No. _____

In the

Supreme Court of the United States

_____

Ronald David McCalister, Jr.,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether this Court should recognize a "miscarriage of justice" exception to waivers of appeal in plea agreements?

PARTIES TO THE PROCEEDING

Petitioner is Ronald David McCalister, Jr., 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 Ronald David McCalister, Jr., seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Ronald David McCalister, Jr.*, 850 Fed. Appx. 277 (5th Cir. June 15, 2021) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 15, 2020. The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

This Petition also involves U.S.S.G. §4B1.5. The relevant portions of that Guideline and commentary state the following:

> (a) In any case in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:
>
> (1) The offense level shall be the greater of:
>
> (A) the offense level determined under Chapters Two and Three; or
>
> (B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

Offense Statutory Maximum	Offense Level
(i) Life	**37**
(ii) 25 years or more	**34**
(iii) 20 years or more, but less than 25 years	**32**
(iv) 15 years or more, but less than 20 years	**29**

Offense Statutory Maximum	Offense Level
(v) 10 years or more, but less than 15 years	**24**
(vi) 5 years or more, but less than 10 years	**17**
(vii) More than 1 year, but less than 5 years	**12**.

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

. . .

Commentary

Application Notes:

. . .

3. **Application of Subsection (a).—**

(A) **Definitions.—**For purposes of subsection (a):

. . .

(ii) "***Sex offense conviction***" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "***Child pornography***" has the meaning given that term in 18 U.S.C. § 2256(8).

18 U.S.C. § 2426(b)(1)(A) and (B) provide the following:

(b)Definitions.—In this section—

(1) the term "prior sex offense conviction" means a conviction for an offense—

(A) under this chapter, chapter 109A, chapter 110, or section 1591; or

(B) under State law for an offense consisting of conduct that would have been an offense under a chapter referred to in subparagraph (A) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States; and

(2) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

LIST OF PROCEEDINGS BELOW

1. *United States v. Ronald David McCalister, Jr.*, 4:20-CR-00059-P-1, United States District Court for the Northern District of Texas. Judgment and sentence entered on June 18, 2020. (Appendix B).

2. *United States v. Ronald David McCalister*, 850 Fed. Appx. 277 (5th Cir. June 15, 2021), CA No. 20-10642, Court of Appeals for the Fifth Circuit. Judgment affirmed on June 15, 2021. (Appendix A)

STATEMENT OF THE CASE

On February 27, 2020, Ronald David McCalister, Jr. (McCalister) was charged in a one-count information with enticement of a child, a violation of 18 U.S.C. § 2422(b), a charge that carries a statutory range of punishment of 10 years to Life. (ROA.17). As a part of a plea agreement, McCalister signed a waiver of indictment (ROA.19), a factual resume (ROA.20-22), and a written plea agreement (ROA.141). The written plea agreement provided that McCalister waived his right to appeal with certain exceptions. (ROA.145).

After entering a guilty plea (ROA.23,51-120), a presentence report (PSR was prepared. (ROA.149). Applying U.S.S.G. §2G1.3 and its enhancements, the PSR first established an adjusted offense level of 30, which would have resulted in a total offense level of 27, after adjusting for acceptance of responsibility. *See* (ROA.155). The PSR also established that McCalister's criminal history score was 4, resulting in a criminal history category III. *See* (ROA.158). This would have resulted in an advisory imprisonment range of 87-108 months, which would have been below the statutory mandatory minimum of 10 years.

However, the probation officer applied the provisions of U.S.S.G. §4B1.5 based upon McCalister having at least one previous sex offense conviction. (ROA.155). This resulted in a base offense level of 37 and a total offense level of 34 after a three-level adjustment for acceptance of responsibility. (ROA.155-156). Section 4B1.5 also increased McCalister's criminal history category to V. (ROA.158). At a total offense

level 34 and a criminal history category V, McCalister's guideline advisory imprisonment range was 235-293. (ROA.163).

McCalister filed objections to the PSR but did not object to the application of U.S.S.G. §4B1.5. *See* (ROA.169-171). The district court imposed a sentence of 235 months imprisonment, a $5,000 special assessment, and a term of supervised release of 15 years. (ROA.39-41,134-135).

On appeal, McCalister argued that the district court committed plain error because his previous conviction did not qualify as a conviction for a sex offense under Section 4B1.5. McCalister also argued that the appellate court should adopt a miscarriage of justice exception to the waiver of appeal provision in McCalister's written plea agreement. The Fifth Circuit declined to adopt such an exception and dismissed McCalister's appeal under the waiver of appeal provision of the plea agreement. *See United States v. McCalister*, 850 Fed. Appx. 277, 278 (5th Cir. June 15, 2021). The court also stated, without explanation or analysis, that McCalister "failed to show that his challenge to the § 4B1.5 enhancement should be allowed to proceed even if such an exception existed." *Id.*

REASONS FOR GRANTING THIS PETITION

I. This Court should recognize a "miscarriage of justice" exception to waivers of appeal.

A. Due Process and Fundamental Fairness requires that a "miscarriage of justice" exception to waivers of appeal.

The Fifth Circuit has expressly reserved the question of whether "miscarriages of justice" constitute an exception to appeal waivers. *See United States v. Burns*, 770 F. App'x 187, 191 (5th Cir. 2019)(unpublished)("Burns contends that we could find his waiver unenforceable under a miscarriage of justice exception. The Fifth Circuit has declined to explicitly adopt or reject this exception.")(citing *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (unpublished), and *United States v. Powell*, 574 F. App'x 390, 394 (5th Cir. 2014) (unpublished)). And the court continued to decline to adopt such an exception in Mr. McCalister's case. *See*

However, most other circuits hold that a waiver of appeal cannot shield a miscarriage of justice. *See United States v. Teeter,* 257 F.3d 14, 21–27 (1st Cir.2001); *United States v. Khattak*, 273 F.3d 557, 559–63 (3d Cir.2001); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Shockey*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009).

Other circuits exempt certain fundamental issues from a waiver, but without using the "miscarriage" language. *See United States v. Johnson,* 347 F.3d 412 (2d Cir 2003)(appeal waiver cannot bar appeal of sentence that unconstitutionally considers defendant's "status"); *United States v. Brown*, 232 F.3d 399, 403 (4th

Cir.2000)(challenges to sentence based on race or sentence exceeding maximum cannot be waived); *United States v. General*, 278 F.3d 389, 399 n. 4 (4th Cir.2002) (*Apprendi* errors and lack of competence cannot be waived); *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996) ("the waiver of a right to appeal may be subject to certain exceptions such as claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence imposed in excess of a maximum statutory penalty").

Both this Court and the Fifth Circuit have agreed that "'no appeal waiver serves as an absolute bar to all appellate claims.'" *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019)(quoting *Garza v. Idaho*, —— U.S. ——, 139 S.Ct. 738 (2019)).

This Court should hold that defendants may appeal a miscarriage of justice, notwithstanding a waiver of appeal. As a matter of contract law, it is unlikely that parties to the plea agreement contemplated leaving no remedy in the event of an extreme injustice following the plea. The D.C. Circuit has concluded that "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court." *Guillen*, 561 F.3d at 530. After all, most "waivers are made before any manifestation of sentencing error emerges," so "appellate courts must remain free to grant relief from them in egregious cases." *Teeter*, 257 F.3d at 25.

This merely applies a general principle of contract law: that parties may avoid an unconscionable contractual obligation premised on a fundamental mistake. *See* Restatement (Second) of Contracts, Section 153 (1981); *Ibarra v. Texas Employment*

Com'n, 823 F.2d 873, 879 (5th Cir. 1987). Here, the defendant – and likely both parties – bargained with the assumption that the sentence would not amount to a miscarriage of justice.

B. Mr. McCalister's case presents a good vehicle for the Court to adopt a "miscarriage of justice" exception.

Mr. McCalister's case presents a situation where his Guideline imprisonment range was enhanced from 87-108 months to 235-293 months by applying the sentencing enhancement in U.S.S.G. §4B1.5 for Mr. McCalister having a prior "sex offense conviction," that conviction being aggravated sexual assault of a child under 14 years of age. The problem is that the Texas offense of aggravated sexual assault of a child younger than 14 does not meet the definition of "sex offense conviction." Texas Penal Code provides the offense of aggravated sexual assault as follows:

> (a) A person commits an offense:
>
> (1) if the person:
>
> (A) intentionally or knowingly:
>
> (i) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
>
> (ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
>
> (iii) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
>
> (B) regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of a child by any means;

(ii) causes the penetration of the mouth of a child by the sexual organ of the actor;

(iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and

(2) if:

(A) the person:

(i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode;

(ii) by acts or words places the victim in fear that any person will become the victim of an offense under Section 20A.02(a)(3), (4), (7), or (8) or that death, serious bodily injury, or kidnapping will be imminently inflicted on any person;

(iii) by acts or words occurring in the presence of the victim threatens to cause any person to become the victim of an offense under Section 20A.02(a)(3), (4), (7), or (8) or to cause the death, serious bodily injury, or kidnapping of any person;

(iv) uses or exhibits a deadly weapon in the course of the same criminal episode;

(v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or

> (vi) with the intent of facilitating the commission of the offense, administers or provides to the victim of the offense any substance capable of impairing the victim's ability to appraise the nature of the act or to resist the act;
>
> (B) the victim is younger than 14 years of age, regardless of whether the person knows the age of the victim at the time of the offense; or
>
> (C) the victim is an elderly individual or a disabled individual.

Texas Penal Code § 22.021.

Accordingly, the Texas Penal Code provides for an offense of aggravated sexual assault of a child younger than 14 when a person, regardless of consent and regardless of any age differential, has sexual intercourse with someone younger than 14 years of age.

Title 18 U.S.C. § 2426 defines "prior sex offense conviction" as a conviction under chapter 117, chapter 109A, chapter 110, or section 1591 under Title 18, or a conviction under state law for conduct that would have been an offense under one of these chapters or sections if it had occurred within the special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. § 2426(b)(1)(A) and (B).

Combing through all of the provisions of chapter 117 (transporting for illegal sexual activity), chapter 109A (sexual abuse), chapter 110 (sexual exploitation of minors) and 18 U.S.C. § 1591 (sex trafficking), there are only two offenses under which Mr. McCalister's prior offense (aggravated sexual assault of a child younger than 14) can fall, and those are the federal offense of aggravated sexual abuse, 18

U.S.C. § 2241(c) and sexual abuse of a minor or ward, 18 U.S.C. § 2243. The relevant portion of § 2241 provides the following:

> **(c) With Children.—**
>
> Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

18 U.S.C. § 2241(c). The subsections (a) and (b) referred to above are provisions of the statute that address sex by force, threat, and by administering drugs. There is no indication that McCalister's offense fell under those subsections of §2241. *See* (ROA.156).

The Federal statute prohibiting sexual abuse of a minor, § 2243 provides the following:

> **(a)Of a Minor.—**Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—
>
> **(1)** has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. §2243(a).

There should be no question that the categorical approach applies to determining whether McCalister's prior conviction for aggravated sexual assault is an offense that qualifies as a "sex offense conviction" under §4B1.5. *See United States v. Wikkernink*, 841 F.3d at 331-332. In making that determination, this Court must compare the elements of McCalister's conviction under Texas Penal Code § 22.041 with those in 18 U.S.C. § 2241(c) and 18 U.S.C. § 2243(a), and "the prior conviction qualifies the defendant for a sentencing enhancement 'only if the elements are the same as or narrower than, those of the generic offense.'" *Id*. quoting *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2284 (2013).[1]

When comparing the Texas statute for which McCalister was convicted with the only federal statutes that appear comparable to the Texas statute, it is undeniable that the Texas statute is broader than the federal statute. Title 18 U.S.C. § 2241 (c)

[1] It is not clear under Texas law whether "aggravated sexual assault of a child under 14" is divisible or non-divisible from the other means of committing an aggravated sexual assault, such as to allow the use of the "modified categorical approach." However whether the Court applies the categorical or modified categorical approach makes no difference in this case. McCalister is not disputing that he was convicted of the "aggravated sexual assault of a child younger than 14 years" portion of the statute. There really is no dispute that the underlying documents reflect that was the offense he was convicted of. Even if the Court were to apply the modified categorical approach, it would simply look to the charging documents to determine what portion of the statute the defendant was convicted of and still compare the elements to see if the offense of conviction was broader. *See United States v. Wikkernink*, 841 F.3d at 332.

criminalizes as an aggravated sexual assault when a person has consensual sex with anyone who has not attained the age of 12. *See* 18 U.S.C. §§ 2241(c). Moreover, 18 U.S.C. 2243(a), the federal sexual abuse statute criminalizes consensual sex with a person between the ages of 12 and 15 when the victim is at least four years younger than the actor. Moreover, 18 U.S.C. § 2243(c) also provides for a defense if the defendant reasonably believed the person had attained the age of 16 years.

The Texas statute allows for prosecution as an aggravated sexual assault consensual sex with anyone who has not attained the age of 14. Moreover, the statute contains no age differential, and no defense if the defendant believed the person was 16 years old. The Texas offense of aggravated sexual assault of a child younger than 14 is without question broader than both of the only two federal statutes that are comparable to his offense of conviction.

McAlister's prior offense does not meet the definition of "sex offense conviction" under 18 U.S.C. 2426(b), and, therefore, does not meet the definition of "sex offense conviction" under U.S.S.G. §4B1.5. Accordingly, McCalister's prior conviction could not be used a predicate offense to apply the sentencing enhancement in §4B1.5. *See United States v. Wikkerink, 841 F.3d* at 332; *see also United States v. Escalante*, 933 F.3d 395, 402 (5th Cir. 2019) (Utah statute for sexual assault of a minor, which was broader than the §2243 because it allowed for the prosecution without requiring the government to prove the four-year age differential, could not be used as a predicate offense for classifying a state offense as a tier II sex offense under SORNA).

This issue was not raised in the trial court. Therefore, the Fifth Circuit would have to apply the plain error standard of review and would only be reversed if McCalister could show. 1) error, 2) that is clear or obvious, 3) that affects substantial rights, and 4) that affects the fairness, integrity or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). Finding a "miscarriage of justice" exception to a waiver of appeal provision would allow the Fifth Circuit to review the above error under the plain error standard. As argued in the Fifth Circuit, McCalister contends that the error set forth above does satisfy the four prongs of plain error.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 12th day of November, 2021.

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