

20-5743

ORIGINAL

No:

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**In the  
Supreme Court of the United States**

JOHNNY MELENDEZ,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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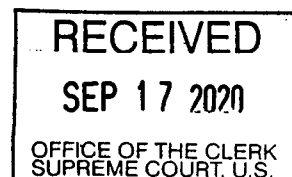
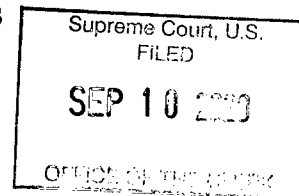
ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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Johnny Melendez  
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Federal Correctional Institution  
P.O. Box 2000  
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## **QUESTIONS PRESENTED FOR REVIEW**

Should a writ of certiorari should be granted to determine if counsel rendered ineffective assistance when it allowed the court to rely on a prior conviction for sentencing purposes, absent court documents to support that Melendez was counseled at the time, thus violating Melendez's rights to representation in violation of *Scott v. Illinois*, 440 U.S. 367 (1995).

Does possession of narcotics in the State of Connecticut, 21(a)-277(a) qualify under the Career Criminal Act for a sentence enhancement.

**PARTIES TO THE PROCEEDINGS  
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the First Circuit and the United States District, District of Puerto Rico.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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**PETITION FOR WRIT OF CERTIORARI**

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Johnny Melendez, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

## **OPINION BELOW**

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision entered on June 16, 2020, in *Melendez v. United States*, Docket No, 19-2237 and is reprinted in the separate Appendix A to this petition.

The denial of Petitioner's Title 28 U.S.C. § 2255 in the District of Puerto Rico, *Meléndez v. United States*, No. 16-1768 (DRD), 2019 U.S. Dist. LEXIS 172159 (D.P.R. Sep. 30, 2019) was denied on September 30, 2019, and is reprinted as Appendix B to this petition.

## **STATEMENT OF JURISDICTION**

The Judgment of the Court of Appeals was entered on June 16, 2020.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 1254(1).

## **CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED**

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.



*Id.* Fifth Amendment U.S. Constitution

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*Id.* Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

\* \* \* \* \*

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

*Id.* Title 28 U.S.C. § 2255

## STATEMENT OF THE CASE

On May 2, 2013, a Grand Jury returned a One-Count Indictment against “Meléndez” for an attempt to possess with intent to distribute one hundred (100) grams or more of a mixture or substance containing a detectable amount of heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(1) and 846. See Crim. No. 13-239 (DRD). Melendez ultimately agreed to enter a straight plea, *i.e.*, without prior agreement with the Government. See Crim. No. 13-239 (DRD), Docket Nos. 33 and 36. Accordingly, on March 11, 2014, Meléndez was sentenced to one-hundred and eighty-eight (188) months. On March 18, 2014, Melendez timely filed a Notice of Appeal. Yet, by July 21, 2015, the First Circuit affirmed the District Court’s Judgment, thus, issuing its judgment affirming the conviction and sentence. See Crim. No. 13-239 (DRD). Subsequently, on April 19, 2016, Melendez timely filed a Motion to Vacate, Set Aside, or Correct Sentence (Title 28 § 2255). Two months thereafter, he filed a Supplemental Brief addressing several allegations of ineffective assistance of counsel. The original brief alleged as follows:

- a. Trial counsel conceding during the Sentencing Hearing that the Petitioner was a career offender and failed to object to and/or appeal the enhancement on grounds that Petitioner’s prior conviction for “aggravated assault on police officer” was not “crime of violence.” Moreover, Meléndez argues that the Government failed to prove by a preponderance of the evidence the offense was a crime of violence, thus the Court should vacate the sentence imposed on March 11, 2015.

The Supplemental Brief alleged as follows:

- a. Allowing the Court to rely on a prior offense for possession of narcotics without submitting documents to support the Petitioner's right to adequate representation; and
- b. Failure to challenge that the possession of narcotics 21(a)-277(a) did not qualify under the career criminal provision.

Finally, Melendez requested relief under *Johnson v. United States*, 135 S.Ct. 2551 (2015) allegation as to his career offender clause and to the residual clause of the guideline that was invalidated by the Supreme Court.

The district court denied the requested relief and the First Circuit denied the request for a certificate of appealability. This timely petition for writ of certiorari followed.

### **REASONS FOR GRANTING THE WRIT**

**THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT**

Supreme Court Rule 10 provides in relevant part as follows:

#### **Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

*Id.* Supreme Court Rule 10.1(a), (c).

### QUESTIONS PRESENTED

**1. SHOULD A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE IF COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN IT ALLOWED THE COURT TO RELY ON A PRIOR CONVICTION ABSENT COURT DOCUMENTS TO SUPPORT THAT MELENDEZ WAS COUNSELED AT THE TIME, THUS VIOLATING MELENDEZ'S RIGHTS TO REPRESENTATION IN VIOLATION OF *SCOTT v. ILLINOIS*, 440 U.S. 367 (1995).**

During the sentencing hearing, the Probation Officer made a determination that Melendez' sentence should be enhanced as a career offender due a prior conviction for Possession of Narcotic's (21a-279(a)) from the State of Connecticut. (PSI ¶ 33) The PSI Report does not provide any facts of this arrest nor whether Melendez was represented at the time. Quite possibly the prior conviction might not be attributable to Melendez since it appears that prior the February 29, 2002, case being docketed, Melendez was already in custody under *United States v.*

*Melendez*, 01-00029, (D.C. Connecticut) and sentenced on January 31, 2002. (PSI ¶ 34) Quite possibly, the matter in the State of Connecticut was never addressed with counsel since Melendez was in federal custody. This Court in *Scott v. Illinois*, 440 U.S. 367 (1995) clarified that the Sixth and Fourteenth Amendments of the United States Constitution require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. In the aforementioned conviction, ¶ 33, the record is devoid of any representation whatsoever in any of Melendez's prior convictions. Counsel had in his possession the Presentence Investigation Report for several months before the sentencing hearing and failed to clarify or review the status of representation of the aforementioned conviction. The Courts have made it clear that a conviction obtained in violation of a right to counsel cannot be used to enhance Melendez's sentence. *See United States v. Tucker*, 404 U.S. 443 (1972); *Burgett v. Texas*, 389 U.S. 109 (1967). These are not cases that developed recently before Melendez's sentencing. These cases were decided years before Melendez's sentencing and should have been the staple of counsel's objection to the Presentence Investigation Report. Although, the Supreme Court in *Nichols v. United States*, 511 U.S. 738 (1994) held that a previous uncounseled conviction that did not expose the defendant to a jail sentence could be used to enhance a prior sentence, (overruling *Baldasar v. Illinois*, 446 U.S. 222 (1990)), in

the instant case, the conviction relied upon by the Probation Officer, ¶ 33 resulted in terms of incarceration which were used to enhance his current Federal sentence.

In *Alabama v. Shelton*, 535 U.S. 654 (2002) the Court held for the first time that the defendant is entitled to a Sixth Amendment to counsel even if he receives probation if he could subsequently be sent to prison. In the instant case, Melendez was sentenced to 5 years concurrent to an undisclosed term of incarceration. It can be assumed that the sentence was related to the federal charges in (PSI ¶ 34), however, it is unknown and cannot be determined based on the records before the district court. The court could not reach a determination that based on the missing information in the PSI that counsel acted with proper diligence and in Melendez' best interest when he failed to challenge the validity of the prior conviction in light of the Probation Officer's determination that Melendez was eligible for a career criminal enhancement. Although Melendez is aware that he cannot challenge the validity of the prior conviction, he may in this Title 28 U.S.C. § 2255 proceeding, challenge counsel's ineffectiveness for his failure to clarify to the Court that the prior convictions were, in fact, uncounseled. See *Alabama v. Shelton*, 535 U.S. 654 (2002). As such, this Court must agree that counsel rendered ineffective assistance and a writ of certiorari should be granted.

**2. DOES POSSESSION OF NARCOTICS IN THE STATE OF CONNECTICUT, 21(A)-277(A) QUALIFY UNDER THE CAREER CRIMINAL ACT FOR A SENTENCE ENHANCEMENT.**

The State of Connecticut provides two sections for a punishment under 21(a)-277, *i.e.* section (a), (b), (c) or (d):

Sec. 21a-277. (Formerly Sec. 19-480). Penalty for illegal manufacture, distribution, sale, prescription, dispensing. (a) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.

(b) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled substance, except a narcotic substance, or a hallucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisoned; and, for each subsequent offense, may be fined not more than one hundred thousand dollars or be imprisoned not more than fifteen years, or be both fined and imprisoned.

(c) No person shall knowingly possess drug paraphernalia in a drug factory situation as defined by subdivision (20) of section 21a-240 for the unlawful mixing, compounding or otherwise preparing any controlled substance for purposes of violation of this chapter.

(d) As an alternative to the sentences specified in subsections (a) and (b) of this section, the court may sentence the person to the custody of the Commissioner of Correction for an indeterminate term not to exceed three years or the maximum term specified for the offense, whichever is the lesser, and, at any time within such indeterminate term and without regard to any other provision of law regarding minimum term of confinement, the Commissioner of Correction may release the convicted person so sentenced subject to such conditions as he may impose including, but not limited to, supervision by suitable authority. At any time during such indeterminate term, the Commissioner of Correction may revoke any such conditional release in his discretion for violation of the conditions imposed and return the convicted person to a correctional institution.

*Id.* Sec. 21a-277

All of the subsections of 21a-277 provide different sentencing schemes.

Section 21a-277(a) provides a sentence of “imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both.” Section 21a-277(b) provides that no defendant shall be “fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisonment.” Section 21a-277(d) provides that the court “may sentence the person to the custody of the Commissioner of Correction for an indeterminate term not to exceed three years or the maximum term specified for the offense, whichever is the lesser.” Based on the PSI Report’s documentation, it is unknown what subsection Melendez was convicted of violating.

Counsel should have advised the Court that that predicate offense fails to meet the minimum requirements for a career criminal enhancement. The Supreme Court’s triage of cases, *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v.*



*United States*, 544 U.S. 13 (2005) and *Descamps v. United States*, 133 S. Ct. 2276 (2013) allow the Court to review a limited number of documents to determine “which statutory phrase [as] [elements] [were] the basis for the conviction.” *Descamps* at 2285, quoting *Johnson v. United States*, 559 U.S. 132 (2010).

Without a review of the limited documents permitted under *Taylor*, *Sheppard* and *Descamps*, none of which are available for the Court to review at the time of sentencing, can the Court determine what element of the charged offense Melendez violated and which category of the statute Melendez violated to determine compliance with the career criminal enhancement. The separate purpose of the review is to determine which alternative elements of the State’s offense are applicable based on Melendez’s plea. With a guilty plea or pleas, the “restricted set of materials” allowed to be reviewed include “the terms of the plea agreement or transcript of a colloquy between [State court] judge and defendant . . .” *Id*, citing *Sheppard* at 25-26. The purpose of the review is to determine which alternative element(s) of the State offense to which the defendant pled guilty. For example, in *Sheppard*, the question was whether *Sheppard* pled guilty by entering a building – Massachusetts burglary alternative element – or a boat or car – Massachusetts burglary alternative elements two and three. If the former then *Sheppard*’s State Court conviction was an adequate predicate. If neither the latter, it was not. In these circumstances, the Court cannot determine by looking only at the elements of

the State crime, or in this case the Probation Officer's notes as to what occurred, whether Melendez was convicted of a CCE enumerated offense predicate. Under the *Taylor, Sheppard, and Descamps* cycle, the first inquiry, therefore, is what are the elements of the charged offense for the Possession of Narcotics? Identifying the elements of the crime should be a simple exercise. However, in the instant case, no elements of the offense nor details of the offense are unavailable.

Therefore, it is unknown whether Melendez committed the elements of a felony offense or of a misdemeanor offense or something else which will not classify under the career criminal enhancement. Discovering the elements of a State crime should not be challenging. Nor should this exercise involve searching the entire State criminal code for the elements of a particular crime. Federal Courts are to look at the elements of the State crime, not go exploring the entire State criminal code looking for elements of crimes that do not exist. Crimes "are made up of factual elements . . . Calling a fact an element has certain legal consequences . . . A jury . . . cannot convict unless it is unanimously found that the Government has proved each element . . ." *Id. Richardson v. United States*, 526 U.S. 813, 817 (1999). In this case, ¶ 34, of the PSI alleged that Melendez was sentenced to 5 years' incarceration for violating 21a-279(a), with nothing else. It is unknown what quantity or type of narcotic Melendez possessed if any. There are no facts, apart from the Probation Officer's statements that Melendez actually violated 21a-

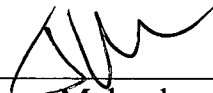
279(a), (b) or (d) for that matter. What Melendez was initially charged with as allegedly doing does not matter. What matters is which alternate version of the offense charged Melendez pled guilty to. This question is left unanswered unless separate documents are available. None of these documents were reviewed by the District Court before sentencing and none were reviewed by counsel prior to contest the validity of the priors. As such, this Court must agree that an evidentiary hearing is required to address the violations of ineffectiveness as raised herein on counsel's failure to object to the Career Criminal enhancement.

As such, a writ of certiorari should be granted to since Connecticut Statute 21(A)-277(A) does meet the career criminal enhancement guideline calculations.

## CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the First Circuit.

Done this 10, day of September 2020.



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