No._____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALVARADO-RIOS, 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 defendant who challenges the substantive reasonableness of a within-Guidelines sentence rebut an appellate presumption of reasonableness of the type recognized in *Rita v. United States,* 551 U.S. 338 (2007).

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David Alvarado Rios 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 December 21, 2022.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

The following cases are related to this case.

United States v. Ryan, U.S. District Court for the Western District of Texas, Number 4:21 CR 00997-DC-1, May 3, 2022.

United States v. Ryan, U.S. Court of Appeals for the Fifth Circuit, Number 22-50330, pending.

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The unpublished opinion of the court of appeals is appended to this petition.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 December 21, 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 David Alvarado pleaded guilty to transporting undocumented immigrants, in violation of 8 U.S.C. § 1324.[1] Alvarado testified in the trial of his

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

girlfriend, codefendant, and drive of the vehicle transporting the immigrants, Francesca Jo Ryan. She was found guilty.

A probation officer prepared and revised a presentence report calculating the advisory U.S. sentencing guidelines range that applied to Alvarado's case. The probation officer recommended a base offense level of 12, under guidelines §2L1.1(a)(3). Three additional levels were assessed under guidelines §2L1.2(b)(2)(A) because six undocumented immigrants had been transported in the vehicle. The probation recommended another four levels because one of the immigrants was 17 years old, see U.S.S.G. §2L1.2(b)(4), and increased by two more levels because the truck bed in which some immigrants rode created a substantial risk of injury, see U.S.S.G. §2L1.2(b)(6).

The probation officer also assessed Alvarado a two-level increase for obstructing justice because his testimony at Ryan's trial, when it was compared to statements he had given about her at the time of his arrest, appeared to minimize her role in the offense. U.S.S.G. §3C1.1. Finally, the officer recommended that Alvarado receive a three-level downward adjustment because he had fully accepted responsibility for his offense. U.S.S.G. §3E1.1. The probation officer determined that Alvarado had a criminal history category of II, and that the imprisonment range under the advisory guidelines was 37 to 46 months' imprisonment.

At sentencing, the district court expressed doubt about the acceptance adjustment. Both defense counsel and the prosecutor urged the court to grant the

adjustment. Defense counsel pointed out that the guidelines provided that a defendant could receive both an obstruction adjustment and an acceptance adjustment. He argued that this was an appropriate case for both adjustments because Alvarado had quickly and consistently acknowledged his guilt, including at his girlfriend's trial. Thus, there was no question that he had accepted responsibility for the offense he had committed. The prosecutor stated that awarding both the acceptance and obstruction adjustments would be warranted because it would reward Alvarado for his good conduct in pleading guilty quickly and in testifying for the government and penalize him for his bad conduct in minimizing Ryan's role. The district court was unpersuaded. It declined to make the acceptance adjustment.

The district court found that the advisory guidelines range should be 46 to 57 months' imprisonment. It sentenced Alvarado at the top of that range to 57 months' imprisonment.

Alvarado appealed. He challenged both the district court's denial of an acceptance adjustment and the substantive reasonableness of the 57-month sentence. The Fifth Circuit affirmed the sentence. In turning aside Alvarado's reasonableness challenge, the court of appeals applied a presumption that sentences within a properly calculated guidelines range are reasonable. *See* Appendix at 2-3 (citing *United States v. Rashad,* 687 F.3d 637, 644 (5th Cir. 2012)). The court of appeals did not engage with the points Alvarado raised regarding his sentence, it simply declared that he had not rebutted the presumption of reasonableness and affirmed the 57-month sentence. Appendix at 2-3.

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-dictated 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 the courts of appeals may, but are not required to, apply a presumption of reasonableness to within-guidelines sentences. *Rita v. United States*, 551 U.S. 338, 347 (2007); *Gall v. United States*, 552 U.S. 38, 51 (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 courts 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 those 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 regarding consideration of lack 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 parsimony principle of § 3553(a), not the impersonal and general averages of 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 later observed that the

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[2] The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia 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).

hardening of the presumption "makes the substantive reasonableness of a sentence nearly unassailable on appeal and renders the role of [the appellate] 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).

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 insuperable, results-determining rule. That this has happened runs contrary to what *Rita* envisioned and contrary to the purpose 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, except to use it to affirm in essentially every case. 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. Alvarado's case is a good vehicle for addressing the issue.

Alvarado's case presents a good vehicle through which Court can 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 arguments under § 3553(a)'s parsimony principle that are worthy of serious review and that go unaddressed as a routine matter.

The analysis of the court of appeals in this case was cursory. The court of appeals stated that the presumption applied and that Alvarado had not rebutted the presumption. Appendix at 2-3. It did not engage with the arguments Alvarado 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 Alvarado had made several interwoven arguments why the 57-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. 22-50247.

Alvarado argued that the sentence was greater than was needed to achieve the goals of § 3553(a), linking the facts of his case to those goals. He contended the 57-month sentence was not needed to deter him from reoffending. *Cf.* 18 U.S.C. § 3553(a)(2)(B). Alvarado had never before been involved in alien-transporting and he committed this offense because it was a way to bring his brother to the United States. That unique motivation and the fact that Alvarado's only prior conviction was a misdemeanor DWI offense in 2014, showed that Alvarado did not need a lengthy sentence to deter him from reoffending. In fact, Alvarado had never been to prison before, though he served a short time in jail for his DWI offense. To impose a prison sentence at the top of the guideline range, 57 months, in such circumstances was more punishment than was necessary to send a message to Alvarado that he needed to avoid

further criminal conduct. The court of appeals saw only the presumption of reasonableness. Appendix A.

Alvarado also argued that the sentence was too great because nothing in the record suggested that he posed any danger to the public or to any individual person. *Cf.* 18 U.S.C. § 3553(a)(2)(C) (sentence should account for need to protect public). His offense was non-violent and so was his history. He also contended that the reason for his offense, helping his brother, mitigated the seriousness of the offense. *See* 18 U.S.C. § 3553(a)(2)(A). Relatedly, he argued that the guidelines failed to account for the positive aspects of Alvarado's life history. *See* 18 U.S.C. § 3553(a)(1). They took no notice of the fact that Alvarado had found himself making his own way in United States at age 15, or that he had found regular, difficult work as a roofer during his time here before being returned to Mexico, where he worked in construction. The guidelines ignored that Alvarado had been on release after his arrest in this case and had appeared for all his court dates and that 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.

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

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

considering the specifics of the case or the reasonableness of the 57-month sentence. The court did not engage with the parsimony principle that is the overriding principle that guides sentencing and review of sentence. *Kimbrough,* 552 U.S. at 101. The court's failure to engage and its fallback onto a presumption that has ossified into inattention demonstrates 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
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DATED: February 1, 2023.