No. 21-____

IN THE
Supreme Court of the United States

JUAN ANGEL VELASQUEZ-CANALES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court erred in applying a six-level enhancement under Section 2L1.2(b)(2)(C) of the Sentencing Guidelines where Mr. Velasquez-Canales' sentence for his prior felony conviction did not exceed one year and one month.

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Petitioner Jose Angel Velasquez-Canales respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's published opinion is available at 987 F.3d 367 (4th Cir. 2021); *see also infra*, Pet. App. 1a.

LIST OF PRIOR PROCEEDINGS

(1) *United States v. Juan Angel Velasquez-Canales*, District Court No. 5:18-CR-442-D, Eastern District of North Carolina (final judgment entered Oct. 7, 2019).

(2) *United States v. Velasquez-Canales*, United States Court of Appeals for the Fourth Circuit, No. 19-4753 (published decision issued February 9, 2021).

JURISDICTION

The Fourth Circuit issued its opinion on February 9, 2021. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISION INVOLVED

Section 2L1.2(b)(3)(C) of the Sentencing Guidelines provides for a six-level enhancement to the base offense level for an illegal reentry offense and applies "[i]f, after the defendant was ordered deported . . . for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month."

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Juan Angel Velasquez-Canales was born and raised in Honduras, where he graduated high school. Lack of financial resources prevented him from attending college, however. In September of 2000, when Velasquez-Canales was seventeen, he was attacked by members of the 18th Street gang, who burned him with cigarettes, cut his wrists, sexually assaulted him, and left him naked in the woods. When gang members subsequently threatened to kill him, Velasquez-Canales fled to the United States, where he illegally crossed the border near Houston, Texas, in January of 2001. From there, Velasquez-Canales made his way to Virginia, where several of his older siblings lived. (Fourth Circuit Joint Appendix 84-85; hereinafter, "J.A.").

For the next seven years, Velasquez-Canales remained in Virginia, where he applied for asylum based on his fear of torture and persecution in Honduras. These claims were eventually denied. He worked various jobs in the construction and restaurant industries and began drinking heavily. His drinking problem led to several alcohol-related misdemeanor convictions for driving under the influence. On September 4, 2005, when he was twenty-one, Velasquez-Canales drove a stolen vehicle while intoxicated, disregarded a law enforcement officer's signals for him to stop, and struck several parked cars. He was convicted in Virginia state court of felony eluding, misdemeanor driving while intoxicated, and misdemeanor hit and run. (J.A. 81, 84).

Unfortunately, this incident, as well as stints with Alcoholics Anonymous, substance abuse treatment, and an Alcohol Safety Action Program in Alexandria, proved ineffectual to curb Velasquez-Canales' alcohol abuse. If anything, the drinking intensified. On August 9, 2006, when he was twenty-two, Velasquez-Canales drank eighteen beers within a four-hour period. Inebriated, he then drove a stolen vehicle and failed to heed an officer's signal to pull over. When police arrested him, he had a knife in his pocket. He pled guilty to felony charges of grand larceny, eluding, and driving while intoxicated. He also pled guilty to misdemeanor carrying a concealed weapon. He served a little over one year in prison and then transferred into ICE custody. He was deported on October 22, 2008. (J.A. 82-84).

On November 9, 2016, Velasquez-Canales returned to the United States illegally near Laredo, Texas, but he was deported a few months later, on March 2, 2017. At

some point, he re-entered the United States, this time settling in Selma, North Carolina. On June 30, 2018, he was arrested on a charge of driving while impaired, to which he pled guilty on August 23, 2018. For this conviction, he received a sentence of 180 days' custody. He also pled guilty to eluding arrest in a motor vehicle with two aggravating factors and larceny of a motor vehicle. The North Carolina state court consolidated these convictions and sentenced him to a term of 6 to 17 months, with nine of these months to be served on post-release supervision. Velasquez-Canales served an active custodial sentence from August 23, 2018 until January 18, 2019, when he was released and his nine-month term of post-release supervision began. (J.A. 82-84).

While serving his state court sentence, a federal grand jury in the Eastern District of North Carolina indicted him on a single count of illegal re-entry by an aggravated felon. (J.A. 7). He pled guilty without a plea agreement on June 17, 2019. (J.A. 9).

Following the plea, the probation officer prepared a presentence investigation report in the case. (J.A. 77). In determining the criminal history score, the probation officer assigned three points to Velasquez-Canales' North Carolina consolidated conviction for eluding arrest and larceny of a motor vehicle. The resulting criminal history score was 6, for a criminal history category of III. The probation officer also relied on the North Carolina conviction to apply a specific offense characteristic under U.S.S.G. § 2L1.2(b)(3)(C), which provides for a six-level increase to the offense level "[i]f, after the defendant was ordered deported . . . for the first time,

the defendant engaged in criminal conduct that, at any time, resulted in a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month." (J.A. 86 ¶ 48). With an offense level of 17 and a criminal history category of III, the guideline imprisonment range for Velasquez-Canales was 30 to 37 months. (J.A. 87 ¶ 58). According to the probation officer, the maximum statutory term of imprisonment was twenty years. (J.A. 87).

Velasquez-Canales objected to the presentence report, arguing that the "sentence imposed" for his prior North Carolina conviction did not exceed one year and one month and thus could not trigger the six-level increase. Instead of six levels, he maintained that only a four-level increase under U.S.S.G. § 2L1.2(b)(3)(D) applied. Similarly, he contended that his North Carolina conviction should score two points instead of three. Velasquez-Canales asserted that the correct guideline imprisonment range was 24 to 30 months. (J.A. 89-91).

At sentencing, the district court overruled the objections and imposed a sentence of 36 months' imprisonment and three years of supervised release. (J.A. 65; 68-74). The court entered its judgment on October 7, 2019. (J.A. 5).

Velasquez-Canales timely appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 75).

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Velasquez-Canales argued that the district court erred in applying the six-level enhancement under U.S.S.G. § 2L1.2(b)(3)(C). The Fourth Circuit rejected this argument and affirmed the judgment of the district court. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Velasquez-Canales argued to the Fourth Circuit that the district court erred in applying the six-level enhancement under U.S.S.G. § 2L1.2(b)(3)(C). The Court of Appeals rejected Velasquez-Canales' argument and affirmed the district court. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration.

REASONS FOR GRANTING THE PETITION

Velasquez-Canales' sentence is unreasonable, because the district court erred in increasing the offense level by six levels under U.S.S.G. § 2L1.2(b)(3)(C). To apply the six-level increase, the defendant must have a prior conviction for which the "sentence imposed" exceeded one year and one month. But Velasquez-Canales' prior North Carolina conviction did not exceed one year and one month. The term "sentence imposed" has the same meaning as "sentence of imprisonment" under U.S.S.G. § 4A1.2. The term "sentence of imprisonment," in turn, expressly excludes any portion of the defendant's sentence that was suspended. In other words, the definition includes only the time spent incarcerated—not the time spent on release under a suspended sentence.

Here, Velasquez-Canales' sentence included a mandatory nine-month period of post-release supervision. This nine-month period operates as a suspended sentence under North Carolina law. Because a portion of Velasquez-Canales' sentence was suspended and never reactivated, this nine-month period must be excluded when determining whether the "sentence imposed" exceeded one year and one month. When the nine-month period is properly excluded, the record shows that the sentence imposed for Velasquez-Canales' prior conviction was six to eight months. Because the sentence imposed did not exceed one year and one month, the six-level increase under U.S.S.G. § 2L1.2(b)(3)(C) does not apply. The Fourth Circuit erred in affirming Velasquez-Canales' sentence.

A. Whether a "sentence imposed" exceeds one year and one month depends on the term of incarceration.

Section 2L1.2(b)(3)(C) of the Guidelines imposes a six-level increase to the offense level "[i]f, after the defendant was ordered deported . . . for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month." The term "sentence imposed" has the same meaning as "sentence of imprisonment" in Application Note 2 and Subsection (b) of U.S.S.G. § 4A1.2. *See* U.S.S.G. § 2L1.2 cmt. n.2.

"Sentence of imprisonment," in turn, "means a sentence of incarceration and refers to the maximum sentence imposed." U.S.S.G. § 4A1.2(b)(1). The definition further provides that "[i]f part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." *Id.* at

§ 4A1.2(b)(2). In other words, a sentence of imprisonment does not include any portion of the sentence that was suspended. Similarly, Application Note 2 of § 2L1.2 says that "[t]he 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. Thus, just as suspended sentences are excluded from the definition of "sentence of imprisonment," the Guidelines exclude terms of probation, parole, and supervised release from the definition of "sentence imposed," unless there is a revocation and reactivation of the custodial sentence.

The issue here is how these definitions apply to Velasquez-Canales' North Carolina conviction, for which he received a sentence of 6 to 17 months. This sentence included a mandatory nine-month period of post-release supervision. *United States v. Barlow*, 811 F.3d 133, 137 (4th Cir. 2015) (explaining mandatory nine-month period of post-release supervision imposed for all North Carolina felons except those serving sentences of life without parole). Thus, Velasquez-Canales received a term of incarceration of no more than eight months, followed by a nine-month term of post-release supervision.

This nine-month period of supervision acts as a suspended sentence: during this nine-month period, the defendant must be released from incarceration, but the term of incarceration may be reactivated if the defendant violates certain conditions of release. *Barlow*, 811 F.3d at 139. The Guidelines do not define the term "suspended sentence." But this Court has made clear that "[a] suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the

defendant is incarcerated not for the probation violation, but for the underlying offense." *Alabama v. Shelton*, 535 U.S. 654, 662 (2002). This is precisely how North Carolina's mandatory nine-month period of post-release supervision operates: "North Carolina courts have expressly held that when a supervisee violates a condition of post-release supervision and returns to prison, that period of imprisonment is part of the original sentence, not punishment for the supervision infraction." *Barlow*, 811 F.3d at 139.

Accordingly, the nine-month period of supervision included as part of Velasquez-Canales' 6-to-17 month sentence can only count as part of the "sentence of imprisonment" under the Guidelines if, following the active term of six to eight months of incarceration, the suspended portion of his sentence—the nine-month term of post-release supervision—was revoked, and Velasquez-Canales re-incarcerated. *See* U.S.S.G. § 4A1.2(b)(2) ("If part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended."); *accord* U.S.S.G. § 2L1.2 cmt. n.2 ("The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.").

That did not happen, however. As the presentence report shows, Velasquez-Canales completed his active term of incarceration, and his nine-month term of post-release supervision was not revoked. (J.A. 82). Because the nine-month suspended portion of his sentence was never activated, only the portion of his sentence that was not suspended—the six to eight months of incarceration—may be

included in the "sentence of imprisonment" for purposes of the Guidelines. U.S.S.G. § 4A1.2(b)(2). Thus, the "sentence imposed" for Velasquez-Canales' North Carolina conviction does not exceed one year and one month. The court therefore erred in increasing the offense level by six levels under U.S.S.G. § 2L1.2(b)(3)(C).

B. *United States v. Barlow* does not answer the question presented here.

In rejecting Velasquez-Canales' appeal, the Fourth Circuit said that his argument was "foreclosed by our decision in *Barlow*." 987 F.3d at 370. But far from defeating Velasquez-Canales' argument, *Barlow* supports his position. In *Barlow*, the Fourth Circuit addressed a question of statutory interpretation. Specifically, *Barlow* interpreted the language of 18 U.S.C. § 922(g)(1) and its phrase "punishable by imprisonment for a term exceeding one year." At issue in *Barlow* was whether the nine-month period of post-release supervision in North Carolina could be included when determining whether the defendant had violated § 922(g)(1) by possessing a firearm after sustaining a conviction for an offense "punishable by imprisonment for a term exceeding one year." 811 F.3d at 136. In construing the statutory phrase "punishable by imprisonment for a term exceeding one year," *Barlow* held that the nine-month term of post-release supervision is "part of the total term of imprisonment" imposed by a North Carolina court. *Id.* at 139. Because the period of post-release supervision is part of the original sentence and may be activated if the defendant commits certain violations, *Barlow* determined that the nine-month period counted towards an offense "*punishable* by imprisonment for a term exceeding one year." *Id.* at 140 (emphasis added).

Barlow does not answer or even address the question presented here. Instead of determining whether the nine-month period of post-release supervision renders an offense "punishable by imprisonment for a term exceeding one year" under § 922(g), the issue here is whether the nine-month period of post-release supervision equates to a portion of a suspended sentence that is excluded from the "sentence of imprisonment" under U.S.S.G. § 4A1.2(b)(2). Thus, the question here is not *Barlow*'s prospective inquiry of whether a North Carolina offense is "punishable" by imprisonment exceeding one year under § 922(g), but instead asks whether the offender was in fact punished by a sentence of incarceration exceeding one year and one month under the Guidelines. *See* U.S.S.G. § 4A1.2(b); § 2L1.2 cmt. n.2. And here, the record shows that Velasquez-Canales did not receive a sentence of incarceration exceeding one year and one month. Because the suspended portion of Velasquez-Canales' sentence was never activated, his sentence of incarceration was only six to eight months. *Barlow* does not suggest otherwise. The Fourth Circuit therefore erred in determining that *Barlow* foreclosed Velasquez-Canales' argument. For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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