No. _____

In the Supreme Court of the United States

JACOB PATRICK KRAFFT, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH 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 the substantive reasonableness of a within-Guidelines sentence?

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Petitioner Jacob Patrick Krafft asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Tenth Circuit on March 7, 2023.

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. Krafft*, No. 4:21-cr-00120-CVE-1 (N.D. Okla. March 29, 2022) (judgment)

- *United States v. Krafft*, No. 22-5023 (10th Cir. Mar. 7, 2023) (unpublished opinion)

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Krafft*, No. 22-5023 (10th Cir. Mar. 7, 2023), 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 Tenth Circuit were entered on March 7, 2023. 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 2021 version of Sentencing Guidelines §2A1.2 is attached to this petition as Appendix C.

STATEMENT

1. On the night of October 21, 2016, Jacob Patrick Krafft, a member of the Cherokee tribe, was beaten and threatened by his father, EK, at their home in Indian Country in Broken Arrow, Oklahoma. Fearing for his life, Mr. Krafft shot his father in the leg with his hunting rifle. Mr. Krafft did not intend to kill EK, but he was aware of the serious risk of bodily injury to which he subjected him. Mr. Krafft called 9-1-1, but his father died by the time the medics arrived. Mr. Krafft was convicted of second-degree murder in Indian Country, in violation of 18 U.S.C. §§ 1111, 1151, and 1153. There was no dispute that Mr. Krafft's behavior in the offense was "largely, if not exclusively due to mental illness" in the context of a credibly threatening situation and his history of familial abuse, but the district court denied his request for a downward variance and sentenced him to 210 months' imprisonment, the bottom of the Guidelines range. On appeal, Mr. Krafft argued that his sentence was substantively unreasonable. The Tenth Circuit affirmed.

2. Mr. Krafft bears many physical and emotional scars of being born into a broken, abusive home. His father, EK, was violent and volatile, the kind of man who shot the dog when it did not mind him. But animals were not the only victims of EK's ire. He had a

long history of significant physical and emotional abuse against Mr. Krafft and Mr. Krafft's mother and sister.

Mr. Krafft has long suffered from untreated, serious mental illnesses stemming from the significant childhood abuse he sustained at the hands of his father and an uncle who sexually assaulted him. He has been diagnosed with multiple mental illnesses, including post-traumatic stress disorder and unspecified bipolar disorder. Objective testing also suggests problems with depression, anxiety, social anxiety, substance abuse, suicidal ideation, and low psychosocial functioning. Prior to Mr. Krafft's current incarceration, his mental illnesses and conditions went largely untreated.

Mr. Krafft's abuse of alcohol and other drugs—given to him by his parents—started at age 13. He was raised more as their "drinking buddy" than a son. Not surprisingly, he became addicted, consuming alcohol daily, progressing to a pint of liquor per day since age 18. Outside of the home Mr. Krafft was sober and a kind, thoughtful, and dependable friend and employee.

3. In the months leading up to Mr. Krafft's offense, EK had been increasingly abusive to Mr. Krafft, regularly threatening to throw him out of the house and shoot Mr. Krafft's beloved dog. On the night of October 21, 2016, Mr. Krafft and EK crossed paths at

the house, and they began to fight. EK yelled degrading names at Mr. Krafft, ridiculing him and repeatedly calling him a coward—a cutting taunt EK had hurled at Mr. Krafft since childhood. At some point, EK walked over to Mr. Krafft, who was lying on the couch, and removed a knife from Mr. Krafft's belt, turned it on himself, and challenged Mr. Krafft to stab EK with it while calling him a coward and weakling.

Mr. Krafft returned to his room and closed the door. His father continued to taunt and debase him. EK again threatened to shoot Mr. Krafft's dog. Then he threatened to stick a handgun into Mr. Krafft's rectum and "blow [his] fucking brains out." Mr. Krafft was terrified. He loaded his hunting rifle and fired a single round into his father's hip to disable him. Mr. Krafft then called for medical assistance. The single bullet, however, had severed EK's femoral artery, and he died of blood loss.

4. Mr. Krafft was originally prosecuted in state court for murder in the second degree and was sentenced to 25 years' custody. But on July 9, 2020, the Court issued its decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Nine months after *McGirt* and nearly five years into Mr. Krafft's state sentence, Oklahoma dismissed the case in accordance with *McGirt*.

5. On March 25, 2021, Mr. Krafft was indicted for unlawfully killing EK with malice aforethought, based on the same conduct that gave rise to the state case, in violation of 18 U.S.C. §§ 1111, 1151, and 1153. He pleaded guilty.

6. A probation officer prepared the presentence report using the 2021 Guidelines Manual. Under guideline §2A1.2, Mr. Krafft's base offense level was 38, and he received a three-point reduction for acceptance of responsibility. *See* U.S.S.G. §3E1.1(a). The officer assessed five criminal history points based a violation of a protective order (2006); domestic assault and battery (2007); various driving violations (2011); and domestic assault and battery (2012). The longest term of imprisonment he served prior to the instant offense was six months. Those five points placed Mr. Krafft in criminal history category III, which combined with his total offense level 35 to yield a Guidelines range of 210 to 262 months' imprisonment.

7. Mr. Krafft submitted a sentencing memorandum requesting a downward variance. In support, he attached a psychological evaluation that concluded his untreated mental illnesses substantially contributed to his offense. He also highlighted that, outside of his abusive home environment and after receiving treatment, he had demonstrated his capacity for rehabilitation. Mr. Krafft renewed

his request at the sentencing hearing, arguing for a sentence in the range of 70 to 97 months. The Government disagreed based on Mr. Krafft's criminal history and a characterization that he lacked remorse.

The district court denied Mr. Krafft's motion for a downward variance, finding that "no factors are present to an extent that separate[ ] this defendant from the mine run of similarly situated defendants or warrant[ ] a downward variance." The court sentenced him to 210 months' imprisonment, the bottom of the Guidelines range.

8. On appeal, Mr. Krafft argued that his 210-month sentence was substantively unreasonable. He noted that, while the court applies a presumption of reasonableness to within-Guidelines sentences, he could rebut that presumption because his mental illnesses "largely if not exclusively" contributed to the offense and he has demonstrated a capacity for reform. The Tenth Circuit affirmed, holding that the district court did not abuse its discretion. Pet. 3a.

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.

Mr. Krafft asks the Court to grant certiorari to provide guidance to lower courts on how to determine whether a within-Guidelines sentence is substantively unreasonable. The 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. *Rita,* 551 at 347–48.

Many courts of appeals, including the Tenth Circuit, apply a presumption of reasonableness to within-Guidelines sentences. But there is little guidance on meaningful judicial standards for determining the substantive reasonableness of within-Guidelines sentences and when the presumption is rebutted. The Court should provide that guidance.

A. Courts of appeals may apply an appellate presumption of reasonableness for within-Guidelines sentences but lack meaningful standards for when this presumption is rebutted.

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*, 552 U.S. at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). However, the 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 Tenth Circuit continues to apply the presumption of reasonableness "even if the Guideline at issue arguably contains serious flaws or otherwise lacks an empirical basis." *United States v. Sandoval*, 959 F.3d 1243, 1246 (10th Cir. 2020) (cleaned up).

The appellate courts play an important role in reviewing sentences, even those sentences that are within the Guidelines range.

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

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. Craig,* 808 F.3d 1249, 1262 (10th Cir. 2015); *United States v. Nikonova*, 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). These courts have held that a defendant can rebut the presumption "only by showing that the sentence does not comport with the factors outlined in 18 U.S.C. § 3553(a)." *See, e.g., United States v. Solomon*, 892 F.3d 278 (7th Cir. 2018).

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).

But "[t]he 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 Sentencing Commission is charged with writing Guidelines that comply with the Section 3553(a) factors. *Rita*, 551 U.S. at 347–48. And the 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 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-Guidelines 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 similarly 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. *United States v. Neba*, 901 F.3d 260, 266–68 (5th Cir. 2018) (Jones, J., concurring).

B. Mr. Krafft's case is an appropriate vehicle to address this important issue.

This case provides the Court with a clear opportunity to provide the courts of appeals with meaningful guidance. There is a strong argument, supported by evidence, that Mr. Krafft's 210-month sentence is substantively unreasonable. Although second-degree murder is a serious violation of the law, Congress designated no mandatory minimum. *See* 18 U.S.C. § 1111(b). Thus, the statutorily designated range of punishment, zero to life, allows for a wide variety of sentences depending on the specific information in each case. Yet the guideline for this offense, §2A1.2, dictates a base offense level of 38 for *all* offenders, without any further consideration of specific offense characteristics. Guideline §2A1.2 does not account for conduct fueled by untreated mental illnesses and committed in the context of credible threats by an abusive parent.

Criminal history, then, becomes the sole distinguishing factor among defendants and the resulting Guidelines range. But unlike other defendants, Mr. Krafft's criminal history was tied exclusively to his long-untreated mental illnesses and substance abuse,

as well as his abusive homelife. His prior convictions were old and short sentences were imposed. In the unique context of this case, a mine-run sentence of 210 months neither promotes respect for the law nor provides just punishment.

A defendant's "mental illness" can "qualify as a compelling justification that may support a significant downward variance from the Guidelines range." *United States v. Robinson*, 778 F.3d 515, 523 (6th Cir. 2015). This is partly because mental illness is relevant not only to the history and characteristics of the defendant under § 3553(a)(1), but to other statutory sentencing factors, such as just punishment and deterrence. *See* § 3553(a)(2)(A), (B).

It was undisputed that Mr. Krafft suffers from several serious mental health issues, including post-traumatic stress disorder, bipolar disorder, substance abuse, and mild neurocognitive disorder due to traumatic brain injury. A psychologist concluded that Mr. Krafft's mental illnesses "largely if not exclusively" contributed to him committing the offense, especially in the context of the threats and history of abuse by EK, which was unrebutted. As the D.C. Circuit has noted, "two of the primary rationales for punishing an individual by incarceration—desert and deterrence—lose some of their relevance when applied to those with reduced mental capacity." *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir.

1993). Defendants whose crimes are driven by mental illness do not "deserve as much punishment as those who act maliciously or for gain." *Id*. In these circumstances, deterrence makes little sense "because legal sanctions are less effective with persons suffering from mental abnormalities." *Id*. This is especially true where, as here, the defendant's mental illnesses and substance abuse—which are inextricably linked—contributed to his reaction to his father's abusive provocations.

The mitigating evidence Mr. Krafft presented at sentencing ought to have rebutted a presumption of reasonableness. Yet, without any meaningful standards from the Court that guide how the presumption of reasonableness is rebutted, the Tenth Circuit resorted to rubber-stamping Mr. Krafft's sentencing in a cursory opinion. The Court needs to provide guidance to the courts of appeals on how to review a within-Guidelines sentence for substantive reasonableness.

CONCLUSION

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

Respectfully submitted.

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