No._____

IN THE SUPREME COURT OF THE UNITED STATES

KYLE VAUGHN, 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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No._____

IN THE SUPREME COURT OF THE UNITED STATES

JEREMY RANDALL VAUGHN, PETITIONER

V.

UNITED STATES OF AMERICA

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

Kyle Vaughn 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 July 25, 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. Vaughn, U.S. District Court for the Western District of Texas, Number 7:22 CR 00061-DC-3, Judgment entered August 16, 2022.

United States v. Vaughn, U.S. Court of Appeals for the Fifth Circuit, Number 22-50749, Judgment entered July 25, 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The unpublished opinion of the court of appeals is appended to this petition.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 July 25, 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 Kyle Vaughn pleaded guilty to a methamphetamine conspiracy offense and a firearm offense. *See* 18 U.S.C. § 924(c); 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 a base

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

offense level of 38 for Vaughn. *See* U.S.S.G. §2D1.1(c)(1). The officer recommended that the offense level be decreased by three levels because Vaughn had accepted responsibility for his offense, U.S.S.G. §3E1.1.

These adjustments created a recommended total offense level of 35. After reviewing Vaughn's criminal history, the probation officer determined that he had a criminal history category of III. That criminal history category, along with an offense level of 35, yielded an advisory sentencing guidelines range of 210 to 262 months' imprisonment on the methamphetamine offense. The firearm offense carried a mandatory 60-month consecutive term.

The district court adopted the guidelines calculations in the presentence report. Vaughn asked the district court to impose a total sentence of 270 months, a 210-month sentence at the bottom of the guidelines-suggested range for the methamphetamine offense, plus the mandatory 60 months' imprisonment on the firearm charge. Defense counsel pointed to Vaughn's extremely difficult childhood and facts that showed Vaughn was less culpable than his codefendant, who had been sentenced to 300 months. The district court sentenced Vaughn to 300 months' imprisonment, 240 months on the methamphetamine count and the statutorily mandated 60 months on the firearm count. The sentence was a within-guidelines sentence.

Vaughn appealed, contending that the 300-month sentence was greater than necessary to achieve the sentencing purposes set out by 18 U.S.C. § 3353(a)(2) and

was therefore unreasonable. Vaughn argued that the sentence overstated the sentence necessary to reflect the seriousness of his offense, that the sentence was greater than necessary to deter him from future offenses, and that the district court and the guidelines had failed to give weight to his history and circumstances, *see* 18 U.S.C. § 3353(a)(1), 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. Neba,* 901 F.3d 260, 262 (5th Cir. 2018)). The court of appeals found that Vaughn 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 HOW TO DETERMINE THE SUBSTANTIVE REASONABLENESS OF 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-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 were to be reviewed for reasonableness. 543 U.S. at 260-63.

The Court in decisions after *Booker* held that it was permissible for courts of appeals 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 permissible presumption was not to be binding and was not to "reflect strong judicial deference" to within-guidelines sentences. *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 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 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). The guidelines are not the measure of § 3553(a) reasonableness.

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 relative accord

between the supposedly empirical guidelines and the selection of a sentence by the district court allowed a non-binding presumption to fairly govern appellate review if a court of appeals chose to implement such a 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 Court recognized that the guidelines are less empirical than *Rita* assumed. 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 goals 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

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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, and the most significant one, behind the difficulties the presumption has caused is that the standards for its application have never been 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. Vaughn's case is a good vehicle through which to address the issue.

Vaughn'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 arguments worthy of serious review under § 3553(a)'s parsimony principle and receiving cursory attention.

The analysis of the court of appeals in this case was quite brief. The court stated that the presumption applied and affirmed Vaughn's sentence. Appendix at 2. It did not engage with the arguments Vaughn 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 Vaughn had made several related arguments as to why the 300-month sentence was greater than necessary in the light of the § 3553(a) factors. *See* Brief and Reply Brief of Appellant, Fifth Circuit Docket No. 22-50749.

Vaughn argued that the sentence was greater than was needed to deter him from reoffending. *Cf.* 18 U.S.C. § 3553(a)(2)(B); *cf. Pepper v. United States,* 562 U.S. 476 (2011). In addition to arguing that a sentence of 210 months' imprisonment on the methamphetamine count would have been sufficient to deter him, he also argued that his allocution showed he had already been deterred. Vaughn took responsibility for his actions. He told the district court that he had "messed up," acknowledged that he had "messed up before," and most importantly confessed that "it's the first time that I've ever felt it." He rued that his error would take him out of the life of his new-born daughter. The combination of the substantiality of a 270-month total sentence with Vaughn's recognition of his mistakes made the 300-month sentence greater than necessary to achieve the sentencing goal of deterrence. *Cf. Kimbrough,* 552 U.S. at 101; *Dean,* 581 U.S. at 67 (parsimony principle must be considered when mandatory consecutive sentence is present in case).

Vaughn also argued that a 210-month sentence on the methamphetamine count would have reflected sufficiently the seriousness of Vaughn's offense, 18 U.S.C. § 3553(a)(2)(A). It would have done so because 17 and 1/2 years is a substantial sentence and because, since it was a conspiracy case, Vaughn was held liable for drug amounts other than those he was personally involved with–a large amount of methamphetamine was found in coconspirator's home. His codefendant, who the district court had sentenced to 300 months, also had numerous guns in his house. Vaughn argued that the district court had acted unreasonably in treating him the same as his codefendant. 18 U.S.C. § 3553(a)(6).

Finally, Vaughn 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). Vaughn had an extremely difficult childhood. He was physically abused by his father, by his mother, and by his mother's companion. Both his father and mother were drug abusers. Neglected and untended, young Vaughn ended up mentored by an older teen who was a drug dealer. This history of pain and trauma, and Vaughn's current steps toward healing and redemption, should have been accounted for by the district court. It was not.

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 affirmed without considering the specific arguments or the reasonableness of the sentence in the light of those arguments. Neither did the court of appeals

acknowledge the parsimony principle. In its failure to engage and its fallback onto a presumption that has ossified into inattention, the court of appeals demonstrated in Vaughn'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: August 21, 2023.