

No. _____

In the Supreme Court of the United States

October Term, 2021

TANNER LANCE KING, *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

How does a court of appeals determine whether a defendant has rebutted the presumption of reasonableness when the defendant is challenging on appeal the substantive reasonableness of a within-Guidelines sentence.

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Petitioner Tanner Lance King 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 April 13, 2022.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. King*, No. 7-20-CR-00330-DC (W.D. Tex. June 10, 2021) (judgment)

- *United States v. King*, No. 21-50543 (5th Cir. April 13, 2022)
(unpublished opinion)

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. King*, No. 21-50543, unpub. op. (5th Cir. April 13, 2022), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 13, 2022. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

The text of 18 U.S.C. § 3553(a) is reproduced in Appendix B.

UNITED STATES SENTENCING GUIDELINE INVOLVED

The 2018 version of Sentencing Guideline §3E1.1 is attached to this petition as Appendix C.

STATEMENT

Tanner Lance King pleaded guilty to possessing 50 grams or more of methamphetamine with intent to distribute it. In the district court, King argued that he should receive a downward adjustment for acceptance of responsibility, under guideline §3E1.1. When the court denied his request, King argued that the resulting guidelines range, which was six years longer as a result of the denial, was greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a). The court sentenced King to 262 months' imprisonment, which was the top of the advisory guidelines range. On appeal, King argued that his sentence was substantively unreasonable. The Fifth Circuit affirmed the sentence, holding that King had not rebutted the presumption of reasonableness for the within-Guideline sentence. App. A at 3. The court of appeals stated, “[e]ven if we reasonably could conclude that a different sentence was proper ... we will not reweigh the § 3553(a) factors.” App. A at 3.

The offense. Officers with the Midland Police Department set up surveillance at King's residence and conducted a series of controlled buys of methamphetamine. When police stopped King for a traffic violation, a search of the car revealed approximately 35 grams of methamphetamine. King was taken to the police station.

At the police station, King admitted to possessing the methamphetamine in the car as well as selling methamphetamine from his residence. King also admitted that he used methamphetamine.

King pleads guilty. King was indicted, on November 18, 2020, for possessing 50 grams or more of methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 841(a) and (b)(1)(A). King waived arraignment, and the case was set for a docket call on December 22, 2020. King pleaded guilty at the next court setting, on January 6, 2021. King did not object to any of the magistrate's factual findings or the recommendation that the district court accept the guilty plea.

The presentence report. A probation officer prepared a presentence report. King was held responsible for a quantity of methamphetamine that resulted in a base offense level of 32. King's lengthy criminal record consisted primarily of offenses related to substance abuse and mental health issues.

King was raised in a household of substance abusers and, during his childhood, had three uncles die from substance abuse related deaths. He has their names—J.J., Danny, and Shan—tattooed on his right arm.

King was 11 years old when he first tried marijuana and 13 years old when he tried alcohol. By 17 years of age, he was convicted of possessing a misdemeanor quantity of marijuana. A couple years later, King was getting in trouble for possessing, for personal use, alprazolam (Xanax), hydrocodone, and clonazepam. When he was 20 years old, he was diagnosed with Bi-Polar Type II Disorder and depression and was put on prescription medication. When he was 24 years old, King stopped taking that medication—he doesn't know why he stopped.

Two years later, in 2018, King was arrested for his first and only prior offense involving distributing a controlled substance. He was sentenced to 10 years in Texas state prison but was released after serving only two. King's prior convictions resulted in a Criminal History Category VI, the highest level possible.

With a three-level downward adjustment for acceptance of responsibility, King's offense level was 29, and his guideline range was 151 to 188 months' imprisonment.

The revised presentence report. A few weeks later, the probation officer revised King's presentence report to remove the downward adjustment for acceptance of responsibility. The reason for denying King the acceptance-of-responsibility adjustment was that he twice had been found with "contraband" in the detention

center. The contraband consisted of tobacco smoking paraphernalia—cigarettes, as well as steel wool and razor blades used to light the cigarettes, and medications, including Tylenol and an antihistamine. The probation officer noted that King was under suicide watch at the local detention facility and had a history of suicide watch in his prior incarcerations.

Without the downward adjustment for acceptance of responsibility, King's guideline range was 210 to 262 months' imprisonment.

King's written objections. King filed written objections to the denial of the acceptance-of-responsibility downward adjustment. King argued that the denial ran contrary to the facts of the case and his timely guilty plea. King pointed out that, without the adjustment, the top-of-the-guideline range increased by more than six years—from 188 months to 262 months.

The detention facility disciplined King for these incidents by placing him in segregation for 15 days and taking away 10 days of commissary.

The sentence. The district court overruled King's objection and adopted the presentence report, with the guideline range of 210 to 262 months' imprisonment. King's counsel asked the court to consider a sentence below the guideline range. Counsel pointed to

King's addiction, mental health issues, and his willingness to particular in a drug treatment program. Counsel also cited the considerable amount of time King was facing in this case when none of the facility incidents had involved violence or anything illegal. The court sentenced King to 262 months' imprisonment, the top of the guideline range. As reasons for the sentence, the court mentioned King's addiction, his lengthy criminal record, and the issues at the detention facility.

The appeal. On appeal, King argued that the district court had procedurally erred by denying him the acceptance of responsibility adjustment. He also argued that, even if the Guidelines range was correctly calculated, his 262-month sentence was substantively unreasonable because the court had failed to adequately account for King's personal history and characteristics—in particular his substance abuse and mental health problems—and it was greater than necessary to reflect the seriousness of his methamphetamine offense and for adequate deterrence. The court of appeals affirmed based on the presumption of reasonableness for within-Guidelines sentences.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to provide guidance to the lower courts on substantive reasonableness review of within-Guidelines sentences.

Tanner King asks this Court to grant certiorari to provide guidance to lower courts on how to determine whether a within-Guidelines sentence is substantively unreasonable. This Court has held that courts of appeals may, but are not required to, apply a presumption of reasonableness to within-Guideline sentences. *Gall v. United States*, 552 U.S. 38, 51 (2007); *Rita v. United States*, 551 U.S. 338, 347 (2007). The presumption is a rebuttable one, however. *Id.*

Many courts of appeals, including the Fifth Circuit, apply a presumption of reasonableness to within-Guidelines sentences. But, as one Fifth Court judge has commented, there is little guidance on “meaningful judicial standards” for determining the substantive reasonableness of within-Guidelines sentences. *United States v. Neba*, 901 F.3d 260, 266–68 (5th Cir. 2018) (Jones, J., concurring). This Court should provide that guidance.

A. Courts of appeals may apply an appellate presumption of reasonableness for within-Guidelines sentences.

This Court has held that an appellate presumption of reasonableness may be applied to a within-Guidelines sentence. *Rita*, 551

U.S. at 347. Sentencing courts, even post-*Booker*,¹ must treat the Guidelines as “the starting point and the initial benchmark” when imposing a sentence. *Gall*, 552 U.S. at 49. In *Rita*, the Court concluded that the alignment of the trial court’s decision with the Sentencing Commission’s assessment of the proper sentencing range supported a presumption of reasonableness. 551 U.S. at 347.

That is so because the Commission bases “its determinations on empirical data and national experience.” *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). However, this Court has recognized that not all guidelines account for past practice and experience, and the Court has suggested that no presumption should apply to these guidelines. *Kimbrough*, 552 U.S. at 109–10. Yet the Fifth Circuit will continue to apply the presumption of reasonableness whether the guidelines are “[e]mpirically based or not.” *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) (noting disagreement with Second Circuit in approach regarding consideration of empirical basis of child pornography guideline).

¹ *United States v. Booker*, 543 U.S. 220 (2005).

The appellate courts play an important role in reviewing sentences, even those that are within the Guidelines range. In reviewing the reasonableness of a sentence, appellate courts examine whether the sentence failed to account for a factor that should have received significant weight, gave significant weight to an irrelevant or improper factor, or represented a clear error of judgment in balancing the sentencing factors. *See United States v. Nikanova*, 480 F.3d 371, 376 (5th Cir. 2007); *United States v. Lyons*, 450 F.3d 834, 835–36 (8th Cir. 2006).

Many courts of appeals apply the presumption, while some do not. The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. circuits apply a presumption of reasonableness. *See, e.g.*, *United States v. Handerhan*, 739 F.3d 114, 119–20 (3d Cir. 2010); *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Brogdon*, 503 F.3d 555, 559 (6th Cir. 2007); *United States v. Liddell*, 543 F.3d 877, 885 (7th Cir. 2008); *United States v. Robinson*, 516 F.3d 716, 717 (8th Cir. 2008); *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006). The First, Second, Ninth, and Eleventh circuits do not apply the presumption. *See, e.g.*, *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006); *United States v.*

Fernandez, 443 F.3d 19, 27 (2d Cir. 2006); *United States v. Carty*, 520 F.3d 984, 994 (9th Cir. 2008); *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005).

“The difference appears more linguistic than practical.” *Carty*, 520 F.3d at 993–94. Indeed, those circuits that have not adopted a presumption of reasonableness still hold that a within-Guidelines sentence is “probab[ly] … reasonable” or “expect[ed] … to be reasonable.” *United States v. Kleinman*, 880 F.3d 1020, 1040 (9th Cir. 2017); *United States v. Foster*, 878 F.3d 1297, 1309 (11th Cir. 2018). The appellate courts have held that a defendant can rebut the presumption “only by showing that the sentence does not comport with the factors outlines in 18 U.S.C. § 3553(a).” *United States v. Solomon*, 892 F.3d 278 (7th Cir. 2018).

But the Sentencing Commission is charged with writing Guidelines that comply with the § 3553(a) factors. *Rita*, 551 U.S. at 347–48. And this Court has held that when a district court selects a sentence recommended by the Guidelines that decision is “fully consistent with the Commission’s judgment.” *Id.* at 350. This leaves the question: if a district court sentences a defendant within the Guidelines, and the presumption of reasonableness applies, what then is the appellate court to review and how?

Indeed, it seems little review is done. Some appellate courts have held that, if a sentence falls within the Guidelines range, “little explanation is required” of the district court and the appellate court will assume the sentence is reasonable. *See Mares*, 402 F.3d at 519. Perfunctory opinions upholding within-Guideline sentences are legion. These decisions also deprive the district courts of guidance. The presumption thus can hide problematic Guidelines and unreasonable within-Guidelines sentences. The practical effect of the presumption of reasonableness is to restrict appellate review.

While on the D.C. Circuit Court of Appeals, Justice Kavanaugh noted that the presumption of reasonableness means that “a within-Guidelines sentence will almost never be reversed on appeal as substantively unreasonable.” *United States v. Gardellini*, 545 F.3d 1089, 1090 (D.C. Cir. 2008). An appellate court judge noted that this Court’s precedent “makes the substantive reasonableness of a sentence nearly unassailable on appeal and renders the role of this court in that regard somewhat akin to a rubbery stamp in all but the rarest cases.” *United States v. Johnson*, 916 F.3d 701, 704 (8th Cir. 2019) (Grasz, J., concurring). Judge Jones of the Fifth Circuit has requested guidance from this Court for “meaningful judicial standards” in determining the substantive

reasonableness of with-Guidelines sentences subject to the presumption of reasonableness. *Neba*, 901 F.3d at 266–68 (Jones, J., concurring).

B. King’s case is an appropriate vehicle to address this important issue.

This case provides this Court with a clear opportunity to provide the courts of appeals with meaningful guidance. There is a strong argument that King’s 262-month sentence is substantively unreasonable. The 262-month sentence was a result of King’s losing a three-level reduction for acceptance of responsibility. U.S.S.G. §3E1.1. King lost acceptance of responsibility because he twice violated detention facility rules by possessing tobacco-smoking paraphernalia and over-the-counter medication. The detention facility punished King for these incidents by placing him in segregation for 15 days and taking away 10 days of commissary. The district court sentenced King to more than six additional years in federal prison for these same incidents.

The 262-month sentence is unreasonable. King’s Guideline sentence was driven by the drug type and quantity and his criminal history. Had King’s drug offense involved cocaine instead of methamphetamine, the loss of acceptance of responsibility would

have resulted in an additional 16 months in prison.² But the conduct resulting in the loss of acceptance would have been the same. And that conduct was no more egregious because King's underlying offense involved methamphetamine instead of some other drug. Additionally, King had strong arguments—his childhood, his mental-health issues, and his substance-abuse problems—mitigating against imposing the 262-month sentence.

Because the 262-month sentence was a within-Guideline sentence, however, the court of appeals did not review for substantive reasonableness. Instead, it simply applied the presumption of reasonableness. Had the court of appeals reviewed Marquez's sentence for reasonableness, rather than with a presumption of reasonableness, the result would have been different. This Court needs to provide more guidance to the federal courts of appeals on how to review a within-Guideline sentence for substantive reasonableness.

² 174.946 grams of cocaine would have been a base offense level of 16. U.S.S.G. §2D1.1(c)(12). Without a reduction for acceptance of responsibility, King's criminal history category VI would result in a Guidelines range of 46 to 57 months' imprisonment. U.S.S.G. Ch.5, Pt.A (sentencing table). With the acceptance-reduction, the Guidelines range would be 33 to 41 months. *Id.* The difference between the top of the ranges is 16 months.

CONCLUSION

FOR THESE REASONS, King asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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