No._____

IN THE SUPREME COURT OF THE UNITED STATES

JEREMY RANDALL EZELL, PETITIONER

V.

UNITED STATES OF AMERICA

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

PHILIP J. LYNCH
Law Offices of Phil Lynch
17503 La Cantera Parkway
Suite 104-623
San Antonio, Texas
(210) 378-3114
LawOfficesofPhilLynch@satx.rr.com

Counsel of Record for Petitioner

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).

.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

U.S. Sentencing Guidelines

Rule

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JEREMY RANDALL EZELL, PETITIONER

V.

UNITED STATES OF AMERICA

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

Jeremy Ezell 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 May 24, 2023.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

United States v. Ezell, U.S. District Court for the Western District of Texas, Number 7:22 CR 00068-DC-1, Judgment entered October 21, 2022.

United States v. Ezell, U.S. Court of Appeals for the Fifth Circuit, Number 22-50946, Judgment entered May 24, 2023.

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The unpublished opinion of the court of appeals is appended to this petition.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 May 24, 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 Jeremy Ezell pleaded guilty to a methamphetamine distribution offense and a methamphetamine conspiracy offense, in violation of 21 U.S.C. § 841(a), (b)(1)(A) and § 846.[1] After that plea, a probation officer prepared, and then revised, a presentence report for the district court's use at sentencing. The officer recommended

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

a base offense level of 32 for Ezell. *See* U.S.S.G. §2D1.1(c)(4). The officer recommended that the offense level be increased by two levels because a firearm had been possessed during the offense, U.S.S.G. §2D1.1(b)(1), and decreased by three levels because Ezell had accepted responsibility for his offense, U.S.S.G. §3E1.1.

These adjustments created a recommended total offense level of 31.After reviewing Ezell's criminal history, the probation officer determined that he had a criminal history category of V. That criminal history category, along with an offense level of 31, yielded an advisory sentencing guidelines range of 168 to 210 months imprisonment.

The district court adopted the guidelines calculations in the presentence report. Defense counsel asked for a sentence in the middle of that range, 180 months' imprisonment. Counsel pointed to Ezell's extremely difficult childhood, his military service, his struggles with substance abuse, and the remoteness of one of the convictions included in the criminal history scoring. The district court sentenced Ezell to 210 months' imprisonment, the top of the guideline range.

Ezell appealed, contending that the 210-month sentence was greater than necessary to achieve the sentencing purposes set out by 18 U.S.C. § 3353(a) and was therefore unreasonable. Ezell argued that the sentence overstated the sentence necessary for the seriousness of his offense and that the district court and the guidelines had failed to give weight to his history and circumstances, which counseled a lesser sentence.

The Fifth Circuit applies a presumption that sentences within a properly calculated guidelines range are reasonable. *See* Appendix at 2 (citing *United States v. Campos-Maldonado,* 531 F.3d 337-38 (5th Cir. 2008)). The court of appeals found that Ezell had not rebutted the presumption of reasonableness and affirmed the 210-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.

.

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-guidelines 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 concrete 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). 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 guidelines 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-guidelines 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 being difficult to apply in practice. The first factor was that the guidelines were recognized to be less empirical than *Rita* proclaimed them. Just six months 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. He had 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

---

[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, and the most significant one, behind the difficulties the presumption has caused 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 a result-dictating rule. That this has happened runs contrary to what *Rita* envisioned and it conflicts with § 3553's command that the parsimony principle is the most important sentencing factor in each individual case. *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 an answer to that question.

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

Ezell's case presents the Court with a good vehicle 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 essentially unheard and unaddressed, 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 stated that the presumption applied and affirmed Ezell's sentence. Appendix at 2. It did not engage with the arguments Ezell had raised as to why and how the guidelines overstated the seriousness of his offense or why and how the district court had failed to weigh the § 3553 sentencing factors. The court of appeals failed to engage even though Ezell had made several interwoven arguments why the 210-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. 22-50946.

Ezell argued that the sentence was greater than was needed to deter him from reoffending. *Cf.* 18 U.S.C. § 3553(a)(2)(B). Ezell's longest prior prison term served was three-and-a-half years in prison, so 17 and 1/2 years overshot the sentence necessary to deter him from reoffending. *Cf.* 18 U.S.C. § 3553(a)(2)(B). In his allocution, Ezell took responsibility for his actions and promised that he would make the most of the greater chance at straightening out his life that a shorter sentence would provide. These facts showed that such a lengthy imprisonment sentence was not necessary to deter him and to set him on the right course. Ezell also argued that a 210-month sentence was greater than necessary because it overstated the seriousness of his offense. *Cf.* 18 U.S.C. § 3553(a)(2)(A). He pointed out that the amount of drugs for which he was held responsible fell in the lower middle of the guidelines range, and thus counseled that a reasonable sentence was near the lower mid-point of the range.

Additionally, Ezell argued that the guidelines and the district court had failed to account in any way for his history and circumstances, factors whose consideration

Congress has specifically required. 18 U.S.C. § 3553(a)(1). Ezell had a very difficult childhood. He rallied and served in the military for a time; he then worked construction. But the struggle with substance abuse that had begun in the midst of his difficult and unguided childhood, derailed him more than once. These personal and historical circumstances made a sentence less 210 months imposed the one that was "sufficient but not greater than necessary." 18 U.S.C. § 3553(a)(1).

The court of appeals did not engage with any of these arguments, let alone their cumulative effect on the reasonableness of the sentence. Instead, invoking the all-but-ironclad presumption that has been cast since *Rita,* 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 Ezell'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: June 16, 2023.