No._____

IN THE SUPREME COURT OF THE UNITED STATES

FERNANDO JUAREZ, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether the presumption of reasonableness for within-guidelines sentences approved in *Rita v. United States,* 551 U.S. 338 (2007) has proved incompatible with the overarching goal of federal sentencing that a sentence be sufficient but not greater than necessary in light of the factors set out in 18 U.S.C. § 3553(a).

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Fernando Juarez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 25, 2020.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals, *United States v. Juarez,* 822 Fed. Appx. 313 (5th Cir. 2020), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 25, 2020. This petition is filed within 150 days after entry of judgment. Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISION INVOLVED

Section 3553(a) of Title 18 of the U.S. Code provides in pertinent part:

(a) **Factors to be considered in imposing a sentence**.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of Title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced[.]

STATEMENT

Petitioner Fernando Juarez was walking across the Miller Ranch in western Texas on May 19, 2019, when Border Patrol agents approached him and his two companions. Juarez and Juan Fierro Aguirre stopped when asked; the third man ran off. Juarez and Fierro were arrested. Three backpacks found by the agents were

seized and found to contain marijuana. Interviewed after their arrests, both Juarez and Fierro confessed that they had been hired to transport marijuana. Fierro stated that Javier Villalobos Urias, the man who fled, had guided them across the desert and knew where the marijuana was to be delivered. Villalobos was caught the next day. He claimed that Juarez was the guide.

The men were charged with drug offenses. Juarez pleaded to an indictment alleging that he had imported more than 50 kilograms of marijuana and had possessed more than 50 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. § 841, 952, and 960. Following Juarez's plea, a probation officer prepared a presentence report.

In that report, the officer found that Juarez's base offense level under the sentencing guidelines was 20. *See* U.S.S.G. §2D1.1(c)(10). The officer recommended a downward adjustment under guidelines §3E1.1 to reflect that Juarez had accepted responsibility for his offense. The officer also recommended that Juarez receive a two-level downward adjustment under guidelines § 3B1.2 because he had played a minor role in the offense. These recommendations created a total offense level of 15, which together with Juarez's criminal history category of II, yielded an advisory guideline sentence range of 21 to 27 months' imprisonment. *See* U.S.S.G. Ch.5, Pt.A. (sentencing table).

Juarez objected to the probation officer's failure to recommend a safety-valve adjustment under sections 2D1.1(b)(18) and 5C1.2 of the guidelines. The government

objected to the recommendation that Juarez receive a minor-role adjustment and sought a two-level leadership increase for him.

The probation officer initially recommended all the objections be overruled. Later, the officer later stripped Juarez of his minor-role adjustment, though no evidence was cited for this reversal. The officer simply asserted "[t[he defendant does not appear to be a minor participant as he is not substantially less culpable than the average participant." This change increased the advisory sentence range to 27 to 33 months' imprisonment.

Defense counsel sought a sentence at the bottom of that range. App. B. Defense counsel argued that the facts of the offense, and Juarez's history warranted a sentence of no more 27 months. She pointed out that Juarez had grown up and still lived in extreme poverty in Mexico, and that he had never had the opportunity to attend even elementary school. App. B. The district court overruled the objections, adopted the recommended advisory guidelines range, and sentenced Juarez at the top of that range to concurrent terms of 33 months' imprisonment. App. B.

Juarez appealed, arguing that the 33-month sentence violated the command of of 18 U.S.C. § 3553(a) that a sentence not be greater than necessary to meet the goals of federal sentencing that statute sets out. Juarez addressed specifically the factors set out in § 3553(a)(2) that the prosecutor or the district court had relied on, contending the sentence was greater than needed to satisfy those factors. *See* Appellant's Brief, 2020 WL 2841411and Appellant's Reply Brief, 2020 WL 4050171.

Juarez also argued that the guidelines and the district court had completely failed to account for his personal history and some relevant circumstances of the offense, even though § 3553(a)(1) these factors be accounted for in determining a sentence that was sufficient but not greater than necessary to achieve the sentencing goals of § 3553(a)(1). Appellant's Brief, 2020 WL 2841411and Appellant's Reply Brief, 2020 WL 4050171. Juarez's offense was non-violent, he surrendered immediately and peacefully to the arresting agents.[1] Juarez grew up in extreme poverty in rural northern Mexico, he never had the chance to go to school, and his family scrabbled to get by. Two of his sisters did not make it. *See id.*

The court of appeals affirmed Juarez's sentence. In so doing, it applied a presumption of reasonableness to the sentence. The Fifth Circuit applies such a presumption in each case involving a within-guideline sentence. See App. A at 2 (citing *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009) and *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008)). The court of appeals explained that the presumption it applies "is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." App. A at 2 (citing *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009)). The court then ruled that "Juarez fails to rebut the presumption of correctness." App. A at 2 It reasoned that "[t]he district

[1] The only violence about Juarez was that done to him by his mother when he was a child–she had sometimes hit him when he was a child if he neglected to take care of the family's goats.

court heard the parties' arguments and evidently agreed with the Government that a sentence of 33 months was appropriate for the purpose of deterrence, a factor listed in § 3553(a). Juarez fails to make the requisite showing that the sentence is substantially unreasonable." *Id.*

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN APPELLATE PRESUMPTION OF REASONABLENESS IS INCOMPATIBLE WITH THE OVERARCHING GOAL OF FEDERAL SENTENCING CONTAINED IN 18 U.S.C. § 3553.

Section 3553(a) of Title 18 sets out the purposes and goals of federal criminal sentencing. The Court has stated that the statute's "overarching" direction is that the district courts "'impose a sentence sufficient, but not greater than necessary' to accomplish the goals" listed in subsection 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553(a)(1)). This controlling "parsimony principle" in § 3553(a)(1) means that a sentence must be condign in light of the circumstances of the case and in the light of the matters § 3553 requires the sentencing court to consider. *Dean v. United States,* 137 S. Ct. 1170, 1175 (2020). The parsimony principle in § 3553(a)(1) ensures that the law does not become "merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in" the particular case. *Gall v. United States*, 552 U.S. 38, 54 (2007).

Following the Court's decision in *United States v. Booker,* which rendered the U.S. sentencing guidelines advisory and, in so doing, changed the way district courts determined criminal sentences in criminal cases, appellate courts review sentences for substantive reasonableness. 543 U.S. 220, 259-61 (2005) (setting out reasonableness standard). In *Gall,* the Court explained that, in determining the reasonableness of a sentence, the courts of appeals "must review" a sentence for "abuse of discretion[.]" 552 U.S. at 50-51. In *Kimbrough,* the Court taught that it was for the appellate court to resolve the "ultimate question," which was "whether the sentence was reasonable—*i.e.,* whether the District Judge abused his discretion in determining that the § 3553(a) factors" supported the sentence imposed. *Kimbrough,* 552 U.S. at 111; *see also Holguin-Hernandez v. United States,* 140 S. Ct. 762, 766 (2020) (explaining review process).

Section 3553's parsimony principle ensures that we punish measuredly within the law and in a way that reflects the individual's culpability, failings, and merits. *See Gall,* 552 U.S. at 52 (citing *Koon v. United States,* 518 U.S. 81, 113 (1996)). As the Court reaffirmed in *Pepper v. United States,* "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 562 U.S. 476, 487 (2011)(quoting *Koon,* 518 U.S. 81, 113 (1996)). The principle that requires this is that "'the punishment should fit the offender and not merely the crime.'" 562 U.S. at 487-88 (quoting *Williams v. New York,* 337 U.S. 241, 247 (1949)).

Pepper also reaffirmed the statement in *Pennsylvania ex. rel Sullivan v. Ashe* that "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender") 562 U.S. at 488 (quoting 302 U.S. 51, 55 (1937)). Section 3553(a)(1)'s command that the sentencing court consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in determining a sufficient sentence reflects that principle.

Between the time *Booker* was decided in 2005 and the day *Kimbrough* and *Gall* were in 2007, the Court had held in *Rita v. United States* that, in reviewing the reasonableness of a sentence, the courts of appeals could, if they chose to, apply a presumption that a sentence within the advisory guidelines range was reasonable. 551 U.S. at 338, 347-351 (2007). *Rita* reasoned that such a presumption would not be binding and could be justified because "by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case." *Id.* at 347 (emphases in original). The Court expected that a presumption of reasonableness afforded to guideline sentences would not impair the dialectical development of the sentencing law. *Id.* at 350. Undoubtedly, the Court also expected that the reasonableness presumption would not interfere with achieving the goal of condign, individualized sentences. *Cf. Pepper,* 562 U.S. at 487-88; *Koon,* 518

U.S. at 113; *Ashe,* 302 U.S. at 55. The course of sentence-review law since *Rita* appears to have confounded those expectations.

Some of that may be that, coming before *Gall, Kimbrough,* and *Pepper,* the presumption *Rita* approved did not fully consider that the "rough approximation of sentences that might achieve § 3553(a)'s objectives," 551 U.S. at 350, it found the guidelines to provide was not properly attuned in actual cases to the sentence "sufficient but not greater than necessary" that § 3553(a) requires and that appellate courts are supposed to ensure. *Cf. Kimbrough,* 552 U.S. at 101. Judge Moore of the Sixth Circuit foresaw the problem. In dissenting from the Sixth Circuit's adoption of a presumption of reasonableness, she observed that. because the guidelines "generally deem offender characteristics irrelevant under Chapter 5H employing a 'presumption of reasonableness' and according extra weight to the Guidelines" was unwise and unlikely to advance the 'overarching provision' in § 3553(a) that sentences should be 'sufficient, but not greater than necessary' to advance the goals of sentencing in § 3553(a)(2). *United States v. Vonner,* 516 F.3d 382, 411 (6th Cir. 2008) (en banc) (Moore, J., dissenting).

Judge Moore's insight was correct. Section 3553(a)(1), which sets forth the overarching parsimony principle, requires consideration by the court of the defendant's history and the circumstances of his offense, but the guidelines, rarely, if ever, account for those factors. See U.S.S.G. Pt. 5, Ch. H, intro. Comment. When, as in this case, the reasons a defendant advances for a lower sentence, whether outside the guidelines or at a lower point in the guidelines range than the court chooses, are

factors whose consideration is required by the § 3553(a) command, but not accounted for by the guidelines, the *Rita*-approved presumption essentially removes the non-guidelines statutory factors from appellate reasonableness review.

The Fifth Circuit's decision in this case illustrates the problem with a presumption that assumes the guidelines' "rough approximation" is good enough for sentencing work. The court of appeals wrote that its presumption of reasonableness "is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." App. A at 3 (citing *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009)).[2] Then, without in any way acknowledging Juarez's argument that personal-history and offense-circumstance facts existed that § 3553(a) required an accounting of the court summarily declared that "Juarez fails to rebut the presumption of correctness." App. A. Cases with such cursory review are plentiful in the Fifth Circuit, and mostly

[2] Lack of real review that the presumption causes is shown by another aspect of this case. Juarez argued that, to the extent, the district court's selection of the sentence was based on deterring him from reoffending, a theory that the prosecutor offered, App. B, it made no sense to jump from the 114-day sentence Juarez had received for his only other offense, to the top of the guideline range. The bottom of the guidelines range that Juarez faced, 27 months, was eight times that 114-day sentence. Nothing about Juarez's offense suggested that a sentence eight times as long was insufficient. Jumping to the top of the guideline range without substantial evidence that sentence was needed to deter Juarez was an improper weighing of the factors and the facts before the district court. Yet, the Fifth Circuit simply shrugged and said the district court "evidently agreed with the Government" that a 33-month sentence was "appropriate for the purpose of deterrence, a factor in § 3553(a)." App. A at 2. This is not review for reasonableness, it is review presuming no error and resting on the existence of a single § 3553 factor.

unpublished. *See, e.g, United States v. Gomez-Herrera,* 523 F.3d 554 (5th Cir. 2008); *United States v. Ponce-Leon,* 299 Fed. Appx. 410 (5th Cir. 2008); *United States v. Muro,* 811 Fed. Appx. 216 (5th Cir. 2020); *United States v. Cantu-Sandoval,* 668 Fed. Appx. 638 (5th Cir. 2016). The presumption has resulted in little-to-no real review of the reasonableness of a sentence. "Cases in which any court has vacated sentences for "substantive unreasonableness" are few and far between." *United States v. Neba,* 901 F.3d 260, 267 (5th Cir. 2018) (Jones, J., concurring). If a sentence falls within the guidelines, that's close enough to reasonable to lead to a near-inevitable affirmance.

While this result seems difficult to reconcile with *Gall, Kimbrough,* and *Pepper* and their requirement of full consideration of the relevant sentencing factors in light of the sufficient but not greater than necessary command, the result does seem largely reconcilable with *Rita*'s approval of the use of a presumption. That conflict between precedents means that the "overarching command" of § 3553(a), *Kimbrough,* 552 U.S. at 101, is often defeated by the presumption that a guidelines sentence near enough to sufficient. But near enough is not what the statute calls for. The Court should consider whether the *Rita* presumption has proved irreconcilable with the requirements of § 3553(a) and the demands of reasonableness review.

The prevalence and effect of the presumption of reasonableness has another consequence for federal sentencing that supports granting certiorari.[3] The *Rita* court

[3] The presumption of reasonableness approved by *Rita* had been adopted in several circuits. See, e.g., *United States v. Johnson,* 445 F.3d 339, 341 (4th Cir. 2006); *Vonner*, ;; *United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005) ("[A]ny sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of

assumed that there would be a feedback loop between the guidelines, appellate review of sentences, and future decisions of the Sentencing Commission. 551 U.S. at 350. As one commentator has noted, appellate review of sentence was to offer an additional check on "arbitrary, ill-reasoned, or out-of-date guidelines." Carter Gee-Taylor *Deference Errors: The United States Sentencing Guidelines, Chevron, and The Appellate Presumption of Reasonableness,* 89 U. COLO. LAW REV. 1209, 1215 (2018). The presumption short circuits that feedback loop. Rather than promoting development of the sentencing law through discussion of the reasonableness of the sentence imposed in the light of the guidelines, the parsimony clause, the points raised by counsel for the defense or the prosecution, and then responses by the Sentencing Commission, the presumption has caused stagnation by finding almost every sentence substantively reasonable. Sentences that are too high, or too low, are approved because they fit an existing rough-approximation guidelines-template, if not the overarching command of § 3553(a). "[T[he presumption is non-binding in theory but nearly ironclad in fact." *Neba,* 901 F.3d at 267 (Jones, J., concurring) (suggesting the Court provide further guidance on the use and usefulness of the presumption).

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reasonableness."); *United States v. Lincoln,* 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006).

This case is a good vehicle for considering the issue presented. A proper § 3553(a) sentence must reflect the seriousness of the offense and promote respect for the law. It must be sufficient to deter criminal conduct, and to protect the public from further crimes by the defendant. It must provide just punishment. 18 U.S.C. § 3553(a)(2)(A)-(D). The guidelines largely consider those issues, though where an individual case falls is subject to debate. In this case, for instance, deterrence–the only issue that the court of appeals mentioned in its abbreviated discussion of Juarez's challenge to his sentence–likely did not require the sentence imposed. A sentence of 27 months would also have been sufficient to deter Juarez from committing offenses in the future. *Cf.* 18 U.S.C. § 3553(a)(2)(B). His only prior jail time had been a sentence of 114 days. A 27-month sentence would have been eight times as long as that prior sentence and would have been sufficient to achieve both the specific and general deterrent purposes of 18 U.S.C. § 3553(a)(2)(B). It would have sent a message to Juarez and to others that a second offense results in a substantially increased prison term.

Still, an appellate court could find that it was reasonable for a district court to disagree with defense counsel on the deterrence argument, as the Fifth Circuit did here. App. A at 2. But a mention of the presumption of reasonableness and one guideline-considered factor is not a determination that the sentence was reasonable overall. That is, such an approach does not meaningfully review whether all the statutory factors, including non-guideline factors were considered and does not meaningfully review whether a sentence was greater than necessary under the

parsimony principle. The presumption of reasonableness that was applied in this case, prevented, as it often does, true review of the reasonableness of the sentence. The Court should grant certiorari to determine whether the Rita presumption is compatible with the statutory command that a sentence be sufficient but not great than necessary and the precedent that puts final responsibility for ensuring that command is met on the appellate courts.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

/s/ PHILIP J. LYNCH
Counsel for Petitioner

DATED: November 2, 2020.