No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

XAVIER ORANGE,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Due to defense counsel's deficiency, petitioner was sentenced based on an incorrect Sentencing Guidelines range (57 months, using a range of 46-57 months), after which the sentencing court recited that if it was wrong in rejecting the defense calculation (37-46 months – also incorrect), it would vary upwards to impose the same sentence. The record is silent as to what sentence would have been imposed but for counsel's deficiency, that is, if the correct range (21-27 months) had been considered.

This case presents the question whether under *Molina-Martinez v. United States*, 578 U.S. 189 (2016), a defendant claiming ineffective assistance of counsel at sentencing can establish prejudice from such a Sentencing Guidelines error despite the sentence relying "in part" on factors outside the Guidelines.

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption and there are no related cases.

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

OPINION BELOW

The decision of the D.C. Circuit (Pet. App. 1) is reported at 21 F.4th 162 (D.C. Cir. 2021). The orders denying panel rehearing and rehearing en banc are at Pet. App. 10-11.

JURISDICTION

The D.C. Circuit issued its judgment (Pet. App. 1) on December 28, 2021. Orders denying panel rehearing and rehearing en banc (Pet. App. 10-11) were issued on March 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Under 18 U.S.C § 3553(a), a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing] set forth in [§ 3553(a)(2)]." Under § 3553(a)(4), one of the factors that the court "shall consider" is "the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission . . . ."

STATEMENT OF THE CASE

Appellant Xavier Orange pled guilty to possessing two guns – one seized from him during a car stop and one found in the kitchen of an apartment. The final PSR recommended a range of 70-87 months, but at sentencing the parties agreed there was no obliterated serial number,

bringing the range to 46-57 months. Defense counsel challenged the extended-magazine enhancement on the ground that the magazine found in the apartment's bedroom was not his and, even if it were, it had not been in "close proximity" to the gun in the kitchen as required. Elimination of this enhancement would have brought the range down to 37-46 months. Defense counsel affirmatively conceded that Mr. Orange's prior conviction for attempted assault with a dangerous weapon qualified as a "crime of violence."

The court rejected defense counsel's extended-magazine arguments, found the Guidelines range to be 46-57 months, not 37-46 months, and sentenced Mr. Orange to 57 months, noting that "if I'm wrong about the guideline range, I would still vary upwards to give you this sentence" and providing reasons for this hypothetical variance.

THE D.C. CIRCUIT'S RULING

Mr. Orange's plea agreement permitted him to appeal on grounds of ineffective assistance of counsel and he did so, arguing that his counsel had made two errors at sentencing. First, his counsel should have realized that, as a matter of law, the "crime of violence"

enhancement did not apply. Second, his counsel failed to recognize that there was insufficient evidence that the gun in the kitchen was "capable of accepting" the large capacity magazine found in the bedroom, as required to apply the extended-magazine enhancement.

Either one of these objections would have brought Mr. Orange's range down to 37-46 months. Both of them together would have brought the range down to 21-27 months.

The panel concluded that it need not consider the merits of either of Mr. Orange's deficiency claims because, even assuming both of his claims were correct, he could not show prejudice, that is, a reasonable probability that, using the correct Guidelines range of 21-27 months, his sentence would have been less than 57 months.

The panel recognized that, under *Molina-Martinez*, in "'most cases'" in which a defendant demonstrates that his counsel's deficient performance caused the sentencing court to incorrectly calculate a Guidelines range, the defendant "will have 'demonstrated [the] reasonable probability of a different outcome'" that is required under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 6 (quoting

Molina-Martinez, 578 U.S. at 200). But the panel concluded that the exception contemplated in *Molina-Martinez*'s applied: "The court's reasons make 'clear' that it 'based the sentence' *at least in part* 'on factors independent of the Guidelines.' [*Molina-Martinez*, 578 U.S. at 200]." Pet. App. 7-8 (emphasis added).

> Orange protests that the district court's analysis was not wholly independent of the Guidelines, since it ultimately selected a sentence within the calculated range. *Molina-Martinez*, however, does not require the government to show that the court's decision was *completely* independent of the Guidelines – only that the court explained why the sentence was "appropriate irrespective of the Guidelines range." Id. When the court offers such an explanation, as it did in this case, an incorrect Guidelines range will not suffice to demonstrate prejudice. Aside from the court's alleged Guidelines error, Orange offers no reason to suppose that he would have received a lesser sentence had his attorney raised the legal and evidentiary objections described above.

Pet. App. 8 (emphasis in original).

For these reasons, the panel affirmed Mr. Orange's judgment without considering whether either or both of his claimed Guidelines errors were valid.

REASONS FOR GRANTING THE WRIT

THE D.C. CIRCUIT IS INTERPRETING *MOLINA-MARTINEZ* SO AS TO ALLOW ITS EXCEPTION TO SWALLOW ITS RULE.

Under *Molina-Martinez*, "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." 578 U.S. at 201. This case presents the question of when "unusual circumstances," *id.,* require more.

The proper scope of the exception contemplated in *Molina-Martinez* is an issue of exceptional importance because it determines the circumstances under which Guidelines errors will be insulated from appellate review. Under the panel's decision, a sentence arrived at via an incorrect Guidelines range is insulated from review for ineffective assistance of counsel (or plain error) whenever a sentencing court indicates that it based its sentence "at least in part" on factors independent of the Guidelines range and that it would have given the same sentence under some other, different range, without any requirement that the court have said – or ever given any consideration

to – what it would have done under the *correct* range. Indeed, the D.C. Circuit recently cited *Orange* as permitting judges to insulate their incorrectly calculated sentences via blanket "recit[ations]" of an alternative intent to vary upward.

> The district court may sentence a defendant under the Guidelines and, alternatively, recite that, if the Guidelines range is incorrectly calculated, it would have instead applied an upward variance and imposed the same sentence. *See United States v. Orange*, 21 F.4th 162, 166 (D.C. Cir. 2021) (district court calculated Guidelines range and explained "if I'm wrong about the guideline range, I would still vary upwards to give you this sentence").

United States v. Miller, No. 20-3084, 2022 WL 1920691, *5 n.9 (D.C. Cir. May 31, 2022).

Under the D.C. Circuit's reasoning, the sentencing court's explanation of its willingness to vary 11 months from the (incorrect) range urged by defense counsel satisfied the *Molina-Martinez* exception by demonstrating that the court based its sentence "at least in part" on "factors independent of the Guidelines." Pet. App. 8. But the D.C. Circuit's "at least in part" language does not appear in *Molina-Martinez* and entirely undermines this Court's holding in that case.

The decision below says that the government need not show that "the court's decision was *completely* independent of the Guidelines." Pet. App. 8 (emphasis in original). But this Court contemplated an exception to the "ordinary case" where it is clear that the sentence was "based" on "factors independent of the Guidelines." 578 U.S. at 200. Given that, under § 3553(a), "factors independent of the Guidelines" (§ 3553(a)(1), (2), (6)), are *always* considered, along with consideration of the Guidelines range (§ 3553(a)(4)), *Molina-Martinez* can only be using "independent" in the sense of *completely* independent. Indeed, this Court's alternative formulation of the exception – it might apply where the record shows the court thought its sentence appropriate "irrespective" of the Guidelines range (578 U.S. at 200) – likewise carries the inference of complete independence from the correct range.

The D.C. Circuit was therefore wrong in reasoning that, once a court explains that it would go outside a particular (incorrect) Guidelines range to impose its sentence, and why, that sentence has necessarily been imposed "irrespective" of the Guidelines. As this Court said in *Molina-Martinez,* "'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.*"'" 578 U.S. at 199 (quoting *Peugh v. United States*, 569 U.S. 530, 542 (2013)). Here, the sentencing court was explaining its willingness to vary 11 months from the (incorrect) alternative Guidelines range of 37-46 months urged by defense counsel. The fact that a sentencing court is willing to discount the Guidelines enough to vary to some degree in light of other factors does not mean that the Guidelines are not still asserting their gravitational pull. An expressed willingness to grant a small variance from the "anchor" of a Guidelines range due to factors outside the Guidelines (here, an 11-month variance from an incorrect range) does not establish that the court has *put the Guidelines aside entirely* and would impose whatever variance was necessary to get from the *correct* Guidelines range to the sentence it arrived at using higher, incorrect ranges (here, a 30-month variance). *Cf. United States v. Bah*, 439 F.3d 423, 431 (8th Cir. 2006) (identical alternative sentence cannot cover "any and all potential guidelines calculation errors"; harmless error not

shown "where the identical alternative sentence was not based on a correctly calculated advisory guidelines range").

The panel concluded that "the record is not silent, and we can readily conclude that the court would have imposed the same sentence irrespective of the Guidelines" (Pet. App. 8), but "irrespective of the Guidelines" means regardless of what the correct Guidelines range might be. The district court did not suggest that it did not care what the Guidelines were or that it was going to ignore altogether any Sentencing Commission guidance in favor of other independent factors. The sentencing court simply considered the appropriate sentence in light of the (incorrect) alternative range advocated by defense counsel. Defense counsel having affirmatively conceded that the court was right about the crime of violence enhancement, the court had no reason to consider, and as far as this record shows, did not consider, the (much lower) correct range. All that is known is that the court would have imposed 57 months of imprisonment if the correct range was between 37 months and 57 months (i.e., irrespective of whether it was 46-57 months or 37-46 months). The *Molina-Martinez* rule still applies with

respect to the actual correct range of 21-27 months: There is nothing to suggest that the 57-month sentence was imposed irrespective of *that* range and thus, under *Molina-Martinez,* there is a reasonable probability that, had the court considered that range, it would have imposed a sentence of less than 57 months.

Nor can a lack of prejudice be inferred from the sentencing court's statement that "[a]nything less than [the] sentence I'm imposing would not be sufficient to comply with the purposes of sentencing." (Pet. App. 7). Imposing the sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing is simply the standard required in every case, 18 U.S.C. § 3553(a), and importantly, the correct Guidelines range is one of the factors to consider in determining that "sufficient" sentence. *See* § 3553(a)(4). The whole point of *Molina-Martinez* is that, unless the sentencing court says otherwise, it is reasonably probable that the "sufficient" sentence will change as the Guidelines range changes. *See* 578 U.S. at 199 ("As this Court has recognized, 'when a Guidelines range moves up or down, offenders' sentences [tend to] move with it.'") (quoting *Peugh*, 569 U.S. at 544).

This Court in *Molina-Martinez* recognized that "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist" and gave as an example the "unusual circumstance[]" in which the record shows that the sentencing court thought its sentence was appropriate "irrespective of" the Guidelines. 578 U.S. at 200-201. Asking only whether the court based its sentence "at least in part" on factors independent of the Guidelines, as the D.C. Circuit now does (Pet. App. 8), allows the *Molina-Martinez* exception to swallow its rule. This case presents this Court with the opportunity to define the limits of the rule set forth in *Molina-Martinez*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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