NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

TRINIDAD NANEZ-RIVERA,

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 A WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

HOWARD A. PINCUS
Asst. 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 out the promise that there would be real review of the length of within-guideline sentences. But in the dozen years that have followed, the large majority of circuits, including the Tenth Circuit from which this case originates, have *never* held a within-range sentence to be substantively unreasonable. The question presented here is:

> Have the length of within-guideline sentences become effectively unreviewable in practice, and is Mr. Nanez-Rivera's sentence near the top of the range for a prison assault -- for which there were mitigating circumstances and that produced minimal injuries as compared to other assaults resulting in bodily injury under the guidelines -- substantively unreasonable?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

CASES

STATUTORY PROVISIONS

OTHER

PRAYER

Petitioner, Trinidad Nanez-Rivera, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on December 26, 2018.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. Nanez-Rivera, No. 17-17-1419, slip op. (10th Cir. Dec. 26, 2018), is found in the Appendix at A1. The district court oral imposition of sentence is found in the Appendix at A7.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, May 21, 2019, see A16, so this petition is timely.

FEDERAL COMMON LAW INVOLVED

This petition implicates the standard for review of federal sentences articulated in United States v. Booker, 543 U.S. 220 (2005):

> We infer appropriate review standards from related statutory language, the structure of the statute, and the "'sound administration of justice.'" [citation omitted]. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for "unreasonable[ness]." 18 U.S.C. § 3742(e)(3) (1994 ed.).

Id. at 261 (brackets by the Court in Booker).

STATEMENT OF THE CASE

In March of 2016, Christopher Martinez, an inmate at the United States Penitentiary in Florence, Colorado, was using a computer in a common area in his housing unit. Two inmates who did not live there, Michael Luna and Trinidad Nanez-Rivera, walked into the unit. A short time later, Mr. Luna came up behind Mr. Martinez, put him in a chokehold and lifted him out of his chair. Mr. Nanez-Rivera then rushed in and began stabbing Mr. Martinez with a homemade prison knife, known as a shank. See generally Vol. 1 at 17 (plea agreement).[1]

Mr. Martinez was quickly able to free himself, see id. at 54, and ran outside, with Mr. Nana-Rivera in pursuit. Although ordered to stop by a guard as he was about to leave the unit, Mr. Nana-Rivera continued the chase. When the two men were outside, Mr. Martinez wound up on the ground. Mr. Nana-Riverez swung and kicked at Mr. Martinez, who (as a

[1] Citations are to the record on appeal in the Tenth Circuit, with the page number being the number that appears in the bottom, right-hand corner of the 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.

video showed) kicked his legs to ward off Mr. Nanez-Rivera, soon tripping him just before guards arrived. See generally Vol. 1 at 17.

The shank recovered was eight inches long. Id. But the two wounds Mr. Martinez received were minor. Despite the size of the knife, neither was deeper than an inch. Vol. 2 at 42.

Mr. Nanez-Rivera was indicted in the United States District Court for the District of Colorado. He pleaded guilty to assault with a dangerous weapon with intent to cause bodily injury, contrary to 18 U.S.C. § 113(a)(3), and to obtaining and possessing a weapon in a prison, in violation of 18 U.S.C. §§ 1791(a)(2), (b)(3).

The presentence report computed his total offense level as 18. Vol. 2 at 42. This included a four-level increase for the use of the shank, and three more levels because Mr. Martinez sustained bodily injury, id., which includes an injury that is painful and obvious, or for which medical attention is routinely sought, see U.S.S.G. § 1B1.1, comment. (n.1(B)).

Mr. Nanez-Rivera, who began using heroin at fifteen and soon became addicted, Vol. 2 at 56, was in Criminal History Category VI, id. at 53. His numerous misdemeanor convictions consisted largely of petty

thefts, possessing or using a controlled substance, and driving offenses. Id. at 43-49. Of his eight prior felony offenses, three were for possession of a controlled substance (for less than one gram of heroin in 1997 and 2002, id. at 48, 50, and for methadone in 2006, id. at 50), one was for possessing with intent to deliver less than four grams of heroin, id. at 51, one was for shoplifting a little over $100 of jewelry, id. at 49, and one was for having a gun as a felon, id. at 50. The other two were for immigration violations, id. at 51, 52, including the one for which he was incarcerated at the penitentiary in Florence.

Mr. Nanez-Rivera, who will soon be 56-years old, id. at 38, had no convictions for a violent offense, id. at 62. His guideline range was 57-71 months. Id. at 57.

The motion for a variant sentence

Mr. Nava-Rivera requested a slight variance from the 57-month bottom of the guideline range, asking for a sentence of 51 months. Id. at 46, 49. The variance motion tried to put the stabbing incident in a larger context, one informed by the problems caused by Mr. Martinez's extensive

gambling operation and by a run-in Mr. Martinez had with Mr. Nanez-Rivera the day before the stabbing.

The motion explained that, for many years, Mr. Martinez had run a gambling ring of great scope. Authorities had information in 2014, when Mr. Martinez was at the United States Penitentiary in Big Sandy, that he had netted more than $12,000 in one month. Id. at 47. As an investigative report detailed, Mr. Martinez dealt "in tens of thousands of dollars each month." Id. Mr. Martinez, the report continued, had "blatant disregard for institutional rules" and had "made it clear he intends to continue running a gambling pool." Id. And this not only posed a security risk to the facility and other inmates, but could also put Mr. Martinez at risk. The report stated that "[Mr. Martinez] and his actions present a danger to the orderly running of the institution and presents a danger to other inmates, staff and possibly himself should he remain in general population at Big Sandy." Id.

The variance motion noted that Mr. Martinez's activities had resulted in his being a target for "security threat groups he has crossed." Id. This included the Texas Syndicate. Members of the group had assaulted Mr. Martinez two months before the incident here "over his gambling

operation." Id. Mr. Martinez, unable safely to remain on the compound at U.S.P. Big Sandy, was sent to the United States Penitentiary in Florence. Id. at 47-48.

Not only was there bad blood between Mr. Martinez and the Texas Syndicate, of which Mr. Nanez-Rivera is a member, but the two men had an "altercation" the day before the stabbing. Id. at 48. Mr. Martinez had "disrespected Mr. Nanez-Rivera . . . in the cafeteria," id. at 46, and that "prompt[ed] retaliation," id. at 48.

The motion also pointed to the fact that the injuries Mr. Martinez sustained were minor ones. They consisted of two wounds, one about 3/4" deep and the other 1" deep. Id. at 48. And this despite the fact that the shank used was fully 8" long. Id. Neither wound (as the depth would indicate) involved a major organ. Id. The bleeding from one was said to be "mild," and from the other one only "minimal." Id. As the prosecution agreed, the injuries were "relatively minor, requiring only some bandages to bind the two wounds." Id. at 57. And the motion invoked the absence of violence in Mr. Nanez-Rivera's criminal record. Id. at 49.

The sentencing hearing

The district court opened the sentencing by sating that it wanted to hear about what it considered to be an "unprovoked[,] premeditated attack on a fellow prisoner in a federal penitentiary." Vol. 3 at 35. In response, and citing both the issues between Mr. Martinez and the Texas Syndicate, and what she described as Mr. Martinez shoving Mr. Nanez-Rivera the day before in the cafeteria, id. at 37-38, counsel said she thought "Mr. Martinez kind of brought on some of this behavior himself by engaging in very high-risk behavior in the Bureau of Prisons," id. at 36. In light of this backdrop, she continued, a 51-month sentence was appropriate:

> a sentence of 51 months shows that this is serious for a case like this, where there was bad blood between Mr. Martinez and the gang Mr. Nanez is affiliated with. There is bad blood between the[] two personally over an incident that happened the day before in the cafeteria where Mr. Martinez shoved my client. And, unfortunately, the way the prison works is it's -- there's a lot of machismo going on and when someone is disrespected in front of everyone else in the prison, they feel like they need to get their -- to get back to show who is the, you know, bigger person in the prison.

Id. at 37-38. Counsel then noted that although Mr. Nanez-Rivera used a "very long shank," Mr. Martinez had only minimal injuries. Id.

The court acknowledged that the lack of serious injury was an appropriate consideration. Id. at 38-39. But it declared that it had a "real problem" with the "notion that the victim was -- somehow had it coming or was engaged in activity that somehow he was responsible for -- for what happened to him, he was asking for it." Id. at 39. The court then drew a comparison between Mr. Nanez-Rivera's situation and what some people, in an earlier era, might have said about a victim's attire and sexual assault:

> That harkens back to -- I'm old enough to remember in the '70s and '80s when, you know, victims of sexual assaults were told, Well, you know, look how you dress, you asked for it. And it's a dangerous road to go down to be saying the victim, because he was engaged in those gambling activities and had some kind of dispute with the Texas Syndicate, that somehow a member of that gang has -- there's a justification that I should take into account under 3553(a) that mitigates his sentence because the victim was engaged in these activities and had it coming to him.

Id.

When counsel pointed out that this case and that of blaming the victim of a sexual assault were "two totally different situations," id. at 41, the court agreed they were not the same, id. Still, the court considered them to be "similar" in some respects:

> . . . I think they're similar in that instead of focusing on the perpetrator, the assaulter in the two instances, by your motion you're asking me to draw my attention to the victim in this case, and I bring it for comparison purposes to the focus in terms of my hypothetical -- of my example of other situations where the -- where the argument is: But look at what the victim did and was doing and how he was -- he was dissing the other side because he was shorting them on gambling, or she was wearing a skirt that was too high.

Id.

Counsel reminded the court that Mr. Martinez had shoved Mr. Nanez-Rivera the day before in the cafeteria. Counsel again stressed this was not justification for the stabbing. Instead, she urged, it was mitigation, "and particularly because the Bureau of Prisons is the way that it is, and that the inmates have the mentality that they have, that if you do that in front of a full cafeteria, that, you know, the person who gets the shove feels the need to retaliate." Id. Although it recognized this reality, the court stated that counsel was "in effect asking me as a federal judge to buy into that." Id.

The court also recognized that the wounds to Mr. Martinez were "more superficial wounds." Id.; see also id. at 55. But it thought the guidelines fully accounted for the nature of the injuries:

> I already told you I'm considering the fact that the victim was not sent off in an ambulance with an emergency wound to the abdomen, bleeding to death. That would have made it a very different crime. So that's -- and as [the prosecutor] pointed out, that's already factored in the appropriate enhancement that the probation officer selected to include in her report.

Id. at 55.

The sentence near the top of the guideline range

The district court denied the variance motion, which it considered to consist of two arguments. The court described the first as being that "because of his risky activities in the prison, the victim had it coming to him." Id. at 59. It described the second as being that the Bureau of Prisons was in significant part responsible for putting Mr. Martinez on a yard with members of the Texas Syndicate. Id. at 60. The court rejected that these were mitigating factors, much less reason to vary below the guideline range in a case involving "this kind of reprehensible and violent crime." Id.

In earlier going through the § 3553(a) factors, the district court had noted that Mr. Nanez-Rivera was being sentenced for his tenth felony conviction (that being the two in this case). Id. at 57. It did not mention

the nature of his prior convictions, or that none involved violence. See *supra* at 4-5.

The district court had also discussed the assault itself. It said that "the instant offense was allegedly a gang-related attack." Vol. 3 at 56. It later remarked that it had viewed the video and saw "the premeditated and vicious character of this cowardly attack." Id. at 58. The court recounted that the shank had fallen to the floor inside the unit, that Mr. Nanez-Rivera had (despite orders to stop) pursued Mr. Martinez outside, id., and that the assault then continued "with Mr. Martinez on the floor trying to parry Mr. Nanez's blows and kicks," id. at 59. It did not dispute counsel's observation that none of those later blows appeared to have landed. Id. at 51.

In actually imposing sentence, the district court simply stated it was imposing a controlling sentence of 68 months. Id. at 61. The court ran that sentence consecuve to the sixty-month sentence that Mr. Nanez-Rivera was still serving for illegal reentry. Id. at 64.

The appeal to the Tenth Circuit

On appeal, the Tenth Circuit applied a presumption that the within-range sentence was reasonable. A4. Concluding that the district court had considered the relevant factors in 18 U.S.C. § 3553(a), it wrote that Mr. Nanez-Rivera "simply dispute[d] how the district court weighed those factors." A5.

The Tenth Circuit proceeded to dismiss two arguments that Mr. Nanez-Rivera had disavowed, both in the district court and on appeal. It wrote that the district court was unpersuaded by the "arguments that the victim was somehow asking to be assaulted, or that the BOP is partially at fault for placing gang members together." Id.

The Tenth Circuit later referred to the shoving incident in the cafeteria the day before the stabbing, though it called it only "possibly provoking conduct by the victim." A6. Stating that Mr. Nanez-Rivera did not cite any appellate case in which such conduct, or the BOP's placement of gang member, was considered mitigating, it stated that "[i]f anything, these circumstances weigh against Nanez-Rivera." Id.

REASONS FOR GRANTING THE WRIT

This Court should grant review to make clear that review for substantive reasonableness of within-guideline sentences is not an empty gesture.

Since this Court's decision in United States v. Booker, 543 U.S. 220 (2005), sentencing appeals have been a significant part of the dockets of the federal courts of appeals. Most federal sentences are still imposed within the advisory guidelines issued by the United States Sentencing Commission. But in all of the very large number of cases in which the substantive reasonableness of a sentence has been challenged, the number of reversals can be counted on fewer than the fingers of both hands.

This pattern belies this Court's observations in Rita v. United States, 551 U.S. 338, 354 (2007), which envisioned that there would be within-guideline sentences that were substantively reasonable. After a dozen years, one would expect that there would be some meaningful number of cases in which the courts of appeals had spotted such erroneous sentences. That this has not occurred shows the need for this Court to once again step into the breach and speak to the role of the courts of appeals in reviewing such sentences.

A. Given the virtually unanimous upholding of within-guideline sentences as substantively reasonable, this Court needs to make clear that review of such sentences is not toothless.

As this Court is well aware, there have been almost no appellate reversals of sentences that are within the advisory guideline range. In 2007, then-Tenth Circuit judge Michael McConnell likened the search for a within-guideline sentence that is substantively unreasonable to a pointless hunt for a mythical "snipe." United States v. Pruitt, 502 F.3d 1154, 1173 (10th Cir. 2007) (McConnell, J., concurring), reversed, 552 U.S. 1306, judgment reinstated on remand, 312 Fed. App'x 100 (10th Cir. 2008). The seeming emptiness of review in such cases, he observed, "raises the question of what we all are doing, and why." Id.

The same frustration exists for defendants who appeal a within-guideline sentence. This Court has held out the promise that, even as to within-guideline sentences, review for substantive reasonableness will not be toothless. "At times," this Court said, district courts "will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." Rita, 551 U.S. at 354. But the almost complete

lack of reversals of within-range sentences as substantively unreasonable appears to make that promise an illusory one.

Of course, one would expect that the great bulk of within-guideline sentences would in fact be substantively reasonable. In each of those cases, the district judge's determination at the "retail" level was the same as the Sentencing Commission's determination at the "wholesale" level. Id. at 349. The convergence is what prompted this Court to permit the courts of appeals, if they so choose, to use a presumption that a within-guideline sentence was a reasonable one. Id. at 350. It surely cannot be, though, that district courts *never* (or virtually never) make a mistake in deciding to impose a sentence that is within the guideline range.

Yet the persistent failure of the courts of appeals to find such errors suggests that this is in practice what has taken hold. The upshot is that "vast quantities of resources" are expended by all the actors in the process -- appellate judges, prosecutors and defense attorneys -- "without much likelihood" that a within-range sentence will be reversed. Pruitt, 502 F.3d at 1173 (McConnell, J., concurring).

Two Justices of the six-Justice majority in Rita wrote separately to emphasize that the rebuttability of presumption of reasonableness is real. They considered the decision there to show this, and to adequately meet the concerns expressed by Judge McConnell:

> 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 continue 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 (Stevens, J., joined by Ginsburg, J., concurring) (emphasis in original; internal citations omitted) (quoting United States v. Pruitt, 487 F.3d 1298 (10th Cir.) (McConnell, J., concurrring), superceded on rehearing by 502 F.3d 1154 (10th Cir. 2007)).

Unfortunately, it does not appear that Rita taught the lesson that the concurrence there thought it would. In the dozen years since this Court decided Rita, the great majority of the courts of appeals have *never*

reversed a within-guideline sentence as substantively unreasonable. It appears that only three circuits have reversed a within-guideline sentence on purely substantive grounds. See United States v. Jenkins, 854 F.3d 181, 188 (2d Cir. 2017); United States v. Ochoa-Molina, 664 Fed. App'x 898, 900 (11th Cir. 2016); United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009).

The only way for appellate review to have meaning in this context is for this Court to make plain that it does. The way for this Court to show that appellate review of within-guideline sentences is not a waste of time is for it to accept review in some of these cases. More than enough time has passed since Gall and Rita for this Court to do so. See S. Bibas, M. Schanzenbach & E. Tiller, Policing Politics at Sentencing, 103 Nw. U. L. Rev. 1371, 1385 (2009) ("Perhaps reversals are so rare [for within-guideline sentences] because the Court has given too little guidance for substantive reasonableness review.").

An appropriate case for this Court to accept -- for any defendant who loses a substantive unreasonableness challenge to a within-guideline sentence could make the same observations that Mr. Nanez-Rivera has just

made -- is a case that could plausibly come out the other way under a more robust review. As explained in the next subsection, this is such a case.

B. This case is an appropriate vehicle for making this clarification, as the sentence could plausibly have been different under a proper approach to substantive reasonableness.

On appeal, Mr. Nanez-Rivera pointed out several ways in which the district court had given improper weight to various factors. The Tenth Circuit gave only the barest of review to his claim, and its approach was flawed in numerous ways.

Mr. Nanez-Rivera first invoked the backdrop of the assault in arguing that the stabbing was not the inexplicable act the district court considered it to be, and which it invoked as a basis for its sentence near the top of the range. One aspect of this backdrop was that Mr. Martinez was running, and had run for years, a high-stakes gambling operation that inevitably led to friction within the close confines of a prison. Indeed, the BOP had concluded that Mr. Martinez's activities posed "'a danger to other inmates, staff, and possibly himself were he to remain in general population.'" Vol. 1 at 47 (quoting investigative report).

Another aspect was that Mr. Martinez had publicly shoved Mr. Nanez-Rivera the day before the assault in the cafeteria. This was an act that, under the ethos of a prison, called for some response.

The district court had dismissed each of these in a misguided way. As to the first, it thought taking account of the effects of Mr. Martinez's illegal activities would partake of blaming the victim, much as considering the attire of a victim of a sexual assault would. But nothing legitimate allows the attire of a sexual-assault victim to be considered. It does not cause any injury to others, and its consideration is based only on gender stereotypes and a misunderstanding of the nature of sexual assaults. In contrast, Mr. Martinez's illegal gambling activities led inevitably to conflicts with other inmates, including the Texas Syndicate, of which Mr. Nanez-Rivera was a member.

As to the second, the public act of disrespect that was the shoving of Mr. Nanez-Rivera in the cafeteria, the district court did not deny that the prison culture called for a response. But it thought that to mitigate the assault sentence *at all* on that basis would be to embrace the legitimacy of the prison mind-set and to endorse a tit-for-tat approach. Vol. 3 at 42-43.

To the contrary, to reduce the sentence in recognition of the environment in which Mr. Nanez-Rivera existed would only have been to acknowledge that expectations in the culture exerted an influence on him. Were Mr. Rivera not to abide those norms, and instead to let pass the very public slight, he might increase the chances of his own victimization at the hands of others. By reacting as the prison culture expected, he may have been acting in a way that he well might not have chosen were he outside of that environment. That he had no convictions for any violent offenses supports this view. One who commits an assault because he succumbs to the pressures of prison culture is simply not as blameworthy as one who commits an assault in an environment free of such pressures.

The Tenth Circuit's consideration of these factors was cursory, which may be unsurprising given the routine endorsement that it, and the other courts of appeals, give any within-range sentence. The Tenth Circuit referred to the "possibly provoking conduct by the victim," A6, even though the district court did not doubt the shoving incident. The court of appeals likewise did not grapple with Mr. Nanez-Rivera's argument in this regard on its own terms. The Tenth Circuit also considered Mr. Nanez-

Rivera to be arguing that the BOP was at fault for where it placed gang members, id., even though Mr. Nanez-Rivera was at pains to stress that this was *not* his point. In its opinion, the Tenth Circuit did not even once mention Mr. Martinez's gambling ring and the frictions it had caused.

The Tenth Circuit instead pointed out that Mr. Nanez-Rivera had not cited an appellate cases holding what it had just described to be mitigating, and then said that "[i]f anything, these circumstances weigh against Nanez-Rivera." A6. With this phrasing, the court seems to have meant that provoking conduct by a victim would not in fact be mitigating, and might actually be its opposite. It is hard to see how this could be so.

If what the Tenth Circuit meant was that the lack of appellate cases on the precise circumstances at hand was reason to reject the claim, this too was misguided. Sentencing is a heavily fact-specific endeavor, and each one is a "'unique study.'" Pepper v. United States, 562 U.S. 476, 487 (2011) (quotation omitted). To require an appellate case precisely on point before a factor can be considered to be mitigating is to demand far too much. Common sense itself tells the amount of provocation by the victim bears on the blameworthiness of the offender.

The Tenth Circuit also failed to consider what all agreed to be the "relatively minor" nature of Mr. Martinez's injuries. Vol. 1 at 56 (statement of prosecutor). The district court reasoned that the guidelines took full account of this because if the wounds had been severe enough, there would have been a five-level increase for "serious bodily injury," rather than only a three-level increase for "bodily injury." Compare U.S.S.G. § 2A2.2(b)(3)(B) *with* id., § 2A2.2(b)(3)(A). This ignores that there are a range of injuries that can be considered "bodily injury," which the guidelines define as "any significant injury, *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." U.S.S.G. § 1B1.1, comment. n. (1(B)).

The fact that the injuries here were minimal for those qualifying as "bodily injury" under the guidelines was something that should have been considered, not just in terms of whether to vary, but in terms of where the district court slotted Mr. Nanez-Rivera within the guideline range. The issue was extensively argued on appeal. The Tenth Circuit, however, entirely ignored it.

The Tenth Circuit's perfunctory review is typified by its observation that the district court considered the relevant factors, and that Mr. Nanez-Rivera "simply dispute[d] how the district court weighed those factors." A5. But mere consideration of the relevant factors by a district court does not ensure that the sentence it selects will be substantively reasonable. Giving too little or too much weight to various factors may well be what produces a sentence that is unreasonable on the particular facts. That is, and contrary to what the Tenth Circuit suggested, a dispute as to the weight a district court has given to the sentencing factors will define most claims of substantive unreasonableness.

On a proper approach, Mr. Nanez-Rivera's sentence near the top of the guideline range was substantively unreasonable. There were factors here that significantly mitigated the assault and that the district court unjustifiably discounted. This made the assault very different than the unprovoked attack the district court thought it to be and made Mr. Nanez-Rivera correspondingly less blameworthy. The minimal nature of the injuries also called for a sentence much lower than one near the top of the guideline range. The injuries were, as compared to other assaults that

result in bodily injury, and with which the guidelines grouped Mr. Nanez-Rivera's assault, at the low end of the spectrum. All of this in combination pointed to the sentence the district court imposed as being far too high and substantively unreasonable.

CONCLUSION

This Court should grant Mr. Nanez-Rivera a writ of certiorari.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002