No. ________________

IN THE

SUPREME COURT OF THE UNITED STATES

Damion Kentrell White , Petitioner,

v.

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NO. 16-11614

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QUESTION PRESENTED

Does *Deschamps v. United States*, 133 S.Ct. 2276 (2013) preclude an appellate court's reviewing the sufficiency of the evidence supporting a defendant's guilty plea? Alternatively, did the Fifth Circuit err by applying Deschamps and the categorical approach to a divisible statute?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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No. ________________

In the

Supreme Court of the United States

Damion Kentrell White , Petitioner,

v.

United States of America, Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
No. 16-11614

Petitioner, Damion Kentrell White, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, filed on December 14, 2017.

Opinions Below

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is *United States v. White*, No. 16-11614, (5th Cir. December 14, 2017). It is reproduced in Appendix A. White sought rehearing, which was denied. The order denying rehearing is reproduced in Appendix B. The judgment entered by the district court is reproduced in Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court, Northern District of Texas, Dallas Division, had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, section 1591—Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
>> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that

the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

Title 18, United States Code, section 1952—Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

(d) If the offense under this section involves an act described in paragraph (1) or (3) of subsection (a) and also involves a pre-retail medical product (as defined in section 670), the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under subsection (a) is greater.

(e)

(1) This section shall not apply to a savings promotion raffle conducted by an insured depository institution or an insured credit union.

(2) In this subsection—

(A) the term "insured credit union" shall have the meaning given the term in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(B) the term "insured depository institution" shall have the meaning given the term in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); and

(C) the term "savings promotion raffle" means a contest in which the sole consideration required for a chance of winning designated prizes is obtained by the deposit of a specified amount of money in a savings account or other savings program, where each ticket or entry has an equal chance of being drawn, such contest being subject to regulations that may from time to time

> be promulgated by the appropriate prudential regulator (as defined in section 1002 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481)).

Statement of the Case

Proceedings Below

On February 14, 2014, a grand jury in the Northern District of Texas returned an indictment. White was named in Count Two. Count Two of the indictment charged White with sex trafficking in violation of 18 U.S.C. § 1591(a)(1) & (b)(1) and aiding and abetting the offense in violation of 18 U.S.C. § 2. On February 26, 2014, White appeared before a U.S. Magistrate Judge. The Federal Public Defender was appointed to represent him. The government sought White's detention. White waived a detention hearing reserving the right to request one later. The Magistrate Judge ordered him detained. White was arraigned on the indictment that same day.

The case was set for trial on June 23, 2014. White sought and obtained a continuance. The case was reset for trial on September 29, 2014. On September 11, 2014, the district court entered an order continuing the trial until January 5, 2015. The order references an agreed motion, but this motion does not seem to be in the record.

On November 12, 2014, a grand jury in the Northern District of Texas returned a superseding indictment. Again, White was named in

Count Two. Count Two remained the same charging White with sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1) & (b)(1), 2. It also added a count, Count Four, charging White and others with a sex trafficking conspiracy in violation of 18 U.S.C. § 1594(c). The superseding indictment added another count, Count Five, charging White with illegal receipt of a firearm by someone under indictment in violation of 18 U.S.C. § 922(n). On December 5, 2014, the district court, apparently again without a motion, continued White's trial to March 16, 2015.

On March 2, 2015, several documents were filed. They included a superseding information, waiver of indictment, plea agreement, and Factual Resume. Count One of the superseding information charged White with Use of a Facility of Interstate Commerce in Aid of a Racketeering Enterprise in violation of 18 U.S.C. § 1952(a)(2) and (B). Count Two of the superseding information charged White with Illegal Receipt of a Firearm by a Person Under Indictment in violation of 18 U.S.C. § 922(n) and 922(a)(1)(D). The Factual Resume contained more than 3 pages of stipulated facts. The plea agreement included various provisions including an agreement by the government to dismiss the other charges and a waiver of appeal, which included the standard exceptions.[1] On March 10, 2015, White pleaded guilty before a Magistrate

[1] In the Northern District of Texas those are: a sentence exceeding the statutory maximum, arithmetic errors, the voluntariness of his guilty plea or the appeal waiver, and ineffectiveness of counsel.

Judge who recommended that White's guilty plea be accepted. The district judge then scheduled White's sentencing for June 22, 2015. Based on the report and recommendation of the Magistrate Judge, the district judge accepted White's guilty plea.

On June 10, 2015, White's attorney moved for a continuance of the June 22nd sentencing. The stated bases for this continuance was counsel's trial schedule and unusually large number of recent sentencings, which delayed timely review of the PSR and objections with White. The court granted this motion and reset White's sentencing to July 27, 2015.

On July 23, 2015, White, acting *pro se*, moved to withdraw his guilty plea. The government filed a lengthy response opposing this. On September 8, 2015, the district judge entered an order denying White's motion to withdraw his guilty plea.

On September 9, 2015, White, again acting *pro se*, moved to dismiss the AFPD representing him and proceed with new counsel. White alleged that the AFPD had not discussed with him relevant evidence in the case, had not discussed the PSR with him, and had failed to object to false statements in the plea agreement. The district judge referred this motion to a Magistrate Judge. On September 18, 2015, the Magistrate Judge held a hearing and granted the motion. By separate order, White was appointed his current counsel. After appointment of new counsel, the district court reset White's sentencing for January 22, 2016.

On January 20, 2016, White's new counsel moved for a continuance of his sentencing. Cited as reasons for the continuance were a need to communicate sufficiently with White, the complexity of the legal issues involved, and counsel's recent sentencings in two other cases. The court reset the sentencing to February 29, 2016. On February 23, 2016, White again sought a continuance of the sentencing. Counsel sought this continuance to obtain the trial transcripts of White's codefendants: "Counsel received information that there was testimony during the trial of White's co-defendant, Mecose Shorter, which may favorably support White's objections to the Presentence Report. Counsel is requesting a sixty day continuance to allow time to order the transcript of the trial as well as time to read and evaluate the testimony." The court granted this motion and reset White's sentencing to May 2, 2016. White's counsel requested certain transcripts from codefendant Mecose Shorter's trial.

On April 27, 2016, White filed another motion for continuance. Though White's counsel had filed a transcript order the day after the court granted his motion for continuance to obtain the codefendant's trial transcripts, this motion for continuance refers to an *ex parte* motion referred to the Magistrate Judge for hearing:

> Defendant subsequently filed his Ex Parte Motion for Production of Co-Defendant's Trial Transcript on April 19, 2016. The Court has referred defendant's motion to the Magistrate Court for a hearing on the matter April 29, 2016 at 11:00 am. Counsel is requesting a sixty day continuance to allow time to have the motion heard and order the requested transcript of the trial in the event that the motion is granted. Should the motion be denied, counsel will need additional time to further prepare in light of the absence of the potentially favorable testimony.

This *ex parte* motion does not appear to be in the record. The district court granted this motion for continuance resetting White's sentencing to July 11, 2016. Then, on June 6, 2016, White filed a more specific transcript order requesting specific bits of codefendant Mecose Shorter's trial.

On June 24, 2016, the government sought a continuance because the AUSA handling this case was going to be out-of-town. The court granted this motion and reset this sentencing to July 18, 2016.

On July 21, 2016, White filed another motion for continuance. It asserted that counsel had received the requested transcripts on June 28 and needed additional time to review them and requested 30 days. The court granted this motion and reset White's sentencing to August 22nd. On August 17, 2016, White requested an additional 30 days to review the transcripts. The court granted this motion and reset White's sentencing to September 26, 2016. The court also set new deadlines for PSR addenda and objections, motions, and sentencing materials. On September 19, 2016, White filed another motion for continuance. The court granted this motion and reset White's sentencing for November 7, 2016.

On October 10, 2016, White filed an objection to the factual basis supporting his conviction on Count One. He objected contending that his admitted "factual basis does not support a conviction under 18 U.S.C. § 1952(a)(2) & (B) carrying a 0–20 year range of punishment and instead support only a conviction under 18 U.S.C. § 1952(a)(1) or (3) & (A) with a 0–5 year range of punishment." White also filed supplemental objections to the Presentence Report based on the transcripts from codefendant Mecose Shorter's trial.

On November 11, 2016, White was finally sentenced. The district court sentenced White to 240 months on Count One and 60 months on Count Two to run concurrently.

Statement of Relevant Facts

Count One (Count Two is not at issue) of the superseding information charged White with Use of a Facility of Interstate Commerce in Aid of a Racketeering Enterprise in violation of 18 U.S.C. § 1952(a)(2) and (B). More specifically, Count One charged as follows:

> From on or about July 4, 2013 through on or about July 22, 2013, the exact dates being unknown, in the Dallas Division of the Northern District of Texas and elsewhere, the defendant, Damion Kentrell White, used facilities in interstate commerce, namely cellular phones, an

automobile and the internet, with the intent to commit a crime of violence to further an unlawful activity, that is a business enterprise involving prostitution in violation of Texas Penal Code Sec. 43.02, and thereafter committed and attempted to commit the crime of violence, to wit: a violation of 18 U.S.C. § 1591(a)(1), sex trafficking by force, fraud or coercion of victim M.S., to further such unlawful activity.

In violation of 18 U.S.C. § 1952(a)(2) and (B).

Title 18, United States Code section 1952(a)(2) and (B) provides as follows: "(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—(2) commit any crime of violence to further any unlawful activity; … an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life." 18 U.S.C. § 1952(a).

Also relevant are other provisions of 18 U.S.C. § 1952. Subsections (a)(1), (a)(3), and (A) of section 1952 provide as follows: "Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—(1) distribute the proceeds of any unlawful activity … or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—(A) an act described in paragraph (1) or

(3) shall be fined under this title, imprisoned not more than 5 years, or both[.]" 18 U.S.C. § 1952.

To plead guilty, White executed a Factual Resume and admitted numerous facts. As this case also involved a separate count with a separate predicate the "Stipulated Facts" section of the Factual Resume is very lengthy. The portions pertinent to Count One, which is not at issue, are omitted.

> Later that night, the Whites drove M.S. to the Park Forest Inn in Dallas, Texas in Kenneth White's Chevrolet Tahoe. Damion White rented a hotel room, and Kenneth White took provocative photos of M.S. on his cellular telephone. The Whites deprived M.S. of food, and they prevented her from leaving the hotel room in order to encourage her to engage in commercial sex acts for them. Kenneth White had sex with M.S., and eventually the Whites posted advertisements featuring M.S. on the website Backpage.com. using a cellular telephone. M.S. eventually engaged in commercial sex acts and provided the money she earned to Kenneth White. Either M.S. or the Whites would coordinate the commercial sex acts with potential customers using the internet and a cellular telephone.
>
> Eventually, the Whites moved M.S. to a Red Roof Inn in Dallas, Texas where they continued to compel M.S. to engage in commercial sex acts during the latter part of July of 2013. Damion White rented the hotel room at this location as well. Mecose Shorter, who is the Whites' cousin, also watched M.S. and prevented her from leaving the hotel room on more than one occasion at both hotels. Shorter was also facilitating commercial sex acts of another woman, Jane Doe, during this same time period at the Red Roof Inn. On July 22, 2013, when Dallas police rescued M.S. from the Red Roof Inn, Shorter was present in M.S.'s hotel room and was acting in these dual roles.
>
> Damion White acknowledges that: (1) M.S. did not want to engage in commercial sex acts, (2) M.S. lacked the

> mental capacity to consent to engage in this type of activity, (3) he and his brother Kenneth used force, fraud or coercion to cause M.S. to engage in commercial sex acts; and (4) he and his brother used the Internet, an automobile and cellular phones to facilitate M.S.'s involvement in commercial sex acts.
>
> …
>
> Likewise, Damion White admits that from on or about July 4, 2013 through July 22, 2013, the exact dates being unknown, in the Dallas Division of the Northern District of Texas and elsewhere, he knowingly used facilities in interstate commerce, namely cellular phones, an automobile and the internet, with the intent to commit a crime of violence to further an unlawful activity, that is a business enterprise involving prostitution in violation of Texas Penal Code Sec. 43.02, and thereafter committed and attempted to commit a crime of violence, to wit: a violation of 18 U.S.C. § 1591(a)(1), sex trafficking by force, fraud or coercion of victim M.S., to further such unlawful activity. White further admits and acknowledges that his conduct violated 18 U.S.C. §§ 1952(a)(2) and (B).

Defendant's first counsel filed as an objection to the Presentence Report a lengthy exposition about why the facts admitted in the Factual Resume did not support the 0–20 year range of punishment in 18 U.S.C. § 1952(a)(B) but did support the 0–5 year range of punishment in 18 U.S.C. § 1952(A). To insure that this objection was brought to the district court's attention, White's new counsel filed a freestanding, specific objection to the sufficiency of the stipulated facts reiterating what was first advanced in the PSR objection. The crux of White's objection in the district court and complaint now on appeal is that his conduct did not constitute a crime of violence justifying a 20 year maximum sentence; rather, his conduct only justified a 5 year maximum sentence.

On appeal, White contended that the factual basis of his plea did not support his conviction under 18 U.S.C. § 1952(a)(2) in Count One of the superseding information. In making that argument, he admitted that the factual basis of his plea did support a conviction under 18 U.S.C. § 1952(a)(3). The Fifth Circuit originally calendared the case for oral argument but later cancelled oral argument and issued an opinion that purported both to resolve his only issue under an application of *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)) and dismiss the appeal as inadequately briefed:

> White asks this court to do the very thing that the Supreme Court has instructed it not to do: look beyond the elements of the offense to the underlying facts to determine whether 18 U.S.C. § 1591(a)(1) is categorically a crime of violence.
>
> In determining whether an offense is a crime of violence, this court looks "only to the statutory definitions—i.e., the elements—of a defendant's offense, and not to the particular facts underlying the convictions." *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)), *cert. denied sub. nom. Allen v. United States*, 137 S. Ct. 2231 (2017). White's brief is not entitled to liberal construction because he is represented by counsel. *See Woodfox v. Cain*, 609 F.3d 774, 792 (5th Cir. 2010). Accordingly, White has not adequately briefed the only issue he raises. This court has recognized that failure to adequately brief an issue on appeal can constitute waiver of the argument. *N.W. Enters., Inc. v. City of Houston*, 352 F.3d 162, 183 n.24 (5th Cir. 2003); *see also* Fed. R. App. P. 28(a)(8)(A); *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001); *United States v. Thames*, 214 F.3d 608, 611 n.3 (5th Cir. 2000); *L & A Contracting Co. v. S. Concrete Servs.*, 17 F.3d 106, 113 (5th Cir. 1994); *United States v. Beau-*

> *mont*, 972 F.2d 553, 563 (5th Cir. 1992). This court finds that White has waived by inadequate briefing the only issue he raises. We DISMISS the appeal.

Slip Op. at 1–2. (The opinion did not expound on how the briefing was inadequate. It's hard to understand how it was. The brief presented only this single issue, the argument spanned more than ten pages and was supported with literally scores of citations to the record, and the argument included specific subheadings. What's more, the opinion did not reconcile its decision that *Deschamps* barred White's requested relief with its conclusion that the briefing was inadequate. It's hard to understand how inadequate briefing allowed the court to reach its conclusion—especially since the case had been previously deemed worthy of oral argument.)

White now petitions this Court for a writ of certiorari to review the Fifth Circuit's decision in this case.

Reasons for Granting the Petition

Does *Deschamps v. United States*, 133 S.Ct. 2276 (2013) preclude an appellate court's reviewing the sufficiency of the evidence supporting a defendant's guilty plea? Alternatively, did the Fifth Circuit err by applying *Deschamps* and the categorical approach to a divisible statute?

***Deschamps v. United States*, 133 S.Ct. 2276 (2013) and the modified categorical approach.**

In *Deschamps v. United States*, 133 S.Ct. 2276 (2013), this Court considered whether the defendant's prior burglary conviction counted as an Armed Career Criminal Act predicate offense and more specifically whether the district court's use of the modified categorical approach to answer that question was appropriate. Deschamps contended that the use of the modified categorical approach in his case was improper and that his prior conviction did not qualify as an ACCA-predicate offense under the categorical approach. This Court "granted certiorari, 567 U.S. ——, 133 S.Ct. 90, 183 L.Ed.2d 730 (2012), to resolve a Circuit split on whether the modified categorical approach applies to statutes like [California Penal Code Ann.] § 459 that contain a single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense." *Id.* at 2283.

The purpose of the modified categorical approach is to determine under which section of a divisible statute the defendant was convicted so that the sentencing court can determine whether that conviction is an ACCA predicate offense:

> Our caselaw explaining the categorical approach and its "modified" counterpart all but resolves this case. In those decisions, as shown below, the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. So understood, the modified approach cannot convert Descamps' conviction under § 459 into an ACCA predicate, because that state law defines burglary not alternatively, but only more broadly than the generic offense.

Id. at 2283.

This Court held that sentencing courts may only apply the modified categorical approach and consult materials other than the elements of the offense to ascertain the basis of a defendant's conviction when the statute in question defined elements in the alternative—*i.e.* "when the defendant's prior conviction is for violating a so-called 'divisible statute.'" A "divisible statute" "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile." *Id.* at 2282. However, "when the crime of which the defendant was convicted has a single, indivisible set of elements[,]" a sentencing court may only look at the statutory elements of the offense *Id.* at 2282. Only when the statute of conviction has the same elements as the "generic" ACCA crime or the statute of conviction defines the elements more narrowly than the "generic"

ACCA crime can the prior conviction serve as an ACCA predicate offense. *See id.* at 2283. "If the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form. The key, we emphasized, is elements, not facts." *Id.* at 2283 (citations omitted).

This Court held that Deschamps's conviction for violating California Penal Code Ann. § 459 was not an ACCA predicate offense because the statute was indivisible, and the statute defined burglary more broadly than generic burglary. Therefore, the district court's application of the modified categorical approach and look at the plea colloquy to determine his actual offense conduct was improper. *Id.* 2285–86.

The question for this Court now is whether *Deschamps* can be properly extended to a restricting an appellate court's review of the sufficiency of the factual basis for a defendant's plea.

White's challenge to the sufficiency of the evidence supporting his conviction on Count One.

As White challenged the sufficiency of the evidence supporting his conviction on Count One in the trial court, the sufficiency of the evidence should have been reviewed for clear error. *United States v. Adams*, 961 F.2d 505, 509 (5th Cir. 1992). White's appeal waiver did not bar appellate review of this issue. Whether an appellate waiver bars an appeal is reviewed *de novo. United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002). An appeal waiver does not bar a claim that the factual basis is insufficient to support the plea. *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th. Cir. 2008).

Somewhat confusing the issue here is the nature of the charge and admitted conduct in this case. White was charged under the Travel Act—*viz.*, 18 U.S.C. § 1952(a)(2) & (B)—with the underlying offense being sex trafficking by force, fraud, or coercion in violation of 18 U.S.C. § 1591(a)(1) & (b)(1). As the charge and plea were structured, White's violation of 1591(a)(1) & (b)(1)— sex trafficking by force, fraud, or coercion—was the crime of violence for 1952(a)(2) & (B).

White contended that the evidence supporting his conviction under section 1952(a)(2) was insufficient. He contended that his conduct did not constitute a crime of violence. As he did in the district court, he challenged whether his admitted conduct conduct was sufficient to support a conviction under section 1952(a)(2) as it was not a crime of violence. At the same time he admitted that his conduct did violate section 1952(a)(3) as it did otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. Put another way, White didn't contest that he committed a violation of 1591(a)(1) & (b)(1) and that this violated 1952(a)(3); his beef was with this violating 1952(a)(2) and triggering a maximum 20 year sentence rather than a maximum 5 year sentence as his conduct and the offense was not a crime of violence.

Does *Deschamps* preclude review of the sufficiency of the admissions supporting a defendant's guilty plea?

The question now is whether *Deschamps* precludes review of the sufficiency of the admissions supporting a defendant's guilty plea. The Fifth Circuit found that it did:

> White asks this court to do the very thing that the Supreme Court has instructed it not to do: look beyond the elements of the offense to the underlying facts to determine whether 18 U.S.C. § 1591(a)(1) is categorically a crime of violence.
>
> In determining whether an offense is a crime of violence, this court looks "only to the statutory definitions—i.e., the elements—of a defendant's offense, and not to the particular facts underlying the convictions." *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)), *cert. denied sub. nom. Allen v. United States*, 137 S. Ct. 2231 (2017).

Slip Op. at 2. But does it? The question White actually asked was whether his admitted facts supported his conviction under section 1952(a)(2). He had to have admitted facts sufficient to show commission of a crime of violence. That was the issue he was raising. *Deschamps* addressed how to determine if a defendant's prior was an ACCA-qualifying predicate offense. It did not address the evaluation of the sufficiency of facts supporting a plea. This Court should grant this petition to determine if *Deschamps* extends to review of the sufficiency of the admissions supporting a plea.

If *Deschamps* applies, did the Fifth Circuit misapply it since section 1591 is divisible?

Alternatively, the Fifth Circuit may have applied *Deschamps* incorrectly. *Deschamps* precluded use of the modified categorical approach to determine if a defendant's prior offense is an ACCA-qualifying prior when that prior offense is a violation of a statute containing a single, indivisible set of elements. The modified categorical approach may only be used when the statute is divisible and can be violated more than one way. To that extent, if the Fifth Circuit cast the question correctly and the question was whether a violation of 1591(a)(1) & (b)(1) is a crime of violence and *Deschamps* does apply, then the Fifth Circuit appears to have misapplied it as 1591(a)(1) is divisible. Section 1591(a)(1) can be violated several ways only some of which qualify was violence. Those are force, threats of force, fraud, or coercion, and coercion includes threats of serious harm or physical restraint; a scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of law or the legal process. Thus, it would seem that, to the extent it's applicable, the modified categorical approach would be appropriate to use in this case. This Court should grant this petition and decide whether the Fifth Circuit erred by not applying the modified categorical approach to determining whether White's conviction was a crime of violence.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

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Respectfully submitted,

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