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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

COLIN MICHAEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

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QUESTIONS PRESENTED

Should an appellate court automatically presume that a within- or below-guideline sentence is substantively reasonable when the underlying rationale for the presumption set forth in *Rita v. United States*, 551 U.S. 338 (2007)—that the district court and United States Sentencing Commission are in agreement as to the reasonableness of a sentence—does not exist in a particular case?

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Petitioner, Colin Michael, respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on September 13, 2021, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's opinion affirming the judgment of the district court is reported at *United States v. Michael*, 12 F.4th 858 (8th Cir. 2021), and is included

in the Appendix at page 1. A copy of the order denying rehearing is included in the Appendix at page 7.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 18 U.S.C. § 3231, because Mr. Michael was charged and convicted of an offense against the United States, i.e., possession of child pornography in violation of 18 U.S.C. § 2252(a)(4).

Mr. Michael appealed from the district court's sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291.

The Eighth Circuit denied rehearing on October 21, 2021. In accordance with Sup. Ct. R. 13.3, this petition is filed within ninety days of the date on which the Court of Appeals entered its order denying Mr. Michael's petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

STATUTE INVOLVED

The statutory provision involved in this case is 18 U.S.C. § 3553. Due to the length of the statute it is set forth in full in the Appendix at page 8, pursuant to Sup. Ct. R. 14.1(f).

STATEMENT OF THE CASE

Colin Michael has significant developmental delays due to autism spectrum disorder, or what use to be termed Asperger's syndrome (DCD 50, Sent. Tr. at 18). As a result, his psychosexual and psychological development are more in line with those of a 12- or 13-year-old boy (DCD 50, Sent. Tr. at 18). After law enforcement officers discovered that Mr. Michael had downloaded child pornography on his personal computer, they searched his residence, and Mr. Michael promptly confessed (DCD 10, Presentence Investigation Report ["PSR"] at ¶¶ 4-7). He sought help and started a sex offender treatment program (DCD 50, Sent. Tr. at 36). On May 12, 2016, he pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4), before the Honorable Dean Whipple, United States District Judge for the Western District of Missouri (DCD 2, Information at 1; DCD 10, PSR at ¶ 3; DCD 49. Plea Tr. at 1, 7).

On June 8, 2016, a pretrial services officer inspected Mr. Michael's home and discovered that Michael was reading a book called "Youthful Prey: Child Predators Who Kill" (DCD 10, PSR at ¶ 3). The officer informed Dr. Bascom Ratliff, the clinical director of the facility where Mr. Michael received sex offender treatment (DCD 50, Sent. Tr. at 35, 38). Dr. Ratliff reviewed the book, found it inappropriate, and discussed the issue with Mr. Michael (DCD 50, Sent. Tr. at 38).

Mr. Michael decided to have his father purchase and review any book he wanted to read to make sure it was suitable (DCD 50, Sent. Tr. at 21, 39).

The United States Probation Office prepared a presentence investigation report using the child pornography guideline, U.S.S.G. § 2G2.2, which the United States Sentencing Commission has found to be fundamentally flawed and has tried to amend for years (DCD 10, PSR at ¶¶ 16-17). United States Sentencing Commission, *Federal Sentencing of Child Pornography: Non-Production Offenses* at 2 (June 2021). With application of the base offense level enhancements typical to most child pornography possession cases—possessing over 600 images, possessing material involving a minor under age 12, possessing material depicting sadistic or masochistic conduct, using a computer—and an increase for passive distribution by a peer-to-peer network, Mr. Michael's offense level skyrocketed from 18 to 30 (DCD 10, PSR at ¶¶ 18-22, 30; DCD 50, Sent. Tr. at 9-10).[1] Even though Mr. Michael had no criminal history points and received an offense level reduction for acceptance of responsibility, his guideline range of 97 to 120 months' imprisonment was at the statutory maximum of 120 months' imprisonment (DCD

[1] The PSR calculated a total offense level of 33, but at sentencing the parties agreed Mr. Michael should receive the benefit of a recent change to U.S.S.G. § 2G2.2(b)(3)(B), which reduced Mr. Michael's total offense level from 33 to 30 (DCD 50, Sent. Tr. at 9-10).

10, PSR at ¶¶ 32-35; DCD 50, Sent. Tr. at 14).

At his sentencing hearing, the defense presented expert testimony from a psychiatrist, Dr. Steven Peterson, who evaluated Mr. Michael, and Dr. Ratliff, the clinical director of the sex offender treatment program where Mr. Michael had received treatment for 11 months (DCD 50, Sent. Tr. at 17, 35-36). Dr. Peterson testified that Mr. Michael has a significant developmental disorder, formerly called Asperger syndrome, which is now classified as autism spectrum disorder (DCD 50, Sent. Tr. at 18). Dr. Peterson explained that Mr. Michael's psychosexual and psychological development plateaued at approximately age 12 or 13 (DCD 50, Sent. Tr. at 18). Mr. Michael has some behaviors—collecting and compulsively rearranging items such as die cast cars and shot glasses—that are consistent with pre-adolescent or adolescent behavior (DCD 50, Sent. Tr. at 19). Like a preteen, Mr. Michael needed supervision from his parents (DCD 50, Sent. Tr. at 24).

Dr. Peterson noted that Mr. Michael was dependent on his parents to structure his day (DCD 50, Sent. Tr. at 19). Mr. Michael is naïve, does not read social cues well, and has concrete thinking (DCD 50, Sent. Tr. at 19). He suffers from anxiety and depression (DCD 50, Sent. Tr. at 20).

Dr. Peterson was aware that Mr. Michael had purchased the "Youthful Prey" book (DCD 50, Sent. Tr. at 21, 32). Mr. Michael told Dr. Peterson that he chose

the book because he was interested in true crime books and this particular book was in the true crime section of a bookstore (DCD 50, Sent. Tr. at 22). Dr. Peterson found it significant that Mr. Michael did not use the book to masturbate, nor did he replay stories from the book in his mind (DCD 50, Sent. Tr. at 22, 33). Dr. Peterson noted that Mr. Michael did not try to hide the book but left it on his couch where the pretrial services officer saw it (DCD 50, Sent. Tr. at 22-23). It was also significant that Mr. Michael acknowledged his poor judgment in selecting the book and that he decided to address the problem by not purchasing any books without his father's approval (DCD 50, Sent. Tr. at 21).

Dr. Ratliff testified that Mr. Michael had been in sex offender treatment for 11 months, participating in individual and group therapy (DCD 50, Sent. Tr. at 36). The program called for an additional 12 months of therapy to be followed by after care (DCD 50, Sent. Tr. at 37). Dr. Ratliff testified that Mr. Michael actively participated in his sex offender treatment program, completed all assignments, and kept a journal that he shared during group treatment (DCD 50, Sent. Tr. at 39).

Dr. Ratliff was aware of the "Youthful Prey" book that was found in Mr. Michael's home and discussed it with Mr. Michael (DCD 50, Sent. Tr. at 38-39). Dr. Ratliff said that he expected people who use pornography to have relapses (DCD 50, Sent. Tr. at 38). The treatment program Mr. Michael attended dealt with

relapses and addressed them as part of the individual's prevention planning (DCD 50, Sent. Tr. at 38).

Dr. Ratliff explained that use of child or adult pornography can become an "obsessive, addictive behavior" that a person does to self-medicate for loneliness, depression, anxiety, or traumatic stress (DCD 50, Sent. Tr. at 41). He explained that use of pornography is an addiction, and like all addictions, it can be treated (DCD 50, Sent. Tr. at 42-43). Dr. Ratliff testified that Mr. Michael recognized that his use of child pornography was a problem that he needed to work on and did not try to distort the problem or rely on a faulty belief system to minimize it (DCD 50, Sent. Tr. at 41, 45).

The government requested a sentence of 40 months' imprisonment, while the defense sought probation (DCD 50, Sent. Tr. at 15-16). Judge Whipple sentenced Mr. Michael to five years of probation, based, in part, on the expert testimony provided and on his belief that the child pornography guideline was unsound policy unsupported by empirical research that offered no meaningful distinction between the least and most culpable offenders (DCD 50, Sent. Tr. at 52-56; DCD 26, Judgment at 2-4).

Judge Whipple imposed special conditions of probation including the following terms: 1) no contact, excluding incidental contact, with persons under

age 18; 2) no possession of any pornography or erotic material, material that described sexually explicit conduct or violence toward children, or child pornography; 3) successful participation in a program of sex offender counseling; 4) successful participation in a program of polygraph testing; and 5) no possession or use of any computer or electronic device capable of accessing any on-line computer service (DCD 10, PSR at ¶ 69; DCD 50, Sent. Tr. at 52-55; DCD 26, Judgment at 2-5). The supervision terms did not prohibit the use of alcohol or require the disclosure of any sexual partner or relationship (DCD 10, PSR at ¶ 69; DCD 50, Sent. Tr. at 52-55).

On March 20, 2017, Mr. Michael's probation officer filed a violation report recommending modification of the conditions of supervision (DCD 27, Violation Report). According to the report, a polygraph examination revealed:

> An undisclosed adult sexual partner; hypersexual activity that included daily masturbation involving fantasies of young boys and girls between the ages of 10 to teenage; arousal to a television show involving sex crimes against children; masturbation to "R" rated movies; lots of incidental contact with children at the bowling alley where he worked and frequented; several trips to local adult porn stores (pulled in parking lot several times, but did not enter) and drinking alcohol to the point of intoxication a few times since starting supervision.

(DCD 27, Violation Report at 2).

Mr. Michael quit his job at the bowling alley and began looking for a job

that would not involve incidental contact with children (DCD 27, Violation Report at 2). The probation officer said, "Michael understands the serious nature of these violations and has taken steps to address them" (DCD 27, Violation Report at 2). The probation officer recommended two weekends of community service and a new condition of supervision prohibiting the possession or consumption of any alcoholic beverage (DCD 27, Violation Report at 2). Mr. Michael waived a hearing and the district court ordered community service and imposed the additional condition (DCD 27, Violation Report at 2; DCD 28, Order Modifying Conditions of Probation). Mr. Michael's sex offender treatment program was changed so that he could receive more intensive treatment (DCD 27, Violation Report at 2).

On September 5, 2017, Mr. Michael's probation officer filed a second violation report, alleging that Michael violated the terms of his probation by: 1) possessing material that was pornographic/erotic or described sexually explicit conduct or violence toward children, or was child pornography; 2) failing to successfully participate in a program of sex offender counseling; 3) possessing or using any computer or electronic device with access to any on-line service; and 4) not truthfully answering his probation officer's questions (DCD 33, Violation Report at 1-2).

After failing a polygraph test, Mr. Michael told his probation officer that he had used an old cell phone to access pornography, but then threw the phone away (DCD 33, Violation Report at 2). He said that he used a You Tube application on a television to access adult pornography and that he attempted to access child pornography (DCD 33, Violation Report at 2). He admitted that he searched for child pornography using terms such as "preteen," "yoga pants," "teen," and "teen models" (DCD 33, Violation Report at 2). Mr. Michael acknowledged suicidal thoughts stemming from a fear that he could not beat his addiction to pornography and was briefly hospitalized (DCD 33, Violation Report at 3).

The probation officer recommended that the court issue an arrest warrant, saying,

> Although Michael remains in sex offender treatment, he is not taking it seriously as evidenced by his continued viewing of adult pornography and most concerning, his attempts to locate child pornography. Michael clearly understands what is expected of him, yet he continues to use deception to access internet devices and search for adult and child pornography. Michael's continued attraction to children is concerning. He takes very little ownership and blames his behavior on the addiction. This type of thinking in combination with his recent mental state makes him a danger to the community. It remains clear that Michael is in need of a treatment program that is far more intensive than those offered in the community.

(DCD 33, Violation Report at 3).

On October 26, 2017, Mr. Michael appeared before the Honorable Roseann Ketchmark, United States District Judge (DCD 47, Revocation Tr. at 1). Mr. Michael stipulated to the four violations listed in the report (DCD 47, Revocation Tr. at 5). With respect to the first violation, however, he stipulated to the possession of pornographic or erotic material but did not stipulate to the possession of child pornography (DCD 47, Revocation Tr. at 5). Judge Ketchmark revoked Mr. Michael's probation and sentenced him to 96 months' imprisonment to be followed by supervised release for life (DCD 47, Revocation Tr. at 14-15; DCD 43, Judgment at 2-3). The court said the one-month downward variance was "based on the defendant's characteristics and his history, in particular his lack of criminal history before this offense" (DCD 47, Revocation Tr. at 16).

Mr. Michael appealed, and the United States Court of Appeals for the Eighth Circuit remanded for resentencing because the district court procedurally erred by not finding the grade of Mr. Michael's probation violation and not considering the appropriate Sentencing Guidelines' policy statements. *United States v. Michael*, 909 F.3d 990, 994 (8th Cir. 2018). The Eighth Circuit also found the sentence to be substantively unreasonable because the record did not demonstrate that the district court was familiar with the "extensive testimony at Michael's initial sentencing hearing about Asperger syndrome and how the illness affected

Michael's intellectual and social development, as well as the offense at issue in this case and the likelihood of there being lapses in judgment." *Id*. at 995. Also, there was no evidence in the record to support a remark made by the court asserting that Mr. Michael "knows in his heart he was viewing child pornography, just wasn't caught." *Id.*

Before the resentencing hearing both parties filed sentencing memoranda in support of their respective sentencing recommendations (DCD 57, Gov't. Sent. Memo.; DCD 63, Def't. Sent. Memo.). The bulk of the government's memorandum focused on the conduct set forth in the probation officer's violation reports summarized above (DCD 57, Gov't. Sent. Memo. at 10-12). The government requested a sentence of no less than 40 months' imprisonment to be followed by supervised release for life (DCD 57, Gov't. Sent. Memo. at 12).

Included with the government's sentencing memorandum was a letter by Dr. Tamara Lyn, the Psychology Services Branch Administrator for the Federal Bureau of Prisons (DCD 57, Gov't. Sent. Memo, Letter; DCD 69, Resentencing Tr. at 3). The letter stated that the Bureau of Prisons (BOP) could provide care and therapeutic programs for individuals like Mr. Michael, who have autism spectrum disorder (ASD) and a sex offense history (DCD 57, Letter at 1).

Dr. Lyn noted that upon entering BOP custody Mr. Michael had reported

"mild suicidal ideation" related to his "distress over his legal difficulties," but observed that he "demonstrated positive adjustment and has engaged in a number of treatment opportunities" (DCD 57, Letter at 2). The treatment opportunities included classes on Basic Cognitive Skills, Skills Training, Interpersonal Effectiveness Skills, Emotion Regulation, and Distress Tolerance (DCD 57, Letter at 3). Dr. Lyn noted that Mr. Michael had "an excellent record of attendance and participation in those groups" (DCD 57, Letter at 3). She noted that Mr. Michael took Zoloft for depression and anxiety as prescribed and reported good results, with no recent suicidal ideation (DCD 57, Letter at 3). Dr. Lyn also stated that there was a voluntary, moderate intensity program (Sex Offender Treatment Program – Nonresidential) for low to moderate risk sexual offenders, such as Mr. Michael, at certain BOP institutions (DCD 57, Letter at 4).

The defense's sentencing memorandum asked that the court continue Mr. Michael on probation or, if the court concluded that imprisonment was required, impose a sentence of no more than 24 months (DCD 63, Def't. Sent. Memo. at 2). The memorandum focused on the policy statements contained in Chapter 7 of the Guidelines Manual and the flawed nature of the child pornography guideline, U.S.S.G. § 2G2.2 (DCD 63, Def't. Sent. Memo. at 5-6, 14- 18).

The memorandum also focused on the statutory sentencing factors contained

in 18 U.S.C. § 3553, including Mr. Michael's unique history and characteristics in light of his autism spectrum disorder, the role autism plays in child pornography possession, the nature of Mr. Michael's criminal conduct, the lack of aggravating factors associated with his particular conduct, and the need for deterrence and to protect the public (DCD 63, Def't. Sent. Memo. at 6-25).

On remand, the district court disclosed that the probation officer had recommended a sentence of 60 months' imprisonment (DCD 69, Resentencing Tr. at 6). The prosecuting attorney recommended a sentence of no less than 40 months' imprisonment, which was consistent with its original sentencing recommendation. The district court imposed the same 96-month sentence (DCD 69, Resentencing Tr. at 43-44; DCD 65, Judgment at 2-3). One concern to the court was Michael's suicidal ideation and whether that was a risk factor:

> I was very concerned about his recent suicidal ideations and his feelings of helplessness, hopelessness, despair, and what type of risk factors that alone creates, either inside the prison or outside the prison. And with someone that is in such a state of anxiety or despair, is that an increased risk factor. And you say he has not had those at any other time, but you – someone just filed on behalf of Mr. Michael a request that the sentencing be done remotely because of suicide – suicidal –

(DCD 69, Resentencing Tr. at 20)

Defense counsel pointed out that the request to appear remotely, rather than

be physically present for the resentencing hearing, was not due to current suicidal ideation, but was due to Michael's *fear* that he *might* become suicidal again if he was transferred to Kansas City, Missouri for the hearing and was away from his support group and treatment program in the BOP (DCD 69, Resentencing Tr. at 20-21; DCD 56, Motion to Appear at Sentencing Remotely at p. 2). Counsel informed the court that when Michael was transferred for the hearing, he did not receive his antianxiety medication and there was a noticeable difference in his demeanor once he was able to take his medication ((DCD 69, Resentencing Tr. at 21). Counsel also explained that people with ASD fear change and to calm the anxiety they experience, they want to control their environment by engaging in ritualized behaviors (DCD 69, Resentencing Tr. at 21-22).

In imposing sentence, the court emphasized its concern with Michael's possession of the "Youthful Prey" book following his guilty plea (DCD 69, Resentencing Tr. at 35-37). The court pointed out that at the initial sentencing hearing Dr. Peterson testified that possession of the book was "a grievous judgmental error" and Dr. Ratliff had said that it was "a terrible book" that Michael should not have or use (DCD 69, Resentencing Tr. at 36). The court pointed out that after the issue about the book arose, Michael watched a television show about "child sexual predators" (DCD 69, Resentencing Tr. at 37). The court said the fact

that Michael may not appreciate how inappropriate it is for him to view that type of material was a significant concern (DCD 69, Resentencing Tr. at 37).

The court noted that after pleading guilty and while receiving treatment, Mr. Michael was not honest with his probation officer about his sexual partners, his fantasies regarding children, and driving to stores that sold pornography, but not going inside (DCD 69, Resentencing Tr. at 37). The court said that this behavior in combination with his use of alcohol to the point of intoxication posed a clear danger to the community (DCD 69, Resentencing Tr. at 37). The court then referred to Mr. Michael's use of a cell phone and a YouTube application in an attempt to access child pornography and noted that he again lied to his probation officer (DCD 69, Resentencing Tr. at 38).

The court stated that Mr. Michael's violations were "significant red flags" that posed "a grave risk to the community," because of "his sexual offender condition that continues to escalate historically, that doesn't appear to be curbed by treatment" (DCD 69, Resentencing Tr. at 39-40). The court concluded that someone with suicidal ideations and feelings of hopelessness and despair posed a risk to himself and to the community (DCD 69, Resentencing Tr. at 40). The court found that Mr. Michael's autism spectrum disorder and the "lapse of judgment" that "go along with the mental health treatment for that disorder" were "a recipe

for significant danger to the community" (DCD 69, Resentencing Tr. at 40).

The court referred to the probation officer's opinion that there were no community-based options that could "address the level of deception and addiction that Michael has demonstrated" (DCD 69, Resentencing Tr. at 40). The court said that Mr. Michael was "escalating to the point that he is again seeking out child pornography while participating in sex offender treatment" (DCD 69, Resentencing Tr. at 41).

Mr. Michael appealed, again challenging the substantive reasonableness of his sentence. This time the Eighth Circuit panel affirmed with one judge dissenting. *United States v. Michael*, 12 F.4th 858, 861 (8th Cir. 2021). The dissenting judge carefully examined each of the district court's reasons offered in support of its concern that Mr. Michael would reoffend, not by viewing child pornography, but by physical assaulting a child, and found them unsupported by the record. *Id*. at 862- 864.

The two-judge majority applied a presumption that a sentence within the 97 to 120 months' imprisonment range is substantively reasonable. *Id*. at 860. Without acknowledging that the presumption is rebuttable, the majority instead said that because the 96-month sentence was a downward variance, it was "nearly inconceivable" that the court abused its discretion by not further varying

downward. *Id*. Accusing the dissenting judge of isolating portions of evidence leading to the conclusion that the district court's sentence was unsupported by the record, the majority said the district court properly relied on Mr. Michael's television viewing, the *Youthful Prey* book, and his attempt to access child pornography to fashion its sentence. *Id*. at 861.

REASONS FOR GRANTING REVIEW

In *Rita v. United States*, this Court held that federal courts of appeals may apply a presumption of reasonableness to sentences imposed within a properly calculated Sentencing Guidelines range. 551 U.S. 338, 347 (2007). The circuit courts of appeals that apply a presumption of reasonableness to within-Guidelines range sentences do so automatically and on a wholesale basis without discerning on a case by case basis whether the rationale for the presumption exists in a particular case or whether it is warranted. *See*, *United States v. Go*, 517 F.3d 216, 218 (4th Cir. 2008) ("If the sentence is within the Guidelines range, we apply a presumption of reasonableness"); *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008) ("A discretionary sentence imposed within a properly calculated guidelines range is presumptively reasonable"); *United States v. Warman*, 578 F.3d 320, 351 (6th Cir. 2009) ("Sentences within a properly calculated Guidelines range are afforded a rebuttable presumption of

reasonableness"); *United States v. Anderson*, 580 F.3d 639, 651 (7th Cir. 2009) ("Where, as here, the district court imposes a below-guidelines sentence, it is presumed that the sentence is not unreasonably high"); *United States v. Wireman*, 849 F.3d 956, 964 (10th Cir. 2017) ("In our circuit, a within-Guidelines-range sentence … is entitled to a presumption of reasonableness"); *United States v. Parks*, 995 F.3d 241, 248 (D.C. Cir. 2021) ("By contrast, when a within-Guidelines sentence is challenged on appeal, this Court applies a presumption of reasonableness").

The presumption has permitted appellate review of federal sentences for substantive reasonableness to become perfunctory, and what was intended to be a genuinely rebuttable presumption has become a rubber stamp. *See e.g*., *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J. concurring) ("If substantive review of sentences actually exists other than in theory, it must be undertaken at least occasionally" and to do so was appropriate where pertinent guideline was fundamentally flawed); *More Than A Formality: The Case For Meaningful Substantive Review* 127 Harv. L. Rev. 951, 959 (January 2014).

Attempts to provide meaningful appellate review by carefully and thoroughly scrutinizing the record to ensure it supports a district court's sentencing decision, such as that done by the dissenting judge in Mr. Michael's case, are

summarily dismissed by reliance on the presumption of reasonableness and vague assurances that the district court relied only on permissible factors. *United States v. Michael*, 12 F.4th 858, 860-61 (8th Cir. 2021). So long as a below- or within-Guidelines-range sentence is imposed, the presumption of substantive reasonableness is applied both to mine-run cases with hypothetically "average" defendants and to cases unique because of their factual circumstances or because of the individual history and characteristics of their decidedly "non-average" defendants.

This Court should reject automatic application of a presumption of reasonableness for within- or below-Guidelines sentences for several reasons. First, in many instances the underlying rationale for the presumption—accord between the district court's sentencing decision and the Sentencing Commission's approximation of what a reasonable sentence would be—is absent. Second, because the Guidelines are a one way ratchet up, the presumption favors aggravating circumstances and conduct while ignoring mitigating circumstances and conduct. Third, meaningful appellate review is thwarted because application of the presumption permits appellate courts to rely on implicit findings and conclusions by treating a district court's silence as a functional rejection of the defendant's arguments in favor of a lower sentence.

ARGUMENT

A. The presumption of reasonableness for within- and below-Guidelines-range sentences permitted by *Rita v. United States* was premised on agreement between the district court's sentencing decision and the Sentencing Commission's approximation of what a reasonable sentence would be based on empirical data and research.

In *Rita v. United States*, this Court held that federal courts of appeals may apply a presumption of reasonableness to sentences imposed within a properly calculated Sentencing Guidelines range. 551 U.S. 338, 347 (2007). The Court said, "the presumption reflects the fact, that 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*. "That double determination significantly increases the likelihood that the sentence is a reasonable one." *Id*.

The Court described the Sentencing Commission's work as "ongoing," envisioning that the Commission would collect data, examine the sentencing decisions of district court judges and the courts of appeals that review them, and "revise the Guidelines accordingly." *Id*. at 350. The result should be Guidelines that embody the sentencing factors set forth in 18 U.S.C. § 3553(a), "both in

principle and in practice" and "reflect a rough approximation of sentences that might achieve 3553(a)'s objectives." *Id*.

The Court stressed, "An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general." *Id*. Rather than having an "independent legal effect," the presumption "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id*. at 350-51.

In many cases, however, a district court's sentencing decision is not in accord with the Sentencing Commission's determination of what a reasonable sentence would be in a mine-run case. Many Guidelines are not based on empirical data and research but on irrational policy or beliefs.[2] One example would be the disparate treatment of crack cocaine offenders and powder cocaine offenders in the Anti-Drug Abuse Act of 1986. *See*, *Kimbrough v. United States*,

[2] See, Barkow, Rachel, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*,133 Harv. L. Rev. 200, 230 () (discussing Sentencing Commission's research on career offenders and attempts to amend Guidelines); *United States v. Garcia-Jaquez*, 807 F.Supp.2d 1005, 1013-15 (D. Colo. 2011) (discussing illegal re-entry guideline and its lack of empirical support).

552 U.S. 85, 95-100 (2007) (explaining the Sentencing Commission's efforts to get Congressional approval for amendments to the Guidelines that would remedy the disparate treatment of crack versus powder cocaine offenders).

The disparate treatment of crack cocaine offenders and powder cocaine offenders has had a greater adverse impact on Black offenders. United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* at 135 (November 2004) ("Todays sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing").

In *Kimbrough*, this Court held that a district court may determine in a particular case that a within-Guidelines-range sentence is greater than necessary to achieve the statutory objectives of sentencing based on a policy disagreement with the Guidelines' treatment of an offense, even if the guideline in question originated in a policy determined by Congress. 552 U.S. 85, 110 (2007). The Court was not confronted with the issue raised here—whether a district court's below- or within-Guidelines-range sentence should be presumed reasonable by an appellate court if

the Sentencing Commission has rejected the guideline on which the range was calculated.

It is not enough that a district court may impose a variance when it disagrees with the Guidelines. This Court should go further and hold that an appellate presumption of reasonableness should not be applied when the Guidelines are not based on empirical data and research. Sentences based on Guidelines that create unfair disparities in the treatment of offenders or that fail to distinguish more culpable offenders from less culpable offenders should not be presumed reasonable. To the contrary, appellate courts should closely scrutinize such sentences.

B. The presumption of reasonableness for within- and below-Guidelines-range sentences permitted by *Rita v. United States* should not be applied in cases where the rationale for the presumption does not exist.

Mr. Michael was sentenced under a guideline that the Sentencing Commission has rigorously sought to amend. For years, beginning with its report to Congress in 2012, the Sentencing Commission has called for the child pornography sentencing scheme to be revised "to account for technological changes in offense conduct, emerging social science research about offender behavior, and variations in offender culpability and sexual dangerousness."

United States Sentencing Commission, *Federal Sentencing of Child Pornography: Non-Production Offenses* at 2 (June 2021). In 2021, the Commission issued a new report with updated data analyzing the three factors it had identified in its 2012 report as the recommended focus in federal sentencing of non-production child pornography offenders. *Id*. at 3.

Key findings of the Commission included: 1) the use of current technology means that most offenders possess thousands of images; 2) U.S.S.G. § 2G2.2 contains a series of enhancements that have not kept pace with technological advancement, with four of the six enhancements covering conduct so ubiquitous that they now apply in the vast majority of cases sentenced under that guideline; 3) because these enhancements apply in most cases, the average guideline minimum and average sentence have increased since 2005; 4) courts increasingly apply downward variances in response to the high guideline ranges; 5) U.S.S.G. § 2G2.2 does not adequately account for relevant aggravating facts, such as participation in online pornography communities and aggravating sexual conduct; 6) courts are considering these aggravating factors in imposing lengthier sentences; 7) sentencing disparities among non-production child pornography offenders are becoming more pervasive; and 8) when tracking offenders released from incarceration or placed on probation in 2019, 4.3 per cent of that group were

rearrested for a sex offense within three years and 8.1 per cent failed to register as sex offenders. *Id*. at 4-7.

Each of these factors speaks to the Sentencing Commission's view that § 2G2.2 is flawed in that it treats as aggravating, conduct typical of all non-production child pornography offenders and fails to target conduct that is, in fact, aggravating. Nonetheless, appellate courts apply a presumption of reasonableness when reviewing below- or within-Guidelines-range sentences for substantive reasonableness, even though the district judge's sentence does not reflect the Sentencing Commission's research and analysis of § 2G2.2. *See e.g*., *United States v. Mondragon-Santiago*, 564 F.3d 357, 366 (5th Cir. 2009) (presumption of reasonableness applies even though child pornography guideline is not empirically based); *United States v. Hall*, 632 F.3d 331, 338 (6th Cir. 2011) ("Under the presumption of reasonableness that we give to a district court's within-Guidelines sentence, we will not second-guess a district court's decision simply because the particular Guideline is not empirically-based") (cleaned up); *United States v. Schuster*, 706 F.3d 800, 808 (7th Cir. 2013) (rejecting argument that presumption of reasonableness should not apply in context of manufacturing child pornography); *United States v. Kiderlen*, 569 F.3d 358, 369 (8th Cir. 2009) (applying presumption of reasonableness in child pornography case because

judge's discretionary decision was in accord with Congress' view of appropriate application of § 3553(a) factors in a mine-run case); *United States v. Grigsby*, 749 F.3d 908, 909 (10th Cir. 2014) (applying presumption of reasonableness to within-Guidelines-range sentence in child pornography production case); *but see*, *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (in a jurisdiction that does not apply a presumption of reasonableness, appellate court reversed a within-Guidelines-range sentence as substantively unreasonable due to flawed child pornography guideline).

In his concurring opinion in *Rita*, Justice Stevens said that "*presumptively* reasonable does not mean *always* reasonable" and the presumption must be "genuinely rebuttable." *Rita*, 551 U.S. at 366 (emphasis in the original). In Mr. Michael's case, however, the Eighth Circuit not only applied the presumption, but, because Mr. Michael received a sentence one month below the low end of the Guidelines range, said it was "nearly inconceivable" that such a sentence would be substantively unreasonable. *Michael*, 12 F.4th at 860. That is the antithesis of a "genuinely rebuttable" presumption. The Eighth Circuit has applied this same approach to substantive reasonableness review in other cases. See, *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006) ("a sentence at the bottom of the advisory guideline range … is presumed reasonable; *only highly unusual*

circumstances will cause this court to conclude that the presumption has been rebutted") (emphasis added).

Other circuits also have required extraordinary circumstances to rebut the presumption, making it nearly impossible for defendants in those circuits to successfully challenge a within-Guidelines-range sentence for substantive unreasonableness. *See*, *United States v. Freeman*, 992 F.3d 268, 281-82 (4th Cir. 2021), rehearing en banc granted in 847 Fed. Appx. 186, 187 (4th Cir. 2021) (Quattlebaum, J., dissenting) (noting that Fourth Circuit, for the first time, was finding a within-Guidelines-range sentence substantively unreasonable and saying "other circuits have only rarely done so, and always in response to extraordinarily unusual circumstances").

Circuit courts are using the presumption of reasonableness to foreclose meaningful appellate review even in cases in which the rationale for the presumption does not exist. Writing two years after *Booker* was decided, a Tenth Circuit judge wrote that "the rebuttability of the presumption is more theoretical than real." *United States v. Pruitt*, 502 F.3d 1154, 1166-67 (2007) (McConnell, J. concurring) (voicing concerns of career offender applicability for a nonviolent drug offender sentenced to 292 months' imprisonment for selling 18.5 grams of methamphetamine saying it was "as close as a within-Guidelines sentence could

come to being substantively unreasonable"), cert. granted in *Pruitt v. United States*, 552 U.S. 1306 (2008), judgment reinstated on remand in *United States v. Pruitt*, 312 Fed. Appx. 100 (2008).

The rebuttability of the presumption remains more theoretical than real today, 17 years after *Booker* was decided. For the past five years, in cases where the original sentence was reversed or remanded, only two per cent or less were for substantive unreasonableness. See, United States Sentencing Commission, Source Book (Table 59) Fiscal Years 2016-2020; also see, Xiao Wang, *From the Bird's Eye: The Sixth Circuit's Efforts to Breathe Life into Substantive Reasonableness Review*, 33 Fed. Sent. Reporter 221, 221 (2021) (hereafter "*Bird's Eye*") (only about two hundred sentences reversed on appeal even though district courts have imposed roughly one million criminal sentences in the past fifteen years and only about two dozen of the reversals were for substantive unreasonableness).

In Mr. Michael's case, the presumption of reasonableness is especially inappropriate because institutional actors other than the Sentencing Commission also disagreed with the district court's sentencing decision. Mr. Michael's probation officer recommended a sentence of 60 months' imprisonment and the Assistant United States Attorney argued for a sentence of no less than 40 months' imprisonment (DCD 69, Resentencing Tr. at 6; DCD 57, Gov't. Sent. Memo. at

12). The presumption should not be applied in these circumstances.

C. The presumption ensures that aggravating circumstances are deemed reasonable while mitigating circumstance are not similarly affirmed.

Guidelines tend to act as a one-way ratchet applying enhancements for factors deemed aggravating to increase a defendant's offense level. Guidelines rarely provide for decreases to a defendant's offense level for mitigating factors. One former district court judge has written that the Guidelines trivialize or exclude from the sentencing calculus, issues like mental health and neuroscientific insights into addiction or childhood adversity. Nancy Gertner, *Apprendi/Booker and Anemic Appellate Review,* 99 N.C. L. Rev. 1369, 1372-73 (2021) (hereafter "Gertner").

The Guidelines declare, for example, that circumstances that might naturally be considered mitigating, such as a defendant's education and vocational skills, drug or alcohol dependence or abuse, employment record, family ties and responsibilities, socio-economic status, and lack of guidance as a youth and a disadvantaged upbringing, are not relevant or a reason for a downward departure. U.S.S.G. §§ 5H1.2, 5H1.4, 5H1.5, 5H1.6, 5H1.10, 5H1.12; *also see*, *Rita*, 551 U.S. at 364-65 (Stevens, J. concurring) ("The Commission has not developed any standards or recommendation that affect sentencing ranges for many individual

characteristics"). In this way, offense level enhancements for aggravating conduct are deemed reasonable but mitigating circumstances are not part of the Guidelines range calculation and, therefore, are not blessed with the presumption.

Given that the presumption is premised on the sentencing decision being consistent with the Sentencing Commission's view in a mine-run case, *Rita*, 551 U.S. at 351, if a presumption is to be applied at all, an appellate court should be required to consider whether the case under review truly is a mine-run case with an "average" defendant before presuming that a defendant's sentence is reasonable. If it is not a mine-run case or the defendant has unique characteristics or personal history, the presumption should not apply. Declaring that "following the Guidelines range trump[s] all other approaches" via the presumption of reasonableness discourages appellate analysis of whether the rationale for the presumption of reasonableness exists and whether the defendant and the circumstances of the offense are truly in the mine-run category. Gertner, at 1385-86.

D. The presumption of reasonableness discourages meaningful substantive review.

In *Rita*, this Court discussed the need for district courts to explain their sentencing decisions as required by 18 U.S.C. § 3553(c). *Rita*, 551 U.S. at 356-

359. The Court said that a public statement of the reasons for a sentencing decision furthers the public's trust in its judicial institutions. *Id*. at 356. "The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." *Id*. A within-Guidelines range sentence "will not necessarily require lengthy explanation." *Id*. "Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical." *Id*. at 357. Unless a party contests the Guidelines as reflecting unsound judgment or not treating certain defendant characteristics in the proper way, "the judge normally need say no more." *Id*.

Thus, applying the presumption of reasonableness short circuits meaningful review. *United States v. Wireman*, 849 F.3d 956, 968 (10th Cir. 2017) (McKay, J., concurring) (the presumption of reasonableness "lowers the bar for how much we will require a sentencing court to say" and should not be applied when there is no "double determination" by both the district court and the Sentencing Commission as to the soundness of a guideline). Because the district court is not required to articulate in any detail why a within- or below-Guidelines-range sentence is in its judgment appropriate, an appellate court is often left with no

articulated reasoning to review. The deferential abuse of discretion standard assumes that district courts "may have insights not conveyed by the record," but an appellate court need not be privy to them to conduct substantive review and affirm a sentence as reasonable. *Rita,* 551 U.S. at 362 (Stevens, J. concurring). If a district court merely listens to a defendant's arguments, appellate courts may treat the district court's imposition of a within-Guidelines-range sentence as "a functional rejection" of the defendant's arguments. *Wireman,* 849 F.3d at 963-64.

Several factors counsel against applying a presumption of reasonableness when reviewing Mr. Michael's slightly below-Guidelines-range sentence. First, Mr. Michael challenged the soundness of the nonproduction child pornography guideline in his sentencing memorandum before the district court and noted that fact in his brief before the Eighth Circuit. Neither the district court nor the Eighth Circuit commented on the soundness of the guideline. When a defendant challenges the soundness of a particular guideline, it is inappropriate to *automatically* apply a presumption of reasonableness based on the hypothetical, but absent, accord between a district court's below- or within-Guidelines-range sentence and the Commission's purported support of the guideline in question.

Second, Mr. Michael is not an "average" defendant, and the Guidelines do not account for his unique characteristics. His autism spectrum disorder has a

profound impact on his life. His psychosexual and psychological development plateaued at approximately age 12 or 13 (DCD 50, Sent. Tr. at 18). Mr. Michael has some behaviors that are consistent with pre-adolescent or adolescent behavior (DCD 50, Sent. Tr. at 19). Like a preteen, Mr. Michael needed supervision from his parents to structure his day (DCD 50, Sent. Tr. at 19, 24). Mr. Michael is naïve, does not read social cues well, and has concrete thinking (DCD 50, Sent. Tr. at 19). He also suffers from anxiety and depression (DCD 50, Sent. Tr. at 20).

Third, two district court judges imposed sentence on Mr. Michael. The first judge heard expert testimony regarding Mr. Michael's autism spectrum disorder, considered the flaws in the child pornography guideline, and sentenced Mr. Michael to probation, knowing full well of his purchase of the *Youthful Prey* book that factored into the second district court judge's imposition of a 96-month sentence. The second district court judge imposed a lengthy sentence despite Mr. Michael's autism spectrum disorder and the flawed guideline. The two judges had widely divergent views as to the soundness of the child pornography guideline and the impact of Mr. Michael's autism spectrum disorder on his sentence. Both decisions cannot be presumed reasonable.

Should deference only apply to the judge who last sentenced Mr. Michael? The second judge had more information gleaned from the probation revocation

proceedings but that should not negate the first judge's sentencing decision in its entirety. After all, the probation officer and Assistant United States Attorney possessed this same information and, perhaps, other "insights not conveyed by the record," yet recommended sentences far below the second district judge's 96-month sentence. The deference afforded courts should apply to these institutional actors as well. *Bird's Eye*, at 223.

E. The presumption of reasonableness deprived Mr. Michael of meaningful appellate review of the substantive reasonableness of his sentence.

The two-judge majority opinion affirming Mr. Michael's sentence was cursory and relied heavily on the presumption of reasonableness and the deference to the district court it believed was required. *Michael*, 12 F.4th at 860-61. The panel majority said that the district court was entitled to "give greater weight to the risk to the public arising from Michael's fascination with violence against children and his persistent attraction to child pornography" than his autism spectrum disorder. *Id*. The majority concluded that the district court's decision was supported by the facts because Mr. Michael read a book about violence towards children and watched a television show depicting crimes against children. *Id*. at 861.

The dissenting judge employed more rigorous analysis and examined the facts found and relied upon by the district court and questioned whether the record supported "the rationale given for the reimposed 96-month sentence." *Id*. The dissenting judge pointed out that deference to a district court's decision is not appropriate when the court places significant weight on facts unsupported by the record. *Id*. at 862. The dissenting judge did not, as the majority claimed, "isolate[] various evidence leading to the conclusion that the district court made unsupported findings." *Id*. at 861. The dissent looked at the factors the district court identified and carefully examined whether they supported the district court's conclusion that Mr. Michael was a danger to the community. *Id*. at 862-64.

The dissent did not isolate or "cherry pick" from these factors but addressed each of them and found no record support that these factors made Mr. Michael a danger to the community or, more specifically, likely to commit a contact sexual offense involving a child. *Michael*, 12 F.4th at 862-64. Substantive review requires more than a finding that it was permissible for the district court to consider these factors. *Id*. at 861 ("It was permissible for the court to consider this evidence when fashioning its sentence"). The facts must support more than mere speculation as to future dangerousness. The district court sentenced Mr. Michael based on his purported threat to children, thus the facts must establish that Mr.

Michael indeed poses a real threat to a child. The dissenting judge carefully and thoroughly explained why the record did not support the district court's sentence, engaging in the type of substantive review that should be required of courts of appeals, rather than relying on a baseless presumption of reasonableness.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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APPENDIX