No. 18-759

In the Supreme Court of the United States

MATTHEW D. SAMPLE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in reversing petitioner's probationary sentence as substantively unreasonable based on its determination that, in imposing a sentence that included no term of imprisonment for petitioner's serious fraud offenses, the district court gave excessive weight to petitioner's high income and the requirement that he pay restitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 18-759

MATTHEW D. SAMPLE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 901 F.3d 1196.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2018. A petition for rehearing was denied on September 14, 2018 (Pet. App. 63a). The petition for a writ of certiorari was filed on December 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and two counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to five years of

probation and ordered to pay $1,086,453.62 in restitution. Pet. App. 13a-16a, 23a. On the government's appeal, the court of appeals reversed and remanded for resentencing. *Id.* at 1a-12a.

1. Petitioner was a licensed securities broker who worked for several top-shelf asset-management firms. Pet. App. 2a. In 2006, he started a hedge fund called the Vega Opportunity Fund, but within a year the fund had lost 65% of its value and collapsed. *Ibid.* Petitioner returned some of the remaining funds to investors, but diverted more than $340,000 to pay for his own expenses. Gov't C.A. Br. 2; Presentence Investigation Report (PSR) ¶ 12.

Petitioner then moved from Chicago, Illinois to New Mexico, where he started another fund, Lobo Volatility Fund, LLC, in 2009. Pet. App. 2a. He invested some money that investors placed with the fund, but he diverted a large amount of the investments he received for personal use and to make payments to other investors. PSR ¶¶ 16-17. Petitioner "provided false monthly statements showing appreciation in value, engaged in misleading email correspondence about market strategies, and provided false tax reports to Lobo Fund investors." Pet App. 2a. In total, between 2009 and 2012, petitioner stole more than $1 million from six different victims. PSR ¶¶ 18, 44-45, 73.

2. Based on the foregoing conduct, petitioner was charged with one count of mail fraud, in violation of 18 U.S.C. 1341, and two counts of wire fraud, in violation of 18 U.S.C. 1343. He pleaded guilty pursuant to a plea agreement to all three counts. C.A. App. 25-41.

In advance of sentencing, the Probation Office prepared a Presentence Report that calculated petitioner's

total offense level under the advisory Sentencing Guidelines to be 27. 10/17/16 Revised PSR ¶ 90. The Probation Office began with a base offense level of 7; added enhancements based on the amount of loss petitioner's scheme had caused, the use of sophisticated means, and petitioner's violation of the securities laws as an investment advisor; and deducted two levels because petitioner had accepted responsibility by pleading guilty. *Id.* ¶¶ 80-83, 89. With a total offense level of 27 and a criminal history category of II (because petitioner committed the present offenses while on probation for a prior driving-under-the-influence conviction), petitioner's advisory range was 78 to 97 months. *Id.* ¶¶ 97-99, 143. The Probation Office identified some factors that might support a sentence below the advisory range, but did not recommend a particular sentence. *Id.* ¶¶ 161-162.

Petitioner sought a sentence of probation, describing "[t]he importance of restitution in this case" as "the central circumstance militating toward a non-incarceration sentence." C.A. App. 256. Petitioner stated that he had begun making restitution payments after pleading guilty, *id.* at 242, and he submitted letters and testimony from his employer to show that he would be able to keep a job with a six-figure salary if he did not serve a term of imprisonment. *Id.* at 277, 748-763.

The government recommended a 78-month sentence, at the low end of the advisory Guidelines range. C.A. App. 888. It submitted a sentencing memorandum that detailed the devastation of the victims, petitioner's use of the fraudulently obtained funds to support a lavish lifestyle, and petitioner's past fraudulent behavior. *Id.* at 86-116. The government also argued that the sentence it sought was supported by the objectives, set forth in 18 U.S.C. 3553(a), of reflecting the seriousness

of the offense, general and specific deterrence, and avoiding unwarranted sentencing disparities. C.A. App. 888-893; see 18 U.S.C. 3553(a). The government objected to a probationary sentence, maintaining that it was not appropriate for petitioner "to be able to essentially buy his way out of jail" on the ground that being out of prison would maximize his ability to pay restitution. C.A. App. 851. The government acknowledged that the objective of providing restitution was an important consideration under 18 U.S.C. 3553(a)(7), but it emphasized that restitution was only one of seven factors that the court was required to take into account; here, the government argued, the petitioner's restitution-focused approach reduced the Section 3553(a) analysis to a single factor. C.A. App. 851-852, 889.

The district court sentenced petitioner to five years of probation and ordered him to pay $1,086,453.62 in restitution, to be paid in minimum increments of $5,675 per month. Pet. App. 23a-24a, 36a, 55a. In imposing that sentence, the court indicated that it was placing principal weight on obtaining restitution for the victims. *Id.* at 30a-31a; see, *e.g.*, *id.* at 37a ("So that's what has really persuaded me, is that these people want their money back."); *id.* at 45a ("I'm looking for a way to try to get these victims as much money as possible."). The court stated that a term of imprisonment would mean that petitioner would lose his current job, "with no guarantee that [he] would have this job or one like it when [he] got out of jail." *Id.* at 30a. "[I]f you didn't have your * * * current job and your ability to make these payments," the court told petitioner, "I might be doing something different." *Id.* at 36a. The court also stated its view that petitioner was not "writing a check to get

off * * * free" because he would be on probation for five years. *Id.* at 45a-46a.

In pronouncing sentence, the district court stated, without elaboration, that "the nature and the circumstances of the offense," the "need to reflect the seriousness of the offense and to promote respect for the law and to provide just punishment for the offense," and "the need to afford adequate deterrence to criminal conduct," were all "sentencing factors [under 18 U.S.C. 3553(a)] that warrant[ed] a sentence outside of the applicable guideline range." Pet. App. 53a. The court also referenced several considerations mentioned by the Probation Office, including: the offense was petitioner's first felony conviction, petitioner had performed well on pretrial release, petitioner had begun making restitution payments, and his mother had serious health conditions. *Id.* at 54a. At the urging of defense counsel, the court added that restitution was "a major motivator in my decision in this case." *Id.* at 59a.

3. On the government's appeal, the court of appeals reversed and remanded for resentencing. Pet. App. 1a-12a. The court found it "clear" from "[t]he record * * * that the district court imposed a lenient probation sentence because [petitioner's] high income allowed him to make restitution payments to his victims." *Id.* at 11a; see *id.* at 8a. The court explained that, in challenging that sentence, the government did not dispute that "it is permissible" to impose a lower sentence based in part on a defendant's "income and consequent ability to pay restitution," but had argued that the probationary sentence in this case was unreasonable because of "the weight that the district court gave to this factor." *Id.* at 5a-6a.

The court of appeals agreed that the sentence was substantively unreasonable. It recognized that the substantive reasonableness of a sentence is reviewed under the abuse-of-discretion standard, and that such review is "deferential." Pet. App. 6a. The court also recognized that "[t]he need to provide restitution to victims is one of the factors district courts must consider in fashioning a sentence." *Id.* at 9a (citing 18 U.S.C. 3553(a)(7)). But the court determined that the district judge, by relying on petitioner's "salary" and concomitant ability to pay restitution as "overriding all other sentencing considerations," the court had "exceeded the bounds of permissible choice." *Ibid.*

The court of appeals found that the sentence of probation did not adequately "reflect the seriousness of [petitioner's] offense," 18 U.S.C. 3553(a)(2)(A), which involved "misappropriat[ing] more than a million dollars" and which had "inflicted considerable harm upon his victims." Pet. App. 9a. "Similarly," the court concluded, "the district court failed to adequately balance the need to 'promote respect for the law,' 'provide just punishment for the offense,' and 'afford adequate deterrence to criminal conduct.'" *Ibid.* (quoting 18 U.S.C. 3553(a)(2)(A) and (B)). With respect to deterrence in particular, the court of appeals stressed that the probationary sentence failed to promote "general deterrence," an objective that Congress, in enacting the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, recognized to be "particularly important in the context of white collar crime." Pet. App. 9a-10a (citing S. Rep. No. 225, 98th Cong., 1st Sess. 76 (1983) (1983 Senate Report)).

The court of appeals also concluded that the probationary sentence risked "unwarranted sentence disparities," Pet. App. 10a (quoting 18 U.S.C. 3553(a)(6)), both because "minimal sentences on white-collar criminals" raise concerns about unequal treatment based on "socioeconomic status," *ibid.* (quoting *United States* v. *Levinson*, 543 F.3d 190, 201 (3d Cir. 2008)), and because "[t]he vast majority of fraud offenders" such as petitioner are sentenced to imprisonment. *Ibid.*; see *id.* at 7a (expressing "puzzle[ment]" at the district court's "implicit suggestion that if [petitioner] were poor and unemployed, he might get a prison term"). And, while recognizing that it could not "treat probation as if it were no punishment at all," *id.* at 11a (citing *Gall* v. *United States*, 552 U.S. 38, 47 (2008), the court of appeals explained that "the particular terms of [petitioner's] probation"—which included no period of home confinement and would allow petitioner to "travel for work, pay his fiancé's college tuition, and even contribute to his 401(k) retirement fund"—"provide[d] overly lenient punishment for a crime" for which the Sentencing Guidelines recommended "seven years in federal prison." *Ibid.*

Finally, the court of appeals noted that the district court had identified a few other mitigating factors in support of its sentencing decision. Pet. App. 11a. But the court of appeals determined that those "factors, considered cumulatively, do not justify the extent of the district court's variance from the Guidelines range." *Id.* at 11a-12a.

4. After the court of appeals issued its mandate, the district court denied petitioner's motion to stay resentencing pending the disposition of his petition for a writ of certiorari, but then postponed resentencing to permit

the preparation of an updated Presentence Investigation Report. D. Ct. Doc. 90 (Jan. 8, 2019).

ARGUMENT

Petitioner contends (Pet. 1-3, 7-26) that the court of appeals erred in reversing his probationary sentence as substantively unreasonable and that this Court's review is necessary to resolve an asserted circuit conflict over whether "a district court may impose a reduced term of imprisonment or probationary sentence" to facilitate the payment of restitution to the defendant's victims. Pet. 2. Those contentions lack merit. The court of appeals correctly determined, on the facts of this case, that the district court gave excessive weight to petitioner's ability to pay restitution, to the exclusion of other statutory sentencing factors, and that the resulting sentence of five years of probation was unreasonable. That fact-bound determination does not conflict with any decision of this Court or of another court of appeals, none of which has adopted a "categorical[]" rule (Pet. 20, 22) prohibiting sentencing judges from imposing a lower sentence to facilitate a defendant's payment of restitution. Further review of the court of appeals' decision is unwarranted.

1. The court of appeals' case-specific determination that the district court imposed a substantively unreasonable sentence was correct and does not warrant further review.

a. A sentence imposed by a district court is subject to review by a court of appeals not only for procedural error, but also for substantive reasonableness under an abuse-of-discretion standard. *Gall* v. *United States*, 552 U.S. 38, 51 (2007). The reviewing court cannot presume that a sentence outside the advisory Guidelines range is unreasonable; must give "due deference to the

district court's decision that the [sentencing factors listed in 18 U.S.C. 3553(a)], on a whole, justify the extent of [any] variance" from the Guidelines range; and may not reverse a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. *Ibid.* But if the court of appeals, applying that deferential standard, concludes that the district court imposed a substantively unreasonable sentence, it must set it aside. "In sentencing, as in other areas, district judges at times make mistakes that are substantive"; "[a]t times, they will impose sentences that are unreasonable"; and "[c]ircuit courts exist to correct such mistakes when they occur." *Rita* v. *United States*, 551 U.S. 338, 354 (2007).

The court of appeals properly performed that function here. The court recognized both the "deferential" standard that governed its review, Pet. App. 6a, and that the district court's principal ground for imposing a sentence of probation—"[t]he need to provide restitution to victims"—is a permissible consideration under 18 U.S.C. 3553(a)(7). Pet. App. 9a. But the court determined that the sentencing judge gave excessive weight to that single consideration and that, on the facts of this case, the resulting sentence, which included no term of incarceration, was unreasonable. *Ibid.* ("[T]he district court's reliance on [petitioner's] salary as overriding all other sentencing considerations exceeded the bounds of permissible choice."); see *id.* at 5a-6a, 10a-11a.

As the court of appeals explained, petitioner's multi-year fraud scheme "was serious and * * * inflicted considerable harm upon his victims," a consideration that "alone weighs against the lenient nature of the sentence

that the trial court imposed." Pet. App. 9a. The probationary sentence was also at odds with Congress's recognition "that general deterrence is particularly important in the context of white collar crime." *Ibid.* That is because, in white-collar cases, sentences of "little or no imprisonment" can "create[] the impression that certain offenses" will be punished with monetary sanctions "that can be written off as a cost of doing business." 1983 Senate Report 76.

At the same time, petitioner's probationary sentence failed to account for the need to avoid unwarranted sentencing disparities, see 18 U.S.C. 3553(a)(6), a factor that the district court did not expressly address in explaining its sentencing decision. Pet. App. 53a-55a; see Gov't C.A. Br. 40. A sentence of probation for a white-collar defendant despite numerous aggravating factors, see Pet. App. 9a, based primarily on the ability to pay restitution through a high-income job, "raise[s] concerns of sentencing disparities according to socio-economic status," *id.* at 10a (citation and internal quotation marks omitted) (citing cases); see *id.* at 7a-10a; see also *id.* at 11a (stating that "[o]ur system of justice has no sentencing discount for wealth"). Here, the decision to "impose a lenient probation sentence" despite numerous aggravating circumstances "because [petitioner's] high income allowed him to make restitution payments to his victims," *id.* at 11a, created disparities between petitioner and otherwise similarly situated fraud offenders, because most fraud defendants with petitioner's criminal history have been sentenced to imprisonment in recent years, *id.* at 10a, and because the sentence constituted a significant deviation from the 78-to-97 month range recommended under the advisory Guidelines,

which "themselves are designed to restrain unwarranted disparities," *id.* at 10a-11a (citing *Gall*, 552 U.S. at 54).

The court of appeals' fact-bound determination that the sentencing judge improperly balanced the foregoing considerations against the need for restitution in imposing a probationary sentence was sound and does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

b. The contrary contentions of petitioner and his amici lack merit. Most of those contentions (Pet. 18-24) rest on the premise that the court of appeals "h[e]ld it categorically impermissible for a district court to impose a shorter prison sentence or probationary term because a defendant's earning capacity would allow him, if not in prison, to make restitution payments to his victims," Pet. 20; see Pet. 2-3, 6-7, 18, 22; see also Nat'l Ass'n of Crim. Def. Lawyers Amicus Br. 2, 10; Nat'l Org. for Victim Assistance Amicus Br. 8. That premise, however, is mistaken.

As explained above, the court of appeals did not understand the government to argue that it is "impermissible" (Pet. 18) to impose a lower sentence based on a defendant's "income and consequent ability to pay restitution," Pet. App. 5a-6a, but instead correctly understood the government to argue that the district court imposed a substantively unreasonable sentence by giving "improper weight" to that factor. *Ibid.*; see, *e.g.*, Gov't C.A. Br. 43 (recognizing that "the need for restitution is a proper sentencing factor," but arguing that "the weight that the court placed upon restitution to the exclusion of other factors was an abuse of discretion");

id. at 46 (arguing that the district court erred "by placing decisive weight upon the need to promote restitution and giving short shrift to the other sentencing factors"). In line with that argument, the court of appeals recognized that "[t]he need to provide restitution to victims is one of the factors that district courts must consider in fashioning a sentence." Pet. App. 9a (citing 18 U.S.C. 3553(a)(7)). The court simply concluded that the sentencing judge in this case "exceeded the bounds of permissible choice" through "reliance on [petitioner's] salary as overriding all other sentencing considerations." *Ibid.* Nothing in that case-specific determination establishes a rule "that considering a defendant's earning capacity is categorically impermissible," Pet. 22.[1]

Petitioner separately faults (Pet. 24-26) the court of appeals for "fail[ing] to appreciate the significant deterrent value of" a probationary sentence. But to the contrary, the court recognized that it was "not permitted to treat probation as if it were no punishment at all." Pet. App. 11a. It explained, however, that "custodial sentences are qualitatively more severe than probationary sentences of equivalent terms." *Ibid.* (quoting *Gall*, 552

---

[1] Petitioner appears to derive (Pet. 2-3, 6, 8, 18) a contrary understanding from a sentence in which the court of appeals stated that "[e]xamining the § 3553(a) sentencing factors *without considering* [*petitioner's*] *earning capacity*, it is not possible to conclude that the probation [petitioner] received, with its lenient conditions, was a reasonable sentence." Pet. App. 12a (emphasis added). Read in context, however, that language simply reflects the court's explanation that the other mitigating factors mentioned briefly by the district court could not sustain a sentence of probation—in other words, that the excessive weight the district court accorded petitioner's high earning capacity in fact rendered the sentence substantively unreasonable and required "[r]esentencing." *Ibid.*

U.S. at 48); see, *e.g.*, *United States* v. *Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009) ("The threat of spending time on probation simply does not, and cannot, provide the same level of deterrence as can the threat of incarceration in a federal penitentiary for a meaningful period of time."). And the court further explained that the terms of petitioner's probation were "overly lenient": while permitting petitioner to engage in work travel, pay his fiancé's college tuition, and contribute to his own retirement account, the conditions did not require any period of home confinement or weekend reporting to a correctional facility, or even an hour of community service. *Id.* at 11a. The court of appeals, in short, reviewed petitioner's sentence in accordance with both the statutory dictates of 18 U.S.C. 3553(a) and this Court's precedents when assessing the deterrent value of a probationary sentence on the facts of this case.

2. Contrary to petitioner's contention (Pet. 7-14), the courts of appeals are not divided over whether district courts may impose a lower sentence to facilitate a defendant's ability to make restitution payments. Neither the court below nor any other court of appeals has prohibited sentencing courts from varying downward on that basis, and the differing outcomes identified by petitioner are attributable to factual differences in the cases considered by the courts of appeals, not the legal rule that those courts have applied.

a. Petitioner incorrectly asserts (Pet. 2-3, 8) that, in the decision below, the court of appeals joined the Fourth and Eleventh Circuits in "hold[ing] that district courts may not reduce a prison sentence, or instead impose a probationary term, to enable a defendant to earn income to pay restitution to his victims." As explained

above, the court of appeals here announced no such categorical rule. See pp. 11-12 & n.1, *supra*. The court determined only that the sentencing judge in this case had "exceeded the bounds of permissible choice" by relying on petitioner's "salary as overriding all other sentencing considerations." Pet. App. 9a; see *id.* at 11a-12a. Nothing in that case-specific determination bars the district court on remand from considering the need for restitution as a factor supporting a below-Guidelines sentence. Nor does the decision categorically preclude a sentencing court faced with different circumstances from opting for probation in lieu of a term of incarceration.

Petitioner's cited decisions from the Fourth and Eleventh Circuits (Pet. 8-9) also do not establish a categorical bar on relying on a defendant's ability to make restitution. Rather, those decisions reversed particular sentences as substantively unreasonable where the district courts focused "solely," *United States* v. *Engle*, 592 F.3d 495, 505 (4th Cir.), cert. denied, 562 U.S. 838 (2010), or "single-mindedly" on the need for restitution, "to the detriment of all of the other sentencing factors," *United States* v. *Crisp*, 454 F.3d 1285, 1292 (11th Cir. 2006).

In *Engle*, for example, the Fourth Circuit reversed a sentence of three years of probation in a tax-evasion prosecution, where the advisory Guidelines range was 27 to 33 months, the district court failed to acknowledge pertinent policy statements of the Sentencing Commission emphasizing the importance of incarceration in tax-evasion cases, and the court—despite its "near-exclusive focus on [the defendant's] ability to pay restitution," 592 F.3d at 498, 504—declined to order the defendant to pay full restitution, *id.* at 503 & n.3. Although finding that the district court in that case had

"abused its discretion by focusing so heavily on [the defendant's] ability to pay restitution," *id.* at 504; see *id.* at 505, the court in *Engle* also stated that it could "envision cases where the ability to pay restitution might properly be the deciding factor leading to a probationary sentence." *Id.* at 504 (giving as an example a case where the Guidelines recommended a short sentence and "restitution is owed to a private party"). "In such cases," the court continued, "the deference owed to district courts' sentencing decisions might require appellate courts to affirm the sentence." *Ibid.* Thus, far from barring district courts from considering a defendant's "ability to pay restitution," *ibid.*, *Engle* makes clear that the Fourth Circuit views that consideration as a permissible one. See also *United States* v. *Butler*, 629 Fed. Appx. 554, 559 (4th Cir. 2015) (per curiam) (explaining that the district court's error in *Engle* was to "overrel[y] on one § 3553(a) factor in determining its sentence"), cert. denied, 136 S. Ct. 1481 (2016) and 137 S. Ct. 1359 (2017).

The Eleventh Circuit's decision in *Crisp*, *supra*—the only precedential decision of that court cited by petitioner—also involved a factbound reasonableness determination.[2] The district court in *Crisp* imposed a

---

[2] Petitioner also cites (Pet. 9) *United States* v. *Jones*, 705 Fed. Appx. 859 (11th Cir. 2017), but the court of appeals in that case simply rejected a defendant's contention that her sentence was unreasonably high because "the district court did not explicitly consider whether a shorter total sentence would enable [her] to begin [restitution] payments earlier." *Id.* at 862. In doing so, the court noted that it had previously rejected the argument that a district court was required to impose a lower sentence simply to allow restitution payments to begin earlier, and stated that there was no ev-

sentence of five hours of imprisonment and five years of supervised release on a corporate comptroller who had "participated in a fraudulent scheme that bilked a bank out of nearly half of a million dollars." 454 F.3d at 1286. The court of appeals determined that, in giving "controlling weight" to the need for restitution in a case where the defendant was unlikely to "meet [his] restitution obligations," *id.* at 1289, 1291, the district court had abused its discretion and imposed a sentence that did not reflect the seriousness of the crime, provide just punishment, or "afford adequate deterrence to criminal conduct." *Id.* at 1291 (citing 18 U.S.C. 3553(a)(2)(A) and (B)). That fact-specific determination—which the court of appeals reached under a more exacting form of reasonableness review that predated this Court's decision in *Gall*, *supra*—does not constitute a categorical prohibition on considering a defendant's need or ability to make restitution. Compare *Gall*, 552 U.S. at 47 (rejecting a rule requiring "'extraordinary' circumstances" to support a non-Guidelines sentence), with *Crisp*, 454 F.3d at 1291 (applying such a rule). To the contrary, the Eleventh Circuit has more recently recognized that the need for restitution to victims is "one of the factors the district court has to consider in fashioning a sentence" and stated that imposing a term of incarceration in some circumstances "arguably cuts *against* that factor." *United States* v. *Plate*, 839 F.3d 950, 957 n.6 (2016).

b. Petitioner errs in asserting (Pet. 9-13) that the foregoing decisions conflict with decisions of the Eighth and Ninth Circuit, and an unpublished decision of the Sixth Circuit, that affirmed sentences of probation for

---

idence that the court had abused its discretion in balancing sentencing considerations here. *Ibid.* In any event, that unpublished decision lacks precedential effect.

particular offenders. All of the relevant cited decisions were ones in which sentencing courts considered the need or ability to pay restitution simply as one factor among others supporting a lower (or probationary) sentence. None announced a rule that it will always be reasonable for a sentencing court to impose a probationary sentence in order to enable a defendant to pay restitution, or demonstrates that the deciding court would have reached a different result from the court of appeals in this case.

The Eighth Circuit's decision in *United States* v. *Cole*, 765 F.3d 884 (2014), for example, involved a below-Guidelines sentence of three years of probation imposed on a defendant convicted of fraud and tax offenses. After the court of appeals initially found procedural error and remanded for resentencing, see *id.* at 885, the district court provided "a lengthy and comprehensive analysis" in imposing the same sentence based on five considerations, only one of which was that "a probationary sentence would allow [the defendant] to work and earn money to make restitution to the victims of the fraud." *Id.* at 886; see *ibid.* (noting the district court's reliance on its findings that, *inter alia*, the defendant was "mostly a passive * * * participant" in her co-defendants' scheme and that she was "not a consummate fraudster" and "markedly different than most of the fraudsters" the court had sentenced) (citation and internal quotation marks omitted). *Cole* does not suggest that on other facts the Eighth Circuit would necessarily uphold a probationary term, or a sentence that varies significantly from the Guidelines range, based solely on a defendant's need or ability to satisfy "her restitution obligations." See *ibid.*

The same is true of the Ninth Circuit decisions cited by petitioner. In *United States* v. *Menyweather*, 447 F.3d 625 (2006), the district court imposed a below-Guidelines sentence of five years of probation (with 40 days to be served "in 'a jail-type institution'"), restitution, and 3000 hours of community service based largely on the "[d]efendant's diminished capacity and family circumstances," and in particular on the fact that the defendant was a single mother who cared for her daughter. *Id.* at 628, 634-636. In affirming that sentence, the court of appeals "also observe[d] that the district court's goal of obtaining restitution for the victims * * * is better served by a non-incarcerated and employed defendant," *id.* at 634, but it did not suggest that that consideration alone would have supported the sentence in that case, much less a greater variance from the advisory Guidelines range.

Similarly, in *United States* v. *Edwards*, 595 F.3d 1004 (2010), the Ninth Circuit affirmed a sentence of probation that the district court had imposed—at a resentencing held nine years after the defendant's offense conduct—based on the need to "best accomplish the goals of the restitution order," *id.* at 1016, as well as the defendant's conduct following the initial sentencing, the court's belief that he posed no risk of reoffending, and the need to provide care for the defendant's "diabetes and related medical complications," *id.* at 1011. As in *Menyweather*, the court in *Edwards* did not address whether the district court's concern with restitution would have supported a sentence of probation were it the sentencing judge's lone or principal basis for varying to that below-Guidelines sentence. See also *United States* v. *Treadwell*, 593 F.3d 990, 1012 (9th Cir.) (recognizing that "[t]he possibility of a wrongdoer making

restitution is * * * only one factor that a district court must weigh in balancing sentencing considerations"), cert. denied, 526 U.S. 916 and 562 U.S. 973 (2010).[3]

The Sixth Circuit's unpublished decision in *United States* v. *Musgrave*, 647 Fed. Appx. 529 (2016) (cited in Pet. 11-12), also does not conflict with the decision below. After the court of appeals reversed the defendant's initial non-custodial sentence as substantively unreasonable, see *United States* v. *Musgrave*, 761 F.3d 602 (6th Cir. 2014), aff'd, 647 Fed. Appx. 529 (6th Cir. 2016), the district court in *Musgrave* sentenced the defendant to one day of imprisonment, five years of supervised release with 24 months of home confinement, a $250,000 fine, and $1.7 million in restitution. 647 Fed. Appx. at 532-533. In imposing that sentence, the court identified multiple factors supporting its sentencing decision and made clear that the defendant "[wa]s 'not staying out to pay restitution'" and that his ability to pay was "merely a factor" in the court's calculus. *Id.* at 536; see *id.* at 537-538 (addressing the other factors). The court of appeals affirmed, rejecting in relevant part the government's argument that the sentence was impermissibly based on the defendant's "socioeconomic status." *Id.* at 535-536. That result does not suggest that the Sixth Circuit would affirm a probationary sentence that, like

---

[3] The remaining Ninth Circuit decisions cited by petitioner (Pet. 10-11) are inapposite. Those cases address not a district court's decision to impose a more lenient sentence based on a defendant's ability to make restitution, but the inverse question of whether the district court improperly considered a defendant's *inability* to pay in deciding to impose a term of incarceration. See *United States* v. *Rangel*, 697 F.3d 795, 803-804 (9th Cir. 2012), cert. denied, 568 U.S. 1182 (2013); *United States* v. *Anekwu*, 695 F.3d 967, 989 (9th Cir. 2012), cert. denied, 569 U.S. 989 (2013); *United States* v. *Burgum*, 633 F.3d 810, 815-816 (9th Cir. 2011).

the one here, included more lenient conditions and was based solely or predominantly on the need to pay restitution. Compare *id.* at 533 (noting the district court's emphasis on the two-year period of home confinement it imposed), with Pet. App. 11a (explaining that petitioner's conditions of probation do not even restrict him "to his own home"). In any event, as petitioner recognizes (Pet. 11 n.2), *Musgrave* is a non-precedential decision and therefore cannot create a conflict warranting this Court's review.[4]

Petitioner's reliance (Pet. 12-13 & n.4) on a series of district court cases is misplaced for similar reasons. As district court decisions, the cited cases could not establish a conflict warranting the Court's intervention. See Sup. Ct. R. 10(a). More to the point, the decisions—a number of which, unlike this case, involve terms of imprisonment or more restrictive conditions of probation, see *United States* v. *Eggleston*, No. 18-cr-42, 2018 WL 5919304, at *3 (E.D. Wis. Nov. 9, 2018); *United States* v. *Goss*, 325 F. Supp. 3d 932, 936 (E.D. Wis. 2018); *United*

---

[4] To the extent petitioner suggests (Pet. 12 n.3) tension between the decision below and the unpublished decision in *United States* v. *Levy*, 311 Fed. Appx. 533 (3d Cir.), cert. denied, 556 U.S. 1249 (2009), that suggestion is unfounded. The district court in *Levy* had asked a representative of the fraud victim whether, if a term of imprisonment would limit the defendant's ability to pay restitution, the victim would still prefer that the court order imprisonment. *Id.* at 534. It was that "inquiry" that the Third Circuit called "perfectly appropriate." *Ibid.* The Third Circuit has elsewhere reserved its "view as to what circumstances justify a reduction in sentence to facilitate payment of restitution." *United States* v. *Kononchuk*, 485 F.3d 199, 206 n.7 (2007); cf. *United States* v. *Stango*, 613 Fed. Appx. 149, 151-152 (3d Cir. 2015) (reversing as procedurally unreasonable a variance sentence that the district court had based in part on a desire to facilitate restitution payments).

States v. *Dennison*, 493 F. Supp. 2d 139, 140 (D. Me. 2007)—show only how district courts have exercised their sentencing discretion in the first instance; they do not address how courts of appeals, such as the Tenth Circuit in this case, have reviewed those exercises of discretion when conducting reasonableness review. Particularly given that neither the Tenth Circuit nor any other court of appeals invariably precludes probationary sentences premised at least in part on considerations of restitution, the cited decisions reflect no disagreement on a legal question that would require this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

MARCH 2019