No. 21-7097

In the
Supreme Court of the United States

Sinmyah Amera Ceasar,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In terrorism cases alone, the Second Circuit has departed from *Gall*'s rule of deferential substantive reasonableness review. In terrorism cases alone, the Court of Appeals performs much closer review, essentially *de novo* review, of the district courts' weighing of the statutory factors in 18 U.S.C. § 3553(a), requires the seriousness of the offense to weigh more heavily than any other factor, and precludes large variances from the Guidelines range for this one class of offense. As demonstrated in Ceasar's petition (at 27-30), the Second Circuit, in this case and others, has led a trend in the Circuits to closely scrutinize downward variances in terrorism cases and re-weigh the sentencing factors under the theory that "terrorism is different" and the seriousness of the offense must be the paramount factor.

Ceasar's petition is an excellent vehicle because it presents this issue in its starkest terms. The district court made detailed findings after a multi-day hearing, explicitly weighed all the sentencing factors, imposed a substantial sentence of incarceration, and set forth the reasons for its sentence on the record and in a 53-page opinion. There was no erroneous fact-finding or procedural

error and none was claimed. The government does not dispute this. Rather, the government and the Second Circuit opinion took issue with the 48-month sentence for being simply too low for a terrorism case, on the theory that terrorism cases as a class are so serious that the nature of the offense must weigh more heavily than other factors. Relying on its own prior conclusions in *United States v. Mumumi*, 946 F.3d 97, 112-113 (2d Cir. 2019), and *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003), that "terrorism is different from any other crimes" and requires "incapacitat[ion] for a longer period of time," Pet. App. 32a-33a, the Circuit held that the seriousness of the offense received too little weight compared to the mitigating factors -- Ceasar's undisputed history of severe abuse since early childhood, her resulting post-traumatic stress disorder, and her need for treatment and her progress made with treatment.

In its brief in opposition, the government does not address the extent to which the Second Circuit's overbearing scrutiny of terrorism sentences alone departs from the *Gall* standard and vitiates the statutory sentencing scheme by precluding sentences toward the lower end of the statutory sentencing range. Instead it raises a series of distracting and muddled arguments in an effort to avoid review.

I. This Is Not an Interlocutory Appeal.

The government's contention that the Second Circuit's decision is interlocutory, as a ground for denying review (BIO 11-12), is meritless. The Circuit reversed the sentence as too low and ordered the district court to resentence Ceasar. This petition is in exactly the same posture as the petition in *Gall v. United States*, 552 U.S. 38 (2007), where the Eighth Circuit had vacated the sentence as substantively unreasonable on the government's appeal and remanded for resentencing, and in the same posture as numerous other decisions of this Court reviewing sentence reversals on government appeals. *E.g.* , *Pepper v. United States*, 562 U.S. 476 (2011) (reviewing Eighth Circuit's decision reversing sentence and remanding for resentencing on government appeal); *Kimbrough v. United States*, 552 U.S. 85 (2007) (reviewing Fourth Circuit's reversal of sentence and remand for resentending on government appeal); *Koon v. United States*, 518 U.S. 81 (1996) (reviewing Ninth Circuit's reversal of sentence and remand for resentencing on government's appeal). The government has likewise sought and obtained certiorari from Circuit reversals of sentences and remands for resentencing. *E.g*, *United States v. Booker*, 543 U.S. 220 (2005) (reviewing Seventh Circuit's decision reversing sentence and remanding for resentencing on

defendant's appeal).

The Second Circuit's decision is a final order, reversing a final judgment of sentence. *Berman v. United States*, 302 U.S. 211, 212-13 (1937). It does not matter that "the court of appeals did not direct the imposition of any particular sentence on remand." BIO 11. If the Second Circuit's opinion stands, it requires a higher sentence to be imposed. If the Second Circuit's decision is reversed by this Court, the original 48-month sentence may be affirmed. The civil cases cited by the government are inapposite and involve the denial of certiorari for lack of ripeness, *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam), denial of review of an appeal from an interlocutory order, *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) and a general statement that the Court reviews final orders, except in extraordinary circumstances. *Hamilton- Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

II. The Circuit Did Not Apply Deferential Abuse of Discretion Review.

The government contends that the Second Circuit applied the correct standard because it cited *Gall*'s abuse of discretion standard of review. Pet. App.

31a, BIO 13. Yes, the Circuit paid lip service to *Gall*. But it actually applied a level of scrutiny to the district court's weighing of the § 3553(a) factors that bore no resemblance to deference. It minutely re-examined all of the facts and, despite finding no errors the district court's fact-finding, re-weighed the § 3553(a) factors from its own perspective, which is that the seriousness of a terrorism offense must heavily outweigh all other factors. The government's examples of what it calls the opinion's deferential review reveal instead the Second Circuit's utter lack of deference -- the Court of Appeals simply ignored those sections of the district court's analysis of the factors with which it disagreed.

For example, the government cites the Second Circuit's statement that the district court "appeared to have considered" the mitigating factors "nearly to the exclusion of countervailing sentencing factors," which "include the need for the sentence to protect the public, deter criminal conduct of the defendant specifically and others generally, promote respect for the law, and reflect the seriousness of the offense committed." BIO 14. But the district court expressly explained on the record at sentencing that it considered specific and general deterrence, including deterring others from doing "what this defendant has done, that is, betray . . . the United States citizens and its law enforcement by giving

information to ISIL members or those who sought ISIL membership who are in this country." Pet. App. 26a, CA 459. It further stated that it "must consider incapacitation," or "will the people of the country be sufficiently protected by her being in prison?" and that "*the defendant's sentence in the first instance in this case since national defense is involved must ensure that the public is adequately punished for her serious criminal conduct*. " CA 460(emphasis added). Thus the district court explicitly considered -- and not in summary fashion but with specific reference to the conduct here -- the very factors that the Second Circuit claimed were nearly excluded from consideration. The Second Circuit's opinion went so far as to delete with ellipses the italicized statement emphasizing the seriousness of the offense and the need to protect the public. Pet.App.26a.

Indeed, the Second Circuit elsewhere in its opinion acknowledged that the district court "recogniz[ed] the seriousness of Ceasar's crimes," "the importance of specific deterrence, as well as general deterrence, to protect the public" and concluded that "in this instance, rehabilitation and specific deterrence go hand in hand." Pet. App. 28a. It simply disagreed with how the district court weighed the competing factors.

The government also touts as an example of deferential review the Second Circuit's statement that the district court noted had "not address[ed] the remarkable fact"that "Ceasar had indeed already offended." BIO 14. Again, the Circuit's disregard of a large chunk of the district court's analysis is striking in its lack of deference. First, the district court devoted four pages of its written sentencing decision to discussing Ceasar's conduct on pretrial release in detail, including her lying to the authorities about her conduct. Pet. App. 70a-73a. Second, this statement ignores the fact that the only reason the sentencing hearing took three days was that Ceasar reoffended on pretrial release. At the hearing, a number of experts addressed the effect of Ceasar's reoffense, as well as other factors, on her likelihood of recidivism in the future. Ceasar had provided significant cooperation, had been released after approximately 18 months in detention, and would have likely received a sentence of time served if she had not violated the terms of her pretrial release. After she violated the terms of pretrial release and was charged with obstruction for deleting posts and lying to agents, the government sought a sentence of 360 months. The fact that she had reoffended was the entire focus of the hearing. So for the Second Circuit to say that the district court "did not address the remarkable fact" that she "had indeed

already offended"was itself remarkable.

Finally, the government does not really defend the Second Circuit's "unwarranted disparity" conclusion, which was based on its comparison of Ceasar's sentence to maximum sentences imposed in three other cases bearing no similarity to this case other than the statutory offense charged. BIO 16-17. There is no defense to this. The Second Circuit acknowledged that these three defendants, unlike Ceasar, were all traveling to fight abroad and lacked any mitigating circumstances. Pet. App. 48a-50a. The only apparent reason for the Circuit to compare Ceasar's sentence to those three cases was that the government cherry-picked them and handed them to the court.

The government claims only that Ceasar did not identify similarly situated defendants with low sentences, suggesting that this would justify the Second Circuit simply accepting the government's cherry-picked cases. It would not, of course, because the Circuit well knew and even acknowledged the dissimilarity of these cases to Ceasar's. *Id*. *See Gall*, 552 U.S. at 56 (error for Eighth Circuit to insist on unwarranted disparity comparison with defendants who were not similarly situated). However, the government's assertion that Ceasar provided no

similarly situated defendants is incorrect as well.

Its claim is based solely on the fact the defendant in *United States v. Doe*, 323 F. Supp. 3d 368 (E.D.N.Y. 2018), a two-year sentence identified by Ceasar, had cooperated and not reoffended while on release. While Ceasar did violate the terms of her release, before her release she, like *Doe*, had provided significant cooperation that the government acknowledged "resulted in the collection of some evidence valuable to several national security investigations." Pet. App. 8a-9a. And the district court accounted for Ceasar's reoffense by sentencing her to twice the term of imprisonment that was imposed in *Doe*. Moreover, Ceasar offered the Circuit other material support sentences well below the maximum, closer to the sentence imposed here, *e.g.*, *United States v. Michael Wolfe*, 14 Cr. 213 (W.D.Tex.) (82 month sentence imposed for traveling to fight for ISIS after military training) (CA Op. Br. 52-53), and the district court had before it a whole range of material support sentences, several well below the guidelines submitted by the defense and the three maximum sentences submitted by the government. Defendant's Sentencing Memorandum, Appellee's Sealed Appendix at 32. The district court was well within its discretion to conclude that Ceasar's extraordinary mitigating factors and her actual significant cooperation warranted

a substantial departure but that her reoffending demanded a sentence twice as high as the *Doe* case. The Second Circuit's choice to compare this sentence only to the three maximum sentences imposed in cases of more serious conduct with no mitigating factors was the same kind of inappropriate "unwarranted disparity" review condemned in *Gall.* 552 U.S. at 56.

III. The Opinion Below Entrenches the Second Circuit's View that "Terrorism is Different" and that Terrorism Offenses as a Class Require Higher Sentences and Close Scrutiny of Downward Variances.

The government contends that the Second Circuit did not apply a less deferential standard of review because this was a terrorism case, that the Circuit's statement that "terrorism is different" was only made in the *Mumuni* case, "the decision below did not repeat that statement," and that the principle is somehow limited to *Mumuni*. BIO 17-19. All of these claims are wrong.

First, *Mumuni* is the law of the Second Circuit, which the court followed in the opinion below. Indeed, the court below cited the *Mumuni* opinion twelve times. Pet. App. 32a, 38a-40a, 46a. Whether or not the opinion below repeated the exact phrase "terrorism is different," it thoroughly applied *Mumuni,* as well as its earlier opinion in *Meskini,* and quoted the synonymous statements in both

cases that terrorism "represents a particularly grave threat" and "terrorists and their supporters should be incapacitated for a longer period of time." Pet. App. 32a. That terrorism is different and requires sentencing closer to the maximum was the guiding principle of *Mumuni*, as it was in the opinion below.

The government's effort to limit the *Mumuni* doctrine that "terrorism is different from other offenses" to the *Mumuni* facts does not withstand scrutiny. The government suggests that in *Mumuni*'s "terrorism is different" section, the Second Circuit was only addressing the issue of whether a sentence near the maximum could be imposed if no one was seriously injured. BIO 19-20. But that question was not in issue in *Mumuni* and the mitigating factors that the Circuit found insufficient did not include the fact that no one was hurt. *Mumuni*, 946 F.3d at 112-13. Rather, in this passage, the Second Circuit concluded its ruling that the 17-year sentence was so low that it "shocked the conscience" by "underscoring that the Guidelines, while only advisory, appropriately reflect Congress's considered judgment that terrorism is different from other crimes," and volunteering that for this reason a sentence at the high end of the Guidelines range would be appropriate in any terrorism case, whether or not there was

serious physical injury. *Id*. Indeed, the Circuit noted that its recent reversal of a 420-month sentence in *United States v. Pugh*, 937 F.3d 108 (2d Cir. 2019) was for procedural error only and posed no substantive reasonableness barrier to a "maximum sentence for a terrorist defendant." *Mumuni,* 946 F.3d at 113, n. 69. In other words, only a sentence at the lower end of the range requires close scrutiny for substantive reasonableness.

Second, the Second Circuit's entire framework for review of Ceasar's sentence was as a sentence for a terrorism offense, which the court treated as a distinct category. After quoting from *Mumuni* and *Meskini* about the grave threat posed by terrorism offenses and the need for severe punishment, the Circuit set forth "Our Relevant Jurisprudence," all focused on terrorism cases. The court stated that it viewed the sentence "in the context of the crimes [Ceasar] has committed, other defendants who have committed similar terrorism crimes, and our treatment of them" and concluded that the 48-month sentence was "shockingly low." Pet. App. 35a. It proceeded to review in detail two prior terrorism sentencing decisions, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009), and *Mumuni*, in which it found the sentences imposed "strikingly low" and

"shockingly low," respectively. Pet. App. 35a-40a. It compared Ceasar's sentence to the maximum sentences imposed in the three cherry-picked cases that bore no similarity to this one except that they involved material support for terrorists. Pet. App. 46a-50a. Throughout its opinion, the only factor the Second Circuit considered was that this was a terrorism offense. Its disagreement with the sentence was based on that factor and its view that no terrorism offense warrants such a large variance.

IV. The Essentially *De Novo* Review of Downward Variances in Terrorism Sentences Not Only Conflicts With *Gall*, but Vitiates the Statutory Sentencing Scheme and Contravenes the Mandate of 18 U.S.C. § 3553(a).

The government asserts that there is no Circuit conflict, noting that other Circuits have joined the trend of overbearing scrutiny of downward variances in terrorism sentences. BIO 21. This is exactly the point made in Ceasar's petition. In direct contravention of *Gall*, there is a lockstep march of Circuit courts riding roughshod over the considered discretion of district judges whenever the government appeals a large variance in a terrorism case. *E.g.*, *United States v. Khan*, 997 F.3d 242 (5th Cir. 2021) (reversing 18-month sentence for young offender who traveled to middle east with a friend to fight, but returned home, pled guilty

and volunteered to educate others about the dangers of Jihad); *United States v. Daoud*, 980 F.3d 581 (7th Cir. 2020) (reversing 16-year sentence on mentally ill youth who was recruited by Government sting operation); *United States v. Abu Ali*, 528 F.3d 210, 262-69 (4th Cir. 2008) (reversing 30-year sentence as too low) and 271-72 (dissent, objecting to *de facto de novo* review based on the offense of terrorism). Only this Court's intervention can stop this.

There is a distinct conflict between the overreaching of the Circuit courts and both the statutory sentencing scheme and the role of district courts in imposing sentence. District courts are fashioning sentences based on consideration of a wealth of facts, which district courts are uniquely situated to weigh, and all of the statutory sentencing factors. One of these factors is "the kinds of sentences available," which includes all sentences within the statutory range. 18 U.S.C. § 3553(a)(3). The statutory range for the offense of providing material support to terrorists is zero to 20 years imprisonment. 18 U.S.C. § 2339B. Congress plainly intended for some defendants convicted of supporting terrorists to be sentenced to no prison time, and for others to be sentenced at the lower end of the range. The Guidelines range, by virtue of the terrorism enhancement,

exceeds the statutory maximum in most cases (see Pet. at 32-33), so for any defendant to be sentenced in even the lower half of the range requires a substantial variance. The intolerance at the Circuit level for substantial downward variances in terrorism cases undermines the statutory sentencing scheme. And it robs district courts of the discretion to fashion the individualized sentences required by *United States v. Booker*, 543 U.S. 220 (2005), enforcing excessive adherence to the Guidelines in terrorism cases.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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