No._____

IN THE SUPREME COURT OF THE UNITED STATES

ABNER RENATO NATARENO-CALDERON, 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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Abner Natareno-Calderon 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 January 26, 2024.

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. Natareno-Calderon, U.S. District Court for the Western District of Texas, Number 2:22 CR 02708-ILL-1, Judgment entered July 21, 2023.

United States v. Natareno-Calderon, U.S. Court of Appeals for the Fifth Circuit, Number 23-50551, Judgment entered January 26, 2024.

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The unpublished opinion of the court of appeals is appended to this petition.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 January 26, 2024. 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 Abner Natareno pleaded guilty to illegally reentering the United States, a violation of 8 U.S.C. § 1326.[1] Following Natareno's guilty plea, a probation officer prepared a presentence report. The officer found Natareno's base offense level under sentencing guidelines §2L1.2(a) to be 8. The officer recommended an eight-level

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

increase to the base offense level because Natareno, before his first removal from the United States, had sustained a felony conviction for theft. *See* §2L1.2(b)(2)(B). Natareno was accorded a three-level decrease in his offense level because he had accepted responsibility for his offense. *See* U.S.S.G. §3E1.1(a)-(b).

These calculations resulted in a recommended total offense level of 13. An offense level of 13, with Natareno's criminal history category of IV, yielded a guidelines sentence range of 24 to 30 months' imprisonment. U.S.S.G. Ch.5, Pt.A. (sentencing table).

Natareno did not object to the guidelines calculations in the presentence report. Instead, his counsel requested that Natareno be given a variance sentence of time served. As reason for that sentence, counsel stated that Natareno was having significant kidney problems and was being evaluated for a transplant; his cousin in Guatemala had been identified as the likeliest donor candidate. Natareno showed the court a catheter of the type he was using because of his kidney problem. The district court declined to impose the requested time-served sentence. It sentenced Natareno to 24 months' imprisonment.

Natareno appealed, contending that the 24-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. Natareno argued that the sentence overstated the sentence necessary for sufficient punishment because a lesser sentence would have protected the public adequately, and because imprisoning him in the United States

rather than letting him receive medical treatment at home did not serve the § 3553(a)(2)(A) command that a sentence be fair and just. The 24-month sentence was, he asserted, substantively unreasonable.

The Fifth Circuit applies a presumption that sentences within a properly calculated guidelines range are reasonable. *See* Appendix at 2 (citing *United States v. Hernandez,* 876 F.3d 161, 166-67 (5th Cir. 2017)). The court of appeals found that Natareno had not rebutted the presumption of reasonableness and affirmed the 24-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 IN LIGHT OF THE *RITA* PRESUMPTION.

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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-calculated 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.

In cases decided after *Booker* , the Court 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 in light of the Rita-permitted presumption.

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-calculated 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)). The Court decided 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 particular 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

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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).

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 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 and most significant factor 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 parsimony command of § 3553(a). The presumption began as a guide, but it has become a result-dictating rule. That result 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. Natareno's case is a good vehicle through which to address the issue.

Natareno's case presents the Court with a good vehicle to provide 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 Natareno's sentence. Appendix at 2. It did not fully engage with the arguments Natareno had raised as to why and how the district court had failed to properly weigh the § 3553 sentencing factors. The court of appeals failed to engage even though Natareno had made several related arguments as to why the 24-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. 23-50551.

Natareno argued that a time-served sentence, in the circumstances of the case, was sufficient to reflect the seriousness of the offense. *Cf.* 18 U.S.C. § 3553(a)(2)(A); *Pepper v. United States,* 562 U.S. 476 (2011). Natareno crossed the border without permission. That conduct was wrong, but the trespassory nature of the offense made it an offense of a lesser nature than dangerous crimes like murder or robbery. Natareno was caught in Eagle Pass, Texas, a town on the border. Thus, his particular offense was merely being on the wrong side of the river, and he could simply have been escorted to the international bridge and removed by being directed to walk back across the bridge to Mexico. His offense impacted no one but the officers who stopped him on his journey.

Natareno also argued that a time-served sentence was also appropriate because he posed no danger to the public. His criminal history does not involve violence or

crimes against persons. A time-served sentence would have been sufficient, and the 24-month sentence therefore overstated the sentence necessary to protect the public. *Cf.* 18 U.S.C. § 3553(a)(2)(C) (sentence should account for need to protect public).

Finally, Natareno 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). The most important circumstance making a 24-month sentence unreasonable is Natareno's health. Defense counsel told the court that Natareno was having kidney failure and that his cousin in Guatemala was considering donating a kidney to help Natareno. Natareno told the court he was using a catheter at the present. The district court in imposing the 24-month sentence stated that Natareno could receive treatment in the Bureau of Prisons. But Natareno could not be near his cousin or plan to receive a transplant from his cousin if he was in prison in the United States rather than home in Guatemala. A district court is required to impose a sentence that considers a defendant's personal circumstances, § 3553(a)(1), a defendant's need for medical treatment, § 3553(a)(2)(D), and the need to impose a just sentence, § 3553(a)(2)(A). In the circumstances of this case, Natareno argued, a just sentence required the imposition of a time-served sentence. It was simply not just to create the risk that Natareno might miss out on the chance for a kidney transplant donation merely for a trespassory offense.

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 now all-but-ironclad *Rita* presumption, the court of appeals affirmed without

considering the specific arguments or the reasonableness of the sentence in the light of those arguments. Appendix at 2. In its failure to engage and its fallback onto a presumption that has ossified into inattention, the court of appeals demonstrated in Natareno's case the pressing need for guidance from the Court about how within-guideline sentences are to be evaluated in light of the *Rita* presumption.

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: February 6, 2024.