No. 18-596

In the Supreme Court of the United States

MARIE NEBA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld petitioner's within-Guidelines sentence as substantively reasonable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 901 F.3d 260.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2018. The petition for a writ of certiorari was filed on November 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; three counts of health care fraud, in violation of 18 U.S.C. 1347 and 2; one count of making false statements relating to health care matters, in violation of 18 U.S.C. 1035 and 2; one count of conspiracy to pay and receive health care

kickbacks, in violation of 18 U.S.C. 371; one count of payment of health care kickbacks, in violation of 42 U.S.C. 1320a-7b(b)(1) and (b)(2) (2012), and 18 U.S.C. 2; and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Judgment 1-2. She was sentenced to 900 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-15.

1. The Medicare program, Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.*, is a federal "health care benefit program." 18 U.S.C. 24(b). Under Medicare, "certain qualified providers of health care services are reimbursed" by the federal government for "providing covered services to" certain persons with disabilities or who are 65 years of age or older. *Bethesda Hosp. Ass'n* v. *Bowen*, 485 U.S. 399, 400 (1988); see *United States* v. *Erika, Inc.*, 456 U.S. 201, 202 (1982). Among the covered services are certain "home health services" provided by eligible home health agencies. 42 U.S.C. 1395c; 11/3/2016 Tr. 122. To qualify for home health services, Medicare beneficiaries must be homebound and under the care of a physician who specifically orders—and then certifies the need for—home healthcare. 11/3/2016 Tr. 126-135. In addition, a registered nurse from the agency providing the services must complete an assessment verifying the need for home healthcare services and develop a plan of care together with the physician. *Id.* at 127, 131.

2. Petitioner, who was a licensed nurse practitioner, and her husband owned a healthcare agency that purportedly provided home health care services to Medicare beneficiaries in Texas. Presentence Investigation Report (PSR) ¶¶ 13-15, 21. From 2006 to 2015, petitioner and others recruited Medicare beneficiaries,

falsely represented to Medicare that those beneficiaries qualified for home health care services, and then billed Medicare for the unnecessary (and often fictitious) services. PSR ¶¶ 21-28.

To orchestrate the fraud, petitioner and her husband paid illegal kickbacks to patient recruiters for referring Medicare beneficiaries to the agency, to the physicians for authorizing unnecessary services, and to Medicare beneficiaries for permitting the agency to bill using the beneficiaries' Medicare numbers. PSR ¶¶ 22, 23, 25. Petitioner and her husband concealed the illegal kickbacks by writing checks from the agency's bank accounts to employees, then instructing those employees to cash the checks and return the cash to petitioner and her husband to pay the Medicare beneficiaries. PSR ¶ 33. Petitioner also falsified records by pre-signing nursing forms without seeing patients and directed others to falsify forms as well. PSR ¶¶ 44, 52, 58-60. During the nine-year conspiracy, Medicare paid the agency more than $13 million for fraudulent home healthcare services for 1,175 putative beneficiaries. PSR ¶¶ 20, 27. Petitioner and her husband "funneled" more than $10 million of those funds through three bank accounts, often "mov[ing] money amongst the accounts as well." PSR ¶¶ 36-37.

3. A grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; three counts of health care fraud, in violation of 18 U.S.C. 1347 and 2; one count of making false statements relating to health care matters, in violation of 18 U.S.C. 1035 and 2; one count of conspiracy to pay health care kickbacks, in violation of 18 U.S.C. 371; one count of payment of health care kickbacks, in

violation of 42 U.S.C. 1320a-7b(b)(1) and (b)(2) (2012), and 18 U.S.C. 2; and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Indictment 4-14. Before a pretrial court appearance, petitioner instructed one of the clinic's employees (who also had been arrested and charged for her role in the scheme) "not to tell the truth about being paid for referrals or paying patients." PSR ¶ 43. Petitioner proceeded to trial, and a jury found her guilty on all counts. Judgment 1.

Before sentencing, the Probation Office calculated a total offense level of 43. PSR ¶ 94. From an initial offense level of 6 for health care fraud, petitioner's base offense level was increased by: 20 levels for causing a loss of between $9.5 million and $25 million; 2 levels because the offense involved ten or more victims; 3 levels for causing a loss to a government healthcare program of between $7 million and $20 million; 2 levels for intentionally engaging in conduct constituting sophisticated means; and 2 levels for having been convicted of a money-laundering offense. PSR ¶ 84; see Sentencing Guidelines §§ 2B1.1(a)(2), (b)(1)(K), (b)(2)(A)(i), (b)(7), and (b)(10)(C), and 2S1.1 (2016). To this base offense level of 35, the Probation Office recommended adding a 4-level enhancement for being an organizer or leader; a 2-level enhancement for abusing a position of trust; and a 2-level enhancement for obstruction of justice (based on the instruction to her subordinate not to tell the truth). PSR ¶¶ 87-89; see Sentencing Guidelines §§ 3B1.1(a), 3B1.3, and 3C1.1 (2016). Because petitioner had contested the charges and proceeded to trial, she was not entitled to a reduction of her offense level for acceptance of responsibility under Section 3E1.1. PSR ¶ 91.

Petitioner had no previous convictions and so had a criminal history category of I, which, when combined with her total offense level of 43, yielded an advisory Sentencing Guidelines range of life imprisonment, capped at the statutory maximum sentence of 900 months of imprisonment under Section 5G1.1(c)(1). PSR ¶¶ 94, 97, 117; Second Addendum to PSR ¶ 8. Petitioner's only objections to the Probation Office's calculations were to the loss amount, the number of victims, and the organizer/leader, abuse-of-trust, and obstruction-of-justice sentencing enhancements. Addendum to PSR 1-2.

At sentencing, the district court overruled petitioner's objections to the Probation Office's calculations. Sent. Tr. 7-8, 10. Petitioner then argued that her deteriorating health and motherhood of two young children justified a below-Guidelines sentence. *Id.* at 15-17. The government recognized "the impact on her family," but observed that petitioner and her husband committed fraud out of greed, not necessity, to support their "lavish spending." *Id.* at 18. The government also pointed out that petitioner impeded the investigation into her fraud and that she was receiving appropriate medical care in custody. *Id.* at 19-20.

The district court recognized petitioner's health problems, but emphasized the seriousness of petitioner's crime, including the "great lengths" petitioner and her husband took "to conceal their fraud, often involving several of their employees." Sent. Tr. 31. The court observed that petitioner also "falsified medical records, sometimes while Medicare auditors were in [petitioner's] offices." *Ibid.* The court also explained that petitioner later "obstructed justice * * * by attempting to tamper with a [co-defendant] witness * * *

and suborn perjury." *Id.* at 32. After considering petitioner's "role in the offense, the amount of loss attributable to [petitioner] compared to others, [her] obstruction of justice, [her] aggravating role enhancement, and most importantly the guideline range of life," the court determined that a within-Guidelines sentence of 900 months of imprisonment was appropriate. *Id.* at 33. Petitioner did not object. *Id.* at 37.

4. The court of appeals affirmed. Pet. App. 1-9. Because petitioner did not object to her sentence in the district court, the court of appeals reviewed petitioner's sentencing challenges for plain error. *Id.* at 2.

The court of appeals explained that the crux of petitioner's arguments on appeal amounted to claims of procedural error, including arguments that the district court mistakenly believed it was required to sentence petitioner to the statutory maximum and that the district court failed to consider petitioner's arguments for a downward variance. Pet. App. 3. The court of appeals determined that both of those procedural claims were belied by the record. *Id.* at 3-4. The court observed that the district court reviewed the presentence report at sentencing and relied on several factors to reach its decision, including petitioner's role in the offense, the loss amount, her obstruction of justice, her aggravating role in the conspiracy, and the Guidelines range. *Id.* at 4. The court of appeals then rejected petitioner's substantive reasonableness challenge to her sentence, "[g]iven the deferential review of a within-guidelines sentence." *Ibid.* And the court rejected petitioner's Eighth Amendment challenge to that sentence, explaining that "we cannot say that [petitioner's] crime was not grave enough that the sentence is grossly disproportionate to her crime." *Id.* at 6.

Judge Jones concurred, Pet. App. 10-15, expressing concern that the presumption of reasonableness for a within-Guidelines sentence authorized by this Court's decision in *Rita* v. *United States*, 551 U.S. 338 (2007), "is non-binding in theory but nearly ironclad in fact." Pet. App. 12. Although Judge Jones remarked that the majority's decision was well-reasoned, she wrote separately to highlight her desire for rules to help determine when a within-Guidelines sentence might be substantively unreasonable. *Id.* at 12-13.

ARGUMENT

Petitioner urges (Pet. 4) this Court to grant certiorari to "set forth the circumstances under which a defendant may rebut the presumption that a within-Guidelines range sentence is substantively reasonable." But petitioner fails to show that her sentence would be substantively unreasonable even without such a presumption, and the court of appeals' decision does not conflict with any decision of this Court or other courts of appeals. No further review is warranted.

1. In *Rita* v. *United States*, 551 U.S. 338 (2007), this 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." *Id.* at 347. The Court recognized that such a nonbinding presumption "reflects 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." *Ibid.* "That double determination significantly increases the likelihood that the sentence is a reasonable one." *Ibid.*

As *Rita* explained, the presumption of reasonableness does not have "independent legal effect," but instead "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view * * * , it is probable that the sentence is reasonable." 551 U.S. at 350-351. That is particularly true in light of the "deferential" standard that applies to appellate review of sentences "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range." *Gall* v. *United States*, 552 U.S. 38, 51, 52 (2007). Accordingly, and as this Court observed in *Rita*, even an appellate court that does not apply the presumption should "usually" find a within-Guidelines sentence to be reasonable "because it reflects both the Commission's and the sentencing court's judgment as to what is an appropriate sentence for a given offender." 551 U.S. at 351. Consistent with that observation, the Fifth Circuit has stated that "there does not seem to be a practical difference between the burden of rebutting a presumption of reasonableness afforded a properly calculated Guideline range sentence and the burden of overcoming the great deference afforded such a sentence." *United States* v. *Alonzo*, 435 F.3d 551, 554 (2006); see Pet. App. 3 (citing *Alonzo*).

2. The court of appeals correctly determined that the district court did not abuse its discretion in imposing petitioner's sentence. As the court of appeals observed, "[t]he sentencing court reviewed the presentence report during sentencing and listed a number of 'factors' that went into the sentencing decision, including [petitioner's] 'role in the offense, the amount of loss attributable to [petitioner] compared to others, [her] obstruction of justice, [her] aggravating role enhancement, and most importantly, the guideline range of

life.'" Pet. App. 4 (citation, brackets, and emphasis omitted). The district court thus made a "reasoned and reasonable decision" that the individual circumstances here justified a lengthy (yet still within-Guidelines) sentence, and the court of appeals properly gave "due deference" to that decision, *Gall*, 552 U.S. at 59-60.

That remains true with or without the presumption of reasonableness. Although the court of appeals noted that petitioner's within-Guidelines sentence is presumptively reasonable on appellate review, it also observed that petitioner had incorrectly labeled as "substantive" claims that were actually procedural in nature, not substantive. Pet. App. 3. The court evaluated and rejected those procedural challenges without applying any presumptions. *Id.* at 3-4. Having rejected those challenges, and in the absence of any other arguments for why petitioner's sentence was unreasonable, the court correctly determined that petitioner's substantive reasonableness challenge failed as well. *Id.* at 4; see *Gall*, 552 U.S. at 52.

Moreover, the court of appeals further examined petitioner's sentence in rejecting her Eighth Amendment challenge. Although the constitutional standard is not the same as substantive reasonableness, the court's reasoning sheds additional light on why the district court did not abuse its discretion here. The court of appeals concluded that, despite the "severe sentence," petitioner's crimes were "grave enough that the sentence is [not] grossly disproportionate" to them. Pet. App. 6. The court observed that "[petitioner] participated as a leader in a prolonged, extensive Medicare fraud scheme, defrauded Medicare of over $13 million dollars, and procured the involvement of numerous outside individuals

to participate in her scheme." *Ibid.* Petitioner's sentence is thus not the sort of "'arbitrary, capricious, whimsical, or manifestly unreasonable'" sentence that would require reversal on appeal. *United States* v. *Robinson*, 437 Fed. Appx. 733, 735 (10th Cir. 2011) (Gorsuch, J.) (citation omitted), cert. denied, 565 U.S. 1136 (2012). To the extent petitioner simply disagrees (Pet. 10-11) with the lower courts' assessment of her personal circumstances, that factbound claim does not warrant this Court's review.

3. Petitioner nevertheless urges (Pet. i) this Court to "overrule or refine *Rita*." But this Court has repeatedly reaffirmed *Rita*'s holding that a "court of appeals may, but is not required to, presume that a within-Guidelines sentence is reasonable." *Peugh* v. *United States*, 569 U.S. 530, 537 (2013); see *Nelson* v. *United States*, 555 U.S. 350, 351 (2009) (per curiam). Indeed, this Court favorably reiterated the principles underlying *Rita* just last Term in *Chavez-Meza* v. *United States*, 138 S. Ct. 1959 (2018), explaining that "[w]hen a judge applies a sentence within the Guidelines range, he or she often does not need to provide a lengthy explanation" because "'circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence * * * in the typical case, and that the judge has found that the case before him is typical.'" *Id.* at 1964 (brackets and citation omitted).

In asking the Court to reconsider *Rita*, petitioner does not question those principles; instead, she asserts that "[i]n practice, the rebuttability of the presumption that a within-Guidelines sentence is reasonable" is a "sham," Pet. 5 (emphasis omitted), citing the low frequency with which within-Guidelines sentences are

found to be substantively unreasonable on appellate review, Pet. 7. Yet what is true of within-Guidelines sentences also is true of non-Guidelines sentences: in 2017, for example, only eight sentences were reversed in the federal system as substantively unreasonable. United States Sentencing Comm'n, *2017 Sourcebook of Federal Sentencing Statistics*, tbl. 59, www.ussc.gov/research/sourcebook-2017. That is no doubt in part because a reviewing court "must first ensure that the district court committed no significant procedural error," and only if the "sentencing decision is procedurally sound" may the court "then consider the substantive reasonableness of the sentence imposed." *Gall*, 552 U.S. at 51. Most sentences that would rise to the level of substantive unreasonableness likely are the product of some antecedent procedural error. And in 2017, 351 federal sentences were reversed or remanded for procedural errors—324 of them for incorrectly computing the Guidelines range. *2017 Sourcebook*, *supra*, tbl. 59.

The low frequency of reversals for substantive unreasonableness also reflects the "deferential" standard of review appellate courts generally apply to a district court's on-the-ground sentencing judgments. *Gall*, 552 U.S. at 52. As a result, "'it will be the unusual case when [a court] reverse[s] a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.'" *United States* v. *Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc) (quoting *United States* v. *Gardellini*, 545 F.3d 1089, 1090 (D.C. Cir. 2008) (Kavanaugh, J.)); see also *United States* v. *Tomko*, 562 F.3d 558, 573 (3d Cir. 2009) (en banc). Given the relative infrequency with which *any* sentence is overturned for being substantively un-

reasonable, petitioner's suggestion that the presumption of reasonableness itself is a barrier to relief lacks meaningful support and provides no reason to revisit *Rita*. Courts of appeals that view the presumption as creating unwarranted results are free to dispense with it or simply to reverse any within-Guidelines sentences that they determine to be an abuse of discretion on the facts of a particular case. See *Gall*, 552 U.S. at 51.

In any event, this case is not a suitable vehicle for reconsidering the presumption of reasonableness. As noted above, petitioner fails to show that the outcome would be different without the presumption. Petitioner raised only procedural challenges (to which the court of appeals did not apply any presumption), and the court appropriately gave "due deference" to the district court's "reasoned and reasonable decision." *Gall*, 552 U.S. at 59-60.

4. Petitioner also briefly argues that the court of appeals' decision renders *United States* v. *Booker*, 543 U.S. 220 (2005), "meaningless." Pet. 10 (emphasis omitted). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory federal Sentencing Guidelines. 543 U.S. at 244. Accordingly, the Court severed "the provision of the federal sentencing statute that makes the Guidelines mandatory," thereby "mak[ing] the Guidelines effectively advisory." *Id.* at 245. From the premise that courts of appeals rarely reverse within-Guidelines sentences as substantively unreasonable, petitioner concludes (Pet. 10) that the presumption of reasonableness has caused *Booker* to be "effectively overturned" "[i]n practice."

The conclusion does not follow from the premise. "A nonbinding appellate presumption that a Guidelines

sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Rita*, 551 U.S. at 353. *Rita* stressed that "the presumption * * * is an *appellate* court presumption" and that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* at 351. It recognized the possibility that, even so, "the presumption will encourage sentencing judges to impose Guidelines sentences," but concluded that the presumption was nevertheless permissible. *Id.* at 354. And in practice, the knowledge that an appellate court will apply a presumption of reasonableness to a within-Guidelines sentence does not appear to have unduly induced district judges to impose within-Guidelines sentences or otherwise treat the Guidelines as if they were mandatory. To the contrary, federal district courts impose within-Guidelines sentences in fewer than half of all cases. See, *e.g.*, *2017 Sourcebook*, *supra*, tbl. N (roughly 49.1% of sentences are within the Guidelines range, 2.9% above it; 47.9% below it).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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