NO. _____

In The Supreme Court of the United States

ERIC A. HICKS,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

Paul S. Rosenzweig
Counsel of Record
LAW OFFICE OF PAUL ROSENZWEIG, ESQ.
509 C Street, NE
Washington, DC 20002
(202) 547-0660
paulrosenzweigesq@gmail.com

Counsel for Petitioner

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THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

Questions Presented

Whether the court of appeals' decision conflicts with this Court's decision in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), in concluding that an unconstitutional sentencing guideline calculation did not constitute "prejudice" sufficient to overcome the procedural barrier to hearing a defaulted claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the district court denying Petitioner's motion for relief pursuant to 28 U.S.C. § 2255 is unreported. *See* Pet. App. 12a-14a.

The opinion of the court of appeals, affirming the denial of Petitioner's motion for relief, is reported at *United States v. Hicks*, 911 F.3d 623 (D.C. Cir. 2018). *See* Pet. App. 1a-10a

Jurisdiction

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 2255. The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. § 2253. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The court of appeals entered judgment on December 28, 2018. *See* Pet. App. 11a. On February 27, 2019, Justice Thomas granted Petitioner an extension of time within which to file a Petition for Certiorari to, and including, April 27, 2019.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides, in relevant part, that: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Reckless Endangerment Guideline of the United States Sentencing Guidelines, U.S.S.G. § 3C1.2, provides, in relevant part that: "If the defendant

recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by 2 levels."

Statement of the Case

1. On March 3, 1993 Petitioner, Eric Hicks, was charged in an Indictment [ECF 4][1] with an assortment of drug distribution and criminal conspiracy charges relating to his alleged membership in the "First Street Crew." Following a two-month trial, and three weeks of deliberation, the jury returned verdicts on some of the charges in the indictment, finding Petitioner and others guilty of conspiracy to distribute crack cocaine (in violation of 21 U.S.C. § 846). Petitioner was also convicted of a RICO conspiracy (in violation of 18 U.S.C. § 862(d)), and three individual counts of possession with intent to distribute cocaine (in violation of 21 U.S.C. § 841). *See* Judgment [ECF 301]. No jury findings were made as to the Petitioner's actions in allegedly fleeing from arrest. The jury acquitted Petitioner of a gun charge (brought under 18 U.S.C. § 924(c)) and was unable to reach a verdict on the remaining charges.

2. At sentencing in May 1994 Petitioner was sentenced under the then-applicable mandatory Sentencing Guidelines. The Pre-Sentence Report (*see* ¶40, CA App. 60)[2] attributed more than 21 kilograms of distributed cocaine to the conspirators. In addition, the Pre-Sentence Report (*see* ¶71, CA App. 66) contended that:

> Defendant Hicks recklessly created a substantial risk of death or serious bodily injury to another person while fleeing from the police. On October 29, 1992, as police officers attempted to arrest Hicks, he fled in his Volvo

[1] The abbreviation "ECF" denotes a docket entry on the District Court's electronic court docket system.
[2] References to "CA App." are to the Joint Appendix filed with Petitioner's opening brief in the court below.

> station wagon. At approximately 6:00 p.m. on a work evening, Hicks drove his Volvo at 80-90 miles per hour, speeding through several red lights, traveling into the intersection of 10th and E Streets, N.E., and crashing into four cars. Hicks got out of the car and ran to a stranger's house, but an elderly woman pushed him off her porch. (Hicks broke his arm and was hospitalized).

With that factual recitation in hand, the Probation Office recommended a Guideline calculation that included at two-level upward adjustment for reckless endangerment under U.S.S.G § 3C1.2[3] for "creat[ing] a substantial risk of death or serious bodily injury to another person in the course of fleeing." *See* Pre-Sentence Report ¶90, CA App. 69. Petitioner's adjusted offense level, with that upward adjustment, was a level 52, which translated to a total offense level of 43, the maximum then permissible under the Guidelines. Save for the district court's brief recitation of its factual finding that Petitioner created a risk while fleeing, *see* Transcript, *United States v. White, et. al.*, No. 93-0097, May 11, 1994 at 133, CA App. 40, no discussion of the endangerment enhancement occurred during the sentencing proceedings.[4]

After reviewing the Pre-Sentence Report and hearing allocution, the district court sentenced Mr. Hicks to life in prison on the drug conspiracy count, to run concurrently with a life sentence on the RICO conspiracy count and with 240- and 480-month sentences on individual drug distribution and aiding and abetting counts.

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[3] With one exception not relevant here, 18 U.S.C § 3553(a)(4)(A)(ii) instructs sentencing courts to consider the Guidelines ranges that "are in effect on the date the defendant is sentenced." Accordingly, except as noted otherwise, citations to the U.S. Sentencing Guidelines in this Petition are to the provisions as in effect at the time of Petitioner's sentencing in May 1994.

[4] The sentencing judge made all of his factual findings using a preponderance of the evidence standard of proof. *Id.* at 90, CA App. 36.

3. On direct appeal, Petitioner challenged various aspects of both his conviction and his sentence, but did not challenge the reckless endangerment enhancement. The court of appeals rejected his arguments, affirming the district court. *See United States v. White*, 116 F.3d 903 (D.C. Cir. 1997), *cert. denied,* 522 U.S. 960 (1997). Petitioner's initial petition for relief pursuant to 28 U.S.C. § 2255 was denied in November 2000. That denial was affirmed on appeal. *See United States v. Hicks,* 283 F.3d 380 (D.C. Cir. 2002).

4. In 2015, this Court decided *Johnson v. United States,* 135 S. Ct. 2551 (2015), holding that the "residual clause" of the Armed Career Criminal Act (the "ACCA") was unconstitutionally vague. The next year this Court acknowledged that the *Johnson* holding was a new substantive rule that was applicable retroactively to cases on collateral review. *See Welch v. United States,* 136 S. Ct. 1257 (2016).

5. Asserting a linguistic and substantive similarity between the language of the residual clause in the ACCA and the endangerment guideline under which his sentence was enhanced, Petitioner sought and was granted leave to file a second or successive motion for relief in September 2016. *See* Order¸ No. 16-3079 (D.C. Cir. Sept. 7, 2016) [ECF 639].[5]

In resolving Petitioner's motion for relief, the district court assumed *arguendo*, that the holdings of *Johnson* and *Welch* were applicable to the Sentencing

[5] Mr. Hicks was also granted leave to file a successive motion for relief relating to the constitutionality of his sentence in light of *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). That motion is not at issue in this petition for certiorari.

Guidelines.[6] It then concluded, however, that § 3C1.2 was not vague. According to the district court:

> As recently explained by another district court, although § 3C1.2 "bears some similarity to the ACCA residual clause in that both are based on an assessment of risk" it does not raise the same constitutional vagueness problem because its application is based on a defendant's "real-world conduct" rather than "a risk assessment based on imagined or hypothetical crimes." *See United States v. Tallent*, No. 6:12-cr-10223, 2016 WL 449123, at *1 (D. Kan. Aug. 25, 2016). As "[t]he Supreme Court expressly stated in *Johnson*, it did 'not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct . . .'" *Id.* (quoting *Johnson,* 135 S. Ct. at 2561).

Pet. App. 14a. Relying on this analysis, the district court entered a Memorandum Opinion and Order, Pet. App. 12a-14a, denying Petitioner's application for relief.

6. Petitioner filed a motion for reconsideration [ECF 644] and a timely notice of appeal, [ECF 646]. The court of appeals held the appeal in abeyance pending a determination by the district court as to whether to issue a certificate of appealability. *See* Order, No. 17-3005 (D.C. Cir. Jan. 27, 2017) [ECF 652]. After the district court denied the motion for reconsideration, [ECF 658], it issued a certificate of appealability allowing appeal of the order denying relief. [ECF 660], CA App 45-47.

7. The court of appeals affirmed the denial of Petitioner's request for relief. Pet. App. 1a-10a. It did so, however, on different grounds from that addressed by the

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[6] At the time of the district court's decision, that issue was pending before this Court. In *Beckles v. United States*, 137 S. Ct. 886 (2017), this Court concluded that the advisory Sentencing Guidelines were not subject to vagueness analysis and challenge. The *Beckles* Court did not address the question of whether or not vagueness challenges could be brought with respect to mandatory Sentencing Guidelines.

district court. The court of appeals concluded that, irrespective of any alleged constitutional error, Petitioner had suffered no demonstrable prejudice and, thus, that he was procedurally barred from seeking relief on the grounds asserted.

The court began with the factual premise that Petitioner's sentencing guideline offense level had totaled, in the end, up to a level 52. It then noted that at the time of Petitioner's sentencing the maximum offense level that could be used in calculating a sentence was level 43. *Id.* at 8a (citing U.S.S.G. ch.5, pt. A, cmt. n.2).

Since Petitioner had not raised his claimed *Johnson/Welch* error on direct appeal, the court below conducted its legal analysis with the premise that Petitioner was obliged to demonstrate "cause" and "prejudice" for his default. Pet. App. 6a-7a (citing *Bousley v. United States,* 523 U.S. 614 (1998)). Because his initial offense level was 52 (in excess of the level 43 maximum) the appellate court concluded that Petitioner could not show any prejudice as he could not "demonstrate that 'there is a reasonable probability that, but for the errors, the result of the proceedings would have been different.'" Pet. App. 7a (quoting *United States v. Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003)). As the court of appeals put it:

> The application of Sentencing Guidelines Section 3C1.2 added two points to Hicks' offense level, elevating his total offense level from 50 to 52. That was a change without a difference because the Sentencing Guidelines capped the maximum offense level at 43. See U.S. Sentencing Guidelines Manual ch. 5, pt. A, cmt. n.2 (U.S. Sentencing Comm'n 1993) ("An offense level of more than 43 is to be treated as an offense level of 43."). Once Hicks hit 43 for his offense level, his mandatory Sentencing Guidelines range was life imprisonment. Indeed, the Sentencing Guidelines' sentencing table did not (and still does not) list offense levels, or corresponding Guidelines ranges, in excess of 43. See id. ch. 5, pt. A. All this means that Hicks was already facing an offense level greater than 43 and a mandatory sentence of life imprisonment long

> before the Section 3C1.2 enhancement was even put on the table. The Section 3C1.2 enhancement had no effect on his sentence at all. His sentence of life imprisonment would have been exactly the same if Section 3C1.2 had never been mentioned.

Pet. App. 8a.

Petitioner contended, *inter alia*, that the court of appeals' analysis was inconsistent with this Court's decision in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). Petitioner argued that under *Molina-Martinez*, a district court's mistaken application of an incorrectly higher Sentencing Guidelines range will by itself establish "a reasonable probability of a different outcome" sufficient to establish prejudice for purposes of collateral review. *Id.* at 1346; *see also id.* at 1347 ("[I]n the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder.").

The appellate court rejected this argument, concluding that Petitioner's situation was not an ordinary or typical case, "precisely because the Sentencing Guidelines error he asserts did not yield a 'higher Guidelines range[.]' *Molina-Martinez*, 136 S. Ct. at 1346." Rather, the court of appeals concluded that the assigned error left Petitioner "right where he started before Section 3C1.2 was raised—an offense level of 43 that prescribed a sentence of life imprisonment." Pet. App. 10a.

This petition follows, raising the sole question of whether the court below misunderstood and misapplied this Court's *Molina-Martinez* precedent.

Reasons for Granting the Petition

The court of appeals misconstrued this Court's decision in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). It mistakenly concluded that an unconstitutional sentencing guideline calculation[7] does not constitute "prejudice" sufficient to overcome the procedural barrier to hearing a defaulted claim in a collateral proceeding. That conclusion is squarely in conflict with this Court's precedent.

1. The Sentencing Guidelines are a lodestar for criminal sentencing, not merely a suggestion. Though no longer mandatory, they remain a critical component of Federal sentencing policy. Their goal is to achieve "*uniformity* in sentencing …. imposed by different federal courts for similar 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) (internal quotations omitted) (emphasis supplied). These twin goals are achieved, in part, by the Guidelines significant role in sentencing. *E.g. Peugh v. United States*, 569 U.S. 530 (2013). As in effect at the time of Petitioner's sentencing, the guidelines were mandatory and thus, the district courts assessment of the applicable Guideline range was, to a very real degree determinative.

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[7] The court of appeals' decision rested solely on its assessment of the lack of prejudice to Petitioner from the unconstitutional application of the sentencing guidelines. The merits of Petitioner's claim that § 3C1.2 of the Guidelines is unconstitutionally vague in contravention of the Fifth Amendment were not addressed and the substantive merits of that claim are not at issue in this petition. We seek only review of the question of "prejudice" identified in the question presented and a remand to the court below for consideration of the merits of Petitioner's constitutional claim in the first instance.

To be sure, the Guidelines are complex. Sometimes factual errors are discovered in the application of the guidelines long after sentencing is complete. In other cases, the application of a particular guideline may be subject to legal doubt (as, for example, the instant matter). Thus, there may arise situations in which the court's calculation of a Guideline range is in error or comes to be viewed, retrospectively, as having trenched upon constitutional requirements of certitude and due process. The question presented in this petition is whether and when such errors should be noticed and redressed.

2. This Court recently gave guidance to answering the question in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). In that case Molina-Martinez had pleaded guilty to being unlawfully present in the United States after having been deported. At the time of his sentencing the Probation Office made an error in calculating his criminal history – an error that neither the Government nor Molina-Martinez noticed until after the sentence had been imposed. As a result of the error Molina-Martinez was sentenced using a Guideline range of 77 to 96 months, and given a sentence of 77 months at the bottom of that range.

On appeal, the error was finally noticed. As it turns out the correct range within which Molina-Martinez should have been sentenced was 70 to 87 months. His 77-month sentence fell within that range as well, but it would have been in the middle of the range rather than the bottom.

On appeal Molina-Martinez claim of sentencing error was subject to plain error review under Fed. R. Crim. P. 52(b) – requiring that he show that the error had

affected his substantial rights. The government, naturally, suggested that Molina-Martinez had suffered no prejudice at all, as his sentence was within the recommended guideline range, even after that range was corrected for error.

This Court disagreed. As it said, nothing in either the text or rationale of Rule 52 "supports a requirement that a defendant seeking . . . review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings." *Molina-Martinez*, 136 S. Ct. at 1345. This Court reached that conclusion even though the ultimate sentence fell both within the correct and the incorrect guidelines range. And, perhaps, most notably, this Court concluded that the error was significant even though it involved the application of non-mandatory Guidelines since the sentencing range forms a beginning point from which the court must explain any deviation. *Id.* at 1345 (citing *Peugh*, 569 U.S. at 2083).

And so, this Court's ultimate conclusion necessarily follows: "From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.* at 1346. To be sure, this Court acknowledged that in some particular cases there may be fact-based reasons to reject this presumption of prejudice. If, for example, the record shows that the district court chose a sentence as appropriate "irrespective of

the Guidelines range" or if the court's "detailed explanation" of its sentence makes clear why a particular sentence was chosen. *Id.* at 1346-47.

The Government, as this Court noted, is free to point to such instance, but "[w]here . . . the record is silent as to what the district court might have done had it consider the correct Guidelines range, the court's reliance on an incorrect range in most instance will suffice to show an effect on defendant's substantial rights. Indeed in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Id.* at 1347.

3. The court below erred, significantly, in failing to heed the teachings of *Molina-Martinez*. Its error is both in derogation of Petitioner's constitutional rights and indicative of significant misinterpretation of *Molina-Martinez* in the lower courts. Its error merits correction and the pervasive misunderstanding of the holding warrants clarification.

In applying *Molina-Martinez* to the instant matter, the court below strayed significantly from its proper interpretation. As noted, the appellate court held that Petitioner's unconstitutional 2-level increase in offense level was of no consequence because, in its view, the error could not have prejudiced Petitioner. As the court below put it: "That was a change without a difference because the Sentencing Guidelines capped the maximum offense level at 43. See U.S. Sentencing Guidelines Manual ch. 5, pt. A, cmt. n.2 (U.S. Sentencing Comm'n 1993) ("An offense level of more than 43

is to be treated as an offense level of 43."). Once Hicks hit 43 for his offense level, his mandatory Sentencing Guidelines range was life imprisonment." Pet. App. 8a.

But much the same could have been said of Molina-Martinez's sentence. It may well have been the case that the district court took the guideline offense level range into consideration, or it may not have. In the case of Molina-Martinez we will never know – and thus, this Court's conclusion that on a "silent record" without any detailed explanation, the prejudice prong of the plain error review is satisfied.

So, too, here with the cause and prejudice test of procedural default. Just as in *Molina-Martinez* Petitioner can receive the same sentence under the corrected sentencing Guideline calculation as he did under the original flawed calculation. But he may not. While Petitioner's sentencing occurred under the mandatory guidelines, the district courts were not disabled from departing below the guidelines range. To be sure, such departures were disfavored and rare, but they were permissible and we cannot know that the Reckless Engagement enhancement did not play a role in the district court's decision, for it did not tell us.

Likewise, the court sentencing Petitioner made no mention of any special circumstances, nor did it offer any opinion at all as to what the appropriate sentence might be in relationship to the Guidelines. Indeed, though there is no record evidence of what role, if any, the Reckless Endangerment enhancement played in influencing the district court's sentence, we note that it may have been significant. The sentencing transcript reflects the sentencing court's long-standing dislike of the mandatory minimums and the sentencing guidelines. *See, e.g.*, Transcript, *United*

States v. White, et. al., No. 93-0097, May 11, 1994 at 91, JA 37 ("I regard the guidelines as profoundly mistaken . . ."). Hence there is no record evidence to which the Government might point to negate the inference of prejudice from Petitioner's sentencing under an unconstitutional provision of law.

Thus, this case stands on all fours with *Molina-Martinez*. As in that case, there was a sentencing error here – indeed, the error here was graver, as it was of constitutional dimension. As in that case, the sentencing error here set the framework for the eventual determination of the district court. As in that case, the ultimate sentence here was within both the correct and the incorrect Guideline range. And, as in that case, the record is absolutely silent as to how, if at all the Guideline range may, or may not, have affected the ultimate choice made by the sentencing authority. If Molina-Martinez's erroneous sentence was plain error, Petitioner's unconstitutional sentence must, likewise, be views as prejudicial. *E.g. United States v. Garcia*, 202 F. Supp. 3d 1109, 1116 n.3 (N.D. Cal. 2016) ("simply because *Molina-Martinez* held that an incorrectly calculated Guidelines range shows prejudice under the lower plain error standard, does not mean that an incorrectly calculated Guidelines range cannot show prejudice under the higher procedural default standard.").

4. The crabbed interpretation afforded *Molina-Martinez* by the court below is no unique occurrence. To the contrary, this Court's decision has been effectively disregarded and minimized by a number of subsequent decisions each of which "distinguishes" this Court's analysis as a way of deriding its impact.

Simply by way of example we offer the following brief summary:

- In *United States v. Kruger*, 839 F.3d 522 (7th Cir. 2016), the court held that an erroneous Guideline calculation was harmless because the sentencing court was constrained by a mandatory minimum sentencing rule. *See also United States v. Bare*, 692 Fed. Appx. 105 (4th Cir. 2018) (same);
- In *United States v. Helton*, 676 Fed. Appx. 476 (6th Cir. 2017) the Court mistakenly said that the burden was on defendant to prove that "the district court would have reached a different sentence" had it not considered an erroneous Guidelines policy;
- Numerous courts have incorrectly limited *Molina-Martinez* to cases involving direct review. *See, e.g., See United States v. Porter,* 2016 WL 5818612, at *1 (W.D. La. Oct. 4, 2016); *Ramirez v. United States,* 2017 WL 44853, at *4 (S.D.N.Y. Jan. 3, 2017); *Lohman v. United States,* 2016 WL 5080157, at *2 (N.D. Tx. Sept. 16, 2016); *United States v. Hoyt,* 2016 WL 3884707, at *2 (W.D. Va. Jul. 13, 2016); and
- Adding to the confusion, at least two district courts opinions have applied *Molina-Martinez* on collateral review to pre-*Booker* cases. *See Lee v. United States*, 2018 U.S. Dist. LEXIS 200292 (S.D. Fla. 2018); *Lopez v. United States*, 2018 U.S. Dist. LEXIS 92640 (S.D. Fla. 2018).[8]

[8] In both cases the government argued that the defendant could not show prejudice because the court could have sentenced him to the same sentence notwithstanding the *Johnson* error. Relying on *Molina-Martinez*, the court rejected the argument, holding that an erroneous guidelines range prejudices the defendant and infringes on his substantial rights even if his actual sentence falls within the correct guidelines range.

As this brief recitation makes clear, misunderstanding of this Court's *Molina-Martinez* decision is pervasive and further supports Petitioner's contention that the erroneous decision below warrants review.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted and the case remanded to that court for consideration of the merits of Petitioner's substantive claim.

Respectfully submitted,

/s/ Paul Rosenzweig
Paul Rosenzweig
Counsel of Record
509 C St. NE
Washington, DC 20002
paulrosenzweigesq@gmail.com
(202) 547-0660
Counsel for Petitioner Hicks