

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____Term, _____

RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also
known as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF *CERTIORARI*

GERALD C. MOTON
*CJA Counsel of Record
for Defendant-Petitioner*
11765 West Avenue, PMB 248
San Antonio, Texas 78216
motongerald32@gmail.com
Telephone (210) 410-8153
Fax: (210) 568-4389
Texas State Bar No. 14596350

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals erred in rejecting Barrera's claim that the District Court's sentence violated constitutional principles of due process and equal protection in selectively applying U.S.S.G. § 2L1.2 cmt. (n.2) to impose a ten-level enhancement in sentencing Barrera because Barrera was previously *sentenced to 5 years* even though he was released on *parole less than one year*, specifically after 337 calendar days, in contrast to imposing a four level enhancement that Barrera would have received if he had been given a *probated 5 year sentence*?

TABLE OF CONTENTS

	<u>PAGE</u>
Questions Presented.....	ii
Table of Contents.....	iii
Index to Appendices.....	v
List of Parties.....	vi
Table of Authorities.....	vii
Opinion Below.....	2
Jurisdiction.....	3
Constitutional and Statutory Provisions.....	3
Statement of the Case.....	3
Reasons the Court Should Grant Review.....	7
I. THE FIFTH CIRCUITS REJECTION OF BARRERA'S CLAIM THAT THE DISTRICT COURT MISINTERPRETED THE TERM "SENTENCE IMPOSED" UNDER § 2L1.2(B)(2)¹ WAS A MISCARRIAGE OF JUSTICE	6

1 Section 2L1.2 states in relevant part:

If, before the defendant was ordered de-ported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

II. THERE IS A CIRCUIT SPLIT REGARDING THE INTERPRETATION OF § 2L1.2 AND THE RESOLUTION IS IMPORTANT GIVEN THE FREQUENCY OF ILLEGAL RE- ENTRY CASES AFTER 13 MONTHS OR MORE SENTENCES HAVE BEEN IMPOSED.....	11
CONCLUSION AND PRAYER FOR RELIEF	13

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.
U.S.S.G. § 2L1.2(b)(2).

INDEX TO APPENDICES

APPENDIX A	Fifth Circuit Court of Appeals Opinion (May 29, 2020)
APPENDIX B	United States District Court, Western District of Texas Judgment In a Criminal Case
APPENDIX C	Fifth Amendment to the United States Constitution
APPENDIX D	Fourteenth Amendment to the United States Constitution

LIST OF PARTIES

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

TABLE OF AUTHORITIES

CASES

<i>United States v. RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also known as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera,</i> (5th Cir.April 10, 2020).....	<i>passim</i>
<i>United States v. Garza-Castaneda,</i> No. 16-11743, ____ F.3d ____ (5th Cir., 2018)	6,7
<i>United States v. Bustillos-Pena,</i> 612 F.3d 863, 865-69 (5th Cir. 2010).....	7,8
<i>United States v. Franco-Galvan,</i> 864 F.3d 338 (5th Cir. 2017).....	7,8 9,11 13
<i>Davis v. Estelle,</i> 502 F.2d 523, 524 (5 th Cir. 1974).....	10
<i>United States v. Compres-Paulino,</i> 393 F.3d 116, 118 (2d Cir. 2004).....	11
<i>United States v. Guzman-Bera,</i> 216 F.3d 1019, 1021 (11th Cir.2000).....	11
<i>United States v. Ruiz-Gea,</i> 340 F.3d 1181, 1188 (10th Cir.2003).....	11
<i>United States v. Jimenez,</i> 258 F.3d 1120, 1125-26 (9th Cir.2001).....	11
<i>Bolling v. Sharpe,</i> 347 U.S. 497, 499 (1954).....	12

<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88, 100 (1976).....	12
<i>Rodriguez-Silva v. INS</i> , 242 F.3d 243, 247 (5th Cir. 2001).....	12
<i>Richard v. Hinson</i> , 70 F.3d 415, 417(5th Cir. 2001).....	12
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200, 215-17 (1995).....	12
<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88, 100 (1976).....	12
<i>Rodriguez-Silva v. INS</i> , 242 F.3d 243, 247 (5th Cir. 2001).....	12

CONSTITUTIONAL PROVISIONS

<i>U.S. Const, Fifth Amendment</i>	12
<i>U.S. Const, Fourteenth Amendment</i>	

STATUTES

8 U.S.C. § 1326(a) and (b)(1).....	4,
28 U.S.C. § 1254(1).....	3
18 U.S.C.A. § 3651.....	10

OTHER AUTHORITIES

U.S.S.G. § 2L1.2.....	ii,iii iv,3 4,6 8,11
U.S.S.G. §§ 2L1.2(b)(2)	iv,3 6,7
U.S.S.G. § 2L1.2(b)(2)(A)-(E).....	4
U.S.S.G. § 2L1.2(b)(3)(A).....	4
U.S.S.G. § 2L1.2(b)(3).....	4
U.S.S.G. § 2L1.2(b)(2)(D).....	6
U.S.S.G. § 4A1.2(b(n.2)).....	7
U.S.S.G. § 2L1.2 cmt. (n.2) (2016).....	7,8 9,12
U.S.S.G. § 2L1.2(D).....	9

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____Term, _____

**RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also
known as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera,**

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner **RAUL BARRERA-VELASQUEZ, also known as Raul V.
Barrera, also known as Raul Velasquez Barrera, also known as Raul
Velasquez-Barrera, (hereinafter referred to as Barrera or Petitioner) respectfully**

asks this Court to grant a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction and rejecting his challenges to the District Court's interpretation of U.S.S.G. § 2L1.2.

OPINIONS BELOW

On April 17, 2019, RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also known as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera (hereinafter “Barrera” or “defendant”) was named in a one count indictment charging the defendant with illegal re-entry into the United States which occurred on or about October 15, 2017, in violation of 8 U.S.C. § 1326(a) and (b)(1). (ROA. 19)². On the same day the Government filed a Notice of Enhanced Penalty. (ROA. 20).

On June 5, 2019, Barrera after re-arraignment and being informed of his rights, plead guilty without a plea agreement to the charge in the indictment. (ROA. 41). On August 22, 2019, a sentencing hearing was held before Judge Orlando L. Garcia and Barrera was sentenced to Twenty-Four (24) months

² The Electronic Record on Appeal (EROA) is referenced by “ROA,” followed by a period, followed by the page number (e.g., ROA.123).

imprisonment; Two (2) years non-reporting supervised release; No Fine; \$100 Special Assessment. (ROA. 46-51).

The Fifth Circuit's opinion, *United States v. RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also known as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera*, No. 19-50809 (5th Cir. May 29, 2020) is attached as Appendix A. The District Court's judgments below is attached as Appendix B. The Fifth and Fourteenth Amendment's are attached below as below is attached as Appendix C and D respectively.

JURISDICTION

The Fifth Circuit entered judgment on May 20, 2020. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Barrera challenges his sentence as being improperly enhanced on his illegal re-entry by the misinterpretation of U.S.S.G. § 2L1.2 which implicates the equal protection guarantees in the Fifth Amendment.

This case serves as the perfect vehicle to resolve a circuit split on the meaning of “sentence imposed” as applied to rendering enhancements after illegal re-entry after convictions of 13 months or more.

STATEMENT OF THE CASE

On April 17, 2019, RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also known as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera (hereinafter “Barrera” or “defendant”) was named in a one count indictment charging the defendant with illegal re-entry into the United States which occurred on or about October 15, 2017, in violation of 8 U.S.C. § 1326(a) and (b)(1). (ROA. 19). On the same day the Government filed a Notice of Enhanced Penalty. (ROA. 20).

On June 5, 2019, Barrera after re-arraignment and being informed of his rights, plead guilty without a plea agreement to the charge in the indictment. (ROA. 41). The probation officer prepared a pre-sentence report (PSR) using U.S.S.G. § 2L1.2. § 2L1.2 directs courts to apply graduated enhancements of two to ten offense levels based on the sentence imposed for convictions sustained "before the defendant was ordered deported or ordered removed from the United States for the first time." U.S.S.G. § 2L1.2(b)(2)(A)-(E). The guideline also directed courts to impose graduated enhancements of two to ten offense levels for criminal conduct engaged in after the defendant was removed. U.S.S.G. § 2L1.2(b)(3).

The PSR assigned Barrera a base offense level of eight and increased his offense by ten levels under U.S.S.G. § 2L1.2(b)(3)(A). (ROA. 65). The ten-level enhancement was based on Barrera's October 8, 2007, sentence to 5 years imprisonment for a driving while intoxicated 3rd or more in the 265th Judicial District Court of Dallas County, Dallas, Texas. (ROA. 65). After 337 calendar days, on September 8, 2008 he was released on parole and thereafter was removed (ROA. 70). The parole term expired on September 20, 2012, which was 4 years and 12 days after Barrera was removed from the United States.. (ROA. 70). The time Barrera served in prison after the driving while intoxicated 3rd at issue plus the parole term imposed was 4 years and 349 calendar days.(ROA. 70). Barrera had been previously removed October 1, 2002. (ROA. 64).

The PSR reduced Barrera's offense level by three levels for acceptance of responsibility. (ROA. 65-66). Barrera's total offense level of 15 combined with his criminal history category of III resulted in an advisory guidelines range of 24 to 30 months of imprisonment. Barrera did not file a written objection to the total offense level calculation. He did, through his trial counsel, orally object to the sentencing calculation at the sentencing hearing. (ROA. 58-59). Barrera was sentenced to 24 months. (ROA. 46).

REASONS THE COURT SHOULD GRANT REVIEW

I. THE FIFTH CIRCUITS REJECTION OF BARRERA'S CLAIM THAT THE DISTRICT COURT MISINTERPRETED THE TERM "SENTENCE IMPOSED" UNDER § 2L1.2(B)(2)³ WAS A MISCARRIAGE OF JUSTICE

The term "sentence imposed" § 2L1.2(b)(2) should have been interpreted to have not included prison time after Barrera's parole and as a result, Barrera should have been subject only to the four-level enhancement under § 2L1.2(b)(2) (D).

This reading of § 2L1.2(b)(2) would be consistent with *United States v. Garza-Castaneda*, No. 16-11743, ____ F.3 ____ (5th Cir., 2018) that the only prison time that should be considered for enhancement on illegal re-entry is the

3 Section 2L1.2 states in relevant part:

If, before the defendant was ordered de-ported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

U.S.S.G. § 2L1.2(b)(2).

prison time actually served pre-deportation. In *United States v. Garza-Castaneda*, No. 16-11743, ___ F.3d ___, Garza asserted that the term "sentence imposed" in § 2L1.2(b)(2)⁴ did not include prison time imposed upon revocation after a prior removal and that his post-removal revocation prison time should have been disregarded. Garza argued that, as a result, he should have been subject only to the four-level enhancement in § 2L1.2(b)(2)(D). Garza cited *United States v. Bustillos-Pena*, 612 F.3d 863, 865-69 (5th Cir. 2010) as further support.

During the pendency of Garza's case, the Fifth Circuit issued a decision in *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017), which interpreted the new § 2L1.2 text and commentary. In *United States v. Franco-Galvan*, 864 F.3d 338 the Fifth Circuit concluded that the 2016 revisions to § 2L1.2 did not affect the reasoning of *United States v. Bustillos-Pena*, 612 F.3d 863, saying: "it remains the case that the contribution of a conviction sustained prior to the deportation order to the seriousness of the illegal reentry offense is to be assessed based on the original, pre-deportation sentence, not a sentence issued upon revocation post-deportation." *United States v. Franco-Galvan*, 864 F.3d at 343.

⁴ "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History). *The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release. U.S.S.G. § 2L1.2 cmt. (n.2) (2016).* (Emphasis added).

Barrera was released on parole and removed after his sentence serving 337 calendar days of a 5 years sentence. (ROA. 65).

The contribution of the time served on a conviction sustained prior to the deportation order should be interpreted the same whether probation or parole is given. *U.S.S.G. § 2L1.2 cmt. (n.2)*. In the context of attempts to enhance sentences with post-revocation imprisonment this Court has interpreted this and previous versions of section 2L1.2 to mean the district courts should look to the original sentence of probation imposed prior to the defendant's deportation order and not any prison sentence imposed upon revocation that followed the order. *United States v. Bustillos-Pena*, 612 F.3d at 868–69. *United States v. Franco-Galvan*, 864 F.3d 338. Barrera asserts that this court should similarly look to original sentence *as paroled* prior to the defendant's deportation order in applying § 2L1.2.

A. In *United States v. Bustillos-Pena*, 612 F.3d at 867 this court began its analysis with the assumption that a defendant who reenters the United States illegally after having committed a serious crime is punished more severely than a defendant who reenters the country illegally without having committed a serious crime. “We also accepted that the seriousness of a defendant's previous crime is measured by looking at the type of conviction and the length of the sentence he

received.” *United States v. Franco-Galvan*, 864 F.3d at 867. Under the commentary to U.S.S.G. § 2L1.2 cmt. (n.2) "Sentence imposed" has the meaning given the term "sentence of imprisonment". Instantly, Barrera was imposed a ten level enhancement even though he only served 337 calendar days after the 5 years sentence was imposed. Under Section 2L1.2 (D) a conviction for any other felony offense (other than an illegal reentry offense) less than one year mandated an increase by 4 levels. Barrera 's correct total offense level was level 12 reduced by three levels for acceptance of responsibility to level 9 combined with his criminal history category of III resulting in an advisory guidelines range of 8 to 14 months of imprisonment.

B. Under the commentary the length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release. This is consistent with “the federal rule ... that a suspended or probated sentence is regarded as having the same effect as any other as the statute plainly

permits”.⁵ *Davis v. Estelle*, 502 F.2d 523, 524 (5th Cir. 1974). Thus for example, a federal probated sentence may be used for purposes of sentencing enhancement in the same manner as any other sentence for which a judgment has been entered. *See generally, Davis v. Estelle*, 502 F.2d at 524. In terms of measuring the seriousness of Barrera's previous crime, the length of the sentence he received in

5. 18 U.S.C.A. § 3651. “Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.”

terms of his imprisonment remains 337 calendar days even after the 5 years sentence was imposed.

C. Barrera's parole term expired on September 20, 2012, 4 years and 12 days after Barrera was removed. The parole term that exceeded his September , 2008 removal was not a term of imprisonment since factually he was not in prison. Such a determination is consistent with *United States v. Franco-Galvan*, 864 F.3d 338,843 (5th Cir., 2017) where the revocation sentence was not counted.

II. THERE IS A CIRCUIT SPLIT REGARDING THE INTERPRETATION OF § 2L1.2 AND THE RESOLUTION IS IMPORTANT GIVEN THE FREQUENCY OF ILLEGAL RE-ENTRY CASES AFTER SENTENCES OF 13 MONTHS OR MORE HAVE BEEN IMPOSED.

The Second Circuit has held that what matters in satisfying the temporal constraint on the enhancement is the date of the conviction, not the date upon which the sentence was imposed. *United States v. Compres-Paulino*, 393 F.3d 116, 118 (2d Cir.2004). The Eleventh Circuit adopted the Fifth Circuit position of not counting a period of revocation for purposes of imposing an illegal re-entry enhancement. *United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir.2000). The Tenth Circuit found that a district court did not plainly err by adopting the Government's approach of applying the illegal re-entry enhancement

to include the period of prison imposed on revocation, but noted that it might have reached a different result if error had been preserved, because “[a] careful examination of the context and purposes of § 2L1.2 might convince us that Defendant's interpretation is the correct one.” *United States v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir.2003). In *United States v. Jimenez*, 258 F.3d 1120, 1125-26 (9th Cir.2001) the Ninth Circuit's interpretation of § 2L1.2 favors the Fifth Circuit approach. Resolution of this question is important. Should the Fifth Circuit view be correct then the time spent in prison prior to illegal re-entry should determine the severity of the enhancement and Barrera's sentence should be vacated and ordered revised.

This Court has found equal protection guarantees in the Fifth Amendment . See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). This court has recognized that “The Due Process Clause of the Fifth Amendment applies to the federal government a version of equal protection largely similar to that which governs the states under the Fourteenth Amendment.” *Rodriguez-Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001); see also *Richard v. Hinson*, 70 F.3d 415, 417(5th Cir. 2001)(“We employ the same test to evaluate alleged equal protection violations under the Fifth Amendment as we

do under the Fourteenth Amendment”) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215-17 (1995)(other citation omitted)). Thus Barrera asserts that under U.S.S.G. § 2L1.2 cmt. (n.2) the application of the provision selectively to apply a ten-level enhancement to him because he was *sentenced* to 5 years **even though he was released on parole after 337 calendar days**, in contrast to a four level enhancement he would have received if he had been given the *same probated sentence*, constitutes a constitutional violation. First, U.S.S.G. § 2L1.2 cmt. (n.2) applies to both probated and paroled sentences. Second, a probated sentence is a judgement of conviction under federal law. The Fifth Amendment's Due Process Clause requires a rational basis for this distinction between a paroled sentence vs. a probated sentence. Under Fifth Circuit's court's analysis in *United States v. Franco-Galvan*, 864 F.3d 338 no rational distinction exists.

CONCLUSION AND PRAYER FOR RELIEF

In summary, this Petition is important. Given the far reaching consequences of the Fifth Circuit's decision review should be granted.

Respectfully submitted,
/s/ Gerald C. Moton

Gerald C. Moton
CJA Counsel of Record
for Defendant-Petitioner
11765 West Avenue, PMB 248
San Antonio, Texas 78216
motongerald32@gmail.com
Telephone (210) 410-8153
Fax: (210) 568-4389

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 29, 2020

Lyle W. Cayce
Clerk

No. 19-50808

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAUL BARRERA-VELASQUEZ, also known as Raul V. Barrera, also known
as Raul Velasquez Barrera, also known as Raul Velasquez-Barrera,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:19-CR-284-1

Before STEWART, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:*

Raising three issues, Raul Barrera-Velasquez appeals the 24-month prison sentence he received following his guilty plea conviction for illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b)(1). He first argues that the district court erred in failing to give notice pursuant to 21 U.S.C. § 851 that it would apply the 10-level enhancement of U.S.S.G.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 19-50808

§ 2L1.2(b)(3)(A) based on one of his prior convictions. The notice requirements of § 851 do “not apply . . . when sentencing is conducted under the Sentencing Guidelines and the defendant receives an increased sentence, which is within a statutory range.” *United States v. Marshall*, 910 F.2d 1241, 1245 (5th Cir. 1990). Barrera-Velasquez’s 24-month sentence is less than his 10-year statutory maximum under § 1326(b)(1). Accordingly, he has shown no error, plain or otherwise. *See id.*; *United States v. Ponce-Flores*, 900 F.3d 215, 217 (5th Cir. 2018).

Barrera-Velasquez next argues that the district court erred in applying the 10-level enhancement of § 2L1.2(b)(3)(A) where he served less than a year of his five-year prison term and was released on parole. Because the sentencing court imposed a five-year maximum prison term and Barrera-Velasquez served part of that term, the district court did not plainly err in assessing the 10-level enhancement. *See United States v. Enrique-Ascencio*, 857 F.3d 668, 674 (5th Cir. 2017); § 2L1.2, comment (n.2); U.S.S.G. § 4A1.2(b) & comment. (n.2).

Finally, Barrera-Velasquez argues that § 2L1.2 is unconstitutional as applied in his case because there was no rational basis for the differential offense level enhancements afforded to the various types of prior sentences. He has shown no plain error given the reasons we have previously recognized for § 2L1.2’s different offense level enhancements based on initial sentence length. *See United States v. Franco-Galvan*, 864 F.3d 338, 342 (5th Cir. 2017); *see also Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 504 (5th Cir. 2006).

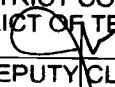
AFFIRMED.

FILED

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AUG 22 2019

CLERK, U.S. DISTRICT COURT,
 WESTERN DISTRICT OF TEXAS
 BY  DEPUTY CLERK

UNITED STATES OF AMERICA

v.

Case Number: 5:19-CR-00284-OLG(1)

USM Number: 29520-480

RAUL BARRERA-VELASQUEZ,
Alias(es): Raul V. Barrera, Raul Velasquez Barrera,
Raul Velasquez-Barrera,

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

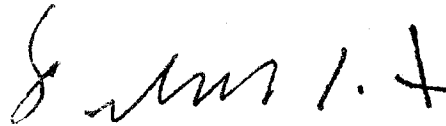
The defendant, RAUL BARRERA-VELASQUEZ, was represented by Gerald C. Moton.

The defendant pled guilty to Count(s) One (1) of the Indictment on June 5, 2019. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 USC § 1326(a)&(b)(1)	Illegal Re-entry into the United States	October 15, 2017	One (1)

As pronounced on August 22, 2019, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and Enhanced Penalties as set forth by the Notice of Penalty Enhancement filed on April 17, 2019.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 22nd day of August, 2019.


 ORLANDO L. GARCIA
 Chief United States District Judge

19-50808.46

DEFENDANT: RAUL BARRERA-VELASQUEZ
CASE NUMBER: 5:19-CR-00284-OLG(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of *twenty-four (24) months as to Count One (1)* with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RAUL BARRERA-VELASQUEZ
CASE NUMBER: 5:19-CR-00284-OLG(1)

**NON-REPORTING
SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of *two (2) years*.

While on supervised release, the defendant shall comply with the mandatory and standard conditions that have been adopted by this Court, and shall comply with the following additional conditions:

- X The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office

DEFENDANT: RAUL BARRERA-VELASQUEZ
CASE NUMBER: 5:19-CR-00284-OLG(1)

CONDITIONS OF SUPERVISION

Mandatory Conditions:

- 1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
- 2) The defendant shall not unlawfully possess a controlled substance.
- 3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- 4) The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- 5) If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- 6) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- 7) If the judgment imposes restitution, the defendant shall pay the ordered restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.
- 8) The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- 9) If the judgment imposes a fine, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- 10) The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within seventy-two (72) hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant shall answer truthfully the questions asked by the probation officer.
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least ten (10) days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within seventy-two (72) hours of becoming aware of a change or expected change.

DEFENDANT: RAUL BARRERA-VELASQUEZ
CASE NUMBER: 5:19-CR-00284-OLG(1)

- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view..
- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least ten (10) days before the change. If notifying the probation officer at least ten (10) days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within seventy-two (72) hours of becoming aware of a change or expected change.
- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within seventy-two (72) hours.
- 10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- 14) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pays such penalties in accordance with the Schedule of Payments sheet of the judgment.
- 15) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- 16) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- 17) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report to the nearest U.S. Probation Officer.

DEFENDANT: RAUL BARRERA-VELASQUEZ
CASE NUMBER: 5:19-CR-00284-OLG(1)

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 655 E. Cesar E. Chavez Blvd, Room G65, San Antonio, TX 78206. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

19-50808.51

APPENDIX C

Fifth Amendment

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 offense 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; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall

assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.