No. 09-6822

IN THE

Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
FRANCES H. PRATT
1650 King St., Suite 500
Alexandria, VA 22314
(703) 600-0815

AMY BARON-EVANS*
LOUISE ARKEL
JENNIFER NILES COFFIN
FEDERAL DEFENDERS NATIONAL SENTENCING RESOURCE COUNSEL
51 Sleeper St., 5th Floor
Boston, MA 02210
(617) 391-2253
abaronevans@gmail.com

Counsel for Amici Curiae

September 7, 2010

* Counsel of Record

[Additional Parties Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Alabama, Middle
CHRISTINE FREEMAN

Alabama, Southern
CARLOS WILLIAMS

Alaska
FRED RICHARD CURTNER

Arizona
JON M. SANDS

Arkansas, Eastern and Western
JENNIFFER MORRIS HORAN

California, Central
SEAN KENNEDY

California, Eastern
DANIEL J. BRODERICK

California, Northern
BARRY J. PORTMAN

California, Southern
REUBEN CAHN

Colorado
RAYMOND P. MOORE

Connecticut
THOMAS G. DENNIS

Delaware
EDSON A. BOSTIC

District of Columbia
A. J. KRAMER

Florida, Middle
DONNA LEE ELM

Florida, Northern
RANDOLPH P. MURRELL

Florida, Southern
KATHLEEN WILLIAMS

Georgia, Middle
CYNTHIA ROSEBERRY

Georgia, Northern
STEPHANIE KEARNS

Guam
JOHN T. GORMAN

Hawaii
PETER C. WOLFF, JR

Idaho
SAMUEL RICHARD RUBIN

Illinois, Central
RICHARD H. PARSONS

Illinois, Northern
CAROL BROOK

Illinois, Southern
PHILLIP J. KAVANAUGH

Indiana, Northern
JEROME T. FLYNN

Indiana, Southern
WILLIAM E. MARSH

Iowa, Northern and Southern
NICHOLAS T. DREES

Kansas
CYD GILMAN

Kentucky, Western
SCOTT WENDELSDORF

Louisiana, Eastern
VIRGINIA SCHLUETER

Louisiana, Middle and Western
REBECCA L. HUDSMITH

Maine
DAVID BENEMAN

Maryland
JAMES WYDA

Massachusetts
MIRIAM CONRAD

Michigan, Eastern
MIRIAM L. SIEFER

Michigan, Western
RAY KENT

Minnesota
KATHERIAN D. ROE

Mississippi, Northern and Southern
SAMUEL DENNIS JOINER

Missouri, Eastern
LEE LAWLESS

Missouri, Western
RAYMOND C. CONRAD, JR.

Montana
TONY GALLAGHER

Nebraska
DAVID STICKMAN

Nevada
FRANCES A. FORSMAN

New Hampshire
MIRIAM CONRAD

New Jersey
RICHARD COUGHLIN

New Mexico
STEPHEN P. MCCUE

New York, Eastern and Southern
LEONARD F. JOY

New York, Northern
ALEXANDER BUNIN

New York, Western
MARIANNE MARIANO

North Carolina, Eastern
THOMAS P. MCNAMARA

North Carolina, Middle
LOUIS C. ALLEN III

North Carolina, Western
CLAIRE RAUSCHER

North and South Dakota
NEIL FULTON

Ohio, Northern
DENNIS G. TEREZ

Ohio, Southern
S. S. NOLDER

Oklahoma, Eastern and Northern
JULIA L. O'CONNELL

Oklahoma, Western
SUSAN M. OTTO

Oregon
STEVEN T. WAX

Pennsylvania, Eastern
LEIGH SKIPPER

Pennsylvania, Middle
JAMES V. WADE

Pennsylvania, Western
LISA B. FREELAND

Puerto Rico
HECTOR E. GUZMAN, JR. (ACTING)

Rhode Island
MIRIAM CONRAD

South Carolina
PARKS NOLAN SMALL

Tennessee, Eastern
ELIZABETH FORD

Tennessee, Middle
HENRY A. MARTIN

Tennessee, Western
STEPHEN B. SHANKMAN

Texas, Eastern
G. PATRICK BLACK

Texas, Northern
RICHARD A. ANDERSON

Texas, Southern
MARJORIE A. MEYERS

Texas, Western
HENRY J. BEMPORAD

Utah
STEVEN B. KILLPACK

Vermont
MICHAEL L. DESAUTELS

Virgin Islands
THURSTON T. MCKELVIN

Virginia Eastern
MICHAEL S. NACHMANOFF

Virginia, Western
LARRY W. SHELTON

Washington, Eastern
ROGER PEVEN

Washington, Western
THOMAS W. HILLIER II

West Virginia, Northern
BRIAN J. KORNBRATH

West Virginia, Southern
MARY LOU NEWBERGER

Wisconsin, Eastern and Western
DANIEL STILLER

Wyoming
RAYMOND P. MOORE

QUESTION PRESENTED

Whether a court of appeals may categorically prohibit sentencing courts from considering defendants' post-sentencing rehabilitation in determining appropriate sentences.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT REPLICATES THE SENTENCING COMMISSION'S ERRONEOUS EXCLUSION OF MITIGATING OFFENDER CHARACTERISTICS FROM CONSIDERATION IN SENTENCING	5
A. Prior To The Sentencing Reform Act, The Defendant's Personal Characteristics Were Among The Most Important Considerations In Sentencing	7
B. The Original Commission's Decision To Omit Offender Characteristics From The Guidelines Was Intended To Be Provisional	8
C. The Commission Prohibited Or Strongly Discouraged Consideration Of Most Mitigating Factors As Grounds For Departure	11

TABLE OF CONTENTS-continued

Page

D. The Commission's Own Research And That Of Others Demonstrates That This Course Was Flawed Because Offender Characteristics Are Indeed Relevant To The Purposes Of Sentencing 16

E. Contrary To The Eighth Circuit's View, Post-Sentencing Rehabilitation Is Relevant To Sentencing Under § 3553(a)..... 22

II. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT CREATES UNJUSTIFIED DISPARITIES, PREVENTS NO UNWARRANTED DISPARITIES, AND IS BASED ON A DISTORTED CONCEPT OF FAIRNESS TO MEAN UNIFORM HARSHNESS..... 24

A. There Is No Reasonable Basis For Treating Post-Sentencing Rehabilitation Differently From Pre-Sentencing Rehabilitation, And Doing So Results In Unwarranted Disparities 24

B. The Eighth Circuit's Prohibition Is Based On A Gross Distortion Of The Concept Of Fairness And Does Not Prevent Any Unwarranted Disparity. 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES Page

Gall v. United States, 552 U.S. 38 (2007).....2, 3, 6, 28
Kimbrough v. United States, 552 U.S. 85 (2007).....3, 6, 22, 30
Koon v. United States, 518 U.S. 81 (1996)..... 2, 15
North Carolina v. Pearce, 395 U.S. 711 (1969)..... 7
Rita v. United States, 551 U.S. 338 (2007).....4, 6, 10, 22, 28
United States v. Blackford, 469 F.3d 1218 (8th Cir. 2006)..... 3
United States v. Booker, 543 U.S. 220 (2005)..... 2, 22
United States v. Bradstreet, 207 F.3d 76 (1st Cir. 2000) 14, 15, 29
United States v. Core, 125 F.3d 74 (2d Cir. 1997).....14, 15, 29
United States v. Douglas, 576 F.3d 1216 (11th Cir. 2009)..... 30
United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991)..... 13
United States v. Green, 152 F.3d 1202 (9th Cir. 1998)..... 14, 29
United States v. Jenners, 473 F.3d 894 (8th Cir. 2007)..... 2
United States v. Lara, 905 F.2d 299 (2d Cir 1990)..... 12
United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006)..... 24
United States v. McMannus, 262 Fed. App'x 732 (8th Cir. 2008)..... 25

TABLE OF AUTHORITIES—Continued

Page

United States v. Pepper, 486 F.3d 408 (8th Cir. 2007) 2, 23
United States v. Pepper, 518 F.3d 949 (8th Cir. 2008) 2
United States v. Pepper, 570 F.3d 958 (8th Cir. 2009) 3, 29
United States v. Perella, 273 F. Supp. 2d 162 (D. Mass. 2003) 26
United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998) 14, 15, 29
United States v. Rivera, 994 F.2d 942 (1st Cir. 1993) 10
United States v. Roberts, 1999 WL 13073 (10th Cir. Jan. 14, 1999) 14
United States v. Ross, 487 F.3d 1120 (8th Cir. 2007) 3
United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999) 14, 15, 23, 29
United States v. Sally, 116 F.3d 76 (3d Cir. 1997) 14
United States v. Sims, 174 F.3d 911 (8th Cir. 1999) 29
United States v. Stapleton, 316 F.3d 754 (8th Cir. 2003) 29
United States v. Ture, 450 F.3d 352 (8th Cir. 2006) 3
Williams v. New York, 337 U.S. 241 (1949) 7
Williams v. United States, 503 U.S. 193 (1992) 12

STATUTES AND LEGISLATIVE MATERIALS

18 U.S.C. § 3142 ..... 26, 27

TABLE OF AUTHORITIES—Continued

Page

18 U.S.C. § 3143(a) 27
18 U.S.C. § 3553(a) ..... *passim*
18 U.S.C. § 3553(b) 2, 3, 10
18 U.S.C. § 3559(a) 27
18 U.S.C. § 3561(a) 27
18 U.S.C. § 3582(a) 8
18 U.S.C. § 3661 1
18 U.S.C. § 3742(e) 2
18 U.S.C. § 3742(e) (2000) 12
18 U.S.C. § 3742(f) (2000) 12
21 U.S.C. § 841(b) 27
28 U.S.C. § 994(d) 8, 9
28 U.S.C. § 994(f) 8, 9
PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(A) (2003) 15
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a) (Oct. 12, 1984) 10
S. Rep. No. 98-225 (1983) 8, 10, 11

U.S. SENTENCING GUIDELINES AND SENTENCING COMMISSION MATERIALS

USSG App. C, amend. 386 (Nov. 1, 1991) 12, 13
USSG App. C, amend. 466 (Nov. 1, 1992) 13
USSG App. C, amend. 602 (Nov. 1, 2000) 3, 14, 29
USSG App. C, amend. 651 (Oct. 27, 2003) 15
USSG Ch. 1, pt. A(4)(b) 10
USSG § 1B1.8 3
USSG § 1B1.10, p.s. 29
USSG § 2D1.1 11
USSG § 2D1.8 11
USSG § 2D1.11 11
USSG § 2L1.1 11
USSG § 2L2.1 12

TABLE OF AUTHORITIES—Continued

Page

USSG § 3B1.2 9
USSG § 3E1.1 9
USSG § 4A1.3, p.s. 15
USSG § 5C1.1 27
USSG § 5H1.1, p.s. 11
USSG § 5H1.2, p.s. 11
USSG § 5H1.3, p.s. 11
USSG § 5H1.4, p.s. 11, 12, 15
USSG § 5H1.5, p.s. 11
USSG § 5H1.6, p.s. 11
USSG § 5H1.7, p.s. 15
USSG § 5H1.11, p.s. 13
USSG § 5H1.12, p.s. 13
USSG § 5K2.0, p.s. 10, 15
USSG § 5K2.0, p.s. (2002) 22
USSG § 5K2.12, p.s. 11
USSG § 5K2.19, p.s. 3, 14
U.S. Sent'g Comm'n, *Final Report of the Impact of* United States v. Booker *on Federal Sentencing* (2006) 23
U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004).....16, 17, 20, 23
U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* (2004)..... 17
U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* (2003) 10, 15
U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, *available at* http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf..... 21

TABLE OF AUTHORITIES—Continued

Page

U.S. Sent'g Comm'n, Simplification Draft Paper, *Departures and Offender Characteristics*, *available at* http://www.ussc.gov/SIMPLE/ depart.htm 14

U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* (Nov. 1996) 18

U.S. Sent'g Comm'n, *Symposium on Alternatives to Incarceration* (2008) 19

U.S. Sent'g Comm'n, Transcript of Public Hearing (Mar. 17, 2010) 22

56 Fed. Reg. 1846 (Jan. 17, 1991) 13

75 Fed. Reg. 27,388 (May 14, 2010) 21, 22, 27

OTHER AUTHORITIES

Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts: *2009 Annual Report of the Director*, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx 25

Allen J. Beck *et al*., Bureau of Justice Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006* (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf 20

Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. & Criminology 127 (2002) 21

TABLE OF AUTHORITIES—Continued

Page

Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (May 2005) 17

Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395 (2007)..... 19

David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541 (1992)..... 20, 21

Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277 (2005)..... 7

Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* (2004) .. 19

Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* (2005), *available at* www.ncjrs.gov/pdffiles1/ojjdp/212757.pdf..... 20

Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105 (2004)..... 20

TABLE OF AUTHORITIES—Continued

Page

Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998) 28

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003)..... 20

Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625 (2005) 20

Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* (2007) 19

Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19 (2003)..... 10, 12

Kevin N. Wright, *The Violent and Victimized in Male Prison*, 16 J. Offender Rehab. 1 (1991) 20

Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. L. Rev. 1441 (1997)..... 12

TABLE OF AUTHORITIES—Continued

Page

Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589 (2007) 18

Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994) 18

Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987* (Aug. 4, 1994), *available at* http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf. 16, 18

Office of Probation and Pretrial Services, *Monograph 110, Judicial Officer's Reference on Alternatives to Detention and Conditions of Release* (April 2009) 25

Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (2007), *available at* http://www.publicsafety.ohio.gov/links/ocjs_researchbriefing7.pdf 19

Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinq. 396 (1993) 20

Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990) 17

TABLE OF AUTHORITIES—Continued

Page

Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465 (2006)..... 17

Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95 (2002)..... 18

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988)..... 9

Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180, 1999 WL 730985 (Jan./Feb. 1999).... 9, 10

Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992)..... 8

Susan L. Ettner *et al.*, *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192 (2006)..... 18

U.S. Dep't of Justice, Office of Federal Detention Trustee, *Detention Needs Assessment and Baseline Report* (2002), *available at* http://www.justice.gov/ofdt/federal_detention_report_2002.pdf. 26

TABLE OF AUTHORITIES—Continued

Page

U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in Adult Prisons and Jails: A National Assessment* (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/182503.pdf 20-21

Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (2006) 19

William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63 (1993) 13

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States, have offices in 90 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals in federal court each year, including those who are sentenced and those who are resentenced. The issue presented in this case and its broader implications are of great importance to our work and the welfare of our clients.

INTRODUCTION

As Petitioner demonstrates, the Eighth Circuit's blanket prohibition on consideration of evidence of post-sentencing rehabilitation conflicts with the instructions set forth in 18 U.S.C. § 3553(a), directly violates 18 U.S.C. § 3661, and is entirely inconsistent with the abuse-of-discretion standard of review. Pet'r Br. 29-35. Moreover, the reasons the Eighth Circuit has offered to justify its rule do not withstand scrutiny. Pet'r Br. 36-49. *Amici* offer further evidence that the Eighth Circuit's rule is wholly unsound in

[1] The parties to the case, including the *amicus* appointed by the court to defend the judgment below, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

light of empirical research, national experience, and a realistic assessment of the disparities it creates.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised § 3553(b)(1) and § 3742(e), and adopted an abuse-of-discretion standard called "reasonableness" review. The factors set forth in § 3553(a) now "guide sentencing" by the district courts, and "in turn will guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261. Before *Booker*, it was an abuse of discretion for a judge to consider a circumstance the Commission had forbidden as a ground for departure. *Koon v. United States*, 518 U.S. 81, 109 (1996). After *Booker*, it is an abuse of discretion to *fail* to consider such a circumstance when relevant under § 3553(a). *Gall v. United States*, 552 U.S. 38, 51 (2007).

Despite this Court's clear instructions, the Eighth Circuit has decreed that post-sentencing rehabilitation is "not relevant" under § 3553(a), thus transferring its prohibition on "departures" on that basis to variances. *See United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007) (citing *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999)); *United States v. Pepper*, 486 F.3d 408, 411, 413 (8th Cir. 2007) (*Pepper II*) (citing *Jenners*, 473 F.3d at 899, and *Sims*, 174 F.3d at 913); *United States v. Pepper*, 518 F.3d 949, 953 (8th Cir. 2008) (*Pepper III*) (citing *Jenners*, 473 F.3d at 899). According to the Eighth Circuit, *Gall* did not alter its precedent that "post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance." *Id.* at 953. In the Eighth Circuit, "'evidence of [a defendant's] post-sentence rehabilitation is not relevant and will not be permitted at resentencing.'" *United*

States v. Pepper, 570 F.3d 958, 965 (8th Cir. 2009) (*Pepper IV*)) (internal citations omitted).

The Eighth Circuit has partially nullified *Booker* by restoring § 3553(b)'s prohibition against basing sentences outside the guideline range on a ground forbidden by the Commission. *See* USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000) (adopting *Sims* rule forbidding downward departures based on post-sentencing rehabilitation). The Eighth Circuit has thus assumed the power to do what the Sentencing Commission cannot do after *Booker*: issue mandatory policies categorically prohibiting consideration of relevant factors. The Eighth Circuit has deemed other factors to be "improper or irrelevant," without regard to § 3553(a), as well. *See, e.g.*, *United States v. Ross*, 487 F.3d 1120, 1124 (8th Cir. 2007) (defendant's religious awakening was an "improper or irrelevant factor"); *United States v. Blackford*, 469 F.3d 1218, 1220-21 (8th Cir. 2006) (disparity caused by government's refusal to agree to immunity pursuant to USSG § 1B1.8 was an "improper factor upon which to base a variance"); *United States v. Ture*, 450 F.3d 352, 359-60 (8th Cir. 2006) (consideration of defendant's obligation to pay back taxes, interest and penalties was "entirely improper").

This Court has rebuffed other attempts by the courts of appeals to deem certain considerations to be categorically "improper" or "impermissible." *See Gall*, 552 U.S. at 57-58; *Kimbrough v. United States*, 552 U.S. 85, 91 (2007). This Court should reject the Eighth Circuit's rule prohibiting consideration of evidence of post-sentencing rehabilitation as well.

SUMMARY OF ARGUMENT

I. This Court should reject the Eighth Circuit's rule prohibiting district court judges from considering evidence of post-sentencing rehabilitation under § 3553(a) because it replicates, by appellate court fiat, an erroneous course followed by the Sentencing Commission, but eventually corrected by this Court in *Booker*, *Rita v. United States*, 551 U.S. 338 (2007), and *Gall*. That course was the elimination from judicial consideration of a defendant's personal characteristics, and thus of most of the mitigating factors that might apply in individual cases and that bear directly on the purposes of sentencing.

Prior to the Guidelines, the defendant's personal characteristics were among the most important considerations in sentencing. Courts understood that the defendant's history and characteristics were highly relevant to achieving rehabilitation, thus restoring the defendant to useful citizenship without risk to the public. The punishment fit the offender and not just the crime. But the Commission constructed the Guidelines almost solely of aggravating factors, and prohibited or discouraged mitigating offender characteristics as grounds for departure. This course was flawed, as shown by the Commission's empirical research and that of others. That research demonstrates that the offender's history and characteristics are highly relevant to the purposes of sentencing and may provide compelling grounds for mitigation.

In Jason Pepper's case, as in others, rehabilitation is a collection of personal characteristics and accomplishments that show a strongly diminished likelihood of recidivism and the ability to live a law-abiding life. According to the empirical research, a defendant

like Pepper – who has abstained from drugs, attended college, held a steady job, established strong family ties, and taken on family responsibilities – does not require lengthy imprisonment to accomplish specific deterrence, protection of the public, or rehabilitation in the most effective manner.

II. While the Eighth Circuit's rule is based primarily on the claim that it prevents "disparity," this rationale does not bear scrutiny. The Eighth Circuit's refusal to permit consideration of post-sentencing rehabilitation while permitting consideration of pre-sentencing rehabilitation is logically flawed and creates disparities that cannot be justified by the purposes of sentencing. The Eighth Circuit's prohibition against consideration of post-sentencing rehabilitation prevents no unwarranted disparity and grossly distorts the concept of fairness to mean uniform, unwarranted, harshness.

It is thus clear that, even if the Eighth Circuit's rule did not flout the governing statutes and this Court's rulings in *Booker*, *Rita* and *Gall*, it would be insupportable.

ARGUMENT

I. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT REPLICATES THE SENTENCING COMMISSION'S ERRONEOUS EXCLUSION OF MITIGATING OFFENDER CHARACTERISTICS FROM CONSIDERATION IN SENTENCING.

The Eighth Circuit's ruling is a continuation, by appellate court fiat rather than regulation, of an erroneous course followed by the Sentencing Commission that was eventually corrected by this

Court's decisions in *Booker*, *Rita* and *Gall*. That course was the elimination from judicial consideration of a defendant's personal characteristics, and thus of most of the mitigating factors that might apply in individual cases. This Court corrected that course in *Booker* by making § 3553(a) the governing provision and reinstating a defendant's personal "history and characteristics" as a principal factor that sentencing courts must consider. It further clarified in *Rita* that sentencing judges need not adhere to Guideline provisions that do not treat offender characteristics properly under § 3553(a). *Rita*, 551 U.S. at 357. And if there were any remaining doubt, this Court dispelled it in *Gall* by upholding a variance based on a number of factors disfavored by the Guidelines' policy statements. *Gall*, 552 U.S. at 53-60.

But the Eighth Circuit's rule against consideration of post-sentencing rehabilitation mimics the pre-*Booker* regime in which certain mitigating characteristics could not be considered. Its decision in this case, declaring Pepper's personal history and characteristics to be "not relevant," is entirely inconsistent with the governing statutes and this Court's decisions, as argued persuasively by Petitioner. Pet'r Br. 22-35. Moreover, the Eighth Circuit's rule creates an absurd disjunction. Judges are free to ignore or reject a Guidelines policy statement prohibiting or disfavoring departure because it fails to treat the defendant's characteristics in the proper way, *Rita*, 551 U.S. at 357, or because it is simply not "pertinent," *Kimbrough*, 552 U.S. at 101 (quoting § 3553(a)(5)). But judges in the Eighth Circuit must comply with an absolute appellate bar against consideration of post-sentencing rehabilitation. The courts of appeals should not be permitted to replicate

the mandatory Guidelines' removal of relevant factors from consideration.

Accordingly, the Court should reject the Eighth Circuit's rule.

A. Prior To The Sentencing Reform Act, The Defendant's Personal Characteristics Were Among The Most Important Considerations In Sentencing.

Before the Guidelines, sentencing judges routinely considered defendants' personal history and characteristics. As this Court recognized in *Williams v. New York*, 337 U.S. 241 (1949), the "fullest information possible concerning the defendant's life and characteristics" was "[h]ighly relevant – if not essential" to sentencing, because "the punishment should fit the offender and not merely the crime." *Id*. at 247. The Court reiterated this principle in *North Carolina v. Pearce*, 395 U.S. 711 (1969), recognizing that a judge may impose "a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id*. at 723 (internal citations omitted).

The reason for consideration of facts about the offender, such as his family life, employment history, and mental health, during this period was the understanding that this information was directly relevant to the most appropriate sentence in a system that emphasized rehabilitation with the goal of restoring the offender to "complete freedom and useful citizenship" without risk to the public. *Williams*, 337 U.S. at 249; *see* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in*

Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 278-79, 289 (2005) (noting that offender characteristics in a system organized by rehabilitative goals are viewed as a central consideration "when seeking to predict and prevent future criminal behavior").

B. The Original Commission's Decision To Omit Offender Characteristics From The Guidelines Was Intended To Be Provisional.

When Congress enacted the Sentencing Reform Act of 1984, it recognized that rehabilitation was an important purpose of punishment, along with just punishment, deterrence, and incapacitation. 18 U.S.C. § 3553(a)(2).[2] Congress encouraged the Commission to include all relevant offender characteristics in the Guidelines. 28 U.S.C. § 994(d). It specifically directed the Commission to consider age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, and criminal history. *Id*. The Commission was to "explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise." S. Rep. No. 98-225, at 175 (1983). Under significant time constraints[3] and with differing inter-

---

[2] Congress, moreover, believed that imprisonment was not an effective means of accomplishing rehabilitation. *See* 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).

[3] Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

nal viewpoints, the original Commission did not include all "the offender characteristics which Congress suggested that [it] should,"[4] but instead "compromised" by promulgating offender characteristic rules that "look primarily to past record of convictions" to increase punishment.[5] All other offender characteristics were left out of the guidelines.[6] Only two mitigating factors were included in the guidelines, role in the offense, USSG § 3B1.2, and acceptance of responsibility, USSG § 3E1.1.[7]

As then-Judge and Commissioner Breyer recognized, the original Commission's policy regarding offender characteristics "deviated from average past practice," in which judges considered a wide variety of mitigating factors.[8] Justice Breyer later explained that the decision to leave offender characteristics other than criminal history out of the guidelines stemmed from "the difficulty of determining *which* other characteristics should be used."[9] It may also have been due to the difficulty of listing, describing, and assigning numerical values to such factors in

---

[4] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988) (citing 28 U.S.C. §§ 994(d) & 994(k)).

[5] *Id.* & n.96.

[6] Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999).

[7] Use of the term "guidelines" here refers to formal guideline rules promulgated pursuant to 28 U.S.C. § 994(a)(1), as distinct from policy statements.

[8] Breyer, *Key Compromises*, *supra* note 4, at 18-19.

[9] Breyer, *Guidelines Revisited*, *supra* note 6, at *5 (emphasis in original).

the abstract.[10] Whatever the reason, the decision was "intended to be provisional and [] subject to revision in light of Guideline implementation and experience."[11]

In the meantime, judges were to depart whenever they found that a mitigating factor covered by the broad terms of § 3553(a)(1) existed in the case that was not adequately reflected (in kind or degree) in the applicable "guidelines," which should result in a different sentence in light of the purposes of sentencing set forth in § 3553(a)(2). *See* U.S.C. § 3553(b) (as enacted by Pub. L. No. 98-473, § 212(a) (Oct. 12, 1984)). "[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.); *see also Rita*, 551 U.S. at 358. The Commission would not "second-guess[] individual judicial sentencing actions either at the trial or appellate level," but instead would learn "whether the guidelines are being effectively

---

[10] *See* USSG Ch. 1, Pt. A(4)(b); USSG § 5K2.0, p.s., comment. (backg'd); U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3 (2003); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 70-71 (2003) (Commission "preferred objective factors, such as drug weight or dollar amount, to subjective ones").

[11] Breyer, *Guidelines Revisited*, *supra* note 6, at *5.

implemented and revise them if for some reason they fail to achieve their purposes."[12] In this way, the Guidelines would "reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation."[13]

C. The Commission Prohibited Or Strongly Discouraged Consideration Of Most Mitigating Factors As Grounds For Departure.

The first set of Guidelines, through policy statements, deemed age, educational and vocational skills, mental or emotional conditions, physical condition, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" as grounds for departure. USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, p.s. (Nov. 1, 1987). Drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were prohibited grounds. USSG §§ 5H1.4, 5K2.12, p.s. (Nov. 1, 1987). The guidelines were thus constructed mostly of aggravating factors, while mitigating offender characteristics were deemed to be not ordinarily or never relevant for purposes of departure.

Over the ensuing years, no mitigating offender characteristics were added to the guidelines,[14] but

---

[12] S. Rep. No. 98-225, at 178 (1983).

[13] *Id.*

[14] A handful of mitigating offense circumstances were added to the guidelines. *See* USSG §§ 2D1.1(b)(11) (two-level decrease if defendant meets safety valve criteria), 2D1.8(a)(2) (four-level decrease based on role in the offense), 2D1.11(a) (decreases if defendant receives mitigating role adjustment), 2L1.1(b)(1)

further limitations on departure were added. While courts of appeals were to uphold reasonable departures, they strictly enforced policy statements restricting departures.[15] This combination of restrictive policy statements and strict appellate review effectively eliminated most mitigating factors from consideration.

When courts sought to recognize mitigating factors not already prohibited or discouraged by the policy statements, the Commission acted to curtail them. For example, when the Second Circuit upheld a departure based on the defendant's "diminutive size and immature appearance," after he had been sexually victimized and placed in solitary confinement for his protection,[16] the Commission issued a revised policy statement asserting that physical "appearance, including physique," is not ordinarily relevant in deciding whether to depart.[17] Similarly,

---

(three-level decrease if alien smuggling offense involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

[15] Courts of appeals were to reverse only "unreasonable" departures, 18 U.S.C. § 3742(e)(3), (f)(2) (2000), but were to reverse incorrect applications of the Guidelines, *id.* § 3742(e)(2), (f)(1). Policy statements were strictly enforced according to the latter provisions even before *de novo* review was added by the PROTECT Act. *See Williams v. United States*, 503 U.S. 193, 200 (1992); *see also* Hofer & Allenbaugh, *supra* note 10, at 83-84; Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. L. Rev. 1441, 1468-70 (1997).

[16] *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

[17] USSG § 5H1.4, p.s.; USSG App. C, amend. 386 (Nov. 1, 1991). The Commission explained that the amendment expressed its position regarding "depart[ures] based upon the defendant's alleged vulnerability to sexual assault in prison due to youthful

in response to a Ninth Circuit holding that a disadvantaged childhood could justify downward departure in some circumstances, the Commission issued a policy statement asserting that a defendant's "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing" are "not relevant" grounds for departure.[18] The Commission gave no official reason for this amendment, but members of the Commission at the time explained that the Commission was concerned that such a departure could "potentially be applied to an extremely large number of cases."[19] Thus, although the Commission recognized the manifest relationship between childhood disadvantage and crime, it prohibited courts from recognizing any distinction relevant to sentencing purposes between defendants raised in privilege and those raised in poverty and neglect. Military, civic, charitable and public service, employment-related contributions, and prior good works were all likewise deemed not ordinarily relevant[20] "in response to court decisions."[21]

---

appearance and slender physique." 56 Fed. Reg. 1846, 1887 (Jan. 17, 1991).

[18] USSG § 5H1.12, p.s.; USSG App. C, amend. 466 (Nov. 1, 1992); *see* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 (1993) (citing *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *overruled on other grounds*, 990 F.2d 501 (9th Cir. 1993) (en banc)).

[19] Wilkins & Steer, *supra* note 18, at 84-85.

[20] USSG § 5H1.11, p.s.; USSG App. C, amend. 386 (Nov. 1. 1991).

[21] U.S. Sent'g Comm'n, Simplification Draft Paper, *Departures and Offender Characteristics*, Part II(B)(3), *available at* http://www.ussc.gov/SIMPLE/depart.htm.

The Commission similarly adopted the Eighth Circuit's minority view regarding post-sentencing rehabilitation, without apparent consideration of the decisions of the seven courts of appeals that had held that post-sentencing rehabilitation was an appropriate basis for downward departure. Adopting the Eighth Circuit's decision in *Sims*, the Commission prohibited downward departure for "[p]ost-sentencing rehabilitative efforts, even if exceptional." USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000). In contrast, the seven other circuits found, in carefully-reasoned opinions, that post-sentencing rehabilitation is relevant to the purposes of sentencing, *see United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997); *United States v. Rhodes*, 145 F.3d 1375, 1381-82 (D.C. Cir. 1998); *United States v. Green*, 152 F.3d 1202, 1208 (9th Cir. 1998); *United States v. Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999); that there is no unwarranted disparity between defendants who are resentenced after an appeal and defendants who are not, *see Core*, 125 F.3d at 77; *Rhodes*, 145 F.3d at 1378, 1381; *Green*, 152 F.3d at 1207 & n.6, 1208; *Rudolph*, 190 F.3d at 724; *United States v. Bradstreet*, 207 F.3d 76, 82 & n.6 (1st Cir. 2000); that there is no reasonable basis for treating post-offense rehabilitation and post-sentencing rehabilitation differently, *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997); *Core*, 125 F.3d at 77; *Green*, 152 F.3d at 1207; *United States v. Roberts*, 1999 WL 13073, at *6 & n.1 (10th Cir. Jan. 14, 1999) (unpublished); *Rudolph*, 190 F.3d at 723; and that a judge's consideration of post-offense rehabilitation in no way interferes with the Bureau of

Prisons' award of good time credits for compliance with disciplinary regulations, *Core*, 125 F.3d at 78; *Rhodes*, 145 F.3d at 1379-80; *Rudolph*, 190 F.3d at 725; *Bradstreet*, 207 F.3d at 83. While the Commission cited most of these cases, it did not mention or address their reasoning, adopting instead the flawed reasons given in *Sims*. *See* Pet'r Br. 36-49.

The Commission subsequently eliminated or limited additional mitigating factors in response to the PROTECT Act's directive to "ensure that the incidence of downward departures are substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A) (2003).[22] Later, it came to light that Congress had been mistaken in its belief, underlying the PROTECT Act, that this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), had caused an increase in judicial leniency.[23]

---

[22] The Commission issued policy statements prohibiting departures based on gambling addiction, USSG § 5H1.4, p.s.; role in the offense, USSG § 5H1.7, p.s.; acceptance of responsibility, USSG § 5K2.0(d)(2), p.s.; decision to plead guilty or enter into a plea agreement, USSG § 5K2.0(d)(4), p.s.; and fulfillment of restitution obligations to the extent required by law, USSG § 5K2.0(d)(5), p.s.; and limiting departure from the "career offender" guideline to one criminal history category, USSG § 4A1.3(b)(3)(A), p.s. *See generally* USSG App. C, amend. 651 (Oct. 27, 2003).

[23] Subsequent to the PROTECT Act, the Commission reported that *Koon* had had no noticeable impact on the rate of departures. *See* U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-56 (2003). The increase in departures was instead due to an increase in government-sponsored departures, primarily to facilitate swift processing of a large number of immigration cases on the southwest border. Until 2003, the Commission had included these government-sponsored departures in the "other downward departure" rate. The Commission reported that at

D. The Commission's Own Research And That Of Others Demonstrates That This Course Was Flawed Because Offender Characteristics Are Indeed Relevant To The Purposes Of Sentencing.

The Commission's policy statements prevented consideration of several factors, as too "ordinary," that research shows to be highly significant with respect to the likelihood of recidivism. These factors thus are closely related to the need to afford "adequate deterrence," the need "to protect the public" from further crimes of the defendant, and the need to provide treatment and training in the "most effective manner." 18 U.S.C. § 3553(a)(2)(B), (C), (D). For example, the Commission's research shows that offenders who are or have been steadily employed are less likely to recidivate than those who are unemployed, that offenders with more education are less likely to recidivate than those with less education, and that those who abstain from illicit drug use are less likely to recidivate than those who use drugs.[24] A significant Bureau of Prisons study also found that "[s]table employment or student status . . . prior to confinement is strongly related to a lower likelihood of recidivating."[25] Offenders who found employment

---

least 40% of these "other downward departures" were sought by the government. *Id*. at 60.

[24] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004).

[25] Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 54 (Aug. 4, 1994), *available at* http://www.

after their release recidivated at about half the rate of those who did not.[26]

The Commission's research shows that offenders who are or have ever been married are less likely to recidivate than those who have never been married,[27] and that offenders with financial dependents are less likely to recidivate than those without dependents.[28] Other empirical research has concluded that the "ability to sustain marriage may predict abstinence from crime," that attachment to a spouse as a young adult is "associated with a significant and substantial reduction in adult antisocial behavior," that offenders who maintain an interest in their families are more likely to be successful when released, and that male offenders who cease to commit crimes often do so in conjunction with the establishment of a sound relationship with a woman.[29] The Bureau of Prisons study similarly found that the recidivism rate among offenders who live with a spouse after release is less

---

bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf.

[26] *Id.* at 4-5.

[27] *Measuring Recidivism*, *supra* note 24, at 12-13 & Ex. 10.

[28] U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* 8 (2004).

[29] *See* Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (May 2005) (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990)); Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465, 497-500 (2006) (finding that "being married is associated with a significant reduction in the probability of crime").

than half that of those who have other living arrangements.[30] "The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."[31]

Conversely, particularly for offenders with a low risk of recidivism, lengthy imprisonment can increase the risk of recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.[32]

A host of studies show the efficacy of drug treatment as an alternative to incarceration and as a method of reducing crime.[33] According to the

---

[30] *See* Harer, *Recidivism*, *supra* note 25, at 5-6.

[31] Shirley R. Klein *et al*., *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002).

[32] *See* Lynne M. Vieraitis *et al*., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, at 6 Criminology & Pub. Pol'y 589, 591-93 (2007) (stating that "imprisonment causes harm to prisoners," isolating them from families and friends, making it difficult to successfully reenter society, and "reinforc[ing] criminal identities" through contacts with other criminals); U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (imprisonment has criminogenic effects including "contact with more serious offenders, disruption of legal employment, and weakening of family ties"), *available at* http://www.ussc.gov/SIMPLE/sentopt.htm; Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.").

[33] *See, e.g.*, Susan L. Ettner *et al.*, *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213

National Institute on Drug Abuse, "Effective treatment decreases future drug use and drug-related criminal behavior, can improve the individual's relationships with his or her family, and may improve prospects for employment."[34] Studies and experience have shown that recidivism is reduced by therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences,[35] post-offense educational and vocational training,[36] and "problem-solving" courts in the federal system that include educational and vocational training as a condition of supervised release.[37]

(2006); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5-6, 18 (2004).

[34] Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12 (2007).

[35] *See* Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence,* 16 Am. J. Psychiatry 1395-1403 (2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (2007), *available at* http://www.publicsafety.ohio.gov/links/ocjs_researchbriefing7.pdf.

[36] *See* Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* 9, Ex. 4 (2006) (comprehensive review of programs with demonstrated effect on reducing recidivism, including prison- and community-based educational programs), *available at* www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.

[37] *See* U.S. Sent'g Comm'n, *Symposium on Alternatives to Incarceration* 22-24 (2008) (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (reporting that district's employment program has resulted in a 33% reduction in recidivism rates);

The Commission's research shows that the likelihood of recidivism declines with age.[38] Other research shows that the young are less culpable than the average offender,[39] and have a high likelihood of reforming in a short period of time.[40] Prison can be especially harmful to young and youthful-looking offenders, who are at particular risk of rape and other violence by other prisoners and staff.[41] A

---

see also id. at 238-39 (testimony of Judge Jackson, E.D. Mo.) (reporting district's revocation rate as "lower than the circuit and the national rates"), *available at* http://www.ussc.gov/ SYMPO2008/ NSATI_0.htm.

[38] *Measuring Recidivism*, *supra* note 24, at 12 & Ex. 9.

[39] *See, e.g.*, Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* 8 (2005), *available at* www.ncjrs. gov/pdffiles1/ojjdp/212757.pdf; Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (2004); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 632 (2005).

[40] *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinq. 396 (1993).

[41] *See* Allen J. Beck *et al.*, Bureau of Justice Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006*, at 4 (2007), *available at* http://bjs.ojp.usdoj.gov/content/ pub/pdf/svrca06.pdf; Kevin N. Wright, *The Violent and Victimized in Male Prison*, 16 J. Offender Rehab. 1, 6, 22 (1991); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545 (1992); U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in*

"particularly strong indicator of whether a prisoner will be victimized is his physical build."[42]

Not surprisingly, most judges report that offender characteristics that are prohibited, discouraged or limited by the Commission's policy statements, including post-sentencing rehabilitation, are in fact "ordinarily relevant" to their determination of the appropriate sentence.[43] The Commission recently issued minor changes to some of its policy statements regarding offender characteristics, but continues to find it difficult to meaningfully change its approach to departures on those grounds.[44] The Commission is,

---

Adult Prisons and Jails: A National Assessment 7-8 (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/ 182503.pdf.

[42] *See* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. & Criminology 127, 167 (2002); *see also* David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545 (1992) ("Rape in prison occurs brutally and inevitably . . . [o]ften, the younger, smaller, or less streetwise inmates are the victims.").

[43] U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, table 13, *available at* http://www.ussc.gov/Judge_Survey/2010/Judge Survey_201006.pdf.

[44] The Commission amended the Introductory Commentary to Chapter 5, Part H (Specific Offender Characteristics) to admonish judges not to give offender characteristics "excessive weight" and that their "most appropriate use" is "not as a reason to sentence outside the applicable guideline range," but to determine the sentence within the guideline range. *See* 75 Fed. Reg. 27,388, 27,389-91 (May 14, 2010). Age, mental and emotional conditions, physical condition, and military service, formerly deemed "not ordinarily relevant" for purposes of departure, now "may be relevant" to departure. The standard

however, beginning to review and revise certain guidelines in response to variance rates.[45] *See Booker*, 543 U.S. at 264 (describing Commission's continuing function to revise the advisory guidelines in response to "actual district court sentencing decisions"); *see also Rita*, 551 U.S. at 350; *Kimbrough*, 552 U.S. at 107.

E. Contrary To The Eighth Circuit's View, Post-Sentencing Rehabilitation Is Relevant To Sentencing Under § 3553(a).

The Eighth Circuit's ruling that the evidence of Jason Pepper's post-sentencing rehabilitation is "not relevant" to the appropriate sentence is wrong. In Pepper's case, as in others, rehabilitation is a collection of personal characteristics and accomplishments that show a strongly diminished likelihood of recidivism and the ability to lead a law-abiding life. According to the research cited above, a defendant like Pepper who has abstained from drugs, attended

---

for factors that "may be relevant," however, is the same as that for factors deemed "not ordinarily relevant" before the PROTECT Act. *Compare id. with* USSG § 5K2.0 (2002). Drug dependence, formerly "not relevant," is now "not ordinarily relevant." 75 Fed. Reg. at 27,390. A need for substance abuse or mental health treatment may be a reason for a limited downward departure, but only for a small number of defendants with low offense levels, most of whom are not in need of treatment. *Id.* at 27,388, 27,390-91; U.S. Sent'g Comm'n, Transcript of Public Hearing 27-31 (Mar. 17, 2010).

[45] *See* 75 Fed. Reg. 27,388, 27,393 (May 14, 2010) (eliminating "recency" points from the criminal history score "in part because criminal history issues are often cited by sentencing courts as reasons for imposing non-government sponsored below range sentences, particularly in cases in which recency points were added to the criminal history score under §4A1.1(e)").

college, held a steady job, established strong family ties, and taken on family responsibilities presents a very low risk of recidivism. *See* J.A. 94-95, 104-12, 116-21, 301-04, 320-21, 323-29. "[R]ather than being a gamble on the prospective efficacy of rehabilitative methods," a variance for post-sentencing rehabilitation "recognizes the empirical success of a specific defendant's attempts at rehabilitation."[46] *Rudolph*, 190 F.3d at 724. The district court should have been allowed to consider these facts about Pepper.

---

[46] Other factors present in Pepper's case, apart from his rehabilitative efforts, also indicate a low likelihood of recidivism, which the guidelines do not take into account. Offenders with zero criminal history points are far less likely to recidivate than offenders with even one criminal history point. *Measuring Recidivism*, *supra* note 24, at 7. Non-violent offenders, including drug offenders, are less likely to recidivate than violent offenders. *Id*. at 13 & Ex. 11. Contrary to the Eighth Circuit's belief, *Pepper*, 486 F.3d at 412-13, lack of violence is not accounted for in the criminal history score. *See* U.S. Sent'g Comm'n, *Final Report of the Impact of* United States v. Booker *on Federal Sentencing* 105 (2006).

II. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT CREATES UNJUSTIFIED DISPARITIES, PREVENTS NO UNWARRANTED DISPARITIES, AND IS BASED ON A DISTORTED CONCEPT OF FAIRNESS TO MEAN UNIFORM HARSHNESS.

A. There Is No Reasonable Basis For Treating Post-Sentencing Rehabilitation Differently From Pre-Sentencing Rehabilitation, And Doing So Results In Unwarranted Disparities.

The Eighth Circuit's differential treatment of pre- and post-sentencing rehabilitation is illogical and unfair. Indeed, while purporting to prevent unwarranted disparities, the Eighth Circuit has actually created disparities that cannot be justified by the purposes of sentencing.

The arbitrariness of the Eighth Circuit's distinction between pre- and post-sentencing rehabilitation is revealed by a comparison of this case with other Eighth Circuit cases. Pepper immediately cooperated with law enforcement and was relieved to get away from methamphetamine. While detained before sentencing, he re-established his relationship with his father. At sentencing, he asked to be placed in a prison drug treatment program rather than boot camp, even though it would mean more time served in prison. J.A. 39-41. Such facts are relevant under § 3553(a) and provide a valid basis for a variance. *See United States v. Lazenby*, 439 F.3d 928, 930-32 (8th Cir. 2006) (recognizing as appropriate grounds for variance that defendant reunited with her son and refrained from using drugs). Pepper then served his 24-month sentence, during which he completed

the drug treatment program he requested. Thereafter, over the course of nearly four years, he built a law-abiding life, attending school full time, excelling in his job, getting married, parenting and supporting his wife's daughter, and remaining drug-free. J.A. 94-95, 104-12, 116-21, 124-31, 133-34, 143-50, 301-05, 320-21, 323-29. The Eighth Circuit said it was "improper" to consider this evidence, but it upheld a variance in another case where the defendant, *while on pretrial release*, stopped using drugs, put himself through community college, was a model employee, and passed all drug tests. *See United States v. McMannus*, 262 Fed. App'x 732 (8th Cir. 2008). Thus, if Pepper had been able to accomplish what he did *before* his original sentencing, the Eighth Circuit would have upheld a variance on that basis. The reason Pepper could not do so was that, unlike McMannus, he was detained before his original sentencing.

Pepper and McMannus both pled guilty to trafficking in methamphetamine. Pepper was detained and McMannus was released. Defendants like McMannus who are released before trial can and do participate in rehabilitative programs, such as educational and vocational programs, substance abuse treatment, and mental health treatment, usually by court order as conditions of release and facilitated by the Office of Probation and Pretrial Services.[47] But

---

[47] *See* Office of Probation and Pretrial Services, *Monograph 110, Judicial Officer's Reference on Alternatives to Detention and Conditions of Release* (April 2009) (encouraging judges to consider alternatives to detention whenever appropriate and setting forth the relevant considerations); Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts: 2009 Annual Report of the Director*, table S-14 (showing that nearly a third of defendants in pretrial services with substance

defendants who, like Pepper, are detained, rarely if ever have access to rehabilitative programs, as the primary focus of pretrial detention is "necessarily detainee processing, movement, and management."[48] *See United States v. Perella*, 273 F. Supp. 2d 162, 166 (D. Mass. 2003) ("Offenders with drug problems are typically referred to drug programs either as a condition of pretrial release, or after sentencing," but "[t]here are few if any programs available . . . to prisoners detained prior to trial."). The different circumstances of defendants in these two situations do not justify a profound distinction in their treatment in sentencing.

The Eighth Circuit's distinction also disadvantages defendants charged with "blue collar" crimes as compared to those charged with "white collar" crimes. Most defendants charged with drug trafficking are detained because, under the Bail Reform Act, they are subject to a rebuttable presumption of detention before conviction, 18 U.S.C. § 3142(e)(3)(A), (g)(1), and must be detained after conviction and before

---

abuse conditions receive judiciary-funded substance abuse treatment), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx; *id*. table H-8 (showing number of pretrial defendants released with a condition of mental health treatment).

[48] *See* U.S. Dep't of Justice, Office of Federal Detention Trustee, *Detention Needs Assessment and Baseline Report* 4 (2002) ("Detention is comparatively temporary in nature and involves the constant movement of detainees in and out of facilities. Detainee self-improvement programs (e.g., education, vocational training, drug treatment, work programs, etc.) are rare because detention is typically short-term."), *available at* http://www. justice.gov/ofdt/federal_detention_report_2002.pdf.

sentencing except in the rarest of circumstances.[49] In contrast, defendants charged with white collar offenses are not subject to a presumption of detention and must ordinarily be released. 18 U.S.C. § 3142(a)-(c).

Finally, the Eighth Circuit's rule against post-sentencing rehabilitation is irrational in view of the fact that there is no prohibition against granting a reduced sentence at an original sentencing to facilitate prospective rehabilitation after sentencing. Indeed, under the Guidelines, a judge may grant a small departure to enable certain defendants to accomplish a specific treatment objective, after consideration of "the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant." *See* USSG § 5C1.1, comment. (n.6) (2009); 75 Fed. Reg. 27,388, 27,388 (May 14, 2010). If it is acceptable to impose a reduced sentence based on a *prediction* of success after sentencing, surely it must be acceptable to recognize *actual* success for a period of time after sentencing. It is particularly irrational to forbid a court from considering post-sentencing rehabilitation where, as here, the defendant has proved that his rehabilitation is real and permanent.

---

[49] Detention after conviction and before sentencing is mandatory unless there is a substantial likelihood that a motion for acquittal or new trial will be granted, or the government recommends that no sentence of imprisonment be imposed. 18 U.S.C. § 3143(a)(2)(A)(i), (ii). The latter exception is not possible in most drug trafficking cases since a term of imprisonment is required for a Class A or B felony. *See* 18 U.S.C. § 3559(a); 18 U.S.C. § 3561(a); 21 U.S.C. § 841(b).

B. The Eighth Circuit's Prohibition Is Based On A Gross Distortion Of The Concept Of Fairness And Does Not Prevent Any Unwarranted Disparity.

The Eighth Circuit and the Commission, invoking the "battle cry of disparity," [50] have adopted a rule of uniform harshness that turns fairness on its head. To force a judge, whose duty is to sentence the defendant before him as an individual, *Gall*, 552 U.S. at 50, 52; *Rita*, 551 U.S. at 357-58, to turn a blind eye to that individual's relevant mitigating characteristics because of abstract concerns about hypothetical defendants is a gross distortion of fairness. It ensures harshness for all, but helps no one – not the defendant before the court, not the hypothetical defendant who is not before the court, and not society at large. Conversely, consideration of post-sentencing rehabilitation assures the defendant before the court that he has been treated fairly. *See Rita*, 551 U.S. at 367 (Stevens, J., joined by Ginsburg, J., concurring) ("If the defendant is convinced that justice has been done in his case – that society has dealt with him fairly – the likelihood of his successful rehabilitation will surely be enhanced."). It furthers society's utilitarian goals, and it harms no one. Prison time is not a zero-sum game where less time for one means more time for another or vice versa.

Petitioner persuasively establishes that differences in sentencing outcomes resulting from the ordinary operation of the criminal justice system do not create *unwarranted* disparities. Pet'r Br. 45-46. The ordinary operating principle here is that sentencing

---

[50] Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 104-42 (1998).

courts may and should consider the facts as they exist at the time of a resentencing, including facts that came into existence after a previous sentencing. *Id*. at 41-44. For this reason alone, there *is* no unwarranted disparity between defendants whose cases are appealed and remanded for resentencing and defendants who are sentenced only once. *See Bradstreet*, 207 F.3d at 82 & n.6; *Rudolph*, 190 F.3d at 724; *Green*, 152 F.3d at 1207 n.6, 1208; *Rhodes*, 145 F.3d at 1378, 1381; *Core*, 125 F.3d at 77. Defendants whose cases are appealed and remanded for resentencing and defendants who are sentenced only once are simply not similarly situated.

The Eighth Circuit, however, created a different operating principle unique to post-sentencing rehabilitation, *i.e.*, good conduct. It held that evidence that arises after an original sentencing may not be considered at a resentencing, and thus evidence of post-sentencing rehabilitation is "not relevant." *See Pepper*, 570 F.3d at 965; *Sims*, 174 F.3d at 913. In contrast, the Eighth Circuit held that a defendant's bad conduct that occurred after the original sentencing may be considered at resentencing. *United States v. Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003). The Eighth Circuit's prohibition against post-sentencing rehabilitation is thus an arbitrary one-way ratchet based on a legal principle that does not in fact exist.[51]

---

[51] The one reason the Sentencing Commission gave for its policy statement banning downward departures based on post-sentencing rehabilitative efforts, in addition to the reasons given by the Eighth Circuit in *Sims*, was that it "is consistent with Commission policies expressed in § 1B1.10." USSG App. C, amend. 602 (Nov. 1, 2000). Ironically, that policy statement, as revised in 2008, now recognizes that post-sentencing conduct is relevant. *See* USSG § 1B1.10, p.s., comment. (n.1(B)(iii)) (inviting

This Court has recognized that it is not for the courts of appeals to ban certain factors because, in their view, consideration of the factor might cause a disparity. "Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities – along with other § 3553(a) factors – when imposing sentences," weighing any disparities "against the other § 3553(a) factors and any unwarranted disparity created by the [guideline] itself." *Kimbrough*, 552 U.S. at 108.

---

courts to consider post-sentencing conduct in determining whether a reduction is warranted and the extent of such reduction within the amended guideline range). If post-sentencing conduct is relevant for that purpose, post-sentencing rehabilitation is surely relevant for purposes of a variance below an advisory guideline range. *Cf. United States v. Douglas*, 576 F.3d 1216, 1220 (11th Cir. 2009) (noting that circuit has held that post-sentencing conduct is an impermissible factor under § 3553(a), but the Commission has made it relevant under § 1B1.10, and reversing because district court did not sufficiently consider evidence of post-sentencing rehabilitation).

CONCLUSION

The Eighth Circuit's appellate ban on consideration of evidence of post-sentencing rehabilitation violates the governing statutes, and also is not supported by any legitimate rationale. This Court should therefore reject it. This Court should vacate the judgment of the court of appeals and remand with instructions that no sentence imposed on remand require Jason Pepper to serve additional time in prison.

Respectfully submitted,

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
FRANCES H. PRATT
1650 King St., Suite 500
Alexandria, VA 22314
(703) 600-0815

AMY BARON-EVANS*
LOUISE ARKEL
JENNIFER NILES COFFIN
FEDERAL DEFENDERS NATIONAL SENTENCING RESOURCE COUNSEL
51 Sleeper St., 5th Floor
Boston, MA 02210
(617) 391-2253
abaronevans@gmail.com

Counsel for Amici Curiae

September 7, 2010

* Counsel of Record