No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEVANTE MARCUS RICHMOND, and
ARTHUR GENE EVANS, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit failed to apply substantive reasonableness review of the sentences imposed by the district court?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. Pursuant to Supreme Court Rule 12.4, two defendants join in this petition, whose direct appeals in Fourth Circuit Case Nos. 19-4895 and 20-4074 were consolidated.

RELATED CASES

(1) *United States v. Richmond*, No. 3:18-CR-864-TLW, U.S. District Court for the District of South Carolina. Judgment entered Nov. 15, 2019.

(2) *United States v. Evans*, No. 3:18-CR-864-TLW, U.S. District Court for the District of South Carolina. Judgment entered Nov. 15, 2019.

(3) *United States v. Richmond*, No. 19-4895, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Feb. 23, 2021.

(4) *United States v. Evans*, No. 20-4074, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Feb. 23, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jevante Marcus Richmond ("Richmond") and Arthur Gene Evans, Jr. ("Evans") respectfully pray that a writ of certiorari issues to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 19-4895, entered on February 23, 2021.

DECISIONS BELOW

The Fourth Circuit panel issued its unpublished opinion on February 23, 2021, affirming the judgments of the United States District Court for the District of South Carolina. This opinion can be found at *United States v. Richmond*, 845 F. App'x 223 (4th Cir. 2021), and is attached as App. 1a-15a. Richmond and Evans did not file a petition for rehearing or rehearing *en banc*.

JURISDICTION

The Fourth Circuit issued its opinion and entered its judgment on February 23, 2021. App. 1a-15a. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 19, 2020, this Court extended the time within which to file a petition for writ of certiorari to 150 days. This petition is filed within 150 days of February 23, 2021.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a) provides:

> (a) Factors to be included 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; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements 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);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement 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

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

INTRODUCTION

This Court has held that appellate courts must review whether a district judge's justification for a sentence is substantively reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007). "[C]loser review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)).

The Fourth Circuit failed to conduct that review in this case. While the Fourth Circuit identified the proper standard, *see* App. 13a-14a, the Fourth Circuit's analysis instead turned on whether the district court's justification for its sentence was *procedurally* reasonable. *See* App. 14a ("[W]e concluded the district court's decision to vary upward was not based solely on a consideration of the nature of the underlying conduct."). The Fourth Circuit did not analyze the substantive reasonableness—whether the district court's explanation supported the degree of its upward variances—of Evans' or Richmond's sentences. Since this was a "mine-run" case, "closer review" was "in order." *Kimbrough*, 552 U.S. at 109. This Court should grant certiorari to review the Fourth Circuit's failure to apply the appropriate standard of review.

STATEMENT OF THE CASE

Evans, Richmond, and a third co-defendant Shelvey Laquan Grant ("Grant") committed three armed carjackings and attempted a fourth over a two-day period in 2018 in the greater Columbia, South Carolina area. They also broke into several trailers at a gun show and stole five firearms. *See* App. 3a.

The carjackings were unremarkable and employed similar plans. Evans would approach the driver of the vehicle, pretend to ask for directions, then point a firearm at the driver and demand that they give him the vehicle. *See* App. 3a-4a. He would get in the vehicle while Grant and Richmond would follow him in another, usually stolen, vehicle. In three of the carjackings, the victims were compliant; in the attempted carjacking, the victim resisted and was struck in the head with a firearm by Grant. *See* App. 3a-4a. On one occasion, someone fired a firearm into the air as they drove away. *See* App. 4a.

The government charged Evans and Grant with several violations of federal carjacking pursuant to 18 U.S.C. § 2119 and possession of a firearm during the commission of a violent crime pursuant to 18 U.S.C. § 924(c). The government charged Richmond with possession of a firearm by a convicted felon pursuant to 18 U.S.C. § 922(g) and brandishing a firearm in furtherance of a crime of violence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). Evans, Richmond, and Grant all entered into plea agreements with the government, with Evans agreeing to plead guilty to two § 924(c) offenses and Richmond agreeing to plead guilty to his felon-in-possession and § 924(c) offenses. Evans' Guidelines range was 204 months'

imprisonment and Richmond's Guidelines range was 184-204 months' imprisonment. *See* App. 5a.

At their first joint sentencing hearing, the district court announced that it rejected the plea agreements because the advisory Guidelines range that resulted from the pleas was too low. Evans and Richmond were given the opportunity to withdraw their guilty pleas; they did not do so. *See* App. 5a.

Evans and Richmond subsequently proceeded to a second joint sentencing proceeding. During that proceeding, both Evans and Richmond marshalled several arguments in favor of sentences within the Guidelines range. Additionally, the government advocated for within-Guidelines sentences for both defendants. *See* Joint Appendix ("J.A.") 224.[1] Despite the recommendations by the parties, the district court imposed above-Guidelines sentences for both defendants, varying upward by four years over the Guidelines range to impose a twenty-one-year sentence on Evans and by three years over the top of the Guidelines range to impose a twenty-year sentence on Richmond. At both sentencing hearings, the district court stressed that it considered the Guidelines ranges for both defendants to be too lenient in light of the serious and violent nature of the offenses.[2]

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[1] The parties filed the Joint Appendix containing the relevant portions of the record with the Fourth Circuit below. *See* Joint Appendix, *United States v. Richmond*, 845 F. App'x 223 (4th Cir. Feb. 23, 2021) (No. 19-4895), ECF No. 23.

[2] As noted in Evans and Richmond's joint brief before the Fourth Circuit, the district court referenced the "serious" or "seriousness" of the offenses at least sixty-two times and "violence" or the "violent" nature of the offenses at least twenty-nine times during the two hearings. *See* Brief for Appellant at 19-20, *Richmond*, 845 F. App'x 223 (No. 19-4895), ECF No. 22.

On appeal to the Fourth Circuit, Evans and Richmond argued that their sentences were procedurally and substantively unreasonable. With regard to substantive unreasonableness, Evans and Richmond argued that the upward variances were unwarranted "because Congress and the Sentencing Commission already had the nature of the conduct in mind when establishing Guidelines ranges for § 924(c) convictions" as well as for carjacking convictions. App. 14a.

The Fourth Circuit rejected these arguments. After finding the sentences procedurally reasonable, the Fourth Circuit found the sentences substantively reasonable because "the district court's decision to vary upward was not based solely on a consideration of the nature of the underlying conduct." App. 14a. The Fourth Circuit noted that "'district courts have extremely broad discretion when determining the weight' of each § 3553(a) factor." App. 14a (quoting *United States v. Nance*, 957 F.3d 204, 215 (4th Cir. 2020)).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision below is demonstrably wrong and applies an incorrect standard of review to conclude that the sentences imposed by the district court were substantively reasonable. The Fourth Circuit's decision is a byproduct of the lack of clarity from this Court on how to review substantive reasonableness arguments. This Court should grant certiorari to review the Fourth Circuit's decision and to clarify the standards an appellate court should apply when reviewing a claim that a sentence is substantively unreasonable.

A. Procedural and substantive reasonableness inquiries are distinct and require separate analyses.

Appellate courts review sentences for reasonableness. *United States v. Booker*, 543 U.S. 220, 261-265 (2005). Reasonableness review has two components: procedural reasonableness and substantive reasonableness. *Gall*, 552 U.S. at 50-52. Both components require that a district court explain its decision, though the inquiries are different.

Procedural reasonableness review questions whether the district court "committed [a] significant procedural error" by "failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id*. at 51. The explanation required varies from case to case, as "[t]he appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." *Rita*, 551 U.S. at 356.

Substantive reasonableness review, by contrast, requires an appellate court to "take into account the totality of the circumstances" to determine whether a

district court abused its discretion in imposing the sentence. *Gall*, 552 U.S. at 51. When a sentence is outside the Guidelines range, the appellate court "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id*. The district judge's reasoning has a significant role in this analysis, as "a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). "[C]loser review may be in order," however, "when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Id*. (quoting *Rita*, 551 U.S. at 351).

In order for a district judge's sentence to be procedurally reasonable, therefore, the district judge must provide an explanation for its decision. The required length of that explanation depends upon the circumstances of the case. Consequently, procedural reasonableness review questions *whether* the district court provided an explanation for its decision and whether the explanation was adequate to provide a basis for its decision. Substantive reasonableness review questions *why* the district court imposed its sentence and whether its explanation justified the sentence imposed.

B. The Fourth Circuit found the sentences substantively reasonable because they were procedurally reasonable.

The Fourth Circuit did not examine the substantive reasonableness of the district court's sentence. Although the Fourth Circuit recited the substantive reasonableness standard, *see* App. 13a-14a, the Fourth Circuit didn't apply that standard. Instead, when confronted with Evans and Richmond's argument that "Congress and the Sentencing Commission already had the nature of the conduct in mind when establishing Guidelines ranges for § 924(c) convictions," the Fourth Circuit found the sentences substantively reasonable because "the district court's decision to vary upward was not based solely on a consideration of the nature of the underlying conduct," citing the "broad discretion" district courts possess in determining sentences. App. 14a. That finding applies procedural reasonableness review to a substantive reasonableness claim.

Whether a district court's decision to vary upward was unreasonable because the decision was based on one or several considerations is an argument about procedure, not substance.[3] Whether the district court came to an improper

[3] Evans and Richmond argued below that other circuits have framed an issue about whether a court gave too much weight to one factor as one of substantive reasonableness, not procedural reasonableness, but recognized that the Fourth Circuit reviews such claims for procedural reasonableness. *See* Brief of Appellant at 31, *Richmond*, 845 F. App'x 223 (No. 19-4895), ECF No. 22 (citing *United States v. Malone*, 503 F.3d 481, 484 (6th Cir. 2007); *United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009)). That is a close question, as"[t]he line between what is procedural and what is substance is famously fuzzy at the margins." *United States v. Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011); *see also Malone*, 503 F.3d at 484 (criticizing the use of substantive reasonableness to review such claims and noting that "consideration of an impermissible factor … more appropriately involves the procedural reasonableness prong [because] the challenge is more to the *process* by

conclusion about the weight those factors should receive is an argument about substance. *See United States v. Irey*, 612 F.3d 1160, 1193 (11th Cir. 2010) (*en banc*) ("[A] district court commits a clear error of judgment, abuses its discretion, when it considers the proper factors but balances them unreasonably."). The Fourth Circuit, consequently, answered the wrong question. The issue was not whether the district court weighed one or several factors but whether the weight the district court assigned those factors supported the sentences imposed.

By answering the wrong question, the Fourth Circuit failed to answer the correct one. The Fourth Circuit conducted no examination of the district court's reasoning for its sentence and did not review the § 3553(a) factors. The Fourth Circuit further failed to determine if this was a "mine-run" case or if the special circumstances of this case warranted an upward variance. *Kimbrough*, 552 U.S. at 109. These failures require correction.

C. The district court's explanation for its sentence was not substantively reasonable.

This Court is "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Since the Fourth Circuit failed to conduct substantive reasonableness review in its opinion below, the appropriate remedy is to remand this matter back to the Fourth Circuit to conduct the appropriate analysis in the first instance. Nevertheless, the district court's sentence cannot be maintained as substantively reasonable.

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which the district court arrived at the given sentence") (emphasis in original). Whether a district court actually considered one factor or several does not present a close question: such an issue is clearly procedural in nature, not substantive.

This is a "mine-run" case. *Kimbrough*, 552 U.S. at 109. Congress enacted the federal carjacking statute—§ 2119—in 1992 to criminalize "armed carjacking" where "two or three criminals approach a car waiting … and force the driver to turn over the keys at gunpoint." H.R. REP. NO. 102-851, at 15 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2381. That is precisely what Evans, Richmond, and Grant did in this case.[4] While not minimizing the emotional terror that their actions inflicted upon their victims nor any physical harm done to them, Evans, Richmond, and Grant's actions were not out of the ordinary for carjacking offenses. Consequently, "closer review" of the district court's decision is warranted. *Kimbrough*, 552 U.S. at 109.

Upon close examination, the district court's reasons for imposing sentences in excess of the Guidelines range cannot be sustained. The district court's primary focus was on § 3553(a)(1)'s requirement that the sentence reflect "the nature and circumstances of the offense." Hence, the district court reviewed the facts of the offenses at length on several occasions during the two sentencing hearings. *See* J.A. 128-129; 140; 155-160; 219-221; 247-251. The district court, however, did not distinguish any conduct on the part of Evans and Richmond that would take this case out of the "mine-run" of carjacking or firearms offenses such that a variance would be warranted. Instead, the district court just repeatedly emphasized the

[4] While neither Evans nor Richmond pleaded guilty to a carjacking offense, the fact that they possessed firearms in order to facilitate their carjackings makes the circumstances of the carjackings and the sentences for carjackings relevant. It would be unreasonable to suggest, for example, that an upward variance would not be warranted for a defendant who pleaded guilty to a single § 924(c) offense and thus faced a recommended five-year Guidelines sentence when that defendant used the firearm to commit a murder.

serious and violent nature of the offenses. *See*, *e.g.*, J.A. 262, lines 9-12 ("So that conduct is significant and had a role in my decision about what decision to make and what sentence to impose in this case. Very serious conduct by this defendant."). The serious and violent nature of carjackings and firearms are inherent in the statutory sentencing ranges set forth by Congress and the Guidelines ranges set forth by the Sentencing Commission for those offenses, though. Since the district court could not distinguish any factor that would elevate these offenses beyond the "mine-run" of carjacking and firearms offenses, the nature and circumstances of the offenses did not warrant an upward variance.

The district court's secondary focus was on "the history and characteristics of the defendant[s]." 18 U.S.C. § 3553(a)(1). In particular, the district court was concerned that "these defendants had all had contact with the state system and had spent some time incarcerated and then came out and committed very serious crimes, very serious crimes, violent crimes, while they were on parole." J.A. 256, lines 10-13. Once again, however, the district court failed to explain why this fact was so abnormal that a sentence in excess of the Guidelines was warranted. Regretfully, many defendants commit new criminal offenses while on some form of release from a prior sentence. For that reason, the Guidelines already account for whether a defendant was on state parole at the time that the defendant committed the offense of conviction. *See* U.S.S.G. § 4A1.1(d).[5] The Guidelines also account for

[5] According to the most recent statistics from the United States Sentencing Commission, 23.7% of all offenders received this enhancement. *See* United States Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing*

prior sentences in general and the length of time defendants spent incarcerated for those offenses before committing new federal offenses. *See* U.S.S.G. § 4A1.1(a)-(c). These considerations did not warrant an upward variance, as they were already reflected in the sentencing range established by the Sentencing Commission acting in the "exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109.

The remaining § 3553(a) considerations weigh in favor of within-Guidelines sentences for Evans and Richmond. With regard to the "need for the sentence imposed to reflect the seriousness of the offense[s], to promote respect for the law, and to provide just punishment for the offense[s]," *see* § 3553(a)(2)(A), seventeen-year sentences for violent carjacking and firearms offenses more than adequately satisfy those requirements. This is especially true given that § 2119(a) provides for a maximum sentence of fifteen years' imprisonment for carjacking unless serious bodily injury or death resulted. As for the "need for the sentence imposed to afford adequate deterrence to criminal conduct," *see* § 3553(a)(2)(B), the government below aptly explained that "a guideline sentence of 17 years does in fact provide specific deterrence" because of the length of time required before release and "that the length of time in prison in relation to deterrence is really going to be up to that individual defendant." J.A. 227, lines 1-7. Furthermore, the "need for the sentence

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Statistics at 76 (Table 23) (25th ed. 2021). The fact that nearly a full quarter of federal offenders committed an offense while still under a criminal justice sentence shows that this factor was also a "mine-run" consideration improperly elevated by the district judge. This is particularly true given that only 2.2% of sentences imposed in Fiscal Year 2020 were above the Guidelines range, either through an upward departure or an upward variance. *See id*. at 84 (Table 29).

imposed to protect the public from further crimes of the defendant," *see* § 3553(a)(2)(C), would also be satisfied by seventeen-year sentences, as the public would be protected for a significant period of time while Evans and Richmond were incarcerated. The district court did not explain why increased sentences were necessary to satisfy these requirements or why within-Guidelines sentences would be inadequate.

The "kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines," *see* § 3553(a)(4)(A), as well as policy statements promulgated by the Sentencing Commission, *see* § 3553(a)(5), clearly support Evans' and Richmond's requests for within-Guidelines sentences. So too does "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct," *see* § 3553(a)(6), as such sentences are embodied by the Guidelines which Evans and Richmond asked the district court to apply to them.

At bottom, the district court rejected the reasoned judgment of the Sentencing Commission, the arguments by Evans and Richmond, and the position of the government to impose above-Guidelines sentences on Evans and Richmond. The reasons proffered by the district court for its chosen sentences are not justifiable upon "close[] review." *Kimbrough*, 552 U.S. at 109. The sentences imposed by the district court, therefore, are not substantively reasonable.

D. Certiorari is warranted to provide clarity to the lower courts on how to review substantive reasonableness claims.

While this case generally involves "the misapplication of a properly stated rule of law," not ordinarily warranting this Court's review, *see* Sup. Ct. R. 10, this Court should grant certiorari due to the level of confusion arising in the lower courts on how to review sentences for substantive reasonableness, particularly in mine-run cases such as these. Since its decision in *Kimbrough*, this Court has not "elaborate[d] on what it meant by 'closer review.'" *United States v. Cavera*, 550 F.3d 180, 217 (2nd Cir. 2008) (Sotomayor, J., concurring in part and dissenting in part). Moreover, this Court "has left the specifics on how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear." *United States v. Evans*, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring in the judgment); *see also Irey*, 612 F.3d at 1259 (Tjoflat, J., specially concurring in part and dissenting in part) (collecting cases and noting that the Eleventh Circuit's decision "cements this circuit's answer to a question that continues to vex the nation's courts of appeals: after *Booker*, what does appellate review of sentences for substantive 'reasonableness' under an abuse of discretion standard mean?").

This Court should therefore grant certiorari to "decide the question *Kimbrough* left open" and develop a formal "framework for evaluating 'reasonableness.'" *Pepper v. United States*, 562 U.S. 476, 513 (2011) (Breyer, J., concurring in part and concurring in the judgment). As this case exemplifies, the circuit courts are lacking guidance from this Court on how to evaluate substantive

reasonableness, resulting in the Fourth Circuit applying a procedural reasonableness standard to evaluate a substantive reasonableness claim.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 23, 2021