No._____

IN THE SUPREME COURT OF THE UNITED STATES

JESUS JAVIER CRUZ-HERNANDEZ, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether the Court should clarify how a defendant who challenges the substantive reasonableness of a within-Guidelines sentence may rebut an appellate presumption of reasonableness of the type recognized in *Rita v. United States,* 551 U.S. 338 (2007).

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Jesus Cruz Hernandez 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 June 23, 2022.

PARTIES TO THE PROCEEDING

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

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 23, 2022. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3553(a)(1) of Title 18 of the U.S. Code provides in pertinent part that "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."

STATEMENT

Petitioner Jesus Cruz pleaded guilty to conspiring to transport undocumented immigrants, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I), (B)(i).[1] After that plea, a probation officer prepared a presentence report for the district court's use at sentencing. The officer recommended a base offense level of 12 for Cruz. *See* U.S.S.G. §2L1.1(a)(3). The officer recommended that the offense level be increased by six levels because the offense involved 29 immigrants in two trips and the guidelines required

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

an adjustment when an offense involved between 25 and 99 undocumented immigrants. *See* U.S.S.G. §2L1.1(b)(2)(B). The officer recommended a further increase of four levels because two of the immigrants Cruz transported were minors, *see* U.S.S.G. §2L1.1(b)(4), and yet another increase of two levels because the officer believed that Cruz had created a substantial risk of serious injury by transporting 20 immigrants in a van, *see* U.S.S.G. §2L1.1(b)(6). Finally, the officer recommended a decrease of three levels because Cruz had accepted responsibility for his offense. *See* U.S.S.G. §3E1.1.

These adjustments created a recommended total offense level of 21. Cruz had no prior convictions and so was placed in criminal history category I. That criminal history category, along with an offense level of 21, yielded an advisory sentencing guidelines range of 37 to 46 months imprisonment.

Cruz objected in writing to the recommended increase for the number of immigrants, arguing that his offense involved only the 19 immigrants he was arrested transporting on May 7, 2021. He also objected that he had not placed the immigrants at a substantial risk of injury by transporting all of them in a van.

Cruz renewed his objections at sentencing. The district court overruled them. The court then adopted the findings and calculation of the presentence report. After hearing allocution, the court sentenced Cruz at the top of the advisory guideline range to 46 months' imprisonment.

Cruz appealed. He argued that the 46-month sentence was greater than necessary to achieve the sentencing purposes set out by 18 U.S.C. § 3353(a) and was therefore unreasonable. Cruz pointed out that the guidelines overstated the seriousness of his offense by imposing upon him the same offense-level increase as it did on a person who had transported 70 more immigrants. He also argued that his steady work history, the lack of any facts suggesting he posed a danger to anyone, and the fact that he had never been to prison before all showed that the top-of-the-guideline sentence of 46 months was too high and that a bottom-of-the-guideline sentence of 37 months would have been the appropriate, necessary, sufficient, and reasonable sentence.

The Fifth Circuit applies a presumption that sentences within a properly calculated guidelines range are reasonable. *See* Appendix at 1-2 (citing *United States v. Jenkins,* 712 F.3d 209, 214 (5th Cir. 2013)). The court of appeals did not engage with the points Cruz raised regarding his sentence, it simply declared that he had not rebutted the presumption of reasonableness and affirmed the 46-month sentence. Appendix at 2.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD PROVIDE GUIDANCE ON THE STANDARDS GOVERNING THE PRESUMPTION APPLICABLE TO WITHIN-GUIDELINES SENTENCES.

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In *United States v. Booker,* the Court held that the mandatory sentencing guidelines scheme enacted by Congress violated the Sixth Amendment. 543 U.S. 220, 234-44 (2005). The Court remedied the constitutional infirmity by excising two portions of the statutes that implemented the mandatory guideline system. The two excised portions were 18 U.S.C. § 3553(b)(1), which required a district court to sentence within the guidelines-derived range and 18 U.S.C. § 3742(e), which set standards of review for all sentences appealed, including those for which no guidelines existed. *Booker*, 543 U.S. at 259. To fill the gap left by the excision of §3742(e), the Court held that, going forward, sentences would be reviewed for reasonableness. 543 U.S. at 260-63.

After *Booker,* the Court held that courts of appeals may, but are not required to, apply a presumption of reasonableness to within-guidelines sentences. *Gall v. United States*, 552 U.S. 38, 51 (2007); *Rita v. United States*, 551 U.S. 338, 347 (2007). The presumption the Court permitted was "not binding[,]" and did not "reflect strong judicial deference[.]" *Rita,* 551 U.S. at 347.

Many courts of appeals, including the Fifth Circuit, chose to apply a presumption of reasonableness to within-guidelines sentences. As time passed, the presumption set, becoming much more a binding conclusion that a within-guidelines sentence is reasonable than a mode of analysis to determine reasonableness. In part, this is

because, as Judge Edith Jones has commented, "meaningful judicial standards for determining the substantive reasonableness of within-Guidelines sentences" have not been articulated. *United States v. Neba*, 901 F.3d 260, 266–68 (5th Cir. 2018) (Jones, J., concurring). Without those standards, the courts of appeals have struggled to analyze within-guidelines sentences. This Court should grant certiorari to provide guidance to the court of appeals as to how to measure the substantive reasonableness of a within-guidelines sentence.

A. The *Rita* presumption has effectively become a binding presumption because of the lack of an articulated method for measuring the reasonableness of a within-guidelines sentence.

Sentencing courts, post-*Booker*, must treat the range calculated under the U.S. Sentencing Guidelines as "the starting point and the initial benchmark" when imposing a sentence. *Gall*, 552 U.S. at 49; *see also Peugh v. United States,* 569 U.S. 530, 541-42 (2013); *Molina-Martinez v. United States,* 578 U.S. 189, 198-99 (2016). While the guidelines-derived range provides the starting point, the sentencing court's obligation is not to impose a guideline sentence, but to impose a sentence that is sufficient but not greater than necessary to achieve the sentencing goals set out in 18 U.S.C. § 3553. *Kimbrough v. United States,* 552 U.S. 85, 101 (2007).

In *Rita*, the Court decided that a non-binding presumption of reasonableness could be applied to within-guideline sentences because the Sentencing Commission in promulgating the guidelines had been guided by "'its determinations on empirical data and national experience.'" *Kimbrough*, 552 U.S. at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). This accord between

the supposedly empirical guidelines and the selection of a sentence by the district court would be sufficient, the Court wrote, to allow a non-binding presumption to fairly govern appellate review if a court of appeals chose to impose the presumption. *Rita,* 551 U.S. at 347.

Since *Rita,* three factors have resulted in the presumption *Rita* envisioned being difficult to apply in practice. The first factor was that the guidelines were not as empirical as they seemed. Three years after *Rita, Kimbrough* recognized that not all guidelines accounted for past practice and experience, and intimated that no presumption should apply to these guidelines. *Kimbrough*, 552 U.S. at 109–10. Despite the Court's cautionary signal, the Fifth Circuit went on to expand the use of the presumption. It held that it would apply a within-guidelines presumption of reasonableness whether a guideline was "[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). Miller went beyond what *Rita* authorized. The problem, however, was not simply acknowledged unempirical guidelines. Even the "empiricism" that *Rita* cited relied on past averages and practices, and as such often found itself at odds with the specific circumstances of a particular defendant's case. Those mismatches highlighted the need for a reviewing court to ensure that the purposes of § 3553(a), not the guidelines, remained the actual measure of the reasonableness of a sentence.

The second factor was that, in the many courts of appeals that chose to apply it, the presumption went from "non-binding in theory [to] nearly ironclad in fact." *Neba,*

901 F.3d at 267 (Jones, J., concurring).[2] Ironclad was in no way an exaggeration, as Judge Jones demonstrated: "Cases in which any court has vacated sentences for 'substantive unreasonableness' are few and far between. The Sentencing Commission reported that only one case was reversed or remanded for a "[g]eneral reasonableness challenge" in *any* circuit in 2017. United States Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics S-149." *Neba,* 901 F.3d at 267 (emphasis original).

This result had been foreseen by then-Judge Kavanaugh in 2008. He cautioned that a 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). Judge Grasz observed that the hardening of the presumption "makes the substantive reasonableness of a sentence nearly unassailable on appeal and renders the role of this court in that regard

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[2] 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); see also *United States v. Foster*, 878 F.3d 1297, 1309 (11th Cir. 2018).

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).

The third factor behind the change in, and difficulties of, the presumption, is that the standards for application of the presumption were never articulated fully. The courts of appeals have struggled to understand their role in ensuring compliance with the sufficient-but-not-greater-than-necessary command of § 3553(a). The presumption began as a guide, but it has become an results-determining invariable rule. That this has happened runs contrary to what *Rita* envisioned and contrary to the enforcement of the parsimony principle. *Cf. Rita, 551 U.S. at 347*; *Kimbrough,* 552 U.S. at 101. And it has happened because the courts of appeals that have adopted the presumption are unsure of what to do with it. As Judge Jones wrote "On what basis may appellate courts that apply the presumption find an abuse of discretion for sentences that, while within the Guidelines, still embody punishment far outside of the mean for crimes of the same general sort?" *Neba,* 901 F.3d at 267. The Court should grant certiorari to provide the needed guidance.

B. Cruz's case is a good vehicle through which to address the issue.

Cruz's case presents a good vehicle to allow the Court to provide the necessary guidance about the presumption. This is so because his case both shows how the presumption is displacing review and shows how defendants are bringing substantial, if largely unheard, arguments under § 3553(a)'s parsimony principle that are worthy of serious review.

The analysis of the court of appeals in this case was cursory. The court of appeals stated that the presumption applied and that Cruz had not rebutted the presumption. Appendix at 2. It did not engage with the arguments Cruz had raised as to why and how the guidelines overstated the seriousness of his offense or why and how the district court had misweighed the § 3553 sentencing factors. The court of appeals failed to engage even though Cruz had made several interwoven arguments why the 46-month sentence the district court had imposed was greater than necessary in the light of the § 3553(a) factors. *See* Brief and Reply Brief of Appellant, Fifth Circuit Docket No. 21-51152.

Cruz argued that the sentence was greater than was needed to deter him from reoffending. *Cf.* 18 U.S.C. § 3553(a)(2)(B). He pointed out that he had never been convicted before. He had never been sent to jail. He had been on release after his arrest in this case. He had appeared for all his court dates. He had quickly admitted his wrongdoing and had waived his *Miranda* rights[3] to give a full account of his actions. All these facts showed that a lengthy imprisonment sentence was not necessary to deter him and to set him on the right course. To impose a sentence at the top of the guideline range, 46 months, for a first, non-violent conviction was more time than was necessary to send Cruz a message that he needed to avoid further criminal conduct. Cruz also argued that a 46-month sentence was greater than necessary because

[3] *Miranda v. Arizona,* 384 U.S. 436 (1966).

nothing in the record suggested that he posed any danger to the public. *Cf.* 18 U.S.C. § 3553(a)(2)(C) (sentence should account for need to protect public).

Additionally, Cruz argued both that a 46-month sentence was not necessary to reflect the seriousness of the offense, *cf.* 18 U.S.C. § 3553(a)(2)(A), and that the guidelines recommendation for a six-level upward adjustment for the 29 immigrants showed the lack of reasonableness of the guidelines range. That six-level adjustment resulted in a 50% increase from the base offense level of 12. That substantial increase overstated the seriousness of the offense. Cruz had been involved in two trips in which immigrants were transported. The first trip involved 10 immigrants; the second trip involved 19.

The total of 29 undocumented immigrants put Cruz just over the threshold of the six-level, 50% increase. Though his offense conduct just crossed the 25-to-99 threshold, he received the exact same increase that a person who had smuggled 99 immigrants received. This illustrates how the guidelines generalities and averages undermine its supposed empiricism. A 70-person disparity is significant in real life; in the supposedly empirical guidelines 29 is the same as 99, a result that is unreasonable. Because that is obviously so, Cruz argued that a low-end sentence of 37 months would reflect that Cruz's offense was serious–it involved more immigrants than some offenses–but would also acknowledge the obvious fact that Cruz's offense was not nearly as serious as those of many offenders who smuggled many more immigrants, yet it fell according to the "empiricism" of the guidelines within the same guideline range.

The court of appeals engaged with none of these arguments, let alone their cumulative effect on the reasonableness of the sentence. Instead, invoking the ironclad presumption that has evolved, the court of appeals simply affirmed without considering the specifics or reasonableness of the sentence in this case. Nor did it consider the parsimony principle that is to guide sentencing and its review. In its failure to engage and its fallback onto a presumption that has ossified into inattention, the court of appeals demonstrated in Cruz's case the pressing need for guidance from the Court about how within-guideline sentences are to be evaluated.

Conclusion

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

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: July 25, 2022.