UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, Appellant,	:	**Dkt. No. 10-1050**
v.	:	(On appeal from judgment
PAUL NEGRONI, Defendant-Appellee.	:	of conviction and sentence in No. **2:08-CR-550** (E.D.Pa.) (Savage, J.))

APPELLEE NEGRONI'S PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING

Pursuant to Fed.R.App.P. 35 and 40(a), appellee Paul Negroni petitions for rehearing en banc. On March 29, 2011, this Court (per Jordan, J., with Greenaway & Stapleton, JJ.) issued a precedential opinion vacating Mr. Negroni's judgment of sentence and remanding for resentencing. A copy is attached, and cited herein as "Op."; it is available at 2011 WL 1125854. See 3d Cir. LAR 35.2, 40.1(a).[1]

Required Statement Under Fed.R.App.P. 35(b)(1):

Counsel express a belief, based on a reasoned and studied professional judgment, that the decision of the panel is inconsistent with precedential decisions of this Court and of the Supreme Court.

1. The panel's decision that the government, as appellant, did not waive the issue of procedural reasonableness of Mr. Negroni's sentence -- and then reversing on that ground -- where the government intentionally claimed only substantive unreasonableness in its statement of issues and in its brief on appeal, is inconsistent with the Federal Rules of Appellate Procedure as interpreted and enforced by this Court in numerous cases, including Abdul-Akbar v. McKelvie, 239 F.3d 306, 316 n.2 (3d Cir. 2001) (en banc), and Institute for Scientific Information, Inc. v. Gordon & Breach, Science Publ., Inc., 931 F.2d 1002, 1011 (3d Cir. 1991); see also United States v. Hoffecker, 530 F.3d 137, 159 (3d Cir. 2008); Ghana v. Holland, 226 F.3d 175, 180 (3d Cir. 2000); Republic of Philippines v. Westinghouse Electric Corp., 43 F.3d 65, 71 n.5 (3d Cir. 1995); Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993). Because the standard of appellate

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[1] While Mr. Negroni's case was consolidated by the Court for disposition with that of co-defendant Hall, the instant petition is filed only on appellee Negroni's behalf.

practice expected of the United States must not be more lax than that enforced against corporate litigants, criminal defendants, and indigent prisoners, and because the novel exception carved out by the panel would be unworkable and unfair if applied generally, rehearing en banc is warranted.

2. The panel's decision that Judge Savage's lengthy explanation failed to suffice as a justification for imposing a sentence of probation, with a special condition of home confinement and coupled with onerous financial penalties, is inconsistent with the Supreme Court's decision in Gall v. United States, 552 U.S. 38 (2007), and this Court's decisions in United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (en banc), and United States v. Grober, 624 F.3d 592 (3d Cir. 2010). Instead, the panel treats the variance in this case like a pre-Booker departure, and elevates the notion of a Guidelines sentence in "serious white-collar" cases almost to the level of a presumption. Then, in the end, the panel reverses the judgment without determining either of the district court's errors to have been prejudicial, that is, without identifying any reasonable probability that a different sentence would have been imposed had Judge Savage better articulated his reasons or had he refrained from responding as he did to the prosecutor's objection to the sentence, after it was imposed. To reverse a sentence on the basis of procedural error without explaining how the sentence may have "resulted from" the claimed errors is contrary to 18 U.S.C. § 3742(f), 28 U.S.C. § 2111, and Fed.R.Crim.P. 52(a), as interpreted by this Court and the Supreme Court. See United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008), and United States v. Brown, 578 F.3d 221, 226-27 (3d Cir. 2009), quoting Williams v. United States, 503 U.S. 193, 203 (1992). For these reasons as well, rehearing by the Court en banc is warranted.

REASONS FOR REHEARING

Paul Negroni, the appellee, pleaded guilty to mail fraud, wire fraud, and money laundering in connection with a scheme to defraud the administrator of certain securities class action settlement funds. On November 23, 2009, following a day of sentencing hearings involving several co-defendants and the receipt of extensive memoranda and exhibits from the parties, Judge Savage sentenced Mr. Negroni to five years' probation beginning with nine months in home confinement, restitution of $677,805.05, a forfeiture money judgment in the same amount, special assessments of $700, and no fine. 3USApp. 644-45. The panel holds that "the District Court committed procedural error in not adequately explaining Negroni's sentence and in basing that sentence, in part, on the undermined assertion," which the panel describes as "a clearly erroneous finding of fact," Op. *9, "that Hall[, a co-defendant,] was more culpable than Negroni." Id. The government advanced neither of these arguments anywhere in its 85-page brief on appeal. When the appellee noted that any procedural reasonableness claim had been waived, Negroni Br. 24, the government adamantly adhered to its substantive-only attack in Reply. In particular, it expressly disclaimed any contention that a single one of the district court's findings was clearly erroneous. Gov't Reply at 4. Because the panel's disposition varies sharply from the norms of appellate review and departs from controlling precedent, the appellee seeks rehearing en banc.

1. The panel opinion deviates from Circuit authority, and sets a dangerous precedent, in reversing the sentence on a basis not articulated by the government as appellant.

The government's sole claim, as appellant, was that Mr. Negroni's sentence of five years' probation, beginning with nine months of home confinement, plus more than $1.3 million in financial penalties, was substantively

unreasonable. This required it to satisfy a burden of showing that "no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." United States v. Tomko, 562 F.3d 558, 568 (3d Cir. 2009) (en banc). The panel does not find that the government's appeal has made that showing. (In fact, it did not, for reasons developed at length in Mr. Negroni's brief and never mentioned in the opinion.) Instead, the panel reverses on grounds never articulated -- and instead expressly disavowed -- by the appellant. For this reason, to ensure consistency of circuit precedent and the workability of the adversarial appellate system, rehearing en banc should be granted.

Rule 28(a) of the Federal Rules of Appellate Procedure provides that the "appellant's brief must contain ... (5) a statement of the issues prsented for review" (emphasis added). Moreover, "for each issue, [the argument in the brief must contain] a concise statement of the applicable standard of review ...." Fed.R.App.P. 28(a)(9)(B). An opinion written by Judge Aldisert for the Court en banc held that these rules "require appellants to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief." Abdul-Akbar v. McKelvie, 239 F.3d 306, 316 n.2 (3d Cir. 2001) (emphasis added). In that case, the appellant -- an indigent prisoner advancing claims of racially motivated physical abuse -- contended that a certain provision of the Prison Litigation Reform Act restricted his access to the Courts, in violation of various constitutional provisions. In his reply brief, he included an argument that yet another constitutional provision was implicated, beyond those mentioned in the opening brief. Over the dissent of four judges, this Court refused to consider the plaintiff-appellant's Eighth Amendment argument, even though it arose on the same facts and implicated most of the same principles as the due process arguments presented in his opening brief. Needless to say, the

government, as appellant, can offer none of the equities that were present -- but failed to carry the day -- in that case. Accord United States v. Hoffecker, 530 F.3d 137, 159 (3d Cir. 2008) (criminal defendant); Ghana v. Holland, 226 F.3d 175, 180 (3d Cir. 2000) (federal prisoner advancing First Amendment issue); Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) (prisoner civil rights case); Republic of Philippines v. Westinghouse Electric Corp., 43 F.3d 65, 71 n.5 (3d Cir. 1995) (rule enforced against highly sophisticated litigant).

In this case, without citing the controlling rule or precedent, the panel insisted on addressing and deciding the case on the basis of the issue never presented or argued:

> Negroni argues that the government cannot challenge the procedural reasonableness of his sentence because, in its Statement of Issues on Appeal, the government asserted only that it was contesting the substantive reasonableness of Negroni's sentence and, therefore, has waived any challenge to the procedural reasonableness. ... Nonetheless, ... many of the arguments it presents fall squarely within the definition of procedural error articulated by the Supreme Court in Gall. ... Thus, despite the label applied by the government, its arguments include a challenge to the procedural reasonableness of Negroni's sentence.
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> ... [W]e do not agree that the government has somehow waived any argument with respect to procedural error simply because the Statement of Issues labels the challenge as substantive rather than procedural. Negroni has identified no case in which an issue has been found waived where it was argued in the briefs but mislabeled in the Statement of Issues. Furthermore, while the Statement of Issues may have used the word 'substantive' rather than 'procedural,' it still notified the Court and the parties that the issue on appeal is the reasonableness of Negroni's sentence, and the brief sets forth at length the precise basis for that challenge .... Negroni has not claimed to have suffered any prejudice as a result ....

Op. *7 n.9.[2] While the difference between a substantive reasonableness

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[2] The denigration of appellee's waiver argument in this passage is unfortunate. Mr. Negroni did not contend that the government had "somehow" waived any claim of procedural error, but rather cited Rule 28(a)(5) and this Court's case law thereunder. The basis of his argument therefore should not have been

argument and a procedural one can sometimes be subtle, it is not a matter of labeling.

The Supreme Court has attempted to draw a sharp distinction between the two aspects of post-Booker appellate review of sentences. While all review is for abuse of discretion, the procedural aspect is relatively strict and has specific components. See Gall, 552 U.S. at 51. Review for substantive reasonableness is exceedingly deferential, as already noted. Id. at 52.[3] Under United States v. Merced, 603 F.3d 203 (3d Cir. 2010), a district court's failure to "meaningfully consider" a relevant factor under 18 U.S.C. § 3553(a) is treated as a "procedural error" (citing United States v. Grier, 475 F.3d 556, 571 (3d Cir. 2007) (en banc)), while an argument that the district court's "choice of sentence did not afford [certain] factors enough weight" is a "substantive complaint." 603 F.3d at 217. The two arguments are related, but one is not simply a mislabeled version of the other. See also United States v. Grober, 624 F.3d 592, 599-602 (3d Cir. 2010) (where panel perceived certain of government's putative procedural challenges to sentence as sounding in substantive reasonableness, contentions analyzed solely as presented).

_____ (footnote cont'd)

treated by the panel as if it were a mystery. Nor is his argument that a waiver results "simply" from mistake in applying a "label" to an appellant's argument. Substantive and procedural reasonableness are different, as discussed in the body of this Petition. It is also inaccurate to suggest that the government "may have" asserted only substantive unreasonableness in this case, as if the matter were debatable. It is a simple fact that the appellant did intentionally, indeed adamantly, limit its appellate argument in that way.

[3] This complex case involved numerous co-defendants. Judge Savage had the benefit of closely examining all of these individuals in sentencing them (other than Waltzer). Each sentencing was interdependent with all the others. See 3App. 595 (opening remarks at Negroni's sentencing: "Again, we are incorporating the testimony and the proceedings and everything that happened earlier this morning in the joint session.").

The panel mistakenly suggests that this Court does not enforce Fed.R. App.P. 28(a)(5) where a party has argued a point but has not identified it in the Statement of Issues. Once such case is Institute for Scientific Information, 931 F.2d at 1011, where the Court found an issue of breach of contract to have been abandoned, even though the appellant pointed to a paragraph of its opening brief where the matter was addressed. Moreover, the panel sets a dangerously loose precedent by rationalizing its decision on the basis that "while the Statement of Issues may have used the word 'substantive' rather than 'procedural,' it still notified the Court and the parties that the issue on appeal is the reasonableness of Negroni's sentence, and the brief sets forth at length the precise basis for that challenge." This is not a matter of using the wrong word to describe an issue -- as if the problem were the appellant's having said it was raising an issue of improper refusal "to depart" where what the lower court did was actually to refuse a variance, for example. Under the panel decision, an appellant who deliberately (but wrongly) argued only that a federal statute violated substantive due process could win on the basis that the panel perceived a procedural due process or equal protection violation, because both arise under Due Process Clause. Nor is there a word in any of this Court's cases enforcing Rule 28(a)(5) that suggests, as does the panel, that unfair surprise or prejudice to the appellee is an essential feature of this Court's willingness to uphold Rule 28.

The standard suggested by the panel -- even if it could be squared with precedent -- should not be adopted. As the Supreme Court recently declared, "In our adversary system, ... in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present." Greenlaw v. United States, 554 U.S. 237, 243 (2008) (holding that government waives illegal sentence error by not appealing). Adherence to this

rule is especially important in the case of government appeals in criminal cases, the Court explained, because a question of separation of powers is involved: "Even when a United States attorney files a notice of appeal with respect to a sentence qualifying for review," a clause of 18 U.S.C. § 3742(b) provides that approval must be obtained from the Solicitor General's office before the appeal can proceed:

> Congress thus entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed. It would severely undermine Congress' instruction were appellate judges to 'sally forth' on their own motion, ... to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence [on the ground chosen for decision].

552 U.S. at 246, quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of rehearing).

While in the present case, Mr. Negroni, as appellee, chose to address all of the government's claims (without "waiving the waiver"), even those which despite the appellant's framing of the issue seemed procedural, in many cases confusion and unfairness would result from the panel's ruling, if applied as a new rule of appellate practice in the Circuit. Often it will not be clear whether some passage in an appellant's brief should be taken as adequately raising a question not mentioned in the Statement of Issues. As a result, the appellee may not fully address the point. This Court's requirement that the appellant specify the place each issue was raised and ruled upon below would become unenforceable, threatening the ability of this Court to show appropriate deference to lower court decisionmaking, as well as the proper application of the "plain error" rule. Fed.R.Crim.P. 52(b). Often, a controversy about the applicable standard of review will exist, yet the omission of the issue from the Rule 28(a)(5) Statement will cause that matter to be overlooked by one or both parties. Not infrequently,

the omission of the issue from the Statement will be tied to omissions of pertinent record material from the Appendix. See Fed.R.App.P. 10(b)(3), 30(a)(1). It would also create uncertainty in the drafting of appellees' briefs, increasing the likelihood of "kitchen sink" coverage. In short, this Court's heretofore relatively strict enforcement of Rule 28(a)(5), a rule which after all is phrased in mandatory terms, is founded in sound considerations of policy and practice.

For all these reasons, the panel's decision involves a significant and problematic deviation from Circuit precedent. The Court en banc should grant rehearing, vacate the decision of the panel, and then either affirm the sentence as not being substantively unreasonable, or else remand to the panel to make that determination.

2. Reversal of appellee Negroni's probationary sentence on the grounds given by the panel would be inconsistent with Circuit and Supreme Court precedent.

Even if this case could properly be decided on the basis of procedural error, where the appellant argued only substantive unreasonableness, the panel's rationale for reversal is inconsistent with binding precedent. For this reason as well, rehearing en banc should be granted.

The panel's first holding is this:

> In a case involving such a substantial variance, it is not enough to note mitigating factors and then impose sentence. Rather, the chain of reasoning must be complete, explaining how the mitigating factors warrant the sentence imposed.
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> [I]f a district court seeks to vary from the Guidelines recommendation of incarceration for persons who have committed serious white-collar crimes, it must provide a thorough and persuasive explanation of why the congressionally-approved policy of putting white collar criminals in jail does not apply. Not having done so in Negroni's case, the District Court committed procedural error.

Op. *8. In particular, the panel faulted the district court's "failure to adequately address the variance" in terms of "the need to avoid unwarranted sentencing

disparities among similarly situated individuals." Id. The panel suggested no kind of "disparity" that might be thought to exist in this case however, other than the fact that the sentence imposed was significantly outside the Guidelines range -- a factor which the panel acknowledged the district court had in fact adequately considered. Compare 18 U.S.C. § 3553(a)(4) (duty to consider Guidelines range) with id.(a)(6) (disparity).

The panel also identified a second reversible error, a logical defect in Judge Savage's response to the prosecutor's objection made after Mr. Negroni's sentence was imposed, in which the court pointed out that the prosecutor had contended that Mr. Negroni was less culpable that co-defendant Hall. Op. *9. The panel describes Judge Savage's rejoinder as based on a clearly erroneous finding of fact, a claim the prosecutor did not make in the sentencing court and which the government never advanced (and in fact expressly disavowed) in its brief on appeal.[4] The panel opinion points to nothing in the record to suggest that Mr. Negroni's sentence might have been different had this supposed error -- which occurred after sentence was imposed -- not been made.

The panel's reference to a "congressionally-approved policy" misses the mark. The policy in question is that of the Sentencing Commission, and is found at USSG § 1A1.4(d). This provision is a Policy Statement, not a Guideline; accordingly, it was never submitted to Congress, even for the option of disapproval under 28 U.S.C. § 994(p). The Commission's recommendation against probation for Mr. Negroni was thus "congressionally approved" only in the sense that Congress did not veto the applicable guideline range when promulgated,

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[4] Despite the district court's clear and unappealed findings in the defendant's favor, the panel seems to cast doubt on the reasonableness of the sentence by referring to Mr. Negroni's "alleged personality disorder," Op. *8, and by stating that he "purported to take 'full responsibility for [his] actions' ...." Op. *4.

which is true of every sentencing case.[5] A policy statement is entitled to consideration by the district court at sentencing under 18 U.S.C. § 3553(a)(5). The panel does not hold, as the government never argued, that Judge Savage failed to give this policy legally sufficient consideration. The Commission's critique of the pre-1984, supposedly excessive use of probation in nonviolent cases is no more a Congressional policy than any other passage in the Guidelines Manual.

The policies of Congress are expressed in statutes. The Sentencing Reform Act does not generally disfavor probation in white collar cases (see, e.g., 18 U.S.C. § 3582(a) ("whether to impose a term of imprisonment"); 28 U.S.C. § 994(a)(1)(A) (guidelines must address "determination whether to impose a sentence to probation ... or a term of imprisonment"),(g) (guidelines must "minimize the likelihood" of increasing prison overcrowding),(j) ("general appropriateness of imposing a sentence other than imprisonment" on nonviolent and similar first offenders), nor does it even suggest that probation cannot serve the important goals of deterrence and just deserts. The legislative history concurs. S.Rep. No. 98-225, 98th Cong., 1st Sess., at 55 (opposing assumption that imprisonment is "necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine"), 77 (duty to consider all options where "less restraint on liberty" would suffice), 91-92 ("very often" probation "will adequately satisfy any appropriate deterrent or punitive purpose") (1983). Indeed, it is Congress that deemed Mr. Negroni eligible for probation on each count of conviction, see 18 U.S.C. § 3561(a), and mandated that Judge Savage consider the "kinds of sentences available" (including probation) in his sentencing

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[5] Ironically, under the Rules Enabling Act, the Federal Rules are "congressionally approved" in exactly the same way and to just the same extent. 28 U.S.C. § 2074(a). Yet the panel refuses to enforce the mandatory terms of Fed.R. App.P. 28(a)(5) in this case, as discussed under Point 1 ante.

decision. Id. § 3553(a)(3). The district court did not defy Congress in any way at Mr. Negroni's sentencing. The panel's suggestion otherwise conflicts with this Court's recent discussion of this same fallacious government argument in Grober, 624 F.3d at 608-09, discussing United States v. Arrelucia-Zamudio, 581 F.3d 142, 150-51 (3d Cir. 2009).

Although courts must consider the guidelines as one of the § 3553(a) factors, they cannot blindly defer to policy decisions of the Sentencing Commission. Pepper v. United States, 562 U.S. --, 131 S.Ct. 1229, 1247-48 (2011); Gall, 552 U.S. at 46-47; Rita v. United States, 551 U.S. 338, 348, 351, 357 (2007). Based on the facts of an individual case, judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," Kimbrough v. United States, 552 U.S. 85, 101 (2007) (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." Rita, 551 U.S. at 347.

In Gall, the Supreme Court specifically endorsed the value of probation as a form of sentence, when thoughtfully selected by the district court in a particular case. "Probation is not granted out of a spirit of leniency ...." 552 U.S. at 48 n.4 (quoting National Council on Crime and Delinquency). Gall disapproved the Eighth Circuit's characterization of Gall's probationary sentence as a "100% downward variance," in part because that characterization failed to recognize the "substantial[] restrict[ion]" of liberty involved in compliance with probation. Id. The Supreme Court in Gall rejected the position that probation "lies outside the range of choice dictated by the facts of this case" because "§ 3553(a)(3) ['kinds of sentences available'] directs the judge to consider sentences other than imprison-

ment." Id. at 59 & n.11.[6] Gall not only tracks the intent of Congress to recognize the value of a probationary sentence, as expressed through the SRA and § 3553(a), but also highlights the reasonableness of the district court's discretionary decision in this case, in light of the Commission's statute-defying over-emphasis on incarceration, to the detriment of all other options.

Under Gall and the other precedent of the Supreme Court and this Court -- indeed, under United States v. Booker, 543 U.S. 220 (2005), itself -- it is not necessary for the district court to "justif[y] a deviation from the recommended range," as the panel put it, Op. *8, or to explain how the circumstances of the case "take Mr. Negroni out of the heartland of circumstances contemplated by the Guidelines ...." Id. n.11. That approach was invalidated in Booker, and the "heartland" theory (which is used to test departures, not variances) was stricken as unconstitutional. What the district court must explain under 18 U.S.C. § 3553(c) is not why the sentence deviates from the Guidelines, but only how the judge concluded that the sentence imposed was "sufficient, but not greater than necessary," id. § 3553(a), to achieve a balance of the statutory goals of sentencing. The panel's Guidelines-centered analysis is inconsistent with the statutory standard.

Nor is it valid under Gall and its progeny to suggest that "In a case involving such a substantial variance, it is not enough to note mitigating factors and then impose sentence. Rather, the chain of reasoning must be complete, explaining how the mitigating factors warrant the sentence imposed." Op. *8.[7] The panel calls the variance in this case "genuinely extraordinary" and thus

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[6] But see United States v. Lychock, 578 F.3d 214, 219 (3d Cir. 2008) (district court must offer a "reasoned explanation for its ... disagreement with the policy judgments of Congress regarding the appropriate sentences for child pornography offenses"). Lychock relied heavily on authority predating Tomko that was cited there only by the dissenters. See Grober, 624 F.3d at 602 (explaining Lychock and United States v. Goff, 501 F.3d 250 (3d Cir. 2007)). Here, Mr.

demands "a thorough justification." Id. *7.[8] But Tomko clarified that, under Gall, it is not the "strength" of the district court's justification, but rather the "significance" of that justification, in the sense of "a more complete explanation," that the court of appeals "may look for" when reviewing a variance, including a "major departure" (or large variance). Tomko, 562 F.3d at 571, quoting Gall, 552 U.S. at 50, and United States v. Levinson, 543 F.3d 190, 197 (3d Cir. 2008). The explanation Judge Savage gave in Mr. Negroni's case is at least as thorough, comprehensive and detailed as the statement upheld as sufficient by the Supreme Court in Gall and far superior to that upheld in Rita. See 552 U.S. at 53-56; 551 U.S. at 356-59. While the "extent of any variance" may also be considered, the

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Negroni's sentence was not based on an expressed disagreement with policy but upon personal facts and circumstances. To the extent there is a tension between Lychock and other post-Tomko cases, however, en banc consideration is all the more warranted.

[7] Not only is the panel's holding inconsistent with binding precedent by suggesting that a more powerful rationale is required to justify a variance from six years' imprisonment to home confinement, but it also mistakenly assumes that the district court correctly calculated the guideline range. To the contrary, the panel opinion completely overlooks the appellee's argument, advanced on appeal in support of the judgment, that the district court erred in disallowing the defense objection to the six-level enhancement under USSG § 2B1.1(b)(2)(C), for "250 or more victims." See Negroni Br. 46-49.

[8] That there may be no "appellate" decision that "uph[o]ld[s] a probationary sentence that so significantly varied from the Guidelines range," id. *7, is unimportant. As counsel for the appellee advised the panel in a post-argument letter, the Sentencing Commission's database for 2009 alone records the existence of 130 such cases (that is, with Guidelines calculated at 70 months or higher, where probation was granted), 91 of which did not even include a home confinement or halfway house condition, and many of which did not even involve defendants in Criminal History Category I (where Mr. Negroni was properly placed). Again limited to this narrow 2009 cohort -- although the Guidelines have existed for over 20 years, and it has been over six years since Booker was decided -- nine of these were non-5K cases involving charges of fraud, embezzlement, forgery, tax violations, and money laundering. The sentence imposed on Mr. Negroni in this case was thus far from unique.

court of appeals must defer to the district court's determination that the extent of the variance was justified in the defendant's particular circumstances. Tomko, 562 F.3d at 571, quoting Gall, 552 U.S. at 41, 51. The panel decision is at odds with these principles.

Finally, the panel opinion reverses without addressing whether any error was prejudicial, that is, without finding any probability of a different outcome on remand. To be reversible, a sentence must have "resulted from" the claimed error. 18 U.S.C. § 3742(f); 28 U.S.C. § 2111; Fed.R.Crim.P. 52(a). See United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008), and United States v. Brown, 578 F.3d 221, 226-27 (3d Cir. 2009), quoting Williams v. United States, 503 U.S. 193, 203 (1992). In this respect as well, the panel opinion fails to adhere to controlling authority.

Because the vacatur of Mr. Negroni's sentence depends on rationales at odds with binding precedent, rehearing en banc should be granted.

CONCLUSION

For each of the foregoing reasons, the Court should grant rehearing en banc of the panel decision overturning the appellee's sentence.

Dated: April 12, 2011

Respectfully submitted,

s/Peter Goldberger

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CERTIFICATE OF SERVICE

On April 12, 2011, I served the foregoing Petition on the attorneys for the appellee, via this Court's ECF system, addressed to:

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