No. 21-8092

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

NOTICE OF SUPPLEMENTAL AUTHORITY

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Supplemental Brief in Support of Granting Certiorari

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Petitioner Nicole R. Bramwell submits this Court's recent decision and opinion issued on June 27, 2022, in the matter of *Concepcion v. United States*, 142 S. Ct. 2389 (2022), in further support of her request for a writ of certiorari. This notice is filed pursuant to Supreme Court Rule 15(8) which allows "[a]ny party [to] file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the part's last filing." Ms. Bramwell filed her petition on June 6, 2022. *Concepcion* was issued afterwards, on June 27, 2022.

Background Summary

In brief, Ms. Bramwell comes to the Court having been convicted (along with her two co-defendants, Larry Howard and Raymond Stone) for various healthcare and kickback offenses. Particularly, Ms. Bramwell was convicted after jury trial for conspiracy and receiving illegal kickbacks (approximately $138,500) for participating in a scheme to defraud Tricare, a government program which provides health insurance

benefits for active and retired military members and their families. Ms. Bramwell's jury trial was completed in January 2018.

Sentencing for Ms. Bramwell in the Middle District of Florida was held on May 9, 2018. The district court calculated her Sentencing Guidelines to include an advisory prison range between 78 and 97 months (or 6½ to slightly more than 8 years). Over the government's objection, the district court varied downward and sentenced Ms. Bramwell to three years of probation with a special condition of one year of house arrest. (The court sentenced Mr. Howard to 160 months in prison and Mr. Stone to 24 months.) As of 2021, Ms. Bramwell successfully served her federal sentence without issue.

The government appealed the district court's sentence in June 2018. Oral argument was heard by the Eleventh Circuit two years later on June 11, 2020. The appellate court published its decision and opinion almost two years later, on March 7, 2022, after Ms. Bramwell had finished her sentence. *See United States v. Howard*, 28 F.4th 180 (11th Cir. 2022). It said that the district court's decision to render a probationary sentence for Ms. Bramwell was substantively unreasonable and that the court unduly abused its discretion when it fashioned the

judgment. Consequently, it vacated and set aside the district court's judgment and remanded the matter for re-sentencing, admonishing the lower court that "[a] reasonable sentence in this case should include, at the least, a non-token period of incarceration." *Id*. at 227.

Ms. Bramwell asked that the court stay the issuance of its mandate (holding off until this Court was afforded an opportunity to entertain her petition), but the court denied that request. The matter was remanded to the district court for re-sentencing. Ms. Bramwell was re-sentenced to 14 months in prison on July 19, 2022, while this instant petition remains active before the Court. She is allowed to self-surrender to the designated Bureau of Prisons facility before October 12, 2022.

The Issues Presented

Ms. Bramwell asserts that the Eleventh Circuit's holding, language, articulated principles, and pronounced sentencing standards in *Howard* are more than concerning – they are not only injurious but are antagonistic to this Court's well-settled principles and standards of review governing federal sentencing. The Eleventh Circuit's determination that it considers Ms. Bramwell's probationary sentence substantively unreasonable promotes the limitation and confinement of

a district court's sentencing discretion (markedly so and especially in white collar proceedings). While the Eleventh Circuit's conception of federal sentencing adversely impacted Ms. Bramwell's fundamental right to a fair sentencing hearing, the decision extends far beyond the cause of an individual defendant. Rather, it is a conception that will necessarily have a chilling effect on any district court's decision to impose a sentence other than imprisonment. Despite the recognized institutional advantage of the district court at sentencing, the Eleventh Circuit ordered the district court to send Ms. Bramwell to prison, finding that probation was *not* an option. *See generally, e.g., Gall v. United States*, 128 S. Ct. 586, 595-596 (2007) (examining the consequences of limited freedom and liberty burden qualitatively suffered by those under a sentence of probation). Thus, the Eleventh Circuit substituted its judgment for that of the district court because it disagreed with the sentencing judge. In the process it rendered an opinion that not only undercuts this Court's case law, but also undermines the statutory principles of 18 U.S.C. §3553 and §3661.

Concepcion v. United States, 142 S. Ct. 2389 (2022).

This Court should take advantage of the opportunity presented by Ms. Bramwell's case to correct an overreach by the appellate court – the Eleventh Circuit's published opinion in *Howard* establishes a binding precedent that wrongly encroaches into a district court's lawful sentencing discretion and acutely undermines this Court's stated sentencing practices and jurisprudence. *Howard* can be used as both a sword and shield to tell and direct a district court what it can and can't do at sentencing, even though the governing statutes and this Court say otherwise. When read closely, *Howard* has alarming, if not insidious impact, on federal sentencing as it marks a return to the lost regime of mandatory sentencing and limited judicial discretion.

Among other complaints, the Eleventh Circuit said that the district court failed to properly consider the relevant sentencing factors, the seriousness of the offense, the need to promote respect for the law, and the necessity to provide just punishment. *See Howard*, 28 F.4th at 205-208. It also said that the sentencing judge failed to properly consider the idea of general deterrence. *See id.* at 208-210. But most significant, the Eleventh Circuit expressly held that issues surrounding (a) loss of one's

professional license, (b) the collateral consequences of suffering felony convictions, as well as (c) the motive and reasons for committing the charged offenses *are impermissible sentencing factors*. *See id*. at 210-215. Other concerns for the Eleventh Circuit included a perceived disparity in sentencing, a so-called *unwarranted* disparity, between Ms. Bramwell and her co-defendants, as well as a fault-ridden consideration and examination of Ms. Bramwell's "pre-crime history and characteristics" when measured against the severity of her offense and "prolonged criminal conduct." *See id*. at 216-224.

In sum, the Eleventh Circuit ruled:

> It is our duty to vacate a sentence as substantively unreasonable if 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 by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case. A sentencing court commits a clear error of judgment, even if it considers all of the proper factors, when it weighs those factors unreasonably, arriving at a sentence that does not achieve the purposes of sentencing as stated in § 3553(a). The error is even more apparent when the court not only does not consider all of the proper §3553 factors, but also considers some factors that are inapplicable in the case before it. That is what happened here.

Howard, 28 F.4th at 225 (cleaned up).

It is Ms. Bramwell's position the appellate court's opinion published in *Howard* is inapposite to this Court's recent decision in *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

Concepcion's opening line recounts the "longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her 'as an individual.' *Koon v. United* States, 518 U.S. 81, 113 (1996). In line with this history, federal courts today generally 'exercise a wide discretion in the sources and types of evidence used' to craft appropriate sentences." *Concepcion*, 142 S. Ct. at 2395-2396 (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)). More so, "[w]hen a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction. *Pepper v. United States*, 562 U.S. 476, 492 (2011). Similarly, when a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing. *Ibid*." *Concepcion*, 142 S. Ct. at 2396.

In *Concepcion*, though this Court was examining the First Step Act and the scope and quality of its impact on modifying a defendant's sentence, the Court recited the overarching sentencing principle that "only when Congress or the Constitution limits the scope of information that a district court may consider in deciding [a sentence] … that a district court's discretion to consider information is restrained." *Id*.

In other words:

> Federal courts historically have exercised [ ] broad [sentencing] discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. ***Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.***

Id. at 2398 (emphasis added). This Court emphasized that principle time and again throughout the opinion: "There is a 'long' and 'durable' tradition that sentencing judges enjoy discretion in the sort of information they may consider at an initial sentencing proceeding;" "Federal judges exercising sentencing discretion have always considered a wide variety of aggravating and mitigating factors relating to the circumstances of both the offense and the offender;" "Accordingly, a

federal judge in deciding to impose a sentence may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Concepcion*, 142 S. Ct. at 2398-2399 (cleaned up).

To be sure, "[t]he only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are set forth by Congress in a statute or by the Constitution." *Id.* at 2400 (citing *Pepper*, 562 U.S. at 489 n.8). This Court highlighted how "Congress is not shy about placing such limits where it deems them appropriate. At an initial sentencing," for example, "Congress has provided generally that '[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense' when deciding what sentence to impose." *Id.* (quoting 18 U.S.C. § 3661).[1] By way of converse, for example, Congress expressly prohibits a district court from crafting an initial sentence on the basis of

[1] Section 3661 prescribes, "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." 18 U.S.C. § 3661.

a defendant's need for rehabilitation to support a longer prison sentence. *See*18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319, 328 (2011).

The Eleventh Circuit's published opinion in *Howard*, however, specifically and with precedential power, cabins a district court's sentencing discretion impermissibly by, *inter alia*, eliminating otherwise proper considerations from its analysis and calculus, such as the collateral consequences of losing one's professional or career license (a doctor's license, or a lawyer's license, for example); or the collateral consequences of suffering a felony conviction (some reports indicate there are more than 44,000 collateral consequences that exist from sustaining a felony conviction);[2] or even the motive and reason for a person to have committed the charged crime, whether financial or some other explanation. *See Howard*, 28 F.4th at 210-215; *see also, e.g., United States v. Perez*, 661 F.3d 568, 583-584 (11th Cir. 2011) (a federal criminal defendant has the right to allocate and to explain him- or herself when

[2] *See U.S. Commission on Civil Rights Calls for Limiting Collateral Consequences*, The Sentencing Project (June 13, 2019), and available online at https://www.sentencingproject.org/news/u-s-commission-civil-rights-calls-limiting-collateral-consequences/#:~:text=More%20than%2044%2C000%20collateral%20consequences,to%20scale%20back%20these%20punishments. ("[m]ore than 44,000 collateral consequences exist nationwide that continue to punish people with felony records long after completion of their sentence").

asking for less severe sentence; the denial of which constitutes plain error) (citing Federal Rule of Criminal Procedure 32(i)(4)(A)(ii)). As only Congress or the Constitution may constrain a district court's sentencing discretion, the Eleventh Circuit is wrong to do it here.

Furthermore, *Concepcion* reaffirmed the tenet that a sentencing court should be 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." *Koon v. United States,* 518 U.S. 81 (1996)). As *Howard* establishes, however, individualized sentencing is irrelevant in the Eleventh Circuit since the suitability of a white-collar sentence depends on whether it fits within that court's matrix of punishments imposed in previous cases.

Concepcion bolsters Ms. Bramwell's request for this Court's intervention by exposing in sharp relief just how smartly *Howard* undercuts federal sentencing practice. This Court should grant Ms. Bramwell's petition.

There are no factual issues, or disputes, or questions presented by this case. It is one purely of law; moreover, it influences and shades every

federal sentencing hearing, if not particularly in the Eleventh Circuit, across the country as well. The governing principle is to have a sentencing court (1) properly calculate the governing Sentencing Guidelines, and then (2) impose a sentence that is sufficient, but no greater than necessary, to mete out and satisfy the stated purposes of federal sentencing by adhering to and applying the principles and mandates of 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38 (2007). Here, there is no debate or contention or argument that the district court did not correctly calculate the guidelines, that it considered all the prescribed statutory factors, and provided more than an adequate and sufficient explanation for its chosen sentence.

What happens, though, when an appellate court substitutes its own judgment for that of the district court; what happens when a reviewing forum simply does not like a sentence imposed by the original sentencing judge?[3] Should this be considered a violation of this Court's case law,

[3] The panel, for example, in *Howard*, took great issue with the idea that Ms. Bramwell, ostensibly a "white collar criminal" because she is (or was (she's since lost her medical license)) a medical doctor. "Anyone with a license," the court wrote, "to practice a profession could abuse the privileges that come with that license to commit crimes without fear of being sent to prison in order to deter others from using their licenses to commit similar crimes. That cannot be right, and it isn't right." *Howard*, 28 F.4th at 208. "General deterrence is more apt, not less apt, in white collar crime cases. … Leniency undermines general deterrence, and the extreme

should it be found to violate this Court's abuse-of-discretion standard announced in *Gall,* i.e., "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Id*. at 597.

Ms. Bramwell frames two questions for review in her petition; she asks:

> (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-guidelines sentence based on its own appellate-reweighing that a different, more severe sentence is appropriate;

and then, closely related to that question, Ms. Bramwell also asks:

> (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).

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leniency of a probation sentence undermines it extremely." *Id*. at 209. In other words, a reasonable inference and understanding of the Eleventh Circuit's language here is to accept the argument that all white-collar criminals *must* go to jail or prison, for at least some "non-token" amount, otherwise, any non-prison sentence like probation will be considered and deemed substantively unreasonable and subject to vacatur. In the words of *Howard*, "That cannot be right, and it isn't right."

When measured against the teaching of *Concepcion*, Ms. Bramwell's petition takes on additional urgency. Her original sentence was set aside after she had successfully completed her required terms of supervision and she has now been re-sentenced to 14-months in federal prison. Her travails result from a published Eleventh Circuit panel opinion that fall incongruous to this Court's sentencing jurisprudence. Ms. Bramwell's petition presents an ideal opportunity and vehicle by which to better explore, discuss, study, and focus our national sentencing practices and jurisprudence. The Court's resolution and decision in this cause would be extremely pragmatic for the criminal practitioner, whether prosecutor or defense, if not significantly more so the country's district courts – this Court should grant Ms. Bramwell's petition to answer the issues raised in her request, questions of national significance, repetition, and, indeed, traditional and statutory practicality.

Conclusion

For the reasons presented and explained, the Court should grant Ms. Bramwell's petition for a writ of certiorari.

Respectfully submitted,

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