

No. ____ - ____

In the
Supreme Court of the United States

SHAWN J. GIESWEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit erroneously speculated – in conflict with the principles enunciated by this Court in *Molina-Martinez v. United States*, 578 U. S. ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) and *Peugh v. United States*, 569 U.S. 530 (2013) and with the approach taken by the Third and Seventh Circuits – that the District Court would have imposed the same sentence on a criminal defendant even when faced with a drastic reduction in the applicable Guidelines range that formed the starting point, anchor and framework of its sentencing decision.

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Petitioner Shawn J. Giewein respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit for review of its decision not to order resentencing.

INTRODUCTION

By speculating that the District Court would have imposed the same sentence upon a criminal defendant that the District Court had imposed when it relied on an erroneous Guidelines calculation as the starting point and framework of its analysis, the Court of Appeals decided an important federal question in a way that conflicts with the principles enunciated by this Court in *Molina-Martinez v. United States*, 578 U. S. __, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) and *Peugh v. United States*, 569 U.S. 530 (2013). Here, the Court of Appeals thus declined to send a case back to the District Court for resentencing. By contrast, the United States Court of Appeals for the Seventh Circuit, in *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017), and the United States Court of Appeals for the Third Circuit, in *United States v. Calabretta*, 831 F.3d 128 (3rd Cir. 2016), applied the principles set forth in *Molina-Martinez*, declined to speculate whether the district courts in those cases would have imposed the same sentence on a criminal defendant following a substantial change in each defendant's respective Guidelines ranges, and sent the cases back for resentencing. In light of the apparent difference in these approaches, both the district courts and courts of appeals would benefit greatly from further elucidation of the extent to which a court of appeals should surmise what a sentencing court would or would not do when presented with a substantially lower Guidelines range as the anchor and framework for its decision.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit concerning Mr. Gieswein's sentencing is reported at *United States v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018) (Pet. App. A.)

The basis of the decision of the United States District Court for the Western District of Oklahoma, from which the appeal to the Tenth Circuit was taken, is contained in the Transcript of Resentencing that occurred on December 14, 2016. (Pet. App. B.) There is no written decision.

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence on April 16, 2018. The Tenth Circuit next entered an Order denying Mr. Gieswein's petition for rehearing on May 1, 2018. This petition is being filed within 90 days of that date and, accordingly, is timely. See Sup. Ct. R. 13.1.

STATUTORY OR OTHER PROVISIONS INVOLVED

A. 18 U.S.C. § 3553(a)

This case implicates 18 U.S.C. § 3553(a). It states the following:

- (a) Factors To Be Considered in Imposing a Sentence – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

B. 18 U.S.C. § 3553(b)(1)

This case also implicates 18 U.S.C. § 3553(b)(1). It states the following:

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

C. Fed. R. Crim. P. 32(d)(1)

This case also implicates Rule 32(d)(1) of the Federal Rules of Criminal Procedure.

Rule 32(d)(1) provides as follows:

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

- (A) identify all applicable guidelines and policy statements of the Sentencing Commission;
- (B) calculate the defendant's offense level and criminal history category;
- (C) state the resulting sentencing range and kinds of sentences available;
- (D) identify any factor relevant to:
 - (i) the appropriate kind of sentence, or
 - (ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

STATEMENT OF THE CASE

A. Original Sentencing

Mr. Gieswein was convicted of illegally possessing a firearm in violation of 18 U.S.C. § 922(g)(1) and witness tampering in violation of 18 U.S.C. § 1512(b)(1). *United States v. Gieswein*, 887 F.3d 1054, 1056 (10th Cir. 2018) (Pet. App. A at 3a).

Prior to his first sentencing, a Presentence Report (“PSR”) concluded that Mr. Gieswein had three prior convictions that qualified as violent felonies from Oklahoma State Court under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 925(e), including: (1) destruction of property by an explosive device; (2) lewd molestation; and (3) first-degree burglary. Based on a total offense level of 33 and a criminal history category of IV, his recommended Guidelines range was 188 to 235 months of imprisonment. 887 F.3d at 1056 (Pet. App. A at 3a.)

The government moved for an upward variance based on Mr. Gieswein’s criminal record. He was convicted in 1995 of destroying a car with a pipe bomb. While on a suspended sentence for that crime, Mr. Gieswein was convicted of lewd molestation. While under a suspended sentence for that crime, Mr. Gieswein was convicted of first-degree burglary for having entered into his ex-girlfriend’s home and stealing itsem of property. He had also violated a protective order against that girlfriend on two occasions. Also while under the suspended sentence for lewd molestation, Mr. Gieswein was

convicted of having embezzled \$3,000 from his employer. At the time of his original sentencing, Mr. Gieswein had pending charges for failing to register as a sex offender. Finally, he had surreptitiously filmed women in intimate situations and had recorded himself molesting his aunt, who was undergoing treatment for cancer, while she slept. 887 F.3d at 1056-57 (Pet. App. A at 3a-4a).

The District Court adopted, as the starting point of its sentencing analysis, the recommended Guidelines range. The District Court, however, concluded that an upward variance was appropriate because, according to the District Court, the Guidelines did “not give sufficient effect to the depth and breadth, the persistence and the depravity and harmfulness of the criminal conduct of the defendant.” 887 F.3d at 1057 (Pet. App. A at 4a). Concluding that Mr. Gieswein had engaged in “a broader range of criminal activity than I have ever seen out of a single defendant,” the District Court imposed a sentence of 240 months, the statutory maximum (five months above the upper end of the recommended Guidelines range).¹ 887 F.3d at 1057 (Pet. App. A at 4a).

B. Resentencing

After the Tenth Circuit had affirmed Mr. Gieswein’s convictions on direct appeal and denied a number of unsuccessful pleadings collaterally attacking his conviction and sentence, Mr. Gieswein sought permission to file a successive motion pursuant to 28

¹ Each count of conviction carried a ten-year statutory maximum, which could be imposed consecutively, for a total sentence of 240 months. 887 F.3d at 1058 n. 2 (citing 18 U.S.C. § 1512(b)(2007) and 18 U.S.C. § 924(a)(2)) (Pet. App. A at 5a n. 2). After Mr. Gieswein was convicted, the statutory maximum for an offense under § 1512(b)(1) was increased by amendment to 20 years. *Id.* (citing Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534, 2537 (2008)) (Pet. App. A at 5a n. 2).

U.S.C. § 2255 based on the decision of the United States Supreme Court in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551, 192 L.Ed. 2d 569 (2015). In *Johnson*, the Court had struck down the ACCA’s residual clause as unconstitutionally vague. 135 S. Ct. at 2563, 192 L. Ed. 2d at 584. After this Court held in *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257, 1265, 194 L.Ed. 2d 387, 403-04 (2016) that *Johnson* applies retroactively to cases on collateral review, the Tenth Circuit granted Mr. Gieswein authorization to file a second § 2255 motion. The government conceded that Mr. Gieswein’s prior conviction for lewd molestation no longer qualified as a violent felony and the District Court then vacated his sentence. 887 F.3d at 1057 (Pet. App. A at 5a).

At resentencing, an addendum to the original PSR noted Mr. Gieswein’s disciplinary record while in prison, which included eight incidents, and an additional, pending charge for assault and battery on a police or other law enforcement officer that had occurred shortly before his original sentence was imposed. 887 F.3d at 1057 (Pet. App. A at 5a).

The addendum to the PSR recommended a base offense level of 24. In addition, though Mr. Gieswein’s prior conviction for lewd molestation no later qualified as a violent felony under the ACCA, the PSR concluded that it was a “crime of violence” under the definition of “forcible sex offense” contained in U.S.S.G. § 4B1.2(a)(2) and application note 1. Mr. Gieswein objected, arguing that the offense did not qualify as a ”crime of violence.” 887 F.3d at 1057 (Pet. App. A at 5a).

The government again moved for an upward departure, contending that Mr. Gieswein should be sentenced to resentenced to 240 months, the statutory maximum. 887 F.3d at 1057 (Pet. App. A at 5a).

At resentencing, the District Court overruled Mr. Gieswein's objections and adopted the PSR's findings. The Court again started its sentencing analysis with the applicable Guidelines range, concluding that, with a base offense level of 24, a two-level enhancement for obstruction of justice, and a criminal history category of IV, Mr. Gieswein's amended guideline range was 92 to 115 months. 887 F.3d at 1057-58 (Pet. App. A at 5a).

The Court concluded, however, that the new Guidelines range “falls far short of reflecting the extent to which Mr. Gieswein is a menace to society” and departed upward substantially. (Pet. App. B at 31a.) The Court stated that Mr. Gieswein’s criminal history was “remarkable not only for the seriousness of the defendant’s conduct but for, if you will, the diversity of it.” (Pet. App. B at 31a.) After reviewing that history, the Court reiterated its comments from the original sentencing that the Guidelines failed to “give sufficient effect to the depth and the breadth and the persistence and the depravity and the harmfulness of this defendant’s criminal conduct.” (Pet. App.. B at 33a.) The Court further concluded that that statement “is even more true now with the additional assault case.” (Pet. App. B at 33a) (quoted in 887 F.3d at 1057-58 (Pet. App. A at 5a-6a)).

Citing what the District Court described as “incapacitation” of Mr. Gieswein as the predominant motivating factor under 18 U.S.C. § 3553(a), the District Court varied

upward to the statutory maximum of 240 months (125 months above the upper end of the applicable Guidelines range). (Pet. App. B at 34a.) The District Court stated that it would have gone higher if not for that maximum. Finally, the Court noted that its conclusion “would be the same even if all of the defendant’s objections to the presentence report had been successful.” Mr. Gieswein then filed a timely appeal with the Tenth Circuit. (Pet. App. B at 35a) (quoted in 887 F.3d at 1058 (Pet. App. A at 6a)).

C. The Tenth Circuit’s Opinion

The Tenth Circuit concluded that the District Court had procedurally erred in concluding that Mr. Gieswein’s lewd molestation conviction was a “forcible sexual offense” as defined by U.S.S.G. § 4B1.2(a)(2) app. n. 1. 887 F.3d at 1060. In so doing, the Court noted that the Guidelines impose an increased offense level for certain firearms offenses if the defendant had two prior felony convictions for a “crime of violence,” U.S.S.G. § 2K2.1(a)(2), which includes a felony “forcible sexual offense,” U.S.S.G. § 4B1.2(a)(2). Applying the categorical approach to determining whether the conviction for lewd molestation qualified as a forcible sexual offense, and not the circumstance-specific approach, the Court concluded that the Oklahoma statute at issue could not be categorically be considered a crime of violence under the forcible sex offense theory. 887 F.3d at 1058-60 (Pet. App. A at 7a-11a).

The starting point of the District Court’s sentencing analysis – the District Court’s Guidelines calculation – thus rested on the erroneous conclusion that Mr. Gieswein’s prior lewd molestation conviction was a forcible sexual offense. Absent the error by the

District Court, Mr. Gieswein's Guidelines range would have been 63 to 78 months instead of the 92 to 115 months adopted by the District Court (or at least 162 months below the 240 months imposed). Specifically, without counting the lewd molestation offense as a crime of violence, Mr. Gieswein's offense level would have been four levels lower. 887 F.3d at 1062 and n. 5 (Pet. App. A at 14a-15a n. 5).

The Court of Appeals then considered whether, having found a procedural error, resentencing was required. The Court stated that, “[i]f we find a procedural error, resentencing is required if the error was not harmless.” 887 F.3d at 1061 (citation omitted) (Pet. App. A at 11a). The Court explained that, “[p]rocedural error is harmless ‘if the record viewed as a whole clearly indicates the district court would have imposed the same sentence had it not relied on the procedural miscue(s).’” *Id.* (citation omitted). The Court of Appeals further noted that the government bears the burden of demonstrating harmlessness by a preponderance of the evidence. *Id.* (Pet. App. A at 11a-12a).

Quoting from this Court's decision in *Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016), the Tenth Circuit stated that, “[w]hen a defendant is sentenced under an incorrect Guidelines range ... the error itself can, and most often will, be sufficient to show a reasonable probability of a different result. 887 F.3d at 1061 (Pet. App. A at 12a). The Court of Appeals added that, “[b]ecause the Guidelines ‘form the essential starting point in any federal sentencing analysis,’ an error in calculating the correct range ‘runs the risk of affecting the ultimate sentence regardless

of whether the court ultimately imposes a sentence within or outside the range the guidelines suggest.” *Id.* (citation omitted). Quoting from this Court’s decision in *Peugh v. United States*, 569 U.S. 530, 541 (2013), the court added that “[a] properly calculated Guidelines range ensures ‘that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review,’ even in cases in which ‘the sentencing judge sees a reason to vary from the guidelines.’” 887 F.3d at 1061 (Pet. App. A at 12a).

Nonetheless, the Court of Appeals stated that “[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonably probability of prejudice does not exist” *Id.* (Pet. App. A at 12a) (quoting *Melina-Martinez*, 136 S. Ct. at 1346). Yet, the Tenth Circuit added that “[i]t will be a ‘rare case’ in which we can confidently state that a Guidelines calculation error ‘did not affect the district court’s selection of the sentence imposed.’” 887 F.3d at 1061 (Pet. App. A at 12a-13a) (citation omitted). The Court of Appeals also added, by way of example, that “a highly detailed explanation of the sentence imposed by the district court ‘could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines.’” *Id.* (Pet. App. A at 13a) (quoting *Melina-Martinez*, 136 S. Ct. at 1347).

The Court of Appeals concluded that the District Court’s resentencing of Mr. Gieswein was one of those exceptional instances in which a procedural error was harmless. In support of this conclusion, the Court cited the fact that, at Mr. Gieswein’s original sentencing, the District Court varied upward from his then-advisory Guidelines

range of 188 to 235 months' imprisonment; and that, as justification for the upward variance, had stated, as noted above, that the Guidelines did not give sufficient effect to Mr. Gieswein's criminal history. 887 F.3d at 1061 (Pet. App. A at 13a). The Court of Appeals also cited that fact that, though Mr. Gieswein's Guidelines range had changed to 92 to 115 months, the District Court imposed the same 240 months' imprisonment; and that, as justification for the upward variance at that time, the District Court made the statements about Mr. Gieswein's criminal history that we note above and cited, as the predominant factor at play, the need to "incapacitate" the defendant. 887 F.3d at 1062 (Pet. App. A at 13a).

The Court of Appeals stated that the fact that the District Court elected to impose the same sentence even though Mr. Gieswein's new Guidelines range was less than half of his original range suggests that the District Court would again impose the same sentence under an even lower Guidelines range. Yet, the Court of Appeals stated that this factor, standing alone, would not be enough to demonstrate harmlessness, explaining that a procedural error is not harmless if it requires the Court to speculate on whether the District Court would have reached the same result absent the error. 887 F.3d at 1062 (Pet. App. A at 15a) (citation omitted).

The Tenth Circuit also stated that it was giving little weight to the District Court's statement that its conclusion would have been the same even if all of Mr. Gieswein's objections to the PSR had been successful. The Court of Appeals made clear that it has

“rejected the notion that district courts can insulate sentencing decisions from review by making such statements.” *Id.* at 1062-63 (Pet. App. A at 15a) (citation omitted).

The Court of Appeals, however, identified two factors that “tipped the scales toward harmlessness” in addition to the District Court’s reimposition of the same sentence. First, the Court of Appeals noted, the District Court stated that it chose to impose a sentence of 240 months because the figure was the statutory maximum and would have imposed a higher sentence if possible. That statement, the Court of Appeals found, indicated that the statutory maximum, rather than the Guidelines range, was the driving force behind the selected sentence. Second, the Court of Appeals noted, the District Court provided a thorough explanation for its decision to impose the statutory maximum as based on Mr. Gieswein’s criminal history as being underrepresented by his Guidelines range. 887 F.3d at 1063-63 (Pet. App. A at 16a).

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The District Court had jurisdiction as the court of first instance pursuant to 18 U.S. Code § 3231.

REASONS FOR GRANTING THE PETITION

The Court of Appeals decided an important federal question in a way that conflicts with the principles enunciated by this Court in *Molina-Martinez v. United States*, 578 U. S. ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) and *Peugh v. United States*, 569 U.S. 530 (2013). Although there does not appear to be a conflict among the United States

Courts of Appeals, the question of law at issue is so important that this Court should not pass on resolving the issue presented.

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission establishes Sentencing Guidelines based on two factors – the seriousness of a defendant’s offense and his criminal history. *Hughes v. United States*, __ U.S. __, 138 S. Ct. 1765, 201 L. Ed. 2d 72, 80 (2018) (citing *Dillon v. United States*, 560 U. S. 817, 820 (2010)). In combination, these two factors yield a range of potential sentences from which a district court may choose in sentencing a particular defendant. *Hughes*, 138 S. Ct. at 1772, 201 L. Ed. 2d at 80.

Of course, after this Court’s decision in *United States v. Booker*, 543 U. S. 220 (2005), the Guidelines are advisory only. Nonetheless, a district court still “must consult those Guidelines and take them into account when sentencing.” 543 U.S. at 264; *see also* 18 U.S.C. § 3553(a)(4). A district court must also consider various other sentencing factors listed in § 3553(a), including “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). “The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are *anchored by the Guidelines....*” *Peugh*, 569 U.S. at 541 (emphasis added).

The Sentencing Guidelines thus “provide the framework for the tens of thousands of federal sentencing proceedings that occur each year.” *Molina-Martinez*, 578 U. S. at ___, 136 S. Ct. at 1342, 194 L. Ed. 2d at 450. The goal of the Guidelines is to achieve

“‘uniformity in sentencing … imposed by different federal courts for similar criminal conduct,’ as well as ‘proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.’” *Rita v. United States*, 551 U. S. 338, 349 (2007) (citation omitted). To achieve those ends, the Commission engaged in “a deliberative and dynamic process” to create Guidelines that account for a variety of offenses and circumstances. USSC, Guidelines Manual § 2 ch. 1, pt. A, intro. comment, p. 14 (Nov. 2015). As part of that process, the Commission considered the objectives of federal sentencing identified in the Sentencing Reform Act of 1984 – the same objectives that federal judges must consider when sentencing defendants. *Molina-Martinez*, 136 S. Ct. at 1342, 194 L. Ed. 2d at 451-52; *see also* 28 U. S. C. § 991(b) and 18 U. S. C. § 3553(a). The result is a set of elaborate, detailed Guidelines that aim to embody federal sentencing objectives “both in principle and in practice.” *Rita*, 551 U.S. at 350.

Uniformity and proportionality in sentencing are achieved, in part, by the Guidelines’ significant role in sentencing. *E.g., Peugh*, 569 U. S. at 541-42. The Guidelines enter the sentencing process long before the district court imposes the sentence. The United States Probation Office first prepares a presentence report that includes a calculation of the advisory Guidelines range that the Probation Office considers to be applicable. Fed. Rules Crim. Proc. 32(d)(1)(A)-(C); *see generally* 18 U. S. C. § 3552(a). The applicable Guidelines range is based on the seriousness of a defendant’s offense (indicated by his “offense level”) and his criminal history (indicated

by his “criminal history category”). *See* Fed. R. Crim. P. 32(d)(1)(B)-(C). The presentence report explains the basis for the Probation Office’s calculations and sets out the Office’s conclusions as to the sentencing options under the applicable statutes and Guidelines. *See* Fed. R. Crim. P. 32(d)(1). It also contains detailed information about the defendant’s criminal history and personal characteristics, such as education and employment history. *See* Fed. R. Crim. P. 32(d)(2).

At the outset of the sentencing proceedings, the district court must determine the applicable Guidelines range. *Peugh*, 569 U.S. at 536. To make that determination, the district court considers the presentence report as well as any objections of the parties to the findings and conclusions contained in the report. The district court then entertains the parties’ arguments as to an appropriate sentence, including whether the sentence should be within the Guidelines range or not. Although the district court has discretion to depart from the Guidelines, the court “must consult those Guidelines and take them into account when sentencing.” *Booker*, 543 U. S. at 264.

In *Molina-Martinez*, this Court stated that it “has made clear that the Guidelines are to be the sentencing court’s ‘starting point and ... initial benchmark.’” 136 S. Ct. at 1345-1346, 194 L. Ed. 2d at 454-455 (emphasis added) (quoting *Gall v. United States*, 552 U. S. 38, 49 (2007)). Federal courts understand that they “must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh*, 569 U. S., at 541 (quoting *Gall*, 552 U. S. at 50). The Guidelines are “the framework for sentencing” and “anchor . . . the district court’s discretion.” *Peugh*, 569

U.S. at 541. “Even if the sentencing judge sees a reason to vary from the Guidelines, ‘*if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.*’” *Peugh*, 569 U.S. at 542 (emphasis added) (citation omitted).

The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious. *Molina-Martinez*, 136 S. Ct. at 1345-46, 194 L. Ed. 2d at 454-455. A district court that “improperly calculat[es]” a defendant’s Guidelines range, for example, has committed a “significant procedural error.” *Gall*, 552 U. S. at 49. That same principle explains the Court’s ruling that a “retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation.” *Peugh*, 569 U. S. at 542.

In keeping with these principles, this Court’s precedents “have confirmed that the Guidelines remain the foundation of federal sentencing decisions.” *Hughes*, 138 S. Ct. at 1769, 201 L. Ed. 2d at 83. For example, in *Peugh v. United States*, 569 U. S. 530 (2013), the Court held that the Ex Post Facto Clause prohibits retroactive application of amended Guidelines that increase a defendant’s sentencing range. *Id.* at 544. The Court reasoned that, *Booker* notwithstanding, the Guidelines remain “*the lodestone of sentencing.*” 569 U. S., at 544 (emphasis added). And in *Molina-Martinez*, the Court held that in the ordinary case a defendant suffers prejudice from a Guidelines error because of “*the systemic function of the selected Guidelines range.*” 578 U. S. at ___, 136 S. Ct. 1346-47, 194 L. Ed. 2d at 455 (emphasis added).

As the Court noted in *Molina-Martinez*, the Sentencing Commission’s statistics demonstrate the real and pervasive effect the Guidelines have on sentencing. 136 S. Ct. at 1345-1346, 194 L. Ed. 2d at 454-455. In most cases, district courts continue to impose “either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government’s motion.” *Peugh*, 569 U.S. at 543; *see also* USSC, 2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics S-50 (19th ed.) (Table N) (2014 Sourcebook). In less than 20% of cases since 2007 have district courts “imposed above- or below-Guidelines sentences absent a Government motion.” *Peugh*, 569 U.S. at 543; *see also* USSC, 2011 Annual Report and 2011 Sourcebook of Federal Sentencing Statistics 63 (16th ed.) (Figure G); 2015 Annual Report and 2015 Sourcebook of Federal Sentencing Statistics (20th ed.) (Figure G). As the Court recognized in *Peugh*, “when a Guidelines range moves up or down, offenders’ sentences [tend to] move with it.” 569 U.S. at 544; USSC, Final Quarterly Data Report, FY 2014, pp. 32-37 (Figures C to H). These realities have led this Court to observe that there is “considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.” *Peugh*, 569 U.S. at 543.

In light of these facts, this Court has confirmed that “the Guidelines are not only the starting point for most federal sentencing proceedings but also the *lodestar*.” *Molina-Martinez*, 136 S. Ct. at 1345-1346, 194 L. Ed. 2d at 454-455 (emphasis added). The Guidelines inform and instruct the district court’s determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range

will affect the sentence. *Id.* The Guidelines “serve as the *starting point for the district court’s decision and anchor the court’s discretion* in selecting an appropriate sentence.” *Id.*, 136 S. Ct. at 1349, 194 L. Ed. 2d at 458 (emphasis added). “It follows, then, that in most cases the Guidelines range will affect the sentence.” *Id.*, 136 S. Ct. at 1349, 194 L. Ed. 2d at 458. “When that is so, a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range.” *Id.* Thus, “[i]n most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome.” *Id.*, 136 S. Ct. at 1346, 194 L. Ed. 2d 444.

In light of all of this, it is clear that the Tenth Circuit’s decision that Mr. Gieswein should not be resentenced in spite of the drastic reduction in his Guidelines range conflicts with the principles enunciated by this Court in *Molina-Martinez* and *Peugh*. Indeed, the starting point for the District Court’s imposition of Mr. Gieswein’s sentence was wrong, as the Tenth Circuit concluded. When, as here, the “starting point is moved forward because of error, it is reasonable to assume that the end point will also be further down the track than it would have been if not for the error.” *United States v. Taylor*, 848 F.3d 476, 497-498 (1st Cir. 2017). When, as here, “the starting point is wrong, the defendant has shown a ‘reasonable probability of a different outcome,’ even if the sentence imposed is within the correct Guidelines range that would be applied on

remand.” *Taylor*, 848 F.3d at 497-98 (quoting *Molina-Martinez*, 136 S. Ct. at 1345, 194 L. Ed. 2d at 451).

The decision of the United States Court of Appeals for the First Circuit in *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017) is instructive. In *Taylor*, the United States Court of Appeals for the First Circuit reasoned, based on the principles enunciated by this Court in *Molina-Martinez*, that, because the district court erroneously adopted a Guidelines range set out in the PSR that counted larceny as a crime of violence, that was enough to show a reasonable probability of a different outcome. The First Circuit reached this conclusion even though the trial judge said that she would have imposed the same sentence regardless of the defendant’s “career offender” status. The Court of Appeals found that the statement was not enough to show that the erroneously-calculated Guidelines range did not influence the sentence ultimately imposed. Rather, the Court concluded, the statement of reasons did not show that the Guidelines “were irrelevant or that the trial judge intended to untether [the defendant’s] sentence from the Guidelines range. *Id.* at 499. The Court concluded that “the fact that she varied downward for an unrelated reason does not eliminate the potential influence of the incorrectly calculated Guidelines range, even though the sentence she imposed is within the correct range.” *Id.* Quoting from *Molina-Martinez*, the Court stated that, “[e]ven if the sentencing judge sees a reason to vary from the Guidelines, “if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.”” 848 F.3d at 500 (quoting *Molina-Martinez*, 136 S. Ct. 1345, 194 L. Ed. 2d at 451).

at 1345, 194 L. Ed. 2d at 455 (quoting, in turn, *Peugh*, 569 U.S. at 542)). Therefore, the Court of Appeals concluded, it was not clear that the Guidelines range did not influence the sentence the trial judge ultimately imposed. 848 F.3d at 500.

Similarly, the decision of the United States Court of Appeals for the Third Circuit in *United States v. Calabretta*, 831 F.3d 128 (3rd Cir. 2016)² is also instructive. In *Calabretta*, the Court of Appeals concluded that resentencing was required when the original sentence was imposed under an incorrect, higher Guidelines range that was based on an erroneous application of the career offender enhancement. Relying on this Court’s decision in *Molina-Martinez*, the Court of Appeals reached this conclusion because the record did not show that the district court thought that the sentence it chose was appropriate regardless of the Guidelines range. Rather, the Court found, there were indications in the record that application of the career offender enhancement in fact did affect the defendant’s sentence. In particular, the District Court had placed significant emphasis on the defendant’s criminal history and lack of reform and had concluded that a substantial sentence was required to get through to the defendant. In light of these statements, the Third Circuit found, it could not “divine” whether the District Court would have placed such emphasis on the defendant’s criminal history if he had not been designated a career offender convicted of multiple, prior “crimes of violence.” *Id.* at 138-39. In addition, the Court of Appeals emphasized the “sheer magnitude of the disparity”

² The Third Circuit’s decision in *Calabretta* was abrogated on other grounds not at issue here, in *Beckles v. United States*, ___ U.S. ___, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).

between the defendant's correct Guidelines range and the erroneously-enhanced Guidelines range. In particular, his Guidelines range was 188 to 235 months when he was erroneously designated as a career offender, while his Guidelines range was as low as 87 to 108 months under a correct calculation – amounting to additional years in prison. By contrast, the Third Circuit noted, this Court had concluded in *Molina-Martinez* that an erroneous Guidelines calculation that affected the defendant's range by seven months constituted plain error. *Id.* at 140 (citing 136 S. Ct. at 1344). Accordingly, the Court of Appeals concluded, the size of the miscalculation weighed strongly in favor of the conclusion that the error affected the defendant's substantial rights. 31 F.3d at 140. Therefore, the Court held, the Guidelines miscalculation was sufficient to establish a reasonable probability that his sentence would have been different absent the error. *Id.* The Court stated that “[w]e cannot assume here that the sentencing court would have imposed the same sentence regardless of the career offender designation. To assume so – particularly when the record suggests that [the defendant's] criminal history placed a role in the ultimate sentence imposed – would ‘have place us in the zone of speculation and conjecture.’” *Id.* (citation omitted).

The same conclusion follows with equal force here. To assume that the District Court would have imposed the same sentence regardless of the erroneous addition of a “crime of violence,” as the Tenth Circuit did, was to place the Court of Appeals in the zone of speculation and conjecture. Indeed, the District Court here placed significant emphasis on Mr. Gieswein's criminal history, a history that erroneously included an

additional “crime of violence.” The fact that the District Court here had sentenced Mr. Gieswein to the statutory maximum on two occasions – when in each case the Guidelines range had been substantially higher – does not mean that the District Court would have imposed the same sentence when the Guidelines range was again lowered substantially. The District Court’s statement here that, even if it had adopted Mr Gieswein’s objections to the applicable Guidelines range, it would have imposed the same sentence does not change this result. Indeed, the statement is not enough to insulate the District Court’s decision and establish that, when actually presented with a Guidelines range that was half of the original range, it would have imposed the same sentence. In the end, the record does not establish that the significantly higher Guidelines range did not influence the District Court’s decision. To the contrary, the record shows that the Guidelines miscalculation was sufficient to establish a reasonable probability that his sentence would have been different absent the error. As a consequence, the Tenth Circuit’s conclusion that the District Court would have imposed the same sentence was speculation – speculation that is impermissible under this Court’s decisions in *Molina-Martinez* and *Peugh*.

Finally, the proper application of the principles enunciated by this Court in *Molina-Martinez* and *Pugh* is unquestionably of exceptional importance to the administration of justice in federal criminal cases. This is just the sort of issue that is arising daily in the district courts and courts of appeals following this Court’s decisions in *Johnson* and *Welch*. Both the district courts and courts of appeals would benefit

greatly from further elucidation of the extent to which a court of appeals should surmise what a sentencing court would or would not do when presented with a substantially lower Guidelines range as the anchor and framework for its decision.

CONCLUSION

For the foregoing reasons, Petitioner Shawn J. Gieswein respectfully requests that the Court grant certiorari to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted this 7th day of August 2018:

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