No. 22-_____

IN THE

Supreme Court of the United States

JOSE MADRID-BECERRA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL L. BURKE
Counsel of Record
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700 voice
michael_burke@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Several states have or had statutes authorizing the early release of state prisoners with deportation orders to the United States Immigration and Naturalization Service ("INS") to facilitate prompt removal from the United States. Arizona had such a statute in effect from 1996 to 2016. *See* A.R.S. § 41–1604.14, repealed 2016 Ariz. Sess. Laws, ch. 89, § 1.

United States Sentencing Guideline ("U.S.S.G.") § 4A1.1(d) adds two points to a federal defendant's criminal history score if the defendant committed an offense "while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape." This petition concerns whether U.S.S.G. § 4A1.1(d) applies to federal criminal defendants who were previously released from prison pursuant to state statutes authorizing the early release of prisoners for purposes of being deported from the United States.

Specifically, does the two-point increase in a federal defendant's criminal history score authorized by U.S.S.G. § 4A1.1(d) apply to a defendant who was previously released from a state prison before serving the entirety of his or her sentence so that he or she could be removed from the United States by the INS, regardless of how many years have transpired since his or her release and regardless of whether his or her sentence would have long since expired?

PARTIES TO THE PROCEEDING

Jose Madrid-Becerra, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

- *United States v. Jose Madrid-Becerra*, No. 19-10458 (9th Cir.). Opinion filed on October 1, 2021; Petition for Rehearing and Rehearing En Banc denied May 20, 2022.
- *United States v. Jose Madrid-Becerra*, No. CR-19-01067-DJH-1 (D. Ariz.) Judgment and sentence entered December 18, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

United States Sentencing Guidelines

Court Rules

Other Authorities

Petitioner Jose Madrid-Becerra respectfully asks the Court to review the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

PROCEEDINGS BELOW

The decision of the court of appeals is reproduced in the appendix at page 1a and reported at 14 F.4th 1096 (9th Cir. 2021). The district court's judgment and sentence for Mr. Madrid-Becerra is reproduced in the appendix at page 27a and is not reported.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion in this case on October 1, 2021. That court denied a timely filed petition for rehearing on May 20, 2022. By order of August 9, 2022 (No. 22A113), Justice Kagan extended the time for filing the petition to and including September 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE INVOLVED IN THIS CASE

United States Sentencing Guideline ("USSG") § 4A1.1(d) (2018):

> The total points for subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> . . .
>
> (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Application Notes:

4. §4A1.1(d). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).

ARIZONA STATE STATUTORY PROVISION INVOLVED IN THIS CASE

Arizona Revised Statute § 41-1604.14, repealed 2016 Ariz. Sess. Laws, ch 89, § 1, Release of prisoners with detainers; eligibility; revocation of release:

A. Notwithstanding any law to the contrary, the director may release a prisoner to the custody and

control of the United States immigration and customs enforcement if all of the following requirements are satisfied:

1. The department receives an order of deportation for the prisoner from the United States immigration and naturalization service.

2. The prisoner has served at least one-half of the sentence imposed by the court.

3. The prisoner was convicted of a class 3, 4, 5 or 6 felony offense.

4. The prisoner was not convicted of an offense under title 13, chapter 11.1

5. The prisoner was not convicted of a sexual offense pursuant to § 13-1404, 13-1405, 13-1406 or 13-1410.

6. The prisoner was not sentenced pursuant to § 13-703, § 13-704, subsection A, B, C, D or E, § 13-706, subsection A or § 13-708, subsection D.

B. If a prisoner who is released pursuant to this section returns illegally to the United States, on notification from any federal or state law enforcement agency that the prisoner is in custody, the director shall revoke the prisoner's release. The prisoner shall not be eligible for parole, community supervision or any other release from confinement until the remainder of the sentence of imprisonment is served, except pursuant to § 31-233, subsection A or B.

Repealed by Laws 2016, Ch. 89, § 1.

STATEMENT OF THE CASE

This petition for writ of certiorari concerns United States Sentencing Guideline ("U.S.S.G.") § 4A1.1(d), which adds two points to a defendant's criminal history score if the defendant committed an offense "while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape." More specifically, this petition concerns whether U.S.S.G. § 4A1.1(d) applies to Mr. Madrid-Becerra, and thousands like him, who were previously released from prison pursuant to state statutes authorizing the early release of prisoners for purposes of being deported from the United States. The question presented is whether the two-point increase in a federal defendant's criminal history score authorized by U.S.S.G. § 4A1.1(d) applies to a defendant who was previously released from prison before serving the entirety of his or her sentence so that he or she could be removed from the United States by the INS, regardless of how many years have transpired since his or her release and regardless of whether his or her sentence would have long since expired.

District Court Proceedings

Mr. Madrid-Becerra pled guilty in 2019 to illegal reentry in violation of 8 U.S.C. § 1326. (The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231.) In 2014, approximately four years prior to his arrest for the illegal reentry charge at issue in this case, Mr. Madrid-Becerra was released from an Arizona state prison after serving half of a 2.5-year sentence for solicitation to commit the sale or

transportation of marijuana. His early release transpired pursuant to a now-repealed Arizona statute that allowed the Director of the Arizona Department of Corrections ("ADOC"), at his or her discretion, to release to the INS prisoners with deportation orders after they had served one half of their state sentences. *See* A.R.S. § 41–1604.14, repealed 2016 Ariz. Sess. Laws, ch. 89, § 1. The now-repealed statute provided that, if a defendant released under Arizona's "half-term release for deportation" program "return[ed] illegally to the United States," the ADOC would "revoke the prisoner's release" and remand him or her to state custody to serve the remainder of his or her sentence. A.R.S. § 41-1604.14(B) (repealed).

After Mr. Madrid-Becerra's 2019 guilty plea to the illegal reentry charge, which he entered without the benefit of a plea agreement, the United States Probation Office prepared a presentence investigation report ("PSR"). In calculating Mr. Madrid-Becerra's criminal history score, the probation office imposed a two-point increase pursuant to U.S.S.G. § 4A1.1(d) because, it maintained, he committed the reentry offense while under a criminal justice sentence for a state conviction for solicitation to commit transportation of marijuana for sale. (*See* App. 3a-4a)

The PSR correctly reported that Mr. Madrid-Becerra sustained an Arizona state conviction in 2013 for solicitation to commit the sale or transportation of marijuana. Although he received a sentence of 2.5 years for this offense, he was released from state custody in 2014 pursuant to Arizona's "half-term release for deportation" program. Mr. Madrid-Becerra was removed from the United States on May

15, 2014, after his early release from ADOC. (*See* App. 3a-4a)

Mr. Madrid-Becerra objected to the two-point increase in his criminal history score. Specifically, he argued that the early-release provision of A.R.S. § 41-1604.14 did not provide the type of "custodial or supervisory component" necessary to make U.S.S.G. § 4A1.1(d) applicable in his case. He maintained that his 2014 release from ADOC for purposes of his removal from the United States was dissimilar to the types of "criminal justice sentence[s]" described in Application Note 4 to § 4A1.1(d), which expressly includes "probation, parole, supervised release, imprisonment, work release, or escape status." (*See* App. 4a)

At sentencing, the district court concluded that the two-point increase applied. According to the court, Mr. Madrid-Becerra's early release carried "the condition that he not return to the United States and that he knows that if he comes back, then he's going to have to go back to custody." In the district court's view, this condition meant that "there's a component of a criminal justice sentence that hangs over his head." The court found this factor sufficient to impose the two-point increase in the criminal history calculation. The district court imposed a sentence of 27 months, to be followed by three years of supervised release. (*See* App. 4a-5a)

Court of Appeals Proceedings

On Mr. Madrid-Becerra's direct appeal from his conviction and sentence, the United States Court of Appeals for the Ninth Circuit (Senior Circuit Judge Bybee, Circuit Judge Bress, and District Court Judge Cardone, sitting by designation) held in a 2-1 opinion

that U.S.S.G. § 4A1.1(d) applies to defendants, like Mr. Madrid-Becerra, who were released under Arizona's now-repealed "half-term release for deportation" program. (App. 1a to 27a) Thus, under the panel majority's holding, federal defendants who were previously released under the Arizona program remain indefinitely "under [a] criminal justice sentence" for purposes of calculating their criminal history score, regardless of how many years have transpired since their release from state custody and regardless of whether their state court sentences would have long since expired.

In reaching this conclusion, the panel majority reasoned that Arizona's "half-term release for deportation" program contained a mandatory condition that defendants released pursuant to the program not return illegally to the United States. Relying solely on this aspect of the early-release program, the majority held that the program was thus "akin to probation." (App. 11a) On this basis alone, the panel majority concluded that Mr. Madrid-Becerra's 2014 release under the now-repealed Arizona statute meant that he was "under [a] criminal justice sentence" when he was arrested for illegal reentry in December 2017. (App. 11a)

Judge Cardone dissented from this ruling, observing that the panel majority's interpretation of U.S.S.G. § 4A1.1(d) was at odds with the language, structure, and intended purpose of that provision. (App. 17a; *see generally* App. 16a-26a) Judge Cardone would have held that Arizona's repealed "half-term release for deportation" program did not qualify as a "criminal justice sentence" under U.S.S.G. § 4A1.1(d), noting that "Arizona's scheme is distinguishable from every 'criminal justice sentence' contemplated by

§ 4A1.1(d)," particularly with regard to the fact that a defendant released under the Arizona program would remain indefinitely under a "criminal justice sentence," a result not contemplated by the sentencing guidelines. (App. 18a-19a)

This timely petition followed.

REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals for the Ninth Circuit in Mr. Madrid-Becerra's appeal decided an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c). During the twenty years that A.R.S. § 41-1604.14 was in effect, thousands of Arizona state prisoners were subjected to early release for purposes of removal from the United States. *See, e.g.*, Yvonne Wingett Sanchez and Alia Beard Rau, *Arizona Gov. Doug Ducey Signs Immigrant Inmate Bill*, The Arizona Republic, Mar. 31, 2016, available www.azcentral.com /story/news/politics/legislature/2016/03/31/arizona-gov-doug-ducey-signs-immigrant-inmate-bill/82491622 (last visited September 26, 2022) (noting that repeal of the Arizona early release program "could affect about 1,000 inmates a year").

Under the Ninth Circuit's majority opinion in this case, every Arizona state prisoner who was subjected to early release for purposes of deportation during the twenty years that the statute was in effect is considered, for purposes of USSG § 4A1.1(d), indefinitely "under [a] criminal justice sentence" for federal sentencing purposes, regardless of whether their sentences would have long since expired.

Nor is Arizona the only state with an early-release-for-deportation program similar to the one at

issue in this case. For example, New Hampshire, North Carolina, and Oklahoma each have current statutes providing for conditional "early release" of state prisoners for purposes of removal from the United States by the INS. *See* N.H. Rev. Stat. Ann. § 651:25(VII) (Release from State Prison); N.C. Gen. Stat. Ann § 148-64.1 (Early conditional release of inmates subject to a removal order; revocation of release); Okla. Stat. tit. 57, § 530.4 (Oklahoma Criminal Illegal Alien Rapid Repatriation Act of 2009). The early release statutes in those states, like the now-repealed Arizona statute, vaguely provide for indefinite early "release," as opposed to parole or probation, for purposes of deportation.

The panel majority's analysis in Mr. Madrid-Becerra's appeal was flawed. The appellate court affirmed the district court's application of U.S.S.G. § 4A1.1(d), holding that, "as a condition of his early release from prison, Arizona required that Madrid-Becerra not illegally reenter the United States." (App. 11a) Failure to comply with this mandatory condition, which the panel majority described as "part and parcel of the terms of his original sentence under Arizona law," meant that Mr. Madrid-Becerra would be returned to custody to serve the remainder of his state-court sentence. The majority held that this condition "reflects a 'custodial or supervisory component' akin to probation," and that it therefore meant that Mr. Madrid-Becerra "was 'under any criminal justice sentence' when he illegally reentered the United States within the meaning of U.S.S.G. § 4A1.1(d)." (App. 11a)

This analysis was incorrect in several respects. For example, the panel majority found that the condition that Mr. Madrid-Becerra not return illegally

to the United States as a condition of his early release from state prison was "part and parcel of the terms of his *original sentence* under Arizona law." (App. 11a (emphasis added)) This appellate finding is incorrect. Mr. Madrid-Becerra's early release resulted from an administrative decision made solely at the discretion of the Director of ADOC pursuant to A.R.S. § 41-1604.14. The possibility of early release was never mentioned at his original state-court sentencing, a fact which the panel majority later essentially concedes (App. 14a), and was thus not "part and parcel" of his original sentence.

Further, and more importantly, the panel majority opinion erroneously concludes that Arizona's "half-term release for deportation" program was "akin to probation." (App. 11a) Probation is "[a] *court-imposed* criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison, [usually] on condition of routinely checking in with a probation officer over a specified period of time." PROBATION, Black's Law Dictionary (11th ed. 2019) (emphasis added). Mr. Madrid-Becerra's early release was neither court-imposed nor did it provide him with an alternative to being sent to prison in the first place. If anything, Mr. Madrid-Becerra's early release was more "akin" to parole than probation. *See* PAROLE, Black's Law Dictionary (defining "parole" as "[t]he conditional release of a prisoner from imprisonment before the full sentence has been served").

As Judge Cardone notes in her dissent, however, Arizona's early-release program differed from parole or conditional release in a critical aspect: any period of time served by defendants on parole or conditional

release "'is deemed service of [their] term of confinement,'" and such defendants are "'entitled to credit on [their] prison sentence for [that] period.'" (App. 17a, Cardone, J., dissenting) (quoting 24 C.J.S. Criminal Procedure and Rights of Accused § 2394 (August 2021 Update))

As Judge Cardone observed, if Mr. Madrid-Becerra's early release were akin to parole or conditional release, he would have received credit for the period following his early release from ADOC and his sentence would have expired prior to his illegal reentry. "That did not happen here. Instead, his custodial sentence stopped running entirely and his service was suspended indefinitely. That is neither parole nor conditional release." (App. 18a)

Moreover, as Judge Cardone observed, the indefinite suspension of Mr. Madrid-Becerra's state-court sentence as a result of his early release by ADOC suggests that he was not "under" a criminal justice sentence, as that term is commonly understood. (*See* App. 19a-20a) Rather, Judge Cardone reasoned that "to be 'under sentence' for the purposes of § 4A1.1(d), a defendant 'need be serving that sentence' or 'under a requirement to serve [that] sentence." (App. 20a (quoting *United States v. Wright*, 891 F.2d 209, 211 (9th Cir. 1989), and *United States v. Damon*, 127 F.3d 139, 147 (1st Cir. 1997)) As a result of ADOC's decision to release Mr. Madrid-Becerra early for purposes of deportation, he "was neither serving nor required to serve his sentence at all." (App. 20a)

Judge Cardone further noted that applying U.S.S.G. § 4A1.1(d) to Arizona's "half-term release for deportation" program runs counter to the purpose the sentencing guideline is intended to serve. For

example, in *United States v. McCrudden*, 894 F.2d 338, 339 (9th Cir. 1990), the Ninth Circuit Court of Appeals observed that § 4A1.1(d) is concerned, at least in part, with the *recency* of the defendant's prior offense. As the Court concluded in *McCrudden*, "It is not unreasonable to enhance the punishment of an offender who again violates the law before fully serving his prior punishment." *Id.* Yet, the panel majority's application of § 4A1.1(d) to the Arizona early-release program runs counter to this purpose: "Indeed, by the majority's logic, even if Appellant had illegally reentered decades after his release, he would still be subject to the two-point enhancement." (App. 21a-22a) As Judge Cardone noted, "That seems to go well beyond § 4A1.1.(d)'s focus on the 'recency of the crime.'" (App. 22a)

Finally, Mr. Madrid-Becerra submits that Judge Cardone's dissent in this case is particularly significant because, as a sitting district court judge in the Western District of Texas, Judge Cardone has one of the busiest immigration crimes dockets in the country. *See, e.g.*, *Immigration Prosecutions for June 2022*, https://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun22/fil/ (last visited Sept. 26, 2022) (In June 2022, Judge Cardone was ranked sixth among all federal district court judges for the number of new immigration crime cases on her docket). Judge Cardone is thus necessarily well-versed in both the Sentencing Guidelines and immigration crimes, and her dissent in this case carries significant weight.

The Ninth Circuit's erroneous interpretation of USSG § 4A1.1(d) in Mr. Madrid-Becerra's appeal will affect the sentencing determinations of thousands of criminal defendants who were previously released by state departments of corrections pursuant to state

statutes permitting early release of state prisoners with immigration detainers. Because the Ninth Circuit's opinion addresses an important question of federal law that has not been, but should be, settled by this Court, Mr. Madrid-Becerra respectfully requests that the Court grant his petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
MICHAEL L. BURKE
Counsel of Record
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700 voice
michael_burke@fd.org
Counsel for Petitioner