No. _____

IN THE

Supreme Court of the United States

ISHMAEL BAITH FORD-BEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN M. KLEPPER
Counsel of Record
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

COUNSEL FOR PETITIONER

QUESTION PRESENTED

In *Rita v. United States*, 551 U.S. 338 (2007), the Court held that an appellate court could presume that a procedurally reasonable within-Guidelines sentence is also substantively reasonable. But the Court stressed that the presumption was rebuttable, reflecting only that a sentence is more likely to be substantively reasonable where the district judge and the Sentencing Commission agree.

A decade later, the majority of Circuits have never found *Rita*'s presumption rebutted. In that time, fewer than ten defendants nationwide have succeeded in rebutting *Rita*'s presumption. Here, the Fourth Circuit issued a routine per curiam affirmance, despite petitioner's extraordinary post-sentencing rehabilitation—and despite the Commission's 2012 decision to withdraw all guidance on post-sentencing rehabilitation.

Has *Rita*'s non-binding presumption of reasonableness become effectively binding?

LIST OF PARTIES

Petitioner is a natural person, whose name appears in the caption. Respondent is the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Sentencing Guidelines

Other Authorities

OPINIONS AND ORDERS BELOW

The decision under review, *United States v. Ford-Bey*, 705 F. App'x 175 (4th Cir. 2017), was unreported. *See* Appendix A. There is no written district court opinion; excerpts from the sentencing hearing transcripts, explaining the district court's sentencing decisions, are attached. *See* Appendices B (resentencing) and C (original sentencing). The Fourth Circuit's opinion in a prior appeal, *United States v. Ford-Bey*, 657 F. App'x 219 (4th Cir. 2016), was unreported. *See* Appendix D.

JURISDICTION

The Fourth Circuit entered judgment on November 29, 2017. On February 22, 2018, in No. 17A888, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 29, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

18 U.S.C. § 3553(a) sets forth the factors that a district court considers in imposing a sentence:

> 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. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT

This petition addresses the standard for appellate review of within-Guidelines sentences. In *United States v. Booker*, 543 U.S. 220 (2005), the Court struck down 18 U.S.C. § 3553(b)(1), which made the U.S. Sentencing Guidelines mandatory. There was too great a risk that mandatory Guidelines would violate a defendant's Sixth Amendment right to a jury trial by increasing his sentence based on facts not found

by a jury or admitted in a guilty plea. *Id.* at 244 (Stevens, J.). But the Court upheld § 3553(a)(4), under which a sentencing judge must *consider* the Guidelines range, among the other factors that traditionally have entered into the sentencing analysis. *Id.* at 245 (BREYER, J.). To promote congressional intent within the Sixth Amendment's confines, the Court directed appellate courts to "review sentencing decisions for unreasonableness," which would "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–265.

Questions soon emerged regarding the mechanics of reasonableness review. In *Rita v. United States*, 551 U.S. 338 (2007) (BREYER, J.), the Court held that a court of appeals could "presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence." 551 U.S. at 341. But the Court emphasized that "the presumption is not binding." *Id.* at 347. Appellate review for unreasonableness was key to the Court's saving construction of § 3553(a) in *Booker*, and such review needed to be meaningful. The presumption therefore came into play only at the appellate level, after the district court imposed a sentence in harmony with the Guidelines. *Id.* at 347, 351. Two members of the six-justice majority joined on the understanding that "the rebuttability of the presumption is real." *Id.* at 367 (Stevens, J., joined by GINSBURG, J., concurring).

In the courts of appeals, however, rebuttability has proven more theoretical than real. Appellate courts have thrown up their hands when faced with claims that a district court abused its discretion in the weight assigned to the § 3553(a) factors.

Over-incarceration, particularly for non-violent drug crimes, is a serious problem facing the country. The courts of appeals, the majority of which have never found *Rita*'s presumption rebutted, have effectively erased a safeguard that was essential to the Court's holdings in *Booker* and *Rita*.

This case is a perfect example. Ford-Bey will be in prison until at least age 65 for a non-violent drug crime. He pleaded guilty to trafficking large quantities of cocaine. He received a 33-year sentence. On his first appeal, the Fourth Circuit held that the district court erred in applying a weapon enhancement, resulting in a too-high Guidelines range. App. 25a–27a. By the time of remand, the record contained extraordinary new, undisputed evidence regarding Ford-Bey's post-sentencing rehabilitation in federal prison. Ford-Bey earned a permanent position and worked a regular schedule as a Suicide Companion. His success in mentoring fellow inmates led prison officials to task him with developing a mentorship program for inmates from the District of Columbia.

Ford-Bey's good deeds had a positive effect beyond the prison walls. At the time of his original sentencing, he had only just co-founded "Fun Club"—a mentoring program for underserved District of Columbia youths. By the time of resentencing, Fun Club had flourished, earning a citation from D.C. Mayor Muriel Bowser for outstanding contributions to youth employment programs.

The district court accepted these undisputed facts. App. 8a. After openly doubting Ford-Bey's professed moral changes in 2015, App. 16a–17a, the district judge

found at resentencing that Ford-Bey's letter was "certainly among the most [insightful]" she had seen in over two decades on the bench. *Id.* And, under the *Ford-Bey I* opinion, App. 25a–27a, the crime of conviction was less serious, with no need for a sentence to account for "the increased danger of violence when drug traffickers possess weapons." USSG § 2D1.1, cmt. 11. The district judge still gave some weight to the fact that Ford-Bey owned a gun, and expressed difficulty getting past the sheer volume of drugs. App. 9a. The bottom-line was a within-Guidelines 30-year sentence. *Id.* Ford-Bey's projected release date, assuming good behavior, is October 5, 2039.

Ford-Bey appealed to the Fourth Circuit. He requested oral argument and a reported opinion, citing the extraordinary evidence of rehabilitation and the lack of guidance that the Commission gives district courts regarding such evidence. The Government, which emphasized the rebuttability of the presumption in *Rita*, told the Fourth Circuit that Ford-Bey's claim was not even legitimate. The Fourth Circuit summarily affirmed Ford-Bey's 30-year sentence. App. 5a.

REASONS FOR GRANTING THE PETITION

Rita's non-binding presumption of reasonableness has become effectively binding.

A. The Court intended a genuinely rebuttable presumption.

1. Like this case, *Rita* involved an unreported per curiam opinion that the Fourth Circuit issued without oral argument. *United States v. Rita*, 177 F. App'x 357, 358 (4th Cir. 2006). *Booker* held that appellate review for unreasonableness was essential to reducing sentencing disparity without running afoul of the Sixth Amendment. 543 U.S. at 264–265. The petitioner in *Rita* asserted that a presumption of

reasonableness strayed too far back toward the pre-*Booker* regime. He argued that even "if the presumption is technically rebuttable (though, as this case indicates, the presumption may be irrebuttable as a practical matter), such a presumption signals to district courts that their sentences are subject to two different tracks for review," with "practically guaranteed affirmance for sentences within the Guidelines range." Pet'r Br., *Rita v. United States*, No. 06-5754, 2006 WL 3740371 (Dec. 18, 2006), at 7.

The Government's response was to assure this Court, in no uncertain terms, that the presumption would be genuinely rebuttable. A presumption of reasonableness for a within-Guidelines sentence "does not mean that such a sentence is reasonable *per se* (*i.e.*, the presumption is not a conclusive one)." Gov't Br., *Rita v. United States*, No. 06-5754, 2007 WL 186288 (Feb. 7, 2007), at 11–12. The Government emphasized that "a within-Guidelines sentence must be vacated if the party challenging it can show that, under the facts and circumstances of the case, the sentence imposed was unreasonable in light of the factors in 18 U.S.C. 3553(a)." *Id.*

Agreeing with the Government, the Court held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," while cautioning that "the presumption is not binding." *Rita*, 551 U.S. at 347. The presumption "does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case." *Id.* The Court was not looking to create another *Chevron*-type regime: "Nor does the presumption reflect

strong judicial deference of the kind that leads appeals courts to grant greater fact-finding leeway to an expert agency than to a district judge." *Id.*

Rita's presumption of reasonableness served a limited role, reflecting "the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case." 551 U.S. at 347. Rather "than having independent legal effect," the presumption "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 351. That double-determination also "alleviates any serious general conflict" between the Guidelines and § 3553(a)'s overarching requirement that the sentence be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. *Id.* at 355.

To avoid a de facto return to the pre-*Booker* regime, the Court cautioned that "the presumption applies only on appellate review," and that district courts could not employ "a legal presumption that the Guidelines sentence should apply." *Rita*, 551 U.S. at 351. By its nature, a "nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Id.* at 353.

By repeatedly characterizing the presumption as nonbinding, *Rita* implicitly recognized that a binding presumption would interfere too much with sentencing courts' independent judgment. To be sure, it did not violate the Sixth Amendment

that the presumption might "encourage sentencing judges to impose Guidelines sentences." *Id.* at 354. But if a judge knows that a within-Guidelines sentence will be affirmed, absent some error in the Guidelines calculation, the "double determination" (*id.* at 347) looks more like a single determination. Indeed, two members of the six-justice majority were explicit that they joined the Court's opinion because it gave a defendant a meaningful opportunity to rebut the presumption:

> As the Court acknowledges … *presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable. I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*. One well-respected federal judge has even written that, "after watching this Court—and the other Courts of Appeals, whether they have formally adopted such a presumption or not—affirm hundreds upon hundreds of within-Guidelines sentences, it seems to me that the rebuttability of the presumption is more theoretical than real." Our decision today makes clear, however, that the rebuttability of the presumption is real.

Rita, 551 U.S. at 366–367 (Stevens, J., joined by GINSBURG, J., concurring) (citations omitted) (quoting *United States v. Pruitt,* 502 F.3d 1154, 1166 (10th Cir. 2007) (McConnell, J., concurring)). Experience has proved otherwise.

B. Rebuttability has proven more theoretical than real.

Rita's presumption is not genuinely rebuttable in the Circuits. The courts of appeals hear about 5,000 sentencing appeals each year, and hundreds of them challenge a district court's substantive weighing of the sentencing factors.[1] A majority of Circuits have *never* found a within-Guidelines sentence substantively unreasonable.

[1] For three years, Table 59 in the U.S. Sentencing Commission's SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (available at https://www.ussc.gov/research/sourcebook/archive) tracked the number of "Substantive: Unreasonable weighing decision" sentencing challenges. There were 626 in FY2013 (affirmance rate of 97.9%), 1,049 in FY2014 (affirmance rate of 95.8%), and 967 in FY2015 (affirmance rate of 99.1%). The numbers are not terribly illuminating, because the Commission

The Defender Services Office keeps a list of reversals for substantive unreasonableness. Amy Baron-Evans & Jennifer Niles Coffin, *Appellate Reversals After* Gall, DEFENDER SERVICES OFFICE (updated Nov. 9, 2017), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/appellate-decisions-after-gall.pdf. The First, Third, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits have never reversed a within-Guidelines sentence as substantively unreasonable. *Id.* Since 2007, only nine opinions, reported or unreported, coming from only five Circuits, have reversed a within-Guidelines sentence as substantively unreasonable.[2] *Id.*

The numbers are actually worse for criminal defendants. Three of those nine reversals characterized the error as substantive, but the only error was reliance on improper factors.[3] Such error is the flip-side of "failing to consider the § 3553(a) factors" under *Gall v. United States*, 552 U.S. 38, 51 (2007), and is better understood as procedural error. *United States v. Bennett*, 698 F.3d 194, 200 (4th Cir. 2012) (Wilkinson, J.). Similarly, one case found substantive error where "the district court did

---

tracked the number of "issues" (rather than the number of appeals), did not distinguish between Government and defendant appeals, and, most importantly, did not distinguish between appeals of within-Guidelines and outside-Guidelines sentences. The Defender Services Office's list, discussed below, indicates that reversals of outside-Guidelines sentences, which are not subject to *Rita*, far outstrip reversals of outside-Guidelines sentences.

[2] The Defender Services Office, which is within the Administrative Office of the United States Courts, has every incentive to keep its list comprehensive. If, however, the office missed any cases, we would welcome the Government identifying them.

[3] *United States v. Plate*, 839 F.3d 950, 957 (11th Cir. 2016) ("the district judge abused his discretion by giving significant (indeed, *dispositive*) weight to [defendant's] inability to pay restitution"); *United States v. Sanders*, 472 F. App'x 376, 381–382 (6th Cir. 2012) (district court apparently lengthened term to promote access to rehabilitative services, in violation of *Tapia v. United States*, 564 U.S. 319, 321 (2011)); *United States v. Wright*, 426 F. App'x 412, 417 (6th Cir. 2011) (Government "declined to file a brief on appeal" after district court stated its belief that the defendant had committed crimes that had never been charged or reported).

not explain why it varied downward on [two counts] but not on the other counts." *United States v. Curry*, 570 F. App'x 315, 316 (4th Cir. 2014). Such an inadequate explanation is classic procedural error. *Gall v. United States*, 552 U.S. 38, 51 (2007). Two reversals involve the Second Circuit cautioning district courts not to uncritically apply a child pornography guideline that it has concluded to be in tension with § 3553(a).[4] One involved an idiosyncratic application of the mandate rule when *Rita* was first decided. *United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009).

Only two cases, from two Circuits, have held that a district court gave substantively unreasonable weight to an otherwise properly considered factor. The Eleventh Circuit held that the district court both "gave significant weight to an irrelevant factor and unreasonably balanced an otherwise properly considered factor." *United States v. Ochoa-Molina*, 664 F. App'x 898, 901 (11th Cir. 2016). There is only one instance, from nine years ago, in which an appellate court reversed based only on an unreasonable balancing of a properly considered factor. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1056 (9th Cir. 2009). A blistering seven-judge dissent declared the panel opinion to be "the first published opinion in this circuit reversing a within-Guidelines sentence as substantively unreasonable." *United States v. Amezcua-Vasquez*, 586 F.3d 1176, 1176 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing). It turned out to be the last.

A defendant's chances of rebutting *Rita*'s presumption are infinitesimal. District judges can hardly miss the fact that if they properly calculate the Guidelines

[4] *United States v. Jenkins*, 854 F.3d 181, 189 (2d Cir. 2017); *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010).

range and impose a within-Guidelines sentence, the sentence will be affirmed. And when appellate attorneys seek to identify issues for appeal, they can hardly miss that a challenge to *Rita*'s presumption is likely a non-starter. Quite simply, *Rita* has not worked as intended. Genuine rebuttability is a key underpinning for *Rita*. *Supra* § A. Without that underpinning, *Rita*'s justification has crumbled.

C. This case is an ideal vehicle for the Court to reaffirm that *Rita*'s presumption is genuinely rebuttable.

No division of authority has emerged in the decade since *Rita*, and none is likely to emerge. The courts of appeals consistently acknowledge the possibility that some hypothetical appellant might rebut the presumption, even as they reject the particular challenges before them. In the aggregate, the bleak numbers for criminal defendants show that *Rita*'s presumption is not working as intended. The only way to correct course is for this Court to grant certiorari in a case where a court of appeals was too deferential. This case presents an ideal opportunity.

The Court intended that the "'reasonableness' presumption, rather than having independent legal effect," would "simply recognize[ ] the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita*, 551 U.S. at 350–351. Here, the Fourth Circuit resolved an extraordinary case with an ordinary per curiam affirmance, without argument, on an issue where the Commission has withdrawn guidance.

1. This is not a "mine run" case. The fact that the Fourth Circuit treated it like one speaks volumes about how *Rita* has worked in the real world.

This case highlights why, in assessing "deterrence, protection of the public, and rehabilitation" under § 3553(a), "there would seem to be no better evidence than a defendant's post-incarceration conduct." *Pepper v. United States*, 562 U.S. 476, 491 (2011) (SOTOMAYOR, J.) (quoting *United States v. McMannus*, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy, J., concurring)). At age 41, Ford-Bey received a 33-year sentence. Many in his position would have fallen into despair or nihilism.

Ford-Bey instead exceeded the criminal justice system's highest expectations for prisoner rehabilitation. Maybe some defendants, in between sentencing and resentencing, have participated in educational courses, mentoring programs, and suicide watches. Ford-Bey created a mentorship program, at his prison's request. From prison, Ford-Bey helped to operate a successful charity serving urban youths.

It would be one thing if the district court had disbelieved Ford-Bey's rehabilitation evidence. But the district court accepted his testimony and found it unusually insightful.[5] App. 8a. Still, the district court imposed a 30-year sentence that coincided with the bottom of the Guidelines range.

This appeal's posture, involving a resentencing after remand, allows heightened transparency regarding the weight that the district court gave the various factors. Because the district court treated the crime as less serious under the *Ford-Bey I*

[5] Because it "'is not uncommon for defendants to discover the virtues of introspection and remorse when facing the threat of punishment,'" district courts tend to be skeptical of post-arrest rehabilitation. *United States v. Martin*, 520 F.3d 87, 94–95 (1st Cir. 2008). The Court expressed much greater confidence in the likely reliability of post-sentencing conduct. *Pepper*, 562 U.S. at 492–93. It is not hard to see why. There is a real risk that the defendant can put on a performance during the discrete time between arrest and sentencing. After a defendant's original sentencing, however, a defendant faces long odds of obtaining de novo resentencing. The Government did not contend, and the district court did not find, that Ford-Bey's redemption was performative.

mandate, a 30-year sentence means that Ford-Bey received significantly less than three years' credit for his extraordinary rehabilitation.

That credit was unreasonably low. The Government's lone counter-argument regarding rehabilitation was that Ford-Bey had disciplinary problems when in prison during his prior sentence. 4th Cir. J.A. 290–291. That evidence's only tendency was to emphasize the dramatic change in the record, with "the most up-to-date picture of his 'history and characteristics.'" *Pepper*, 562 U.S. at 477 (quoting 18 U.S.C. § 3553(a)(1)). In his twenties, Ford-Bey was unable to behave in prison. In his thirties, he returned to crime. In his forties, after receiving a 33-year sentence that would have driven many to give up on their own humanity, Ford-Bey walked the walk. He has worked to reform not just himself but the lives of the men around him, and of District of Columbia children, to help them avoid making the same mistakes he did. There is no good reason to keep him in prison until he is 65 years old.

2. This case is an ideal vehicle for another reason. *Rita* assumes a "double determination," where "the judge's discretionary decision accords with the Commission's view." 551 U.S. at 347, 351. Here, however, the Guidelines say nothing about post-sentencing rehabilitation.

The Commission has historically resisted consideration of post-rehabilitation conduct. Before 2000, the Guidelines addressed rehabilitative conduct only in the context of the two-level adjustment for acceptance of responsibility. *See United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997). When courts then divided on departures based on post-sentencing rehabilitation, the Commission promulgated § 5K2.19,

which barred consideration of post-sentencing rehabilitative efforts, no matter how exceptional. USSG Amendment 602 (eff. Nov. 1, 2000). Post-sentencing rehabilitation thus joined the ranks of race, sex, and national origin as a forbidden consideration. *See* USSG § 5H1.10; *Koon v. United States*, 518 U.S. 81, 93 (1996).

The Court rejected that view in *Pepper*. It saw "no question" that such evidence was "a critical part" of the defendant's "history and characteristics." 562 U.S. at 492. It bore "on the likelihood that he [would] engage in future criminal conduct, a central factor that district courts must assess." *Id.* A defendant's "exemplary postsentencing conduct may be taken as the *most accurate indicator* of 'his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.'" *Id.* at 492–493 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)) (emphasis added).

The Commission could have amended § 5K2.19 to provide affirmative guidance for applying *Pepper*. Instead, 20 months after *Pepper*, the Commission eliminated § 5K2.19. *See* USSG Amendment 768 (eff. Nov. 1, 2012). With that change, the Guidelines again say nothing about rehabilitation evidence, apart from the acceptance-of-responsibility credit.[6] It is easy to see how a district court might fail to give adequate weight to exemplary post-sentencing rehabilitation.

[6] Justice Thomas agreed with the *Pepper* majority "that postsentencing rehabilitation can be highly relevant to meaningful resentencing," but dissented because "Congress made the Guidelines mandatory" and authorized the Guideline forbidding consideration of such evidence. *Pepper*, 562 U.S. at 519–520 (THOMAS, J., dissenting). With no on-point Guideline now in place, that concern is gone.

3. Notwithstanding these powerful reasons to find the presumption rebutted, the Fourth Circuit issued a routine unreported affirmance. Requesting oral argument—a prerequisite for a reported opinion in the Fourth Circuit—Ford-Bey noted the desirability of precedent to guide district judges after the Commission decided to give no guidance in applying *Pepper*. The Fourth Circuit dispensed with oral argument and threw up its hands: "While the court might have imposed a lower sentence given the mitigating circumstances cited by Ford-Bey, the mere fact that the court did not consider the mitigating circumstances worthy of a greater reduction does not render the sentence unreasonable." App. 4a.

To understand the message that these kinds of routine affirmances send, the Court need look no further than the Government's brief here. In *Rita*, the Government assured the Court that the presumption could be rebutted in practice. Gov't Br., *Rita v. United States*, No. 06-5754, 2007 WL 186288 (Feb. 7, 2007), at 11–12. Ten years later, the Government argued that whether "Mr. Ford-Bey's asserted rehabilitation merited any sentence reduction, a three year reduction,[7] or—as Mr. Ford-Bey argues now—something more, is not a legitimate claim of error." 4th Cir. Gov't Br. 9.

The Government was not far off from how the Circuits have applied *Rita*. Such a challenge is not illegitimate in the sense that counsel would face sanctions for asserting it. But a defendant has no genuine chance of success in challenging a within-Guidelines sentence based on the weight given to the sentencing factors.

[7] As noted above, Ford-Bey received significantly less than a three-year reduction for his rehabilitation, because, under the *Ford-Bey I* mandate, the district court treated the crime as less serious on remand.

A decade ago, the Court selected an unreported per curiam Fourth Circuit opinion, issued without argument, as the vehicle to decide whether appellate courts could employ a presumption of reasonableness.[8] The Court should now review another such opinion to establish that the Court meant what it said in *Rita*, and that the presumption is genuinely rebuttable.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted:

STEVEN M. KLEPPER
Counsel of Record
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

Dated: March 28, 2018

[8] Perhaps in recognition of the Fourth Circuit's idiosyncratic publication practices, *see Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (THOMAS, J., dissenting from denial of certiorari), the Court has been receptive to reviewing unreported Fourth Circuit opinions. *See, e.g.*, *Benisek v. Mack*, 584 F. App'x 140, 141 (4th Cir. 2014) (summary affirmance without argument), *cert. granted*, 135 S. Ct. 2805 (2015); *Chen v. Mayor & City Council of Baltimore*, 546 F. App'x 187, 188 (4th Cir. 2013) (summary affirmance without argument), *cert. granted*, 135 S. Ct. 475 (2014), *cert. dismissed,* 135 S. Ct. 939 (2015).