

No. 17-297

In the Supreme Court of the United States

JEFFREY ROTHBARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's decision to sentence petitioner to a 24-month term of imprisonment, at the bottom of the range recommended by the Sentencing Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 851 F.3d 699.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. A petition for rehearing was denied on May 25, 2017 (Pet. App. 30-32). The petition for a writ of certiorari was filed on August 22, 2017. 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 Southern District of Indiana, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 19-20. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. *Id.* at 21. The court of appeals affirmed. *Id.* at 1-16.

1. In 2010, petitioner was convicted in Indiana state court of felony forgery and placed on probation. Pet. App. 2. While on probation, he used his position as a registered agent of “GreenCity Finance” to defraud 17 victims out of more than \$210,000. *Id.* at 2-3. Petitioner would purport to arrange for financing for energy savings upgrades but would require a deposit to process the loan. *Id.* at 3. Rather than holding the deposits in escrow, however, petitioner used the funds for personal expenses, including a PGA golf tournament and a vehicle for his son. *Ibid.*

2. Petitioner was charged with one count of wire fraud, in violation of 18 U.S.C 1343. Pet. App. 3. He waived indictment and pleaded guilty. *Ibid.*

Before sentencing, petitioner filed a sentencing memorandum contending that he should be given a non-custodial sentence because he suffers from a serious medical condition. D. Ct. Doc. 56, at 17-24 (Nov. 3, 2016). In 2005, well before petitioner initiated the GreenCity fraud scheme, he was diagnosed with imatinib-resistant chronic myeloid leukemia. Pet. App. 3. His doctor, Larry Cripe, prescribed nilotinib, one of three drugs recognized for the treatment of this form of leukemia. *Ibid.* Nilotinib, like the other recognized drugs, is very expensive, with an annual price of well over \$100,000. *Ibid.* The drug was effective in leading to remission, and Dr. Cripe believes that nilotinib is the only drug that can effectively control petitioner’s disease. See D. Ct. Doc. 56, at 21-22. In seeking a noncustodial sentence, petitioner noted that nilotinib is not listed on the Bureau of Prisons (BOP) National Drug Formulary and that there is no guarantee he would receive the drug if sentenced to prison. *Id.* at 22-23.

The Probation Office prepared a Presentence Investigation Report (PSR), which calculated an advisory guidelines range of 24 to 30 months of imprisonment. PSR ¶ 65. In view of petitioner's health, however, the Probation Office recommended a sentence of 12 months of detention at a halfway house and 12 months of home confinement. Pet. App. 4; PSR ¶ 71(n) and (o). The Probation Office later revised its recommendation to three years' probation, noting that although petitioner appeared to require a harsher penalty to deter future criminal behavior because he had committed the fraud while on probation, it would be unfair to burden taxpayers with the cost of petitioner's medication in prison. Pet. App. 4.

At sentencing, the district court applied the sentencing factors under 18 U.S.C. 3553(a) and determined that a custodial sentence was necessary to protect the public and promote deterrence. Pet. App. 6; Sent. Tr. (Tr.) 42-43. It observed that petitioner's scheme was a "crime of pure greed" that had been committed while petitioner was on probation for another offense. Pet. App. 6; Tr. 36, 39. The court specifically considered petitioner's medical condition and found based on the evidence in the record that the BOP would be able to provide the necessary medical care. Tr. 41. The record examined by the district court included a letter from Dr. Paul Harvey, the Regional Medical Director for the BOP's North Central Region. Pet. App. 5; D. Ct. Doc. 70-1 (Nov. 30, 2016). Dr. Harvey's letter explained that prisoners in petitioner's health classification (CARE Level 4)

require services available at a Medical Referral Center (MRC) and may require daily nursing care. The MRC facilities have clinical staff available in-house,

24-hours per day, and have contracts with community specialists for additional review and/or care, if clinically necessary. The BOP has six Medical Referral Centers.¹

D. Ct. Doc. 70-1, at 2.

Dr. Harvey's letter also expressed the view that "the BOP has the necessary staff and resources to properly manage [petitioner's] current medical needs, in addition to any future medical needs that may arise," noting, specifically, that the BOP "has provided, and continues to provide, medical treatment for inmates who have been diagnosed with leukemia and are in various stages of treatment." D. Ct. Doc. 70-1, at 3. Dr. Harvey also explained that while nilotinib is not on the National Drug Formulary, the BOP permits a medical provider to "submit a non-Formulary request and prescribe the requested medication pending approval of the request."

Ibid. An expedited approval process is also available and generally results in a determination within 24 hours.

Ibid. Nilotinib "has been approved for inmates with medical conditions similar to [petitioner's]." *Ibid.*

In light of this information, the district court determined that petitioner's medical condition did not require a noncustodial sentence. Pet. App. 6; Tr. 48. The court noted that the crime was sufficiently serious that it had "never really seriously considered probation," given that petitioner's "medical issues [would] be adequately taken care of by the department." Tr. 48. The court sentenced petitioner to 24 months of imprisonment, to be followed by two years of supervised release. Tr. 46. It also "point[ed] out to the Bureau of Prisons

¹ Petitioner was later designated to one of those centers. Pet. App. 5.

that the defendant does have leukemia that's in remission by medication and request[ed] that the Bureau of Prisons take special note of that medication and make sure that he receives that medication." Tr. 47.

3. Petitioner appealed, contending that the 24-month term of imprisonment was substantively unreasonable because the BOP may be unable or unwilling to furnish the medication he requires. Pet. App. 2. He also moved for a stay of his reporting date pending resolution of the appeal. *Id.* at 6. The district court denied the motion, but the court of appeals granted a stay and expedited his appeal. *Ibid.* The court of appeals also directed the parties to supplement the record with additional information about petitioner's anticipated course of treatment were he to be housed in a BOP facility. *Ibid.*

After considering the supplemental information, the court of appeals affirmed, explaining that even assuming it might have imposed a different sentence in the first instance, "the district court here gave sound reasons for its chosen sentence." Pet. App. 2. The court determined that "this is not a case in which the only substantively reasonable sentence would have been one that kept [petitioner] out of prison." *Id.* at 9. The court found "no clear error" in the district court's "findings of fact" and "no reason to find [petitioner's] sentence of 24 months * * * substantively unreasonable." *Ibid.*

The court of appeals also examined for itself the availability of non-formulary medications in federal prison, the qualifications of BOP medical staff, and the history of medical care for prisoners with conditions like petitioner's. Pet. App. 7-8. The court emphasized the evidence that the BOP has processed "ten requests for

nilotinib since 2010, and all ten requests have been approved for the same condition as [petitioner] has,” notwithstanding its high price. *Id.* at 7; see *id.* at 8. The court explained that although “BOP is not willing or able to pre-commit to nilotinib for [petitioner], before he has gone through the intake examination at the prison medical center,” its “reservation of the right to conduct its own medical examination” was reasonable, because even if petitioner’s case were “an easy one, there will be other entering inmates who are subjectively convinced that they need one particular medication, but for whom an alternative or more conservative treatment may be medically acceptable.” *Id.* at 8-9. “BOP,” the court continued, “would be acting irresponsibly if it did not make an independent decision, based on a thorough and professional examination of the new inmate and his medical history.” *Id.* at 9. The court also noted that if the BOP failed to meet petitioner’s medical needs, he could invoke BOP grievance procedures to seek redress. *Id.* at 9-10.

Judge Posner dissented. In his view, it was “apparent from the extensive literature on the medical staff and procedures of the Bureau of Prisons * * * that the Bureau cannot be trusted to provide adequate care to [petitioner].” Pet. App. 12.

ARGUMENT

Petitioner contends (Pet. 5-16) that the court of appeals erred in affirming the sentence imposed by the district court. Petitioner’s factbound argument lacks merit and presents no circuit conflict or disputed question of law. This Court’s review is not warranted.

1. The court of appeals correctly determined that the within-guidelines sentence imposed by the district court was substantively reasonable. Sentencing courts

are accorded substantial discretion in imposing an appropriate sentence because they are “in a superior position to find facts and judge their import under § 3553(a).” *Gall v. United States*, 552 U.S. 38, 51 (2007) (citation omitted). “[T]he appellate court must review the sentence under an abuse-of-discretion standard.” *Ibid.*

a. Petitioner first contends (Pet. 5-7) that the district court “ignor[ed] the directives of 18 U.S.C. § 3553(a)” and “predetermined” his sentence. To the extent that argument challenges the procedural reasonableness of the sentence, see *Gall*, 552 U.S. at 51-52, it was not presented to, or decided by, the court of appeals. See Pet. App. 2 (describing petitioner’s challenge as one of substantive unreasonableness); see also Pet. C.A. Br. 9-19 (focusing on the substantive unreasonableness of the sentence). Recognizing that it is “a court of review, not of first view,” this Court generally declines to reach issues that “were not addressed by the Court of Appeals.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Even if this argument had been pressed below, it would not warrant further review. Petitioner misreads the district court’s statement that it “never really seriously considered probation” to mean that the court disregarded the facts of petitioner’s case. Pet. 6 (citation omitted). But it is clear from the record that the district court specifically considered the Section 3553(a) factors in light of the nature of petitioner’s offense, his criminal history, his medical condition, and other relevant factors. See Tr. 36-48; cf. *United States v. Miranda*, 505 F.3d 785, 794 (7th Cir. 2007) (remanding for resentencing where the district court failed to address the de-

fendant's principal argument in favor of a lower sentence). After weighing the pertinent sentencing factors, and "with consideration that [petitioner's] medical issues [would] be adequately taken care of," the district court reasonably determined a sentence of 24 months' imprisonment was appropriate. Tr. 48.

b. Petitioner further contends (Pet. 7-16) that the imposition of a 24-month custodial sentence—indeed, a custodial sentence of *any* duration—was substantively unreasonable in light of the BOP's inability to guarantee that petitioner would receive the medical care that he needed while incarcerated. The lower courts considered and rejected that argument, and that case-specific ruling does not merit further review. See *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The district court appropriately considered petitioner's medical needs, along with the BOP's ability to provide him with the necessary medical care, at the time of sentencing. The court knew that petitioner had leukemia and was being successfully treated with nilotinib, and it also knew that petitioner's doctor viewed no other prescription as a viable treatment option. The court accordingly reviewed the evidence regarding the BOP's ability to treat petitioner. The court permissibly relied on Dr. Harvey's letter explaining BOP procedures, noting that the BOP had approved nilotinib for inmates in the past, and expressing the view that the BOP could meet petitioner's medical needs. Pet. App. 5-6. The court then properly considered other relevant circumstances, including petitioner's recidivism while on probation and the harm he caused to his victims, and concluded that a custodial sentence was justified. Tr. 41-43.

The court of appeals, for its part, correctly determined that the district court had not abused its discretion in imposing a within-guidelines custodial sentence. As the court of appeals recognized, faced with evidence supporting both a custodial and a noncustodial sentence, the district court was entitled to credit the evidence favoring a custodial sentence. Pet. App. 9 (“[W]e have no reason to find [petitioner’s] sentence of 24 months (which fell within the recommended Guidelines range) substantively unreasonable.”). And the court of appeals also solicited and reviewed supplemental evidence to assure itself that petitioner’s medical needs would be adequately addressed.² *Id.* at 6-9.

2. Petitioner challenges the lower courts’ assessment of the need for a custodial sentence, arguing in effect that the lower courts incorrectly weighed the competing considerations in selecting a custodial sentence. See, *e.g.*, Pet. 16 (contending that review is warranted “to provide [petitioner] with the opportunity to receive the best medical treatment available” and that BOP resources “should be reserved” for violent offenders). That factbound claim provides no basis for further review of the considered determinations of the lower courts.

Petitioner asserts the “possibility” (Pet. 13) that his medical needs might not be met. But “[m]any persons

² This Court has held that the courts of appeals may adopt a presumption of reasonableness for within-guidelines sentences, see *Rita v. United States*, 551 U.S. 338, 347 (2007), and the Seventh Circuit has adopted such a presumption. See, *e.g.*, *United States v. Moore*, 851 F.3d 666, 674, cert. denied, No. 16-9579 (Oct. 2, 2017); *United States v. Maxfield*, 812 F.3d 1127, 1130 (2016) (*per curiam*). Although the court did not explicitly rely on this presumption in upholding petitioner’s sentence, the fact that it could have presumed the sentence to be reasonable further supports its conclusion.

in poor health are confined in federal prisons,” *United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001), cert. denied, 534 U.S. 1163 (2002), including terminally ill patients. Petitioner cites (Pet. 12) two cases in which courts of appeals affirmed district court decisions awarding downward departures based on defendants’ medical needs. But each case turned on its specific facts and the court of appeals concluded only that the district court had not abused its discretion in granting the departure. See *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000); *United States v. Martin*, 363 F.3d 25, 50 (1st Cir. 2004). Indeed, both decisions expressly recognize that incarceration is acceptable even for defendants suffering from serious medical conditions. See *Gee*, 226 F.3d at 903; *Martin*, 363 F.3d at 51.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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