

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

TERIUS THOMAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Molina-Martinez v. United States*, 578 U.S. 189 (2016), this Court held that for purposes of plain error review, a “court’s reliance on an incorrect [sentencing] range in most instances will suffice to show an effect on the defendant’s substantial rights,” and that “[a]bsent unusual circumstances, [the defendant] will not be required to show more” to obtain relief for a plain guideline error. *Molina-Martinez*, 578 U.S. at 201.

The question presented for review is:

Whether the Eleventh Circuit has created a new exception to *Molina-Martinez*’s plain error prejudice standard which conflicts with the general rule that *Molina-Martinez* establishes.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Terius Thomas, No. 22-60049-Cr-Smith
(November 30, 2022)

United States Court of Appeals (11th Cir.):

United States v. Terius Thomas, No. 22-14119
(July 29, 2024)

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PETITION FOR WRIT OF CERTIORARI

Terius Thomas respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-14119 in that court on July 29, 2024, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District

Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on July 29, 2024. Justice Thomas granted a 30-day extension for this petition until November 26, 2024. Accordingly, this petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following provision:

Fed. R. Crim. P. 52

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(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

Mr. Terius Thomas (Thomas) was indicted on the following offenses: (1) attempted Hobbs Act Robbery and (2) using and carrying a firearm in relation to a crime of violence. Mr. Thomas pled guilty to count 1, and the government dismissed count 2, pursuant to *United States v. Taylor*, 142 S.Ct. 2015 (2022).

Although there was no plea agreement, the parties agreed to a factual proffer. In that proffer, Mr. Thomas admitted that he robbed an Uber driver at gunpoint, demanding the Uber driver's wallet. A struggle ensued which resulted in Mr. Thomas exiting the vehicle without the wallet. As the Uber driver left the area, Thomas discharged his gun in the direction of the Uber vehicle. The government stated also that it had supporting documentary evidence including phone records, cell site GPS location data, Instagram photos, and Uber and Lyft records. Mr. Thomas specifically affirmed the factual basis of the charge at the plea, and he was adjudicated guilty of attempted Hobbs Act robbery. (DE 46:13).

Subsequent to the plea, a Presentence Investigation Report (PSR) was prepared. It calculated the guidelines under U.S.S.G. §2B3.1 (2021). Under that guideline, it found that the base offense level was 20, and it recommended an enhancement of +7 for discharge of a firearm. The PSR also recommended a 3-point reduction for acceptance of responsibility. This resulted in a total offense level of 24. The PSR also stated that Mr. Thomas had four criminal history points for criminal history category (CHC) III. A level 24, CHC III, resulted in a guideline range of 63-

78 months imprisonment.

In addition, the PSR also detailed some of Mr. Thomas' personal circumstances. It noted his youth, as he was 21 years old when he committed the instant offense. The PSR also noted Mr. Thomas' most significant relationship, his girlfriend, and the fact that they had an 8-month-old daughter together.

The PSR also stated that Mr. Thomas had no relationship with his father, and he was unable to provide any information about his father's current location or status. Thomas' parents never married and his father was rarely present during his upbringing. Furthermore, his mother was not able to support the family, and she often had to rely on help from extended family to meet their basic needs. The PSR also reflected that Thomas' family moved frequently and he attended several Broward high schools, but he never graduated.

In addition, the PSR listed six other children that were born to his mother. Their ages ranged from newborn – early twenties. The only full sibling to Mr. Thomas was his twin sister. The other five children were half-siblings, and it appeared that there were at least three other men who fathered these children. The defendant's last residence was with his mother and siblings in a rental apartment that they had moved into in October 2021. When the PSR was submitted in November 2022, however, the family had already moved on from that address. The PSR also referenced some mental issues that emerged when Mr. Thomas was 16. (stating that Mr. Thomas had been hospitalized through the Baker Act when he was 16 years old).

Before sentencing, the government filed a motion for an upward variance based on underrepresentation of criminal history. It argued that Mr. Thomas' prior juvenile cases had not been counted in the criminal history score, and thus, Thomas' criminal history was more serious than what was reflected in his CHC. The government requested an upward variance to 150 months.

At sentencing, the government reiterated its variance request. The defense argued against the variance. It noted that the guidelines had accounted for the discharge of the firearm in the instant case by adding a +7 enhancement to the base offense level. The defense also brought to the court's attention statistics from the Judiciary Sentencing Information platform (JSIN), that the national average sentence for a defendant in Mr. Thomas' position, i.e., Hobbs Act Robbery, guideline level 24, CHC III, was 63 months incarceration. In addition, the defense argued that Mr. Thomas' longest previous sentence was for nine months, and that increasing the sentence from that amount up to 150 months was too sharp of a jump, especially in light of Thomas' youth at age 22. Accordingly, the defense requested a sentence at 63 months, the low end of the guidelines.

Mr. Thomas allocuted and apologized for his actions. He also stated he wanted to improve himself and be a father to his daughter.

Although not granting the government's request for 150 months, the court varied upwards and sentenced Mr. Thomas to 120 months' imprisonment. It found that Thomas' criminal history constituted "substantial violent history over and over,"

which was not counted in the guidelines. The court further found that the facts of the instant case were serious due to the discharge of the gun. At the sentencing, the court also posed the question, “So, where did we go wrong here? What happened?” And the court expressed surprise that Mr. Thomas’ parents were not present for the federal sentencing proceeding. At the conclusion of the hearing, the court sentenced Mr. Thomas to 120 months imprisonment. Notably, the court did not give an alternative sentence or state on the record that it would give the same sentence even if the guideline calculation had been incorrect. The defense objected to the sentence being outside the guidelines.

Mr. Thomas filed a timely appeal. In his appeal, Mr. Thomas argued that the court had miscalculated his guideline range because it had made defective criminal history calculations. He explained that two of his prior offenses that had been counted as 2-point convictions were in reality nolo pleas with adjudications withheld. Therefore, these two convictions constituted diversionary dispositions which only garnered 1 criminal history point each. With the reduced criminal history points, Mr. Thomas went from a criminal history category (chc) III down to a chc II. This in turn, reduced his guideline range from 63-78 months down to 57-71 months. Citing to *Molina-Martinez v. United States*, 578 U.S. 189 (2016) and *Rosales-Mierles v. United States*, 578 U.S. 189 (2016), Thomas argued that the guideline error adversely affected his substantial rights because it increased the sentencing guidelines that formed the starting point of the court’s sentencing analysis. He further argued that

the error affected the fairness and integrity of his judicial proceedings.

Mr. Thomas also argued that his sentence was procedurally unreasonable because of the CHC miscalculation and because the court made erroneous factual findings with respect to the nature of his prior unscored juvenile offenses. He noted that his juvenile record was not “violent . . . over and over” as the court found, but that most of his juvenile offenses involved non-violent theft crimes. Mr. Thomas also argued that his sentence was substantively unreasonable due to the errors above, and because the court had not sufficiently accounted for the mitigating factors he had with respect to his difficult upbringing and young age.

The government conceded that the guideline error had occurred, that Mr. Thomas’ proper CHC was II, and that his correct guideline range was 57-71 months. However, the government argued that Thomas’ sentence should be affirmed because – against the backdrop of the court’s upward variance -- the error did not affect Mr. Thomas’ substantial rights. The government also argued that Mr. Thomas’ sentence was procedurally and substantively reasonable.

After full briefing and oral argument, the Eleventh Circuit issued its opinion, *United States v. Thomas*, 108 F.4th 1351 (11th Cir. 2024), which affirmed Thomas’ sentence. Although acknowledging that the district court did not consider alternative sentences or whether guideline errors would impact its sentencing analysis, the court found that the significant upward variance to 120 months was a strong indication that the miscalculated range did not affect Thomas’ substantial rights. *Thomas*, 108

F.4th at 1357. The Eleventh Circuit also found that Thomas' sentence was procedurally and substantively reasonable.

The Eleventh Circuit's decision changes the prejudice prong of plain error review for erroneous guideline calculations in a way that conflicts with this Court's relevant decision of *Molina-Martinez*, 578 U.S. 189. Therefore, this Court should grant the petition for writ of certiorari and preclude the Eleventh Circuit from establishing its new plain error rule that is in conflict with *Molina-Martinez*.

REASON FOR GRANTING THE WRIT

This Court should intervene to preclude the Eleventh Circuit from creating a new exception to *Molina-Martinez*'s plain error prejudice standard which conflicts with the general rule that *Molina-Martinez* establishes.

This case involves an important federal question regarding how plain error review operates in federal sentencing proceedings. The question involves how to gauge when a plain guideline error has prejudiced or adversely affected a defendant's substantial rights. In its seminal case of *Molina-Martinez v. United States*, 578 U.S. 189, this Court set out a standard addressing the issue, holding that a: "court's reliance on an incorrect [sentencing] range in most instances will suffice to show an effect on the defendant's substantial rights," and that "[a]bsent unusual circumstances, [the defendant] will not be required to show more" to obtain relief from a plain guideline error. *Molina-Martinez*, 578 U.S. at 201; *accord*, *Rosales-Mireles*, 138 S.Ct. 1897, 1903 (2018) (holding a plain Guidelines error "in the ordinary case" warrants a remand for a new sentencing hearing because "it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings."). The Eleventh Circuit's new analysis conflicts with *Molina-Martinez* and should be corrected.

To reverse on plain error review, "there must be (1) an error (2) that is plain and (3) that has affected the defendant's substantial rights." *United States v. Olano*, 507 U.S. 725 (1993). When all three prongs are met, the court may "exercise discretion to correct the error if (4) the error seriously affects the fairness, integrity,

or public reputation of judicial proceedings.” *Id.*

As noted in *Molina* above, this Court has found that the third “prejudice” prong of the plain error test is generally met by virtue of the guideline error itself. Only in the “unusual” case will the defendant need to show anything more. This rule highlights the guidelines’ importance and centrality to the sentencing process. *See e.g., Peugh v. United States*, 569 U.S. 530, 544 (2013) (recognizing the guidelines as the lodestone of sentencing); *Gall v. United States*, 552 U.S. 38, 49 (2007) (recognizing the guidelines as the initial starting point and benchmark of the sentencing process). And it makes clear that this Court intends for the guidelines to continue in their vital role even though the guidelines have been deemed to be advisory, rather than mandatory. So central to the sentencing process is the guideline system that the “[D]istrict courts must begin their analyses with the guidelines and remain cognizant of them throughout the sentencing process.” 18 U.S.C. §3553(a)(4); *Gall*, 552 U.S. at 50 n.6. Likewise, when reviewing a sentence on appeal, “the appellate court must ‘first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range’” *Gall*, 552 U.S. at 51. Because the guidelines are foundational to the sentencing process, this Court in *Molina* emphasized that it was difficult to trace-out the impact that a sentencing guideline error had on the district court’s ultimate sentencing decision. Thus, it found that a guideline error itself was sufficient evidence of prejudice.

This Court also clarified in other cases that the guideline framework not only impacted within-guideline sentences, but it also provided an anchor for the district court, even when the court varied from the guideline range. Thus in *Peugh*, 569 U.S. at 542, this Court found that, “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 in original). Therefore, the fact that a court varied from the guidelines does not mean that the guidelines failed to impact the sentence. Rather, the guidelines remained relevant because they set the baseline for the sentence. Other strong factors added to the guidelines, but the guidelines remained the anchor and point of reference for subsequent decisions. Thus, the guidelines continue to temper the impact of other unusual factors, even when the court parts ways from a guideline range. Because the guidelines remain an integral underlying force even when a court varies from them, the general rule set out in *Molina* – that a guideline error itself is sufficient evidence of prejudice – continues to govern plain guideline errors even in cases where a court varied from the guidelines.

Because the guidelines remain relevant even when a district court varies from them, a district court must do something more than simply impose a variance to make clear that the guidelines did not impact the final sentencing decision. The courts have, in fact, been able to clearly articulate when the guidelines play no significant

role. It is a simple matter of district courts adequately explaining their sentencing decisions and making clear when a case is unusual to the point that the guidelines have lost their gravitational pull. *See e.g., United States v. Seabrook*, 968 F.3d 224, 233-234 (2d Cir. 2020); *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017); *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021); *United States v. Gieswein*, 887 F.3d 1054, 1062-63 (10th Cir. 2018). Without such clarity on the part of the district courts, reviewing courts must engage in speculation about all the myriad factors that combined for the district court to reach its final sentence. This endeavor to divine the district court's thought process becomes astronomically more difficult when the district court begins its analysis on erroneous guideline calculations. In that difficult situation, the reviewing court must determine what the proper guidelines were and then project what it believes the overall impact of the error was on the final sentence. Unless the district court makes the situation clear through its own statements, the reviewing court has a nearly impossible task. And that is why this Court in *Molina* set the general default rule to be that the guideline error itself was sufficient evidence of prejudice for purposes of plain error review. Thus, the *Molina-Martinez* court settled this dilemma by finding that when "the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights."

Molina-Martinez, 578 U.S. at 201.

Petitioner's case fit squarely in *Molina-Martinez's* general rule. The district court began sentencing proceedings by calculating the guideline range. After doing so, it discussed other factors that it found to be compelling. As noted above, the court was especially troubled by the petitioner's prior criminal history and also by the petitioner's actions in discharging the firearm during the crime. As a result of these factors, the court imposed a substantial upward variance from the guidelines. Although the government requested a variance of up to 150 months, the court did not go that far. Rather it imposed a variance of 120 months. Petitioner submits that the guidelines' anchoring effect was the countervailing force that prevented the district court from granting the government's full request to 150 months. Thus, the fact that the court did not adopt the government's recommended number is evidence that the guidelines remained a relevant factor which combined with others to result in the final sentence of 120 months. Other than granting the variance, the district court said nothing else to make clear that it was abandoning the guidelines altogether. And it did not indicate that any guideline error would be irrelevant to its final sentence. As it turned out, there was an error in the guideline calculation which was the result of faulty criminal history point calculations. And further, the court erred in its finding that petitioner's prior criminal record was "violent history over and over." This finding was belied by the record, which showed that the majority of petitioner's prior crimes involved non-violent theft offenses, with the exception of one battery in

which the petitioner punched someone when he was 16 years old. As the district court did not indicate that such errors were irrelevant to the final sentence, *Molina-Martinez's* general rule governed. Under *Molina-Martinez*, sufficient evidence of prejudice was established by virtue of the erroneous guideline calculations. The Eleventh Circuit's decision to the contrary was in error. The Eleventh Circuit's new standard which seeks to weaken *Molina-Martinez's* rule with speculation rather than clear record evidence is flawed and should not be permitted to stand. Accordingly, the Court should intervene and grant the Petition for Writ of Certiorari.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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