NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LUCAS MONTAGNE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Should an exception to the doctrine of invited error be recognized in a case in which an illegal sentence is imposed?

2. Should an exception to the doctrine of invited error be recognized in a case in which both parties invited the error?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Lucas Montagne, No. 3:19-cr-30005-1, U.S. District Court for the Western District of Arkansas. Judgment entered February 19, 2020.

United States v. Lucas Montagne, No. 20-1389, U.S. Court of Appeals for the Eighth Circuit. Judgment entered May 12, 2021; panel and en banc rehearing denied by order entered June 30, 2021.

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OPINION BELOW

On May 12, 2021, the court of appeals entered its unpublished opinion and judgment affirming the judgment of the district court. *United States v. Montagne*, 854 F. App'x 761 (8th Cir. 2021); Petitioner's Appendix ("Pet. App.") 1a-4a. The Eighth Circuit's order denying rehearing is not reported. *Id.* at 5a.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2021. On May 25, 2021, an order was entered extending the deadline for filing a petition for rehearing to June 9, 2021. A petition for en banc or panel rehearing was timely filed by Mr. Montagne on June 9, 2021. On June 30, 2021, an order was entered denying the petition for rehearing. *See* Pet. App. 5a. Pursuant to the order of this Court entered on March 19, 2020, in light of the COVID-19 pandemic, the deadline to file any petition for a writ of certiorari due on or after March 19, 2020 was extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Although that order has since been rescinded by subsequent order dated July 19, 2021, the order of the court of appeals denying rehearing was issued prior to July 19, 2021; therefore, according to the July 19 order, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order. Accordingly, this petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

18 U.S.C. § 3559(e) provides, in relevant part:

> (1) **In general.**—A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.
>
> (2) **Definitions.**—For the purposes of this subsection—
>
> (A) the term "Federal sex offense" means an offense under section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), or 2423(a) (relating to transportation of minors);
>
> (B) the term "State sex offense" means an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if, to the extent or in the manner specified in the applicable provision of this title—
>
> (i) the offense involved interstate or foreign commerce, or the use of the mails; or
>
> (ii) the conduct occurred in any commonwealth, territory, or possession of the United States, within the special maritime and territorial jurisdiction of the United States, in a Federal prison, on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country (as defined in section 1151);
>
> (C) the term "prior sex conviction" means a conviction for which the sentence was imposed before the conduct occurred

constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense;

(D) the term "minor" means an individual who has not attained the age of 17 years; and

(E) the term "State" has the meaning given that term in subsection (c)(2).

18 U.S.C. § 2241(c) provides, in relevant part:

(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.

Tex. Penal Code Ann. § 22.011 provides, in relevant part:

(a) A person commits an offense if:

* * *

(2) regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly:

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

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

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

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

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

* * *

(b) In this section:

(1) "Child" means a person younger than 17 years of age.

STATEMENT OF THE CASE

1. Lucas Montagne was named in an eight-count indictment filed in the Western District of Arkansas. Four counts charged Mr. Montagne with production of child pornography in violation of 18 U.S.C. §§ 2251(a) & (e), an offense that is generally punishable by 15 to 30 years in prison. As to each of these counts, however, the indictment also charged that the enhancement found at 18 U.S.C. § 3559(e) was applicable, which requires mandatory life imprisonment for repeated offenses against children. The indictment contained a special allegation asserting that Montagne had four prior convictions for sexual assault of a child in violation of Texas state law. *See* Tex. Penal Code Ann. § 22.011(a)(2).

2. Mr. Montagne entered an open plea of guilty to a single count of production of child pornography. As there was no written plea agreement, Montagne submitted a document to the district court titled "Defendant's Intention to Plead Guilty to Count Three" (hereinafter, the "Plea Exhibit") which was signed by Montagne and his attorney and which contained a factual basis supporting his guilty plea. At the change-of-plea hearing, Montagne's attorney read from the factual basis

contained in the Plea Exhibit, and Montagne affirmed that he had signed the document and that he agreed that the Government could prove the facts set forth therein if the case were to proceed to trial. Montagne further stipulated in the Plea Exhibit that he had previously been convicted of "a sexual offense in which the victim was a minor," referencing his prior convictions for sexual assault of a child in Texas state court under Tex. Penal Code Ann. § 22.011. In a section titled "Maximum Penalties," the Plea Exhibit states:

> Pursuant to the sentencing enhancement in 18 U.S.C. § 3559(e), a person convicted of a federal sex offense (including offenses under 18 U.S.C. § 2251) in which the victim is a minor shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim. This enhancement applies to Count Three and therefore Defendant understands that a life sentence shall be imposed.

The court accepted Mr. Montagne's guilty plea to Count Three and indicated that the remaining counts of the indictment would be reset for jury trial. After the change-of-plea hearing, however, the Government filed a motion to dismiss the remaining counts of the indictment. The court granted this motion and dismissed the remaining counts without prejudice.

3. At Mr. Montagne's sentencing, the district court noted that § 3559(e) required that a life sentence be imposed. When the court asked the Government's attorney if she had any statement to make in regard to the sentence to be imposed, she responded in the negative, noting that "the statutory implications of the Defendant pleading to the count is a life sentence . . . ." Montagne's attorney also acknowledged that Montagne understood that "once he pled, he knew he was going to be facing a mandatory life sentence." The court stated that it "could go through in

significant detail about the factors under [18 U.S.C. §] 3553(a), but I really don't think that is necessary, since the sentence has already been determined by the offense of conviction." Because the parties and the court mistakenly believed that Montagne's Texas convictions qualified as "prior sex convictions," the district court imposed the mandatory life sentence it believed was required by § 3559(e).

4. While Mr. Montagne conceded that he had been convicted of a "Federal sex offense" as that term is defined under § 3559(e), he argued on appeal to the Eighth Circuit that his prior Texas convictions did not actually qualify as "prior sex convictions" under the statutory definition of that term. Montagne cited to a recent case with very similar facts in which the Second Circuit, on plain error review, reversed the sentence of a defendant also convicted of violating §§ 2251(a) & (e) after determining that the defendant's prior state conviction did not qualify as a "prior sex conviction" under § 3559(e) "because the state statute under which he was convicted sweeps more broadly than its federal equivalent." *United States v. Kroll*, 918 F.3d 47, 50 (2d Cir. 2019). Montagne argued, as did the defendant in *Kroll*, that his state statute of conviction swept more broadly than 18 U.S.C. § 2241(c), its closest federal equivalent. Montagne noted that the Texas statute at issue prohibited sexual conduct involving victims older than 12 years of age, while § 2241(c) generally prohibits sexual conduct with victims who have not attained the age of 12. Because § 3559(e) did not apply in his case, Montagne argued that the sentence imposed was illegal, as it was in excess of the statutory maximum of 30 years imprisonment.

5. A panel of the Eighth Circuit affirmed the sentence imposed by the district court. *United States v. Montagne*, 854 F. App'x 761 (8th Cir. 2021); Pet. App. 1a. The panel did not address the merits of Mr. Montagne's arguments, instead finding that he had invited any error by the district court and accordingly waived his right to appeal the issue. The Government raised the issue of invited error in its response brief, and Montagne urged the court of appeals in his reply brief to recognize that, if the error was found to have been invited, an exception to the invited error doctrine should be recognized and applied.

6. Mr. Montagne argued that an exception to the doctrine of invited error should apply when an illegal sentence would otherwise be allowed to stand. The Eighth Circuit did not address this argument in its opinion. Montagne also argued that an exception should apply when both parties invited the error complained of. The court of appeals briefly addressed and dismissed this argument. The court found that Montagne had invited any error in the sentence imposed by the district court. Accordingly, the court found that Montagne had waived his right to argue on appeal that he was incorrectly sentenced to life imprisonment under § 3559(e).

Mr. Montagne filed a timely petition for rehearing that was denied on June 30, 2021. Pet. App. 5a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should resolve a circuit split and determine whether exceptions to the doctrine of invited error should be recognized when an illegal sentence has been imposed or when both parties invited the error.

A defendant is subject to a mandatory life sentence under 18 U.S.C. § 3559(e) if (1) he is convicted of a "Federal sex offense in which a minor is the victim" and (2) he has a "prior sex conviction" in which a minor was the victim. There is no dispute that Mr. Montagne's offense of conviction in the instant case qualifies as a "Federal sex offense in which a minor is the victim." However, Montagne asserted on appeal that none of his prior convictions for sexual assault of a child under Tex. Penal Code Ann. § 22.011(a)(2) meets the statutory definition of a "prior sex conviction."

In order to qualify as a "prior sex conviction," an offense has to meet the statute's definition of either a "Federal sex offense" or a "State sex offense." *See* 18 U.S.C. § 3559(e)(2)(C). To determine whether a prior conviction is for a "State sex offense," a court must determine whether the offense would have been a "Federal sex offense" had a proper basis for federal jurisdiction existed. *See* 18 U.S.C. § 3559(e)(2)(B). Section 3559(e)(2)(A) provides a list of specific offenses that are considered "Federal sex offenses." In order to determine whether a prior conviction was for a "State sex offense," a court should compare the relevant state statute to the federal statutes listed in § 3559(e)(2)(A) and determine whether any of them are a categorical match. *See United States v. Zigler*, 708 F.3d 994, 996 (8th Cir. 2013) (quoting *United States v. Sonnenberg*, 556 F.3d 667, 669-70 (8th Cir. 2009)) ("To determine whether [a] prior offense qualifies as a predicate offense for the purpose of

a sentence enhancement, federal courts apply a categorical approach."); *Kroll*, 918 F.3d 47. In other words, a court should determine whether all defendants who were convicted under the state statute would necessarily have committed one of the listed federal offenses if a basis for federal jurisdiction had also been present.

Mr. Montagne argued on appeal that none of the "Federal sex offenses" listed at § 3559(e)(2)(A) were a categorical match for the offense he was convicted of in Texas. His prior Texas convictions each involved a 15-year-old victim, and the relevant Texas statute defined a "child" to include persons younger than 17 years of age. Tex. Penal Code Ann. § 22.011(c)(1). Montagne specifically argued that the closest federal equivalent to his Texas offense, 18 U.S.C. § 2241(c), was not a match because it generally prohibits sexual conduct with victims who have not attained the age of 12, while a defendant could be convicted of sexual assault of a child under Texas law for sexual conduct with a child under the age of 17. Because the § 3559(e) enhancement did not apply, Montagne asserted that his sentence was illegal as it exceeded the statutory maximum of 30 years imprisonment.

Mr. Montagne acknowledged that he had represented to the district court his belief that he was subject to a mandatory life sentence under § 3559(e); he asked the court of appeals to review his arguments under a plain error standard of review. He argued that relief was warranted even under such a standard, just as the Second Circuit had granted relief on plain error review in *Kroll*. The Eighth Circuit, however, declined to reach the merits of Mr. Montagne's arguments under any standard of review. Instead, the court found that Montagne had invited any error the district

court made in sentencing him to life imprisonment and had therefore waived his right to be heard on the issue on appeal.

The court of appeals did not acknowledge Mr. Montagne's assertion that the district court had imposed an illegal sentence and did not address his argument that an exception to the invited error doctrine should apply in such a case. As Montagne noted in his reply brief on appeal, the doctrine of invited error "is a branch of the doctrine of waiver by which the courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences by having the verdict vacated." *United States v. Barrow*, 118 F.3d 482, 490 (6th Cir. 1997). As Montagne also pointed out in his reply brief, even the Eighth Circuit itself has previously recognized that "a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver." *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003). By holding that Montagne had waived his right to appeal the life sentence imposed upon him but failing to consider his argument that an exception to the invited error doctrine should apply when an illegal sentence has been imposed, the court of appeals failed to follow its own precedent; under *Andis*, a defendant should not be prevented from appealing an illegal sentence even if he has waived the right to challenge the sentence by inviting the error. In other words, a defendant who requests and receives a sentence in excess of the statutory maximum should not be barred from appealing the illegality of that sentence.

Furthermore, by failing to expressly recognize an exception to the invited error doctrine when an illegal sentence has been imposed, the Eighth Circuit's decision

puts it at odds with several of its sister circuits. In *United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994), the Ninth Circuit held that "[t]he preservation of the integrity of the judicial process or the prevention of a miscarriage of justice are exceptional situations requiring reversal even if an error is invited." And in *United States v. Green*, 272 F.3d 748, 754 (5th Cir. 2001), the Fifth Circuit held that the court may reverse on the basis of invited error to prevent "manifest injustice." The Fourth Circuit has also "acknowledged a potential exception to the invited error doctrine 'when it is necessary to preserve the integrity of the judicial process or to prevent a miscarriage of justice.'" *United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013) (quoting *United States v. Herrera*, 23 F.3d 74, 76 (4th Cir. 1994)). Mr. Montagne suggests that these courts would have considered his arguments on their merits under the standards articulated in these cases, even if they found that he had invited the error he complained of, because permitting an illegal life sentence to stand constitutes a miscarriage of justice that threatens the integrity of the judicial process. The Eighth Circuit erred by failing to recognize a similar exception and by refusing to consider Montagne's arguments on their merits. Review by this Court is needed to correct the circuit split on this issue.

The Eighth Circuit panel did address (and reject) Mr. Montagne's argument that an exception to the invited error doctrine should apply when the error was invited by both parties. In *Barrow*, the Sixth Circuit found an exception to apply when both parties invited the error complained of on appeal. *See* 118 F.3d at 491 ("[A]ssuming that error occurred, the government was as much at fault for inviting

the error as the defendant since the parties stipulated to the same [jury] instructions."). In the instant case, the Government represented in the indictment that the § 3559(e) enhancement applied to Montagne's offense of conviction, and it confirmed this position again at sentencing. If the error was invited, it was clearly invited by both parties. The panel cited *United States v. Campbell*, 764 F.3d 874 (8th Cir. 2014), as controlling on this question, and noted that, while "[t]he *Campbell* defendants and the government both agreed that the challenged Guidelines provision applied" in that case, "that did not alter [its] analysis." *Montagne*, 854 F. App'x at 763; Pet. App. 3a.. As Montagne pointed out in his petition for rehearing, the defendants in *Campbell* did not ask the court to recognize an exception when both parties invited the error; accordingly, the court of appeals in *Campbell* did not even consider the possibility that an exception might apply in such circumstances. It was error for the panel to treat *Campbell* as controlling on a question that was not presented to or ruled upon by the court in that case. If the panel was correct about *Campbell*, however, then prior Eighth Circuit precedent is in conflict with the Sixth Circuit. (And if the panel erred—as Montagne asserts it did—its refusal to recognize such an exception is still in conflict with the Sixth Circuit.)

Even if it ultimately found that Mr. Montagne was not entitled to relief, the Eighth Circuit still should have considered his arguments under a plain error standard of review. Montagne asserts that the Fourth, Fifth, Sixth, and Ninth Circuits all would have at least considered his arguments rather than finding that he had waived them by inviting the error. This Court should resolve this conflict among

the circuits and grant certiorari to consider the important question of what exceptions, if any, should apply to the doctrine of invited error.

CONCLUSION

For all of the foregoing reasons, Petitioner Lucas Montagne respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 24th day of November, 2021.

Respectfully submitted,

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