

18-6982

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2018  
DOCKET NO. \_\_\_\_\_

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JERRY WALDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

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ORIGINAL

Supreme Court, U.S.  
FILED

NOV 20 2018

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BY: JERRY WALDEN, Pro Se  
No. 43301-054  
33½ Pembroke Rd.  
Danbury, CT 06811

QUESTION PRESENTED

Whether the petitioner is entitled to resentencing, where due to Guideline application error, the district court incorrectly applied the more severe career offender provision of the Federal Sentencing Guidelines, even though the sentence imposed was within the correct range, in light of this Court's ruling in Molina-Martinez v. United States, 136 S.Ct. 1338 (2016)?

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### JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

### OPINION BELOW

The District Court's order denying the petitioner's motion under 28 U.S.C. Section 2255 and denying a certificate of appealability ("COA") is hereto attached. The Court of Appeals order denying a COA is hereto attached.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2253 et seq.; U.S.S.G. Section 4B1.2; and 28 U.S.C. Section 994(h).

### STATEMENT OF THE CASE

The Court of Appeals below authorized the petitioner to file a successive motion under 28 U.S.C. Section 2255 to raise the issue that his prior state convictions for robbery in the first degree and attempted robbery in the second degree were impermissibly used to enhance his sentence under the career offender provision of the Sentencing Guidelines, U.S.S.G. Section 4B1.2, in contravention of Johnson v. United States, 135 S.Ct. 2551 (2015).

On March 29, 2018, the district court denied the petitioner's Section 2255 motion, and sua sponte, denied a COA, on the ground that any Johnson error was harmless because it would have imposed the same sentence.

### REASONS FOR GRANTING THE WRIT

In denying the petitioner's Section 2255 motion, the district court ruled that "any Johnson-related error would have been harmless, as the Court would have imposed the same sentence regardless". In the instant case, the district court explicitly relied upon the petitioner's status as a career offender in determining its sentence. Moreover, at sentencing, the district court said nothing to suggest that it would have imposed a 480 month sentence if the petitioner had not been classified as a career offender. Given these circumstances, it is at least debatable among jurists of reason that the district court would have imposed a different sentence had it known that the petitioner did not qualify for sentencing as a career offender. See Molina-Martinez v. United States, 136 S.Ct. 1338 (2016) and Slack v. McDaniel, 529 U.S. 473 (2000).

As a matter of law, the guidelines served as the starting point for the district court's discretion in selecting an appropriate sentence. See Molina-Martinez, supra. The district court was duty-bound to consider the directive of 28 U.S.C. Section 994(h), that career offenders be sentenced at or near the top of the applicable guideline range, pursuant to 18 U.S.C. Section 3553(a).

The district court's ruling is "debatable among jurists of reason", and deserving of a COA, where due to the asserted

Johnson-error, the petitioner was sentenced under the harsher career offender provision of the Guidelines, which call for a sentence at or near the top of the guideline range. See Section 994(h). In Molina-Martinez, this Court made it clear that applying an incorrect Sentencing Guidelines range affects a defendant's substantial rights, even if the sentence imposed is within the correct range. Id. at 1346-1347. Despite the fact that the petitioner's 480 month sentence is within the correct range of 360 months to life, it is based on the wrong, and more severe career offender guideline provision. See Section 994(h).

Accordingly, Molina-Martinez clearly renders the district Court's ruling at least debatable among jurists of reason. See Slack, Id., and Buck v. Davis, \_\_\_ U.S. \_\_\_ (2017).

#### CONCLUSION

Certiorari should be granted on the authority of Molina-Martinez.

Respectfully submitted,

  
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JERRY WALDEN, Pro Se

Dated: November 25, 2018