving the function of nipping fanciful defendant arguments in the bud. In their view, Castillo-Rivera’s arguments fully satisfied *Duenas-Alvarez*, which should have allowed Castillo-Rivera to reach the merits:

Duenas-Alvarez does not defeat Castillo-Rivera’s claim. *Duenas-Alvarez* is concerned with the defendant who tries to demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through “the application of legal imagination.” Castillo-Rivera is not relying on “the application of legal imagination” to establish that TPC § 46.04(a) is overbroad; he is relying on the statute’s plain language.

Id. at 239. Supporting this view, the dissenting judges cited the Ninth Circuit’s en banc interpretation of the *Duenas-Alvarez* rule, which is, simply stated, “Where . . . a state statute explicitly defines a crime more broadly than the generic definition . . . [t]he state statute’s breadth is evident from its text.” *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc). In other words, according to the Ninth Circuit, a concrete example is unnecessary when the text of a state statute is explicitly broader on its face. *Id.*

Viewed more globally, the Fifth Circuit’s en banc majority holding on the *Duenas-Alvarez* rule directly conflicts with the First, Third, Sixth, Ninth, and Eleventh Circuits, creating an entrenched and well-defined circuit split. A brief

survey of these circuits draws a sharp contrast to the holding of the Fifth Circuit.

In *Swaby v. Yates*, the First Circuit considered the categorical breadth of the Rhode Island drug schedules in comparison to the federal drug schedules. 847 F.3d 62, 66 (1st Cir. 2017). The court held that the Rhode Island statute was broader on its “plain terms,” “whether or not there is a realistic probability that the state actually will prosecute offense involving that particular drug.” *Id.* In *Singh v. Attorney General*, the Third Circuit held that when the elements of a crime of conviction are different, on their face, from the elements of a generic federal offense, a court errs by conducting a “realistic probability inquiry.” 839 F.3d 273, 286 (3d Cir. 2016). In *Mendieta-Robles v. Gonzales*, the Sixth Circuit held that the Government’s interpretation of the *Duenas-Alvarez* rule, which was the same as that of the Fifth Circuit here, failed because “it requires us to ignore the clear language” of a statute. 226 Fed. App’x 564, 572 (6th Cir. 2007).

In *United States v. Grisel*, the Ninth Circuit, sitting en banc, provided perhaps the most well-put articulation of its interpretation of the *Duenas-Alvarez* rule: “Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” 488 F.3d 844, 850 (9th Cir. 2007) (en banc). Finally, in *Vassell v. United States*, the Eleventh Circuit held: “*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than ‘the application of legal imagination’ to that language, creates the ‘realistic probability’ that a state would apply the statute to conduct beyond the generic definition.” 839 F.3d 1352, 1362 (11th Cir. 2016). As with

the First, Third, Sixth, and Ninth Circuits, this holding by the Eleventh Circuit is irreconcilable with the Fifth Circuit's holding in this case.

B. The Fifth Circuit's interpretation of *Duenas-Alvarez*, via *Castillo-Rivera*, breaks the bounds of this Court's opinion and creates unnecessary tension with this Court's guidance in *Taylor v. United States* and elsewhere.

In *Duenas-Alvarez*, the entire “concrete example” controversy stems from a hypothetical scenario presented at oral argument that had nothing to do with the underlying facts of the case. *Duenas-Alvarez*'s counsel made a novel argument regarding the California vehicular theft statute, that being charged as an “aidor and abettor” would open up the defendant to being held responsible for any crime that “naturally and probably” resulted from the theft crime, e.g. buying minor liquor and being held responsible for the minor's future reckless driving. 549 U.S. at 191. Counsel was attempting to show that California's application of the “natural and probable consequences doctrine” was nongeneric, not that the statute itself was overly broad.

The Fifth Circuit is thus applying the “concrete example” requirement to situations where the plain language of the underlying statute of conviction is at issue, not hypotheticals. *See Castillo-Rivera*, 853 F.3d at 238 (Dennis, J. dissenting) (Viewed in this context, it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case); *see also United States v. Espinoza-Bazaldua*, 2017 WL 4641264, at *4 (5th Cir. Oct. 16, 2017) (“In our court, however, once a district court determines that a defendant's statute of conviction

meets the corresponding generic definition, the defendant arguing on appeal that a state statute is nongeneric cannot ‘rest’ on statutory text, even if the text seems facially broader than the conduct covered by the generic definition”).

As counsel for Castillo-Rivera argued, this Court has always started with the “plain meaning rule” when interpreting a statute’s meaning: “Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Along with the plain meaning rule comes the so-called “surplusage canon,” which simply counsels that no words in a statute should be ignored. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174-79 (2012) (“The surplusage canon holds that it is no more the court’s function to revise by subtraction than by addition.”). The Fifth Circuit’s interpretation of *Duenas-Alvarez* violates both canons.

In *Duenas-Alvarez*, this Court was concerned with a defendant who sought to establish a statute as overbroad in an unlikely way, through “the application of legal imagination.” *Castillo-Rivera*, 853 F.3d at 239. In many instances, as in *Duenas-Alvarez*, a concrete example would be well-received because it dissipates concerns over fanciful argumentation. But in other instances, no legal imagination could ever be needed because the plain language of the statute of prior conviction is overbroad on its face. Viewed in this context, it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case. *Castillo-Rivera*, 853 F.3d at 239 (Dennis, J. dissenting). It is in these instances that a hyper-rigid interpretation of the *Duenas-Alvarez* rule serves no purpose but to limit a defendant’s

ability to defeat an erroneous sentencing enhancement.

From its inception in *Taylor v. United States*, the categorical approach has been rooted in text over application, focusing first and foremost on “the elements of the statute of conviction.” 495 U.S. 575, 601 (1990). *Duenas-Alvarez* should not be used to make the statute of conviction *narrower* than it is on its own terms, but that is exactly what the Fifth Circuit’s interpretation does: if a defendant cannot locate a nongeneric example of the statute’s application, the appellate court will simply treat the nongeneric portion of the statute of conviction as if it were absent. But it will still be there, on the page, in concrete terms rather than in the realm of “legal imagination.” *Castillo-Rivera* essentially turns its eye to the plain language of the statute.

If, for example, a statute of prior conviction defines “burglary” as “unlawful entry, with intent to commit a crime therein, of a building or occupied structure,” and the state defines “occupied structure” to expressly include cars and boats, courts should not be permitted to ignore the “cars and boats” portion of the statute under any circumstances. But the Fifth Circuit’s interpretation of *Duenas-Alvarez* would require courts to ignore “cars and boats” unless or until the defendant can identify a case where a court has applied the statute to a car or a boat. Or as here, where Mississippi allows conviction under § 97-5-23 for the touching of “any body part,” while federal law and tier classification III only allows conviction for the touching of six enumerated, private areas on a person. Compare Miss. Code Ann. § 97-5-23, with 34 U.S.C. § 20911(4) and 18 U.S.C. §§ 2244, 2246(3). Must we ignore the Mississippi statute’s broader substantive scope until a defendant can sift through a myriad of

records at a district clerk's office to find a defendant who was convicted for shoulder rubbing or French kissing with the requisite intent?

To state differently, according to the Fifth Circuit, the plain language of the statute does not exist when the legislature passes it and the governor signs it, nor does it exist when a prosecutor indicts under it; it only exists when a defendant can identify a time when a prosecutor secured a conviction. But, what if the statute is newly enacted? What if the defendant is representing him- or herself and does not have access to court records in other cases? What if there was a case identical to the nongeneric suggested manner, but the case was pled to a lesser included offense? Or never appealed? Or the records were lost or the transcripts destroyed? *See Castillo-Rivera*, 853 F.3d 244-45 (Higginson, J., dissenting) (“With most criminal prosecutions ending in plea agreements and putative charges driving plea negotiations, the conduct states define as criminal may not be expressed in appellate-level decisions, and the evidence required to satisfy the majority's rule may thus be unavailable”).

This is an undue burden on defendants that this Court did not envision in *Taylor*, *Duenas-Alvarez*, or elsewhere.

- C. Mr. Alton Young has made a consistent, preserved argument that his prior Mississippi conviction for lustful touching is not “comparable or more severe than” 34 U.S.C. § 20911(4) and 18 U.S.C. § 2246 because the plain language of the state statute of conviction is categorically broader than its federal counterpart.**

Mr. Alton Young has consistently argued that § 97-5-23 criminalizes a broader range of conduct than the federal criminal code. Following Supreme Court precedent and the categorical approach, Mr. Young's tier classification should have not been

affirmed as a Tier III.⁶

Comparing the elements of § 97-5-23 to 34 U.S.C. § 20911(4)(A)(ii) and “sexual contact” defined at 18 U.S.C. § 2246(3) leads us to this:

Miss. Code Ann. § 97-5-23:

1. handling or touching or rubbing;
2. of a child under the age of 16 years;
3. by a person above the age of 18 years;
4. of any part of his or her body or any member; or with any object;
5. for purposes of gratifying lust or indulging licentious sexual desires. . .

34 U.S.C. § 20911(4)(A)(ii) – Tier III classification

1. abusive sexual contact (as described in 18 U.S.C. § 2244) against a minor who has not attained the age of 13 years;

18 U.S.C. § 2246(3) – sexual contact:

1. intentional touching, either directly or through the clothing;
2. of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;
3. with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

The plain language of 18 U.S.C. § 2246(3) gives no leeway to include body parts that are not enumerated for criminal “sexual contact.” A finite number of body parts are criminally prosecutable if touched. Mississippi, on the other hand, is unlimited in the body parts a person can be touched and found guilty of violating criminal law.

If Mississippi had wanted to criminalize the touching of specific body parts, it easily could have. In *United States v. Coleman*, the issue revolved around Minnesota’s second degree sexual conduct statute which was much more akin to federal abusive sexual contact. 2017 WL 1032094 (Mar. 15, 2017). Minnesota specifically criminalized

⁶ In its briefing to the Fifth Circuit, the government conceded that Miss. Code § 97-5-23 was an indivisible statute and conceded that the categorical approach was the correct analytical framework to compare the statutes.

the touching of “intimate parts.” Minn. Stat. § 609.341, subd. (11)(a) (Minnesota defines sexual contact as, inter alia, “the intentional touching by the actor of the complainant's *intimate parts*,” when such an action is done “with sexual or aggressive intent”) (emphasis added).

Based solely on a comparison of the plain language of the elements in both statutes, Mississippi encompasses a larger breadth of conduct. The conduct being criminalized, i.e. the touching of the body parts, is the focus of Mr. Young’s argument. Under the categorical approach, a sentencing court focuses solely on the statutory elements, comparing the elements of the prior conviction with the elements of the generic federal offense specified as a sentencing predicate. *See Descamps*, 133 S. Ct. at 2283; *Taylor*, 495 U.S. at 599-600. The prior conviction may operate as a predicate if it is defined more narrowly than, or has the same elements as, the generic federal crime. *Descamps*, 133 S. Ct. at 2283. If, however, the statute defining the prior offense “sweeps more broadly than the generic crime,” the prior offense cannot serve as a statutory predicate. *Id.* The “key” to this comparison is “elements, not facts.” *Id.*

As to the *Castillo-Rivera* argument, Mr. Young has consistently argued that the Fifth Circuit has misinterpreted and misapplied the language from *Duenas-Alvarez* requiring defense counsel to conjure up a case to prove the underlying statute is categorically broader. While no case was presented to the Fifth Circuit in briefing or oral argument, additional research has found a 1967 case from the Supreme Court of Mississippi where the facts established the defendant tried to kiss a nine-year old girl. *Newburn v. State*, 205 So.2d 260 (Miss. 1967). The defendant was convicted of

burglary with the intent to violate the person of a child⁷. Newburn alleged the evidence did not show that the attempted kissing was done with the intent to gratify his sexual desire. *Id.* at 263. The Supreme Court disagreed, stating the rhetorical question: “What other reason can be given for acts done by the defendant except that they were done for the purpose of gratifying his lust, indulging his depraved licentious sexual desire?” *Id.* at 265. This case, had it been discovered prior to oral argument, would have demonstrated a “realistic probability” case to satisfy any *Castillo-Rivera* concerns. However, because the statute was a much older version in *Newburn*, it was not discovered by defense counsel at the time of filing.

Simply put, the plain language of Miss. Code § 97-5-23 is categorically broader than the federal criminal offense of abusive sexual contact. The plain language of a statute should not be subject to *Duenas-Alvarez* challenges. The Fifth Circuit has created a significant split between Circuits, one that needs to be resolved for future cases.

CONCLUSION

This Court should grant review for one compelling reason: the Fifth Circuit has created a well-defined and problematic circuit split when it adopted a hyper-rigid interpretation of this Court’s *Duenas-Alvarez* “concrete example” rule. Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

⁷ The statute in question was Miss. Code 1942 § 2052 which developed into Miss. Code § 97-5-23, the statute in question here.

Respectfully submitted,

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