NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALEX QUINTANA-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

In *Rita v. United States*, 551 U.S. 338 (2007), this Court held that an appellate court could presume that a procedurally-reasonable, within-Guidelines-range sentence is also substantively reasonable. The Court recognized, however, that this presumption was not binding, and was subject to rebuttal. But in the decade since *Rita*, the majority of the circuit courts of appeals have *never* found this presumption of reasonableness rebutted. The question presented is:

Whether *Rita*'s presumption of reasonableness is, in practice, effectively binding and not rebuttable, and whether the 15-year, within-Guidelines sentence imposed on this defendant, an undisputed drug addict with nearly no criminal history who helped transport a load of drugs, is substantively unreasonable?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Sentencing Guidelines

Other Authorities

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alex Quintana-Torres, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on September 14, 2018.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Quintana-Torres*, ___ F. App'x ___ (10th Cir. 2018), is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on September 14, 2018. Justice Sotomayor extended the time in which to petition for certiorari by 60 days, to and including February 11, 2018. *See* Appendix at A5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

The relevant statutory provision, 18 U.S.C. § 3553(a), is included in the Appendix at pages A7 to A8. *See* Sup. Ct. R. 14.1(f).

STATEMENT OF THE CASE

Petitioner Alex Quintana-Torres is, in his own words, "a drug addict." (Vol. 3 at 19.)[1] Although only 29 years old, he's struggled with substance abuse for nearly half his life; he began drinking around age 13, and by 16 had begun to smoke methamphetamine on a daily basis. (Vol. 2 at 6, 18-19.) Over the years, his addiction has cost him tremendously—lost jobs, a discharge from the military, strained family relationships, and, finally, in this case, a loss of his freedom. (Vol. 1 at 21.)

Two years ago, Mr. Quintana-Torres and some friends tried to transport a load of drugs from Las Vegas, Nevada, where they lived, to Columbus, Ohio. (Vol. 1 at 13-14, 20-21; Vol. 2 at 9-10, 16; Vol. 3 at 8, 38-41.) Needless to say, their plan did not go as planned.

One of the group rented a car in Las Vegas, and headed east with the drugs. (*Id.* at 15.) But he didn't realize that the rental contract barred the vehicle from leaving Nevada. And so when, two days later, the rental car company discovered that its car was parked at a truck stop in Oakley, Kansas, it remotely disabled the vehicle and contacted local law enforcement. (Vol. 2 at 9-10.)

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

When an officer arrived at the truck stop, he observed two vehicles parked side-by-side—the rental, and a car occupied by Mr. Quintana-Torres. (*Id.* at 9.) The officer eventually obtained Mr. Quintana-Torres's consent to search his vehicle. (*Id.*) In the trunk, he found a duffle bag and an extra spare tire, both of which, it was later learned, had been moved from the rental car after it would no longer run. (*Id.*) Inside the bag and tire, the officer found bundles of what turned out to be approximately 6.11 kilograms of methamphetamine. (*Id.* at 9.) The men were taken into custody (*id.* at 9-10), and a subsequent search of the rental car discovered an additional 2.2 kilograms of heroin. (*Id.* at 11.)

The federal government ultimately charged Mr. Quintana-Torres with two possession with intent to distribute counts—one for the meth, one for the heroin—in violation of 21 U.S.C. § 841(a)(1). (Vol. 1 at 9-10.) Because of the drug quantities involved, both counts carried mandatory minimum sentences of ten years. *See* § 841(b)(1)(A). (Vol. 1 at 14; Vol. 2 at 38.)

Aside from a DUI a few years prior, Mr. Quintana-Torres had no criminal history, and he was released on bond a few weeks after being indicted. (Vol. 2 at 8.) But unsurprisingly given his history with drug abuse, his time on release did not go smoothly—he racked up violations, including two positive tests for methamphetamine, and was returned to custody that summer. (*Id.*)

A short time later, Mr. Quintana-Torres pleaded guilty to both charged counts; he did so openly, without a plea agreement. (Vol. 1 at 13-17; Vol. 2 at 8; Vol. 3 at 37, 45-47.)

His Presentence Investigation Report ("PSR") calculated an advisory Guidelines range of 168 to 210 months' incarceration. (Vol. 2 at 12.) This was based entirely on the quantity of drugs involved, which set Mr. Quintana-Torres's offense level at 38 (out of 43) before accounting for a three-level reduction for acceptance of responsibility on account of his guilty plea. (*Id.*) No specific offense characteristics applied under U.S.S.G. § 2D1.1, and beyond the single DUI (from 2014), for which he served 30 days in jail, Mr. Quintana-Torres had no criminal history, and was, therefore, a criminal history category of I. (*Id.* at 12-13.)

Mr. Quintana-Torres did not object to the PSR (vol. 2 at 27; vol. 3 at 6), but instead argued for a downward variance to the ten year mandatory minimum sentence (vol. 1 at 20-23). In support of this request, defense counsel pointed to Mr. Quintana-Torres's long history of addiction, explaining that Mr. Quintana-Torres "knows drug dealers because he is an addict," and that he and his friends executed the scheme to make money and were merely the transport for the drugs. (*Id.* at 21; Vol. 3 at 8-9.) Furthermore, he explained, Mr. Quintana-Torres's inability to remain free on bond was proof positive that his addiction drove his decision-making. (*Id.* at 10.)

Defense counsel also pointed out that, prior to this offense, Mr. Quintana-Torres had only ever spent 30 days in custody (for the 2014 DUI). (Vol. 1 at 21-22.) Finally, he observed that even the ten year mandatory minimum sentence would have a devastating deterrent effect on Mr. Quintana-Torres, who would miss most of his young daughter's childhood and his elderly parents' final years (*id.* at 22; Vol. 3 at 9-10). All told, counsel argued, ten years' would be more than enough punishment for Mr. Quintana-Torres, and that during this time he'd also be able to complete the intensive drug rehabilitation program offered by the Bureau of Prisons ("BOP"). (Vol. 1 at 22.)

The government opposed any variance and instead sought a sentence at the bottom of the Guidelines range, i.e., 168 months (14 years). (Vol. 1 at 24-28; Vol. 3 at 8.) But the district court went even higher than that, imposing a mid-range sentence of 180 months, that is, 15 years. (Vol. 3 at 24.)[2]

In explaining this sentence, the court noted that the large "distribution amounts" of two different drugs involved in the failed transport were at the forefront of its concern, even though it acknowledged that there was no evidence that Mr. Quintana-Torres knew of the quantity of drugs he and his friends had been tasked with moving. (*Id.* at 20-22.) The court further noted that Mr. Quintana-Torres was "a

[2] The court imposed that sentence on both counts, and ran them concurrently. (*Id.*)

relatively young man looking at a long sentence" (*id.* at 20), and one who had a "light criminal history" (*id.* at 22). Finally, the court recommended Mr. Quintana-Torres for BOP's intensive drug treatment program because it "believe[d] that his addiction was doubtlessly a primary driver in the events that have brought him to this situation here today." (*Id.* at 23.)

On appeal, Mr. Quintana-Torres challenged this 15-year, middle-of-the-Guidelines-range sentence as substantively unreasonable. (Appendix at A3.) He recognized that because the sentence fell within a correctly-calculated Guidelines range it was entitled to a presumption of reasonableness, *see Rita v. United States*, 551 U.S. 338 (2007). But he argued that this presumption was rebutted because his sentence represented a manifestly unreasonable balancing of the 18 U.S.C. § 3553(a) sentencing factors. (Opening Br. at 8-9.) That is, he contended, the court gave inadequate weight to numerous mitigating factors, particularly Mr. Quintana-Torres's long history of addiction and the fact that a shorter sentence would have had an equally effective deterrent effect, given how little time he had previously served in custody (30 *days*, on the 2014 DUI). (*Id.* at 9-12.)

The government acknowledged that the district court could have "impose[d] a below-Guidelines sentence based on some or all of [Mr. Quintana-Torres's] proffered reasons." (Answer Br. at 11, 13.) Nonetheless, the government argued for affirmance. In its view, the presumption of reasonableness was not rebutted because

although "[n]o question exists that this record could have rationally supported a lower sentence" *(id.* at 13), the 15-year sentence imposed *also* was reasonable (*id.* at 8-14).

The Tenth Circuit concluded that Mr. Quintana-Torres had not "overcome the presumption of reasonableness that we must afford to the sentence imposed by the district court." (Appendix at 3-4.) The circuit concluded that even with the mitigating factors cited by Mr. Quintana-Torres, the 15-year sentence imposed still was reasonable. (*Id.*)

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The rebuttability of the presumption that a within-Guidelines sentence is reasonable has proven more theoretical than real, and this Court's intervention is necessary to reaffirm the non-binding nature of the presumption it announced over a decade ago in *Rita*.

In *Rita v. United States*, this Court held that the courts of appeals could "presume that a sentence imposed within a properly calculated [Guidelines] range is a reasonable sentence." 551 U.S. 338, 341, 347 (2007). But, the court emphasized, "the presumption is not binding." *Id.* at 347, 353.

Indeed, two justices of the six-justice majority opinion wrote separately to emphasize the importance of this rebuttability principle:

> As the Court acknowledges, moreover, *presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable. I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually

> mandatory after our decision in *Booker*. One well-respected federal judge has even written that, "after watching this Court—and the other Courts of Appeals, whether they have formally adopted such a presumption or not—affirm hundreds upon hundreds of within-Guidelines sentences, it seems to me that the rebuttability of the presumption is more theoretical than real." Our decision today makes clear, however, that the rebuttability of the presumption is real.

Rita, 551 U.S. at 366-67 (2007) (Stevens, J., joined by Ginsburg, J., concurring) (emphasis in original; internal citations omitted) (quoting *United States v. Pruitt,* 487 F.3d 1298 (10th Cir. 2007) (McConnell, J., concurring)).

In the decade since *Rita* was decided, however, the rebuttability of the presumption has proven to be the opposite—far more theoretical than real. The majority of circuits have never reversed a within-Guidelines sentence as substantively unreasonable; indeed, only three appear to have clearly done so. *See, e.g.*, *United States v. Jenkins*, 854 F.3d 181, 188 (2d Cir. 2017) ("We conclude that the factors upon which the district court relied . . . cannot bear the weight of the sentence the district court imposed."); *United States v. Ochoa-Molina*, 664 F. App'x 898, 900 (11th Cir. 2016) (unpublished) (per curiam) (concluding that "the district court gave significant weight to an irrelevant factor . . . and unreasonably balanced an otherwise proper factor"); *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) ("We conclude, however, that under the circumstances of this case, it was unreasonable to adhere to the Guidelines sentence.").

Now it is possible, of course, that every sentence that would have been unreasonable under the Guidelines resulted in a variance (either downward or upward) from that recommended range. But, as the *Rita* Court recognized, "[i]n sentencing, as in other areas, district judges at times make mistakes that are substantive." 551 U.S. at 354. It seems unlikely that in a majority of circuits over more than a decade, no mistakes resulting in unreasonable sentences were made.

Broad principles like the presumption announced in *Rita* require application in real cases to give them effect. That's particularly true here, where the circuits have not effectively given meaning to the rebuttability of the presumption announced in *Rita*. Thus, over a decade later, this Court's review is again necessary to reaffirm that *Rita* meant what it said and that the presumption of reasonableness is not meant to be a rote or reflexive guarantee of reasonableness.

II. This case presents a good vehicle for review, and to reaffirm that *Rita*'s presumption is genuinely rebuttable.

The second reason weighing in favor of review is that Mr. Quintana-Torres is entitled to relief: his 15-year sentence is manifestly unreasonable.

The Guidelines calculation in this case was simple—the quantity of drugs exclusively drove Mr. Quintana-Torres's range, even without evidence that he and his friends knew what they'd been tasked with transporting.

In contrast, there were compelling reasons weighing in favor of a lower sentence, factors that were far more compelling than either the district or circuit court credited.

For instance, Mr. Quintana-Torres's long history of addiction was both a mitigating force in and of itself, but also important because, as the district court recognized, it helped to explain the circumstances that led to the offense conduct in this case. (Vol. 3 at 23 (noting that "his addiction was doubtlessly a primary driver in the events that have brought him to this situation here today").) It was unreasonable for the court to recognize the impact Mr. Quintana-Torres's addiction had on the commission of this offense, but fail to give it *any* meaningful weight in its sentencing decision.

Additionally, the district court failed to give adequate weight to the fact that Mr. Quintana-Torres had never before served any significant time in custody. Indeed, Mr. Quintana-Torres had only one prior conviction—a 2014 DUI for which he served 30 days in jail, and which counted for only one criminal history point in this federal sentencing. (Vol. 2 at 13.) There was no reason to think that a custodial sentence longer than 30 days, but shorter than *15 years*, would not have had an adequate deterrent effect on Mr. Quintana-Torres. Other courts of appeals have recognized what is obvious—that is, that even short terms of incarceration can have meaningful deterrent effects on those who have previously spent little or no time in

prison. *See, e.g.*, *United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001) (noting that a relatively short prison sentence can nonetheless be expected to deter a defendant where deterrence has not yet been tried or where defendant received very short sentences previously); *United States v. Baker*, 445 F.3d 987, 992 (7th Cir. 2006) (concluding that district court's determination that prison would mean more to defendant on his first conviction than to a defendant who previously had been imprisoned was consistent with § 3553(a)). And this was particularly true here, given that Mr. Quintana-Torres was exposed to a *ten year* mandatory minimum sentence, which itself would have deprived him of many meaningful years of his family's life, including most of his daughter's childhood and his parents' elderly years.

That is, of course, not to say that it was inappropriate for the district court to weigh the offense conduct in this case. That conduct (i.e., the amount and types of drugs) and its reflection in the guidelines, are factors to consider under § 3553(a). But where, as here, that conduct was itself inextricably linked to compelling mitigating factors (which the district court itself acknowledged), it was unreasonable to give that offense conduct such overwhelming weight in the sentencing analysis.

The fact that this is a non-violent drug offense further makes this case a good candidate for review. Drug offenses comprise one of the largest categories of federal prosecutions. Indeed, in the 12-month period ending June 30, 2018, there were nearly 22,000 cases resolved in the district courts categorized as "Drug Offenses," second

only to immigration-related offenses. *See* Statistical Tables For The Federal Judiciary, Table D-4, U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary (June 30, 2018).[3] And for a generation, we've become accustomed to the routine imposition of long prison terms for drug offenses. *See, e.g.*, Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 Harv. L. & Pol'y Rev. 375, 390-92 (2017) (recounting that throughout the 1980s "the federal government increased penalties and limited judicial discretion in setting sentences for drug offenses").

With this volume and frequency, it is easy to become accustomed and inured to such sentences. But *fifteen years* is an extremely long period of time to lock a human being away in prison. Indeed, by way of just one example, by the time Mr. Quintana-Torres is released from custody in 2030,[4] his now-young daughter may have graduated from college.

Finally, it bears mention that the unpublished disposition of the decision below does not change the fact that this case presents a good vehicle for review, as *Rita* itself came to this Court from an unpublished per curiam opinion in the Fourth Circuit. *See United States v. Rita*, 177 F. App'x 357, 358 (4th Cir. 2006) (per curiam).

---

[3] *Available at* https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2018/06/30.

[4] *See* Federal Bureau of Prisons Inmate Locator, *available at* https://www.bop.gov/inmateloc/.

* * *

Simply put, Mr. Quintana-Torres does not need to sit in federal prison for *15 years* to provide either adequate deterrence or punishment in this case, and compelling mitigating reasons counsel in favor of a lower sentence. This case presents a good vehicle for this Court to reaffirm that it meant what it said in *Rita*, and that just because a Guidelines' sentence is *presumptively* reasonable, that does not mean that it is *always* reasonable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ John C. Arceci
JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

FEBRUARY 2019