No. _____

IN THE
Supreme Court of the United States

NICOLE R. BRAMWELL,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220, 260-262 (2005), this Court invalidated both 18 U.S.C. § 3553(b)(1), which made the Sentencing Guidelines mandatory, and 18 U.S.C. § 3742(e), which directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines. Consequently, the Guidelines are now advisory and appellate review is limited to "reasonableness." *Booker* and its progeny have "made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 552 U.S. 38, 46 (2007).

Unfortunately, there remains a jurisprudential sentencing tension between district courts and appellate courts even though this Court has explained the significance of affording a trial judge the discretion and due deference that is necessary and required to meet and fulfill the stated purposes of federal sentencing. Since *Booker*, statistics reveal that circuit courts are far more likely to reverse a district court's below-guideline sentence rather than an above-guideline sentence, often discounting to irrelevance a district court's judgment that the 18 U.S.C. § 3553(a) factors, on a whole, justify the extent of a downward variance. As such, the questions presented by this case are:

> (1) When a district court commits no procedural error at sentencing – e.g., correctly calculates the guidelines, considers all statutory sentencing factors, and provides adequate explanation for the chosen sentence – does a court of appeals violate *Gall*'s limited abuse-of-discretion review when it reverses a below-guideline sentence based on its own appellate-reweighing that a different, more severe sentence is appropriate; and

(2) Given the scope and permission of 18 U.S.C. § 3661, whether a district court is prohibited from considering collateral consequences of a conviction when adjudging the most appropriate sentence that is sufficient, but no greater than necessary, to mete out and satisfy the calls and mandates of federal sentencing, pursuant to 18 U.S.C. § 3553(a).

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

Petitioner, Nicole R. Bramwell, was the criminal defendant in the district court and the appellant as well as the cross-appellee in the court of appeals. Respondent, the United States of America, was the prosecutor and plaintiff in the district court and the appellee and cross-appellant in the court of appeals. The related cases include the following:

United States District Court (M.D. Fla. (Orlando Division)):

United States v. Nicole R. Bramwell, Case No. 6:17-cr-143-Orl-40-DCI.

United States Court of Appeals (11th Cir.):

United States v. Nicole R. Bramwell, 28 F.4th 180 (11th 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicole R. Bramwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's published decision and opinion, 28 F.4th 180, is provided in the petition's appendix. *See* Appendix; *United States v. Howard*, 28 F.4th 180 (11th Cir. 2022).

JURISDICTION

The Eleventh Circuit issued its decision and opinion on March 7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Ms. Bramwell has timely filed this petition pursuant to the Rule of the Supreme Court.

CONSTITUTIONAL AND STATUTORY AND PROVISIONS INVOLVED

Title 18, United States Code § 3353. Imposition of a sentence

> (a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—
> >
> > > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > >
> > > (B) to afford adequate deterrence to criminal conduct;
> > >
> > > (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Title 18, United States Code § 3661. Use of information for sentencing

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

In May 2018, the district court varied downward from the accepted Sentencing Guidelines in this case, 78-97 months, and sentenced Nicole Bramwell to serve three years of probation with the first year to be served under house arrest. Ms. Bramwell successfully completed her sentence without issue. For its part, the government appealed the sentence, arguing that it was substantively unreasonable. Almost four years after the appeal was docketed, the Eleventh Circuit Court of Appeals agreed. When doing so, however, the appellate court clearly usurped the broad discretion afforded the sentencing judge and violated the enumerated principles and express mandates of *Gall v. United States*, 128 S. Ct. 586 (2007).

> The Court of Appeals clearly disagreed with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation; it believed that the circumstances presented here were insufficient to sustain such a marked deviation from the Guidelines range. But it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence. Accordingly, the judgment of the Court of Appeals is reversed.

Gall, 128 S. Ct. at 602.

Here, the Eleventh Circuit held that the district court's judgment to render a probationary sentence given an advisory guidelines range between 78 and 97 months (or 6 ½ to slightly more than 8 years) was wrong. The appellate court said that the sentencing judge was wrong because he failed to afford consideration to relevant sentencing factors, he gave significant weight to improper sentencing factors (like considering losing one's professional license, the reasons for carrying out the charged offenses, and the collateral effects of sustaining felony convictions), and clearly erred when considering proper sentencing factors. *See* Appendix.

Among other matters, the appellate court said that the district judge failed to take into account the seriousness of the offense, the need to promote respect for the law, and the need to provide just punishment for the offenses; it also said that the district court did not consider the need for general deterrence and, *a fortiori*, it took into account so-called prohibited sentencing factors, like the loss of a professional license, the effects of convicted felon status, and the reasons and motives for committing the crimes charged. The Eleventh Circuit said that the district court did not avoid unwarranted sentencing disparities between Ms. Bramwell, her co-defendants, and others similarly situated. Finally, the Eleventh found that the district court clearly erred when it weighed Ms. Bramwell's personal history and characteristics against the length and time in which the offenses were committed. All this, according to the Eleventh Circuit, led to a substantively unreasonable sentence subject to reversal. *See id*. "For all these reasons, we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing

the §3553(a) factors," the Eleventh Circuit ruled, "by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Howard*, 28 F.4th at 225 (internal citations and quotations omitted). It went on, "The [district] court's explanation for its major variance from the guidelines range is not sufficiently compelling to support the degree of the variance. … While we review only for an abuse of discretion, our review of the totality of the circumstances in this case through the lens of abuse of discretion yields the conclusion that [Bramwell's probation] sentence is substantively unreasonable." *Id.* (citation omitted).

Just as it did in *Gall*, Ms. Bramwell respectfully comes to the Court asking for the same relief granted there – the Court of Appeals should be reversed. The appellate court clearly replaced the district court's judgment with its own, something it cannot do. And, by doing so, the Eleventh Circuit endorsed a sentencing matrix in a published, precedential opinion that unduly constricts the discretion of the presiding district court judge and 18 U.S.C. §§ 3553(a) and 3661 -- a concise, narrow bandwidth of sentencing choices confined, effectively, to a prescribed range of time in prison, a mandatory sentence found within the calculated Sentencing Guidelines score. Not only does the decision and opinion below run afoul of *Gall*, it discounts to irrelevance the broad sentencing discretion afforded district courts by this Court's decisions in *Booker*, *Rita v. United States*, 127 S. Ct. 2456 (2007), and *Kimbrough v. United States*, 128 S. Ct. 558, 573-576 (2007) (holding district courts have freedom to disagree with Guidelines based on their policy disagreements with them without violating the "need to avoid unwarranted sentencing disparities"). The Court should accept Ms.

Bramwell's case for further merits review and grant her petition for a writ of certiorari in light of the significance and influence the Eleventh Circuit's opinion carries over federal criminal sentencing.

Summary of Case History

Nicole Bramwell, along with two co-defendants, Larry Howard and Ray Stone, were indicted on various counts of conspiracy and receiving illegal healthcare kickbacks involving TRICARE, a health insurance program of the United States Department of Defense. The indictment was returned and filed on June 22, 2017. All three defendants were found guilty as charged after jury trial between January 8 and January 12, 2018. Mr. Howard was sentenced to 160 months in prison on March 30, 2018. Ray Stone was sentenced to two years' imprisonment on April 27, 2018. Though Ms. Bramwell's calculated Sentencing Guidelines included a recommended prison range between 78 and 97 months, she was sentenced on May 9, 2018, to three years of probation, a condition of which the first year was to be served under house arrest.

As of this petition, Ms. Bramwell has successfully served and completed her sentence. All three defendants appealed their convictions; additionally, the government cross-appealed the district court's sentence of probation, arguing that such a sentence was substantively unreasonable given the accepted guidelines score. The Eleventh Circuit, more than four years after trial, issued a published decision and opinion in March 2022 affirming and upholding the defendants' convictions and sentence, but, it agreed with the government that the district court abused its discretion by sentencing Ms. Bramwell to probation. *See generally United States v.*

Howard, 28 F.4th 180 (11th Cir. 2022). Consequently, the Eleventh Circuit reversed Ms. Bramwell's sentence and remanded the cause for re-sentencing to the district court to impose "[a] reasonable sentence [that] should include, at the least, a non-token period of incarceration." *Howard*, 28 F.4th at 225-226.

The appellate court denied Ms. Bramwell's motion to stay the mandate, and such mandate was issued by the court below on April 5, 2022. The district court presently has scheduled re-sentencing for July 19, 2022, in Orlando. Ms. Bramwell now petitions this Court for a writ of certiorari to the Eleventh Circuit Court of Appeals.

Procedural Background and Sentencing

On June 22, 2017, the United States filed an indictment charging Dr. Nicole Bramwell in Count One with conspiracy to offer, pay, solicit, and receive healthcare kickbacks and to defraud the United States, in violation of 18 U.S.C. § 371, and receipt of kickbacks in connection with a federal healthcare benefit program, in violation of 42 U.S.C. § 1320a-7b(b)(1)(A), in Count Two. *See* Doc. 1. Dr. Bramwell has since lost her license to practice medicine.

After a four-day jury trial (in January 2018), the Jury found Defendant Bramwell guilty of conspiracy to receive healthcare kickbacks, in violation of 18 U.S.C. § 371 (Count One); and receipt of healthcare kickbacks, in violation of 42 U.S.C. § 1320a-7b(b)(1)(A) (Count Two). *See* Order Denying Bramwell's Motion for Judgment of Acquittal and Alternative Motion for New Trial, Doc. 213.

The Government alleged that Dr. Bramwell, as well as Defendants Larry Howard and Raymond Stone, conspired to pay and/or receive kickbacks and bribes in order to direct individuals to Howard's pharmacy for furnishing prescription compounded drugs, for which payment was made by TRICARE, a Federal health care program; that is, TRICARE. *Id*. at 4.

In its order denying her Motion for Judgment for Acquittal, the district judge detailed the extent of Ms. Bramwell's criminal liability. *Id*. at 5-9. The court concluded that "Dr. Bramwell joined in this conspiracy to commit healthcare fraud by writing prescriptions for creams, which were filled by Mr. Howard's pharmacy, in exchange for kickbacks." *Id.* at 5. Although Dr. Bramwell only received $138,500 in kickback payments, the court noted that she wrote prescriptions that accounted for $3,560,804.00 of the approximate $4.4 million payment made by TRICARE. *Id*. at.6.

Prior to her sentencing, Ms. Bramwell submitted a 20-page sentencing memorandum and the PSR provided 59 letters of support to the district court. Doc. 211. Ms. Bramwell's sentencing memorandum argued for a probationary sentence based on the application and consideration of the sentencing factors set forth in 18 U.S.C. § 3553(a).[1] Ms. Bramwell described her remarkable life story – a narrative

[1] The sentencing factors described at 18 U.S.C. §3553(a) include, *inter alia*: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," § 3553(a)(2)(A)-(D); "the kinds of sentences available," § 3553(a)(3); "the need to avoid unwarranted sentence disparities among

that conveyed her rise from a challenging past to her work as physician who often served the indigent at no cost. *Id*. at 5-10. Concerning her criminal conduct, the memorandum asserted that in contrast to other healthcare fraud cases:

> Dr. Bramwell was not convicted of illegally prescribing controlled substances. She [was] not charged with falsifying medical billing reimbursement claims or falsely claiming that medical services were rendered when they were not. Moreover, Dr. Bramwell [was] not accused of performing unnecessary medical procedures on patients in order to generate fraudulent reimbursements from a healthcare benefit program or health insurance company . . . and the government [did] not allege that she [prescribed] compounded creams that were medically inappropriate or unnecessary.

Doc. 213 at 11. The memo also asserted in arguments concerning the other § 3553 factors including the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to impose just punishment and to provide general and specific deterrence. *Id*. at 10-16.

As to 18 U.S.C. § 3553(a)(3), the memorandum pointed out that a probationary sentence was an available sentence under the statutes of conviction. *See id.* at 16. Concerning the need to avoid unwarranted sentencing disparities, the memorandum compared Dr. Bramwell's case to other white collar fraud cases, in which probation was imposed, in both the Middle District of Florida and in another circuit.[2] *Id.* at 17.

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defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6); and "the need to provide restitution to any victims of the offense," § 3553(a)(7).

[2] Notably, in relying on a case from another circuit, Dr. Bramwell followed this Court's advice concerning assessing the § 3553 factor of disparity. *See, e.g., Kimbrough v. United States,* 552 U.S. 85, 108 (2007). Unfortunately, as this memorandum describes, the Eleventh Circuit believes that the disparity factor is

Ms. Bramwell cited a Sixth Circuit case, whereat the defendant there received a sentence of one day of incarceration to be followed by supervised release, a fine, and house arrest. *Id*. at p. 17 (citing *United States v. Musgrave*. 647 Fed. Appx. 529 (6th Cir. 2016)). As the memorandum stated, the Sixth Circuit noted that this sentence afforded adequate deterrence. *Id*.

Ms. Bramwell appeared for sentencing on May 9, 2018. After overruling her objections, the district court described its extensive review and study of the relevant sentencing materials:

> I went back and I reviewed the indictment, the final presentence report which we've been discussing at docket entry 207. There's a notice of witnesses expected to testify at docket entry 210. There's a motion for downward variance at 211. I have reviewed the sentence I imposed in the case of Mr. Howard, as well as Mr. Stone. I have reviewed very carefully the 55 letters submitted that are attached to the presentence report. And when I say that, I mean I literally read every one. I don't take that as something that's not important. If you submitted it, I read it.

Doc. 280 at 17. The district judge further asserted that his preparation for the sentencing hearing included his evaluation of the evidence and the law in preparing and drafting his order on the motion for new trial or judgment of acquittal. Notably, he also reviewed his trial notes and the entire trial transcript. *Id*. at 18.

During Ms. Bramwell's sentencing hearing, the defense presented seven witnesses on her behalf, in addition to 59 letters of support. Ms. Bramwell's witnesses detailed a remarkable life in which she began working at the age of 12 to support her

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better measured by that court's own decisions, all of which coincidentally call for imprisonment.

single mother and sister. *Id*. at 19-50. The witnesses also consistently described Ms. Bramwell as an individual characterized by an unwavering dedication to others, a commitment to her patients and family, her lack of greed, and her excellence as a doctor and human being. *Id.* For example, Pastor Kevin Craig stated that Ms. Bramwell provided pro bono medical services to 50 to 60 members of his church. *Id*. at 21. Like Pastor Craig, Danielle Bramwell spoke of her sister's integrity, honesty, and dedication to others, as well as her significant contributions to her Church. *Id*. at 23-27. She also described how being a medical doctor was everything to Ms. Bramwell and her main goal in life was helping people. *Id.* at 24. Ms. Bramwell's husband, Dr. Reginald Bowden, reiterated that she lived her life in service to others and to her family, including her daughter. *Id*. at 30-32.

After Ms. Bramwell's statement, the parties presented argument considering her punishment. At their conclusion, the district court stated that it needed to take a break before imposing sentence. Doc. 280 at 79-80. Upon his return, the district judge listed each § 3553(a) factor that it had to consider in imposing Ms. Bramwell's sentence. *Id*. at 80. The district court noted that this Court had "wisely" struck down the mandatory guidelines which could be just or unjust depending on the particular case. *Id*. at 81. As a result, district courts were left with "the discretion and the burden … to fashion a sentence based upon the individual facts in the case and the individual characteristics of the person appearing before them." *Id*. The court stated that it agreed with the jury's verdict based on the facts of case as outlined in its Order Denying the Motion for Acquittal and Motion for New Trial. *Id*. at 81-82. After

reviewing these factors based on the facts of Ms. Bramwell's case, the judge maintained that he was fully aware that these factors would support a period incarceration since she had committed a serious crime. *Id.* at p. 85. But the district court also stated:

> I sincerely hope when the sentence I'm about to pronounce is reviewed by the Court of Appeal that they take the time to read the letters, that they take the time to listen to the testimony I heard, because there is a level of inherent goodness that's portrayed about you that I can't just ignore. It's something that is real.

Doc. 280. at 84-85. Before granting a variance from the advisory guideline sentence, the judge noted that he had thought about Ms. Bramwell case "for very long time" and that "he did not take sentencing decisions lightly" *Id.* at 87.

Some four years after her sentencing, after she had successfully completed her three-years' of probation and one-year period of house arrest, the Eleventh Circuit characterized the district court's decision as anything but deliberative and Ms. Bramwell's individual circumstances more than run-of-the-mill in ordering her mandatory imprisonment.

REASONS FOR GRANTING THE WRIT

WITHOUT THIS COURT'S INTERVENTION, THE ELEVENTH CIRCUIT WILL CONTINUE TO FLAUNT THE REQUIREMENT THAT APPELLATE COURTS MUST APPLY THE ABUSE OF DISCRETION STANDARD TO REVIEW BELOW-GUIDELINE SENTENCES.

A district court's discretion is no longer limited by the mandatory sentences previously imposed by the guidelines since its matrix is now merely advisory. *United States v. Booker,* 543 U.S. 220, 245-67 (2005). Instead, a sentencing court is unencumbered in its ability "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall v. United States*, 552 U.S. 38, 53 (2007) (quoting *Koon v. United States,* 518 U.S. 81 (1996)). Thus, courts must impose a punishment that "fit[s] the offender and not merely the crime." *Pepper v. United States*, 562 U.S. 476, 487-88 (2011) (citation omitted).

To conduct an individualized assessment, the Sentencing Reform Act specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

Consistent with this principle, § 3553(a) requires sentencing courts to consider not only the advisory Guidelines range, but also the facts of a specific case through the lens of seven factors. *See* 18 U.S.C. § 3553(a)(1)-(7). Nevertheless, "[s]entencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence. This durable tradition remains, even as federal laws

have required sentencing courts to evaluate certain factors when exercising their discretion." *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017) (citing *Pepper*, 562 U.S. at 487–89)). For example, in *Koon v. United States*, 518 U.S. 81 (1996), this Court unanimously declared that traditional departures from then-mandatory guidelines should only be reviewed for an abuse-of-discretion, not *de novo*, rejecting the government's argument that only *de novo* review would protect against unwarranted sentencing disparities arising from the differing approaches of individual district judges. Similarly, in *Rita v. United States*, 551 U.S. 338 (2007), this Court stressed the importance of deference to district judges' broad discretion to consider a wide array of facts and factors when selecting a particular sentence, prohibiting courts of appeals from adopting a presumption of unreasonableness for every variance from the guidelines. And in *Gall*, this Court held appellate courts must review the sentence imposed under abuse-of-discretion standard regardless of whether that sentence is inside or outside the Guideline range.

After *Booker*, there was comfort in the thought that the era of mandatory prison sentences had ended for most crimes. In a post-*Booker* realm, then, a defendant expects that this Court's conception of individualized sentencing provides the bulwark against punishments prescribed in advance. Protected by a touchstone of individualized consideration, that same defendant hopes that he will be sentenced as he appears on the date of his hearing and that his cause will be governed by judicial discretion informed by complete and accurate information.

For defendants in the Eleventh Circuit, however, such comfort, expectation and hope no longer endures since that appellate court has slowly but consistently constructed its own mandatory sentencing regime. And whether this construct results from hostility or indifference, the result is the same. In Ms. Bramwell's case, the court below has rendered a decision that is antagonistic to this Court's concept of federal sentencing – a framework founded on both constitutional and statutory principles. As this petition establishes, the Eleventh Circuit's decision in the instant case has cast federal sentencing in that circuit into a dark wood where constitutional protections and this Court's precedent are wholly lost and gone.[3]

(A) A Return to Mandatory Sentencing in the Eleventh Circuit

Some 17 years after *Booker* eliminated the mandatory punishment scheme effectuated by the mandatory sentencing guidelines, the Eleventh Circuit has built an alternative regime of mandatory prison sentences for certain offenses and defendants. And in the process, the Eleventh Circuit has elevated appellate sentencing, despite its inherent limitations, over the long-standing and superior ability of the district court to exercise its discretion in fashioning a just sentence.

In doing so, the appellate court has circumvented the inconvenience of individualized sentencing by judging reasonableness according to an assessment of the sentences imposed in other Eleventh Circuit involving the same charges. *See Howard*, 28 F.4th at 207 (citing *United State v. Hayes*, 762 F.3d 1300, 1302 (11th Cir.

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[3] *See* Dante Alighieri, *La Divina Commedia, Inferno*, Canto I (1472) ("Midway through this life we borne upon I found myself in a dark wood where the way of truth was wholly lost and gone").

2014); *United State v. Kuhlman*, 711 F.3d 1321 (11th Cir. 2013); *United State v. Crisp*, 454 F.3d 1285, 1290 (11th Cir, 2006)).

Thus, the appellate court has effectively created its own mandatory sentencing matrix in which the reasonableness of a defendant's sentence ultimately depends on whether the punishment fits within the Eleventh Circuit's grid of punishment, regardless of the individual circumstances of the case. With its sentencing grid, the lower court resurrects the uniformity once secured by the mandatory guidelines with its dictate that defendants convicted of the same offenses will receive the same punishment. Unfortunately, that same punishment is always imprisonment.

An undeniable attribute of the Eleventh Circuit's sentencing matrix is that it ignores the particulars of each case that sometimes mitigate and sometimes magnify the punishment to ensure. Rather, it determines reasonableness based on the length of prison sentences imposed in similar cases. While sentencing disparity is a § 3553 factor that must be considered, it should no longer occupy the predominant role it once had during the era of mandatory guidelines. Indeed, unwarranted similarities poses the same risk as unwarranted disparities in the sentencing process. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity,* 29 AM. CRIM. L. REV. 833, 851–71 (1992); s*ee also Gall*, 544 U.S. at 54 ("[I]t is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated").

(B) The Death of Deference in the Eleventh Circuit

Uniformity is of course incompatible with individual assessment and discretion. That is the cost associated with attaining just and reasonable sentences. *See Booker*, 552 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure [through mandatory Guidelines]"). Based on this Court's precedent, it is incontrovertible that individual assessment and judicial discretion are the defining principles of the post-*Booker* landscape. In *Gall*, this Court held that a district court "may not presume that the Guidelines range is reasonable" but "must make an individualized assessment based on the facts presented." While an appellate court may consider the extent of the deviation from the Guidelines, it "must give due deference to the district court's decision that the §3553(a) factors, on the whole, justify the extent of the variance." *Id*. at 51.

In establishing the abuse of discretion standard for appellate review of a defendant's sentence, this Court concluded that a district court has "greater familiarity with ... the individual case and the individual defendant before him than the {Sentencing Commission or the appeals court." *Rita*, 551 U.S. at 357 – 358. Thus, a district judge is "in a superior position to find facts and judge their import under § 3553(a)" in each case. *Gall,* 552 U.S. at 51.

This notion that a district court occupies a superior position in the sentencing process due to its institutional role was especially applicable in Ms. Bramwell's case. Indeed, after a four- day trial and through post-trial motion practice, the district court

had not only gained considerable familiarity with the facts of the case, but also acquired a significant comprehension of the unique circumstances surrounding each defendant's conduct and history. It also had an extended period to assess the co-defendants.

Prior to Dr. Bramwell's sentencing hearing, the district court was prepared with substantial information in determining Dr. Bramwell's sentence. The district court sat through the trial of the three co-defendants, reviewed the evidence during the post-trial motion process, reviewed the entire trial transcript, and read every sentencing submission including the PSR, the 59 letters of support, and the sentencing memorandums. Furthermore, the district court had already presided over the sentencing hearings of Dr. Bramwell's co-defendants. Such knowledge and preparation demonstrate that this Court was entirely correct in returning discretion to district court judges in the sentencing process.

Although the appellate court stated that the district court had discretion in fashioning Ms. Bramwell's sentence, it really didn't. Or if it did, said discretion existed only to the extent that the district judge imposed a sentence that fit within the appellate court's punishment matrix; that is, non-token incarceration. This tenet is underscored by the fact that the Eleventh Circuit has consistently upheld this same district court's exercise of discretion when it imposes sentences above the advisory guideline range. *United States v. Hill*, 853 F. App'x 351, 355 (11th Cir. 2021) (unpub.) (affirming above guideline sentence of 240 months in prison as substantively reasonable where guideline range was 121-151 months' imprisonment); *United States*

v. Rowland, 828 F. App'x 554, 557 (11th Cir. 2020) (unpub.) (affirming above guideline sentence of 300 months in prison—180 month upward-variance from advisory guideline—as substantively reasonable); *United States v. Amaya-Rivas*, 784 F. App'x 671, 672 (11th Cir. 2019) (unpub.) (affirming above guideline sentence of 48 months in prison—nearly triple top end of guideline range of 8-14 months—as substantively reasonable); *United States v. Mitchell*, 789 F. App'x 774, 777 (11th Cir. 2019) (unpub.) (affirming above guideline sentence of 30 months in prison, triple low-end of guideline range, as substantively reasonable); *United States v. Paulson*, 665 F. App'x 769, 771-72 (11th Cir. 2016) (unpub.) (affirming above guideline sentence of 240 months in prison—10 years above guideline range—as substantively reasonable).

But to be fair, the Eleventh Circuit's application of different standards of deference in cases involving downward variances as opposed to cases including upward variances is not targeted at this one experienced district judge. *See*, *e.g*, *United States v. Early*, 686 F.3d 1219, 1223-25 (11th Cir. 2012) (Martin, J., concurring).

In the Eleventh Circuit, if the sentencing court addresses the § 3553(a) factors and imposes a sentence within the statutory maximum, the Eleventh Circuit requires "deference to that judgment on any variance above the Guideline range, no matter how large." *Id.* at 1223 (citations omitted). In contrast, that same appellate court refuses to show such deference in cases involving downward variances. *Id.* (citations omitted). In effect, the Eleventh Circuit applies a presumption of unreasonableness to most sentences that vary below the guidelines. *Contrast Gall,* 552 U.S. at 51 ("But

if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness").

Contrary to this Court's precedent, the Eleventh Circuit applied a heightened level of scrutiny to Ms. Bramwell's case, simply because it involved a downward variance. *See id.*; s*ee also Gall*, 552 U.S. at 58 (noting that a heightened standard of review is inconsistent with the abuse-of-discretion standard that applies to appellate review of all sentencing decisions). This lack of deference to the district court was necessary to uphold that appellate court's mandatory sentencing matrix. Thus, the outcome for Ms. Bramwell was preordained. Regardless of the human failings that mitigated her punishment, the Eleventh Circuit had already prescribed a sentence of imprisonment for Ms. Bramwell on the day of her hearing.

(C) The Only Relevant § 3553 Factors in the Eleventh Circuit Are Those It Favors and Which Compel a Sentence in Prison

Because the Eleventh Circuit recognized this Court's support of a district court's deference in sentencing, it had to mischaracterize the judge's exercise of discretion in Ms. Bramwell's case. To this end, the appellate court erroneously asserted that the district court "was so moved by" the Defendant's history and characteristics, that this one § 3553 factor outweighed the six other statutory factors "that strongly favored a greater than mere probation sentence." *Howard*, 28 F.4th at 220. As a preliminary matter, the lower court's characterization of "mere probation" as insignificant punishment is at odds with this Court's precedent. *See Gall*, 552 U.S. at 48 (noting that prison sentences prescribed by the guidelines "give no weight to the 'substantial restrictions of freedom' involved in a term of supervised

release or probation"). Such a characterization further ignored that Ms. Bramwell's sentence involved even a greater restriction of liberty since it also included a year of house arrest.

Moreover, the lower court's assertion that the district court was so enamored by the defendant's history and characteristics that it ignored the other § 3553(a) factors is contradicted by the record. While the district court considered the totality of the § 3553 factors as required by this court, the Eleventh Circuit declined to conduct such a comprehensive examination. This reason for such a declination is apparent because such an analysis would not have justified the imposition of a mandatory prison sentence. Undoubtedly, a non-token prison sentence not only would fit in the appellate court's pantheon of punishment, but also would provide additional legal support in the next appellate case involving a variance.

To support Ms. Bramwell's incarceration, the appellate court declined to examine or alternatively give weight to the factors of 1) Ms. Bramwell's history and characteristics; 2) the need for specific deterrence; 3) the need to provide the Defendant with medical treatment or vocational training; 4) any policy statements by the Sentencing Commission; and 5) the need to make restitution to victims of the offense. Such a failure is significant since each one of these factors supported the imposition of a probationary sentencing in Ms. Bramwell's case.

As the evidence established, at the time of her first sentencing hearing, Bramwell was a 52-year-old black woman with no criminal history whose existence was characterized by perseverance, hard work, and a commitment to others. Because

of the life she had led including her complete lack of a criminal history, the district court correctly noted that her criminal activity was an aberrant period against the backdrop of her entire life.

Concerning the factor of specific deterrence, the Eleventh briefly noted that the Government had declined to contest the finding that Bramwell posed no risk of recidivism. *Howard*, 28 F.4th at 208. Nevertheless, this uncontested fact played no role in the Eleventh Circuit's analysis as it had for the district court.

Because of Ms. Bramwell's health, education and extensive employment history from the age of 12, the factor of medical treatment and vocational training failed to support the imposition of a prison sentence.

Although the Eleventh sought legal support in the Sentencing Guidelines with its matrix of punishment, it ignored the § 3553 factor concerning the Sentencing Commission's policy statements. Notably, the Sentencing Commission has recognized the low recidivism rates of first-time offenders like Bramwell and thus has proposed lowering the guideline levels for such offenders. *See* U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines*, at 1-4 (Dec. 19, 2016), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf.

Finally, as to the § 3553 factor concerning the need to make restitution for any victims of the offense, this factor supported the district court's imposition of a probationary sentence with house arrest. *See United States v. Rangel*, 697 F.3d 795, 803-04 (9th Cir. 2012) ("the district court's goal of obtaining restitution for the victims

of Defendant's offense, 18 U.S.C. § 3553(a)(7), is better served by a non-incarcerated and employed defendant") (citation omitted).

Rather than applying these factors which all supported the district court's sentence, the Eleventh Circuit predicated its demand for a "non-token prison sentence" on the seriousness of the offense, general deterrence, and disparity. In making these the predominant factors, at the expense of the other § 3553 factors, the lower court assured that prison will become mandatory for certain offenses regardless of the individual circumstances of each case or defendant.

Concerning the seriousness of the offense, the appellate court acknowledged that the district court stated that Ms. Bramwell committed a serious crime.[4] *Id.* at 205-206. The district court stated, however, that the Bramwell's case, which was involved kickbacks, was different from other medical fraud cases in which medical services were billed, but not provided or were unnecessary. *Id*. at 69. In response, the Eleventh assumed the role as trier of fact in quibbling with the district court's assessment of the evidence, despite the latter's significant grasp of the case.

The Eleventh Circuit also emphasized that general deterrence was one of the key purposes of sentencing. *Howard*, 28 F.4th at 209. The court further stated that the district court erred by not taking it into account. *Id*. at 208. Rather than being just a mere error, the Eleventh Circuit accused the district court of reasoning away that sentencing factor, "as if it had erased that requirement from the Sentencing Act."

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[4] In fact, the district court stated that Bramwell's offense was serious three separate times during her sentencing. Doc.280 at 85.

Id. A remarkable accusation, but a terribly inaccurate one, nonetheless. Putting aside the tenet that a district court has the inherent discretion to weigh one sentencing factor over another, the district court did conduct an analysis of the factor of general deterrence.[5] *See* Doc. 280 at 86.[6]

Finally, the Eleventh alleged that the district court failed to focus on the § 3553 factor of unwarranted sentencing disparities. In support of this contention, the Eleventh committed two significant errors. First, despite its inferior institutional position, it became the trier of fact not only in assessing the criminal conducts of Defendants Stone and Bramwell, but also in weighing the different circumstances and characteristics of the individuals. Regarding this latter assessment, the Eleventh expends great effort in equating a single letter supporting Stone with the overwhelming amount of written and oral testimony that was presented on behalf of Bramwell. Second, the Eleventh returned to its own matrix of cases to bolster its argument for an imprisonment sentence. And therein lies the rub. In the Eleventh Circuit, the § 3553 factor of disparity will always require imprisonment, as opposed

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[5] Moreover, defense counsel specifically maintained that Bramwell's loss of her medical license would have a deterrent effect on other doctors who attempted to engage in similar criminal conduct. Doc. 280 at 60.

[6] The Eleventh Circuit's emphasis on the factor of general deterrence may be misplaced. The United States Department of Justice has concluded that incarcerating defendants is not an effective means of deterrence. *See* U.S. Dept. of Justice, Nat'l Inst. of Justice, *Five Things About Deterrence* (July 2014). In fact, the Department of Justice finds that even increasing the severity of punishment does little to deter crime. *See id*.; *see also* Hannah Arendt, *Eichmann in Jerusalem*, Epilogue (1963)("No punishment has ever possessed enough power of deterrence to prevent the commission of crimes").

to other federal circuits, since that court only relies on its own cases that always result in incarceration. *Contrast Kimbrough,* 552 U.S. at 108 (2007) (concluding that as to the factor of disparity, "district courts must take account of sentencing practices in other courts . . .").

The misuse of the disparity factor to require imprisonment reveals a larger and alarming aspect of the Eleventh's treatment of the § 3553 factors. By emphasizing the seriousness of the offense and the need for general deterrence, and limiting disparity to cases only involving imprisonment, at the expense of the other § 3553 factors, the Eleventh has precluded district courts from varying to sentences of probation in most cases.

(D) The Unlawful Limitation on Relevant and Reliable Sentencing Information Under 18 U.S.C. § 3661

Title 18, United States Code § 3661 places no limitation on the information a sentencing court can consider concerning the background, character, and conduct of a person convicted of an offense. Nevertheless, the Eleventh Circuit has placed restrictions on the information that can presented to a sentencing court. As this section provides, the Eleventh Circuit constructed such limitations in Ms. Bramwell's case in relying on an inaccurate description of the trial record and by returning to the safe harbor of the Sentencing Guidelines. The Eleventh Circuit further confined a district court's discretion in foreclosing its consideration of Ms. Bramwell's culpability.

Eleventh Circuit precedent acknowledges that "[t]he weight to be accorded any given § 3553(a) factor is a matter committed to the sound discretion of the district

court." *See United States v. Clay*, 483 F.3d 739, 743 (11th Cir. 2007) (quotations omitted). So theoretically, if the district court was in fact so moved by Ms. Bramwell's narrative, it had the ability to give great weight to this factor in fashioning her sentence. Nevertheless, as previously discussed, the appellate court's description of a court, overcome by emotion, is baseless. But because the district court had great discretion in weighing the § 3553 factors, Eleventh Circuit was compelled to contend that the sentencing court predicated Ms. Bramwell's sentence on improper considerations.

The court below asserted that "the district court gave significant weight to the fact that Bramwell would – as she ultimately did - lose her medical license." *Howard*, 28 F.4th at 210. It also asserted that the district court improperly considered the collateral consequences of Bramwell's felony conviction.

Because the Eleventh erroneously claimed that the district court failed to associate Bramwell's loss of license with a specific § 3553(a) factor, it selectively chose to use the factor of just punishment. *Id*. (citing 18 U.S.C § 3553 (a)(2)(a)). These assertions are breathtaking in their inaccuracy.

The sentencing transcript indicates that the sentencing court made two references to Bramwell's loss of her medical license. Doc. 230 at 85-86. First, the district court stated that Bramwell's loss of her medical license demonstrated the seriousness of her crim. *Id.* at 85. Second, the court referred to the licensing loss within the context of factor of general deterrence. *Id*. at 86. Conversely, there is no mention of just punishment.

Armed with the strawman of just punishment, the Eleventh engaged in a self-serving analysis of why it cannot be considered in this context. Remarkably, it does so by relying on the Sentencing Guidelines' exclusion of departures based on socioeconomic status and its own decision in a pre-*Booker* case reversing a departure from the mandatory Guidelines for loss of a medical license. *See id*. at 210-11 (citing *United States v. Hoffer*, 129 F.3d 1196, 1198 (11th Cir. 1997)). Of course, if you want to construct a mandatory sentencing regime there is no better place for legal support than the precedent arising from the previous mandatory sentencing regime. More significantly, by excluding socio-economic considerations in Ms. Bramwell's case, the Eleventh now has binding precedent to exclude this factor in all future cases, including those which involve indigent defendants.

Concerning the Eleventh Circuit's prohibition on the consideration of the impact of a felony conviction on a defendant, it is a stark and unavoidable penalty that impacts a defendant's punishment. *See*, *e.g.*, GAO Report 17-691, NONVIOLENT DRUG CONVICTIONS, *Stakeholders Views on Potential, Actions to Address Collateral Consequences*, (Sept. 2017), available at http://www.gao.gov/products/GAO-17-691.pdf; *United States v. Nesbeth*, Case No. 1:15-cr-00018, 2016 WL 3022073, at *1 (E.D.N.Y May 24, 2016) (Block, J.) (varying downward from guideline range of 33 to 44 months imprisonment to one-year of probation for a drug defendant based in part on the number of statutory and regulatory consequences he faced as a convicted felon). Precluding courts from recognizing these consequences reveals the Eleventh's indifference to the tenet that [sentencing courts should have discretion in

the information they consider when fashioning a just sentence. *Pepper*, 562 U.S. at 487–89.

Finally, the Eleventh Circuit argued that the district court improperly considered Ms. Bramwell's "temptation and opportunity to commit the crime." *Id*. at 215. Regardless of its characterization, the Eleventh Circuit is referring to the court's assessment of Bramwell's culpability. In this regard, the district court observed that Ms. Bramwell's commission of her crime resulted during financially vulnerable time in her life when she was "preyed" upon by her co-defendant Howard. Doc. 280 at 83; *see* Howard, 28 F.4th at 215. It is not particularly controversial, let alone an abuse of discretion, to assess a defendant's culpability in determining their punishment. *See Atkins v. Virginia*, 536 U.S. 304, 305 (2002) ("As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability").

Although the Eleventh Circuit the terms "temptation and opportunity,"[7] the district court's discussion of Bramwell's criminal conduct necessarily involved the

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[7] To add further injury to its dismissal of the district court's thoughtful assessment of Ms. Bramwell's sentence, the Eleventh Circuit cavalierly refers to an Oscar Wilde quote on "temptation." *Howard*, 28 F.4th at 215 (citation omitted). The great advantage, however, to turning to Oscar Wilde for support is that his limitless witticisms can be used as ammunition to support a number of legal arguments, including contentions raised in this petition. Indeed, as to the Eleventh Circuit's aim of returning to the consistency once offered by the mandatory guideline regime, Wilde observed that "consistency is the last refuge of the unimaginative." Oscar Wilde, *The Relation of Dress to Art: A Note in Black and White on Mr. Whistler's Lecture*, *Pall Mall Gazette* (1885). As to the Eleventh Circuit's imposition of mandatory imprisonment for Ms. Bramwell based on that circuit's experience with other cases in which it reversed variances in favor of longer prison sentence, Wilde noted that "experience is the name we simply give our mistakes." Oscar Wilde, *Vera; or, The Nihilists* (1880).

circumstances surrounding her commission of the crime. Rather than being an improper factor, these facts had to be considered by the district court since they involved "the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall v. United States*, 552 U.S. at 53.

This Court emphasized the tradition of affording courts with the discretion in the "sort of information they may consider when setting an appropriate sentence." *Dean*, 137 S. Ct. at 1175 (2017) (citing *Pepper*, 562 U.S. at 487–89). Such a tradition is suspect in a circuit which precludes its district judges from considering information that is highly relevant to a defendant's punishment.

(E) The Decision is Contrary to Pepper

Consistent with the requirement in § 3661 that a district court should consider all relevant information at the time of sentencing, a court must sentence a defendant as he appears before it on the day of his hearing. *See Pepper,* 562 U.S.at 492.

In Ms. Bramwell's case, her sentence was reversed some four years after her sentencing date. In that time, she has completed her probationary sentence and her term of house arrest. Regardless of what has transpired in the four years since her sentencing hearing and how she appears on the date of her resentencing, the Eleventh Circuit has commanded the district court to sentence Ms. Bramwell to a non-token prison sentence. To the Eleventh Circuit, then, *Pepper* does not apply to Bramwell's case. *Pepper* cannot in the appellate court's mandatory sentencing regime.

CONCLUSION

This Court changed the landscape of federal sentencing by affirming the discretion of district court judges and emphasizing an assessment of a broad swath of information. The unwavering goal was to achieve an individualized sentencing process which considered the defendant as an individual whose unique circumstances and characteristics could magnify or mitigate the crime and punishment to ensue. Such a conception, though firmly rooted in constitutional and legal tradition, was necessarily inconsistent with the false security and imperfect uniformity offered by the mandatory sentencing guidelines. And it compelled a transition from the deference owed to the Sentencing Commission to the deference due to a sentencing court.

This Court's precedent, as seen in *Booker* and *Gall*, may have changed the world for many, but not all. Indeed, Ms. Bramwell's case demonstrates the Eleventh Circuit's desire to restore a mandatory sentencing regime in which individualized sentencing is lost against a backdrop of prior mandatory sentences, certain § 3553 factors are more important than others, and the district court is limited in its consideration of complete and relevant information. In such a regime, you achieve consistence, but you also get "justice dictated in advance, marked by visceral condemnation, and based on the pretense of omniscience." *United States v. Williams*, 372 F.Supp.2d 1335, 1337-1338 (M.D. Fla. 2005) (Presnell, J.).[8]

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[8] Although *Williams* was reversed by the Eleventh Circuit in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), the Eleventh Circuit's decision was

But in the end, that is always how injustice occurs. It arises not by the impact of cataclysmic decisions, but the erosion of precedent along the margins -- quietly, but incrementally, consistently, but insidiously -- until the precedent we look to is but a hollow man. So, this is the way *Booker* and *Gall* end, not with a bang but a whimper. *See* T.S. Elliot, *Poems*; *The Hollow Men* (Faber & Gwyer 1925).

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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overruled by the United States Supreme Court. *See Kimbrough v. United States*, 552 U.S. 1353 (2007).