No. 18-759

IN THE

Supreme Court of the United States

MATTHEW D. SAMPLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government does not deny that the question presented—whether a court may reduce a defendant's sentence to allow him to earn money to pay timely restitution to his victims—is extremely important. Nor does it dispute that the answer to that question is yes; numerous federal statutes require courts to facilitate the payment of restitution, and nothing prohibits considering a defendant's earning capacity towards that end. *See* Pet. 18-26; Br. of Nat'l Org. for Victim Assistance et al. 4-14; Br. of NACDL 3-11.

Instead, the Government tries to repackage the Tenth Circuit's decision. According to the Government, the Tenth Circuit concluded merely that a court may not place "excessive weight" on earning capacity. BIO 9. But that is not what the Tenth Circuit held. The Tenth Circuit ruled that it is categorically impermissible for a court to impose a less severe sentence because the defendant could earn money to pay restitution if not imprisoned. Pet. App. 2a, 7a-12a. The court of appeals thereby chose sides in a circuit split and ordered that petitioner be sentenced "without considering [his] earning capacity." *Id.* 12a.

This Court should grant certiorari to resolve the conflict over the question presented and, if the Solicitor General is not willing to defend the rule the Government elicited below and has propounded in numerous other cases, appoint an amicus to do so.[1]

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[1] *See, e.g.*, *Green v. Brennan*, 136 S. Ct. 1769 (2016) (appointing amicus in similar circumstances).

1. The Government advances three arguments attempting to portray the Tenth Circuit's decision as nothing more than a "fact-bound determination" that the district court placed "excessive weight" on petitioner's earning capacity. BIO 8. None succeeds.

First, the Government conflates the general question whether a court may consider the need to provide *restitution* with the specific question whether a court may consider a defendant's *earning capacity* towards that end. The Government correctly notes that the Tenth Circuit recognized that sentencing courts generally may consider "'[t]he need to provide restitution to victims.'" BIO 9 (quoting Pet. App. 9a). But when the Tenth Circuit turned to the specific question whether a court may consider a defendant's ability to earn income to make restitution, the Tenth Circuit held that courts "should not rely" on that factor. Pet. App. 7a. The Tenth Circuit reasoned that reducing a defendant's sentence because his earning capacity would allow him to pay restitution is equivalent to sentencing him "based on his income" or his "wealth." *Id.* 2a, 7a. And that, the Tenth Circuit explained, is "impermissible," for there is "no sentencing discount for wealth." *Id.* 8a, 11a (internal quotation marks and citation omitted).

Second, the Government asserts that it argued below merely that the district court placed "improper weight" on petitioner's earning capacity. BIO 11 (internal quotation marks omitted). It does not matter, however, what the Government argued below; what matters is what the court of appeals held.

In any event, the Government's characterization of its briefing below does not tell the full story. While

the Government argued in some places that the district court gave too much weight to petitioner's earning capacity, the Government also maintained that the district court's consideration of petitioner's "earning capacity" was "impermissible." U.S. CA10 Br. 43 (internal quotation marks omitted); *see id.* at 42 ("the fact that Sample has a high paying job was *not a proper factor* for granting a variance" (emphasis added)); *see also United States v. Sayad*, 589 F.3d 1110, 1116 n.1 (10th Cir. 2009) (noting Government's similar blending of arguments). The Government also asked (U.S. CA10 Br. 45) the Tenth Circuit to follow the Fourth Circuit's lead in *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010), which held that considering a defendant's "earning capacity" under these circumstances is "impermissible." *Id.* at 504-05.

Nor was the Government's briefing in this case an anomaly. For years, the Government has been urging courts—sometimes successfully, sometimes not—to hold that it is "entirely improper" for district courts to reduce sentences because defendants' earning capacities would allow them to pay restitution if not imprisoned. U.S. Br. at 23, *United States v. Engle*, 592 F.3d 495 (4th Cir. 2008) (No. 08-4497) ("U.S. *Engle* Br.") (internal quotation marks omitted). According to the Government's briefs, such a sentence reduction is tantamount to considering a defendant's "'socio-economic status,'" which is "'not relevant in the determination of a sentence.'" *Id.* (quoting U.S.S.G. § 5H1.10); *see also* U.S. Br. at 14, *United States v. McCormick*, 303 Fed. Appx. 119 (3d Cir. 2008) (No. 07-4776) (arguing that "reducing a sentence to facilitate payment of restitution is *never* reasonable" (emphasis added)); *infra*

at 6-8 (citing several more briefs with same or similar language). Indeed, the Government has already begun citing *the decision below* for the categorical proposition that "[c]ourts do not, and should not, give 'middle class' discounts at sentencing" by considering the fact that, if not imprisoned, a defendant would be able "to work" and pay restitution. U.S. Br. at 40, *United States v. Johnson*, Nos. 17-3776 & 18-2455 (8th Cir. Jan. 18, 2019).[2]

Third, the Government tries in a footnote to explain away the Tenth Circuit's conclusion that, "without considering [his] earning capacity," petitioner's sentence is substantively unreasonable. Pet. App. 12a. The Government says that statement means that "the excessive weight the district court accorded petitioner's high earning capacity in fact rendered the sentence substantively unreasonable." BIO 12 n.1. But this argument cannot be squared with the English language. Holding that a sentence must be judged "without considering" a factor is simply not the same as saying that a court must not afford the factor "excessive weight."

In short, the Tenth Circuit held that petitioner's sentence was substantively unreasonable because it cannot be sustained absent considering his earning capacity for purposes of enabling him to pay restitution, and that consideration is improper. The question

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[2] Most of the briefs cited in the preceding paragraph involve appeals by the Government. The Solicitor General's office must approve the prosecution of all such appeals. 18 U.S.C. § 3742(b); 28 C.F.R. § 0.20(b); Dep't of Justice, Justice Manual § 2-2.121 (2018), https://www.justice.gov/jm/jm-2-2000-procedure-respect-appeals-generally#2-2.121.

whether that prohibition is correct is therefore squarely presented and dispositive in this case.

2. The Government's attempts to dispel the conflict over the question presented likewise fail.

a. Two courts of appeals besides the Tenth Circuit also have held that sentencing courts may not consider whether a defendant would be able to earn money to pay restitution if not imprisoned.

The Fourth Circuit held in *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010), that considering a defendant's "earning capacity" is "impermissible," because that consideration makes "prison or probation depend[] on the defendant's economic status." *Id.* at 504-05. The Government emphasizes (BIO 15) that the Fourth Circuit suggested in *dicta* there "might" be a carve-out from that categorical rule for cases in which the Guidelines recommend a minimal term of imprisonment. *Engle*, 592 F.3d at 504. The Government, however, identifies no Fourth Circuit or other decision recognizing such an exception. Nor would such an exception apply here in any event. The Guidelines in this case, as in *Engle* itself, recommended several years in prison. *See* Pet. 4.

The Eleventh Circuit in *United States v. Crisp*, 454 F.3d 1285 (11th Cir. 2006), also held that sentencing a defendant to a brief term of imprisonment to preserve his "ability to earn a living so as to be able to make restitution payments" was impermissible. *Id.* at 1290-91 (internal quotation marks omitted). The Government points to language in the opinion suggesting that the district court erroneously gave undue "weight" to the goal of restitution. BIO 15-16 (quoting

Crisp, 454 F.3d at 1289). But, just as in the decision below, such statements about restitution in general are irrelevant; the Eleventh Circuit *also* held more specifically that courts may not place *any* weight on a defendant's earning capacity with respect to restitution. *Crisp*, 454 F.3d at 1290-91. Furthermore, the Eleventh Circuit recently reaffirmed that *Crisp* "rejected the argument that a term of imprisonment should be shortened simply to allow a defendant to begin making restitution payments earlier." *United States v. Jones*, 705 Fed. Appx. 859, 862 (11th Cir. 2017).[3]

The Government's current arguments also contradict how it has presented the holdings of *Engle* and *Crisp* to other courts. Most pointedly, the Government cited *Crisp in its briefs on appeal in Engle* and (accurately) described *Crisp* as holding that "a reduction in a prison sentence . . . in order to allow a defendant to make restitution 'turns the Sentencing Guideline's policy on its head.'" U.S. *Engle* Br. 23 (alterations omitted) (quoting *Crisp*, 454 F.3d at 1291); U.S. Reply Br. at 2, *United States v. Engle*, 592 F.3d 495 (4th Cir. 2008) (No. 08-4497) (citing *Crisp* and equating the "ability to generate income" to pay restitution with the improper consideration of "socio-economic status" (internal quotation marks omitted)).

In *United States v. Musgrave*, 647 Fed. Appx. 529 (6th Cir. 2016), the Government likewise cited *Engle*

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[3] The contrary language the Government cites from the Eleventh Circuit's decision in *United States v. Plate*, 839 F.3d 950, 957 n.6 (11th Cir. 2016), is pure *dicta* from a case that did not cite *Crisp*.

for the proposition that "courts have long viewed it as impermissible for sentencing courts to fashion a defendant's sentence based on his 'economic status' or ability to make restitution." U.S. Reply to Def.'s Sent. Mem. at 16, No. 3:11-cr-00183 (S.D. Ohio July 8, 2013). After the district court rejected that argument, the Government again relied on *Engle* to argue on appeal that the district court's "goal of obtaining restitution" by ensuring the defendant was "non-incarcerated and employed" was "both improper and unreasonable." U.S. Br. at 49-50, *United States v. Musgrave*, 647 Fed. Appx. 529 (6th Cir. 2015) (No. 15-3043) (internal quotation marks omitted). While the Sixth Circuit rejected that argument and affirmed, *see* Pet. 11-12, the Government to this day uses *Engle* even in other contexts as a stock example of a holding that appellate courts should automatically vacate sentences where "the district court relied on 'impermissible,' suspect viewpoints." U.S. Br. at 25, *United States v. Provance*, No. 18-4786 (4th Cir. Jan. 31, 2019) (quoting *Engle*, 592 F.3d at 505).

Other examples that controvert the Government's current descriptions of *Engle* and *Crisp* abound. *See* U.S. Br. at 39, *United States v. Slaton*, 801 F.3d 1308 (11th Cir. 2014) (No. 14-12366) (arguing that *Crisp* "expressly rejected . . . as unreasonable" the district court's justification that a probationary sentence would enable the defendant to provide restitution to the victims); U.S. Sent. Mem. at 9-10, *United States v. Boesen*, No. 4:05-CR-00262 (S.D. Iowa May 1, 2007) (arguing, based in part on *Crisp*, that "the need for restitution should not serve as grounds for imposing

a more lenient sentence than is otherwise warranted"). The Government has even cited *both Engle* and *Crisp* together for the proposition that sentencing based on a defendant's "ability to pay restitution" is "impermissible" and "unreasonable"—and in the same breath called the contrary argument "frivolous." U.S. Opp. to Def.'s Sent. Mem. at 7, *United States v. Tolz*, No. 11-20160 (S.D. Fla. July 25, 2011) (internal quotation marks omitted).

b. The Government does not dispute that the Eighth, Ninth, and Sixth Circuits have all held that a sentencing court may consider a defendant's ability to earn money to pay restitution as a reason to impose a lower or probationary sentence. Pet. 9-12; BIO 17. Yet the Government insists that those courts would not have affirmed petitioner's sentence. The Government is incorrect.

Take, for example, *United States v. Cole*, 765 F.3d 884 (8th Cir. 2014). There, the Guidelines range for the defendant was 135-168 months' imprisonment—roughly double petitioner's range here—for fraud and tax offenses that deprived private entities of $33 million dollars and avoided $3 million in taxes—a figure many multiples higher than the $1 million at issue in this case. *Compare id.* at 885, *with* Pet. App. 53a. The district court nevertheless sentenced Cole to three years' probation because that sentence "would allow Cole to work and earn money to make restitution to the victims of the fraud." *Cole*, 765 F.3d at 886. To be sure, the district court relied on other factors as well. *Id.* But so did the district court here. *See* Pet. 5 (citing Pet. App. 35a, 53a-55a). And in affirming Cole's sen-

tence, the Eighth Circuit found "no error" in the district court's consideration of Cole's earning capacity. *Cole*, 765 F.3d at 887. It therefore did not ask, as the Tenth Circuit here did, whether the other factors the district court considered, "without considering [her] earning capacity," would *alone* suffice to justify her sentence of probation. Pet. App. 12a.

In fact, the Government plainly understood the meaning of *Cole* when it was decided: In its petition for rehearing, the Government recognized that the Eighth Circuit had allowed district courts to "sentenc[e] a defendant to probation in order to improve the chances of restitution." U.S. Pet. for Rehg. at 14, *United States v. Cole*, 765 F.3d 884 (8th Cir. 2014) (No. 11-1232) (internal quotation marks omitted). The Government argued this was "a legal error" because earning capacity is "an entirely improper factor on which to rely." *Id.* (internal quotation marks omitted). But the Eighth Circuit denied the petition.

Ninth Circuit case law is in accord. The Guidelines in *United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2006), and *United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010), recommended shorter terms of imprisonment than in this case. But nothing in the Ninth Circuit's opinions suggests that earning capacity somehow becomes an impermissible factor when the Guidelines recommend a sentence of six or seven years, instead of two or three.

The Sixth Circuit also would have affirmed petitioner's sentence. In *Musgrave*, the defendant faced a 57-71 month Guidelines range for fraud offenses that caused a loss of $1.7 million to private entities. 647 Fed. Appx. at 530-31. The district court sentenced the

defendant to one day of imprisonment and five years of supervised release "to facilitate payment of restitution." *Id.* at 530, 536 (internal quotation marks omitted). The Sixth Circuit affirmed, expressly rejecting the Government's argument that the sentence "was based on the impermissible consideration of socioeconomic status." *Id.* at 532, 536.

The Government attempts to distinguish *Musgrave* by suggesting that the sentence there was not based "solely or predominantly on the need to pay restitution." BIO 20. But the Government ignores that the district court in that case explicitly stated that restitution was "'a compelling reason for the consideration of not imposing a term of imprisonment.'" 647 Fed. Appx. at 536. And there is no reason at all to believe that, absent the need for restitution and Musgrave's earning capacity, the district court would not have imposed a substantial term of imprisonment.

c. The Government claims that decisions from district courts outside of the six circuits discussed above are immaterial because they "show only how district courts have exercised their sentencing discretion in the first instance," not whether the courts of appeals in those jurisdictions would allow the consideration of earning capacity as a means of facilitating restitution. BIO 21. But the reason we lack direct guidance from those courts of appeals is that, in contrast to this case and others, the Government has declined to appeal defendants' below-Guidelines sentences in circumstances substantially similar to those here. *See* Pet. 12-13.

That reality only underscores the need for this Court's intervention. As the Government itself notes,

Congress and this Court have stressed the need to avoid unwarranted sentencing disparities. BIO 10 (citing 18 U.S.C. § 3553(a)(6)); *see also* Pet. 14. Yet not only are several courts of appeals divided over whether a sentencing court may consider a defendant's ability to earn money to make restitution, but the Government also has exacerbated the situation by allowing the law in other circuits to vary on a courtroom-by-courtroom basis.

This checkerboard of outcomes has spread widely enough. The Court should grant review and return Congress's longstanding project of ensuring full restitution for crime victims to its intended track.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 2019